Federal Court of Australia

Springs v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 197

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| Appeal from: | *Springs v Minister for Immigration* [2020] FCCA 371 |
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| File number: | NSD 356 of 2020 |
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| Judgment of: | **PERRAM J** |
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| Date of judgment: | 11 March 2021 |
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| Catchwords: | **MIGRATION** –appeal from Federal Circuit Court dismissal of judicial review application of Administrative Appeals Tribunal (‘Tribunal’) decision – where Appellant required internationally recognised record of exceptional and outstanding achievement for Distinguished Talent (Residence) (class BX) subclass 858 visa in arts – where evidence given at Tribunal hearing by musical production company that not familiar with Appellant before his audition – whether evidence ‘information’ for purposes of *Migration Act 1958* (Cth) s 359A – whether evidence in its terms constituted a ‘rejection, denial or undermining’ of Appellant’s claim in light of *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26 – whether information ‘would be the reason, or a part of the reason, for affirming the decision’ – temporal limit on formation of requisite Tribunal opinion – when Tribunal’s ‘reasoning on the facts of the case’ occurs ­– whether inference can be drawn based on Tribunal’s reasons and transcript of hearing  **MIGRATION** –where Tribunal relied on three factual matters in concluding Applicant did not satisfy visa criterion – whether logical connection between evidence and conclusions drawn – whether Tribunal impermissibly treated matters as additional visa criteria  **EVIDENCE** – compellability – proving Tribunal member formed a particular mental state – where *Administrative Appeals Tribunal Act 1975* (Cth) s 60(1) grantsmember in performance of duties same protection and immunity as a Justice of the High Court – where *Evidence Act 1995* (Cth) s 16(2) makes a judge compellable upon the grant of leave |
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| Legislation: | *Constitution* s 75(v)  *Acts Interpretation Act 1901* (Cth) s 15A  *Administrative Appeals Tribunal Act 1975* (Cth) s 60(1)  *Evidence Act 1995* (Cth) ss 16(2), 129, Dictionary definition of ‘Australian or overseas proceeding’, ‘Australian court’ and ‘judge’  *Judiciary Act 1903* (Cth) s 39B  *Migration Act 1958* (Cth) ss 338, 357A, 359A, 368, 424A  *Migration Regulations 1994* (Cth) cl 858.212(2)  *Evidence Act 2008* (Vic) s 16(2) |
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| Cases cited: | *Applicant M1014 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 1190  *AVX16 v Minister for Immigration* [2020] FCA 945  *Chiorny v Minister for Immigration and Multicultural Affairs* [1997] FCA 127; 73 FCR 238  *Commissioner for Australian Capital Territory Revenue v Alphaone Pty* *Ltd* (1994) 49 FCR 576  *CUR24 v Director of Public Prosecutions* [2012] NSWCA 65; 83 NSWLR 385  *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* [1995] HCA 23; 183 CLR 168  *Herijanto v Refugee Review Tribunal* [2000] HCA 16; 74 ALJR 698  *Herijanto v Refugee Review Tribunal (No 2)* [2000] HCA 21; 74 ALJR 703  *Johnson v Director of Consumer Affairs Victoria* [2011] VSC 595  *Kioa v West* [1985] HCA 81; 159 CLR 550  *Knowles’ Trial* (1692) 12 Howell’s State Trials 1167  *Mathews v Health Insurance Commission (No 1)* [2005] FCA 1061  *Minister for Immigration and Citizenship v SZLFX* [2009] HCA 31; 238 CLR 507  *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611  *Moodie v Racing Integrity Commissioner* [2017] VSC 175  *Muin v Refugee Review Tribunal* [2002] HCA 30; 76 ALJR 966  *MZXBQ v Minister for Immigration and Citizenship* [2008] FCA 319; 166 FCR 483  *MZZZW v Minister for Immigration and Border Protection* [2015] FCAFC 133; 234 FCR 154  *NAQR v Minister for Immigration (No 1)* [2002] FMCA 271  *O’Shane v Harbour Radio Pty Ltd* [2013] NSWCA 315; 85 NSWLR 698  *Re Brennan; Ex parte Muldowney* (1993) 67 ALJR 837  *Re Jarman; Ex parte Cook (No 1)* [1997] HCA 13; 188 CLR 595  *Re Toohey; Ex parte Gunter* (1996)70 ALJR 644  *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; 228 CLR 294  *Saint v Holmes* [2008] FCA 987; 170 FCR 262  *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; 81 ALJR 1190  *SZKLG v Minister for Immigration and Citizenship* [2007] FCAFC 198; 164 FCR 578  *SZMFZ v Minister for Immigration and Citizenship* [2008] FCA 1890  *SZMPT v Minister for Immigration and Citizenship* [2009] FCA 99  *SZNBE v Minister for Immigration and Citizenship* [2009] FCA 1198  *Tran v Minister for Immigration* [2019] FCCA 2859  *VWSU v Minister for Immigration* [2006] FMCA 212  *Winters v Fogarty* [2017] FCA 51  Australian Law Reform Commission, *Evidence (Interim)* (Report No 26, 1985)  Australian Law Reform Commission, *Evidence* (Report No 38, 1987)  New South Wales Law Reform Commission, *Competence and Compellability* (Discussion Paper No 7, 1980) |
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| Division: |  |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 102 |
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| Date of hearing: | 18 November 2020 |
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| Counsel for the Appellant: | Mr H Bevan with Ms K Hooper |
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| Counsel for the First Respondent: | Mr T Liu |
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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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|  | | NSD 356 of 2020 |
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| BETWEEN: | TIMOTHY O'NEAL SPRINGS  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | PERRAM J |
| DATE OF ORDER: | 11 march 2021 |

THE COURT ORDERS THAT:

1. 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

PERRAM J:

# Introduction

1. The Appellant (Mr Springs) is a citizen of the United States of America and is a professional actor, singer and dancer. Mr Springs applied for a Distinguished Talent (Residence) (class BX) subclass 858 visa in the area of the arts in January 2015. The criteria an applicant must satisfy for the grant of a Distinguished Talent visa are set out in cl 858.212(2) of Sch 2 of the *Migration Regulations 1994* (Cth) (‘the Regulations’). The central criterion under cl 858.212 is that an applicant ‘has an internationally recognised record of exceptional and outstanding achievement’ in their respective area. It is this criterion which is the subject of the present appeal. Other criteria contained in cl 858.212(2) include that the applicant would be an asset to the community, would have no difficulty obtaining employment and that they remain prominent in their area of talent.
2. In support of his visa application Mr Springs provided a range of documentary evidence including his curriculum vitae and a variety of references. In July 2015 a delegate of the First Respondent (‘the Minister’) refused his visa application on the basis that he did not have an internationally recognised record of the requisite standard.
3. Mr Springs sought a review of the delegate’s decision before the Administrative Appeals Tribunal (‘the Tribunal’). At the Tribunal hearing one of Mr Springs’ witnesses, Ms Taylor, gave oral evidence about Mr Springs’ audition for ‘Show Boat’, a show run by a production company of which she was the executive director. Ms Taylor’s evidence generally was to the effect that, in her opinion, Mr Springs had an internationally recognised record of exceptional and outstanding achievement. However, in the course of her examination Ms Taylor stated that she was not familiar with Mr Springs prior to his audition for the show. The characterisation of this evidence and the emphasis the Tribunal placed on it are contested matters between the parties in this Court. At the heart of the debate is the tension between Ms Taylor’s evidence that Mr Springs had an internationally recognised record of exceptional and outstanding achievement and her evidence that she had not heard of him prior to the audition.
4. On 27 July 2016 the Tribunal affirmed the delegate’s decision to refuse Mr Springs’ visa application. The Tribunal agreed with the delegate that Mr Springs had not satisfied the requirement that he have an internationally recognised record of exceptional and outstanding achievement in the arts. Mr Springs then applied for judicial review of the Tribunal’s decision in the Federal Circuit Court but this application was dismissed on 28 February 2020: *Springs v Minister for Immigration* [2020] FCCA 371.
5. In this Court, Mr Springs contends that the primary judge erred in three respects. First, the primary judge should have found that the evidence given by Ms Taylor concerning her familiarity with Mr Springs was ‘information’ to which s 359A of the *Migration Act 1958* (Cth) (‘the Act’) applied. If this be correct, it means that the Tribunal was obliged to put the information to him for his comment (which it did not do). Secondly, Mr Springs argues that the primary judge erred in finding that the Tribunal’s conclusion was not unreasonable and that it was entitled to rely on implicit generalisations. (The Tribunal did so, for example, by observing that a person with an international reputation would not normally be required to audition for a role.) Finally, Mr Springs submitted that the primary judge erred by not finding that the Tribunal impermissibly inserted additional requirements into the criteria for the visa (for example, a requirement that performances evidencing the required record of achievement be as a central artist rather than in a supporting capacity).
6. For the reasons that follow the appeal should be dismissed with costs.

