IN THE SUPREME COURT OF NAURU

AT YAREN

Refugee Appeal No. 03 of 2024

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

BETWEEN:

AC 24

Appellant

AND:

REPUBLIC OF NAURU

Respondent

BEFORE: Brady J

DATE OF HEARING: 12 February 2025

DATE OF JUDGMENT: 28 April 2025

CITATION: *AC 24 v Republic of Nauru*

CATCHWORDS:

APPEAL - *Refugees – Refugee Status Review Tribunal – Whether Tribunal failed to consider a substantial submission by Appellant – Whether Tribunal failed to take account of, or give proper consideration to, relevant evidence before the Tribunal - Tribunal did not fail to consider a substantial submission or relevant evidence - No legal error in Tribunal's findings - Appeal Dismissed*

LEGISLATION: *Refugee Convention Act* 2012 (Nr) ss 43, 44

CASES CITED: *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088 at [24]-[25]; *QLN133 v Republic of Nauru* [2017] NRSC 82 at [37]-[49]; *TTY167 v Republic of Nauru* [2024] NRCA 1 at [19]; *Applicant WAEE v Minister for Immigration and Multicultural Affairs* [2003] 236 FCR 593 at [46]-[47]; *REF001 v Republic of Nauru* [2018] NRSC 54; *WET054 v Republic of Nauru* [2023] NRCA 8; *Minister for Immigration and Ethnic Affairs v Guo* [1997] 191 CLR 559 at 575; *SZSSC v Minister for Immigration and Border Protection* [2014] FCA 863; *QLN133 v Republic of Nauru* [2017] NRSC 82 at [39], [49]; *BCE20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 124 at [39]; *TTY167 v Republic of Nauru* [2024] NRCA 1; *ETA 067 v Republic of Nauru* [2018] HCA 46; *WAEE v Minister for Immigration* [2003] FCAFC 184; *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; 74 ALJR 405; *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2); Paramananthan v Minister for Immigration and Multicultural Affairs* [1998] FCA 1693; (1998) 94 FCR 28 at 63; *Sellamuthu v Minister for Immigration and Multicultural Affairs* [1999] FCA 247; (1999) 90 FCR 287 at 293 – 294; *SDAQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 120; (2003) 199 ALR 265 at 273 [19]

APPEARANCES:

Counsel for Appellant:	Dr A McBeth (instructed by Craddock Murray Neumann)
Counsel for Respondent:	Mr R O'Shannessy (instructed by Republic of Nauru)

JUDGMENT

INTRODUCTION

1. The Appellant is a Bangladeshi national. He left Bangladesh in September 2023 and, after arriving in Australia, he was transferred to Nauru. On 17 January 2024, the Appellant made an application for a Refugee Status Determination (**RSD**).

2. On 25 October 2024, the Refugee Status Review Tribunal (**Tribunal**) made a determination (**Tribunal Decision**) affirming the decision of the Secretary of the Department of Multicultural Affairs (**Secretary**) dated 14 June 2024 that the Appellant was not recognised as a refugee and was not owed complementary protection under the *Refugees Convention Act* 2012 (Nr) (**the Act**).

3. Pursuant to s.43 of the *Refugees Convention Act 2012* (Nr) (**the Act**), the Appellant now appeals to this Court from the Tribunal Decision.

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

   (a) an order affirming the Tribunal Decision; or

   (b) an order remitting the matter to the Tribunal for reconsideration.

5. Section 44(2) of the Act provides that where this Court makes an order remitting the matter to the Tribunal, the Court may also make either or both of the following orders:

   (a) an order declaring the rights of a party or of the parties; and

   (b) an order quashing or staying the decision of the Tribunal.

GROUNDS OF APPEAL

6. The Appellant pursues three grounds in his Amended Notice of Appeal:

   (a) The Tribunal failed to consider a substantial submission made by the Appellant which supplemented or modified a submission made in writing.

   Particulars

   (i) The Appellant's representative made oral submissions at the hearing that supplemented or modified the earlier written submission that acknowledged that low-level BNP supporters were unlikely to be of interest to the Bangladesh authorities.

   (ii) The Tribunal failed to have regard to the modification of the written submission or the supplementary oral submissions.

   (b) The Tribunal failed to consider whether the Appellant may resume his political participation (even at the low-level accepted by the Tribunal) on return to Bangladesh, and if so, whether he faced a reasonable possibility of harm, separate from whether he would have a raised profile.

(c) The Tribunal failed to take into account or give proper consideration to evidence that was before it.

Particulars

(i) The Tribunal had before it a report by **DFAT** [the Australian Department of Foreign Affairs and Trade] titled "DFAT Country Information Report Bangladesh" dated 30 November 2022 (**the DFAT Report**) and relied on that report.

(ii) The Tribunal failed to take into account the directly relevant information at [3.82]-[3.84] of the DFAT Report to the effect that DFAT assessed that low-level BNP supporters could be targeted with criminal charges, including false or vexatious charges.

FACTUAL BACKGROUND

7. The Appellant is a national of Bangladesh. His claims for refugee status, or to be a person owed complementary protection, arose from his contended involvement with the Bangladesh Nationalist Party (**BNP**).

8. The Appellant claims he fears being persecuted by reason of his actual and imputed political opinion; that is, he was an active supporter or senior worker for the Juba Dal branch of the BNP; and that he is a member of a particular social group, being a recruiter of BNP supporters. The Appellant claims that he risks serious harm and an incapacity to subsist if he is returned to Bangladesh.

9. The Appellant's counsel on this appeal summarised the Appellant's claims and the Tribunal's response as follows:

> "3. …[The Appellant] described himself as being an active supporter of the BNP, and also a "senior worker" in his local branch of the Juba Dal, which is the separate youth organisation aligned with the BNP. His submission explained that he was informally considered a senior worker in Juba Dal because he could regularly be relied upon to gather an average of 20 people to BNP gatherings.
>
> 4. The Tribunal rejected the claim to be a "senior worker" and instead found the Appellant was a low-level supporter of the BNP, who may have attended protests or demonstrations…."

