FEDERAL COURT OF AUSTRALIA

AKT16 v Minister for Home Affairs [2018] FCA 1565

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| Appeal from: | *AKT16 v Minister for Immigration and Border Protection* [2018] FCCA 1004  |
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| File number(s): | VID 526 of 2018 |
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| Judge(s): | **O'CALLAGHAN J** |
|  |  |
| Date of judgment: | 19 October 2018 |
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| Catchwords: | **MIGRATION** – appeal from a decision of a Federal Circuit Court judge raising two grounds of appeal – where leave sought by appellant to raise two further grounds of appeal – where grounds of appeal allege that the Federal Circuit Court failed to find that the Tribunal erred – whether Tribunal erred by determining without a logical and probative basis that evidence relied upon by appellant was false – finding that Tribunal did have logical and probative basis for such a finding – whether Tribunal erred in providing little weight to corroborative letters – finding that it was open to Tribunal to give little weight to corroborative letters – whether Tribunal erred in its consideration of letter from a doctor regarding the appellant’s medical state – finding that it was open to the Tribunal to isolate information gaps in the letter – finding that Tribunal had no obligation to furnish those information gaps to the appellant given appellant had provided the letter to the Tribunal – whether Tribunal’s political influence from the Australian government gives rise to apprehended bias – finding of no evidence to support a claim of apprehended bias – appeal dismissed – leave to raise two new grounds of appeal refused  |
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| Legislation: | *Migration Act 1958* (Cth), ss 65, 424A  |
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| Cases cited: | *BZD17 v Minister for Immigration and Border Protection* [2018] FCAFC 94*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337*Isbester v Knox City Council* (2015) 255 CLR 135*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611*Minister for Immigration and Multicultural Affairs, Re; Ex parte Applicant S20/2002* (2003) 198 ALR 59; [2003] HCA 30*SZDGC v Minister for Immigration and Citizenship* [2008] FCA 1638*VUAX v Minister for Immigration and Multicultural & Indigenous Affairs* (2004) 238 FCR 588  |
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| Date of hearing: | 3 September 2018 |
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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: | 57 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Counsel for the First Respondent: | Ms N Campbell |
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| Solicitor for the First Respondent: | Clayton Utz |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

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|  | VID 526 of 2018 |
|   |
| BETWEEN: | AKT16Appellant |
| AND: | MINISTER FOR HOME AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | O'CALLAGHAN J |
| DATE OF ORDER: | 19 october 2018 |

THE COURT ORDERS THAT:

1. The appellant’s application to amend his notice of appeal to include new grounds 3 and 4 be refused.
2. The appeal be dismissed.
3. The appellant pay the first respondent’s costs, as agreed or assessed.

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

REASONS FOR JUDGMENT

O’CALLAGHAN J:

## Introduction

1. The appellant appeals from a decision of a judge (the **primary judge**) of the Federal Circuit Court of Australia (the **Federal Circuit Court**), dismissing an application for judicial review of a decision of the Administrative Appeals Tribunal (the **Tribunal**) made on 22 January 2016 affirming a decision of a delegate of the First Respondent (the **Minister**) to refuse to grant the appellant a Protection (Class XA) visa under s 65 of the *Migration Act 1958* (Cth) (the **Migration** **Act**).

## Background

1. The appellant is a citizen of Sri Lanka of Tamil ethnicity and Hindu religion. He arrived in Australia as a so-called “irregular maritime arrival” on 22 July 2012 and applied for a Protection (Class XA) visa (the **visa**) on 20 November 2012.
2. On 13 September 2013, the delegate refused to grant the visa to the appellant.
3. The appellant then applied to the Tribunal for review of that decision.