# Ground 1

1. Ms Taylor’s examination by the Tribunal commences at Appeal Book (‘AB’) p 401. The examination took place over a telephone line and was, at times, indistinct. The Tribunal began by asking Ms Taylor about how she came to be acquainted with Mr Springs. This exchange occurred at AB402-403 (emphasis added):

Member: Thank you. And how did you know Mr Springs, how did you come to meet him?

Ms Taylor: I came to meet Timothy, he came to audition for us a few years ago for our production of *Show Boat*, which is an American musical we were staging as part of our season, and it has an African American cast. Timothy was new to us, and new to Australia at that time, we weren’t familiar with him. And he gave an excellent audition, and we cast him in the production [unintelligible 01:16:07].

Member: I’ve got to ask you, I’m going to ask you to slow down, because I didn’t make the key point that I’m trying to take notes while you’re talking.

Ms Taylor: Oh okay, sure. So he came to audition for us.

Member: Yep, a few years ago, in *Show Boat*.

Ms Taylor: A few years ago for *Show Boat*.

Member: An African American cast.

Ms Taylor: It does, yes.

Member: And you said he was new to us and new to Australia…

Ms Taylor: Correct.

Member: … and you weren’t familiar, you’re not familiar with his work, is that right?

Ms Taylor: We weren’t familiar with him or his work prior to that, and he really impressed us with his talent, and we cast him in the production, the feature ensemble role. And we’re delighted to work him, we’d be very happy to work with him again and again.

1. In the first two emphasised passages Ms Taylor directly answered the question asked by the Tribunal, giving an answer which included some evidence that Mr Springs was new to Australia and that she was not familiar with him. In the third emphasised passage, the Tribunal asked a more pointed question about Ms Taylor’s lack of familiarity with Mr Springs and she repeated her evidence that the company had not been familiar with him.
2. Taken in isolation, this testimony by Ms Taylor might be apt to suggest that Mr Springs did not have an internationally recognised record of exceptional and outstanding achievement in the arts. If one makes the assumption that if he did have such a record it is likely that Ms Taylor would have heard of him, then the fact that she had not heard of him tends to suggest that he did not have such a record. Viewed from that perspective, Ms Taylor’s evidence about this matter could be characterised as adverse to Mr Springs’ interests.
3. But to read Ms Taylor’s evidence on that topic in isolation would be an incomplete exercise. The Tribunal itself returned to the central question of whether Ms Taylor thought Mr Springs had the requisite record at AB404:

Member: Look, the issue that I have to consider is whether Mr Springs has an internationally recognised record of exceptional and outstanding achievement in the arts.

Ms Taylor: Yes.

Member: Would you say he has an internationally recognised record of exceptional and outstanding achievement in the arts?

Ms Taylor: I would say that. I would also say that in Australia, we’ve had very few African American artists of his calibre, and that we would absolutely welcome giving any support to his application to stay and work in the arts in Australia.

Member: Why do you say he’s internationally recognised as having an exceptional and outstanding achievement? Because when I look at his record, he hasn’t performed a lead role in any major production involving a major production company or major venue in Australia or in the US from what I can see.

Ms Taylor: Well, he’s worked off-Broadway, he’s worked in Florida I know, he’s worked in some pretty big venues in America and in New York City. Not everybody who performs as a leading artist, or at that stage of their career, but I would still say he is an exceptional talent.

1. Thus, considered as a whole, Ms Taylor’s evidence on the issue of Mr Springs’ record had elements which assisted Mr Springs’ case and other elements which did not.
2. As will be apparent, a transcript of the hearing was prepared. It is not clear from the appeal papers whether the transcript was available to the Tribunal member or whether only the recording itself was available or whether the Tribunal member took very detailed notes. However, I infer that the Tribunal had access to some form of reasonably precise record of Ms Taylor’s evidence. I do so because its recitation of Ms Taylor’s evidence in its statement of reasons closely tracks the transcript which is before this Court. The relevant passage is contained in a portion of [40] of the Tribunal’s reasons and deals both with the fact that Ms Taylor was unfamiliar with Mr Springs and with her evidence that she thought he had the requisite record:

During the hearing the Tribunal spoke with Ms Taylor, Executive Director at The Production Company. She stated that she came to meet the applicant a few years ago when he auditioned for a role in the *Show Boat* production. She stated that they needed an African American cast. She said that Tim was new to the production company and he gave an excellent audition and he was new to Australia and they were not familiar with him or his work. They were impressed with his talent at the audition and cast him in a featured ensemble role and they are happy to work with him again and again. He has not worked for The Production Company since *Show Boat*. She stated the role of stevedore was a featured ensemble role, which sang in the opening of the show and was crucial to the story. The applicant sang as part of a quartet, including the principal lead Joe and two other cast members. When asked if the applicant has an internationally recognised record of exceptional and outstanding achievement in the area of the arts, she said yes, and then stated that in Australia we have very few African American artists of his calibre and would absolutely welcome to be able to support his application to stay and work in the arts in Australia.

1. It is not in dispute that the Tribunal did not raise with Mr Springs Ms Taylor’s evidence that she had not been familiar with him until she met him and that it did not raise with him that this was capable of suggesting that he did not have the requisite record. The question which now arises is whether it was obliged to do so.
2. At common law a decision maker is bound to provide a person adversely affected by a decision with an opportunity to address any adverse material which the decision maker has in its possession: *Kioa v West* [1985] HCA 81; 159 CLR 550 at 587 per Mason J and 628 per Brennan J; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty* *Ltd* (1994) 49 FCR 576 at 591 per Northrop, Miles and French JJ. In this case, the inquiry would likely devolve to whether the fact that Mr Springs was present at the hearing when Ms Taylor’s evidence was elicited was sufficient notice.
3. However, it is not necessary to determine the answer to that question because Mr Springs’ case is not governed by the common law. For reasons which need not be dwelled upon, the decision by the delegate to refuse to grant him the visa he sought was a ‘Part 5-reviewable decision’, a concept defined in s 338 of the Act. Perhaps unsurprisingly, the review by the Tribunal of Part 5-reviewable decisions is governed by Part 5 of the Act. Division 5 of Part 5 provides detailed procedural rules about the conduct of such reviews. The first significant principle is contained in s 357A(1) which provides as follows:

**357A Exhaustive statement of natural justice hearing rule**

1. This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
2. The effect of s 357A(1) is that if Div 5 ‘deals with’ the question of whether an applicant for review should be given notice of adverse material then it supplants the common law to that extent. In fact, Div 5 does deal with adverse information in s 359A(1) (emphasis added):

**359A**  **Information and invitation given in writing by Tribunal**

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

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

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

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

1. Where the Tribunal ‘considers’ in the relevant way, then the obligations imposed by s 359A(1) are enlivened. It must give an applicant clear particulars of the information, it must ensure so far as reasonably practicable that the applicant understands why the information is relevant to the review and it must invite the applicant to comment upon the information. The Appellant claims that Ms Taylor’s evidence that she was unfamiliar with him prior to his audition is information that gives rise to these obligations under s 359A.
2. Mr Springs faces two obstacles. First, the Minister contends – and the primary judge found – that Ms Taylor’s evidence was not information to which this provision could apply. Secondly, even if it was information in that sense, the Minister submits that it was not shown that the Tribunal considered that her evidence ‘would be the reason, or a part of the reason’ for affirming the decision under review.
3. As to the first issue, ‘information’ is not defined in the Act. However, it is established in relation to provisions in identical terms to s 359A(1) that in order for a matter which comes to the attention of the Tribunal to be information to which the provision applies:
4. it is necessary that it should contain *in its terms* a ‘rejection, denial or undermining’ of an applicant’s claims to be entitled to the grant of the visa; and
5. the claims were to be understood as the criteria for the visa being sought.

