IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 57/2014
Being an appeal against a decision of the Nauru Refugee Status Review Tribunal brought pursuant to s43 of the Refugees Convention Act 2012

BETWEEN

DWN 023 APPELLANT

AND

The Republic of Nauru RESPONDENT

Before: Khan, J
Date of Hearing: 26 July 2016
Date of Judgement: 5 May 2017

Case may be cited as: DWN023 –v- The Republic

CATCHWORDS:
Whether the Tribunal failed to properly consider relevant considerations of the claims or integers of claims or information required by the Act- whether the Tribunal failed to properly have regard to information or to make determinations on material questions of fact as required by sections 22,31, 35,36,37 and 40 of the Act.
Held- dismissing the appeal -determinations by the Tribunal made in accordance with the Act.

APPEARANCES:

Counsel for the Appellant: A Krohn
Counsel for the Respondent: A Mitchelmore

JUDGMENT

INTRODUCTION

1. The appellant filed an appeal against the decision of the Refugee Status Review Tribunal (the Tribunal) pursuant to the provisions of s43 of the Refugees Convention Act 2012 (the Act) which states: -

"(1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against the decision on a point of law."

2. The Tribunal delivered its decision on 26 September 2014 affirming the decision of the Secretary that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.

3. The appellant filed an appeal in this Court on 13 November 2014 and the grounds of appeal were amended on 26 June 2016.

BACKGROUND

4. The appellant is a citizen of Pakistan. His date of birth is 18 April 1986. He is a single man of Pashtun ethnicity and a Sunni Muslim.

5. His family owns 3 homes in Wah Cantt.

6. His father died in 2003 and his mother lives in one of the houses. The two other houses in Wah Cantt are leased out. His family has another house about 20 minutes' drive from the city of Abbottabad in Khyber Pakhtunkhwa (KPK) Province. He has lived there between the two properties but has spent more time in Wah Cantt.

7. He left school in 2001. He worked for himself buying land and building houses thereon and selling them. He described that as a good business.

8. In 2001 he began working for Sui Northern Gas Pipelines (Sui) which is one of Pakistan's largest oil/gas distributors. He was given a job at Sui as his father had worked there. He stated that his job at Sui was highly sought after.

9. The appellant worked for Sui's Wah Cantt office. His job was to install meters and check gas lines. He worked mainly in Wah Cantt but often travelled between Peshawar, Mardan and Charsadda. He travelled with a driver and sometimes another colleague depending on the size of the job.

10. He travelled to Gurguri oil fields once during his employment with Sui to replace a person who usually did the travelling to Gurguri. He travelled with security provided by the oil fields.

11. After his trip to Gurguri oil fields which is in Karak district of KPK, he claimed that he received a phone call from a person claiming to be from Mir Mangal Bagh Group (Lashkar-e-Islam [LI]). The caller knew his name and told him that he should join the group and take people to the oil fields.

12. The appellant stated that he did not know as to how the caller obtained his name and telephone number but said that there are many spies in Pakistan.

13. The appellant stated that he received 3 or 4 phone calls in total. He did not tell his employer, Sui, about the phone calls.

14. He made a report to the police in Wah Cantt and they told him that someone was playing a joke on him; and that there was no such group as Mangal Bagh.

15. The appellant stated that he received a letter from Mangal Bagh Group at his home on 10 December 2013.

16. The appellant stated that he was walking home along his usual route on 14 March 2013 when he was stopped by masked men. They slapped him and put a gun to his head and took his phone and wallet and tried to force him into their car. He resisted and just then a car approached and they left him having pushed him to the ground.

17. After the incident on 14 March 2013, the appellant decided to leave Pakistan as he felt that he would never be safe.

18. The appellant claimed that if he returned to Pakistan he would be seriously hurt or killed by LI or Tehrik-e-Taliban (TTP).

19. The appellant claimed that he is imputed with a political opinion of being opposed to LI as he did not comply with their demand to take their people into the Gurguri oil fields and from the insurgent groups such TPP who were responsible for bombing and other attacks in Pakistan.

APPLICATION TO THE SECRETARY

20. On 16 December 2013, the appellant attended a transfer interview.

21. On 16 December 2013, the appellant made an application to the Secretary of Justice and Border Control (the Secretary) for Refugee Status Determination (RSD) for recognition as a refugee and for complementary protection under the Act.

22. On 20 May 2014, the Secretary made a determination that he is not a refugee and is not owed complementary protection.

APPLICATION TO THE TRIBUNAL

23. The appellant made an application for review of the Secretary's decision pursuant to s.31 of the Act which provides:

"1) A person may apply to the Tribunal for merits review of any of the following:

a) a determination that the person is not recognised as a refugee;
b) a decision to decline to make a determination on the person's application for recognition as a refugee;
c) a decision to cancel a person's recognition as a refugee (unless the cancellation was at the request of the person).
d) A determination that the person is not owed complementary protection.

