FEDERAL COURT OF AUSTRALIA

DAO16 v Minister for Immigration and Border Protection [2018] FCAFC 2

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| Appeal from: | *DAO16 v Minister for Immigration and Border Protection* [2017] FCCA 616 |
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| File number(s): |  |
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| Judge(s): | **KENNY, KERR AND PERRY JJ** |
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| Date of judgment: | 15 January 2018 |
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| Catchwords: | **MIGRATION –**  appeal from decision of the Federal Circuit Court dismissing the appellant’s application for judicial review of a decision of the Administrative Appeals Tribunal affirming a decision by the Minister’s delegate not to grant the appellant a Protection (Class XA) visa – where appellant claimed to fear significant harm if returned to his country of nationality by reason of his homosexuality - where Tribunal dismissed as false the evidence of 16 witnesses on which the appellant relied in support of his claim to be homosexual – where no rational or logical basis for Tribunal’s rejection of corroborative evidence – where Tribunal’s decision legally unreasonable – where reasons of Court below inadequate – appeal allowed with costs. |
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| Legislation: | *Migration Act 1958* (Cth)  *Migration Amendment (Complementary Protection) Act 2011* (Cth) |
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| Cases cited: | *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174; (2016) 250 FCR 109  *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146  *Minister for Immigration and Border Protection v SZUXN* [2016] FCA 516  *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611  *Minister for Immigration and Citizenship v SZNSP* [2010] FCAFC 50; (2010) 184 FCR 485  *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33; (2013) 210 FCR 505  *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; (2013) 212 FCR 99  *Minister for Immigration and Ethnic Affairs v Guo* [1997] HCA 22; (1997) 191 CLR 559  *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 719; (1999) 93 FCR 220  *Public Service Board of NSW v Osmond* (1986) 159 CLR 656  *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247  *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152  *SZDGC v Minister for Immigration and Citizenship* [2008] FCA 1638  *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71; (2013) 212 FCR 235  *SZLGP v Minister for Immigration and Citizenship* [2009] FCA 1470; (2009) 181 FCR 113  *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089; (2015) 233 FCR 451 |
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| Date of hearing: | 16 August 2017 |
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| Registry: | New South Wales |
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| Division: | General Division |
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ORDERS

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|  | | NSD 584 of 2017 |
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| BETWEEN: | DAO16  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGES: | KENNY, KERR AND PERRY JJ |
| DATE OF ORDER: | 15 January 2018 |

THE COURT ORDERS THAT:

1. The appeal is allowed.
2. The orders made by the Federal Circuit Court of Australia on 29 March 2017 are set aside and in place of those orders, order that:
   1. the decision of the Administrative Appeals Tribunal dated 20 September 2016 is set aside;
   2. the matter is remitted to the Administrative Appeals Tribunal, differently constituted, to be heard and determined according to law; and
   3. the first respondent is to pay the applicant’s costs of the proceeding, as agreed or taxed.
3. The first respondent is to pay the appellant’s costs of the appeal, as agreed or taxed.

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

REASONS FOR JUDGMENT

THE COURT:

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| 1 INTRODUCTION | [1] |
| 2 BACKGROUND | [5] |
| 2.1 The first application for a protection visa | [5] |
| 2.2 The second application for a protection visa | [9] |
| 2.3 The decision of the Federal Circuit Court | [23] |
| 3 RELEVANT PRINCIPLES: LEGAL UNREASONABLENESS | [30] |
| 4 IS THE AAT’S DECISION LEGALLY UNREASONABLE? | [31] |
| 4.1 The issues | [31] |
| 4.2 The decision is legally unreasonable | [35] |
| 5 ALLEGED INADEQUACY OF REASONS BELOW | [46] |
| 6 CONCLUSION | [49] |

##### INTRODUCTION

1. This is an appeal from a decision of the Federal Circuit Court given on 29 March 2017. By that decision, the primary judge dismissed the appellant’s application for judicial review of a decision by the Administrative Appeals Tribunal (the **AAT**) on 20 September 2016. The AAT had affirmed a decision by the delegate of the first respondent, the Minister for Immigration and Border Protection (the **Minister**), not to grant the appellant a Protection (Class XA) visa (the **visa**) under s 65 of the *Migration Act 1958* (Cth) (the **Act**). The decisions of the delegate and the AAT addressed only the question of whether the appellant should be granted a protection visa on the ground that he was a person to whom Australia owed complementary protection obligations so as to satisfy the criteria under s 36(2)(aa) of the Act.
2. The appellant claimed that, by reason of his homosexuality, he would be at risk of harm in India if he were required to return (AAT’s reasons at [74]). The AAT did not accept that the appellant was homosexual and, on that basis, rejected his claim to fear a real risk of significant harm.
3. The notice of appeal contends that:
4. the Court below erred in failing to find that the AAT’s decision was tainted by jurisdictional error:
   1. by reason of the AAT’s dismissal of the evidence of the appellant’s 16 witnesses without any logical, rational or probative basis (Grounds 1, 2 and 5, notice of appeal);
   2. in taking into account irrelevant considerations, including illogical assumptions and opinions about, among other things, homosexual relationships and the appellant’s relationship with his family (Grounds 3, 4, and 5);

(the **legally unreasonable grounds**)

1. the Court below erred in failing to provide adequate reasons for the dismissal of the appellant’s application for judicial review (Ground 6).
2. The appeal is allowed for the reason that the AAT’s decision demonstrates extreme illogicality and lacks an intelligible foundation. The matter must be remitted to the AAT differently constituted to determine according to law.