See *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; 81 ALJR 1190 (‘*SZBYR*’) at 1195 [17] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ, considering the operation of s 424A of the Act.

1. In this case, therefore, what must be shown is that Ms Taylor’s evidence that she was not familiar with Mr Springs involves *in its terms* a ‘rejection, denial or undermining’ of the criterion that Mr Springs should have an internationally recognised record of exceptional and outstanding achievement in the arts. The literal form of that evidence is that Ms Taylor was not familiar with Mr Springs until she met him.
2. The nub of the issue is whether this evidence involved *in its terms* an undermining of Mr Springs’ claim that he satisfied that criterion. The primary judge did not think that Ms Taylor’s evidence had this quality. Effectively, his Honour reasoned that Ms Taylor’s evidence only became relevant to the criterion once there was added an additional integer of reasoning. His Honour expressed himself this way at [22]:

… Ms Taylor’s evidence became (adversely) relevant to the applicant’s claim after the Tribunal reasoned on it; and the reasoning the Tribunal performed on the evidence was to draw an inference from the applicant's being new to Ms Taylor and to her company, and from Ms Taylor’s and her company’s not being familiar with the applicant or his work, that the applicant might only have a limited reputation as an actor, singer, or dancer. The Tribunal then relied, not on Ms Taylor’s evidence, but on the inference it drew on the basis of Ms Taylor’s evidence (the applicant might only have a limited reputation as a singer, actor, or dancer), together with other matters, to conclude it was not satisfied the applicant has an internationally recognised record of exceptional and outstanding achievement in the area of the arts.

1. The additional integer was, therefore, the if-then statement that if Ms Taylor was not familiar with Mr Springs then Mr Springs could not have an internationally recognised record of the requisite kind. If R stands for the proposition that Mr Springs had an internationally recognised record satisfying the criterion, and F stands for the proposition that Ms Taylor was familiar with Mr Springs then, using ~ to represent negation, the argument was as follows:

Proposition 1: ~F

Proposition 2: If ~F then ~R

Deduction: ~R

1. In the primary judge’s view, the fact that ~F did not bear directly on the criterion but required the additional reasoning inherent in Proposition 2, meant that ~F did not involve *in its terms* a ‘rejection, denial or undermining’ of R. I agree that it did not involve, in its terms, a rejection or denial of R.
2. However, the question of whether it involved an undermining of R is more complex but nevertheless informed by the High Court’s requirement that the undermining be *in its terms*. As I have said, the evidence only undermined the criterion if one accepts that Ms Taylor’s unfamiliarity with Mr Springs implied that he did not have an internationally recognised record (Proposition 2). On balance, and not without some considerable hesitation, I am driven to the conclusion that the primary judge’s reasoning is the inevitable consequence of *SZBYR*. The evidence of Ms Taylor did not *in its terms* undermine Mr Springs’ application unless and until the Tribunal engaged with Proposition 2. Without Proposition 2 her evidence did not bear upon the eligibility criterion.
3. This outcome might give one pause to consider whether *SZBYR* is a sensible decision, however, it directly governs this appeal and my views on its soundness are irrelevant. For completeness, however, I would record that I have some difficulty with the reasoning in *SZBYR*: the word ‘criteria’ does not appear in the provision (although the High Court placed much emphasis upon it) and the idea that the information must go *in its terms* (ie explicitly) to the criteria (which it does not mention) seems very difficult to reconcile with the words which the provision does use: ‘or a part of the reason’. These words explicitly accept that the information need not resolve the review application in its entirety. If the information need not resolve the application in its entirety this rather suggests that the concept of information must include integers of evidence conceptually below the level of a visa criterion. If information can only go ‘in its terms’ to the visa criterion then in what circumstances could the information ever be such as to be only ‘a part of the reason’ for affirming the decision under review? It would always be *all* of the reason. The reasoning in *SZBYR* therefore seems to proceed by reference to a word which does not appear in the provision and to ignore words which do.
4. It also seems to lead to an operation for the provision which is both arbitrary and emasculating. For example, the result of *SZBYR* in this case is that Ms Taylor’s evidence that she had not previously heard of Mr Springs is not information so that he need not be given a chance to comment on it. But if, instead, her evidence was that she did not think he had an internationally recognised record this would be information and he would be entitled to be heard on it. Where is the sense in this? In the domain of refugee law, the result is more idiosyncratic. If the Tribunal receives evidence to the effect that a protection visa applicant is not a member of a claimed religious group (for example, a Twelver Shia Muslim) then this is information which the protection visa applicant must be heard on. What shall he say? It is difficult to see that the submission would be any more than ‘No I am’. But if the evidence is that the protection visa applicant does not pray on a *turbah* (which the Twelver Shia do but others, such as the Sunni do not) this is not information and the applicant need not be given an opportunity to be heard on it. The fact that he might have said something useful like ‘I have a sore knee which prevents me using a *turbah*’ would never come to light.
5. The Tribunal is then entitled to reason that because the applicant does not pray on a *turbah* he is not a Twelver Shia Muslim without giving the visa applicant an opportunity to be heard on the matter. This is because this evidence does not ‘in its terms contain a “rejection, denial or undermining” of the review applicant’s claim to be a refugee’: *Minister for Immigration and Citizenship v SZLFX* [2009] HCA 31; 238 CLR 507 (‘*SZLFX*’) at [22] per the Court. This is not only unfair on the visa applicant it also makes for substandard decision making from an instrumental perspective. By keeping this kind of material out of the review process the risk of the wrong decision being made is greatly enhanced. I struggle to grasp the rationality of such an outcome, particularly where the text of the provision appears not to require it.
6. However, the High Court has spoken. Ms Taylor’s evidence was not information for the purposes of s 359A(1)(a). The primary judge did not err therefore in reaching the same conclusion.
7. If that conclusion were wrong with the result that Ms Taylor’s evidence was ‘information’ for the purposes of s 359A, it would then be necessary to consider whether, on the evidence before the Federal Circuit Court, the obligation imposed by the provision had been engaged before the Tribunal. To be clear, the information, on this hypothesis, is that Ms Taylor was not familiar with Mr Springs until his audition.
8. The language of s 359A(1)(a) is forward looking. The obligations imposed by it are enlivened when the Tribunal ‘considers’ that the information ‘would be the reason, or a part of the reason, for affirming the decision that is under review’. This is difficult English. The provision would be more accessible if it said that it was engaged when the Tribunal is of the opinion that the information would be, *subject to any further submissions*, the reason or a part of the reason for affirming the decision under review.
9. In fact, this *is* what it means. This is for two reasons. First, as the Full Court explained in *SZKLG v Minister for Immigration and Citizenship* [2007] FCAFC 198; 164 FCR 578 (‘SZKLG’) at [33] whilst ‘consider’ could mean look at attentively or survey, in s 359A(1)(a) it means ‘be of the opinion that’, a view subsequently affirmed by the High Court in *SZLFX* at [24]. Secondly, the reason that the word ‘would’ leaves the reader all at sixes and sevens is because the reader expects it to be followed by a clause beginning with an ‘if’ or an ‘unless’ (or even, perhaps, an ‘except if’). Compare these: *This section would be clearer if the drafter had avoided the use of the subjunctive mood*; or *The Tribunal must provide particulars of the information if it thinks that the information would be a reason for affirming the decision under review unless persuaded to the contrary by a subsequent submission.* The problem would (!) be avoided if the drafter had used ‘will’ but one may perhaps understand their choice to say ‘would’ to reflect the contingent possibility that the Tribunal is persuaded by a submission made as a result of the notice under s 359A(1). But by leaving out any reference to the nature of the contingency which the subjunctive necessarily implies, the provision is, at least on its face, baffling.
10. In any event, so understood, s 359A(1)(a) is enlivened when the Tribunal forms an opinion that, as presently advised, the information it has will be the reason, or a part of the reason for affirming the decision under review. This is a question of fact. What needs to be shown as a fact is that the Tribunal held such an opinion. When that fact is proved the provision is enlivened.
11. Two further issues then arise. When must the opinion be held? The provision says nothing on this topic, merely that it is enlivened when the opinion is held. That would suggest that the answer is that the opinion may be held at any time. In *SZBYR* at [17] the plurality observed that the use of the future conditional tense ‘rather than the indicative strongly suggests that the operation of s 424A(1)(a) is to be determined in advance – and independently – of the Tribunal’s particular reasoning on the facts of the case’. No doubt this is so but the more difficult question is when can it be said that the ‘Tribunal’s particular reasoning on the facts of the case’ takes place?
12. The Full Court suggested in *SZKLG* at [33] that it could take place prior to the hearing, but observed in that case there was no evidence that the tribunal had formed the requisite opinion at that stage.
13. In *SZMFZ v Minister for Immigration and Citizenship* [2008] FCA 1890, Siopis J concluded at [36] that ‘the assessment of whether the information enlivened the obligation on the Tribunal under s 424A(1) is made by reference to the time at which the Tribunal becomes aware of the information’; see also *MZXBQ v Minister for Immigration and Citizenship* [2008] FCA 319; 166 FCR 483 at [27] per Heerey J. With respect to his Honour, it does not appear to me that this can be correct. Section 359A(1) (the equivalent of s 424A(1)) is explicit in the obligation arising where the Tribunal has a particular opinion *about* the information. It is not enlivened merely because the Tribunal is aware of the information.
14. When therefore does the process of reasoning occur? The only reasons of the Tribunal which have adjudicative legal consequence are those which it delivers when it makes its decision. By s 368(1) where the Tribunal make its decision on a review it must deliver a written statement setting out the decision together, inter alia, with ‘the reasons for the decision’ and its ‘findings on any material questions of fact’. If the Tribunal had other reasons in its mind before it made the decision, those reasons have no legal consequences and cease to exist so far as the law is concerned. The Tribunal may think at some point between the hearing and the announcement of its decision that tentative reason *TR1* is a good reason. But at a later point it may come to the view that *TR1* is wrong and it may instead embrace a new tentative reason *TR2*. It may be that it is *TR2* that finds its way into the final statement of reasons as actual reason *AR2*. The Tribunal’s actual process of reasoning from a legal perspective is *AR2*. It is not meaningful to speak of *TR1* and *TR2* as part of the Tribunal’s reasoning process, absent some statement in the final reasons that evidences their existence such as ‘I initially placed some weight on *TR1*until my attention was drawn to *TR2*’.
15. This rather suggests, and I conclude, that the process of reasoning on the facts of the case occurs at the moment the Tribunal makes its decision. It is only at that moment that a decision is made and talk of reasons can make any sense. Speaking extra-curially of the will-o-wisp nature of draft judgments, the late great Hely J of this Court once drily observed ‘You can always add a “*not”*’. If that be true – and it certainly is – the only reasoning process which eventually takes place is the one manifest in the statement of reasons. Everything else is writ in water.
16. So one returns to the question posed by s 359A(1). It does not impose any temporal limitation on the formation of the opinion. It simply says that if an opinion is held then an obligation is enlivened. I can see no warrant for imposing any temporal limitation upon it apart from the one arising from the fact that at the moment the decision is made the Tribunal becomes functus officio.
17. It follows, therefore, that if at any time before the decision is delivered the Tribunal forms the opinion in s 359A(1) the obligation is enlivened. For the reasons I have given I do not regard *SZBYR* as requiring a different outcome.
18. The second issue is this: how may the existence of such an opinion be proved? Each member of the Tribunal has in the performance of his or her duties the same protection and immunity as a Justice of the High Court: *Administrative Appeals Tribunal Act 1975* (Cth) (‘the AAT Act’) s 60(1). By s 16(2) of the *Evidence Act 1995* (Cth) (‘the Evidence Act’) a judge in an Australian proceeding is not compellable to give evidence about that proceeding unless the Court gives leave. This altered the common law position which was that judges were not compellable at all to give evidence about the exercise of their judicial powers: *Knowles’ Trial* (1692) 12 Howell’s State Trials 1167 at 1179-1180; *Herijanto v Refugee Review Tribunal* [2000] HCA 16; 74 ALJR 698 (‘*Herijanto*’) at [13] per Gaudron J. The interim report which preceded the introduction of the Evidence Act opined that judges should be so compellable upon the granting of leave, without elaborating on the circumstances where it would be appropriate to grant leave: Australian Law Reform Commission (‘ALRC’), *Evidence (Interim)* (Report No 26, 1985) at [247]-[248], [527]. The final report recorded that this view had received ‘general support’ before recommending the introduction of what is now s 16(2): ALRC, *Evidence* (Report No 38, 1987) at [68]; see also New South Wales Law Reform Commission (‘NSWLRC’), *Competence and Compellability* (Discussion Paper No 7, 1980) at [2.2].
19. On its face the effect of s 60(1) of the AAT Act is to give the members of the Tribunal the same immunities as a Justice of the High Court. What are those immunities? Relevantly here, they spring from two sources. First, and most obviously there is the immunity conferred by s 16(2) on all judges from being compelled to give evidence about a proceeding before them (which may, however, be removed on the grant of leave). Secondly, there may be a particular immunity in the case of High Court Justices from being subject to proceedings for mandamus, prohibition or an injunction under s 75(v) of the *Constitution*.
20. There is no particular difficulty in understanding s 60(1) as conferring upon the members of the Tribunal in the performance of their functions the same immunity that s 16(2) confers upon, inter alia, High Court Justices.
21. However, if the effect of s 60(1) is to confer on the members of the Tribunal an immunity from suit under s 75(v) of the *Constitution* (which, as I shortly explain, arguably does describe the position of High Court Justices) then s 60(1) would clearly lie beyond the legislative power of the Commonwealth.
22. In fact, the better view is that whilst High Court Justices may not be subject to proceedings under s 75(v) of the *Constitution* the reasons for this are largely procedural and it may not be correct to speak of it as an immunity. McHugh J held in *Re Toohey; Ex parte Gunter* (1996)70 ALJR 644 (‘*Re Toohey*’) at 645 that relief under s 75(v) could not be obtained against a Justice of the High Court exercising the court’s jurisdiction, a proposition with which Mason CJ had flirted without reaching any definitive conclusions in *Re Brennan; Ex parte Muldowney* (1993) 67 ALJR 837 at 839. Toohey and Gaudron JJ subsequently cited McHugh J’s statement about High Court Justices in *Re Toohey* in *Re Jarman; Ex parte Cook (No 1)* [1997] HCA 13; 188 CLR 595 at 616 and the proposition was also endorsed by Brennan CJ at 603-604, Dawson J at 610 and Gummow J at 636. One issue in that case was whether the High Court should remit to the former Industrial Relations Court of Australia the proceeding before it under s 75(v) which sought writs of certiorari and mandamus against that court. The whole High Court was of the view that a court could not direct the prerogative writs to its own members and therefore did not remit the application. That suggests that the principle at work is not an immunity from suit per se but rather a procedural artefact relating to the nature of the prerogative writs.
23. It is true that the reasoning of McHugh J in *Re Toohey* is more grounded in the position of the High Court at the apex of the judicial system. Nevertheless, I think the better view is that what is at work is only the procedural rule that prevents a court issuing prerogative relief against itself. So viewed, it is probably the case that this principle is not an ‘immunity’ a Justice of the High Court has and is, therefore, not something purportedly conferred on the Tribunal member by s 60(1) of the AAT Act.
24. If I were wrong in that then the apparent effect of s 60(1) would be to purport to confer on the members of the Tribunal an immunity from suit under s 75(v) of the *Constitution* and, concomitantly, an immunity from suit under s 39B of the *Judiciary Act 1903* (Cth). However, it does not lie within the legislative competence of the Commonwealth to immunise Commonwealth officials from relief under s 75(v), for s 75(v) guarantees that there is a Chapter III court with jurisdiction to grant relief against an unlawful exercise of, or refusal to exercise, Commonwealth executive authority: *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* [1995] HCA 23; 183 CLR 168 at 204-205 per Deane and Gaudron JJ.
25. In that circumstance, s 15A of the *Acts Interpretation Act 1901* (Cth) would require s 60(1) of the AAT Act to be read so as not to exceed the legislative power of the Commonwealth and, where it would so exceed that power, it is to be read as valid ‘to the extent to which it is not in excess of that power’. Section 15A therefore requires, if possible, s 60(1) to be read down so as not to immunise members of the Tribunal from proceedings under s 75(v). Such a reading is readily available. Section 60(1) of the AAT Act should, in that case, be read as if it conferred on the members of the Tribunal ‘the same protection and immunity as a Justice of the High Court apart from any immunity from judicial review proceedings’.
26. In any event, either reading of s 60(1) leads to the same conclusion that the members of the Tribunal are not compellable to give evidence about a proceeding over which they presided without the leave of the court in which their evidence is sought to be adduced.
27. For completeness, it also relevant to note the effect of s 129(1) of the Evidence Act:

**129 Exclusion of evidence of reasons for judicial etc. decisions**

(1) Evidence of the reasons for a decision made by a person who is:

(a) a judge in an Australian or overseas proceeding; or

(b) an arbitrator in respect of a dispute that has been submitted to the person, or to the person and one or more other persons, for arbitration;

or the deliberations of a person so acting in relation to such a decision, must not be given by the person, or a person who was, in relation to the proceeding or arbitration, under the direction or control of that person.

1. This does not erect an immunity from compellability as s 16(2) does. Instead it is a rule about admissibility of evidence. If leave were granted under s 16(2) the effect of s 129(1) by itself would be to prevent the Tribunal member giving evidence about their reasons for decision or their deliberations. However, s 129(1) does not apply in judicial review proceedings by reason of s 129(5):

(5) This section does not apply in a proceeding that is:

…

(c) by way of appeal from, or judicial review of, a judgment, decree, order or sentence of a court; or

1. In this case, one comes to be looking at s 129(1) of the Evidence Act not because of the position of the Tribunal but because of the position of the High Court. This follows from s 60(1) of the AAT Act. It is a question not necessary to answer whether s 129(1) and s 129(5) have any effect on the Tribunal independently of their derivative application via s 60(1).
2. This may be fortunate. An ‘Australian or overseas proceeding’ is defined in the Evidence Act’s Dictionary to include a proceeding in an ‘Australian court’. The expression ‘Australian court’ is in turn defined in very broad terms to include by subclause (e) of the definition ‘a person or body authorised by an Australian law…to hear, receive and examine evidence’ and a ‘judge’ is defined to be the ‘judge, magistrate or other person’ before whom the proceeding is being held. This would appear to include the Tribunal and its presiding member respectively.
3. In *Johnson v Director of Consumer Affairs Victoria* [2011] VSC 595; (‘*Johnson*’)Kyrou J commented at [73] fn 36 that the Victorian Civil and Administrative Tribunal (‘VCAT’) was not an ‘Australian court’ for the purposes of s 16(2) of the *Evidence Act 2008* (Vic). This statement, which was not by any means central to his Honour’s reasoning, appears to overlook the rather broad definition of an ‘Australian court’ and the resulting definition of ‘judge’ which appears wide enough to include, in this context, a member of the Tribunal. On the other hand, the carve-out in s 129(5)(c) is not literally expressed in terms of the same breadth. I would favour a reading of s 129(5)(c) such that the word ‘court’ (which is not elsewhere defined) corresponds with the breadth of s 129(1). If not read that way, then there arises the curious anomaly that s 129(1) and s 129(5) will apply to permit evidence to be given by a judge about his or her reasons (or deliberations) in judicial review proceedings but will not apply to permit identical evidence to be given by a Tribunal member in the same circumstances. This will be because, on the present hypothesis that s 129(1) and s 129(5) are different in scope, such a Tribunal will not usually be a ‘court’ within the meaning of s 129(5). There is nothing in any of the reports of the ALRC, or the NSWLRC or the language of s 129 which suggests that such an idiosyncratic operation for the provision was intended.
4. However, as I have said, it is not necessary to consider how s 129(1) and s 129(5) apply directly to the Tribunal because their relevance only arises derivatively from the position of Justices of the High Court through the operation of s 60(1) of the AAT Act.
5. The net result of this substantial although scenic detour remains the same. The members of the Tribunal can be compelled to give evidence about a proceeding before them provided leave is granted: s 16(2). Further, by reason of s 129(5)(c) evidence about the member’s deliberations is not forbidden by s 129(1).
6. The complexities to which s 60(1) of the AAT Act and s 16(2) of the Evidence Act (which commenced on 18 April 1995) potentially give rise have not always been appreciated. For example, in *Herijanto* which was decided on 31 March 2000, Gaudron J appears not to have had her attention drawn to s 16(2) and was led into applying the common law position (seemingly in error). There are similar statements in *Muin v Refugee Review Tribunal* [2002] HCA 30; 76 ALJR 966 at [25] per Gleeson CJ, at [197] per Kirby J and at [299] per Callinan J but it is apparent that these observations too did not take into account the alteration to the common law position wrought by s 16(2).
7. A similar oversight may be discerned in the reasons of the various decisions which have understandably followed *Herijanto*: *NAQR v Minister for Immigration (No 1)* [2002] FMCA 271 at [11]; *Mathews v Health Insurance Commission (No 1)* [2005] FCA 1061 at [14]; *VWSU v Minister for Immigration* [2006] FCMA 212 at [19]-[24]; *Applicant M1014 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 1190 at [14]; *Saint v Holmes* [2008] FCA 987; 170 FCR 262 at [57]-[59]; *O’Shane v Harbour Radio Pty Ltd* [2013] NSWCA 315; 85 NSWLR 698 at [183] cf [194]; *MZZZW v Minister for Immigration and Border Protection* [2015] FCAFC 133; 234 FCR 154 at [74]; *Winters v Fogarty* [2017] FCA 51 at [130]-[133]; *Moodie v Racing Integrity Commissioner* [2017] VSC 175 at [22]; *AVX16 v Minister for Immigration* [2020] FCCA 945 at [30]-[36].
8. Reassuringly on the other hand, it has been accepted on at least one occasion in this Court that the effect of s 16(2) is that a member of the Tribunal can be compelled by subpoena to give evidence about a case they have heard if leave is first obtained under s 16(2): *Chiorny v Minister for Immigration and Multicultural Affairs* [1997] FCA 127; 73 FCR 238 (‘*Chiorny*’) at 239 per Olney J; see also *CUR24 v Director of Public Prosecutions* [2012] NSWCA 65; 83 NSWLR 385 at [45]-[46] per Meagher JA.
9. Where a party is not compellable in relation to a particular topic it is not possible to make orders for discovery or interrogatories against that party.  In *Herijanto*, Gaudron J declined to allow the Plaintiff to administer interrogatories to the Refugee Review Tribunal in relation to its decision making processes although her Honour did permit some interrogatories to be administered where they did not go to any aspect of the decision making process. In a subsequent decision in the *Herijanto* litigation her Honour declined to permit discovery to be ordered against the Tribunal in relation to matters which her Honour perceived to be within the immunity conferred by s 60(1) of the AAT Act(but discovery was ordered on issues not caught by that provision): *Herijanto v Refugee Review Tribunal (No 2)* [2000] HCA 21; 74 ALJR 703.
10. It would appear to follow from s 16(2) of the Evidence Act that with the leave of the court a member of the Tribunal may be compelled to give evidence about the proceeding which the member heard and, indeed, Olney J held as much in *Chiorny*. It must follow therefore that, provided leave is first obtained under s 16(2), a party may administer an interrogatory to a Tribunal member about their process of reasoning in a review application (and, if necessary, obtain discovery).
11. Since s 359A explicitly makes it an issue of fact as to if and when the Tribunal member formed a particular mental state, it follows that the court may grant leave to administer an interrogatory to the Tribunal to ascertain that matter. In this case, for example, Mr Springs could have sought leave to issue an interrogatory to the Tribunal member asking (a) whether the Tribunal formed the view that Ms Taylor’s evidence that she had not previously heard of Mr Springs would be the reason or a part of the reason for affirming the decision under review and (b) if yes to (a), when was that view formed?
12. If leave to interrogate the Tribunal member is not sought, it remains possible, with a grant of leave under s 16(2), to subpoena the Tribunal member to testify. If that course is taken, the member may be asked in the witness box about his or her mental states in relation to s 359A(1).
13. In addition to any answers obtained from the Tribunal member by these various means, two other sources of evidence on the issue will be the reasons of the Tribunal and the transcript of the hearing before the Tribunal: *SZMPT v Minister for Immigration and Citizenship* [2009] FCA 99 at [15]-[18] per Jacobson J; *SZNBE v Minister for Immigration and Citizenship* [2009] FCA 1198 at [33]-[36] per McKerracher J. The High Court in *SZLFX* at [26]looked to the Tribunal’s reasons to determine whether the requisite mental state had been reached so as to enliven the obligation.
14. In the Court below, both the reasons and the transcript were in evidence. The issue then is what may be inferred from them. The relevant parts of the transcript are set out above at [7] and [10]. The relevant part of the Tribunal’s reasons appear at [40] which is set out above at [12] and a portion at the end of [58] of the Tribunal’s reasons:

The Tribunal has carefully considered the various aspects of the applicant’s careers and comments from others in the industry, including the critics; however, on balance the Tribunal is not satisfied that the applicant has an internationally recognised record of exceptional and outstanding achievement in the area of the arts. The applicant has performed in primarily supporting roles in Australia, Europe and the USA and has had few roles as a principal or lead in a musical, opera or play. Similarly, he had a supporting role in the USA national tour with Mr Marsalis in a choir of approximately 74 persons, where he was a featured vocalist. The applicant has performed in front of large sporting crowds on two occasions in the USA and Australia, although these crowds were primarily in attendance to watch a large sporting event and the applicant’s performance was part of the pregame ceremony. The Tribunal accepts that the applicant has performed with well-known artists, including Mr Marsalis, Mr Burke, Mr Fordham and Mr Boykin and the Metropolitan Opera, however these performances have been in a supporting capacity not as a central artist in the relevant production. Similarly, the applicant has performed in some famous venues, but again these were primarily in supporting roles not as the lead in the relevant production. The applicant has had some lead roles, e.g. Side Show, the Sammy Davis Jnr Show and Parade in Australia and Fred and Bongo, however these have been relatively few and in smaller venues for relatively short runs. The applicant has also had other significant roles. For example as a Doo-Wop singer and a stevedore but these have been performances as part of a quartet, rather than as a soloist only. Further, the Tribunal took into account that the applicant obtained such roles in Show Boat at an audition with others, not due to any previous reputation or knowledge by the producers or directors of the applicant.

1. From [40] and [58] one may rationally infer that the Tribunal did, by the time it produced its reasons, think that the fact that Ms Taylor was unfamiliar with Mr Springs until she met him meant that he did not have the requisite internationally recognised record. Since the reasons were not delivered ex tempore it is an inevitable inference that before the reasons were delivered they existed in a final draft form. By that time it is inevitable that the Tribunal member had formed the opinion upon which s 359A(1) operates.
2. Consequently, had Ms Taylor’s evidence been information to which the provision applied, I would have inferred from the Tribunal’s reasons that it had formed the state of satisfaction required by s 359A(1)(a) by no later than the completion of that draft. For the reasons I have given, this would therefore have required the Tribunal then to give Mr Springs the particulars required by the provision. Since it did not do so, it would follow that jurisdictional error was established: *SZBYR* at [13] citing *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; 228 CLR 294.
3. Mr Bevan made an alternate submission that the transcript showed that the state of satisfaction had, in fact, been formed by the Tribunal during the hearing. He submitted that the transcript showed (at AB402-403) that the Tribunal had been alive to the issue because it had returned to it a second time to clarify the matter (as I indicated above). The hearing was on 15 July 2016 and the decision was published on 27 July 2016, a period of 12 days. This suggests that the hearing was in the mind of the Tribunal at the time that the reasons were produced.
4. There are three available inferences:
5. The Tribunal was aware at the hearing that the evidence of Ms Taylor *could* form the basis of a conclusion to affirm the delegate’s decision but this thought had not yet crystallised into the idea that the evidence *would* form part of its reasons for affirming that decision;
6. The Tribunal was aware of the evidence of Ms Taylor and had come to the view during the hearing that it *would* be part of its reasons for affirming the decision under review; and
7. The Tribunal was not alive to the significance of Ms Taylor’s evidence during the hearing.
8. I do not think the third inference should be drawn. It is clear from the fact that the Tribunal touched on the topic twice during the hearing that it understood the relevance of the issue. That leaves a choice between the first and the second inference. I am unable to say that one of these is more likely than the other. They are both equally consistent with the evidence: see *SZKLG* at [33] per the Court. I do not think that the fact that the Tribunal ultimately did reason this way provides any material which would permit a choice to be made between them. As a matter of formality, it follows that the evidence does not establish on the balance of probabilities that the inference should be drawn that the Tribunal did consider at the hearing that Ms Taylor’s evidence would be the reason or a part of the reason for affirming the decision under review.
9. Consequently, if Ms Taylor’s evidence had been information for the purposes of s 359A(1)(a) I would have accepted that the Tribunal had formed the requisite state of satisfaction by no later than the time at which it completed the final draft of its reasons and would have been obliged to comply with the obligations imposed by that provision. I would not have accepted that it had formed the requisite state during the hearing.

# Ground 2

1. The second ground of appeal is that the primary judge erred in holding that the Tribunal was entitled to rely on three implicit generalisations as the basis for its decision. The Appellant submits that these generalisations had no evidentiary or factual foundation and that the Tribunal’s decision that the Appellant did not have an internationally recognised record of exceptional and outstanding achievement was legally unreasonable.
2. The key passage of the Tribunal’s reasoning can be found at [58] which has been set out above at [64]. The primary judge identified from [58] that the Tribunal had relied on three matters in coming to its conclusion that the Appellant did not satisfy the criterion. First, the Appellant had primarily performed in supporting roles and had been in few roles as a lead or principal. Secondly, the lead roles that the Appellant had featured in were in small venues and for relatively short runs. Thirdly, the Appellant had obtained his roles in ‘Show Boat’ from auditions rather than as a result of his reputation or the directors or producers having knowledge of him. The primary judge considered that these were relevant considerations for the Tribunal to take into account because they were based on implicit generalisations. The relevant portion of the primary judge’s reasons can be found at [66]-[68]:

66. The Tribunal relied on three principal matters. One is that the applicant has primarily performed in supporting roles, and has had few roles as a principal or lead in a musical, opera, or play. The relevance the Tribunal attached to these matters is based on an implicit generalisation that lead roles in a musical, opera, or play, would be assigned to persons who have an international record of exceptional and outstanding achievement, if such persons were available to play the role, and, if not, to such persons whom the producers considered to be the best suited. It was reasonably open to the Tribunal to rely on a generalisation to this effect. That means it was also reasonably open to the Tribunal to infer from the applicant’s only having played a few roles as a principal or lead that he does not have an internationally recognised record of exceptional and outstanding achievement.

