"According to law, and not humour": Illogicality and administrative decision-making after SZMDS

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This article examines the history and development of illogicality as a species of jurisdictional error at common law. It commences with a discussion of the merits/legality dichotomy in Australian administrative law and the place that the illogicality grounds of review occupies within this dichotomy. The effects of the High Court's decision in Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, which hampered the development of an illogicality ground of review, are discussed, as is the decision of the High Court in Minister for Immigration & Citizenship v SZMDS (2010) 240 CLR 611, where the availability of the illogicality grounds of review was finally confirmed. Ultimately it will be concluded that although the High Court's decision in SZMDS is consistent with a view of the law that has been developing for some time, the differences in approach between the respective joint judgments leaves the law in this area in a confused state.

I. INTRODUCTION

Administrative lawyers have witnessed over the course of the past 30 years a profound extension in the scope of judicial review of administrative action.[1] Courts are more prepared than ever to scrutinise the process of administrative decision-making, the result being that a higher level of scrutiny is imposed on procedural steps that would have have "amazed an earlier generation of administrative lawyers".[2] However, notwithstanding the "expanding role of process in judicial review", the courts have continued to exercise great caution when dealing with matters that appear to go to the "quality" or "merits" of a decision,[3] no more so than where the decision-maker's decision appears to be productive of an illogical chain of reasoning. For much of the past 30 years, the prevailing consensus, at least amongst judges of the Federal Court of Australia and of the State Supreme Courts, if not administrative lawyers generally, was that illogical reasoning does not of itself constitute jurisdictional error, a sentiment reflected in the oft-quoted statement that "want of logic … is not synonymous with error of law".[4] The recent decision of the High Court in *Minister for Immigration & Citizenship v SZMDS* (2010) 240 CLR 611 has, however, turned such orthodoxy on its head. For the first time, the High Court has embraced the notion that an administrative decision can be set aside on the basis that no rational or logical decision-maker could have arrived at the decision based on the evidence before the decision-maker.

The purpose of this article is to examine the history and role of the illogicality doctrine in Australian administrative law. The article commences with a recognition of the fact that "the role of judicial review is to ensure that decision-making is procedurally, not substantively, sound"[5] and will seek to demonstrate that the rhetorical commitment to the maintenance of the merits/legality boundary had prevented the development of the illogicality grounds of review. This article will also

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[1] French R, "The Rise and Rise of Judicial Review" (1993) 23 UWALR 120 at 133. See also Jackson D, "Development of judicial review in Australia over the last 10 years: The growth of the constitutional writs" (2004) 12 AJ Admin L 22.

[2] Basten J *Judicial Review: Intensity of Scrutiny* (Speech delivered at the Land and Environment Court Conference, Sydney 9 May 2008) at 15.

[3] Weeks G, "The expanding role of process in judicial review" (2008) 15 AJ Admin L 100 at 101.

[4] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356.

[5] Weeks, n 3 at 101.

demonstrate, through a discussion of the High Court's decision in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 and its progeny (a low point in the development of illogicality doctrine) that the courts' suspicion of the illogicality grounds of review was founded upon a misapprehension as to how they operate. It remains to be seen whether this suspicion survives in the wake of the decision in *SZMDS* where the availability of the illogicality grounds of review was again confirmed by the High Court. Ultimately it will be concluded that although the High Court's decision in *SZMDS* is consistent with a view of the law that has been developing for some time, and which favours more rigorous scrutiny of the entire administrative decision-making process, it also raises as many questions as it provides answers.[6]

II. FUNDAMENTALS OF JUDICIAL REVIEW AND THE LEGALITY/MERITS DISTINCTION

In the federal context, the availability of judicial review of administrative action is, as a starting point, found within s 75(v) of the *Constitution*, which provides that "in all matters … in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth … the High Court shall have original jurisdiction". Section 75(v) creates a constitutionally guaranteed right to seek judicial review of the actions of officers of the Commonwealth that cannot be abrogated or curtailed by statute.[7] According to Deane and Gaudron JJ in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 204-205:

> [Section 75(v)] constitute[s] an important component of the Constitution's guarantee of judicial process in that [its] effect is to ensure that there is available, to a relevantly affected citizen, a Ch III court with jurisdiction to grant relief against an invalid purported exercise of Commonwealth legislative power or an unlawful exercise of, or refusal to exercise, Commonwealth executive authority.

Since Federation it has been consistently held that s 75(v) (or the section's analogues)[8] merely confers on the High Court (or other courts exercising the same original jurisdiction that is conferred on the High Court by s 75(v)) a *jurisdiction*[9] to grant the remedies of prohibition, mandamus and injunction and does not, subject to constitutional considerations, alter the substantive law that the court applies in the exercise of its jurisdiction.[10] According to Aronson and Dyer: "Whilst no law can validly diminish the court's power to grant the three remedies on either constitutional or non-constitutional grounds, an Act can reduce the likelihood of judicial review on non-constitutional grounds by conferring powers on officers which are so wide that it would be difficult for them to be breached."[11] Although it has been argued that "[n]o satisfactory test has ever been formulated for distinguishing findings which go to jurisdiction from findings which go to the merits",[12] and notwithstanding the recent growth in the reach of judicial review of administrative decision-making,

[6] So much was implicitly acknowledged recently by the Full Federal Court in *MZSKA v Minister for Immigration & Citizenship* [2010] FCAFC 123 where Keane CJ, Perram and Yates JJ stated that "there is an evident difference in approach in the respective joint judgments [in *SZMDS*] with respect to the consequences that attend the reasoning of a decision-maker that is found to 'illogical' or 'irrational'" (at [45]). Their Honours later remarked that given that the Tribunal's decision was not illogical, "it is not necessary to embark upon any further consideration of the difference in approach between the respective joint judgments in *SZMDS*" (at [78]).

[7] *Plaintiff S157/2002 v Commonwealth* (2003) 2003) 211 CLR 476 at [6] (Gleeson CJ). In *CFMEU v Australian Industrial Relations Commission* (2001) 203 CLR 645 at [43], the High Court stated "relief by way of prohibition is not relief for the enforcement of a right or duty created or conferred by statute. Rather, the right in issue when relief is sought by way of prohibition is the right conferred by s 75(v) of the *Constitution* to compel an officer of the Commonwealth to observe the limits of that officer's power or jurisdiction. The corresponding duty to observe those limits also derives from s 75(v)".

[8] See, eg *Judiciary Act 1903* (Cth), s 39B, which provides: "Subject to subsections (1B), (1C) and (1EA), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth." In a similar vein, *Migration Act 1958* (Cth), s 476, provides: "Subject to this section, the Federal Magistrates Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the *Constitution*."

[9] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [156] (Hayne J). See also *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 178 (Mason CJ).

[10] Cowen Z, *Cowen and Zines' Federal Jurisdiction in Australia* (3rd ed, Federation Press, 2002) p 59.

[11] Aronson M and Dyer B, *Judicial Review of Administrative Action* (1st ed, LBC, 1996) p 33.

[12] De Smith SA, *Judicial Review of Administrative Action* (1st ed, Stevens, London, 1959) p 69

the process of judicial review remains limited (rhetorically at least) to the assessment of the legality of particular administrative action with the courts possessing no general power to rectify administrative injustices or to concern itself with the merits of the decision. As Brennan J stated in *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 35-36:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If in doing so, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone … If courts were to postulate rules ostensibly related to limitations on administrative power but in reality calculated to open the gate into the forbidden field of merits of its exercise, the functions of the courts would be exceeded.

