Federal Court of Australia

CMC16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 121

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| Appeal from: | *CMC16 & Anor v Minister for Immigration & Anor* [2021] FCCA 276 |
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| File number(s): |  |
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| Judgment of: | **ROFE J** |
|  |  |
| Date of judgment: | 18 February 2022 |
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| Catchwords: | **MIGRATION** – appeal from judgment of the Federal Circuit Court of Australia – judicial review of a decision of the Administrative Appeals Tribunal affirming decision of the delegate not to grant a protection visa – whether Tribunal made findings without probative evidence – whether Tribunal took into account irrelevant matters – whether Tribunal failed to take into account probative evidence – findings regarding appellants’ credibility – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) |
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| Cases cited: | *AFD21 v Minister for Home Affairs* [2021] FCAFC 167  *BFH16 v Minister for Immigration and Border Protection* [2020] FCAFC 54  *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2  *Minister for Home Affairs v Buadromo* [2018] FCAFC 151  *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30  *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1 |
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| Date of hearing: | 18 October 2021 |
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| Counsel for the Appellants: | A J Byrne |
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| Solicitor for the Appellants: | MyVisa Lawyers |
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| Solicitor for the First Respondent: | A Cunynghame of Sparke Helmore |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

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|  | | VID 127 of 2021 |
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| BETWEEN: | CMC16  First Appellant  CMD16  Second Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | ROFE J |
| DATE OF ORDER: | 18 February 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellants pay the first respondent’s costs as assessed or agreed.

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

REASONS FOR JUDGMENT

ROFE J:

# Introduction

1. This is an appeal from a decision of the Federal Circuit Court of Australia (the **FCC**) dismissing an application for judicial review of a decision of the second respondent, the Administrative Appeals Tribunal (the **Tribunal**). The Tribunal had affirmed the earlier decision of a delegate of the first respondent, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (the **Minister**), not to grant the appellants’ protection visas under the *Migration Act 1958* (Cth) (the **Act**).
2. The appellants are Indian citizens who arrived in Australia in 2007 on student visas. They met upon arrival in Australia and married later that year. At the conclusion of the first appellant’s student visa, she unsuccessfully applied for a temporary graduate visa. The first appellant then applied for a protection visa on 13 August 2014, naming the second appellant as a secondary applicant. This application was refused by a delegate of the Minister on 30 March 2015.
3. On 17 August 2016, the Tribunal published reasons affirming the Minister’s decision to refuse the appellants’ application for a protection visa. The Tribunal was not satisfied that the Appellants were people in respect of whom Australia owed protection obligations. The Tribunal did not accept that state protection in India was not available to the Appellants, did not accept that the Appellants would face a real chance of serious harm or real risk of significant harm if returned to India, and was not satisfied that the Appellants had a well-founded fear of persecution.
4. The appellants applied for judicial review of the Tribunal’s decision in the FCC, which dismissed the application.
5. In this appeal, the appellants challenge the conclusion of the FCC that the Tribunal’s decision was not illogical, irrational, or otherwise legally unreasonable.
6. For the reasons that follow, the appeal should be dismissed with costs.

# Background

1. The background facts below are based on the Tribunal and FCC decisions.
2. The first appellant was born and raised in a small village in India with a population of around 2000 people. The first appellant is Hindu, and her father was a well-known political figure and member of the Bharatiya Janata Party (one of India’s major political parties).
3. In 2002 a man called Baljinder Singh Sonu (**Baljinder**) began pursuing the first appellant in the hope of marrying her. The first appellant and her family were not in favour of the marriage and rejected Baljinder’s advances. The first appellant claims Baljinder had previously been involved in criminal activity such as drug smuggling, theft, and murder.
4. In August 2002, a group of armed assailants (including Baljinder) invaded the first appellant’s family home and attempted to kidnap her. Members of the first appellant’s family were injured during the invasion, requiring hospitalisation.
5. While Baljinder was “booked”, and police pursued charges against a number of other assailants, all charges were ultimately dropped by 2005. Baljinder spent some days in prison but was released shortly after the home invasion. The first appellant’s father organised a rally after the invasion, which attracted some media attention.
6. The first appellant states that she remained at home for two years after the home invasion, and could not continue her studies in India.
7. In the decade following the home invasion, two members of the first appellant’s family were killed in vehicle incidents:
8. In 2005, the first appellant’s grandfather was struck and killed by a vehicle while walking with the first appellant’s father in their village. Before the Tribunal, the first appellant stated that the driver was jailed for some months before being released on bail; and
9. In 2012, the first appellant’s uncle was struck and killed by a vehicle in the same village. In this case, the driver was jailed for two years.
10. The appellants are of the view that Baljinder was involved in both the 2005 and 2012 incidents. The first appellant says her father was the target of both attacks, and that he was told words to the effect that he would be killed next. The first appellant also says that her father saw Baljinder in the truck with the driver in the 2005 incident.
11. In February 2007, the first appellant left India and came to Australia on a student visa. As noted above, the appellants met in Australia and married on 29 June 2007. After some time, the second appellant became the second applicant on the first appellant’s student visa.
12. The first appellant applied for a subclass 485 (temporary graduate) visa, which was refused. On 13 August 2014, the first appellant then lodged an application for a protection visa. The second appellant was the secondary applicant on the protection visa application.
13. The first appellant’s grounds for seeking a protection visa included:

* her family had continued to receive threats from Baljinder and his associates;
* Baljinder was involved in the road accidents leading to both her grandfather’s death in 2005 and her uncle’s death in 2012;
* her parents have told her to stay away from India because of the continued threat posed by Baljinder;
* the police in Punjab cannot and will not protect the appellants should they return to India; and
* the second appellant’s parents do not accept the couple’s marriage, so returning to India would put their marriage at risk.

1. On 30 March 2015, the delegate of the Minister refused to grant the protection visa.

# The Tribunal decision

1. The Appellants were represented throughout the protection visa application process, and gave oral evidence before the Tribunal at the hearing on 16 November 2015. Their representative filed submissions before the Tribunal hearing and provided further material afterwards.
2. At [5]–[20] of its reasons, the Tribunal summarised the relevant legal principles relating to Australia’s protection obligations and complementary protection regime.
3. At [21]–[34], the Tribunal considered the claims and evidence put forth by the appellants.
4. The Tribunal then went on to assess the oral evidence given by the appellants at the hearing; discussing the first appellant’s evidence at [35]–[90] and the second appellant’s at [91]–[119]. The appellants’ oral evidence is summarised in some detail.
5. At [120]–[132], the Tribunal considered country information about India, sourced from a DFAT Country Report dated 15 July 2015. The Tribunal also acknowledged other sources of country information, including road safety statistics and an article published in the Times of India.
6. The Tribunal sets out its reasons and findings from [133]. It is not necessary to summarise all of the Tribunal’s findings, but the key findings were as follows:
7. the Tribunal accepted that the first appellant had been pursued by Baljinder and that she was the target of an attempted kidnapping in the 2002 home invasion. The Tribunal noted that the contemporaneous media reports provided by the appellants were consistent with the first appellant’s evidence. The Tribunal accepted that the harm feared by the first appellant is kidnapping or killing, which equate to serious and significant harm.
8. the Tribunal accepted that the first appellant’s grandfather and uncle were killed in two separate road accidents in 2005 and 2012, noting that her grandfather’s cause of death was by bus and her uncle’s cause of death by truck. However, the Tribunal did not accept that Baljinder was related to those two accidents. As this reasoning is the basis of the appellants’ grounds of appeal, the relevant passage from [143] is set out below:

The Tribunal does not accept that these two accidents were related to Baljinder Singh Sonu and his interest in pursuing Applicant 1. Whilst appreciating that India is a patriarchal society and that the applicant’s father may be blamed for the rejection of the marriage proposal and hence targeted, this is only speculative and no evidence exists to suggest that this is the case or that he was responsible. Furthermore, the Tribunal places weight on the high degree of road accidents which occur in India and finds that this is the most likely and logical explanation. **There is no logic in why Baljinder Singh Sonu would target the applicant’s older male relative in 2005 or in 2012**. In 2005, Applicant 1 was still in India and she could have been the target. The accidents occurred three and ten years after the attempted kidnapping. The media had reported widely on the attempted kidnapping and in spite of the applicant’s families dismay that few were arrested, some of those in the attack were brought before the courts. The attempted kidnapping has been presented to the Tribunal as newsworthy in the applicant’s home town and as such any persons likely to perpetrate such crimes would be likely to be afraid of the repercussions and the fact that they would be under suspicion.

(Emphasis added.)

Relatedly, the Tribunal noted the absence of media reporting of these incidents (in contrast to the media reporting of the 2002 home invasion). The Tribunal found that the two deaths were caused by unfortunate road incidents, considering the country information about road fatalities in India.

