



IN THE SUPREME COURT OF NAURU

AT YAREN

Appeal No. 21 of 2025

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:

AU25

Appellant

AND:

REPUBLIC OF NAURU

Respondent

Before: Brady J
Dates of Hearing: 15 August 2025
Date of Judgment: 19 November 2025

Citation: *AU25 v Republic of Nauru*

CATCHWORDS:

APPEAL - Refugees – Refugee Status Review Tribunal – Whether Tribunal Decision was made in pursuit of an unfair procedure – Whether Tribunal Decision affected by legal unreasonableness, irrationality or procedural unfairness – Tribunal did not adopt unfair procedure – Tribunal Decision not affected by illogicality, irrationality or legal unreasonableness – Appeal Dismissed

LEGISLATION:

Refugees Convention Act 2012 (Nr), ss 43, 44, 49; Interpretation Act 2011 (Nr) s 55

CASE AUTHORITIES:

BRF038 v Republic of Nauru [2017] HCA 44; (2017) 91 ALJR 1197, Minister for Immigration and Border Protection v WZARH (2015) 256 CLR 326, Kioa v West (1985) 159 CLR 550 at 629, Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252 at 256 [2], Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88, Tahiri v Minister for Immigration and Citizenship (2012) 87 ALJR 225, HFM038 v Republic of Nauru [2023] NRCA 14 at [14], DWN034 v Republic of Nauru [2018] NRSC 57 at [62], Minister for Immigration and Citizenship v SZIAI (2009) 83 ALJR 1123, DWN080 v Republic of Nauru [2023] NRCA 4, AIU16 v Minister for Immigration and Border Protection [2019] FCA 1493.

APPEARANCES:

Counsel for Appellant: Mr A Aleksov (instructed by Craddock Murray Neumann)

Counsel for Respondent: Mr R O'Shannessy (instructed by Republic of Nauru)

REASONS FOR JUDGMENT

INTRODUCTION

1. The Appellant is a national of Bangladesh. On 28 June 2024, the Appellant applied to the Republic for recognition as a refugee, or a person owed complementary protection. The Appellant claimed to be fear persecution in Bangladesh due to his actual or imputed political opinion as a supporter of the Bangladesh National Party (BNP) and due to his membership of a particular social group, being the family member of a local BNP politician. He also claimed fear of persecution from smugglers who facilitated his travel to Australia, from Jamaat-e-Islami (JeI) and Islami Chhatra Shibir.

2. Pursuant to s 43 of the *Refugees Convention Act 2012 (Nr)* (**the Act**), the Appellant appeals from a decision of the Refugee Status Review Tribunal (**Tribunal**) made on 10 April 2025 (**Tribunal Decision**). The Tribunal affirmed a determination of the Acting Secretary of the Department of Multicultural Affairs (**Secretary**) dated 27 September 2024 (**Secretary's Decision**). The Secretary decided not to recognise the Appellant as a refugee under the Act and found that the Appellant was not owed complementary protection under the Act.
3. By s 43(1) of the Act, the Appellant may appeal to this Court on a point of law. 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 in accordance with any directions of this Court.

GROUND OF APPEAL

4. By an Amended Notice of Appeal filed on 10 July 2025, the Appellant initially advanced five grounds of appeal. The Appellant abandoned the fifth ground at the hearing of this appeal. The four remaining grounds are set out in the Amended Notice of Appeal in these terms:
 1. The Tribunal Decision was made in pursuit of an unfair procedure because:
 - (a) the Tribunal did not give the Appellant the whole of the brother's statement;
 - (b) the Tribunal did not consider the whole of the brother's evidence up to the time of decision in AU25's case.
 2. The Tribunal decision is affected by legal unreasonableness, in that:
 - (a) the Tribunal did not call the Appellant's brother to give evidence or run the cases on a joint basis;
 - (b) the Tribunal did not obtain the whole of the brother's evidence up to the time of decision in AU25's case.
 3. The Tribunal decision is affected by illogicality, irrationality or legal unreasonableness, or procedural unfairness, in that:
 - (a) the Tribunal stated:

“The Tribunal also notes the inconsistency with his brother's account regarding this incident. The brother said they went to [H] for a friend's party and so were not home when the fire occurred. The applicant said he did not know why they went to [H] other than his brother had some tasks to do there. The Tribunal would have expected him to remember that he had attended a party or know something of his reasons for travelling to [H].”

- (b) One point was “The Tribunal would have expected him to...know something of his reasons for travelling to [H].”
 - (c) It is unclear whether the Tribunal is referring to the Appellant when it says, “his reasons”, as in “the Appellant’s reasons for travelling to [H]”; or to the brother, as in “the brother’s reasons for travelling to [H]”.
 - (d) If the former, it is unintelligible because the Appellant went there with his brother because his brother had tasks to do. That was “his reason” for travelling to [H].
 - (e) If the latter, it is a finding made in pursuit of an unfair procedure. The Tribunal had an “expectation” about the evidence that the Appellant should be able to give. The expectation in this respect is not something that the Appellant could have known about, and it was unfair not to tell the Appellant about the expectation, so that he might either address the point through evidence or give argument about why the expectation was not valid.
4. The Tribunal decision is affected by illogicality, irrationality or legal unreasonableness, or fails to consider the actual evidence given by the Appellant, in that “T10-12 shows the applicants giving direct evidence, and not vague evidence as to the issue at Reasons [119]-[122].

PROCEDURAL HISTORY

- 5. The Appellant arrived in Australia in May 2024. On 1 June 2024, he was transferred to Nauru pursuant to the Memorandum of Understanding between the governments of Nauru and Australia. On 28 June 2024, the Appellant made an application for refugee status determination (RSD).
- 6. The Secretary’s Decision was made on 27 September 2024. The Appellant then applied to the Tribunal for review of that decision. The Appellant (through his representative) provided further submissions to the Tribunal and a further statement.
- 7. The Appellant attended a hearing before the Tribunal on 27 January 2025. He appeared together with his representative, Mr Del Monaco, and an interpreter.
- 8. The Tribunal Decision was delivered on 10 April 2025.
- 9. On 23 April 2025, the Appellant filed a Notice of Appeal in this Court. An Amended Notice of Appeal was filed on 11 July 2025. The parties filed their respective outlines of submissions prior to the hearing of the appeal in this matter on 15 August 2025. At the appeal hearing, I was provided with a copy of the statement of the Appellant’s brother given as part of the RSD process.

THE APPELLANT’S CLAIMS

- 10. In the Secretary’s Decision, the Secretary summarises the Appellant’s material claims for protection in his RSD application in the following terms:

- The [Appellant] described how his family are Bangladesh National Party (BNP) supporters but particularly his next eldest brother [D]. The [Appellant] said that [D] was the [identified position] in the BNP and had held that position since 2022.
- The [Appellant] claimed that he began helping his brother [D] with BNP work from 2020. He would help him distribute food as part of campaigning activities and do community-related tasks with him. He was publicly affiliated with the party and more so his brother's profile.
- Rallies were ramped up in the lead up to the general election in January which were scheduled to be held on 7 January 2024.
- The [Appellant] claimed that he and his brother were constantly threatened and intimidated by Awami League (AL) supporters around the time of the election.
- His brother had bought bags of rice and lentils to distribute amongst the local population as a campaign effort from BNP. His brother was given money from a BNP leader to purchase supplies and assist poor people in their area.
- On 30 November 2023, their family house was burnt down by AL supporters. His parents and four of his brothers were at home at the time of incident. It was late afternoon when the house was set on fire. They escaped with their lives.
- He and his brother [D] stayed at their paternal cousin's place in [H].
- They left for Chittagong on 1 December.
- His elder brother told him that it was for the best if they left the country, as their lives were very much in danger.
- He has great fears about going back to Bangladesh. His life would be in danger. AL supporters burnt his house down and got away with impunity. No one was charged or brought to justice.
- He is unwilling or unable to avail himself of the protection of the authorities of his country if he returned as they act on the instructions of AL. The police did not even attend the site of their house when it burnt down. They would not even take their complaint as they are BNP supporters."