PROCEDURAL HISTORY

10. On 17 January 2024, the Appellant made an RSD application accompanied by a Statement of Claim dated 16 December 2023. On 14 June 2024, the Secretary made a determination that the Appellant was not a refugee and not owed complementary protection.

11. On 21 June 2024, the Appellant applied to the Tribunal for review of the Secretary's determination. The Appellant gave evidence in person before the Tribunal on 2 September 2024 and provided substantial material to the Tribunal for its consideration. Relevantly, for the purposes of this case, the Tribunal considered submissions filed on behalf of the Appellant as well as the DFAT Report.

12. The Tribunal Decision was delivered on 25 October 2024.

13. The Appellant filed a Notice of Appeal to this Court on 13 November 2024, which was later amended on 20th January 2025 (**Amended Notice of Appeal**). This appeal was heard on 12 February 2025.

GROUND 1 – FAILURE TO CONSIDER A SUBSTANTIAL SUBMISSION

Nature of Ground 1

14. By his first ground of appeal, the Appellant contends that the Tribunal failed to consider a substantial submission made by him, which was supplemented or modified orally before the Tribunal from a version of the submission which was made in writing.

Relevant Evidence

15. The Appellant's solicitors provided written submissions to the Tribunal dated August 2024[1] (**Tribunal Submissions**). Those submissions detailed the Appellant's claim for refugee status.

16. Paragraph 3 of the Tribunal Submissions formulated the real chance of persecution as arising because of the Appellant's:

    (a) actual or imputed political option as an active supporter of the BNP;

    (b) actual or imputed political opinion as a "senior worker" for Juba Dal branch of the BNP; and

    (c) membership of a particular social group being a recruiter of BNP support.

17. The Appellant submits that this is a clear articulation of there being essentially two limbs to the Appellant's case: the first involving him being an "active supporter" of the BNP; the second involving him being a "senior worker" or a "recruiter" for the BNP.

18. The Secretary in his decision did not accept that the Appellant was a senior worker or a recruiter within the BNP. The Tribunal Submissions addressed that finding. According to those submissions:

    "12. In summary, we disagree with the RSD Officer [being a reference to the Secretary] that [the Appellant] was not considered a senior worker in his local BNP Juba Dal branch. He has been consistent in his responses as to the activities he assisted with and has provided further detail in the attached statement. A previous lack of detail should not be viewed negatively but rather as understandable. [The Appellant] did not leave Bangladesh imagining he would ultimately be submitting an application for protection in Nauru, even if it is perfectly reasonable, he now does so given his past experiences in Bangladesh…."

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[1] The submissions do not contain an identified date.

19. At paragraph 15 of the Tribunal Submissions, the Appellant's representative said:

> "15 We acknowledge independent country information provides low-level members and supporters of the (then) opposition the AL, such as [the Appellant], are unlikely to be of ongoing interest to the authorities. However, there have been significant changes in Bangladesh recently, which we submit will considerably raise [the Appellant's] profile in the future and place him at an increased risk of harm." [emphasis added]

20. Ms Robson appeared on behalf of the Appellant before the Tribunal on 2 September 2024. When invited by the Tribunal to address it in relation to anything further that Ms Robson wanted to say, she said the following (T15 lines 30ff):

> "MS ROBSON: (Indistinct) All right. Firstly, it's really Irene's comments that I think are the most pertinent in terms of his particular circumstances. When he came to me, it was a bit like, I was going where's the harm in the past. And I think there was always that risk of harm as it is for any BNP supporter in that previous context. So, it was really about when I was sorting out whether he was a senior worker and what his position was, he's been absolutely consistent in that regard. So, as my submission stated, I believe he was a senior worker. He was given that role in the processes that are available in Bangladesh. And specifically what he's been consistent about is the fact that he's a recruiter, he's a mover of people. And so this is where the changes that are going on in Bangladesh, I think, is where his position, suddenly the profile's raised. All my research, and I'm sure you know this, it's all – it's people power.
>
> MS O'CONNELL: (Indistinct) People power.
>
> MS ROBSON: People power. It's all about what happens on the streets. It's the numbers count. You know (indistinct) Trump, you know, it is about being able to say this many people turned up to this procession. So, there's no way you can argue he is a senior–senior position and all the rest of it, but local level politics is actually where it's all at in Bangladesh. And therefore, a local mobiliser, someone that can successfully recruit 20, 30 people, whatever it may be, is of value. In terms of the changes that are happening, first, I want to say, you know, it's always been very, very difficult to succeed in Bangladesh.
>
> There's no doubt about that. But I think what's happened is what is going on actually reflects that we've all underestimated. I always speak for myself. Just how dysfunctional, corrupt, violent Bangladesh has been over many years, that this level of change is significant and one would hope incredibly positive. And there's always been the approach that if you are going to look at the nexus being political opinion, it has to be (indistinct) policy, they have to be a leader, they have to be in a position of influence, whereas I think in Bangladesh it's virtually the opposite. You actually have to be local.
>
> ...
>
> And he's at risk, once again, at this local level, whether it's Dhaka, whether it's a village whether it's Chittagong, that if he were to engage in his activities, which he has a reputation for and is relied on, then I think he is at risk 10 per

cent. Just winding it up in terms of is that serious harm. I think the nature of these protests and the nature of the violence that does on in Bangladesh, it's just a slip, you know, it's like a rubber bullet getting in the wrong place. And then, you know, where is the protection in place at the moment? I think everything says the police remain the most corrupt institution. It's at a local level, I think those power broker is going to be very difficult to shift. You might have, again, I read something today where the leaders are fleeing – they're all going (indistinct) is arguably going to take, as he has said, it's going to take time. And people aren't going to let go of their power base easily, as much as anything, because it's so much about survival – core survival. That's really all I want to say (indistinct)."

