Federal Court of Australia

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Parata [2021] FCAFC 46

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| Appeal from: | *Parata v Minister for Home Affairs & Anor* [2020] FCCA 1582 |
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| File number: |  |
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| Judgment of: | **CHARLESWORTH, BURLEY and JACKSON JJ** |
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| Date of judgment: | 31 March 2021 |
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| Catchwords: | **MIGRATION** – Administrative Appeals Tribunal refusing to decide an application for merits review of a migration decision under s 348 of the *Migration Act 1958* (Cth) on the grounds that the application had not been “properly made” – Tribunal finding that application was made after the prescribed statutory time limit expired – Tribunal finding the application was not accompanied by the prescribed fee – Tribunal calculating the time limit from the date upon which the appellant received a notice of the reviewable decision purportedly given under s 127 of the Act – notice given to the appellant did not specify whether the decision was reviewable under Pt 5 or Pt 7 of the Act as required by s 127 – whether the giving of the defective notice operated to set the statutory time frame running – whether the legal operation of the notice depended upon the defect in the notice having no material bearing on the appellant’s failure to comply with the requirements for a valid review application – whether an application for review may validly be made before the statutory time frame begins to run – Tribunal’s finding that the time to apply for review had expired affected by jurisdictional error – judgment of primary judge upheld – no occasion to determine a notice of contention in respect of the non-payment of the prescribed fee as the time for payment of the fee has not yet expired  |
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| Legislation: | *Migration Act 1958* (Cth) ss 66, 116, 127, 338, 347, 348, 412, 474*Migration Regulations 1994* (Cth) rr 4.10, 4.13  |
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| Cases cited: | *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557*Benissa v Minister for Immigration and Border Protection* (2016) 150 ALD 276*Braganza v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 364*DFQ17 v Minister for Immigration and Border Protection* (2019) 270 FCR 492*Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123*Kirk v Minister for Immigration and Multicultural Affairs* (1998) 87 FCR 99*Minister for Home Affairs v Brown* (2020) 275 FCR 188*Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627*Parata v Minister for Home Affairs & Anor* [2020] FCCA 1582*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355*Singh v Minister for Immigration and Border Protection* [2020] FCAFC 31*SZOFE v Minister for Immigration and Citizenship* (2010) 185 FCR 129*VQAR v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 900*Yu v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 912*Zhan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 128 FCR 469  |
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| National Practice Area: |  |
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| Number of paragraphs: | 137 |
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| Date of hearing: | 29 January 2021  |
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| Counsel for the Appellant: | Mr C Lenehan SC with Mr C Tran |
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| Solicitor for the Appellant: | Australian Government Solicitor |
|  |  |
| Counsel for the First Respondent: | Mr M Guo |
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| Solicitor for the First Respondent: | Victoria Legal Aid |
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| Solicitor for the Second Respondent: | The Second Respondent filed a Submitting Notice |

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| **Table of Corrections** |  |
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| 13 May 2021 | The title of the appellant is amended from “Minister for Home Affairs” to “Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs” , MNC also amended to reflect this change |
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|  | Paragraph 1: line four: “of the then-named Minister for Home Affairs” replacing “of the Minister for Home Affairs” |

ORDERS

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|  | VID 461 of 2020 |
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| BETWEEN: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSAppellant |
| AND: | KARL WILLIAM PARATAFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| order made by: | CHARLESWORTH, BURLEY and JACKSON JJ |
| DATE OF ORDER: | 31 MARCH 2021 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

CHARLESWORTH AND JACKSON JJ:

1. The first respondent, Mr Karl Parata, is a citizen of New Zealand. He arrived in Australia when he was seven years old and has resided here as the holder of a Special Category (subclass 444) (Class TY) visa issued under the *Migration* ***Act*** *1958* (Cth). On 20 September 2018 a delegate of the then-named Minister for Home Affairs cancelled Mr Parata’s visa in the exercise, or purported exercise, of a power conferred under s 116 of the Act (the cancellation decision).
2. The cancellation decision is a “migration decision” and a “Part 5-reviewable decision” for the purposes of the Act. A person subject to a Part 5-reviewable decision may apply to the Administrative Appeals **Tribunal** for merits review in accordance with the provisions of Pt 5.
3. Mr Parata lodged an application for review with the Tribunal on 1 October 2018. The Tribunal concluded that it did not have jurisdiction to review the cancellation decision because Mr Parata had not lodged an application for review accompanied by a prescribed fee within the time prescribed by the Act and the *Migration* ***Regulations*** *1994* (Cth).
4. On 4 January 2019, Mr Parata made an application for judicial review of the Tribunal’s decision to the Federal Circuit Court of Australia. Before the primary judge, Mr Parata argued that the time to make a valid application to the Tribunal had not “commenced to run” (and so had not expired) because he had not received notification of the Minister’s decision in a manner and form that complied with the requirements of the Act. The primary judge upheld that ground and allowed the application:  *Parata v Minister for Home Affairs & Anor* [2020] FCCA 1582. Other grounds of judicial review were rejected.
5. The Minister appeals from that judgment.
6. By a Notice of Contention Mr Parata seeks to re-agitate the arguments that were rejected at first instance.
7. For the reasons that follow, the Minister’s appeal should be dismissed. In the result, it is unnecessary to determine the issues arising on the Notice of Contention.

# Legislation

1. Section 116 of the Act authorises the Minister to cancel a visa on a number of possible grounds. Nothing turns on the particular ground relied upon in Mr Parata’s case.
2. Section 127(1) provides that when the Minister decides to cancel a visa, he or she is to notify the visa holder of the decision “in the prescribed way”. Section 127(2) provides:

(2) Notification of a decision to cancel a visa must:

(a) specify the ground for the cancellation; and

(b) state whether the decision is reviewable under Part 5 or 7; and

(c) if the former visa holder has a right to have the decision reviewed under Part 5 or 7—state:

(i) that the decision can be reviewed; and

(ii) the time in which the application for review may be made; and

(iii) who can apply for the review; and

(iv) where the application for review can be made.

1. Section 127(3) provides that a failure to give notification of a decision does not affect the validity of the decision.
2. As has been said, the cancellation decision was a Part 5-reviewable decision as defined in s 338(3) of the Act. Section 347(1) of the Act specifies the requirements for an application for review of the decision in mandatory terms, relevantly as follows:

(1) An application for review of a Part 5-reviewable decision must:

(a) be made in the approved form; and

(b) be given to the Tribunal within the prescribed period, being a period ending not later than:

(i) if the Part 5-reviewable decision is covered by subsection 338(2), (3), (3A), (4) or (7A)—28 days **after the notification** of the decision; …

… and

(c) be accompanied by the prescribed fee (if any).

…

(5) Regulations made for the purposes of paragraph (1)(b) may specify different periods in relation to different classes of Part 5-reviewable decisions (which may be decisions that relate to non-citizens in a specified place).

(Emphasis added)

1. Section 348 of the Act provides that if an application is “properly made” under s 347 for review of a Part 5-reviewable decision, the Tribunal must review the decision.
2. As can be seen, s 347(1)(b) of the Act contemplates and empowers the making of regulations prescribing the period for making an application to the Tribunal, being a period “ending not later than …  28 days after the notification of the decision”. A shorter time is prescribed by reg 4.10 of the Regulations. It provides:

**4.10 Time for lodgment of applications with Tribunal (Act, s 347)**

(1) For paragraph 347(1)(b) of the Act, the period in which an application for review of a Part 5-reviewable decision must be given to the Tribunal:

…

(b) if the Part 5-reviewable decision is mentioned in subsection 338(3) or (3A) of the Act—starts when the applicant receives notice of the decision and ends at the end of 7 working days after the day on which the notice is received; or

…

1. The Tribunal does not have the power to extend the timeframes prescribed in the Act or the Regulations for the lodging of an application for review.
2. At the relevant time, the Regulations prescribed a fee to accompany the review application in the amount of $1,764:   reg 4.13(1). The Registrar of the Tribunal had the discretion to determine that the prescribed fee to accompany the application was 50% of that amount if satisfied that the prescribed fee has caused or is likely to cause severe financial hardship to the review applicant:  Regulations, reg 4.13(4).

# THE TRIBUNAL’S DECISION

1. Mr Parata was in prison at the time that his visa was cancelled and throughout his dealings with the Tribunal.
2. In its reasons for decision, the Tribunal said that the time for lodging the application was that prescribed in reg 4.10 (seven working days after receipt of notice of the decision). The Tribunal said that the seven working days were to be calculated from 21 September 2018, being the date upon which Mr Parata had signed a document acknowledging that he had received notification of the decision to cancel his visa. Accordingly, the Tribunal said, the time for lodging a valid application for review expired on 2 October 2018.
3. The Tribunal noted that the application lodged on 1 October 2018 had not been accompanied by the prescribed fee, nor by any reduced fee, nor by an application for a reduction of the fee. It also noted that the application lodged was not in the approved form although it did not suggest that to be a basis for refusing to exercise jurisdiction.
4. The Tribunal noted that Mr Parata had lodged an application for review in the correct form on 24 October 2018 together with a bank authorisation for the payment of a fee of $100. The fee authorisation was not in the prescribed amount, nor was the application accompanied by an application for reduction of the prescribed amount.
5. The Tribunal noted that Mr Parata had been in custody and acknowledged the difficulties faced by people in his situation in dealing with the process of applying for review. However, the Tribunal concluded:

9. … the application fee was required to be provided within the prescribed time. There has been no payment of fee received by the Tribunal by 2 October 2018. There has not been an application for reduction of the prescribed fee, by 2 October 2018.

10. The prescribed fee has not been paid. In these circumstances, the application for review is not a valid application and the Tribunal has no jurisdiction in this matter.

