FEDERAL COURT OF AUSTRALIA

C7A/2017 v Minister for Immigration and Border Protection [2020] FCAFC 63

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| Appeal from: | *C7A/2017 & Ors v Minister for Immigration & Anor* [2019] FCCA 1440 |
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| File number: |  |
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| Judge(s): | **KATZMANN, WIGNEY AND ABRAHAM JJ** |
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| Date of judgment: | 9 April 2020 |
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| Catchwords: | **MIGRATION** — Protection visa — mother (first appellant) and two sons (second and third appellants) — where visa application based on first appellant’s claim to be daughter of stateless Rohingya father from Myanmar and Indonesian mother — where Tribunal made adverse credibility findings and was satisfied that appellants either had or were entitled to Indonesian nationality — where substantive claims in visa application made by first appellant and second and third appellants’ claim based on membership of same family unit but where submissions made before Tribunal hearing made separate claims on behalf of children — where at hearing first appellant told Tribunal children had no separate claims and children sent out of hearing room and not recalled — where appellants represented by migration agent, whether primary judge erred in holding Tribunal had lawfully heard, considered and determined children’s claims — whether Tribunal denied children procedural fairness in breach of s 425(1) of *Migration Act 1958* (Cth) —whether primary judge failed to determine a ground of review — where Tribunal in no doubt as to the correctness of its opinions, whether Tribunal bound to consider alternative possibility that appellants unable to reside lawfully in Indonesia — whether Tribunal failed to consider certain evidence and, if so, whether Tribunal’s approach legally unreasonable — whether findings about name of first appellant’s father and right of appellants to enter and reside in Indonesia legally unreasonable — whether reasons of primary judge inadequate |
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| Legislation: | *Migration Act 1958* (Cth) ss 5J, 36, 45AA, 65, 425(1), s 496  *Migration Regulations 1994* (Cth) reg 2.08F, Sch 2, cl 785.221  *Judiciary Act 1903* (Cth) s 44 |
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| Cases cited: | *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593  *BNH16 v Minister for Immigration and Border Protection* [2017] FCAFC 109  *CSR Ltd v Eddy* (2008) 70 NSWLR 725  *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166  *Minister for Immigration & Multicultural & Indigenous Affairs v SCAR* (2003) 128 FCR 553  *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611  *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575  *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559  *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220  *Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU*(2013) 215 FCR 35  *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 |
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| Date of last submissions: | 20 November 2019 |
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| Registry: | New South Wales |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice |

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| **Table of Corrections** |  |
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| 7 January 2021 | In paragraph 78, “appellant’s” has been replaced with “appellants” |
| 7 January 2021 | In paragraph 123, “[37]” has been replaced with “[38]” |

ORDERS

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|  | | ACD 47 of 2019 |
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| BETWEEN: | C7A/2017  First Appellant  C7B/2017  Second Appellant  C7C/2017  Third Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGES: | KATZMANN, WIGNEY AND ABRAHAM JJ |
| DATE OF ORDER: | 9 April 2020 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The first appellant pay the first respondent’s costs.

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

REASONS FOR JUDGMENT

THE COURT:

## Introduction

1. The appellants are a woman and her two sons, born on 21 November 2000 and 8 May 2009, who arrived in Australia by boat from Malaysia in February 2013. The first appellant claims that she and her two sons are stateless Rohingya. She also claims to fear that, if she were to return to Malaysia, she would be imprisoned for want of documentation, would not be allowed to legally enter Myanmar, and would be harmed by the authorities if she returned illegally. She applied to the Minister for protection visas, including the children as members of her family unit. A delegate of the Minister determined not to grant the visas. The appellants applied to the Refugee Review Tribunal for review, but the Tribunal affirmed the delegate’s decision. The Tribunal did not accept that she was a stateless Rohingya. Rather, it believed that she was Indonesian and that both she and her sons were entitled to Indonesian citizenship. The appellants challenged the Tribunal’s decision in the Federal Circuit Court, alleging that the Tribunal had committed multiple jurisdictional errors, but the primary judge dismissed their applications. This is an appeal from that judgment.

## The statutory framework

1. The power to grant a visa to a non-citizen vests in the Minister (*Migration Act 1958* (Cth), s 65), although like all the powers conferred on the Minister by the Act, it may be delegated: Migration Act, s 496. A visa of any kind can only be granted if the Minister is satisfied that the applicant satisfies the criteria for the visa set out in the Act or the regulations made under the Act.
2. The first appellant applied for Protection (Class XA) visas, that is to say, for permanent protection visas. By operation of s 45AA of the Act, however, and reg 2.08F of the *Migration Regulations 1994* (Cth), the application was taken to be an application for a Protection (Class XD) (Subclass 785) visa, that is to say, for a Temporary Protection visa (TPV).
3. A principal criterion for the grant of a Subclass 785 (Temporary Protection) visa was that at the time of the decision the Minister is satisfied that a criterion mentioned in para 36(2)(a) or (aa) of the Act is satisfied in relation to the applicant or that the person is a member of the same family unit as such an applicant and the applicant has been granted such a visa: Migration Regulations, Sch 2 cl 785.221.
4. Paragraph 36(2)(a) provides that a criterion for a protection visa is that the applicant is a non‑citizen in Australia to whom Australia owes protection obligations because the applicant is a refugee. “Refugee” is defined in s 5H(1) to mean a person:

(a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or

(b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

1. “Well-founded fear of persecution” is defined in s 5J. Subsection 5J(1) relevantly provides that, for the purposes of the application of the Act and regulations, a person has a well-founded fear of persecution if the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of those reasons. The real chance of persecution must relate to all areas of a receiving country.
2. These provisions derive from Article 1A(2) of the *Convention Relating to the Status of Refugee*s, commonly referred to as “the Refugee Convention” and in this judgment, for convenience, we will refer to the reasons listed in s 5J as “the Convention reasons”.
3. Paragraph 36(2)(aa) states that an alternative criterion is that the applicant is a non-citizen in Australia in respect of whom the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant’s removal from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.
4. This is known as “the complementary protection criterion”.
5. Subsection 36(3) of the Act, however, provides that:

Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

1. There are exceptions. Those exceptions appear in subss 36(4), (5) and (5A).
2. First, subs 36(3) does not apply in relation to a country in respect of which the non-citizen has a well-founded fear of being persecuted for a Convention reason and the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of availing himself or herself of a right mentioned in subs (3), there would be a real risk that the non‑citizen will suffer significant harm in relation to the country: subs 36(4).
3. Second, subs 36(3) does not apply in relation to a country if the non-citizen has a well-founded fear that the country will return the non-citizen to another country in which the non-citizen will be persecuted for a Convention reason: subs 36(5).
4. Finally, subs 36(3) does not apply in relation to a country if the non-citizen has a well-founded fear that the country will return the non-citizen to another country and the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non‑citizen availing himself or herself of a right mentioned in subs 36(3), there would be a real risk that the non-citizen will suffer significant harm “in relation to the other country”: subs 36(5A).
5. Subsection 36(6) provides that the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

## Background

### The status of the first appellant’s husband

1. The first appellant’s husband arrived in Australia before his wife and their two sons on 9 November 2009. A delegate of the Minister was satisfied that he was a stateless Rohingya refugee. He was granted a permanent Protection (class XA) (Subclass 866) visa on 18 May 2011 and continues to reside in Australia.