Judicial review and merits review each fulfil a different function and provide different remedies.[13] While judicial review is concerned solely with the *legality*[14] of the particular decision, merits review enables the review body to "stand in the shoes" of the primary decision-maker and make a fresh decision based on the presented evidence.[15] Judicial review remedies are generally limited to setting aside a particular decision and remitting the matter to the administrative decision-maker for re-determination (Brennan J at 35-36). An important concomitant of the fact that judicial review court is limited to an examination of the legality of administrative action is that the court should not engage upon a consideration of the factual basis of the individual decision. There is no reviewable error simply in making a wrong finding of fact and as Mason CJ stated:

> The expression "judicial review" … ordinarily does not extend to findings of fact as such. To expose all findings of fact, or the generality of them, to judicial review would expose the steps in administrative decision-making to comprehensive review by the courts and thus bring about a radical change in the relationship between the executive and judicial branches of government.[16]

It is one thing to say, however, that a court exercising a supervisory jurisdiction must focus upon the legality of an administrative decision; it is quite another to say that factual findings made by the administrative decision-maker are never considered by the court during the process of judicial review. Indeed, although the focus of a court exercising a supervisory jurisdiction is upon the legality of the particular decision, and more precisely, whether the decision-maker fell into jurisdictional error, it is important to be cognisant of the important conceptual differences between the factual findings made by the decision-maker and the manner in which the decision-maker came to make such findings. As Kirby J has stated:

> [A] wrong finding of fact by an administrative official does not provide a sufficient ground for a court's intervention. However, an analysis of the process of fact-finding, and the degree to which findings are referrable to the evidence adduced, may disclose reviewable error. Whether a court is entitled to intervene then depends upon the decision-making and statutory context, as well as the grounds of review that are available. Flaws apparent in fact-finding may, for instance, disclose, or confirm, that the administrator has misunderstood the applicable legal criteria, or otherwise trespassed beyond the jurisdiction or authority conferred by the enactment.[17]

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[13] Bennett D, "Balancing Judicial Review and Merits Review" (2000) 53 Admin Rev 3 at 3. See Kirby M, "Administrative Review on the Merits: The Right or Preferable Decision" (1980) 6 Mon LR 171 at 172-173.

[14] Airo-Farulla G, "Rationality and Judicial Review of Administrative Action" (2000) MULR 543 at 550-552: the concept of "legality" has replaced "jurisdiction" as the fundamental organising principle that explains judicial review. Under the rubric of "jurisdiction" the courts would only consider those issues that related to the scope of the decision-maker's power to decide; issues relating to the exercise of an admitted decision-making power were immune. "Legality", however, replaced "jurisdiction", which meant that issues relating to the exercise of a power were reviewable. One illustration of the common law's embrace of legality is the emergence of the relevant/irrelevant considerations dichotomy and *Wednesbury* unreasonableness.

[15] Douglas R, *Administrative Law: Commentary and Materials* (2nd ed, Federation Press, 2002) pp 220-279.

[16] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 341. See also Basten J, "The supervisory jurisdiction of the Supreme Courts" (2011) 85 ALJ 273 at 289.

[17] *Re MIMA; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [116]; 198 ALR 59.

Although Kirby J did not expressly refer to the illogicality ground of review, the sentiment he expressed captures the essence of the rationale for the existence of this ground of review. Finkelstein J posed the question more directly in *Gamaethige v Minister for Immigration & Multicultural Affairs* (2001) 109 FCR 424 at [21]:

> Not every administrative decision involves the exercise of a discretionary power. A decision-maker is often required to make findings of fact, and sometimes findings of a "jurisdictional" fact. Those findings may be of primary facts, or findings by way of inference from primary facts. In either case, the decision-maker may make a wrong finding, or what appears to be a wrong finding. One cause for error may be that the decision-maker has proceeded on a flawed basis, so that the result might be described as illogical. Is an administrative decision that is based on flawed logic reviewable?

In a general sense, the question that this article is looking to address, and the question that the High Court was required to consider in *SZMDS*, is to what extent will an administrative decision-maker have fallen into jurisdictional error if, upon an examination of its reasoning, a serious defect in reasoning is detected.

III. ILLOGICALITY AND JURISDICTIONAL ERROR

It can barely be doubted that the requirement of logicality exists as an important organising principle that underlies a number of the judicial review grounds. In *Othman v Minister of Immigration, Local Government & Ethnic Affairs* [1991] FCA 455, French J expressed the view that the "pervasive requirement" of logicality or rationality provides an important limitation on administrative decision-making, tracing this requirement to the famous passage in the judgment of Lord Halsbury LC in *Sharp v Wakefield* [1891] AC 173 at 179 where his Lordship said:

> when it is said that something is to be done within the discretion of the authorities… that something is to be done according to the rules of reason and justice, not according to private opinion … according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

The notion that an administrative decision-maker must act in a logical fashion was implicitly acknowledged in a number of early pronouncements of the High Court. In *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430, Latham CJ stated:

> where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist.
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> …
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> It should be emphasised that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question. What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.

Similarly, in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 120, the High Court commented (per Dixon CJ, Williams, Webb and Fullagar JJ):

> The inadequacy of the material is not in itself a ground for prohibition. But it is a circumstance which may support the inference that the tribunal is applying the wrong test or is not in reality satisfied of the requisite matters. If there are other indications that this is so or that the purpose of the function committed to the tribunal is misconceived it is but a short step to the conclusion that in truth the power has not arisen because the conditions for its exercise do not exist in law and in fact.

For Aronson and Dyer, the "timid"[18] approach of the High Court in *Melbourne Stevedoring* was indicative of the courts' original tendency to rationalise significant factual errors as being indicative of a decision-maker's misunderstanding of the law. Such an approach gave the courts a way to circumvent the common law's disdain for engaging in intensive review of the factual findings upon which a decision was based.[19] The existence of logicality as an organising principle underlying a number of review grounds was also recognised by Lord Diplock in *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 at 410-411 where his Lordship articulated (somewhat bravely)[20] a three-part taxonomy of the grounds of judicial review of administrative action. According to Lord Diplock, each judicial review ground falls within one of three categories:

(a) illegality, which focuses on whether the decision-maker understands, and has given effect to, the law that regulates the decision-maker's power;
(b) irrationality/illogicality;[21] and
(c) procedural impropriety.

Lord Diplock's famous dictum was, of course, uttered in the post-*Anisminic*[22] world, where the distinction between jurisdictional and non-jurisdictional errors of law had been abandoned.[23] Australia has not embraced the *Anisminic* doctrine, and as such, the distinction between jurisdictional and non-jurisdictional errors of law remains undisturbed.[24] Australian courts, however, have historically embraced a flexible approach to the concept of jurisdictional error, arguably rendering formal adoption of the *Anisminic* doctrine unnecessary.[25] In any event, Lord Diplock's taxonomy fits within the parameters of the doctrine of jurisdictional error in Australia. In drawing upon Lord Diplock's three-part taxonomy, French CJ has opined:

> There is inherent in administrative decision-making according to law, a requirement for a basic or minimum level of rationality. That requirement is applicable to the ascertainment of the law, the finding of the facts and the application of the law to the facts as well as the exercise of the discretion. Rationality, in this sense, does not mandate only one outcome. Nor does it mandate a single pathway of reasoning for any particular case. It is an envelope which may be said to cover a family of alternative pathways for reaching what can be described as a rational decision. Evidentiary material may allow more than one inference to be drawn about matters of fact. As to process, fairness, which serves rationality, may be achieved in more than one way. It serves rationality by minimising the risk that an answer to one view of a matter is not overlooked because no opportunity has been given to express it or that matters extraneous to decision-making such as prejudice, partiality or conflict of interest do not contaminate it. There is a pervasive requirement for rationality in the exercise of statutory powers based upon findings of fact and the application of legal principle to those findings.[26]

As can be discerned from French CJ's comments, it is important to remember that the putative illogicality ground of review is concerned with the manner in which a decision-maker reached a

[18] Aronson M and Dyer B, *Judicial Review of Administrative Action* (2nd ed, Lawbook Co, 2000) p 207.

[19] Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action* (3rd ed, Lawbook Co, 2004) p 252.

[20] Preston B, "Judicial review of illegality and irrationality of administrative decisions in Australia" (2006) 28 ABR 17 at 18.

[21] Airo-Farulla, n 14 at 544, notes that Lord Diplock equated the concept of irrationality with "*Wednesbury* unreasonableness", in the sense that the impugned decision is one that is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

[22] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[23] Basten, n 16 at 289, argues that the jettisoning of the distinction between jurisdictional and non-jurisdictional errors of law did not properly occur until the later decision in *O'Reilly v Mackman* [1983] 2 AC 237.

[24] See *Public Service Association (SA) v Federated Clerks' Union (Aust), SA Branch* (1991) 173 CLR 132 at 141 (Brennan J, 165 (McHugh J).

[25] Ellis-Jones I, *"The Anisminic Revolution" in Australia: The Reception of the Doctrine of Extended Jurisdictional Error in Australia* (LLM Thesis, University of Technology, Sydney, 1997) p 92 (a comprehensive and insightful analysis of the reception of the *Anisminic* doctrine in Australia: on file with the author). See also Ellis-Jones I, "Jurisdictional error: An alternative approach" (2008) 14 LGLJ 109 (argues that doctrine of jurisdictional error has outlived its usefulness and ought to be abolished altogether and should be replaced by a more "pragmatic" test that focuses upon the seriousness of the error of law in the circumstances).