# THE APPLICATiON FOR JUDICIAL REVIEW

1. On an application for judicial review of a migration decision, the onus is upon the applicant to show that the decision subject to review is affected by jurisdictional error:  Act, s 474; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
2. The first ground of review was to the effect that Mr Parata had not been notified of the Minister’s decision in accordance with the requirements of s 127 of the Act such that the time for lodging an application for review had not “commenced to run”. The notice of the decision purportedly given to Mr Parata under s 127 of the Act was said to be defective in two respects:  it did not comply with s 127(2)(b) because it did not specify whether the decision was reviewable under Pt 5 or whether it was reviewable under Pt 7 and it did not comply with s 127(2)(c) because it contained an incorrect statement of the time in which an application for review must be made. The statement was said to have been based on the wrong assumption that the notice must be taken to have been given to Mr Parata by email transmission on 20 September 2018.
3. The second ground of review was to the effect that the payment of the prescribed fee within the prescribed time was not a requirement for a valid application for review.
4. In either case, it was submitted, the Tribunal had erroneously concluded that it did not have jurisdiction to review the cancellation decision and so had committed jurisdictional error.
5. The primary judge upheld the contention that the notice did not comply with s 127(2)(b) of the Act. The “grammatical effect” in that provision of the word “whether”, his Honour said, was to require specification of which of Pt 5 or Pt 7 governed the visa holder’s right of review (at [15] – [16]). The primary judge further observed that the provisions formed part of a regime that provided for very strict time limits and that a precise approach to their construction was required (at [17]).
6. It was not sufficient, his Honour concluded, for the notice to contain a statement that a visa holder could make an application for review to the Tribunal. What was required was a statement that the decision was reviewable under Pt 5 or a statement that the decision was reviewable under Pt 7, depending on which Part of the Act applied.
7. The primary judge observed:

20 Importantly, the two Parts of the Act, whilst similar, are not identical. It is not the case that the identification of which of Part 5 or 7 applies is irrelevant information …

21 The Notice failed to comply with s.127(2)(b) because it did not set out which Part of the Act provided for review of the particular decision. The distinction was of significant importance to Parliament to the extent that the section was amended to ensure the Part was identified in the Notice. The additional information is also important for practical reasons relating to time limits and fees for application for review.  …

1. His Honour cited the judgments of the Full Court of this Court in ***DFQ17*** *v Minister for Immigration and Border Protection* (2019) 270 FCR 492 and Allsop J (as he then was) in *Zhan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 128 FCR 469 in support of his conclusion that the notice was “invalid” (at [17] – [21]). His Honour said that Mr Parata had not been “notified in accordance with” s 127 of the Act, and granted declaratory relief to that effect. His Honour said that “therefore the time limit for review has not yet commenced to run” (at [22]).
2. The primary judge rejected Mr Parata’s contention that the notice did not comply with s 127(2)(c) because it stated the time limit on the basis that the notice had been delivered to him by email on a certain day, when in fact it was only delivered to him by hand, the following day. Any such error, his Honour said, would be immaterial because the Tribunal properly calculated the time from the date upon which Mr Parata actually received the notice, and not from the earlier date of the email transmission.
3. Before proceeding further, it may be observed that his Honour’s conclusion that the time had commenced to run on 21 September 2018 does not appear to accommodate his earlier conclusion that the notice given on that day was not valid, such that the time had not “commenced to run” at all. It may be that little turns on that, the critical finding being that the time to lodge an application for review had not expired.
4. As to the non-payment of the fee, the primary judge said:

34. In this case the application was not accompanied by the prescribed fee (whether the fee waiver was granted or not). Section 347 sets out the requirements for an application and it was not met by the applicant. The argument that the application is valid despite not being accompanied by the prescribed fee cannot be accepted having regard to the relevant authorities:  *Benissa v Minister for Immigration and Border Protection* [2016] FCA 76 per Edelman J and *Dahi v Minister for Home Affairs* [2019] FCA 784 per Davies J.

35. Whilst a fee waiver application may justify not paying a fee until the waiver is decided, it seems unlikely it would justify failing to pay the reduced fee with the application (as there is no full waiver available here):  see *Grey v Minister for Immigration & Anor* [2018] FCCA 1564.

# issues arising on the appeal

1. The Minister relies on three grounds of appeal.
2. Ground 1 alleges that the primary judge erred by failing to apply the judgment of Emmett J in ***Yu*** *v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 912 (which concerned the legal consequences of non-compliance with s 127(2)(b) of the Act). It is unnecessary for this Court to give discrete attention to this ground. The authorities will be considered in the course of determining the remaining grounds. They are as follows:

2. The primary judge erred in concluding (at **J[21]**) that the notice of cancellation of the First Respondent’s visa did not comply with s 127(2)(b) of the *Migration Act 1958* (Cth).

3. In the alternative to ground 2, and assuming therefore that the notice of cancellation of the First Respondent’s visa did not comply with s 127(2)(b) of the *Migration Act 1958* (Cth), the primary judge erred in concluding (at **J[21]-[22]**) that the notice was invalid such that the time limit for applying for a review by the Administrative Appeals Tribunal had not commenced to run.

(original emphasis)

1. Resolution of the second ground depends upon the proper construction of s 127(2)(b) of the Act in order to determine whether its requirements were complied with. It may be referred to as the non-compliance issue.
2. Resolution of the third ground also depends upon the proper construction of s 347(1)(b) of the Act and reg 4.10 of the Regulations (being a regulation made under it). It may be referred to as the validity issue.

# THE NON-COMPLIANCE ISSUE

1. The documents received by Mr Parata on 21 September 2018 included a decision record setting out the reasons for the cancellation of the visa. They also included a notice containing the following statements:

You may make an application for merits review of this cancellation decision with the Administrative Appeals Tribunal (AAT).

An application for merits review of this decision must be given to the AAT within the prescribed timeframe.

The prescribed timeframe commences when you are taken to have received this letter and ends at the end of seven (7) working days after the day on which you are taken to have received this letter.

As this letter was sent to you by Email, you are taken to have received this letter at the end of the day it was transmitted.

1. As can be seen, the notice did not specify that the cancellation decision was reviewable under Pt 5 of the Act. The question is whether s 127(2)(b) of the Act imposed a requirement to include such a statement.
2. As McHugh, Gummow, Kirby and Hayne JJ said in ***Project Blue Sky*** *Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (at [78]):

… the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.  …

1. The Minister acknowledged that the interpretation of s 127(2)(b) determined by the primary judge accorded with the textual meaning of the provision. The Minister submitted that when regard was had to the purpose of the provision, a different meaning should be discerned. The Minister submitted that when first enacted, there existed different tribunals to which an application for review of different migration decisions might be made under the Act. The purpose of s 127(2)(b) was to assist the review applicant to identify the applicable tribunal. It was submitted that upon the later amalgamation of the tribunals, that purpose fell away. The Minister submitted that the present purpose of s 127(2)(b) was to advise the review applicant that an application may be lodged with the Tribunal. Which Part of the Act governed the review amounted to nothing more than information about the “technical structure” of the Act and could serve no apparent purpose, so it was submitted.
2. Nothing in the Minister’s submissions discloses appealable error on the part of the primary judge as summarised earlier in these reasons. Most critically, if Parliament had intended that s 127(2)(b) refer only to review “by the Administrative Appeals Tribunal”, Parliament could reasonably have been expected to have used those words. But it did not; the section refers instead to review “under Part 5 or 7”. The words that Parliament did use must be given effect. There is no redundancy or absurdity in their use. As the primary judge said, following the merger of the former tribunals, there now exists in the Act distinct regimes for review contained in Pt 5 and Pt 7, each having differences that are not irrelevant. The differences include matters that may bear on the question of whether a review application has been “properly made” within the meaning of s 348 of the Act, including the correct form (as mandated by s 347(1)(a)) and the correct fee (as mandated by s 347(1)(c)). The purpose of including a requirement to state under s 127(2)(b) which of the alternate regimes applies is evident:  it provides the prospective applicant with broad guidance as to which provisions of the Act and Regulations govern the manner of applying and so supplements the more specific statements required to be given under s 127(2)(c).
3. In these circumstances, it is not enough for the Minister merely to posit a reason why the distinction between Pt 5 and Pt 7 may not be as important as it once was, because the Tribunal with jurisdiction to conduct reviews under both Parts is the now the same body. The distinction is still a relevant one. The words of s 127(2)(b) – all of them – still serve an intelligible purpose.
4. As to the word “whether”, the Minister relied on the history of an amendment to the provision which took effect in 1998. Before that, the relevant part of s 127(2) read:

Notification of a decision to cancel a visa must:

(a) specify the ground for the cancellation; and

(b) if the decision is reviewable under Part 5 or 7 [sic]; and

(c) if the former visa holder has a right to have the decision reviewed under Part 5 or 7-state…

1. The Minister noted that the explanatory memorandum accompanying the *Migration Legislation Amendment Bill (No. 1)* 1998 which introduced the amendment said that the change was made to resolve an ambiguity, so that the notice would state “*whether* a decision is reviewable under Part 5 or 7 rather than *if* it is reviewable”. This, the Minister submitted, means that “whether” in the current version of the provision should be given the same meaning as “if” in the previous version. But it is immediately apparent that there had been a wider drafting mishap in the earlier version of s 127(b), because a necessary verb (such as “state”) was missing from the start of subs (b). So whatever the explanatory memorandum says, the ambiguity went beyond the use of the word “if”. The amendment fixed the mistake. The legislature chose at the same time to substitute a different word for 'if', and that is the word to which meaning should now be given. It is not ambiguous now. Its ordinary meaning should not be overridden by excursion into an obscure comment in extrinsic material appearing in the legislative history.
2. The second ground of appeal must be rejected.

