FEDERAL COURT OF AUSTRALIA

Gupta v Minister for Immigration and Border Protection [2017] FCAFC 172

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| Appeal from: | *Gupta & Ors v Minister for Immigration & Anor* [2016] FCCA 3212 |
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| File number: | NSD 2223 of 2016 |
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| Judges: | **GILMOUR, LOGAN & MORTIMER JJ** |
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| Date of judgment: | 1 November 2017 |
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| Catchwords: | **MIGRATION** – decision to cancel a Student (Temporary) (Class TU) visa, subclass 573 (Higher Education Sector) under s 116 of the *Migration Act 1958* (Cth) for breach of a visa condition – whether the decision-maker’s reasons were illogical, irrational or otherwise unreasonable – whether the decision-maker gave genuine consideration to the cumulative impact of the appellant’s claims in considering whether the breach of the visa had occurred in extenuating circumstances beyond the breaching party’s control  **PRACTICE AND PROCEDURE** – whether a party of infant age requires an infant representative – whether leave should be given to amend a notice of appeal to raise a ground not raised before the primary judge |
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| Legislation: | *Migration Act 1958* (Cth) ss 78, 116(1)  *Tribunals Amalgamation Act 2015* (Cth) s 2  *Federal Court Rules 2011* (Cth) rr 9.61, 36.10  *Migration Regulations 1994* (Cth) reg 2.07AF(3), sch 8 cond 8202(2)(a) |
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| Cases cited: | *Commissioner of the Australian Federal Police v Oke* (2007) 159 FCR 441  *Coulton v Holcombe* (1986) 162 CLR 1  *Iyer v Minister for Immigration & Multicultural Affairs* [2000] FCA 1788  *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24  *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 231 FCR 437  *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11  *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332  *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611  *Sun v Minister for Immigration and Border Protection* [2016] FCAFC 52; 243 FCR 220  *Sunshine Coast Broadcasters Pty Ltd v Australian Communications and Media Authority* [2012] FCA 1205  *SZOOR v Minister for Immigration and Citizenship* [2012] FCAFC 58; (2012) 202 FCR 1  *SZRCI v Minister for Immigration and Citizenship* [2012] FCA 965  *SZRUO v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 777  *University of Wollongong v. Metway [No. 2]* (1985) 59 ALJR 481  *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158 |
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| Date of hearing: | 8 August 2017 | |
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| Registry: |  | |
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| Division: |  | |
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| Counsel for the Second Respondent: | The Second Respondent submits to any order the Court may make save as to costs | |

ORDERS

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|  | | NSD 2223 of 2016 |
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| BETWEEN: | DEEPIKA GUPTA  First Appellant  **AJAY MAHAJAN**  Second Appellant  **AMEN MAHAJAN**  Third Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGES: | GILMOUR, LOGAN AND MORTIMER JJ |
| DATE OF ORDER: | 1 November 2017 |

THE COURT ORDERS THAT:

1. The application to amend the notice of appeal be refused.
2. The appeal be dismissed with costs.

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

REASONS FOR JUDGMENT

GILMOUR AND MORTIMER JJ:

1. In this matter, the appellants have sought to appeal from a judgment of the Federal Circuit Court dismissing the appellants' application for judicial review of a decision of the second respondent, the Administrative Appeals Tribunal (the Tribunal). The Tribunal had affirmed a decision of a delegate of the first respondent (the Minister) to cancel a Student (Temporary) (Class TU) visa, subclass 573 (Higher Education Sector) (a student visa) held by the first appellant.
2. Three grounds of appeal are advanced in the Notice of Appeal. Approximately two weeks prior to the hearing, the appellant lodged an amended Notice of Appeal containing a further ground of appeal. The appellant did not comply with the requirements of r 36.10 of the *Federal Court Rules 2011* (Cth), and was therefore required to seek the Court’s leave to amend, which she did at the hearing on 8 August 2017.
3. We would refuse leave to amend the Notice of Appeal and would otherwise dismiss the appeal for the following reasons.

## Background

1. The first and second appellants are citizens of India. The second appellant is the husband of the first appellant. The third appellant is their son.
2. On 25 February 2013, each of the first and second appellants was granted a student visa. At or around the time of his birth on 11 February 2014, the third appellant was granted a student visa.