[26] *Bakhtyar v MIMA* [2001] FCA 947 at [35].

conclusion and not whether the court agrees with the actual conclusion reached by the decision-maker. In considering whether the putative illogicality ground of review has been made out, the court will not consider the sufficiency of the evidence before the administrative decision-maker, but rather will focus upon the extent to which the decision-maker has properly engaged with the material that is before it and whether the decision-maker has engaged in a logical of reasoning in reaching a specified outcome.

Against the background of the distinction between *means* (the process of administrative decision-making) and *ends* (the outcome of administrative decision-making) that is so central to any discussion of judicial review of administrative action, the debate about the illogicality ground of review invariably focuses upon whether the decision-maker's reasoning need only be "objectively logical" (that it need only be capable of being logically justified on the evidence before the decision-maker) or whether it must be "subjectively logical", in the sense that it must be logically justified on a reading of the decision-maker's *actual* process of reasoning.[27] Further, the fact that an administrative decision appears to be logical does not mean that the decision is sound or that the decision-maker has properly engaged with the material before it. An example of reasoning (in the migration decision-making sphere) that is logical, but not necessarily sound, is as follows.

- Major premise – Persons who fear persecution in Country A would not return to Country A.
- Minor premise – Person A returned to Country A.
- Conclusion – Person A therefore did not fear persecution in Country A.

This reasoning is plainly logical given that the conclusion that is drawn is valid based on the premises that have been selected. However, where the major premise that has been selected does not conform to the circumstances of the case, the conclusion that is reached may not be sound. An example of a factual situation where the above major premise may not be valid can be found in *SZMDS*, where it was argued that it is plausible that a person who fears persecution based on the person's sexuality may return briefly to the country where persecution is feared based on the assumption that it is unlikely that his or her sexuality would be revealed during the course of a short trip. What this example reveals is that in order for an administrative decision-maker to act "judicially" (ie, "according to law, and not humour") it will not be sufficient for the administrative decision-maker to simply adopt a mechanical process of abstract deductive reasoning; to the contrary, the decision-maker must actively engage with each component issue and ensure that this is reflected in the stated reasons for the decision.

A. Bond: Endorsing "objective rationality"

The traditional starting point of any analysis of the illogicality grounds of review is the comments of Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321. *Bond* involved a judicial review application under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) in relation to findings made by the Australian Broadcasting Tribunal that Mr Bond was not a fit and proper person to hold a commercial broadcasting licence. In considering whether findings and inferences of fact are reviewable under the ADJR Act, Mason CJ expressly stated that, although the question of whether there is any evidence of a particular fact, or whether a particular inference can be drawn from the facts as found, are questions of law (at 356): "at common law …. 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." Mason CJ went on to note that although there existed English authorities suggesting that findings and inferences of fact are reviewable for error of law on the ground that they could not be reasonably made on the evidence or reasonably drawn from the primary facts, this approach had not been adopted by the High Court (at 356-367).

Deane J disagreed with Mason CJ's endorsement of the theory of "objective logicality" concluding that the issue is not merely whether findings must be objectively open on the evidence; the actual reasons for the finding themselves must be logical. According to Deane J (at 367-368):

[27] Airo-Farulla, n 14 at 568.

> If a statutory tribunal is required to act judicially, it must act rationally and reasonably. Of its nature, a duty to act judicially (or in accordance with the requirements of procedural fairness or natural justice) excludes the right to decide arbitrarily, irrationally or unreasonably. It requires that regard be paid to material considerations and that immaterial or irrelevant considerations be ignored. It excludes the right to act on preconceived prejudice or suspicion. Arguably, it requires a minimum degree of "proportionality" … When the process of decision- making is disclosed, there will be a discernible breach of the duty if findings of fact upon which a decision is based are unsupported by probative material and if inferences of fact upon which such a decision is based cannot reasonably be drawn from such findings of fact. Breach of a duty to act judicially constitutes an error of law which will vitiate the decision.
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> There is nothing in either the provisions of the *Broadcasting Act 1942* (Cth) or the particular circumstances which had the effect of excluding or modifying any of the above incidents of the Tribunal's duty to act judicially in the present case. That being so, it was necessary that any findings of fact made by the Tribunal, upon which a reviewable "decision" was based, were supported by some probative material which was properly before the Tribunal. If a finding of fact was not so supported, a "decision" which was based upon it was invalid. In that regard, it would matter not that the decision could be supported by some other finding of fact which was open to the Tribunal but which the Tribunal had not made. The point can be illustrated by reference to a hypothetical case where a decision could be supported by either a finding of fact A or a finding of fact B and where there was probative material to support a finding of A but no probative material at all to support a finding of B. If, in such a case, the Tribunal stated that it made no finding about, and placed no reliance upon, A but based a reviewable "decision" on a positive finding of B, the Tribunal would have failed to discharge its duty to act judicially. Its decision would be based on a finding of fact which, being unsupported by any probative material, was, as a matter of law, not open. It would simply be irrelevant to say that there was probative evidence upon which the Tribunal had not relied which would have supported a finding of A which the Tribunal had neither made nor relied upon.

Deane J's approach in *Bond* accords with the view he adopted as a member of the Full Federal Court in *Minister for Immigration & Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 689, where he was of the view that the requirement that a decision-maker abide by the rules of natural justice would meaningless if the actual decision could be based on considerations that were irrelevant or illogical or on findings or inferences of fact which were not supported by some probative material or logical grounds.

B. Overcoming Bond

As is the case with the theoretical underpinnings of judicial review generally, there exists a continued debate[28] as to whether the requirement of logicality is a freestanding "common law doctrine" on the one hand, or a product of the presumed intention of the legislature on the other.[29] In the English context, Professor Wade has argued stridently that the doctrine of ultra vires, which involves ensuring that administrative decision-makers stay within the legal parameters contemplated by Parliament, provides the necessary justification for judicial review and the requirement of rationality:

> In every case (the judge) must be able to demonstrate that he is carrying out the will of Parliament as expressed in the statute conferring the power. He is on safe ground only where he can show that the offending act is outside the power. The only way in which he can do this, in the absence of an express provision, is by finding an implied term or condition in the Act, violation of which then entails the condemnation of ultra vires.[30]

[28] For a recent acknowledgement of the existence of this debate, see *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252; 84 ALJR 507 at 511; *Plaintiff M61/2010E v Commonwealth* (2010) 85 ALJR 133 at [74]; [2010] HCA 41.

[29] Mason A, "Judicial Review: The Contribution of Sir Gerard Brennan" in Creyke R and Keyzer P (eds), *The Brennan Legacy: Blowing the winds of legal orthodoxy* (Federation Press, NSW, 2002) p 45. See also Jaffe L and Henderson E, "Judicial Review and the Rule of Law: Historical Origins" (1956) 72 LQR 345; Kneebone S, "What is the Basis of Judicial Review" (2000) 12 PLR 95; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 142-143.

[30] Wade W, *Administrative Law* (6th ed, Oxford University Press, NY, 1988) p 42.

The House of Lords has affirmed the view that, in the context of English constitutional law, the ultra vires doctrine provides the central organising principle for judicial review. Sir Anthony Mason[31] and Craig[32] have strongly criticised the House of Lords' approach, arguing that the doctrine of ultra vires does not provide an adequate explanation for modern judicial review. Indeed, the nascent judicial review grounds such as *Wednesbury* unreasonableness[33] and the relevant/irrelevant considerations dichotomy are only referable to an ambiguous presumption that Parliament intended that administrative decision-makers be required to apply the principles of good administration when making decisions.[34]

Although it would seem that the common law justification for judicial review has prevailed in Australia,[35] the ultra vires doctrine remains of some importance. Indeed, in *Bruce v Cole* (1998) 45 NSWLR 163, Spigelman CJ relied on the ultra vires doctrine to overcome what was said to be the common law position that the drawing of an illogical inference does not in itself constitute an error of law. *Bruce v Cole* concerned the removal of a judicial officer under the NSW Constitution, which provides that a judicial officer may only be removed by the Governor on advice from Parliament on the ground of "proved misbehaviour or incapacity". A Conduct Division of the Judicial Commission of New South Wales was established under the *Judicial Officers Act 1986* (NSW), which recommended to the Governor that the relevant judicial officer be removed on the grounds of "proved incapacity". According to Spigelman CJ (at 189), the fact that the statutory opinion related to a process in which "proved incapacity" must be established was such that it required that a logical process of reasoning to be adopted by the Conduct Division.

