IN THE SUPREME COURT OF NAURU

AT YAREN

Case No.25 of 2017

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T16/00353, brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

PIM 093 Appellant

AND

THE REPUBLIC Respondent

Before: Justice I Freckelton

Appellant: Ms Catherine Symons
Respondent: Mr Rogan O'Shannessy

Date of Hearing: 22 March 2018
Date of Judgment: 14 December 2018

CATCHWORDS

APPEAL – failure to put country information to Appellant - breach of procedural fairness obligations – failure to put the Appellant on notice of the issues in the proceeding – APPEAL DISMISSED.

JUDGMENT

1. This matter is before the Court pursuant to s 43 of the *Refugees Convention Act* 2012 ("the Act") which provides that:

> *(1) 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 parties to the appeal are the Appellant and the Republic.*
>
> *...*

2. A "refugee" is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951 ("the Refugees Convention")*, as modified by the *Protocol Relating to the Status of Refugees 1967* ("the Protocol"), as any person who:

> "*Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable to or, owing to such fear, is unwilling to return to it …*"

3. Under s 3 of the Act, complementary protection means protection for people who are not refugees but who also cannot be returned or expelled to the frontiers or territories where this would breach Nauru's international obligations.

4. The determinations open to this Court are set out in s 44(1) of the Act:

> *(a) an order affirming the decision of the Tribunal;*
> *(b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.*

5. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on 20 May 2017 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of 20 October 2016, that the Appellant is not recognised as a refugee under the Convention relating to the Status of Refugees, as amended by the Protocol, and is not owed complementary protection under the Act.

6. The Appellant filed a Notice of Appeal on 31 May 2017 and an Amended Notice of Appeal on 26 February 2018.

BACKGROUND

7. The Appellant is a married male of Shi'a Muslim religion from Iran. He has a degree in industrial electrics and has worked for a motor company. He was married in 2010 and the Appellant's wife and sister have applied for derivative status as dependants of the Appellant.

8. The Appellant has claimed a fear of persecutory harm arising from what he has described as a purported extra-marital affair. He asserts that he would be imputed with an anti-regime political opinion because of the affair. He further claims a fear of harm because of his membership of the particular social groups of failed asylum-seekers, failed asylum seekers returning from western countries, adulterers in Iran, and contraveners of Sharia law. He also claims that he would face harm in Iran because he would be imputed with the religious beliefs of a Christian, as his wife and sister-in-law have converted to Christianity.

9. In May 2013, the Appellant travelled to Australia via Malaysia and Indonesia, arriving on Christmas Island in August 2013. The Appellant was transferred to Nauru in February 2014.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

10. The Appellant attended a Refugee Status Determination ("RSD") interview on 12 July 2014. In the interview, the Appellant claimed that, in August or September 2012, he met a woman when he stopped by a kiosk to buy a newspaper. The woman seemed to flirt with him and got into the car beside him. The woman said that she was divorced from her husband and an ice addict. Before parting ways, the woman gave the Appellant her phone number. After about a month, the Appellant and the woman began a sexual relationship, and saw each other about twice a week. After two months, the Appellant agreed to meet the woman at her friend's house. Following this meeting, the Appellant noticed that the woman changed her attitude towards him, and the Appellant decided to end the relationship.

11. About two weeks after ending the relationship, a man claiming to be the woman's husband verbally abused the Appellant. He demanded 10 million toman from the Appellant, but the Appellant ignored the demand. The next day the Appellant received an envelope containing 15 photographs showing him and the woman having sexual intercourse. There was also a note demanding payment of 10 million toman within a week, or the photographs would be sent to his parents, wife, family and workplace. He believed the woman had sought him out for the purposes of extortion. The Appellant delivered the money to the specified location. About a month later, another letter was delivered to the Appellant with more pictures of him with the woman. The Appellant rang the phone number, and was told to provide another 15 million toman.

12. The Appellant sought the advice of his sister-in-law's brother, who informed the Appellant that he could be stoned to death or executed if his guilt was proven. The Appellant decided to pay the 15 million toman. One month later, the Appellant received another letter, and the extortionist demanded a further 15 million toman. The Appellant promised to pay the money in one month. However, the Appellant decided not to pay it and instead made arrangements to leave Iran. The Appellant authorised his mother-in-law to obtain his long service payment from his employer, but was told that the Appellant had to collect it himself. A friend in the security section told the Appellant that there was strong case against

the Appellant because of his extra-marital affair, and if he returned he would be handed over immediately to the Iranian authorities.[1]