### The appellants

1. We will from here refer to the first appellant as the appellant as, substantively, the appeal principally concerns her. The other appellants’ appeals rise or fall with hers. The appellant satisfied the primary criteria for the grant of a student visa. Her husband and son relied on their membership of her family unit to satisfy the secondary criteria for the grant of a student visa. The appellant’s husband was included in the appellant’s application as he was a member of her family unit at the time of the application: *Migration Regulations 1994* (Cth) (the Regulations) reg 2.07AF(3). As the appellant’s son was born in Australia while she held her visa, her son was taken to have been granted a visa of the same kind and class: *Migration Act 1958* (Cth) s 78.
2. During the hearing, an issue also arose as to whether the third appellant, the appellant’s son, had a litigation representative appointed for the proceedings before this Court. Rule 9.61 provides that ‘[a] person under a legal incapacity may start, or defend, a proceeding only by the person’s litigation representative’. The dictionary for the Federal Court Rules defines ‘person under a legal incapacity’ to include a ‘minor’ which in turn is defined to mean a person under the age of 18 years.
3. Further, r 9.63 would require that the relevant party apply to the Court for an order to appoint a litigation representative, accompanied by an affidavit outlining the legal incapacity of the relevant party (here, the infant age of the third appellant) and stating that the proposed litigation representative has consented in writing.
4. No such application had been made for the appellant’s son before this Court prior to the hearing. However, the Court has the discretion to dispense with the requirement of serving and filing an application and supporting affidavit. For example, in *SZRUO v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 777 at [2], Cowdroy J made an order in court to appoint an infant’s father as his litigation representative, in the absence of an application. His Honour noted that r 9.61 required then (as it still does) that the appointment be made when the proceedings and instituted, but dispensed with the requirement as the first respondent, the Minister, consented to the making of the order.
5. During the hearing, when prompted by the Full Bench, counsel for the appellants sought an order that the Court dispense with the need for consent and a further order jointly appointing the appellant and her husband as the third appellant’s litigation representatives. However, the Full Bench deferred its consideration of whether to grant the orders sought, owing to the fact that the application of r 9.61 in situations where there is a family group involved, as is the case here with the appellant and her husband and son, is not settled. It may be that, because the appellant herself, as the primary appellant, is not under a legal incapacity, r 9.61 may not apply to her son as third appellant. There would arguably be less of a need for a litigation representative in those circumstances, and the strict application of r 9.61 could be waived.
6. In these circumstances, we are minded to waive the requirement that the appellant’s son have a litigation representative appointed. His appeal rests entirely on the success of his mother’s case as the primary appellant, rendering the appointment of a litigation representative for him unnecessary.

### The procedural history

1. The appellant's student visa was granted subject to a number of conditions, including condition 8202. Condition 8202 is set out in Schedule 8 to the Regulations and relevantly requires a student visa holder to be enrolled in a registered course of study: condition 8202(2)(a).
2. The appellant was invited to make submissions about this apparent breach and whether or not her visa should be cancelled. The appellant did not respond to the notice.
3. On 31 March 2015, a delegate of the Minister decided to cancel the appellant's student visa pursuant to s 116(1) of the Act (the delegate's decision), stating that, based on evidence available to him, the appellant did not appear to have been enrolled in a registered course of study since 21 March 2014. As a consequence of the cancellation of the appellant's visa, the visas of her husband and son were also cancelled.
4. On 8 April 2015, the appellant and her husband and son applied to the Migration Review Tribunal (as it then was) for review of the delegate's decision. The Migration Review Tribunal, along with other tribunals, was amalgamated with the Tribunal on 1 July 2015 in accordance with s 2 of the *Tribunals Amalgamation Act 2015* (Cth).
5. On 21 April 2016, the appellant, who was represented before the Tribunal, lodged written submissions and other documents with the Tribunal. On 29 April 2016, the Tribunal conducted a hearing, which was attended by the appellant, her husband and son, and her representative. The appellant gave evidence and made submissions and her representative also made submissions.
6. On 2 May 2016, the Tribunal handed down its decision, in which it affirmed the delegate's decision to cancel the appellant's student visa.
7. On 2 June 2016, the appellants applied to the Federal Circuit Court for judicial review of the Tribunal's decision. They filed an amended application on 6 October 2016. On 12 December 2016, the Federal Circuit Court ordered that that application be dismissed.
8. On 23 December 2016, the appellants appealed to this Court from the judgment delivered by the Federal Circuit Court.

