# HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, KIRBY AND CALLINAN JJ

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MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS — APPELLANT

AND

NADASARA RAJAMANIKKAM & ANOR — RESPONDENTS

*Minister for Immigration and Multicultural Affairs v Rajamanikkam*
[2002] HCA 32
*8 August 2002*
S122/2001

**ORDER**

1. *Appeal allowed.*

2. *Order 1 made by the Full Court of the Federal Court on 3 August 2000 set aside and in lieu thereof:*

a) *appeal to that Court allowed;*

b) *Orders 1 and 2 made by Einfeld J on 19 November 1999 set aside; and*

c) *application for review of the decision of the Refugee Review Tribunal of 29 September 1998 dismissed.*

On appeal from the Federal Court of Australia

**Representation:**

J Basten QC with S B Lloyd for the appellant (instructed by Australian Government Solicitor)

D K Catterns QC with N C Poynder for the respondents (instructed by Craddock Murray Neumann)

## CATCHWORDS

### Minister for Immigration and Multicultural Affairs v Rajamanikkam

Immigration – Protection visa – Decision of a delegate to the Minister for Immigration and Multicultural Affairs refusing the respondent's application for protection visa and refugee status – Delegate's decision affirmed by Refugee Review Tribunal – Respondent from Sri Lanka lodged application for refugee status and protection visa on basis of fear of persecution – Refugee Review Tribunal rejected the respondent's application concluding the primary claim was concocted – Consideration of the scope of "no evidence" ground of review in s 476(1)(g) and s 476(4) of the *Migration Act* 1958 (Cth) – Whether factors identified by Refugee Review Tribunal going to the credibility of the respondent were based on facts that did not exist – Whether "no evidence" ground made out – Whether particular facts on which the respondent relied did exist – Whether particular facts that did not exist were critical to the making of the Refugee Review Tribunal's decision – Relevance of similar provisions in *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

Administrative law – Judicial review of administrative decisions – No evidence ground in *Migration Act* 1958 (Cth), ss 476(1)(g) and (4) – Adverse finding as to credibility of male applicant for refugee status and protection visa – Whether such finding invalidated in law because "based on" the existence of a particular fact, critical to the decision, found on review to be unsupported by evidence – Importance of distinction between judicial review and merits review of factual conclusions.

Words and Phrases – "particular facts" – "facts critical to the making of a decision".

*Migration Act* 1958 (Cth) ss 476(1)(e), 476(1)(g), 476(4)
*Administrative Decisions (Judicial Review) Act* 1977 (Cth) ss 5(1)(f), 5(1)(h), 5(3).

1 GLEESON CJ. This appeal concerns the meaning and effect of provisions of the *Migration Act* 1958 (Cth) ("the Act") relating to judicial review of administrative decisions by the Federal Court of Australia on the ground that there was no evidence or other material to justify the making of the decision in question. Those provisions have since been repealed. Even so, the case is of general importance, because they are to the same effect as provisions in the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act").

2 The respondents, husband and wife, are citizens of Sri Lanka. They arrived in Australia in May 1996, and applied for protection visas under the Act. Their contention was that the first respondent was a person to whom Australia owed protection obligations on the ground that he was a refugee within the definition of the Refugees Convention and Refugees Protocol, having a well-founded fear of persecution in Sri Lanka. The applications were refused by a delegate of the appellant. The respondents appealed to the Refugee Review Tribunal ("the Tribunal"). The Tribunal affirmed the decision of the delegate. The respondents applied to the Federal Court for judicial review of the Tribunal's decision. They were successful, both at first instance before Einfeld J, and later before the Full Court (Kiefel, North and Mansfield JJ)[1].

3 The decision of the Full Court was based upon narrower grounds than that of Einfeld J. The present appeal concerns only the reasoning of the Full Court, and that Court's conclusion that the "no evidence" ground of judicial review of the Tribunal's decision had been made out.

4 The decision of the delegate was made pursuant to s 65 of the Act, which provides that if, after considering a visa application, the Minister is satisfied that the relevant criteria have been met, the visa is to be granted, and if the Minister is not so satisfied, the visa is to be refused. The delegate stood in the position of the Minister. The decision of the Tribunal, reviewing the decision of the delegate, was as follows:

> "Having considered the evidence as a whole, the Tribunal is not satisfied that the [first respondent] is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the [first respondent] does not satisfy the criterion set out in s 36(2) of the Act for a protection visa.
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> The Tribunal affirms the decision not to grant protection visas."

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**1** *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2000) 179 ALR 495.

5 The decision was to refuse the visas. The ground of the decision was that the Tribunal was not satisfied, on the whole of the evidence, that the first respondent satisfied the criteria for refugee status. Because the Tribunal was not so satisfied, the decision to refuse the visas was required by s 65 of the Act.

6 That was a judicially-reviewable decision by virtue of ss 475 and 476 of the Act. The relevant ground of review was that referred to in s 476(1)(g), as qualified by s 476(4). Those provisions were as follows:

> "476 (1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:
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> (g) that there was no evidence or other material to justify the making of the decision.
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> (4) The ground specified in paragraph (1)(g) is not to be taken to have been made out unless:
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> (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or
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> (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

7 Those provisions mirrored ss 5(1)(h) and 5(3) of the ADJR Act. Section 476(1)(g) was to the same effect as s 5(1)(h), and s 476(4) was to the same effect as s 5(3).

8 The appeal turns upon the application of s 476(1)(g), as qualified by s 476(4)(b), to the decision of the Tribunal. That requires examination of the Tribunal's reasons. But it is to be kept in mind that the ultimate question is whether it has been demonstrated that there was no evidence or other material to justify the making of the Tribunal's decision.

The respondents' case before the Tribunal

9 The first respondent claimed to have been caught up in the conflict between the Sri Lankan Army and the Liberation Tigers of Tamil Eelam (LTTE), and to have been mistreated by both sides. He gave an account of mistreatment extending back to 1984.

10 For much of his life, the first respondent lived and worked as a medical practitioner in Jaffna in the north of Sri Lanka. His home was in Point Pedro near Jaffna. In 1992 he moved to Trincomalee, a Tamil area to the south of Jaffna, but he kept his house in Point Pedro. Central to his claim of fear of persecution was his evidence that he had been arrested by government forces in Trincomalee in April 1996, and released only after paying a bribe and offering to leave the area. He then came to Australia.

11 As to fear of the LTTE, the first respondent said that, in 1995, militants took him into the jungle to treat people who were sick or injured. In order to persuade them to let him go he promised to pay them SLR 50,000 and to leave Sri Lanka for good.

The Tribunal's reasons

12 The Tribunal concluded that the first respondent had concocted his primary claims. It disbelieved his claim concerning the 1996 detention by government authorities, and it was not satisfied that he was of any interest to the LTTE or that he owed them money.

13 The Tribunal said:

> "The Tribunal is of the view that the [first respondent] does not have a well founded fear of persecution. He does not fit the profile of someone of particular interest to the Sri Lankan authorities. While he is from the North of Sri Lanka he is elderly. As a medical practitioner he was reasonably well known in Trincomalee. He had experienced no problems during the routine security checks undertaken in Trincomalee during the four years he lived there. He has had a long medical career with the Government and practised in many parts of Sri Lanka. He receives a pension from the Government in spite of his claims to the Department that he did not receive a pension.
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> As the [first respondent] is a Tamil he may be caught up in the routine security checks which occur in Sri Lanka. However he told the Tribunal that while in Trincomalee he had not experienced difficulties during the routine security checks. Such security checking is not unreasonable in the civil war circumstances facing Sri Lanka and would not amount to persecution under the Convention.

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> Even if I am wrong in my assessment that the [first respondent] had no problems in Trincomalee in 1996, the Tribunal is of the view that it would be reasonable for the [first respondent] and his wife to relocate to either Colombo, or to relocate to the north to either Jaffna or Point Pedro or the Central area. Even on his own account, the authorities have only asked him to leave Trincomalee. There is no reason to believe he has any other significant problem with the Sri Lankan authorities apart from his claimed problem in Trincomalee.
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> The [first respondent] has worked for many years in different locations in Sri Lanka. However, from 1971 until 1992 he lived in Point Pedro in Jaffna. The [first respondent] has a pension from the Sri Lankan Government. His pension is not a large amount of money, but in the context of Sri Lanka it is significant. … He or his children own a house and land in Point Pedro. While his house may have fallen into disrepair nevertheless he would have access to these assets. Country information is that basic services are available in Jaffna.
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> The [first respondent] is elderly and his wife is old and disabled. However, the [first respondent's] pension and his assets would be sufficient to provide for the basics of life in Sri Lanka and they would enjoy a similar standard of living to which they would have had in Sri Lanka if they had not left for Australia. He and his wife may also receive support from their children who are overseas. He is in contact with his children and currently stays with one of his daughters.
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> Additionally the [first respondent] could choose to live in Colombo. He has one family contact there, the father in law of his son. Alternatively he could move to the Tamil speaking Hill Country where he had worked previously for many years."

14 As appears from the above, the Tribunal did not believe the first respondent's evidence as to his arrest by government authorities in Trincomalee in 1996, shortly before he left Sri Lanka. But, in any event, the Tribunal considered that, if he returned, he could safely "relocate" to Point Pedro or elsewhere. As to the first respondent's credibility, the Tribunal said:

> "There are a range of factors, which when considered together, and while allowing for difficulties with translation and the [first respondent's] age, lead the Tribunal to doubt the [first respondent's] credibility. It is the number of difficulties with his evidence which in the end tell strongly against the [first respondent's] credibility."

15 The Tribunal set out in detail its reasons for disbelieving the first respondent, listing, and explaining, eight factors which constituted what had earlier been described as "difficulties with his evidence". The Full Court analysed each of those factors. It concluded that, in relation to two of them, the reasoning of the Tribunal involved not only error, but error of a kind that was covered by the ground of judicial review invoked by the respondents.

The decision of the Full Court

16 The Federal Court was not conducting what is sometimes called a merits review of the kind that had been conducted by the Tribunal in relation to the decision of the delegate. What was involved was judicial review of an administrative decision upon statutory grounds; hence the need for the Full Court to express its conclusions in a fashion that brought them within the statutory rubric. This explains what might otherwise appear to be a surprisingly oblique manner of expressing disagreement.

17 Of the eight factors referred by the Tribunal in explaining why it did not accept the first respondent as a credible witness, the Full Court found relevant error in part of factor one, and in factor five. In each case, the error consisted in attributing to the first respondent a representation which the Tribunal regarded as misleading, but which the Full Court found had not been made.

18 Factor one involved what the Tribunal regarded as misleading information given by the first respondent to the Department of Immigration and Multicultural Affairs in respect of two matters: the payment of a pension; and the security situation that applied in Point Pedro. It is the second matter that assumed significance in the Full Court. Its connection with the first respondent's claims arose out of the Tribunal's suggestion that, although the LTTE had at one time occupied Point Pedro, they had been cleared out of the area by government forces, and if the first respondent returned there he would have nothing to fear. The Tribunal attributed to the first respondent a denial that Point Pedro had been taken over by government forces. It then said:

> "The Tribunal is of the view that in relation to his evidence to the Department concerning … the security situation in Point Pedro the applicant was attempting to give misleading evidence which would raise concerns about whether it would be reasonable for the applicant to return to Jaffna/Point Pedro or otherwise relocate."

19 The Full Court found as a fact that the first respondent had not denied that Point Pedro had been taken over by government forces. The Tribunal was found to have misunderstood an answer given by the first respondent. The Court said:

> "It does appear that the tribunal erroneously understood that the [first respondent] had said 'no' rather than 'now' when asked whether Point

> Pedro was being taken over by the Sri Lankan government. There was no evidence from the [first respondent] denying that Point Pedro had been taken over by the Sri Lankan government. The tribunal attributed that denial to him. The fact that he denied that to the department is a fact which did not exist."

20 Factor five related to the Tribunal's view that the first respondent had falsely claimed to be new to Trincomalee at the time in 1996 when, according to him, he had been arrested by government forces. The Tribunal said:

> "In his first declaration of 25 November 1996 he claims that his surgery was searched and he was arrested as a 'Jaffna Tamil who had moved from Jaffna recently'. However, he had been living in Trincomalee for just over four years. He was not a recent arrival at all albeit that there may be different cultural understandings of what is meant by 'recent'. However, in the Tribunal's view the [first respondent] in this declaration was attempting to create a profile and a reason for his arrest which he did not have."

21 In the declaration of 25 November the first respondent had said that, at the time of his 1996 arrest, he had moved from Jaffna recently. Later in the declaration, however, he said he had left Jaffna in 1992.

22 The Full Court said:

> "The view of the tribunal that the [first respondent] was attempting to create a profile and a reason for his arrest which he did not have depends upon its finding that the [first respondent] conveyed that he was new to Trincomalee. That is how the tribunal labelled factor (5) … He did not by [his] statement seek to convey that he had arrived in Trincomalee much later than 1992, although the tribunal used the fact that he had arrived in Trincomalee in 1992 to contrast his statement that he was a recently arrived Tamil. No other evidence was identified as providing any basis for attributing to the [first respondent] such a claim. In that circumstance, the particular fact that the [first respondent] had made the claim as identified by the tribunal did not exist."

23 As in the case of factor one, the final sentence states a conclusion about an error of fact in a form regarded as bringing the conclusion within the language of the statute; a form that, but for the statute, would be unlikely to occur to anybody.

