IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 106/2015
Being an appeal against a decision of the Nauru Refugee Status Review Tribunal brought pursuant to s43 of the *Refugees Convention Act 2012*

BETWEEN

CRI035 APPELLANT

AND

The Republic of Nauru RESPONDENT

Before: Khan J
Date of Hearing: 29 August 2016
Date of Judgment: 6 November 2017

Case may be cited as: CRI035v The Republic

CATCHWORDS:

Whether the Tribunal acted in accordance with the principles of natural justice –whether the Tribunal failed to give particulars of certain information to the appellant – whether the Tribunal failed to have regard to integers of the claim – whether the Tribunal failed to have regard to information – whether the Tribunal had regard to irrelevant considerations – whether the Tribunal was unreasonable.

Held: Appeal dismissed- Tribunal's decision affirmed.

APPEARANCES:

Counsel for the Appellant: A Krohn
Counsel for the Respondent: C Fairfield

JUDGMENT

INTRODUCTION

1. The appellant filed an appeal against the decision of the Refugee Status Review Tribunal ("the Tribunal") pursuant to s43(1) of the *Refugees Convention Act 2012* ("the Act") which states:

> A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.

2. The Tribunal delivered its decision on 7 August 2015 affirming the decision of the Secretary for the Department of Justice and Border Control ("the Secretary") that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.

3. The appellant filed an appeal in this Court on 18 December 2015and the grounds of appeal were subsequently amended.

EXTENSION OF TIME

4. At the time of the Tribunal's decision, s 43(3) of the Act provided that a Notice of Appeal against a decision of the Tribunal had to be filed within 28 days after the appellant received a written statement of the Tribunal's decision. At that time, there was no provision in the Act (or otherwise) for an extension of the 28 day period.

5. On 14 August 2015, the Act was amended by the *Refugees Convention (Amendment)Act 2015*which provides for a period of 42 days in s 43 of the Act for filing of the appeal. The amendment also provided that the Court may extend the period in s 43(3) of the Act if, inter alia, it is satisfied it is necessary in the interests of the administration of justice to make that order.[1]

6. On 13 October and 27 November 2015, orders were made by the Registrar to extend the time for appeal to be filed against the decision delivered on 7August 2015 to 31 December 2015.

7. The Notice of Appeal was filed on 18 December 2015.

8. After the hearing the Republic and the lawyers for the appellant have come to an agreement that the extension of time will no longer be an issue and a consent order was filed on 14 November 2016.

BACKGROUND

9. The appellant is a 28 year old man from Bariga, Kochuawa, Chadpur, Kumila in Bangladesh. He was born on 14 December 1988 and speaks Bengali.

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[1] *Refugees Convention (Amendment) Act 2015*, s 43(5).

10. The appellant first outlined his claims in the Transfer Interview and Refugee Status Determination ("RSD") application.

11. The appellant joined Jamat Islam ("JI") in 2009.He attended rallies, put up posters and spoke at rallies and events. He was known locally as an active member and assisted recruitment. Members of the Awami League ("AL") were opposed to JI. They prevented JI members from holding rallies, attacked and harmed them and kidnapped them and took them to the jungle.

12. In July 2011, some JI supporters from a rally that the appellant attended were tortured and tied up in the jungle by AL members. At a rally organised in protest at AL 15 to 20 days later, a fight broke out with AL members and the police who had been called in to break up the rally. Homes and businesses of JI members were set on fire.

13. The appellant continued to organise rallies which were broken up by AL members and the police. In December 2012, the appellant received a threat that he and his family would be harmed if he continued his activities with JI.

14. On 1 January 2013, the appellant sustained injuries to his chest and spinal cord at a rally and he spent three days in hospital. Three of his fellow JI members were killed. The appellant reduced his activities for JI because he was restricted by his injuries.

15. From December 2012 to April 2013, the appellant acted as what he described as a bodyguard for local leader Mohammad Shah Jalal and was responsible for organising meetings and rallies.

16. The appellant continued to receive threats that he would be detained or killed.

17. On 13 January 2013, the appellant helped to organise a rally at which JI members were armed. A fight broke out with AL members and the police. A member of AL was killed, and the appellant fled to the jungle to hide from police, who were looking for the organisers of the rally.

18. On 19 January 2013, the appellant was working as a driver when a customer asked him to stop on the road. The appellant was then abducted and assaulted by a group of people who he believes were AL members. His vehicle was burned and destroyed. The group blindfolded him and tied up in a house where he was beaten with logs, had his hands cut by broken glass and hit in the head. He was found and taken to hospital the next day.

19. After two days at hospital, the appellant spent a week at the doctor's house. The fighting between AL and JI members continued. The appellant reported the incident to the police but received no assistance because they were friends of AL. He went into hiding after leaving hospital.

20. His family was approached four times asking for his whereabouts and were threatened. In March 2013, a letter was received threatening death if he did not leave Bangladesh.