##### BACKGROUND

###### The first application for a protection visa

1. The appellant is a citizen of India who was aged in his late 20s at the time of the AAT’s decision. He is a Sikh and his parents are religious Sikhs. He arrived in Australia on a subclass 573 (student) visa on 30 December 2007. He was granted a further student visa which ceased on 9 March 2012.
2. The appellant applied to the Department of Immigration and Citizenship for a protection visa under s 36(2)(a) of the Act on 26 August 2011 claiming that he was homosexual and will be subject to persecution in India by reason of his sexuality.
3. The delegate refused to grant the visa on 16 November 2011 on the ground that he did not accept that the independent evidence supported the appellant’s claims that he would experience persecution in India as a homosexual and was not therefore satisfied that he was a refugee. That decision was affirmed by the then Refugee Review Tribunal (**RRT**) on 23 April 2013, which did not believe the appellant’s claim to be homosexual.
4. While the first decision of the RRT was not included in the appeal book, it was summarised in the reasons of the delegate on the second application for a protection visa as follows:

The Refugee Review Tribunal found that the applicant had not presented any credible or trustworthy evidence that he is gay and did not accept that he is. The person who claimed to be his gay partner [Mr R] was found to have provided false and misleading evidence. In sum the Tribunal found that the applicant was willing to do and say anything to achieve his desired migration outcome.

###### The second application for a protection visa

1. With effect as and from 24 March 2012, the Act was amended by the *Migration Amendment (Complementary Protection) Act* *2011* (Cth). Those amendments enacted the complementary protection regime. In particular, under s 36(2)(aa) the Minister may grant a protection visa to a non-citizen on the ground that the Minister is satisfied that Australia has protection obligations “*because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm*”. It is a criterion for the grant of a protection visa under the complementary protection regime enacted by s 36(2)(aa) that the Minister is not satisfied that the person is entitled to a protection visa under s 36(2)(a), i.e., that Australia has protection obligations because the non-citizen is a refugee. Section 36(2)(aa), in other words, creates an alternative basis for the grant of a protection visa where the Minister is not satisfied that the person is a refugee.
2. Subsequently in *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71;(2013) 212 FCR 235 (***SZGIZ***), the Full Court held that s 48A of the Act did not prevent a non-citizen who had made a valid application on the basis of the refugee criterion in s 36(2)(a) from making a further application on the basis of the complementary protection provision in s 36(2)(aa) whilst she or he remained in the migration zone.
3. Following the decision in *SZGIZ*, the appellant made a second application for a protection visa on 19 May 2014 under s 36(2)(aa) of the Act. The delegate refused to grant the visa on 26 February 2015 (the **second delegate decision**). The delegate found that no evidence had been presented by the appellant which led him to disagree with the findings of the previous Tribunal that he is not gay. The delegate further found that the evidence presented by a witness, Mr JT, that he has had and continues to have sex with the appellant was contrived for the purpose of supporting the appellant’s claims.
4. The appellant applied for review of the second delegate decision by the AAT on 26 March 2015. The appellant said that he had realised he was sexually attracted to boys whilst he was in India and he had a relationship with his neighbour who was a close friend. However, he said that when his parents found out, his father was upset and angry and decided to send him to Australia to “*make me normal*”. He pursued studies in Australia and frequented the gay scene in Sydney. He said that he met Mr R during the Queen’s Birthday weekend in June 2011 and commenced a relationship with him soon thereafter. It was the appellant’s evidence that he and Mr R had lived together in Mr R’s house and had a relationship until they broke up in mid-2014. The appellant gave evidence of casual relationships with a number of other men.
5. On 19 August 2016, the AAT wrote to the appellant inviting him to comment on adverse information which the AAT explained may lead it, among other things, to find that Mr R is an unreliable witness and that his claims were not credible.
6. In support of his claim to fear significant harm by reason of his sexuality the appellant relied among other things upon:
7. evidence from 16 witnesses including Mr R, Mr R’s wife, and Mr R’s neighbour;
8. email confirmation of the appellant’s subscription with AussieMen Team dated 12 November 2009 (AAT reasons at [40]);
9. membership cards for the Colombian Hotel and the Taxi Club dated 2010 (AAT reasons at [20], [37]);
10. copies of text messages between the appellant and others dating from June 2011 (AAT reasons at [20], [43]);
11. copies of drivers licenses showing the appellant’s previous addresses depicting that at times the appellant was recorded as residing at Mr R’s address (AAT reasons at [43]);
12. evidence that the appellant had provided Mr R’s address for a bank account (AAT reasons at [43], [65]);
13. a message on the appellant’s Facebook page (AAT reasons at [20]);
14. a printout dated 18 October 2011 of his profile on a gay website, Aussiemen.com, (AAT reasons at [20]);
15. invitations to the appellant on his email address from Manhunt Exclusives and from Midnight Shift Promotions (with no year noted on the documents) (AAT reasons at [37]); and
16. copies of “*Grindr* chat history” for July (effectively undated) (AAT reasons at [38]).
17. The decision of the AAT, with which the application for judicial review below was concerned, was given on 20 September 2016 and affirmed the second delegate decision.
18. The AAT summarised its reasons for affirming the second decision as follows:

45. As stated above, the applicant has claimed to be a homosexual man who was effectively banished from India by his father due the shame and stigma he would bring to his family. Having considered all of the evidence, the Tribunal does not accept that the applicant was homosexual in India, or that he has since become homosexual in Australia or that he has participated in a homosexual lifestyle in Australia. The Tribunal considers that the circumstance surrounding the lodgement of the application, and the evidence provided to support his claims to be homosexual, are indicative of the fact that he has contrived evidence in an attempt to establish that he is homosexual. The Tribunal accepts that the applicant may have attended gay clubs and parties and a dinner party in June 2011 with homosexual men and to have had some sexual experiences with men. The Tribunal does not accept that the applicant’s preparedness to engage in some sexual experiences with men establishes that he is homosexual or that he will pursue a homosexual lifestyle upon his return to India. In the Tribunal’s view it establishes only his preparedness to do anything he considers necessary in order to achieve a favourable immigration outcome.

1. Specifically the AAT rejected the appellant’s claimed relationship with Mr R. Rather, the AAT considered that the evidence raised serious concerns that Mr R was involved in assisting the appellant to fabricate evidence to establish that he is homosexual. In so finding the AAT:

64. … considers it to be beyond coincidence that Mr [R] would have homosexual relationships almost simultaneously with both the applicant and [Mr RK], who were both applicants for Protection visas. The Tribunal accepts that the applicant attended a dinner party with a number of homosexual men, including [Mr R], but has serious concerns that the purpose of the dinner party and any subsequent contact between [Mr R] and the applicant was to fabricate evidence to establish that the applicant is homosexual and he and [Mr R] had a homosexual relationship. The Tribunal accepts that the applicant lived in Mr [R’s] home … which has been described by the applicant as a large home where other men had lived from time to time, but does not accept that this establishes that he and Mr [R] were at any time in a genuine homosexual relationship.

1. That notwithstanding, the AAT considered it unnecessary to speculate on Mr R’s motivation for assisting the appellant and found that its concerns that Mr R had fabricated the relationship:

65. … are strengthened by the dearth of evidence supporting the applicant’s claims to have been in a relationship with Mr [R] from 2011 until 2014. … The evidence provided following the hearing shows only that the applicant at some point provided Mr [R’s] address for a bank account and had it recorded on drivers licenses. The applicant has not provided any other evidence to establish that he and Mr [R] were in a long term relationship. The Tribunal considers it is reasonable to expect that the applicant would have had photographs, text messages, social media entries or other documentation, even allowing for the fact that the relationship has since ceased. The Tribunal does not accept the applicant’s explanation for his failure to have any documentation of this kind and as discussed below he has sought to rely instead on statutory declarations and statements from persons who have connections to Mr [R] or have been directly or indirectly involved in Protection visa applications. In the Tribunal’s view, the evidence he has provided to support his claimed homosexuality is indicative of the fact that it has been fabricated following his inability to obtain permanent residence by other means and that he sought to rely on his fabricated relationship with Mr [R] to establish his homosexuality.

1. As indicated in the passage quoted above, it was central to the AAT’s rejection of the evidence from the other witnesses relied upon by the appellant that those witnesses included persons connected to Mr R including Mr R’s former wife, his business associate, his office assistant, and his neighbour and/or had some connection with applicants for protection visas. While the AAT accepted at [70] that “*various persons have provided statutory declarations in previous and past applications and that there is no evidence that those persons have any contact with applications for Protection visas*”,the AAT found that:

70. … However, until recently when some statutory declarations were provided to this Tribunal, the witnesses who had made statements or given oral evidence were almost all associated with Protection visa applicants, and many appear to be associated with [Mr R], including [Mr JT] with whom the applicant claims to have had a sexual relationship with following his break up with [Mr R]. The Tribunal acknowledges that the gay Indian community in Australia may be relatively small and close knit and that the evidence in relation to the connections between persons who have been willing to provide statements for the applicant or oral evidence is not in itself adverse. However, combined with the number of concerns in relation to this application and the circumstances surrounding the lodgement of the application, the Tribunal considers that the connections between the witnesses with applications for Protection visas or with [Mr R], to be beyond coincidence. In the Tribunal’s view, there are numerous other homosexual men in Sydney with whom the applicant could have had relationships if he were genuinely a homosexual man, and considers that the connection between various witnesses is not coincidental. The Tribunal considers it is instead indicative of the fact that the applicant has had difficulty obtaining witnesses who are truly independent to support his claims to be homosexual. In the Tribunal’s view this is because he is not homosexual.