24 The appellant contends that the Full Court, in a manner not warranted by the Act, undertook a re-evaluation of the material and reasoning upon which the Tribunal reached a conclusion that the first respondent was not a credible witness, and found that two of the eight reasons given for that conclusion were affected by factual error. The Full Court found that the first respondent had not

denied something and in that respect had not attempted to mislead. It also found that the first respondent, in using a certain form of words in a declaration, had not attempted to create a false impression. In the appellant's submission all this amounted to was that, in the opinion of the Full Court, the Tribunal's reasoning on credibility was flawed. To set aside the decision on that ground, it was submitted, was an impermissible intrusion into, and usurpation of, the basic fact-finding process. In terms of the Act, it did not support a conclusion that there was no evidence or other material to justify the making of the decision. It merely supported a conclusion that the Full Court disagreed in two respects with the part of the reasons given by the Tribunal for its assessment of the first respondent's credibility, those, in turn, being only part of the reasons given by the Tribunal for concluding that, on the whole of the evidence, it was not satisfied that the first respondent satisfied the definition of a refugee.

The legislative provisions

25 In 1964, in *R v Deputy Industrial Injuries Commissioner; Ex parte Moore*, Diplock LJ said that the rules of natural justice to be observed by an administrative decision-maker could be reduced to two[2]: "First, he must base his decision on evidence, whether a hearing is requested or not. Secondly, if a hearing is requested, he must fairly listen to the contentions of all persons who are entitled to be represented at the hearing". Referring to the position at common law, where the requirements of fairness were often expressed as part of a duty to act judicially, Deane J said, in *Australian Broadcasting Tribunal v Bond*[3]:

> "If a statutory tribunal is required to act judicially, it must act rationally and reasonably. Of its nature, a duty to act judicially (or in accordance with the requirements of procedural fairness or natural justice) excludes the right to decide arbitrarily, irrationally or unreasonably ... When the process of decision-making is disclosed, there will be a discernible breach of the duty if findings of fact upon which a decision is based are unsupported by probative material and if inferences of fact upon which such a decision is based cannot reasonably be drawn from such findings of fact. Breach of a duty to act judicially constitutes an error of law which will vitiate the decision."

26 As that case showed, identification of the "decision" may constitute an important step in deciding whether there has been an error of law in the form of a

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**2** [1965] 1 QB 456 at 487-488.

**3** (1990) 170 CLR 321 at 367.

breach of a duty to act in accordance with the requirements of procedural fairness. The requirement is to "base [a] decision on evidence"; a requirement as to the way the decision-maker is to go about the task of decision-making. The distinction between judicial review of administrative decision-making upon the ground that there has been an error of law, including a failure to comply with the requirements of procedural fairness, and comprehensive review of the merits of an administrative decision, would be obliterated if every step in a process of reasoning towards a decision were subject to judicial correction[4]. The duty to base a decision on evidence, which is part of a legal requirement of procedural fairness, does not mean that any administrative decision may be quashed on judicial review if the reviewing court can be persuaded to a different view of the facts.

27 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*[5], in 1977, was a case where the statute empowered a decision-maker to give a direction based upon a matter of judgment. Lord Wilberforce said[6]:

> "If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge."

28 The House of Lords held that there was no factual ground upon which the Secretary of State could have found that a local authority was acting unreasonably and, on that basis, formed a judgment which was a pre-condition to the exercise of a statutory power.

29 The ADJR Act was framed against the background of common law principle, but it was intended to alter the position at common law in certain respects. The legislative history was examined by Wilcox J in *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal*[7].

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**4** cf *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337 per Mason CJ.

**5** [1977] AC 1014.

**6** [1977] AC 1014 at 1047.

**7** (1986) 13 FCR 511.

30 The relationship between s 5(1)(h) and s 5(3) of the ADJR Act was considered in *Australian Broadcasting Tribunal v Bond*[8]. Mason CJ said[9]:

> "The effect of s 5(3) is to limit severely the area of operation of the ground of review in s 5(1)(h)."

31 Mason CJ went on to refer to s 5(3)(a) (corresponding to s 476(4)(a)), which, leaving aside par (b), restricts the "no evidence" ground to decisions in respect of which the decision-maker was required by law to reach the decision only if a particular matter was established. His reasons were agreed in by Brennan J[10] and Deane J[11].

32 In *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal*[12], Wilcox J pointed out how s 5(3)(b) (like s 476(4)(b)) was intended to restrict the operation of s 5(1)(h) (or s 476(1)(g)). If it had not been for that provision, an administrative decision could be challenged on the ground that it was based upon the assumption of a particular fact of which the decision-maker had no evidence. But the legislation in this respect limits the "no evidence" ground to a case where the applicant for review can actually negative the fact on which the decision was based. The legislative policy for this was explained by Wilcox J in a convincing manner.

33 It has been necessary for courts to consider whether a particular decision was based on the existence of a particular (non-existent) fact, within the meaning of s 5(3)(b) of the ADJR Act (or s 476(4)(b) of the Act). In *Curragh Queensland Mining Ltd v Daniel*[13], Black CJ (with whom Spender J and Gummow J agreed) said:

> "Section 5(3)(b) does not require the identification of some single particular fact that may be said to be the foundation of the decision. A decision may be based upon the existence of many particular facts; it will be based upon the existence of each particular fact that is critical to the making of the decision. A small factual link in a chain of reasoning, if it is truly a link in a chain and there are no parallel links, may be just as

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**8** (1990) 170 CLR 321.

**9** (1990) 170 CLR 321 at 357.

**10** (1990) 170 CLR 321 at 365.

**11** (1990) 170 CLR 321 at 369.

**12** (1986) 13 FCR 511 at 519-520.

**13** (1992) 34 FCR 212 at 220-221.

> critical to the decision, and just as much a fact upon which the decision is based, as a fact that is of more obvious immediate importance. A decision may also be based on a finding of fact that, critically, leads the decision-maker to take one path in the process of reasoning rather than another and so to come to a different conclusion."

34 Black CJ also pointed out, however, that it is not enough to satisfy the requirements of s 5(3)(b) alone, as to do so would ignore the language of the ground provided for by s 5(1)(h)[14]. In relation to the Act, it is s 476(1)(g) that provides the ground of review. That provision is qualified by s 476(4), but satisfaction of s 476(4)(a) or (b), while necessary, is not sufficient.

Application of the legislation to the present case

35 The nature of a decision, and the process of reasoning that leads to it, will bear upon a contention that there was no evidence or other material to justify the decision, and upon a contention that the decision was based upon the existence of a particular fact. The circumstance that an applicant seeks to satisfy s 476(4)(b) for the purpose of making a case under s 476(1)(g) may also bear upon the level of particularity or generality at which a fact is identified. The higher the level of particularity at which a fact is identified, the harder it may be to demonstrate that the decision was based upon the existence of that fact, or that there was no evidence or other material to justify the decision, especially if the decision is arrived at because of a lack of satisfaction of the existence of a state of affairs.

36 The Tribunal's decision to refuse visas to the respondents was the consequence of the legal operation of s 65 of the Act upon the conclusion that the Tribunal was not satisfied that the first respondent satisfied the criteria for refugee status; relevantly, that he had a well-founded fear of persecution in Sri Lanka. The reasons why the Tribunal was not so satisfied involved a number of elements, as appears from the passages quoted above. The first respondent was not seen as fitting the profile of someone likely to attract adverse attention from the authorities. He was in receipt of a government pension. He had a long history of government service. He was an elderly, respected, medical practitioner. The Tribunal did not believe his story about being arrested in Trincomalee. That disbelief, in turn, was based on eight cumulative reasons, two of which were found to involve error. In each case, the error consisted in attributing to the first respondent a representation about a circumstantial fact.

37 The Tribunal's decision to refuse visas was not based upon a finding that the first respondent had not been arrested at Trincomalee in 1996. The Tribunal was not willing to accept the first respondent's evidence to that effect; but it went on to say that, even if his evidence about that had been believed, he could safely

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**14** (1992) 34 FCR 212 at 221.

return to Point Pedro or elsewhere, and therefore his arrest was not a basis for a well-founded fear of persecution. The Tribunal considered that the first respondent was not of any interest to the LTTE. The view was principally formed by reference to his personal background and characteristics. I cannot accept, as did the Full Court, that the decision was based upon two of the eight reasons given by the Tribunal for doubting the credibility of the first respondent.

38 The Full Court said:

> "Thus it was the combination of [eight] factors which caused the tribunal to doubt the [first respondent's] claims. It was the accumulation of difficulties with his evidence which led to its conclusion. Each of those two facts which have been shown not to exist was integral to a factor which comprised part of that accumulation. Neither of those two matters is therefore of peripheral importance to the decision. As the tribunal has described its process of reasoning, each is a matter which played a part in the tribunal's process of reasoning … This is not, therefore, a case where those matters are merely parallel links in a chain of reasoning; they are matters without which the tribunal may well not have reached the conclusion which it did."

39 The "conclusion" to which the Full Court was there referring was the Tribunal's "adverse conclusion" about the first respondent's credibility. To say that, but for the two errors found by the Full Court, the Tribunal "may well not have reached" a conclusion adverse to his credibility, simply means that, without those two errors, the conclusion might, or might not, have been different.

40 There is, however, a more fundamental problem confronting the respondents. The ground of review relied upon is that there was no evidence or other material to justify the making of the decision to refuse visas. The Full Court, in its reasoning, did not address this question separately, but explained why it found the case fell within s 476(4)(b). It did not explain why the case fell within s 476(1)(g).

41 In seeking to support the decision of the Full Court, counsel for the respondents submitted that s 476(4) is "both a limiting provision and a deeming provision". This submission must be rejected. It depends upon reading the opening words of sub-s (4) as if they read: "The ground specified in paragraph (1)(g) is not to be taken to have been made out unless *but shall be taken to have been made out if*." There is no warrant for such revision of the text of the statute. Having regard to the approach taken by the Full Court, it is understandable that the need to make such a submission was felt. But the language of sub-s (4) is plain. Sub-section (4) qualifies par (1)(g). It does not add to it. It limits it. It does not advance the argument to speak of sub-s (4) as elaborating par (1)(g). That merely distracts attention from the language of the statute, which involves no ambiguity.

42 The Act required the Tribunal to decide that visas should be refused if it was not satisfied that the first respondent satisfied the criteria for refugee status. The Tribunal's lack of satisfaction related to whether he could return to Sri Lanka without being persecuted. There was nothing in the evidence or other material that compelled a conclusion that the first respondent would be persecuted if he returned to Sri Lanka. There may be cases in which it could be said that there is no evidence or other material to warrant a lack of satisfaction that a person will be persecuted if returned to a particular country. It might depend upon the country, and the person. But this Tribunal was not satisfied that an elderly, respected, medical practitioner, who had many years of government service, and who was in receipt of a government pension, would be persecuted if he returned to Sri Lanka. It gave a number of reasons for that, which included, but were not limited to, reasons for not accepting him as a credible witness. Most of those reasons were plausible, and have not been shown to involve error. I find it impossible to conclude that there was no evidence or other material to justify the decision which was required by law in the event of such lack of satisfaction.

43 The only part of the reasoning of the Full Court that throws light on its approach to s 476(1)(g), as distinct from s 476(4)(b), is the Court's summary of the argument for the respondents as being that "there was no evidence or other material to justify the making of the decision … *because* the decision was based on the existence of particular facts that did not exist." (Emphasis added). That is a *non sequitur*. It may be that, in some cases, depending upon the nature of the decision in question, the process of reasoning by which it was reached, and the relevance to the decision of a particular finding of fact, it may be a short step from the proposition that the decision was based on the existence of a particular fact or particular facts that did not exist to the proposition that there was no evidence or other material to justify the making of the decision. But in other cases, of which the present is an example, that may be a large step. The Full Court did not explain how it took that step, or explicitly acknowledge the need to take it.

Conclusion

44 The appellant is correct in the contention that the Full Court erred in holding that the case fell within s 476(1)(g) of the Act. The appellant does not seek to have an order for costs or to disturb the costs orders made in the Federal Court.

45 The appeal should be allowed. Order 1 made by the Full Court of the Federal Court on 3 August 2000 should be set aside. In place thereof it should be ordered that the appeal to that Court be allowed, that Orders 1 and 2 made by Einfeld J on 19 November 1999 should be set aside, and that the application for review of the decision of the Refugee Review Tribunal of 29 September 1998 be dismissed.

46 GAUDRON AND McHUGH JJ. The question in this appeal is whether, as held by a Full Court of the Federal Court[15], there was not evidence or other material to justify a decision by the Refugee Review Tribunal ("the Tribunal") affirming an earlier decision of the delegate of the Minister for Immigration and Multicultural Affairs refusing applications by the respondents, Dr and Mrs Rajamanikkam, for protection visas.

Relevant legislative provisions

47 At the time of the Tribunal's decision in September 1998, Div 2 of Pt 8 of the *Migration Act* 1958 (Cth) ("the Migration Act") made provision for judicial review by the Federal Court of certain decisions under that Act[16], including decisions of the Tribunal[17]. The permissible grounds of review were set out in s 476(1) and included:

> "(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;
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> ...
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> (g) that there was no evidence or other material to justify the making of the decision".