21. The appellant departed Bangladesh on 14 April 2013.

22. He arrived in Australia in December 2013 and was subsequently transferred to Nauru.

23. At the RSD interview, the appellant said that he would yell slogans such as, "long live JI!" at rallies and recruited members by telling people that JI was a good party. He clarified that he publicised JI meetings rather than organised them. In his role as a bodyguard, he drove the leader around in his auto-rickshaw, which he drove for a living. If he thought there was going to be trouble he would take a different route and he sometimes received petrol money for his services.

24. At the RSD interview the appellant said that the only occasion on which he was beaten was that on 19 January 2013. The attackers did not speak but he believes was attacked because he was a JI member and assisted a JI leader. After leaving the doctor's house he stayed at his family home for a week before departing the village. He confirmed that this was the only occasion on which he was beaten.

25. At the RSD interview he said that the first threat he received was in February 2013 and that his mother received four threats, with the last being that received in March 2013. AL were looking for him in connection with deaths occurring at a rally in January 2013.

26. Before the Tribunal, the appellant stated that he joined JI because he was from an Islamic background and his friends from the madrassa where he studied were JI supporters. He appreciated that it followed Islamic rules and did everything to help people. He did not join the youth wing because they were involved in doing wrong things. For example, the youth wing would retaliate if attacked but JI would not.

27. The appellant told the Tribunal that there was no formal process for joining and that there was a JI office in the neighbouring village of Gulbahar. He said that his role mostly comprised accompanying the leader and listening and taking part. The appellant did not know much about trials of JI leaders, though he did know that some were hanged, jailed or missing. He knew that Delwar Hossain Sayeedi was convicted but no other information. He said that JI wanted fair trials and were unable to organise protests at trials.

28. Before the Tribunal, the appellant claimed that he was tortured on three occasions because of his involvement with JI. On the first occasion he was driving in a rally with friends and yelling slogans such as, "long live JI, Allu Akbar".AL members beat him and his vehicle with hockey sticks. He was left on the ground. His friends ran away but were killed. He was taken to a dispensary and stayed for three days. He returned day after day for treatment to his head, back and hands. The second occasion took place on 13 January 2013. The police stopped the appellant'scar in a procession. He and other supporters had knives in the car. When they objected they were beaten by other parties. He received minor injuries, but his friends were killed. He fled for the jungle. He also hid at the leader's house. After two to three nights, a friend told him that charges had been laid against him. He laid low for two days before returning to work, but only driving in safe areas as he received information about which routes would be dangerous.

29. Before the Tribunal the appellant described the third incident in which he was beaten on 19 January 2013. He was asked to drive a group of four or five people. The destination was an unsafe area but it was only 30 minutes away and the people were nice so he drove them. He was abducted and beaten. He has scars on his hands from the attack. They were drinking alcohol and constantly abused, referring to his support for JI. After this incident he received threats saying that the attackers had intended to kill him in retribution for deaths of AL members. He spent seven days at the dispensary instead of the hospital because he felt unsafe. This incident was the only one in which he felt his life was at risk.

30. The appellant told the Tribunal that he was threatened in March 2013 and that they made inquiries with his family. The AL members wanted to get to the leader through him. Some threats were made by phone and others by letter. One letter was delivered by a classmate who gave a letter to his family saying that AL were very angry. He suggested that the appellant should flee. The leader was not easily found captured so that is why AL members targeted the appellant. He thinks that the leader fled after killing five people in revenge for the attacks on the appellant and other things that AL had done against JI. He thinks that JI is often framed for atrocities it did not commit or associated with the Pakistan party of the same name. JI had only done wrong things where there was no other option.

APPLICATION TO THE SECRETARY

31. On 13 January 2014, the appellant attended a Transfer Interview.

32. On 6 March 2014, the appellant made an application to the Secretary for recognition as a refugee and for complementary protection under the Act.

33. On 23 February 2015, the Secretary made a determination that the appellant is not a refugee and is not owed complementary protection.

APPLICATION TO THE TRIBUNAL

34. The appellant made an application for review of the Secretary's decision pursuant to s 31(1) of the Act which provides:

> A person may apply to the Tribunal for merits review of any of the following:
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> a) a determination that the person is not recognised as a refugee;
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> b) a decision to decline to make a determination on the person's application for recognition as a refugee;
>
> c) a decision to cancel a person's recognition as a refugee (unless the cancellation was at the request of the person).
>
> d) A determination that the person is not owed complementary protection.

35. On 10 May 2015, the appellant made a statement and on 27 May 2015 his lawyers, Craddock Murray Neumann, made written submissions to the Tribunal.

36. On 3 June 2015, the appellant appeared before the Tribunal to give evidence and present his arguments with his representative and an interpreter in Bengali and English languages.

37. The Tribunal handed down its decision on 7 August 2015affirming the decision of the Secretary that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.

THIS APPEAL

38. The appellant filed six grounds of appeal which are:

1) The Tribunal erred in law in that it failed to act according to the principles of natural justice as required by law, including section 22(b) of the Act.