13. The Secretary rejected the claims that the Appellant was lured into an extra-marital affair, extorted and threatened; was of interest to the Iranian authorities when he left Iran as his affair had been reported; and is at risk as a non-practising Muslim in Iran.[2] In coming to these conclusions, the Secretary noted that the Appellant presented as an intelligent and capable man, committed to his marriage, and it was implausible that he would begin an adulterous relationship in the circumstances as claimed, given the significant risks to him and his family.[3] There were several internal inconsistencies in the Appellant's account, including whether the woman was part of a criminal operation, or a drug addict, in which case it was surprising she was able to organise expensive equipment to take the photos and footage.[4] The Appellant also failed to provide any documentary evidence in support of his claims, such as bank statements, photographs and threat letters.[5]

14. The Secretary therefore rejected the Appellant's claim surrounding his extra-marital affair in its entirety and found no fear of harm on this basis.[6]

15. As to the Appellant's claimed fear of harm on the basis of being a failed asylum-seeker, the Secretary said that current information indicates that seeking asylum is not regarded as an offence in Iran, and, while failed asylum-seekers may be subject to interrogation, those with no anti-government, activist or criminal profiles are not likely to be at risk of harm.[7] Thus, while the Appellant may be subject to interrogation, this was unlikely to expose anything of concern to the authorities, and he would be likely to be allowed to re-enter Iran without further action. Therefore, there was no reasonable possibility of the Appellant experiencing harm on this basis, and the Appellant's fear of harm was not well-founded.[8]

16. In light of these findings, the Secretary concluded that the Appellant did not attract refugee status.[9] Based on the same factual findings, the Secretary was also not satisfied that the Appellant's circumstances engaged Nauru's international obligations, and thus he did not attract complementary protection.[10] The Appellant's wife and sister could not be accorded derivative status.[11]

REFUGEE STATUS REVIEW TRIBUNAL

17. On 1 March 2017, the Appellant appeared before the Tribunal to give evidence and present arguments. The Appellant reiterated and expanded upon his central

[1] Book of Documents ("BD") 81 – 82.
[2] Ibid 86.
[3] Ibid 84 – 85.
[4] Ibid 85.
[5] Ibid.
[6] Ibid.
[7] Ibid 87 – 91.
[8] Ibid 91.
[9] Ibid 92.
[10] Ibid.
[11] Ibid 93.

claim to have had an extra-marital affair in Iran that put him at risk of harm should he return.

18. On the basis of the consistency in his account in this respect, the Tribunal accepted that the Appellant engaged in an extra-marital affair prior to leaving Iran.[12] However, the Tribunal rejected the Appellant's claims that he was photographed with the woman, extorted and threatened.[13] The Tribunal rejected these claims on the basis of inconsistencies in the Appellant's evidence, including who called whom after the initial meeting at the kiosk,[14] the time period of the relationship and when the woman suggested to the Appellant they go to her friend's house,[15] whether the woman's face could be seen in the photographs and footage,[16] and whether the motivation to leave Iran was the Appellant's fear of his adultery being exposed, or a desire on the part of the Appellant and wife to leave Iran.[17] The Tribunal considered that evidence of a general desire to leave Iran, coupled with evidence that the Appellant departed Iran with a number of colleagues, suggests that the departure was planned and co-ordinated.[18]

19. The Tribunal further noted that the length of the extra-marital affair, and the one or two month period before the woman organised the pair to be filmed at her friend's house, was inconsistent with an intention to engage in extortion of the Appellant.[19] Additional matters of concern to the Tribunal were the Appellant's evidence that he could not have entered a *sigeh* (a temporary marriage) with the woman, and thereby have avoided prosecution;[20] and unpersuasive documentary evidence suggesting the Appellant's employer had been sent copies of the photographs and footage.[21]

20. The Tribunal did not accept that the Appellant would be imputed with an anti-regime political opinion because of his anti-Islamic behaviour, or that he would be considered a member of the particular social group of contraveners of Sharia law, as the Appellant's family and the authorities were not aware of the adulterous relationship. There was no reasonable possibility of the Appellant suffering harm because of the extra-marital affair from the extortionists, his former employer, the Iranian authorities, or his wife's family.[22]

21. As to the Appellant's claimed fear of harm on religious grounds, the Tribunal considered that the Appellant had not put forward any evidence of his practice or conduct that would lead to him being identified as an atheist or apostate if he was returned to Iran. There was similarly no evidence that the Iranian authorities were aware that the Appellant's wife and sister-in-law had converted to Christianity, and the Tribunal did not accept that their activities would lead to the Appellant