# THE VALIDITY ISSUE

1. The Minister submitted that if the requirements of s 127 were not met in the notice given to Mr Parata, it would not necessarily follow from that conclusion that the notice was “invalid”. So much may be accepted as a matter of general principle. As McHugh, Gummow, Kirby and Hayne JJ said in *Project Blue Sky* at [91]:

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.

(footnote omitted)

1. The validity issue gives rise to a single question of construction.
2. As has been mentioned, the parties’ submissions and the reasons given at first instance focussed upon the time from which the period prescribed under reg 4.10 had “commenced to run”. These reasons employ the same language, although perhaps in a different sense to that intended by the parties. In the present case, the parties did not put in issue whether an application for review of a “Part 5-reviewable decision” may be “properly made” within the meaning of s 348 at any time *before* a notice complying with s 127(2) is given to the review applicant. In these reasons, when it is said that time has not “commenced to run”, this Court is concerned with the date from which the *expiry* of the time to make an application should be calculated. To say that time has not “commenced to run” does not necessarily mean that a review applicant is precluded from making a valid application for review before that date. In Mr Parata’s case, the Tribunal declined to exercise its powers of review because it determined that the application had been filed too late, not that it had been made too early. The distinction assumes some significance in the disposition of this appeal.
3. In *Yu*, a visa holder had been given a notice under (or purportedly under) s 127 of the Act that was said to have contained an incorrect statement of the time in which an application for review could be made. Justice Emmett did not accept the argument that the statement was incorrect. His Honour went on to consider a further submission that the notice was non-compliant because (among other things) it did not contain a statement as to whether the decision in question was reviewable under Pt 5 or Pt 7. His Honour said:

18 Regulation 4.10(2)(a) does not speak in terms of notifications. It makes no reference to s 127. There is a distinction, in my view, between the receipt of notice of a decision and the contents of a document whereby such notice is given. That distinction appears to me to be recognised by the terms of s 127 itself. Thus, s 127 requires that the Minister must notify a visa holder of a decision to cancel. Secondly, it requires that notification must be given in the prescribed way. Section 127(2) requires that the notification must also furnish additional information beyond mere notice of the decision.

19 Even if the document that was handed to the applicant on the evening of 19 March 2002 did not strictly comply with the requirements of s 127, there can be no doubt that the applicant received notice of the decision at that time. I am not persuaded by the reasoning of the Tribunal in reference N9301742 of 7 April 1995, that failure to comply with s 127 rendered void any notification to the applicant of the decision to cancel his visa.

1. The effect of his Honour’s construction at [18] is to disassociate the phrase “notice of the decision” from the mandatory requirements of s 127(1). All that is required, his Honour held, was that the visa holder be made aware of the fact that the decision had been made.
2. In our respectful view, there is no reason in principle to give the phrase “notice of the decision” in reg 4.10(1)(b) a different meaning from the phrase “notification of the decision” as found in s 347(1)(b), the empowering provision. Where a regulation is made to give effect to a provision of an Act which contemplates that a deadline be calculated from the date of “the notification of the decision”, the choice of the similar word “notice” in the regulation should not be taken to indicate some different starting point (even assuming that a regulation which did have that effect could be valid). Textually, each phrase ought to be understood as referencing a notification given under and in accordance with s 127 of the Act. Given the prescriptive terms of s 127 and the centrality of s 347 and s 348 in the regime of the Act, Parliament should not be taken to have intended the time to apply for review to run from the date that the affected person has been made aware, by any means at all, that a decision affecting his or her visa has been made. Again, whether an application may validly be made before a compliant notice is given under s 127 of the Act is not raised in this appeal.
3. The statement of principle in *Project Blue Sky* (extracted at [45] above) concerns the validity of acts done in breach of a condition regulating the exercise of a statutory power. The conditions presently under consideration are those imposed under s 127(2) of the Act. The Act is structured in such a way that s 127 interplays with the requirements for a valid review application, and hence with the question of whether the powers of the Tribunal under Pt 5 or Pt 7 of the Act have been enlivened. Whilst s 127 may be broadly conceived of as a statutory power for the purpose of applying the principles of construction, in our view it is more properly characterised as a provision imposing upon the Minister a statutory obligation. The obligation forms a part of the machinery of the Act that governs whether a decision made under the Act may be subject to merits review or not. When considering the legal consequences of a failure to comply with s 127, the nature of the obligation and its interplay with other provisions of the Act must be taken into account.
4. Just as s 347 of the Act is concerned with objective matters of manner and form, so too is s 127. Its purpose is to provide all persons affected by reviewable decisions with the information that Parliament has determined should be provided to all persons to fairly comprehend not only the existence of the right of the review but also to ascertain the conditions for a valid application. Parliament intended that the information be provided contemporaneously with the person becoming aware of the decision affecting his or her immigration status, and not at a later time. It was open to Parliament to leave it to all prospective review applicants to identify such matters for themselves within the limited time frames prescribed elsewhere in the Act or the Regulations, but that approach was not adopted. In that sense, Parliament has determined the information that is of material assistance. It has not qualified the obligation to provide the information by reference to whether the assistance is needed on the facts of a particular case.
5. These considerations weigh heavily against the construction favoured by Emmett J in *Yu.* With respect, the “distinction” identified by his Honour is not supported by the context of the provisions in question within the regime as a whole. It severs the requirement that the affected person receive “notice of the decision” from the requirement to give a “notification of a decision” that complies with s 127. That leaves open the possibility that the person receives information that Parliament considered material to his or her ability to make an application for review (the “notification”) after the time for making that application has expired (seven days after receiving the “notice”). Moreover, the focus is not to be confined to the purpose of each condition in s 127(2) of the Act, but must also be on the purpose to be served by fixing the time period under s 347 of the Act objectively by reference to the time that the notification under s 127 is given.
6. The “validity question” was discussed by Perram J in *DFQ17* in the context of an alleged failure to comply with the similar notification requirements in s 66 of the Act:

47 As the appeal was conducted, this third step was not disputed by the Minister. That position was consistent with two decisions of this Court in which it has been held that a failure to comply with any element of s 66(2) means that there has been no notification of the decision. That approach was taken by Allsop J in *Zhan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 128 FCR 469 at [62] (*Zhan*) although it is apparent that **the contrary was not suggested in that case**. Gray J thought that there was ‘a strong case’ for the proposition that non-compliance with an element of s 66(2) meant the duty to notify had not been carried out:  *Chan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 308 at [46]-[47] (*Chan*). It is evident, however, that Gray J was relying upon *Zhan*. **I will proceed on the same assumption whilst emphasising that that is what it is, an assumption. These reasons should not be taken as expressing a view one way or the other on the issue.**

…

62 I have no doubt that in this case the letter of 3 February 2017 failed to convey clearly the information that any review application had to be made by 13 March 2017. It was piecemeal, entirely obscure and essentially incomprehensible. Consequently, the letter did not state the matter in s 66(2)(d)(ii). **It was not in dispute that this meant that time had not yet commenced to run.** The Tribunal erred in concluding that the review application was out of time and was therefore wrong in thinking it had no jurisdiction to entertain the review application.

(emphasis added)

1. The same “interesting questions” were touched upon by the Full Court in *Singh v Minister for Immigration and Border Protection* [2020] FCAFC 31 (at [25] – [26]) but were unnecessary to decide.
2. Like *Yu, DFQ17* and the cases cited therein were concerned with applications that had been filed after the expiry of a period calculated from the “start” date, being the date which the Tribunal (rightly or wrongly as the case may be) determined was the date on which notification had been given. It was unnecessary in each case to determine the validity of an *application for review* made before the date a notice complying with s 66 of the Act had been provided.

## Materiality on the authorities

1. The Minister submitted that in order for the notice under s 127 to be “invalid” it would be necessary to demonstrate a factual and causal relationship between non-compliance with the provision on the one hand and the matters that rendered an application to the Tribunal invalid on the other. It was submitted that the primary judge erred in failing to so construe the Act and in failing to identify the factual circumstance that rendered the defect in the notice issued to Mr Parata *material* on the facts of the case. The Minister’s submissions were said to rely on principles bearing a “family resemblance” to cases concerning materiality of error by an administrative tribunal in exercising powers of review conferred upon it, as explained by the High Court in ***Hossain*** *v Minister for Immigration and Border Protection* (2018) 264 CLR 123. Materiality in that context is concerned to identify whether a breach of a relevant condition on the Tribunal’s powers is material in the sense that compliance with the condition could realistically have resulted in a different decision:  see *Minister for Immigration and Border Protection v* ***SZMTA*** (2019) 264 CLR 421, Bell, Gageler and Keane JJ (at [45]).
2. The present case is one in which an administrative decision maker concluded that it was not authorised to exercise the statutory powers of review conferred under Pt 5 of the Act and so did not embark on a review at all. The context is important. In this case, discernment of jurisdictional error requires identification of the conditions that must exist in order for the Tribunal to embark upon a review, that is, to correctly assume jurisdiction. Of course, the preconditions to the exercise of the Tribunal’s powers under Pt 5 are to be discerned as a matter of statutory construction, as are the limits of its powers once its jurisdiction is properly enlivened:  see *Hossain*, Kiefel CJ, Gageler and Keane JJ (at [23], [27]). But an erroneous failure to identify that the preconditions for the conferral of jurisdiction exist will invariably result in the Tribunal wrongly refusing to exercise the powers of review that are conferred upon it under s 348 of the Act. The issue of materiality, in the sense of the seriousness of a breach by the Tribunal of an inviolable limitation governing the conduct of the review will not arise (*SZMTA* at [45]). Proof of the erroneous denial of jurisdiction is sufficient, without more, to demonstrate jurisdictional error.
3. In this appeal, the Minister’s point about “materiality” arises at a different stage in the inquiry. It is not about whether any error made by the Tribunal was material. It is a submission that the Minister’s departure from the notification requirements in s 127(2) had no adverse consequences in fact for Mr Parata. This is said to mean that a time limit, after which Mr Parata could not invoke the Tribunal’s jurisdiction, started running and that time limit expired before Mr Parata made an application complying with s 347.
4. This raises a question of statutory interpretation. The Minister acknowledges that there is no authority binding on this Court that bears directly on whether there is to be inferred in the statute a requirement to show a material causal connection between the instance of non-compliance with a notice given under s 127 and the instance of non-compliance with s 347(1)(b) to support an argument that time has not commenced to run. Within that vacuum, the Minister submits that this Court should adopt the approach of French CJ, Gummow, Hayne, Crennan and Bell JJin *Minister for Immigration and Citizenship v* ***SZIZO*** (2009) 238 CLR 627 as applied by the Full Court of this Court in ***SZOFE*** *v Minister for Immigration and Citizenship* (2010) 185 FCR 129.
5. *SZIZO* concerned the consequences of a tribunal’s non-compliance with statutory procedures in the conduct of a review in a context where there was no question that the jurisdiction to embark upon the review had been properly invoked. The procedures in question concerned a subsequent notice of the hearing of the Refugee Review Tribunal (RRT). The appellants had in fact received timely notice of the hearing, and attended it, but after the RRT made a decision adverse to them they claimed it was vitiated by the fact that the addressee of the notice was not the addressee required by the terms of the Act. Their Honours said:

34 In combination, ss 425A and 441G ensure that an applicant for review receives timely and effective notice of the hearing. They impose obligations which facilitate the conduct of a procedurally fair hearing. However, the *manner* of providing timely and effective notice of hearing is not an end in itself. The procedural steps dealing with the manner of giving notice are to be distinguished from other components of the statutory statement of the hearing rule, including the obligation to give particulars of adverse information (s 424A(1)) and to invite the applicant to appear to give evidence and to present arguments relating to the issues arising in the decision under review (s 425).

35 While the legislature may be taken to have intended that compliance with the steps in ss 441G and 441A would discharge the Tribunal’s obligations with respect to the giving of timely and effective notice of the hearing, it does not follow that it was the intention that any departure from those steps would result in invalidity without consideration of the extent and consequences of the departure. The respondents acknowledge that they suffered no injustice by reason of the Tribunal’s omission and they do not take issue with the Full Court’s characterisation of the result in the circumstances as being ‘rather absurd’. The admitted absurdity of the outcome is against acceptance of the conclusion that the legislature intended that invalidity be the consequence of departure from any of the procedural steps leading up to the hearing. In a case in which the Tribunal fails to comply with the requirements for the giving of notice of a hearing, the factual determination of whether the applicant for review and his or her authorised recipient received timely and effective notice of the hearing does not require the court to consider how the applicant might have presented his or her case differently had the Tribunal complied with the statutory procedures. No question arises, in the case of an applicant who has received timely and effective notice of the hearing, of the loss of an opportunity to advance his or her case.

36 Notwithstanding the detailed prescription of the regime under Divs 4 and 7A and the use of imperative language it was an error to conclude that the provisions of ss 441G and 441A are inviolable restraints conditioning the Tribunal’s jurisdiction to conduct and decide a review. They are procedural steps that are designed to ensure that an applicant for review is enabled to properly advance his or her case at the hearing; a failure to comply with them will require consideration of whether in the events that occurred the applicant was denied natural justice. There was no denial of natural justice in this case.

(footnotes omitted)

1. In this way, the High Court determined that statutory provisions about the manner of notification of a hearing in the course of the RRT’s exercise of review jurisdiction should not be interpreted in a way that would deny legal effect to the RRT’s decision in cases where divergence from the prescribed manner does not in fact deprive an applicant of fair notice of the hearing, and therefore does not give rise to any practical injustice. It concerned the application of provisions that were different to the ones under consideration in this case, in the context of the conduct of the review.
2. The facts and provisions in *SZOFE* are closer to the present case. There, the Full Court was concerned with the consequences of a decision notification which was alleged to have failed to comply with s 66 of the Act in its incomplete specification of the places at which an application for review under Pt 7 of the Act may be lodged.
3. The notification of decision in *SZOFE* gave the applicant, who lived in Sydney, the addresses of registries of the RRT in Sydney and Melbourne but did not give addresses in Adelaide, Brisbane and Perth. The applicant lodged an application in Sydney in a manner that complied with the requirements of the Act, but subsequently sought to have the decision made on the review set aside because of the asserted non-compliance with the notification provisions. She submitted that the notification was not effective to commence time running under reg 4.13 of the Regulations which (together with s 412 of the Act), required an application to be given to the RRT within a period commencing on the day on which an applicant was notified of the decision. The assumption behind the submission was that an application for review could not validly be made to the RRT (and so could not validly invoke its jurisdiction) if it were made at any time prior to the receipt of a notice strictly complying with s 66. The Minister challenged that underlying assumption.
4. The application was heard by a Full Court, which unanimously dismissed it. Justice Emmett held that the omission to specify all the Registries of the RRT where an application could be made did not constitute non-compliance with the statutory requirement that the notification state “where the application for review can be made” [27] – [28]. His Honour went on to consider whether, if the notification had been non-compliant, the consequence would be that the applicant was not “notified” of the decision within the meaning of the Regulation which required any application to be made within 28 days of that notification. His Honour said at [30]:

…  It is not possible to glean, from the language of the provisions in question, an intention on the part of the Parliament to invalidate a process simply because an applicant was not told that an application for review could be lodged at a place which was of no relevance or significance, so far as that particular applicant was concerned. While the Parliament may be taken to have intended that compliance with the requirements of s 66(2) would discharge the Minister’s obligation with respect to the giving of timely and effective notice of a decision, it does not follow that it was the intention that any departure from those steps would result in invalidity, without consideration of the extent and consequences of the departure …

1. Buchanan and Nicholas JJ proceeded from the starting point that the Regulation prescribing the time to apply for review fixed both a start date and an end date, so creating a window of time in which a valid application for review could be made. Their Honours said (at [62]):

… the language of the Regulations (regs 4.10 and 4.31) appears to establish an envelope of time within which an application must be made. That is so because they state that the period within which an application may be made ‘starts’ (reg 4.10) or ‘commences’ (reg 4.31) when notification of the decision occurs. We do not accept the submission made by the Minister in the present case that if the Regulations have that effect they are inconsistent with the sections which empower them. Each of s 347 and s 412 permit a prescription of time which ends not later than 28 days after notification of the decision. Neither s 347 nor s 412 exclude the possibility that the period between the decision and notification of it will not be a period during which an application might be made. Perhaps that was not intended by the drafter of the regulation but the language is sufficiently clear and must take priority over assumed, or even expressed, intent (*Saeed v Minister for Immigration and Citizenship* (2010) 84 ALJR 507; 267 ALR 204 at [31]-[33]). It may be that it was not anticipated by those who drafted ss 347 and 412, or by the Parliament, that by delegated legislation a commencement to a prescribed period might be established, but neither section in our view excludes a regulation having that effect provided any period fixed does not extend beyond 28 days after notification of the decision. Neither reg 4.31 nor reg 4.10 has that effect.

1. It was in that context that their Honours considered the role of materiality in determining the legal consequences of an application having been made *earlier* than the date on which a notice complying with s 66 of the Act had been given. Their Honours said:

64 …  The present case is an example of the necessity to test the question whether jurisdictional error has resulted from an alleged failure to comply with a statutory requirement by reference to the particular circumstances of the case in question. It is not necessary to decide in the present case whether the failure to draw to the attention of a potential applicant for review the facility of lodging an application at a registry of the AAT in Brisbane, Adelaide or Perth would constitute a jurisdictional error in some circumstances. It does not do so in the present case.

65 …  The applicant’s argument can only succeed if the procedural direction in s 66(2)(d)(iv) is first interpreted as requiring notification of all possible places of lodgment (whether with the RRT directly or through the AAT) to all potential applicants for review regardless of where they reside. Furthermore, the argument can only succeed if such a requirement is seen as fundamental to the exercise of any jurisdiction by the RRT even if a potential applicant is effectively notified of a decision and, in response, files an application for review in the required manner and within the required time. **Neither premise should be accepted.** The reasons why neither premise should be accepted are interconnected.

66 In the case of an administrative tribunal, it is frequently necessary to consider the consequences of a departure from a statutory (or other) requirement before concluding that jurisdictional error has been committed (*Craig v South Australia* (1995) 184 CLR 163 at 179-180; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]; *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 at [35]-[36] (*SZIZO*)). The exercise of jurisdiction by the tribunal must be, in some way, ‘affected’ by the error or failure alleged. Counsel for the applicant submitted that the principle had no application in the present case because the failure of which the applicant complained did not arise during the process set in train by her application to the RRT but, rather, prevented that process from being commenced. The failure to specify all places at which her application might be made was said to be fatal to any application by her even though there were no adverse consequences, procedural or otherwise, from the alleged failure.

67 However, in our view there cannot be an adequate assessment of whether the requirements of s 66 of the Act have been breached, or of whether the jurisdiction of the RRT was not engaged, without some examination of the consequences of the alleged non-compliance. The judgment of the High Court in *SZIZO* has expressly drawn attention to the need to evaluate the practical consequences of failure to comply with procedural obligations under the Act.  …

(emphasis added)

1. Their Honours concluded (at [69]):

…  On the facts of the present case the application made on 2 June 2009 would not have been ineffective to initiate a review by the RRT even if it had been lodged before the date of deemed receipt of the notification because no adverse consequence of any kind would be visited upon the applicant from early receipt of the application by the RRT. It is difficult to envisage a case where such a conclusion would ever be justified but it is not necessary to give a universal answer to that question.