24. On 20 July 2014, the appellant's lawyers, Craddock Murray Newmann, made written submissions to the Tribunal. On 23 July 2014, he appeared before the Tribunal with his lawyers for the hearing and was assisted by an interpreter in Urdu and English language.

25. The Tribunal handed down its decision on 26 September 2014 affirming the decision of the Secretary that the appellant is not recognised as a refugee and was not owed complementary protection under the Act.

THIS APPEAL

26. The appellant filed 5 grounds of appeal which are as follows:

i) The Tribunal erred in law in that, it failed properly to consider relevant considerations by failing to consider claims, or integers of claims, or information required by the Act to be considered.

Particulars

The Tribunal failed properly or at all to consider and to determine the following necessary and relevant questions or claims:

a) The appellant claimed to fear harm because he worked for a partly Government owned company, but the Tribunal failed to consider whether, because of this work, the appellant may suffer persecution, or serious or significant harm from Tehrik-e-Taliban or other militant groups for reasons of imputed political opinion of opposition to them, or for reason of membership of a particular social group of workers for Government or quasi-Government agencies.

b) The Tribunal considered whether the applicant may fear harm from the Pakistan authorities as a failed asylum seeker (Decision [36-37]), but it failed to consider and determine the appellant's claim to fear harm as a failed asylum seeker at the hands of Lashkar-e-Islam or Tehrik-e-Taliban.

c) The transfer interview was brief and conducted through an interpreter, and noted by the Tribunal as not intended to explore protection claims in detail, but the Tribunal failed properly to consider the appellant's evidence, arguments and submissions about the constraints of the transfer interview, and the reasons why he had not mentioned some matters at the transfer interview including the demands by Lashkar-e-Islam to take people into the oil fields and his claim that when he was robbed his attackers tried to kidnap him. (Decision [30]).

d) The Tribunal failed to consider whether some employment of the applicant in the future might take him again within the reach of Lashkar-e-Islam. The Tribunal's finding that the appellant would have no reason to travel in

areas where Lashkar-e-Islam is active was therefore reached without consideration of relevant questions or claims.

e) The Tribunal failed to consider whether the appellant may be at risk or persecution or harm because of having refused the demands by Lashkar-e-Islam.

f) The Tribunal failed properly or at all to consider the question of the appellant's entitlement to complementary protection, giving only the barest discernible consideration of complementary protection, with no consideration of the basis of Nauru's obligations, and no real grappling with the question of generalised insecurity in the context of these obligations. (Decision [39]).

ii) Ground of appeal No. 2

The Tribunal erred in law in that, it failed properly to have regard to information, or to make determinations on material questions of fact, as required by law, including sections 22, 31, 35, 36, 37, 39 and 40 of the Act.

Particulars

The appellant refers to and repeats the particulars to Ground 1.

iii) Ground of appeal No. 3

The Tribunal erred in law by failing to give the applicant procedural fairness and natural justice, in breach of the common law and in breach of s.22 and s.37 of the Act.

Particulars

The Tribunal said:

"The Tribunal does not accept that members of LI (Lashkar-e-Islam) asked the applicant to take LI people into the ..... oil fields. Firstly, the ... oil fields are some distance from LI's power base of Khyber agency and from Peshawar making it unlikely that LI sought entry to the oil fields. (Decision [23]).

The Tribunal however failed to give the applicant an opportunity to know and to respond to the issue whether the distance of oil fields from power base of LI made it unlikely that they would want to seek to enter the oil fields but this part of the Tribunal's reasons for affirming the decision it was required to review."

iv) Ground of Appeal 4

The Tribunal erred in law in misinterpreting, misunderstanding or misapplying the law.

Particulars

a) The Tribunal said:

"The Tribunal does not accept that members of LI (Lashkar-e-Islam) asked the applicant to take LI people into the ... oil fields. Firstly, the ... oil fields are some distance from LI's power base of Khyber agency from Peshawar making it unlikely that LI sought entry to the oil fields. Secondly, the applicant travelled to the ... oil fields only once during his employment ... and only because the employee who went was unavailable making it unlikely that LI would approach him to obtain entry. Thirdly, the Tribunal does not accept that the applicant would not have told his employer if insurgents had made such a demand of him and does not accept that the police would have dismissed such a demand as a practical joke. Fourthly, ... the Tribunal does not accept that the applicant would have been able to take unauthorised people into the oil fields."

b) The Tribunal also said:

"The Tribunal accepts that the transfer interviews are brief and not intended to explore a person's claims in detail. According to the notes of the Transfer Interview, however, the applicant was specifically asked why he left Pakistan and he referred only to generalised violence. The Tribunal does not accept that the applicant would not have mentioned a specific demand and subsequent threats from insurgent groups had they occurred..."

