FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

DUX22 v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FedCFamC2G 1018

File number(s):	SYG 2749 of 2018
Judgment of:	**JUDGE LAING**
Date of judgment:	9 December 2022
Catchwords:	**MIGRATION** – application for judicial review of a decision of the Administrative Appeals Tribunal – whether the Tribunal failed to give proper, genuine and realistic consideration to the best interests of the first applicant's children – whether the Tribunal was obliged to make inquiries – whether the Tribunal overlooked material that was centrally relevant to the best interests of the children – application succeeds
Legislation:	*Migration Act 1958* (Cth) ss 101, 109(1), 140 *Migration Regulations 1994* (Cth) r 2.41
Cases cited:	*Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; (2003) 236 FCR 593 *Minister for Home Affairs v Buadromo* [2018] FCAFC 151; (2018) 267 FCR 320 *Minister for Immigration, Citizenship and Multicultural Affairs v RGKY* [2022] FCAFC 177 *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 96 ALJR 497 *Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1480 *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125
Division:	Division 2 General Federal Law
Number of paragraphs:	42
Date of hearing:	11 November 2022
Place:	Sydney

Counsel for the Applicant	Mr O. Jones
Solicitor for the Applicant	Ray Turner Immigration Lawyers
Counsel for the First Respondent	Mr T. Reilly
Solicitor for the First Respondent	Australian Government Solicitor

Table of Corrections

19 December 2022	In the appearances on the cover page, Solicitor for the Applicants has been amended from 'Ronayne Owens Lawyers' to 'Ray Turner Immigration Lawyers'

ORDERS

SYG 2749 of 2018

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN:	**DUX22** First Applicant
	DUY22 Second Applicant
	DUZ22 (and others named in the Schedule) Third Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY: **JUDGE LAING**

DATE OF ORDER: **9 DECEMBER 2022**

THE COURT ORDERS THAT:

1. A writ of certiorari issue, quashing the decision of the second respondent dated 27 August 2018 in case number 1724951.
2. A writ of mandamus issue directing the second respondent to determine the application for review according to law.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE LAING

INTRODUCTION

1 Before the Court is an application for judicial review of a decision of the Administrative Appeals Tribunal (**Tribunal**). The Tribunal affirmed a decision of a delegate (**Delegate**) of the first respondent (**Minister**) to cancel the first applicant (**Applicant**)'s Subclass 886 (Skilled – Sponsored) visa (**skilled visa**) under s 109(1) of the *Migration Act 1958* (Cth) (**Act**).

BACKGROUND

2 The Applicant is a national of India. The second applicant is the Applicant's wife. The third, fourth and fifth applicants are the couple's children.

3 On 20 July 2005, the Applicant applied offshore for a student visa. In that application, he answered 'no' to questions regarding whether he (a) had been known by any other name; (b) had been excluded from or asked to leave any country including Australia; (c) had an outstanding debt to the Commonwealth; (d) held a visa for travel to Australia; and (e) had been refused an entry permit or visa to Australia. The student visa was granted, following which the Applicant entered Australia.

4 On 21 April 2009, the Applicant applied for a skilled visa. The Applicant again denied having been known by any other name and that he owed a debt to the Commonwealth. When asked if he held a visa to travel to Australia, he only disclosed the student visa referred to above. The Applicant claimed that from January 2000 to August 2005 he had worked as an accountant in Hyderabad, India. The Applicant was granted the skilled visa in 2013.

5 On 26 October 2012, the identity recognition system of the NSW Roads and Maritime Services (**RMS**) detected a facial match between the Applicant another person (**Mr A**). On 9 July 2013, the Applicant was contacted by the Department. The Applicant provided reasons why issuing restrictions should be lifted by RMS, which appear to have been accepted (although the facial comparison report did not appear to have been considered as part of the assessment).

6 On 14 December 2016, an identity report concluded that the Applicant and Mr A were the same person. Site visits in India were conducted in 2017, during which further evidence in

this regard was taken. The Department also observed that Mr A had a debt to the Commonwealth in the amount of $1,500.

7 By letter dated 15 August 2017, the Applicant was issued with a Notice of Intention to Consider Cancellation (**NOICC**). On 5 September 2017, the Applicant provided a response in which he denied ever being known as Mr A or coming to Australia before 2005. The Applicant provided a number of documents, including witness statements, in support of his claim to have lived in India before coming to Australia in 2005.