1. The Tribunal did not accept that the first appellant went into hiding for two years after the 2002 home invasion, noting that the first appellant’s account of the two years was vague and lacking in detail, and that the first appellant then evidently lived more openly in the village for a further three years before coming to Australia.
2. The Tribunal found that the appellants had enhanced their claims to support their protection visa application. As this conclusion is challenged by the appellants, it is useful to set out the full passage at [146]:

The Tribunal has considered the time in which it took for Applicant 1 to lodge her protection visa application. She arrived in Australia on a student visa in 2007. She told the Tribunal she came to “save her life” yet she waited seven years to apply for a protection visa. Over the course of this time, she refers to road accidents that killed family members and claims they are related to her yet she did not seek to apply for protection. Furthermore, the Tribunal notes that Applicant 2 confirmed his brother-in-law who lives in Australia returned to India for “a couple of weeks” yet Applicant 1 stated he came to Australia to “save his life”. The Tribunal does not accept that someone who is so fearful of being harmed that they seek protection in another country would return because their “in-laws” requested it yet put their life at risk. This adds further weight to the finding that the Tribunal does not accept that Applicant 1’s family members died because of Baljinder Singh Sonu. The Tribunal finds that Applicant 1 and 2 have enhanced their claims to support their protection visa application. The Tribunal finds these claims are not credible for the reasons explained above.

1. The Tribunal did not accept that the first appellant’s family continued to receive ongoing and constant threats from Baljinder, nor that they fear for their lives or the lives of the applicants. This finding was based on the fact that the first appellant’s family came to Australia in July 2013 and stayed for a year (during which time they did not seek protection) before returning to India.
2. The Tribunal found that Baljinder was an undesirable character, but that he would not likely pose a threat to the appellants. The appellants also challenge this part of the reasoning at [154]:

The Tribunal finds that Baljinder Singh Sonu was an undesirable character that tried to unsuccessfully kidnap Applicant 1 in 2002 when Applicant 1 was 18 years old. The Tribunal notes that Applicant 1 and 2 are married and fourteen years have since passed. The Tribunal finds that with the passage of time it is highly implausible that Baljinder Singh Sonu would continue to try and pursue, marry or threaten Applicant 1 or her family (including Applicant 2).

1. The Tribunal did not accept that state protection is not available to the Applicants.
2. Based on the above, the Tribunal concluded at [161]–[163] that it was not satisfied that the applicants are people to whom Australia owes protection obligations under s 36(2) of the Act.

# The Federal Circuit Court decision

1. The appellants applied to the FCC for judicial review of the Tribunal’s decision. The grounds before the FCC are substantially the same as those relied on in this proceeding.
2. Grounds 1 and 2 before the FCC were put as follows (extracted from [27]–[28] of the FCC decision):

1. The Tribunal fell into jurisdictional error; on the basis of legal unreasonableness and irrationality or illogicality, by failing to consider probative evidence.

Particulars

(a) In finding that there would be ‘no logic’ in [Baljinder] targeting the first applicant’s older male relatives in violence in 2005 and 2012, and that it was ‘highly implausible’, given the passage of time since 2002, the [sic] Baljinder would continue to threaten, or pose a threat of, violence to the first applicant or her family, the Tribunal failed to consider, or give any weight to evidence that:

(i) Baljinder was a member of a crime family and had background of involvement in illegal activities (including drug smuggling, theft and murder);

(ii) Baljinder was involved with extremist groups;

(iii) the failed attempted kidnapping of the first applicant was arranged and directed by Baljinder;

(iv) during the kidnapping attempt, the assailants attempted to kill, with weapons, members of the first applicant’s family;

(v) during the kidnapping attempt, the assailants caused, with weapons, violent and severe injuries to members of the first applicant’s family;

(vi) the first applicant’s father spoke out publicly against Baljinder in relation to the kidnapping attempt;

(vii) Baljinder was charged, and held in jail on remand for four days, in relation to the kidnapping; and

(viii) Several of the assailants (involved in the kidnapping attempt) had criminal proceedings brought against them, and these remained on foot until 2005; and

(b) In not accepting that Baljinder was involved in the deaths of the first applicant’s grandfather (in 2005) and uncle (in 2012) (each hit by a vehicle whilst walking with the first applicant’s father), the Tribunal failed to consider, or give any weight, to the evidence referred to in paragraph (a) above or evidence that:

(i) the first applicant’s grandfather and uncle were run down by vehicles in the same area (and in both cases, whilst walking with the first applicant’s father);

(ii) criminal proceedings were on foot against certain of the attempted kidnapping assailants up to 2005;

(iii) the vehicle that killed the first applicant’s grandfather was owned by a friend of Baljinder, and the driver of the vehicle was an associate of Baljinder;

(iv) Baljinder was a passenger in the vehicle that killed the first applicant’s grandfather (when the death occurred); and

(v) Following the death of the first applicant’s grandfather, Blajinder said to the first applicant’s father ‘you are lucky to survive’, ‘you are the one need to worry’ [sic] and ‘next time I am going to kill you’.

2. The Tribunal fell into jurisdictional error, on the basis of legal unreasonableness and irrationality, or illogicality, in that the following findings were not supported by any probative evidence.

(a) that there would be ‘no logic’ in Baljinder targeting the first applicant’s older male relatives with violence in 2005 and 2012;

(b) that it was ‘highly implausible’ that, given the passage of time since 2002, Baljinder would continue to threaten, or pose a threat of, violence to the first applicant or her family; and

Particulars – (a) and (b)

The applicants refer [sic] the particulars of Ground 1 above.

(c) that ‘state protection is available’ to the applicants.

Particulars – (c)

(i) The applicants repeat the particulars of Ground 1 above.

(ii) Notwithstanding witness statements concerning the failed kidnapping attempt (and attempted killing of members of the first applicant’s family), none of the assailants was convicted of any crimes.

1. In considering these grounds, at [40] the primary judge cited the principle expressed by the Full Court in *BFH16 v Minister for Immigration and Border Protection* [2020] FCAFC 54 (***BFH16***) at [55]:

The Court’s role is not to assess the merits of the Tribunal’s decision, including the weight to be given to the evidence. The Court will only intervene if there is no logical connection between the fact proved by the evidence… and the fact in issue.

1. The primary judge summarised the Tribunal’s decision in great detail, and ultimately concluded that the impugned findings — including those regarding Baljinder’s involvement in the deaths of the first appellant’s uncle and grandfather, and those regarding the threat posed by Baljinder some 14 years after the attempted kidnapping — were entirely open to the Tribunal on the evidence before it.
2. At [56], the primary judge also emphasised the need to consider the impugned findings in the context of other findings:

In addition, the findings made by the Tribunal at [154] must be viewed in the context of the following Tribunal findings:

(a) the death of the first applicant’s grandfather and uncle were not related to Baljinder pursuing the first applicant but rather these resulted from unfortunate road accidents;

(b) the first applicant did not stay home for two years after the kidnapping or drop out of her studies to avoid danger;

(c) the first applicant’s family have not been the subject of threats on a regular and constant basis from Baljinder and his supporters and they are not in fear of their lives or the lives of the applicants;

(d) the first applicant remained in India for five years after the attempted kidnapping and the Tribunal was not satisfied that she came to Australia for safety reasons.

1. The primary judge concluded at [58]–[59] that while a different decision maker may have weighed the evidence differently, there was nothing in the Tribunal’s reasoning to warrant a finding of jurisdictional error. Grounds 1 and 2 invited the court to engage in impermissible merits review and simply took issue with the conclusions reached by the Tribunal.
2. Ground 3 before the FCC was put as follows:

The Tribunal fell into jurisdictional error, on the basis of legal unreasonableness and irrationality or illogicality, in determining that the applicants were not credible, by making unwarranted assumptions, and adopting illogical reasoning, as to matters relevant to the applicant’s credibility.

Particulars

(a) Assumption that, in light of the information then available and Indian laws (for libel or similar) the local Indian media would have published stories connecting the road deaths in 2005 and 2012 to Baljinder;

(b) Assumption that, notwithstanding threats made against them, family members and neighbours who witnessed the kidnapping attempt would have made themselves available as witnesses for prosecution of Baljinder and the other assailants;

(c) Assumption that statements provided by those witnesses could have been used (and would be admissible evidence under Indian law) even if the witnesses were unwilling to be witnesses at trial;

(d) Assumption that, had he posed a continuing threat to the first applicant, Baljinder would have made further attempts to kidnap her after 2002;

(e) Assumption that the first applicant’s parents’ decision not to seek a protection visa in Australia indicates that:

(i) they do not consider there to be a real risk to them, or the first applicant, of significant harm in India; and

(ii) there is not a real risk that the first applicant will suffer significant harm in India; and

(f) the Tribunal’s finding that the first applicant’s delay in seeking a protection visa against the applicant’s credibility is unreasonable and illogical in that:

(i) until the first applicant applied for a protection visa, she had been in Australia on a student visa; and

(ii) since entering Australia on that student visa, the first applicant had not returned to India.