By s 476(4) of the Migration Act, it was provided:

> " The ground specified in [s 476(1)(g)] is not to be taken to have been made out unless:
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> (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person

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**15** *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2000) 179 ALR 495.

**16** The relevant provisions of Div 2 of Pt 8 were repealed by Sched 1 of the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth) and new provisions inserted.

**17** Section 475(1)(b).

was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist".

48 Provisions identical to ss 476(1)(g) and 476(4) of the Migration Act, as they stood at the relevant time, are to be found in s 5(1)(h) and s 5(3) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the AD(JR) Act"). However, the AD(JR) Act does not contain an exact counterpart to s 476(1)(e). Rather, s 5(1)(f) specifies as a ground of review under the AD(JR) Act that "the decision involved an error of law, whether or not the error appears on the record of the decision".

49 In *Australian Broadcasting Tribunal v Bond*[18], in the context of a discussion as to the extent to which the AD(JR) Act permits of the review of factual findings, Mason CJ discussed the relationship between s 5(1)(f) (the "error of law" ground) and s 5(1)(h) (the "no evidence" ground) of that Act. In the course of that discussion, his Honour pointed out that it had been accepted prior to the AD(JR) Act that "the making of findings and the drawing of inferences in the absence of evidence [was] an error of law"[19]. Because of that, his Honour thought the preferable view was that the "'error of law' [ground] in s 5(1)(f) [embraced] the 'no evidence' ground as it [had been] accepted and applied in Australia before the enactment of the AD(JR) Act and [that] the 'no evidence' ground in s 5(1)(h), as elucidated in s 5(3), [expanded] that ground of review in the applications for which pars (a) and (b) of s 5(3) make provision."[20] His Honour added that, as s 5(3)(a) of the AD(JR) Act requires only "an absence of evidence or material from which the decision-maker could reasonably be satisfied that the particular matter was established ... ss 5(1)(h) and 3(a) have the effect of overcoming to a limited extent and in a limited area the restrictions on the traditional 'no evidence' ground"[21].

50 As already indicated, the "error of law" ground in s 5(1)(f) of the AD(JR) Act is different from the "error of law" ground previously found in s 476(1)(e) of the Migration Act. The terms of s 476(1)(e) made it plain that the "error of law"

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**18** (1990) 170 CLR 321 at 355-358.

**19** (1990) 170 CLR 321 at 355-356, referring to *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 481, 483.

**20** (1990) 170 CLR 321 at 358.

**21** (1990) 170 CLR 321 at 358.

ground specified in that paragraph extended only to "error[s] involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision". Those words are not apt to include the making of factual findings or the drawing of inferences in the absence of evidence. That being so, it is necessary to consider whether the views expressed by Mason CJ in *Bond*[22] in relation to s 5(1)(h) and s 5(3) of the AD(JR) Act are applicable to ss 476(1)(g) and 476(4) of the Migration Act.

51 In *Bond*, Mason CJ expressed the view that the effect of s 5(3) of the AD(JR) Act is "to limit severely the area of operation" of the "no evidence" ground in s 5(1)(h) of that Act[23]. His Honour did not make clear his reasons for that view. Nor did he indicate the meaning or operation which, in his view, s 5(1)(h) would have in the absence of s 5(3) of the AD(JR) Act. It seems to us that it can only be said that s 5(3) limits s 5(1)(h) if the view is taken that, standing alone, s 5(1)(h) is to be construed as bearing some more extensive meaning than that which is suggested by its terms – "no evidence or other material to justify the making of the decision".

52 The only basis upon which it is possible to give s 5(1)(h) of the AD(JR) Act, if it stood alone, a meaning more extensive than its terms would suggest is that, as the "error of law" ground in s 5(1)(f) of that Act covers the traditional "no evidence" ground, s 5(1)(h) must apply to factual findings which are not reasonably open or for which there is "no sufficient evidence"[24]. On that view, it may well be appropriate to say that s 5(3) of the AD(JR) Act limits the "no evidence" ground in s 5(1)(h) of that Act.

53 Whether or not the approach taken by Mason CJ in *Bond* is the correct approach to the "harmonization"[25] of ss 5(1)(f) and 5(1)(h) of the AD(JR) Act, it is not one that can be applied to s 476 of the Migration Act, as it stood at the relevant time. That is because the "error of law" ground in s 476(1)(e) clearly did not include the traditional "no evidence" ground and, thus, provided no basis for giving a meaning to the "no evidence" ground in s 476(1)(g) which was more extensive than its terms suggested. Once that is accepted, there is no reason to

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**22** (1990) 170 CLR 321 at 358.

**23** (1990) 170 CLR 321 at 357.

**24** See, for example, *R v Governor of Brixton Prison; Ex parte Armah* [1968] AC 192 at 235 per Lord Reid. And see the discussion of that decision in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 per Mason CJ.

**25** See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 358 per Mason CJ.

approach the words of s 476(1)(g) of the Migration Act on the basis that, although standing alone, they meant more than what they said, their operation was limited by s 476(4) of that Act. The better approach, in our view, is to treat the words of s 476(1)(g) as having introduced a new and discrete ground of review, with its precise content identified in s 476(4) of the Act.

54 We should add that, notwithstanding the difference between the terms of s 5(1)(f) of the AD(JR) Act and those of s 476(1)(e) of the Migration Act, we see no reason why the "no evidence" ground should not be approached in the same way in both Acts, namely, on the basis that it is a discrete ground of review, the precise content of which is identified by the succeeding paragraphs of sub-s (4). That is not to say that the "error of law" ground in s 5(1)(f) of the AD(JR) Act does not include the traditional "no evidence" ground applied before the enactment of that Act. Rather, it is simply to say that, under the AD(JR) Act, a single finding might involve a reviewable error that falls within both the "error of law" and the "no evidence" grounds of that Act.

55 So far as concerns s 5(3)(b) of the AD(JR) Act, which was precisely replicated in s 476(4)(b) of the Migration Act, Mason CJ observed parenthetically that that paragraph is directed to the "proof of the non-existence of a fact critical to the making of [a] decision"[26]. Clearly, the word "critical" is appropriate to a finding of the kind referred to in s 5(3)(a) and replicated in s 476(4)(a), namely, a finding as to a matter which is required to be established before the decision in issue can be reached. The question whether it is also appropriately applied to a finding of the kind referred to in s 476(4)(b) depends upon the meaning of the words "based ... on ... a particular fact".

56 The word "particular" in s 476(4)(b) is of significance. Had that paragraph been expressed in terms of a decision "based on the existence of a fact", it might have been apt to refer to any fact taken into account in the reasoning process leading to the decision in question. The word "particular" indicates that the paragraph is intended to have a more limited operation. And when regard is had to the requirement that the decision be "based ... on ... a particular fact", the paragraph, in our view, is to be understood as referring to a finding of fact without which the decision in question either could not or would not have been reached. In this sense, it is, in our view, appropriate to speak of a "fact critical to the making of the decision"[27].

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**26** *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 357-358 per Mason CJ.

**27** *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 357-358 per Mason CJ.

57 Whether a decision could or could not have been reached without a particular factual finding may depend either on logic or on the law to be applied. To the extent that a decision could not have been reached without a particular factual finding because of the law to be applied, there may have been some overlap between pars (a) and (b) of s 476(4) although, of course, par (a) imposed a less stringent test.

58 Whether a decision would or would not have been made without a particular factual finding depends on indications to that effect in the decision, the reasons for decision or the decision making process. And unless it is possible to say on a proper analysis of the decision, the reasons for decision or the decision making process that, had a particular finding not been made, the decision in question would not have been reached, it is, in our view, impossible to say that the decision was based on that finding.

Dr Rajamanikkam's claim and the Tribunal's decision

59 Dr Rajamanikkam claimed in his application for a protection visa that he had a well-founded fear of persecution for reasons of race, membership of a particular social group or political opinion if he were to return to Sri Lanka. It is not in issue that, if Dr Rajamanikkam's claim had been accepted by the Tribunal, he was entitled to a protection visa. Conversely, if the Tribunal was not so satisfied, he was not entitled to a protection visa[28]. Mrs Rajamanikkam made no separate claim and the success or failure of her application for a protection visa must follow on the success or failure of her husband's.

60 In support of his claim that he feared persecution if he were to return to Sri Lanka, Dr Rajamanikkam gave an account of events which, he said, he had experienced in Sri Lanka before coming to Australia. To put those events in context, it is necessary to note that Dr Rajamanikkam is a Sri Lankan of Tamil ethnicity who was born in the Jaffna area. After qualifying as a medical practitioner, he was employed by the Sri Lankan Department of Health in various areas of Sri Lanka before returning to the Jaffna area in 1971. From 1971 until 1976, he worked at Point Pedro, which is in the Jaffna area, and, in late 1976, he commenced his own medical practice there. He closed that practice in 1989 and, in 1992, commenced another practice in Trincomalee.

61 Dr Rajamanikkam claimed that, whilst at Point Pedro, he was harassed by members of the Liberation Tigers of Tamil Eelam ("LTTE") and repeatedly

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**28** See ss 5(1), 36(2) and 65 of the *Migration Act* 1958 (Cth); sub-class 866.22, Sched 2, Migration Regulations 1994 (Cth).

warned by the authorities against having contact with the LTTE. He claimed that the LTTE forced him to treat their members and, on occasions, kidnapped him for that purpose. On one occasion, he said, he was abducted by the LTTE and accused of supporting the Tamil United Liberation Front ("TULF"), a moderate Tamil organisation. He also claimed that when riding a bike in Point Pedro in 1984, he was kicked by members of the Sri Lankan Army.

62 In 1987, according to Dr Rajamanikkam, the Indian Peace Keeping Force ("IPKF") damaged his surgery and, in 1988, arrested and detained him for three days on suspicion of being an LTTE supporter. He said that he was released after he paid a bribe to a member of the Eelam Peoples' Revolutionary Liberation Front ("EPRLF") who, he said, was working with the IPKF.

63 Whilst in Trincomalee, according to his claims, Dr Rajamanikkam was forced by the LTTE to treat its members and, in 1995, was taken into and detained in the jungle for that purpose. He was able to leave, he said, on promising to pay SLR 50,000 and, also, to leave Sri Lanka permanently.

64 Dr Rajamanikkam's central or primary claim was that he feared persecution at the hands of Sri Lankan authorities who, by reason of his origins and activities, either would identify him as a supporter of the LTTE or had already identified him as such. In support of this claim, he gave an account of being arrested and detained by Sri Lankan authorities in 1996. He said in his application that he was arrested as a "Jaffna Tamil who had moved from Jaffna recently". On the basis of this statement, the Tribunal wrongly attributed to Dr Rajamanikkam the claim that, in 1996, he was new to Trincomalee.

65 According to Dr Rajamanikkam, he was identified during his detention in Trincomalee as an LTTE supporter by persons he believed to be members of EPRLF or of the Tamil Eelam Liberation Organisation, both of which organisations, it seems, supported the Sri Lankan government. He was released, he said, after paying a bribe to one of the persons concerned. Shortly after being released, he travelled to Colombo to obtain an Australian visa and then travelled to Australia.

66 The Tribunal rejected Dr Rajamanikkam's application for a protection visa on the ground that he had "concocted his primary claims" with respect to events in Trincomalee in 1996. Additionally, the Tribunal expressed the view that, if it was "wrong in [its] assessment that the applicant had no problems in Trincomalee in 1996," it was, nonetheless reasonable for Dr Rajamanikkam and his wife "to relocate to either Colombo, or ... Jaffna or Point Pedro or the Central area".

67 The issue of relocation to Point Pedro had been considered by the primary decision-maker whose decision was the subject of review by the Tribunal. It was

also considered by the Tribunal. One question that arose concerning that issue was whether Point Pedro had been taken over by government forces. In its decision, the Tribunal attributed to Dr Rajamanikkam a statement to the Department that it had not been taken over when, in fact, he made no such statement.

68 The Tribunal's decision that Dr Rajamanikkam was not entitled to a protection visa was based on its conclusion that he had concocted his claim with respect to events in Trincomalee in 1996. Its conclusion in that regard was, in turn, based on its doubts as to his credibility. Those doubts came about because of what the Tribunal described as "a range of factors".

69 There were eight factors which led the Tribunal to doubt Dr Rajamanikkam's credibility. In general terms, those factors were:

1. Misleading evidence given by Dr Rajamanikkam to the Department, including his denial that Point Pedro had been taken over by government forces;

2. Doubts about Dr Rajamanikkam's account of events in Trincomalee in 1996, particularly the unlikelihood "that a Tamil militant would have been able to arrange his escape ... and to visit him alone in his cell as he claim[ed]";

3. Inconsistency in the descriptions given by Dr Rajamanikkam of the place in which he claimed to have been held in detention in Trincomalee;

4. The "vague and inconsistent" nature of Dr Rajamanikkam's account of the number of people who interviewed him during his detention in Trincomalee;

5. Dr Rajamanikkam's claim that he was new to Trincomalee in 1996;

6. Inconsistency in the claim made by Dr Rajamanikkam with respect to the bribe he said he agreed to pay the LTTE in 1995;

7. Inconsistency in Dr Rajamanikkam's evidence as to when he went to Colombo to get his Australian visa and the "vague and uncertain" nature of his evidence as to when he was arrested and what he did prior to travelling to Colombo;

8. The timing of Dr Rajamanikkam's alleged detention in Trincomalee which, in the Tribunal's view, was suggestive of concoction.