FIRST GROUND OF APPEAL – THE BROTHER'S EVIDENCE

11. The first ground of appeal alleges that the procedure adopted by the Tribunal was unfair because the Tribunal did not give the Appellant the whole of his brother's statement. Further, the Tribunal did not consider the whole of the brother's evidence at the time of its decision in this case. This second aspect of ground 1 overlaps with ground 2. I will consider it as part of that ground below.

12. The Appellant has a brother in Nauru, who has also made protection claims. This is the brother referred to above as [D]. [D's] RSD interview was conducted on 9 July 2024 and his review application was heard by the Tribunal on 30 January 2025.

The Relevant Evidence

13. In his original Statement of Claim before the Secretary, the Appellant described the circumstances of his family house having burned down in these terms:

[13] On 30 November, our house was burnt down by Awami League supporters. My parents and four of my brothers were at home at the time of incident. It was late afternoon when the house was set on fire. They escaped with their lives.

[14] My brother, [D], and I were outside of the house when it happened. We were in the [H] town centre at the time of the incident. One of my brother's friends informed us that the house was fire [sic].

[15] [D] and I stayed at my paternal cousin's place in [H].

[16] We left for Chittagong on 1 December.

14. There were five occasions drawn to my attention where [D's] statement/evidence was mentioned during the course of the Tribunal hearing.

15. The first instance referred to starts at T-13 line 27 of the transcript. It was in the following terms:

Ms Boddison: Did your brother store any food anywhere?

The Interpreter: Sometimes we used to save it in our house, store it in our house, and during the house, it got fire, got fire, many amounts of food got burned.

Ms Boddison: I'm asking you this because your brother described what he was doing in his statement in November 2023. And he said that in -

The Interpreter: This food was stored in our house in the November month and that is when the house got burned. Could be one of the reasons.

Ms Boddison: Well, your brother says that he was given 20 lakh Taka to buy food and on the 12 November, he bought rice and lentils, and he distributed five lakh worth of food. And it was rice and lentils.

The Interpreter: Yes, he said yes. Those foods were stored in my house, my family house.

16. The second reference during the course of the Tribunal hearing to [D's] statement commences at T-16 line 32. The passage is in the following terms:

Ms Boddison: Okay. And I want to go back. Did your brother attend any processions or campaigns for the BNP?

The Interpreter: Yes.

Ms Boddison: Okay. Within his statements, he says he didn't attend any processions or take part in any campaigns?

The Interpreter: But it is true that he attended meetings and rallies.

Ms Boddison: Well, he says he went to meetings, but he didn't go to any processions or campaigns is what he says.

The Interpreter: I wasn't with him all the time.

17. The third occasion on which the Tribunal referred to [D's] statement commenced as a continuation of the previous mention. Starting at T-17 line 5, the following appears from the transcript:

Ms Boddison: And you weren't at home, your house was burnt down, is that right?

The Interpreter: That's right.

Ms Boddison: So where were you?

The Interpreter: Okay. 28th, which month, but he didn't mention, he said 28th, before the day of the incident, I went to [H], and I stayed with my cousin's house. One of my brothers called me, and one of my friend, sorry, one of my friends called me and gave me the information that my house got burnt, and my friend said, don't go to the village now, the place is not safe for you, you will be harmed if you go there, so stay in my house for a few days, then when the situation gets cooled down, then you can go.

Ms Boddison: I was asking you why you had gone to [H] before your house was burnt down?

The Interpreter: (Indistinct)

Ms Boddison: Why had he gone to [H] on the date...

The Interpreter: [H].

Ms Boddison: ...[H], yeah before his house was burnt, what was the reason for him being here?

The Interpreter: Thank you, Member. That reason, my brother knows. I just accompanied him.

Ms Boddison: Just, sorry?

The Interpreter: Accompanied him.

Ms Boddison: (Indistinct) okay.

The Interpreter: My brother said, come along with me, and you stay in cousin's house and I will do my walk. [*sic*]¹ Once I finish, we can come back.

Ms Boddison: Your brother says that you and he went there to a friend's party?

The Interpreter: Could be he attended the party, he asked me to stay in my cousin's house. I stayed there. I don't know.

Ms Boddison: And did the person ring you or your brother to tell them about the fire?

The Interpreter: My brother.

Ms Boddison: Do you know how the fire started?

The Interpreter: I wasn't there.

Ms Boddison: But you've since been speaking to your family, do they have any idea about how the fire started?

The Interpreter: No, I did not ask all those details.

Ms Boddison: So why do you think it was the Awami League that started the fire (indistinct).

The Interpreter: Because they told before they threatened us by saying that anytime we can arson your house.

Ms Boddison: When did they say that?

The Interpreter: Before the set fire. A few days before they set fire.

Ms Boddison: Can you tell me the circumstances of them telling you that?

The Interpreter: The food, where it's stored in our house, maybe that would be the reason.

Ms Boddison: But you said that a few days before the fire they threatened to set fire to your house. Were you at that conversation? How did it come about? Where were you? I want to know a bit more about that.

The Interpreter: Before the house got burnt, a group of people came, and they threatened us by saying that.

Ms Boddison: Where did, when you said they came, where were you, where did this threat take place?

The Interpreter: I wasn't at home.

¹ In relation to the reference to "walk" in the transcript, both parties accepted during the course of the hearing before me that it was actually a reference to the word "work".

Ms Boddison: So, who, who did – who was the threats said to if it weren't said to you?

The Interpreter: Other members of my family, for example, my younger brother were there.

Ms Boddison: So, can you – I know you weren't there, but what have you been told about what happened?

The Interpreter: My younger brother told me about the threatening.

Ms Boddison: Have you or your brother have mentioned these threats before?

The Interpreter: I think I haven't mentioned it before.

Ms Boddison: You think you haven't.

The Interpreter: I haven't mentioned it before.

18. Associated with this third occasion, the fourth occasion where the evidence of [D] is mentioned starts at T-19 line 17, where the following exchange occurred:

Ms Boddison: Your brother seems to have said that he and his brother attended a friend's party in (H) and whilst he was away, he heard that the house is burnt down. He wasn't sure who was responsible for the fire. He thought it might be the AL members because they previously asked him about the food. And he said the Awami League never took responsibility for it, they never said that they did it.

The Interpreter: They used to say to the local people.

Ms Boddison: And what you felt would happen to you if you went back to Bangladesh?

The Interpreter: They will kill me,

Ms Boddison: Who will kill you?

The Interpreter: Awami League people.

19. Finally, the issue of [D's] statement was raised by the Appellant's representative directly with the Tribunal. Starting at T-21 line 6, the following exchange occurred:

Mr Del Monaco: Can I ask a couple of questions before we go for a break.

