FEDERAL COURT OF AUSTRALIA

AFD16 v Minister for Immigration and Border Protection [2020] FCA 964

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| Appeal from: | *AFD16 & Anor v Minister for Immigration & Anor* [2016] FCCA 2810  |
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| File number: | NSD 2129 of 2016 |
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| Judge: | **PERRY J** |
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| Date of judgment: | 10 July 2020 |
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| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court (FCC) dismissing application for judicial review of decision by Administrative Appeals Tribunal (AAT) affirming decision not to grant the appellant family protection visas – where father and mother claimed among other things to fear that their extended family would subject their minor daughters to female genital mutilation if returned to Egypt – where psychiatric evidence that father suffered from serious mental illness pointed to significant and relevant disadvantages attending the giving of his evidence – where AAT failed comprehensively to engage in a meaningful consideration of the psychiatric evidence in making adverse credibility findings including deliberate dishonesty, despite ostensibly accepting the medical opinion – where AAT accepted psychiatric diagnosis but not symptoms underpinning diagnosis applying *SZSFS v Minister for Immigration and Border Protection* (2015) 232 FCR 262 – where error in assessment of credibility material to AAT decision – consideration of principles governing judicial review of credibility findings by administrative decision-maker – appeal allowed**MIGRATION** – where finding that father would be able to return to work in Egypt in reasonably foreseeable future had no probative foundation in the psychiatric evidence and was illogical – where findingfailed genuinely to consider the human consequences of returning the family to Egypt by honestly confronting what that would mean, having regard to the psychiatric evidence – where error not material **MIGRATION** – whether AAT failed to afford appellants a real opportunity to give evidence and make submissions contrary to s 425, Migration Act – where, despite concerns about fairness of the hearing, the evidence did not establish that the father was entirely unfit to attend the AAT hearing applying *BJB16 v Minister for Immigration and Border Protection* (2018) 260 FCR 116 – whether AAT’s conduct in restricting the appellants’ representatives’ participation in the hearing constituted jurisdictional error – whether the AAT failed to apply the “*real chance*” test and consider the possibility that its finding that there was no real risk to the daughters of genital mutilation in Egypt might be wrong - whether FCC denied appellants natural justice  |
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| Legislation: | *Migration Act 1958* (Cth) ss 36(2), 91R, 91S, 425, 427(6)*Federal Court Rules 2011*  |
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| Cases cited: | *ASB17 v Minister for Home Affairs* [2019] FCAFC 38; (2019) 268 FCR 271*AVQ15 v Minister for Immigration and Border Protection* [2018] FCAFC 133; (2018) 266 FCR 83*AWU16 v Minister for Immigration and Border Protection* [2020] FCA 513*BJB16 v Minister for Immigration and Border Protection* [2018] FCAFC 49; (2018) 260 FCR 116*BYA17 v Minister for Immigration and Border Protection* [2019] FCAFC 44; (2019) 269 FCR 94*Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 66*Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379*DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2; (2018) 258 FCR 175*DQM18 v Minister for Home Affairs* [2020] FCAFC 110*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22;(2007) 230 CLR 89*Friend v Brooker* [2009] HCA 21;(2009) 239 CLR 129*Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; (2018) 267 FCR 628*Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; (2018) 264 CLR 123*Minister for Home Affairs v Omar* [2019] FCAFC 188; (2019) 373 ALR 569*Minister for Immigration and Border Protection v BBS16* [2007 FCAFC 176; (2017) 257 FCR 111*Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 231 FCR 437*Minister for Immigration and Border Protection v Singh* [2016] FCAFC 183*Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1*Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 264 CLR 421*Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 322*Minister for Immigration and Citizenship v SZNCR* [2011] FCA 369*Minister for Immigration and Citizenship v SZNVW* [2010] FCAFC 41; (2010) 183 FCR 575*Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33; (2013) 210 FCR 505*Minister for Immigration and Ethnic Affairs v Guo* [1997] HCA 22; (1997) 191 CLR 559*Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323*Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* [2003] FCAFC 126; (2003) 128 FCR 553*Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 78 ALJR 992*NAMJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 983; (2003) 76 ALD 56*Nguyen v Minister for Home Affairs* [2019] FCAFC 128*Re Minister for Immigration and Multicultural Affairs; Ex Parte Cassim* [2000] HCA 50; (2000) 74 ALJR 1404*Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; (2000) 74 ALJR 405*Singh v Secretary, Department of Employment and Workplace Relations* [2009] FCAFC 59*SZQUM v Minister for Immigration and Citizenship* [2012] FCA 493*SZSFS v Minister for Immigration and Border Protection* [2015] FCA 534; (2015) 232 FCR 262*SZTFQ v Minister for Immigration and Border Protection* [2017] FCA 562*Tickner v Chapman* [1995] FCA 1726; (1995) 57 FCR 451*W375/01A v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 89;(2002) 67 ALD 757*WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 30; (2004) 134 FCR 271  |
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| Date of hearing: | 16 March 2020 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Counsel for the Second Respondent: | the Second Respondent filed a submitting notice |

ORDERS

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|  | NSD 2129 of 2016 |
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| BETWEEN: | AFD16First Appellant**AFE16**Second Appellant**AFH16 (and others named in the Schedule)**Third Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOTHERFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | PERRY J |
| DATE OF ORDER: | 10 July 2020 |

THE COURT ORDERS THAT:

1. The appeal is allowed.
2. Order 2 of the orders made by Federal Circuit Court of Australia on 23 November 2016 be set aside and in lieu thereof:
	1. an order in the nature of certiorari be issued to the Administrative Appeals Tribunal quashing the decision made on 8 January 2016 affirming the decision of a delegate of the first respondent not to grant the appellants protection visas; and
	2. the matter be remitted to the Administrative Appeals Tribunal differently constituted for determination according to law.
3. In the event that the parties are not agreed as to the appropriate order as to costs:
	1. on or before 4pm on 17 July 2020, the appellants are to file and serve written submissions of no more than 5 pages in support of the orders as to costs which they seek, including whether they seek to have order 3 of the orders made by the Federal Circuit Court of Australia on 23 November 2016 set aside and orders made in lieu thereof;
	2. on or before 4pm on 24 July 2020, the Minister is to file and serve written submissions of no more than 5 pages in response; and
	3. on or before 4pm on 29 July 2020, the appellants are to file and serve any written submissions of no more than three pages in reply.

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

REASONS FOR JUDGMENT

PERRY J:

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##### INTRODUCTION

1. The appellants, Mr and Mrs [AFD], are citizens of Egypt and arrived in Australia in 2011. The third to fifth appellants are their three daughters, who are minors. Mr and Mrs [AFD] claimed among other things that there was a real chance that Mrs [AFD]’s family would arrange for their daughters to be subjected to female genital mutilation if they returned to Egypt. They also claimed to fear harm for their daughters from Mrs [AFD]’s uncle who was a powerful Salafist and had tried to run over their eldest daughter because of the way she was dressed.
2. This is an appeal from a decision of the Federal Circuit Court (the **FCC**) dismissing the appellants’ application for judicial review of a decision of the Administrative Appeals Tribunal (the **AAT**) dated 8 January 2016. The AAT had affirmed an earlier decision by a delegate of the first respondent, the Minister for Immigration and Border Protection (the **Minister**), not to grant the appellants protection (class XA) visas (**protection visas**).
3. As reflected in their further amended notice of appeal, the appellants abandoned grounds 3, 4 and 6 of appeal. At the hearing, the appellant also abandoned ground 8 of the further amended notice of appeal. The remaining issues on the appeal may be summarised as follows.
4. Ground 2, 5, 7 and 10 focus upon errors said to arise from the report of the consultant psychiatrist, Dr Prem Naidoo, dated 7 September 2015 on which the appellants relied before the AAT. In particular, by **ground 5** the appellants contend that the FCC should have held that the AAT’s decision was irrational and legally unreasonable because it made adverse credibility findings having regard to Dr Naidoo’s diagnosis of Mr [AFD]’s mental illness but not to the symptoms underlying that diagnosis (relying upon *SZSFS v Minister for Immigration and Border Protection* [2015] FCA 534; (2015) 232 FCR 262 (***SZSFS***)). **Ground 7** challenges a specific finding by the AAT as to Mr [AFD]’s capacity to work if returned to Egypt for the same reason and on the ground that the AAT misconstrued Dr Naidoo’s opinion as Mr [AFD]’s prognosis. **Grounds 2** and **10** challenge aspects of the AAT’s conduct of the hearing, given its acceptance of Dr Naidoo’s diagnosis.
5. The appellants also contend that the FCC erred in failing to find that the AAT failed to apply the so-called “*what if I am wrong*” test in *Minister for Immigration and Ethnic Affairs v Guo* [1997] HCA 22; (1997) 191 CLR 559 (***Guo***) for determining whether the appellants had a well-founded fear of persecution (**ground 10**).
6. Finally, by **ground 1**, the appellants contend that, in breach of natural justice, the FCC failed to offer them an opportunity to be heard on the relevance or otherwise of the principles enunciated by Branson J in *NAMJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 983; (2003) 76 ALD 56 (***NAMJ***).
7. For the reasons set out below, the appeal must be allowed on ground 5. I note however, that while I did not uphold the other grounds relating to Mr Naidoo’s report, my consideration of grounds 2, 7 and 10 reinforced my conclusion with respect to ground 5 insofar as they demonstrated that the AAT failed comprehensively to engage in a meaningful consideration of the psychiatric evidence of Dr Naidoo, despite ostensibly accepting his medical opinions.

##### PROCEDURAL HISTORY

1. Given the length in the delay in resolving this appeal, it is necessary to explain the procedural history of the matter in some detail. The appeal was initially listed for hearing on 1 May 2017. By emails to the Court dated 17 March 2017, the parties sought an adjournment of the appeal pending the determination by the High Court of an application for special leave (M12/2017) to appeal from the decision of the Full Court in *Minister for Immigration and Border Protection v Singh* [2016] FCAFC 183. On 23 March 2017, I made orders in chambers adjourning the appeal accordingly. The application for special leave in *Singh* was refused on 12 May 2017.
2. The appeal was subsequently listed for hearing on 21 May 2018. On 17 May 2018, in response to an enquiry from the Court, the parties sought by consent that the proceedings be adjourned pending the decision of the High Court in *CQZ15 v Minister for Immigration and Border Protection & Anor* [2018] HCATrans 79; *BEG15 v Minister for Immigration and Border Protection & Anor* [2018] HCATrans 80; and *Minister* for *Immigration and Border Protection v SZMTA & Anor* [2018] HCATrans 34. These appeals considered the circumstances in which a failure to disclose a certificate issued under s 438 of the *Migration Act 1958* (Cth) (the **Migration Act**) (and its equivalent in Part 5 of the Migration Act, namely, s 375A) may constitute a jurisdictional error. By orders made on 17 May 2018, the hearing of the appeal was adjourned pending the determination by the High Court of those appeals. Judgment was delivered in each of those matters by the High Court on 13 February 2019: *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 264 CLR 421 (***SZMTA***).
3. The appellants were legally represented, and filed and served written submissions on 9 May 2018 (then represented by Mr Ashok Kumar of counsel before his untimely death) and on 26 August 2019 (being then represented by Ms Grotte of counsel) (**AS-1** and **AS-2** respectively). On 26 August 2019, the appellants also filed and served the affidavit of Mr Christopher McArdle, solicitor, affirmed on 26 August 2019, to which was annexed a draft amended notice of appeal. The Minister filed and served an outline of submissions on 14 May 2018 (**RS-1**) and a supplementary outline of submissions on 2 December 2019 (**RS-2**), with the latter addressing the proposed amended notice of appeal.
4. At the hearing of the appeal on 9 December 2019, a number of concerns were raised *in arguendo*. As a result, the appellants sought leave to further amend the notice of appeal and timetabling orders were made. Pursuant to those orders, the appellants filed and served further submissions on 7 February 2020 addressing the three additional grounds of appeal raised in the further amended notice of appeal (grounds 8, 9 and 10) (**AS-3**) and the respondents filed an outline of supplementary submissions on 21 February 2020 (**RS-3**).