Conclusion and orders

70 It will be apparent from the above account of Dr Rajamanikkam's claims and the Tribunal's decision that, in reaching its decision, the Tribunal took into account two facts that did not exist, namely, the supposed denial by Dr Rajamanikkam that Point Pedro had been taken over by government forces and his supposed claim to have been new to Trincomalee in 1996. However, it does not follow that the Tribunal's decision was based on those particular facts.

71 Given the "range of factors" to which the Tribunal pointed as giving rise to doubts as to Dr Rajamanikkam's credibility, it is not possible to say that, had it not found that Dr Rajamanikkam denied that Point Pedro had been taken over by government forces and/or that he claimed to be new to Trincomalee in 1996, it would not have found that he was not entitled to a protection visa. That being so, it cannot be said that its decision was based on those particular facts which did not exist.

72 The appeal should be allowed and consequential orders made as proposed by the Chief Justice.

73 KIRBY J. This appeal from a judgment of the Full Court of the Federal Court of Australia[29] concerns the "no evidence" ground of judicial review as it formerly appeared in s 476 of the *Migration Act* 1958 (Cth) ("the Act"). As will appear, the provision was somewhat opaque.

74 Although s 476 of the Act has now been repealed[30], it has continuing application to the present matter and to "dozens" of other cases litigated under the Act as it formerly stood. The point in issue is also relevant, by analogy, to the operation of the corresponding provisions of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)[31] ("the ADJR Act"). An argument that special leave to appeal should be revoked in light of the supervening repeal was faintly argued. It should be rejected.

The history of the proceedings

75 Dr Nadasara Rajamanikkam and his wife Mrs Balambikai Rajamanikkam ("the respondents") are Sri Lankan citizens. They arrived in Australia in May 1996. In June of that year they applied for protection visas under the Act[32]. In March 1997 a delegate of the Minister refused their combined application. The respondents immediately applied for review of that decision by the Refugee Review Tribunal ("the Tribunal"). In September 1998 the Tribunal affirmed the decision of the delegate.

76 The respondents applied to the Federal Court for judicial review of the Tribunal's decision. In November 1999 the primary judge (Einfeld J) upheld their combined application[33]. The Minister for Immigration and Multicultural Affairs ("the Minister") appealed from that judgment to a Full Court of the Federal Court. In August 2000 that Court unanimously dismissed the appeal, although it did so on grounds more limited than those that had been upheld by the primary judge[34]. The Full Court found that two factual matters, relied on by the

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**29** *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2000) 179 ALR 495.

**30** By the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth), Sched 1, Pt 1, item 7.

**31** The ADJR Act, ss 5(1)(h) and (3).

**32** The Act, s 36.

**33** *Rajamanikkam v Minister for Immigration and Multicultural Affairs* [1999] FCA 1411.

**34** *Rajamanikkam* (2000) 179 ALR 495 per Kiefel, North and Mansfield JJ.

Tribunal to support its finding that the male respondent lacked credibility, were mistaken. In terms of s 476(4)(b) of the Act, they were facts which "did not exist". The error was held to invalidate the Tribunal's finding that the male respondent had "concocted his primary claims" as to the facts. This required confirmation of the orders of the primary judge. His orders had set aside the Tribunal's decision and remitted the matter to be heard again by the Tribunal, differently constituted.

77 The primary judge had reached similar conclusions with respect to other facts upon which the Tribunal member had based his decision. However, after special leave was granted to the Minister to appeal to this Court, no notice of contention was filed for the respondents seeking, upon grounds different from those upheld by the Full Court, to sustain the orders requiring redetermination of their combined application for review by the Tribunal. In particular, the respondents did not seek to restore the conclusions of the primary judge with respect to the other factual findings that he decided had been flawed for want of evidence. In this way, the present appeal has been confined to consideration of the legal effect, under s 476 of the Act as it previously stood, only of the concurrent findings of factual error in which the primary judge and the Full Court had agreed. As the argument developed, the entitlements of Mrs Rajamanikkam were treated as dependent upon the outcome of Dr Rajamanikkam's arguments. She sought a protection visa as a member of the same family unit as her husband[35].

The relevant facts

78 Dr Rajamanikkam was born in Sri Lanka in 1921. He is a retired medical practitioner. He has two daughters living in Australia. He claims to be a person to whom Australia owes protection obligations under the Refugees Convention as amended by the Refugees Protocol ("the Convention"). In accordance with the Convention definition of "refugee", incorporated in the Act, Dr Rajamanikkam claimed that he feared persecution "both from the Sri Lankan authorities because of his perceived association with the LTTE [Liberation Tigers of Tamil Eelam], and from the LTTE because he is perceived by them to be a moderate Tamil"[36].

79 For most of his life Dr Rajamanikkam lived and worked in Point Pedro, a town near Jaffna, in the north of Sri Lanka. However, in 1992 he moved to Trincomalee, a district to the south of Jaffna, principally inhabited by ethnic Tamils.

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**35** *Rajamanikkam* (2000) 179 ALR 495 at 497 [2].

**36** (2000) 179 ALR 495 at 497 [7].

80 The Tribunal dismissed the claim by Dr Rajamanikkam that he was "of interest" to the Sri Lankan authorities or the LTTE or other Tamil militants. It concluded that he had "concocted his primary claims". In giving its reasons for this opinion, the Tribunal said:

> "The Tribunal had a number of concerns with the applicant's claim that he was of interest to the Sri Lankan authorities. … There are a range of factors, which when considered together, and while allowing for difficulties with translation and the applicant's age, lead the Tribunal to doubt the applicant's credibility. It is the number of difficulties with his evidence which in the end tell strongly against the applicant's credibility."

81 The Tribunal identified eight "factors" as leading to this conclusion[37]. It is the first and fifth of those factors which the Full Court found to have been flawed, and indeed mistaken, to the extent that they represented "particular fact[s] [which] … did not exist" upon which the Tribunal, making the decision in Dr Rajamanikkam's case, had "based the decision" within the meaning of s 476(4)(b) of the Act, as it then stood.

82 The first factor concerned evidence given to the Department of Immigration and Multicultural Affairs that the Tribunal had concluded was misleading. Of two items mentioned within this factor, one concerned the security situation in Point Pedro and whether, in an interview with a Departmental officer in February 1997, Dr Rajamanikkam had "denied that Point Pedro had been taken over by the [Sri Lankan] Government". A portion of the transcript of that interview reads:

> "Q: So your house, no-one was living in your home when you left?
>
> A: No.
>
> Q: Is anyone living there now?
>
> A: Somebody living not but there are boys the LTTE has taken the house and left.
>
> Q: In Point Pedro?
>
> A: Yes.
>
> Q: I thought that area was being taken over by the Sri Lankan Government?

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**37** Set out in the reasons of Gaudron and McHugh JJ at [69].

A: Now."

83 During the hearing before the Tribunal in July 1998, Dr Rajamanikkam appeared to acknowledge that the Sri Lankan authorities had been in control of Point Pedro for two years, that is, a period which would date back to mid-1996. The member constituting the Tribunal thought that he had detected an inconsistency, which he put to the applicant in these terms:

> "Member: So, why did you say that you could not go back to Point Pedro and that it had not been cleared to the Department of Immigration?
>
> Interpreter: Well, I did not say that it had not been captured."

84 In consequence of his understanding of this answer, the member constituting the Tribunal concluded that Dr Rajamanikkam had been attempting to falsify the situation so far as the security of Point Pedro was concerned, to establish the basis for the "fear" that had led him to leave Sri Lanka and claim protection in Australia. He attributed to Dr Rajamanikkam that he "had denied that Point Pedro had been taken over by the Government". He concluded:

> "[T]he applicant was attempting to give misleading evidence which would raise concerns about whether it would be reasonable for the applicant to return to Jaffna/Point Pedro or otherwise relocate."

85 The Full Court regarded the Tribunal's conclusion in this respect as seriously flawed[38]:

> "It does appear that the tribunal erroneously understood that the respondent had said 'no' rather than 'now' when asked whether Point Pedro was being taken over by the Sri Lankan government. There was no evidence from the respondent denying that Point Pedro had been taken over by the Sri Lankan government. The tribunal attributed that denial to him. The fact that he denied that to the department is a fact which did not exist".

86 In this appeal I did not take the Minister to contest that a mistake had been made by the Tribunal in the respect identified by the Full Court. Instead, the Minister concentrated his argument on the legal consequences (if any) of such a mistake. If the mistake was contested, as it was the subject of concurrent findings by the primary judge and the Full Court, I would not be inclined to reopen the issue. The question in this appeal is what follows from the mistake.

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**38** (2000) 179 ALR 495 at 504 [28].

87 The second suggested mistake in fact-finding concerned factor five of the eight that the Tribunal mentioned as warranting its conclusion that Dr Rajamanikkam's credibility was unreliable and that he had "concocted" his claims grounding the combined application for protection visas. As described by the Tribunal, this factor was Dr Rajamanikkam's "claim that he was new to Trincomalee". To the extent that his claim of a fear of persecution related to the conduct of Sri Lankan government forces, it is relevant to note that Dr Rajamanikkam stated that he had been arrested by those forces in Trincomalee in April 1996. He claimed that he had only been released after paying a bribe and offering to leave the area. This he had done and had come to Australia soon after. Accordingly, the circumstances of his arrest were potentially important for the claim to protection.

88 The Tribunal subjected the material before it to fine textual analysis:

> "In his first declaration of 25 November 1996 he claims that his surgery was searched and he was arrested as a 'Jaffna Tamil who had moved from Jaffna recently'. However, he had been living in Trincomalee for just over four years. He was not a recent arrival at all albeit that there may be different cultural understandings of what is meant by 'recent'. However, in the Tribunal's view the applicant in this declaration was attempting to create a profile and a reason for his arrest which he did not have."

89 A fair reading of the evidence given to the Tribunal casts a different light upon the claim of a recent arrival in Trincomalee. The following exchanges are recorded:

> "Member: The other thing I found curious about your first statutory declaration was your claim that you were a newcomer to Trincomalee. Do you understand why you said that?
>
> Interpreter: Well, who says that I was a newcomer?
>
> Member: It says that:
>
> > 'The security people came to my surgery. I was arrested being a Jaffna Tamil who had moved from Jaffna recently.'
>
> Interpreter: Well, a newcomer in the sense I was not born and bred there."

90 The Full Court examined at some length this suggested basis for finding against the credibility of Dr Rajamanikkam[39]. It concluded that the factual foundation for the Tribunal's conclusion was faulty, indeed non-existent[40]:

> "The view of the tribunal that the respondent was attempting to create a profile and a reason for his arrest which he did not have depends upon its finding that the respondent conveyed that he was new to Trincomalee. That is how the tribunal labelled factor (5). … He did not by [his] statement seek to convey that he had arrived in Trincomalee much later than 1992, although the Tribunal used the fact that he had arrived in Trincomalee in 1992 to contrast his statement that he was a recently arrived Tamil. No other evidence was identified as providing any basis for attributing to the respondent such a claim. In that circumstance, the particular fact that the respondent had made the claim as identified by the Tribunal did not exist."

91 Many, perhaps most, claims to refugee status involve examination of the truthfulness of the factual assertions of the applicant. Many turn on the assessment of credibility first by the delegate of the Minister and, if review is sought, by the Tribunal[41]. It is worth repeating the words of Gummow and Hayne JJ in *Abebe v The Commonwealth*[42]:

> "… the fact that an applicant for refugee status may yield to temptation to embroider an account of his or her history is hardly surprising. It is necessary always to bear in mind that an applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not life itself."

92 These words had special relevance to the care needed in conducting and analysing the fact-finding process in the present case. Although Dr Rajamanikkam had experience in the use both of written and oral English, a clinical psychologist had reported to the Tribunal that "he had lost some skill in English as his second language and that his behaviour and presentation may be

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**39** (2000) 179 ALR 495 at 506-507 [37]-[40].

**40** (2000) 179 ALR 495 at 506 [38].

**41** For example see *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 75 ALJR 848 at 854 [32], 864 [86], 865 [94]; 179 ALR 296 at 304, 317, 319-320.

**42** (1999) 197 CLR 510 at 577-578 [191], repeated in the joint reasons in *Epeabaka* (2001) 75 ALJR 848 at 854 [32]; 179 ALR 296 at 304.

consistent with early signs of a dementing process".[43] He was 77 years of age when giving evidence to the Tribunal. He did so through an interpreter. In such circumstances, to subject his testimony, and especially particular words within it, to such close verbal scrutiny invited error.

93 The only basis for relief propounded by Dr Rajamanikkam was that such error was of a kind that gave rise to a review under s 476 of the Act and specifically under s 476(1)(g) as elaborated by s 476(4)(b).

The applicable legislation

94 The provisions of ss 476(1)(g) and (4) of the Act, as they stood at the relevant time, are set out in the reasons of other members of the Court[44]. There was no contest that the Tribunal's decision was a "judicially-reviewable decision" within s 476(1). Nothing in s 476(2) was relevant in this case to qualify the generality of the ground stated in par (g).