[12] Ibid 235 at [47].
[13] Ibid at [48].
[14] Ibid at [49].
[15] Ibid at [50].
[16] Ibid 236 at [53].
[17] Ibid 237 at [54].
[18] Ibid 238 at [55].
[19] Ibid 229 at [24]; BD 235 at [51].
[20] Ibid 238 at [56].
[21] Ibid at [57].
[22] Ibid 239 at [63].

being imputed with the religious beliefs of a Christian.[23] The Tribunal did not accept that there was any reasonable possibility that the Appellant would suffer serious harm because of his lack of religious beliefs, being a non-practising Shi'a Muslim or an atheist, or because of his wife's and sister-in-law's conversion to Christianity.[24]

22. As to the Appellant's claimed fear of harm due to being a failed asylum-seeker, the Appellant's representative submitted that his time outside Nauru, the inclusion of his personal information in a data breach by the Australian Department of Border Protection, his social media presence, and activities of his wife would create a level of interest in him upon return to Iran.[25] The Tribunal accepted that the Appellant may be identified as a failed asylum-seeker, and questioned about his reasons for leaving Iran; however, given the Appellant's negligible political profile, and that he has not previously come to the adverse attention of the authorities, the Tribunal considered that the Appellant would not face harm upon return.[26] The Tribunal found there was no reasonable possibility that the Appellant would be persecuted because he applied for asylum in Australia and Nauru.[27]

23. The Tribunal therefore found that the Appellant did not have a well-founded fear of harm on the basis of his extra-marital affair, his atheist attitudes and association with his wife and sister-in-law, or being a failed asylum-seeker. The Tribunal concluded that the Appellant was not a refugee within the meaning of the Convention.[28] For the same reasons that the Tribunal rejected the Appellant's application for refugee status, it found there were no substantial grounds for believing the Appellant would be in danger or tortured so to engage Nauru's international obligations. The Appellant was therefore also not eligible for complementary protection.[29]

THIS APPEAL

24. The Appellant's Amended Notice of Appeal filed on 26 February 2018 reads as follows:

> *1. The Tribunal breached s 22(b) of the Act by not according the appellant natural justice.*
>
> *Particulars*
>
> *a. One of the reasons for the Tribunal's rejection of the appellant's claim to apprehend harm as a result of having conducted an extra-marital affair was that the appellant was unable to address country information that had earlier been identified by the Tribunal in its written statement ([56]);*

[23] Ibid 241 at [73].
[24] Ibid at [72], [75].
[25] Ibid 242 at [81].
[26] Ibid 244 at [89].
[27] Ibid 245 at [90].
[28] Ibid at [94]-[95].
[29] Ibid 246 at [99]-[100].

b. *The country information was identified at [28] and [29] of the Tribunal's written statement and comprised six items of 'country information' from a range of sources, including newspaper articles (the country information);*
c. *The Tribunal failed, prior to handing down its determination, to identify for the appellant the particular country information, and the Secretary in his decision had not referred to the country information.*
d. *In circumstances where the case that the appellant was required to meet was to address (and effectively rebut) the country information, the Tribunal failed to comply with its obligation under s 22(b) of the Act to act according to the principles of natural justice.*
e. *Further, one of the reasons for the Tribunal's rejection of the appellant's claim to apprehend harm as a result of having conducted an extra-marital affair was that the Tribunal had identified country information that supported the proposition (i) that adultery prosecutions are more likely against women ([28] and [56]); and (ii) there was no religious aspect of using sigeh as a means of defending or explaining a charge of adultery ([56]).*
f. *The Tribunal did not identify for the appellant (or his representative) the substance of this country information or the source from which it was derived.*
g. *In these circumstances, the Tribunal failed to comply with its obligation under s 22(b) of the Act to act according to the principles of natural justice.*
h. *Further still, the Tribunal did not identify for the appellant or allow him the opportunity to ascertain and comment on, the following issue that was of dispositive significance to his claim and to apprehend harm as a result of having conducted an extra-marital affairs;*
    i. *That the Tribunal might reject his claim for reasons that included the appellant's delay in providing Facebook messages in support of his claims ([57]).*
i. *In these circumstances, the Tribunal failed to comply with is [sic] obligation under s 22(b) of the Act to act according to the principles of natural justice.*
j. *Further again, the Tribunal failed to identify for the appellant, or allow him the opportunity to ascertain and comment on, the following issues that were of dispositive significance to the appellant's claim to apprehend harm for the reason that he would have imputed to him (by association) the profile of a Christian convert;*
    i. *That the Tribunal had separately considered the appellant's wife and sister-in-law in separate decisions and found that they were not genuine Christian converts and would not seek to practice Christianity or disclose their claimed conversion on return to Iran (at [73]);*
    ii. *There was no evidence that the Iranian authorities were aware of the purported conversions of the appellant's wife and sister-in-law ([73]);*
    iii. *The photos provided by the appellant did not identify his wife and sister-in-law as attending religious events ([73]); and*
    iv. *The Facebook pages that the appellant's wife and sister-in-law had liked did not indicate they had converted to Christianity ([73])*
k. *Further again, the Tribunal failed to identify for the appellant, or allow him the opportunity to ascertain and comment on, the following issues that were of dispositive significance to the appellant's claim to apprehend harm for the reason that he would have imputed to him (by association) the profile of a Christian convert:*
    i. *That the Tribunal had separately considered the appellant's wife and sister-in-law in separate decisions and found that they were not genuine Christian converts and would not seek to practise Christianity or disclose their claimed conversion on return to Iran (at [73]);*
        ii. *There was no evidence that the Iranian authorities were aware of the purported conversions of the appellant's wife and sister-in-law ([73]);*