Ms Boddison: Yes.

Mr Del Monaco: Great. During the interview, you referred to the statement of the applicant's brother.

Ms Boddison: Yes.

Mr Del Monaco: Is that the statement that was lodged with the RSD precaution²? Are you intending to provide a copy of that statement to the client?

Ms Boddison: I can, because under section 49 are just the parts that are quoted perhaps (indistinct).

Mr Del Monaco: Okay (indistinct) sorry. So the statements from your brother ...

Ms Boddison: Yea.

Mr Del Monaco: ... that's being talked about today, that will be provided to us. To me as a representative?

Ms Boddison: Well, under section 49, I only have to provide the parts that I have talked to him, so that would be it.

Mr Del Monaco: The part that was an omission, you said these weren't provided.

Ms Boddison: Sorry.

Mr Del Monaco: Part of it that was an omission, is that these pictures were not provided by your brother?

Ms Boddison: But then I'd have to give you the, I can, but how can I give you an omission.

Mr Del Monaco: By possibly releasing everything you relied on?

Ms Boddison: Well, I can say that they've not been provided. I can give you a list of what was provided.

Mr Del Monaco: That's definitely your call, it's just that there is something here, a bit of evidence that's been talked about that is not in my possession.

Ms Boddison: I know.

Mr Del Monaco: ...the statement, that isn't in my possession.

Ms Boddison: I know, and that's why I was putting it to him, because that's what section 49 requires me to do.

Mr Del Monaco: Okay, so section 49 gives you that authority, so in the future, if there's other information that becomes known about the brother, you will provide that as well, of course.

Ms Boddison: Anything that I'm going to use in the decision, section 49, that I'm going to rely on, section 49 says I have to put to him. I don't have to provide the actual document, just what I've said.

² The reference to "precaution" here seems, clearly enough, to be meant to refer to the RSD "application".

Mr Del Monaco: Ah that's section 49, is it (indistinct) section 49. That's okay, we'll just leave it there.

Ms Boddison: If there's anything I might rely on, any information that is contrary to the interests of the applicant, I'm required to raise with you if it's perceived in confidence from someone else. ...

Tribunal Decision

20. The Tribunal dealt with the issue of [D's] statement starting at paragraph [20] of the Tribunal Decision. Under the heading "The Applicant's Brother's Statement", the following passages appear:

[20] As noted above, the applicant left Bangladesh, travelled to Australia with his brother, who has also made an application to be recognised as a refugee or a person owed complementary protection. The applicant claims were to some extent reliant on his brother's case as his main claim was that he would be targeted by AL supporters because he assisted his brother in his brother's political activities.

[21] The Tribunal notes that at the commencement of his RSD interview, the applicant asked if he could be interviewed jointly with his brother. This request was denied on the basis he had made a separate application, and his case would be assessed on its merits.

[22] On 14 January 2025, the applicant was sent an invitation to appear before the Tribunal at a hearing to be held on 27 January 2025, pursuant to section 40 of the Act. The invitation stated:

Please inform the Tribunal in writing within seven days of any witness the applicant wishes the Tribunal to take oral evidence from.

Please inform the Tribunal as soon as possible if the applicant wishes to bring a support person to the hearing or has any special needs in relation to interpreting any other aspect of the hearing.

[23] No request was made by the applicant for his brother to attend the hearing, either as a support person or as a witness.

[24] Pursuant to section 36(b) of the Act the Tribunal had access to the applicant's brother's RSD application including the supporting statutory declaration.

[25] At the hearing when the applicant's evidence appeared to be inconsistent with some aspects of his brother's statement, that portion of his brother's statement was read to him, for him to comment on the inconsistencies.

[26] The Tribunal regarded the brother's statement as information falling within section 49 of the Act, as it was information given to the Secretary in confidence.

[27] At the conclusion of the hearing, there was a discussion with the applicant's representative as to whether the full statement would be provided to the applicant and the Tribunal indicated that it was not required to do so as it had read out the relevant portions of the statement and given him the opportunity to comment. The representative indicated that he would "get back" to the Tribunal regarding the brother's statement. As at the date of decision, no further material has been received from the applicant's representative and no request has been made for the brother's statement.

21. At [107] to [110], the Tribunal dealt with its findings concerning the Appellant's provision of false photographs in support of his application. Following on from that consideration, the Tribunal continued in the following terms in relation to the Appellant's family house being burned:

[111] The fact the applicant has provided false documents to verify this event casts doubt on this account, but is not determinative.

[112] More concerning to the Tribunal was the applicant's claimed lack of knowledge of his family's current living situation. He claimed the house was burnt down in November 2023. In his RSD application, he said that he spoke to his parents every day. He told the Tribunal that he spoke to his parents 2-3 times per week. The Tribunal accepts that the applicant is currently in a stressful situation but is concerned that he did not know where his family was living, who they were living with, whether they had rebuilt their home or anything about their living situation. He assumed they were living in various places, spending a few days at one place, then moving on and had been doing this for over a year. Given the frequency of his contact with his family, the Tribunal does not accept that he has never enquired as to their living situation and is of the view he was being deliberately vague and evasive.

[113] The applicant knew nothing about the circumstances of the fire. The Tribunal would have expected him to find out something about how it started and what occurred.

[114] The Tribunal also notes the inconsistency with his brother's account regarding this incident. The brother said that they went to [H] for a friend's party, and so were not home when the fire occurred. The applicant said he did not know why they went to [H] other than his brother had some tasks to do there. The Tribunal would have expected him to remember that he had attended a party or know something of his reasons for travelling to [H].

[115] There was also the applicant's evidence that the AL came to his family home "a few days ago" and threatened his parents which suggested the family home still existed and his parents were living there. The Tribunal does not accept his explanation that when he said "a few days ago" he meant over a year ago. Rather it indicated he had forgotten his earlier evidence that he did not know anything about his family's living situation.

[116] For all these reasons, the Tribunal does not accept that the applicant's family home was burnt down.

Applicant's Involvement in his Brother's BNP Activities

[117] At both the RSD interview and the Tribunal hearing, the applicant was adamant that he was not a BNP supporter. He did not like the BNP or the AL, and he was not involved in BNP activities and only helped his brother.

[118] The Tribunal accepts that the applicant is not a supporter of the BNP.

[119] If the applicant was not a supporter of the BNP and did not like them, it is hard to understand why he would put himself at risk (of serious harm and of death) out of loyalty to his brother. His other brother did not appear to have this loyalty to [D].

[120] There appears to be a contradiction between him saying he was targeted because he helped his brother, and his insistence on deleting from his statement "I was publicly affiliated with the party [BNP] and more so my brother's profile". Saying this was not the case.

[121] Even taking into account his youth and the fact he presented as quite unsophisticated, the Tribunal found the applicant's evidence was vague, confused and contradictory regarding his activities assisting his brother. He did not know very much about his brother's political activities.

[122] The Tribunal does not accept that the applicant assisted his brother in any BNP activities to the extent that he was identified as a BNP supporter.

