FEDERAL COURT OF AUSTRALIA

BKQ16 v Minister for Immigration and Border Protection [2019] FCA 40

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| Appeal from: | *BKQ16 v Minister for Immigration & Anor* [2018] FCCA 137 |
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| File number: | VID 166 of 2018 |
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| Judge: | **MORTIMER J** |
|  |  |
| Date of judgment: | 29 January 2019 |
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| Catchwords: | **MIGRATION –** appeal from decision of Federal Circuit Court affirming decision of Administrative Appeals Tribunal to refuse protection visa application – whether decision of Tribunal to refuse appellant’s application for adjournment of hearing unreasonable – where adjournment concerned second hearing following reconstitution of Tribunal – where appellant unrepresented at second hearing – failure to grant adjournment unreasonable in the circumstances – appeal allowed **MIGRATION –** appeal from decision of Federal Circuit Court affirming decision of Tribunal to refuse protection visa application – whether Tribunal failed to exercise jurisdiction due to error in factual findings relevant to assessment of credibility– appeal allowed **PRACTICE AND PROCEDURE** – application for leave to amend notice of appeal – where ground not pressed before Federal Circuit Court – consideration of principles concerning leave to amend notice of appeal – leave granted |
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| Legislation: | *Migration Act 1958* (Cth) ss 48B, 363(1)(b), 415(2)(a), 425, 426A(1), 427(1)(b) *Federal Court of Australia Act 1976* (Cth) s 37M |
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| Cases cited: | *ARK16 v Minister for Immigration and Border Protection* [2018] FCA 825*AVQ15 v Minister for Immigration and Border Protection* [2018] FCAFC 133*BKQ16 v Minister for Immigration & Anor* [2018] FCCA 137*CKC16 v Minister for Immigration and Border Protection* [2018] FCA 1260*Coulton v Holcombe* [1986] HCA 33;162 CLR 1*CPE15 v Minister for Immigration and Border Protection* [2017] FCA 591*Haritos v Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315 *Maharjan v Minister for Immigration and Border Protection* [2017] FCAFC 213; 258 FCR 1*Minister for Immigration and Border Protection v Aulakh* [2018] FCAFC 91*Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 92 ALJR 713*Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332*Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73*MZZJO v Minister for Immigration and Border Protection* [2014] FCAFC 80; 239 FCR 436*WAGO of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 437; 194 ALR 676 |
|  |  |
| Date of hearing: | 13 November 2018 |
|  |  |
| Date of last submissions: | 27 November 2018 |
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| Registry: |  |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 94 |
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| Counsel for the Appellant: | Ms G A Costello |
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| Solicitor for the Appellant: | Victoria Legal Aid |
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| Counsel for the First Respondent: | Mr C M McDermott  |
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| Solicitor for the First Respondent: | Australian Government Solicitor |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

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|  | VID 166 of 2018 |
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| BETWEEN: | BKQ16Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | MORTIMER J |
| DATE OF ORDER: | 29 January 2019 |

THE COURT ORDERS THAT:

1. Leave is granted to the appellant to rely, in addition to ground 1 in his notice of appeal filed on 19 February 2018, on the proposed ground of appeal set out in paragraph 1A of his interlocutory application dated 18 July 2018.
2. The appeal be allowed.
3. The orders of the Federal Circuit Court made on 29 January 2018 be set aside, and in lieu thereof, order that:
	1. The decision of the Administrative Appeals Tribunal made on 26 May 2016 be set aside.
	2. The matter be remitted to the Administrative Appeals Tribunal, differently constituted, for determination according to law.
4. The parties are to agree on appropriate costs orders for the appeal and for the hearing before the Federal Circuit Court by way of a lump sum and file a joint minute of proposed orders on or before 4 pm on 12 February 2019.
5. In the absence of any joint minute of proposed order being filed pursuant to paragraph 4 of these orders:
	1. on or before 4 pm on 19 February 2019, the appellant file and serve submissions (in accordance with paragraphs 4.10 to 4.12 of the Court’s Costs Practice Note (GPN-COSTS) dated 25 October 2016).
	2. on or before 4 pm on 26 February 2019, the first respondent file and serve submissions (in accordance with paragraphs 4.13 to 4.14 of the Costs Practice Note (GPN-COSTS).
6. In the absence of any agreement having been reached on or before 5 March 2019, the matter of an appropriate lump sum figure for the appellant’s costs be referred to a Registrar for determination.

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

REASONS FOR JUDGMENT

MORTIMER J:

1. This is an appeal from orders made by the Federal Circuit Court on 29 January 2018, dismissing the appellant’s application for judicial review of a decision by the Administrative Appeals Tribunal, made on 26 May 2016. The appeal was lodged on 19 February 2018. The appellant arrived in Australia in July 2012: it can be seen it has taken the appellant a long time to get from his arrival in Australia to this Court: more than six years. None of the delays have been of the appellant’s making, but rather the responsibility of the Australian administrative and judicial processes with which he has been required to engage.
2. For the reasons set out below, the appeal will be allowed.

# Relevant background

1. The appellant is a citizen of Sri Lanka. Some considerable time after his arrival, and after he had spent more than six months in immigration detention, on 1 February 2013 he was permitted to apply for a protection visa, presumably through an exercise of the Minister’s personal discretion under s 48B of the *Migration Act 1958* (Cth). In the statement accompanying that application the details of the countries to which he had travelled, prior to arriving in Australia, were set out. These details identified that for the period 1 October 2009 through to June 2012, he had been in Malaysia.
2. At Question 6 of his application form 866B he answered “no” to a question about whether he had previously lived in a refugee camp, centre for refugees, or detention centre outside Australia.
3. On 29 October 2013, the appellant’s then representative, from the firm Craddock Murray Neumann, emailed the delegate providing additional information in support of the appellant’s claims for protection and amendments to his protection visa application. In particular the appellant modified his answer to Question 6 to state:

Between October 2009 and March 2010 resided in a centre run by IOM in Marak Boat Harbour, Indonesia. Our client cannot recall the name of the Centre and further instructs that question 6 of Form 866B in his application should be amended to include this information

1. After an interview, and his representatives having made submissions to the delegate, the delegate refused to grant the appellant a protection visa.
2. On 10 January 2014, the appellant sought merits review in the Tribunal. Craddock Murray Neumann were listed on the Tribunal application form as the representatives of the appellant. Completion of the review was delayed because of the reconstitution of the Tribunal. The reconstitution is also of relevance to the appellant’s grounds of appeal.

## The appellant’s claims and how the Tribunal dealt with them

1. The appellant’s claims centred on the treatment initially experienced by his family, rather than him, at the hands of the Sri Lankan Army, with the first significant incident in his narrative being the detention of his brother in 1999 for a period of three days, by the army, along with other young Tamil men. The appellant stated his brother and the other young men were accused of association with the LTTE. It is not necessary to set out in detail the narrative given by the appellant of what happened to his family from there on – but it involved his parents securing his brother’s release, his brother being detained again, and then disappearing for good, his father being beaten and sliding into ill health and dying prematurely, army harassment and intimidation of the family at their house (including the appellant being beaten by army officers). The appellant states that he went into hiding in 2007 with a relative in another part of Sri Lanka and then in 2009, his mother mortgaged the family land to pay a people smuggler to get the appellant, as the last remaining male in his family, out of Sri Lanka. He claimed the army continued to come looking for him at his mother’s house, up until 2010, after he fled Sri Lanka. He claimed to fear harm at the hands of the Sri Lankan Army, on the Convention grounds of race (Tamil) and imputed political opinion (imputed LTTE association). He also made claims relating to his fear of harm if returned to Sri Lanka as an unsuccessful asylum seeker.
2. Finally, and importantly for the proposed second ground of appeal, the appellant contends he made claims to fear harm because he was on what has been called the “Merak ship”: that is, an Indonesian boat which, full of Sri Lankan asylum seekers, was prevented from leaving the port of Merak in Indonesia, bound for Australia. The situation drew international media attention. The appellant claimed that if he were forced to return to Sri Lanka, he would be singled out by the Sri Lankan authorities for his involvement in this incident and therefore the risk of harm to him was higher.
3. The original Tribunal conducted a review hearing on 14 May 2015, which the appellant attended in person with an interpreter and with his migration agent on the telephone. Unbeknown to the appellant, on 11 November 2015, the Tribunal was reconstituted. This fact emerged only through the Tribunal documents produced to the appellant’s legal representatives under freedom of information processes. Where necessary, I shall call the reconstituted Tribunal the “second Tribunal”.
4. Four months after the reconstitution, on 11 March 2016, the second Tribunal invited the appellant to a further hearing, scheduled for 22 April 2016. This further hearing invitation makes statements such as:

We have considered the material before us but we are unable to make a favourable decision on this information alone.