2) The Tribunal erred in law in that it failed properly or at all to give particulars of certain information to the appellant, or to ensure, as far as was reasonably practicable, that the appellant understood why the information was relevant to the review, and the consequences of it being relied upon in affirming the determination or decision under review, or to invite the appellant to comment on or respond to the information, as required by section 37 of the Act.

3) The Tribunal erred in law in that it failed to have regard to integers of the appellant's claim for recognition as a refugee or as a person owed complementary protection, or otherwise failed to have regard to relevant considerations as required by law.

4) The Tribunal erred in law in that it failed to have regard to information, or to make determinations on material questions of fact, as required by law, including sections 22, 31, 35, 36, 37, 39 and 40 of the Act.

5) The Tribunal erred in law in that it had regard to irrelevant considerations.

6) The Tribunal erred in law in that it was unreasonable or had no logical basis or probative evidence for findings.

SUBMISSIONS

39. In addition to the submissions filed by the appellant and the respondent, they also made oral submissions which were of great assistance to me and I am indeed very grateful to both counsel.

CONSIDERATION

Grounds One and Two

40. The appellant submits in ground one that the Tribunal failed to act according to the principles of natural justice in relation to its rejection of the appellant's claims as not being credible. The Tribunal was required to inform the appellant that his credibility was in question pursuant to s 22(b) of the Act as well as common law principles of natural justice.

41. Ground two makes a similar submission on the grounds of the provisions of s 37 of the Act.

42. Section 22(b) of the Act states that the Tribunal "must act according to the principles of natural justice and the substantial merits of the case."

43. Section 37 of the Act was repealed retrospectively with effect from 10 October 2012 by the Refugees Convention (Derivative Status and Other Measures) (Amendment) Act 2016. After the Amendment I made enquiries as to whether the parties wanted to make further submissions in relation to s37. I was informed by both parties that they did not wish to do so. Section 37 is no longer applicable to this appeal. In the circumstances I will not deal with Ground 2 and will only deal with Ground 1 of the appeal.

44. The appellant submits that the principle of natural justice requires the Tribunal in its inquisitorial role to inform the appellant of the issues that he needed to address[2].

45. The appellant relies on *SZBEL v Minister for Immigration and Multicultural Affairs*[3] where the High Court of Australia stated:

> [32] In Alphaone the Full Court rightly said [19]; "It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected the decision is to be given the opportunity of being heard. *That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues* and to be informed of the nature and contents of adverse material."
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> [34] The Tribunal is not confined to whatever may have been the issues that the delegate considered. The issues that arise in relation to the decision are to be identified by the Tribunal. But if the Tribunal take no steps to identify some issue other than those that the delegate considered dispositive, and does not tell the appellant what that issue is, the appellant is entitled to assume that the issues the delegate considered dispositive are 'the issues arising in relation to the decision under review'. That is why the point at which to begin the identification of issues arising in relation to the decision and the review will usually be the reasons given for that decision. And unless some addition

[2] Appellant's written submission [45]

[3] [2006] HCA 63; (2006) 231 ALR 592; (2006) 81 ALJR 515 (15 December 2016), at [32], [34-35] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ

issues are identified by the Tribunal (as they may be), it would ordinarily follow that, on review by the Tribunal, the issues arising in relation to the decision and the review would be those which the original decision-maker identified as determinative against the appellant.

[35] It is also important to recognise that the invitation to an applicant to appear before the Tribunal to give their evidence and make submissions is an invitation that need not be extended if the Tribunal considers that it should decide the review in the applicant's favour. Ordinarily then, as was the case here, the Tribunal will begin its interview of the applicant who has accepted the Tribunal's decision to appear, knowing that it is not persuaded by the material already before it to decide the review in the applicant's favour. That lack of persuasion may be based on particular questions the Tribunal has about specific aspects of the material already before it; it may be based on nothing more particular than a general unease about the veracity of what is revealed in that material.But unless the Tribunal tells the applicant something different, the applicant would be entitled to assume that the reasons given by the delegate for refusing to grant the application will identify the issues that arise in relation to that decision.

46. The appellant accepts that he had a legal representative with him at the hearing, but he submits that it did not absolve the Tribunal of its obligations of natural justice under the common law or s22 of the Act[4].

47. The appellant also accepts that the Secretary rejected his claim as not being credible[5] which were:

a) He was a body guard for a particular JI person;

b) He organised raids at meetings;

c) He was beaten on 1 January 2013;

d) He was bitten on 19 January 2013;

e) He received threat letters.

48. The appellant submits that the Tribunal did not say anything about his credibility claim at the beginning of the hearing[6] and towards the end of the hearing the Tribunal stated[7]:

"Well I suppose it has been raised from the beginning about what is the level of [the appellant's] involvement in the party. And there has been a number of inconsistencies that were raised as we've gone along, and I suppose we have to look at that and see whether that [a]ffects the overall credibility of [the appellant's] case. And there has

[4] Appellant's written submissions [47]
[5] Appellant's written submissions [48]
[6] Appellant's written submissions [49]
[7] BD page 151 Line 34

also been a few new claims or new matters that have been raised today, so I suppose we have to look at them."