1. The AAT concluded that:

73. The Tribunal is drawn to the conclusion, having found that several aspects of the applicant’s claims and evidence have been fabricated, that the applicant acquired some membership cards and subscribed to a gay newsletter because he had become aware that the Skilled visa pathway was fraught with difficulties and the likelihood that he would obtain a visa through that means was becoming “impossible”. In the Tribunal’s view, the applicant at that time began fabricating some initial evidence with a view to lodging a Protection visa application on the basis of his homosexuality. The Tribunal is also drawn to the conclusion, having regard to all of the evidence and findings, including ***the lengthy delay in the lodgement of the application,*** the lack of independent witnesses until recently, ***despite the fact that the applicant lives in a city which has a sizeable and visible homosexual population***, and the applicant’s inability to achieve permanent residence by alternative means, that the witnesses who have provided statutory declarations and oral evidence to support the applicant’s applications for Protection visas have been willing to provide false evidence to support the applicant’s claims. As stated above, ***the Tribunal has accepted, as stated above, that the applicant may have been prepared to participate in homosexual relations of some kind to support his applications for Protection.***  ***The Tribunal has not accepted that this establishes that the applicant is homosexual.*** The Tribunal considers, in light of all of the numerous adverse findings made above, that ***it establishes only that the applicant is prepared to do whatever he considers necessary to assist him to obtain a permanent visa to remain in Australia.*** The Tribunal does not, therefore, accept that statutory declarations from persons claiming to have had homosexual experiences with the applicant establish that he is homosexual or will be homosexual upon his return to India. The Tribunal also does not accept that due to his contact with homosexual men, or as a result of any involvement in the homosexual community for the purposes of fabricating claims to be homosexual, that the applicant will be perceived to be homosexual upon his return to India.

74. The Tribunal does not accept that the applicant is homosexual, that he has ever been homosexual or that he had a boyfriend in India called [H] or that he left India for these reasons. The Tribunal does not accept that the applicant’s father has any intention of harming the applicant because he is homosexual or forcing him to marry a woman against his will. The Tribunal is not satisfied that there is a real risk that the applicant will be subject to significant harm upon his return to India. Accordingly, the Tribunal finds that there are not substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to India that there is a real risk that he will suffer significant harm, which includes arbitrary deprivation of life, torture, the death penalty, cruel or inhuman treatment or punishment or degrading treatment or punishment.

(emphasis added)

1. The words emphasised in the passages quoted above were the subject of particular focus in the challenge by the appellant to the AAT’s decision in the Court below and on the appeal.
2. We interpolate to note how closely the conclusion reached by the AAT as to the appellant’s alleged preparedness to do anything necessary to obtain a protection visa mirrors the finding made by the RRT in its earlier decision, despite the significant volume of corroborating material relied upon by the appellant by the time that his application was before the AAT.

###### The decision of the Federal Circuit Court

1. The appellant had legal representation in the Court below. The primary judge gave *ex tempore* reasons for dismissing the application for judicial review.
2. In his reasons, the primary judge summarised the reasons of the delegate and the AAT in detail at paragraphs [4]-[41]. His Honour then considered the grounds of review raised by the appellant.
3. The first ground alleged that the AAT failed to take into account relevant considerations and took into account irrelevant considerations, being the evidence provided by various witnesses to the effect that the appellant was engaged in active homosexual life. In relation to this ground, the Court below found that:

43. In relation to ground 1, it is apparent from the Tribunal’s reasons that the Tribunal referred to the respective witnesses who provided statements purportedly in support of the applicant’s homosexual life. There is no basis to support the proposition that the Tribunal failed to take into account that evidence. The adverse findings made by the Tribunal in relation to the evidence provided by the applicant were open and cannot be said to lack an evident and intelligible justification. Ground 1 fails to make out any jurisdictional error.

