IN THE SUPREME COURT OF NAURU

AT YAREN

Appeal No. 13 of 2019

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T17/00403 brought pursuant to s43 of the *Refugees Convention Act* 1972

BETWEEN:	**YAU026**	Appellant
	AND:	
	REPUBLIC OF NAURU	Respondent

Before:	Brady J
Dates of Hearing:	19 October 2022
Date of Judgment:	6 December 2022
CITATION:	*YAU026 v Republic of Nauru*

CATCHWORDS:

APPEAL - *Refugees – Refugee Status Review Tribunal – whether the Tribunal failed to make an obvious inquiry in relation to obtaining the recording of the interview before the Secretary – whether error in law – Tribunal listened to relevant recording and did not make legal error – Appeal Dismissed*

APPEARANCES:

Appellant:	F. Batten
Respondent:	T. Reilly

JUDGMENT

INTRODUCTION

1. The Appellant appeals from a decision of the Refugee Status Tribunal (**Tribunal**) made on 4 June 2019 (**Second Tribunal Decision**). The Tribunal affirmed a decision of the Secretary of Justice and Border Control (**Secretary**) dated 2 November 2014 (**Secretary's Decision**) not to recognise the Appellant as a refugee and that he is not owed complementary protection under the *Refugees Convention Act* 2012 (**the Act**).

2. The Second Tribunal Decision is the second decision of the Tribunal after the High Court of Australia (**High Court**) remitted the matter to the Tribunal for reconsideration.

3. By section 44(1) of the Act, this Court may make either of the two following orders:

   (a) an order affirming the Second Tribunal Decision; or

   (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of this Court.

GROUNDS OF APPEAL

4. By his Amended Notice of Appeal, the Appellant relies upon one ground of appeal:

   > "The Tribunal failed to make an obvious inquiry in relation to obtaining the recording of the interview before the Secretary, either by requesting a copy of the audio recording from the Secretary or from the Appellant's representatives."

5. For the reasons set out below, I find that the Appellant has failed to make out this ground of appeal. The Tribunal did listen to, and did take into account, the recording of the Refugee Status Determination interview (**RSD interview**). The Tribunal therefore did not fail to make an "obvious inquiry" in relation to obtaining the recording of the RSD interview.

FACTUAL BACKGROUND

6. The Appellant is a national of Bangladesh. He claims to be a Sunni Muslim born in 1985. His wife and son remain in Bangladesh.

7. The Appellant left Bangladesh for Malaysia in July 2013. He travelled to Christmas Island, via Indonesia, in November 2013. He was then transferred to Nauru pursuant to a memorandum of agreement between the Republic of Nauru and the Commonwealth of Australia in December 2013.

THE APPELLANT'S CLAIMS

8. The Appellant claims to fear harm because of his political involvement with the Bangladesh Nationalist Party (**BNP**) and its student wing, the Chatra Dal, also known as the Jatiotabadi Chatra Dal (**JCD** or **Chatra Dal**). He claims that due to his involvement with those entities, he was beaten and harmed by members of the Awami League (**AL**), the opposing political party, resulting in his hospitalisation.

9. He claims that he was pursued by members and supporters of the AL for an extended period and after he left Bangladesh, they continued looking for him and set fire to his farm. He also claims that someone with an "Australian accent" made telephone inquiries about him at the police station in his village and this has increased his profile with the Bangladeshi authorities.

10. The Applicant claims that he would be pursued and harmed upon his return to Bangladesh by members of the AL and, as a result, he has a well-founded fear of persecution for reasons of his political opinion as a supporter of the JCD and BNP and his imputed and/or actual political opinion as a person opposed to the AL as well as his membership of a particular social group of failed asylum seekers. He claims that due to these factors, there is also a reasonable possibility that he will face torture, cruel, inhuman and degrading treatment and/or arbitrary deprivation of life if he is removed to Bangladesh.

PROCEDURAL HISTORY

Initial Application for Refugee Status Determination

11. On 28 February 2014, the Appellant made an application for refugee status determination (**RSD**) to the Republic, in order to be recognised as a refugee and/or a person owed complementary protection.[1] The Appellant attended an RSD interview on 14 May 2014.

12. What happened at the RSD interview is the subject of the sole ground of appeal and is considered in more detail below.