49. The appellant submits that the brief global reference to the Tribunal 'a number of inconsistencies that we've raised as we've gone along' was not adequate to identify for the appellant at the end of a long hearing of matters which were of concern to the Tribunal to cause it to disbelieve the appellant's sworn evidence[8]; and that the Tribunal failed to accord natural justice, and that it failed to alert the appellant that the inconsistencies would cause the Tribunal to reject his claim which it eventually did[9] which were:

a) The appellant recruited people to JI, as the Tribunal considered the appellant could not explain what he would say to make people join JI, (at [60] of the Tribunal's decision);

b) The appellant was seriously injured, whether at a rally or otherwise (at [62] of the Tribunal's decision) although this was a claim apparently accepted by the Secretary (BD page 6 of Secretary's decision);

c) The appellant was abducted and assaulted (because of the Tribunal's assume of the inconsistencies in his evidence) (BD 179, [63] of the Tribunal's decision);

d) The appellant received death threats, as he did not have a profile of the level to warrant this (at BD 178-179, [62], [63], and [64] of the Tribunal's decision);

e) That three of the appellant's friends were killed at the rally he organised, or at all, (because the Tribunal found he did not organise the rallies and because he did not know about the circumstances of their death) (BD179 [63] of the Tribunal's decision);

f) The appellant was in hiding (BD 179, [64] of the Tribunal's decision).

50. That appellant submits the Tribunal did not put the above matters for comment at the hearing or otherwise failed to accord the principles of natural justice to him in breach of s22 of the Act.

51. The respondent submits that the appellant was plainly on notice that his credibility was a determinative issue on review[10]; and that the Tribunal's conclusion that the appellant was not a credible witness was a finding of fact for the Tribunal to determine[11]; that there is nothing apparent in the Tribunal's reasoning that the Tribunal's approach was wrong[12].

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[8] Appellant's written submissions [51]
[9] Appellant's written submissions [52]
[10] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 [47]
[11] Re: *Minister for Immigration and Multicultural Affairs;* exparteDurairajasingham (2000) 168 ALR 407 [67]
[12] Respondent's written submissions [15]

52. The respondent further submits [13] that procedural fairness does not require the decision-maker to disclose their thought processes or propose conclusions [14] where Lord Diplock stated:

> "... the rules of natural justice do not require the decision-maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy and the trial by jury would be abolished."[15] The Full Federal Court of Australia stated:

> 'Where the exercise of statutory power attracts a requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or terms of the statute under which is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or mental processes or provisional views to comment before the making of the decision in question[16].

53. The respondent further submits that the Secretary had credibility concerns about the appellant's claim about being a body guard, raising rallies, of being beaten up on two occasions and of receiving written threats; and that further that the appellant's legal representative provided extensive written submissions to the Tribunal on his behalf[17]; the appellant also provided further written submissions which dealt with his credibility issues.

54. The respondent further submits that the legal representative at the hearing described the procedure as 'thorough' and that the Tribunal had asked 'a lot of detailed questions'[18]; that it cannot be said that there is any evidence to suggest that the appellant was taken by surprise by the Tribunal not accepting his claims[19].

55. The respondent also submits that it was not required to provide a running commentary that it would not accept some of his claims or that it found that to be inconsistent and relies on SZBEL[20] where the High Court of Australia stated:

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[13] Respondent's written submissions [17]
[14] *Hoffman–La Roche v State Secretary* [1975] AC 295 (Lord Diplock 369)
[15] *Hoffman La-Roche* [1975] AC295 cited with approval by the High Court in SZDEL (2006) 228 CLR 152, 166 [48]; *Minister for Immigration and Citizenship v SZGGUR* (2011) 241 CLR 594 [9]
[16] *Commissioner for ACT Revenue v Alphaone Pty Limited* (1994) 49 FCR 576 [29]
[17] BD 78-100
[18] BD 154 T48 - 138
[19] Appellant's written submissions [25]
[20] SZBEL (2006) 228 CLR 152 [47]

> "... there may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicates to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of a contradictor..."

56. The respondent further submits that if the Tribunal were to consistently put to the applicant in the course of the hearing that it does not accept what he or she says as correct the Tribunal runs the risk of being claimed of apprehended or actual bias[21].

57. The respondent further submits that *SZBEL v Minister for Immigration and Indigenous Affairs* (2006) (228 CLR 158) is distinguishable as the High Court held in that case that the appellant was entitled to assume that the matters were not in issue before the Tribunal or on which the Tribunal did not question; and that is not this case. That the appellant has not demonstrated any practical injustice and there was no denial of procedural fairness[22] and that the appellant has not demonstrated how this alleged breach of procedural fairness has placed him at a disadvantage or denied him the opportunity to present his case.