The Appellant's Submissions

22. In his written submissions, Mr Aleksov on behalf of the Appellant submitted that [D's] evidence was used against the Appellant. The Tribunal noted, as set out above, that the Appellant was told where his evidence was inconsistent with his brother's written statement. However, by the time of the Tribunal decision, [D] had given oral evidence to the Secretary (or, more accurately, the RSD officer on behalf of the Secretary) and to the Tribunal. It is also possible that he had given further written evidence to the Tribunal.
23. The Appellant submitted that the Tribunal should have disclosed to him the whole of his brother's written statement to ensure fairness to the Appellant. Whilst inconsistencies were put to the Appellant at the level of "the gist of the information", the Appellant submitted that possession of the whole of the statement might have given him the opportunity to reconcile any apparent inconsistencies between his evidence and that of his brother.
24. The Appellant submitted that the Tribunal considered that s 49 of the Act required only that limited aspects of [D's] evidence needed to be provided to him. However, the Appellant argued that s 49 does not cut down the Tribunal's broader obligations to afford procedural fairness. The question is not "what did s 49 require?" but rather

“what did procedural fairness require?” In this case, Mr Aleksov submitted that procedural fairness required the *whole* of [D’s] statement to be provided to the Appellant. Any concern about confidentiality could be met by an order under s 49(3).

25. Further, the Appellant submitted that it was unfair of the Tribunal not to “seek out” [D’s] “full evidence” which, by the time of the decision, included his oral evidence to the Secretary and his oral evidence before the Tribunal. Without taking that step, the Tribunal could not have known whether the Appellant had recanted or changed aspects of his evidence in his initial written statement.

26. Counsel for the Appellant relied upon the decision of the High Court of Australia in *BRF038 v Republic of Nauru* [2017] HCA 44; (2017) 91 ALJR 1197 to submit that the information that must be provided to a person in the position of the Appellant is not simply information that might be considered to be “adverse” to his interests, but extended to *any* information which might be said to be credible, relevant and significant, including evidence that is, or may be, of assistance to the Appellant. The High Court said:

[57] The appellant argued that the hearing before the Tribunal was conducted without reference to the appellant’s capacity to avail himself of effective police protection against mistreatment by reason of the fact that the Somaliland police force included members of his tribe. The appellant argued that the country information relating to the tribal composition of the Somaliland police was credible, relevant and significant to the decision the Tribunal would make. It followed that fairness required that the Tribunal ought to have put the substance of that information to him. Its failure to do so, the appellant argued, constituted a breach of the requirements of procedural fairness contemplated by s 22 of the Refugees Act.

[58] In *Minister for Immigration and Border Protection v SZSSJ*, this Court held that procedural fairness requires that a person whose interest is apt to be affected by a decision be put on notice of “the nature and content of information that the repository of power undertaking the enquiry might take into account as a reason for coming to a conclusion adverse to the person”.

[59] In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*, Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ referred with evident approval to the following statement by the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*:

“Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision maker.”

[60] The respondent accepted, correctly, that procedural fairness requires a person to be given the opportunity to deal with all information that was “credible, relevant and significant” to the decision. The respondent sought to argue that disclosure of such information was required only in relation to the “critical issue or factor on which the administrative decision is likely to turn” and that the information as to the tribal composition of the Somaliland police was not a factor on which the Tribunal’s decision was likely to turn. It was said to be apparent from the Tribunal’s reasons that the Tribunal had already made findings sufficient to dispose of the appellant’s claim, namely, that he had no well-founded fear of persecution, before its reference to the tribal composition of the Somaliland police.

[61] The respondent’s reading of the Tribunal’s reasons in this respect is unsustainable. It cannot be said that the Tribunal’s observation as to the composition of the Somaliland police force did not significantly affect its assessment of whether the appellant was likely to face persecution in Somaliland. On the contrary, that consideration was integral to the Tribunal’s reasons for its conclusion.

[62] The circumstances that the Tribunal expressly referred to this information in the course of reaching its conclusion, while not necessarily determinative, goes some way to demonstrating that the information was integral to the Tribunal’s conclusion. It is evident from the lengthy passage excerpted above that the conclusions there stated were directly is positive of the issue, whether the appellant has a well-founded fear of persecution as a result of his membership of the Gabooye tribe. It is also apparent from the excerpt that the country information to which the Tribunal referred in the first paragraph of that excerpt (which was a basis for its conclusion adverse to the appellant) included the information as to the tribal composition of the Somaliland police force. [footnotes omitted]

27. In reliance upon this passage, counsel for the Appellant submitted that material before the Tribunal which is “credible, relevant and significant” and which might *not* be adverse to an applicant, but instead, if known to them, that person might have made something favourable out of the material, is material that ought to have been provided to the Appellant. By that submission, a failure to give credible, relevant and significant information to a person deprives them of procedural fairness, regardless of whether it was adverse material. Even if it may simply have put an applicant on a train of enquiry that might have led to something favourable being made of it, that would be sufficient to breach the requirements of procedural fairness.

28. Counsel for the Appellant also referred to the decision of the High Court of Australia in *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326. In that case, the respondent had been interviewed by a “first reviewer” for the purposes of independent merits review. However, during the course of the decision-making process, the first reviewer became unavailable after having interviewed the respondent. Unknown to the respondent, another person (the second reviewer) completed the independent merits review. The respondent in that case contended that

the second reviewer's failure to conduct her own interview meant that the respondent was denied procedural fairness.

29. The High Court agreed with the Full Court of the Federal Court that the decision was made in breach of the requirements of procedural fairness. The respondent lost an opportunity to advance his case. An interview by the second reviewer might have made a difference to the outcome of the independent merits review process. By analogy with this reasoning, counsel for the Appellant submitted that information which is credible, relevant and significant must have been put into the hands of the Appellant in this case. It is unknown what the Appellant might have made of this, but the failure to provide him with evidence in the hands of the Tribunal amounted to a failure to afford procedural fairness.
30. The Appellant submits that the fact that the Appellant did not in this case ask for his brother's case to be heard at the same time as his, nor did he ask for his brother to give evidence in the Appellant's case, is not determinative of whether he was provided with procedural fairness. The Appellant's representative asked for a copy of the relevant statement, and it was refused. It is incorrect to examine whether the Appellant had capacity to do something after the hearing to ascertain the nature of his brother's evidence. The failure to afford procedural fairness occurred simply by the decision of the Tribunal not to provide the Appellant with his brother's statement.

The Republic's Submissions

31. Mr O'Shannessy for the Republic started his submissions by referring to the specific terms of s 49 of the Act and distinguished the word "information" from "document". Counsel submitted that the Appellant had not identified any item of credibility, relevance or significance to the Tribunal decision, adverse or otherwise, from [D's] statement that was not put to the Appellant by the Tribunal.
32. My attention was also drawn to the definition of "document" in s 55 of the *Interpretation Act 2011* (Nr).
33. Counsel for the Republic then took me back to the decision of the High Court of Australia in *BRF038*. The Republic submits that when regard is had to the passages of the authorities cited by the High Court in *BRF* as I have set out above, it is plain that the Court was referring to *adverse* information, not information in a broader sense. Counsel noted the comments in *Kioa v West* (1985) 159 CLR 550 at 629 by Brennan J to the effect that an opportunity should be given to deal with "adverse information" that is credible, relevant and significant for the decision to be made.
34. The High Court in *BRF038* also cited a passage from the High Court decision of *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [29], quoting from *Commissioner for ACT Revenue v Alphaone* (1994) 49 FCR 576 at 591-592. That was a reference to a passage in *Alphaone* to the following effect:

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut

or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.” [emphasis added]

35. The next point made by Counsel for the Republic came from the decision of the High Court in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 256 [2] which specifically referred to the opportunity to be given to a person to deal with “*adverse* information that is credible, relevant and significant for a decision to be made” (emphasis added).