8 On 12 October 2017, the Delegate cancelled the Applicant's visa. The Delegate found that the Applicant had provided incorrect information and failed to declare information in order to achieve immigration outcomes. After considering various matters arising from the material before them, the Delegate concluded that the Applicant's visa should be cancelled. By force of s 140(1) of the Act, the other visas held by members of the Applicant's family were also cancelled.

9 On 13 October 2017, the Applicant and his family members applied for review of the Delegate's decision to the Tribunal. A hearing before the Tribunal was held on 22 August 2018.

10 On 27 August 2018, the Tribunal affirmed the Delegate's decision.

THE TRIBUNAL'S DECISION

11 The Tribunal set out the evidence before it regarding the Applicant's use of identity (at [12]-[20]). The Tribunal observed that in his evidence to the Tribunal, the Applicant had conceded that he had given incorrect answers and used a different identity to travel to Australia between 1999 and 2003 (at [17]). The Tribunal concluded that the Applicant had previously been known as Mr A and that he had provided incorrect answers in previous applications for visas. The Tribunal accordingly found that there was non-compliance by the Applicant with s 101 of the Act in the manner described in the s 107 notice (at [20]-[21]).

12 Having found that there was non-compliance with s 101 of the Act, the Tribunal then considered whether the Applicant's visa should be cancelled, having regard to the matters in r 2.41 of the *Migration Regulations 1994* (Cth) and other matters. The Tribunal considered:

(a) **The correct information:** The Tribunal observed that the correct information was that the Applicant had been known by a different name and used a different identity to

travel to, and stay in, Australia between 1999 and 2003. The Applicant stayed in Australia for about four years and had a debt to the Commonwealth at the time he applied for a visa (at [24]).

(b) **Whether the decision to grant a visa, or immigration clear the visa holder, was based, wholly or partly, on incorrect information or a bogus document:** The Tribunal found that the decision to grant the visas was based, wholly or partly, upon incorrect information (at [26]).

(c) **The circumstances in which the non-compliance occurred:** The Tribunal did not accept that the fault could be described as *"unintentional"* or attributable to one youthful error. The Tribunal observed that the Applicant not only used a false identity but that he had failed to disclose this in two subsequent visa applications. The Tribunal did not accept that the Applicant's family circumstances justified *"such a significant breach of the Australian laws"* (at [27]-[31]).

(d) **The present circumstances of the visa holder:** The Tribunal had regard to a number of factors in considering the Applicant's circumstances. These included that:

(i) The Applicant had been living in Australia for a number of years and was settled in Australia, with his four children attending schools in Australia (at [32]).

(ii) The Applicant had previously operated a business in Australia (which he sold), and purchased property in Sydney (at [32]).

(iii) The Applicant invested in a restaurant, where he was working as a chef and employed four staff. The Applicant stated that he would sell the business if his visa was not reinstated (at [33]).

(iv) The Applicant's claim that his wife was going through a *"big trauma"* and had been hospitalised. However, the Tribunal considered that the medical records did not reflect any medical problems of such degree or severity as to require ongoing and complex medical attention. The Tribunal therefore did not accept the Applicant's evidence about his wife's state of health (at [34]).

(v) The Applicant's evidence that his children were attending school and participating in sport, and that his eldest son's study had been affected by *"what is happening with the visa"*. The Tribunal accepted the Applicant's

evidence that the children had grown up in Australia, had no idea about the Indian life and did not want to live in India (at [35]).

(e) **The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act:** The Tribunal observed that in response to the NOICC, the Applicant had *"provided an extensive amount of bogus documents and incorrect information"* (at [36]).

(f) **Any other instances of non-compliance by the visa holder:** The Tribunal found that the Applicant did not comply with s 101 of the Act in relation to a student visa application made in 2007 and a business visa application made in 2011 (at [37]-[38]).

(g) **The time that had elapsed since the non-compliance:** The Tribunal accepted that 13 years had passed since the non-compliance in relation to the 2005 student visa application and over 9 years had passed since the non-compliance in relation to the skilled visa (at [39]).