58. The appellant's credibility was in issue when the Secretary made his finding and both the appellant, and his legal representative made extensive submissions on the issue of credibility to the Tribunal and his legal representative described the hearing as 'thorough'. The Tribunal did not err in failing to put the matters referred to in [49] above individually for comment and therefore there is no denial of procedural fairness. The Tribunal was not required to put to the appellant that his credibility was in issue in relation to those issues. Further the appellant has not demonstrated how the alleged breach of procedural fairness has put him at a disadvantage or denied him the opportunity to present his case.

59. This ground of appeal has no merit and is dismissed.

Grounds Three and Four

60. The appellant submits in relation to ground three that the Tribunal failed to have regard to integers of the appellant's claim for recognition as a refugee or as a person owed complementary protection, or otherwise failed to have regard to relevant considerations; and further in relation to ground three that the Tribunal failed to have regard to information or make determinations on material questions of fact. At the hearing, counsel made submissions on grounds three and four together and I will also consider these grounds together.

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[21] Appellant's written submissions [27]

[22] Re: Minister for Immigration and Multicultural Affairs; exparte Lam (2003) CLR No. 1

61. The appellant notes that a failure to have regard to information would be a failure to engage with the obligations imposed by ss 22, 31, 35 - 37, 39 and 40 of the Act and that therefore such a failure amounts to an error of law.

62. The appellant further submits at [63] of its submissions that:

> The Tribunal must have regard to relevant considerations. In doing so it must engage consciously with the claims, questions and material before it. As Perry J said in *SZSZW v Minister for Immigration and Border Protection* [2015] FCA 562 (5 June 2015), at [17]:
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> > "...the requirement to consider a claim or integers of a claim made by an applicant requires the application of an active intellectual process. As the Full Court held in *Minister for Immigration and Border Protection MZYTS* [2013] FCAFC 114; (2013) 136 ALD 547 (*MZYTS*) at 559 [38], '*[t]hat task could not be lawfully undertaken without a consciousness and consideration of the submissions, evidence and material advanced by the visa applicant...*' ".

63. In relation to Ground Four the appellant submitted that ss22, 31, 35, 36, 37, 39 and 40 of the Act relates to the Tribunal's statutory task in engaging in merit review and that its ability to get information; and that it having regard to the information and it having to give particulars of information (s37). As discussed earlier, s37 is no longer applicable; but if the Tribunal does not discharge its statutory task then it is an error of law on its part.

64. The appellant further submitted that the material on Ground Three is also applicable to Ground Four.

Ground Three

Specific claim determined by the Tribunal

65. The appellant submits that the Tribunal did not have regard to or determine five matters which was an integer of a claim, or a material question of fact, squarely raised on the material before the Tribunal.[23] The matters potentially affect the assessment of the appellant's risk of suffering harm and are as follows:

a) whether three friends of the appellant were killed, whether at a rally or otherwise, and how this may affect the risk to the appellant. The Tribunal rejected the claim that the deaths occurred at a rally but did not clearly determine whether it accepted the death of the friends at all;

b) whether a friend of the appellant's father was killed on a journey to their home village, and why, and how this may affect the risk to the appellant;

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[23] See the cases cited above. See also *Paramananthan v Minister for Immigration and Multicultural Affairs;Minister for Immigration and Multicultural Affairs v Vijaya Kumar Sivarasa* [1998] FCA 1693 (21 December 1998)

c) the risk to the appellant if he returns to Bangladesh and resumes the active support for JI which the Tribunal accepts he had engaged in;

d) the risk for the appellant whom the Tribunal found to have been a driver for a leader of JI, and who may resume such work; and

e) the risk for the appellant whom the Tribunal found to have confronted AL members at rallies, and may do so again.

66. In response the respondent submits that the Tribunal concluded in the appellant's claim and evidence and made findings that were open to it[24]; that the Tribunal would be in error if it fails to deal with a 'substantial, clearly articulated argument relying on established facts' it will have fallen into error[25]; and that the Tribunal is 'not obliged to deal' with claims which are not articulated and which do not clearly arise from the material before it[26].

67. The respondent further submits that it is important to draw the distinction between failing to deal with a claim which is articulated and clearly arises on the material and failing to deal with a piece of evidence in support of that claim[27]; it is not necessary for the Tribunal to refer to every piece of evidence and every contention made by the applicant[28]; that the inference that an issue has not been dealt with is not an inference readily to be drawn[29].

68. The respondent submits that the appellant claimed that he was at risk of persecution in Bangladesh because of his political involvement; and that was the claim articulated by the appellant; and in support of that claim he made numerous allegations that he suffered because of his political activities; the Tribunal considered that claim and made findings about it; and that there is nothing in the Tribunal's decision to support the inference that it made any error with respect to those findings.