iii. *The photops provided by the appellant did not identify his wife and sister-in-law as attending religious events ([73]); and*
iv. *The Facebook pages that the appellant's wife and sister-in-law had liked did not indicate they had converted to Christianity ([73])*

l. Additionally, the Tribunal failed to identify for the appellant as an issue in the review that it might not accept his claims to fear harm as a result of anti-Muslim behaviour because these concerns had not been raised by the appellant in his RSD and RSRT statements or his evidence to the Tribunal (at [64[).

25. The Appellant submits that the Australian High Court decision in *BRF 038 v The Republic of Nauru*[30] upheld that the obligations of procedural fairness apply to the Tribunal in exercising its review function. The Appellant also relies on the decisions cited therein to assert that an applicant should be put on notice of the nature and content of the country information a decision-maker may rely upon in making its decision, and should be extended a right of reply to that information.[31] Further to this, the High Court in *Minister for Immigration and Border Protection v SZSSJ* held an applicant should be put on notice of the "nature and content" of the information, including its provenance.[32]

26. According to the Appellant, "[a]n integral link in the chain of reasoning employed by the Tribunal to reject the appellant's claim to apprehend harm as a person who had engaged in an extra-marital affair, was the Tribunal's criticism that the appellant was unable to 'address' (and counter) certain country information that the Tribunal noted had been addressed above".[33] This "criticism" is said to be found at [56] of the Tribunal's reasons:

> "*The applicant was also unable to address country information discussed above which indicates that adultery prosecutions are more likely against women, that men, including married men, can escape any official sanction through claiming they were temporarily married under a sigeh to the woman at the time but had neglected to register the marriage. The Tribunal is not convinced by the representative's claim that the applicant's case is different because there is probative evidence of his infidelity – the Tribunal has not accepted, below, that the claimed photos and videos are in existence and even if they were, there is no basis to conclude that this would change the ability or appetite of the authorities to prosecute the applicant given the country information. The Tribunal does not accept that the applicant could not claim he had entered a temporary marriage at the time because of his religious beliefs, or more accurately his lack of religious beliefs, and that this would force him to act against his religious convictions – this claim is misconceived – the applicant would not have in fact entered into a temporary marriage but would only be claiming he had, the country information does not indicate that there is any religious aspect or component to the practice of using sigeh in this manner. Further, as below, the Tribunal does not accept that the applicant is a trenchant or committed atheist such that claiming a sigeh as a means of avoiding punishment would fundamentally infringe on his religion / lack of religion, noting that he married his wife under Islamic law*".[34]

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[30] [2017] HCA 44.
[31] (2016) 333 ALR 653 at 670; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576.
[32] (2016) 333 ALR 653 at 670.
[33] Appellant's submissions at [21].
[34] BD 238 at [56].

27. The Appellant submits that the country information referred to by the Tribunal in the first sentence of [56] is set out at [28] and [29] of the Tribunal's reasons, including in footnotes 1 and 2. This information includes:

- a BBC News report entitled "Iran woman escapes stoning death for adultery" dated 9 July 2010;
- a Guardian article entitled "Eight women and a man face stoning in Iran for adultery" dated 21 July 2008;
- a United States Department of State Country Report on Human Rights Practices entitled "Iran – premarital sex and extramarital relationships";
- a Guardian article entitled "When adultery means death" dated 7 August 2010;
- an Australian Department of Foreign Affairs and Trade report entitled "Country Information Report: Iran" dated 21 April 2016; and
- a United Kingdom Home Office report that is not further identified.

28. The Appellant submits that none of this country information, or the provenance of this information, was identified to the Appellant at the Tribunal hearing, or detailed in the Secretary's determination.

