IN THE SUPREME COURT OF NAURU

AT YAREN

Case No. 13 of 2025

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T24/00482, brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

AM 25 Appellant

AND

THE REPUBLIC Respondent

Before:	Justice I Freckelton
Appellant:	Mr A Aleksov
Respondent:	Mr L Brown SC
Date of Hearing:	4 June 2025
Date of Judgment:	8 August 2025

CATCHWORDS

APPEAL — Irrationality – Real chance test - 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 appellant filed an Amended Notice of Appeal dated 14 May 2025 against the decision of the Refugee Status Review Tribunal ("the Tribunal") decision of 26 February 2025 ("the decision"), seeking that the appeal on a point of law should be allowed and that the matter be remitted to the Tribunal and that pursuant to section 44(2)(b) of the Act, the decision of the Tribunal be quashed.

BACKGROUND

6. The Appellant is a 37 year old man who was born in West Bengal. He is married and has a daughter.

7. In January 2024 the Appellant travelled to Bangladesh where his wife and child remain. He arrived in Australia by boat in February 2024 and on 18 February 2024 was transferred to Nauru where he made an application to be recognised as a refugee or a person owed complementary protection (RSD application), claiming to fear being harmed in India due to being Muslim, in particular, fearing being killed by Hindu Nationalists as a result of his ownership of property; and membership of a particular social group – unskilled, minimally educated, Muslims without family support throughout India.

8. On 12 March 2024 the Appellant made application to be recognised as a refugee or a person owed complementary protection.

9. On 3 September 2024 the Acting Secretary made a determination that the Appellant was not a refugee and is not owed complementary protection.

10. On 12 September 2024 the Appellant applied to the Tribunal for review of the Secretary's determination.

11. On 12 December 2024 he appeared before the Tribunal to give evidence and present arguments, assisted by an interpreter in the Bengali and English languages and with the assistance of a representative.

12. On 26 February 2025 the Tribunal affirmed the decision of the Secretary.

13. It noted that the "bare bones" of the Appellant's claim are that he was a Muslim whose family lived in a Hindu area to the north-west of Kolkata, Kalipur; he was an orphan at an early age; he inherited the family home but Hindus wanted it and harassed him and used it without permission. This led him to leave but he returned to Kolkata to marry and for the birth of his daughter. He decided to flee India and returned to the Kolkata area and arranged for his wife to sell his property to the Hindu neighbours, whereupon he and his family left for Bangladesh. He stated that he feared harm on return to India as a Muslim but predominantly feared harm from the Hindus from his village who wanted his property, and he fears that he will be killed by Hindu nationalist.[1]

14. The Tribunal concluded that the Appellant gave "very confused and contradictory evidence at the hearing and much of what he said was inconsistent with what he told the RSD officer, and what was in his RSD application. He was evasive and appeared to be deliberating obfuscating."[2] This resulted in the Tribunal being left in a position where it concluded it could not be satisfied of even the most basic facts. [3]

15. The Tribunal accepted that the Appellant was born in Kalipur and is Muslim, as well as that he is married and has one daughter. It observed that he could provide no plausible explanation as to why his mother and father would be the only Muslims in his village.[4]

16. It concluded that:

> 110. Due the vague, inconsistent and contradictory nature of his claims, and the Tribunal's overriding concern that he has not been candid in his evidence, the Tribunal does not accept the other elements of his claims, such as his

[1] Tribunal Decision, at [21].
[2] Tribunal Decision, at [19].
[3] Tribunal Decision, at [20].
[4] Tribunal; Decision, at [107].

education, employment and personal circumstances, or his mistreatment at the hands of Hindus and/or BJP supporters including that they wanted to take his land and/or would not let hm use it

111. Having concluded that the applicant has not given a full and honest account of his circumstances, the Tribunal is unable to determine what his actual situation was and it is unnecessary for the Tribunal to attempt to do so for the purpose of this decision.

THIS APPEAL

17. The Appellant's Amended Notice of Appeal dated 14 May 2025 asserts that:

1. The Tribunal acted irrationally or illogically, or failed to apply the real chance test, in adopting a statistical analysis.
2. The Tribunal did not comply with s34(4) in relation to why this person, as a Muslim, was not at risk of harm in India.

SUBMISSIONS ON BEHALF OF THE APPELLANT

Ground One

18. On behalf of the Appellant Mr Aleksov of counsel contended that he was at risk of harm in India by reason of being a Muslim. He noted that the Tribunal cited country information from the Department of Foreign Affairs and Trade ("DFAT") that was relevant to this claim.[5] He accepted that the DFAT information was put at a high level of generality with its gist being that there is some risk of violence for some Muslims in India, but that the risk is generally low, especially in Muslim majority areas.

19. Referring to *CGA15 v Minister for Home Affairs*[6], Mr Aleksov observed that it has been held in Australia that it is not a correct approach to the "real chance test" to reason by reference to the logic that:

(a) There is a known, but small, incidence of harm to persons of a particular religion;
(b) There is a large number of persons of that religion in that country or area;
(c) The incidence being small, and the total population being large, there is not a real chance of harm for the individual in question.