Bruce v Cole was far from a prosaic judicial review case; the proceedings, as Spigelman CJ noted (at 166), involved "legislation of the highest constitutional significance for the rule of law" and one in which the "gravity of the consequences for the individual judge" was immense (at 190). In light of the significance of the proceedings, it is understandable that a conclusion was reached that a decision-maker must adopt a logical process of reasoning in forming a conclusion of incapacity. Accordingly, it would have been reasonable to assume that Spigelman CJ's approach would only be followed in cases where the consequences of the impugned administrative decision would be profound for the judicial review applicant. However, Spigelman CJ expanded upon the approach in *Bruce v Cole*, noting, in *Hill v Green* (1999) 48 NSWLR 161 at 174-175:

> where a statute or regulation makes provision for an administrative decision in terminology which does not confer an unfettered discretion on the decision-maker, the courts should approach the construction of the statute or regulation with a presumption that the parliament or the author of the regulation intended the decision-maker to reach a decision by a process of logical reasoning and a contrary interpretation would require clear and unambiguous words.

The decisions *Bruce v Cole* and in *Hill v Green* were also significant in their criticisms of the approach in *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, where the New South Wales Court of Appeal held that a factual conclusion which is "perverse, illogical or marred by patent error does not involve error of law" (at 155-157). It is important to point out that *Azzopardi* concerned a construction of a statutory formula which limited appeals from decisions of judicial members of the NSW Workers' Compensation Commission to appeals on a point of law and, much like Mason CJ's "want of logic" comment in *Bond* (which was made in the context of a discussion of the concept of "error of law" in s 5(1)(f) of the ADJR Act) has arguably limited application in the s 75(v) context. However, notwithstanding the significance of the decisions in *Bruce v Cole* and *Hill v Green*, which

[31] Mason, n 29, p 45.

[32] Craig PP, "Ultra Vires and the Foundations of Judicial Review" (1998) 57 Camb LJ 63, Craig PP, "Competing Models of Judicial Review" [1999] PL 428.

[33] In *Abebe v Commonwealth* (1999) 197 CLR 510 at [114], Gaudron J expressed doubt as to whether *Wednesbury* unreasonableness is even a creature of the common law in this country.

[34] Mason, n 29, p 45.

[35] Gageler S, "The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?" (2000) 28 Fed LR 53.

emphasised that the conclusion as to whether the making of illogical findings of facts constitutes jurisdictional error depends on the statutory context (a point made forcefully by French J in a number of decisions in the early 1990s) administrative lawyers have, despite the urgings of the High Court, failed to "abandon their fascination with … *Bond*".[36] This "fascination" was exemplified in *Minister for Immigration & Multicultural Affairs v Epeabaka* (1999) 84 FCR 411, where the Full Court of the Federal Court expressly disagreed with the primary judge's view that the illogicality grounds of review should be viewed through the prism of "subjective illogicality"; according to the court (at [23] per Black CJ, von Doussa and Carr JJ), "the position in Australia is as stated by Mason CJ in *Bond*, and not what might be seen as the broader position articulated by Deane J in *Pochi*". Three years after *Epeakaba*, the High Court issued a timely reminder, which unfortunately remained largely unheeded by lower courts,[37] about the correctness of *Bond* outside the context of the applications under the ADJR Act:

> The Minister's reliance upon what was said by Mason CJ in *Australian Broadcasting Tribunal v Bond* was misplaced. Mason CJ there was construing those of the grounds of review of decisions, specified in s 5 of the ADJR Act, in particular that the decision "involved an error of law", which might embrace complaints as to fact finding. The Court was not considering notions of jurisdictional error elaborated in the decisions given under s 75(v) of the *Constitution*. Section 5 is constructed with a scope which spans more than jurisdictional error. Thus, for example, it is a ground under s 5(1) that "the decision involved an error of law" (par (f)), yet as *Muin v Refugee Review Tribunal* illustrates, there may be errors of law within jurisdiction and so beyond the constitutional writs. In any event, as the judgments in *Minister for Immigration & Multicultural Affairs v Rajamanikkam* illustrate, what was said in *Bond* respecting erroneous fact finding and review under s 5 of the ADJR Act may give rise to differences of opinion in this Court.[38]

C. Applicant S20/2002

Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 77 ALJR 1165; 198 ALR 59 concerned a claim that the decision-maker had acted irrationally or illogically in failing to place any weight on evidence that, on its face, corroborated the visa-applicant's claims in circumstances where the decision-maker had found that the general account of events given by the visa-applicant was not credible. Although a majority of the High Court (Gleeson CJ, McHugh, Gummow and Callinan JJ; Kirby J dissenting) rejected the suggestion that the decision-maker's actual decision was attended by illogical reasoning as claimed, the decision is of some significance given Gummow and McHugh JJ's suggestion that a decision-maker may fall into jurisdictional error where "its determination that the condition upon which depended the power (or duty) to [make a decision] was not met was irrational, illogical and not based upon findings or inferences of fact supported by logical grounds" (at [34]).

In the context of protection visa applications under the *Migration Act 1958* (Cth). Gummow and McHugh JJ's approach dictated that a decision-maker will have fallen into jurisdictional error if its determination that a visa-applicant did not possess a well-founded fear of persecution was "irrational, illogical and not based upon findings or inferences of fact supported by logical grounds". As Gummow and Hayne JJ later stated in *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at [37]-[38]; 207 ALR 12:

> [Section] 65 of the Act provides that the Minister is to grant a visa sought by valid application "if satisfied" of various matters. These include that any criteria for the visa prescribed by the Act are satisfied: s 65(1)(a)(ii). Section 65 imposes upon the Minister an obligation to grant or refuse to grant a visa, rather than a power to be exercised as a discretion. 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 delegate was in the same position as would have been the Minister (s 496) and the Tribunal exercised all the powers and discretions conferred on the decision-maker (s 415).

[36] Basten J, "Constitutional elements of judicial review" (2004) 15 PLR 187 at 199.

[37] See, eg *NACB v MIMIA* [2003] FCAFC 235; Aronson et al, n 19, p 250.

[38] *Re MIMA; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [57]; 198 ALR 59.

> 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. To say that a decision-maker must have acted in good faith is to state a necessary but insufficient requirement for the attainment of satisfaction as a criterion of jurisdiction under s 65 of the Act. However, inadequacy of the material before the decision-maker concerning the attainment of that satisfaction is insufficient in itself to establish jurisdictional error.

Central to an understanding of the illogicality grounds of review, as evidenced by the approach in *Applicant S20/2002*, is that it does not operate on every particular finding of fact made by a decision-maker. To the contrary, the illogicality grounds of review focus upon the ultimate finding that enlivens a decision-maker's power (ie, the "jurisdictional fact") and whether, in totality, it was "irrational, illogical and not based on findings or inferences of fact supported by logical grounds". A decision-maker will not have fallen into jurisdictional error simply because it has made a factual finding, or has drawn a factual inference, that appears to be illogical; what is important is the extent to which the factual finding or inference impacts upon the ultimate determination (or the existence of a jurisdictional fact) and whether it could be said that decision-maker misunderstood, or failed to carry out, its core jurisdictional task. (That said, it is somewhat difficult to square Gummow and Hayne JJ's comment in *SGLB* that "inadequacy of the material before the decision-maker concerning the attainment of that satisfaction is insufficient in itself to establish jurisdictional error" with the requirement of logicality given that such a decision could hardly be said to be based on "findings or inferences of fact supported by logical grounds" if the material before the decision-maker is inadequate.) An example of the necessary relationship between the identified illogical process of reasoning, and the decision-maker's ultimate jurisdictional task, can be found in the words of Moore J of the Federal Court:

> The Tribunal's conclusion that the applicant was not a homosexual was based squarely on an illogical process of reasoning. Section 65(1)(a)(ii) of the [Migration] Act required the Tribunal to determine whether or not it was satisfied that the applicant met the criteria for the grant of a protection visa set out in the Act. The applicant's alleged membership of a particular social group arising from his homosexuality was an essential element of this inquiry.[39]

Another important aspect of *Applicant S20/2002* is that it represented "the culmination of a number of earlier High Court and other judgments which had doubted whether *Wednesbury* unreasonableness could be used to challenge grossly unreasonable fact-finding".[40] As Gummow and McHugh JJ emphasised in *Applicant S20/2002*, a challenge on *Wednesbury* unreasonableness grounds involves the purported vitiation of an *outcome* (on the basis that a discretion was unreasonably exercised); an illogicality challenge, on the other hand, is based on an assertion that the power to make a decision had not arisen because the conditions for its exercise did not exist in law[41] (ie, the decision-maker fell into error in determining that the necessary factual condition precedent did not exist). The approach of Gummow and McHugh JJ means that a challenge on *Wednesbury* unreasonableness grounds can only attach itself to the discretionary aspects of administrative decision-making. The practical consequences can be demonstrated through the following examples.