95 The proper approach to the problem presented by this appeal is to subject the foregoing statutory provisions to analysis[45]. However, as a matter of history, it is worth noting that these statutory provisions built upon and extended (in the decisions to which it applied) the common law provision for judicial review of an administrative decision on the ground of absence of evidence to sustain the decision. The common law rule, as then expressed, was explained by Starke J in *Federal Commissioner of Taxation v Broken Hill South Ltd*[46] in these terms:

> "But if there be no material which would justify the meaning given by the tribunal to the words, that is a question of law. This court has no authority to decide whether the finding is correct, but only whether there is any material upon which the tribunal could reasonably so find."

96 For some time there has been a controversy in Australia as to the exact scope of the "no evidence" ground of review at common law[47]. It is not

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**43** [1999] FCA 1411 at [2] per Einfeld J.

**44** Reasons of Gleeson CJ at [6]; reasons of Gaudron and McHugh JJ at [47]; reasons of Callinan J at [147].

**45** cf *Allan v Transurban City Link* (2001) 75 ALJR 1551 at 1555 [15], 1566 [76]; 183 ALR 380 at 384, 399.

**46** (1941) 65 CLR 150 at 155. See also at 157 per McTiernan J, 160 per Williams J.

**47** cf *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156; cf 146-152; *CA Ford Pty Ltd v Comptroller-General of Customs* (1993) 46 FCR 443 at

(Footnote continues on next page)

necessary in this appeal to settle this question for we are here concerned only with the application of a federal statute. Its language, in the then terms of the Act, was clearly derived from the substantially similar provisions of the ADJR Act[48]. The history of the latter has been usefully traced by Wilcox J in *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal*[49]. I draw upon, but will not repeat, that exposition.

97 It is clear that the ADJR Act provisions, equivalent to ss 476(1)(g), (4)(a) and (4)(b) of the Act, were intended to reflect, in statutory form, the decision of the House of Lords in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*[50], contemporary with the drafting and enactment of the ADJR Act. When *Tameside* is read, the provenance in particular of s 5(3)(a) of the ADJR Act and of s 476(4)(a) of the Act become plain. That leaves s 476(4)(b) (and s 5(3)(b) of the ADJR Act) to be given meaning. But when those provisions are read against the pre-existing common law it is difficult to escape the conclusion that a purpose of those provisions was to extend and expand the availability of the pre-existing common law remedy of judicial review for want of evidence before the decision-maker.

98 In the Federal Court – which has the primary responsibility of applying the ADJR Act and (before it was amended) the equivalent provisions in s 476 of the Act in question in this appeal – there have been several attempts to explain how the primary ground for judicial review for "no evidence" (relevantly s 476(1)(g)) is to operate in relation to the elaboration of that ground (relevantly, s 476(4)(b))[51]. This Court was taken to these authorities. They are helpful and I have taken them into account in reaching my own view. However, I do not feel obliged to attempt to describe and distinguish the course that the authorities have

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446-447; *Bowen-James v Delegate of the Director-General of the Department of Health* (1992) 27 NSWLR 457 at 475; *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 66 ALD 1 at 19 [71]; Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 211-212.

**48** Relevantly, ss 5(1)(h) and (3).

**49** (1986) 13 FCR 511 at 519-521.

**50** [1977] AC 1014 at 1047 per Lord Wilberforce. See reasons of Gleeson CJ at [27].

**51** See eg *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212; *Xiang Sheng Li v Refugee Review Tribunal* (1996) 45 ALD 193 at 203-204 per Sackville J; *Applicant C* (2001) 66 ALD 1 at 17-22 [66]-[87]; *Jegatheeswaran v Minister for Immigration and Multicultural Affairs* [2001] FCA 865; *Fernando v Minister for Immigration and Multicultural Affairs* [1999] FCA 962; *Sarancharkh v Minister for Immigration and Multicultural Affairs* [2001] FCA 1461 at [43]-[48].

taken. The Minister complained that the decision of the Full Court in the present matter represented a departure from the reasoning that had recommended itself to most of the judges of the Federal Court in earlier decisions. He asked for correction.

99 There is no binding authority of this Court on the relationship between ss 476(1)(g) and (4) of the Act (or of ss 5(1)(h) and (3) of the ADJR Act). A somewhat similar issue arose obliquely during argument in *Australian Broadcasting Tribunal v Bond*[52]. However, because the applicant for review under the ADJR Act in that case did not rely on a "no evidence" ground, the scope and meaning of s 5(1)(h) of the ADJR Act did not strictly fall for decision. In his reasons in *Bond*[53], Mason CJ expressly acknowledged that the ground of review in that paragraph had "no direct application here". Nevertheless, he went on to say[54]:

> "The better view, one which seeks to harmonize the two grounds of review [s 5(1)(f) and 5(1)(h)], is to treat 'error of law' in s 5(1)(f) as embracing the 'no evidence' ground as it was accepted and applied in Australia before the enactment of the AD(JR) Act and to treat the 'no evidence' ground in s 5(1)(h), as elucidated in s 5(3), as expanding that ground of review in the applications for which pars (a) and (b) of s 5(3) make provision. Within the area of operation of par (a) it is enough to show an absence of evidence or material from which the decision-maker could reasonably be satisfied that the particular matter was established, that being a lesser burden than that of showing an absence of evidence (or material) to support the decision. This interpretation of the two grounds of review enables one to say that s 5(1)(h) and (3)(a) have the effect of overcoming to a limited extent and in a limited area the restrictions on the traditional 'no evidence' ground considered by Barwick CJ and Gibbs J in *Sinclair v Maryborough Mining Warden*[55].

100 In his reasons in *Bond*, Deane J adverted to a situation similar to that said to have arisen in the present case where the actual "decision" of the administrative decision-maker rested upon (to use a neutral expression) a factual finding shown to be flawed and even wholly lacking an evidentiary foundation

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**52** (1990) 170 CLR 321.

**53** (1990) 170 CLR 321 at 358.

**54** (1990) 170 CLR 321 at 358.

**55** (1975) 132 CLR 473 at 481, 483. See also *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 75 ALJR 1105 at 1119-1120 [80]; 180 ALR 1 at 21.

but arguably supported by other facts which are not subject to such criticisms. The remarks of Deane J are necessarily *obiter dicta*. Nevertheless, they are helpful to the approach that should be taken to the present problem[56]:

> "[T]he Tribunal [has a] duty to act judicially in the present case. That being so, it was necessary that any findings of fact made by the Tribunal, upon which a reviewable 'decision' was based, were supported by some probative material which was properly before the Tribunal. If a finding of fact was not so supported, a 'decision' which was based upon it was invalid. In that regard, it would matter not that the decision could be supported by some other finding of fact which was open to the Tribunal but which the Tribunal had not made. The point can be illustrated by reference to a hypothetical case where a decision could be supported by either a finding of fact A or a finding of fact B and where there was probative material to support a finding of A but no probative material at all to support a finding of B. If, in such a case, the Tribunal stated that it made no finding about, and placed no reliance upon, A but based a reviewable 'decision' on a positive finding of B, the Tribunal would have failed to discharge its duty to act judicially. Its decision would be based on a finding of fact which, being unsupported by any probative material, was, as a matter of law, not open. It would simply be irrelevant to say that there was probative evidence upon which the Tribunal had not relied which would have supported a finding of A which the Tribunal had neither made nor relied upon. Therein, to my mind, lies the compelling force of [the requirement] that a decision made in compliance with [the requirements of natural justice and procedural fairness] must be '*based*' upon probative and relevant material (see, also, *Mahon v Air New Zealand*)."[57]

101 As well as presenting directly for decision the meaning and application of the relevant statutory provisions, this appeal also presents a case that is arguably not covered by Deane J's analysis. Depending on the meaning to be attributed to the statutory phrase "based … on"[58], this was a case where a finding of fact A was unsupported by probative evidence or material but the decision of the Tribunal and the issue to which the findings A and E were addressed (namely credibility of the applicant for a protection visa) were arguably supported by findings B, C, D, F, G and H. In such a case was judicial review available under the Act on the ground that there was "no evidence or other material" to justify the making of the decision? Or could the decision be "justified" or "based on" the

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**56** (1990) 170 CLR 321 at 367-368.

**57** [1984] AC 808 at 820-821.

**58** The Act, s 476(4)(b).

remaining six factors that were not undermined by the Federal Court's critical scrutiny of the factual foundation for the Tribunal's finding against the credibility of Dr Rajamanikkam?

The Minister's argument

102 It may be accepted that the meaning and intended operation of the provisions of s 476(4)(b) of the Act in relation to s 476(1)(g) are not entirely clear. Indeed, they are unclear. It can also be accepted that the Minister presented a number of persuasive arguments for the interpretation that he advanced. I will collect them to show that I have given them due consideration.

103 First, there is the language and structure of s 476 itself. Upon one view, s 476(1) is the primary grant of the facility of application to the Federal Court. Sub-section (4) is a subordinate provision, intended to elaborate, but not to alter, the scope of the primary ground as stated in s 476(1)(g). Upon this basis, the starting point for a "no evidence" application is to ask whether the requirement of par (g) of sub-s (1) has been fulfilled. The Minister argued that, in the present case, it had not. There was evidence or other material to justify the making of the "decision" in question. This was the "decision" that the Tribunal was not satisfied that Dr Rajamanikkam was entitled to a protection visa. So far as that "decision" was concerned, the mere fact that it was based, in part, upon an assessment of his credibility and that two of eight grounds advanced for reaching that assessment were knocked away, did not mean that there was "no evidence". There remained the six other grounds for the Tribunal's credibility finding, undisturbed by judicial review. Therefore, so the Minister argued, the respondents did not get to first base. The respondents acknowledged, properly, that the requirements of ss 476(1)(g) and (4)(b) were cumulative in their requirements. According to the Minister, if there was some evidence to sustain (that is, "justify") the "decision" of the Tribunal, that was the end of the matter. Judicial review was unavailable.

104 Secondly, the Minister submitted that it was essential to read the two related provisions together. Clearly, that is correct. Insofar as any interpretation of par (b) of s 476(4) might otherwise appear to give rise to a ground of review on the basis of some mistake in the assessment of a particular item of evidence, the language of that paragraph, and the context in which it appeared, would lead to the contrary conclusion. As to the language, it was suggested that the reference to basing "the decision on the existence of a particular fact" was inapposite to a case where the "decision" in question involved a satisfaction as to the *absence* of entitlements rather than the affirmative *existence* of a "particular fact". It is this line of reasoning that has persuaded several judges in the Federal Court that s 476(1)(g) read with s 476(4)(b) has no application where the "decision" in question is to the effect that facts do *not* exist. The Minister argued that, in this case the relevant "decision" was of such a character. It was that the Tribunal, reviewing the decision of the delegate who stands in the position of the

Minister, was not satisfied that Australia has protection obligations to the particular claimant[59]. In this sense, it was argued, the notion of the decision being based on the *existence* of a particular fact (as s 476(4)(b) contemplates) was inapplicable. The "decision" in question involved the conclusion that the relevant particular fact or facts did *not* exist – rather than that they existed[60]. One judge of the Federal Court has even described the contrary interpretation as "extremely strained"[61].

105 Thirdly, the Minister pointed to the context of the provisions in question. They appear in legislation (both the ADJR Act and the Act as it then stood) providing for judicial review. This is a limited form of review for errors of law. It does not involve a full merits review of factual finding. Respectful of their limited role in judicial review proceedings, courts need to resist attempts to press their functions into what amount, in effect, to factual scrutiny of the evidence and the way in which the administrative decision-maker, charged with the responsibility of making the decision, has carried out that task. This Court was reminded of what it had said in *Attorney-General (NSW) v Quin*[62], and repeated recently in *Minister for Immigration and Multicultural Affairs v Yusuf*[63].

106 The Minister argued that, if s 476(4)(b) were given the "expansive" construction upheld by the Full Court and urged by the respondents in this appeal, it would effectively open up every affected administrative decision to scrutiny against the broad criterion of whether some factual error or omission had arguably occurred in reaching a particular conclusion about matters of detailed evidence. It was submitted that this was not the proper province of judicial review and that the detailed judicial analysis of the evidence in the present case illustrated that this could not have been the purpose of s 476(4)(b) of the Act.

107 Further, it was argued that the conjunction of ss 476(4) and (1)(g) made it clear that the former was intended to narrow, and not expand, the operation of the latter. This was made obvious by the introductory language of s 476(4) by which, presumably whatever else was arguable in an appeal to the generality of

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**59** By s 65 of the Act, the Minister is to grant a visa "if satisfied" that certain criteria have been met.

**60** Some of the cases in which this view has been expressed are collected in *Sarancharkh* [2001] FCA 1461 at [43] per Hill J.

**61** *N258/00A v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 478 at 486 [27] per Katz J.

**62** (1990) 170 CLR 1 at 35-36 per Brennan J.

**63** (2001) 75 ALJR 1105 at 1118 [73]; 180 ALR 1 at 19.

the language of s 476(1)(g), that provision – narrow as it already was – "is not to be taken to have been made out" unless one or other of the requirements of pars (a) or (b) of s 476(4) were also satisfied.

108 According to the Minister, the interpretation of s 476(4)(b), accepted in this case by the Full Court, would permit a provision obviously intended to be *restrictive* to *expand* beyond all recognition the "no evidence" ground provided by s 476(1)(g). The added qualification would be distorted into an over-reach that was fundamentally incompatible with the limited role of judicial review envisaged in s 476(1). Moreover, it was inconsistent with the strictly limited enlargement of the former common law position provided in the companion provisions of s 476(4)(a), which gave effect to what the House of Lords had held in *Tameside*. In short, in the context, the Minister suggested that par (b) of s 476(4) was an unlikely means to work such a revolution in the traditional limits of judicial review for absence of evidence to justify an administrative decision.