You are invited to appear before the Administrative Appeals Tribunal (AAT) to give evidence and present arguments relating to the issues arising in your case.

1. This hearing invitation does not acknowledge that the Tribunal had already had a hearing, and that submissions had been made in advance of that first hearing. It does not acknowledge that, so far as the appellant and his representative were concerned, the Tribunal was essentially reserved in its review. The reconstitution of the Tribunal is not mentioned. Inexplicably (other than by administrative inattention) it is in a form which suggests it is the first hearing invitation, and that the Tribunal is considering the appellant’s review for the first time. It is surprising the Tribunal’s processes are such that there is no ability to send out more individualised hearing invitations, which actually deal with the particular circumstances of an individual review applicant. It may be that some attention should be paid to remedying this aspect of the Tribunal’s processes. Where a review applicant is represented, no doubt calls might be made to clarify what is going on. However, that should not have to occur. Further, if a person is not represented, the difficulties in understanding what is going on may be more substantial.
2. After this further hearing invitation, on 18 March 2016, Craddock Murray Neumann emailed the Tribunal stating that the firm no longer represented the appellant. I note that it was agreed between the parties, and apparent from the documents in evidence, that Craddock Murray Neumann is a firm of legal practitioners, at least some of whose lawyers are also registered migration agents under Pt 3 of the Migration Act. The email did not explain why the firm had ceased to represent the appellant. It simply informed the Tribunal of the fact and invited the Tribunal to communicate directly with the appellant going forward.
3. On 13 April 2016, just over a week before the scheduled Tribunal hearing, the appellant’s wife (who, I infer, spoke some English) telephoned the Tribunal on his behalf. The documentary evidence (a Tribunal file note) reveals she informed the Tribunal officer to whom she spoke that the appellant could not pay his outstanding legal fees and that his lawyer “might not help his case anymore”. She asked the Tribunal to postpone the hearing. She was asked to put the request in writing, with reasons and was told that the Tribunal member would consider it. The appellant’s wife was not told about the reconstitution of the Tribunal, nor was she told her written request should specify the proposed date range to which the hearing would be rescheduled.
4. Through his wife, the appellant made the written request as he had been asked to do. The request relevantly took the following form:

My name is [redacted] case number [redacted] would like to reschedule which will be held on 22 April 2016 (Friday) due to no representative on that day.

On end of March i receive a letter by informing that the representatives couldn’t argue for my case due to the government not support them financially. So, they ask me to look for private lawyer or pay to them $4400 upfront for the case. Even I request them to pay them installment but they they refuse to do that. All the information given by the receptionist even I ask the receptionist pass to the lawyer for further question and also pay payment by installment to the lawyer because I don’t have that much money on my hand but the lawyer refuse to answer my call

So, i look for new lawyer in short time they ask me to pay more than the lawyers demand. certain lawyers refuse to take my case to take my case because not enough time and busy as well. Since no lawyers take my case, so i call legal aid to take my case but they said that the lawyers are busy and time also very short to review my case

Based my case hearing and situation i need more time to get new lawyer as re presenter and to review my case and also prepare money for my case to pay the lawyers. Once i get information on today from MRDivision since i don’t have any solution for my cases to send email to you for reschedule.

Here, my humble request to reschedule my hearing based on my situation since this is my life matter. Please be consider my situation. Don’t hesitate to call me [redacted] if any question.

hopefully, the person whom concern will reply me as soon as possible.

Thanks MILLION.

1. It remains unclear on the evidence what was the difficulty for Craddock Murray Neumann in continuing to represent the appellant. A question might be asked whether their obligations under the Immigration Advice and Application Assistance Scheme obliged them to do so. One possible inference is that no extra funds were payable under the Scheme for a situation where the Tribunal was reconstituted and the legal representative had to attend a second Tribunal hearing. If that were the basis on which Craddock Murray Neumann informed the appellant it would not act for him any further without further payment, that would be of concern. However, the evidence remains unclear about why Craddock Murray Neumann ceased to act for the appellant prior to his Tribunal review being completed, when they had been retained under the IAAAS Scheme to act for him during the course of that review. Therefore, I make no findings on this matter.
2. On 14 April 2016, the Tribunal refused the adjournment request and gave reasons for that decision:

I refer to your email below.

The Presiding Member has **declined your request for a postponement**. You have already had a full hearing with a different Member and this is a further hearing to discuss issues arising out of that hearing and more up to date country information. In light of the fact that his last hearing was held nearly a year ago, the Tribunal will not be delaying the matter any further in the circumstances.

**The hearing will still go ahead on 22 April 2016 at 2:00pm**

(bold in original).

1. The appellant confirmed he would attend without a representative. The reality was he had little choice but to do so. He said (in an email):

Ok I happy to attend this hearing because it’s about my future and life matter. Slightly feel sad and worried that I couldn’t get a lawyer as representer in short time period.

## The second Tribunal’s decision

1. The Tribunal’s decision was made on 26 May 2016, and affirmed the refusal of a protection visa to the appellant. There is only one aspect of the Tribunal’s decision which is in issue on the appeal, and it is appropriate to focus on the Tribunal’s reasoning about that issue. Aside from this issue, in summary the Tribunal found there were a number of discrepancies in the appellant’s accounts of the various events giving rise to his claims and this led to the Tribunal rejecting several key aspects of the appellant’s claims (eg that his father was beaten by the Sri Lankan Army). The rejection of many aspects of the appellant’s factual narrative led the Tribunal to find (at [45] of its reasons) that the appellant did not have a well-founded fear of persecution for the reasons he claimed, because of what had happened to him in the past. It went on to reject his claims associated with being returned to Sri Lanka as a failed asylum seeker.
2. The Tribunal’s reasoning on why it rejected the factual narrative of the appellant could be open to criticism at several points, but no ground of appeal is raised about that reasoning.
3. In relation to the claim about being on the Merak ship, it is appropriate to reproduce the two paragraphs of the Tribunal’s reasons which deal with this issue:

46. The applicant also claimed that he fears harm on his return to Sri Lanka because he was on the Merak ship and enquiries had been made by the authorities, particularly army intelligence, after they had allegedly seen him in media footage of this ship. The Tribunal notes the applicant only raised his alleged presence on this ship during the first hearing with the previous Member. There was nothing in the applicant’s protection visa application to suggest he had spent six months in Indonesia at the end of 2009 and early 2010. Rather, in his protection visa application he claimed to have been in Malaysia from 1 October 2009 (2008 as he subsequently amended) to 22 June 2012. When asked in the second hearing why he did not mention anything in his statutory declaration about being on this ship or the authorities coming and asking his mother about him after allegedly seeing him on this ship, the applicant claimed that his lawyer had told him if he did not have any evidence this would not be accepted. The Tribunal does not accept that the applicant’s adviser would have advised the applicant that his alleged presence on the Merak ship could not be included in his claims unless he had evidence. The Tribunal notes that there are several aspects of the applicant’s claims, including the alleged visits to his home in 2006, which he has not submitted substantiating evidence. Further, the Tribunal notes when the first Tribunal queried why he had not raised this in his statutory declaration attached to his protection visa application, the applicant had stated he is now relaxed and can tell and he had told his lawyer he had made mistakes like this. There was nothing in the applicant’s earlier evidence to suggest that he had been advised by his lawyer that this information could not be included because he had no evidence to support this claim.