The Tribunal's Relevant Findings

21. The Tribunal Decision relevantly set out the following conclusions:

"28. In a detailed submission, the [Appellant's] advisor submitted that the [Appellant] faces a "real chance" of persecution because of his actual and imputed political opinion as an active supporter of the BNP; as a senior worker for the Juba Dal branch of the BNP; and his membership of a particular social group as a recruiter of the BNP support base. It was further submitted that the [Appellant] is unable to avail himself of effective state protection and cannot relocate within Bangladesh because of the current political, social and economic upheaval in Bangladesh. It was also submitted that the [Appellant] will be unable to subsist and is owed complementary protection as it is more than reasonably possible that the [Appellant] will face significant harm if he is returned to Bangladesh.

29. The [Appellant's] advisor also submitted low-level BNP members and supporters, such as the [Appellant] are unlikely to be of ongoing interest to the authorities but in view of the recent political changes the [Appellant's] profile as a BNP recruiter would be raised and he would be at an increased risk of harm.

...

36. The [Appellant] was unimpressive in his evidence demonstrating limited knowledge and vague and inconsistent descriptions of his claimed BNP role, the political activities he claimed to have attended and the reasons for his travel to Malaysia and Dubai. At paragraph 14 and 15 of his first statement, the [Appellant] said that he had been a leader of the youth party for a very long time, had always been in the limelight, and used to gather people for protest marches.

37. In his RSD interview, the [Appellant] stated he was a worker for the BNP and he slowly started attending meetings and protests. He said his role as a senior worker began in 2021. He said he would tell BNP supporters about meetings and protests but would not gather them. The [Appellant] was unable at his RSD interview to provide any detail about political meetings or protests in 2023 that reflected his involvement or attendance as a leader of the youth party. In his

evidence before the Tribunal, the [Appellant] said his role was to gather workers at his workplace by talking with them or phoning them.

...

44. The Tribunal has noted the country information submitted by the [Appellant's] advisor concerning the change in government and that a period of political and social uncertainty lies ahead. It also noted that violence, harassment and intimidation have been part of the political environment in Bangladesh. The [Appellant's] advisor submitted that low-level members and supporters, such as the [Appellant] are unlikely to be of interest to the authorities. DFAT in its Country Information Report Bangladesh (dated 30 November 2022) assesses that most returnees, including failed asylum seekers, are unlikely to face adverse attention from the authorities unless they are of a high profile, regardless of whether they have returned voluntarily or involuntarily.

45. As stated above, the Tribunal finds that the [Appellant] was a low-level BNP supporter and finds that he will not attract attention by the authorities or the Awami League on his return to Bangladesh. The [Appellant's] ability, before the change in government, to depart and return for years to Bangladesh without problems, as well as being able to live safely in the same family home in Dhaka without being harassed or threatened by the Awami League or the police, indicates strongly that he was not and will not be of interest to the Awami League or the authorities. The Tribunal does not accept the [Appellant's] claim regarding police interest in him and finds that he was not of interest to the police as he suggested in his first statement when he said, "so far they have been unable to arrest me because I have been living overseas." This statement is inconsistent with his evidence of the frequency of his detention by the police. The Tribunal finds that the [Appellant] had no difficulty departing Bangladesh on 25 September 2023 from Ziah International Airport, Dhaka and did so without attracting adverse attention from the authorities when he travelled to Indonesia on his way to Australia.

46. The [Appellant's] advisor submitted the [Appellant's] recruitment capacity would, on return to Bangladesh, be highly sought after by the BNP and it also puts him at risk from Awami League supporters. However, while the Tribunal accepts that the [Appellant] had a limited BNP supporter role and may have attended some BNP protests as a supporter, it does not accept that the [Appellant] played any greater role, such as recruiting BNP supporters or gathering people for protests and will not be at risk from Awami League supporters.

47. It was submitted that the recent changes in Bangladesh recently [sic] will considerably raise the [Appellant's] profile in the future and place him at an increased risk of harm. In view of the Tribunal's finding that the [Appellant] was a low-level BNP supporter and not a Youth Party leader, or activist supporter or worker or senior worker, the Tribunal does not accept that the recent political changes will raise the [Appellant's] profile in the future. It does not accept that he will be encouraged or pressed by the BNP to recruit BNP supporters and, as a consequence, he will not be at risk of harm from rogue Awami League supporters. The Tribunal is not satisfied that, on return to

> Bangladesh, there is a reasonable possibility that the [Appellant] will be seriously harmed."
>
> [emphasis added]

Appellant's Arguments

22. Dr McBeth submitted on behalf of the Appellant that there were essentially two aspects to the Appellant's claim to fear harm: firstly, that he attended processions and political meetings (i.e. he was an "active supporter") and secondly, that he also assisted to mobilise others for the BNP in a manner akin to being a senior member or worker for the BNP.

23. The Appellant accepts that the Tribunal found that he was not a person involved in mobilising other persons to participate in BNP activities. That is, he was not a "senior member" of the BNP or Juba Dal. However, he submits that this finding is not the end of the matter. It was, he submits, still incumbent on the Tribunal to assess his role as a "low level" supporter of the BNP and to determine the risk to him of future harm based on his role as a "low level supporter".

24. The Appellant contends that the Tribunal effectively treated paragraph 15 of his written submissions extracted above as two concessions: firstly, that the Appellant was only a low-level supporter and secondly, that low-level supporters were unlikely to be of interest to the authorities. The Appellant contends that the Tribunal at [44] and [45] extracted above relied on that misunderstanding of the written submission to conclude that the Appellant was only a low-level supporter and that he would not attract attention from either the authorities or the Awami League on his return to Bangladesh.

25. In doing so, the Appellant contends that the Tribunal failed to appreciate or take into account the fact that the Tribunal Submission was qualified in an important way in the Tribunal hearing.

26. The Appellant argues that Ms Robson submitted as follows:

> "...That after further research after the written submission, it became apparent that the usual approach in refugee cases, of a person having to be a leader and have a high profile to be at risk of harm, is not appropriate in Bangladesh, and in fact, In Bangladesh, it's virtually the opposite. You actually have to be local."