## The Tribunal Decision

1. It was not an issue before the Tribunal that the appellant had failed to comply with condition 8202 as she had not been enrolled in a registered course of study during the period from 21 March 2014 to 31 March 2015. The only issue was whether the Tribunal ought to exercise its discretionary power under s 116(1) of the Act to cancel the appellant’s visa.
2. In exercising its discretion to cancel the appellant’s visa and in turn her husband and son’s visas, as members of her family unit,the Tribunal took into account a number of matters. These included having regard to the policy guidelines contained in the Department’s Procedures Advice Manual (PAM3). Indeed, the Tribunal’s reasons are structured in a way whereby each of the nine matters set out under PAM3 are considered under a relevant heading even if not entirely in the same order as in PAM3.
3. It is not in dispute that neither the Act nor the Regulations made under it prescribe what matters are to be taken into account in the exercise of the relevant discretion.
4. The Tribunal had regard to the fact that the appellant was in breach of condition 8202 for a long period of time from 21 March 2014 to 31 March 2015. This was characterised as a significant factor pointing toward a decision to cancel her visa.
5. The Tribunal had regard to the appellant’s failure to apply for enrolment in a course in early 2015. Moreover, for reasons stated, it did not accept as credible her claim that she had telephoned the Australian Technical and Management College, said to be part of Charles Darwin University who she claimed had told her that they were going to defer her course in 2014.
6. The Tribunal then gave detailed consideration to the appellant’s health issues. The Tribunal considered the various medical evidence that the appellant had provided, going to her physical and mental health. The evidence included ultrasound results, referral letters to a specialist and to a psychologist, prescriptions, and psychologist reports.
7. Whilst the Tribunal accepted that the appellant and her family would feel disappointed were sheto return to India without obtaining an Australian qualification it rejected as exaggeration both the evidence of the appellant that in returning she would be seen as a failure as well as the evidence of her psychologist that returning would be psychologically disastrous for her.
8. The above are all matters which were weighed adversely to the appellant.
9. The further following matters weighed favourably in stated varying degrees to the appellant:
   1. the Tribunal found no evidence that the appellant’s past and present behaviour towards the Department had been untruthful or uncooperative. This was given some weight;
   2. the appellants may eventually become unlawful non-citizens and liable for detention (but not indefinite detention) and removal. This was given limited weight but not such as to outweigh other factors that point to cancellation of the visa; and
   3. the appellants may be prevented from making a valid application for visas (other than protection visas) without the Minister intervening personally. This was given limited weight.
10. The Tribunal rejected the appellant’s claim that shewould not be able to obtain good employment in India. **S**he had already obtained a Masters of Business Administration (MBA) and Bachelor of Computing form Indian educational institutions. Moreover she had previously worked in India in a primary school and an engineering school. Accordingly, the Tribunal concluded that neither the appellant nor her family members would face any significant degree of hardship, whether financial, psychological or emotional, were her visa to be cancelled. Nonetheless, the Tribunal gave this factor limited weight in her favour.

## Federal Circuit Court Proceedings

1. The appellant and her husband and son advanced three grounds of judicial review, before the Federal Circuit Court:
2. First, they claimed that it was not open to the Tribunal to find that the appellant's failure to make contact with any potential education provider or to seek an offer of enrolment in July 2016 cast doubt on the genuineness of her intention to undertake future study.
3. Second, they claimed that it was not open to the Tribunal to find that it was not satisfied that the breach of condition 8202 had occurred in extenuating circumstances beyond the appellant's control.
4. Third, they claimed that the reasons for the Tribunal's decision showed that it had not given cumulative consideration to the claims and evidence before it in considering whether the breach had occurred in extenuating circumstances.
5. In each case, the Federal Circuit Court found that the Tribunal's reasons did not lack an evident and intelligible justification and rejected the ground as claimed.

## The Appeal to this Court

1. Before this Court, the appellants essentially restated the three grounds which failed before the Federal Circuit Court albeit couched as asserted errors by the primary judge in failing to uphold those grounds.
2. The first two grounds, in effect, challenge findings of fact made by the Tribunal on the grounds that they were ‘illogical, irrational or otherwise unreasonable’, in the circumstances particularised under each respective ground.
3. To discern irrationality or illogicality in the Tribunal’s reasoning, more must be shown than simply the fact that the decision is one upon which reasonable minds may differ: *SZOOR v Minister for Immigration and Citizenship* [2012] FCAFC 58; (2012) 202 FCR 1 at [84]–[85] citing *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [131] per Crennan and Bell JJ. As Crennan and Bell JJ stated in *SZMDS* 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. Moreover, illogicality must be shown to have affected the decision in question: *SZOOR* at [85].
2. As to unreasonableness, the applicable standard was summarised by the Full Court in *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 231 FCR 437 at [44] as follows:

In order to understand how the standard of legal unreasonableness is to be ascertained, it is important to see where the concept fits in terms of the court’s supervisory powers over executive or administrative decision-making. In *Li*, the judgments identify two different contexts in which the concept is employed. Legal unreasonableness can be a conclusion reached by a supervising court after the identification of an underlying jurisdictional error in the decision-making process: 297 ALR 225; [2013] HCA 18 at [27]–[28] per French CJ, at [72] per Hayne, Kiefel and Bell JJ; cf *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 at [39] per Gummow A-CJ and Kiefel J. However, legal unreasonableness can also be outcome focused, without necessarily identifying another underlying jurisdictional error. The latter occurs in what French CJ (in *Li* 297 ALR 225; [2013] HCA 18 at [28]) calls “an area of decisional freedom”: it has the character of a choice that is arbitrary, capricious or without “common sense”. See also the plurality at [66] referring to an area within which a decision-maker has a genuinely free discretion. The plurality in Li described this as an inference to be drawn because the court cannot identify how the decision was arrived at. In those circumstances, the exercise of power is seen by the supervising court as lacking “an evident and intelligible justification”. Gageler J also uses language suggestive of review for legal unreasonableness being concerned with an examination by the supervising court of the outcome of the exercise of power (in *Li* 297 ALR 225 ; [2013] HCA 18 at [105]):

It is, of course, true that, as a measure in fact of time, space, quantity and conduct, reasonableness is a concept deeply rooted in the common law: and so, in such cases, is the power of a court to say whether a particular decision of that fact is or is not within the bounds of reason”: *Giris Pty Ltd v FCT* (1969) 119 CLR 365 at 383–384 ; [1969] HCA 5. Review by a court of the reasonableness of a decision made by another repository of power “is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process” but also with “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at 220–221 [47].