47. The Tribunal has also taken into consideration the applicant’s evidence in his entry interview regarding where he lived before coming to Australia, his time since he left Sri Lanka and his travel route to Australia and the applicant did not mention anything about being on board the Merak boat for 6 months. As the Tribunal put to the applicant in the hearing, in accordance with the requirements in s.424AA of the Act, the relevance of this information is that his failure to raise this claim during the entry interview when providing detailed information about his travel since departing Sri Lanka raises serious doubts that he was on this boat or ship. While the applicant, in response; insisted he was on the Merak ship or boat, given the applicant’s delay in raising this claim regarding his presence on the Merak ship, the Tribunal does not accept that he was on this ship as he claimed or that there were any enquiries made by army intelligence, CID or any other authorities from his mother about him as a result of being seen in video footage of this ship. The Tribunal finds that the applicant has embellished this aspect of his claim in an effort to bolster his case. As such it does not accept his claim in the hearing that he jumped into the sea to show that they were trying to commit suicide or that he was the one who was informing the media about the fact they were refugees. The Tribunal therefore does not accept that the applicant faces a real chance of serious harm, now or in the reasonably foreseeable future for reasons of an imputed political opinion based on his alleged presence on the Merak ship.

1. Paragraph [52] of the Tribunal’s reasons should also be reproduced:

52. The applicant also claimed that he faces harm on return to Sri Lanka as a failed asylum seeker after a number of years absence from the country. He claimed he will be questioned about how he went to Australia and what information he gave and he will be tortured and beaten because he had said bad things about the country. During the hearing with the previous Member the applicant referred to a boy named Reuben who had come by ship and had returned to Sri Lanka in 2009 because his mother had had a heart attack and was taken to the fourth floor and beaten and tortured. When asked how he knew what had happened to Reuben, the applicant claimed that Reuben’s mother had informed this to the people on the ship, presumably the Merak ship, by calling on one of the two phones. She said what happened to her son should not happen to any other people. The Tribunal finds the applicant’s evidence regarding Reuben and what allegedly happened to him on his return to Sri Lanka to be vague and lacking in detail. The applicant provided no detail regarding the profile of Reuben, particularly if he had any association with the LTTE or a criminal history or the circumstances of Reuben’s alleged arrest on return to the country. Further, given the Tribunal’s findings above regarding the applicant’s claimed presence on the Merak ship, the Tribunal has serious doubts about the credibility of the applicant’s claims that he learnt about what allegedly happened to this particular person while on the ship and as such, also taking into consideration the limited nature of the information the applicant provided about this person, the Tribunal does not accept his claims are credible.

1. The Tribunal also referred to the appellant’s adjournment request, and explained why the Tribunal had refused to grant the adjournment:

On 11 March 2016, the Tribunal wrote to the applicant inviting him to attend a further hearing on 22 April 2016. On 13 April 2016, the applicant wrote to the Tribunal requesting a postponement of the hearing to allow him time to obtain a new representative as his previous agent was no longer representing him. The applicant explained the efforts he had gone to in order to engage a new representative and requested time to collect the money required to pay for a new representative. The Tribunal considered the applicant’s request but decided to refuse to postpone the hearing on the basis that the applicant had the assistance of an adviser for the hearing with the previous Member and that the purpose of the second hearing was to discuss issues arising out of his evidence given during that hearing, as well as more recent country information, Further, the Tribunal took into consideration the fact that the previous hearing had been held nearly a year before and that there was nothing in the information provided by the applicant to indicate that he would be in a position to engage another representative in the near future. In light of these circumstances the Tribunal was of the view that the matter should not be delayed any further.

## The Immigration Advice and Application Assistance Scheme

1. The evidence is clear that Craddock Murray Neumann were retained to act on behalf of the appellant under the IAAAS Scheme. In the appeal book were documents such as the appellant’s consent for information to be provided to Craddock Murray Neumann as his IAAAS provider.
2. The apparently unilateral decision of Craddock Murray Neumann to cease to act for the appellant before his Tribunal review process was complete was a matter which the Court raised during argument on the appeal. The Court directed the parties to file a joint note about how the Scheme operates. The following information is taken from that note, which states it was prepared from publicly available sources. The joint note also confirmed that Craddock Murray Neumann were listed as providers of the IAAAS Scheme at the time the appellant was receiving assistance from that firm.
3. The IAAAS is a Scheme administered by the Commonwealth government to provide free, independent, and professional migration advice and visa application assistance to “disadvantaged” non-citizens, meaning non-citizens who are financially disadvantaged or disadvantaged in another way, for example because they are from a non-English speaking background.
4. Services under the IAAAS Scheme are provided by registered migration agents or legal aid officers working for contracted IAAAS Scheme providers. Providers were initially selected in an open tender process completed in 2011. Regulatory oversight of registered migration agents is conducted by the Office of the Migration Agents Registration Authority, a federal authority.
5. Prior to 31 March 2014, services under the IAAAS Scheme were available to disadvantaged non-citizens to assist them to complete and submit visa applications and ceased once the visa applied for had been finally determined as granted or refused following merits review. After 31 March 2014, access to the IAAAS Scheme was restricted to non-citizens who arrived in Australia with a valid visa and no longer included assistance at the merits review stage.
6. No party submitted to the Court that Craddock Murray Neumann ceased to act for the appellant during the Tribunal’s review process because of the changes to which I have referred in [28], although there is insufficient evidence to exclude that possibility.

## The appellant’s judicial review

1. The appellant sought judicial review by an application dated 9 June 2016, and amended that application on 28 November 2017. The Federal Circuit Court sets out the amended grounds of application at [10] of its reasons. The Federal Circuit Court dismissed the application on 29 January 2018: see *BKQ16 v Minister for Immigration & Anor* [2018] FCCA 137.
2. Only one of the grounds raised before the Federal Circuit Court is pressed on the appeal: that is, ground one before the Federal Circuit Court, which alleged legal unreasonableness in the refusal by the Tribunal of the appellant’s adjournment request.
3. That ground was rejected by the Federal Circuit Court on the basis that there was an “evident and intelligible justification” for the refusal, the Federal Circuit Court taking that language from the High Court’s decision in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332. The Federal Circuit Court found that because the appellant had not asked for an adjournment of a specified timeframe, nor provided any basis for the Tribunal to conclude he might ultimately secure legal representation if an adjournment were to have been granted, the Tribunal’s refusal was not legally unreasonable. The Federal Circuit Court concluded at [18]:

Whilst not articulated in argument, this is a case where the need for a further hearing is said to arise out of discrepancies in the evidence, but also clearly arose out of the fact the Tribunal was now reconstituted by a different member. The conduct of the Tribunal administration resulted in a need for further hearing at a time after which the applicant appears to have exhausted his funds and capacity to obtain legal representation. In these circumstances, had the applicant provided a reasonable basis for explaining how he would obtain legal representation within a reasonable timeframe (not necessarily a short timeframe) one would have expected the Tribunal to grant the adjournment.

## The appellant’s claims on judicial review and on this appeal

1. In the original notice of appeal to this Court, four grounds of appeal were raised.
2. By an interlocutory application dated 17 July 2018, the appellant sought to amend his notice of appeal, by adding two further grounds. However, when the appellant’s written submissions were filed, they indicated the appellant intended to rely only on the first “new” ground in the interlocutory application, and to maintain only one of the four grounds before the Federal Circuit Court, namely the legal unreasonableness ground to which I have referred above. The new ground related to the way the Tribunal dealt with the appellant’s claim to have been on the Merak ship. The Minister opposed leave being granted to raise the new ground of appeal.
3. The appeal proceeded on the basis that counsel for the appellant would develop her arguments on the proposed new ground as well as the existing ground that was pressed, and the Court would consider the question of leave in its final reasons.
4. Proposed ground two concerns a finding of fact by the Tribunal. The appellant contends that the Tribunal made an erroneous factual finding that “infected the Tribunal’s credit findings” about the appellant. As the extract above reveals, the Tribunal found (at [46]) that there was nothing in the applicant’s protection visa application to suggest he had spent six months in Indonesia at the end of 2009 and early 2010. In fact, and the Minister did not dispute this, the appellant had provided information in his protection visa application that between October 2009 and March 2010 he had lived in a centre run by the International Organisation for Migration in “Marak Boat Harbour”, Indonesia.
5. The Minister did not oppose the appellant’s application to file fresh evidence on the appeal – namely the transcript of the Tribunal hearing, and evidence about the reconstitution of the Tribunal. These documents were exhibited to the affidavit of Amy Faram affirmed 29 October 2018, which was read without objection. The appellant also read a second affidavit of Ms Faram, exhibiting the Tribunal’s hearing records, again without objection from the Minister.

