FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v Singh [2016] FCA 575

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| Appeal from: | *Singh v Minister for Immigration & Anor* [2016] FCCA 257 |
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| File number: |  |
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| Judge: | **EDELMAN J** |
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| Date of judgment: | 23 May 2016 |
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| Catchwords: | **MIGRATION** – finding by Federal Circuit Court of errors in Migration Review Tribunal’s factual findings – whether Tribunal made factual errors – whether any factual errors would be jurisdictional errors |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 13(2)(d)  *Administrative Appeals Tribunal Act 1975* (Cth) s 44  *Administrative Decisions (Judicial Review) Act* 1977 (Cth) s 5(2)  *Federal Court of Australia Act 1976* (Cth) s 27  *Freedom of Information Act 1982* (Vic) s 50(4)  *Legislation Act 2003* (Cth) s 13(1)(a)  *Migration Act 1958* (Cth) ss 5F, 5F(3), 31, 65  *Migration Regulations 1994* (Cth) regs 1.15A, 1.15A(3)(d)(iii), 1.15A(3)(d)(iv), 2.03, 2.03A, 2.03AA; Sch 2, cll 820.21, 820.211(2)(a) |
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| Cases cited: | *Attorney-General (NSW) v Quin* [1990] HCA 21;(1990) 170 CLR 1  *CDJ v VAJ (No 2)* [1998] HCA 76; (1998) 197 CLR 172  *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389  *Freeman v National Australia Bank Ltd* [2003] FCAFC 200  *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332  *Minister for Immigration and Citizenship v SZNPG* [2010] FCAFC 51  *Morgan Research Centre Pty Ltd v Commissioner of State Revenue* [2001] HCA 49; (2001) 207 CLR 72  *Osland v Secretary to the Department of Justice* [2010] HCA 24; (2010) 241 CLR 320  *Shaw v Yarranova Pty Ltd* [2014] FCAFC 171  *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231; (2003) 77 ALD 402  *SZRPT v Minister for Immigration and Border Protection* [2014] FCA 2  *The Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346  *Waensila v Minister for Immigration and Border Protection* [2016] FCAFC 32  *Waterford v Commonwealth* [1987] HCA 25; (1987) 163 CLR 54  S Gageler “The Master of Words: Who Chooses Statutory Meaning?” in A Connolly and D Stewart (eds) *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (Federation Press, Sydney, 2015) |
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| Date of hearing: | 23 May 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 66 |
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| Counsel for the Appellant: | Mr B McGlade |
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| Solicitor for the Appellant: | Sparke Helmore Lawyers |
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| Counsel for the First Respondent: | The First Respondent appeared in person with the assistance of an interpreter |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice |

ORDERS

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|  | | QUD 157 of 2016 |
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| BETWEEN: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  Appellant | |
| AND: | INDERJIT SINGH  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | EDELMAN J |
| DATE OF ORDER: | 23 MAY 2016 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Circuit Court of Australia in proceeding no BRG 615 of 2015 made on 4 February 2016 be set aside and in lieu thereof order that:
   1. the first respondent’s application to the Federal Circuit Court of Australia filed on 2 July 2015 be dismissed;
   2. the first respondent pay the appellant’s costs of the Federal Circuit Court of Australia proceeding no BRG 615 of 2015 to be taxed if not agreed.
3. The first respondent pay the appellant’s costs of this proceeding to be taxed if not agreed.

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

REASONS FOR JUDGMENT

EDELMAN J:

## Introduction

1. On 26 April 2012, Mr Singh applied for a Partner (Temporary)(Class UK)(Subclass 820) Visa. He had married his sponsor several days earlier on 21 April 2012. His evidence was that a significant motivation for the timing of the marriage was his desire to obtain a visa. On 3 December 2013, a delegate of the Minister refused to grant Mr Singh a visa under s 65 of the *Migration Act 1958* (Cth). That was affirmed by the Migration Review Tribunal, which is now the Administrative Appeals Tribunal (**the Tribunal**). The Tribunal considered that Mr Singh was not the spouse or de facto partner of an Australian citizen. However, the Federal Circuit Court quashed the decision of the Tribunal and remitted the matter for reconsideration. This is an appeal by the Minister from the decision of the Federal Circuit Court.
2. In the Federal Circuit Court, the primary judge quashed the decision of the Tribunal on the basis of a finding that the Tribunal made a factual error. The factual error was found to have arisen due to a misconstruction by the Tribunal of two letters before it which concerned the date when Mr Singh commenced living with his wife (his **sponsor** for the visa application). For the reasons explained below, the Tribunal did not make any error. Further, if the Tribunal had erred in its factual finding, as the Federal Circuit Court found, the error would not have been a jurisdictional error. The appeal must be allowed.