1. Their Honours thus applied principles of materiality so as to conclude that the application in that case validly invoked the jurisdiction of the RRT, notwithstanding that it had been made before the earliest date mandated by reg 4.13. On the plurality’s analysis, whether the jurisdiction of the RRT had been validly invoked depended upon whether the applicant was materially prejudiced by the RRT assuming jurisdiction to review the decision, that is, to exercise the powers of review conferred by Pt 7 of the Act.
2. The provisions concerning Pt 7 are cognate to the Pt 5 provisions under consideration in this case, including in respect of the Regulations prescribing the applicable time limits. Like the present case, *SZOFE* concerned the pre-conditions that must exist for a merits review tribunal to exercise jurisdiction. The question in *SZOFE* was whether jurisdiction had been wrongly assumed; the question in Mr Parata’s case is whether jurisdiction has been wrongly refused. It is desirable that there be some uniformity in approach. Regretfully, however, we do not consider the reasoning in *SZOFE* should be followed, for two reasons.
3. First, we consider that a valid application for review of a Part 5-reviewable decision can be made to the Tribunal at a time before the review applicant has received a notice that complies with s 127 of the Act. That was Emmett J’s view in *SZOFE*:  see [33] – [35]. To the extent that such an application is made before the earlier side of the “window of time” provided for in reg 4.10, it is difficult to comprehend how or why that circumstance should render the review application invalid and so legally ineffective to enliven the Tribunal’s powers. As the plurality observed in *SZOFE* it is difficult to envisage any factual scenario that might justify such a conclusion (assuming materiality to form a part of the test for validity of the review application). That is a compelling indicator that s 348 of the Act should be construed so as to include within the phrase “properly made” those applications that are made to the Tribunal before an expiry date fixed by the statute and that otherwise fulfil the essential conditions for a valid application.
4. The statutory text does not require any different conclusion. Regulation 4.10 speaks of “the period in which an application for review of a Part-5 reviewable decision must be given to the Tribunal”. It is open to read that as referring to a period before the expiry of which an application must be made. While r 4.10 goes on to specify the period as having a start date and an end date, the start date is specified because it is necessary in order to calculate the end date, not because of any apparent intention that a person cannot invoke the Tribunal’s jurisdiction before that start date. As for the Act itself, s 347(1)(b) requires an application to be made “within the prescribed period”. But the constraint on the prescribed period it then imposes does not include a start date. Rather, the purpose and effect of the section is to set an end date, after which a valid application cannot be made. The Regulation can and should be read consistently with that purpose.
5. As will be seen, the status of the applications that Mr Parata has to date made to the Tribunal (and hence the remedies that might be granted on the appeal) turns upon the answer to such questions. Plainly it is in the interests of the parties in the present case to have the status of those applications clarified. It will be necessary to return to this topic in due course.
6. Second, as we have said earlier in these reasons, proof of the erroneous denial of jurisdiction is sufficient, without more, to demonstrate jurisdictional error. In our view, whether the Tribunal had jurisdiction to review the cancellation decision depends on the existence of a jurisdictional fact:  it ought not depend on the different or additional materiality test about the consequences of a non-compliant notification of a kind proposed by the Minister or applied by the Full Court in *SZOFE*.
7. The provisions contained in s 127 and s 347 form a part of a scheme that is intended to define with certainty the essential preconditions for the existence of the Tribunal’s jurisdiction, that is, its very authority to decide. In that context, the question of statutory construction is: does the phrase “notification of a decision” in s 347(1)(b) refer only to a notice that complies with the mandatory requirements in s 127(2) objectively assessed, or does the phrase encompass a notice having defects that are not shown to be prejudicial to the review applicant on the facts of the particular case?
8. For the reasons that follow, the former construction is to be preferred.
9. Of critical importance is the circumstance that s 127 and s 347 are to be read together and are each expressed in objective and unqualified terms. Reading them together reveals a direct textual link. Section 347(1)(b) contemplates that the period within which an application must be made ends on a date calculated from “notification of the decision”. That corresponds with the language in s 127(2), requiring that “Notification of a decision to cancel a visa must” contain certain information. The inference is that the notification referred to in s 347(1)(b) is a notification of the kind referred to in s 127(2) (while the specific time limit is prescribed in r 4.10, we have already explained why the use of the word 'notice' in that regulation is of no moment).
10. It is consistent with the structure and purpose of the statutory regime to construe these provisions so that a notification that does not comply with the requirements in s 127(2) cannot operate as “the notification” for the purposes of s 347(1)(b). On the Minister’s argument (which for present purposes is accepted), non-compliance with s 347 of the Act has the fatal consequence that the application is not “properly made” and so will not enliven the Tribunal’s obligation under s 348 of the Act to review the decision. Parliament has not conferred upon the Tribunal the discretion to extend the time limit in accordance with considerations of fairness or by reference to where the interests of justice might lie. In determining whether an application conforms to the requirements of s 347 of the Act, the Tribunal is not authorised to enquire into the circumstances as to why the application does not conform. That tells against a conclusion that Parliament implicitly intended the Tribunal to embark upon an enquiry into whether there exists a causal connection between any instances of non-compliance by the Minister with the mandatory notification requirements under s 127 and any instances of non-compliance by the review applicant with the mandatory requirements of s 347. Had Parliament intended the question of jurisdiction to turn on considerations of fairness assessed in each individual case, it may reasonably have been expected to make express provision for it, mostly logically by introducing some flexibility in the requirements for a valid review application in s 347 of the Act.
11. As mentioned earlier, express provision has been made in s 127(3) to the effect that a failure to give notice of a decision does not affect the validity of the decision itself. It indicates that Parliament had an eye to questions of validity that might arise as a consequence of non-compliance with the obligations in s 127(1) and (2). The construction advanced by the Minister is one that might easily have been expressly provided for in a similar fashion to the saving provision in s 127(3).
12. In our view, the objective and prescriptive text in s 127 and s 347 evinces an intention that ascertainment and enforcement of the time limitation should proceed from an objective assessment as to when the time limit should be calculated from and hence when it expired, based on objective facts that are immediately ascertainable at critical times. Considerations of certainty have been recognised by the Full Court as relevant in the process of statutory construction with respect to other provisions of the Act:  *Minister for Home Affairs v Brown* (2020) 275 FCR 188, Allsop CJ, Kenny and Banks-Smith JJ (at [60]); see also *VQAR v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 900, Heerey J (at [10]).
13. A construction that advances the object of certainty should be favoured, having regard to the significance of the consequences for the individual if the period prescribed under s 347 has expired. Whether a notice purportedly given under s 127 is “the notification” for the purposes of s 347 of the Act and reg 4.10 of the Regulations has real implications for a putative applicant (and, for that matter, the Tribunal) in real time. Considered in context, it is undesirable that the test for validity should turn on an enquiry based on developments subsequent to the notification to be explored in later curial proceedings, as is best illustrated by reference to the facts of Mr Parata’s case.