29. While the Appellant accepts the Tribunal put to the Appellant that adultery prosecutions are more likely against women,[35] and that men may be able to escape prosecution through claiming they were temporarily married under a *sigeh*,[36] counsel for the Appellant asserts that the Tribunal did not put the Appellant on notice that it was inclined to draw from the country information the conclusions that (i) adultery prosecutions are more likely against women; and (ii) the country information indicates that reciting a *sigeh* to escape prosecution does not raise any religious concerns, refuting the Appellant's explanation that he could not claim a *sigeh* because it was inconsistent with his religious beliefs.

30. In response to the Respondent's argument that no "practice injustice" flowed from the Tribunal's failure to identify certain country information, the Appellant submits that the practical injustice in this case consists of the lack of a fair opportunity to be heard.[37] In any event, counsel for the Appellant contends that, if the information had been identified to the Appellant, the Appellant may have been able to make submissions capable of altering the disposition of the Tribunal, given that:

- at least one item of the country information identified that a male had faced stoning in Iran for adultery (Guardian article dated 21 July 2008);
- at least one item of country information identified that "temporary marriage" or *sigeh* was only available after a "religious ceremony and a civil contract outlining the union's conditions" (United States Department of State report); and
- at least one item of country information identified that "[c]riminal prosecution for adultery, and the handing down of a stoning verdict, does not even require a personal plaintiff" (Guardian article dated 7 August 2010).

[35] Supreme Court Transcript 11 at ln 34 – 36.
[36] Ibid 12 at ln 28.
[37] See *Minister for Immigration and Citizenship v WZARH* [2015] HCA 40 at [60].

31. The Appellant additionally argues that the Tribunal failed to accord him procedural fairness by neglecting to foreshadow that it might reject the Appellant's asserted fear of harm due to his extra-marital affair and anti-Islamic behaviour for reasons including his delay in providing Facebook messages, and by neglecting to make known its concerns regarding his anti-Islamic attitudes and conduct. The Appellant contends that, had these concerns been properly identified to the Appellant, the Appellant may have been able to provide a satisfactory explanation for not raising these matters earlier.[38]

32. The Tribunal also neglected to foreshadow that it might reject the Appellant's fear of harm due to the conversion of his wife and sister-in-law to Christianity for reasons including that his wife and sister-in-law would not practise Christianity in Iran, there was no evidence the authorities were aware of their conversion, they were not identified in photographs depicting Christian religious events on Facebook, and that the Facebook pages they had "liked" did not reveal that they had converted to Christianity. The Appellant submits that the Tribunal ought to have put these incriminating matters to the Appellant, and given him the opportunity to respond.[39]

33. The Respondent submits, in relation to the country information complained of by the Appellant, that the BBC report dated 9 July 2010 and the Guardian article dated 21 July 2008 are not "adverse" to the interests of the Appellant, given the documents do not pass comment on whether the use of stoning as a punishment for adultery is an increasingly widespread phenomenon,[40] and that the United States Department of State report was, in fact, referred to by the Appellant's representatives in their submissions to the Tribunal and supported the Appellant's contention that entering a *sigeh* has religious implications (see BD 134 at [94]).[41]

34. Irrespective of this, the Respondent says that the substance of the country information relied upon by the Tribunal was identified to the Appellant through the Tribunal's questioning at the hearing.

35. In any event, the Respondent submits that the "central claims" advanced by the Appellant at the Tribunal hearing were that there were photographs and video footage of the Appellant's extra-marital sexual relationship, that the Appellant was extorted for money, and threatened that the photographs and video footage would be released if the Appellant failed to comply with the extortionists' demands. The Tribunal, says the Respondent, considered these claims at [53] and [54], concluding that they lacked credibility because of internal inconsistencies in the Appellant's accounts, and the lack of any persuasive explanation for those inconsistencies, and spelt out its findings on the claims at [59] to [61]. The Respondent says it was the Tribunal's rejection of these claims that informed its statement at [62] that "[a] consequence of these findings about the central claim of the applicant is to lead the Tribunal to conclude that he is not

[38] Supreme Court Transcript p 23 at ln 6 – 9.
[39] Appellant's submissions at [34.3] and footnote 29; Appellant's reply submissions at [14]; Supreme Court Transcript p 26 at ln 38 – 45.
[40] Supreme Court Transcript p 35.
[41] Ibid p 36.

a credible witness". The Tribunal's consideration of the Appellant's failure or inability to counter the country information referred to by the Tribunal at [56] had no role to play in the Tribunal's conclusion as to the Appellant's credibility.