1. The second ground alleged that the AAT acted beyond its power by taking into account irrelevant considerations, being unsubstantiated conclusions, assertions and assumptions as to various matters. Specifically, the appellant argued below that the AAT had made a number of assumptions as to the nature of the gay community, in relation to Sikhs and the connections that there may be in that community, and that the homosexual relationship allegedly between Mr R and the appellant would be monogamous. The primary judge however found without elaboration at [44] that “*[n]o such assumption in relation to the relationship being monogamous was made by the Tribunal. The reasoning in relation to the homosexual community was open.*” The primary judge also found, again without elaboration, that the AAT’s reasons in relation to the appellant’s evidence and the lack of independent evidence “*were logical and rational and do not identify an impermissible assumption or stereotyping in relation to homosexual persons.*”
2. By ground 3, the appellant alleged that the AAT made findings of fact without any supporting probative evidence that:
3. he is not homosexual and would not engage in a homosexual lifestyle if returned to India, despite accepting that he may have engaged in homosexual sexual experiences and have attended homosexual events and venues;
4. he engaged in homosexual sexual activity as a contrivance including while he held a student visa (and therefore before he applied for a protection visa); and
5. if he genuinely feared harm in India by reason of his homosexuality, he would have applied for a protection visa on arriving in Australia and not relied on a student visa.
6. The primary judge however found at [47] that this ground:

… is in substancean impermissible challenge to the adverse findings of credit made by the Tribunal. In the present case, the Tribunal gave logical and rational reasons in support of the adverse credit findings. The adverse findings in relation to the applicant’s credit in respect of being a homosexual cannot be said to lack an evident and intelligible justification. The adverse finding was open to the Tribunal.

1. Finally in relation to ground 4 which sought to challenge the AAT’s decision on the ground that it had applied an illogical process of reasoning to probative evidence (relying upon the particulars for grounds 2 and 3), the Court below found simply that:

48. …The Tribunal’s adverse findings were open on the material before the Tribunal. This is not a case where the Tribunal engaged in any illogical process of reasoning or made findings unsupported by the evidence.

##### RELEVANT PRINCIPLES: LEGAL UNREASONABLENESS

1. The relevant principles can be summarised as follows.
2. While findings as to credit are generally matters for the administrative decision maker, this does not mean that such findings as to credit are beyond scrutiny on judicial review: *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146 (***CQG15***) at [37]-[38] (the Court). The question of whether a credibility finding is tainted by jurisdictional error is a case specific inquiry, and is not assessed by reference to fixed categories or formulae (*ARG15* *v Minister for Immigration and Border Protection* [2016] FCAFC 174; (2016) 250 FCR 109 (***ARG15*)**at [83](b)). In each case it is necessary to analyse in detail what the decision-maker has decided: *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317;(2013) 212 FCR 99 (***SZRKT***) at [77] (Robertson J).
3. Without derogating from the case specific nature of the inquiry, adverse credibility findings may involve jurisdictional error on recognised grounds such as legal unreasonableness or reaching a finding without a logical, rational or probative basis (*ARG15* at [83](d)). In this regard, Crennan and Bell JJ explained in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 (***SZMDS***) that:

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

(Emphasis added)

(3) By way of example, in *SZRKT* at [78], Robertson J considered that jurisdictional error may be established where a finding on credit on an objectively minor matter of fact constitutes the basis on which the decision-maker rejects the entirety of an applicant’s evidence and claims. Furthermore, as Flick J explained in *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089; (2015) 233 FCR 451 (***SZVAP***)at [22] (in a passage on which the appellant particularly relied), “[*u*]*nwarranted assumptions by a Tribunal as to matters relevant to the formation of a view on the credibility of a corroborative witness may cause the Tribunal to disbelieve and disregard that evidence and may constitute a failure duly to consider the question raised by the material put before it: WAGO of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 194 ALR 674 at [54].*”Equally jurisdictional error may be established by “*a process of reasoning* *which damns a man’s credibility by reference, materially, to a false factual premise concerning a critical document”*: *SZLGP v Minister for Immigration and Citizenship* [2009] FCA 1470; (2009) 181 FCR 113 at [37].

(4) Findings or reasoning along the way to reaching a conclusion by the decision-maker that are illogical or irrational may establish jurisdictional error (*SZMDS* at [132] (Crennan and Bell JJ)). In this regard, with respect to the significance of an illogical or irrational finding as to credit to the administrative decision necessary to establish jurisdictional error, Wigney J explained in *Minister for Immigration and Border Protection v SZUXN* [2016] FCA 516 (in a passage approved in *CQG15* at [60])that:

56 An irrational or illogical finding, or irrational or illogical reasoning leading to a finding, by the Tribunal that the review applicant was not a credible or honest witness may in some circumstances lead to a finding of jurisdictional error. That would particularly be the case where the adverse credibility finding was critical to the Tribunal’s decision that it was not satisfied that the applicant met the criteria for the grant of a visa. Whilst it is frequently said that findings as to credit are entirely matters for the Tribunal, such findings do not shield the Tribunal’s decision-making processes from scrutiny…

(citations omitted)

(5) A high degree of caution must, however, be exercised before finding that adverse findings as to credit expose jurisdictional error in order to ensure that the Court does not embark impermissibly upon merits review: *SZMDS* at [96]; *SZVAP* at [14]-[15]. As such, to establish jurisdictional error based on illogical or irrational findings of fact or reasoning, “*extreme*” illogicality must be demonstrated “*measured against the standard that it is not enough for the question of fact to be one on which reasonable minds may come to different conclusions*” (*SZRKT* at [148]; see also *SZMDS* at [135] and *CQG15* at [60]). Thus, “*[e]ven emphatic disagreement with the Tribunal’s reasoning would not be sufficient to make out illogicality*”: *CQG15* at [61].