# Resolution

1. I consider ground one should succeed. I also consider leave should be granted to the appellant to raise ground two, and that ground should succeed.

## Ground One

1. Unlike *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 92 ALJR 713, which dealt with legal unreasonableness relating to the Tribunal’s discretionary power under s 426A(1) of the Migration Act to make a decision on a review if two preconditions are satisfied (broadly, that a hearing invitation has been given and a review applicant has failed to appear), the current appeal concerns a different discretionary power vested in the Tribunal. That is the power in s 427(1)(b) – to adjourn the review from time to time. This was the power applicable to the appellant’s request that the second hearing be postponed.
2. However, like s 426A(1), there is no dispute that the power in s 427(1)(b) is conditioned by the requirement that it be exercised reasonably. The High Court’s decision in *Li* concerned a similar power given to the then Migration Review Tribunal in s 363(1)(b) of the Migration Act. The High Court proceeded on the basis the power was conditioned by a requirement it be exercised reasonably.
3. On this appeal, there was also no dispute that the exercise of the adjournment power was material to the Tribunal’s ultimate exercise of power to decide the review, and therefore if it was exercised in a legally unreasonable way, this would invalidate the exercise of power on review under s 415(2)(a) of the Migration Act.
4. In *SZVFW*, some of the reasons for judgment use adjectival descriptions of the kind of factual situation which may lead to a conclusion that an exercise of a discretionary power was legally unreasonable. They are adjectives such as “extraordinary” (Gageler J at [70]) and “unexpected or remarkable” (Nettle and Gordon JJ at [121]). These adjectival descriptions illustrate that the test for legal unreasonableness is, as the Chief Justice observed in *SZVFW* at [11], “necessarily stringent”. This is not to say that a factual situation meeting these descriptions would inevitably mean that an exercise of a discretionary power adversely to an applicant was legally unreasonable – for there yet still might be an evident and intelligible justification. However, noting those adjectival descriptions does assist in reaffirming that the repository of a discretionary power such as an adjournment power, has a significant level of decisional freedom in choosing how to exercise the power, especially given the fact intensive context in which such powers fall to be exercised.
5. Unlike the way a review usually proceeds (cf the observations of Gageler J in *SZVFW* at [68]-[69], the reconstitution of the Tribunal without notice to the appellant, the calling of a second review hearing some 10 months after the first review hearing and initially by notice to the appellant’s representative rather than him, does not give rise, in my opinion, to any assumption that a Tribunal “acting fairly and justly is entitled to regard an applicant to whom it is satisfied that an invitation complying with s 425 has been sent as having had adequate notice of his or her opportunity to appear”. There was nothing usual about these circumstances, and the Tribunal in my opinion needed to recognise that in the way it dealt with the appellant’s request to postpone the hearing.
6. The Minister accepted, and I agree, that where the Tribunal gave some reasons at the time of the exercise of the power (see [17] above) and further reasons at the time of its decision on the review (see [23] above), it is appropriate for the supervising Court to examine both sets of reasons. To do so is to ensure that the Tribunal’s explanations are taken fairly and in context. As the Tribunal officer foreshadowed to the appellant’s wife, I infer that what occurred at the time of the refusal was that the request was referred to the member constituting the second Tribunal (whom the Tribunal officer called the “Presiding Member”), and that the reasons which were conveyed back to the appellant by email were the reasons given by the member constituting the second Tribunal. That is a further reason why in my opinion the correct approach is to look at the two explanations together.
7. When that is done, the Tribunal’s explanation for the refusal can be described in the following way:
8. The appellant had already had a “full” hearing and the second hearing was for a more limited purpose (described as “to discuss issues arising out of that hearing and more up to date country information”);
9. Given that the appellant’s previous hearing was nearly a year ago, the Tribunal “will not be delaying the matter any further in the circumstances”: in other words, that the appellant’s request would cause “delay”;
10. The appellant had the assistance of an adviser at the first hearing, and the purpose of the second hearing was limited (in the way set out above); and
11. There was nothing in the information provided by the appellant to suggest he would be in a position to engage another representative in the future.
12. The first two parts of the explanation were given at the time of the exercise of power. Their contemporaneity with the exercise of power may give them additional weight in terms of assessing what really motivated the Tribunal to refuse the adjournment. They were repeated in different language at [5] of the Tribunal’s reasons, and the delay factor was linked in those reasons to the fourth factor set out above, in contrast to what appeared in the email to the appellant declining an adjournment, which did not refer to the fourth factor. It may be that, on reflection, the Tribunal intended to link these factors. Whichever way these reasons are interpreted, it does not affect my conclusions.
13. The circumstances in which the Tribunal was asked to exercise the power in s 427(1)(b) were unusual in several respects.
14. First (and as the Federal Circuit Court noted), the entire situation in which the appellant came to ask the Tribunal for more time before attending a further hearing was a situation of the Tribunal’s making and not the appellant’s. The Tribunal had been reconstituted, without any person from the Tribunal informing the appellant or his representative, let alone explaining why that had occurred. Instead, out of the blue, after almost a year, the appellant’s representative received a second hearing invitation.
15. That invitation itself is uninformative. Notably it is not consistent with what the Tribunal later asserted (in its reasons) was the purpose of the second hearing. The hearing invitation does not tell the appellant and his (then) representative, that the second hearing had a limited purpose – to discuss “issues arising” from the first hearing and to update country information. The latter step was of course only necessary because of the Tribunal’s own delay in finalising the review. Indeed, if anything, the terms of the second hearing invitation – being substantially the same as the first invitation – suggest a “full” hearing, without any explanation as to why that might be required. The terms of the letter convey the opposite impression to the purposes later articulated by the Tribunal. In any event, as I explain below, the second hearing was not conducted on any limited basis at all, and was wide-ranging, and all aspects of the appellant’s claims were tested. It is irrational for the Tribunal, in its reasons at [5] to describe the second hearing in the way it did, having by this stage conducted it, and knowing that it was not limited in the way it describes. What the Tribunal appears to have done at [5] is to decide to adhere to the language used in the email sent to the appellant at the time of the exercise of the power, even though it was not an accurate description of what occurred.
16. Second, the Tribunal did not inquire at all into how it was that the appellant found himself without his IAAAS Scheme provider. The Tribunal can be taken to know the circumstances which lead to a person in the appellant’s situation being assigned a representative under the IAAAS Scheme. The Tribunal’s merits review was not completed. At least on its face, the task for which Craddock Murray Neumann had been engaged, using public funds, was not complete. The Tribunal made no inquiries, and took no steps, to understand how it was that the firm who represented the appellant through the IAAAS Scheme was now telling the appellant it would no longer represent him and/or that the appellant had to pay them a further $4,400. Of course, it is no part of the Tribunal’s function to attend to ensuring the appellant has representation: that is not the relevant point. However, the whole reason the appellant was requesting the second hearing be postponed was that he had a representative who was now telling him she or he would no longer be acting and would not attend the second Tribunal hearing. In the circumstances, a Tribunal acting reasonably would have inquired how this came about, at least through correspondence with Craddock Murray Neumann. It was clearly relevant to whether or not to postpone the second Tribunal hearing.
17. Next, it is irrational for the Tribunal to rely on the fact the appellant was represented at the first hearing: that fact was of no relevance to the merits of postponing the second hearing. Representation at the first hearing could not assist the appellant at the second hearing. What was of relevance was for the Tribunal to consider whether the second hearing was likely to be fair and just to the appellant if, having been represented previously, he now had to attend without representation before a differently constituted Tribunal. Knowing (as the Tribunal clearly did) that one of the purposes of the second hearing was for the newly constituted member to form her own views of the appellant, and of what he said to the first Tribunal member, a Tribunal acting reasonably would have appreciated that especially in those circumstances (and indeed more critically than at the first hearing) the appellant would be assisted by having representation. The appellant was going to be placed, by the Tribunal, in the difficult situation of being examined about what he said at the first hearing, with the Tribunal likely to look (as its reasons disclose it in fact did) for discrepancies and inconsistencies. Especially given the appellant had no functional English, that is precisely the kind of situation where the appellant would be assisted by having a representative to ensure he was being treated fairly, to point out matters to the Tribunal, to make submissions (whether at the hearing or afterwards) on whether what the Tribunal thought might be discrepancies or inconsistencies really should be described as such and whether they mattered.
18. Further, the very subject matter of the second ground of appeal – the Merak ship claim – provides an example of how the appellant might have been assisted by representation. A representative, acting competently, would be expected to have pointed out to the Tribunal that the appellant had indeed made this claim before the delegate, and had mentioned in his initial interview that he had been at Merak Boat Harbour.
19. The chronology is also of some significance, in two ways. First, after no communications at all from the Tribunal for almost a year (on the evidence), then unexpectedly by a letter to the appellant’s representative on 11 March 2016, the Tribunal issued a second hearing invitation (with the infirmities to which I referred above), nominating a hearing date of 22 April 2016. That date was six weeks away from the date of the Tribunal’s letter.
20. The appellant’s representative, which the Tribunal can be taken to know had been retained under the IAAAS Scheme, informed the Tribunal by email on 18 March 2016 that the firm no longer acted for the appellant, with no explanation as to why.
21. 11 March 2016 was a Friday. Craddock Murray Neumann responded to the Tribunal on 18 March 2016, also a Friday. It is reasonable to assume, and it would have been reasonable for the Tribunal to assume (if it turned its mind to such things), that the appellant had been told at least by 18 March 2016 that the firm would inform the Tribunal it no longer represented him. Effectively then, the weekend intervening, the appellant had from Monday 21 March 2016 to contact the Tribunal about the forthcoming hearing and his circumstances.
22. The appellant’s wife telephoned the Tribunal on his behalf on 13 April 2016, two and a half weeks later. There is no direct evidence about what occurred during these two and a half weeks, save for what the appellant’s wife said in the record of her phone conversation with the Tribunal officer, and what the appellant (with his wife’s assistance) said in the subsequent email. What is apparent from these two sources is that the appellant had made efforts first to understand why his current representatives were declining to continue to act for him, and then whether they would accept payment by instalments for their “private” fees. It also appears the appellant (or more likely his wife) was having difficulty speaking to anyone except a receptionist at Craddock Murray Neumann and I infer there had been several attempts at communication with the firm.
23. The Tribunal knew, or ought to have known, this was an applicant who was attentive to the conduct of his review, and had demonstrated a commitment to participating in the process. The evidence is that the first hearing was scheduled to be by video link between Melbourne (where the Tribunal was) and Tamworth, New South Wales, (where the appellant was). The appellant instructed his representatives to ask for the hearing to be reorganised, so that he could come to Melbourne and attend in person. This is a review applicant who wanted to make the very most of the opportunity he was given. The evidence is that the appellant’s representatives only attended the first hearing by telephone. The date of the hearing did not change, but the first Tribunal arranged for the appellant to attend in person in Melbourne.
24. In the written adjournment request, the appellant gave the Tribunal his telephone number in the email and invited the Tribunal to call him. It did not do so. That is, however, the point at which the Tribunal could have asked the appellant, firstly, how long he needed the hearing postponed for and, secondly, what steps he was taking to secure a lawyer. That information was clearly the kind of information the Tribunal wished to have, as it relied on its absence as part of the reason for refusing the adjournment. The method for acquiring that information lay in the hands of the Tribunal and the appellant had offered to speak to the Tribunal about whatever the Tribunal wished. There is no more that the appellant could have reasonably done, given his circumstances. Having been represented to this point, and having had a professional person with carriage of his review, it is hardly reasonable to expect the appellant to divine for himself the nature and level of information he should be supplying to the Tribunal with his adjournment request. The Tribunal officer did not inform him about those matters. No-one at the Tribunal, on behalf of the member, took up the appellant’s invitation to call him and give him some information about what additional details it would be helpful for him to provide. These are straightforward matters, of sensible and fair administration, in a situation such as this. The Tribunal was dealing with a person who had unexpectedly and newly become self-represented, and not by choice.
25. On 13 April 2016, the Tribunal officer told the appellant’s wife that the appellant needed to put his request in writing. The appellant (I infer with the help of his wife) did so promptly, on the same day, less than two hours later. The written request was therefore sent a week and a half before the scheduled hearing date.
26. Although the request did not specify a timeframe for any rescheduling, it did clearly state that the appellant needed more time to “prepare money for my case to pay the lawyers”. It is implicit in that statement that the appellant had access to money to pay for a lawyer, if given time. This was not a statement, common in this Court as well as in the Tribunal, that an applicant had no money to pay for a lawyer. And indeed, as the Tribunal discovered at the second hearing (and would have discovered earlier if it had asked), the appellant was in employment. A reference was provided to the Tribunal by his employer. The reference stated:

To whom it may concern

It is my utmost pleasure to provide a Character Reference for [redacted], known to us as ‘[redacted]’. [Redacted] has worked as a Machine Operator in one of the factories that I manage since August 2015. In that time [redacted]’s fantastic work ethic, attention to detail and ability to pick up new tasks has seen him become one of my most valued operators.

Moreover, [redacted] has consistently demonstrated integrity in all aspects of his work, honesty and openness when discussing his training and operations, and a willingness to communicate and learn that is highly desirable. [Redacted] is the first to participate in toolbox meetings, looking to implement continuous improvement opportunities. His enthusiastic personality is highly valuable to the working culture at [redacted]. Permanent residency would allow him to participate in the Government training initiatives that we are currently running.

I am fully confident that [redacted]’s personal attributes will allow him to find success in his life in Australia. I am pleased to recommend him for Permanent Residency in Australia, and wish him the best in his application.

I may be contacted on [redacted] or [redacted] for further comment or questioning.

1. The Tribunal did not contact the appellant’s employer, whose opinion of the appellant was in stark contrast to the conclusions reached by the Tribunal, on the basis of the “discrepancies” it identified. However, the employer’s letter made it clear the appellant had been in steady employment with him for some time. Hence, when the appellant stated in his written request to the Tribunal that he needed time to “prepare money for my case to pay the lawyers” he had a substantive basis for making that statement. Again, it is likely that a simple phone call from the Tribunal to the appellant would have elicited this information.
2. The Tribunal declined the adjournment request the next day.
3. Finally, as I noted at the hearing of the appeal, in the particular circumstances of this Tribunal review, it was astonishing for the Tribunal to justify the refusal of an adjournment application by saying the “Tribunal will not be delaying the matter any further”. There had been an extraordinary amount of delay at the hands of the Tribunal in the appellant’s review. The review application was lodged on 10 January 2014. The Tribunal did nothing about the appellant’s review for more than a year. It did not issue the first hearing invitation until 25 February 2015. The hearing was not scheduled until May 2015, some three months later. The Tribunal’s reconstitution, which was in evidence (having been obtained through freedom of information), occurred in November 2015. The reconstitution notice shows the “file location” of the appellant’s review as still with the first Tribunal member. In other words, the first Tribunal member had had six months after the hearing to finalise a review she had told the appellant at the first hearing would take her a “few weeks”. There was more “delay” at this point as well, but it was not of the appellant’s making.
4. The reconstitution itself caused considerable delay. The reasons for the reconstitution have never been explained by the Minister.
5. The Tribunal then again failed to communicate at all with the appellant (or his representative) until the 11 March 2016 second hearing invitation, some ten months after the first hearing, and four months after the reconstitution.
6. In that context, no Tribunal acting reasonably could possibly have justified the refusal of an adjournment to this appellant by relying on any “delay” that such an adjournment might cause. By this stage, the Tribunal itself had delayed the appellant’s review for over two years. It can be accepted that the Tribunal is under considerable, and unrelenting, pressure in terms of the numbers of migration cases it is expected to deal with. The delays in the review which I have described may no doubt be attributable to those pressures. However, the point here is that the Tribunal sought to use what was likely to be a relatively small lapse in time (the evidence being the appellant had always acted promptly and conscientiously and had represented to the Tribunal – as was the fact – that he had the capacity to pay for a lawyer) as a justification for refusing the adjournment. That was a justification no reasonable Tribunal could have given, in the circumstances of the Tribunal’s own delays.
7. I accept, as the Minister submits, that some of the features of the appellant’s circumstances which were not particular to him – the importance of the Tribunal’s review to his future, his need for an interpreter, his inability to make post hearing submissions – were not the kind of factors likely of themselves to render the refusal of an adjournment legally unreasonable. Indeed, one of the points made by Gageler J and Nettle and Gordon JJ in *SZVFW* is that where the facts surrounding a particular applicant are “unremarkable”, it may be more difficult to prove legal unreasonableness. However, here, there are a number of factors particular to the appellant’s circumstances, as I have explained.
8. From the appellant’s perspective, it would have appeared that the review was starting again, and that would be an understandable perspective. The reconstitution gave the Tribunal more material in which to find discrepancies and use them against the appellant, which is what it did. If all plaintiffs and applicants had to give their evidence twice to different decision-makers and be tested on their accounts twice, separated in time by more than a year, relating events that occurred many years previously which are said to have caused them considerable distress, I have no doubt most of them would do so in a way that would involve some “discrepancies”: that is simply a function of being human. In such circumstances, the appellant’s desire to have representation before appearing before the second Tribunal to assist him in managing such a difficult situation is entirely understandable, and the Tribunal should have been alive to the effects of the reconstitution on him, and on how his review would proceed. The Tribunal’s reasons disclose no consciousness of the effects and consequences of the reconstitution of the Tribunal on the appellant, and on his desire to continue to have representation. No Tribunal acting reasonably would have failed to appreciate this factor.
9. Ground one should be upheld.