Three Friends were Killed

69. In regard to the three friends being killed the appellant submits that the Tribunal failed to determine as to how the three friends were killed and how that affected the risk of harm to him. The appellant had claimed that he had organised a rally at which he was seriously harmed and at which three friends had been killed. The respondent submits[30] that the Tribunal did not accept that he had organised the rally, that he had been seriously harmed or that his three friends had been killed at the rally.

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[24] Appellant's written submissions [44]

[25] *Dranichinikov v Minister for Immigration* (2003) 197 ALR 389 (Gummow and Callinan JJ [24],(Kirby J) 405; see also Plaintiff M61/2010 E v Commonwealth (2010) 243 CLR 319, 356 [90]

[26] *NABE v Minister for Immigration and Multicultural Affairs* (No. 2) (2004) 144 FCR 1 [60]

[27] *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396 (Allsop J) [79], (Heerey J) [95]

[28] *Paul* (2001) 113 FCR 396 [79], [95]

[29] Applicant *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 [47]

[30] Respondent's written submissions [51]

70. The Tribunal's finding about three friends being killed was based on the finding that the appellant did not organise any rally, so he could not have suffered any harm or his three friends were killed. The Tribunal's finding was conclusive and the appellant never claimed that he was at risk of persecution because of any perceived association with his three friends.

Father's Friend Being Killed on a Journey Home

71. The appellant submits that the Tribunal failed to make a finding whether a friend of his father was killed on a journey home.

72. The respondent submits that there was no evidence before the Tribunal in relation to the claim of his father's friend having been killed on a journey home; and that at the completion of the Tribunal hearing the appellant and his legal representative were asked if there was anything further that he wished to tell the Tribunal. His representative made submissions but this matter was not raised. The respondent further submits that the appellant never claimed that he would be at risk of persecution because of his political profile of his family members or because of the political profile of friends of family members; and that his claim was based on his political involvement in the context of acting as bodyguard for Mr Jalal.

JI Support upon return to Bangladesh

73. The respondent submits that the appellant did not claim that his political involvement would be greater than what it had been in the past therefore in assessing the risk to the appellant the Tribunal must use what happened to him in the past as a guide as to what may happen to him in the future[31]; and that the appellant did not claim that the Tribunal erred in its finding as to what happened to him in the past.

74. The respondent further submits[32] that the Tribunal accepted that the appellant was a supporter of JI and the Tribunal's reasoning at [65] – [71] disclosed as to what would happen to him upon his return to Bangladesh.

Driver of JI

75. The appellant submits that the Tribunal failed to take into account the risk to him as a driver of the leader of JI.

76. The respondent submits that the Tribunal did not accept that he was a bodyguard of Mr Jalal; that he had exaggerated his involvement with Mr Jalal; the Tribunal found that it was 'a matter of convenience' for Mr Jalal to engage his rickshaw as it was located close to Mr Jalal's residence; and that at [67][33] the Tribunal examined his individual circumstances and found that he was not at risk by reason of his profile.

Risk from harm to have confronted AL members

[31] *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559
[32] Respondent's written submissions [56]
[33] Tribunal's decision

77. The appellant submits that the Tribunal failed to have regard to the risk of the appellant 'whom the Tribunal found to have confronted AL members at rallies, and may do so again'.

78. The respondent submits[34] that the Tribunal found that the appellant's profile was such that he would not receive the level of adverse attention from AL members; it also did not accept that he was in hiding from them or they were looking for him or threatening him; at [65] – [68] the Tribunal considered what might happen to him in the future by reason of his low-level involvement with JI. That the Tribunal found that the appellant would not be harmed by reasons of his support for JI.

79. Having discussed the submissions of the parties in relation to the five claims listed above I am satisfied that the Tribunal considered those five claims or integers of the claims or information.

The constraints at the Transfer Interview, and the reasons why the appellant had not mentioned some matters at the Transfer Interview

80. The appellant submits that the Tribunal failed to consider the constraints of the transfer interview when determining the weight to be given to claims or evidence not presented at the transfer interview.

81. The appellant noted the brief duration of the transfer interview (one hour and 20 minutes with an interpreter), that the appellant might reasonably have considered the transfer interview to be a separate process to his refugee application, that the transfer interview's main purpose is described as to "collect background information" and that the transfer interview form in no way suggests that the comparison of the evidence given at the transfer interview with that given later in the application may cause the application to be rejected.

82. In a statement dated 16 December 2013, the appellant said, "The information I provided during my transfer interview was only a summary of my claims for protection."

83. The respondent submits that the appellant's submission that the Tribunal failed to consider the constraints of the interview is based on incorrect reading of the Tribunal's reasonings[35] that the Tribunal did not attribute weight to failure to mention certain matters at the transfer interview but the Tribunal noted that there was a failure to mention important aspects of the appellant's claim involving Mr Jalal at earlier stage; and in particular the appellant made no mention of Mr Jalal having killed five people as a revenge or that there were charges laid against the appellant.