13. On 2 November 2014, the Secretary decided that the Appellant was not recognised as a refugee in accordance with Part 2 of the Act and that he was not a person to whom Nauru owed protection obligations under the Refugee Convention.[2]

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1 Book of Documents (**BD**) 21-44

2 BD 53-62

First Tribunal Decision

14. The Appellant lodged a Review Application with the Tribunal dated 9 November 2014.[3]

15. On 26 March 2015, the Appellant appeared in a hearing before the Tribunal (**First Panel**), represented by his Claims Assistance Providers (**CAPs**) representative.[4] The Appellant made written submissions and provided further evidence both before and after that hearing.

16. On 22 May 2015, the First Panel made a decision affirming the determination of the Secretary that the Appellant was not recognised as a refugee and was not owed complementary protection under the Act (**First Tribunal Decision**).[5]

17. For present purposes, it is sufficient to note in summary in respect of the First Tribunal Decision the Tribunal:

    (a) did not accept that the Appellant was a member of either the BNP itself or its student wing, the Chatra Dal, whilst he was in Bangladesh, or that he held the position of General Secretary of his local Chatra Dal branch;[6]

    (b) did not accept that the Appellant played any part in organising or arranging Chatra Dal meetings or other functions or in recruiting new members;[7]

    (c) accepted that the Appellant may have been present at public events staged in his area by the BNP or Chatra Dal but did not accept that he attended in any capacity other than as a member of the general public;[8]

    (d) was not satisfied that the Appellant was engaged in any activity on behalf of the BNP or Chatra Dal;[9] and

    (e) did not accept that the Appellant had suffered harm of any kind in Bangladesh in the past, let alone harm amounting to persecution arising because of his political opinion, and did not accept that he left Bangladesh to escape harm.[10]

18. The Tribunal did not accept that the Appellant faced any real possibility of harm of any kind in Bangladesh for the reasons he advanced or any other reason. The Tribunal therefore was not satisfied that he was owed complementary protection.[11]

Appeal to Supreme Court

19. On 3 September 2015, the Appellant filed a notice of appeal to the Supreme Court from the First Tribunal Decision.[12]

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3 BD 67
4 Transcript of hearing at BD 107 - 157
5 BD 177 - 190
6 BD 189 at [45]
7 BD 189 at [45]
8 BD 189 at [45]
9 BD 189 at [45]
10 BD 189 at [45]
11 BD 190 at [49]
12 BD 197-198

20. After a hearing on 25 July 2016, this Court delivered judgment on the appeal on 31 May 2017[13] affirming the First Tribunal Decision.[14]

Appeal to High Court

21. The Appellant filed an appeal from the decision of this Court to the High Court. At that time, the High Court was the Court to which appeals from this Court were heard.

22. On 14 November 2017, the High Court ordered that the appeal be allowed, that orders of this Court be set aside and in their place an order that the First Tribunal Decision be quashed and the matter be remitted to the Tribunal for reconsideration.[15]

Second Tribunal Hearing

23. Pursuant to the High Court's orders, the Appellant's application was remitted to the Tribunal for further consideration.

24. The Appellant appeared before the Tribunal (**Second Panel**) on 13 and 23 February 2018 (**Second Tribunal Hearing).**[16]

25. The Appellant provided further evidence and submissions after the Second Tribunal Hearing.[17]

Third Tribunal Hearing

26. On 4 June 2018, the Tribunal emailed the Appellant's solicitor and advised that following the judgment of this Court on 19 April 2018 in *SOS011 v Republic,*[18] the Second Panel was being reconstituted.

27. In *SOS011*, Freckelton J considered a case where the Tribunal's original decision had been set aside and the matter was remitted to the Tribunal for further consideration. The further consideration was undertaken by a second tribunal, differently constituted, but where one of the members of the original tribunal also sat on the subsequent tribunal. There was an appeal to the Supreme Court from the second tribunal's decision on the basis that the second tribunal was affected by apprehended bias.

28. His Honour held[19] that:

> "...a fair-minded lay observer might reasonably apprehend that the Tribunal member shared between the first and second Tribunal might not bring an impartial and unprejudiced mind to the resolution of the questions the Tribunal was required to decide."

29. As a result of the reconstitution of the Second Panel, the Tribunal invited the Appellant to appear for a third time, before the reconstituted Tribunal, in early December 2018.

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13 BD 281-296; *YAU026 v Republic of Nauru* [2017] NRSC 48
14 BD 296 at [70]
15 BD 303
16 BD 335 – 405; BD 409 - 414
17 BD 417
18 [2018] NRSC 22
19 At [75]

The Appellant was then unable to attend that hearing due to ill-health and he had been removed from Nauru for treatment.