Under the *Migration Act*, a decision-maker must grant a protection visa to a visa-applicant if it is *satisfied* that the visa-applicant possesses a well-founded fear of persecution on the basis of a ground prescribed in the Refugees Convention. Contrast the *Migration Act* with the Financial *Sector (Shareholdings) Act 1998* (Cth), s 14(1) of which provides: "If the applicant satisfies the Treasurer that it is in the national interest to approve the applicant holding a stake in the company of more than 15%, the Treasurer may grant the application." In the context of *Wednesbury* unreasonableness and the

[39] *SZMDS v Minister for Immigration & Citizenship* [2009] FCA 210 at [29].

[40] *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [58].

[41] *Re MIMA; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [73]; 198 ALR 59.

illogically grounds of review (and based on Gummow and McHugh JJ's approach in *Applicant S20/2002*) an aggrieved applicant whose application was not granted would have to structure a challenge in the following manner:

(a) the Treasurer fell into jurisdictional error given that his or her determination that it was not in the national interest to approve the application (ie, the determination that the condition that enlivened the Treasurer's power to make a decision was not met) was "irrational, illogical and not based upon findings or inferences of fact supported by logical grounds"; or

(b) assuming that the Treasurer was satisfied that it was in the national interest to approve the application, but nevertheless decided not to grant the application, the Treasurer's decision not to grant the application was so unreasonable that no reasonable person would have made it, and hence the Treasurer fell into jurisdictional error.

Notwithstanding the approach in *Applicant S20/2002* that recognised the conceptual differences between *Wednesbury* unreasonableness and the illogicality grounds of review, judges and commentators[42] have been reticent in recognising the important conceptual differences between the two grounds of review. For example, in a comparatively recent decision f the NSW Supreme Court, which concerned the making of regulations under the *Liquor Act 2007* (NSW), Hoeben J, in response to a submission that a decision can be set aside on the basis that it was "irrational, illogical and not based on findings or inferences of fact supported by logical grounds", stated:

> [The] proposition [is] somewhat novel if by it the plaintiffs were submitting that this is a separate and discrete basis for challenging an administrative decision. The concept of irrationality is well known in this area of law and is usually applied in the context of *Wednesbury* unreasonableness, ie that a decision was so unreasonable that no reasonable administrator could have made it. I propose to approach this issue on that basis.[43]

Furthermore, a number of judges have continued to rationalise that, flawed reasoning, rather than giving rise to jurisdictional error itself, may provide a signpost as to the existence of some other jurisdictional error. According to Allsop J:

> Illogicality of some kind can be seen in the reasoning processes of many decision-makers, administrative and judicial. Perfect accord with the requirements of logical reasoning is a standard few can achieve in the daily life of decision-making. Sometimes identification of illogicality is merely no more than understanding how an error was made within the jurisdictional task provided.[44]

Allsop J's comment must be considered in context of his Honour's earlier view that where an administrative decision-maker's reasoning exhibits flawed logic or reason, the inference may be drawn that the decision-maker failed to properly consider the material before it. As his Honour stated:

> By and large fact-finding is a task within jurisdiction, though factual error is not necessarily mutually exclusive of jurisdictional error … Where fact-finding has been conducted in a manner which can be described, as here, as in substantial respects unreasoned, and mere assertion lacking rational or reasoned foundation, at times as plainly and ex facie wrong and as selective of material going one way, these considerations may found a conclusion that the posited fair-minded observer might, or indeed would, reasonably apprehend that the conclusions had been reached with a mind not open to persuasion and unable or unwilling to evaluate all the material fairly.[45]

[42] Carroll E, "Scope of Wednesbury unreasonableness: In need of reform?" (2007) 14 AJ Admin L 86 at 95-99.

[43] *Hemmes Trading Pty Ltd v New South Wales* [2009] NSWSC 1303 at [92].

[44] *NADH of 2001 v MIMIA* [2004] FCAFC 328 at [136].

[45] *NADH of 2001 v MIMIA* [2004] FCAFC 328 at [115].

D. The reception of Applicant S20/2002

Following the High Court's decision in *Applicant S20/2002*, the courts, and in particular the Federal Court, were reluctant to recognise that illogical reasoning in the process of forming a subjective state of satisfaction may constitute jurisdictional error resulting in invalidity.[46] For example, although the Full Federal Court accepted in *NACB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 235 at [21] that there was an "important error in the logic adopted by the RRT in framing its reasons", it nevertheless concluded (at [30]) that *Applicant S20/2002* did not derogate from the existing authorities that suggested that an administrative decision based on flawed logic does not exhibit jurisdictional error.[47] However, as Aronson, Dyer and Groves argue, "it is difficult to square the 'no change' view of [*Applicant S20/2002*] with the High Court's repeated criticisms of Mason CJ's approach in *Bond*".[48] The approach in *NACB* was followed on a number of occasions by the Federal Court,[49] even in the face of Gummow and Hayne JJ's clarificatory comments in *SGLB*:

> 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. To say that a decision-maker must have acted in good faith is to state a necessary but insufficient requirement for the attainment of satisfaction as a criterion of jurisdiction under s 65 of the Act. However, inadequacy of the material before the decision-maker concerning the attainment of that satisfaction is insufficient in itself to establish jurisdictional error.[50]

In more recent times, however, the courts have more readily embraced the proposition that an administrative decision can be set aside on the basis of flawed logic or reason, while also recognising that a finding of illogicality contemplates a "more demanding or higher threshold for review"[51] than other grounds such as *Wednesbury* unreasonableness. Symptomatic of this change in approach by the courts is the decision of Madgwick J in *SZAPC v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 995 at [57], where his Honour summarised the illogicality grounds of review, framing the putative ground of review as part of the requirement that administrative decision-makers act judicially:

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[46] See, eg *NACB v MIMIA* [2003] FCAFC 235; *W404/01A of 2002 v MIMIA* [2003] FCAFC 255; *NATC v MIMIA* [2004] FCAFC 52; *WAJQ v MIMIA* [2005] FCAFC 79; *SZEEO v MIMIA* [2005] FCA 546; *SZCZN v Minister for Immigration & Citizenship* [2008] FCA 173.

[47] See also *SZEEO v MIMIA* [2005] FCA 546 per Tamberlin J: "[14 The law is settled at the appellate level in this Court that the want of logic does not, of itself, suffice to constitute an error of law … In accordance with the settled authority, I would not depart from these decisions unless I formed the view that they were clearly wrong in principle on this point. [15] The representative for the appellant referred to … *SGLB* … at [38]", where Gummow and Hayne JJ said: "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*." (Emphasis added.) [16] Their Honours based these remarks on a similar observation in … *S20/2002* … at [37] and [52] per McHugh and Gummow JJ and at [173] per Callinan J … Those remarks were considered by the Full Court in *NACB*, *VWST* and *NATC* but they did not deter their Honours from concluding that illogical reasoning without anything more is not sufficient to constitute jurisdictional error. It is to be noted that in *S20/2002*, their Honours concluded that the determination by the Tribunal was not irrational or illogical as contended for, so the question did not arise for determination. Chief Justice Gleeson noted that it is often unhelpful to discuss, in the abstract, the relevant consequences of irrationality, or illogicality or unreasonableness. At [9], the Chief Justice said, after referring to illogicality: "… If in a particular context, it is material to consider whether there has been an error of law, then it will not suffice to establish some faulty inference of fact." His Honour then applied the observations of Mason CJ in … *Bond* (1990) 170 CLR 321 at 356. [17] Having regard to the Full Federal Court decisions that I have referred to above, I do not consider that illogicality on its own, of the type which is here alleged, amounts to jurisdictional error. I note that in the above obiter in *SGLB*, their Honours did not suggest that illogicality is sufficient but rather that there must also be a determination based on findings of fact not supported by logical grounds.