##### BACKGROUND

###### Criteria for a protection visa

1. The Migration Actprovides for the circumstances in which a person who is not a citizen of Australia (a non-citizen) may enter and remain in Australia. Among the different classes of visa for which provision is made, s 36 of the Migration Act creates the class of protection visas. A protection visa must be granted where either the criterion in s 36(2)(a) or in s 36(2)(aa) is met.
2. As at the relevant time, under s 36(2)(a) the Minister (or the AAT on review) was required to be satisfied that the person is a person to whom protection obligations are owed because she or he is a refugee as defined in article 1A(2) of the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137, [1954] ATS 5 (entered into force 22 April 1954) as amended by the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267, [1973] ATS 37 (entered into force 4 October 1967) (collectively, the **Refugees Convention**). Article 1A(2) defines a refugee as a person who:

…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return it.

1. As at the relevant time, this definition as incorporated into the Migration Act was qualified by s 91R with respect to the nature of the serious harm feared, as well as 91S. Section 91R relevantly provided that:

(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and

(b) the persecution involves serious harm to the person; and

(c) the persecution involves systematic and discriminatory conduct.

(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of ***serious harm*** for the purposes of that paragraph:

(a) a threat to the person’s life or liberty;

(b) significant physical harassment of the person;

(c) significant physical ill‑treatment of the person;

(d) significant economic hardship that threatens the person’s capacity to subsist;

(e) denial of access to basic services, where the denial threatens the person’s capacity to subsist;

(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.

1. A determination of whether a subjective fear is objectively “*well-founded”* requires the AAT to assess what will occur in the future. A fear is “*well-founded*” when there is *“a real and substantial basis for it”* even though the chance of the fear eventuating is less than 50 per cent (often described as a “*real chance*”): *Guo* at 572 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ); *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 (***Chan***) at 388 (Mason CJ), 397 (Dawson J) and 429 (McHugh J). Conversely, a fear of persecution is not well-founded *“if it is merely assumed or if it is mere speculation”*: *Guo* at 572.
2. Section 36(2)(aa) provided in the alternative for the grant of a protection visa to a non-citizen where the Minister is not satisfied that the person is a refugee but is nonetheless satisfied that the person is entitled to protection under Australia’s international *non-refoulement* obligations (described as **complementary protection**), being a person:

…in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm…

1. A determination of whether there is a real risk for the purposes of s 36(2)(aa) requires a consideration of whether there is a “*real chance*” that an applicant will suffer “*significant harm*” (as defined in s 36(2A)) if returned to her or his country of origin: *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33; (2013) 210 FCR 505 at [242]-[246] (Lander and Gordon JJ) (with whom Besanko and Jagot JJ at [297] and Flick J at [342] relevantly agreed). The level of risk of harm under s 36(2)(aa) was therefore the same as the level of risk required under s 36(2)(a) of the Migration Act.

###### The appellants’ claims for protection

1. The appellants’ applied for the protection visas on 11 May 2011 without the assistance of a migration agent (AB1). In the application, Mr [AFD] claimed that, following the revolution in Egypt, the country was “*out of control without police*” who were busy dealing with internal problems. Mr [AFD] claimed that the military occupied the streets and that kidnapping, stealing and killing were commonplace (AB19). He claimed that without a government in Egypt, he and his family were in danger and that family members in Egypt had warned him not to return (AB18, 20). In particular, he claimed to fear harm due to corruption and discrimination against him for holding anti-government political opinions and by reason of threats made against him by the government. He claimed to fear being arrested and gaoled without trial, and that his children could be kidnapped and abused (AB17-22; AAT reasons at [6]).
2. At the Departmental interview on 21 July 2011, Mr [AFD] made additional claims including that:
3. he regularly talked about politics at work where he was employed by the government, resulting in his transfer to a rural office;
4. he attempted unsuccessfully to join an opposition political party;
5. taxi drivers in Egypt had unsuccessfully attempted to abduct his wife because of the way she was dressed;
6. he was a “*liberal Muslim who associated with a wide variety of people*” and had sent his eldest child to a school in Malaysia that held bible classes;
7. he had criticised the Egyptian Military Council on social media;
8. his mother had told him that since February 2011, unknown persons had visited her asking whether Mr [AFD] had returned to Egypt; and
9. he may be accused of being a spy.

(Delegate’s statement of reasons at AB77).

1. Mr [AFD] also claimed among other things at the first hearing before the RRT on 15 December 2011 that:
2. he had been tortured in Egypt and arrested for two weeks in an army gaol after he threatened to lodge a complaint (RRT reasons, AB107, at [81]-[82] and [99]-[100]);
3. Mr [AFD] had visited Egypt for a month in 2009 while he was working in Malaysia, leaving his wife and the children there for almost a month until he could afford to buy tickets to bring them to Malaysia. Following his return to Malaysia, however, his wife was subject to two kidnapping attempts by taxi drivers because of what she was wearing. Mrs [AFD]’s parents also told her that she should “*circumcise*” her daughters, that Mr [AFD] was an infidel, and that she should divorce him (RRT reasons at [94]-[97]).
4. Mrs [AFD] and the children subsequently returned to Egypt for over a month in 2010. During this time, Mrs [AFD]’s uncle, who is a Salafist and a powerful man, told Mrs [AFD] that she should leave her husband, and subsequently tried to run over their eldest daughter because she was dressed in shorts and a singlet top (RRT reasons at [145]-[146]).
5. Two or three days before she re-joined Mr [AFD] in Malaysia, Mrs [AFD] telephoned her husband and “*told him an appointment had been made for the children to be circumcised. She left before the date of the appointment. She went crazy because she had already had a bad experience as she had had that surgery herself. Even her mothers and sisters had it. His wife cannot live a sexual life.*” (RRT reasons at [146]). When asked why Mr [AFD] had not mentioned this issue earlier, he responded among other things that “*this is a taboo issue*” (RRT reasons at [146]).

###### Earlier RRT decision quashed by the Federal Court

1. On 25 July 2011, a delegate of the Minister refused to grant the appellants protection visas (AB75-86). The appellants sought review of that decision in the then Refugee Review Tribunal (the **RRT**) which affirmed the delegate’s decision (AB106-193). The RRT’s decision was quashed by the Federal Court on 29 May 2015 and the matter was remitted to the AAT for rehearing: *SZSFS* (AB226-244).

###### The report of Dr Prem Naidoo, Psychiatrist

1. On 19 September 2015, the appellants’ migration agent provided to the AAT a report of a consultant psychiatrist, Dr Prem Naidoo BSc MCChB MRCPsych, dated 7 September 2015 (**Dr Naidoo’s report**). The covering letter from the appellants’ migration agent to the AAT stated that “*[b]ased on the psychiatrist’s report we request that this matter be processed as soon as possible*” (AB198).
2. Given the significance of Dr Naidoo’s report to four grounds of appeal and the nature of those grounds, it is necessary to describe Dr Naidoo’s report with some care.
3. In his report, Dr Naidoo briefly described his qualifications and experience, including that he had been a member of the Royal College of Psychiatrists (London) since 1984. He said that he had read the Code of Conduct for Expert Witnesses and agreed to be bound by it.
4. Dr Naidoo examined Mr [AFD] for assessment purposes on 4 and 14 August 2015 and also interviewed his wife. He explained that Mr [AFD] gave a four year history of among other things: always being distracted, with the consequence that communication with people was very difficult for him; losing trust in everyone; having disturbed sleep with recurrent nightmares and sleepwalking around the house looking for his children; being constantly tired and fatigued; feeling “*scared all the time*”; and constantly ruminating day and night about his fears, especially for his daughters who he considered were at serious risk of genital mutilation (AB200-201). Dr Naidoo said that Mr [AFD] also felt that people were constantly plotting against him, heard whispering voices, and felt spied upon in his own home (AB202). On interviewing Mr [AFD]’s wife, she related similar symptoms and behaviour, including that Mr [AFD] had become increasingly forgetful, and that he thought that there were supernatural people living in the walls, believed that phone calls were being recorded, and would often misinterpret events as being against him (AB203).
5. Dr Naidoo described Mr [AFD]’s past medical history including that he was diagnosed as having irritable bowel syndrome for about seven years which had worsened in the last few years and as to his psychiatric history, that he had been treated with two types of antidepressant medication and an antipsychotic medication for the last two years (AB201). He noted that Mr [AFD] had been diagnosed as suffering from psychotic depression by a psychiatrist approximately three years earlier and treated accordingly. Prior to that, in 2011, psychological tests showed “*severe levels of distress consistent with a diagnosis of severe depression*” and that Mr [AFD] had contemplated suicide leading to his involuntary admission to hospital. Dr Naidoo also observed that Mr [AFD] had been under the care of a psychologist, Mr Girgis, since 2012 who opined in March 2015 that Mr [AFD]’s “*cognitive abilities remain insufficient, stopping him from studying to practice*” in his chosen profession which in turn provoked feelings of hopelessness and despair. Mr Girgis diagnosed Mr [AFD] as suffering from “*Major Depressive Disorder*” and recommended that no additional stresses be placed upon him “*as they may have overwhelming effects on [his] mental state … It is extremely obvious that [Mr* AFD*] is not fit to neither [sic] work nor seek employment*” (AB 201). Dr Naidoo also noted that Mr [AFD] had been treated by a psychiatrist, Dr Mohammed Allam, over seven months in 2013 where he reported feeling confused with people, suffering poor concentration, and feeling that people could read his mind. He stated that Dr Allam had diagnosed Mr [AFD] as suffering “*from depression with psychotic features*” and had considered that he was “*quite dysfunctional*” (AB201).
6. Dr Naidoo explained that there had been a number of occasions in the past where Mr [AFD] had been taken to hospital in a suicidal state, with the last occasion being about 12 weeks prior to seeing Dr Naidoo.
7. With respect to his diagnosis of Mr [AFD], Dr Naidoo expressed the following opinions:

This patient has been experiencing chronic psychiatric difficulties for an extended period. He showed symptoms of severe Depression in testing done in 2011. In 2013 he was diagnosed as suffering with a Psychotic Depression by psychiatrist.

The patient appears to have suffered with extreme anxiety, depression, suicidal ideation and psychotic symptomatology over the past four years or so. The progress of this patient’s illness has been marked with exacerbations and fluctuations. Recently his mental state has worsened and about twelve weeks ago he was once again seriously suicidal necessitating hospital assessment.