## The decision of the Tribunal

1. On 22 January 2016, the Tribunal affirmed the delegate’s decision.
2. The appellant claimed to fear harm from the Sri Lanka Criminal Investigation Department (**CID**) and Sri Lankan Authorities arising from his imputed political opinion in support of the Liberation Tigers of Tamil Eelam (**LTTE**), his Tamil Ethnicity and his status as a failed asylum seeker or returnee.
3. The Tribunal accepted that the appellant was a co-owner of an electrical shop with his cousin, but did not accept that the appellant’s cousin was a member of the LTTE. The Tribunal accepted that it was plausible that, in 2004, two military personnel were found dead 200 metres in front of his shop. However, it did not accept that the appellant and his cousin were taken into detention by the army and interrogated.
4. The Tribunal highlighted a number of inconsistencies and discrepancies with the appellant’s claim, in particular, the length of the alleged detention, what occurred when he was in detention, whether the appellant was arrested with his cousin or separately, and whether they were detained together. The Tribunal found that the appellant had provided inconsistent evidence in relation to his account of what was a significant event and that it did not accept his claims as credible. The Tribunal accepted as plausible that the appellant had witnessed an army truck explode in front of his shop, however, given the inconsistencies in what occurred after the event, the Tribunal did not accept the claim that the army began to pull shop owners out on to the street and beat them or that his cousin was arrested while the appellant managed to escape. The Tribunal did not accept the shop was destroyed on the night of the explosion.
5. The Tribunal rejected the appellant’s claims that he fled to Colombo after the explosion; that the appellant’s parents were visited by the CID or army asking about the appellant; that the army threatened to kill his parents; that his parents were required to report to an army camp; or that his parents were arrested and detained.
6. The Tribunal did not accept that the appellant had problems leaving the country – rather, it found that he obtained his passport through the usual channels in 2004, and did not accept that he required assistance to pass through the airport.
7. Further, the Tribunal was not satisfied by the appellant’s representative’s explanation of the significant discrepancies in the appellant’s account.
8. It followed that the Tribunal did not accept that the appellant was of any interest to the authorities in the past and did not accept that upon his return to Sri Lanka he would face a real chance of persecution, now or in the reasonably foreseeable future.
9. The appellant also relied on two letters, by way of corroboration, one from a priest, one from a member of parliament (the **MP**).
10. The letter from the MP was in these terms (errors in original):

TO WHOM IT MAY CONCERN

This is to certify that [the appellant] and [the appellant’s son] of … are known to me very well as they comes from my Electoral Administrative purview and I know that [the appellant] was running a Welding Shop …

Further, I certify that [the appellant] made a report to me that the welding shop of his son was burnt was demolished by the unknown persons of the suspicion that some persons were killed and injured by the Claymore incident occurred in 2005 at Veppankulam, Vavuniya and following that incident some were arrested and [the appellant] was searching by the Security Forces and due to the fear of life he left from this country to save his life and also he is being searching by the Security Forces.

Hence, I feel that if he comes to this country he may be face trouble and danger to his life.

Hence, I request the authority to grant him asylum at where he is living and also it is advisable him to live outside of this country.

1. The letter from the priest was in these terms:

TO WHOM IT MAY CONCERN

This is to sincerely state that [the appellant] … presently residing in your country is well known to me.

He is known to me since his school days on wards and he studied up to the O/L (ordinary level). After his studies he opened a welding shop … and some people were killed in the attack. Following that incident his welding shop was burnt and some were arrested by Sri Lankan army on suspicion. [The appellant] too was being sought after. Due to these threatening situations he fled to your country seeking for asylum.

Even after his departure from the country some unknown armed forces to his house and threatened his family members and relatives to bring him back to Sri Lanka.

Therefore if he is in Sri Lanka or comes back to Sri Lanka he would be in danger of death. Therefore please be good enough to accept him in your country.

 Thank you.

 Yours truly.

 Rev. Fr. A. Rajanikanth

1. The Tribunal said this of those letters at [44]-[45] (referring to the appellant as the “applicant”):

The Tribunal has also taken into consideration the letters from N.Sivasakythy Ananthan, Member of Parliament, Vanni district dated 27 May 2013 and Father Rajanikanth, Parish Priest of St Joseph’s Church, Vappankulam dated 4 June 2013 which both refer to the “Claymore” attack that took place in 2005 outside the applicant’s shop and state that the applicant’s shop was burnt and the applicant was being sought. Given the Tribunal’s concern regarding the credibility of the applicant’s claims, for the reasons discussed above, the Tribunal places little weight on them.

Based on the above, the Tribunal does not accept that the applicant was of any interest to the authorities in the past, in relation to the incident in 2004 when two army personnel were found dead near to his shop or the bomb explosion in 2005 which resulted in the death of a number of senior army officers. The Tribunal does not accept that the applicant’s shop was destroyed, that his cousin was arrested and detained or that the applicant fled to Colombo and hid there until he departed the country in February 2007. Nor does it accept whereabouts, that threats were made to kill his parents and him, that either of his parents were arrested and detained or that they were made to sign a document stating that he was a member of the LTTE. As such, the Tribunal does not accept that on the applicant’s return to Sri Lanka, he would face a real chance of persecution, now or in the reasonably foreseeable future, from the army, the CID, the police or anyone else because they believe he was responsible for these incidents or because they suspect him of being associated with the LTTE.

1. As to the appellant’s health, the Tribunal had regard to a letter from Dr Nagendran dated 12 May 2015 which stated that the appellant was suffering from poorly controlled diabetes and depression and anxiety relating to the emotional trauma and violence that was subjected to in Sri Lanka.
2. The letter from Dr Nagendran was relevantly in these terms:

[The appellant] is suffering from poorly controlled diabetes and is under my care. He is an asylum seeker from Sri Lanka. His diabetes is under regular review and is currently not controlled well. I am worried his diabetes would further deteriorate with worsening co-morbidities should he return to Sri Lanka currently.