## The legislative provisions

1. It is necessary to begin with the relevant legislative provisions concerning the grant of a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act.*
2. The *Migration Regulations 1994* (Cth) prescribe criteria for visas as provided for by s 31 of the *Migration Act*. Regulation 2.03 of the *Migration Regulations* provides that subject to regulations 2.03A and 2.03AA, the prescribed criteria for the grant to a person of a visa of a particular class are:

(a) the primary criteria set out in a relevant Part of Schedule 2; or

(b) if a relevant Part of Schedule 2 sets out secondary criteria, those secondary criteria.

1. Two relevant clauses to this application in Schedule 2 of the *Migration Regulations* are clauses 820.21 and 820.211(2)(a). The heading in clause 820.21has the effect that *at the time that the visa application is made* (here, 26 April 2012), the applicant must be the “spouse” or “de facto partner” of an Australian citizen or an Australian permanent resident or an eligible New Zealand citizen. The heading to the clauses is taken to be “part of” of the *Regulations* and is relevant to the task of construction due to the combined operation of s 13(1)(a) of the *Legislation Act 2003* (Cth) and s 13(2)(d) of the *Acts Interpretation Act 1901* (Cth).
2. Clauses 820.22 and 820.221 of the *Migration Regulations* also require that *at the time of the decision* (i) the applicant continued to be the spouse or de facto partner of a person as outlined above, or (ii) other alternatives. The other alternatives include that the applicant satisfies the decision maker of matters including that the relationship between the applicant and the sponsoring partner ceased due to family violence committed by the sponsoring partner.
3. Section 5F of the *Migration Act*, which remains in force, defined “spouse” and “married relationship” as follows:

**Spouse**

(1) For the purposes of this Act, a person is the ***spouse*** of another person if, under subsection (2), the 2 persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a ***married relationship*** if:

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

1. The regulations to which reference is made in s 5F(3) of the *Migration Act* include regulation 1.15A of the *Migration Regulations*, which relevantly provided (and continues in force):

**Spouse**

1. For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.
2. If the Minister is considering an application for:

…

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) the living arrangements of the persons; and

(iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being married to each other; and

(ii) the opinion of the persons’ friends and acquaintances about the nature of the relationship; and

(iii) any basis on which the persons plan and undertake joint social activities; and

(d) the nature of the persons’ commitment to each other, including:

(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together; and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long-term one.

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

## Background and the decision of the Minister’s delegate

1. Mr Singh is a citizen of India.
2. On 7 November 2009, he arrived in Australia holding a student visa.
3. On 26 April 2012, three days before Mr Singh’s student visa was due to expire, he applied for a Partner (Temporary) (Class UK) (Subclass 820) visa on the basis of his marriage to an Australian citizen. His wife was the sponsor for his application. Mr Singh said to the delegate that he had met his wife on 10 January 2012. The delegate said that on 27 March 2013, the Department of Immigration and Border Protection (**the Department**) was advised that Mr Singh and his sponsor no longer resided together and that their relationship had broken down.
4. On 8 November 2013, the delegate refused Mr Singh’s visa application. The delegate was not satisfied that the applicant and the sponsor were in a spousal relationship at the time of the application (on 26 April 2012) or thereafter, and therefore did not meet the requirements of the *Migration Regulations*. Mr Singh applied to the Tribunal for a review of the delegate’s decision.

## The decision of the Tribunal

1. On 5 June 2015, the Tribunal conducted the review of the delegate’s decision to refuse to grant the visa.
2. In assessing whether Mr Singh was in a spousal relationship with his sponsor, the Tribunal considered (i) the financial aspects of the relationship, (ii) the social aspects of the relationship, (iii) the nature of the commitment that Mr Singh and his sponsor had to each other, and (iv) the nature of the household.

### The financial and social aspects of the relationship and the parties’ commitment to each other

1. As to the financial aspects of the relationship, the Tribunal observed that there was very limited evidence of joint financial arrangements or financial commitment between the parties, or of mingling of their financial affairs *at the time of the application*. The Tribunal considered a joint ANZ bank account and evidence concerning the account which was led by Mr Singh. The Tribunal also considered the purchase of a number of items (motor vehicle, television set and so on) by Mr Singh for his sponsor, *after the application.*
2. As to the social aspects of the relationship, the Tribunal considered statements and photos provided by Mr Singh and his sponsor. The Tribunal concluded that the parties engaged in joint social activities, represented themselves to other people as being in a relationship, and that they were recognised as such by their friends.
3. As to the nature of Mr Singh’s and his sponsor’s commitment to each other, the Tribunal considered Mr Singh’s evidence that he had known his sponsor from November 2011, started a relationship in January 2012, and married in April 2012. The Tribunal explained Mr Singh’s evidence that his father had cancelled the loan for his studies and Mr Singh’s sponsor had told him that he could stay in Australia if they got married. The Tribunal also considered Mr Singh’s evidence that (i) he was proud of his marriage and that his family was happy with the marriage, (ii) that he loved the sponsor a lot, and (iii) that his father had enough money for him to have extended his student visa for six months. The Tribunal also put to Mr Singh a record of a phone call to the Department from his sponsor on 12 February 2014:

Stated that [Mr Singh] and herself married so that he could receive an Australian visa [but] they have broken up and [Mr Singh] is now making her life difficult. She wished to provide more information about the relationship. I explained the dob in line and GFU – call not suitable for either.