### The first appellant’s claims

1. In her entry interview, the first appellant declared that she left Malaysia to look for her husband and to enable her children to be with their father. According to the delegate, she did not raise her claims for protection during her entry interview, although she did give her ethnicity as Rohingyan. For present purposes it matters not whether the delegate was correct in this regard because claims for protection were clearly made in the visa application, completed with the assistance of a migration agent and through an interpreter, which the first appellant signed on 26 September 2013.
2. In that application, the mother claimed that she alone had claims for protection. The application included her two sons, but only as members of her family unit. In the application, against the question (Q12) “[i]f you are called for an interview, are there any factors we will have to take into account (*such as access for a disabled person*)?”, the “Yes” box was ticked for both the second and the third appellants and in the box underneath it the words “TOO YOUNG!” were entered.
3. In a Statement of Claims dated 26 September 2013 attached to the visa application, the first appellant made the following claims. Her father was born in Burma and was stateless. He died when she was in utero. Her mother was Indonesian. She left the first appellant when she was only six years old. Like her father and husband, she is a stateless Rohingya. She lived all her life in Malaysia as a refugee, though not recognised as such, until she fled to Australia to seek asylum and be reunited with her husband. He had been deported from Malaysia leaving her and their sons behind. She fears harm from the authorities in Myanmar because she is an ethnic Rohingyan and a practising Muslim. She did not say that she feared harm because of her husband’s Rohingyan ethnicity.
4. This was not the first application the appellants had made for Australian visas. On 6 January 2012, while they were still in Malaysia, the first appellant applied for Global Special Humanitarian (Class XB) (Subclass 202) visas for her and her children. The proposer was her husband. It appears that that application was pending at the time the first appellant applied for protection visas since the application for special humanitarian visas was declined on 26 May 2015 — about two weeks before the delegate’s decision on the protection visas.
5. With the first appellant’s consent the Minister’s Department undertook inquiries into her identity.
6. In response to those inquiries the Department received an email from the UNHCR sent on 25 May 2015. The email contained information apparently derived from the husband’s file in Malaysia. The sender, Magdalena Palys, advised, amongst other things, that the first appellant was not registered with the UNHCR; she was not the biological mother of the second appellant (his mother was stated to be an Indonesian national named XXXXXXX); the first mention of the first appellant in the file is from 2011 when the UNHCR received “a request letter for registration”; and the information on the file indicates that the mother was born in Malaysia to a Rohingya father and an Indonesian mother and that she married her husband in 1999. There was no mention of the first appellant ever having been in Myanmar. Ms Palys said that, since the first and third appellants were not registered with the UNHCR, the UNHCR was unable to provide a copy of “their file”.
7. During the interview with the delegate, the first appellant produced identity cards issued by the UNHCR relating to her husband and the elder boy, the second appellant. She told the delegate that she had requested an identity card a number of times but did not receive one. She said she was in hospital when the second appellant received his. She said that she went to the UNHCR office in Malaysia with her husband and the two UNHCR cards but “could not resolve her status in Malaysia”. She also said that she went to the UNHCR office in Malaysia with her husband but they were not granted entry and were not issued with any documents. A certified copy of the marriage certificate was supplied. It indicated that the first appellant was the daughter of “Suparman”, which was not the name she used and not the name assigned to her father in her visa application. The delegate noted that country information stated that Suparman is an Indonesian name and a very common name in Java.
8. An “effective protection check” was conducted in October 2014 to see whether Indonesia was a safe third country for the first appellant but the Department’s records disclose that, owing to her lack of identity documents, permission for her to reside in Indonesia could not be determined. But the delegate observed that she had not sought any determination of her eligibility for Indonesian citizenship and was not satisfied that she was not eligible and could not reside in Indonesia.
9. The first appellant told the delegate that her grandfather was Rohingyan from Maungdaw in Myanmar and that her father was born in Maungdaw and travelled to Malaysia as a refugee. She said that, after her mother had abandoned her and returned to Indonesia, she lived with, and was raised by, her uncle, who was Rohingyan, and that her knowledge of Rohingyan people is derived from what her uncle told her. Nevertheless she informed the delegate that she could not speak their language.

### The delegate’s decision

1. The delegate accepted that the first appellant was Muslim but did not accept that her other claims were credible. Consequently, he was not satisfied that she is a Rohingya, at risk of being seriously harmed in Malaysia or of being deported from Malaysia to Myanmar, or that she travelled to Australia because she needs protection. Noting that “no specific claims” were made by, or on behalf of, her sons, it was also not satisfied that, as members of the same family unit as the first appellant, they met the criteria for the visa. Furthermore, the delegate said that the first appellant’s declaration that the second appellant was her son was inconsistent with the UNHCR information supplied on 25 May 2015 (in the email from Ms Palys). Despite the statements made by the first appellant to this effect, the delegate stated that he had no evidence that the first appellant was the mother of the second and third appellants. In these circumstances, he said he could not be satisfied that either of the boys was a member of the same family unit as the first appellant.

## The Tribunal proceeding

1. On 15 June 2015 an application for review was lodged with the Refugee Review Tribunal, which amalgamated with the Administrative Appeals Tribunal two weeks later. The review application listed the three appellants individually as persons applying for review. In a letter to their migration agent dated 16 June 2015, the Tribunal acknowledged receipt of the applications.
2. On 31 January 2017 the Tribunal wrote again to their migration agent, inviting the appellants to provide a written submission setting out all the claims they made and maintained and informing her that if she was proposing to call evidence at the hearing from a witness, a witness statement setting out the witness’s evidence should be provided by 10 February 2017. In a letter bearing the same date, addressed to the first appellant, the Tribunal advised that, having considered the material before it, it was unable to make a favourable decision and invited her to appear before the Tribunal to give evidence and present arguments relating to the issues arising in her case on 17 February 2017.
3. In the response to the hearing invitation, lodged by the appellants’ then migration agent, Nathan Willis, in answer to the question “will you take part in the hearing scheduled for 17 February 2017”, crosses were placed in the “yes” column beside the names of each of the three appellants. The hearing was later postponed and a further hearing invitation was extended to the first appellant on 23 February 2017. In the response to that hearing invitation, it was again indicated in the same way that all three appellants would take part in the hearing.
4. Before the hearing took place, DNA “parentage testing” was conducted on the mother and her husband and the two children. The DNA tests confirmed to a level of virtual certainty that the first appellant was the mother of the second and third appellants and her husband their father.
5. On 14 March 2017 Mr Willis emailed the Tribunal advising that he, the first appellant, her husband, and each of the two children would be present for the hearing the next day. Attached to the email were copies of the following documents: a statutory declaration from the husband dated 21 December 2011; the first appellant’s Statement of Claims; the DNA test reports, an opinion dated 22 February 2017 from a “law scholar” concerning the question of eligibility for Indonesian citizenship; a copy of the marriage certificate; a further statement from the first appellant dated 14 March 2017; and a 17-page submission which addressed, among other things, the errors allegedly made by the delegate. Despite the indication that the children intended to participate in the hearing and the specific invitation from the Tribunal to provide statements from witnesses, no statements were provided from either of the children.
6. The legal opinion set out some of the circumstances in which a person is considered to be an Indonesian citizen, what is necessary to obtain Indonesian citizenship, and how it can be lost. The author expressed the view, based on a number of assumptions many of which the Tribunal did not accept, that, if the first appellant were able to establish that her mother was an Indonesian citizen, it is possible she might be considered as an Indonesian citizen but that it was likely she would experience significant difficulties “evidencing this possible right of citizenship, by virtue of the fact that she never met her mother and she holds no documentation relating to her mother and has never lived in Indonesia”. If she were unable to establish her Indonesian citizenship, the author continued, it follows that her children and her husband are unlikely to be recognised as Indonesian citizens.
7. Section 6 of the submission reads as follows:

**6.** **separate claims for applicant two and applicant three** …

6.1 We note further to the Delegate finding on the basis of UNHCR advice that Applicant Two is not the biological child of Applicant One that this finding has now been proven due to the DNA results to hand.

6.2 Furthermore, we note that should circumstances arise whereby the Tribunal does not accept that Australia has a Protection Obligation for Applicant One, that Applicant Two and Applicant Three raise their own clarified claims for protection. Such claims arise due to their Rohingya ethnicity, Muslim religion, their father’s accepted claim for Protection in Australia and the DNA results confirming paternity. We make further submissions below in relation to Australia’s obligations arising under the Convention on the Rights of the Child (CROC) which also arise in relation to both Applicant Two and Applicant Three.

1. In the first appellant’s statement of 14 March 2017, she maintained that she was of Rohingyan ethnicity. She also addressed the apparent inconsistency between the name given to her father in the marriage certificate and the name she had given him in her visa application. She stated:

I say now that I have always known my father as [the name recorded in the visa application]. I know that the Rohingya language is a language that is only spoken [and] is difficult for non-Rohingya to pronounce and often words can be transliterated incorrectly, this may explain why my father’s name that I know only in Rohingya, appears slightly different when transliterated to English.