He is also suffering from significant depression and anxiety related to the emotional trauma and physical violence he has been subjected to in Sri Lanka. He has exhibited suicidal ideation in the past. Please kindly do take these factors into consideration.

1. The Tribunal was not satisfied that the medical evidence supported the argument that the appellant’s evidence at the hearing was affected by his medical condition. The Tribunal reasoned as follows (at [40]-[43]):

The Tribunal has taken into consideration the applicant’s evidence in the hearing that he was hit in the head and has a sugar problem so is unable to recollect. When asked who hit him in the head and when, the applicant stated that he was hit all over the place by the army. The applicant claimed that he had been beaten up quite intensely and did not remember until now but after being questioned it was all coming back to him. As was put to the applicant in the hearing, the Tribunal has difficulty accepting that he would only remember well into his review hearing that he had been beaten intensely and not during any of the previous interviews he had or discussions with his lawyers. Given the Tribunal’s concern regarding the applicant’s credibility generally and his delay in raising this claim regarding the hit to his head, it does not accept that the applicant has any problems recollecting as a result of any beatings he received from the army to his head.

In relation to his sugar problem, the Tribunal notes that following the hearing it received a letter from Dr Nagendran dated 12 May 2015 in which it was stated that the applicant is suffering from poorly controlled diabetes and is suffering from depression and anxiety related to emotional trauma and physical violence he had been subjected to in Sri Lanka and has exhibited suicidal ideation in the past. The Tribunal notes that there is nothing in this document to indicate when the applicant first consulted Dr Nagendran or how many times the applicant has seen the doctor, when the applicant was diagnosed with anxiety and depression or what basis the diagnosis was made or when in the past the applicant exhibited suicidal ideation. Further, in relation to the applicant’s diabetes, there is no information provided by Dr Nagendran to indicate when the applicant was diagnosed with this condition, why the applicant’s diabetes is “currently not controlled well” despite being under regular view or on what basis the doctor worries that the applicant’s diabetes would deteriorate further if he was returned Sri Lanka. While it was submitted by the applicant’s adviser that this would impeded the applicant’s ability to concentrate during long hearings, the Tribunal is not satisfied on the somewhat limited medical evidence before it, which post-dates the hearing, that the applicant’s evidence was affected by his medical condition. Nor does the Tribunal accept the applicant’s adviser’s contention that the doctor’s statement in his letter that the applicant suffers from depression and anxiety as a result of past trauma experienced, is evidence that the applicant has been subjected to trauma in the past or that it substantiates the applicant’s claims regarding his past experiences as submitted given that the doctor’s opinion is based on the applicant’s own self reporting. The Tribunal also does not accept on the limited medical evidence provided in the letter from the applicant’s doctor that the applicant’s depression and anxiety makes it difficult for him to recount precise details of his past, as submitted by the applicant’s adviser.

The Tribunal has also taken into consideration the applicant’s evidence that a lot of the time has passed since these events took place and he has forgotten many things, however the Tribunal does not accept that this adequately explains the numerous discrepancies in the applicant’s evidence. While the Tribunal accepts that these events happened a number of years ago and that this may, in some circumstances, make recalling aspects of what occurred challenging, the Tribunal has had regard to the significance of these events to the applicant’s claim for protection. Although a passage of time may explain a few trivial inconsistencies and discrepancies, the Tribunal finds that the number of differences in the applicant’s evidence, sometimes of quite significance, undermines the credibility of the applicant’s claims.

The Tribunal has had regard to the applicant’s advisers submissions regarding a number of factors which should be taken into consideration in assessing the Tribunal’s credibility concerns including the applicant’s lack of familiarity with the formal interview process, the fact he comes from a country where he had a fear of the authorities therefore it is plausible he would have a lack of trust in authorities generally, making it difficult for him to speak openly to them in Australia and the fact the applicant has been required to speak through an interpreter through the process. The Tribunal does not accept, even cumulatively, that the factors raised by the applicant’s adviser adequately explains the numerous significant discrepancies in the applicant’s account of his personal experiences, as discussed above, or dispels the Tribunal’s concerns regarding the credibility of his claims.

1. The appellant sought review of that decision in the Federal Circuit Court on 24 February 2016.

## The decision of the Federal Circuit Court

1. At the hearing, the appellant told the Federal Circuit Court that he no longer relied on the grounds set out in his application or affidavit, but relied only on his written submissions. Those submissions were reproduced at [12] of the decision below, which was as follows:

**3. Errors of Law**

I would like to put forward the following points which have been suggested to me as errors of law in my case:

Per paragraph 26 of the Tribunal’s Decision Record, the Tribunal expressed its concern regarding the credibility of the applicant’s claims based on a number of inconsistencies in his evidence in relation to “quite significant facts, several implausibility’s (sic) in his evidence and the introduction of new claims during the hearing.” However, based on the analysis below, the inconsistencies are not significant, especially given the circumstances of the applicant in terms of the time that has passed since the events, the applicant’s deteriorating mental state and that such inconsistencies are in fact consistent with the suffering of a traumatic event. The Tribunal’s reliance on these immaterial inconsistencies to dismiss the applicant’s entire claims, including written supporting letters from a Minister and a Priest, is an error of law.