67. The second principal matter on which the Tribunal relied is that the lead roles in which the applicant featured were relatively few, and in smaller venues, and for relatively short runs. The relevance the Tribunal attached to these matters is based on an implicit generalisation that persons who have an internationally recognised record of exceptional achievement in music, theatre, or dancing would be performing in larger venues than the ones in which the applicant performed, and would be in productions that had longer runs than the ones in which the applicant performed. It was reasonably open to the Tribunal to rely on a generalisation to this effect. That means it was also reasonably open to the Tribunal to infer from the applicant's only having performed relatively few lead roles in smaller venues, and for relatively short runs, that he does not have an internationally recognised record of exceptional and outstanding achievement.

68. The third principal matter on which the Tribunal relied is that the applicant obtained his roles in the “*Show Boat*” in an audition with others, rather than as a result of any knowledge by the producers or directors of that show of the applicant or of any reputation attached to the applicant. The Tribunal relied on a generalisation that a person who has an internationally recognised record of exceptional and outstanding achievement as a singer, actor, or dancer, either would not have to audition for a role or, if he or she were to have auditioned, the producers of the musical would at least have been aware of the person’s record of achievement as a singer, actor, or dancer. It was reasonably open to the Tribunal to rely on such a generalisation, which means it was reasonably open to the Tribunal to infer from the producer’s or director’s not having heard of the applicant at the time he auditioned for “*Show Boat*” that the applicant does not have an internationally recognised record of exceptional and outstanding achievement as a singer, actor, or dancer.

(Footnotes omitted)

1. The primary judge identified the following three generalisations that the Tribunal had implicitly relied on:
2. Lead roles would be assigned to persons who have an international record of exceptional and outstanding achievement if such persons were available to play the role;
3. Persons who have an internationally recognised record of exceptional achievement would be performing in larger venues than those in which the Appellant performed, and would be in productions that had longer runs than the shows that the Appellant had performed in; and
4. Persons who have an internationally recognised record of exceptional and outstanding achievement would not have to audition for a role or, if he or she were to have auditioned, the producers of the musical would at least have been aware of the person’s record of achievement.
5. The primary judge considered that the Tribunal was entitled to rely on these generalisations and referred to the, with respect, valuable discussion of generalisations his Honour gave in *Tran v Minister for Immigration* [2019] FCCA 2859 at [23]-[28]. In that case, his Honour noted that fact-finders often rely on implicit generalisations based on common life experiences when drawing inferences from established facts. The Appellant contends that the three generalisations in this case are not derived from common life experiences but rather reflect an idiosyncratic view of the arts. In relying on these generalisations, according to the Appellant, the Tribunal substituted its own views for an assessment of the evidence before it.
6. At the hearing in this Court the Appellant submitted that each of the generalisations was unreasonable and excluded certain individuals in the arts from satisfying the criterion. The first generalisation, according to the Appellant, required an individual to be in the spotlight, front and centre in order to have an internationally recognised record. Similarly, the second generalisation meant that an individual must perform in venues of a particular size or in runs of a particular length to satisfy the criterion.
7. I am not persuaded by the Appellant’s arguments. The point the primary judge was making by labelling the propositions as generalisations was that the Tribunal viewed them as applying *generally* and not as hard and fast rules. As I discuss in more detail in relation to ground three, the Tribunal’s reasoning at [58] cannot be characterised as imposing strict requirements for the satisfaction of the criterion. What the Tribunal was doing was referring to the factors which it had weighed in its decision.
8. The Appellant’s submissions in relation to the third generalisation, that an individual with the requisite record would not need to audition, follow a similar vein. The Appellant noted that this generalisation incorrectly asserted that notoriety obviates the need for audition. While I do think that an individual could have the requisite international record whilst simultaneously being required to audition for roles, for the reasons that follow I do not think the Tribunal’s reliance on the fact that the Appellant was required to audition for a role can be considered to be legally unreasonable.
9. The key question for this Court is whether it can be said that the Tribunal’s decision was legally unreasonable in that it lacked a logical or probative basis. A decision may be said to be illogical where there is no logical connection between the evidence and the conclusions drawn. However, if a finding is reached on which reasonable minds could differ, there can be no illogicality: *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 at 648 [131] and 649 [135] per Crennan and Bell JJ; also at 632 [78] per Heydon J. The Appellant argues that the finding of the Tribunal was contrary to the evidence that was before it.
10. I do not think it can be said that there is no logical connection between the evidence before the Tribunal and its conclusion. At [58] (extracted above at [64]) the Tribunal placed weight on the nature of the Appellant’s roles (whether they had been leading or supporting), the length and run of performances and whether or not he had auditioned for roles. All of these were details contained in the evidence before the Tribunal. The Tribunal was entitled and, indeed, obliged to analyse the evidence presented to it. The Appellant noted that the distinction between lead and supporting roles in terms of recognition was not a distinction that had been drawn by any of the witnesses. I do not think this makes it illogical for the Tribunal to have referred to it. Although the generalisations relied on cannot be correct in every circumstance, I do not think it can be said that it was not open to a reasonable decision maker to rely upon them in its reasoning process.
11. In this Court the Appellant placed particular emphasis on the fact that the Appellant’s highly qualified referees considered him to have an internationally recognised record of exceptional and outstanding achievement. As the primary judge noted, what amounts to exceptional and outstanding achievement is largely a matter of opinion and degree. Whether or not the Appellant satisfied the criterion, ultimately, was a matter for the Tribunal and not the Appellant’s referees. The Tribunal was to have regard to the views of the referees but their views were not determinative. The Tribunal noted this at the hearing with the Appellant and in its reasons at [59] acknowledged that the Appellant had references from ‘other well-known international artists’. The nature of the Appellant’s roles, the length of show runs, the size of venues and whether or not the Appellant auditioned, while each not individually determinative, were open considerations for a rational decision maker to take into account. The fact that these contradict what the Appellant’s referees ultimately concluded does not make the Tribunal’s process of reasoning irrational.
12. It follows that the primary judge did not err in finding the Tribunal was entitled to rely on the generalisations as a basis for its decision and by not finding that the Tribunal reasoned unreasonably.