## Ground two

1. Ground two was not raised before the Federal Circuit Court and the appellant requires leave to raise it for the first time on appeal.
2. Before the Federal Circuit Court, there was originally a ground raised about the Merak ship and the Tribunal’s fact finding, although it was differently framed:

2. The Tribunal failed to take into consideration substantially relevant matters provided by the Applicant.

a. No serious or meaningful consideration has been given to the claim of the Applicant that he was on the Merak ship and that the Applicant informed the media about the fact that the people on the boat were refuges (Paragraph 47 of the decision)

b. The Tribunal failed to adequately consider the Applicant’s claim that the Applicant’s advisor would have advised the Applicant that his alleged presence on the Merak ship could not be included in his claims unless he had evidence (Paragraph 46 of the decision)

…

1. It appears this ground was ultimately not pursued. However, a challenge to the Tribunal’s reasoning process about the Merak ship was not, in itself, entirely new.
2. I have explained, the correct approach to the question of whether leave should be granted to an appellant in this jurisdiction to raise a new ground of appeal in a number of previous decisions, both of my own and as a member of a Full Court: see *Haritos v Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315 at [79]-[83]; *Minister for Immigration and Border Protection v Aulakh* [2018] FCAFC 91 at [99]-[112]; *Maharjan v Minister for Immigration and Border Protection* [2017] FCAFC 213; 258 FCR 1 at [31]-[37]; *ARK16 v Minister for Immigration and Border Protection* [2018] FCA 825 at [19]-[25]; *CPE15 v Minister for Immigration and Border Protection* [2017] FCA 591 at [11]-[27]. In *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73 at [55]-[58] I explained why a focus on authorities such as *Coulton v Holcombe* [1986] HCA 33;162 CLR 1 in the context of the judicial review of migration decisions might not be appropriate. There may be some nuances between these decisions about the level of merit a new ground should have before leave is granted (all other factors being equal) and underlying approaches of individual judges may vary in terms of emphasis on particular aspects of the principles. For my own part, I adhere to the opinion I expressed in *Murad* and *Aulakh,* each concerning different circumstances in which the principles came to be applied.
3. The Minister submits the Court should “weigh carefully the collateral impact arguing a new case on appeal can have upon the resources of the Federal Court of Australia and other parties generally, and the clear distinction between the original jurisdiction of the Circuit Court and the appellate jurisdiction of this Court”.
4. In this case, there has been no such impact. The appeal was listed and would have needed to be heard in the usual course on ground one. The appellant was entitled to have pressed the three other grounds raised before the Federal Circuit Court, but did not. In that sense, the appellant conserved the resources of the Court and the Minister, rather than extending them. Instead he raised proposed ground two. The Minister was given ample notice and did not submit otherwise. The Minister’s counsel was ready to deal with the substance of the argument and did so capably. I do not see any real impact on resources or time, nor is this an occasion when the overarching objective in s 37M of the *Federal Court of Australia Act 1976* (Cth) has a substantive effect on the discretion whether to grant leave.
5. The real question, as is usually the case, is the merits of the ground. I consider the ground has sufficient merit for leave to be given to raise it. Indeed, as I set out below, I consider the ground should succeed. It would not be in the interests of the administration of justice in those circumstances for leave to be refused: if the Court considers the Tribunal’s decision is affected by jurisdictional error, the decision should not be permitted to stand, save for exceptional discretionary considerations, none of which are present here.
6. The way the appellant puts this ground is that there was a claim made and the Tribunal considered it, but did so by rejecting the claim on credibility grounds based on a false premise – namely that the appellant had not raised this claim before he raised it before the first Tribunal.
7. The appellant contends, and I accept, that the Merak ship narrative is, as a claim for protection, factually separate from the appellant’s other claims, arising as it does from events occurring after he left Sri Lanka. The appellant contends, and I agree, that acceptance of this claim by the Tribunal was capable of providing an independent basis on which the appellant could have been found to have a well-founded fear of persecution. In that sense, I accept the appellant’s submission that the way the Tribunal dealt with the claim was material to the outcome of its review.
8. The Tribunal’s false premise was expressed during the second hearing:

MEMBER: You made claims to the previous member that you were on a Merak ship. Is that correct?

INTERPRETER: In 2009 I came in that ship.

MEMBER: When did you board that ship?

INTERPRETER: In 2009 we were boarded in Malaysia, and offloaded in Indonesia.

MEMBER: When in 2009 did you board that ship?

INTERPRETER: October, approximately.

MEMBER: What happened?

INTERPRETER: So, there was a breakdown so the ship wouldn’t move, so it automatically sailed towards Indonesia, and we - probably I shouldn’t. Sorry, Member, I have to use the word “beach” - Indonesia, after that, we told the Indonesians that we are Sri Lankan refugees, and we are living refugee like, and they said they wanted to check us. We refused to get off the ship.

We told them that we cannot trust them, therefore we will not get off the boat. And we told them that we are on our way to Australia. So after that, from the embassy there, there was an Australian girl who came there, and she said this is a dangerous journey, I promise you, she said, look at my eyes, I’m telling you that I will send you in a proper way to Australia. We will send you in a flight to Australia.

MEMBER: How long were you on this boat for?

INTERPRETER: It was anchored in Indonesian harbour for about, in Merak Harbour, for about six months. And after that we were transported in a bus to Kungeprenang gaol.

MEMBER: Sorry, did you say the ship broke down and then it beached in Indonesia? Can you explain what exactly you mean by that?

INTERPRETER: After the breakdown, when it entered into the Indonesian border, they came there and the Australian person also met us while we were in the ocean, or the sea.

MEMBER: Can you state, why you never mentioned anything about this before that hearing, and the fact that you also claimed the army came and asked your mother about you after seeing you on this boat? Why didn’t you mention that before your hearing, with the previous member?

INTERPRETER: They asked me for the evidence. I don’t have any evidence for that. Therefore, there itself, they told me that this will not be accepted.

MEMBER: Who asked you for evidence?

INTERPRETER: In that interview, they asked me but I didn’t have proof of it. And everybody who were there were registered by units there, and imprisoned as Kungeprenang gaol.

MEMBER: Which interview? What interview are you referring to? You’ve had a number of interviews, but I’m not sure which one you’re talking about.

INTERPRETER: Lawyers interview.

MEMBER: I have some serious concerns that your lawyer wouldn’t present these claims without - because you didn’t have any evidence.