## Validity in real time

1. At first instance, Mr Parata relied on an affidavit in which he deposed to his dealings with the Tribunal. There was no objection to the admissibility of the affidavit, nor was Mr Parata cross-examined on it. In addition, some of Mr Parata’s dealings are summarised in the Tribunal’s reasons in passages the accuracy of which is not challenged by either party. On the basis of those passages and the affidavit, the facts are as stated in the discussion below.
2. Mr Parata received the document purportedly given under s 127 of the Act on 21 September 2018. The document did not specify that the decision was reviewable under Pt 5 of the Act. Mr Parata lodged an application with the Tribunal on 1 October 2018, prior to the expiry of seven working days after 21 September 2018. He did not utilise the form approved for an application for review under Pt 5, and he did not pay the prescribed fee for an application under Pt 5.
3. After the Tribunal received the application on 1 October 2018, an officer of the Tribunal sent an email to the prison where it was assumed Mr Parata was held. The email included “the correct application forms and information sheets”. The forms included a form for making an application for reduction of the prescribed fee. In the email, the officer stated that there were strict timeframes for the lodgement of applications and that the Tribunal was unable to extend them. A copy of the email was not in evidence before the primary judge or on this appeal. Beyond the broad summary just given, its content is unknown. However, for present purposes it may be assumed that the information and forms provided by the Tribunal contained statements to the effect that the cancellation decision was reviewable under Pt 5 of the Act. On the Minister’s argument, provision of that advice would fulfil a purpose of s 127 and so be relevant on the question of materiality.
4. On the facts, however, Mr Parata did not receive the email on the date that it was sent because he had been moved to another prison. On his unchallenged evidence, he did not receive the email and its attachments until 4 October 2018, that is more than seven working days after he received the notice under (or purportedly under) s 127 of the Act.
5. For the purposes of argument, let it be supposed that the Tribunal succeeded in its attempt to contact Mr Parata and that he was provided with the information required to be provided under s 127(2)(b) of the Act one hour before the time for making the application was otherwise due to expire, he having received the Minister’s non-compliant notification seven days before. A multitude of questions would arise for Mr Parata and in real time. Would Mr Parata have but one hour to research the prescribed fee to be paid for a review under Pt 5, source the funds, and draft and lodge another application for review? Alternatively, would time commence to run from the time he received the information that ought to have been provided by the Minister in the s 127 notice? If the first of these alternatives is correct, what policy imperative is fulfilled by affording Mr Parata less time than other prospective review applicants to avail himself of that opportunity? If instead time starts running from the point at which Mr Parata had received all the required information, does that not suggest that the notice did not validly operate to commence the time running from 21 September 2018? If the time commenced to run when all the required information was received, must the later deadline be communicated to Mr Parata? If so, by whom? If there be a new deadline, does it not follow that the deadline specified on the face of the notice is incorrect, so giving rise to another instance of non-compliance with the requirements of s 127(2) of the Act? And if that defect in that notice is not remedied, would that not leave Mr Parata labouring under the impression (wrongly conveyed in the notice) that the time to apply has expired so that “late” payment of the prescribed fee could make no difference? If there be multiple deficiencies in the notice, does the time to apply for review expire after seven working days from the date that the required information in all respects has been provided? Or do different time frames apply to different conditions affecting the validity of the application for review, depending on what prejudice may be demonstrated in each instance? These questions have consequences for prospective applicants during critical period of time in which their interests are affected. They are not adequately explored or resolved in the Minister’s submissions.
6. Returning to the facts, Mr Parata was confused “by the forms” he received from the Tribunal on 4 October 2018. He contacted a publicly funded legal assistance service for help. Mr Parata told his adviser that there were delays in his communication with the Tribunal because of his imprisonment, but he was advised that the deadline had nonetheless expired and that the deadline was strict. That advice is consistent with the statements contained both in the notice given under (or purportedly under) s 127 of the Act and in the subsequent correspondence sent by the Tribunal. As with the other messages, it presupposed the validity of the Minister’s notice.
7. By a further letter dated 11 October 2018 (sent by post) the Tribunal advised Mr Parata that the application fee was required to be paid within seven days of the date from which he was “notified of the primary decision” and that his application had not been made in the approved form. Those assertions were unqualified. The letter contained an invitation to Mr Parata to make submissions as to “whether a valid application has been made”. The letter did not afford him an opportunity to remedy any defect in the application filed on 1 October 2018. It may be observed that if it was open for Mr Parata to pay the prescribed fee within seven working days from 4 October 2018 (which is not made clear on the Minister’s submissions) the time to do so had not expired as at 11 October 2018.
8. On the basis of the information received by Mr Parata in the notice and in the Tribunal’s correspondence and from the legal service, it would not be unreasonable for Mr Parata to form a belief that the Minister’s notice was valid, that his application lodged on 1 October 2018 was invalid and that there was nothing more that he could do.
9. The Minister does not contend that the time for making an application for review commenced to run from 4 October 2018, being the date on which Mr Parata received information (by another source) that should have been stated in the s 127 notice. However, at the same time, the Minister’s causation test appears to contemplate a scenario in which the review applicant could and should take steps to remedy defects in a review application after the time for complying with s 347 of the Act has expired on the Minister’s case, if only to discharge a burden to prove in later curial proceedings what he *would* have done had the Minister’s notice been compliant. That submission cannot be easily reconciled with the Minister’s submissions in relation to the strict requirements for a valid application for review. The causation test takes on the appearance of an implied power in the Tribunal to forgive instances of non-compliance with s 347 or to extend the time for compliance with some or all of its requirements, a power that it simply does not have.
10. These factual circumstances reinforce the importance of certainty as a policy consideration guiding the proper construction of the relevant provisions of the Act. The obligations of the Minister under s 127 of the Act are neither difficult to understand, nor are they difficult to comply with.
11. None of this is to say that, on a proper construction of the statute applied to the objective facts at the time of a purported notification, *any* degree of non-compliance will invalidate the notification, no matter how trivial. That question does not arise here; we have found that the notice of 20 September 2018 failed in substance to state something it was required to state. The argument we have rejected was not about the extent of non-compliance, judged by comparing the content of the notification with the requirements of s 127. It was an argument that the legal consequences of non-compliance depended on events subsequent to the non-complying notification.

# NOTICE OF CONTENTION AND RELIEF

1. Ground 3 of the Notice of Contention states:

The Administrative Appeals Tribunal had jurisdiction because validity of the review application was not dependent on the application being accompanied by the prescribed fee within the prescribed period, nor an application for a reduction of the prescribed fee within the prescribed period, nor that part of the fee within the prescribed period that would be payable if the Registrar of the Administrative Appeals Tribunal were to determine a reduction in the fee payable.

1. On the undisputed facts, Mr Parata has not paid the prescribed fee that is required to accompany an application for review of the cancellation decision. On his unchallenged evidence, he is able and willing to pay that fee and does not seek to make an application for the fee to be reduced.
2. The declaratory relief granted by the primary judge is to the effect that Mr Parata has not been given notification of the cancellation decision in accordance with s 127 of the Act. For the reasons given above, the declaration is a correct statement of a critical matter affecting the rights and liabilities of the parties and will not be disturbed by this Court.
3. As well as a writ of certiorari quashing the Tribunal’s decision, his Honour also issued a writ of mandamus requiring the Tribunal to determine the application for review according to law. That is inconsistent with his Honour’s rejection of Mr Parata’s argument that his application was valid despite not being accompanied by payment of the prescribed fee prior to the expiry of the prescribed period. Mr Parata challenges that rejection in the ground of the notice of contention set out above. But our determination that the prescribed period has not commenced means that the contention is hypothetical, confined as it is to the question of payment of the fee before the expiry of that period. Even if the fee was required to be paid within that time, the time has not expired. So there is no need to consider the correctness of the long line of single judge decisions to the effect that the fee must be paid (or an application for fee waiver must be made) within the prescribed period for the Tribunal’s jurisdiction to be invoked:  see *Kirk v Minister for Immigration and Multicultural Affairs* (1998) 87 FCR 99; *Benissa v Minister for Immigration and Border Protection* (2016) 150 ALD 276. Here, for the Tribunal to be under a present obligation to review the cancellation decision, it would be necessary to find that the obligation arises regardless of whether the fee is ever paid.
4. So the present position can be summarised as follows. The Minister has not given a notification effective to commence the period for which r 4.10 provides. Our disagreement with the joint judgment in *SZOFE* means that, even in the absence of an effective notification, Mr Parata’s application made in the correct form on 24 October 2018 was not ineffective by reason of being premature. The question potentially raised by the writ of mandamus is whether the Tribunal must conduct the review even if no fee is ever paid. But that is not the question raised by ground 3 of the notice of contention. And the other grounds of contention fall away in view of the success of the appeal.
5. For this Court to conclude that the Tribunal is obliged to make a review decision even though the applicant has not paid the prescribed fee would have potentially significant consequences for its ability to collect fees for the review of Part 5 reviewable decisions. There are reasons to doubt that such a conclusion would be correct. The requirement that the application be “accompanied by” the fee might be flexible enough to mean that the application and the fee need not be given to the Tribunal at the exact same time:  see the discussion in *Braganza v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 364 at [56] – [58]. But it must at least require that the fee be paid before the review is conducted; if the fee is paid after the application is determined, there is no meaningful sense in which the application was “accompanied by” the fee.
6. So to hold that the Tribunal must review the decision in the absence of the fee would mean that no adverse consequence would follow from an applicant’s failure to comply with the express and clear requirement in s 347(1)(c) that an application must be accompanied by the fee. The Tribunal would have to conduct the review and try to recover the fee from the applicant (often by that stage an applicant dissatisfied with the outcome). That construction of s 347 and s 348 may not give full meaning to the requirement in s 348(1) that an application “is properly made under section 347”, which seems to refer to the whole of s 347 including the requirement in s 347(1)(c). It may also fail to give full effect to the use of the word “properly”, which is apt to describe compliance with the procedural requirements in s 347(1), including payment of the fee.
7. If these views are correct, then it may be that unless and until the fee is paid, the mandamus should be discharged. However, the Minister did not argue that the primary judge erred by issuing the writ of mandamus by reason of the non-payment of the fee and it has not been suggested that this Court should vary or revoke the writ because the fee is yet to be paid. The Court should not resolve such issues unless they are squarely put in a notice of contention (or notice of appeal) and fully argued.
8. In the present case, the issues are likely to be academic anyway. Mr Parata can now pay the prescribed fee for review. As soon as he does so, there will be no question that the Tribunal is seized of the review and must proceed with it. Alternatively, the Minister may give him a new notification that is effective to commence the period under r 4.10. That will give Mr Parata seven days within which to pay the fee, or risk the Minister submitting, and the Tribunal finding, that he is then out of time.
9. In these circumstances the appropriate order to dispose of the appeal is simply an order that it be dismissed.

# CONCLUSION

1. The primary judge was correct to conclude that the notice given to Mr Parata did not comply with s 127(2)(b) of the Act. His Honour was also correct to conclude that the notice was “invalid”, in the sense that notice of the decision had not been given to Mr Parata within the meaning of reg 4.10(1)(b) of the Regulations, properly construed, so that the event from which the expiry of the application period is to be calculated has not yet occurred.

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| I certify that the preceding one hundred and three (103) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Charlesworth and Jackson. |

Associate:

Dated: 31 March 2021

REASONS FOR JUDGMENT

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BURLEY J:

##### INTRODUCTION

1. I have had the advantage of reading in draft the reasons of Charlesworth and Jackson JJ. I gratefully adopt their introduction to the issues on the appeal. I agree that the appeal should be dismissed.
2. As the joint judgment summarises in more detail, the Minister made a Part 5-reviewable decision to cancel Mr Parata’s visa. Mr Parata lodged an application for review within the seven working days prescribed by the Regulations, but it was not accompanied by the correct fee. The Tribunal then determined that he had not made a valid application and that it had no jurisdiction to hear the matter: ***Parata v Minister*** *for Home Affairs & Anor* [2020] FCCA 1582 at [9].
3. I agree with the reasons given by Charlesworth and Jackson JJ that the failure on the part of the Minister to “state whether the decision is reviewable under Part 5 or 7” amounted to a failure to comply with the requirements of s 127(2)(b) of the Act and, accordingly, grounds 1 and 2 of the appeal should be dismissed.
4. I also agree with Charlesworth and Jackson JJ that ground 3 should be dismissed. I have, however, approached the question of the consequences flowing from the Minister’s failure to issue a notice complying with s 127(2)(b), and the ultimate determination of whether the Tribunal made a jurisdictional error in declining to exercise jurisdiction, in a different manner.