(h) **Any breaches of the law since the non-compliance and the seriousness of those breaches:** The Tribunal considered that the Applicant had intentionally made a false statement in a statutory declaration in breach of s 11 of the *Statutory Declarations Act 1959*. The Tribunal found this to be serious, noting the potential penalty of imprisonment for 4 years (at [41]).

(i) **Any contribution made by the holder to the community:** The Tribunal considered evidence regarding the Applicant's business activities and community involvement, and regarding his participation as a witness in a criminal trial. The Tribunal accepted that the Applicant had made contributions to the community and actively participated in community activities ([42]-[44]).

(j) **Consequences of visa cancellation:** The Tribunal acknowledged that unless granted another visa, the Applicant would be unlawful and liable to detention and removal. His wife and children who were not Australian citizens were subject to consequential cancellations. There may be restrictions upon future travel and visa applications. However, the Tribunal considered that there were *"no provisions in the Act which prevent[ed] the applicants from making a valid visa application without the Minister's intervention"* (at [46]-[48]).[1]

[1] This last sentence is incorrect as a general proposition (see s 48 of the Act). It may be, as was suggested by Mr Reilly on behalf of the Minister, that the Tribunal was contemplating the potential for protection visa applications to be made. In any event, no point in this regard was taken on behalf of the applicants.

(k) **International obligations and the best interests of the children:** The Tribunal found at [50] that *"cancellation would not lead to removal in breach of non-refoulement obligations"*. As the best interests of the children are central to the grounds of review, it is useful to reproduce the Tribunal's reasoning under this heading reasonably fulsomely:

> 51. The applicant has four children in Australia. Three of his children were born in Australia and were permanent residents prior to the cancellation of their visas and the youngest child is an Australian citizen. In his submission to the Tribunal of 20 August 2018 the applicant states that his three younger children were born in Australia and one is an Australian citizen. They have been raised in Australia their entire lives. The applicant refers to an UNICEF publication about development in formative years, noting that his eldest child has spent 12 years in Australia and is into the formative years of his life. The other children are in early childhood and all the children are at a crucial stage of development. The applicant submits that sending them to India will have a detrimental impact on their development as they will live in a country with unsafe conditions both in the education system and the community.
>
> 52. The applicant has not presented adequate evidence to satisfy the Tribunal that his children would be unsafe in India. The applicant refers to general information - for example, articles showing that there is corporate punishment in India which may be detrimental to them - but the applicant has not provided adequate information about his own family circumstances and what options may be available to him, for example: what schools the children may attend, what environment they would live in, what support, including from the extended family would be available to them, etc. It is not sufficient to state that the situation in Australia is more preferable than the situation in India or that there are potential problems in India such as corporal punishment. The Tribunal must consider the circumstances of this particular family and the interests of these particular children, and broad references which the applicant makes are unhelpful.
>
> 53. The applicant told the Tribunal that the children visited India only for short periods and they have not spent much time in India. His children have only been exposed to the Australian culture and education. They are scared of going to India and of the Indian education system. The applicant said that he has distant relatives in Australia, and siblings and a mother-in-law in India. The applicant's children have provided written statements to the Tribunal explaining why they wish to remain in Australia and not return to India and the applicant's daughter gave oral evidence to the Tribunal. The applicant said that this wife and children are innocent and were not involved in anything he has done and should not be punished for it. The evidence of the applicant's wife is that she was unaware of the applicant's first visit to Australia and the Tribunal is prepared to accept that evidence. The Tribunal accepts that neither the applicant's spouse nor the children had any involvement in the provision of incorrect answers.
>
> 54. The Tribunal acknowledges that the applicant's three children were born in Australia and spent their entire lives in Australia. The Tribunal accepts that his eldest child has spent the majority of his life in Australia, as he came to Australia at a very young age. The Tribunal accepts that the children attend Australian schools and are well used to living in Australia. The Tribunal

accepts that it is in the best interests of the children to maintain that environment. The Tribunal accepts that the best interests of the children require their presence in Australia.

(l) **Other relevant matters, including hardship:** In this regard:

(i) The Tribunal referred to the Applicant's evidence regarding the time he and his family had spent in Australia. The Tribunal observed that the Applicant had referred to his wife having a mental breakdown for fear of having to leave Australia, including her fears for her children. The Tribunal acknowledged that the Australian citizen child would likely accompany his parents due to his age (at [55]).