…

With regard to his ***symptoms*** over the last four years or so these include ***marked depression, anxiety, constant ruminatory negative thought patterns and persistent paranoid ideation combined on occasion with frank delusional ideation and auditory hallucinations***. ***Together with these symptoms a recurrent symptom has been the patient’s inability to concentrate due to a preoccupation with his own thoughts***. Taken together with his other symptoms one would have to consider whether his though [sic] difficulty represents a reflection of formal thought disorder which is a common accompaniment to psychotic disorders such as schizophrenia.

From a formal diagnostic point of view there is little doubt that the patient suffers with a Major Depressive Disorder. He also has clearly had a Psychotic component to his illness which probably indicates the extreme level of stress that he has been experiencing in relation to the difficulties with his visa application combined with his fears for the safety of his daughters.

(AB203-204)

On the issue of Mr [AFD]’s prognosis, Dr Naidoo expressed the opinion that Mr [AFD]’s prognosis was “*difficult to predict accurately*” but he did not expect that (even) with “*optimal treatment*” he would be fit for work within 12-18 months (AB204).

1. Finally, Dr Naidoo expressed the views that:

[Mr AFD] is not able to work and his financial situation seems unviable. It seems inconceivable that he would be able to access appropriate psychiatric care in Egypt. As well as this if he returns to Egypt he is clearly going to become utterly dependent on his family for support and this puts his daughters into the most precarious position imaginable. He will not be able to live independently in Egypt given both his psychiatric disorder and his financial state.

***Given the patient’s present mental state and his adverse response to stresses I believe he is not fit to attend the hearing before the tribunal as it might seriously endanger his health***.

(AB204) (emphasis added)

###### The appellants’ submission on the risks posed to the daughters of female genital mutilation

1. Among other things, the appellants’ representative also lodged a written submission with the AAT on 23 October 2015 in support of the application to protect Mr and Mrs [AFD]’s three minor daughters from female genital mutilation in Egypt (the **FGM submission**). The submission contained detailed references to country information including citing a report by the Egyptian Ministry of Health and Population 2015 that the prevalence of genital mutilation among females in Egypt between 15 and 49 years of age is 92% (AB221, 223) and submitted that “*it is a cultural norm*”. The appellants’ daughters were at that stage aged 10 and below (AB222-223). After referring to case law holding that a “*real chance*” means a substantial but not remote chance of persecution only, it was submitted that the prevalence of female genital mutilation in Egypt constituted a “*real chance*” (AB223-224). Furthermore, while the FGM submission acknowledged that there was evidence that the prevalence of female genital mutilation in educated wealthy families is less than in other groups, it “*remains alarmingly high at 81%*” (AB224). The submission further stated that:

[The appellants] have lived in Australia in poverty and with limited financial resources provided by Red Cross. They have no savings or assets in both Australia and Egypt. If they were returned to Egypt they would be without the finances required to start and maintain a new life. The primary applicant’s current mental health status prevents him from working in Australia. If he survived his return to Egypt he would undergo a significant deterioration in his mental health status and as in Australia be unable to work. The primary and [sic] applicant and his wife would therefore not have the mental, financial and physical capacity to protect their three daughters from FGM.

Likewise the applicants’ mother has not worked since her arrival in Australia. She has had two children born since her arrival. There are mental health reports related to her that have been lodged with the [Department].

They would be stuck in Egypt without physical, financial and access to medical assistance because of their poor circumstances. Being unable to house and feed your family amongst many other obstacles will be a strong incentive to reconnect with family for assistance for their basic survival needs. This reconnection would therefore ensure in time the FGM of their three daughters by their family members.

The primary applicant and his wife would experience a downward spiral in their mental health status at the prospect of being returned to Egypt. This will also be detrimental to the well-being of their children.

(AB224)

###### The decision of the AAT

1. Mr and Mrs [AFD] attended a hearing before the AAT on 28 October 2015 with their registered migration agent present. (I note that the AAT incorrectly stated at [4] of its reasons that the hearing was held on 27 October 2015.) Mr and Mrs [AFD] gave evidence at the hearing with the assistance of an interpreter in the Arabic and English languages (AAT reasons at [4]). Oral evidence was also received from Reverend Rick Simpel.
2. On 8 January 2016, the AAT affirmed the delegate’s decision on review (AB360).
3. In its statement of reasons, the AAT summarised the evidence given by Mr and Mrs [AFD] at the hearing at [10]-[48]. The AAT noted that before the hearing, the appellants’ representative forwarded the FGM submission (AAT reasons at [7]; FCC reasons at [8]; see AB221). Before the AAT, the appellants also claimed that they would be harmed because of their Christian faith (AAT reasons at [11], [22]-[31], [37]-[43]).
4. The AAT then turned to consider its findings which may be summarised as follows.
5. First, as I explain in more detail later, the AAT found that Mr and Mrs [AFD] were medically able to attend the hearing despite the opinion expressed by Dr Naidoo in his report that doing so may seriously endanger Mr [AFD]’s health (at [52]-[53]). The AAT also found that it was sufficient to give the appellants the opportunity to ask for breaks during the hearing if the stress became too great (at [53]).
6. Secondly, the AAT found that the diagnosed conditions did not wholly explain “*the inconsistencies apparent during the hearing*” (at [53]) and found the appellants’ evidence to lack credibility and that some elements of the claim were fabricated (at [54]).
7. Thirdly, in relation to the female genital mutilation claim, the AAT did not accept that there was a real chance that their daughters would be required to undergo female genital mutilation were they to return to Egypt, or that they would be forced to undergo it by their grandparents or any prospective husband (AAT reasons at [55]-[67]). The AAT also did not accept the appellants’ claim about a risk of harm at the hands of a radical Salafist uncle, as neither Mr or Mrs [AFD] mentioned during the AAT hearing that the uncle had attempted to run over the eldest daughter in Egypt (AAT reasons at [68]).
8. Fourthly, with respect to the appellants’ claim based on their religious conversion to Christianity, the AAT did not accept that the appellants’ attendance at church, or Mr [AFD]’s baptism, were the result of a genuine commitment to Christianity, and disregarded both of those matters under s 91R(3) of the Migration Act (AAT reasons at [69]). The AAT did not accept that the appellants would have any genuine interest in Christianity, or that they would be perceived to have an interest in Christianity, if they were to return to Egypt (at [76]).
9. Under the heading “*Other Claims*”, the AAT did not accept that the husband was discriminated against because of his political opinion, concluding that his claims lacked credibility (AAT reasons at [81]). The AAT also did not accept the husband’s claim that he had previously been gaoled, that his family was in danger, or that his daughters were vulnerable to child abuse (at [83]-[84]). The AAT also stated that it had taken into account Dr Naidoo’s report and “*note[d] that [Mr [AFD]] would not be fit to work for another 12 to 18 months. I am satisfied that this means that with treatment [Mr [AFD]] would be able to return to work in Egypt in the reasonably foreseeable future*” (at [86]). While the AAT also noted Dr Naidoo’s concern that Mr [AFD] would not have access to appropriate psychiatric care in Egypt, it considered on the basis of country information that facilities for addressing his “*mental health issues are available*”, albeit that they are “*not as good as the mental health system in Australia*” (at [87]).
10. For these reasons, the AAT was not satisfied that the appellants had a well-founded fear of persecution in Egypt for a Convention reason. Nor, given these factual findings, was the AAT satisfied that the appellants were owed protection obligations under the complementary protection criterion in s 36(2)(aa) (AAT reasons at [90]-[93]).

###### The decision of the FCC

1. On an application for judicial review before the FCC, counsel for the appellant advanced three grounds:
2. the AAT breached s 425 of the Migration Act because Mr [AFD] was not in a fit state to give evidence and present arguments;
3. the AAT’s decision was illogical because first, the AAT accepted the opinion of Dr Naidoo, a psychiatrist, but not the symptoms upon which that opinion was based, and secondly, the AAT proceeded on an understanding of part of Dr Naidoo’s report which was not open; and
4. the AAT denied the appellants procedural fairness because the husband was not given the opportunity to give his evidence, in light of his mental condition.

(FCC reasons at [16].)

1. In support of the application for judicial review, the appellants relied upon the affidavit of Mr Christopher McArdle affirmed 31 March 2016 (AB 399) annexing a copy of the transcript of the hearing before the AAT.
2. In addressing the first ground, the FCC cited a number of authorities explaining when an applicant’s psychological state can render a Tribunal hearing a nullity, including *NAMJ* at [52] (Branson J), and *Minister for Immigration and Citizenship v SZNCR* [2011] FCA 369 (***SZNCR***) at [30] (Tracey J). The FCC noted that whether the husband was unfit, in the sense of being ***unable***, to give evidence, present arguments and answer questions in the course of the hearing, was a question of fact: *SZQUM v Minister for Immigration and Citizenship* [2012] FCA 493 at [38] (Jacobson J). The FCC rejected this ground because while Dr Naidoo’s opinion was that the husband was not fit to attend a hearing, the reason given by Dr Naidoo was that to do so “*might seriously endanger [the husband’s] health*” rather than because the husband would be unable to make submissions or comprehend questions (FCC reasons at [27]). The primary judge also held that the transcript of the AAT hearing demonstrated that the husband could, and in fact did, take part in the hearing (ibid).
3. The second ground alleged illogicality or irrationality on two bases. In respect of the first basis, the FCC considered the report of Dr Naidoo and the way in which the AAT dealt with it (FCC reasons at [37]-[42]) and found that the AAT’s reasons demonstrated that it had not fallen into the same error as the RRT. The primary judge held that the AAT did not reject any of the symptoms upon which Dr Naidoo’s diagnosis was based (at [43]). Nor, with one exception, were the AAT’s findings or reasons inconsistent with any matter referred to by Dr Naidoo in relation to the husband’s mental health. That exception related to the availability of medical facilities in Egypt, and the FCC found that it was open to the AAT to reject Dr Naidoo’s opinion on that matter in light of country information set out in its reasons (ibid).
4. With respect to the second basis, the appellants submitted that it was not open to the AAT to read a passage from Dr Naidoo’s report other than as a recommendation that the husband be granted a visa as soon as possible (FCC reasons at [45]-[46]). The FCC rejected this submission, holding that Dr Naidoo did not expressly state that the husband would only improve if he were given a visa and that, while it could be inferred from Dr Naidoo’s statement that Egypt did not have sufficient facilities to treat the husband, this was not so directly connected to this aspect of the report as to compel that inference (at [46]). The FCC further found that even if the AAT had erred as the appellants submitted, any such error was immaterial because an opinion that a visa applicant’s health will improve if they are given a visa does not logically impact upon the AAT’s duty to review the delegate’s decision, and the AAT’s consideration of Dr Naidoo’s report was in the context of its explanation of how the hearing was conducted, rather than being critical to its decision to affirm the delegate’s decision (at [47]).
5. Finally, the primary judge rejected the third ground at [49]-[50] on the ground that the husband had every reasonable opportunity to address the potential impact of his mental condition on his credibility, and in fact did so. The primary judge referred to the appellants’ submissions dated 23 October 2015 focussing on the female genital mutilation claims which stated that issues of “*personal credibility or panic or other distress need not be considered*”, and to the presence of the appellants’ adviser at the AAT hearing.
6. For those reasons, the FCC dismissed the application for judicial review.