*2004 Incident*

In paragraph 32, the Tribunal states that given inconsistencies as to whether [the] applicant was arrested by himself or with Suresh, whether they were kept separately or together while in detention and whether they were detained for a few hours and released the same day or detained overnight or for a period of one week, the Tribunal did not accept that the incident occurred.

In *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317, (2013) 212 FCR 99 at 121, Robertson J pointed out that credibility findings are open to judicial review:

[78] It is not, in my opinion, the case that a finding in relation to credit may never found a conclusion of jurisdictional error, particularly where a finding on credit on an objectively minor matter of fact is the basis for a tribunal’s rejection of the entirety of an applicant’s evidence and the entirety of the applicant’s claim.

Robertson J went on to [conclude] that a finding on the intrinsic lack of credibility of the applicant’s evidence was flawed when the Tribunal did not consider corroborative written evidence.

Robertson J also concluded that the failure to consider a central issue in this case, being a university results transcript, meant that the considerations necessary to found or disprove a protection claim were not taken into account.

The inconsistencies by the applicant relate to minor details of the main incident, being the arrest of the applicant and subsequent torture. The applicant has never been inconsistent in relation to the overall incident, being his arrest and torture. The inconsistencies in the applicant’s assertions are not “significant facts” as asserted by the tribunal, and are understandable given the length of time that has passed, the applicant’s mental health (as corroborated by a letter from a doctor), and is actually consistent with the suffering of a traumatic experience.

In paragraph 32, the Tribunal further states that “he has provided varying evidence in relation to facts that are central to his claims and in light of the number of discrepancies in his account of this one particular significant event, the Tribunal does not accept that his claims are credible. As such, the Tribunal does not accept that following his release from detention, the army or the STF passed by the applicant’s shop every day in the morning and threatened him saying “if there were any future problems you people will not be alive.”

In *SZLGP v Minister for Immigration & Citizenship* [2008] FCA 1198, Gordon J (then as a Federal Court Justice) concluded that if a tribunal is to find that an applicant’s evidence has been fabricated, the tribunal must make specific findings in that regard. Furthermore findings on the evidence have to be based on probative material and be logically based. Gordon J concluded:

24. And finally, even if the reasons for decision are to be read as making a finding or inferring that the failure to name a village in a statement provided in support of the application for a protection visa is a fabrication of a “fundamental aspect” of the first appellant’s claims or supports a finding or inference of fact that some other unidentified “fundamental aspect” of the first appellant’s claims has been fabricated, then I am of the view that **those findings or inferences of fact are not grounded upon probative material and logical grounds**. (emphasis in applicant’s submissions)

The rationale that as there are inconsistencies in the details of his arrest, that subsequent threats did not occur is not grounded upon probative material or logical grounds.

*2005 Incident*

The Tribunal did not accept the applicant’s claims in relation to the 2005 incident on the basis that in the interview with the delegate, the applicant mentioned that he ran away from the army when they “tried to hold him.” On escaping, the applicant claimed that he sat down first and after that he went home. In his hearing with the Tribunal, the applicant mentioned that he did not have any contact with the army on escaping the shop, and he went to a friend’s place and stayed there until evening and then he went home. There was also an inconsistency in whether the cousin was detained for 3 to 4 months as mentioned to the Tribunal or 7 months as mentioned in the advisor’s submission. We note that there is no significant difference in the two versions of the stories as the Tribunal alleges, so as to entirely dismiss the applicant’s evidence. The discrepancies are minor in nature, especially given the time that has passed, the applicant’s deteriorating mental condition, and corroborating written letters from a Member of Parliament in Sri Lanka and a Priest. The Tribunal also placed little weight on these letters based on its adverse finding of credibility.

As stated by Robertson J in *Minister for Immigration and Citizenship v SZRKT*, such a finding on the intrinsic lack of credibility of the applicant’s evidence was flawed when the Tribunal did not consider corroborative written evidence.

Similar to the above, the discrepancies raised by the tribunal with respect to the length of time the applicant’s cousin was detained or the treatment of the applicant’s parents, which led the Tribunal to not accept the claims, are again immaterial given the consistency of the overall event - that the applicant’s cousin was detained or the applicant’s parents were harassed. This is especially so given the length of time that has passed, the applicant’s mental health (as corroborated by a letter from a doctor), and that such inconsistencies in minor details are actually consistent with the suffering of a traumatic experience. Given these circumstances of the applicant, the dismissal of the applicant’s claims based on such minor inconsistencies is an error of law.