1. In considering all of these matters concerning the nature of Mr Singh’s and his sponsor’s commitment to each other, the Tribunal concluded that their relationship lacked the commitment which would be expected of persons in a married relationship. The relationship had developed over a short period of time. Mr Singh’s concern for his visa status was a significant motivation in the timing of the marriage.
2. There was also evidence before the Tribunal concerning family violence claims by Mr Singh against his sponsor. There was evidence of a police protection order that had been put in place until recently before the hearing. This order prevented Mr Singh and his sponsor from living together.

### The nature of the household

1. As to the nature of the household, there was conflicting evidence before the Tribunal concerning when the parties first started living together. That evidence was as follows.
2. **First**,there was a letter from Coast2Bay Housing Group dated 25 July 2012 (**the 25 July 2012 C2B letter**). Mr Singh provided this letter to the Department. That letter said that Mr Singh had commenced living at a Caboolture property (where his sponsor also lived) on 19 July 2012:

Our records show that [Mr Singh] commenced living at the said property with [the sponsor] on 19 July 2012.

1. This letter was one reason why the delegate refused Mr Singh’s visa application. It suggested that Mr Singh and his sponsor did not commence living together until after the date the visa application was lodged. The delegate observed that “[n]o evidence has been provided to show that [Mr Singh] had set up a household from [the date of marriage: 21 April 2012] and only limited evidence has been provided from June 2012 to date”.
2. **Secondly**, Mr Singh’s evidence before the Tribunal was that he had moved in with his sponsor on 14 February 2012 but that he did not tell this to the Coast2Bay Housing Group. He said that he did not inform them because he wished to avoid an increase in the rent. In support of this evidence he provided another letter from C2B (**the 17 July 2012 C2B letter**). The 17 July 2012 C2B letter was addressed to both Mr Singh and his sponsor at the Caboolture property address. That letter provided the details of their new (increased) rental amount from 30 May 2012.
3. **Thirdly**,there was evidence of correspondence to Mr Singh from the ANZ and Commonwealth banks which were sent to the Caboolture address in late March and early April 2012.
4. **Fourthly**, there was evidence of correspondence to Mr Singh from Vodafone that was sent to a different address. Mr Singh’s evidence before the Tribunal was that this was because he did not change his address.
5. The Tribunal concluded as follows:

23. On balance, the Tribunal is not satisfied that the parties maintained a joint household at the time of application. Even if the applicant and sponsor prepared the visa application themselves, the applicant nevertheless presented to the Department that they had commenced living together on 19 June 2012. It was not until after the visa application was refused that he attempted to bring this date forward to 14 February 2012. There is some evidence in support of the applicant’s earlier date – namely the correspondence from the ANZ and Commonwealth banks. There is also some evidence to the contrary – namely the applicant’s Vodafone accounts. The electricity account provided is also consistent with the later date. Ultimately, the Tribunal considers that the most reliable evidence is that from Coast2Bay Housing Group, and the earliest date that places the applicant as living at [the Caboolture address] is 30 May 2012.

24. The Tribunal found the applicant’s explanation that they did not tell Coast2Bay Housing Group of the earlier date to avoid the rent going up to be unpersuasive. The applicant has clearly requested and obtained a letter from Coast2Bay Housing Group addressed to the Department of Immigration. It provided a date of 19 June 2012. The applicant then gave that letter to the Department. It is hard to escape the conclusion that if that date was materially incorrect, he would not have forwarded the letter to the Department in that form. The Tribunal is prepared to accept that the applicant may have been living there from 30 May 2012, when the rent was adjusted, but it is not prepared to accept that he was living there as at 26 April 2012 or an earlier date.

### The Tribunal’s conclusion

1. The Tribunal weighed all of the matters discussed above and concluded that (i) the parties’ limited joint finances, (ii) the absence of a joint household, and (iii) the Tribunal’s concerns about the level of commitment between Mr Singh and his sponsor outweighed the other factors in their favour such as social recognition. The Tribunal concluded that it was not satisfied that the parties were in a spousal relationship at the time the visa application was made.
2. Since the Tribunal was not satisfied that the parties were in a spousal relationship at the time of the visa application, it was unnecessary for it to consider subsequent events such as the family violence allegations. The reason why the Tribunal considered this unnecessary was because it assumed, as the Full Court did in *Waensila v Minister for Immigration and Border Protection* [2016] FCAFC 32, that the *Migration Regulations* required satisfaction of *both* the relevant criteria at the time of application *and* the criteria at the time of decision. That assumption was not challenged by Mr Singh in the Federal Circuit Court or in this Court. It accords with the structure of the *Regulations,* in particular the sequence of headings. I proceed on the same assumption.