# Ground 3

1. The third ground of appeal is that the primary judge erred in not finding that the Tribunal had misapplied cl 858.212(2) of Sch 2 of the Regulations by importing the following requirements into its assessment:
2. That the Appellant’s performances be as a central artist and not in a supporting capacity;
3. That the Appellant’s lead roles be of a particular number, in venues of a particular size, and for particular production runs; and
4. That the Appellant’s significant roles be as a soloist and not as part of a quartet.
5. The Appellant submits that at [58] of the Tribunal’s reasons it impermissibly added the above three matters as requirements for the granting of a visa under cl 858.212(2). The primary judge considered at [75] of the judgment that what the Tribunal was engaged in at [58] was merely a recitation of the matters which led it to its conclusion that the Appellant did not satisfy the visa criteria, rather than the impermissible imposition of additional requirements that the Appellant needed to meet.
6. In the case of many visas, the criteria are readily ascertainable objectively. For example, for a student visa it must usually be demonstrated that the applicant is enrolled in an approved course of study at an approved institution and that the applicant has achieved a particular standard of English under a test such as the IELTS English skills test. These are matters which are facts which may be simply established (or not established). These kinds of criteria do not call for any qualitative assessment by the decision maker. They are, in effect, ‘tick a box’ criteria.
7. However, there are other kinds of visas where the criteria require the decision maker to embark upon a process of subjective assessment. For example, in refugee cases it is necessary for the decision maker to form a view as to whether the fear held by an applicant of harm on repatriation is a fear which is ‘well-founded’. So too, in this appeal, the visa criterion called for an assessment by the Tribunal of whether Mr Springs had an internationally recognised record of exceptional and outstanding achievement in the arts. This required the Tribunal to assess Mr Springs’ record and to ask itself whether it had certain qualities vizbeing a record which was both exceptional and outstanding and, further, being in that regard internationally recognised.
8. These are open-textured requirements calling for the application of judgment and, within the limits circumscribed by administrative law doctrines such as irrationality and so forth, the Regulations (and the Act which authorises the Regulations) repose the formation of that judgment in the decision maker.
9. So much is clear. Nevertheless, in each case the Tribunal remains bound to give reasons for its conclusions: s 368 of the Act. Where the criteria are objectively determinable (as in the student visa example set out above), these reasons will likely be brief and reasonably conclusory as one would expect in a box-ticking exercise: eg, the applicant has not provided evidence that she is enrolled in an approved course at an approved institution. But where the criteria are open-textured the obligation to give reasons for the decision to refuse to grant a visa will rarely, if ever, be satisfied by a mere assertion that the criteria have not been satisfied. For example, in this appeal had the Tribunal merely said that it was not satisfied that Mr Springs had an internationally recognised record of exceptional and outstanding achievement in the arts without explaining *why* it held that view, the argument would no doubt now be raised that its reasons were not adequate in an administrative law sense.
10. In the provision of an explanation as to why it has arrived at a particular conclusion on whether such qualitative criteria have been satisfied, it is inevitable the Tribunal will give an explanation for its conclusions which is couched in terms which lie outside the criteria themselves. A conclusion, for example, that Mr Springs does not have an internationally recognised record of exceptional and outstanding achievement in the arts inevitably must involve intermediate steps of reasoning which differ from that criterion.
11. But, as Mr Springs correctly submits, these intermediate steps cannot be permitted to supplant the criterion itself. The challenge under the present ground, therefore, is to distinguish (a) those cases in which the Tribunal permissibly explains why it does not think the criterion is satisfied using legitimate processes of reasoning towards a qualitative conclusion from (b) those cases where the Tribunal sets up some other requirement which supplants the criterion itself.
12. Using, for the sake of argument, the three matters which Mr Springs now says were substituted by the Tribunal as visa criteria, an example of (b) would be the following:

‘The question the Tribunal must ask itself is whether Mr Springs has an internationally recognised record of exceptional and outstanding achievement in the arts. In order to satisfy that criterion he must establish each of the following:

1. that the Appellant’s performances be as a central artist and not in a supporting capacity;
2. that the Appellant’s lead roles be of a particular number, in venues of a particular size, and for particular production runs; and
3. that the Appellant’s significant roles be as a soloist and not as part of a quartet.

Mr Springs does not meet these requirements and therefore does not satisfy the criterion.’

1. On the other hand, an example of (a) would be this:

‘The question the Tribunal must ask itself is whether Mr Springs has an internationally recognised record of exceptional and outstanding achievement in the arts. In this case, the Tribunal observes that most of the roles he has had have been in a supporting capacity, that the lead roles he has had have not been numerous or before large audiences or for long runs and that much of his work has not been as a soloist but as a member of quartet. In those circumstances, the Tribunal does not think it can be said that he has an internationally recognised record of exceptional and outstanding achievement in the arts.’

1. In the latter example, the Tribunal assays the factual conclusions it has reached against the mandated criterion. In the former example, it impermissibly substitutes the mandated criterion with its own criteria and assays the facts against those criteria. The resolution of the present debate therefore turns on examining the criteria the Tribunal in fact applied to the facts it found.
2. The relevant portion of the Tribunal’s reasons at [58] show, in my view clearly, that the Tribunal made factual findings and then applied the mandated criterion to them. In the first sentence it correctly identifies the criterion to be applied and what then follows in the balance of the paragraph are its reasons for that conclusion. This reasoning is factual in nature. I do not detect in it the imposition of additional criteria but, rather, the routine process of fact assessment.
3. Nor can I accept, as was faintly suggested in oral argument, that the references in [58] to the factual matters upon which the Tribunal relied meant that implicitly, if not overtly, the Tribunal had imposed these matters as additional criteria. This alternate submission appeared to accept that [58] did not in terms reveal that the Tribunal had impermissibly imposed additional criteria but sought to evade the consequences of that conclusion by asserting that an implication could be drawn from [58] to the same effect. I do not accept that any such implication is available.
4. It follows that I detect no error in the primary judge’s identical conclusion. Mr Springs mounted an argument that the primary judge had made another error in his reasoning on this issue. This argument turned on the primary judge’s analysis of [59] in the Tribunal’s reasons. In circumstances where I am satisfied that the primary judge was correct to conclude that the Tribunal did not impose additional criteria, even assuming his Honour erred in the way he handled [59] this would not be material to the outcome. It is not necessary therefore to form a concluded view on this argument. However, for the sake of completeness I would say this:
5. The primary judge pointed to [59] of the Tribunal’s reasons where it considered other matters which were in the Appellant’s favour. This, in the primary judge’s opinion as expressed at [75] of his Honour’s reasons, showed that the Tribunal was not limiting its consideration to the issues contained in [58] as would be the case if it were imposing them as essential requirements.
6. In this Court the Appellant argued that the primary judge’s reliance on [59] in this way was unsatisfactory. At [59] the Tribunal said this:

The Tribunal accepts that the applicant is highly talented in singing especially, but also dancing and acting and that he is a “triple threat”. However, the Tribunal does not consider that being highly talented and having references from other well-known international artists is sufficient to establish that the applicant has an internationally recognised record of exceptional and outstanding achievement in the area of the arts. Further, the Tribunal had regard to the comments regarding the applicant’s capacity in Australia to perform the roles of African American characters and the shortage of persons with the requisite skill levels to play these parts in various areas of the arts, however, the Tribunal does not consider that the applicant’s attributes in this regard to meet this skills shortage demonstrates that the applicant has an internationally recognised record of exceptional and outstanding achievement in the area of the arts. The Tribunal appreciates that the applicant would be an attribute to the Australian arts scene given his talents, however, after considering all the matters above, the Tribunal is not satisfied that the applicant has an internationally recognised record of exceptional and outstanding achievement in the area of the arts.

1. The Appellant submitted that the second sentence of [59] demonstrated the Tribunal’s failure to appreciate the Appellant’s references and that the remainder of the paragraph is directed to a submission put to the Tribunal about the Appellant’s ability to fill a skills shortage in Australia. The Appellant appears to be arguing that at [59] the Tribunal was not weighing up factors that were in the Appellant’s favour in relation to whether the Appellant had an internationally recognised record and therefore [59] cannot be relied upon in the manner done so by the primary judge.
2. Respectfully, I am not entirely convinced by the primary judge’s reliance on [59] to characterise [58] as not containing essential requirements. Just because the Tribunal referred to factors in the Appellant’s interest at [59] does not mean that the Tribunal could not simultaneously be imposing minimum requirements for the grant of a visa in [58]. Moreover, whether [59] even addresses factors which could be considered to be in the Appellant’s favour in relation to the internationally recognised record criterion is far from clear. It does not seem, for example, that the reference to the Appellant’s capacity to fill a skills shortage goes to the criterion in question.
3. However, regardless of the correctness of the primary judge’s approach to [59], for the reasons I have already given, the Tribunal’s reasoning at [58] cannot be characterised as imposing any additional requirements for the grant of a visa under cl 858.212(2).
4. Ground 3 must therefore be rejected.

# Conclusion

1. All three grounds of appeal failing, the appeal should be dismissed with costs.

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| I certify that the preceding one hundred and two (102) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Perram. |

Associate:

Dated: 11 March 2021