## These proceedings

1. In this court, the appellant (who was self-represented but, with the assistance of an interpreter, relied on a detailed written submission prepared by someone with legal training) seeks leave to rely on an amended notice of appeal raising four grounds of appeal:
2. The Federal Circuit Court failed to find that the Administrative Appeals Tribunal fell into jurisdictional error in determining without a logical and probative basis that all my evidence upon which my claim was based was false.
3. The Federal Circuit Court failed to find that the Administrative Appeals Tribunal fell into jurisdictional error in placing little weight on corroborative letters provided by:
	1. N Sivasakythy Ananthan, Member of Parliament, Vanni district dated 27 May 2013; and
	2. Father Rajanikanth, Parish Priest of St Joseph’s Church, Veppankulam dated 4 June 2013.
4. The Federal Circuit Court failed to find that the Administrative Appeals Tribunal fell into jurisdictional error in dismissing the letter received from Dr Nagendran dated 12 May 2015:
	1. stating that the applicant suffers from depression and anxiety as a result of past trauma experienced, on the basis that the doctor's opinion is based on the applicant's own self reporting; and
	2. failing to provide an opportunity to furnish the information gaps which the Administrative Appeals Tribunal identified with respect to the doctor’s letter.
5. The Federal Circuit Court failed to find that the Administrative Appeals Tribunal fell into jurisdictional error on the basis that the political influence the government at the time had on the constituents of the adjudicating tribunal members of the Migration and Refugee Decision of the Administrative Appeals Tribunal, around the time the Administrative Appeals Tribunal heard my case, gives rise to apprehended bias.
6. The Minister opposed the appellant being granted leave to rely on grounds 3 and 4 for the first time on appeal.

### Ground 1

1. By Ground 1 the appellant alleges that the primary judge failed to find that the Tribunal fell into jurisdictional error in determining without a logical and probative basis that the evidence upon which the appellant’s claim was based was false.
2. To succeed on this ground, the appellant must show that the Tribunal’s state of satisfaction was one which no rational or logical decision-maker could arrive at on the same evidence.
3. As Crennan and Bell JJ said in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [130] :

In the context of the Tribunal’s decision here, “illogicality” or “irrationality” sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is “clearly unjust” or “arbitrary” or “capricious” or “unreasonable” in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case.

1. It is, in this case, quite impossible to say that no rational or logical decision maker could have arrived at the conclusions (as the Tribunal did in this case) that the appellant’s evidence was not to be accepted because of numerous and specifically identified inconsistencies, implausibilities, embellishments and discrepancies identified in the evidence given by the appellant to the Tribunal. They are identified and explained at [26]-[43] of the Tribunal’s statement of decision and reasons. The reasons are lengthy and detailed.
2. The inconsistencies, implausibilities, embellishments and discrepancies there identified by the Tribunal are not minor matters. Nor, as the Tribunal found, were they adequately explained on the basis of the passage of time, the appellant’s claimed memory problems or the medical evidence led.
3. The primary judge was clearly correct to find that it was open to the Tribunal to rely on those inconsistencies, implausibilities, embellishments and discrepancies in forming its view about the truthfulness of the appellant’s claims.
4. Ground 1 must be dismissed.

### Ground 2

1. Ground 2 alleges that the primary judge failed to find that the Tribunal fell into jurisdictional error in placing little weight on corroborative letters provided by “N Sivasakythy Ananthan, Member of Parliament, Vanni District, dated 27 May 2013” and “Father Rajanikanth, Parish Priest of St Joseph's Church, Veppankulam dated 4 June 2013”.
2. At [29], the primary judge recorded how the Tribunal dealt with the letters, namely:

… The Tribunal dealt with the letters of support as follows:

[44] The Tribunal has also taken into consideration the letters from N. Sivasakythy Ananthan, Member of Parliament, Vanni district dated 27 May 2013 and Father Rajanikanth, Parish Priest of St Joseph’s Church, Veppankulam dated 4 June 2013 which both refer to the “Claymore” attack that took place in 2005 outside the applicant’s shop and state that the applicant’s shop was burnt and the applicant was being sought. Given the Tribunal’s concern regarding the credibility of the applicant’s claims, for the reasons discussed above, the Tribunal places little weight on them.