(ii) The Tribunal did not accept that the family would be unable to support themselves in India or that the children would be denied access to appropriate education and other basic services (at [56]). Nonetheless, the Tribunal accepted that the visa cancellation could cause considerable hardship to the family (at [57]).

(iii) The Tribunal considered that the psychological report that had been provided (**Psychological Report**) was of limited probative value, as it was based upon a single session attended for migration purposes and was influenced by self-reporting. The Tribunal nonetheless accepted that the best interests of the children were to remain in Australia. The Tribunal accepted that the second applicant had been affected by the cancellation and that it was likely to cause significant hardship to the family (at [59]-[60]). However, the Tribunal considered the evidence regarding the second applicant's medical condition was limited and that there was no evidence that she would be unable to access medical treatment in her home country (at [61]).

13 The Tribunal concluded that the Applicant had been deliberately untruthful or misleading in his dealings with the Department and others (at [62]–[64]). It found that the *"applicant entered the country using a false identity, used the false identity to open a bank account and obtain a driver's license and made a visa application with deliberately false claims in order to stay and work in Australia"* (at [64]). It formed the view that *"[c]onsistently throughout his stay in Australia, the applicant had knowingly and deliberately provided false information to the Department and other authorities because his preference was to remain in Australia.*

The applicant appeared to have been unconcerned about the Australian laws and his obligations under the Australian laws as long as his desires were satisfied" (at [68]).

14 The Tribunal acknowledged that there were reasons favouring not cancelling the visa. At [66], the Tribunal stated:

> 66. The Tribunal considers there are reasons why the visa should not be cancelled. The applicant has been living in Australia for many years and is well settled in Australia. He operates a business, employs Australian staff and contributes to the economy. His wife and children are settled in Australia and one of his children is an Australian citizen. He makes significant contribution to the community through various activities. He has purchased a home in Australia and has made financial investments. The Tribunal accepts that the applicant's partner is distressed about the possibility of having to leave Australia, as are his children, and the Tribunal acknowledges the medical evidence in relation to [DUY22]. The Tribunal accepts that the cancellation of the visa would cause a significant degree of hardship to the family. Most importantly, the Tribunal has formed the view that the best interests of his four children would be best served if they remain in Australia and the Tribunal acknowledges the applicant's evidence that one of his children is an Australian citizen and that child is likely to leave Australia with his family. The Tribunal acknowledges that the best interests of the children constitute a primary consideration, although it is not a determinative factor in exercising discretion.

15 However, the Tribunal weighed this against the seriousness of the Applicant's breach and the Applicant's other conduct, finding that he *"had been persistently untruthful in his dealings with Immigration"* and appeared to have little genuine remorse. The Tribunal observed that the Applicant's conduct had influenced his migration outcomes in Australia. It considered that his conduct was not consistent with Australian laws and values (at [67]-[73]). The Tribunal concluded (at [75]-[76]):

> 75. The Tribunal acknowledges that there are strong reasons why the visas should not be cancelled. Most importantly, the Tribunal has formed the view that the best interests of the applicant's four children would be to remain in Australia. The Tribunal also accepts the applicant's evidence that he is well settled in Australia and that he has made a significant contribution to the Australian community. However, the significance of the breach and the extent of the applicant's falsehoods throughout his stay in Australia, his persistent disregard for the Australian laws, and continuous provision of incorrect information and bogus documents in many of his dealings with the Department and other authorities outweigh, in the Tribunal's view, such considerations.
>
> 76. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

16 Accordingly, the Tribunal affirmed the Delegate's decision (at [77]). The Tribunal considered that it had no jurisdiction in respect of the other applicants, as the other visas were cancelled by operation of s 140(1) of the Act (at [3] and [78]).