27. The Appellant contends that the Tribunal failed to consider this oral submission that in Bangladesh, holding high office or a senior position in a political party was not necessary to face a risk of harm and that people "taking sides" at the local level were at a risk of harm. He submits that this is consistent with paragraph 3 of the Tribunal Submissions where he articulated a separate claim for his role as an "active supporter" of the BNP.

28. The Appellant relies upon the decision of the High Court of Australia in ***Dranichnikov*** *v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088 at [24]-[25] per Gummow and Callinan JJ. That case is said to stand

for the proposition that a Tribunal will fall into error and constructively fail to exercise its jurisdiction if it fails to respond to a substantial, clearly articulated argument put on behalf of an Appellant. The Appellant submits that this Court has adopted the principle set out in *Dranichnikov* in cases such as ***QLN133*** *v Republic of Nauru* [2017] NRSC 82 at [37]-[49] per Crulci J.

29. The Appellant contends that not only did the Tribunal fail to respond to the oral submission, but it also treated the earlier written submission as an effective concession, and in doing so failed to take account of the fact that the "concession" had been qualified or supplemented in oral submissions. In doing so, the Tribunal failed to consider a substantial, clearly articulated argument based on established facts: that is, that as an "active supporter" of the BNP, the Appellant had a well-founded fear of being persecuted for reasons of political opinion.

The Republic's Arguments

30. The Republic contends that the Tribunal did properly understand the Appellant's claim as it was put by the Appellant: that is, that he was a "low-level" or "local mobiliser" of people in support of the BNP. It invites the Court to consider the way in which the Appellant advanced his claim before the Tribunal.

31. As part of his initial claim, the Appellant claimed that he was a "leader" of the Youth Party, or otherwise held some kind of formal position in respect of the BNP which involved him "gathering" between 20 to 40 people to attend protests or meetings. He expanded upon this initial claim in a written statement dated 22 August 2024 which was provided to the Tribunal.

32. Relevantly, that statement to the Tribunal included the following:

> "5. I have always been a BNP supporter. I follow them because their activities are favourable towards Islam.
>
> 6. I have always supported BNP, although I was not a registered member for the reasons I have explained. You don't need a party card to be considered a valued party member.
>
> 7. The reason I became more involved is that my previous support had been noticed by village leaders as well as the Ward leader of the local BNP, Juba Dal branch. I was asked to take on a more active role.
>
> 8. Following this, I tried to attend as many processions and meetings as possible held in front of the party headquarters in [Dhakka]. I would do this at least once or twice a month.
>
> 9. My hometown is about an hour from Dhakka. So when I was needed, I would go.
>
> 10. I would hear about these meetings from my direct senior. He would ask me to come with other friends I knew. He would ask me to try and bring about 20 or so people. I was not the only person who was called but he knew I could convince people to come.

11. The leaders would give us money to cover people's transport costs to attend the meeting.

12. I was regularly called to bring people to attend the meetings. Sometimes I would bring less than 20 people sometimes more. It depended on when the meetings were held, like a weekend or public meets there would naturally be more people.

13. I was considered a senior worker because I attended regularly, I was reliable and always brought people with me. Processes in Bangladesh are very informal. Many people are considered "senior" for as long as they have strong local connections with the local leaders and constituent. This is why I was considered a senior member. [sic]"

33. In his evidence before the Tribunal, the Appellant was asked some questions about his role in organising a procession of BNP supporters. At BD 137 line 35, the Appellant described his role in these terms:

> "THE INTERPRETER: I gathered people, then I went to procession with them."

34. At BD 139 lines 4 to 9, the following exchange occurred:

> "MR LYNCH: Oh, I see. Okay. Can you explain – you said these people were looking at you. What does that mean that they were looking at you. What were they doing?
>
> THE INTERPRETER: I thought that some kind of danger is coming in the future.
>
> MR LYNCH: So, you had that feeling, but what caused you to have that feeling?
>
> THE INTERPRETER: I was gathering people, and I was motivating people to do activity for BNP, so that's why."

35. The Republic argues that in both his written statement and in his evidence before the Tribunal, and in his solicitor's submissions to the Tribunal, the Appellant did not rely on any label such as "leader" or "senior," but rather on his conduct of "gathering" between 20 to 40 people to attend a meeting or protest. That is to say, the Appellant's claim was premised on the Appellant's status as a "local mobiliser" and the prospect of the Appellant facing harm as a "low-level" supporter (or member) of the BNP relied on the Appellant acting as a "mobiliser" or "recruiter."

36. However, as the Republic points out, the Tribunal did not accept that the Appellant ever acted as a mobiliser. It rejected that part of the Appellant's claim at [46] of the Tribunal Decision. The Republic also refers to [43] of the Tribunal's decision where the Tribunal found that the Appellant's travel and lengthy absences from Bangladesh between 2016 and 2022 were for work purposes and "are not compatible with him being influential or politically active for the BNP."

37. The Republic argues that the Tribunal will not have failed to consider a claim where there is a factual premise upon which that claim rests which has been rejected: *TTY167 v Republic of Nauru* [2024] NRCA 1 at [19], adopting the reasoning in *Applicant WAEE v Minister for Immigration and Multicultural Affairs* [2003] 236 FCR 593 at [46]-[47]. The Republic contends that by rejecting the Appellant's claim to have acted as a mobiliser of people (as well as rejecting the claim that the Appellant was "politically active for the BNP"), it rejected the key premise on which the Appellant's claim in this regard was advanced.

38. The Republic contends that to the extent the Appellant now asserts that his representative contended that the less senior he was, the greater a target he might become, the Republic describes that contention as "obviously nonsensical."

39. Nor is there any error of the kind described iu *Dranichnikov* because the Tribunal did not "fail to respond to a substantial, clearly articulated argument *relying on established facts.*" Even if it is accepted that the Appellant's representative advanced a claim orally that qualified the Appellant's other claim, the Republic contends that the "qualifying claim" relied on a fact that was expressly rejected, and therefore never established.