1. Ultimately, given the Tribunal’s concern regarding the credibility of the appellant’s claims, it was open to the Tribunal to give little weight on the letters. As Gleeson CJ said in *Minister for Immigration and Multicultural Affairs, Re; Ex parte Applicant S20/2002* (2003) 198 ALR 59; [2003] HCA 30 at [12]:

It was contended that this passage shows that the tribunal member adopted a flawed approach to her evaluation of the evidence, failing to assess the evidence of the applicant/appellant in the light of the corroborating evidence, and giving no weight to the evidence of the corroborating witness for reasons that had nothing to do with the quality of that evidence. The essence of the complaint is that the tribunal failed to consider the evidence as a whole, but first considered, and disbelieved, the evidence of the applicant/appellant, without taking account of the corroboration, and then considered and rejected the corroboration because of the rejection of the evidence of the applicant/appellant. I do not accept that this is a fair criticism of the tribunal's reasons. **In my view, all that the member was saying was that, for reasons already given at length, she found the applicant/appellant’s story implausible, and in some important respects unbelievable, and that she also rejected the evidence of the corroborating witness, even though she had no separate reason to doubt his credibility other than the reasons that she had already given for rejecting the claim she was considering. The member could have expressed herself more clearly. It is not necessarily irrational, or illogical, for a finder of fact, who is convinced that a principal witness is fabricating a story, which is considered to be inherently implausible, to reject corroborative evidence, even though there is no separate or independent ground for its rejection, apart from the reasons given for disbelieving the principal witness**.

(Emphasis added.)

1. And so it is here. It was open to the Tribunal to give little weight to the letters because, for reasons it has already given (at [22]-[43]) it found the appellant’s story to contain numerous and specifically identified inconsistencies, implausibilities, embellishments and discrepancies, including with respect to the matters about which the MP and the priest had made general assertions of matters told to them by the appellant. For example, the Tribunal made the following findings about his claims that his shop had been destroyed at [33]-[36]:

The applicant claimed that the next incident occurred in 2005. He claimed that in 2005 he witnessed an army truck explode in front of his shop, killing 4 or 5 senior officers including an army commander. In the hearing, the applicant claimed that he was in his shop, at the counter at the time of the explosion and his cousin Suresh was putting items on the shelves. When asked what he did after he saw the bomb explosion, the applicant stated that he went through the rear of the shop and crossed over the fence and ran away. The applicant’s evidence in the hearing was that he did not have any contact with the army between witnessing the explosion and leaving the shop through the rear and running away. The applicant claimed that he went to a friend’s place about 1.5 to 2km from his shop and stayed there until evening and the problems had subsided and then he went home. He claimed he stayed at his home that night but when he heard dogs barking he thought people were coming so he went to the back of their land and the next day travelled to Colombo, where he stayed at his grandmother’s house in Wellawatta for 8 or 9 months or thereabouts. The applicant claimed that his cousin Suresh was arrested and “beaten very solidly”, although he did not see him, and detained for three to four months.

In contrast to the applicant’s evidence in the hearing regarding this particular incident, the Tribunal notes that according to the delegate’s decision, a copy of which was provided to the Tribunal, the applicant had claimed that ten minutes after the explosion the army came and got hold of his cousin Suresh and beat him and asked him for information. He claimed the army took Suresh and they also caught him but he managed to escape. The Tribunal notes according to the decision, when asked if the army was holding him before he escaped, the applicant said they tried to hold him but he ran away. The applicant also claimed, when asked where he went after he escaped from the army that he sat down first and after that he went home. The Tribunal notes that there was no mention made that he had gone and stayed with a friend for some time, until problems subsided, before going to his home.

While the Tribunal accepts as plausible that the applicant may have witnessed an explosion in 2005 which resulted in the death of a number of senior army officers, including a Commander, based on the inconsistencies in the applicant’s evidence regarding what transpired after this particular event, the Tribunal does not accept the applicant’s claim that the army subsequently began pulling shop owners out on the street and beat them or that his cousin was arrested and detained but the applicant managed to escape are credible. The Tribunal notes in relation to his cousin’s alleged detention, the applicant claimed in the hearing that his cousin was held for 3 or 4 months, however in the submission from his adviser received on 12 December 2013, it was stated that the applicant’s cousin was detained for 7 months. The Tribunal therefore does not accept the applicant’s cousin was detained in 2005 following this incident.

The Tribunal therefore does not accept that the applicant’s shop was destroyed the same night as the explosion. The Tribunal has taken into consideration the applicant’s evidence in his protection his visa application regarding his employment history, that he worked at Suresh Electrical Store from 2004 to 2007. The Tribunal finds it implausible that if the applicant had run away to Colombo in the 6th or 7th month of 2005 when this incident occurred, as he claimed in the hearing, and his shop had been destroyed around that time, that he would state that he was employed in that shop for another year and a half after it allegedly no longer existed.