INTERPRETER: He asked me if you have evidence, in order for you to prove you were in that ship, and I told him I don’t have any evidence. That’s what he told me, only if you have evidence we will be able to tell that. If you don’t have evidence, we cannot do anything about it.

MEMBER: So why did you raise it at the tribunal hearing last time?

INTERPRETER: No, I have mentioned that in that one, and then they went and told my mother, they said you told us that he has gone to Malaysia for work. Sorry Member, it was told that he has gone to Malaysia for work, but he has got caught in this particular boat, and there are about 254 people including (indistinct) members, and he is in Australia now, he was trying to go there.

MEMBER: No. I am asking you - you have told me you have not mentioned this earlier because you were told by your lawyer you didn’t have any evidence. I want to know why you mentioned it at the last hearing, because that is the first time you’ve ever raised anything about being on the Merak boat, so tell me why you only mentioned it at your last hearing, and never at any time before that.

INTERPRETER: Because that I was asked what other evidence I could provide, therefore I told them I can only give an oral evidence about this, I have also been (indistinct).

**MEMBER: All right, well I have some serious concerns about the credibility of your claims that you were you on this ship, or that any enquiries were made because you are seen to be on this ship, because you only raised it for the first time during that last hearing - the hearing you had with the previous member.**

INTERPRETER: He was never given a chance to give any evidence. I told them that I can give an oral evidence, and I was dismissed. The only evidence is those 254 people who were on that particular boat, they will be able to identify myself - identify me. So they are in Australia, New Zealand, Germany, America and other places, they will be able to tell me.

(emphasis added)

1. In contrast to the position the second Tribunal member assumed to be the case, the evidence is that the appellant had raised this claim before the delegate. Ms Faram deposed that she listened to the transcript of the interview with the delegate, and transcribed it. Her evidence was not challenged on the appeal by the Minister. Relevant passages from that transcript are as follows:

Applicant: When I was in the ship in Indonesia I got caught and a person who was in that particular ship when he went he got tortured and I heard about it and also while I was in the ship, I had given interviews to the media and they had also taken a lot of photographs.

Therefore, my mother told me we were able to see you, you guys are on the ship and you got caught. And also you have applied for refugee status and therefore - stating that you were tortured and that you were subjected to other things - therefore please don’t return because if you return you will be in trouble. My friend who was with me at the ship had got off and gone back because he heard that his mother was ill and he was held there and he was tortured, therefore I did not like to go because I will also have a similar situation.

Case Officer: Ok. Now, at your earlier interview, we call it an entry interview. There was a very specific question asked - did the police and security or intelligence agencies impact on your daily life in your home country. And you have clearly answered no. Is there any reason?

Applicant: I don’t understand that question. …

[there was then a break in the hearing]

Case Officer: Interview resumed at 1:30 Ok - do you have anything else to tell me, other than what you have told me before?

Applicant: I would like to say something about the Merak Boat. [1:27]

Case Officer: Oh, ok.

Rep: I missed that. Interpreter can you repeat that?

Interpreter: Where I stayed in Merak boat.

Applicant: I don’t know if I have mentioned about that in my case, I was in that particular boat and I got unwell and then I had to get off and then I was provided treatment and after that I went to Malaysia.

Case Officer: Ok

Applicant: They had seen everything in the news that we were in the particular ship for five months and we were struggling and we were seeking asylum. And they had seen everything. After this, the civil army had gone to my home and asked my mother that you said that your son has gone to work but your son is in that particular ship. There were about three of us from the same village who were in that village - they had gone and told my mother, ‘we saw them there in the ship’. People who were in the boat have come here, everyone has come here, and there was one person who has died and after that I had itching and as I was unable to stay in the particular ship, I had come out of the ship and gone outside and I received treatment and then I went. I don’t know if I have mentioned it here, therefore I am telling that to you.

Case Officer: So how does that story affect your claim?

Applicant: They have seen me in the, seen that in the news and they have gone to my mother, they have gone and asked her that you said your son was working in Malaysia but he has got caught in Indonesia.

Case Officer: Ok, so in what way does that affect you?

Applicant: That could be also a reason, because they will think that I was escaping to go into another country and the people who were in the ship also who went also got affected.

 So even if they consider that you have gone to another country to seek asylum, in what way does that affect you?

Applicant: They will ask me, you have gone and sought protection, saying you are having problems but there is no problem here. For that particular question I don’t have any answer. ‘Why are you lodging an application, what is the problem you have here’, they will ask me that and this.

Case Officer: So if they ask you what is the problem?

Applicant: I cannot say that because I have also made an application here, therefore if I go, if I say anything, they will torture me - they can torture me.

Case Officer: …

The country information that we have clearly states that returnees from Australia are processed by the state intelligence service and they are asked questions about why they have gone, where they have gone - only if they are suspected to have committed any criminal offences, you will be detained, otherwise you will be sent out of the airport in a few hours time. So, we do have that country information. But there is no country information to substantiate that they are being persecuted because they have been returned from, after seeking asylum in a western country. Ok.

Applicant: But they have been persecuted, even two of my friends who were with me in the ship: when they went back, they were detained and they were persecuted. I don't know what's happening to them now.

1. Properly, the Minister’s counsel accepted this evidence demonstrated the appellant had relied on the narrative about what happened to him on the Merak ship before the delegate. The Minister also accepted there was a reference to the appellant being detained at a “centre” in Merak Boat Harbour in his protection visa application documents, between October 2009 and March 2010. It will be recalled that in his evidence to the second Tribunal, the appellant stated that he was detained on this boat for about six months. Obviously, a boat is not easily described as a “centre”, but there are a number of explanations for that language difference, none of which were explored by the Tribunal because it simply rejected the appellant’s claim as entirely false.
2. Despite the narrative given to the delegate about the Merak ship, the delegate made no findings on this claim. That may, in practical terms, explain why the second Tribunal mistakenly thought it was a claim made for the first time to the Tribunal. Of course, if the second Tribunal had listened to the interview before the delegate, the Tribunal would have understood that the appellant did make the claim at that stage.
3. An alternative explanation, as the Minister submitted, is that the error was initially made by the first Tribunal. The transcript of the review hearing before the first Tribunal indicated that when the appellant spoke about the Merak ship incident, in answer to a question from the first Tribunal, he was challenged about why he was raising this claim for the first time. The first Tribunal transcript reveals the appellant gave substantive evidence about how he had been identified in Sri Lanka from media footage, including in his village. Whether or not this is the explanation is not material to the existence of the error. I am satisfied there was such an error.
4. In terms of the characterisation of the error, the appellant relies on two decisions. The first is the decision of the Full Court in *AVQ15 v Minister for Immigration and Border Protection* [2018] FCAFC 133 at [48], where the Court said:

We are satisfied that the Tribunal’s decision is affected by jurisdictional error and the primary judge erred in not upholding ground 1 of the amended application for judicial review. The Tribunal’s apparent overlooking of material in the form of the transcript of the appellant’s interview with the Departmental officer could also be characterised as a constructive failure to exercise jurisdiction (see *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22; 206 CLR 57 at [80] ff per Gaudron J; *VAAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 117 at [68]-[77] per Hill, Sundberg and Stone JJ and *COZ16 v Minister for Immigration and Border Protection* [2018] FCA 46 at [38]-[46] per Griffiths J). That is because, in assessing whether or not there were inconsistencies between the appellant’s written and oral claims, it was incumbent upon the Tribunal to consider relevant parts of that transcript, which it failed to do. The appellant had, after all, made clear in his original statutory declaration that he would expand upon his claims in that interview. Further, in any situation where an applicant is given an opportunity to attend an interview or engage in a review process, it is reasonable for that applicant to expect that she or he will be able to expand on, or explain, aspects of the narrative she or he has given prior to that point. This expectation and the other matters to which we previously referred (see [24]-[26] above) must be properly considered by a decision-maker in making any assessment of the applicant’s claims and evidence.