1. Here, where reasons have been provided for the Tribunal’s decision, the Court must assess the reasoning process and identify the factors of legal unreasonableness: *Singh* at [45]. Those factors are fact dependant: *Singh* at [48]. Equally, even if reasons have been provided, it may be the case that a Court is unable to comprehend how the decision was arrived at, in which case ‘[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification’: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76].
2. The third ground challenges the Tribunal’s finding that the appellant’s breach of her visa condition had not occurred in extenuating circumstances beyond her control.
3. We will deal with the grounds in turn.

### Ground 1

1. The particular finding impugned in the Tribunals reasons is at [38] which is in these terms:

The Tribunal asked the applicant about what she would do if her visa was reinstated and she said she will undertake a MBA either at ATMC/CDU or other institutions such as La Trobe. She said she had not contacted any of them concerning enrolment in July 2016 and that she hadn’t as there was still a one month period. However as put to her, she was notified of the Tribunal hearing on 11 March 2016 and her failure to make any contact with any potential education provider or to seek an offer of enrolment to enable her to secure admission further casts doubt on whether she has any genuine intention to enrol and undertake such studies as she claims.

1. The unreasonableness of the Tribunal’s finding is said to arise in circumstances where the Tribunal knew that the appellant’s student visa had been cancelled on 26 February and that she had sought review of that decision to the Tribunal and further that following the cancellation of her Student visa she held a bridging visa and was not entitled to study.
2. The appellant submits that because of the way in which the Tribunal conducted the hearing, the Tribunal was obliged to turn its mind to whether the appellant was, subsequent to her student visa cancellation, in a position to secure an offer of enrolment in circumstances where her student visa had been cancelled and where she currently held a bridging visa. Further, she submits that the exchange between the Tribunal and the appellant at the hearing reveals that the Tribunal itself had assumed that the appellant must first have her visa reinstated before she was in a position to enrol in a course. This exchange is extracted and discussed later in these reasons at [88]–[96]. However, she submits that the Tribunal’s reasons at [38] reveal an entirely different logic.
3. The appellant submits there is no logical connection between the Tribunal’s line of reasoning concerning the fact that the she was notified of the Tribunal hearing on 11 March 2016 and her failure to seek an offer of enrolment for courses commencing in July 2016 as she was not in a position to know prior to the hearing on 29 April 2016 that the Tribunal would make a decision on that day. In addition, she submits that the Tribunal’s finding as to her failure to seek an offer of enrolment to enable her to secure admission was significant and a finding “on the way” to the critical conclusion reached by the Tribunal that the appellant was not a genuine student and therefore, that her visa should be cancelled. She submits that the Tribunal’s reasoning demonstrates an absence of a logical connection between the evidence and the conclusions drawn by the Tribunal and that no logical or rational decision-maker could have come to the same conclusion. There was she submits, no evidence and no rational grounds to support the Tribunal’s finding at [38].
4. The appellant contends further that the primary judge failed to grapple with her submissions as to unreasonableness pointing in particular to what his Honour said at [23] of his reasons:

23. …The fact that the first applicant may have had a no study condition on her visa is not a matter that renders unreasonable or illogical the observation made by the Tribunal in relation to the first applicant’s failure to contact the Charles Darwin University if, in fact, she had a genuine intention to enrol and undertake studies as the applicant claimed. Ground 1 fails to make out any jurisdictional error.

1. Amplifying this submission the appellant submits that the primary judge failed to engage with her argument that:

The Tribunal was not merely requiring the appellant to contact Charles Darwin University but also required her to have sought “an offer of enrolment to enable her to secure admission”.

#### Consideration of ground 1

1. Whilst the Tribunal was aware that the appellant and her husband and son held a bridging visa it is not apparent that it knew which subclass or subclasses of bridging visa there were or indeed what if any conditions attached to them. Nor was it established that a bridging visa is, as the appellant had submitted, typically subject to a ‘no study’ condition.
2. As but one of its considerations the Tribunal considered, as appears in the Tribunal’s reasons at [38] that, in circumstances where she was notified of the Tribunal hearing on 11 March 2016, her failure to make any contact with any potential education provider or to seek an offer of enrolment to enable her to secure admission further cast doubt on whether she had any genuine intention to enrol and undertake studies as she had claimed.
3. There is nothing self-evidently unreasonable in the conclusion reached for the reasons given. It is neither irrational nor illogical. Enquiries of that kind might well be expected to have been made by someone in the appellant’s then circumstances. Her failure to do so is logically connected to the inference drawn – that is, the conclusion that she did not have a genuine intention to enrol and undertake studies as she had claimed. This conclusion is far from lacking an evident and intelligible justification: *Li* at [76].
4. Moreover, the Tribunal’s conclusion needs to be considered within the totality of the Tribunal’s reasons. It was but one of a number of adverse conclusions reached by the Tribunal as to the appellant’s claims that she genuinely intended to study. It is by no means among the most significant of the factors which led to the rejection of her claim that her health issues were the cause of her being unable to enrol in any registered course during the relevant period. The Tribunal had also found other evidence both given and adduced by the appellant to have been exaggerated. It also rejected her evidence that the Australian Technical & Management College/Charles Darwin University had agreed to defer her course in 2014 and that she thought they had done so in 2014.
5. Accordingly even if this particular submission had been made good (and it is not), it would not impugn the Tribunal’s conclusion, otherwise reached, that the appellant, during the relevant period, had no genuine intention of studying.
6. Ground 1 of the appeal therefore fails.