1. The appellant relied on the judgment of Finkelstein J in *SZDGC v Minister for Immigration and Citizenship* [2008] FCA 1638 at [23]. But this is not a case where the Tribunal failed to give proper, genuine, and realistic consideration to evidence of alleged corroboration (cf, more recently, *BZD17 v Minister for Immigration and Border Protection* [2018] FCAFC 94 at [45]). The letters relied on (set out at [15] and [16] above) do not contain assertions of fact which in any meaningful way can be said to corroborate the appellant’s contentions. Unlike *BZD17 v Minister for Immigration and Border Protection* [2018] FCAFC 94, where the Tribunal had swept to one side detailed and important evidence of “the only witness who claimed to have met the appellant and Mr B in Cameroon some three years before the appellant left for Australia and applied for a protection visa, to have personally observed the relationship between the appellant and Mr B, and to have personal knowledge of their active involvement in his organisation concerned with the human rights needs of gay people in Cameroon”, here the letters from the MP and the priest do no more than assert that the incident at Claymore occurred (something that the Tribunal accepted), and make general claims that the appellant’s life would be in danger if he were to return to Sri Lanka. In circumstances where the appellant’s own evidence was not accepted, including, among many other things, with respect to his claim that his shop was burnt down (a central assertion of the letters) it was open to the Tribunal to place little weight on these non-specific claims in light of its detailed findings set out above.
2. It follows that the primary judge was correct to reject that ground of appeal. It must be dismissed.

### Ground 3

1. By proposed ground 3, the appellant alleges that the primary judge failed to find that the Tribunal fell into jurisdictional error in dismissing the letter received from Dr Nagendran dated 12 May 2015. The appellant submitted that it is “somewhat irrational” not to have regard to the doctor’s report on the ground that it was based on “self-reporting” because such reports are “largely driven by self-reporting”.
2. This issue was not raised below. The appellant therefore needs leave to raise it in this appeal. The Minister submits that leave should not be granted because, leaving aside the fact that the appellant gives no explanation for not raising the point below, the ground has no merit. See *VUAX v Minister for Immigration and Multicultural & Indigenous Affairs* (2004) 238 FCR 588, 598-599 at [46]-[48]:

In our view, the application for leave to rely upon the sole ground of appeal now raised should be refused. Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so: *O’Brien v Komesaroff* (1982) 150 CLR 310; *H v Minister for Immigration & Multicultural Affairs;* and *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [20]-[24] and [38].

In *Coulton v Holcombe* (1986) 162 CLR 1, Gibbs CJ, Wilson, Brennan and Dawson JJ observed, in their joint judgment, at 7:

It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.

The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused. In our view, the proposed ground of appeal has no merit. There is no justification, therefore, for permitting it to be raised for the first time before this Court.

1. It is clear that the Tribunal considered and weighed in the balance Dr Nagendran’s letter at [40]-[43] of its reasons, set out above at [19] above. It was clearly open to the Tribunal not to give weight to the letter for the numerous reasons it gave, namely that there was nothing in the letter to indicate when the appellant first consulted Dr Nagendran or how many times he had seen the doctor, when he was diagnosed with anxiety and depression, or what basis the diagnosis was made, or when in the past the appellant exhibited suicidal ideation, when the appellant was diagnosed with diabetes, why the appellant’s diabetes was “currently not controlled well” or on what basis the doctor worried that the appellant’s diabetes would deteriorate further if he were returned Sri Lanka. It was clearly also open to the Tribunal to find that it on the basis of that brief letter that the appellant’s ability to concentrate during long hearings was affected by his medical condition.
2. As for the Tribunal’s reference to “self-reporting” (“Nor does the Tribunal accept the [appellant’s] contention that the doctor’s statement in his letter that the applicant suffers from depression and anxiety as a result of past trauma experienced, is evidence that the applicant has been subjected to trauma in the past or that it substantiates the applicant’s claims regarding his past experiences as submitted given that the doctor’s opinion is based on the applicant’s own self reporting”), the Tribunal was doing nothing more than making the self-evident point that in the context of all the evidence, the fact that the doctor was purporting to assert that the appellant suffered depression and anxiety “related to” events in Sri Lanka was an assertion to which it gave no weight.
3. There is no discernible illogicality resulting in a jurisdictional error that arises from that finding, or any of the findings in relation to the doctor’s letter.
4. The appellant also complains that he was not given an opportunity to furnish the “information gaps” in the letter received from Dr Nagendran dated 12 May 2015. On this issue, the appellant made the following written submission:

The AAT a paragraph 41 also highlights information missing in the doctor’s report such as when I first consulted the doctor, how many times I’ve seen the doctor, when I was first diagnosed with anxiety and depression or on what basis the diagnosis was made. I submit that I was never given an opportunity to clarify these points which I could have easily done through having the doctor expand upon his report. I submit that this again infects the AAT’s decision with jurisdictional error.

1. The appellant does not explain why this alleged failure infects the Tribunal’s decision with jurisdictional error and, as the Minister correctly submitted, in the circumstances the Tribunal was under no obligation to give the appellant such an opportunity.
2. To the extent that it might be assumed the appellant seeks to invoke s 424A of the Migration Act in support of this claim, it is clear that any such invocation is misplaced.
3. Section 424A(1) of the Migration Act provides:

(1) Subject to subsections (2A) and (3), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and

(c) invite the applicant to comment on or respond to it.