1. The Full Court also referred (at [49]) to what had been said by Lee and RD Nicholson JJ in *WAGO of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 437; 194 ALR 676 at [54]:

The unwarranted assumptions of the tribunal as to matters relevant to formation of a view on the credibility of the corroborative witness caused the tribunal to disbelieve and disregard that evidence and constituted a failure by the tribunal to duly consider the question raised by the material put before it: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; 176 ALR 219 at [4] per Gleeson CJ. Although the remarks of the Chief Justice in *Aala* were directed to entitlement to review by constitutional writ on the ground of absence of authority for the tribunal to make a decision that exercised the decision-making power in a manner that was not procedurally fair, his Honour’s comments are equally pertinent to an unauthorised exercise of decision- making power that results from the tribunal failing to take into account relevant material. In misunderstanding the material before it, the Tribunal thereby failed to have regard to relevant material, resulting in a decision for which the Tribunal had neither authority nor jurisdiction under the Act: *Yusuf* at [82]-[85] per McHugh, Gummow and Hayne JJ. It follows that grounds for review of the tribunal’s decision arise under s 476(1)(b) and (c) of the Act.

1. I accept the second Tribunal’s error about the Merak ship claim can be characterised in this way. In not appreciating, by reference to his earlier interview, that the appellant had described being on the Merak ship and what he feared would happen to him on return to Sri Lanka because of this episode, the Tribunal failed to perform its task on review and constructively failed to exercise its jurisdiction.
2. A similar approach was taken by Lee J in *CKC16 v Minister for Immigration and Border Protection* [2018] FCA 1260.
3. The Minister’s main answer to this ground, counsel having properly accepted the factual basis for how the appellant put the ground, was twofold. First, the Minister submitted that the Tribunal was still entitled to reject the claim on a credibility basis because the appellant did not advance it in his entry interview, or in his original protection visa documents (prior to their amendment via the email in which the reference to “Marak Boat Harbour” was made). I accept there is, on their face, some difficulty in connecting what is put in the email to the delegate with how this claim is later made. A few straightforward questions may have resolved that difficulty, but the second Tribunal was so set on its view of the appellant about this claim that it did not ask any such questions. Further, regardless of the differences in how the matter is put in the email and how the claim was later made, the second Tribunal made a second clear factual error (in addition to the error about *when* the claim was first raised) when it found at [46] that “[t]here was nothing in the applicant’s protection visa application to suggest he had spent six months in Indonesia at the end of 2009 and early 2010.” To the contrary, this is clearly what the email to the delegate, which formed part of the appellant’s visa application, says. While it is correct there are some chronological inconsistencies in the protection visa application, these were not explored or relied upon by the second Tribunal: it simply found there was a complete failure by the appellant to mention he had been in Indonesia during the period he later claimed to have been on the Merak Ship.
4. The Minister also submits that there were other, independent bases for the Tribunal’s credibility findings against the appellant and further that no reference to the Merak incident is made in the statutory declaration made by the appellant in support of his visa application. This, the Minister contended, provided an independent, rational and logical basis by which the claim was disposed, such that the Tribunal’s factual mistake was immaterial. It is correct there are a series of adverse credibility findings against the appellant, most of which are used by the Tribunal to justify the rejection of his narrative about what happened to him in Sri Lanka. While, for example, it is correct that the Tribunal uses the failure to mention the Merak ship incident at entry interview (at [47] of the reasons) as an apparently separate reason to find the appellant was not on the Merak ship, in reality the findings cannot be compartmentalised in this way. In *CKC16* at [33]-[35] Lee J said:

In *SZTFQ v Minister for Immigration and Border Protection* [2017] FCA 562 at [44]-[45], I made the point that:

It is [often] not realistic to put the various aspects of the appellant’s evidence into hermetically sealed boxes or to approach the reasoning of the Tribunal member on the basis that this is how the evidence was approached. The assessment of credibility is necessarily an impressionistic one, which, if properly formed, takes into account all of the evidence. As the Full Court (Hill, Sundberg and Stone JJ) observed in *VAAD v Minister for Immigration & Multicultural Affairs* [2005] FCAFC 117 at [79] “*an assessment of credibility is not necessarily linear*”. Put another way, as Gleeson CJ commented in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89, “*[d]ecisions as to credibility are often based upon matters of impression, and an unfavourable view taken upon an otherwise minor issue may be decisive.”*

Like in the very different circumstances of the error in *SZTFQ*, the erroneous findings here, that the appellant had recently invented his evidence about his father’s role, or about the making of the relevant political statement, were not peripheral to assessing the creditworthiness of the appellant. No other fair reading of the reasons seems to me to be available. It is understandable that the Tribunal member would have serious concerns about the appellant’s overall credibility, given the misapprehension held as to the Religious Claims Error and the Political Statement Error. As I noted in *SZTFQ* at [45]:

To be too confident that emphatic disbelief on one issue would not inform, even subconsciously, the approach taken to weighing other evidence of the person disbelieved is, to my mind, to underplay the complexity of the anatomy of decision-making. As Kirby J observed in *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at 23 [81]:

…decision-making is a complex mental process. Disbelief of a litigant or witness on one point might carry over to affect the decision-maker’s disbelief of the same person on other points. Contrary-wise, establishing that an initial disbelief of a person’s credibility on one matter was erroneous might convince a decision-maker of the need to revisit other conclusions and to look at the person’s entire evidence in a new light.

It follows from the above that I reject the Minister’s submission that the errors in rejecting the claims were not critical to the end result. As I have explained, the independent support for rejecting the religious claims, was itself based upon an illogical process of reasoning containing unwarranted assumptions. The finding as to implausibility of the political claim as “somewhat far-fetched”, provides no truly independent support for the conclusion that the appellant did not make the political statement, but is rather inseparable from the credibility findings impacted upon by the errors. Ground two is made out.

1. I respectfully agree with those observations.
2. The Court, and decision-makers who bring an open mind to these issues of credibility, must also recall what was said by the Full Court in *MZZJO v Minister for Immigration and Border Protection* [2014] FCAFC 80; 239 FCR 436at [56] about entry interviews:

On the latter issue, some caution should be exercised by decision-makers in relation to omissions by applicants of matters at entry interview. They are conducted shortly after a person has arrived in Australia; in the case of the appellant, after a long journey on the ocean in cramped and difficult conditions. On the evidence, a significant part of the entry interview content concerns questions designed to elicit information about so-called “people smuggling”. They are the first substantive and formal engagement with Australian officials by people who come, as the appellant does, from regimes where authority figures may be viewed with some fear and mistrust. A person is asked to articulate personal matters of family and individual history not only to a strange official, but also to an interpreter who is a stranger, without the assistance and support of a lawyer or migration agent. It is unlikely many interviewees appreciate the use to which the information they give might be put, notwithstanding the script which is read to them. The interviewees are being asked to digest a lot of information quickly and in circumstances they may perceive as hostile.

1. Had the Tribunal looked more carefully at the material before it, and approached the earlier evidence given by the appellant to the delegate in a more open way, the Tribunal may well not have been so decisive about the absence of this claim – in terms – from the appellant’s protection interview narrative. When the Court is assessing the effects, or consequences, of a misunderstanding of the evidence or information by a decision-maker such as the Tribunal, it must, in my opinion, be careful not to conduct that assessment by reference to what the Court knows only with the benefit of hindsight about the remainder of the decision-maker’s approach. The Court must act on the basis that the decision-maker, if properly instructed on the evidence and information, had a mind open to persuasion. The Court does not, and cannot, know the weight the appellant’s perceived recent invention had with the Tribunal in terms of its overall approach to the appellant’s credibility. As Lee J observes, these kinds of findings cannot be nicely compartmentalised from one another: that is not how credibility reasoning works.
2. I am satisfied that the false assumptions made by the Tribunal about the stage at which the appellant made a claim to have been on the Merak boat affected in a material way its view of the credibility of the appellant overall, but most importantly in terms of how the Tribunal assessed this separate claim. It led to a miscarriage of the Tribunal’s review function.

# Conclusion

1. Leave will be granted to the appellant to raise ground two of the proposed amended notice of appeal, and orders will be made allowing the appeal, together with the usual consequential orders. Directions will be given to give the parties an opportunity to agree costs, in the absence of any agreement short submissions will be directed to be filed.

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| I certify that the preceding ninety-four (94) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer. |

Associate:

Dated: 29 January 2019