### Ground 2

1. Ground 2 of the appeal related to the Tribunal’s consideration of whether there were any extenuating circumstances beyond the appellant’s control. The Tribunal had earlier concluded that the breach of condition 8202 for a long period of time from 21 March 2014 until 31 March 2015 was a significant factor that pointed to cancelling the visa. We accept, as the appellant submits, that the Tribunal’s conclusions as to whether such extenuating circumstances existed was a significant factor weighing in the overall exercise of its discretion under s 116 of the Act.
2. The appellant accepts that the Tribunal correctly identified the obligation to consider whether to cancel the visa, in its discretion, once the breach of Condition 8202 was made out. She also accepts that neither s 116 nor the Regulations set out any mandatory relevant considerations for the Minister in the exercise of the discretion to cancel a visa.
3. Thus the appellant, correctly, accepts that the discretion under s 116 of the Act is broad but submits that as an exercise of a statutory power it must be exercised reasonably: *Singh* 445 at [43]; *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 at [61(b)] per Griffiths J.
4. The appellant submits that the cancellation of her visa was legally unreasonable going both to the decision making process as well as the outcome itself: *Li* 363 at [66] per Hayne, Kiefel and Bell JJ and at [105] per Gageler J at [44]; and *Stretton* at [61(c)] per Griffiths J.
5. Thus the appellant submits that in evaluating the Tribunal’s decision, the exercise of the Tribunal’s discretion was ‘plainly unjust’ or ‘obviously disproportionate’ such that the exercise of the Tribunal’s discretion fell outside the range of lawful outcomes. Alternatively, she submits that the justification in the reasons was not sufficient to outweigh the inference that the decision was otherwise outside the bounds of legal unreasonableness, having regard to the Tribunal’s reasons and its acceptance, as a matter of fact, of circumstances which had occurred to the appellant in the period leading up to and during the period of the breach.
6. The appellant submits that the following findings in the Tribunals reasons at [27] lacked evident and intelligible justification:

27. Considering all the evidence, the Tribunal does not accept that the breach of condition occurred “due to” extenuating circumstances beyond her control. The degree of hardship that may be caused to the visa holder and any family members: decision-makers should assess whether the visa holder is, or any family members are, likely to face financial, psychological, emotional or any other hardship as a result of a cancellation decision.

1. An understanding of what the Tribunal intended by [27] is gained from the preceding paragraphs. In particular, at [25], whilst accepting that the appellant had suffered post-natal depression and other health problems as well as the issues arising from the death of her father and brother-in-law, the Tribunal concluded that these did not constitute ‘…extenuating circumstances beyond her control which led to the later breach of the conditions’.
2. Earlier, at [23], concerning her health problems, the Tribunal concluded that these were not of such a severity that the appellant was unable to undertake any study from 21 March 2015 to 31 March 2016, or was unable to seek enrolment in a course, or even a deferral for such a long period of time.
3. Accordingly, fairly and sensibly considered, [27] of the Tribunal’s reasons ought be read as saying:

Considering all of the evidence, the Tribunal does not accept that the breach of the condition occurred *due to* extenuating circumstances beyond her control.

1. The appellant submits that having made findings that she had suffered post-natal depression and other health concerns, the conclusion by the Tribunal that the relevant breach did not occur in extenuating circumstances beyond her control lacked evident and intelligible justification.
2. We have already explained how, sensibly and fairly read,the expression ‘occurred in extenuating circumstances beyond her control’ at [27] of the Tribunal’s reasons ought to be read. More than that, it is evident that what the appellant was seeking to do was to engage in impermissible merits review. It is well-established that the courts regard the unreasonableness ground of review as very confined in its scope, so as to avoid interference with the merits of administrative decisions: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 42 per Mason J. It is impermissible for judicial review of a decision, which the appellant seeks before this Court, to enter a review of the merits of that decision: *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 532 per Gleeson CJ and Gummow J. Ground 2 as pleaded by the appellant, should not provide a basis for disguised merits review: *Sunshine Coast Broadcasters Pty Ltd v Australian Communications and Media Authority* [2012] FCA 1205 at [124].
3. There is nothing irrational, illogical or otherwise unreasonable in the Tribunal’s concluding, as it did, that such health and other related issues as it accepted had occurred were not such as to constitute extenuating circumstances beyond the appellant’s control which *led to* or were *causative* of the grounds upon which her visa cancellation arose. The necessary causative element was not made out.
4. The Tribunal so found and the primary judge, for the reasons we have explained, made no error in rejecting that ground of review which impugned that finding.
5. Ground 2 therefore fails.