##### THE VALIDITY ISSUE

1. The task of this Court when undertaking judicial review is to detect and remedy jurisdictional error in the decision of the Tribunal. The central finding upon which the Tribunal declined to exercise jurisdiction was that Mr Parata had not paid the application fee within the prescribed time limit: *Parata v Minister* at[9]. Relevantly, the time limit ends seven days after notice of the cancellation decision is taken to have been received by Mr Parata: Regulations reg 4.10. However, for the reasons given by Charlesworth and Jackson JJ, the notice that Mr Parata received did not comply with s 127(2)(b) of the Act. This raises the question of whether the notice had the legal effect of commencing the seven day time limit in which Mr Parata was required to make a valid application. It is in this context that the question of whether the Tribunal’s decision is affected by jurisdictional error arises. This question is to be answered by considering whether the legislature intended for the breach of s 127(2)(b) to invalidate, and deny the legal force of, the notice purportedly given under s 127.

###### The submissions

1. It is common ground between the parties that, as a matter of principle, whether non-compliance with s 127(2)(b) results in the notice being invalid is to be determined by the proper construction of the statute in question: *Project Blue Sky* at [91]. The parties, however, place different emphasis on the factors relevant to guiding the appropriate statutory construction in these circumstances.
2. The Minister submits that the purpose of s 127 is to ensure that an applicant is aware of their ability to apply to the Tribunal. He submits that the consequence of any failure to comply with the requirements imposed by s 127 requires consideration of whether, in the events that occurred, the applicant was thwarted in his application to the Tribunal by reason of that failure, citing cases including *SZIZO* and *SZOFE*. He characterised this submission as illustrating the same kind of analysis that underpins the law on materiality as described by the High Court in *Hossain*. He did, however, maintain a distinction between the reasoning in the cases of *Project Blue Sky*, *SZIZO* and *SZOFE*, which he characterised as cases concerning the validity of an antecedent step in the decision-making process, and the reasoning in materiality cases, such as *Hossain* and *SZMTA*, which he suggested were cases concerning the validity of the actual decision under review.
3. In this connection, the Minister contends that a notice failing to state the difference between Part 5 and Part 7 (as the notice to Mr Parata failed to do) would nonetheless be valid if: (a) it otherwise directed a person to the Tribunal; (b) it correctly stated the time limit within which to apply; and (c) there was no evidence that the defect in any way in fact caused or contributed to the applicant missing the deadline for lodging an application or paying the required fee. He expanded on this in his reply submissions, contending that “[i]f a particular instance of non-compliance is, on the evidence, causally related to an applicant for review not applying validly to the Tribunal, then a notice which does not comply with s 127 can properly be regarded as invalid”. He contends that there was “no evidence of such a causal connection” and that, in these circumstances, “it is not to be expected that the Parliament intended the non-compliance to result in invalidity”.
4. Mr Parata submits that the consequences of invalidity are to be determined by statutory construction, an exercise which he suggested is rightly abstracted from the idiosyncratic facts of any case, citing *Project Blue Sky* at [91] – [93]. This approach, Mr Parata contends, leaves “little room” for arguments about materiality which require examination of the “consequence of non-compliance” and some ex post facto analysis of causation. He seeks to distinguish *SZIZO* and *SZOFE* on the basis that in those cases the visa applicants actually enjoyed merits review and engaged entirely with the review process but, after losses before the Tribunal, raised arguments that the Tribunal had no jurisdiction as a consequence of defective notifications given prior to the Tribunal review. In any event, he contends that *SZIZO*, to the extent that itstands for the proposition that it is necessary to consider the extent and consequences of a failure to comply with the requirements of s 127, supports the primary judge’s conclusion that the notice was invalid and time had not begun to run. This is because the failure to specify which of Parts 5 or 7 applied to Mr Parata’s review actually misled him in that he attempted to pay the fee applicable to a Part 9 review. He further contends that “[t]he statutory object is to ensure, as is set out in s 127(1)(b) [sic, s 127(2)(b)], that the applicant is informed amongst other things whether the review he or she has is under Part 5, or Part 7”, and that it is inappropriate to replace this object with some lesser, unexpressed requirements.

###### The relevant law

1. Not all instances of non-compliance with statutory requirements in the context of administrative decision-making will result in the decision being affected by jurisdictional error. In *Project Blue Sky* at [91], the consequences of a breach of a statutory condition were found to depend upon whether there could be discerned a legislative purpose to invalidate any act that failed to comply with the condition. This legislative purpose is to be ascertained by reference to the statute, its subject matter and objects, *and* the consequences for the parties of holding void any act done in breach of a condition: *Project Blue Sky* at [91]. This is the process of analysis that the parties now urge.
2. In *Attorney General (NSW) v World Best Holdings Ltd* [2005] NSWCA 261; 63 NSWLR 557, Spigelman CJ addressed the relevance of the particular circumstances of a breach under consideration to this exercise of statutory construction. Referring to the tests set out by the High Court in *Project Blue Sky* at [91] and [93], his Honour said:

107 There is a slight difference between the two formulations. The passage (at 388 [91]) refers to a legislative intention “to invalidate *any* act that fails to comply” (emphasis added). The second (at 390 [93]) refers to a purpose to invalidate “*an* act done in breach” (emphasis added). I do not understand the word “any” to be used in the sense of “every”. The word “an” (at 390 [93]) indicates that a court must look at what Parliament intended to be the consequences of the particular breach under consideration.

108 There may, of course, be legislative requirements with respect to which it is appropriate to conclude that Parliament intended every breach to lead to invalidity. (See, for example, *Hatton v Beaumont* [1977] 2 NSWLR 211 at 226.) There are other requirements where it is appropriate to consider the particular circumstances of the case when determining what are the consequences of the defective compliance. The decisions of this Court, to which the High Court referred with approval, support this conclusion.

1. However, as I have noted, the Minister also characterised his submission as illustrating the same kind of analysis that underpins the law on materiality as described by the High Court in *Hossain*.
2. In *Hossain*, the High Court gave consideration to whether, in misconstruing and misapplying a criterion prescribed by the Act and Regulations, the Tribunal’s error rose to the level of a jurisdictional error: *Hossain* at [37]. The majority of the High Court (Kiefel CJ, Gageler and Keane JJ) made the following observations about jurisdictional error:

23 Jurisdiction, in the most generic sense in which it has come to be used in this field of discourse, refers to the scope of the authority that is conferred on a repository. In its application to judicial review of administrative action the taking of which is authorised by statute, it refers to the scope of the authority which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences. *It encompasses in that application all of the preconditions which the statute requires to exist in order for the decision-maker to embark on the decision-making process*. It also encompasses all of the conditions which the statute expressly or impliedly requires to be observed in or in relation to the decision-making process in order for the decision-maker to make a decision of that kind. A decision made within jurisdiction is a decision which sufficiently complies with those statutory preconditions and conditions to have "such force and effect as is given to it by the law pursuant to which it was made".

24 Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, *correspondingly refers to a failure to comply with one or more statutory preconditions or conditions* to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it. To describe a decision as "involving jurisdictional error" is to describe that decision as having been made outside jurisdiction…a decision made outside jurisdiction is a decision in fact which is properly to be regarded for the purposes of the law pursuant to which it was purported to be made as "no decision at all". To that extent, in traditional parlance, the decision is "invalid" or "void".

(citations omitted and emphasis added)

1. The majority went on to emphasise that the question is to be answered by construing the statute, saying at [27]:

Just as identification of the preconditions to and conditions of an exercise of decision-making power conferred by statute turns on the construction of the statute, so too does discernment of the extent of non-compliance which will result in an otherwise compliant decision lacking the characteristics necessary to be given force and effect by the statute turn on the construction of the statute. The question of whether a particular failure to comply with an express or implied statutory condition in purporting to make a particular decision is of a magnitude which has resulted in taking the decision outside the jurisdiction conferred by the statute cannot be answered except by reference to the construction of the statute.

(citations omitted)

1. The majority noted at [29] that ordinarily, although not universally, a statute that impliedly requires a condition to be observed in the course of a decision-making process is not to be interpreted as denying legal force and effect to every decision that might be made in breach of the condition. The statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance.
2. The majority went on to say:

30 Whilst a statute on its proper construction might set a higher or lower threshold of materiality, the threshold of materiality would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which that decision was made. The threshold would not ordinarily be met, for example, where a failure to afford procedural fairness did not deprive the person who was denied an opportunity to be heard of "the possibility of a successful outcome", or where a decision-maker failed to take into account a mandatory consideration which in all the circumstances was "so insignificant that the failure to take it into account could not have materially affected" the decision that was made.

31 Thus, as it was put in *Wei v Minister for Immigration and Border Protection*, "[j]urisdictional error, in the sense relevant to the availability of relief under s 75(v) of the Constitution in the light of s 474 of the *Migration Act*, consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by that Act". Ordinarily, as here, breach of a condition cannot be material unless compliance with the condition could have resulted in the making of a different decision.

 (citations omitted)

1. Justice Edelman, who delivered separate reasons, expressed general agreement that considerations of materiality inform the assessment of jurisdictional error, however, noted that there were exceptions to this general rule. His Honour found support for his reasoning in previous High Court cases including *Project Blue Sky* and *SZIZO*, saying:

66 …The broad test for determining whether an implied legislative condition is jurisdictional was set out by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority*. Their Honours said that it was necessary to "ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid".