40. Mr O'Shannessy for the Republic also submitted that the decision in ***QLN133*** had not subsequently been followed by the Courts of Nauru. In ***REF001*** *v Republic of Nauru* [2018] NRSC 54, Freckleton J held that the *ratio* of QLN 133 went further than the reasoning in *Dranichnikov* to the extent that QLN 133 supported the view that the Tribunal was obliged to consider a submission that plainly lacked merit or was ill-conceived. His Honour considered that, to that extent, the view of Crulci J in QLN 133 was plainly wrong.

41. The Republic submitted that the approach of Freckleton J in *REF001* was approved by the Nauru Court of Appeal in *WET054 v Republic of Nauru* [2023] NRCA 8 at [45]. However, on my reading of that decision of the Court of Appeal, the argument was noted, but the Court did not need to determine it (and did not determine it) because it found that the Tribunal did take the relevant argument into account.

42. In any event, it is also unnecessary for the purposes of this judgment for me to resolve the differences between *QLN133* and *REF001*.

Consideration of Ground 1

43. The Tribunal rejected the Appellant's claim that he had some role of responsibility in the BNP: Tribunal Decision at [35]. That finding is not the subject of appeal before this Court.

44. The Tribunal found, instead, that the Appellant was a "low level BNP supporter": Tribunal Decision at [35], [45]. Again, there is no challenge to that finding on this appeal.

45. Ground 1 of the Notice of Appeal fundamentally challenges instead the Tribunal's conclusion that as a low-level BNP supporter, he would not attract attention by the authorities or the Awami League: Tribunal Decision at [45]. The Appellant contends

that the Tribunal failed to assess his role as a low-level supporter of the BNP and to determine whether there is a risk of harm to him.

46. However, it is apparent that the Tribunal did in fact undertake this task.

47. First, at [44] of its decision, the Tribunal repeated paragraph [15] of the Appellant's written submission before it to the effect that low-level members and supporters, such as the Appellant, are unlikely to be of interest to the authorities. At no point did the Appellant expressly resile from that written submission. Nor, in my view, are the oral submissions made before the Tribunal inconsistent with this written submission.

48. The passages of the oral submissions before the Tribunal extracted above demonstrate that the oral submissions were primarily aimed at the geueral submission as to the Appellant's role as a recruiter. As already noted, that submission was rejected and there is no appeal from that rejection. To the extent that the oral submissions refer to the importance of "local" action, it is apparent that the submission was made in the context of an argument about the Appellant being a local organiser.

49. In my view, read fairly and as a whole, there is nothing in the oral submissions which would detract from paragraph [15] of the written submissions.

50. In any event, the Tribunal did not rely solely on paragraph [15] of the Appellant's written submissions as forming the basis for its conclusion that the Appellant would likely not attract attention as a low-level supporter of the BNP. As is apparent at paragraphs [44] to [47] its decision, the Tribunal also relied upon:

    (a) independent country information from DFAT about the risks of adverse attention for returnees (at [44]);

    (b) the Appellant's ability before the change in government to depart and return to Bangladesh on various occasions over multiple years (at [45]); and

    (c) a rejection of the contention that the recent political changes in Bangladesh would raise the Appellant's profile and, as a low-level BNP supporter, the Tribunal was not satisfied that on return to Bangladesh the Appellant would be seriously harmed (at [47])

51. The Tribunal fairly considered the case put by the Appellant. It rejected that case not merely because of the submissions made to it in writing, but based on a fair consideration of all of the evidence, including the oral submission on his behalf. It did consider whether the Appellant was at risk as a "low-level" supporter of the BNP, regardless of his role as a recruiter, or as a senior worker. This is not a case like *Dranichnikov* where the Tribunal failed to respond to a substantial, clearly articulated argument put on behalf of the Appellant.

52. Accordingly, I reject Ground 1 of the appeal.

GROUND 2

Nature of Ground 2

53. Ground 2 of the Appellant's Amended Notice of Appeal contends that the Tribunal failed to consider whether he may resume his political participation (even at the low-level accepted by the Tribunal on his return to Bangladesh) and so the Tribunal failed to determine whether he faced a reasonable possibility of harm, separate from the question of whether he would have a raised profile.

Appellant's Arguments

54. The Appellant contends that having found that he was a supporter of the BNP and may have attended some BNP protests as a supporter of the party, part of the Tribunal's task was to consider whether the Appellant would resume his political engagement on return to Bangladesh, and if so whether there was a real risk that he may face harm as a result. The Appellant refers to the Tribunal's rejection of his submission that the recent change in political circumstances in Bangladesh and the resulting volatility would place him at increased risk of harm as a result of raising his profile. However, the Appellant contends that this finding does not absolve the Tribunal of the need to consider whether the Appellant would resume his engagement at the level the Tribunal accepted (that is, as a low-level supporter who attended mass protests) and to assess the degree of risk in him doing so.

55. The Appellant contends that the Tribunal's finding that he had not previously been harmed as a result of his political activity was not a substitute for the obligation on the Tribunal to consider future harm. That is especially so in circumstances where the political climate in Bangladesh will be far more volatile in the foreseeable future than it was at the time of his departure.

56. The Appellant contends that the failure of the Tribunal to conduct this assessment constituted a legal error in the sense described in *Dranichnikov* and *QLN 133*.

The Republic's Arguments

57. The Republic argues that when reading the Tribunal's decision fairly and as a whole, it is apparent that the Tribunal did consider this aspect of the Appellant's claim. The Republic submits that the Tribunal's rejection of the submission that the Appellant had any role as a mobiliser or recruiter of supporters for the BNP, and its rejection that he had been "influential or politically active for the BNP" means that this ground of appeal can only succeed if it is established that the Tribunal erred in failing to consider the prospect of the Appellant resuming his very limited political participation on his return to Bangladesh.

58. The Republic calls in aid the principle articulated in *Minister for Immigration and Ethnic Affairs v* ***Guo*** [1997] 191 CLR 559 at 575 to the effect that determining whether there is a real chance that something will occur requires an estimation of the likelihood that one or more events will give rise to the occurrence of that thing. In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future.