##### RELEVANT PRINCIPLES

1. The issues on appeal fall to be considered in the context of established principles concerning judicial review of credibility findings by an administrative decision-maker.
2. ***First***, the onus lies upon the appellants to establish jurisdictional error: *BYA17 v Minister for Immigration and Border Protection* [2019] FCAFC 44; (2019) 269 FCR 94 at [35] (the Court).
3. ***Secondly***, the question of whether a decision by the Tribunal is affected by jurisdictional error must be considered in the particular statutory context within which the decision was made and is a case specific inquiry: *AVQ15 v Minister for Immigration and Border Protection* [2018] FCAFC 133; (2018) 266 FCR 83 (***AVQ15***) at [41(a) and [c)] (the Court). In this regard, the Full Court in *AVQ15* emphasised (at [41(c)] that:

The importance or cogency of the material, its place in an assessment of the appellant’s claim and in the performance of the statutory task are matters of fundamental importance in a protection visa case. Those matters inform an assessment of the seriousness or gravity of the error.

1. ***Thirdly***, Allsop CJ (with whom the remainder of the Full Court agreed) in *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; (2018) 267 FCR 628 (***Hands***) explained:

3. … where decisions might have devastating consequences visited upon people, the obligation of real consideration of the circumstances of the people affected must be approached confronting what is being done to people. This obligation and the expression of its performance is not a place for decisional checklists or formulaic expression. Mechanical formulaic expression and pre-digested shorthand expressions may hide a lack of the necessary reflection upon the whole consideration of the human consequences involved. Genuine consideration of the human consequences demands honest confrontation of what is being done to people.

1. This passage was recently quoted with approval by the Full Court in *Minister for Home Affairs v Omar* [2019] FCAFC 188; (2019) 373 ALR 569 (***Omar***) at [37]), which at [36] also emphasised a passage from Kiefel J’s reasons (as her Honour then was) in *Tickner v Chapman* [1995] FCA 1726; (1995) 57 FCR 451 (***Tickner***) at 495 as follows:

(c) To “consider” is a word having a definite meaning in the judicial context. The intellectual process preceding the decision of which s 10(1)(c) [of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)] speaks is not different. ***It requires that the Minister have regard to what is said in the representations, to bring his mind to bear upon the facts stated in them and the arguments or opinions put forward and to appreciate who is making them***. From that point the Minister might sift them, attributing whatever weight or persuasive quality is thought appropriate. ***However, the Minister is required to know what they say***.

1. Thus, in *DQM18 v Minister for Home Affairs* [2020] FCAFC 110 (***DQM18***), Bromberg and Mortimer JJ (referring to *Omar*) explained that:

25 In performing the statutory task, the Assistant Minister was “obliged to give meaningful consideration to the representations” made to him about what other reasons there were for revoking the appellant’s visa cancellation … That duty is implicit rather than explicit in the statutory scheme… It involves an “active intellectual process” by the decision-maker…

(citations omitted)

1. In the ***fourth*** place, while findings as to credit are the exclusive province of the administrative decision-maker (*Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; (2000) 74 ALJR 405 at [67]), they must be made within lawful bounds. Such findings may therefore be subject to judicial review including on grounds of legal unreasonableness, reaching a finding without a logical, rational or probative basis, failing to discharge the statutory task of review, and failing to take into account material critical to the formation of the requisite state of satisfaction: *AVQ15* at [41(b)]; *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2; (2018) 258 FCR 175 at [30(1)] (the Court). However, in order to guard against the Court impermissibly engaging in merits review, caution must be exercised before the Court concludes that errors in an adverse credibility assessment by the Tribunal are jurisdictional in nature (*AVQ15* at [41(f)]).
2. ***Fifthly***, as Mortimer J explained in *AWU16 v Minister for Immigration and Border Protection* [2020] FCA 513 (***AWU16***):

26 “Irrational” or “illogical” implies that no reasonable person could reason in such a way. As Crennan and Bell JJ said in [*Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611] at [135]:

A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn.

1. Thus her Honour correctly rejected as a “*gloss*” upon the test, the Minister’s submission that the authorities required that the illogicality or irrationality of reasoning “*be of an ‘****extreme’*** *kind*” (*AWU16* at [24]-[25]).
2. Furthermore, as to reliance upon inconsistencies in assessing an applicant’s credibility, the Full Court in *AVQ15* emphasised that:

23. A decision-maker is entitled to rely upon inconsistencies in assessing a visa applicant’s credibility but it is important that the process be conducted fairly and reasonably, taking into account that the assessment of the reliability, and credibility, of accounts given by asylum seekers is well recognised as involving a number of particular features and considerations, and calls for a careful and thoughtful approach.

1. In this regard, their Honours referred with approval to the description in Hathaway and Foster, *The Law of Refugee Status* (2nd edition, 2014) (*Hathaway Refugee Law*) at p 139, of the assessment of credibility as being based on one or more of four matters: “*plausibility, relevant knowledge of an asylum seeker, demeanour and consistency of testimony*” (*AVQ15* at [24]). The ensuing discussion in *Hathaway Refugee Law* of comparative jurisprudence on these matters emphasised, as the Full Court explained, “*[t]he necessity for care, fairness and a reasonable approach, in order to avoid what the learned authors describe at one point as ‘a quest to disbelieve’ (at p 138), or to avoid irrationality or legal unreasonableness in an approach to credibility assessment*” (*AVQ15* at [24]).
2. After referring to the inevitability of slightly different versions of events, especially when given with the assistance of an interpreter as explained in *W375/01A v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 89;(2002) 67 ALD 757, the Full Court in *AVQ15* continued:

26. Consistently with its task on review, and bearing the reality to which the Full Court in W375/01A referred steadily in mind, appropriate attention has to be given by a decision-maker (here, the Tribunal) to all relevant material in making a finding of inconsistency which then underpins an adverse credibility assessment.

1. In line with this, the Full Court warned that:

28. … even where it is reasonably open to find that a person has given inconsistent evidence, the decision-maker needs to assess the significance of that inconsistency and the weight to be given to it. This requires consideration of, for example, the significance of the inconsistency having regard to the person’s case as a whole and whether the inconsistency is on a matter which is central to the person’s case or is at its periphery and involves an objectively minor matter of fact. It also requires the decision maker to remain conscious of the particular challenges facing asylum seekers in giving accounts of why they fear persecution, including that they may have to give multiple accounts, using interpreters, and that they may reasonably expect an interview or a review process will provide an opportunity for them to elaborate on, or explain, the narratives they have previously given. Consideration should also be given to whether there is an acceptable explanation for the person having given inconsistent evidence such that the fact of the inconsistency should attract little, if any, weight. How all these matters are weighed and evaluated in a particular case is a matter for the decision-maker, ***but a failure by the decision-maker to appreciate the particular nature of the task, or to perform it reasonably and fairly, may be the subject of judicial review***.

(emphasis added) (approved in *ASB17 v Minister for Home Affairs* [2019] FCAFC 38; (2019) 268 FCR 271 at [44] (the Court))

1. The Full Court’s approach in *AVQ15* in this regard resonates with that adopted by Allsop CJ (with whom the remainder of the Full Court agreed) in *Hands* to which I have earlier referred. Equally, in assessing a protection visa applicant’s credibility, a decision-maker must honestly confront and take into account evidence of serious mental health issues where that evidence points to significant and relevant disadvantages attending the giving of evidence by that applicant. This is especially so where the harm feared by the applicants labouring under such difficulties includes the risk of significant harm to young children, as in this case, who may be unable to give evidence on their own behalf and lack knowledge or understanding of the risks.
2. Finally, even if irrational or illogical, an aspect of reasoning or finding will generally not sound in jurisdictional error if it was immaterial or not critical to the ultimate conclusion: *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; (2018) 264 CLR 123 (***Hossain***) at [29]-[30] (Kiefel CJ, Gageler and Keane JJ); *SZMTA*;and *AVQ15* at [41(f)]. As Bell, Gageler and Keane JJ explained in *SZMTA*, *“[a] breach is material to a decision only if compliance could* ***realistically*** *have resulted in a different decision*” (at [45]; emphasis added). In turn, save where the decision made was the only decision legally available to be made, “*the question of the materiality of the breach is an ordinary question of fact in respect of which the applicant bears the onus of proof. Like any ordinary question of fact, it is to be determined by inferences drawn from evidence adduced on the application*” (*SZMTA* at [46]).
3. In expanding upon the correct approach to materiality in the context of a finding that the Minister had failed to appreciate that the lack of an obligation to accord procedural fairness in that case did not entail a lack of power to do so, Mortimer and Bromwich JJ in *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 66 (***Chamoun***) helpfully explained that:

66. … We are ***not*** required to be satisfied it is more likely than not [that the Minister] would have exercised the power he did not appreciate he had, only that there is a realistic possibility he might have. In our opinion, the adjective “realistic” in the statements of principle by the majority in the High Court in *Hossain* and *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 364 CLR 421 is used to distinguish the assessment of the ***possibility*** of a different outcome from one where the possibility is ***fanciful or improbable***, no more than that.

(emphasis added)

1. Their Honours further emphasised that particularly where questions of discretion and weight are involved, the Court must ensure that any assessment of materiality on judicial review does not stray into the areas of merits review (*Chamoun* at [69]). Rather, their Honours explained that:

70. On judicial review, where there is an identification of legal error and an assessment of whether it was an error which should be characterised as jurisdictional, there is a ***significant element of reconstruction*** involved. The reviewing court is asking: what if the repository of the power had (relevantly here) properly understood the nature of his power? That reconstructive exercise cannot simply be done by taking the reasons and findings as they stand, because those reasons are a product which incorporates the misunderstanding. The approach must be more objective, and nuanced, than that. Otherwise, there is a risk that the decision-maker’s reasons are used in a way which amounts to prejudgment. Such prejudgment would itself normally give rise to error. It cannot be used as proof of immateriality.

(emphasis added)

(See also the Full Court decision in *Nguyen v Minister for Home Affairs* [2019] FCAFC 128 at [45]-[51].)

##### ALLEGED ERRORS BASED ON THE AAT’S TREATMENT OF DR NAIDOO’S PSYCHIATRIC REPORT

###### Was the AAT’s assessment of Mr [AFD]’s credibility irrational given its acceptance of the psychiatric evidence (Ground 5)?

The issue

1. As earlier mentioned, the appellants challenge the Tribunal’s decision by reason of its treatment of Dr Naidoo’s report in a number of different respects. I will deal first with the contention raised by ground 5 of the further amended notice of appeal.
2. By ground 5 the appellants contend that in making adverse credibility findings, the AAT’s reasons were illogical, irrational or unreasonable on the basis that, despite accepting Dr Naidoo’s diagnosis of Mr [AFD]’s mental illness, the AAT did not accept the symptoms which formed the basis on which that diagnosis was made. This was said to be a material error because Dr Naidoo’s evidence explained omissions, inconsistencies and contradictions in Mr [AFD]’s evidence on which the AAT had relied in making the adverse credibility findings.
3. Relevantly, after referring to Dr Naidoo’s advice that attending the hearing may seriously endanger Mr [AFD]’s health, the AAT continued as follows:

52. I have taken into account the letter provided by Dr Naidoo a consultant psychiatrist in which he claimed that the applicant was not fit to attend the hearing before the Tribunal because it might seriously endanger his health. I note that in the following paragraph however, the psychiatrist also stated that the delay in processing the application was exacerbating his psychiatric disorder and that expediting his application would be of substantial benefit to the patient. It is not apparent from the context whether he meant by the term 'expediting' approving, or conducting the hearing. The applicant's adviser also stated that the applicant's appearance was against his advice, although a letter from the same legal firm on 19 September 2015 (folio 43) referenced the psychiatrist's report and requested that the matter be processed as soon as possible.