36. I was also taken to *Kioa v West* (1985) 159 CLR 550 and in particular, the decision of Brennan J at 629 where His Honour said:

Nevertheless, in the ordinary case where no problem of confidentiality arises, opportunity should be given to deal with adverse information that is credible, relevant and significant to that decision to be made. [emphasis added]

37. Counsel submitted that these passages make clear that when the High Court in *BRF038* was using the word “information”, it implicitly confined itself to *adverse* information. Indeed, Counsel submitted that this was the submission that was put to the High Court in *BRF038* and which the High Court accepted.

38. Counsel for the Republic submits that the Appellant’s case is not that he was denied “information” but rather, that he was denied access to a “document”. The Republic notes that the Appellant has not identified what information could have led to something favourable for him. He has not identified what information might have put the Appellant on a train of inquiry. The Appellant’s position is entirely speculative.

39. In relation to *WZARH*, Mr O’Shannessy submitted that the facts of that case presented quite a different scenario. The case dealt with a situation where a person was given the opportunity to present evidence to a decision-maker. The visa applicant in *WZARH* was effectively deprived of the opportunity for the decision-maker to consider his demeanour, his behaviour and his responsiveness to questions because the decision-maker was not the person who interviewed him.

40. Counsel for the Republic did however note the High Court case of *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88. In particular at page 96, paragraph [17], the High Court said:

References to information that is “credible, relevant and significant” is not to be understood as depending upon whether characterisation of the information the decisionmaker may later have chosen to apply to the information when expressing reasons for the decision that has been reached.

41. In *Tahiri v Minister for Immigration and Citizenship* (2012) 87 ALJR 225, a unanimous High Court of Australia stated at [24]:

That the delegate referred to undisclosed material may be acknowledged but the material has not been shown to be adverse in any relevant sense. The delegate did not treat it as contradicting Ms Tahiri's claim that the husband was missing and did not use it to make any findings as to the husband's current location, assuming him to be alive.

42. Counsel for the Republic submits that any conflict between the approach of the High Court in *VEAL* and the cases that preceded it was resolved by the same Court in *Tahiri*. It was resolved in such a way that made clear two things. First, the obligation to put credible, relevant and significant information was limited to adverse information. Secondly, whether information was first, adverse, and second, significant, can only be assessed or analysed having regard to the decisionmaker's reasons and the use that they give to that information in the end.
43. Counsel for the Republic then dealt with the occasions highlighted by the Appellant in the transcript of the hearing before the Tribunal where reference was made to the Appellant's brother's statement as part of the RSD process.
44. The first instance referred to is at T-13 of the transcript and is set out above. The Tribunal referenced this exchange starting at paragraph [79] of the Tribunal Decision. The Tribunal described the evidence of the Appellant, but the Republic submits that it ultimately "made nothing" of any discrepancy between the Appellant's evidence and his brother's statement in this respect.
45. The second reference during the course of the Tribunal hearing to [D's] statement was at page T-16 and is set out above. The Tribunal dealt with this matter at paragraph [77] of the Tribunal Decision. The paragraph accurately records the Appellant's evidence but nothing adverse was made of it when the Tribunal set out its reasons.
46. The third and fourth occasions set out above deal with the occasion on which the Appellant's family home was burnt down. The Appellant was not only given the opportunity to respond to the information from [D's] statement that was credible, relevant and significant to the Tribunal's decision, but he also took that opportunity to address it. In the Republic's submission, the fact that the Tribunal was not persuaded by the Appellant's evidence does not in any way indicate a breach of the requirements of procedural fairness.

Consideration

47. By s 22(b) of the Act, the Tribunal was bound to act "according to the principles of natural justice and the substantial merits of the case". Did the principles of natural justice here require that the entirety of [D's] statement be given to the Appellellant?
48. The Appellant relies, in part, on s 49 to advance his case. Section 49 is relevantly in the following terms:

49 Disclosure of certain information

- (1) This Section applies to information that:

(a) is given to the Secretary or the Tribunal in confidence;
or

(b) is of a kind prescribed by the Regulations.

(2) Where the Secretary or the Tribunal receives information to which this Section applies, the Secretary or the Tribunal, as the case requires:

(a) may, for the purpose of the exercise of powers under this Act, have regard to the information; and

(b) shall, if intending to rely on the information for the purpose of the exercise of powers contrary to the interests of the applicant, disclose the information to the applicant.

(3) Where the Secretary or the Tribunal discloses information to the applicant under subsection (2)(b), the Secretary or the Tribunal, as the case requires, may give a direction to the applicant that the information shall not be disclosed except in a specified manner and to specified persons, or to persons of a specified class.

49. The first thing to note is that s 49 deals with the disclosure of *information*, not *documents*. Whilst the *Interpretation Act 2011* (Nr) does not assist with a definition of the term “information”, it does state at s 65 that in a written law:

‘document’ means a record of information ...

50. I proceed on the basis that s 49 has application to [D’s] statement, being information given to the Tribunal in confidence. However, even assuming the application of s 49, the requirement to disclose the information to the applicant only extends to “information” that the Tribunal intends to rely upon “for the purpose of the exercise of powers contrary to the interests of an applicant”.

51. Here, the Tribunal met its obligations under s 49(2)(b) by disclosing the effect of those parts of [D’s] statement that it relied upon for the exercise of its powers contrary to the interests of the Appellant. It gave such disclosure was during the course of the hearing, rather than by the separate provision of the statement. However, s 49 says nothing about how disclosure of relevant information is to be provided. In my view, the Tribunal’s obligation under 49(2)(b) was met here.

52. However, that does not itself answer the Appellant’s argument here. The Appellant argues that the common law principles of natural justice required the provision to him of the whole of [D’s] statement. That is because natural justice required that he be provided with information that was “credible, relevant and significant” to the Tribunal’s decision and the statement of [D] answered that description. It was not necessary, in addition, that the information be “adverse” to the Appellant’s interests.

53. What information or documents did the principles of natural justice require the Tribunal to provide to the Appellant in this case?

54. The starting point for this consideration is that of the Australian High Court in *Kioa v West*. In the well-known statement of Brennan J at 628-629, his Honour advanced two general propositions: first that “in the ordinary case where no problem of confidentiality arises, an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made”; and second, that “[i]nformation of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information.”
55. The question of what is meant by information that is “credible, relevant and significant” has been considered in subsequent cases. In *VEAL*, the High Court addressed this issue commencing at [16] as follows:

“Credible, relevant and significant”?

[16] What is meant by “adverse information that is credible, relevant and significant to the decision to be made”? As is always the case, what is said in reasons for judgment must be understood in the context of the whole of the reasons. Examining sentences, or parts of sentences, in isolation from the context is apt to lead to error. In particular, what Brennan J said about “information that is credible, relevant and significant” takes its meaning from the point his Honour had made only a few sentences earlier: that “[a]dministrative decision-making is not to be clogged by inquiries into allegations to which the repository of the power would not give credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made”. Moreover, what is meant by “credible, relevant and significant” must be understood having regard also to the emphasis that his Honour had given earlier in his reasons to the fundamental point that principles of natural justice, or procedural fairness, “are not concerned with the merits of a particular exercise of power but with the procedure that must be observed in its exercise”. Because principles of procedural fairness focus upon procedures rather than outcomes, it is evident that they are principles that govern what a decision-maker must do in the course of deciding how the particular power given to the decision-maker is to be exercised. They are to be applied to the processes by which a decision will be reached.