84. The respondent further submits that the Tribunal considered the appellant's reasons for his failure to mention those matters earlier and the Tribunal stated that it did not accept his lack of familiarity of an explanation and the Tribunal stated at [58]:

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[34] Respondent's written submissions [61]

[35] Appellant's written submissions [62] and [63]

> There was also his failure to mention important aspects of his claims at *an earlier stage* such as the claim that he was informed that there were charges against him, the fact his local leader Mohammad Shah Jalal killed five people as revenge for the applicant's kidnapping (and also because of atrocities committed by the AL) and the fact he was being targeted because his leader had killed five people. The Tribunal found it implausible that the leader Mohammad Shah Jalal would kill five people as revenge for the attack on the applicant and if he did, that the applicant would be targeted in relation to it, rather than Mohammad Shah Jalal. The Tribunal is of the view that these claims were recent inventions. The Tribunal does not accept that the applicant was held responsible for the deaths of AL supporters that he claimed had been perpetrated by Mohammad Shah Jalal. (emphasis added)

85. I agree that the Tribunal did not attribute weight to the failure mention certain matters at an earlier stage, however, the tribunal did not impose any requirement that all matters be raised in full at the transfer interview stage. I am satisfied that in doing so the Tribunal considered the constraints at the transfer interview stage.

Appellant's explanation for additional details at a later time

86. The appellant submits that the Tribunal failed to consider his explanations for giving additional details at a later time in its assessment of the appellant's claims.

87. In addition to its reasons at [58] stated above, the Tribunal stated at [62]:

> ...Due to the inconsistencies in the applicant's evidence and the vagueness of his account the Tribunal does not accept that he was abducted and assaulted. It does not accept that he received death threats as there is nothing about his profile that would warrant this level of attention from AL supporters. The Tribunal does not accept that he was considered as high profile in his area.

88. The respondent submits that at the hearing the appellant's legal representative addressed the Tribunal about discrepancies in the appellant's various accounts and timing of the claims. The representative stated that the appellant was not aware of the legal procedures as well as the requirement to be detailed and thorough [BD 155]. That the Tribunal considered the appellant's explanation and at [55] the Tribunal stated that having 'discussed at the hearing'. At [56] to [58] it did not accept the appellant's lack of familiarity with the interview process or any misunderstanding by him as an explanation for the concerns that he had identified.

89. The Tribunal at [55] had regard to the appellant's representative submissions about his 'lack of familiarity' with the interview process; at [57] it found that there were 'contradictions' in his evidence at the hearing; at [58] the Tribunal concluded that the appellant's failure 'to mention as aspects of his claims at an earlier stage' and found certain aspects of his claims to be 'recent inventions'. In light of these matters it is clear that the Tribunal considered the appellant's explanation for giving additional details at a later time.

90. I accept the respondent's submissions and accept that the Tribunal considered the explanation provided by the appellant.

The appellant's detailed evidence about his claimed abduction

91. The appellant submits that the Tribunal cannot have considered the appellant's evidence about being abducted, tortured and seriously injured because it described the account as vague. The evidence on this subject was detailed and cannot reasonably be described as vague.

92. The respondent submits that there is no basis to make this submission as it is clear from the Tribunal's reasons and the material before it that the appellant gave inconsistent version of his political activity and the tribunal relied on these inconsistencies that he was not abducted and assaulted as he claimed .It also relied upon ' vagueness of his account to the Tribunal'; that the appellant does not impugn about the Tribunal's findings about contradictions but he submits that it failed to have regard to his evidence because it 'cannot be regarded as vague'. The Tribunal set out the evidence in its reasons. Any consideration of the reasonableness of the Tribunal's finding would amount to a merits review of the quality of the appellant's evidence.

93. The Tribunal considered the appellant's evidence about his claimed abduction at [44] and [45] of its decision. The Tribunal noted that "his evidence was very vague when asked what they actually said" and the Tribunal put to the appellant that at the RSD interview he said that 'they did not say anything to him'.

94. It is clear that the Tribunal did consider the appellant's evidence about his claimed abduction. So, this ground of appeal is dismissed.

Complementary protection

95. The appellant submits that the Tribunal did not consider the entitlement to complementary protection, limiting itself to the "barest discernible consideration". The Tribunal accepted that the appellant has some level of political involvement and that there were high levels of political violence in Bangladesh.

96. The appellant submits[36] that:

> [85] While the Tribunal referred to the International Covenant on Civil and Political Rights, it did not grapple with the question whether as a real possibility the level of political violence would either punish the appellant for political activity or would cause him through fear to refrain from the exercise of the political freedom protected and enshrined in the Covenant.

97. The respondent submits that the Tribunal made findings about the appellant's entitlement to complementary protection; and in so doing it was not necessary for the Tribunal to recite again the matters that it had accepted or finding that it had made[37].

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[36] Appellant's written submissions [85]

[37] *SZSGA V Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 774 [57]

The reasons must be read fairly and as a whole[38]. The Tribunal did not accept that he would be harmed upon his return to Bangladesh[39].