53. The applicant presented to the Tribunal and did so ***in the full knowledge*** of the psychiatrist's report and the adviser's advice. I have taken these into account as well as the applicants' assertions that they were medically able to attend the hearing. The applicants were given the opportunity to ask for breaks during the hearing if the stress became too much and breaks were taken. I am satisfied that the measures put in place by the Tribunal to ameliorate the ***stress*** felt by the applicants was sufficient to ensure that their evidence could be given in a coherent manner that took into account the medical advice proffered. I am also satisfied that the diagnosed conditions with which they presented at the Tribunal were not wholly explanatory of the inconsistencies apparent during the hearing.

54. I found the applicants’ evidence regarding their claims to lack credibility. For reasons set out below I did not find the first- and second-named applicants [Mr and Mrs [AFD]] to be entirely credible or truthful witnesses, and that some elements of the claim were fabricated in order to be granted a protection visa.

(emphasis added)

1. With respect to the equivalent ground argued below, as earlier explained, the primary judge held (at [43]) that the AAT did not reject any symptoms on which Dr Naidoo’s diagnosis was based and therefore his Honour found that the Tribunal did not fall into the same error as the RRT in *SZSFS*. In so holding, the appellants submitted that the primary judged erred for the following reasons:

The primary judge found at [43] (AB 16) that the Tribunal did not repeat the error identified by Logan J [in *SZSFS*] and that specifically “the Tribunal did not reject any of the symptoms upon which Dr Naidoo’s diagnosis was based”.

Although the error was not identical, it had the same effect. The error of the tribunal was in failing to have regard altogether to the expert opinion of Dr Naidoo, the history, the symptoms and the manifestation of the mental illness. ***If proper regard had been had to all of these matters reported on by Dr Naidoo by the Tribunal, it would have taken account of them in determining the credibility of the Appellants***. In determining the credibility of the Appellants, ***the Tribunal proceeded as if there was no mental condition or illness, or if there was, it was “stress” and “anxiety” which could be ameliorated by taking rest breaks during the hearing***. In this way the Tribunal considered that it facilitated the First Appellant giving coherent evidence.

In so proceeding the Tribunal failed to have proper regard to the relevant evidence of Dr Naidoo and acted unreasonably in the performance of its statutory function.

(emphasis added) (AS-2 at [33]-[35])

The decision in *SZSFS*

1. In *SZSFS*, the appellants submitted that the RRT’s decision was unreasonable in that it gave “*significant weight*” to the diagnoses of Mr [AFD] of anxiety and depressive disorders but did not accept that the psychological reports of Ms Higgins and Mr Girgis provided a “*satisfactory explanation*” for deficiencies in Mr [AFD]’s evidence relied upon the RRT (*SZSFS* at [35]). As his Honour explained:

35. This point was further developed in the Appellants’ submissions by reference to para 346 of the Tribunal’s reasons. Here, too, is to be found an acceptance by the Tribunal that the First Appellant suffered from the diagnosed “mental health issues” in 2011 and 2012. At the same time, the Tribunal adverted to the “significant opportunity” which the Tribunal had had to take evidence from the First Appellant. The Tribunal recorded its observation, based on this opportunity, that he was “eloquent, intelligent, articulate, able to express himself and tell the Tribunal when he did not understand a question”. In light of this and notwithstanding that it gave “significant weight” to the diagnoses and a related submission that the diagnosed conditions explained the way in which the First Appellant gave his evidence, the Tribunal did not accept that the reports of [the psychologists] provided a “satisfactory explanation” for the omissions, inconsistencies and contradictions which the Tribunal considered (for reasons elsewhere given) were a feature of his evidence.

36. The Appellants’ case was that there was thus revealed an inherent tension in the Tribunal’s reasoning. One could not on the one hand note of specialist opinion evidence that the opinions expressed were based on an uncorroborated factual foundation, depending solely on self-reporting by the First Appellant, nonetheless accept the resultant diagnoses (and the symptoms of the condition), give them “significant weight” and, at the same time, based on lay observations in the course of his evidence, form a quite different view of the First Appellant. Further, to accept the diagnosis of Mr Girgis was also to accept, so the submission went, its factual premises. Yet the Tribunal (at paragraph 345) discounted one of those premises, which was “‘severe lack of concentration and memory’, claustrophobia and a fear of being in the presence of an authority figure”. Either one discounted the opinions on the basis that they depended on a factual foundation completely inconsistent with those observations or, if one accepted them, ought to have found in them an explanation for the First Appellant’s evidence. In a case where so much depended on the credibility of the account given by the First Appellant, the Tribunal’s reasons for why it was not satisfied that a protection obligation was owed to the First Appellant and his family disclosed, so the submission progressed, a conclusion which was unreasonable. Part of this submission was that, in reaching that conclusion, the Tribunal had not considered the ramifications of accepting the diagnoses and the symptoms of the conditions. It was submitted that it was in this fashion that a relevant consideration, in the sense used in the ground of appeal, had not, truly, been taken into account.

1. Logan J identified the question posed by the ground of review as whether the RRT’s reasons exhibited irrationality such that the absence of satisfaction of the criteria was unreasonable and the decision to refuse the protection visas was therefore attended with jurisdictional error (*SZSFS* at [39]). His Honour answered that question in the affirmative for the following reasons:

40. … I regard the manner in which the Tribunal has dealt with the evidence of [the psychologists] with all due respect to the Tribunal member concerned, as an irrational basis for the discounting of the credibility of the First Appellant and his wife, for just the reasons developed by the Appellants in submissions. Had the Tribunal discounted the opinions of [the psychologists] because they were based on self-reported conditions quite inconsistent with the Appellants’ observed demeanour when giving evidence that would have been rational. That is not what the Tribunal did.

1. Logan J held that the RRT’s decision should be quashed as this was not a case where the error could not possibly have produced a different result because “*so much in relation to the claims made by the First Appellant depended upon an assessment of his and his wife’s credibility. And the Tribunal discounted for reasons which I regard as irrational an explanation for the inconsistencies and omissions in evidence which informed its view as to their credibility*” (*SZSFS* at [41]).
2. No issue was taken on this appeal by the Minister with the correctness of the reasoning in *SZSFS*. Rather the Minister submitted that the error made by the RRT had not been repeated by the AAT on the remittal in making its credibility findings. In this regard, the Minister submitted that the Tribunal’s findings did not disregard the symptoms experienced by Mr [AFD] as this was not a case where the Tribunal made adverse credibility findings on the basis of, for example, Mr [AFD]’s demeanour. Rather, the Minister submitted that the Tribunal relied upon:
3. the weight of independent country information and the internal implausibility of claims made by Mrs [AFD] with respect to the claims that Mr and Mrs [AFD]’s daughters may suffer female genital mutilation in Egypt (Tribunal reasons at [56]-[63]);
4. the failure by either appellant to mention the incident involving the uncle attempting to run over one of their daughters (Tribunal reasons at [68]);
5. with respect to the claim that Mr [AFD] would be unable to access mental health care in Egypt, that this was not made out on the basis of the country information (Tribunal reasons at [87]); and
6. with respect to Mr [AFD]’s claim to have converted to Christianity and attended church, the fact that Mrs [AFD] was unable to recall whether her husband had attended church (Tribunal reasons at [75]).

(RS-1 at [24])

1. That being so, the Minister submitted that it was not irrational for the Tribunal on the one hand to accept all of Dr Naidoo’s medical opinions as the primary judge correctly held, while on the other hand finding that Mr [AFD]’s condition did not explain all of the inconsistencies in his evidence and rejecting some of the appellants’ claims (RS-2 at [20]). As such, the Minister submitted that the primary judge’s finding at [43] was correct. In the alternative, the Minister submitted that the primary judge’s decision could be upheld in any event on the ground that any such error by the AAT was not material.

Ground 5 must be upheld

1. It is not the task of this Court to determine whether Dr Naidoo’s evidence explained perceived deficiencies in Mr [AFD]’s evidence. Nor, as the Minister correctly submitted, does acceptance of Dr Naidoo’s medical opinions entail acceptance of the appellants’ claims to fear harm. However, in my view the appellants have established that the AAT erred in the manner alleged in ground 5.
2. The starting point, as in *SZSFS*, is that the AAT accepted the diagnosis by Dr Naidoo and therefore the symptoms on which it was based, as the primary judge held. So much, as I have earlier said, was uncontroversial on the appeal.
3. However, the AAT assessed Mr [AFD]’s credibility having regard to:
4. Mr [AFD]’s assessment that he was medically able to attend the hearing and the fact of his attendance “*in full knowledge of*” the advice of Dr Naidoo as to the dangers in doing so and against advice from Mr [AFD]’s adviser; and
5. the AAT’s lay assessment that he was able to give evidence “*in a coherent manner*” given the measures adopted at the hearing to ameliorate his (and his wife’s) “*stress*”, namely, the opportunity to ask for breaks and the fact that he in fact took breaks.

(AAT reasons at [52]-[53])

1. That Mr [AFD] could present coherently might be thought to be consistent with Dr Naidoo’s opinion that he was “*oriented in time and place and there was no clouding of consciousness*” and that he “*appeared to retain* ***some*** *insight into his difficulties*” (AB202; emphasis added). However, Mr [AFD] did not merely suffer from stress on which the Tribunal focused, but from “*extreme anxiety*” and an “*extreme level of stress*” (AB203 and 204). Furthermore, these symptoms were butone component only of Mr [AFD]’s symptomology. The accepted medical evidence established that Mr [AFD] suffered under very particular and extreme disadvantages well beyond those ordinarily impacting upon the giving of evidence by those seeking protection which in any event call for “*care, fairness and a reasonable approach … to avoid irrationality or legal unreasonableness*” in assessing credit (*AVQ15* at [24]; see further above at [54]-[58]).
2. Despite this, there was no recognition by the AAT of the seriousness of Mr [AFD]’s illness and the complexity of his symptoms in its assessment of his credibility including Mr [AFD]’s inability to concentrate, psychotic symptomology, and persistent paranoid ideation. Yet plainly these were matters of such significance to an assessment of Mr [AFD]’s credibility that if they were taken into account, it would have been expected that the Tribunal would have referred to them before finding that the appellants were not entirely truthful and that elements of their claims were fabricated (at [54]) (*Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [10] (Gleeson CJ); *DQM18* at [28]-[30] (Bromberg and Mortimer JJ). Those are extremely serious findings of deliberate dishonesty.
3. It is true, as the Minister submitted, that the AAT found that some inconsistencies on a small number of peripheral matters could be explained by what the AAT described generically as “*medical conditions*” (AAT reasons at [75]). However, this does not demonstrate that the AAT took into account in a meaningful way the seriousness of Mr [AFD]’s medical condition before making such damning findings as to his credit. In my view, the failure to do so despite accepting Dr Naidoo’s medical opinions established that the AAT’s decision was irrational in circumstances where, as in *SZSFS*, much depended upon the AAT’s assessment of Mr (and Mrs) [AFD]’s credibility. By way of example, they claimed to fear that Mrs [AFD] or their daughters would be subjected to violence or killed by Mrs [AFD]’s uncle who was a Salafist and had previously attempted to run over one of their daughters because of the manner in which she was dressed (AAT reasons at [8]). That claim was dismissed by the AAT as follows:

68. I also do not accept that [Mrs [AFD]] has a Salafist uncle who seeks to kill her or her children or that he attempted to run over the third named applicant in Egypt… Neither applicant mentioned this incident during the hearing, and it is reasonable to believe that an uncle who had previously attempted to kill one of their daughters would have been made mention of, if this in fact had been the case. Instead, [Mr [AFD]] simply claimed that [Mrs [AFD] “had some problems” with an uncle while [Mrs [AFD]] didn’t mention the incident at all.