##### IS THE AAT’S DECISION LEGALLY UNREASONABLE?

###### The issues

1. Grounds 1 and 2 challenge the primary judge’s finding at [43] (quoted at [25] above) that the AAT did not err in dismissing (or failing to give any weight to) the evidence of the 16 witnesses on which the appellant relied in support of his claims to be homosexual.
2. The appellant submitted first that it is apparent that the primary judge failed to address whether the AAT was in error in dismissing the evidence of the 16 witnesses. Alternatively, the appellant submitted that, if the expression “*evidence produced by the applicant”* at [43] of the AAT’s reasons is read so as to capture the evidence provided in support of the appellant’s case, “*his Honour erred in failing to find that, in the circumstances of the application before the Tribunal, the Tribunal was justified in making the credit findings that it did, in effect imputing its credit findings concerning the Appellant to the other witnesses.*”As the appellant also submitted:

At the core of the AAT Decision is the finding by the Tribunal that the Appellant was prepared to “*do anything he considers necessary to achieve a favourable immigration outcome*”. However, the decision reveals a circularityin that respect, so far as: (a) the Tribunal determined that the Appellant was without credibility, on the stated basis that he was unable to present any “independent” witnesses to attest to his homosexuality; but (b) dismissed, and gave no weight at all to, evidence produced by 16 witnesses, and contained in underlying documents, presented by the Appellant to prove his homosexuality, by reason that the Tribunal considered all of that evidence to be, in effect, poisoned by the Appellant’s lack of credibility.

1. In this regard, the appellant submitted that the AAT’s findings were not sufficient to bring it within the category of “*rare*” cases where a party’s credibility has been so weakened that the tribunal of fact may treat what is proffered as corroborative evidence as being of no weight because “*the well has been poisoned beyond redemption*”: *SZDGC v Minister for Immigration and Citizenship* [2008] FCA 1638 at [23]-[24] and [27] (Finkelstein J); see also *Minister for Immigration and Citizenship v SZNSP* [2010] FCAFC 50; (2010) 184 FCR 485 at[36]-[38] (North and Lander JJ) and [50] (Katzmann J).
2. The third and fourth grounds of appeal allege that there was no rational or logical basis for several material findings made by the AAT, and in particular that:
3. the appellant having entered Australia on a student visa (and delayed in applying for a Protection visa) was inconsistent with him having been banished by his family from India because he is homosexual;
4. the appellant’s family providing funds to him in Australia was inconsistent with him having been banished by his family from India because he is homosexual;
5. had the appellant genuinely been homosexual, he would have had additional sexual partners (beyond those from among the 16 witnesses supporting his application) who could have provided evidence; and
6. although the appellant may have had homosexual experiences with men, he would not engage in any such experiences upon returning to India.

###### The decision is legally unreasonable

1. The AAT rejected the evidence of most witnesses on which the appellant relied because of their relationship with Mr R and because almost every witness, including Mr R, until the last submission to the AAT, had some connection with applicants for protection visas (AAT reasons at [68]). As the appellant submitted, the AAT’s finding that the appellant’s serious relationship with Mr R was fabricated so ‘poisoned the well’ that the AAT rejected as fabricated the corroborative evidence led from the other witnesses and documentary evidence, and found that the appellant was prepared to do anything necessary to obtain a permanent visa to remain in Australia. Similarly, counsel for the Minister submitted that:

… this applicant claimed that he had been in a very serious sexual relationship for three years with Mr [R]. That is rejected; therefore, one of the centrepieces of this man’s life in Australia, a three-year relationship with Mr [R], is a complete fabrication; if I satisfy you of that, we say the poisoned well flows. That is, the centrepiece of the claim, this claimed homosexual relationship, of which the first satellite of witnesses purported to attest to – once that falls over, then, in combination with the other facts, the tribunal just couldn’t accept any other corroborative evidence; that’s its reasoning, and, if I don’t persuade you of that, I don’t win, but that’s the reason.