1. The primary judge referred to the Tribunal’s reasons as well as parts of the transcript of the Tribunal hearing. At [68] the primary judge held that the Tribunal’s adverse credibility findings were open to it. The primary judge explained the Tribunal’s reasoning, finding that it had not made any of the unwarranted assumptions alleged by the appellants, and that the Tribunal had clearly had regard to relevant evidence and put concerns to the applicants regarding their evidence.
2. At [78] the primary judge held:

When one considers the Tribunal’s reasons in their entirety and read fairly, it is clear that the Tribunal had some significant concerns in believing the applicants’ claims to fear harm if they were to return to India, notwithstanding having accepted that the attempted kidnapping had occurred

# Grounds of review

1. Grounds 1–3 of this appeal correspond to grounds 1–2 in the FCC decision. The parties dealt with grounds 1–3 together. Each of the grounds alleges error on the part of the primary judge in not identifying jurisdictional error (by reason of unreasonableness or illogicality) in the Tribunal decision. The grounds concern several factual findings and are set out below:

1. The primary judge erred in failing to find that the Second Respondent (**Tribunal**) fell into jurisdictional error, based on unreasonableness or illogicality, by reason of its findings, without the support of probative evidence, that:

1. there would be ‘no logic’ in the First Appellant’s older male relatives being targeted, by the perpetrator (**Assailant**) of the home invasion of the First Appellant’s home in 2002, with violence in 2005 and 2012; and
2. it was ‘highly implausible’, given the passage of time since the home invasion of 2002, that the Assailant continued to threaten, or pose a threat of, violence to the First Appellant and her family.

2. The primary judge erred in failing to find that the Tribunal fell into jurisdictional error, based on unreasonableness or illogicality, by reason of its taking into account, in making the findings in [sub-paragraphs (a) and (b) in the first ground of appeal], irrelevant matters including opinions and unwarranted assumptions about:

1. the effect of the passage of time on the Assailant’s motivation to threaten or perpetrate violence against the First Appellant or her family;
2. the actions that the Assailant would have taken after 2002 if he truly continued to pose a threat to the First Appellant or her family; and
3. the operation of, and rules concerning evidence and witnesses in, the criminal justice system in India (and the region in India in which the First Appellant and her family lived).

3. The primary judge erred in failing to find that the Tribunal fell into jurisdictional error, based on unreasonableness and illogicality, by reason of its failing to take into account probative evidence that the Assailant had been:

1. placed into custody following the home invasion in 2002 in connection with the home invasion; and
2. directly involved in the death of the First Appellant’s grandfather in 2005.
3. Ground 4 of the present appeal relates to the Tribunal’s decision on the applicants’ credibility, and corresponds to ground 3 before the FCC. Ground 4 was put as follows:

4. The primary judge erred in failing to find that the Tribunal fell into jurisdictional error, based on unreasonableness or illogicality, in determining that the Appellants were not credible, notwithstanding the matters in [the first to third appeal grounds] and the probative evidence before the Tribunal supporting the Appellants’ application.

# Consideration

1. As a preliminary matter, the parties agree that the substance of this appeal is a challenge to the conclusion that the Tribunal decision was not “illogical” or “irrational”. It therefore falls to this Court to examine the Tribunal’s decision to determine whether the Federal Circuit Court’s conclusion was correct: *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; *AFD21 v Minister for Home Affairs* [2021] FCAFC 167 at [40].