[17] It follows that what is “credible, relevant and significant” information must be determined by a decision-maker before the final decision is reached. That determination will affect whether the decision-maker must give an opportunity to the person affected to deal with the information. And that is why Brennan J prefaced his statement about a person being given an opportunity to deal with adverse information that is credible, relevant and significant, by pointing out that there may be information, apparently adverse to the interests of a person, which can and should be put aside from consideration by the decision-maker as not credible, not relevant, or of little or no significance to the decision to be made. “Credible, relevant and significant” must therefore be understood as referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision. And the decision-maker cannot dismiss information from further consideration unless the information is evidently not credible, not relevant, or of little or no significance to the decision that is to be made. References to information that is “credible,

relevant and significant” are not to be understood as depending upon whatever characterisation of the information the decision-maker may later have chosen to apply to the information when expressing reasons for the decision that has been reached. [Emphasis added]

56. It seems clear enough that the consideration of the High Court in this case was directed to information held by the decision-maker about which the relevant affected person might make submissions because it was relevant *and adverse*. That approach is consistent with other cases cited, including *Kioa v West* itself, *SZBEL* (at 162) quoting the decision of the Full Federal Court in *Alphaone*, and *Saeed* at 256. It is also consistent with the approach of the High Court in *Tahiri* at the extract set out at paragraph [41] above.
57. I note that the Nauru Court of Appeal cited with approval the relevant passage from *Alphaone* in *HFM038 v Republic of Nauru* [2023] NRCA 14 at [14].
58. The Appellant contends that *BRF038* however says nothing about the necessity for the information to be “adverse”. Thus, information that may support an applicant’s case may have to be disclosed if it is otherwise credible, relevant and significant. I do not accept that submission.
59. First, the High Court in *BRF038* quotes with approval at [58] the passage of the High Court in *Minister for Immigration and Border Protection v SZSSJ* (2016) 90 ALJR 901 at 915 to the effect that procedural fairness requires that a person whose interest is apt to be affected by a decision, be put on notice of “the nature and content of information that the repository of power undertaking the inquiry might take into account as a reason for coming to a conclusion adverse to the person” [emphasis added].
60. Second the High Court in *BRF038* quotes with approval at [59] the prior decision of the Court in *SZBEL* referring with approval to the decision of the Full Federal Court in *Alphaone* (at 591-592) to the effect that the entitlement to information “extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker”. [emphasis added]
61. Third, the High Court in *BRF038* quoted with approval the comments of Brennan J in *Kioa v West* which referred to “adverse information”.
62. Having regard to the Australian authorities, and the acceptance of the principle from *Alphaone* by the Nauru Court of Appeal in *HFM038*, I conclude that the common law obligation of procedural fairness on the Tribunal in this case was to provide the Appellant with notice of information adverse to the Appellant’s case which was “credible, relevant and significant”.
63. The Tribunal met its obligation in this case. It was not required to provide the full statement of [D]. Its obligation was to provide “information” and not any particular “document”. To the extent that the statement contained adverse information that was credible, relevant and significant, the Appellant was provided with that information as part of the hearing process. He was given the opportunity to comment on that

information, and in fact did so. The Tribunal thus met its obligations under s 22(b) of the Act. It also met its obligation under s 49 of the Act.

64. The Appellant has not, in any event, identified any other part of [D's] statement that he contends constituted information that was credible, relevant and significant. The Appellant has a copy of the statement, and it was tendered in evidence before me.
65. Thus, even if I am wrong in my view about the content of the obligation of procedural fairness in this case, as a matter of fact I am not satisfied that the Tribunal breached any obligation to provide information which was otherwise credible, relevant and significant, regardless of whether or not it was adverse.
66. There was no failure to afford natural justice to the Appellant in breach of s 22(b) of the Act. Ground 1 of the Amended Notice of Appeal is not established.

GROUND TWO

The Appellant's Submission

67. Ground 2 is a contention that the Tribunal Decision is affected by legal unreasonableness in that the Tribunal did not call the Appellant's brother to give evidence or obtain the whole of the brother's evidence up to the time of decision in the Appellant's case. This ground overlaps, in part, with Ground 1's contention that the Tribunal adopted an unfair procedure in not considering the whole of [D's] evidence.
68. The Appellant submits that a failure to seek out relevant evidence that is easily obtainable may amount to legal unreasonableness. In this case, [D] was the "lead" political actor, and the Appellant was what his counsel describes as the "tag-along dutiful younger brother." Plainly, [D's] evidence was relevant to the Appellant's case and the Appellant had requested at the RSD level that his case be assessed jointly with his brother. There was no separate request made to the Tribunal for the two cases to be assessed jointly.
69. The Appellant submits that there was no valid reason to deny the request to have the Appellant's and his brother's cases advance together, as separate cases but handled together – noting that this request was made as part of the RSD process. The integrity of the evidence could have been managed by ensuring the receipt of each brother's evidence was done out of earshot of the other. There is also a prospect of inconsistent findings as between the decisions in the Appellant's case and his brother's case. That was a point which, in the Appellant's submission, would have powerfully supported a joint hearing.
70. The Appellant contends that taking these matters together, it was legally unreasonable for the Tribunal not to call the Appellant's brother to give evidence in the Appellant's case. More appropriately, the cases should have been handled together. Alternatively, it was at least legally unreasonable not to obtain the Appellant's brother's "full evidence" as given in his own case prior to the Tribunal reaching its decision in the Appellant's case.

71. Mr Aleksov submitted that by the time of the Tribunal's decision in this case, [D] had likely given evidence on two different occasions - once to the RSD officer and once to the Tribunal. I was invited to infer that this evidence was likely to have traversed all of the issues in his statement. That being the case, it is unknown whether [D] maintained the same version of events as he did in his initial RSD statement.
72. It was either unfair not to go and obtain that further updated information (ground 1) or it was legally unreasonable for the Tribunal not to go and find out what the Appellant's brother had said on the subsequent occasions after his initial RSD statement (ground 2). In the further alternative, it was unreasonable to use [D's] statement against the Appellant in circumstances where it must be regarded as "historic and possibly overtaken."
73. Counsel for the Appellant accepted that there was no evidence to indicate whether the Appellant or his representatives had ever asked for that material to be provided to them.

The Republic's Submission

74. The Republic submits that there was no obligation on the Tribunal to seek out any evidence that the Appellant's brother may have given in support of his application for refugee status. It was for the Appellant to advance arguments or evidence that he wished to advance in support of his claim: see *Abebe v Commonwealth of Australia* (1999) 197 CLR 510 at [187], cited in *DWN034 v Republic of Nauru* [2018] NRSC 57 at [62] (per Freckelton J).
75. In addition, the hearing invitation sent to the Appellant on 14 January 2025 included a statement inviting the Appellant to inform the Tribunal in writing within seven days of any witness that the Appellant wished the Tribunal to take evidence from. The Appellant did not request evidence from his brother. Further, after the Tribunal hearing, the Appellant and his representative had around two and a half months to request that the Tribunal consider further evidence from the Appellant's brother, and failed to do so.
76. The Republic submits that the Appellant has not articulated any intelligible basis for the assertion that it was legally unreasonable for the Tribunal not to call evidence from a witness the Appellant evidently did not wish to be called.
77. As to the contention that the two cases would have been more appropriate to have been handled together, the Republic submits, firstly, that no such request was made to the Tribunal. Secondly, whilst a "joint review" may have been possible, s 23(1) of the Act requires the hearing of the application for review to be "in private". The Republic notes that in *COA025 v Republic of Nauru* [2017] NRSC 104, the Nauru Supreme Court (Khan J) held that the Tribunal did not comply with the requirement in s 23(1) of the Act and committed an error of law by "taking it upon itself to combine the hearings": see [60]. That was in circumstances where neither the Appellant in that case, her husband nor her legal representative had made a request for the reviews to be heard together. The Tribunal instead took it upon itself to combine the review applications.