1. The appellants appeared before the Tribunal on 15 March 2017, as the Tribunal recorded in its decision record “to give evidence and present arguments”. No transcript of the hearing was included in the appeal book and none was provided to the court below either. Nor did the appellants supply a recording of the hearing. It appears from the Tribunal’s decision record that the first appellant was asked at the outset if the children had separate claims or whether they came solely under her claims and that she told the Tribunal that they relied on her claims alone. It also appears from the Tribunal record that the rest of the family were asked to wait outside the hearing room, she was then questioned by the Tribunal, and, when that interrogation concluded, the husband returned to the hearing room so that he could be questioned. The hearing was conducted with the assistance of an Indonesian interpreter.
2. The appellants were represented by Mr Willis. He drew the Tribunal’s attention to section 6 of his pre-hearing submission. Despite this, neither of the sons was questioned at any time.
3. After the first appellant and her husband had been interrogated, the Tribunal put to the first appellant two matters it considered would be the reason, or part of the reason, for affirming the delegate’s decision (see Migration Act, s 424AA). First, it put to her that the Tribunal was concerned that her father had an identifiably Indonesian name and the name in the UNHCR document of the mother of the second appellant also had an Indonesian name, which suggested to the Tribunal that the first appellant was actually an Indonesian national who may have a family support network in Indonesia and had not been abandoned at the age of six. Second, the Tribunal put to the first appellant that, if she did not speak Rohingyan and, as she had claimed, her uncle told her that she could not register with the UN unless she had a Rohingyan identity, it was reasonable to believe that her uncle would have tried to teach her Rohingyan, which raised concerns that she had in fact no Rohingyan relations. In a follow-up letter dated 22 March 2017, the Tribunal wrote to Mr Willis, enclosing a letter addressed to all three appellants, inviting them to comment on, or respond to, the following “information”, presumably in conformity with its obligation under s 424A of the Migration Act:

During your AAT hearing, the Tribunal discussed its concerns that both the primary applicant’s parents were Indonesian and that the claim to have a Rohingya father was fabricated. This also raised doubts that the applicant was an Indonesian citizen already, may well have substantive family connections within Indonesia, and hence could enter and reside there. Both children appear to also be eligible for Indonesian citizenship if they did not already possess it and could also reside and enter into Indonesia. The Tribunal has concerns that the applicant and her husband had fabricated the claim regarding the identity of the mother of one of the children, as well as the antecedents of the applicant and this could mean the Tribunal forms an adverse opinion regarding the credibility of the applicants’ claims.

1. Mr Willis addressed these issues in post-hearing submissions. He also took advantage of the opportunity to make further submissions about the claims for protection made by or on behalf of the second and third appellants. In the course of those submissions, Mr Willis referred again to the Convention on the Rights of the Child, drawing attention, amongst other things, to Art 3(1), and wrote (at [3.7]–[3.8]) (without alteration):

We submit that if Applicant’s Two and Three are forcibly returned to either Indonesia or Malaysia, neither of whom are signatories to the Refugee Convention, they will experience no protection from *refoulement*. In either case, they will be treated as marginalised refugees and lack basic health and educational rights. We submit that either of these outcomes constitute a violation of the best interests of the child and potential violation of the requirement to provide measures to avoid neglect or negligent treatment and consequentially a violation of CROC.

Additionally, we note that if Applicant’s Two and Three are forcibly returned to either Indonesia or Malaysia they will be separated from the father who is an Australian Permanent Resident. We submit that this outcome constitutes a violation of the best interests of the child under CROC.

## The Tribunal’s decision

1. The Tribunal member found that the first appellant’s evidence lacked credibility. Indeed, it went so far as to conclude that she was neither reliable nor truthful and that she had fabricated her claims in order to acquire a protection visa. Consequently, it did not accept that she was who she claimed to be, that her father was Rohingyan, or that she was stateless within Malaysia. To the contrary, it was satisfied that both her parents were Indonesian nationals, that she either already had, or was able to obtain, Indonesian citizenship, and that the children were too.
2. The Tribunal said that the information from the UNHCR indicated that the first appellant was an Indonesian national with a Javanese name and that her father’s name was also Javanese. It did not accept the first appellant’s contention that the UNHCR record was the result of a mix‑up during registration of the birth of the second appellant. It considered the husband’s evidence about this matter to be “vague and contradictory” and it placed little weight on the marriage certificate, which showed the first appellant to have a different surname from either of her parents. It considered that it was difficult to verify the “veracity” (authenticity?) of the certificate, the basis for recording the name or whether any checks were undertaken to verify its accuracy. It also placed little weight on the post-hearing submissions which sought to explain the discrepancy in the names. It concluded that the first appellant had fabricated her claims that her father was from Myanmar, was deceased, that she had never known either of her parents, and that she had been raised by a Rohingyan uncle in Malaysia.
3. Since it decided she was an Indonesian national, the Tribunal said, “it follows that [she] could not have had a Rohingyan uncle who raised her”. It considered her inability to speak the Rohingyan language supported this finding and rejected her explanation that she had struggled to learn the language. Since it decided she was an Indonesian national, the Tribunal said that it also follows that she is not stateless. Since she had provided no evidence that she had applied for Indonesian citizenship, the Tribunal concluded that this was because she already had the necessary documentation but was unwilling to admit it or “because she ha[d] not yet taken all steps to avail herself of the right to enter and reside in Indonesia, as [s]ection 36(3) requires before Australia is required to exercise its protection obligations”. The Tribunal said it had taken into account the legal advice from the Indonesian law firm but gave it little weight because it was based on what the Tribunal considered were false assumptions that the first appellant’s father was from Myanmar and was dead, that she never knew her mother or father, and that she was raised by her Rohingyan uncle in Malaysia.
4. As for the children, the Tribunal said:

45 Although the applicant has claimed that the second- and third-named applicants relied on her claim, a separate claim for them has been raised in the post-hearing submission. Because I have found the first-named applicant to be an Indonesian national, it follows that the second- and third-named are not stateless, but have a right to Indonesian citizenship themselves.

46 The Indonesian Citizenship Statute No 12, 2006 states that an Indonesian citizen includes ‘Children born through legal wedlock from an Indonesian mother and a stateless father or whose country does not provide automatic citizenship to their offspring.’ Given this, the applicant is able to pursue Indonesian citizenship for both the second- and third-named applicants. Her failure to provide evidence that she has done so, or attempted to do so, would indicate either that she has either already done so and has not been honest to the Tribunal, or because she wishes to portray them as being stateless when she is able to take steps to avail herself of the opportunity to enter and reside in Indonesian and to gain citizenship for her children.

47 I have taken into account the post-hearing submission that speaks of the need to consider the Convention of the Rights of the Child’ (*sic*). Some of the aspects mentioned refer to the second- and third-named applicants as stateless Rohingya Muslims which I have found not to be the case. Whilst I acknowledge that their case is somewhat complex, the complexity is largely the result of the first-named applicant and her husband trying to pass the applicants off as stateless Rohingyas when the Tribunal finds that they have Indonesian citizenship or can avail themselves of it.

48 The second- and third named applicant can freely live as Indonesian citizens with their Indonesian mother and a pathway exists (article 19) for the husbands of Indonesian citizens to become naturalised in due course. How they arrange their family is not the business of the Tribunal, other than to be satisfied that there is not a real chance that they will suffer serious harm if returned to Indonesia.

1. Based on these conclusions, the Tribunal was not satisfied that there were substantial grounds for believing there is a real risk that the appellants will suffer significant harm if they were returned to Malaysia or that they would be refouled if they were returned to Indonesia.