### Ground 3

1. In her third ground of appeal, the appellant submits that the Tribunal did not consider the cumulative impact of the appellant’s claims in considering whether the breach of the visa had occurred in extenuating circumstances beyond the appellant’s control and in the overall exercise of the discretion under s 116 of the Act.
2. She submits that the Tribunal did not give any genuine consideration to the cumulative impact of her diagnosed medical conditions, combined with the fact that one month after the period of the breach commenced, the appellant had a new born baby, as well as the broader cumulative impact that the appellant’s circumstances had on her frame of mind in thinking about engaging with her studies in the future.
3. In particular the appellant submits that there was evidence before the Tribunal, for example, that after the appellant’s baby was born on 11 February 2014, she was feeling very stressed and depressed and reported that she felt her ‘world was destroyed’: she had no support and she struggled looking after the baby and coping with her health issues.
4. The appellant challenges the Tribunal’s conclusions that her medical conditions were not of such severity to render her unable to take any study from 21 March 2014 to 31 March 2015 by referring to certain parts of her evidence. This submission amounted to attempted merits review *par excellence* as it calls into question a finding of fact made by the Tribunal, rather than any investigation into the reasoning process or outcome of that process.
5. The Tribunal, in terms at [27] of its Reasons, states its conclusion that it did not accept that the breach of the condition was due to extenuating circumstances beyond the control of the appellant. It prefaced this conclusion with the words ‘[c]onsidering all of the evidence’.
6. The appellant submits that these prefatory words cannot be construed as amounting to any genuine, intellectual engagement or consideration of the appellant’s claims cumulatively. Rather, she submits that the Tribunal’s reasons reveal that the claims advanced by the appellant were dealt with without consideration being given to the significant practical realities faced by the appellant whose life had changed dramatically just one month before the period of the condition breach commenced and thus the Tribunal failed to complete its statutory task by not giving any consciousness or consideration to the cumulative impact of the appellant’s claims, which, she submits, gives rise to jurisdictional error.
7. We do not accept these submissions. Apart from what it had said at [27] of its reasons, the Tribunal at [40] reiterated its consideration of the evidence cumulatively:

40. Considering the evidence *as a whole* the Tribunal concludes that the visa should be cancelled.

(emphasis added)

1. The statements at [27] and [40] were not the recitation of some meaningless mantra. It is evident from its reasons as a whole that close consideration was given to all of the evidence and structured, as we have mentioned, in a way that traversed the relevant matters found in PAM3. As the primary judge observed, correctly, the Tribunal’s reasons reflect a cumulative consideration of the appellant’s evidence and relevant claims and no material was pointed to that was not taken into account. The Tribunal’s reasons at [25] are an example of this cumulative consideration, where it clearly makes reference to the evidence available, and outlines how it has considered and evaluated that evidence.
2. For these reasons, ground 3 also fails.

### Proposed new procedural fairness ground

1. The appellant submitted, in an amended notice of appeal, a further ground in the following terms:

The Tribunal denied the appellant procedural fairness, constructively failed to exercise its jurisdiction, or otherwise failed to carry out its statutory task by failing to put the appellant on notice of an issue arising on the review as required by s 360 of the *Migration Act 1958* (Cth).

1. The appellant sought leave to amend by her proposed notice of appeal dated 25 July 2017. The proposed ground was not raised before the primary judge. The application was opposed by the Minister.

#### Principles governing leave to amend

1. No application for leave to amend the Notice of Appeal was made prior to the amended Notice of Appeal being filed on 25 July 2017. Nor was any affidavit then filed in support of any application for leave.
2. Under r 36.10, leave of the Court is required where a ‘supplementary notice of appeal’ has not been filed within 28 days of the filing of a Notice of Appeal. A party may make an application for leave to amend during the course of a hearing which can be heard concurrently with submissions in support of the proposed new grounds: *SZRCI v Minister for Immigration and Citizenship* [2012] FCA 965 at [15].
3. Here, the proposed amended notice of appeal includes a further ground which was not previously advanced before the primary judge in the Federal Circuit Court of Australia. Leave is therefore required to both amend the notice of appeal and to raise this further ground.
4. In determining whether or not to exercise the court’s discretion to grant leave in the present case, relevant considerations include the reasons why any new arguments were not raised below and whether it is expedient in the interests of justice to allow the proposed amendments: see, eg, *Commissioner of the Australian Federal Police v Oke* (2007) 159 FCR 441 at 444–445 [17]–[21].
5. The appropriate considerations to be applied in relation to whether leave should be granted to a party who wishes to raise new grounds propounded for the first time on appeal are set out in *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158 at [46]–[48] as recently re-affirmed in *Sun v Minister for Immigration and Border Protection* [2016] FCAFC 52; 243 FCR 220 at [89]-[90]. Essentially, as the Full Court articulated in *VUAX* at [48], the key consideration is whether it is expedient in the interests of the administration of justice to allow a new argument to be raised on appeal.
6. As the Full Court in *VUAX* stated at [48]:

The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused.