## Grounds 1–3

1. The parties’ written and oral submissions dealt with grounds 1–3 together. Grounds 1–3 essentially challenge two sets of findings made by the Tribunal: first, the Tribunal’s finding that there would be “no logic” in Baljinder targeting the first Appellant’s family in the 2005 and 2012 vehicle incidents (the “**no logic” finding**); and second, the Tribunal’s finding that it was “highly implausible” due to the passage of time that Baljinder would continue to pursue or threaten the Appellant or her family (the **“highly implausible” finding**). Each of the grounds allege jurisdictional error on the basis of unreasonableness or illogicality.
2. Ground 1 alleges that the impugned findings were made absent the support of probative evidence.
3. Ground 2 alleges the Tribunal erred in the course of making the “no logic” and “highly implausible” findings by taking into account irrelevant matters including opinions and assumptions. The appellants contend that the Tribunal made unfounded assumptions about the effect of the passage of time on Baljinder’s motivations, about his actions, and about the operation of the Indian criminal justice system.
4. Ground 3 alleges that the Tribunal erred by failing to take into account probative evidence, namely evidence that Baljinder had been placed into custody following the 2002 home invasion, and that he had been directly involved in the 2005 death of the first appellant’s grandfather.
5. The appellants submit that the following probative evidence before the Tribunal precluded both the “no logic” and the “highly implausible” findings:
6. Baljinder’s involvement in extremist groups and past criminal behaviour;
7. Baljinder’s involvement in the home invasion in 2002, which led to members of the first appellant’s family being attacked and sustaining serious injuries requiring hospitalisation;
8. the criminal proceedings against several of Baljinder’s associates flowing from the home invasion;
9. that the first appellant’s father saw Baljinder in the vehicle involved in the 2005 incident where the first appellant’s grandfather was struck and killed; and
10. Baljinder’s death threat over the telephone to the first appellant’s father following the 2005 vehicle incident.
11. I do not accept that this evidence before the Tribunal meant that it was illogical or unreasonable for it to make the “no logic” finding. Taking the reasons as a whole, the Tribunal clearly had regard to the first appellant’s evidence regarding Baljinder’s alleged involvement in the vehicle incidents, but was also influenced in its decision-making by country information and its findings regarding the appellants’ credibility.
12. It is clear from the reasons that the Tribunal acknowledged that Baljinder is an undesirable character who was involved in the 2002 home invasion. The Tribunal essentially accepts the first appellant’s evidence regarding that particular incident, noting that her account was supported by contemporaneous media reports. At [68], the Tribunal acknowledged that the appellant gave evidence about her father witnessing Baljinder in the vehicle which struck her grandfather, and the telephoned death threat.
13. What the appellants’ submissions fail to do is to acknowledge the other factors that the Tribunal took into account in making its “no logic” finding. Other factors weighed by the Tribunal included:
14. country information about the high volume of road accidents that occur in India, referred to at [130]–[132], [143] and [145];
15. the length of time between the 2002 marriage rebuff and home invasion and the two vehicle incidents in 2005 and 2012;
16. the lack of media reporting about the 2005 and 2012 incidents, in contrast to the media interest in the attempted kidnapping.
17. For these reasons, the Tribunal did not accept that Baljinder was involved in the 2007 and 2012 incidents, and concluded at [145] that the deaths of the first appellant’s grandfather and uncle were caused by unfortunate road accidents. As the primary judge held at [55] of the FCC reasons, the finding was open on the evidence before the Tribunal.
18. Similarly, I do not accept that the abovementioned evidence meant there was no logical or rational basis for the Tribunal to make the “highly implausible” finding. When read in context, the Tribunal states at [154] that “…with the passage of time it is highly implausible that Baljinder Singh Sonu would continue to try and pursue, marry or threaten Applicant 1 or her family”. The appellants’ submissions attempt to divorce the “highly implausible” language from its context. The Tribunal here is merely noting that, given the marriage rebuff and home invasion took place nearly two decades ago, and the fact that the first appellant is now married, Baljinder is unlikely to continue to pursue or threaten the first appellants.
19. I also note that there was no material before the Tribunal addressing Baljinder’s conduct since 2012 (apart from the appellants’ vague statements about continuing phone threats and the first appellant’s mother being sworn at). Apart from their stint in Australia, the first appellant’s family has continued to reside unscathed in the same small village of approximately 2000 people. The appellant herself continued to live in the village for five years after the home invasion. It is evident from the Tribunal’s reasons at [59] that the member put it to the appellant that she and her parents had remained safe throughout the passage of time, to which the appellant said her father had been granted a revolver licence. At [149] the Tribunal found that that fact did not infer that the family continued to be in danger, as the appellants contend. In my view, these factors also provide reasonable basis for the Tribunal’s “highly implausible” finding.
20. The Appellants’ submission that it was not open for the Tribunal to find it was unlikely Baljinder would have any further interest in the appellant is also weakened by the fact that there is no evidence, apart from unverified suggestions of ongoing phone threats, of any ongoing animus, criminality or violence since 2002. Even if the Tribunal had accepted Baljinder was involved in the 2005 or 2012 vehicle incidents, some 10 years have passed since then. Without further evidence regarding Baljinder’s actions in the intervening years, it was entirely reasonable for the Tribunal to find it implausible that Baljinder would try to pursue, marry or threaten the applicant or her family.
21. In respect of ground 2, the Tribunal has not made any unwarranted assumptions or opinions as alleged by the applicant.
22. The appellants submit that the Tribunal’s reasoning is based on an unfounded assumption that Baljinder’s conduct was only motivated by the first Appellant’s rejection, and that due to the passing of time that motivation would fade.
23. The appellants rely on the concept of “common human experience” expressed in *BFH16* at [48]. That case concerned the credibility of a same-sex couple applying for a protection visa, where the Tribunal made certain findings about the applicants’ sexual encounters. The majority identified error in the reasons of the Tribunal, finding that the Tribunal had made assumptions about the expected psychological reaction of the couple after their first sexual encounter when such reactions could not be said to be “matters of common human experience”. The appellants in this case submit that, while recovery from the 2002 marriage rebuff might be a “common human experience” (and thereby appropriate for the Tribunal to make such an assumption), the assumption cannot be made where the rebuffed party is a “violent criminal”.
24. The analogy with *BFH16* is imperfect. The Tribunal clearly reasons as to why it does not believe that Baljinder continues to pose a threat to the appellant. Its conclusions are not solely based on any assumptions as to common human experience. While another decision-maker may have come to a different conclusion about the effect of the passage of time or the likely actions of Baljinder, it was open for the Tribunal to find as it did.
25. The appellants further submit that the Tribunal made unwarranted assumptions about the criminal justice system in India. This was not fully addressed in written submissions, however counsel for the appellants made brief oral submissions before the Court. Counsel submitted that the Tribunal made an unwarranted assumption at [148], when it stated that “the Tribunal does not accept that witnesses to the attempted kidnapping were too afraid to speak”, referring to the dropped prosecution case against several assailants in the 2002 kidnapping.
26. As the primary judge said at [73] of the FCC reasons, it is clear that the Tribunal considered the applicant’s claims about the attempted kidnapping case and the availability of witness statements. The Tribunal did not make any assumptions about the operation of the Indian legal system, it merely did not accept the appellants’ statements that witnesses were too afraid to speak. The Tribunal also acknowledged various limitations on the Indian justice system, including the incidence of corruption and delays caused by understaffing and backlogs, but did not consider these features to be a factor in this case.
27. The appellants also submit that the Tribunal failed to take into account evidence that Baljinder had been placed into custody following the home invasion. As the respondents submit, there is no requirement for the Tribunal to make reference to every piece of evidence before it. While there is one media article that suggests that Baljinder was in custody for several days, another article suggests that the organisers of the home invasion were not arrested. The first appellant also gave oral evidence that Baljinder was not arrested. The Tribunal noted that it took into account the documentary and oral evidence and concluded that Baljinder had not been arrested.
28. Additionally, the Tribunal clearly accepts at [154] that Baljinder was involved in the 2002 home invasion. Regardless of whether or not he was imprisoned, the Tribunal evidently understood the seriousness of Baljinder’s conduct and found him to be an “undesirable character”, and that he “may have been supported by extremists” (at [156]).
29. In any event, the Tribunal is not obliged to refer to each piece of evidence or contention before it. As the Full Court explained in *Minister for Home Affairs v Buadromo* [2018] FCAFC 151 at [48] (citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1):