1. Furthermore, the AAT must be taken to have entertained no real doubt about the falsity of appellant’s claim as to his sexuality. If the AAT had entertained any real doubts, it would have been required to consider in the alternative whether there was a “*real risk*” that the appellant may suffer “*significant harm*” as defined in s 36(2A) of the Act on the assumption that it was wrong in finding that claim to be fabricated: see *Minister for Immigration and Ethnic Affairs v Guo* [1997] HCA 22; (1997) 191 CLR 559 (***Guo***) at 576 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ); see also *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 719; (1999) 93 FCR 220 (Sackville J at [62] (North J agreeing)). In this regard, it is important to emphasise that it suffices to establish a “*real risk*” for the purposes of s 36(2)(aa) if there is a reasonable possibility of the harm occurring even if that risk is less than 50%, that is, the level of risk required is the same as that for s 36(2)(a): *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33; (2013) 210 FCR 505 at [246]-[247] (Lander and Gordon JJ) (Besanko and Jagot JJ agreeing at [296] and Flick J at [342]).
2. There were, however, four witnesses who were regarded as “*independent*” by the AAT because there was no evidence of any link with Mr R or of any association with other protection visa applications, namely, Mr P, Mr G, Mr W and Mr PD. If their evidence was accepted, they would have directly corroborated the appellant’s claims to be homosexual. Thus, Mr G gave evidence in writing and at the hearing that he had met the appellant through a dating site in January 2016, that they met regularly and engaged in casual sex, and that he hoped their casual relationship would become a long-term relationship. Mr P gave evidence that he met the appellant on a male dating site in July 2015 and that he and the appellant had had, and continued to engage in, casual sex. Mr W said that he was an openly gay man, he met the appellant on Grindr, a gay app, in July 2016, and they meet regularly for casual sex, while Mr PD said that he was gay, he met the appellant on Grindr in December 2013, they had sex a couple of times, and are now friends. The question therefore arises as to whether the evidence of these so-called “*independent*” witnesses was dealt with in the same way by the AAT as the evidence of the other witnesses on which the appellant relied to support his claim.
3. Counsel for the Minister submitted that the AAT’s reasons should not be read as having rejected the evidence of these four witnesses because the AAT “*accepted … that the applicant may have been prepared to participate in homosexual relations of some kind to support his applications for Protection*”, but found that this demonstrated only that the appellant was prepared to do whatever he considers necessary to obtain a permanent visa (referring to AAT reasons at [73]). This finding, however, does not identify those men with whom the AAT considered that the appellant may have had sex. It also says nothing about whether the Tribunal considered that those men may have been unaware that the appellant was not (in the AAT’s view) “*genuinely*”homosexual. More fundamentally, the Minister’s submission overlooks the AAT’s finding at [70] that it “*does not accept that the evidence contained in the statements/statutory declarations by persons supporting the applicant’s claims to be in a homosexual relationship is truthful*” and “*[n]or* *does [it] accept that the applicant was in a homosexual relationship with … Mr [G].”* Similarly, at [73] the Tribunal in unqualified terms found that “*the witnesses who have provided statutory declarations and oral evidence to support the applicant’s application for Protection visas have been willing to provide false evidence to support the applicant’s claims.”* It follows that the appellant rightly submits that the Tribunal found that the evidence of all 16 witnesses was false.
4. The question then arises as to the reasons for rejecting the evidence of the four “*independent*” witnesses. Mr G’s evidence was rejected by the AAT on the basis of the bare assertion that “*the applicant’s claims in his statement that Mr [G] wants him to be his ‘husband’ [are] indicative of his attempts to fabricate evidence of their relationship*” (AAT reasons at [70]). However, that does not disclose a rational explanation. There is nothing so inherently implausible in a claim that Mr G wanted the appellant to be his husband that the mere making of the claim was indicative of fabrication. Indeed, Mr G gave evidence that he wished for a long-term relationship. Furthermore, the AAT made no finding as to why Mr G had (on its findings) been prepared to fabricate claims for the appellant and expressly declined to do so on the ground that it was unnecessary (AAT reasons at [70]).
5. As to the remaining three witnesses, there was no attempt by the AAT to analyse their evidence and explain why it was fabricated. As such, it would appear that the AAT’s findings in this respect rested again on the proposition that the appellant’s false claim to have been in a serious sexual relationship with Mr R had so ‘poisoned the well’ that no corroborating evidence could be accepted. However, there was no evidence of any connection between these four witnesses and Mr R, or of any connection between them and any other applicants for protection visas. In those circumstances, no logical, rational, or probative basis can be discerned for the finding that the evidence of the so-called “*independent*” witnesses was false. (We note that, in so finding, we do not suggest that the findings with respect to the other witnesses, including Mr R, were not without their own difficulties.)
6. The primary judge failed to address whether the AAT erred in dismissing the evidence of the 16 witnesses and thereby fell into error. For the reasons we have given, his Honour ought to have found that the Tribunal’s decision was tainted by jurisdictional error on the ground that there was no logical, rational, or probative basis for the finding that the evidence of these four witnesses was fabricated.
7. As we have intimated, the gravity of our concerns as to the reasonableness of this decision extends well beyond these errors. It suffices to mention some examples.
8. First, the AAT at no point identifies any evidence which might explain why Mr R and 15 other witnesses might wish to assist the appellant to remain in Australia if the appellant is not in fact homosexual, and indeed the AAT expressly disavows any need to “*speculate*” on Mr R’s or Mr G’s reasons for assisting the appellant at [65] and [70]. Yet the emphatic certainty of the AAT’s conclusions in the absence of any such evidence is irrational given among other things that the AAT accepted that the appellant may have participated in homosexual relations (at [73]), the number of gay men who deposed to sexual relationships with the appellant, the lack of any connection between a number of those witnesses, the natural reluctance which many people are likely to feel in giving evidence on such intensely personal matters overlaid by cultural sensitivities, the fact that some of those witnesses deposed to relationships with the appellant well before the appellant met Mr R, and documentary evidence stemming from November 2009. Equally irrational is the emphatic certainty of the finding at [45] that the AAT does not accept that “*the applicant’s preparedness to engage in some sexual experiences with men establishes that he is homosexual or that he will pursue a homosexual lifestyle upon his return to India … [but] establishes only his preparedness to do anything he considers necessary in order to achieve a favourable immigration outcome*”: see also AAT reasons at [73].
9. Secondly, the AAT’s finding at [73] that the appellant had acquired some membership cards and subscribed to a gay newsletter because he became aware that the skilled visa pathway was fraught with difficulties, was based expressly on its finding that several aspects of the appellant’s claims and evidence had been fabricated. As such, they are again traceable back ultimately to the AAT’s rejection of the evidence about the relationship between Mr R and the appellant. Yet, for example, there is no logical connection between the rejection of Mr R’s evidence and the email confirmation of the appellant’s subscription to a gay newsletter on 12 November 2009 well before the appellant met Mr R and indeed two years before his protection visa application was made while he was still on a student visa.
10. Thirdly, as the appellant submits, a consideration of the AAT’s reasons discloses that many of its findings were underpinned by unexpressed and unwarranted assumptions not based in any evidence. An example is the disbelief expressed by the AAT member as to, among other things, the polygamous nature of some of the sexual relationships between the appellant and a number of the witnesses at [62]-[63] of its reasons. As a further example, in finding at [73] that “*the witnesses who have provided statutory declarations and oral evidence to support the applicant’s applications for Protection visas have been willing to provide false evidence to support the applicant’s claims*”, the AAT took into account among other things “*the lack of independent witnesses until recently, despite the fact that the applicant lives in a city which has a sizeable and visible homosexual population*”. Among other objections that might be made to this line of reasoning, it is underpinned by an unwarranted assumption that if the appellant had truly been homosexual, he would have engaged in sexual relationships with a larger number of men. Furthermore, the finding shows no appreciation of the fact that a visa applicant is entitled to call evidence afresh before the AAT, including to address issues considered dispositive by the delegate bearing in mind that the issues before the Tribunal are usually the issues raised by the decision under review (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 at [35] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ)). Bearing in mind that the further evidence was not relied upon here to raise a new claim, the mere fact that the appellant relied upon evidence from additional witnesses in support of his claim to be homosexual in circumstances where the delegate did not believe that claim, does not logically suggest that the additional witnesses were giving false evidence.