## The decision of the Federal Circuit Court

1. Mr Singh sought judicial review of the Tribunal’s decision in the Federal Circuit Court. He relied on three grounds of review:
2. the Tribunal’s finding that the applicant and his sponsor were lacking the expected level of commitment of a married relationship and not in a genuine relationship at the time of decision was illogical and not based on inferences of fact support by the evidence;
3. the Tribunal made a jurisdictional error in taking into account the alleged motivation of the applicant in his marriage to his sponsor; and
4. the Tribunal made a jurisdictional error in failing to take into account the relevant consideration of the applicant suffering domestic violence committed by the sponsor, and the effect of this on the relationship between the applicant and the sponsor at the time of the decision.
5. The primary judge dismissed all of these grounds.
6. In relation to the first ground, the primary judge held that the decision could not be said to be illogical or based on inferences of fact not supported by the evidence. The Tribunal had considered all the evidence and balanced it in reaching the conclusion.
7. In relation to the second ground, his Honour, with respect entirely correctly, observed that the Tribunal did not err in taking into account the motivation of Mr Singh in his marriage to his sponsor. This was a matter relevant to the consideration of all “the circumstances of the relationship” in regulation 1.15A of the *Migration Regulations* as well as a matter relevant to the factors listed in regulations 1.15A(3)(d)(iii) and 1.15A(3)(d)(iv).
8. In relation to the third ground, the primary judge held, again with respect entirely correctly, that the Tribunal did not err by failing to take into account the domestic violence issue. The Tribunal correctly observed that it was not necessary to deal with that issue which was subsequent to the date of Mr Singh’s visa application. The Tribunal’s decision was based only upon its lack of satisfaction that *at the time the visa application was made* the parties were in a spousal relationship.
9. However, the primary judge was concerned with a matter which was not the subject of these grounds of review. His Honour was prepared to consider that new matter. He explained that Mr Singh was unrepresented, and had not had an interpreter for one hearing. He therefore did not consider the failure of Mr Singh to raise this review ground as fatal to his application. The primary judge observed that Mr Singh had, in fact, raised the point in submissions although “somewhat inelegantly”. Counsel for the Minister, quite properly, did not suggest that the point could not be decided because it had not been directly raised as a ground of review.
10. The reasoning of the primary judge on this additional point was that the Tribunal had committed a jurisdictional error for the following reasons:
11. there was a contradiction between the 17 July 2012 C2B letter and the 25 July 2012 C2B letter. On the one hand, Mr Singh commencing living in the Caboolture property on 19 July 2012 but, on the other hand, the property had an increased rent from 30 May 2012. This contradiction was apparent to the Tribunal but the Tribunal provided no explanation as to how that contradiction could have been addressed ([28]);
12. having regard to a **third C2B letter**, dated 16 January 2016, which was provided to the Federal Circuit Court but which was not before the Tribunal, the Tribunal had erroneously interpreted the two C2B letters before it, and reached an incorrect conclusion as to their effect. The third C2B letter contained the following:

...Our records show that on the 19th June 2012 [the sponsor] provided us with evidence (marriage certificate) that [Mr Singh] commenced living at the above property at the end of April 2012 because they were now married. [The sponsor] originally informed us on the 27th March 2012 that she would be getting married. As [the sponsor] had to change her details with the Department of Housing to show that she was now married, we added [Mr Singh] as an occupant, as a Community Housing provider. We don’t require all occupants to be on the lease as long as we are aware of all occupants in the household. As a Community Housing Organisation we also base rent on all occupants’ income and in this case charged rent based on both [the sponsor’s] and [Mr Singh’s] income from the 30th May 2012 once evidence of income was received...

and,

1. the Tribunal’s finding that Mr Singh and the sponsor were not in a spousal relationship was “based totally” on the incorrect conclusion it reached as to the effect of the C2B letters ([30]). The erroneous way the Tribunal looked at the C2B letters and its reliance on them was the foundation for its rejection of the application ([32]) and the evidence of the C2B letters was the “lynchpin” upon which the Tribunal made its decision ([22]).
2. The Minister now appeals from the decision of the Federal Circuit Court.