78. The Republic submits that the Tribunal in this case was acting in thoughtful compliance with its obligations under the Act as those obligations were explained by Khan J in *COA025*.

Consideration of Ground 2

79. The Appellant was invited to inform the Tribunal in writing as to any witness that he wished to take evidence from. Neither the Appellant nor his representatives gave any notice that he wished for evidence to be obtained from his brother. Nor did the Appellant ask the Tribunal to hear the two cases together.

80. As this Court said in *COA25*:

[57] A joint hearing is appropriate when there is “common cause” but not so where the presence would cause unfairness or disadvantage - see [28] of *SZAYW*³ where it is stated:

“[28] The other applicants who were present when the appellant was giving his evidence to the Tribunal were people with whom the appellant was making common cause. His migration agent had told the Tribunal that all four men knew what the others’ claims would be. As a matter of fairness, it appeared that the other applicants would have been entitled to be told what the appellant said in his evidence. The Tribunal thought it appropriate that they be present when the appellant gave his evidence. The appellant and his migration agent raised no objection to their presence. That presence caused no unfairness. It was to the appellant’s advantage.”

[58] In this matter, neither the appellant, her husband nor her legal representative made a request for the review to be heard together and it appears that the Tribunal took it upon itself to combine the review applications as is evident from the Tribunal’s Decision at [3].

[59] The Tribunal’s main reason for rejecting the applicant’s claim for conversion to Christianity was that: At the hearing, the applicant’s “credibility” was already in issue. When the Tribunal put to the appellant’s husband that he had provided an “inconsistent and implausible” account of accusations by the Zergani family - the appellant conceded that “she was not present and relied on her husband’s evidence”. So, the appellant’s husband’s presence caused her “unfairness” and further it disadvantaged her position.

[60] In the circumstances, I find that the Tribunal did not comply with the requirements of s 23(1) of the Act and committed an error of law by taking it upon itself to combine the hearings and the appellant therefore succeeds on this ground of appeal.

81. Similarly, in this case, the Appellant did not ask the Tribunal for the matters to be heard together. Nor did he seek an order requiring his brother to give evidence in his case.

³ (2006) 230 CLR 486

82. There may well have been good forensic reasons for adopting that approach. However, regardless, the Appellant was represented by competent lawyers and for whatever reason, did not pursue before the Tribunal the position which he took in the RSD process about the matters progressing together.
83. In the circumstances, and consistent with the comments of Khan J noted above, I consider that the Tribunal would have been at considerable risk of falling into error by taking it upon itself to combine the hearings, or to call [D] as a witness, in circumstances where the Appellant did not seek that course. Accordingly, there is no legal unreasonableness in the Tribunal's failure to call the Appellant's brother to give evidence, or to run the cases on a joint basis.
84. I find no error of law in that regard.
85. As to the contention that the Tribunal had an obligation (either as a matter of procedural fairness or in order to preclude legal unreasonableness) to "seek out" further evidence from [D], the requirements of procedural fairness and reasonableness do not go so far.
86. In *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, the Australian High Court considered the question of whether the Australian Refugee Review Tribunal was under a duty to make its own inquiries. At [25] the Court said:

Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a "duty to inquire", that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case. [footnotes omitted]

20. The Nauru Court of Appeal considered *SZIAI* in *DWN080 v Republic of Nauru* [2023] NRCA 4. The Court of Appeal there said:

[34] A careful consideration of the decision in *SZIAI (supra)*, it is obvious that although the High Court of Australia had accepted that the Refugee Review Tribunal might on certain occasions be subjected to a duty to inquire, the Court had left the issue open without coming to a final conclusion. It is also to be noted that the High Court had suggested that the common law requirements of procedural fairness would not normally support a duty to inquire.

[35] The High Court in *SZIAI (supra)* also kept open the question of whether the ground of unreasonableness would support a limited duty to inquire.

[36] However, the High Court had accepted that a failure to inquire might give rise to a jurisdictional error if there is a failure to make “an obvious inquiry into a critical fact which could be easily ascertained.”

21. The Court of Appeal went on to conclude:

[54] It is therefore abundantly clear that in terms of section 24(1)(d) of the Refugees Convention Act 2012, it is only a discretionary power that the Tribunal is empowered with, to make arrangements for an applicant to undergo a medical examination. It is apparent that there cannot be any compulsion for such an action to be taken by the Tribunal and therefore relevant action would be considered by the Tribunal only if it thinks that it is necessary to take such measures.

[55] The role of an administrative authority, such as a Tribunal, is limited to carry out an investigation to review the issue before it and reach a considered decision. In order to arrive at a decision, such a body would have to function within the given parameters by the statute it was formed.”

87. The duty on the Tribunal here was a duty to conduct a merits review: s 31(1) of the Act. There is no provision of the Act which required the Tribunal to undertake a process of seeking out further evidence in relation to this matter. I do not consider that, in order to act reasonably, the Tribunal had a duty to inquire into the evidence of the Appellant’s brother, particularly in circumstances where, despite invitation, the Appellant did not seek to have his brother give evidence. That the Tribunal did not undertake these particular inquiries does not render its decision as having been made without evident and intelligible justification.

88. I do not consider that a failure to obtain the evidence of [D], whether before the RSD officer, or before the Tribunal on his review, constituted a failure to undertake its merits review obligations. It was not a constructive failure to exercise jurisdiction, nor was it a breach of the requirements of procedural fairness, nor does a failure to obtain that further information bespeak legal unreasonableness. No legal error is demonstrated.

89. It was for the Appellant, should he have wished to, to advance evidence or arguments in support of his claim. There is no separate obligation on the Tribunal to seek out potentially relevant information which was not requested by the Appellant.

90. In the circumstances, the Appellant has failed to make out Ground 2 of the Notice of Appeal.

GROUND 3

Appellant’s Submission

91. By Ground 3 of the Amended Notice of Appeal, the Appellant contends that the Tribunal’s Decision is affected by illogicality, irrationality or legal unreasonableness arising from the Tribunal’s findings concerning the events at the time of the Appellant’s house being burned.

92. The Appellant refers to paragraph [114] of the Tribunal Decision. The first point which counsel for the Appellant makes is that it is unclear from this paragraph whether the Tribunal was referring to the Appellant when it refers to “his reasons” for travelling to [H], or whether it was referring to his brother’s reasons for travelling to [H].
93. In the event that it is a reference to the Appellant’s reasons, the Appellant submits that such a finding was the result of an unfair procedure. The Tribunal had an “expectation” about the evidence that the Appellant should be able to give. The expectation in this respect was something which the Appellant submits he did not know about, and it was unfair not to tell him about the Tribunal’s “expectation” as to his knowledge of the reasons for travel to [H]. That was so that he might either address that point through evidence or give argument about why the expectation was not reasonable. The Tribunal’s “expectation” need not have been notified to the Appellant prior to his giving evidence, but it did need to be notified prior to the decision.
94. Further, the Appellant had stated the reason for his travel to [H] – to accompany his brother who had work to do there. It was legally unreasonable for the Tribunal to have concluded that the Appellant did not know why he was travelling to [H].
95. Alternatively, if the reference to “his reasons” for travel to [H] was a reference to [D’s] reasons, the decision is “unintelligible” when there is no reason for the Appellant to know what his brother was doing in [H].

