



## HIGH COURT OF AUSTRALIA

19 May 2021

MZAPC v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR  
[2021] HCA 17

Today the High Court dismissed an appeal from the Federal Court of Australia concerning the content and proof of "materiality" – a threshold which is ordinarily required to exist for a breach of an express or implied condition of a conferral of statutory decision-making authority to result in jurisdictional error.

The appellant, a citizen of India, had applied to the Refugee Review Tribunal ("Tribunal") for merits review of a decision to refuse him a protection visa under the *Migration Act 1958* (Cth) ("the Act"). In the context of that review, the Secretary of the Department of Immigration and Border Protection notified the Tribunal that s 438(1)(b) of the Act applied to certain documents, including a "Court Outcomes Report", which revealed that the appellant had been convicted of, among other things, the offence of "state false name". The s 438 notification was not disclosed to the appellant, and the Tribunal's reasons made no reference to the notification nor to any of the documents specified in the notification. The Federal Circuit Court of Australia dismissed an application for judicial review of the Tribunal's decision. The appellant then appealed to the Federal Court. Before the Federal Court, there was no dispute that the Tribunal's failure to disclose the notification to the appellant had breached the implied condition of procedural fairness. The parties were at issue only in relation to the materiality of the conceded breach. The question of materiality, the Federal Court recognised, turned on whether disclosure could realistically have resulted in the Tribunal having made a different decision. The Federal Court accepted that question could not be answered in the affirmative without first finding that the Tribunal had in fact taken information covered by the notification into account in making its decision. Unable to find on the evidence that the Tribunal had taken the information into account, the Federal Court dismissed the appeal.

The appellant's primary ground of appeal before the High Court consisted of two strands. First, the appellant disputed that he needed to prove that the Tribunal took information covered by the notification into account in order to establish materiality. He argued that once he had demonstrated by way of reasonable conjecture that the Tribunal could have taken the information covered by the notification into account adversely to him and that, if it did, it could have been persuaded by him to make a different decision if it had disclosed the notification to him, the onus then shifted onto the first respondent to prove that disclosure of the notification could not have resulted in the Tribunal having made a different decision. Second, the appellant contended that the Federal Court independently erred by erecting and acting on a presumption of fact that the Tribunal did not take information covered by the notification into account because there was no reference to the information in its reasons.

The High Court was unanimous in dismissing the appeal but did so for different reasons. A majority of four Justices held that the counterfactual question of whether the decision in fact made could have been different had the breach not occurred cannot be answered without first determining the basal factual question of how the decision that was in fact made was in fact made. The majority held that the onus of proof in relation to materiality lies on the plaintiff, who bears the overall onus of proving jurisdictional error. The majority also rejected the second strand of the appellant's primary ground of appeal, holding that no such "presumption" exists. Finding that there was no basis in the evidence to find that the Tribunal took the information into account, the majority ultimately dismissed the appeal. The other three Justices also dismissed the appeal. The principal difference between the judgments concerned the question of which party bears the onus of proof in relation to materiality. Three Justices held that once error is identified by an applicant, the onus of proving that the error is immaterial to the decision that was reached should be on the party who seeks to affirm the decision's validity – namely, the Executive.

*This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*