## The grounds of appeal in this Court

1. The Minister relies on four grounds of appeal. I have renumbered those grounds in the order in which they are considered below.
2. The learned Federal Circuit Court judge erred (at [30] and [32]) in finding that the Tribunal came to an incorrect conclusion as to the effect of the C2B Letters and that the Tribunal looked at the C2B Letters in an erroneous way in circumstances where:
   1. the Tribunal construed the two C2B Letters before it correctly and in a way that was open to it;
   2. the learned Federal Circuit Court judge impermissibly took into account, and regarded as relevant, evidence that was not before the Tribunal-namely the C2B Letter dated 4 January 2016; and
   3. the learned Federal Circuit Court judge impermissibly considered, and weighed into, the merits of the Tribunal’s decision.
3. The learned Federal Circuit Court judge erred (at [22], [30] and [33]) in finding that the C2B Letters were the lynchpin, foundation and total basis for the Tribunal’s ultimate decision in circumstances where the C2B Letters were just two (of a number of) pieces of evidence that weighed into the Tribunal’s ultimate decision and which were not the lynchpin, foundation or total basis for its ultimate decision.
4. The learned Federal Circuit Court judge erred (at [28]) in finding that the Tribunal did not provide an explanation as to how the contradictory evidence the subject of the July 2012 C2B Letters was addressed. The learned Federal Circuit Court judge erred in circumstances where the Tribunal apparently resolved such contradictory evidence by (at [18] to [24] of the Tribunal’s decision) weighing various pieces of evidence probative for and against Mr Singh living with the sponsor at the Caboolture unit as at 26 April 2012 (the relevant date being the date of the application) and making a finding of fact that “The Tribunal is prepared to accept that [Mr Singh] may have been living [in the Caboolture unit] from 30 May 2012, when the rent was adjusted, but it is not prepared to accept that he was living there as at 26 April 2012 or an earlier date”.
5. The learned Federal Circuit Court judge erred in finding that the errors identified (the existence of which are denied) infected the Tribunal’s decision with jurisdictional error in circumstances where such errors were errors of fact within jurisdiction.

## Mr Singh’s submissions

1. On this appeal, Mr Singh provided an affidavit and videos on a USB. Many of his submissions concerned new evidence which purported to re-agitate matters of fact which were before the Tribunal.
2. In relation to the C2B letters, Mr Singh’s affidavit annexed a **fourth C2B letter** dated 10 May 2016. In that letter, C2B confirmed that Mr Singh was living in the Caboolture property managed by C2B. This point has never been disputed. But the letter continues:

We are writing to clarify the rent charges for this property. As previously stated [the sponsor] originally informed us on the 27th March 2012 that she was getting married at the end of April and that [Mr Singh] would be moving in with her at that time. [The sponsor and Mr Singh] didn’t provide the appropriate documentation (marriage certificate) to us until the 19th of June 2012 at which time we informed them that we still needed evidence of income for [Mr Singh] to assess their rent. [The sponsor and Mr Singh] did not provide sufficient evidence of income until 17th July 2012 at which time the rent for the property was assessed on the household income. The rent increase would normally be effective as at the date the new household member started living at the property however due to the time delay in receiving the income statements Coast2Bay Housing decided to only backdate the rent increase from the 30th of May 2012 giving the tenants a 4 week reprieve of the increased rent amount.

1. Mr Singh also sought to tender evidence on this appeal in relation to a number of matters including:
2. reasons why he terminated the retainer of his lawyer relating to advice she gave him concerning the protection order made by the court in Caboolture in 2013;
3. reiterating his commitment to the sponsor and his reasons for attending the police station in 2013 as well as recordings on USB of their relationship;
4. further evidence of a joint household including his evidence that he and the sponsor had a joint electricity account, a joint bank account opened on 29 March 2012 and closed on 29 March 2012 (which may be a typographical error) as well as other bills that he paid;
5. reasons why his Vodafone account was sent to his previous address;
6. furnishings that he and the sponsor purchased together but for which no receipts were kept; and
7. reasons why his sponsor did not attend his hearing.
8. On the morning of the appeal, Mr Singh also sought to tender an affidavit from his sponsor. In that affidavit, she explained that she married Mr Singh because she loved him and that although there was domestic violence in the past, they could not stay away from each other and helped each other. She explained that she had not attended the Tribunal hearing because she was at a funeral for her oldest child’s birth father and that she had told this to Mr Singh’s lawyer. She described her medical conditions with which Mr Singh acts as her carer. She denied making the phone call to the Department and said that Mr Singh could not understand questions that the Tribunal asked him.
9. Mr Singh also sought to rely upon video evidence which he said was contained on a USB filed with his affidavit. Mr Singh said that the video evidence concerned his relationship with his sponsor. He explained that the video evidence was of him and his sponsor and that the videos were taken from after they were married on 21 April 2012 until 1 March 2013. The USB upon which the video evidence was provided was not able to be accessed on a computer, despite numerous attempts today by a court information technology officer. In any event, for the reasons I explain later, video evidence of Mr Singh’s relationship from the time of his marriage was inadmissible on this appeal.