98. I accept that the Tribunal had accepted certain matters and made its findings on the appellant's claim and it was not necessary for the Tribunal to again recite the matters in determining the appellant's entitlement to complementary protection. I find that this ground of appeal has no merit and is dismissed.

99. For the reasons given above I find that both grounds 3 and 4 have merit and are dismissed.

Ground 5 – Irrelevant consideration

100. The Tribunal having regard to the 'later time' for 'some claims' or 'some details' being given, attach weight to a consideration made irrelevant by the Act[40] and relied on *MZZSK v Minister for Immigration and Another*[41].

101. The respondent submits that the effect of the appellant's submissions is that in assessing the genuineness of a claim which the appellant has made, the Tribunal is precluded from taking into account when that claim is made and that such a construction is inconsistent with the purposes of merits review under the Act[42]. The respondent further submits that the appellant had ample opportunity in his written statement to the Secretary, his RSD Interview and his written statement to the Tribunal to provide details of his claims; and the appellant was not denied the opportunity and expanded at the Tribunal hearing upon basic claims which he had made; and his later claims contradicted the earlier claims which had been made. That the Tribunal did not penalise the appellant because the claim was made late, but given the seriousness of the later claims, it was entirely open to the Tribunal to have expected them to have been 'mentioned' at an earlier point in time[43].

102. It is correct that given the seriousness of some of the claims made later, it was entirely 'open to the Tribunal' to have expected them to have been mentioned earlier; and the Tribunal did not attach weight to the fact that the appellant presented some claims later nor did the Tribunal penalise the appellant for doing so.

103. In the circumstances this ground of appeal has no merit and is dismissed.

Ground Six – Unreasonableness

104. The respondent submits that the Tribunal was unreasonable or had no logical basis or probative evidence for rejecting the appellant's claim to have been abducted and

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[38] *Wu Shan Liang* (1996) 185 CLR 259 at 271 -272, 291
[39] Appellant's written submissions [70]
[40] Appellant's written submissions [92]
[41] [2014] FCCA 883 at [57] – [60]
[42] Appellant's written submissions [73]
[43] Respondent's written submissions [74]

tortured because of 'the vagueness of his account'[44]; and that this is a jurisdictional error in several ways – it an error of law by proceeding without logical probative evidence and also, generally, unreasonable[45]. The appellant relies on *Associated Provincial Picture Houses Limited v Wednesbury Corporation*[46].

105. The respondent further submits that the Tribunal accepted the appellant's evidence regarding abduction and assault at [62] of the Tribunal's decision as being vague and the Tribunal's rejection was 'generally reasonable'. The respondent submits that the appellant's assertion that the decision is unreasonable is without elaboration is untenable as the unreasonableness is with respect to the decision must relate to the decision itself; and not as the appellant would have it, each of the individual findings.

106. The respondent further submits at [78] – [82][47]as follows:

> [78] Ground 6 of the Amended Notice of Appeal is misconceived for the following additional reasons
>
> [79] First, the appellant's reliance on Australian authority in this context is misplaced. The present proceeding is an appeal on a point of law and not a judicial review of an exercise of a power by the Tribunal.
>
> [80] Secondly, the application of the Refugees Convention and complementary protection under the Act by the Tribunal does not involve any exercise of discretionary power. Rather the Tribunal is required to apply the statutory definitions to the facts as found by it. Thus the appellant's reliance upon *Wednesbury* unreasonableness is also misplaced.
>
> [81] Thirdly, the challenge appears to be one finding of fact relating to the 'vagueness of' the appellant's account to the Tribunal. The appellant appears to submit that this finding was not supported by 'logically probative evidence'. The appellant does not demonstrate how this would necessarily result in an error of law by the Tribunal.
>
> [82] Finally, in any event, it was clearly open to the Tribunal to form the view that the appellant's evidence to it was vague. That the appellant or the Court might have come to a different view having read the transcript is not to the point[48].It cannot be said that the Tribunal having the benefit of seeing and hearing the appellant give his evidence and listening to his answers at the hearing could not have come to that view. The appellant merely invites the Court to engage in a merits assessment of the appellant's evidence to the Tribunal. The Tribunal did not make a decision that was unreasonable nor does it exercise its powers unreasonably.

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[44] Appellant's written submissions [93]
[45] Appellant's written submissions [94]
[46] [1948] 1 KB 223
[47] Appellant's written submissions
[48] Cf *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 (Crennan and Bell JJ) [131]

107. I accept that it was clearly open to the Tribunal to form the view that the appellant's evidence was vague; and that the Tribunal had the benefit of observing the appellant when giving evidence and made its finding against the appellant; which cannot be described as unreasonable nor can it be suggested that the Tribunal exercised its powers unreasonably.

108. In the circumstances, this ground of appeal is dismissed.

CONCLUSION

109. Under s44(1) of the Act, I make an order affirming the decision of the Tribunal.

DATED this 6th day of November 2017

Mohammed Shafiullah Khan
Judge

THE SEAL OF THE SUPREME COURT
REPUBLIC OF NAURU