PROCEEDINGS BEFORE THIS COURT

17 The present proceedings were commenced by an application filed on 26 September 2018. At the hearing, the applicants were granted leave to rely upon an amended application, which contained the following under the heading *"Grounds of application"*:

> 1. The Tribunal failed to give proper, genuine and realistic consideration to the best interests of the first applicant's children. This constituted jurisdictional error.
>
> a. The Tribunal determined that it was in the best interests of the first applicant's children that they remain in Australia and that the first applicant's visa not be cancelled.
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> b. The Tribunal failed to take into account that the first applicant's children would be deprived of the country of their birth, its protection and support, culturally and medically, and other aspects of their lifestyle.
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> c. The Tribunal failed to take into account the resultant social and linguistic disruption of the children's childhood and the loss of their homeland.
>
> d. The Tribunal failed to take into account the loss of educational opportunities available in Australia.
>
> e. The Tribunal failed to explain why it was in the best interests of the first applicant's children to remain in Australia.
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> f. The Tribunal failed to identify how the first applicant's children would be impacted by the decision to cancel the first applicant's visa in light of the facts found by the Tribunal.
>
> g. The Tribunal misunderstood its function in assessing the best interests of the first applicant's children and failed to make necessary inquiries in relation to those interests.
>
> h. The Tribunal failed to consider evidence demonstrating a risk that the educational system in India was unsafe.
>
> i. The Tribunal failed to consider the impact on the first applicant's children resulting from the removal of their mother from Australia.
>
> j. The Tribunal failed to take into account the fears expressed by the first applicant's children about their removal to India.
>
> k. The Tribunal failed to take into account that the first applicant's children do not speak Hindi.

18 I do not accept that a number of the above contentions are able to be made out. The Tribunal did consider, at least to some extent, that the result of its decision would be to deprive the children of their ability to reside in Australia (in which the Tribunal acknowledged that three of the children had been born, and in which all of the children had gone to school and lived substantial parts of their lives). The Tribunal acknowledged that one of the children was an Australian citizen, who would likely be required to leave his country of citizenship due to his age. The Tribunal accepted that the children were used to living in Australia (and therefore, implicitly, that moving to India would involve some level of adjustment). I do not accept that the Tribunal failed to appreciate that this involved at least some level of disruption for the children. I also do not accept that the Tribunal failed to consider or appreciate that the hardship experienced by their parents may have some effect upon the children, although the Tribunal appears not to have accepted the level of psychological impact that had been contended in respect of the children's mother (at [51]-[61]).

19 In terms of loss of educational opportunities, Mr Jones was unable to direct me to anything specific in this regard that had been put forward by the applicants. I accept that the Psychological Report (at CB 157) referred to a statement by the second applicant that *"the standard of education in India was at a much lower standard compared with Australia, limiting her children's opportunities for advancement"*. However, I also accept that such a general statement was capable of falling within the Tribunal's criticism at [52] regarding the applicants broadly referring to the situation in Australia being preferable to India, without providing further information (such as about *"what schools the children may attend"*). The Tribunal at [56] did not accept that the *"family will be unable to support themselves in India or that the children will be denied access to appropriate education and other basic services"*. Whilst Mr Jones submitted that this did not involve an effective comparison, or acknowledgement of, the differences between the two systems he did not direct attention to evidence by which the Tribunal was placed in a position to make more detailed comparisons. I am therefore not persuaded that the Tribunal failed to consider this evidence.

20 I am also not persuaded that the Tribunal was under a duty to inquire, where it found parts of the applicants' evidence in this regard to be lacking. As Mr Reilly submitted on behalf of the Minister, the task of the Tribunal was to assess the best interests of the children based upon the evidence and submissions before it. It was under no general duty to inquire: see *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125 at [181] (per O'Bryan J, Katzmann J agreeing at [1]) and *Minister for*

Immigration, Citizenship and Multicultural Affairs v RGKY [2022] FCAFC 177 at [205] (per Farrell and Halley JJ). In circumstances where the applicants had been given the opportunity to provide, and had provided, evidence regarding the issues under consideration (albeit evidence that was not regarded as entirely satisfactory by the Tribunal), the applicants have not demonstrated why the Tribunal was obliged to make further inquiries in accordance with the principles considered in such cases.

21 The Tribunal at [53] acknowledged that the children were "*scared of going to India and of the Indian education system*". I accept that this informed the Tribunal's acceptance that the cancellation would cause significant hardship to the children and also its acceptance that remaining in Australia would be in their best interests (at [54], [57], [60] and [66]). These are matters to which it appears to have accorded significant weight (at [74]).