[48] Aronson et al, n 19, p 250.

[49] See, eg *W404/01A of 2002 v MIMIA* [2003] FCAFC 255.

[50] *Minister for Immigration & Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at [38]; 207 ALR 12.

[51] *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [59].

1. A "no evidence" attack will only suffice as such if it can be said that there is an actual "absence of any foundation in fact for the fulfilment of the conditions upon which, in law, the existence of a power depends", that is, if there is no evidence to support a finding of a jurisdictional fact.
2. Nevertheless, there are constitutional minimum standards of judicial review and the powers of decision-makers such as the Tribunal are not to be exercised capriciously – not "according to humour", but according to law.
3. It is a critical legal requirement that the determination should not be able to be characterised as "irrational, illogical and not based on findings or inferences of fact supported by logical grounds". My own shorthand paraphrase of this is that, in that minimal sense, the determination must be a rational one.
4. If that critical legal requirement is not met, there will be jurisdictional error sufficient to warrant the issue of a constitutional writ.

Similarly, in a statement that was later approved in *SZMDS* by Gummow and Kiefel JJ in the High Court, Lee and Moore JJ in *WAIJ v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 74 at [22], noted:

> The requirement that the review procedure be carried out according to law, is an irreducible duty arising out of s 75(v) of the *Constitution* … Failure to observe that requirement will mean that the purported decision of the Tribunal has no "jurisdictional" foundation … The Tribunal only obtains power to make a determination under the Act where the determination is based on findings or inferences of fact that are grounded upon probative material and logical grounds … A determination based on illogical or irrational findings or inferences of fact will be shown to be a decision not supported by reason and to have no better foundation than an arbitrary selection of a result. It is because it is *based* upon such findings that the determination is an unreasoned decision. Such findings or inferences of fact become part of, and are not distinguishable from, the decision subject to judicial review … A review culminating in such a decision would be a process lacking practical fairness or justice and would not be a process conducted according to law.

The issue arose squarely for consideration by the High Court in *SZMDS*, where the Minister argued that although illogicality does not operate as an independent ground of review, the existence of it may lead to the conclusion that the decision-maker fell into jurisdictional error elsewhere. Following the High Court's decision in *SZMDS* it can barely be doubted that administrative decision that exhibits illogical reasoning *may* be invalid, although identifying the circumstances in which an administrative decision-maker will have fallen into jurisdictional error in this regard remains elusive.

IV. SZMDS

The High Court's decision in *Minister for Immigration& Citizenship v SZMDS* (2010) 240 CLR 611 involved an appeal from a decision of Moore J of the Federal Court,[52] where his Honour, in allowing the visa-applicant's appeal against a decision of a Federal Magistrate, made orders quashing the Refugee Review Tribunal's decision not to grant the visa-applicant a protection visa. The relevant facts were summarised by the Tribunal as follows:

> The applicant essentially claim[ed] that he is a homosexual and that he is fearful of persecution because homosexuals face discrimination in the society and are penalised under the Pakistani laws and also because he does not want to bring shame upon his family …
>
> The applicant claimed that he engaged in homosexual acts while residing in [the United Arab Emirates]. A copy of the applicant's passport provided with the application indicates that the applicant had travelled to [UAE] on numerous occasions and that he returned to Pakistan. He also confirmed in oral and written evidence that he travelled to Pakistan before his arrival in Australia, that is, after he claims to have commenced the relationship with his friend and after he claims he had the relationship with the boss. The applicant's willingness to return to Pakistan and to remain in Pakistan, albeit for only a few weeks, despite his alleged homosexual conduct, causes the Tribunal to question the applicant's claim that he engaged in homosexual acts in [UAE] or that he was genuinely fearful of persecution in Pakistan. The applicant explained that he wanted to see his children, but the Tribunal is of the view that if the applicant was genuinely fearful of serious harm as a result that his homosexuality may become known in Pakistan, he would not have travelled to Pakistan, even for a short period, after his claimed homosexual relationships in [UAE].

[52] *SZMDS v Minister for Immigration & Citizenship* [2009] FCA 210.

> Further, the applicant had indicated that he had travelled to the [United Kingdom] but did not seek protection there because he had a good life in the [UAE] and was in a good relationship with his friend. However, the applicant's claims are directed at Pakistan where he claims to have feared persecution due to his homosexuality. The applicant was unable to explain to the satisfaction of the Tribunal why, if he was fearful of his homosexuality becoming apparent to his family or to others in Pakistan, he would take no action to seek protection despite having a good relationship with his friend. The applicant appeared to suggest that he had nothing to fear until his relationship with the boss deteriorated. However, this appears to be inconsistent with his claim that he was fearful of being perceived, or of being found to be, a homosexual upon his return to Pakistan, not of being discovered as being in a relationship with the boss. The applicant was unable to explain to the satisfaction of the Tribunal why he preferred at the time to hide his homosexuality for years to come rather than seek protection.[53]

According to the Tribunal, the visa-applicant's conduct in returning to Pakistan and in failing to seek protection was inconsistent with the claimed fear of persecution arising as a result of his homosexuality. The Tribunal did accept that the visa-applicant had engaged in homosexual activities in UAE or that he was fearful as a result of such activities or his homosexuality and that, accordingly, he did not possess a well-founded fear of persecution.

A. Federal Magistrates Court and Federal Court

The visa-applicant's judicial review application failed in the Federal Magistrates Court. The visa-applicant appealed to the Federal Court, which allowed his appeal and remitted the matter to the Tribunal for re-determination. According to the Federal Court:

> The Tribunal's conclusion that the applicant was not a homosexual was based squarely on an illogical process of reasoning. Section 65(1)(a)(ii) of the [Migration] Act required the Tribunal to determine whether or not it was satisfied that the applicant met the criteria for the grant of a protection visa set out in the Act. The applicant's alleged membership of a particular social group arising from his homosexuality was an essential element of this inquiry.[54]

In allowing the visa-applicant's appeal, the Federal Court was critical, in two broad respects, of the way in which the Tribunal formed the view that the visa-applicant did not have a well-founded fear of persecution. Firstl the court pointed out that the Tribunal did not make any finding as to how the applicant's putative homosexuality would have become known to his family or anyone else during his short return to Pakistan. According to the court, given that the applicant's claimed fear was based on his apprehension that others in Pakistan might come to know of his sexuality, it was necessary for the Tribunal make a finding as to how his homosexuality would become know to others in Pakistan. The Tribunal's failure to make such a finding meant that there was no basis for the Tribunal to conclude that the fact that he returned to Pakistan briefly was inconsistent with having a well-founded fear of persecution.[55] Secondly, the court was of the view that the visa-applicant's explanation as to why he did not claim asylum during the course of his brief visit to the UK was perfectly plausible given that at the time of his UK visit he did not have a well-founded fear of persecution in Pakistan given that he could return to his the UAE where he had a good life and was in a good relationship.[56]

B. High Court

The High Court, by a majority (Heydon, Crennan and Bell JJ; Gummow ACJ and Kiefel J dissenting) allowed the Minister's appeal, finding that the Tribunal's decision was not tainted with illogical reasoning and that, accordingly, the Tribunal did not fall into jurisdictional error in finding that the visa-applicant was not a person to whom Australia owed protection obligations.

1. Gummow ACJ and Kiefel JJ

After briefly outlining the facts and the relevant statutory provisions, Gummow ACJ and Kiefel J turned their attention to the important distinction between jurisdictional error and non-jurisdictional

[53] [2008] RRTA 35 http://www.austlii.edu.au/au/cases/cth/RRTA/2008/35.html (viewed 30 November 2010).

[54] *SZMDS v Minister for Immigration & Citizenship* [2009] FCA 210 at [29].

[55] *SZMDS v Minister for Immigration & Citizenship* [2009] FCA 210 at [26].