1. With respect to this claim, there is no suggestion by the AAT that Mr and Mrs [AFD] might have been acting on a misapprehension as to the incident in question. The finding at [68] can be read only as a finding that the Tribunal member regarded the claim as a fabrication, in line with its findings at [54]. As such, it left no room for any real doubt that the account might be true and therefore for the Tribunal to consider an alternative scenario on the basis that its finding might be wrong (see *Guo* at 576 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)). That being so, the submission by the Minister that this was not a case where adverse credibility findings were made on the basis, for example, of Mr [AFD]’s demeanour and, therefore, that the Tribunal’s findings should not be read as having disregarded Mr [AFD]’s symptoms, must be rejected.
2. This example also illustrates that, if the ramifications of accepting the diagnoses and their symptoms had been considered in a meaningful way, there was a real possibility that the AAT may have reached a different decision and therefore the error was material. Indeed, during the line of questioning of Mr [AFD] about this issue some 45 minutes into the hearing and prior to any break, Mr [AFD] expressly referred to problems in recalling the incident by reason of his illness, responding “*To be honest well, I really don’t remember. I have been here for a long time, I am very exhausted, I have taken so many medications and because of the situation that I’m in – that I’m in I really cannot remember*” (AB416).
3. More broadly, the strong adverse credibility finding at [54] was plainly a significant factor in the AAT’s subjective reasoning processes, and it may be inferred in determining those aspects of the evidence to which it would give weight, as well as those which were ***not*** regarded as material and to which therefore it did not refer. As Mortimer and Bromwich JJ explained in *Chamoun* at [70], the “*reconstructive exercise*” in which a reviewing court must engage in determining materiality, *“… cannot simply be done by taking the reasons and findings as they stand, because those reasons are a product which incorporated the misunderstanding*” (see [61] above). In a similar vein, Mortimer J explained in *AWU16* (referring to *SZTFQ v Minister for Immigration and Border Protection* [2017] FCA 562 at [44]-[45] (Lee J)):

20. … the assessment of credibility is necessarily impressionistic, and emphatic adverse findings on credibility may well, expressly or implicitly, be linked with one another so that it will not be possible, or realistic, for a reviewing Court to be confident that an error in one strand of credibility reasoning does not infect other strands.

1. Finally, I am reinforced in my conclusions on ground 5 by the lack of any real engagement by the AAT with the symptoms of Mr [AFD]’s mental illness and its seriousness as a pervasive element in the AAT’s approach to the hearing and otherwise in its reasons as I explain in addressing grounds 7, 2 and 10 below. In other words, the AAT’s decision, as well as the process adopted at the hearing, make it clear in my opinion that the AAT member, with respect, comprehensively failed in a meaningful way: 1) to have regard to what was said in Mr Naidoo’s report; 2) to bring his mind to bear upon the facts stated in the report and the opinions put forward and their ramifications; and 3) to appreciate who was expressing the opinions (an independent expert as opposed to the lay appellant), adapting the words of Kiefel J in *Tickner* at 495 (quoted at [49] above).

###### Was the Tribunal’s finding that Mr [AFD] would not suffer serious harm by reason of his mental health if returned to Egypt illogical and irrational (Ground 7)?

The issue

1. Ground 7 of the further amended notice of appeal challenged the primary judge’s reasons at [42]-[43] which in turn dismissed a challenge to the AAT’s reasons at [86]-[87]. Specifically, the appellants submitted that the AAT’s finding that Mr [AFD] would not suffer serious harm for Convention purposes because with treatment he “*would*” be able to work within the reasonably foreseeable future,was unreasonable also based upon *SZSFS*.
2. The relevant passages from the AAT’s reasons commence at [85] where the AAT accepted that Mr [AFD] “*has a mental health condition that would preclude him from practising as a dentist for some time on return, but [did] not accept that this represents serious harm for Convention purposes.*” The AAT did not expressly refer to s 91R of the Migration Act in its reasons or in the brief paragraphs at attachment A said to set out the “*relevant law*”. However, it was plainly referring here to the concept of “*serious harm*” as incorporated into the refugee criterion by s 91R. This provides that serious harm includes significant economic hardship, denial of access to basic services, and denial of capacity to earn a livelihood of any kind, which in each case must threaten the person’s capacity to subsist (see [11] above).
3. In this regard the AAT found first that:

85. … [Mrs [AFD]] is a qualified teacher and is therefore able to earn a wage. Given I have not accepted that the applicants’ families seek to have their daughters undergo FGM or that [Mrs [AFD]] has a violent Salafist uncle, and that they maintain regular contact with their families, I am satisfied that they have a supportive relationship with them.

1. Secondly, the AAT found that:

86. … I have taken into account the letter from the consultant psychologist dated 7 September 2015 … and note that [Mr [AFD]] would not be fit to work for another 12 to 18 months. ***I am satisfied that this means that with treatment the first-named applicant would be able to return to work in Egypt in the reasonably foreseeable future***.

87. I also note the psychiatrist’s claim that “it seems inconceivable that he (the first-named applicant) would be able to access ***appropriate*** psychiatric care in Egypt” however note that he has not indicated the basis on which he has made this finding. Independent country information indicates that, while it is not as good as the mental health system in Australia, facilities for addressing the first-named applicant’s mental health issues are available.

(emphasis added)

1. The country information was discussed by the AAT in the following paragraph as follows:

88. The Egyptian government has a General Secretariat of Mental health and Addiction Treatment that is part of the Ministry of Health and Population. A six-year mental health reform program was initiated by an Egyptian-Finnish bilateral aid program between 2002-07, and a Mental Health Act was passed in 2009 – there are 61 facilities providing mental health services. The mental health facilities are concentrated in Cairo; of the six mental health hospitals in Egypt, three are in Cairo. This would indicate that there are facilities and a mental health system that operates within Egypt that the applicant could access if required.

1. After quoting paragraphs [86] and [87] from the AAT’s decision where it was said to have “*considered the question of treatment referred to by Dr Naidoo*”, the primary judge continued:

43. The Tribunal’s reasons in the present proceedings show that, contrary to the applicant’s argument, the Tribunal did not repeat the error identified by Logan J [in *SZSFS*]. Specifically the Tribunal ***did not reject any of the symptoms upon which Dr Naidoo’s diagnosis was based.*** With one exception, ***none*** of the Tribunal’s findings or reasons was inconsistent with any matter referred to by Dr Naidoo relevant to the applicant’s mental health. The exception concerned the availability of medical facilities in Egypt. In effect, the Tribunal rejected Dr Naidoo’s opinion on that matter in light of country information which it set out in its reasons. It was open to the Tribunal to do that. As the Tribunal noted, Dr Naidoo did not give any basis for his opinion about medical facilities in Egypt and that basis could not be inferred from any training or experience referred to in the report.

1. Importantly, as I have mentioned, the AAT accepted the correctness of Dr Naidoo’s medical opinions: RS-2 at [20]; see also AAT reasons at [53] and [85]. The question is, therefore, whether the primary judge correctly found that the Tribunal’s findings and reasons were not inconsistent with Dr Naidoo’s medical opinions in relevant respects, leaving aside the exception to which his Honour referred.

Was the AAT’s finding that with treatment in Egypt Mr [AFD] “*would*” be able to return to work in Egypt “*in the reasonably foreseeable future*” illogical?

1. In support of ground 7, the appellants submitted that contrary to the primary judge’s finding at [43], “*[t]he Tribunal has conflated its understanding of the report that at least for a period that the First Appellant would be not be able to work with its understanding that there was a limit on the period of incapacity*” and its conclusion was illogical, irrational and/or unreasonable (AOS-1 at [37] and [39]). Rather, the appellants submitted that the primary judge ought to have found that the Tribunal misapprehended Dr Naidoo’s evidence. In effect and in common with ground 5, they submit that, having accepted Dr Naidoo’s diagnosis, it was irrational and illogical for the Tribunal to make the findings at [86]-[87] because they were inconsistent with Dr Naidoo’s description of Mr [AFD]’s symptoms underpinning that diagnosis.
2. The appellants’ submission to this extent should be upheld. The finding by the Tribunal that Mr [AFD] would not be fit for work for a period of 12-18 months but that with treatment (in Egypt) he “*would be able to return to work in Egypt in the reasonably foreseeable future*” had no foundation in Dr Naidoo’s report and failed to engage in any real or meaningful sense with the complexity and severity of Dr Naidoo’s diagnosis and description of the underlying symptoms.
3. In this regard, I have already set out Mr [AFD]’s history of serious medical illness and suicidal ideations going back at least to 2011 as detailed in Dr Naidoo’s report (see above at [22]-[24]). I have also set out Dr Naidoo’s diagnosis of a Major Depressive Disorder with a psychotic component, the symptoms of which included extreme anxiety, suicidal ideation, persistent paranoid ideation, delusional ideation, inability to concentrate, forgetfulness, and auditory hallucinations (see above at [25]).
4. Against that complex diagnosis, Dr Naidoo’s opinion was that Mr [AFD]’s “*response to treatment is going to be* *difficult to predict accurately*” but that treatment was “*almost certainly going to be prolonged*” given the chronicity of Mr [AFD]’s difficulties and the inadequacy of his previous treatment (AB204). In particular, Dr Naidoo was of the view that:

… *[****T]he patient remains seriously ill***. I believe that he is not receiving adequate or appropriate psychiatric treatment at present and that he is at some significant risk because of this. He is going to need treatment for his depression and psychosis in the form of medication and psychotherapy over a ***minimum*** period of 18 months. He is definitely not fit to work at the present time and clearly has been unable to do so for an extended period. I do not believe he is likely to be fit to entertain the idea of serious work prior to the psychiatric treatment above being completed. ***With optimal treatment*** I do not expect therefore he will be fit for work within a twelve to eighteen month period.

(AB204) (emphasis added)

1. In this regard Dr Naidoo referred to the need for appropriate treatment in a setting likely to reduce stress to “***an absolute minimum***” (AB204; emphasis added). He had earlier explained that the psychotic component of Mr [AFD]’s illness was probably indicative of the extreme level of stress he was experiencing not only by reason of the difficulties with his visa application, but combined with his fears for his young daughters’ safety if they were returned to Egypt which were the subject of constant ruminations.
2. There was no finding by the AAT that Mr [AFD]’s ***subjective*** fears that his daughters were at risk of female genital mutilation in Egypt were not truly held by him. The AAT’s findings related only to the question of whether it considered that those fears were ***objectively*** well founded. That being so, as counsel for the appellants submitted, the finding by the AAT that with treatment in Egypt [Mr [AFD]] “*would*” be able to return to work in Egypt “*in the reasonably foreseeable future*” had no basis in the evidence. To the contrary it was inconsistent with Dr Naidoo’s report and the AAT’s acceptance of his diagnosis based upon those symptoms. It follows that there was no logical connection between the evidence and the inferences drawn by the AAT (cf *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 as quoted at [52] above). The inference drawn also represented, with respect, a failure genuinely to consider the human consequences of returning Mr [AFD] to Egypt by honestly confronting what that would mean, having regard to Dr Naidoo’s description of Mr [AFD]’s illness and symptoms (see at [48]-[50] and [58] above).