59. The Tribunal accepted country information to the effect that a period of political and social uncertainty lies ahead in Bangladesh. The Tribunal also made findings about events of the past in order to predict the likelihood of events that may occur in the reasonably foreseeable future. Implicit in the Tribunal's prediction of what would occur if the Appellant returned to Bangladesh in the reasonably foreseeable future was that the Appellant would continue with those (limited) activities. The Republic submits that in the absence of any express statement to the contrary, this implication should be accepted in construing the Tribunal's reasons.

60. The Republic draws attention to paragraphs 45 and 46 of the Tribunal's reasons (extracted above) and that the Tribunal rejected the claim that the Appellant's profile would be raised in the future. The Republic contends that it is implicit, given the Tribunal's findings, that the Tribunal did make findings about future matters based on its findings in relation to past events and consistent with the approach set out in *Guo*. On this basis, the Republic contends that the Tribunal concluded at [49] that:

> "The [Appellant] has not in the past faced adverse interest from the Awami League, and there is no reasonable possibility he will face any adverse attention from the Awami League or the authorities in the reasonably foreseeable future on return to Bangladesh."

61. Implicit in rejecting the prospect of the Appellant's profile being raised in the future is an acceptance that he would maintain the same profile he had in the past, that is, that he would continue to have a limited "supporter role". Accordingly, the Republic submits that there was no failure to consider whether the Appellant may resume his limited political participation if he were to return to Bangladesh.

Consideration of Ground 2

62. The Tribunal at [44]-[49] did in fact consider the position of the Appellant as a low-level BNP supporter. It found that in that role, there was no reasonable possibility that the Appellant would face any adverse attention upon his return in the reasonably foreseeable future. The Tribunal's approach of considering past events, and also relevant country information, was entirely orthodox in terms of assessing the risk of future events.

63. Specifically, at [47] the Tribunal made a series of findings about the potential future risks to the Appellant. If found first that it did not accept that the recent political changes would raise the Appellant's profile in the future. But that is not the only finding about the future. The Tribunal also did not accept that the Appellant would be encouraged or pressed by the BNP to recruit BNP supporters and therefore the Appellant would not be at risk of harm from Awami League supporters. It also was not satisfied that, on return to Bangladesh, there was a reasonable possibility that the Appellant would be seriously harmed.

64. Those findings involved an implicit acceptance that the Appellant upon return to Bangladesh would resume the same "profile" he had in the past, as a low-level BNP supporter. The Tribunal expressly addressed itself to whether, and rejected the contention that, the Appellant faced a reasonable possibility of harm on that basis upon his return to Bangladesh. In doing so, the Tribunal considered the position beyond simply finding that there would be no raised profile.

65. Accordingly, and for the same reasons as set out above in relation to Ground 1 of this appeal, I reject Ground 2 of the Notice of Appeal.

GROUND 3

Nature of Ground 3

66. By his third ground, the Appellant contends that the Tribunal failed to take into account or give proper consideration to the DFAT Report and in particular relevant information contained in that report at [3.82] to [3.84] to the effect that DFAT assessed that low-level BNP supporters could be targeted with criminal charges, including false or vexatious charges.

Relevant Evidence and Findings

67. The DFAT Report starting at paragraph 3.77 sets out an assessment of the types of harm that might be faced by BNP supporters. At paragraph [3.79]-[3.81], the DFAT Report sets out potential consequences for senior BNP members. The report goes on to consider lower-level members at 3.82 to 3.84 in these terms:

> "3.82. There are fewer examples that demonstrate a pattern of violence or discrimination against low-level BNP members, than for higher level BNP members. Those who engage in low-level BNP activity (for example attending rallies or attempting to convince others to join the party) are less likely to be arrested than the higher profile actors. For low-level actors, the nature of their activities is unlikely to attract attention in the first place. Those with seniority and reputation are more likely to attract government attention but any member could, in theory, be arrested on charges of violence, obstructing police, corruption or other charges. One source told DFAT that it would be necessary to hold an official position in the party to be arrested. This may be a useful distinction but does not rule out potential arrest of a person who does not hold an official position, even if it is unlikely.
>
> 3.83. False criminal charges and vexatious civil court procedures are used to harass members of the BNP. As outlined in the section on the judiciary, the Bangladesh Court system is difficult and expensive to navigate, as well as slow and subject to corruption. It is possible that charges, particularly related to violence, are genuine – protests in Bangladesh are often very violent. It is difficult to apply an overall assessment to various circumstances, particularly if a charged person denies being engaged in violence.
>
> 3.84. The patronage-based nature of Bangladeshi politics means that the BNP has lost support (it has less to offer members), and thus influence and capacity, to hold mass demonstrations, further reducing its visibility. DFAT understands from sources that the party is not actively recruiting new members at this time, but notes that this could change in the lead-up to the national elections (due January 2024). DFAT assesses that allegations of violence against BNP figures are credible. Reports of violence by BNP activists are also credible. High profile figures are more likely to be targeted by politically motivated charges; however, DFAT assesses that any BNP member who actively

opposes the government, and especially if they are involved in violent protests, can be targeted through criminal charges."

The Appellant's Arguments

68. The Appellant argued before me that these passages in the DFAT Report were explicitly relied on by the Appellant in written submissions before the Tribunal. My attention was drawn to generic submissions made to the Tribunal headed "Recent Changes in Bangladesh." a 30-page document which was provided to the Tribunal in support of the Appellant's application. These passages from the DFAT report are extracted in full (with some emphasis on those passages about the risk of violence) in that document, which is not page or paragraph numbered, but with the relevant passages appearing on what would be pages 10 and 11 of the document.

69. The Appellant contends that the Tribunal was obliged to consider this relevant information in considering the risk of harm faced by him upon return to Bangladesh. This includes an argument that the Tribunal was obliged to consider whether the Appellant would attend political protests and whether he may be caught up in violence in doing so. There was also a separate question as to whether he may be arrested. The Appellant submits that it is a particularly relevant issue on the question of complementary protection – that is, his return to Bangladesh may result in the arbitrary deprivation of life, even if it did not constitute targeted persecution of the Appellant.