1. Section 424A(3) qualifies the Tribunal’s obligation to provide particulars of information, and, of relevance in this instance, s 424A(3)(b) provides that s 424A does “not apply to information…that the applicant gave for the purposes of the application for review.” The “information gaps” (insofar as they might be deemed “information” for the purposes of s 424A) were given by the applicant to the Tribunal and consequently s 424A of the Migration Act was not enlivened. Put simply, the appellant cannot ask the Tribunal to give clear particulars of information of something that he provided to the Tribunal.
2. Leave to amend the notice of appeal to include proposed ground 3 will accordingly be refused.

### Ground 4

1. By proposed ground 4, the appellant alleges that the primary judge failed to find that the Tribunal fell into jurisdictional error on the basis that the political influence the government at the time had on the constituents of the adjudicating tribunal members of the Migration and Refugee Division of the Administrative Appeals Tribunal at the time that the case was heard.
2. The appellant seeks to make a claim of apprehended bias on the part of the Tribunal on the basis that the government had “political influence” over it, and presumably any other Tribunal constituted at whatever relevant time is said to matter.
3. The applicant sought to tender a number of documents to make good his case. They were documents 7-15 in a folder that was handed up during the hearing. I have reviewed those documents. I reject the tender because, quite apart from anything else, the documents relate to a time period that has no explicable connection with this case, and they have no bearing on the claim sought to be advanced.
4. Where apprehension of bias is alleged in relation to an administrative proceeding, the test is whether a hypothetical fair-minded lay person, properly informed as to the nature of the proceedings or process, might reasonably apprehend that the decision-maker might not have brought an impartial mind to making the decision: *Isbester v Knox City Council* (2015) 255 CLR 135 at [20]-[23] per Kiefel, Bell, Keane and Nettle JJ, at [57] per Gageler J) (***Isbester***). In that case Kiefel, Bell, Keane and Nettle JJ said at [20]-[23]:

[20] The question whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made.

[21] The principle governing cases of possible bias was said in *Ebner [v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337] to require two steps to be taken in its application. The first requires the identification of what it is said might lead a decision-maker to decide a case other than on its legal and factual merits. Where it is said that a decision-maker has an “interest” in litigation, the nature of that interest must be spelled out. The second requires the articulation of the logical connection between that interest and the feared deviation from the course of deciding the case on its merits. As Hayne J observed in [*Minister for Immigration and Multicultural Affairs v] Jia Legeng* [(2001) 205 CLR 507], essentially the fear that is expressed in an assertion of apprehended bias, whatever its source, is of a deviation from the true course of decision-making.

[22] It was observed in *Ebner* that the governing principle has been applied not only to the judicial system but also, by extension, to many other kinds of decision-making and decision-makers. It was accepted that the application of the principle to decision-makers other than judges must necessarily recognise and accommodate differences between court proceedings and other kinds of decision-making. The analogy with the curial process is less apposite the further divergence there is from the judicial paradigm. The content of the test for the decision in question may be different.

[23] How the principle respecting apprehension of bias is applied may be said generally to depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker. The principle is an aspect of wider principles of natural justice, which have been regarded as having a flexible quality, differing according to the circumstances in which a power is exercised. The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made as well as to have knowledge of the circumstances leading to the decision.

(Footnotes omitted.)

1. Even affording the “wider principles of natural justice” the most “flexible quality” in this case, it cannot be said that a properly informed and fair minded lay person might reasonably apprehend that the decision-maker might not have brought an impartial mind to making the decision. The appellant does not point to any conduct or particular interest on the part of the Tribunal member who decided his case. The submission sought to be advanced is that the Tribunal is influenced by the relevant Department and the Australian Government due to the circumstances surrounding its creation, the manner of appointment of its members and by reference to government policies concerning maritime arrivals in Australia (in particular, in the year 2013). That case cannot possibly succeed.
2. Leave to amend must be refused. The ground was not argued below, and there is not a scintilla of evidence to support it.

## Other matters

1. The appellant also relied on a written document entitled “Submission for Appellant: Response to Minister’s Submission”. It was marked as Exhibit 1. Having considered the contents of that document (which, like the appellant’s written submission, was obviously prepared by someone with legal training) I find that it does not add any additional submission of substance.
2. The appellant also read in Tamil a statement which he said he had prepared. It was translated by the interpreter and is recorded in the transcript. Although I confess that I found the statement difficult to follow, to the extent that I did follow it, it too did not disclose any additional issue of substance.

## Conclusion

1. The primary judge was correct to find that the decision of the Tribunal was not affected by jurisdictional error.
2. The proceeding must be dismissed with costs.

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| I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Callaghan. |

Associate:

Dated: 19 October 2018