The Republic’s Submissions

96. The Republic submits that there is nothing irrational, illogical or legally unreasonable about the Tribunal’s expectation that the Appellant would have remembered attending a party on the night his family home burned down, if that is what occurred, or that he would otherwise know why he and his brother were not at home that night. The issue was discussed at some length in the Tribunal hearing. The Tribunal was not required to give the Appellant a “running commentary” upon what it thought about his evidence: *SZBEL* at [47] - [48].

Consideration of Ground 3

97. Paragraph [114] of the Tribunal Decision notes the inconsistency between the Appellant’s account and that of his brother concerning what they were doing at the time that their family home burned down. The Tribunal noted that [D] had said that they went to [H] for a friend’s party. That was the explanation given for why they were not at their family home when the fire occurred. The Appellant gave a different version of events. He said that he did not know why they went to [H] other than that his brother had some tasks to do there.
98. The Tribunal ultimately found that it would have “expected him to remember” either that he had attended a party or he knew something of the reasons for his travel to [H]. Clearly the Tribunal there is referring to expecting *the Appellant* to remember those matters. There is nothing illogical or irrational or legally unreasonable about the Tribunal’s conclusion at [114]. The Tribunal has exposed its reasoning in this regard. It is not unreasonable for the Tribunal to conclude that it would expect the Appellant

either to recall that they attended a party (if [D's] version is accepted) or the reasons that they travelled to [H] (if the Appellant's version is accepted) when the Appellant's explanation was opaque at best, as "he did not know why they went to [H] other than his brother had some tasks to do there".

99. It is not the mark of irrationality or illogicality for the Tribunal to have expressed itself in the way which it did in the final sentence of that paragraph. To say that the Tribunal would "have expected" the Appellant to remember certain things, is not in my view an indication of a lack of rationality, nor is it an indication of a failure to afford the Appellant procedural fairness.

100. In *SZBEL*, Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ said at [47]-[48]:

[47] First, there may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor. But where, as here, there are specific aspects of an applicant's account, that the Tribunal considers *may* be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted.

[48] Secondly, as Lord Diplock said in [F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry](#):

"the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished."

Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment. [footnotes omitted][emphasis added]

101. Here, the Tribunal first asked the Appellant the reason for his travel to [H]. It then raised with him the inconsistency of his evidence with that of [D]. The Tribunal did not need to give the Appellant a running commentary on its thoughts about the evidence which he was giving. Procedural fairness did not require the Tribunal to do more than it did. Specifically, it did not require the Tribunal to tell the Appellant that it would have expected a better, or different, answer, and give him an opportunity to respond.

102. No error is demonstrated in respect of the third ground of appeal.

GROUND 4

The Appellant's Submissions

103. The fourth ground advanced by the Appellant is that the Tribunal Decision is affected by illogicality, irrationality or legal unreasonableness, or fails to consider the actual evidence given by the Appellant, in that he actually gave direct evidence and not vague evidence on the issues dealt with at Tribunal Decision [119] - [122].
104. The Appellant submits that the transcript of the hearing before the Tribunal at T10-T12 demonstrates that the Appellant was able to indicate what he did with his brother. He says that this is irreconcilable with the Tribunal's finding of "vagueness" of the Appellant's evidence. The Tribunal did not mention the detail of this evidence in its reasons, which on the Appellant's submission suggests that it did not give sufficient mental effort to "consider" that evidence.
105. Mr Aleksov submits that it is "untenable" and "just not open to the Tribunal" to treat the Appellant's evidence as vague, confused and contradictory. To the contrary, he submits that the Appellant's evidence was clear and specific. It answered the questions asked. There was a clear coherent, concise and responsive set of answers from the Appellant.
106. The Appellant relies upon the decision of the Federal Court of Australia of *AIU16 v Minister for Immigration and Border Protection* [2019] FCA 1493. In that case, Anastassiou J considered a similar argument to that put by the Appellant here. His Honour concluded that it was not open to treat the evidence in the way which the Tribunal did.
107. Counsel relies upon it as an "instructive case" on how a Court, on judicial review, should and needs to compare what a person said and what the Tribunal found. If the Court forms the impression that it is just not open to describe that evidence as vague, confused or contradictory, that constitutes a point of law for the purposes of the Act.

The Republic's Submission

108. Mr O'Shannessy submits that the assessment of the Appellant's evidence was a core function of the Tribunal's task. It was not required to accept, uncritically, all allegations made by him. Nor is the Tribunal required to set out in its written statement the detail of the Appellant's evidence. In that regard, the Republic relies upon s 34(4) of the Act.
109. The Republic submits that the Appellant's evidence regarding his activities assisting his brother was, in the Tribunal's assessment, "vague, confused and contradictory". Whilst the Appellant may disagree with this assessment, he has not identified any way in which the actual assessment undertaken by the Tribunal was in any way defective.

Consideration of Ground 4

110. It is not the function of this Court to assess the evidence on which the findings were made and reject the finding if it would not have reached the same conclusion. However, the Court may consider the reasons of the Tribunal and the evidence upon

which it relied to determine whether the conclusion is rationally and reasonably supported by the analysis exposed in the reasons: *AIUI6* at [33].

111. I have had careful regard to the terms of the evidence given by the Appellant at T10-T12. Without setting out the detail of that lengthy passage, the following matters are of note:

- (a) the Appellant was unable to remember how long his brother held his position within the BNP (T-11 line 3);
- (b) other than receiving money from the leader and distributing it to the poor, the Appellant did not know anything else that [D] did in his role with the BNP (T-11 line 6);
- (c) the Appellant appeared to struggle in his attempted explanation of the activities which he helped his brother undertake in the 6 months prior to him leaving Bangladesh (T11 line 19 to T-12 line 4); and
- (d) notwithstanding the Appellant having told the RSD officer that he was not involved in campaigning, the Appellant told the Tribunal that he suggested that people should vote for the BNP (T11 line 34 to T12 line 4, T12 lines 20 to 24).

112. The finding at paragraph [121] of the Tribunal Decision that the Appellant's evidence was "vague, confused and contradictory regarding his political activities assisting his brother" was, in my view, reasonably open on the evidence. As at least the matters set out in the preceding paragraph demonstrate, it is rationally and reasonably supported by the evidence, notwithstanding that the Appellant disagrees with that conclusion.

113. I do not consider that the Tribunal's conclusion at [121] was irrational, legally unreasonable or otherwise amounted to an error of law.

114. Ground 4 is not made out.

CONCLUSION

115. For the reasons which I have set out, the Appellant has failed in respect of each of the grounds of his Amended Notice of Appeal. Accordingly, the appeal is dismissed.

116. Pursuant to s.44(1) of the Act, I make an order affirming the Tribunal Decision. I make no order as to the costs of the appeal.

JUSTICE MATTHEW BRADY



19 November 2025