70. The violent nature of protests was also directly addressed by the solicitor for the Appellant in her submissions before the Tribunal, mentioned above.

71. Dr McBeth submitted that there were effectively two forms of harm that were addressed by the Appellant: first, whether he was subject to arbitrary arrest; and second, whether he would be caught up in political violence. The Appellant contends that neither of those two forms of contended harm was directly addressed by the Tribunal.

72. The Appellant contends that the Tribunal was obliged to consider the information from the DFAT report set out above, and to refer to them in its reasons. He argues that s.34(4)(d) of the Act obliged the Tribunal to refer to the evidence of the DFAT Report and its failure to do so constituted an error of law.

73. In reply, counsel for the Appellant referred to the decision in *SZSSC v Minister for Immigration and Border Protection* [2014] FCA 863 which was adopted in this jurisdiction in *QLN133 v Republic of Nauru* [2017] NRSC 82 at [39], [49]. He contended that the Appellant had advanced a substantial and clearly articulated argument on this point. He also referred to *BCE20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 124 at [39] in support of the proposition that the Tribunal was not relieved of the obligation to consider the Appellant's contentions simply because they were not made good on the evidence. The Appellant also referred to the decision of the Nauru Court of Appeal in ***TTY167*** *v Republic of Nauru* [2024] NRCA 1, and in particular to the discussion by their Honours of the obligation on the Tribunal to be found at paragraphs [19]-[20].

The Republic's Arguments

74. The Republic notes that s 34(4)(c) of the Act requires the Tribunal to set out, in its written statement of reasons, "the findings on any material questions of fact."

75. The Republic notes that the Tribunal considered the DFAT Report and expressly referred to it in [44] and [61] of its reasons. The Respondent submits that the fact that the Tribunal did not mention these specific passages at 3.82 to 3.84 of the DFAT Report does not indicate that the Tribunal did not consider those passages. To the contrary, the Republic submits that where the Tribunal referred to the DFAT Report elsewhere, the proper inference to draw is that the Tribunal did consider the specific passages referred to by the Appellant. However, the Tribunal considered that it was not material to refer to those passages in its reasons.

76. The Republic refers to the decision of the High Court of Australia (when it was the final Appellate Court of Nauru) in ***ETA 067*** *v Republic of Nauru* [2018] HCA 46 where the High Court (per Bell, Keane and Gordon JJ) said:

> "13. The absence of an express reference to evidence in a Tribunal's reasons does not necessarily mean that the evidence (or an issue raised by it) was not considered by that Tribunal. That is especially so when regard is had to the content of the obligation to give reasons, which, here, included referring to the findings on any "material questions of fact" and setting out the evidence on which the findings are based. There was no obligation on the Tribunal to refer in its reasons to every piece of evidence presented to it.
>
> 14. Further, there is a distinction between an omission indicating that a Tribunal did not consider evidence (or an issue raised by it) to be material to an applicant's claims, and an omission indicating that a Tribunal failed to consider a matter that is material: including one that is an essential integer to an applicant's claim or that would be dispositive of the review."

77. The Republic draws parallels between the facts of this case and the facts in *ETA 067*. In *ETA 067*, the Tribunal did not expressly refer to evidence provided by the appellant relating to assaults on third parties by members of the Awami League. The High Court went on to explain (emphasis in original):

> "24. The absence of a reference to the Awami League Assault Evidence in the Tribunal's reasons did not justify an inference that it was not considered. This was not a case where the reasons of the Tribunal were so comprehensive that the omission was indicative of the evidence having been overlooked. Rather, as the respondent submitted, the absence of any express reference was consistent with the Tribunal having not found the Awami League Assault Evidence to be persuasive as to, let alone material to the assessment of, the likelihood of the Appellant considering harm amounting to persecution.
>
> 25. The question for the Tribunal was the risk of persecution of the *Appellant*. The Tribunal was presented with detailed evidence regarding the Appellant's own experiences of being confronted by the Awami League. And, as already noted, the Tribunal challenged the aspects of that evidence which it considered did not stand up to scrutiny.

26. The Appellant's own evidence was material to the assessment of the well-foundedness of his fear. The Awami League Assault Evidence was not. At best, the Awami League Assault Evidence *might* have been explanatory of a subjective fear held by the Appellant or *might* have added some plausibility to the Appellant's suggestion that he may suffer harm. But in circumstances where the Tribunal was presented with detailed evidence of the Appellant's own treatment by the Awami League, including evidence of threats but no actual physical violence, over a five-year period, the Awami League Assault Evidence was not central to the determination of the Appellant's claims.

27. Any perceived failure of the Tribunal to consider that evidence further did not cause the Tribunal to breach its obligations under s.22(b)(2) to "act according to the principles of natural justice and the substantial merits of the case"."

78. The Republic contends that the Tribunal's task in this case was to consider the risk of persecution of the Appellant, and the Appellant himself provided detailed evidence on that subject. The Appellant did not expressly seek to rely on the specific passages he now raises. The Republic contends that it was open to the Tribunal to consider those passages did not give rise to a material question of fact.

79. In any event, the contentions raised in the paragraphs of the DFAT Report extracted above were dealt with at a higher level of generality [44]-[49] of the Tribunal's reasons and in any event those paragraphs concerned BNP *members*. The Tribunal did not accept that the Appellant was a BNP member; it only accepted that he was a "low-level supporter."

Consideration of Ground 3

80. The Court of Appeal of Nauru expressed the position in these terms recently in *TTY 167*:

> [19] There is no obligation for the Tribunal to mention every piece of evidence and every argument pnt forth by an applicant in its determination, as it might be unnecessary to make a specific determination on a particular issue when it is already encompassed within broader findings. The manner in which a Tribunal decision should be scrutinized has been emphasized time and again in various authorities. In *WAEE v Minister for Immigration* [2003] FCAFC 184 it was observed:
>
> > "[46] It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [87]- [97]) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The Tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high

volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinized "with an eye keenly attuned to error." Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.