## The application to the Federal Circuit Court

1. The application for a show cause order was filed in the High Court and remitted by Bell J on 24 August 2017 to the Federal Circuit Court pursuant to s  44 of the *Judiciary Act 1903* (Cth). By an amended application lodged in the court below on 30 May 2018, the appellant sought writs of certiorari and mandamus to have the Tribunal’s decision quashed and the review application re-determined according to law, as well as a writ of prohibition restraining the Minister, his employees, officers, delegates or agents from acting upon, or giving effect to, the decision.
2. Five grounds were pleaded, supported by detailed written submissions, which, like the Minister’s written submissions, were copied and pasted in their entirety into the reasons for judgment. Each of the alleged errors was said to be jurisdictional.
3. The primary judge dismissed all five grounds.
4. Ground 1 alleged that the Tribunal failed to hear, consider and determine the claims advanced by the second and third appellants, “which were related, but separate, from those advanced by the [first appellant]”.
5. The primary judge noted that the Tribunal had before it the visa application in which the children were only characterised as members of the same family unit as the first appellant, referred to the statement in the post-hearing submission that the children “raise their own claims for protection”, and had recorded that the first appellant confirmed that the children relied upon her claims alone. His Honour also noted that the Tribunal had referred to part of the post-hearing submission and “set out its admittedly brief consideration” of the argument in support of the claims for protection advanced on behalf of the children in that submission. In those circumstances, his Honour held that it could not be said that the Tribunal did not consider the children’s claims.
6. Ground 2 alleged that the Tribunal failed to consider and determine an integer of the claims, namely, what would occur if the appellants were unable to gain access to residence in Indonesia after departing from Australia.
7. Ground 3 alleged that the Tribunal failed to consider what would occur if it were wrong in its findings as to the identity of the first appellant.
8. The primary judge dealt with these two grounds together. His Honour described them as “misconceived”, observing that in *Minister for Immigration and Ethnic Affairs v* ***Guo***(1997) 191 CLR 559 at 576 the High Court said that “[g]iven its apparent confidence in its conclusions, the Tribunal was not then bound to consider its findings might be wrong”. His Honour considered this to be such a case. His Honour also referred to the judgment in ***BNH16*** *v Minister for Immigration and Border Protection* [2017] FCAFC 109 at [35]–[36] and [44]–[45] and said that he accepted the Minister’s submissions. The relevance of *BNH16* in this context is obscure. The Minister’s submissions relied on what was said in *Guo* at 576 and submitted that the language used by the Tribunal was clear and did not exhibit doubt. The Minister also submitted that the Tribunal was not required to make out the first appellant’s case for her, that it was open to the Tribunal to rely on inconsistencies in her evidence to come to an adverse finding as to her credibility, and that the Tribunal was not required to give the first appellant the benefit of the doubt. The Minister further submitted that the Tribunal’s finding that the appellants could live freely in Indonesia was open to it in the circumstances.
9. Ground 4 alleged that the Tribunal failed to consider material obtained from the UNHCR in Malaysia indicating that the first appellant was born in Malaysia to a Rohingya father and an Indonesian mother, in circumstances where the Tribunal made a positive finding as to the reliability of other material obtained from the same source and used it adversely to the appellants.
10. His Honour said that the central contention of this ground was “unsustainable” for the reasons given by the Full Court in *BNH16.* His Honour held that the Tribunal had considered and “determined” the material from the UNHCR in [26] and [34]–[36] of its reasons. He observed that the Tribunal had placed greater weight on some evidence than other evidence and the weight to be attached to any evidence was a matter for the Tribunal. Otherwise, his Honour said that he accepted the Minister’s submissions. The Minister made the same point about the weight to be attached to any item of evidence and submitted that the Tribunal’s findings were open to it for the reasons it gave.
11. Ground 5 alleged that the Tribunal erred and acted outside its jurisdiction by making unreasonable material findings of fact in respect of the name of the first appellant’s father and the citizenship status of the appellants.
12. The primary judge held that the Tribunal’s findings were “clearly open on the evidence”. His Honour referred, in particular, to the Tribunal’s adverse assessment of the first appellant’s credibility and her inability to speak the Rohingya language although she had claimed that she had been brought up by her Rohingyan uncle.

## The issues on the appeal

1. Five grounds of appeal were pleaded, though some of the material and some of the arguments overlapped. They raised the following issues:
2. whether the primary judge neglected to determine one of the grounds of the application for judicial review, namely whether the Tribunal had failed to provide procedural fairness to the second and third appellants (ground 1);
3. whether the primary judge erred in holding that the Tribunal had considered and determined the claims advanced by the second and third appellants (grounds 1 and 2); and
4. whether the primary judge failed to provide adequate reasons ruling against the appellants on each of the grounds of review (grounds 1 to 5).

## Did the primary judge neglect to determine whether the Tribunal had failed to provide procedural fairness to the second and third appellants or fail to give adequate reasons for dismissing ground 1 of the application (ground 1)?

1. In the particulars to ground 1 of the notice of appeal the appellants stated that ground 1 of the application in the court below contended, amongst other things, that the Tribunal failed to provide procedural fairness to the second and third appellants by failing to invite them into the hearing room to present evidence and submissions when they had been identified as “separate applicants”, had clearly articulated claims separate to those of their mother, and the Tribunal was notified that they would be attending and participating in the hearing. The appellants submitted that the primary judge treated ground 1 of the application only as a complaint that the Tribunal had failed to deal with, or consider, a claim. They argued that this left undetermined the question whether the Tribunal had complied with s 425 of the Act and therefore failed to conduct the review required of it.
2. The appellants submitted that the primary judge failed to determine whether the first appellant could lawfully waive her children’s statutory entitlement to procedural fairness. They further submitted that the primary judge should have held that the question of legal disability was irrelevant and that the Tribunal’s jurisdiction to hear from the children was not determined by the fact that they were under the age of 18. Rather, according to the appellants, the relevant question was whether the children have the capacity to be heard and, at least in the case of the elder child, the second appellant, who was nearing the age of majority, this is a significant matter. They referred to the following remarks of McHugh J in *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at [103]:

Parents in their capacity as guardians of an infant child have the power under the common law to make decisions on behalf of the child, provided that the child does not have the competence to make the decision. Thus, where a child lacks capacity, the ordinary rules of the common law authorise the parent or guardian of the child to act on the child’s behalf. Parental authority diminishes as the child’s legal competence emerges. The parent’s authority is at an end when the child has sufficient intellectual and emotional maturity to make an informed choice.

(Footnotes omitted.)

1. The appellants argued that the Court should hold, consistently with Australia’s obligations under international law, that, when a child asylum seeker applies for review, whether through a parent or in the child’s own right, in order to perform its obligations under the Act, the Tribunal must turn its mind to the capacity of the child to present arguments and give evidence. Further, they continued, “if the Tribunal formed the view that the child has the capacity to be meaningfully heard from then a child applicant should be accorded an appropriate opportunity to be heard”. They submitted that the primary judge should have held that the invitation to attend the hearing under s 425 of the Act was an “empty gesture”.
2. One problem with this ground of appeal is that ground 1 of the application for judicial review did not expressly allege a failure to afford procedural fairness or a failure to comply with s 425.
3. Be that as it may, this point was not taken by the Minister and it was raised in the appellants’ submissions below. In these circumstances the primary judge should have dealt with it. The Minister did not argue otherwise. Since his Honour did not do so, his reasons were at least in this respect inadequate. Neither the appellants nor the Minister asked for a new trial, however, and, having heard full argument, there is no reason why this Court should not determine the issue itself. For the following reasons, it should be determined against the appellants.
4. Section 425(1) of the Act provides that the Tribunal must invite the applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision. The invitation must be real and meaningful: *Minister for Immigration & Multicultural & Indigenous Affairs v* ***SCAR***(2003) 128 FCR 553. Devoid of context, the Tribunal’s decision to send both the second and third appellants outside the hearing room is puzzling, even disturbing, particularly since the second appellant was then 17 years old. But the question at hand cannot be considered in vacuo. As with everything, context is all-important.
5. The Minister argued that the fact that the second and third appellants were asked to wait outside the hearing room does not establish error on the part of the Tribunal for the following reasons.
6. First, the appellants were represented at all times by a migration agent, who was also a lawyer, and there is no evidence that he raised any objection to the procedural course taken by the Tribunal or to the first appellant’s statement that the second and third appellants relied on her claims alone.
7. Second, the appellants did not adduce evidence of material that they would have put before the Tribunal that the procedural course adopted by the Tribunal prevented them from presenting.
8. Third, the Court is not in a position to know precisely how the sequence of events played out without a transcript of the Tribunal hearing and/or evidence from the appellants’ then migration agent or the appellants themselves.
9. The Minister also submitted that the error could only have been jurisdictional if it was material and the onus of proving that the error was material rested with the appellants.
10. It is true that the appellants were represented during the hearing. Mr Willis was not in the hearing room but he did participate by telephone and there is no evidence to indicate that he was not present on the phone for the entire hearing. It is true, too, that Mr Willis wanted to attend in person and the Tribunal was so advised. The Tribunal received a telephone call at 10:41 on the morning of the hearing to advise that his flight had been cancelled and the next available flight would delay his presence at the hearing. A request was made on Mr Willis’s behalf that the starting time be postponed until 2:30 PM. The Tribunal member did not agree to the request but agreed to him attending by telephone. The hearing commenced at 1:30 PM.
11. While the request appears to have been a reasonable one, the appellants did not argue, either on the appeal or in the court below, that it was unreasonable of the Tribunal to decline to agree to it.
12. It is also true that there is no evidence that Mr Willis objected to the procedure adopted by the Tribunal or that, at the time the first appellant told the Tribunal that the children relied on her claims alone, he intervened to correct her. But the decision record clearly shows that, notwithstanding the terms of the visa application and what the first appellant had said to the Tribunal, Mr Willis reminded the Tribunal that, if it were not persuaded by the first appellant’s claims to protection, the children had their own separate claims.
13. Senior counsel for the appellants submitted that the children were “critical witnesses”. He argued:

[T]hey could have obviously told the tribunal what – where they had grown up; where they had gone to school; how they were treated; whether they were treated as Rohingyas or not; whether they had access to education; whether they ever met their uncle, who spoke to their father in a funny language that they didn’t understand – those things are critical pieces of information, not just for some academic notion of their independent claims but for all of the claims…

1. In theory, this is a sound argument. The problem for the appellants is that they were represented throughout by their registered migration agent.
2. It was not suggested, let alone argued, that the conduct of the migration agent had the effect of stultifying the hearing or subverting the operation of s 425: cf. *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189. At no time did the appellants challenge Mr Willis’s conduct or his authority. No evidence was presented to this Court, or to the court below, which called his authority into question. Nor was any evidence adduced of what the children would or could have said. In these circumstances, the Court can only proceed on the basis that the agent did not ask that they be questioned because he had instructions that they had no evidence to offer which would have advanced their claims for protection. Thus, although the children were sent out of the hearing room and not questioned, they were not effectively precluded from taking part in the hearing (cf. *SCAR*). They had an opportunity to be heard but, through their migration agent, they declined to exercise it. In the circumstances, the Tribunal was not obliged to question them.
3. The appellants were not prevented from giving or communicating evidence unless it is assumed that they had evidence to give. No such assumption can be made. Apart from the responses to the hearing invitations, there is no evidence to indicate that the Tribunal was told that either of the children wished to give evidence or that Mr Willis wanted them to be called, or, indeed, that they had any relevant evidence to give. No statements were submitted from them, either before or after the hearing. And neither the pre- nor post-hearing submissions identified such evidence. Section 425 does not require that the Tribunal actively assist an applicant to put his or her case: *SCAR* at [36]. Nor does it impose an obligation on the Tribunal to call further evidence or to seek out evidence for itself; “the hearing required by s 425 of the Act is not nullified by a mere failure by an applicant to present his case in the best possible light”: *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575 at [22] (Keane CJ).
4. It follows that we are not persuaded that there was a denial of procedural fairness or a failure to comply with s 425. As the appellants’ submissions in the court below acknowledged, with respect to obligations of procedural fairness, “[t]he concern of the law is to avoid practical injustice”: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37] (Gleeson CJ). The appellants, who bear the onus, have not demonstrated that the Tribunal’s decision to exclude the children from the hearing room, puzzling though it may seem, resulted in any practical injustice. It was up to them to demonstrate that, in a practical sense, they lost an opportunity to give material evidence or to make a material submission: *CSR Ltd v Eddy* (2008) 70 NSWLR 725 at [38] (Basten JA, Hodgson and McColl JA agreeing at [1] and [10] respectively). They failed to do so.
5. In reaching this conclusion, we would not want our remarks to be taken as an unqualified endorsement of the approach the Tribunal took. It would have been both prudent and preferable for the Tribunal to have directly raised with Mr Willis at the conclusion of the husband’s evidence whether either of the children wanted to give evidence or listen to the submissions or simply re-enter the hearing room. That is particularly so, given that Mr Willis, through no fault of his own, was only able to appear by telephone. In the absence of a transcript or recording of the hearing, however, which might have cast some light on why the children were asked to leave the hearing room and the subsequent events, it would be inappropriate to say anything more.

## Did the primary judge err in holding that the Tribunal had lawfully heard, considered and determined the claims of the second and third appellants (ground 1)?

1. The argument on this question largely focussed on the alleged denial of procedural fairness/failure to comply with s 425 point. Indeed, the particulars to ground 1 in the notice of appeal indicate this was the only basis for the allegation and the written submissions did not stray beyond the particulars. To the extent that the oral argument did, it should be rejected as outside the scope of the appeal. In any case, the Tribunal did deal separately with the children’s claims. It considered the submissions which dealt with their claims, expressly referring to the Convention on the Rights of the Child. It found that they were not stateless but could live freely in Indonesia with their mother. It also found that there was no real chance that they would suffer serious harm in Indonesia or that they would be refouled to Myanmar if they were returned to Indonesia. It is true that the separate claims were not dealt with at length but that reflects the attention given to them in the material as a whole in comparison with the first appellant’s claim.

## Did the primary judge fail to determine the second ground of review or to give adequate reasons for dismissing it (ground 2)?

1. It will be recalled that ground 2 in the court below alleged that the Tribunal failed to consider and determine an integer of the appellants claims, namely what would happen if they were unable to gain access to residence in Indonesia. It will also be recalled that the primary judge dealt with this ground together with ground 3 in which it was alleged that the Tribunal failed to consider what would occur if the Tribunal was wrong in its findings as to the identity of the first appellant.
2. The Minister did not address the adequacy of the primary judge’s reasons. Rather, his submissions went to the merits of the ground raised in the court below. He took the same approach to the other grounds.
3. The appellants’ argument was set out in the particulars to this ground of appeal, which took the following form:

* This ground concerns the way in which the Court below disposed of ground two.
* The Appellants had each raised a claim that they faced *refoulement* from Indonesia in the event they were deported there.
* This was dealt with by the Tribunal finding that all three Appellants had a legal right to citizenship in Indonesia.
* However, no specific findings were made as to how the Appellants would enter Indonesia nor was any consideration given to how they would evidence and advance any assertion of a right to citizenship of that country. No findings were made that they possessed passports, identity papers or any similar material. Nor was it clear that they enjoyed family or other support within Indonesia.
* This left undetermined and unconsidered what would occur if the Appellants were unable to gain access to residence in Indonesia after departure from Australia (despite any legal right to citizenship) and were refouled to Malaysia or Myanmar/Burma.
* Ground two below contended that this amounted to a failure to consider and determine an integer of their claims that squarely arose, being what would occur if the Appellants were unable to gain access to residence in Indonesia after departure from Australia.
* The Court below, at [53] characterized this as, “*a species of the genus set out in ground 3 regarding what is somewhat colloquially known as the ‘what if I am wrong argument’”* and then at [54] to [56] failed to adequately state the basis for the rejection of the ground.
* This was to misunderstand the basis of the ground and accordingly fail to dispose of it.
* A proper consideration of the matter ought to have resulted in a finding that there had been a failure to consider and determine an integer of the claims advanced, a failure to consider and determine an integer of the claims advanced, a failure to review the decision and jurisdictional error.