Giving meaning to ss 476(1)(g) and (4)(b)

109 The foregoing are substantial arguments. Various reflections of them have found favour in particular decisions of the Federal Court concerning the problem that is now before this Court. However, for a number of reasons I consider that the preferable construction of the legislation, that is at once consistent with the language and purpose of the Act as it stood at the relevant time and with the decision of the Full Court in the present case, supports the submissions for the respondents.

110 First, it is clear from an examination of the pre-existing common law, that the purpose of enacting at least the paragraphs of the ADJR Act in question here (and hence of ss 476(1)(g) and (4)(b)) of the Act was not merely to state the existing law but to enlarge its ambit of operation. So much was stated in *Bond*[64] by Mason CJ. Indeed it is plain on the face of the provisions. The ADJR Act was a major example of reforming legislation. Although the decision of this Court in the present case has significance for the present parties and other transitional cases still affected, the substantial impact of this decision is likely to be upon future cases arising under the "no evidence" provisions of the ADJR Act. There is no reason to give such provisions a narrow reading.

111 Secondly, as I would read the interaction of s 476(1)(g) with s 476(4), the latter is not a qualification of the application of the "primary" requirement for judicial review stated, as such, in s 476(1)(g), so much as a statement of the content of that application, that is, an exposition of the particular circumstances in which, for these statutory purposes, a "no evidence" ground is taken to apply.

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**64** (1990) 170 CLR 321 at 358.

Viewed in this light – which appears to be the way Mason CJ treated the ADJR Act equivalent ground in *Bond*[65] – the statutory "no evidence" ground of judicial review is both wider and more specific than was the case with "no evidence" grounds for judicial review at common law. This does not read s 476(1)(g) out of the Act. It simply gives that paragraph particular content. So much is made clear by the words of s 476(4) themselves. The ground specified in par (g) of s 476(1) is not to be taken to have been made out unless the requirements of par (a) or (b) of s 476(4) are satisfied. So far as operative effect is concerned, therefore, s 476(1)(g) has none unless one of the two points in s 476(4) is satisfied.

112 Thirdly, once this conclusion is reached, there is no reason to narrow unduly the two grounds mentioned in s 476(4), as the Minister's construction would do. In particular, there is no reason to confine the availability of judicial review by reference to the common law notions that preceded the passage of the Act (and earlier, the ADJR Act). On the contrary, the correct approach to applying such provisions is to give effect to their purposes as apparent in their language. Once this is accepted, there is nothing offensive to the provision of relief by way of judicial review in interpreting s 476(4)(b) of the Act to cover a decision based on a "particular fact" so long as that fact is not some inconsequential or minor fact or item of evidence on the way to reaching the "decision" in question.

113 It does not involve an undue intrusion of the judiciary into the fact-finding processes of an administrative decision-maker to conclude that where, say, a critical fact is found to exist without any foundation in evidence or other material, the judge, supervising the administrative decision-making process for legal error, will set aside such a flawed decision and require it to be made again, freed from such an error. As Deane J indicated in *Bond*[66], where a reviewable decision made under a statute by a repository of statutory power is not supported by some probative material properly before the decision-maker, the "decision", resting on such a foundation, will be invalid. In earlier times, at common law, this would have been explained by resort to the fiction that the Parliament could not have "intended" that a conclusion reached, resting on a mistaken view as to the existence of a critical fact, would be a "decision" of the kind for which it had provided. The judge ordering review is confined to a proper and limited role. He or she does not substitute a decision on the facts or an opinion on the merits of the evidence for that made by the repository entrusted with such functions. All that is done is to set aside the flawed "decision" and to require that a true "decision" be reached without a disqualifying basis resting on the existence of a particular fact which the applicant for relief can show did not exist.

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**65** (1990) 170 CLR 321 at 358.

**66** (1990) 170 CLR 321 at 367-368.

114 Fourthly, the concerns of the Minister that this approach to s 476(4)(b) would open such decisions to undue scrutiny of evidentiary (and thus factual) findings can be met satisfactorily, so long as that paragraph may properly be confined to the non-existence of a fact "critical to the making of the decision". Those words appeared first in the reasons of Mason CJ in *Bond*[67]. Relevantly, those reasons had the added authority of the concurrence of Brennan J[68] and of Deane J[69]. As I have pointed out, *Bond* strictly concerned the ADJR Act but not s 5(1)(h), which is the provision equivalent to s 476(1)(g) of the Act here in question. Nevertheless, the confinement of provisions such as s 476(4)(b) to cases where the "particular fact" in question is "critical" to the decision impugned has been accepted in a series of decisions in the Federal Court. Such decisions can be traced to the reasons of Black CJ (with the concurrence of Spender J and Gummow J) in *Curragh Queensland Mining Ltd v Daniel*[70].

115 In *Curragh*, Black CJ sought a textual source for the idea propounded by Mason CJ in *Bond* – so as to put outside the ambit of judicial review factual findings and evidentiary conclusions at a lower level of importance to the "decision" in question but to admit as proper to judicial review findings and conclusions that could be shown to be "critical" in the sense used by Mason CJ in *Bond*. If the applicant for judicial review could affirmatively establish that such a "critical" finding was based on facts that could be shown not to exist the "decision" would qualify for review.

116 According to Black CJ in *Curragh*, the textual source for this distinction was to be found in the verb "based". A decision will be "*based* … on the existence of a particular fact" where a finding of that fact is critical to the decision. Where a decision is found to be *based* on the existence of more than one fact, Black CJ employed a metaphor to explain the circumstances in which judicial review might be granted in such a case. A decision would be "based" on a particular fact even where that fact is but "[a] small factual link in a chain of reasoning … and there are no parallel links"[71]. In the summary of his reasoning, Black CJ said[72]:

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**67** (1990) 170 CLR 321 at 358.

**68** (1990) 170 CLR 321 at 365.

**69** (1990) 170 CLR 321 at 369.

**70** (1992) 34 FCR 212 at 220-221.

**71** (1992) 34 FCR 212 at 221.

**72** (1992) 34 FCR 212 at 221.

> "A decision may also be based on a finding of fact that, critically, leads the decision-maker to take one path in the process of reasoning rather than another and so to come to a different conclusion."

117 I accept this approach to the meaning of s 476(4)(b) of the Act in question in this appeal. I also agree with what Black CJ went on to say[73]:

> "If a decision is in truth *based*, in the sense I have described, on a particular fact for which there is no evidence, and the fact does not exist, the decision is flawed whatever the relative importance of the fact. Accordingly, I agree with the conclusion of Lee J in *Akers v Minister for Immigration and Ethnic Affairs*[74] that there is no reason to read s 5(3)(b) in a way that would limit its operation to a predominant reason for the decision under review."

118 The decision of the Full Federal Court in *Curragh*, in the context of the corresponding provisions of the ADJR Act, has stood for a decade. It has been applied many times by single judges[75] and by Full Courts of the Federal Court.[76] In earlier proceedings in the Federal Court, the Minister suggested that it was erroneous or inapplicable, at least where the statutory power has not been exercised. So far this argument has not enjoyed success in the Federal Court[77]. In cases similar to the present, the Full Court of that Court has declined to limit, or qualify, *Curragh*[78].

119 I acknowledge that metaphors such as "links in a chain" and synonyms such as "critical" can present difficulties in practice, at least in borderline cases[79]. However, such difficulties have not proved insurmountable in the decade since

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**73** (1992) 34 FCR 212 at 221 (emphasis added).

**74** (1988) 20 FCR 363 at 374.

**75** See eg *Fernando* [1999] FCA 962 at [23]; *Sarancharkh* [2001] FCA 1461 at [48].

**76** See eg *Applicant C* (2001) 66 ALD 1 at 19 [71]-[73]; *Jegatheeswaran* [2001] FCA 865 at [55]-[56], [60].

**77** *Applicant C* (2001) 66 ALD 1 at 19 [71].

**78** *Applicant C* (2001) 66 ALD 1 at 20 [75].

**79** See *Fernando* [1999] FCA 962 at [21]-[22]. Mason CJ had used the word "critical" in *Bond* (1990) 170 CLR 321 at 357-358, a point noted by Gaudron and McHugh JJ in their reasons at [55].

*Curragh* was decided. On the contrary, the judges of the Federal Court have experienced no apparent difficulty in applying the principle established in that case. After all, it is substantially the one foreshadowed by Mason CJ and Deane J in *Bond*. In most instances, judges have rejected the argument that the particular fact in issue, said not to exist, was "critical to the making of the decision" in question.[80] Sometimes, whilst accepting that the impugned finding of fact was "critical" they have rejected the contention that the applicant (who bears the burden of doing so) has shown that the relevant fact does not exist[81]. On rare occasions, of which this is one, the Federal Court has found that the decision-maker has "based" the decision on the existence of a particular fact, classified as "critical", and the person affected has proved that such "fact did not exist", warranting judicial review under s 476(1)(g) of the Act, as elaborated by s 476(4)(b). In my opinion, this approach represents a sensible and entirely appropriate application of the statutory provision. It gives content to the provision consistently with its terms. The construction urged for the Minister would severely curtail the operation of s 476(4)(b). There is no reason to do this. The Minister has now procured from the Parliament amendment to delete the provision in cases of this kind. Why, then, would this Court now impose a construction of the statutory language, different from that which the Federal Court has long treated as settled?

Conclusion: confining but upholding judicial review of facts

120 When the foregoing approach is applied to the facts of the present appeal, it follows that the judgment of the Full Court should be confirmed. The Full Court took as its guide the reasons of Black CJ in *Curragh*.[82] Indeed their Honours recorded that, for the purposes of this case, counsel for the Minister had agreed with counsel for the respondents that what had been said in *Curragh*, in the context of the provisions of the ADJR Act, applied aptly to the relationship between ss 476(1)(g) and (4)(b) of the Act. The Full Court correctly stated that whether or not a finding as to the credibility of an applicant for a protection visa was a finding of a "particular fact" would depend on the circumstances of the particular case.[83] And that an applicant would still have to surmount the two hurdles established by the terms of s 476 of the Act as it stood at the relevant time:

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**80** This was done, for example, in *Xiang Sheng Li* (1996) 45 ALD 193 at 204; *Fernando* [1999] FCA 962 at [25]; *Sarancharkh* [2001] FCA 1461 at [49].

**81** As was the case in *Jegatheeswaran* [2001] FCA 865 at [60]-[61].

**82** (2000) 179 ALR 495 at 501 [19].

**83** (2000) 179 ALR 495 at 502 [21].

- The decision-maker must have "based" the decision in the existence of the particular fact rendering it, as it is sometimes described, "critical" in the circumstances; and

- The applicant must be able to show that the fact did not exist, that is, that there was no evidence or other material concerning the fact before the decision-maker "to justify the making of the decision".[84]

121 Correctly, the Full Court pointed out[85] that this was not a case where the Tribunal had based its conclusions as to the credibility of Dr Rajamanikkam simply on the impression that he had made as a witness. Different considerations would apply in such a case. Instead, commendably in my view, the Tribunal itemised the grounds on which it had found him to be lacking in credibility. Careful analysis had shown that two of these grounds were incorrect in fact. Correctly too, the Full Court noted the wording in s 476(4)[86]. In using the wording "particular fact", it is suggested that something more "particular" and "factual" than the decision on the ultimate fact in issue was contemplated by the terms of s 476(4)[87]. Yet it still had to be a "particular fact" upon which the decision-maker "based the decision" and the consideration that that fact did not exist had to be such as to deprive the "decision" of the Tribunal of evidence or other material justifying its making[88].

122 In the circumstances of this case the Full Court considered that these preconditions for the statutory "no evidence" ground had been made out in respect of the two facts that it found did not exist. In my opinion, that conclusion is fully supported by the critical importance of the finding that the Tribunal made about the want of credibility in Dr Rajamanikkam's evidence and the way in which that evidence explained the significance for its reasoning of the identified "factors" (by inference each of the "factors" operating together). Following the decisions at two levels in the Federal Court, this Court should not, in my opinion, perform its own analysis in order to substitute its own version of the facts on which the Tribunal's decision was based[89]. We are here to correct any error of

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**84** The Act, s 476(1)(g).

**85** (2000) 179 ALR 495 at 502 [23].

**86** (2000) 179 ALR 495 at 501-503 [19]-[24].

**87** cf *Chen v Minister for Immigration and Multicultural Affairs* [1999] FCA 34 at [34] quoted at (2000) 179 ALR 495 at 502 [22].

**88** The Act, s 476(1)(g).

**89** cf reasons of Gleeson CJ at [37]-[42].

the Federal Court. In doing so we should accept the concurrent findings upon which that Court approached its legal duty.

123 Against the background of my analysis, it is worth repeating, with emphasis, what the Tribunal said[90]:

> "There are a range of factors, *which when considered together*, and while allowing for difficulties with translation and the applicant's age, lead the Tribunal to doubt the applicant's credibility. It is the *number of* difficulties with his evidence which in the end tell strongly against the applicant's credibility."