Generally, an obligation to give reasons does not require a “line-by-line refutation of the evidence of the claimant either generally or in those respects where there is evidence that is contrary to findings of material fact made by the Tribunal”. The Tribunal must give the reasons for its decision, not the sub-set of reasons why it accepted or rejected individual pieces of evidence.

(Citations omitted.)

1. In submissions, the appellants also challenge the Tribunal’s finding that state protection would be available to them. The Appellants submit that this finding was made without any regard to the failure of Indian authorities to convict any of the assailants (including Baljinder) of the home invasion in 2002. The Tribunal based this finding on independent country information available to it, including the size and diversity of the Indian population. The Tribunal did note at [68] that the case concerning the 2002 home invasion was ultimately dismissed in 2005. Evidently, the Tribunal has weighed up several factors and concluded that state protection would be available, notwithstanding the lack of convictions. There is no jurisdictional error in this finding.
2. As a final matter, I acknowledge the respondent’s submission that grounds 1–3 “simply suggest disagreement with the Tribunal’s adverse credibility findings and seek that the Court undertake impermissible merits review” and they “do not address the primary judge’s reasons for rejecting those grounds”. The primary judge dismissed the Appellant’s claims for this reason, concluding at [57]–[59]:

Having regard to these findings, the Tribunal’s findings at [154] were entirely open on the evidence and were not illogical or irrational or otherwise unreasonable.