36. As to the Appellant's claimed fear of harm on the basis of the conversion of his wife and sister-in-law to Christianity, the Respondent submits that the Tribunal put the Appellant on notice of that the legitimacy of their conversion was in issue at the hearing in saying:

> "*TRIBUNAL MEMBER: I suppose following on from that when you're considering about whether you may be imputed or accused of being Christian because of your wife's Christian beliefs we also have to make assessment of whether we think your wife is a genuine Christian and has genuinely converted."*[42]

37. The Respondent argued that the Tribunal was not required to take it any further than this and alert the Appellant that it had found that the Appellant's wife and sister-in-law were not genuine converts. This aside, there was no "practical injustice" in the Tribunal not specifically drawing the attention of the Appellant to these matters – given the Tribunal's findings that the Appellant's wife and sister-in-law did not genuinely convert to Christianity were made in separate decisions, there was nothing the Appellant could have said that was capable of altering the Tribunal's disposition on this point.

CONSIDERATION

Natural Justice

38. It is not necessary for a decision-maker to draw the attention of a person affected by the decision to all matters likely to be taken into account, where these are obvious, given the context, or to identify the significance of its questions.[43] Further, there is no "universal proposition" that the Tribunal must put to an applicant the concerns that incline it to make an adverse finding on a particular issue or expose its mental processes or provisional views before coming to a decision.[44]

Practical Injustice

39. The Court was taken to several authorities relevant to the need to consider whether, if procedural fairness has not been accorded, there was any "practical injustice" to the applicant. In *Re Refugee Review Tribunal; Ex parte Aala*, Kirby J held that:

> "*Once the applicable breach is proved, the victim of the breach is ordinarily entitled to relief. It is only where an affirmative conclusion is reached, that compliance with the requirements of procedural fairness "could have made no difference" to the result,*

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[42] BD 208 at ln 46 – BD 209 at ln 7.
[43] *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592. See also *CQG15 v Minister for Immigration and Border Protection* (2016) 70 AAR 413.
[44] See *Re Refugee Review Tribunal; Ex parte Aala* ("*Ex parte Aala*") (2000) 204 CLR 82 at [75]; *Applicant M189 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 131 at [7].

that relief will be withheld. This Court has emphasised that such an outcome will be a rarity. It will be "no easy task" to convince a court to adopt it".[45] (citations omitted)

40. In *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs*, Hill J Lee, Goldberg and Weinberg JJ said:

> "*We consider, in accordance with Stead and Aala, that the appellant, having established a breach of the rules of natural justice, was entitled to succeed unless the primary judge was satisfied that the breach could have had no bearing on the outcome. In accordance with the observations of the High Court in Aala, that is not an easy task. If the adverse material might realistically have affected the outcome, the decision-maker will have failed to discharge the onus that rests upon him.*"[46]

41. A question that arises in this case is whether, if the Appellant had been explicitly given the opportunity to respond to the country information referred to at [56], the outcome could not have been different. This question arises only in the context of a finding of a denial of procedural fairness and would require the Court to undertake the task of construing the Tribunal's reasons to assess the relative weight of [56] to the subsequent findings of the Tribunal.

Country Information (Particulars (a)-(g))

42. It is apparent that the Tribunal put to the Appellant the substance of the relevant country information at [56] of its reasons.

43. At the Tribunal hearing, the Tribunal noted in general terms that it had accessed country information indicating that it is usually the husband who brings claims of adultery; however, the Tribunal did not make explicit the point that adultery prosecutions are more likely against women. The relevant exchange was:

> "*TRIBUNAL MEMBER: So I've read as widely as I can about prosecutions for zina in Iran. So the articles I've read tend to indicate that it's usually the husband of the woman who brings the charge ---*
>
> *APPELLANT: No.*
>
> *TRIBUNAL MEMBER: --- which might indicate it's unlikely that either someone's wife or the wife's family or the authorities would bring a charge of ---*
>
> *THE INTERPRETER: You know, you might have got it wrong on the part that whoever that see or brings about an illicit relationship the prosecution can have*."[47]

44. However, it is apparent that the Tribunal raised the issue explicitly for the Appellant. In short, he was well on notice that it was a live issue.

45. As to the point of whether a married man can escape prosecution in Iran by relying on a "sigeh" or "temporary marriage" arrangement, the following exchange occurred:

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[45] *Ex parte Aala* at [130].
[46] (2003) 133 FCR 541 at [97].
[47] BD 188 at ln 7 – ln 18.