20. He accepted that this approach is not inherently impermissible. but argued that it is necessary to be careful to ensure that such an approach does not disable one from assessing the particular population in question, by reference to information that descends to an appropriate level of particularity to justify a finding of risk beneath the threshold for refugee status.

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[5] Tribunal Reasons, at [117].
[6] (2019) 268 FCR 362; [2019] FCAFC 46 at [49]-[53].

21. Mr Aleksov argued that in this case the logic adopted by the Tribunal was flawed by reason of being irrational or failing to apply the correct chance test. He emphasised that the Tribunal did not confront the fact that the Appellant's home region is not a Muslim-majority region, which was said by DFAT to be a relevant consideration. He contended that the critical point not addressed by the Tribunal's reasoning is why the Appellant was not one of a small number of persons at risk in India on account of being Muslim.

Ground Two

22. Mr Aleksov argued that the Tribunal's determination of the religion-based claims in the case of this Appellant was "highly simplistic and followed the logic of 'there are many millions of Muslims in West Bengal'". It did not state what evidence it relied upon to reach the conclusion that the Appellant's individual risk was beneath the "real" level, noting that a "low risk", as set out by DFAT may well be a risk sufficient to attract a favourable outcome. He argued that there was no reason to explain why the Appellant was not within the low risk category and no evidence to justify his falling outside the identified low risk category.

23. He argued that this amounted to a failure to comply with section 34(4) of the Act.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

24. The Respondent denied that the regard had by the Tribunal to a statistical expression of the experience of Muslims in India rendered its decision irrational or illogical or that it demonstrated that it failed to apply the "real chance" test.

25. It also denied that the Tribunal had failed to comply with section 34(4) of the Act and argued that any non-compliance with section 34(4) should lead to the Tribunal's decision being quashed.

26. Mr Brown of Senior Counsel for the Respondent maintained that the Tribunal had not reasoned in the way asserted by the Appellant – "It did not say there's a low risk of harm to Muslims in India and therefore this appellant ... is not at risk."[7] He asserted that to the extent that there was an undifferentiated analysis of the position of Muslims in general in India, this was as a consequence of the way in which the Appellant put his case before the Tribunal. He instanced the statement dated 3 December that the Appellant made to the Tribunal:

> India provides no secure future for myself or my family. As Muslims we will always belong to a minority group subject to discrimination by Hindu nationalists. We are destined to live in slums. I have no way of providing for my child's future.
> Life is hard enough without family connections and support in India, it's even harder if you're a Moslem.[8]

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[7] Transcript, at p10.

[8] Statement, 3 December 2024, at [13]-[14]

27. He also drew attention to the country information from DFAT to which the Tribunal made reference in its reasons, where it was said that in general there is a low risk of violence toward Muslims, although "where it does occur, the consequences can be serious and even fatal. Poorer and lower-caste Muslims are at greater risk of violence."[9]

28. Mr Brown observed that the Appellant does not fall into this at-risk category as he is neither poor nor lower caste.

29. Mr Brown reminded the Court that the Appellant does not claim to have been the victim of communal violence or of discrimination in his employment. He identified that the Appellant claimed that when he lived in Mumbai there were clashes between Muslims and Hindus but he did not get involved. This, he said was not surprising, and it was appropriate that the Tribunal did not accept that the appellant had suffered harm in the past on account on his Muslim religion. It took into account the country information that generally Muslims were not at risk in India – this was something that it could take into account. It was against this backdrop of not being poor, having a job, having a housed and not having been a victim of communal violence that the Tribunal found that there was no reasonable possibility of his being harmed on the basis of being a Muslim.

30. Mr Brown drew the Court's attention that that the Appellant did not give evidence about what risk he would face in his home town. Thus, all that the Tribunal could respond to was a generalised claim.

31. The Tribunal accepted that the Appellant's parents died when he was young and so that he was an orphan but found his evidence as to his experiences as an orphan to be "vague, inconsistent, contradictory" and concluded he was not candid in his evidence. Thus, it stated at [110] that it did not accept the other elements of his claims such as his education, employment and personal circumstances, or his mistreatment at the hands of Hindus and/or BJP supporters.

32. Mr Brown noted that at [133] the Tribunal did not accept that the Appellant had in the past suffered significant economic hardship that threatened his capacity to subsist or his claim to being subject to economic destitution. It found that he appeared to have rented accommodation, supported himself and his wife and child. There was also evidence that he owned property and was educated. In short, then, the Tribunal, as asserted Mr Brown, gave careful attention to the circumstances of the matter and decided it was not satisfied that there was a real risk of serious harm to the Appellant. This was what was required under section 34(4) of the Act.

CONSIDERATION

Ground One

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[9] Tribunal, Reasons, at [117].