22 The Tribunal also considered, at least to some extent, evidence regarding why the educational system in India was said to be unsafe. At [52], the Tribunal referred to "*articles showing there is corporate punishment*" (sic) in India. The Tribunal took issue with the generality of this information, in circumstances where it considered that inadequate information had been provided regarding the family's circumstances in India including the schools the children may attend. I find it somewhat troubling that, on this basis, the Tribunal does not appear to have considered it necessary to refer to the detail of the article, which indicated a very high general rate of corporal punishment (which was said to be between 70% to 89%, with the expressed consequence that "*virtually all children*" in (inter alia) India were "*subject to corporal punishment in schools*"). It is unclear why such an apparently prevalent, systemic issue would not have been accorded any real weight, simply because the precise school that the children would attend had not yet been confirmed.

23 It is unnecessary, however, to determine whether the Tribunal's reasoning in this regard reflected the level of consideration or engagement required by the authorities. This is because I accept that two other representations (and associated evidence) that were advanced regarding the children were not considered by the Tribunal:

(a) That the children were unable to speak Hindi, and that this was an impediment or concern relevant to their situation in Hyderabad; and

(b) That the Applicant's daughter, the fifth applicant, would be affected as a female child by gendered social restrictions, discrimination and/or violence in Hyderabad.

24 In relation to the first representation, the Psychologist's Report recorded concerns raised by the second applicant regarding the inability of her children to speak Hindi. That language was said to be *"one of the main languages spoken in Hyderabad"* and *"the language spoken by [the Applicant] and [DUY22's] families"* (at CB 157).

25 In relation to the second, the Psychologist's Report recorded the following (at CB 158):

> An additional concern raised by [DUY22] related to safety issues in India, reporting high levels of crime, and particularly of sexual crimes[15] against women. She was worried that both herself and her young daughter would not be safe in India, and would lose a lot of their freedoms they currently enjoyed in Australia. For example, [DUY22] reported that in Hyderabad she would be unable to leave her house unaccompanied by a male[16], thus restricting her freedom. She was also concerned she would be unable to re-accustom herself to this way of life after having enjoyed the freedom and independence afforded by living in Australia… [DUY22] described the Muslim population in Hyderabad as being highly traditional, resulting in women being unable to leave their home unaccompanied, and as facing wide-spread discrimination within the workforce and educational sector.

26 In support of the above, links were provided to a news article regarding increasing rape cases in Telangana, Hyderabad and to a 2018 Human Rights Watch World Report for India which were said to provide information regarding *"widespread violence and crimes against women"*. The full content of that material is not before me. However, it may be inferred that it substantiated, at least to some extent, what it had been submitted to substantiate in this regard.

27 Relatedly, at the hearing before the Tribunal, the second applicant gave the following evidence (at page 39 of the transcript that is in evidence):

> TYPING NOISE) ..... (01:16:33) my children are born here and I've also been here for last ..... (01:16:40) years, my husband, so ..... (01:16:44) told me to think about my children's future ..... (01: 16:47) their lives ..... stress that I'm going through now. That they should have education while they are living here and ..... (01:17:01) because ..... (01:17:04) my children stress and ..... (01:17:10) other country with us because school and ..... (01: 17: 15) and everything and as for me I'm also living here for last 12 years so it's like my home and I think it's the best place for other female to live and with my husband I've been living, you know, very nicely and I do not think that going back to India and live there ..... (01:17:37) is not good for the other female ..... (01:17:42) the treatment what you get other female ..... (01:17:49) every minute. There's not safety for other woman and we cannot live independent - independent there. So what I can see her is much more better life. In the future this is like my home.

28 Another witness who provided oral and written evidence to the Tribunal, additionally gave evidence in this regard (at SCB 240):

> Young girls age between 5 and over are raped and murdered and nothing can be

> done. If the culprit is caught and has strong political support he will be treated as a hero.

29 A letter from the Applicant's daughter submitted to the Tribunal referred, inter alia, to fears about violence towards girls for actions such as dancing. A letter from the Applicant's son re-iterated concerns about females leaving the house in India. This supported what the second applicant had said about the restrictions that her daughter would face growing up in Hyderabad.