"*TRIBUNAL MEMBER: I've also got some country information here that says that in Iran a married man when arrested for adultery can claim he had privately recited the sigheh but failed to register the marriage as a way of getting out of the charge. So why couldn't you just do that, say that, "We had had a private temporary marriage that I forgot to register"?*

THE INTERPRETER: First of all, I did not know that this was a planned thing and then there is something behind it.

TRIBUNAL MEMBER: No. This is after you were arrested, you then can say, "But I privately recited the sigheh and so it's okay. We were actually in a temporary marriage." Say that after the fact.

THE INTERPRETER: For a temporary marriage… that you go to, you know, a special, you know, offices and thing, you know. They just give also, you know, a written note or something. And then for a specific length of time and things like that, it's – you know, it seems you have forgotten the main problem. The main problem is that those photos and those videos has gotten into the hand of the intelligence or Heresat of our company."[48]

46. The Tribunal raised with the Appellant the question about which it was concerned. It afforded him the opportunity of responding to it and, moreover, the Appellant availed himself of the opportunity.

47. As to the point of whether a private individual needs to initiate a prosecution for adultery, the Tribunal put to the Appellant:

"*TRIBUNAL MEMBER:…The country information says that in the cases of adultery, if there is no private plaintiff, there is no case. The government – the police don't bother prosecuting unless somebody actually – a private person complains*."[49]

48. Again, then, the matter was properly raised with the Appellant. The fact that the Appellant did not respond directly to the point put to him, instead saying that the photographs and video footage of the extra-marital relations exposed him to punishment under Islamic law, does not give rise to any point of law. There is no obligation on the Tribunal to ensure a party takes the best advantage of the opportunity to which he is entitled.[50] There was no error by the Tribunal in this regard.

Particulars (h)-(j)

Facebook messages

49. One of the considerations which raised concerns about the Appellant's credibility for the Tribunal was a Facebook message claimed to have been sent to the Appellant in July 2013, but not provided to the Tribunal until February 2017. The Tribunal's finding on the credibility of the Facebook message is found at [57],

[48] BD 188 at ln 38 – BD 189 at ln 10.
[49] Ibid 189 at ln 22 – ln 25.
[50] *Sullivan v Department of Transport* (1971) 29 ALR 323, 343. See also *Minister for Immigration and Citizenship v SZNVW* [2010] FCAFC 41 at [22].

where the Tribunal said that by reason of the delay in providing the message, and lack of any explanation for the delay, the message was given "little weight".[51]

50. It was self-evident that the latter-day provision of such material on which the Appellant relied raised questions relevant to its provision and to his credibility. It was not obligatory for the Tribunal to point this out to the Appellant.

51. Importantly, and separately, the Tribunal affirmed the Secretary's decision on the basis that it concluded he did not hold the requisite subjective fear of persecution, instead finding that "his fear is that it will end his marriage, with all of the emotional and financial consequences that this would bring, and nothing more."[52] This finding was a product of its analysis in all the preceding paragraphs, including its view that the Appellant was not a credible witness. This view was formed on the basis of a number of matters, including:

    1. The Appellant's evidence on the relationship and claimed extortion was inconsistent (at [48]);
    2. The Appellant varied his evidence about who called whom after the first meeting (at [49]);
    3. The Appellant's account for the time period of the relationship was inconsistent (at [50]);
    4. The duration of the relationship was inconsistent with the claim that the purpose of the relationship was extortion (at [51]);
    5. Doubts about the departure by the Appellant with colleagues from Iran (at [55]);
    6. The Appellant's inability to address country information relating to the greater likelihood of adultery prosecutions against men (at [56]);
    7. The Appellant's inability to address country information relating to the option of a sigeh (at [56]);
    8. The Appellant's delay in providing a Facebook message purporting to be dated July 2013 from a former colleague to the Appellant, which stated that the Appellant's mother had been blocked from collecting the Appellant's long service payment from the Appellant's employer because the employer was aware of the Appellant's conduct (at [57]).

52. The Tribunal's findings with respect to the Appellant's inability to address country information, and delay in providing the Facebook message, therefore, do not constitute separate and independent findings. Notably at [48] the Tribunal referred to "the following reasons" and at [62] to "these findings". In these circumstances, it is not appropriate to conclude that the reasons of the Tribunal at [56] and [57] constitute an "indispensable basis" for its ultimate conclusion at [63]. No error on the part of the Tribunal is established in this respect.

Particular (k)

Conversion of Wife and Sister-in-law to Christianity

[51] BD 239 at [57].
[52] Ibid at [60].