1. The second to sixth dot points in the particulars extracted above repeat the essence of the argument in the court below. In substance, as the sixth dot point makes clear, this ground consisted of an allegation that the Tribunal failed to consider what would occur if the appellants were unable to gain access to residence in Indonesia after departure from Australia. The question it raised for determination was whether the Tribunal failed to consider the consequences of refoulement and, if so, whether it fell into jurisdictional error. In order to determine that question it was unnecessary for the Tribunal to make findings about how the appellants would enter Indonesia and advance any right to citizenship of that country or to consider what family support they may have had there.
2. We reject the contention that the primary judge misunderstood the basis of ground 2 of the amended originating application. The primary judge’s reasons for dismissing grounds 2 and 3 were certainly brief, but they were not inadequate. His Honour appears to have accepted, or at least assumed, that the Tribunal did not consider the consequences of refoulement but held that it did not thereby fall into jurisdictional error.
3. In so doing, we are not persuaded that his Honour erred.
4. The Tribunal did not consider the consequences of refoulement because it was confident that there was no risk of refoulement. That is apparent from its reasons at [50] and [52]. At [50] it said that it did not accept that there was a real chance that any of the appellants would be refouled or face any other serious harm if returned to Indonesia because they all have a right to enter and reside in Indonesia. At [52] it relied in part on this finding to conclude that it was not satisfied that there were substantial grounds for believing that there was a real risk the appellants would suffer significant harm if they were returned to Indonesia.
5. It is clear from the authorities that the Tribunal did not have an obligation to consider the risk of refoulement in circumstances such as these where the risk only arose if it was wrong to conclude that the first appellant was not Rohingyan and that the three appellants had the right to enter and reside in Indonesia and its degree of satisfaction was tinged with real doubt.
6. In *Guo*, to which the primary judge referred,Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ rejected the criticism of the Tribunal proffered by Einfeld J in the Full Court for failing to consider the possibility that any of its findings was inaccurate. Amongst other things, their Honours observed at 576:

[G]iven the strength of some of the Tribunal's findings – for example, “the treatment the Applicant received on return to the PRC in October 1992 [is] reflective of punishment for illegal departure and not because of his political activities, application for refugee status or contact with Australian officials”, “the Applicant's illegal departure in 1993 will not result in an imputed political profile”, “these matters will not result in persecution to the Applicant for Convention reasons if returned to China” – the Tribunal was not bound to consider the possibility that its findings were inaccurate or that the punishment was Convention based.

1. Their Honours acknowledged that, in determining whether there is a real chance that an event will or will not occur in the future for a particular reason, it is relevant to consider the degree of probability that similar events have or have not occurred in the past. If, for example, their Honours continued, a tribunal were to find that “it is only slightly more probable than not that an applicant has not been punished for a Convention reason”, in determining whether there is a well-founded fear of persecution for a Convention reason in the future, it must take into account the chance that the applicant was so punished. In other words, where the scale just tips against an applicant, the Tribunal must consider what could happen to him or her if its findings are wrong. But their Honours held that the Tribunal was not required to do so in that case because of the strength of the Tribunal’s conviction in the accuracy of its findings:

In the present case, however, the Tribunal appears to have had no real doubt that its findings both as to the past and the future were correct. That is, the Tribunal appears to have taken the view that the probability of error in its findings was insignificant. Once the Tribunal reached that conclusion, a finding that nevertheless Mr Guo had a well-founded fear of persecution for a Convention reason would have been irrational. Given its apparent confidence in its conclusions, the Tribunal was not then bound to consider whether its findings might be wrong.

1. In the present case, as the Minister argued and the primary judge accepted, the Tribunal had a similarly strong conviction about the correctness of its findings. That is apparent from the language it used to dismiss the appellants’ claims. It concluded, for example, that the first appellant had “fabricated her claim in order to be granted a protection visa” (at [32]). It found that the second and third appellants could “freely live as Indonesian citizens with their Indonesian mother ...” (at [48]). While acknowledging that the case of the children was “somewhat complex”, it said that the complexity was largely attributable to the first appellant and her husband “trying to pass the [appellants] off as stateless Rohingyas” when the Tribunal had found that they either “have Indonesian citizenship or can avail themselves of it” (at [47]). In at least three places in the Tribunal’s reasons, it declared that the first appellant “is an Indonesian national” (at [39], [41]) and [49]). The Tribunal said (at [49]) that, if the first appellant were refused refugee status in Malaysia, as she had claimed, “it would have been because she was Indonesian and not part-Rohingya”. These findings are not redolent of any doubt.
2. In *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 at [67], Sackville J held that whether the Tribunal should have considered the possibility that its findings of fact might not be correct is to be determined by reference to its own reasons. If a fair reading of the Tribunal’s reasons as a whole showed that the Tribunal entertained no real doubt that the claimed events had not occurred, his Honour continued, “there is no warrant for holding that it should have considered the possibility that its findings were wrong”. He said that “reasonable speculation as to whether the applicant had a well-founded fear of persecution” does not require that the Tribunal explore a possibility inconsistent with its own findings. He added:

Only if a fair reading of the reasons allows the conclusion that the [Tribunal] had a real doubt that its findings on material questions of fact were correct, might error be revealed by the [Tribunal’s] failure to take account of the possibility that the alleged events might have occurred (or the possibility that an event said not to have occurred did not in fact occur).

1. A fair reading of the conclusions of the Tribunal in the present case shows that it had no doubt about the correctness of its findings on any material question of fact. It had no real doubt that the first appellant was Indonesian and that all three appellants would be able to enter and reside in Indonesia. It did not accept that they would be refouled to Myanmar. Consequently, it did not fall into jurisdictional error by failing to consider what might occur if it were wrong in these respects. Senior counsel for the appellants submitted during the hearing that there were “no findings of great certainty [by the Tribunal] about how the Indonesian government would respond to an application for the issue of the citizenship papers or her capacity to satisfy them”. But it was unnecessary for the Tribunal to make “findings of great certainty” about those matters.

## Did the primary judge fail to give adequate reasons for dismissing ground 3?

1. Ground 3 raised the same issue in relation to the Tribunal’s findings as to the identity of the first appellant. For the same reasons, the primary judge did not err in dismissing that ground and his Honour’s reasons were not inadequate. Once again, the Tribunal had no doubt about its conclusions. At [33], for example, it said that it did not accept that the first appellant’s name was the name that appeared on her visa application.

## Did the primary judge fail to give adequate reasons for dismissing ground 4?

1. Ground 4 in the court below concerned the alleged failure by the Tribunal to consider the material from the UNHCR in Malaysia indicating that the first appellant was born in Malaysia to a Rohingya father and an Indonesian mother. The submissions appear as particulars of the ground of appeal.
2. In the court below, the appellants argued that “it was unreasonable and [a] jurisdictional error to fail to consider this evidence as favourable to the Applicant, with its source and providence [presumably, provenance] identical to evidence relied upon in a significantly adverse way”.
3. The criticism of the primary judge was that, in his reasons at [58]–[59], he failed to state why using the information from the same source in different ways was reasonable and therefore the Court is unable to discern his Honour’s reasoning process.
4. This is what the primary judge said at [58]–[59]:

In my view, the central contention in this Ground of Review is unsustainable, again for the reasons given by the Full Court in *BNH16*. It is plain that the Tribunal here, at pars.26, 34, 35 and 36 of its reasons, set out the matters advanced before it regarding material from the UNHCR. Those paragraphs likewise disclose the Tribunal’s consideration and determination of that material. In my view, it is not open to argue that the Tribunal did not consider that material when plainly it did so. The Tribunal made plain that it placed greater weight on certain evidence than on other evidence. It is not for this Court to trammel upon issues of “weight”; to do so would expose this Court to making an impermissible inquiry into the merits of the Tribunal’s decision.

Otherwise, again I accept the submissions on behalf of the First Respondent Minister.