## Grounds 1(a) and 2: No factual errors by the Tribunal

1. It is convenient to consider these two grounds first. These grounds essentially allege that the primary judge erred by finding that the Tribunal had made errors in its factual findings concerning when Mr Singh was living in the Caboolture property.
2. As the primary judge recognised, there was an apparent contradiction between the first two C2B letters. The 25 July 2012 C2B letter recorded that the C2B Group’s records had shown that Mr Singh commenced living at the Caboolture property with his sponsor on 19 July 2012. But the second letter (the 17 July 2012 C2B letter) suggested that Mr Singh had commenced living at the Caboolture property from 30 May 2012. Neither before the Tribunal, nor before the Federal Circuit Court, nor before this Court, was there any dispute about the *construction* of the words in the first two C2B letters: see *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389, 397 (the Court). The only question was what factual finding should be made about the date Mr Singh commenced living in the Caboolture property based on the evidence *including* those letters.
3. The Tribunal resolved the apparent conflict in the letters in favour of Mr Singh. The Tribunal’s finding was that the earliest date at which it was prepared to accept that Mr Singh was living at the Caboolture property was 30 May 2012. What the Tribunal did *not* do was accept Mr Singh’s explanation that he had commenced living at the Caboolture property on 14 February 2012. It was open to the Tribunal not to accept Mr Singh’s explanation that he had not told the C2B Group of his earlier occupation of the Caboolture property in order to avoid a rent rise from the earlier date. Neither of the letters supported Mr Singh’s evidence that he commenced living at the Caboolture property on 14 February 2012. On the evidence before the Tribunal, the Tribunal committed no error.
4. I explain below why the additional evidence, the third letter dated 16 January 2016, was not admissible in the Federal Circuit Court in order to attempt to contradict the Tribunal’s conclusion on this point. However, it suffices at this point to say that the third letter did not contradict the Tribunal’s conclusions.
5. The third letter from the C2B Group establishes only that the sponsor had provided the C2B Group with a marriage certificate as “evidence” that Mr Singh would be living at the Caboolture property from the end of April 2012. The third letter does not clearly establish that the sponsor *told* C2B Group on 19 June 2012 that she and Mr Singh had commenced living together from the time of their marriage. However, that inference might have been sought from the letter. If the third letter had been before the Tribunal, and if the Tribunal had been invited to make that inference based on the third letter, then it would have been required to reconcile such a conclusion with the higher rent being charged only from 30 May 2012. Then, even if the Tribunal concluded that the sponsor had *told* the C2B Group that she and Mr Singh lived together from the end of April 2012 the Tribunal would still have been required to accept that they had lived together from the end of April. Ultimately, if that conclusion were reached it still would not necessarily have been inconsistent with the Tribunal’s conclusion that Mr Singh was not living there as at 26 April 2012 (the date of his application) or on 14 February 2012 as he claimed.
6. As I explain below, the fourth C2B letter dated 10 May 2016 provided by Mr Singh on this appeal is not admissible. But, in any event, it also does not contradict this conclusion. If that letter had been before the Tribunal then it is possible that the Tribunal would have accepted that Mr Singh and the sponsor intended to move in together “at the time” of their marriage and that they had informed C2B Group that they moved in together at the time of their marriage. That evidence would have supported the Tribunal’s rejection of Mr Singh’s evidence that he moved in with the sponsor on 14 February 2012. At its highest, the fourth letter might have caused the Tribunal to consider that there was an increased likelihood that Mr Singh and his sponsor had been living together for several days before the time the visa application was made. It does not establish that the Tribunal was factually wrong by failing to accept that Mr Singh was living at the Caboolture property on 26 April 2012 or on 14 February 2012 as he claimed.
7. For completeness, I have also considered a different submission by Mr Singh that the Tribunal erred in relation to another finding of fact. When considering the financial aspects of the relationship, the Tribunal said that the bank statements provided “indicate that the balance never exceeded $400, and most of the time was less than $50”. Mr Singh submitted that this was an error because the bank statements showed a balance of $750. The Tribunal did not make this error. The amount of $750 was the total deposits made from 29 March 2012 until 14 May 2012. After withdrawals the highest running balance was just under $400.
8. The Tribunal made no factual error. Grounds 1(a) and 2 should be upheld.