[56] *SZMDS v Minister for Immigration & Citizenship* [2009] FCA 210 at [27].

error in Australian administrative law. Although their Honours recognised that it is not the role of the judicial review court to attempt to cure administrative injustices and that the merits of a decision lie with the repository of the power alone, they recognised that, in certain circumstances, factual errors by the administrative decision-maker may lead to the conclusion that the decision-maker fell into jurisdictional error, particularly where the exercise of a power is conditioned upon the decision-maker reaching a certain state of satisfaction (*SZMDS* (2010) 240 CLR 611 at [19]-[24]). According to their Honours, where a decision-maker has a reached a state of satisfaction arbitrarily, capriciously, irrationally or in a manner lacking bona-fides, the decision-maker will have failed to exercise its jurisdiction (at [23]). In rejecting the Minister's submission that this approach entails the court engaging in a process of merits review, they opined that "the apprehended fear of 'merits review' … should be rejected [given that] [i]t gives insufficient weight to the importance of s 75(v) of the *Constitution* in ensuring that the legislative expression of jurisdictional facts in terms of satisfaction of opinion of a decision maker does nor rise higher than its source" (at [42]).

In considering the Tribunal's decision, their Honours noted that the Tribunal focused on two matters that were said to be inconsistent with visa-applicant's claimed fear of persecution, first, the fact that the visa-applicant retuned to Pakistan for a short period in May 2007 and, secondly, the fact that he failed to claim protection when he visited the UK in 2006 ([43]-[45]). According to the Tribunal, if the visa-applicant genuinely feared persecution he would have claimed protection at the first opportunity and would not have returned to the country in which persecution is feared.

As Gummow ACJ and Kiefel J correctly identified, the difficulty with the Tribunal's reasoning lay with its reliance on the assumption (which may, of course, be valid in certain circumstances, for example, where the visa-applicant fears persecution on the basis of his or her race) he or she would not return to a country in which persecution is feared (at [47]). The difficulty with this analysis is that it fails to take account of the fact that the visa-applicant only returned to Pakistan for a short period and is the product of an adopted assumption that a person's sexuality would likely be revealed even upon a short return to that person's homeland (at [50]-[51]). In a broader sense, the Tribunal failed to properly consider the circumstances of the case and failed to properly articulate its concerns surrounding the applicant's claim that he would only fear persecution if he were required to live in Pakistan permanently. However, as their Honours reminded us (at [48]):

> As McHugh and Kirby JJ put it in *Appellant S395/2002* ((2003) 216 CLR 473 at 495 [59]) a claimant to refugee status is asserting an individual right not merely undifferentiated membership of a group, and as Gummow and Hayne JJ put it (at 500 [78]):
>
> > The central question in any particular case is whether there is a well-founded fear of persecution. That requires examination of how *this* applicant may be treated if he or she returns to the country of nationality. Processes of classification may obscure the essentially individual and fact-specific inquiry which must be made (original emphasis).

According to Gummow ACJ and Kiefel J, the Tribunal's reliance on the assumption that a visa-applicant would not return to a country in which persecution is feared meant that it saw no need to turn its mind to the issue of how, during the course of a brief visit, it could have become known to the visa-applicant's family or others in Pakistan that he was a homosexual, particularly in light of the fact that the visa-applicant had claimed that he had made other short visits to Pakistan that did not lead to the fact of his homosexuality being revealed. The failure to ask this question, according to their Honours, led to the absence of any logical connection between the Tribunal's decision and the evidence that was before it (at [53]).

2. Heydon J

Heydon J focused on the Federal Court's criticisms of the Tribunal's approach to key aspects of its decision; namely its reasoning in relation to the visa-applicant's short return to Pakistan and its reasoning in relation to his failure to seek asylum during his short visit to the UK in 2006. In relation to the former, his Honour summarised the Tribunal's approach in the following terms (at [74]):

> The reasoning of the Tribunal member may be summarised as follows. Although she did not say so in terms, it is plain that she selected as her major premise the proposition that persons who claim to fear serious harm arising from their conduct if it becomes known in their country of origin – including death

> through shame to themselves, their wives, their daughters, their brothers and their sisters – are likely to have so strong a revulsion to the conditions and dangers in their country of origin which made these outcomes likely that they will not return to it. The minor premise was that the first respondent did return to his country of origin. The conclusion was that he probably did not in fact fear serious harm of the kind claimed. The Tribunal's reasoning rested on the idea that there was an inconsistency between the first respondent fearing certain perils if his application for a protection visa were rejected and he returned to Pakistan, and his failure to fear those perils when he went there voluntarily in 2007.

According to Heydon J, it was not open for the Federal Court to conclude that there was no basis for the Tribunal's conclusion that the fact the visa-applicant returned briefly to Pakistan was inconsistent with him having a fear of harm based on his family and others in Pakistan coming to know he was a homosexual (at [77]). Implicit in Heydon J's criticism of the Federal Court's approach to the issue is the suggestion that it impermissibly strayed into the merits of the decision (at [78]):

> The issue was one on which minds might differ. The Federal Court evidently operated on one assumption or conclusion about that issue. The Tribunal operated on another. The difference was one of degree, impression and empirical judgment. It did not stem from an error in logic by the Tribunal member. The difference could not be said to reveal an absence of any basis whatsoever for her conclusion.

With respect, a full reading of the Federal Court's reasoning in respect of this issue reveals that it went no further than expressing criticism of the Tribunal's failure to consider the "fundamental question" of exactly how the visa-applicant's sexuality would be revealed during the applicant's brief return to Pakistan. As the Federal Court had stated:

> *The Tribunal made no finding about how, during the applicant's brief return to Pakistan, it might conceivably have become known to his family or anyone else that he had become, on his account, a practising homosexual … Without findings of this type, or at least in the absence of an explanation as to how there was any risk that his homosexuality would become known during the brief period of his visit, I simply fail to see how the fact that the applicant briefly returned to Pakistan undermined his claim that he had become an active homosexual in the UAE in the preceding two years*. There was simply no basis, in my opinion, for the Tribunal to have concluded that the fact that the applicant returned briefly to Pakistan was inconsistent with him having a fear of harm based, on his case, on his family and others in Pakistan coming to know he was a homosexual [emphasis added].[57]

As Heydon J recognised, the Tribunal's conclusion, that a person who feared persecution would not return to the country where persecution could occur, is not necessarily illogical. The weakness of his Honour's approach, however, is that it fails to grasp that "[t]he central question in any particular case is whether there is a well-founded fear of persecution … [which] requires examination of how *this* applicant may be treated if he or she returns to the country of nationality".[58] The thrust of the Federal Court's criticism (and indeed Gummow ACJ and Kiefel J's criticism) was simply that the Tribunal failed to consider exactly how the visa-applicant's homosexuality would be revealed upon his short return to Pakistan; the absence of such a finding (in light of the fact the a person's sexuality is not readily identifiable) meant that the conclusion reached by the Tribunal was not one that could be said to be the product of the "individual and fact-specific inquiry which must be made" in determining a person's refugee status. It was not open for the Tribunal, charged with the responsibility of acting judicially, to reach a conclusion based on assumptions that were inapplicable to the circumstances of the case. Somewhat curiously, however, Heydon J took his criticism one step further, stating (in the absence of any factual findings by the Tribunal to this effect) (at [79]):

> There is a further difficulty in relation to the Federal Court's attacks on the reasoning of the Tribunal member. The means by which the first respondent's family or anyone else in Pakistan would discover facts about the first respondent which he claimed he wished to conceal were not limited to those flowing from his physical presence in Pakistan. If the facts were discovered, the impact would be felt in Pakistan. But the facts could be discovered independently of the first respondent's presence in Pakistan. The facts could be discovered, for example, through messages out of the United Arab Emirates via correspondence, telephone or other electronic means, or through reports of Pakistanis coming home

[57] *SZMDS v Minister for Immigration & Citizenship* [2009] FCA 210 at [29].

[58] *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 at [78] per Gummow and Hayne JJ.

> from the United Arab Emirates. That diminishes the significance of the length of the first respondent's trip: for even if its brevity reduced the chance of the facts being discovered from the first respondent's mere presence in Pakistan, it did not reduce the chance of persecution taking place as a result of communications during the previous 20 months.

Heydon J then considered the way in which the Federal Court dealt with the issue of the visa-applicant's visit to the UK in 2006 and the visa-applicant's failure to apply for a protection visa in the UK. Again, his Honour was critical of the way in which the Federal Court had characterised the Tribunal's reasoning as "illogical". According to his Honour, "[although] not all minds would share [this] thinking", it was not illogical for the Tribunal to conclude that the visa-applicant's failure to apply for a protection visa in the United Kingdom damaged the visa-applicant's credibility (at [84]).