Whilst another decision maker may have weighed the evidence differently, that is not sufficient to warrant a finding that the Tribunal’s findings are affected by jurisdictional error.

The applicants’ arguments in relation to grounds one and two simply take issue with the conclusions reached by the Tribunal and invite the court to engage in impermissible merits review.

1. For the reasons above, the respondent’s submission and the reasoning of the primary judge is correct. While a different tribunal member may have weighed each piece of evidence difficulty, there was no illogicality or unreasonableness as the appellants contend, and therefore the Tribunal decision was not affected by jurisdictional error.

## Ground 4

1. Ground 4 contends that the primary judge erred in failing to find that the Tribunal’s decision was unreasonable or illogical in determining the appellants were not credible. The appellants rely on the matters raised in grounds 1–3 as well as other evidence before the Tribunal in support of this ground.
2. The full court in *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2 summarised the principles governing legal unreasonableness in relation to credibility findings at [30]:

(1) While findings as to credit are generally matters for the administrative decision maker, this does not mean that such findings as to credit are beyond scrutiny on judicial review. The question of whether a credibility finding is tainted by jurisdictional error is a case specific inquiry, and is not assessed by reference to fixed categories or formulae. In each case it is necessary to analyse in detail what the decision-maker has decided.

(2) Without derogating from the case specific nature of the inquiry, adverse credibility findings may involve jurisdictional error on recognised grounds such as legal unreasonableness or reaching a finding without a logical, rational or probative basis. In this regard, Crennan and Bell JJ explained in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16 that:

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

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

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

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

(5) A high degree of caution must, however, be exercised before finding that adverse findings as to credit expose jurisdictional error in order to ensure that the Court does not embark impermissibly upon merits review. As such, to establish jurisdictional error based on illogical or irrational findings of fact or reasoning, “extreme” illogicality must be demonstrated “measured against the standard that it is not enough for the question of fact to be one on which reasonable minds may come to different conclusions”.

(Citations omitted, emphasis in submissions.)

1. The Appellants submit that the matters identified by the Tribunal to support the conclusion at [146] of the Reasons that the Appellants had “enhanced their claims to support their protection visa application” did not provide any logical or rational basis for such a conclusion. The Appellants identify these matters as the “false premise” as to Baljinder’s motivations and likely conduct over the passing of time. The Appellants again submit that the finding that it was unlikely that Baljinder would still have any ongoing interest in or animus toward the first Appellant and her family was inconsistent with the evidence before the Tribunal (including the home invasion, Baljinder’s history of criminality, and the media and rallies surrounding the home invasion).
2. In response, the Minister submits that the Tribunal’s adverse credibility findings were open to it precisely for the reasons given in [146].
3. Given my findings in relation to grounds 1–3, I do not accept that the Tribunal was acting on a “false premise” as to Baljinder’s motivations, or any other unwarranted assumption. As explained above, the Tribunal had considered the relevant evidence before it and made conclusions open to it about Baljinder’s involvement in the vehicle incidents and the likely current level of threat posed to the appellants by Baljinder.
4. The Tribunal considered and identified other factors that, in its opinion, weighed against the credibility of the appellants. In addition to its findings the subject of grounds 1–3 of this appeal, the Tribunal considered the length of time in making the application for a protection visa, the fact that the appellant did not apply for protection after the vehicle incidents which she claims are related to her, and that the first appellant’s Australian-citizen brother was able to visit India for a “couple of weeks” despite claims he moved to Australia to save his life. The Tribunal evidently weighed these factors against the appellants’ credibility, as it was entitled to do.
5. This is not one of the exceptional cases referred to in the authorities that would permit a finding of jurisdictional error based on the Tribunal’s credibility findings. To do so would be to stray into impermissible merits review of the Tribunal decision. It follows that the primary judge did not err in finding at [68] and [72] that the adverse credit findings were open to the Tribunal.

# Conclusion and orders

1. As each of the appellants’ grounds of appeal fail, the appeal is dismissed with costs.

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| I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rofe. |

Associate:

Dated: 18 February 2022