1. There is little doubt that his Honour could have expressed himself more clearly. For a start, the cross-reference to *BNH16* without a paragraph reference is unhelpful. But we are not persuaded that his reasons do not disclose his process of reasoning. They just require some unpacking.
2. In substance, his Honour’s reasons for dismissing the ground were that the Tribunal’s decision record showed that it took the evidence in question into account and the weight to be attached to that evidence was purely a matter for the Tribunal. The difficulty, with respect, is that his Honour does not seem to have grappled with the appellants’ complaint. He did not deal with the submission that the Tribunal’s approach was legally unreasonable.
3. Without more, reference to certain passages in *BNH16,* taken out of context, do not assist. The only passages from *BNH16* cited by his Honour appear as part of a section of his judgment immediately preceded by the heading “Consideration & Disposition”. They are paras [35]–[36] and [44]–[45]. They are cited (at [41]) as recent “statements of principle regarding ‘credibility findings’ (with some overlap with ‘legal unreasonableness’)” (see [38]). It is not entirely clear what bearing his Honour believed those paragraphs had on the resolution of ground 4 of the application. Two passages were emphasised. One was the statement in [36] of *BNH16*:“We accept that other constructions were available but, in adopting those which it did, we do not consider that the Tribunal made any jurisdictional error”. The other was in [44] in which the Court said that “there was a logical basis, in the evidence which supported the Tribunal’s findings”.
4. The gravamen of the appellants’ complaint was that the Tribunal relied upon material obtained from the UNHCR to make a finding against the first appellant (as to her nationality) but did not consider other material from the UNHCR which supported her claim as to her father’s nationality. The other material was the statement in Ms Palys’s email that “information available on file indicates that the [first appellant] was born in Malaysia to a Rohingya father and an Indonesian mother” and married her husband in 1999. This was said to be legally unreasonable because the source of the information in both cases was the same.
5. The Tribunal relied on the UNHCR information that the mother of the second appellant was an Indonesian woman named XXXXXXX and the DNA evidence that the first appellant was the mother of the second appellant. Based on the information from the UNHCR, the Tribunal believed that the first appellant’s true name was XXXXXXX and not the name she was using in support of her visa application. It rejected the husband’s evidence that the UNHCR record was the result of a mix-up during registration, noting that he had been “vague and contradictory with this claim”. It explained (at [36]):

[He] initially stated that when he went to register at the UNHCR he only gave his and his son’s names to the agent. When asked whether he had given them his wife’s name he said that he had and added that he just used another person’s photocopy with the name XXXXXXX. It makes no sense that he would be dictating to an agent to fill out a form because he was illiterate and at the same time producing a photocopy form from someone else that contained a different name for the mother of the child.

1. It is common ground that the Tribunal did not refer to the statement in Ms Palys’s email that the information on file was that the appellant was born to a Rohingyan father. There is no reason to believe, however, that the Tribunal did not take it into account, since it plainly had regard to the email itself. The Tribunal is not obliged to refer to every piece of evidence before it: *Applicant* ***WAEE*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at [46] (French, Sackville and Hely JJ); *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166 at [143] (North, Logan and Robertson JJ). In *WAEE* at [46] the Full Court pointed out that there is a distinction between a failure by the Tribunal to advert to evidence, which, if accepted, might have led to a different factual finding and a failure by the Tribunal to address a contention, which, if accepted, might satisfy a criterion for the grant of protection. The Full Court emphasised that the Tribunal was not a court but “an administrative body operating in an environment which requires the expeditious determination of a high volume of applications”.
2. The weight to be accorded that evidence — like the weight to be accorded the contents of the marriage certificate — was a matter for the Tribunal, as the primary judge recognised. It is not legally unreasonable to accept one piece of evidence and not another, even if the two pieces of evidence come from the same source and even if the source is considered reputable. The Tribunal knew that not all of the information conveyed by Ms Palys was reliable. Having regard to the DNA evidence, the Tribunal did not accept that the first appellant was not the biological mother of the second appellant. It was for the Tribunal to evaluate the evidence as a whole. The Tribunal did not engage in irrational “cherry-picking”, as senior counsel for the appellants suggested during the hearing.
3. The appellants have not established that it was illogical or irrational or otherwise legally unreasonable for the Tribunal to give more weight to the information in Ms Palys’s email about the nationality and surname of the first appellant than it gave to the information in the email about the nationality of her father.

## Did the primary judge fail to give adequate reasons for dismissing ground 5?

1. The appellants’ case below was that the Tribunal fell into jurisdictional error by making unreasonable findings of fact in relation to two matters: the name of the first appellant’s father (“the first matter”) and the capacity of the appellants to enter and reside in Indonesia (“the second matter”). On the appeal they contended that the reasons of the primary judge (at [61]‑[63]) did not engage with the evidence (presumably the evidence upon which they relied) and their submissions. Their written submissions were sparse. They were merely that “while the ground appears to have been properly understood, the reasons given were conclusory and inadequate”.
2. The primary judge’s reasons were these:

61 The central difficulty with this Ground of Review relates to the very clear but adverse assessment by the Tribunal of the Applicant Mother’s evidence. A crucial part of that evidence was the inability of the Applicant to speak Rohingyan in circumstances where she asserted that she had been brought up, since she was six years of age, by an Uncle who was himself Rohingyan. The findings by the Tribunal in the light of this evidence, together with the other evidentiary deficiencies highlighted by the Tribunal, in my view, were clearly open on the evidence.

62 Giving all proper consideration to the principles regarding (a) legal unreasonableness in *Stretton* (noted earlier in these reasons), and (b) findings in relation to credibility in *CQG15* at [36] – [38] (noted earlier in these reasons), there is no basis for the contention that the Tribunal’s conclusion(s) were not open to it in the light of the evidence and the findings made. Further, again I recall the comments of the Full Court in *BNH16* at [44] as follows:

The material, oral and written, before the Tribunal was, as BNH16’s solicitor contended before the Tribunal, complex and open to misinterpretation. That said, there was a logical basis, in the evidence, which supported the Tribunal’s findings …

63. Respectfully, the same comments can, and should, in my view, apply here to the Tribunal’s reasons and the findings it made.

1. It is true that the primary judge did not engage with the appellants’ submissions and the evidence upon which they relied. To that extent they are deficient. For the following reasons, however, we are not persuaded that the Tribunal’s findings on the two matters were legally unreasonable.

### The name of the first appellant’s father

1. With respect to the first matter, the appellants contended below (and on the appeal), that the Tribunal unreasonably concluded that the name on the marriage certificate was Javanese (at [25]), “distinctly Javanese” (at [35]), “identifiably Indonesian” (at [26]) and “peculiarly Indonesian” (at [25]), and to use these findings to reason that the first appellant’s father was in fact Indonesian. The Tribunal did not find that the Suparman name was “peculiarly Indonesian” but it did find that it was “distinctively Javanese”. The references at [25] and [26] of the decision record are to propositions put to the husband during the hearing at a time, one must assume, before the Tribunal had reached a concluded view on the question.
2. In their notice of appeal, the appellants referred to their contention that it was unreasonable to so conclude and repeated the following submissions made in the court below. The material before the Tribunal not only suggested that the name was used in Indonesia. It was also used in other parts of Southeast Asia. A review of Malaysian databases indicates that it is common in the region. The name is based on an Arabic word, “Sufarmin”. Rohingya people commonly adopt Malaysian names. “Par-min” (and therefore Parmin, if not Parman) is a common Burmese name and an obvious transliteration of “Suparman”. The appellants contended that the Tribunal disregarded or did not consider this “evidence”.
3. While the pre-hearing submission accepted that Suparman was a popular Javanese name, the points of contention were those urged on the Tribunal in the same submission. The Tribunal was not bound to accept those arguments. There were few source references for them and none was furnished to the Tribunal. The appellants did not submit that the Tribunal was obliged to seek them out for itself.
4. The Tribunal concluded at [35] that the UNHCR information, read with the DNA evidence, indicates that the first appellant was an Indonesian national by the name of XXXXXXX and that that was supported by the naming conventions “exhibited by Javanese”. It based this finding on country information. It stated that there was a range of country information indicating that the name Suparman is Javanese and the prefix “su” is an honorific in the construction of Javanese personal names. Two references were cited in support of the last two statements. Neither was in evidence. In these circumstances, as the Minister submitted, the Court could not hold it was not open to the Tribunal to conclude that the first appellant’s father was Javanese.
5. At the hearing of the appeal, senior counsel for the appellants submitted that the Tribunal’s conclusion was illogical. As he put it:

[T]he scope of the logic is such as to say, “Because Smith is a common name in England, a person in Australia with the name Smith must have an entitlement to English nationality.” It is — that is the — that is the quality of the basis for the finding that my client, the mother, fabricated her evidence to the tribunal. It’s the foundation for the finding that she is, in fact, Indonesian without any positive finding that she had ever been there...