67 A close examination of legislation will usually have the effect that not every express or implied condition must be construed in a binary way. A legislative condition need not be construed as (i) always depriving a decision maker of power, or (ii) never doing so, no matter how it is breached. The question is always one of construction of the legislation: which breaches of a provision does the legislation, either expressly or, more commonly, impliedly, treat as depriving the decision maker of power? Just as it is unlikely to be concluded that Parliament intended to authorise an unreasonable exercise of power, so too it is unlikely to be an intention that the legislature is taken to have that a decision be rendered invalid by an immaterial error.

 …

69 The decision in *SZIZO* illustrates a common manner in which this concept of materiality is part of the implication that a decision will not be invalid or beyond authority where the error could not have affected the result of the decision. Another example was contemplated in the joint judgment in this Court in *Kirk v Industrial Court (NSW)*. In that case, the erroneous reversal of the onus of proof was a jurisdictional error. However, the joint judgment observed that there may be some departures from the rules of evidence that would not warrant the grant of relief in the nature of certiorari. In other words, the joint judgment contemplated that a non-material departure from the rules of evidence might not be either a jurisdictional error or a material error of law on the face of the record.

 (citations omitted)

1. In *SZMTA*, the majority of the High Court (Bell, Gageler and Keane JJ) reiterated the centrality of materiality to the existence of jurisdictional error, saying:

44 …The Secretary's provision of an incorrect, and therefore invalid, notification that s 438 applies in relation to a document or information amounts, without more, to an unauthorised act in breach of a limitation within the statutory procedures which condition the performance of the overarching duty of the Tribunal to conduct a review. Applying the principle of construction recently explained in *Hossain v Minister for Immigration and Border Protection*, however, the Act is not to be interpreted to deny legal force to a decision made on a review in the conduct of which there has been a breach of that limitation unless that breach is material.

45 Materiality, whether of a breach of procedural fairness in the case of an undisclosed notification *or of a breach of an inviolable limitation governing the conduct of the review in the case of an incorrect and invalid notification*, is thus in each case essential to the existence of jurisdictional error. A breach is material to a decision only if compliance could realistically have resulted in a different decision.

(citations omitted and emphasis added)

1. These passages suggest, albeit in the context of a different factual matrix, that when considering the question of construction in the present case, it is of no moment whether the breach relates to a statutory condition that is: (1) a precondition on the ability of a decision-maker to embark on the decision-making process; or (2) a condition required to be observed by the decision-maker within the decision-making process. In either event it is to be assumed that the legislature did not intend that every breach of a precondition or condition will result in invalidity. Put another way, it may be implied that Parliament did not intend every breach of a precondition or condition to invalidate the exercise of jurisdiction unless the breach was material. The statute is to be construed in a way such that only decisions involving material breaches of preconditions or conditions are those infected by jurisdictional error to be denied legal force. Whether a breach is material can be broadly restated as whether compliance could realistically have resulted in a different decision: *SZMTA* at [45] (Bell, Gageler and Keane JJ). Where materiality is in issue, to establish that a decision is affected with jurisdictional error requires examining the consequences of a breach of a statutory precondition or condition in the particular circumstances of the decision under review.
2. The emphasised passages in *Hossain* and *SZMTA* might lead one to the view that in considering a case such as the present, materiality is a consideration that must be taken into account in determining the consequences of the breach in question. However, regardless of whether it is necessary to look to the materiality of the breach in this particular case, or whether there remains a relevant distinction between the approaches in *Project Blue Sky* and *Hossain*,the outcome in the present case is the same.

###### Consideration

1. It is relevant first to observe the manner in which the statutory scheme operates. Section 127 relevantly provides:

**127 Notification of decision**

(1) When the Minister decides to cancel a visa, he or she is to notify the visa holder of the decision in the prescribed way.

(2) Notification of a decision to cancel a visa must:

(a) specify the ground for the cancellation; and

(b) state whether the decision is reviewable under Part 5 or 7; and

(c) if the former visa holder has a right to have the decision reviewed under Part 5 or 7—state:

(i) that the decision can be reviewed; and

(ii) the time in which the application for review may be made; and

(iii) who can apply for the review; and

(iv) where the application for review can be made.

(3) Failure to give notification of a decision does not affect the validity of the decision.

1. The language of s 127 imposes a statutory obligation upon the Minister, who decides to cancel a visa, to provide notification of a certain type to the visa holder. Section 127(1) obliges the Minister to notify the visa holder of the cancellation decision in the prescribed way. Section 127(2) makes plain that the specified notification requirements are for the purpose of informing the visa holder of: the reason for the cancellation (s 127(2)(a)); whether it is reviewable under Part 5 or 7 of the Act (s 127(2)(b)); and, other basic information relevant to their right to apply for a review (s 127(2)(c)). Contrary to the Minister’s submissions advanced in relation to ground 1 of the appeal, the nomination of whether or not the decision is reviewable under Part 5 or Part 7 is substantive. As the Minister submitted in apparent support of his argument in relation to ground 3, “the salient differences between Part 5 and Part 7 relate to fees and timing”. Depending on which part of the Act the decision is reviewable under, there are specific and separate regulatory requirements to file applications within a certain time and to pay a prescribed fee.
2. In my view, the notification requirements under s 127 go hand in glove with the requirements imposed upon a visa holder by s 347 of the Act. Section 347 sets out the requirements with which an application to the Tribunal for a review of a Part 5-reviewable decision must comply. Section 347(1) provides that the application must be made in the approved form, be given to the Tribunal within the prescribed period and be accompanied by the prescribed fee. The relevant prescribed period is set out in reg 4.10 of the Regulations as being seven days starting from when the applicant receives notice of the decision. There is an obvious textual link between the requirements of s 347(1) and s 127 in that s 127(2) calls for “[n]otification of a decision” and s 347(1)(b) provides that the application for review must be made within the prescribed number of days after the “notification of the decision”.
3. If an application is properly made under s 347 the Tribunal must review the decision: s 348(1). It was the failure of Mr Parata to provide the prescribed fee within seven days that led the Tribunal to conclude that it did not have jurisdiction to entertain his application for review. A failure to file the application within the seven days prescribed will similarly fail to invoke the jurisdiction of the Tribunal. The Tribunal has no power to extend the time prescribed in the Regulations.
4. These matters indicate that the content of s 127 must be considered to be part of the legislative scheme of the Act whereby a failure to comply with the requirements of s 347 will entirely deprive an applicant of the entitlement to access administrative review of the Minister’s decision to cancel their visa. The scheme of the Act draws a necessary connection between the requirements by which a visa holder is to be notified of their entitlement to seek a review of a decision and the mandatory requirements of s 347 which must be strictly complied with to invoke the jurisdiction of the Tribunal. It thereby recognises that information relevant to the filing of any application for review lies in the hands of the Minister, and requires that he provide a certain amount of that information to the visa holder so that a valid application may be made.
5. Furthermore, the consequences of non-compliance with s 127, insofar as they concern the ability to access merits review, are different to the consequences of a non-compliant notification to the status of the visa itself. In the case of the latter, Parliament expressly provides that non-conformity does not affect the validity of the visa cancellation: s 127(3). In the case of the former, there is no such validation.
6. The foregoing tends to support the conclusion that there is a legislative purpose to invalidate a notification purportedly provided under s 127(1) if it fails to comply with the condition in s 127(2)(b).
7. Furthermore, in my view, where the consequences of the breach in question must be examined, or where it is to be implied that only material breaches will invalidate the act purportedly done pursuant to the statute, both point in the same direction.
8. Mr Parata received the defective notification on 21 September 2018. He lodged an application for review on 1 October 2018, prior to the expiry of seven working day time limit. However, he did not utilise the approved form for an application for review under Part 5, nor did he pay the required fee. An officer at the Tribunal sent an email to the prison where it was assumed that Mr Parata was held, including what was said to be the correct application forms and information sheets, but Mr Parata did not receive that email before the expiry of seven working days after he received the purported notice.
9. Mr Parata filed an affidavit in the proceedings before the Federal Circuit Court of Australia which was received into evidence. He was not cross-examined. In it he states that if he had been told that he needed to provide payment of more than $100 he would have obtained permission from his mother for authorisation for another amount. The primary judge determined that Mr Parata’s payment of $100 was “no doubt based upon an incorrect assumption that the decision was made under Part 9 of the Act”: *Parata v Minister* at [19].
10. The Tribunal decided that it did not have jurisdiction to hear the application for review because it did not receive the correct fee within seven days of the notice.
11. The Minister submits that it is not to be expected that Parliament intended the non-compliance to result in invalidity when it had no bearing upon Mr Parata’s failure to make a valid application to the Tribunal. However, on the basis of the facts available, I would reach the opposite conclusion. Had Mr Parata been informed that the decision was a Part-5 reviewable decision, he would have been armed with the information necessary to determine the correct fee to pay. It is apparent from his evidence that he was willing, and had access to the necessary funds, to do so. I infer that there is a realistic possibility that had Mr Parata received information that the decision of the Minister was a Part-5 reviewable decision he would have determined the correct fee to tender and done so at the time that he filed his review application.
12. In this respect, the position is to be distinguished from *SZOFE*, where it was clear on the facts that the alleged defect in the notification had no bearing at all on the applicant’s ability to invoke the jurisdiction of the Tribunal: *SZOFE* at [2] – [6] (Emmett J) and [65] – [68] (Buchanan and Nicholas JJ). The facts of the present case are notably different and lead me to the opposite conclusion.

##### DISPOSITION

1. For the reasons set out above, in my view, Parliament can be taken to have intended the notification provided by the Minister in the circumstances of the present case to be void and of no effect. As a consequence, Mr Parata was not validly notified of the cancellation decision and the time in which he was required to submit a valid review application had not commenced to run. The Tribunal’s decision, being based on an erroneous view as to its jurisdiction, was affected by jurisdictional error. I agree with the orders proposed by Charlesworth and Jackson JJ.

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| I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Burley. |

Associate:

Dated: 31 March 2021