1. The two considerations relevant, then, are the explanation for the delay and the merit of the new ground sought to be raised.

#### Consideration

1. The appellant, during the course of the hearing, submitted that the Minister would not suffer prejudice because he was on notice, in a broad sense, that there was an issue with the way that the Tribunal had raised the matters before the appellant.
2. Counsel for the respondent submitted that a consideration of whether leave ought to be granted does not ordinarily involve a full consideration of the merits of the grounds: *Iyer v Minister for Immigration & Multicultural Affairs* [2000] FCA 1788 at [24]. Accepting that is the case, it is nonetheless the merits of the proposed new ground that the appellant primarily relied upon in seeking leave, and on which the success of the application for leave will depend.
3. The substance of the new ground of appeal is that the Tribunal did not put the appellant on notice of an issue that arose on review. The Tribunal considered the issue of the breach of the appellant’s condition from 21 March 2014 until 31 March 2015 as a significant factor that pointed to cancelling the visa, in circumstances where it was not satisfied that the breach of the condition had occurred in extenuating circumstances beyond the appellant’s control having regard to the evidence before it.
4. The Tribunal had made an adverse finding against the appellant by reason of the fact that she had not contacted course providers concerning enrolment in July 2016 and, crucially, because she had failed to seek an offer of enrolment to enable her to secure admission which the Tribunal found cast doubt on the appellant’s genuine intention to enrol and undertake studies as she claimed.
5. The appellant submitted that this issue arose from a number of exchanges between the Tribunal and the appellant or her representative during the hearing on 29 April 2016. The exchanges are contained in the transcript of the Tribunal hearing.
6. The appellant submits that in response to direct questioning from the Tribunal at the hearing as to what course the appellant would enrol in “if her student visa was to be reinstated”, the appellant explained that, if that circumstance arose, she would study an MBA.
7. The exchange between the Tribunal and the appellant herself was as follows:

Q. Okay, so if your student visa was to be reinstated, what would you enrol in?

A. First of all, if that condition comes, like, I will be very highly grateful to you, like I will go for MBA once again.

…

1. The appellant was then asked about whether she had inquired into enrolling in a course, and answered that she had not and that she still had a further month to make those inquiries:

Q. Okay. So we invited you to the hearing 11 March 2016, I think it was emailed out to you, have you contacted any of those universities about the possibility of enrolment in July of this year?

A. Of this year?

Q. Yes.

…

Q. But have you contacted any of these educational providers about being enrolled in July this year?

A. No, I haven’t – I haven’t contacted them.

Q. But you’ve been aware the hearing is coming up, if you wanted to be enrolled in something, if you wanted to go and enrol in a course, I’m surprised you haven’t been contacting them about the availability and whether you’d be able to get into a course in July.

A. Because there is one month in between that period, I can talk with them about the study and all.

…

1. The appellant submits that the Tribunal made an adverse finding against the appellant not only because she had failed to make contact with any potential course providers but also because she had not sought “an offer of enrolment to enable her to secure admission” which the Tribunal found cast doubt on whether the appellant had any genuine intention to enrol and undertake studies as claimed.
2. This, she submits, denied her procedural fairness by failing to identify an issue critical to the disposition of the review, namely that, the appellant’s failure to obtain an offer of enrolment in a course *prior* to her student visa being reinstated could cast doubt on her genuineness as a student. This she submits was not an issue the delegate considered to be dispositive, and because the Tribunal said nothing about this matter which it decided against the appellant, it had breached s 360 of the Act. Thus, she submits that she was reasonably denied an opportunity to present her case to the Tribunal. Further, she submits that had she been put on notice of that issue, she could have, for example, provided evidence that she was, following the cancellation of her student visa, subject to a condition which prohibited her from engaging in any studies or training in Australia.
3. The appellant then relied on an exchange between a member of the Tribunal and the appellant’s representative in which the representative had the opportunity to say anything he wished.
4. The relevant excerpts of that exchange between the Tribunal member and the representative are as follows:

Q. Okay. As I said to you, I want to give you the opportunity to make comments to me, so is there anything that you’d like to say on behalf of your client?

…

R: Yes, because the side effect. So she having medical issue during that period. And now actually I think her visa’s got cancelled, actually unless she has the visa she won’t be able to get enrolled in the courses now.

Q: Yes, I mean I can’t take that against her –

R: Yes.