124 Such credibility was critical to the combined application for protection visas. Without credibility, doubt would be cast on the version of events he gave of the circumstances immediately prior to his departure from Sri Lanka and his arrival in Australia. These circumstances were, in turn, critical to the existence of the "fear" and to establishing its grounds in terms that could attract the operation of the Convention definition of "refugee" contained in the Act. In the event, the Full Court refrained for the most part from using the non-statutory synonym "critical". There was no mention of the metaphorical "links in the chain"[91]. However, it is clear that the Full Court conceived itself to be applying what had been said in *Curragh*, although by reference to the terms of s 476(4)(b) itself. The Full Court asked itself whether there were other factors independent of the credibility of Dr Rajamanikkam that would sustain the decision of the Tribunal[92] as "based on" a separate factual foundation. Given the critical importance of the issue of credibility to the success of the combined application and the way in which the Tribunal had explained that the eight factors had to be "considered together", it is unsurprising that the Full Court concluded as it did.

125 The members of this Court might not think that the "critical" factual decision was "based on" the flawed ("non-existent") fact nominated by the Tribunal[93]. But that, in my view, is a factual assessment. It is inconsistent with the list of facts provided by the Tribunal itself as the *basis* of its decision. All that the respondents ask is that the Tribunal's decision be made again without any weight at all being given to the facts found to have been non-existent. In judicial

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**90** The Tribunal's decision extracted in the reasons of the Full Court: (2000) 179 ALR 495 at 508 [48] (emphasis added).

**91** An exception is at (2000) 179 ALR 495 at 509 [50].

**92** (2000) 179 ALR 495 at 509 [50].

**93** Reasons of Gleeson CJ at [37]; reasons of Gaudron and McHugh JJ at [70]; reasons of Callinan J at [161].

review, limited to requiring that the process of decision-making not be legally flawed, this Court's task is not to make its own factual assessments. It is to uphold the respondent's right to have such decisions made lawfully by the repository of the fact-finding power, relevantly the Tribunal. Doing so, the Tribunal might well come to the same conclusion in this case. But at least it will then have done so without a "critical" disqualifying flaw in its reasoning. The Full Court recognised this distinction. This Court should maintain it because it lies at the heart of the proper relationship of courts to administrative decision-makers in conducting judicial review.

Order

126 There was no error in the approach of the Full Court or in its conclusion on the issue that has been argued in this appeal. It follows that the Minister's appeal should be dismissed with costs.

127 CALLINAN J. The question which this appeal raises is whether the Full Court of the Federal Court was right to characterise two findings made by the Refugee Review Tribunal as critical facts which did not exist within the meaning of s 476(4)(b) of the *Migration Act* 1958 (Cth) ("the Act").

Facts

128 The first respondent who is a medical practitioner lived for some years at Point Pedro near Jaffna in north Sri Lanka. The second respondent is his wife. In 1992 the respondents moved to Trincomalee but retained their residence in Point Pedro.

129 The first respondent and his wife arrived in Australia on 24 May 1996. On 26 June 1996 they lodged applications for protection visas. On 20 March 1997 the applications were refused by a delegate of the Minister. On 1 April 1997, the respondents sought a review of that refusal by the Refugee Review Tribunal ("the Tribunal"). On 29 September 1998 the Tribunal affirmed the decision of the delegate.

130 An application for review of that decision was filed in the Federal Court. On 19 November 1999 the Court, Einfeld J, upheld the application, set aside the decision of the Tribunal, and remitted the matter for hearing by a different member of the Tribunal.

131 The Minister appealed against the decision of the Federal Court to the Full Court of the Federal Court. On 3 August 2000 the Full Court (Kiefel, North and Mansfield JJ) unanimously dismissed the appeal. They did so on the basis that the Tribunal purported to rely on two facts critical to its decision which "did not exist" (s 476(4)(b) of the Act). Those two "facts" were the subject of two findings out of some eight in total made by the Tribunal, held to be false, and elements of a concoction on the first respondent's part to enable him to obtain residence in this country.

132 The substance of the first respondent's claim was that he had been arrested by Sri Lankan government forces in Trincomalee in April 1996 and that he had been released from custody only by paying a bribe and offering to leave the district. During the proceedings before the Tribunal the first respondent was asked why he could not return to Point Pedro or Jaffna. He answered that he was harassed in Point Pedro by the Liberation Tigers of Tamil Eelam ("LTTE") and that the LTTE was still operational. The Tribunal then suggested to him that he would be able to recover his property which he claimed he had handed over with the title deeds to it, to the LTTE before leaving Trincomalee, a claim inconsistent with another assertion by him that he had given his property to his children. The Tribunal pursued the question of the respondent's right to his property at Point Pedro. The first respondent then said that the house might have been bombed, and that his friends had told him that the indications were that it had been. He

conceded however that his children would still own the house, and that, according to Sri Lankan law it remained in the children's names.

133 The Tribunal made a number of findings adverse to the first respondent: that his evidence about his entitlement to, and receipt of a pension was inconsistent and deliberately misleading; his evidence of the details of his arrest and subsequent release in April 1996, specifically as to his place of confinement, who were actually present there, his interrogation and his access to people who could negotiate his release, was simply not credible; and indeed, was fabricated. Nor did the Tribunal accept the first respondent's account of his movements in Sri Lanka, particularly his assertion that he had moved to Jaffna recently when in fact he had lived in Trincomalee for four years. Other matters in respect of which the Tribunal thought the first respondent to have been less than frank were as to the fact and time of payment of the bribe to secure his release, the timing of his visit to Colombo to obtain a visa, and his arrest after he had informed the LTTE that he was leaving the country only six weeks before his departure.

134 Passages in the first respondent's evidence to the Tribunal which capture both some of its uncertainties and the sense of some of the contradictions in it are as follows:

> "Q: So your house, no-one was living in your home when you left?
>
> A: No.
>
> Q: Is anyone living there now?
>
> A: Somebody living not but there are boys the LTTE has taken the house and left.
>
> Q: In Point Pedro?
>
> A: Yes.
>
> Q: I thought that area was being taken over by the Sri Lankan Government.
>
> A: Now.
>
> Q: Alright. Okay but no-one in your family's there? Now that the house, there's no-one …
>
> A: No, No.
>
> Q: Okay so someone's probably taken temporary ownership. Because that house is still in your name, you still have the deeds to that house, is that right?

A: The house is still in our name but they have been taken by them.

Q: Right, okay, but apparently that goes on that when people vacate the house the house gets taken by whoever's in residence in the area at that time. But the house is still, you have deeds to the house, the house is still yours, still your property? You still own the property?

A: We have [indistinct] but they also have taken the deeds. LTTE.

Q: Well they might have taken the deeds but it's only temporary the deeds are given over to the LTTE when people leave the country.

A: And when they leave they take all the deeds.

Q: I understand that. But you still under Sri Lankan law would have access to …

A: … under Sri Lankan law it belongs to us.

Q: That's right. Because people have been able to move back to their houses after the LTTE have left the area.

A: But whether the house is there is the question.

Q: Well that's true I understand that. And what condition it's in.

A: Have been bombed by the Government.

Q: I understand. No I understand, a lot of people's houses have been bombed and I know what you're saying.

A: Especially if it has been used by the boys it will definitely be bombed and finished off.

Q: I understand."

And,

"INTERPRETER: Army? You mean in Point Pedro?

MR THOMSON: Yes.

INTERPRETER: Yes, they are camped most there.

MR THOMSON: It is now there?

INTERPRETER: Well, after that it was not there because LTTE had captured everything.

MR THOMSON: But Jaffna has been cleared for several years now.

INTERPRETER: Yes, for the past two years what will under that be. It is under their control.

MR THOMSON: So, why did you say that you could not go back to Point Pedro and that it had not been cleared to the Department of Immigration?

INTERPRETER: Well, I did not say that it had not been captured.

MR THOMSON: Tell me why you cannot go back to Point Pedro?

INTERPRETER: You mean to Point Pedro?

MR THOMSON: Or to Jaffna?

INTERPRETER: Well, my home town is Point Pedro. Well, Point Pedro I left because LTTE took me and harassed me and mistreated me. That is why I left.

MR THOMSON: Yes, but they are no longer in Jaffna. Why can you not go back?

INTERPRETER: Why they not there. Even the brigadier, they shot him dead.

MR THOMSON: So you say they are still operational?

INTERPRETER: Yes.

MR THOMSON: You would be able to get your properties back, would you not?

INTERPRETER: Any property I had I have given to my children. Well, after that – boys they took the house.

MR THOMSON: Yes, they took the house but you would own it legally. The Tigers would not be allowed to own your house.

INTERPRETER: Well, also Tigers will not be able to keep. If a house had been occupied by Tigers, well, this house will be bombed and it will be treated as a house occupied by Tigers. That is what is happening there.

MR THOMSON: You did not answer my question. I said you would own that house if it is still there, would you not?

INTERPRETER: Well, if it is there well, not to me because I have already given to my children.

MR THOMSON: Well, your children would own it.

INTERPRETER: Well, you mean house, land?

MR THOMSON: Yes.

INTERPRETER: Legally?

MR THOMSON: Legally.

INTERPRETER: Not practically.

MR THOMSON: Well, I do not understand 'not practically' because the Tigers are not there from day to day.

INTERPRETER: The Tigers are there or they maybe even given to someone.

MR THOMSON: You did not give them the title deeds, did you?

INTERPRETER: Well, they took it.

MR THOMSON: They took your title deeds?

INTERPRETER: Well, when we left we gave the title deed and other things and that is how we came this way.

MR THOMSON: So, are you or are you not or are your children – do your children own the properties in Point Pedro or do they not?

INTERPRETER: Well, according to the Sri Lankan law it is in their name or ownership but these persons who benefit have given to their people and how could one get all this back.

MR THOMSON: Well, I do not think the Tigers would be going into the Sri Lankan courts.

INTERPRETER: No, but there is no court there.

MR THOMSON: No, you could ask the military but - - -

INTERPRETER: Well, there is no municipality. Even the mayor has been shot dead."

Proceedings in the Federal Court at first instance

135 In the Federal Court, Einfeld J said that the first respondent, whilst apparently "invited" to appear to "present arguments", was not given an opportunity to do so on "the crucial concoction issue". This, His Honour said, became an issue for the first time in the decision of the Tribunal. It was an issue not merely "related to" the decision under review, but was virtually determinative of it. Section 425(1) of the Act required that such an important allegation be clearly put to the first respondent and his answer taken and recorded. Section 430 of the Act imposed an absolute need for a reasonable analysis and explanation of what the actual discrepancies were, even more so as the protection and ordinary safeguards of adversarial litigation were absent. The decision of the Tribunal was deficient in these respects.

136 His Honour then dealt with the first respondent's contention that the Tribunal had no basis for the making of some, at least, of the adverse findings that it had made. One of them related to the first respondent's entitlement to, and receipt of a pension. As to that his Honour said:

> "The delegate had found that he was receiving a pension. At the hearings the Tribunal did not ask the [first respondent] whether he was receiving a pension. At the second hearing in reply to the question: 'How much do you get for your Government pension?' he stated: '… less than $100 … a month'. The [first respondent] did not say there or anywhere else that he was in fact receiving the pension, as opposed to having a legal entitlement to it. The question of whether, how and when he would ever receive it was never addressed other than the interviewer's proposition that 'as far as I know there is no reason that they would stop it unless you asked them to'. This comment represents no evidence on which to base a conclusion of the kind advanced by the Tribunal."

137 Einfeld J then discussed the Tribunal's finding that the first respondent's personal networks in the South and Central districts would help him to settle there if he were so disposed, and that therefore a criterion of the United Nations High Commissioner for Refugees that:

> "a valid threshold for returnees to establish themselves without serious personal security problems in [different areas], would be the presence of close relatives and/or duration of previous residence and/or a past employment in these areas"

was not met.

138 His Honour's view of that finding appears from these passages:

> "The [respondents] are elderly people in failing health. According to the evidence, they have no family, status or possessions in Jaffna town. Dr Rajamanikkam said that there was no effective civil administration there and that there were people resigning from government positions as a result of murders by the LTTE. So far as I can see, there was no contrary evidence. The Tribunal did not explain how Jaffna was or would be a possible place for the [respondents] to live. The impression is that the Tribunal just selected Jaffna as a well known town in a Tamil area and worked up to relocation without reason."

The approach of Einfeld J, (as if, in my view, his Honour were sitting on a full appeal by way of rehearing) appears from the following passage from his judgment.

> "Point Pedro is said to be an important town located some 22 miles from Jaffna town/city but in the Jaffna region/province. From 1976 it was the applicant's home town where he had owned properties but his evidence was that his house and everything else that was his in Point Pedro had been taken by the LTTE. Although the army now has a military headquarters in Point Pedro and it is under government control, the LTTE still operates in Point Pedro. In his second statement, the applicant stated that in Point Pedro he would be suspected to be a Tamil because of his name, language and identification card. He would there be branded as a 'Tiger'.
>
> …
>
> Having set up and then accepted the Jaffna option in what in my view can only be considered as a confusing almost semantic quibble, and having apparently found the problems surrounding Point Pedro as too difficult to address, the Tribunal then dismissed the Colombo proposition [the first respondent's ability to relocate to Colombo] without any explanation at all. Even the issue being debated was not made clear. The question was whether Point Pedro or Jaffna or Colombo or somewhere in the central region would be safe for two ageing retired Tamils who had been suspected by both sides of the conflict of links with the other. This may be a life and death question, not to be determined by drawing an unexplained link between a mistaken understanding of evidence about a pension and whether a man who had been out of Sri Lanka for more than two years said or knew that the LTTE were still operating in Point Pedro or not and what was the extent of government control of the town."