## Grounds 1(b), 1(c), 3 and 4: Any factual errors were not jurisdictional errors

1. It is convenient to consider these grounds together. Each of these grounds relates to the same essential point. The point is that any error by the Tribunal was not a jurisdictional error. The appellant was not entitled to supplement the record by adducing fresh evidence merely in order to demonstrate an error of fact. And the Tribunal decision should not have been quashed for a mere error of fact within jurisdiction.
2. It is well established that a *mere* incorrect finding of fact (if it is not a jurisdictional fact) or merely unsound reasoning is not a jurisdictional error: *Attorney-General (NSW) v Quin* [1990] HCA 21; (1990) 170 CLR 1, 35-36 (Brennan J); *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231; (2003) 77 ALD 402, 407-408 [20] (the Court); *Minister for Immigration and Citizenship v SZNPG* [2010] FCAFC 51 [20] (North and Lander JJ); *SZRPT v Minister for Immigration and Border Protection* [2014] FCA 24 [36] (Katzmann J).
3. Although an incorrect finding of fact (which is not a jurisdictional fact) will not be a jurisdictional error, it may be arguable that a jurisdictional error exists where an erroneous finding of fact can be characterised as unreasonable or irrational, even if the exercise of power is not expressly or impliedly conditioned upon reasonable and rational fact finding. In *The Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346 [141]-[194], I considered the authorities in relation to erroneous factual findings. The issue had been raised in that case but it had not been fully argued. My view was that recognition of a ground of review based upon unreasonable or irrational fact finding may require development of Australian law. Although there may be arguments in favour of such a development, it should not be undertaken without careful consideration. It involves the boundary of a fundamental divide which still exists in Australian law. That divide is sometimes expressed as one between decisions that are within power and those which are *ultra vires.* It is sometimes described as the difference between a review on the basis of legality and authority and a review on the basis of “merits”. And it is sometimes characterised as an error which is “jurisdictional” and one which is “non-jurisdictional”: see S Gageler “The Master of Words: Who Chooses Statutory Meaning?” in A Connolly and D Stewart (eds) *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (Federation Press, Sydney, 2015) 12, 15.
4. Some recent decisions have suggested that such review of findings of fact might have been contemplated by the decision of Hayne, Kiefel and Bell JJin *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, 365-366 [72] where their Honours spoke of a decision maker committing jurisdictional error by acting unreasonably in a legal sense in relation to “[t]he more specific errors in decision-making, to which the courts often refer” and committing “a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally”. However, the reference to specific errors in decision making was accompanied by a footnote reference to *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 5(2) which is concerned with discretionary exercises of power, rather than findings of fact. Similarly, Gageler J referred to reasonableness as a condition of the exercise of a discretionary *power* as well as where reasonableness is a prerequisite to an exercise of a statutory power or performance of a statutory duty (370-371 [90]). His Honour did not say that mere unreasonable fact finding would suffice.
5. The primary judge proceeded upon the basis that the factual errors he found were jurisdictional errors. His Honour proceeded upon that view on the basis that the errors were, as he described them, the lynchpin, foundation or total basis for the Tribunal’s ultimate decision. It is unnecessary in this appeal to explore whether, if his Honour’s characterisation were correct, the errors would be jurisdictional errors. The reason why it is unnecessary to explore this point is because the errors that his Honour found do not rise above mere factual errors which were one of a number of considerations taken into account by the Tribunal.
6. As I have explained, the Tribunal’s conclusion that Mr Singh had failed to establish that he was in a spousal relationship *at the date of application* (26 April 2012) involved balancing a number of matters. The matters upon which the Tribunal relied adversely to Mr Singh were (i) the limited joint finances of the parties, (ii) the absence of a joint household, and (iii) the Tribunal’s concerns about the nature of their commitment to each other. The latter point was a matter of considerable significance for the Tribunal. As it explained, a significant motivation for Mr Singh’s marriage to his sponsor was to obtain a visa.
7. The evidence concerning the date on which Mr Singh and the sponsor moved in together at the Caboolture property was relevant only to the factor concerning the absence of a joint household. Even with the additional evidence that Mr Singh tendered in the Federal Circuit Court, and which he sought to tender in this Court, the most that the Tribunal *might* have concluded was that Mr Singh moved in with the sponsor several days before the application. Even if the failure to reach such a conclusion were a factual error by the Tribunal, it would only have been one which was at the periphery of the Tribunal’s reasoning. It could not be said to be an erroneous finding of fact which was legally unreasonable or illogical.
8. For that reason also, the evidence that Mr Singh tendered in the Federal Circuit Court, and the fourth C2B letter that he sought to tender in this Court, was inadmissible. In *Waterford v Commonwealth* [1987] HCA 25; (1987) 163 CLR 54, 77-78, Brennan J considered s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) which is concerned with a right of appeal “on a question of law”. His Honour explained that the consequence of the conclusion that there is no error of law simply in making a wrong finding of fact was that “an appellant cannot supplement the record by adducing fresh evidence merely in order to demonstrate an error of fact”. These remarks, made in the context of an appeal on a question of law, are applicable also in relation to judicial review proceedings. As French CJ, Gummow and Bell JJ explained in *Osland v Secretary to the Department of Justice* [2010] HCA 24; (2010) 241 CLR 320, 331 332 [18] in relation to a provision concerning appeals from decisions made under s 50(4) of the *Freedom of Information Act 1982* (Vic), “[d]espite the description of proceedings under the section as an ‘appeal’, it confers original not appellate jurisdiction; the proceedings are ‘in the nature of judicial review’”. See also *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* [2001] HCA 49; (2001) 207 CLR 72, 79 [15] (Gaudron, Gummow, Hayne and Callinan JJ).
9. Grounds 1(b), 1(c), 3 and 4 are also established. If there had been any factual error by the Tribunal as found by the primary judge, that factual error would not have been a jurisdictional error.