53. The Tribunal's finding with respect to the Appellant's claims based on the purported conversion of his wife and sister-in-law to Christianity is set out at [75], where the Tribunal said that it:

> "*does not accept that there is a reasonable possibility that the applicant would suffer serious harm because of his wife and sister-in-law's baptisms and purported conversions to Christianity, nor that their or his social media behaviour or their or his behaviour on return to Iran would lead to him being imputed as a Christian convert."*

54. As the Tribunal explained (at [73]), it had separately considered the claims of the Appellant's wife and sister-in law in separate decisions.

55. The Tribunal's reasons for its findings are found at [74], where itstated:

> "*The applicant claims he has commented on these Christian posts on his wife's Facebook page. This constitutes no more than 'likes' of some of the posts and the Tribunal does not accept that this information would be located by the Iranian authorities, or that if it was that it would indicate to them that the applicant is a Christian convert. The Tribunal has had regard to the photos provided of the applicant which were taken when he attended church with his wife. As with those of his wife and sister-in-law these merely appear show [sic] the applicant in a range of social situations there is nothing in the photographs that indicate he is at church or involved in Christian activities. In one photo there is a man with a cross around his neck – the applicant has not identified who this is and the Tribunal does not accept that these photos or Facebook 'likes' would lead the authorities of Iran to suspect or presume that the applicant is a Christian convert. The applicant said he had not attended his wife and sister-in-law's baptisms".*

56. The Tribunal explained to the Appellant that an assessment of his claims would also involve an assessment of the claims of the Appellant's wife and sister-in-law with respect to their conversion to Christianity as follows:

> "*TRIBUNAL MEMBER: … if someone questioned you and accused you of being a Christian you would be able to say "No. I'm not" wouldn't you? Because you're not a Christian are you?*
>
> *THE INTERPRETER: You know, I can say I'm not Christian but, you know, your family – my wife cannot say, you know, her sister cannot say and your – your just, you know, a one unit family.*
>
> *TRIBUNAL MEMBER: I suppose, following on from that, <u>when we're considering about whether you may be imputed or accused of being Christian because of your wife's Christian beliefs we also have to make assessment of whether we think your wife is a genuine Christian and has genuinely converted</u> as well and you will also be aware that the secretary didn't accept a lot of your story and didn't really accept your account of being involved in this adulterous relationship and that's something that we have to consider as well. So I don't think we've got further questions. You can either – if you want to say anything about that now or you can have a break and talk to your advisor and tell us about that after the break*."[53]

[53] BD 208 at ln 39 – BD 209 at ln 7.

57. This exchange made it clear that the claim was regarded as a "cross-reference claim" arising from the claims of the Appellant's wife and sister-in-law without any additional information being adduced by the Appellant. In the circumstances there was no practical injustice in the Tribunal failing to add in its reasons to what it said to him in respect of the issue. The Appellant was on notice of the issue and was afforded an opportunity to put his position in relation to it. Thus, no error is made out in this regard.

Particulars (l)

Anti-Islamic Behaviour

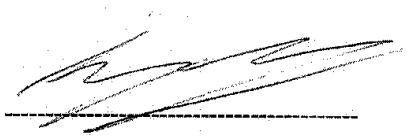
58. The Tribunal identified the Appellant's alleged anti-Islamic behaviour at [64] as including drinking alcohol, going out to night clubs, dressing in "very modern western attire", and having his left eyebrow pierced. The Tribunal considered that being required to adhere to dress and behaviour restrictions in Iran does not entail any breach of fundamental human rights, and concluded that the Appellant did not have any well-founded fear of persecution on account of this.[54]

59. The Tribunal's conclusions on these matters arose from material canvassed during the hearing and were open on the known material. In the submissions provided to the Tribunal by the Appellant's representatives, the representatives submitted that the Appellant's anti-Islamic behaviour, such as drinking alcohol and going to night clubs, is likely to expose the Appellant's abandonment of the Islamic faith.[55] The representatives further submitted that the Appellant's anti-Islamic behaviour would bring him to the adverse attention of the authorities, and he would be imprisoned, and at risk of persecution while detained.[56] The Appellant therefore had the opportunity, and availed himself of the opportunity, to make submissions on any likely risk of harm resulting from his anti-Islamic behaviour.

60. There was no decision-making in respect of these matters that deprived the Appellant of the opportunity of making submissions or providing information about them. Thus there was no denial of procedural fairness to him.

CONCLUSION

61. Under s 44(1) of the Act, I make an order dismissing the appeal and affirming the decision of the Tribunal and make no order as to costs.



Justice Ian Freckelton
Dated this 14th day of December 2018

[54] Ibid 240 at [65].
[55] Ibid 132 at [80].
[56] Ibid 133 – 135 at [91] – [97].