30. On 5 February 2019 a third hearing (**Third Tribunal Hearing**) was conducted before the reconstituted Tribunal (**Third Panel**).[20]

31. On 7 March 2019, the Appellant responded to some specific questions from the Tribunal by letter from his solicitor.[21]

The Second Tribunal Decision

32. The Second Tribunal Decision was delivered on 4 June 2019 by the members of the Third Panel.

33. In summary, the Tribunal:

(a) found that having regard to the totality of the evidence, it was not satisfied that the Appellant was a credible witness and did not accept any of his claims regarding his involvement with the BNP or the JCD.[22] The Tribunal considered that the Appellant's evidence regarding the party he joined, the manner in which he joined and his political involvement during a period in which there was a caretaker government raised concerns that his claims to have become a member of the BNP or to have been the General Secretary of the JCD, had been fabricated.[23]

(b) did not accept that at the time the Appellant left Bangladesh he had an adverse political profile as a person opposed to the AL;[24]

(c) did not accept that any of the claimed threats against the Appellant, assaults on him and hospitalisations occurred;[25]

(d) did not accept that the Appellant was attacked and harmed by any identified individual or his associates or any other person from the AL at any time;[26]

(e) was not satisfied that there was a reasonable possibility that the Appellant will suffer harm amounting to persecution because he is of a particular social group of failed asylum seekers;[27]

(f) found that the Appellant was not a refugee because it was not satisfied that there is a reasonable possibility of persecution for a Convention reason;[28]

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20 BD 463 - 476
21 BD 493 - 496
22 BD 520 at [124]
23 BD 506 at [50]
24 BD 520 at [124]
25 BD 520 at [124]
26 BD 520 at [124]
27 BD 522 at [137]
28 BD 525 at [151]

(g) was not satisfied that there is a reasonable possibility that the Appellant would suffer any relevant kinds of harm if he were returned to Bangladesh, thus was not satisfied that the Appellant is owed complementary protection.[29]

GROUND OF APPEAL - FAILURE TO MAKE INQUIRY

The Appellant's submissions

34. The Appellant contends that the Tribunal erred in failing to "make an obvious inquiry in relation to the recording of the interview before the Secretary". The "interview before the Secretary" is a reference to the RSD interview.

35. At [49] of the Second Tribunal Decision, the Tribunal said:

> "The Tribunal has been unable, due to recording problems, to listen to the RSD interview, but accepts the summary of the evidence set out in the Secretary's decision. The decision indicates that the [Appellant] exhibited a reasonable knowledge of the BNP and JCD during the interview and was able to provide a reasonably coherent and persuasive explanation for his interest in those organisations."

36. The Appellant argues that the statement that the Tribunal had been unable to listen to the RSD interview bespeaks a failure by the Tribunal to comply with the duty imposed upon it by the Act. Specifically, Ms Batten on behalf of the Appellant refers to the following sections of the Act:

(a) section 31(1) which provides that a person may apply to the Tribunal for "merits review" of the Secretary's RSD Decision;

(b) section 6(1) which provides that the Secretary shall determine an application to be recognised as a refugee made under s.5;

(c) section 7(1)(a)(ii) which provides that for the purposes of making an RSD determination, the Secretary may require the asylum seeker to attend one or more interviews;

(d) section 32(3) which provides that where an application for review of the Secretary's Decision is made to the Tribunal, the Secretary shall, as soon as practicable after being notified of the application, give to the Registrar of the Tribunal each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the determination or decision.

37. The Appellant relies on the affidavit of Salmaaan Shah sworn on 19 October 2022. Mr Shah is a solicitor with CAPs. He requested his colleagues in CAPs to provide him with a copy of the recording of the interview between the appellant and the Refugee Status Determination Officer on 14 May 2014 – that is, the RSD interview. He deposed that he had "listened to the recording in full" and noted that the recording is

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29 BD 526 at [156]

approximately 56 minutes and 9 seconds in duration. It commences from the beginning of the interview until the 56 minute and 9 second mark.

38. Ms Shah caused a transcript to be prepared of the recording from approximately the 26 minute and 17 second mark onwards. He exhibits a copy of that transcript to his affidavit (**the transcript**).

39. I note that at the end of the transcript, it is recorded that "tape cuts out". This is consistent with the recording "cutting out" before the end of the interview. It is apparent from the transcript that the at the time the recording cuts out, the RSD interview was not yet complete.