## Conclusion and the new evidence

1. The primary judge carefully considered the Tribunal’s decision, and properly allowed considerable latitude for the fact that Mr Singh was not represented. The primary judge focused on the evidence and identified an inconsistency in the evidence concerning the two C2B letters before the Tribunal which he considered had led the Tribunal into error. However, I conclude that the Tribunal did not erroneously interpret the C2B letters and did not commit any error in its findings of fact. Further, any such error would not have been a jurisdictional error.
2. I have addressed above the new evidence of the fourth C2B letter that Mr Singh sought to tender on this appeal. The other, wider ranging, evidence which Mr Singh sought to adduce on this appeal is also inadmissible.
3. Section 27 of the *Federal Court of Australia Act 1976* (Cth) provides a discretion for the court to receive further evidence on an appeal. The discretion is exercised in the interests of justice: *CDJ v VAJ (No 2)* [1998] HCA 76; (1998) 197 CLR 172, 202 [111] (McHugh, Gummow and Callinan JJ). Two relevant considerations are whether (i) the evidence could not with reasonable diligence have been adduced at the hearing below, and (ii) the likelihood that the result would be any different, it often being the case that the evidence will need to be potentially cogent: *Shaw v Yarranova Pty Ltd* [2014] FCAFC 171 [59] (the Court); *Freeman v National Australia Bank Ltd* [2003] FCAFC 200 [57] (the Court). I also take into account the fact that Mr Singh is an unrepresented litigant, and that some of the new evidence which he sought to rely upon involved matters that he said that he had provided to his representative prior to the Tribunal hearing. Nevertheless, I do not consider that the additional evidence is admissible for three reasons.
4. First, this appeal is concerned only with whether the primary judge erred in relation to his conclusions about factual errors concerning the date when Mr Singh commenced cohabitation with his sponsor. I cannot see what notice of contention, or ground of cross-appeal, could reasonably be formulated which would make these new matters of evidence relevant to this appeal. Some of Mr Singh’s new evidence was directed to reagitating matters decided by the Tribunal. Other matters concerned evidence which post-dated his application as I explain below. None of the new evidence was concerned with identifying any error in the primary judge’s reasoning that would have allowed the appeal to be dismissed.
5. Secondly, and in any event, much of the evidence was concerned with matters concerning Mr Singh’s relationship with his sponsor which post-dated 26 April 2012. That was the date of Mr Singh’s application. As I have explained, the Tribunal found that Mr Singh had not established the requirements for a spousal relationship *at that date.* Therefore, it did not need to consider whether the spousal relationship arose later. The new evidence threw very little light on the circumstances surrounding Mr Singh’s relationship with the sponsor *at the date of application.*
6. Thirdly, to the extent that the new evidence threw light on circumstances existing at the date of Mr Singh’s application, I do not consider that the new evidence is particularly cogent. The Tribunal had accepted Mr Singh’s evidence on a number of these matters already including joint social activities. The Tribunal had rejected Mr Singh’s evidence that he was living with his sponsor from 14 February 2012 and none of the new evidence contradicts that conclusion. Although the new evidence might have been the basis for an inference that Mr Singh and his sponsor had begun living together days before his application, the Tribunal’s central concerns about the level of commitment between the parties at the time of the application was not challenged: the relationship had developed over a short period of time and Mr Singh’s concern for his visa status was a significant motivation in the timing of the marriage.
7. The appeal must be allowed. Subject to any submission concerning the fixing of costs, orders will be made as follows.
8. The appeal be allowed.
9. The orders of the Federal Circuit Court of Australia in proceeding no BRG 615 of 2015 made on 4 February 2016 be set aside and in lieu thereof order that:

(a) the first respondent’s application to the Federal Circuit Court of Australia filed on 2 July 2015 be dismissed;

(b) the first respondent pay the appellant’s costs of the Federal Circuit Court of Australia proceeding no BRG 615 of 2015 to be taxed if not agreed.

1. The first respondent pay the appellant’s costs of this proceeding to be taxed if not agreed.

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| I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Edelman. |

Associate:

Dated: 23 May 2016