##### ALLEGED INADEQUACY OF REASONS BELOW

1. Ultimately it is unnecessary to consider ground 6 of the notice of appeal, given that the appeal must be allowed in any event. Nonetheless, it is helpful briefly to address this ground, given the deficiencies in the reasons of the primary judge, as outlined below.
2. The requirement to give reasons is an incident of the judicial process and reasons ought to be given in any case in which an appeal lies from the decision in order to allow that right of appeal to be exercised: *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 667 (Gibbs CJ).As Mahoney JA stated in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 273:

Where, in the decision of an ordinary dispute, reasons are necessary, they are necessary because of the expectation that, being a judicial decision, a sufficient explanation will be given of why the order was made. And, in my opinion, it will ordinarily be sufficient if *…* by his [or her] reasons the judge apprises the parties of the broad outline and constituent facts of the reasoning on which he [or she] has acted.

1. However, the reasoning on the basis of which the primary judge reached his decision in this case is not revealed by his reasons. The primary judge addressed the grounds of judicial review by stating his conclusion for rejecting each ground at such a high level of generality that the basis for the conclusion is not exposed; nor do the reasons disclose that the primary judge considered fundamental aspects of the appellant’s case such as, for example, the challenge to the dismissal by the AAT of the evidence of the 16 witnesses. To find, for example, that adverse findings were open and cannot be said to lack an evident and intelligible justification is merely to assert a conclusion: see above at [25].

##### CONCLUSION

1. For the reasons given above, the appeal must be allowed with costs and the matter remitted to the AAT for re-determination according to law by a different member of the Tribunal. The appellant should be awarded his costs of the appeal and in the Court below.

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| I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Kenny, Kerr and Perry. |

Associate:

Dated: 15 January 2018