Was the AAT’s finding material?

1. While I consider that the AAT’s finding was illogical in the manner alleged in ground 7, I do not consider that the error was material. This was because there was no claim that the appellant’s mental illness and consequential incapacity for work constituted persecution for a Refugees Convention reason (see above at [10]-[11]). In other words, the fact that person may, for example, suffer significant economic hardship that threatens that person’s capacity to subsist or to earn a livelihood by reason of mental illness does not, without more, satisfy the criteria for a protection visa under s 36(2)(a). As such, the claim by Mr [AFD] of significant economic harm by reason of his mental illness could not in any event have succeeded before the AAT.

###### Did the Tribunal extend to the appellants a real opportunity to appear in accordance with s 425 of the Migration Act (Grounds 2 and 10)?

1. It is convenient to deal with grounds 2 and 10 together as both concern the conduct of the hearing by the Tribunal.
2. First, by ground 2 the appellants alleged that the AAT failed to provide them with an invitation to appear in compliance with s 425 in circumstances where Dr Naidoo’s report had clearly advised that Mr [AFD] was unfit to attend the Tribunal. In particular, the appellants submitted that the primary judge’s reasons for finding that the appellants had not established that Mr [AFD] was not given a meaningful opportunity to attend a hearing and give evidence and present arguments at [27]- [28] were based on an understatement of Dr Naidoo’s opinion as to Mr [AFD]’s mental state and a lack of appreciation of the submission made on behalf him, as well as an acceptance that the Tribunal did enough to accommodate Mr [AFD]’s mental health condition (AS-2 at [28]). As against the seriousness of Mr [AFD]’s mental illness, the appellants described the provision of rest breaks with some force as “*hollow gestures*” (AS-2 at [30]). They further submitted that:

The submission was that the First Appellant was not able to give cogent evidence or present arguments because of his serious mental state. His attendance at the hearing, was not evidence that he was able to make the decision to agree to attend or that he could give cogent evidence or present arguments. His evidence to the Tribunal in response in the affirmative to the question “are you medically able?” is not evidence that he was in fact able to give evidence and present arguments to the Tribunal. The Tribunal misunderstood its statutory obligation to provide an opportunity for a meaningful hearing and understated the severity of the diagnosed condition by the expert. The Tribunal did not properly take account of the entirety of the relevant evidence of the expert and it reduced a comprehensive report regarding the mental health condition of the First Appellant to a couple of points, being that he was unfit to work and attend the hearing, but that expediting the process would be of substantial benefit to him. The Tribunal preferred its own assessment of the medical fitness of the First Appellant to give evidence and present arguments over that of an expert consultant psychiatrist, without explaining why.

(AS-2 at [29])

1. In their submission the appellants stated that they did not contend that Mr [AFD] was denied the opportunity to put his case in the best possible way which was not an error of a jurisdictional kind, but rather that he was “*severely* *prejudiced by his severe mental condition*” (AS-2 at [30]).
2. Secondly, by ground 10 the appellants submitted that the FCC erred at [50] in finding that “*the applicant had every opportunity to address the issues”* of his mental condition and credibility and failed to find that the AAT had acted unreasonably by not permitting the appellants’ advisor to participate in the hearing and assist given Dr Naidoo’s evidence.
3. The transcript of the AAT hearing on 28 October 2015 reveals relevantly that the following exchange between the Tribunal member, Mr [AFD] and the appellants’ migration agent, Mr McArdle, with the assistance of the interpreter (**INT**) took place after the member briefly outlined the criteria for a protection visa:

Q34 … Now, I am aware that there have been some mental health issues with yourself – with both applicants? Are you medically able to attend and undertake this hearing?

A(INT) I am very fearful.

MR McARDLE He’s acting against advice in coming today.

Q35 So you have – you believe you are medically able to attend this hearing?

A(INT) But I am afraid, I am panicking, I am very, very scared.

Q36 Okay. I understand that you need – this is a yes or no question. So are you medically able to attend this hearing?

MR McARDLE It’s not really a yes or no answer, if I may say so.

Q37 Can you just be quiet and not interject please? I am asking the applicant a question.

MR McARDLE I was just trying to be of assistance.

Q38 Well, can you stop being of assistance until I request your assistance. I have a copy of your psychiatric report. You have voluntarily attended – come to attend this hearing. Are you – do you believe that you are able and fit to attend this hearing? You need to answer yes or no. I understand you are anxious and nervous.

A(INT) I can but I am tired. There is a bit of exhaustion.

Q39 Okay. But you believe that you are able to attend?

A(INT) Yes.

…

Q41 Okay. Now, I have taken into account your medical report. If, during this hearing, you are getting too anxious and you need a break during the hearing please let me know and I’ll facilitate those breaks for you if you believe your anxiousness – if you believe you are getting too anxious and it is impacting on your ability to give coherent evidence I am happy to give you a break. Okay. Do you understand?

A(INT) Okay. Yes, I understand.

…

Q45 Okay. What I will ask now if you can wait outside. As I said before, please let me know if you need a break during the hearing. Just to lower your stress levels I am happy to take a series of short breaks if you require them.

(AB408-410)

1. It appears that Mrs [AFD] was present during these exchanges, but was then asked to wait outside while her husband was questioned. Mr McArdle, the appellants’ migration agent, was present throughout the hearing. On a number of occasions, during the hearing, Mr McArdle attempted to interrupt in order to request a break for the appellant. The first occasion was shortly before the end of the first hour when the member was in the course of asking questions about the risks that his daughters would be subjected to female genital mutilation despite Mr and Mrs [AFD]’s opposition. The member refused to allow Mr McArdle to speak, simply saying “*Not finished yet.*” (AB419, Q96). Not long thereafter the following exchange took place:

Q104 So you wanted to raise something?

MR McARDLE Just you asked the witness if he wants to go to the toilet or something like that. We have been going for an hour and a half.

Q105 Yes, that is fine. Excuse me.

MR McARDLE Sorry.

Q106 Please do not do that.

MR McARDLE What’s that, your Honour?

Q107 Please don’t suggest to me when he might want to break.

MR McARDLE I see.

Q108 I will be the arbitrator.

MR McARDLE Okay. Well, it might be helpful if you ask him.

Q109 I’ll ask him when I am ready to ask him.

MR McARDLE Very well.

Q110 Okay. I’d like to go on to your claim about religion.

MR McARDLE Can I just ask one thing though? You did say he could tell you if he ever wants a break.

Q111 Correct.

MR McARDLE You did say that earlier.

Q112 Yes I did.

MR McARDLE Yes.

Q113 I didn’t say you could ask me for a break on his behalf though, did I?

MR McARDLE I was just trying to be of assistance.

Q114 Okay. I think, as I said at the start, unless you’ve got something substantive to add, then please don’t try and interrupt.

MR McARDLE I’m not trying to interrupt, I was just trying to be of assistance.

Q115 Okay. I think we’ll just leave it there. Okay. So I’d like to go on now to your claim about the Christianity.

A(INT) Can I please go to the toilet?...

(AB 420-421)

1. Finally, at this point Mr [AFD] was permitted to take a toilet break before the hearing continued.
2. It must be borne in mind that the audiotape of the hearing was not in evidence and therefore that the tone in which the AAT member was speaking in these passages is not known. Nonetheless, these passages give rise to real concerns as to the fairness of the hearing given in particular: Dr Naidoo’s opinions as to the seriousness of Mr [AFD]’s mental illness, his extreme anxiety and the serious dangers which attending a hearing might pose to his mental health; and by reason among other things of the member’s refusal to permit his representative to make submissions about his mental capacity to give evidence at the hearing and to request a break for Mr [AFD]. The member’s conduct in these respects also, as I have mentioned, reinforces my conclusion that the Tribunal member has comprehensively failed to consider, in a real and meaningful sense, the ramifications of Dr Naidoo’s medical opinions.
3. It is to be expected that an officer of the Commonwealth occupying a position of considerable authority and power will always treat an applicant and her or his representatives with dignity and respect, particularly where the applicant is in a situation of extreme vulnerability, and the failure to do so may be indicative of jurisdictional error. As Allsop CJ said in *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1 with reference to a consideration of whether a decision is legally unreasonable:

9. … The terms, scope and policy of the statute and the fundamental values that attend the proper exercise of power – a rejection of unfairness, of unreasonableness and of arbitrariness; equality; and the humanity and dignity of the individual – will inform the conclusion, necessarily to a degree evaluative, as to whether the decision bespeaks an exercise of power beyond its source.

1. Nonetheless, despite my concerns I do not consider that a jurisdictional error is established in this case by grounds 2 or 10. Given my conclusion that the appeal must be allowed in any event on ground 5, my reasons can be briefly stated.
2. With respect to ground 2, the AAT’s obligation to provide an applicant for a protection visa with an invitation to appear is governed by s 425 of the Migration Act. That section provides that:

(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.

(2) Subsection (1) does not apply if:

(a) the Tribunal considers that it should decide the review in the applicant’s favour on the basis of the material before it; or

(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or

(c) subsection 424C(1) or (2) applies to the applicant.

(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

1. The AAT may fail to give an applicant an invitation in compliance with s 425 of the Migration Act even if it is unaware of the adverse impact of a mental illness upon the particular applicant’s capacity to represent herself or himself and give evidence. As the Full Court in *BJB16 v Minister for Immigration and Border Protection* [2018] FCAFC 49; (2018) 260 FCR 116 (***BJB16***) explained (referring to *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* [2003] FCAFC 126; (2003) 128 FCR 553 at [41]):

41. The authorities concerning s 425 of the *Migration Act* indicate that an inability of applicants to represent themselves before the Tribunal by reason of mental or physical unfitness may, even if not known by the Tribunal, give rise to a failure by the Tribunal to provide a “real and meaningful” invitation to them to appear before the Tribunal to give evidence and to present arguments relating to the decisions under review.

1. The Full Court further explained in *BJB16* that:

43. Applicants who assert that their psychological condition deprived them of the “meaningful opportunity” required by s 425 of the *Migration Act* must establish more than the fact of the condition. They must also establish that their condition is such as to deny them the capacity to give an account of their experiences, to present argument in support of their claims, and to understand and respond to the questions put to them: *SZMSA v Minister for Immigration and Citizenship* [2010] FCA 345 at [20]-[25] and [32]-[35] (Gilmour J); *SZNVW* at [20] (Keane CJ). Further, even when psychological evidence may, had it been available to the Tribunal, have led it to take a different view of the credibility of an applicant’s account, the absence of that evidence does not, of itself, establish that the hearing before the Tribunal proceeded on a false assumption about the applicant’s ability to give evidence and to present arguments relating to the issues arising in relation to the decision under review: *SZNVW* at [19]. Generally, it is insufficient for applicants to show no more than that a medical condition may have deprived them of the ability to put their case to best advantage.