40. The Appellant relies upon the decision of this Court in *QLN043 v Republic of Nauru.*[30] In that case, the appellant contended that there had been a breach of s.23(2) of the Act which required that an audio or audio-visual recoding of a Tribunal hearing "must be made". The appellant contended that because a recording was not made of the entirety of his hearing and that important parts of the hearing were not recorded, there had been a legal error.

41. Marshall J held, consistent with an earlier case of *COA025 v Republic of Nauru,*[31] that a breach of the requirement to record a *Tribunal hearing* amounted to an appealable point of law as it involved the Tribunal failing to comply with the express requirements of the Act.

42. The Appellant also relies upon the decision of the Full Federal Court of Australia in *AVQ15 v Minister for Immigration and Border Protection.*[32] At [26], the Full Court held that consistently with its task on review, the (Australian) tribunal had to give "appropriate attention … to all relevant material in making a finding of inconsistency which then underpins an adverse credibility assessment." What the Appellant had told a Departmental officer at the appellant's initial interview was highly relevant to the question of whether the appellant had given inconsistent evidence.

43. Finally, the Appellant refers to the decision of the High Court in *Minister for Immigration and Citizenship v SZIAI.*[33] At [20] the Court said that:

> "The failure of an administrative decision-maker to make inquiry into factual matters which can be readily determined and are of critical significance to a decision made under statutory authority, has sometimes been said to support characterisation of the decision as an exercise of power so unreasonable that no reasonable person would have so exercised it."

44. At [25], the Court noted that "the failure to make an obvious inquiry about a critical fact…could…supply a sufficient link to the outcome as to constitute a failure to review."

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30 [2018] NRSC 3
31 [2017] NRSC 104
32 [2018] FCAFC 133; 266 FCR 83; 361 ALR 227
33 [2009] HCA 39; 83 ALJR 1123

45. The Appellant submits that the Tribunal's contended failure to obtain and listen to the RSD interview was a failure of such a type. It follows, the Appellant submits, that the Tribunal effectively failed to conduct the review as required by the Act.

The Respondent's Submissions

46. The Respondent submits that despite paragraph [49] of the Second Tribunal Decision, the Tribunal probably did listen to the recording, or at least such of the recording as was able to be listened to. There are aspects of paragraph [53] of the Second Tribunal Decision (set out below) which were not recorded in the Secretary's Decision and which can only have come from listening to the recording of the RSD interview, or such of it as was able to be listened to.

47. Further, as a matter of law, it is not the case that because material was sent by the Secretary, the Tribunal must have regard to all of it. There is no authority for the proposition that there is a positive duty on the Tribunal to consider *all* material before it. In any event, there cannot be a duty on the Tribunal to listen to an impaired recording.

Consideration

48. It is apparent that there is no available recording of the full RSD interview. The only available recording cuts out at the 56-minute mark.

49. This is consistent with the evidence of Mr Shah and also with the First Tribunal Decision. At footnote 6 of that hearing, the First Panel noted "The Tribunal has reviewed the audio recording of the RSD interview but it is incomplete." This is a strong indication that the Secretary provided the (incomplete) audio recording to the Tribunal consistent with his obligation under s.32(3) of the Act to give all documents relevant to the decision to the Registrar of the Tribunal.

50. Thus, the starting point is that there is no known complete recording of the full RSD interview but that an incomplete recording of the RSD interview was provided to the Tribunal.

51. Unlike the obligation on the Tribunal to record its hearing pursuant to s.23(2) of the Act, there is no such obligation on the Secretary to do so in respect of RSD interviews. Accordingly, I am not assisted by cases such as *QLN043* and *COA025* which concerned the express statutory requirement to record *Tribunal* hearings.

52. At paragraph [49] of the Second Tribunal Decision, the Tribunal said that it had been "unable, due to recording problems" to listen to the RSD interview. It accepted the summary of the evidence at the RSD interview as set out in the Secretary's Decision.

53. However, at paragraph [53] of the Second Tribunal Decision, the Tribunal sets out four bullet points summarising what the Appellant said in the RSD interview.

54. Some of those summarised points clearly do not find their genesis in the Secretary's Decision. Instead, they are consistent with that part of the transcript exhibited to Mr Shah's affidavit. In other words, despite paragraph [49], paragraph [53] is consistent with the Tribunal having actually listened to that part of the RSD interview that was available to it.