139 It is unnecessary to refer to other grounds upon which his Honour found in favour of the respondents as these were not the subject of argument in this Court. In the result his Honour set aside the decision of the Tribunal and ordered a rehearing of the respondent's review by a differently constituted Tribunal.

Proceedings in the Full Court of the Federal Court

140 The appellant appealed from the decision of Einfeld J to the Full Court[94] of the Federal Court (Kiefel, North and Mansfield JJ). That Full Court took the view that the reasoning of an earlier Full Court (Black CJ, Spender and Gummow JJ) in *Curragh Queensland Mining Ltd v Daniel*[95] effectively governed this case. There, Black CJ (with whom Spender J and Gummow J agreed) said of like provisions in the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act")[96]:

> "In a 'no evidence' case in which s 5(1)(h) is relied upon, the ground may be made out if, but only if, the case falls within either s 5(3)(a) or (b). It is not suggested that this case falls within s 5(3)(a) but it is put that the finding that Curragh could have had a later delivery date was a finding of a particular fact, upon the existence of which the decision-maker based his decision, and that such a fact did not exist.
>
> The fact in question was clearly a 'particular fact' and, in my view, the decision was 'based' upon it. If the existence of a particular fact is seen to be critical to the making of a decision then the decision will be based on the existence of that particular fact. In *Bond's* case[97] Mason CJ said (at 357) that s 5(3)(b) was directed to 'proof of the non-existence of a fact *critical* to the making of the decision' [emphasis added]. See also *Luu v Renevier*[98] where a Full Court of this Court (Davies, Wilcox and Pincus JJ) used the word 'critical' to distinguish unsupported findings of fact that go to the validity of a decision from findings relating only to a matter of peripheral importance that may not affect the validity of a decision."

141 Later however Black CJ, appears to have rejected the proposition that the non-existent fact needed to be a critical fact and summarised his reasoning in this way[99]:

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**94** *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2000) 179 ALR 495.

**95** (1992) 34 FCR 212.

**96** (1992) 34 FCR 212 at 220.

**97** *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

**98** (1989) 91 ALR 39 at 47.

**99** (1992) 34 FCR 212 at 221.

> "If a decision is in truth based, in the sense I have described, on a particular fact for which there is no evidence, and the fact does not exist, the decision is flawed *whatever the relative importance of the fact*. Accordingly, I agree with the conclusion of Lee J in *Akers v Minister for Immigration and Ethnic Affairs*[100] that there is no reason to read s 5(3)(b) in a way that would limit its operation to a predominant reason for the decision under review." [emphasis added]

142 The Full Court in this case held that "facts which did not exist" were relied on by the Tribunal here and that those facts were non-peripheral facts. It dealt with one of those facts in this way[101]:

> "It does appear that the tribunal erroneously understood that the respondent had said 'no' rather than 'now' when asked whether Point Pedro was being taken over by the Sri Lankan government. There was no evidence from the respondent denying that Point Pedro had been taken over by the Sri Lankan government. The tribunal attributed that denial to him. The fact that he denied that to the Department is a fact which did not exist."

143 The other non-existent fact was dealt with in this way[102]:

> "The statement of the respondent, containing the information that he had moved to Trincomalee in January 1992 and that he thought he had been arrested as a Jaffna Tamil who had moved from Jaffna recently, does not provide evidence that the respondent claimed he was 'new' to Trincomalee in the sense that expression was used by the tribunal. He did not by that statement seek to convey that he had arrived in Trincomalee much later than 1992, although the tribunal used the fact that he had arrived in Trincomalee in 1992 to contrast his statement that he was a recently arrived Tamil. No other evidence was identified as providing any basis for attributing to the respondent such a claim. In that circumstance, the particular fact that the respondent had made the claim as identified by the tribunal did not exist."

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**100** (1988) 20 FCR 363 at 374.

**101** *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2000) 179 ALR 495 at 504 [28].

**102** *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2000) 179 ALR 495 at 506 [38].

144 The Full Court stated its conclusion as follows[103]:

> "… it was the combination of factors which caused the tribunal to doubt the respondent's claims. It was the accumulation of difficulties with his evidence which led to its conclusion. Each of those two facts which have been shown not to exist was integral to a factor which comprised part of that accumulation. Neither of those two matters is therefore of peripheral importance to the decision. As the tribunal has described its process of reasoning, each is a matter which played a part in the tribunal's process of reasoning. That is so, not simply taking those two matters separately, but also because they contributed to its conclusions concerning [a third] factor … . This is not, therefore, a case where those matters are merely parallel links in a chain of reasoning; they are matters without which the tribunal may well not have reached the conclusion which it did. In our judgment, each of those matters in the particular circumstances of this case were particular facts upon which the tribunal based its decision to reject the respondent's primary claims as concocted. As those facts were facts which did not exist, the ground of review under s 476(1)(g) and (4)(b) has been made out."

145 The Full Court, contrary to the opinion of Einfeld J, was not persuaded that the Tribunal erred by failing to comply with s 430 of the Act in deciding that the first respondent could reasonably relocate within Sri Lanka, either to Colombo, Jaffna, Point Pedro or the central area. The Court also rejected an assertion of the respondents that there has been a failure to find material facts, and therefore a breach of s 430(1)(c) of the Act.

146 The Full Court, having found however that the Tribunal had erred in the respects to which I have referred, dismissed the appellant's appeal.

The appeal to this Court

147 In this Court the appellant repeated his argument in the Court below, that the respondents were not entitled to succeed in the Federal Court because they failed to satisfy the two conditions for judicial review that are prescribed by ss 476(1)(g) and 476(4)(b). Those provisions which have now been repealed were as follows:

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**103** *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2000) 179 ALR 495 at 509 [49].

"476(1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

…

(g) that there was no evidence or other material to justify the making of the decision.

…

(4) The ground specified in paragraph (1)(g) is not to be taken to have been made out unless:

…

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

148 Sub-section (1) requires that there be no evidence or other material to justify the making of the decision. Its provisions raise a high hurdle. Here there were eight grounds for the Tribunal's finding on credit, which was, I would accept, critical. Only two of these were erroneously made. The appellant submits that six of its findings adverse to the first respondent were based on evidence or other material well justifying the conclusion that the respondents' claims were unacceptable, and therefore the decision. Against that, the respondents put that the Tribunal relied, for its ultimate finding of a concoction on the part of the first respondent, upon the *compendium* of the eight matters: that if one, or, as here, two must be subtracted from the compendium, then there was no evidence to justify the making of a critical part of the decision, that is, of a concoction.

149 With respect to s 476(4)(b), the appellant submits that even if the respondents made good their argument as to the effect of s 476(1)(g) they cannot bring the Tribunal's decision within s 476(4); that this sub-section is concerned with facts which are particular, in the sense of being facts which the Tribunal must find, facts essential to the exercise of a jurisdiction in favour of an applicant such as, the holding of a fear, that the fear is well founded, and it is of persecution for a Convention reason; and not facts such as whether an applicant was untruthful as to a matter of detail, or as to a matter which was not an ultimate one for the conclusion that a Convention ground has been made out.

150 It is important to distinguish between the exercise by the Federal Court of its jurisdiction to review a decision under the Act, and the exercise of appellate power on an appeal by way of rehearing. In the course of the latter, subject only to the conventional caution exercised by appellate courts with respect to findings on credit and of fact, the appellate court is entitled to reverse a decision of the

court or tribunal appealed from on matters of fact as well as law. And, I have pointed out[104] on other occasions, even if there is evidence available to support a decision at first instance, error as to other factual matters may in some circumstances, infect that decision to the extent that it should be set aside. That is not the situation here. The decision of the Tribunal could only be set aside by the Federal Court if the respondents could bring it within the specific provisions of s 476(1)(g) and (4).

151 Sub-section (4) was obviously not intended to expand the basis for review for which sub-s (1)(g) provided. This is clear from the opening words of the provision which employ the negative expression, "the ground … is *not* to be taken to have been made out unless …" [emphasis added]. A different interpretation might have been available had the sub-section been expressed in the affirmative to suggest that one, but perhaps not the only basis for the application of s 476(1)(g) would be, the making of a decision based on a non-existent fact. Sub-section (4) stated:

> "The ground specified in paragraph (1)(g) is not to be taken to have been made out unless:
>
> …
>
> (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

152 It is also important to distinguish between a decision and the reasoning upon which a decision is reached. What was the decision here? In terms it was as follows:

> "Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant does not satisfy the criterion set out in s 36(2) of the Act for a protection visa."

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**104** *Rosenberg v Percival* (2001) 75 ALJR 734 at 774 [222]; 178 ALR 577 at 632:

> "… In *Boland v Yates Property Corp Pty Ltd* [(1999) 74 ALJR 209 at 270-271 [299]; 167 ALR 575 at 656-657] I expressed my concern about the artificiality in some situations, of excising clearly erroneous parts of a judgment from other parts in which no error is apparent. That process may assume an even more unconvincing air when the error relates to credibility and credibility is a significant issue in the trial."

153 The "decision" was not that the first respondent had not told the truth about two matters. It was not even that the first respondent's claims in support of his application were a concoction. That eight of them were not honest claims may have been a reason why the Tribunal regarded the first respondent's application as insufficient to establish a Convention reason, but that there had been a concoction (because of six or eight falsehoods) was not the decision of the Tribunal to which both sub-sections referred.

154 In order for the respondents to succeed however it was not necessary for the first respondent to show that a non-existent fact formed part of the decision. It would be enough if the decision were shown to be based on a non-existent fact. The Tribunal here did not find, as Courts or Tribunals sometimes do, that one or more, but not all of several facts or matters were sufficient to produce an adverse reaction to the first respondent's credibility. Quite specifically the Tribunal held that it was the cumulative effect of the first respondent's falsehoods that led it do so.

155 It is important nonetheless to give the words "based the decision" full weight. "Based" certainly implies in my opinion, something more than "had regard to" or "took into account". For s 476(4)(b) to apply the Tribunal must have used the non-existent fact as a base for, or, if a synonym be required, as a foundation for the decision.

156 It is also necessary to keep in mind the difference that may exist between an erroneous finding of fact and a non-existent fact. Not all of the former will necessarily involve reliance on the latter. An erroneous finding of fact will only involve the basing of a decision upon a non-existent fact if another condition is also satisfied, that an affirmative finding of a fact which does not exist has been made.

157 Another significant matter to be noted is the use of the emphatic word "particular" in s 476(4)(b). Its presence has three implications: that it is unlikely that the legislature intended a "non-existent fact" to embrace a negative finding by the Tribunal as to factual allegations by a claimant for refugee status; that the particular fact must be a central or critical one, or indeed a fact basic to the decision; and that the reference is to a fact and not an inference from it or other facts.

158 In *Australian Broadcasting Tribunal v Bond*[105] Mason CJ discussed ss 5(1)(h) and 5(3) of the ADJR Act. Those provisions, his Honour said, did not exclude the possibility of a "no evidence" ground of review arising as an "error

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**105** (1990) 170 CLR 321.

of law" pursuant to s 5(1)(f) but that case did not raise the question which must be answered here. What his Honour did relevantly say was this[106]:

> "However, such a result would verge upon the extreme and would pay scant attention to the traditional common law principle that an absence of evidence to sustain a finding or inference of fact gives rise to an error of law. The better view, one which seeks to harmonize the two grounds of review, is to treat 'error of law' … as embracing the 'no evidence' ground as it was accepted and applied in Australia before the enactment of the AD(JR) Act and to treat the 'no evidence' ground … as expanding that ground of review in the applications for which pars (a) and (b) of s 5(3) make provision."[107]

159 The respondents contend that the following passage in the Tribunal's reasons contains affirmative findings of non-existent facts.

> "The Tribunal had a number of concerns with the applicant's claim that he was of interest to the Sri Lankan authorities. The main problems faced by the applicant from the Sri Lankan authorities occurred in an incident in April 1996, approximately six weeks before he left Sri Lanka. There are a range of factors, which when considered together, and while allowing for difficulties with translation and the applicant's age, lead the Tribunal to doubt the applicant's credibility. It is the number of difficulties with his evidence which in the end tell strongly against the applicant's credibility."

160 I would read that passage as a rejection of the first respondent's claim rather than as the making of affirmative findings of fact. What has happened is that the first respondent has failed to persuade the Tribunal of the validity of his claims.

161 Having regard to the matters to which I have referred therefore this appeal must be allowed. The Tribunal held that the first respondent was not a credible witness. There was evidence to support that holding with respect to no fewer than six matters. There were clearly evidence and material to support the Tribunal's decision that the first respondent was not entitled to the status of a refugee for a Convention reason. The Tribunal did not reach its decision on the basis of the existence of a particular fact which did not in truth exist. One example of such a non-existent fact might be a baseless affirmative finding that the first respondent was a spy for either the forces of the government or the insurgents. There was no finding of such a kind here. And, in any event errors with respect to two matters out of eight going to the first respondent's credibility

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**106** (1990) 170 CLR 321 at 358.

**107** The equivalent of s 476(4).

do not, singly or together, answer the description of a "decision based … on the existence of a particular fact [which] did not exist."

162 I would allow the appeal, and, by agreement of the parties, make no order as to costs.