1. Similarly in *SZNCR* (in a passage cited by the primary judge at [25]), Tracey J held that:

30. … an applicant who has a diagnosed mental impairment which does not render him or her “entirely unfit” to attend a Tribunal hearing and answer questions cannot be held to have been denied a “real and meaningful” opportunity to participate in the appeal hearing. It must be demonstrated that the applicant was unfit (***in the sense of being unable***) to give evidence, present arguments and answer questions in the course of the hearing.

(emphasis added)

(See also *Minister for Immigration and Citizenship v SZNVW* [2010] FCAFC 41; (2010) 183 FCR 575 (***SZNVW***) at [20] (Keane CJ).

1. It can readily be accepted, as the appellants submitted, that Mr [AFD] was severely prejudiced by his serious mental condition. There is also considerable force in the submission that the Tribunal’s offer to provide rest breaks only where Mr [AFD] asked for them and not his representative, failed sufficiently to accommodate Mr [AFD]’s serious mental condition and afford him a fair hearing, given among other things the implicit assumption that Mr [AFD] would feel able to do so and was able to self-assess as to when he needed a break.
2. However, as the primary judge held, the evidence did not go so far as to establish that Mr [AFD] was rendered “*entirely unfit*” to attend the AAT hearing and answer questions, applying *BJB16*  and *SZNVW*. The transcript indicates that he was able to participate in the hearing and answer questions generally in a responsive and, at times, relatively detailed manner. Nor did Dr Naidoo express an opinion that Mr [AFD] was unable to give evidence, as opposed to raising concerns about the serious dangers that attending a hearing might pose for Mr [AFD]’s mental health, as the primary judge held at [27]. That notwithstanding, the real difficulty in circumstances where his illness was the subject of detailed, expert evidence and no application was made for an adjournment on the basis of that evidence, was the Tribunal’s failure to take the psychiatric evidence into account in assessing the Mr [AFD]’s credibility as I have already held with respect to ground 5.
3. With respect to ground 10, the appellants submitted that the Tribunal has a discretion to permit the appellant’s advisor to participate in the hearing and assist which it failed to exercise reasonably for the following reasons:

The First Appellant had medical evidence that demonstrated an incapacity which, on any reading, impacted on his ability to attend the hearing and present argument. The complaint is not that he was not able to give his *best* evidence or present his *best* case, but to present his case *unencumbered by significant mental illness and psychiatric impairment* of which the Tribunal has evidence.

His legal representative was present and could have assisted with country information and the First Appellant’s history. The approach adopted by the Tribunal indicates a distrust of the Appellant and his advisor, and his preventing the advisor from participating in the hearing was unreasonable in all the circumstances.

The measures taken by the tribunal to ask whether the First and Second Appellants felt medically able to give evidence and could take breaks if they needed to were insufficient and as submitted below to the Federal Circuit Court a “hollow gesture”, which was meaningless and perfunctory and failed to address the real issue.

(original emphasis) (AS-3 at [26]-[28])

1. Notwithstanding the concerns earlier expressed as to the manner in which the AAT conducted the hearing, the appellants have not established that the AAT’s conduct in restricting the appellants’ representative’s participation at the hearing in the way that it did constituted jurisdictional error.
2. First, any determination of legal unreasonableness falls to be determined against the particular statutory context: *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 322 at [92] (Gageler J). In this regard, s 427(6)(a) of the Migration Act provides that a person appearing before the AAT to give evidence is not entitled “*to be represented before the Tribunal by any other person*” (cf s 366A). The AAT, therefore, had no statutory obligation to permit the appellants’ representative to speak or participate in the hearing. It follows as McHugh J held with respect to s 427(6)(a) in *Re Minister for Immigration and Multicultural Affairs; Ex Parte Cassim* [2000] HCA 50; (2000) 74 ALJR 1404:

11. … That subsection declares that a person appearing before the tribunal is not entitled to be represented or to examine or cross-examine witnesses. The common law rules of natural justice cannot prevail against this legislative declaration.

1. Furthermore, while a refusal to permit a person to be represented may, depending upon the circumstances, constitute a breach of procedural fairness, s 422B of the Migration Act excludes the natural justice hearing rule in respect of the matters dealt with in that division, including s 427(6)(a): cf *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 30; (2004) 134 FCR 271 at [72] and [84] (French and Lee JJ) and [91] and [110] (Hill J) which concerned the Migration Actas it stood before the enactment of s 422B. It follows, as the Minister submits, that to suggest that it would be unreasonable not to permit legal representation as a general proposition would be to impose a requirement that is inconsistent with the statute.
2. Legal unreasonableness, however, is “*invariably fact dependent… [and] will require careful evaluation of the evidence, including any inferences which may be drawn from that evidence*”: *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 231 FCR 437 at [42] (the Court). It is therefore possible that in the particular circumstances of the particular case, it may be unreasonable to refuse to permit a representative to appear and participate at a hearing, or to refuse to consider such a request, where, for example, the person was incapable by reason of psychiatric illness of making submissions on their own behalf. In my view, it is no answer to this, with respect, to say that many individuals who appear before the AAT suffer from psychological disorders or psychiatric illness contrary to the Minister’s submissions (RS-3 at [18]). The decision in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 78 ALJR 992 at [92] cited by the Minister does not suggest otherwise.
3. In this case, the Tribunal sought only to limit the representative’s participation so as to enable the Tribunal to ask questions directly of Mr [AFD] without the representative’s contribution. Furthermore, the Tribunal stated early in the hearing that after Mr and Mrs [AFD] had completed their evidence, “*I’ll give your adviser the opportunity to clarify anything that’s been said or to put forward any additional comment.*” (AB407, Q30). At the end of the hearing, the Tribunal allowed the representative the opportunity to provide further information and submissions with the benefit of the transcript of the hearing, as requested (AB405-459). A further submission was in fact made following an unsuccessful application for the Tribunal member to disqualify himself, and was taken into account by the Tribunal in its decision.
4. In those circumstances, while reasonable minds may differ, even strongly, with the approach adopted by the Tribunal member with respect to the appellants’ representative’s ability to represent them at the hearing, that does not suffice to establish that the Tribunal’s limitations upon the representative’s participation were so egregious and unfair as to be legally unreasonable.

###### Grounds 1 and 9

1. Finally, in the circumstances grounds 1 and 9 can be disposed of shortly. I will deal with them in reverse order as ground 1 deals with a discrete issue concerning the fairness of the hearing before the primary judge.
2. First, it will be recalled that ground 9 alleged that the AAT failed to apply the “*real chance*” test as explained by the High Court in *Guo* and *Chan* and, in particular, failed to consider the possibility that its findings in relation to the risk of female genital mutilation in Egypt might be wrong. It is unfortunate that the Tribunal’s reasons do not set out any explanation by the AAT of its understanding of this critical aspect of the definition of a refugee under the Migration Act and, in particular, that it suffices if the risk of harm is less than 50%, so long as it not fanciful or remote (see above at [12]). Nonetheless, the Tribunal referred generically to the correct test at [55] of its reasons in finding that it did not accept that “*there is a* ***real chance*** *that the third-to fifth-named applicants will be subject[ed] to FGM on return to Egypt”* (emphasis added). In so finding, the AAT’s reasons in the following paragraphs do not suggest any level of doubt so as to render it necessary for the AAT to consider alternative scenarios in the event that it was wrong in so finding. In those circumstances, notwithstanding that I have reservations about the line of reasoning by which the AAT reached that conclusion, I do not consider that ground 9 was established.
3. Secondly, by ground 1 the appellants alleged that the FCC denied them procedural fairness in failing to afford them an opportunity to make submissions on the applicability of *NAMJ.* The factual context in which the issue arises is not in issue and is conveniently summarised in the Minister’s submissions as follows:

At the hearing the Court noted that there may be a decision of Branson J which was on point and invited the parties to provide the citation of the case if they were able to locate it. After the decision was reserved, the appellants’ representative provided the judge a citation of the decision (*NAMJ)* and also made a submission about the decision. The judge ignored the decision on the basis that no leave had been granted to permit the [appellants] to make the submission: AB 465-466 at [17]-[18].

(ROS-2 at [6])

1. Specifically the primary judge held that:

18. … No leave was granted to make any such submissions. That this is entirely inappropriate and is so well-established that it hardly bears repeating: *Patel v Minister for Immigration & Border Protection* [2016] FCCA 954 at [15] citing *MZABP v Minister for Immigration & Border Protection* [2015] FCA 1391; *Carr v Finance Corporation of Australia Ltd* (1981) 147 CLR 246; [1981] HCA 20 at 257-258 per Mason J; *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318; [2003] HCA 28 at [27]-[31] per McHugh J; *NT Power Generation Pty Ltd v Power & Water Authority* (2004) 219 CLR 90; [2004] HCA 48 at [191]-[192] per McHugh A-CJ, Gummow, Callinan and Heydon JJ; *Seafish Tasmania Pelagic Pty Ltd v Burke, Minister for the Sustainability, Environment, Water, Population & Communities* [2013] FCA 782 at [2]-[5] and *Singh v Department of Employment & Workplace Relations* [2009] FCAFC 59 at [66]-[72].

19. Nevertheless, it appears that many lawyers in this State remain unaware of this basic principle. Needless to say, I have ignored the submissions.

1. In so holding, the primary judge did not fall into error. First, as the Full Court held in *Singh v Secretary, Department of Employment and Workplace Relations* [2009] FCAFC 59:

70. Legal practitioners and the parties, represented or not, must understand that they should not make supplementary submissions to the Court after an appeal has been heard, and whilst judgment is under consideration, without first obtaining the Court’s permission. The parties must make their written submissions before the hearing of the appeal. The hearing of the appeal is for oral submissions. It is not designed to provide the parties with material for further written submissions.

71. At the completion of the hearing of the appeal the parties’ right to make submissions on the appeal is exhausted. If it were otherwise and a party could simply present a further submission, the appeal could go on interminably. Such would be inconsistent with the maintenance of the administration of justice.

1. Secondly, it was not suggested that the primary judge decided the case on the basis of an issue which was not raised by either party at the hearing or by the Court: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22;(2007) 230 CLR 89 at [132]; *Minister for Immigration and Border Protection v BBS16* [2007 FCAFC 176; (2017) 257 FCR 111 at [33]. To the contrary, as the Minister submitted, the question of whether the requirements of s 425 of the Migration Act had been met given Mr [AFD]’s mental illness was squarely raised at the hearing, and the leading decision, *SZNVW*, was cited.
2. Thirdly, that being so, the natural justice hearing rule does not prevent the Court from relying upon an authority relevant to a matter in issue even if it was not raised by the parties or addressed at the hearing, as the Minister submitted: *Friend v Brooker* [2009] HCA 21;(2009) 239 CLR 129 at [118].
3. It follows that ground 1 must be dismissed.

##### CONCLUSION

1. For those reasons above, the appeal must be allowed and the matter remitted for determination according to law by the Tribunal differently constituted. In accordance with the request by the Minister, I will afford the parties the opportunity to make submissions on the issue of costs.

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| I certify that the preceding one hundred and twenty-six (126) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perry. |

Associate:

Dated: 10 July 2020

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | NSD 2129 of 2016 |
| Appellants |  |
| Fourth Appellant | AFG16 |
| Fifth Appellant | AFF16 |