33. To be accounted a refugee a person is required to show that he or she has a "well-founded fear of persecution" for a Convention reason if returned to their country of origin. A fear of persecution is "well-founded" if there is a "real chance", namely a chance that is not "remote" or "far-fetched", [10] that they will suffer the claimed persecution in the reasonably foreseeable future.

34. The test of whether there is a "real chance" than an applicant for protection will suffer harm in a place was held in *CGA15 v Minister for Home Affairs*[11] not to be a relative one and it is not determinative whether the risk is one place is less severe than another place.

35. Whether a Tribunal's reasons disclose a misunderstanding or a misapplication of the "real chance" test depends on the facts of the case and on a fair reading of the reasons, looked at as a whole and without an eye keenly attuned to the perception of error.[12]

36. The fact that the Tribunal uses relative language at some points of its decision does not necessarily supersede its objective findings.[13]

37. In the current case, the Tribunal referred to DFAT information that there is a low risk of societal violence for Muslims, but accepted that such violence can be serious and even fatal. It observed that poorer and lower-caste Muslims are at greater risk of violence. Importantly, the Appellant does not fall into this category and is not at risk of discrimination.

38. The Tribunal declined to find as a fact that the Appellant had suffered harm as a result of his Muslim religion.[14] To reach this position it took into account that generally Muslims are not at risk of harm in India and had regard to the Appellant's past behaviour and profile. In this context it found his account of being an orphan plausible but regarded his evidence about his experiences as an orphaned child to be "vague, inconsistent and contradictory."[15] It also took into account that he was a property owner, he had been able to rent property and support his family, rejecting his evidence about lacking family or social support and having been destitute.[16] It did not accept his evidence about his education, employment and personal circumstances or mistreatment by Hindus.

39. It is apparent, then, that the Tribunal was attentive in its evaluation of the evidence given by the Appellant, accepting some aspects and rejecting others. Its reference to the general experience of Muslims was no more than one part of the information it took into account in finding there not to be a real chance that he would suffer persecution in the reasonably foreseeable future.

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[10] *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389 (Mason CJ), 398 (Dawson J, 407 (Toohey J) and 429 (McHugh J).
[11] (2019) 268 FCR 362; [2019] FCAFC 46 at [23].
[12] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).
[13] *CGA15 v Minister for Home Affairs* (2019) 268 FCR 362; [2019] FCAFC 46 at [32].
[14] Tribunal reasons at [123].
[15] Tribunal reasons at [109].
[16] Tribunal reasons at [109].

40. Fairly read in context, there is no reason to conclude that the Tribunal misunderstood or misapplied the real chance test and to the very limited extent that it used relative language, fairly viewed in context, this does not give rise to a reasonable inference that its awareness of the relative unusualness of violence against Muslims meant that it did not give proper consideration to the objective facts. In fact, it made specific findings as to the credibility of the Appellant's claims and the absence of a reasonable possibility that he would be seriously harmed on account of being Muslim in the reasonably foreseeable future.

41. Accordingly Ground One is not established as the Tribunal's reasoning was neither irrational nor illogical, and it did not fail to apply the real chance test, in adopting a statistical analysis.

Ground 2

42. Section 34(4) of the Act provides that:

> The Tribunal shall give the applicant for review and the Secretary a written statement that:
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> (a) sets out the decision of the Tribunal on the review; and
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> (b) sets out the reasons for the decision; and
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> (c) sets out the findings on any material questions of fact; and
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> (d) refers to the evidence or other material on which the findings of fact were based.

41. It has been asserted on behalf of the Appellant that the Tribunal failed to comply with section 34(4) in that it failed to make findings as to why the appellant, as a Muslim, is not at risk of harm in India.

43. This ground has no merit. The Tribunal reviewed country information from both Australian and United Kingdom sources that formed the basis for its analysis of risk and discrimination against Muslims in different contexts. This formed the context for its specific findings in relation to the Appellant, which were person-specific and included his "past behaviour and profile" (para 123) which in turn had been the subject of findings earlier in its reasons (at paras 106 – 111). The Tribunal was not able "to determine what his actual situation was" (para 111) and stated that it was not prepared to accept his claims in relation to his education, employment and personal circumstances, or his mistreatment at the hands of Hindu and/or BJP supporters.

44. On the basis of this, it was logical, rational and internally consistent that the Tribunal determined (at para 123) that "there is no reasonable possibility that he will be seriously harmed on account of being Muslim in the reasonably foreseeable

future, and that his fear of persecution is not well-founded." (para 123). Further, the Tribunal gave proper and sufficient reasons in compliance with its obligations under section 34(4) of the Act. There was no error in this regard.

CONCLUSION

45. Under section 44(1)(a) of the *Refugees Convention Act 2012* (Nr), the appeal is dismissed and the decision of the Tribunal dated 26 February 2025 is affirmed

Ian Freckelton

Justice Ian Freckelton
Dated this 8th day of August 2025