30 None of this was directly considered, expressly, by the Tribunal.

31 For the Minister, Mr Reilly observed that the Tribunal was not required to specifically refer to every item of evidence or every submission put to it, or to provide a *"line-by-line refutation"* of the applicants' claims: *Minister for Home Affairs v Buadromo* [2018] FCAFC 151; (2018) 267 FCR 320 (***Buadromo***) at [48]-[49]. This may be accepted. As was observed in *Buadromo,* there is long-standing authority to the effect that some findings and considerations may (inter alia) be subsumed in findings of greater generality: see *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; (2003) 236 FCR 593 at [46]-[47]. This is the inference that Mr Reilly submitted ought to be drawn in the present case.

32 In relation to the language issue raised in respect of the children, Mr Reilly suggested that it could be taken that this was accepted by the Tribunal. However, no reference to this, nor to the potential consequences of this (in terms of the children's ability to communicate with their Hindi speaking family, or more generally in Hyderabad) appears in the Tribunal's decision. Whilst Mr Reilly suggested it was common knowledge that English is widely spoken in India, he accepted that the extent of English spoken in Hyderabad was not a matter of general knowledge. Nor, it must be accepted, was the extent to which this language was spoken or utilised in the children's families.

33 The Tribunal did, as Mr Reilly emphasised, state at [55]:

> 55. … The applicant states that leaving Australia would have a detrimental effect on his children, three of whom were born in Australia and the eldest spending the majority of his life in Australia. This has been addressed above and essentially, the Tribunal accepts that evidence...

34 However, as was submitted by Mr Jones, the evidence the Tribunal was referring to in [55] as having been accepted was expressly limited to what had *"been addressed above"*. No express

reference was made in the earlier paragraphs to the material regarding language issues, or to the issues that had been raised concerning the daughter's situation as a female child.

35 The Tribunal at [52] referred to the Applicant not having presented adequate evidence that his children would be unsafe in India. However, the balance of the paragraph indicates that the submissions regarding safety with which the Tribunal was concerned in this regard referred to what had been put forward in submissions made on behalf of the Applicant dated 17 August 2018. The paragraph did not refer to the concerns of the Applicant's wife regarding gendered violence, discrimination and/or social restrictions in Hyderabad (nor to the supporting evidence that had been put forward in this regard). Nor did it refer to the evidence that had been given regarding the children's inability to speak Hindi.

36 None of this evidence was directly referred to in the Tribunal's general acceptance at [54], [55] and [57] that the children would face hardship and that it would be in their best interests to remain in Australia.

37 I find it unlikely that the Tribunal would have specifically, repeatedly referred to what had been submitted regarding corporal punishment without referring to what had been submitted regarding language and gender issues affecting the children, had the latter issues in fact been considered. I find the more likely inference to be that what had been submitted in this regard was overlooked by the Tribunal.

38 I therefore find that the Tribunal did not consider what had been submitted regarding the impediments that had been raised concerning the children's inability to speak Hindi and the potential issues faced by the Applicant's daughter as a female child in Hyderabad. The material put forward in this regard, which was not considered by the Tribunal, was centrally relevant to the question of the children's best interests.

39 I accept Mr Jones' submission that, in the circumstances of this case, the Tribunal was obliged to give requisite consideration to those interests: see *Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1480 at [52]-[60] (noting however the caution expressed regarding the use of terminology such as *"proper, genuine and realistic"* in *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 96 ALJR 497 at [26]-[35]).

40 I accept Mr Jones' submission that this was not done in the present case, having regard to the evidence and representations that were put forward but not considered by the Tribunal. Had

those matters been considered by the Tribunal, it is possible that the outcome could have been different. This is because it is possible that greater weight may have then been given to the interests of the children. Those interests were identified by the Tribunal as the *"[m]ost important"* reason favouring the visas not being cancelled (at [75]).

CONCLUSION

41 As jurisdictional error has been demonstrated, the application before this Court succeeds.

42 I will hear the parties in relation to costs.

I certify that the preceding forty-two (42) paragraphs are a true copy of the reasons for judgment of Judge Laing.

Associate: Gillian Shaw

Dated: 9 December 2022

SCHEDULE OF PARTIES

SYG2749/2018

Applicants

Fourth Applicant:	DVA22
Fifth Applicant:	DVB22