[47] The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may rise a strong inference that it has been overlooked".

[20] Moreover, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; 74 ALJR 405 the High Court of Australia stated that it would be contrary to the direction in section 420 of the Migration Act (Cth), which is identical to section 22 of the Refugees Act, for a Tribunal to give line-by-line refutation of the evidence. It stated at para [65]:

> "...it is not necessary for the Tribunal to give a line-by-line refutation of the evidence for the claimant either generally or in those respects where there is evidence that is contrary to findings of material fact made by the Tribunal."

[21] Also, it must be noted that only if a claim is squarely raised based on the available material, will a Tribunal be obligated to consider it. In *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; 144 FCR 1 this was discussed as follows:

> [58] The review process is inquisitorial rather than adversarial. The Tribunal is required to deal with the case raised by the material or evidence before it – *Chen v Minister for Immigration and Multicultural Affairs* [2000] FCA 1901; (2000) 106 FCR 157 at 180 [114] (Merkel J). There is authority for the proposition that the Tribunal is not to limit its determination to the 'case' articulated by an applicant if evidence and material which it accepts raise a case not articulated – *Paramananthan v Minister for Immigration and Multicultural Affairs* [1998] FCA 1693; (1998) 94 FCR 28 at 63 (Merkel J); approved in *Sellamuthu v Minister for Immigration and Multicultural Affairs* [1999] FCA 247; (1999) 90 FCR 287 at 293 – 294 (Wilcox and Madgwick JJ). By way of example, if a claim of apprehended persecution is based upon membership of a particular social group the

> Tribunal may be required in its review function to consider a group definition open on the facts but not expressly advanced by the applicant – *Minister for Immigration and Multicultural Affairs v Sarrazola (No 2)* [2001] FCA 263; (2001) 107 FCR 184 at 196 per Merkel J, Heerey and Sundberg JJ agreeing. It has been suggested that the unarticulated claim must be raised 'squarely' on the material available to the Tribunal before it has a statutory duty to consider it – *SDAQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 120; (2003) 199 ALR 265 at 273 [19] per Cooper J. The use of the adverb 'squarely' does not convey any precise standard, but it indicates that a claim not expressly advanced will attract the review obligation of the Tribunal when it is apparent on the face of the material before the Tribunal. Such a claim will not depend for its exposure on constructive or creative activity by the Tribunal."

81. The reference to paragraphs 3.82 to 3.84 in the DFAT report was not addressed orally at the hearing, nor in the individualised submissions made on behalf of the Appellant to the Tribunal. Those paragraphs were specifically addressed in only one of the three sets of generic submissions made on behalf of the Appellant to the Tribunal.

82. It is apparent that the three paragraphs in question in the DFAT Report were principally directed at the position of BNP "members" or "figures." The Tribunal found that the Appellant was a "low level BNP supporter." It rejected his contention that he had a longstanding role in BNP leadership, or a role as a worker or senior worker. To the extent that these paragraphs of the DFAT report address the position of low-level supporters, the report states that those who engage in low level BNP activity are less likely to be arrested than are higher profile actors as the nature of their activities is unlikely to attract attention in the first place. However, it does not rule out the potential arrest of a person who does not hold an official position, even if it is unlikely.

83. Those paragraphs of the DFAT report are not dispositive of any issue required to be determined by the Tribunal.

84. The other observations in those paragraphs are directed to members of the BNP, or BNP "figures," rather than low-level supporters such as the Appellant was found to be.

85. The Tribunal did consider the case advanced by the Appellant as to the possibility of him suffering serious harm amounting to persecution because of his role as a low-level BNP supporter: Tribunal Decision at [44]-[49]. I have already addressed the relevance of these paragraphs in my consideration of Ground 1 of the Notice of Appeal above. The paragraphs in the DFAT Report identified by the Appellant did not add materially to the considerations addressed by the Tribunal on that question.

86. As the extracts from TTY 167 above demonstrate, it is not for the Tribunal to refer to every piece of evidence before it. The Tribunal is an administrative body and not a Court. It operates with a need to expeditiously determine a significant number of applications referred to it. Its reasons are not to be scrutinised with an eye keenly attuned to error.

87. The issue in question - whether the Appellant's position as a low-level supporter of the BNP gave rise to the reasonable possibility of serious harm amounting to persecution – was identified and answered by the Tribunal. It was unnecessary for the Tribunal to refer in its reasons specifically to paragraphs 3.82 to 3.84 of the DFAT Report because those paragraphs were of little relevance given the findings about the nature of the Appellant's role as merely a low-level supporter. To the extent that they were relevant at all, they essentially do nothing more than *not rule out* the possibility of potential arrest of a person in the position of the Appellant, albeit that being an unlikely eventuality.

88. I am not satisfied that the Tribunal did not consider the terms of paragraphs 3.82 – 3.84 of the DFAT Report. The nature of those paragraphs was not dispositive of any question that the Tribunal was required to address. Coupled with the findings of the Appellant's role as a low-level supporter of the BNP, there was therefore no reason to specifically refer to the DFAT report beyond the way the Tribunal did. The nature of the submissions made by the Appellant before the Tribunal, and the terms of the identified paragraphs of the DFAT Report, did not require the Tribunal to make positive findings about the evidence contained in those specific paragraphs. I therefore do not infer that the Tribunal overlooked relevant evidence.

89. Ground 3 therefore fails.

CONCLUSION AND DISPOSITION OF THE APPEAL

90. For the reasons set out in this judgment, I have found that I ought not to accede to the Appellant's appeal in respect of each of grounds 1, 2 and 3 in the Amended Notice of Appeal.

91. The Appeal is dismissed.

92. Pursuant to s.44(1) of the Act, I make an order affirming the decision of the Tribunal.

93. I make no order as to costs of the Appeal.

SUPREME COURT OF NAURU

JUSTICE MATTHEW BRADY

28 April 2025