1. At the hearing of the appeal, senior counsel also submitted that the first appellant’s father might have assumed an Indonesian surname and that would not necessarily negate his Rohingyan ethnicity. It was, of course, possible that the appellant’s father had an assumed name. In the pre-hearing submission at [4.4], it was said that “in the absence of identity documentation many Rohingya refugees in Malaysia adopt Malaysian names”. Noting a statement by the first appellant that she knew her father as “Parman”, the pre-hearing submission noted (at [4.5]) that “Parmin” or “Par Min” was a common Burmese name. This proposition was supported by a reference to a *New York Times* article, which was not before the Court and does not seem to have been given to the Tribunal. At [4.8] it was said to be “highly plausible” that the first appellant’s father had chosen to go by “the transliterated name”, like a Frenchman named “Jean” might call himself “John” in English-speaking nations.
2. The appellants’ submission that the Tribunal failed to have regard to this material must be rejected. The Tribunal said at [35] that it had “taken into account the post-hearing submission explanation for the inconsistency in the father’s name and the possible transliteration issues”. But it put greater weight on “the fact that the distinctively Javanese name fits in with the [first appellant’s] mother’s name” and what it believed to be the appellant’s name.
3. At the hearing of the appeal, senior counsel for the appellants also argued that “[i]t is fundamentally irrational to say that because a name might be used in a particular place — may even have originated in a particular place — therefore, a person who carries such a name is ethnically of that place, or is a citizen of that place, or her father was a citizen of the place, or she’s entitled to be a citizen of the place”. There are at least two answers to this argument. One is that, although there might be other reasons for the use of the name, it is not irrational to conclude from the fact that a person has a Javanese surname that he is Javanese. It is at least a plausible explanation for the name. Another is that the Javanese name was not the only evidence upon which the Tribunal relied.
4. The view the Tribunal reached may have been against the weight of the evidence. There may well have been other explanations for the name. Someone else confronted with the same material might well have found the arguments made in the pre-hearing submission compelling. But it was not legally unreasonable for the Tribunal to have concluded on the basis of the evidence before it and the country information available to it that the first appellant’s father, like her mother, was Indonesian. The mere fact that an alternative conclusion was available, even if it is a persuasive one, does not mean that the Tribunal made a jurisdictional error. As Crennan and Bell JJ observed in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [131], another case in which the reasoning was said to be illogical, irrational or unreasonable:

If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable simply because one conclusion has been preferred to another possible conclusion.

### The eligibility of the second and third appellants to Indonesian citizenship or a right to reside in Indonesia

1. The second matter concerned the Tribunal’s conclusions that the second and third appellants would “automatically be considered to be Indonesians (*sic*) citizens by dint of the fact that they had Indonesian parents or an Indonesian mother” (at [44]), that they could “freely live as Indonesian citizens with their Indonesian mother” (at [48]), and that they have a right to reside in Indonesia (at [50]). The appellants contended that there was no reasonable basis for these findings in the material before the Tribunal.
2. The significance of these findings, of course, is that, even if the Tribunal was satisfied that the first appellant and her children were Rohingya, the protection obligations were taken not to apply to her or her children by force of s 36(3) of the Act, unless one of the exceptions applied.
3. In their pre-hearing submissions to the Tribunal, the appellants submitted that relocation to Myanmar was not an option and then proceeded to deal with the question of relocation to Indonesia.
4. First, they cited the following passage from the judgment of Buchanan J in *Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU*(2013) 215 FCR 35 (FC) at [77] (with whom Tracey, Robertson and Griffiths JJ agreed), emphasising the underlined words:

It is clear from the terms of s 36(3) of the Act that the “right to enter and reside” in another country which a non-citizen of Australia may have is not necessarily a right associated with citizenship of that other country. Indeed, the commonplace scenario is that of a citizen fleeing his or her own country and seeking refuge in Australia. The question for consideration in such a case is whether there is a third country (ie other than Australia or the country of citizenship) where the visa applicant already has a right to enter and reside. If so, by reason of the operation of s 36(3) at least, Australia does not owe that visa applicant protection obligations. In those circumstances, the “right” to which s 36(3) refers cannot be equated to rights which accompany citizenship. Inevitably, the “right” is less certain or secure than that.

1. Then they cited the conclusion in the legal opinion forwarded with their submissions that it was “unlikely” that the first appellant could “establish her status as an Indonesian citizen”. They also referred to the delegate’s statement that the “applicant’s effective protection check for Indonesia could not be determined”. They submitted that, “on the face of the facts”, it was “highly uncertain” that the first appellant had a right, sufficient to enter and reside in Indonesia, and that the position was worse for the second and third appellants because they “lack adequate identity documentation”. Moreover, they submitted, that there was a real risk of refoulement should the first appellant go to Indonesia and not be found to have a right to reside there.
2. The pre-hearing submission referred to s 36(5) and submitted (at [7.9]–[7.11]):

It is clear that Indonesia has engaged in ‘pushback’ of fleeing Rohingya refugees as well as a publicly stated policy of indefinite detention of Rohingya asylum seekers. The uncertainty of whether Indonesia would receive and recognise this (*sic*) inchoate rights of the Applicant is highly pertinent to determining whether all possible steps have been taken.

… [T]he delegate erred in concluding that it was reasonable for the Applicant to seek to avail herself of a remote ‘possible’ right to enter Indonesia, with no guarantee she would not be refouled, detained, or barred from residing there with her husband.

… [T]his remote possibility of a ‘right to return and reside’ in Indonesia is not and has never been an effective or realistic option to be considered by the Applicant.

1. The pre-hearing submission also contended that, if the first appellant were to avail herself of a potential right to enter and reside in Indonesia, there is “a strong likelihood” that her husband would never be able to join her there. It was argued that, in considering whether or not the first appellant had taken all possible steps to avail herself of a right to enter Indonesia the best interests of the children should be taken into account. It was pointed out that this was a primary consideration (presumably a reference to PAM3, the guidelines made in accordance with Ministerial Direction No 56). Despite the absence of any reference in the Tribunal’s decision to the best interests of the children, the appellants did not argue on the appeal or in the court below that the Tribunal failed to take the best interests of the children into account or that it failed to treat them as a primary consideration.
2. We referred to the post-hearing submission on this issue above at [38].
3. The central proposition underlying the attack on the Tribunal’s decision in this respect is that there was no reasonable foundation for its finding that the children had the right to enter and reside in Indonesia. That is what it is alleged made the Tribunal’s finding on this question unreasonable. That proposition must be rejected. The foundation for this finding was the Indonesian Citizenship Statute No 12, 2006. The Tribunal said at [44] that “[t]he [appellants] would automatically be considered to be Indonesian citizens by dint of the fact that they had Indonesian parents or an Indonesian mother (Article 4)”. The first appellant always said that her mother was Indonesian. It follows, then, as the Tribunal said at [45] that her children would be, too. The Tribunal also said at [46]:

The Indonesian Citizenship Statute No 12, 2006 states that an Indonesian citizen includes ‘Children born through legal wedlock from an Indonesian mother and a stateless father or whose country does not provide automatic citizenship to their offspring’. Given this, the applicant is able to pursue Indonesian citizenship for both the second- and third-named applicants. Her failure to provide evidence that she has done so, or attempted to do so, would indicate either that she has either already done so and has not been honest to the Tribunal, or because she wishes to portray them as being stateless when she is able to take steps to avail herself of the opportunity to enter and reside in Indonesia and to gain citizenship for her children.

1. The appellants did not challenge the first statement. It was consistent with their legal advice. The Tribunal said at [44] that the difficulties to which the lawyer referred in the advice only applied to aliens who need to acquire citizenship. This statement was not challenged either. The opening paragraph of the legal advice begins by noting that the Indonesian Citizenship Statute outlines a number of circumstances in which a person is considered to be an Indonesian citizen. It provides three such circumstances. One, covered by Article 4e, is “[a] child born from a marriage between an Indonesian mother and a stateless father”. The lawyer concluded “it appears that if [the first appellant] is able to provide evidence of the fact that her mother is an Indonesian citizen then perhaps she can be considered as an Indonesian citizen”.
2. The Tribunal’s finding that the children were able to enter and reside in Indonesia was therefore not without reasonable foundation.

## Conclusion

1. It follows that the appeal must be dismissed. The first appellant should pay the Minister’s costs. There will be orders accordingly.

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| I certify that the preceding one hundred and twenty-seven (127) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Katzmann, Wigney and Abraham. |

Associate:

Dated: 9 April 2020