The difficulty with Heydon J's approach is that it elides the fact that at the time the visa-applicant visited the UK he did not fear persecution in Pakistan as (according to his own evidence) there was no realistic prospect that he would be required to return to Pakistan permanently. Again, Heydon J's approach fails to recognise the "individual and fact-specific inquiry which must be made".[59] It is one thing to say that an administrative-decision maker's reasons are sustainable as a piece of abstract logical reasoning; it is quite another thing to say that, having applied itself in such a way, the administrative decision-maker has properly grasped the issues in suit and has taken account of them in reaching a determination. Contrary to the way in which they were characterised by Heydon J, the Federal Court's criticisms of the Tribunal reasoning should be read in light of the language of *Craig v South Australia* (1995) 184 CLR 163 at 179, where the High Court stated:

> If … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers.

It is submitted that *SZMDS* is "a variant of this same type of jurisdictional error. The Tribunal has asked itself the correct question in the broad sense of asking whether it should be satisfied that Australia owed protection obligations to the [visa-applicant]"[60] in light of the visa-applicant's failure to claim asylum in the UK (and his short return to Pakistan) but did so without properly taking account of the visa-applicant's explanation as to why his putative well-founded fear of persecution in Pakistan only arose at a later time.

3. Crennan and Bell JJ

According to Crennan and Bell JJ, the crucial issue in the proceedings was whether "illogicality", "irrationality", or "lack of articulation" in a finding of jurisdictional fact can amount to jurisdictional error, bearing in mind that illogical reasoning will, according to their Honours, only give rise to jurisdictional error where the decision-maker's state of satisfaction is one at which "no rational or logical decision-maker could arrive on the same evidence" (*SZMDS* (2010) 240 CLR 611 at [94], [130]). In considering whether the Tribunal's fact finding was illogical, their Honours were emphatic in their denial that the Tribunal's decision was attended by illogical reasoning (at [132]):

> It is clear, from the extracts from the Federal Court decision set out above, that the Federal Court emphatically disagreed with the Tribunal's finding that the first respondent's return to Pakistan and failure to seek asylum in the United Kingdom was conduct which was inconsistent with the claimed fear of persecution arising as a result of homosexuality. It also seems clear that the Federal Court, acting on the same material or evidence on which the decision was based, would have been satisfied that the first respondent feared persecution as alleged.

In a similar vein, their Honours also concluded that: "The Federal Court differed from the Tribunal in finding that the first respondent's fear of persecution as a result of homosexuality was plausible whereas the Tribunal had found it improbable" (at [134]). Not unlike Heydon J, Crennan and Bell JJ appear to be suggesting that the basis of the Federal Court's decision was simply that it disagreed with the Tribunal's factual findings.

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[59] *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 at [78].

[60] *SZLGP v Minister for Immigration & Citizenship* (2009) 181 FCR 113 at [41] per Logan J.

Again, such a conclusion is based on a misreading of the Federal Court's decision; the Federal Court's criticism simply being that it was not open for the Tribunal to make the factual findings it did given the way in which the Tribunal framed its inquiry. Indeed, the allegation that the Federal Court had impermissibly strayed into the merits of the decision was denied by Gummow ACJ and Kiefel JJ, where, in discussing the centrality of jurisdictional error in Australian administrative law, they stated that "[i]t is the operation of that doctrine which marks this case off from those in which judicial review is attempted for alleged factual error not going to jurisdiction" (at [15]).

In contrast to the approach endorsed by Gummow ACJ and Kiefel JJ, Crennan and Bell JJ were of the view that the correct approach in deciding the appeal was "to ask whether it was open to the Tribunal to engage in the process of reasoning in which it did engage and to make the findings it did make on the material before it" (at [133]). Although Crennan and Bell JJ ultimately concluded that neither the Tribunal's *actual* conclusion, nor any *actual* anterior findings it made, were illogical, they were also of the view that "[w]hilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker" (at [135]). In framing the issue in this way, their Honours appeared to have endorsed the theory of "objective logicality" (discussed above and exemplified by Mason CJ in *Bond*). Although the distinction between objective logicality and subjective logicality had little impact on the decision (given their Honours' acceptance that the decision-maker's actual process of reasoning was not illogical), their Honours' endorsement of the theory of subjective logicality may have profound, and ultimately deleterious, effects on public administration. In essence, their Honours' approach represents a repudiation of the requirement that decision-makers bring a certain degree of competence to bear, commensurate with their role, when engaging in the fact-finding process. In this context, the comments of one commentator are apposite and bear repeating:

> Regardless of how much the evidence objectively supports the finding, the right kind of relationship does not exist when the decision-maker guesses, ignores inconvenient evidence, or reasons irrationally about it. It sends the wrong message and is functionally incoherent for the courts to say to administrators that they are not legally required to think rationally about the evidence that is before them.[61]

V. CONCLUSION

The High Court's decision in *SZMDS* may yet prove to have important consequences for the development of Australian administrative law. For perhaps the first time, the issue of illogicality as a species of jurisdictional error at common law fell squarely for consideration by the High Court. Although some may be disappointed that the High Court did not respond to Aronson, Dyer and Groves' exhortation for guidance as to "just *how* irrational or illogical a decision must be"[62] before it can be said that a decision-maker fell into jurisdictional error, a number of important themes emerged from the decision. As this article has attempted to explain, the illogicality grounds of review are concerned with the process by which a decision-maker reaches (or fails to reach) the necessary state of satisfaction and, properly considered, has little to do with the merits of the actual decision but simply is a function of the requirement that the decision-maker properly grasp the issues in suit and has properly taken account of them in reaching a decision. It is important to remember that the imposition of the requirement that an administrative decision be based on findings or inferences of fact supported by logical grounds does not "mandate a single pathway of reasoning for any particular case. It is an envelope which may be said to cover a family of alternative pathways for reaching what can be described as a rational decision".[63]

Although the High Court in *SZMDS* recognised that an administrative decision can be set aside on the basis that the decision-maker engaged in an illogical process of reasoning, the circumstances in

[61] Airo-Farulla, n 14 at 567-568.

[62] Aronson et al, n 19, p 266.

[63] *Bakhtyar v Minister for Immigration & Multicultural Affairs* [2001] FCA 947 at [35].

which a court will set aside an administrative decision on this basis will be rare. While it is true that "not every lapse of logic will give rise to jurisdictional error" (at [130]), the notion that a decision will not be invalid "if there is room for a logical or rational person to reach the same decision on the material before the decision maker", as suggested by Crennan and Bell JJ in *SZMDS*, renders toothless the illogicality ground of review. One of the features of judicial review is that it encourages administrative decision-makers "to study the case carefully and to state their reasoning intelligibly";[64] the notion that an administrative decision-maker's decision need only be capable of being logcally justifiable on the evidence is inconsistent with the aim of encouraging good public administration, which provides a conceptual anchor for the illogicality ground of review. Not unlike the requirement to give reasons, the requirement of logicality, it is submitted, "furthers the objectives of reasoned decision-making and the strengthening of public confidence, but does not provide the foundation for a merits review of [its] fact-finding processes".[65]

The divergence of approaches to the issue expressed by the High Court in *SZMDS* can be traced back to the disagreement between Mason CJ and Deane J in *Bond*. As this article has demonstrated, for much of the past 20 years, the approach of Mason CJ in *Bond* has prevailed, with courts being reluctant to intervene even where the decision-maker's decision appears to be productive of an illogical chain of reasoning The approach of Gummow ACJ and Kiefel J in *SZMDS* hopefully represents the first step in the disabling of the grip that Mason CJ's approach in *Bond* has had on Australian administrative law. That said, it is unlikely that administrative lawyers have heard the last word from the High Court on the issue of illogicality and jurisdictional error. It is hoped that, over time, a requirement of subjective logicality will be judicially grafted onto the process of administrative decision-making and although such a development may be met with some resistance, any suggestion that such a development entails "judicial intrusion into the merits of administrative decision-making"[66] ought to be rejected. As one commentator aptly puts it: "A subjective rationality requirement is really just a requirement that administrators do their job properly. It is not an invitation to judges to review the correctness of their factual findings."[67]

[64] Legomsky S, "Political Asylum and the Theory of Judicial Review" (1989) 73 Minn LR 1205 at 1210.

[65] *MIMA v Eshetu* (1999) 197 CLR 611 at 646 per Gummow J.

[66] McMillan J, *The Courts vs the People: Have the Judges Gone Too Far?* (Paper presented to the Judicial Conference of Australia: Launceston Colloquium, 27 April 2002) at 22 (on file with the author).

[67] Airo-Farulla, n 14 at 568.