Q: Well, I mean she could seek an offer of enrolment, she could have sought an offer.

R: Yes.

…

1. Counsel for the appellant during the hearing pointed to the comment by the Tribunal member that the appellant ‘…could seek an offer of enrolment, she could have sought an offer’ as not giving rise to a meaningful opportunity for the appellant to her claim.
2. We do not accept these submissions. At the hearing, the Tribunal put to the appellant, who was represented that:
   1. the appellant could have contacted an education provider before the Tribunal hearing about the possibility of enrolment in July 2016; and
   2. it was surprising that she had not done so;

and then gave the appellant an opportunity to respond.

1. It is apparent from the passages of the transcript that the Tribunal member’s comment to the appellant’s representative was put as a question, rather than merely a throwaway line. I am satisfied that the appellant was given a real and meaningful opportunity both to give evidence and present argument relating to the delegate’s decision.
2. The merits of the proposed ground of appeal are, for these reasons, short of warranting giving leave to the appellant to raise them before this Court.
3. Leave to amend the Notice of Appeal is therefore refused.

## Conclusion and orders

1. We would order that the application to amend the Notice of Appeal be refused, and that the Appeal be dismissed with costs.

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| I certify that the preceding one-hundred and one (101) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Gilmour and Mortimer. |

Associate:

Dated: 1 November 2017

REASONS FOR JUDGMENT

LOGAN J:

1. I have had the advantage of reading in draft the joint judgment of Gilmour and Mortimer JJ. I agree with the orders which they propose both in respect of the application for leave to amend the notice of appeal and with respect to the disposal of the appeal. I also agree with their reasons but wish to add some additional observations in relation to the application for leave to amend the grounds of appeal.
2. It was the Federal Circuit Court, not this Court, to which Parliament consigned an original jurisdiction judicially to review a decision of the Migration Review Tribunal. The jurisdiction exercised by this Court in this type of case is appellate only. This remains the position in this type of case now that the Migration Review Tribunal’s administrative review jurisdiction has been assumed by the Administrative Appeals Tribunal. The appeal to this Court is against the orders made by the Federal Circuit Court, not those made by the Tribunal.
3. In modern times, the root authority in relation to the granting by an intermediate appellate court of leave to raise on appeal a point not taken at trial is *Coulton v Holcombe* (1986) 162 CLR 1 (*Coulton v Holcombe*). The observations made in that case by Gibbs CJ, Wilson, Brennan and Dawson JJ (at 7) are applicable to the present case:

To say that an appeal is by way of rehearing does not mean that the issues and the evidence to be considered are at large. It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish. The powers of an appellate court with respect to amendment are ordinarily to be exercised within the general framework of the issues so determined and not otherwise. In a case where, had the issue been raised in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this Court has firmly maintained the principle that the point cannot be taken afterwards …

Their Honours also emphasised (at 8) the following then recent observations made by six justices of the High Court in *University of Wollongong v. Metwally* *[No. 2]* (1985) 59 ALJR 481, at 483:

It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.

1. The additional ground sought to be raised does not raise any issue of pervasive public importance but rather whether, in the particular circumstances of the case before the Tribunal, there was a denial of procedural fairness. The place for the determination of any such jurisdictional error issue is, in all but the most exceptional cases, in the original jurisdiction of the Federal Circuit Court, not in this Court. The “public interest in the fairness and expedition of the administration of justice” referred to in *Coulton v Holcombe* at 11, is abroad in this case, too.
2. It is likewise abroad in protection visa cases but in those cases the potentially catastrophic consequences upon return to a country of former habitual residence for a person if, truly, they have a well-founded fear of persecution, coupled with illiteracy in English and absence of legal representation either in the Tribunal or the Federal Circuit Court, can sometimes offer countervailing considerations in respect of the allowance on appeal as a fresh ground of a pure point of law going to the Tribunal’s jurisdiction. None of the appellants was an asylum seeker.
3. To delve into the prospective merits of the proposed ground of appeal is a way of avoiding the visiting on the appellants of the type of disappointment referred to in *Coulton v Holcombe* at 10-11 but it might also be thought subversive of the general position for which that case is authority and which is unconcerned with whether the omission to raise the point below was deliberate or inadvertent. Thus, my preference, given the nature of the proposed additional ground, would have been peremptorily to have refused leave to raise it.
4. Another consideration which looms large in modern times in relation to the allowing of on appeal of the amendment of ground of appeal so as to raise a point not taken below is the sheer volume of cases arising under the *Migration Act 1958* (Cth) (Migration Act). The resources which this Court can devote to the exercise of its appellate jurisdiction are finite. That appellate jurisdiction is exercisable as never before in respect of a great breadth of original Federal jurisdictions. To allow too readily in cases arising under the Migration Act the raising of points not taken in the original jurisdiction is fraught with the risk of encouraging the overwhelming of the efficient allocation of judicial resources to the timely disposal of other appeals in fields of appellate jurisdiction.

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| I certify that the preceding seven (7) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 1 November 2017