55. The first bullet point at paragraph [53] is that at the end of 2007, the Appellant began supporting the BNP and joined its student wing, the JCD, in December 2007. That statement is closely consistent with the evidence of the Appellant recorded in the RSD interview transcript at pages 5 and 6, which was in the following terms:[34]

> Q: Which party did you support in Bangladesh?
>
> A: BNP
>
> Q: What does it stand for?
>
> A: Bangladesh National Party.
>
> Q: When did you become a supporter of this party?
>
> A: At the end of 2007 - end of 2007.
>
> Q: Did you, did you become a member of the party?
>
> A: Yes.
>
> Q: When did you become a member of the party?
>
> A: At the end of 2007, um, December 2007.
>
> Q: How did you become a member?
>
> A: Part of BNP is a BNP Student Wing. I join in the BNP Student Wing.

56. The Secretary's Decision records the Appellant's evidence slightly differently. At BD 56, the Secretary says that when "[a]sked about his involvement with JCD, the Applicant stated that he became a member in late 2007 and was later appointed General Secretary of Ward 9 of Joshor Union." The Secretary's Decision says nothing about the Appellant becoming a "supporter" separate to his becoming a member.

57. The first bullet point at paragraph [53] is more consistent with that information coming directly from the recording of the RSD interview rather than being a restatement of the summary given in the Secretary's Decision.

58. The second bullet point at paragraph [53] is that when asked whether it was the BNP or the JCD he joined, he said the BNP is the main party and it has student and youth groups, and they all work together. This is closely consistent with the language of the Appellant at page 6 of the transcript, as set out below:

> Q: What is the name of the BNP Student Wing?
>
> A: [Bangladesh] Nationalist Student Party.

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34 The questions were asked by a RSD officer. The answers were provided via interpreter.

Q: First need to confirm because there are different processes for being a member of BNP and a process for being a member of Chatra Dal. Were you a member of BNP or Chatra Dal?

A: BNP the main party and also the student wing and also there's a youth group BNP youth group. These are all together.

59. There is no similar language in the Secretary's Decision.

60. Thus, the second bullet point at paragraph [53] of the Second Tribunal Decision is consistent with that information coming directly from the recording of the RSD interview rather than being some restatement of information from the Secretary's Decision.

61. The fourth bullet point at paragraph [53] is that the Appellant said that he was chosen as general secretary so quickly because no qualifications were required, and the party members and the President or Secretary were aware of his character and had knowledge of his personal life. That is closely consistent with the language of the Appellant at page 17 of the transcript of the RSD interview, as set out below:

"Q: When did you become general secretary?

A: I joined to the 2007 December. Same time I become general – secretary.

Q: How did you get the position so quickly?

A: Because I am in the village, the same village, it is not that, you know, you have to be qualified from the bottom. But they … choose me because I living in that locality, they knows my personal life and my character. So they chose me they picked me up will be the right person for that position they choose me and put in that for for that post.

Q: Who chose you?

A: Party member of our team. The Union level also the other presidents, secretary, they are all over different circuit. Whoever has qualified for that post, they put that post.

62. There is no similar statement in the Secretary's Decision.

63. The fourth bullet point at paragraph [53] is therefore consistent with that information coming directly from the recording of the RSD interview, and not otherwise from the summary of the RSD interview evidence given in the Secretary's Decision.

64. Reading the Second Tribunal Decision as a whole, and having regard to the transcript of the RSD interview and the reasons of the Secretary, it is apparent that the Tribunal in fact *did* listen to the recording of the RSD interview. It did not rely solely on the summary of the Appellant's evidence in the Secretary's Decision.

65. To the extent that paragraph [49] of the Second Tribunal Decision might suggest otherwise, the reality is that there were "recording problems" which meant that the *whole* of the RSD interview was not recorded. The Tribunal was unable, due to the

recording problems, to listen to the *whole* RSD interview. That is how paragraph [49] should be understood in the overall context of the Second Tribunal Decision, and especially paragraph [53].

66. Accordingly, I find that the Tribunal did not fail to take account of the Appellant's evidence during the RSD interview. The Tribunal possessed the (partial) recording and listened to it. It summarised the relevant effect of that evidence in paragraph [53] of the Second Tribunal Decision. The Tribunal therefore did not fail to make inquiry into factual matters that could be readily determined by it. Nor did it overlook relevant material available to it.

67. The Appellant has failed to make out his sole ground of appeal.

CONCLUSION AND DISPOSITION OF THE APPEAL

68. For the reasons set out in this judgment, I have found that the Appellant has failed to make out his sole ground of appeal.

69. Pursuant to s.44(1) of the Act, I make an order affirming the decision of the Tribunal made on 4 June 2019. I make no order as to costs.

JUSTICE MATTHEW BRADY

6 December 2022