c) The Tribunal was required to consider if the applicant had well-founded fear of persecution or if his return to Pakistan would breach Nauru's international obligations. It was therefore required to consider if there was a "real chance" or a "real possibility" of the applicant suffering persecution or harm. In using the terms "unlikely" (Decision [23]) and "would" (Decision [23-24]) the Tribunal reveals that it was not correctly interpreting, understanding or applying the law to its findings in the course of making its decision.

d) Further, the acceptance by the Tribunal that this appellant had been caught up in terrible attacks in Lahore (where Benazir Bhutto was killed in 2007; Decision [29]), Wah Cantt (where his friend was killed in 2008, and he helped carry the injured and the dead; Decision [30], and Peshawar (where the appellant himself was injured in a bomb attack in 2012; Decision [31]), together with its conclusion that it does not accept that there is "a reasonable possibility he will be harmed by insurgent groups in Wah Cantt or Abbottabad for convention reason or in the cause generalised violence (Decision [35]) or he has a well-founded fear of persecution (Decision [38]) or that his return to Pakistan would breach Nauru's international obligations (Decision [39]), reveals that the Tribunal has misconstrued or misapplied the test it is required to apply.

v) The Tribunal erred in law in that the decision was illogical, or was so unreasonable that no reasonable Tribunal could so have proceeded.

Particulars

The appellant refers to and repeats the particulars of all other grounds of appeal.

SUBMISSIONS

27. In additions to the submissions filed by the appellant and respondent, they also made oral submissions which was of great assistance to me and I am grateful to both counsels.

CONSIDERATION

28. The appellant submits that the Tribunal must consider each material question of fact, a necessary and relevant consideration and/or integer of the claim and relies on *Minister for Immigration and Multicultural Affairs v Yusuf*[1] *and Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[2]. The appellant submitted at [28] and [29] of his submissions as:

[28] The Tribunal must have regard to relevant considerations. In doing so it must engage consciously with the claim, and questions and material before it. As Perry J said in *SZSZW v Minister for Immigration and Border Protection*[3]:

"... the requirement to consider a claim or integers of a claim made by an applicant requires the application of an active intellectual process. As the Full Court held in *Minister for Immigration and Border Protection v MZYTS [2013]FCAFC114; [2013]136ALD547 (MZYTS) at [559]38*, 'that task could not be lawfully undertaken without a consciousness and consideration of the submissions, evidence and material advanced by the visa applicant....

[29] The Tribunal must also properly have regard to the information, or to make determination on material questions of fact, as required by law including s.21, 31, 35, 36, 37, 39 and 40 of the Act.

Ground 1(a) -Whether a risk of harm because of work for partly Government owned or supported agency.

29. The applicant submits that he worked for an agency partly government owned company and he would be based in Pakistan because of his work for with the gas company; he feared that he will be imputed with a political opinion or opposition to Taliban and insurgent groups.

30. It is submitted that the claim was noted by the Secretary and it was subject of question at the Tribunal hearing, but the Tribunal failed to consider and to determine the claim;

[1] [2001] HEA30
[2] [1996] HEA40
[3] [2015] FCA562 (5 June[2015], at [17]

and made no finding on the risk of persecution or harm to give rise to a breach of Nauru's international obligations because of his work; whether he may suffer persecution or serious or significant harm from TPP or other insurgent groups because of his work for a partly owned Government agency, or for reason of membership of a particular social group of workers for Government or quasi-government agencies.

31. The respondent in response submits at [19], [20] and [21] of the submissions as follows:

> "[19] The appellant's claim to fear harm on the basis of imputed political opinion as an employee of SNGP, which was partly Government owned was effectively premised on his continuing to work for that company. On his own evidence, that was not the case, as the Tribunal noted, in its reasons (in DR [27]):
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> The applicant stated in the hearing that he probably lost his job at SUI because he left without telling his employer. The applicant therefore has no reason to travel in areas where LI is active in the future and there is no reason why he would be of interest to LI on return to Pakistan.
>
> [20] In circumstances where the Tribunal rejected the factual premise on which the claim of which the appellant now complains was based, the Tribunal was not required to proceed to consider claim which rested on that premise. As the Full Court of Federal Court of Australia stated in *Applicant WAEE v Minister for Immigration and Multicultural Affairs*[4]:
>
> The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not directly to be drawn where the reasons were otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected.
>
> [21] In the present case, having found that the appellant would not return to his previous employment in Pakistan, the Tribunal did not need to consider whether he may face a real chance of persecution in the future on the basis of that employment.

32. I agree with the respondent's submission that there was no need for the Tribunal to consider whether the appellant may face a real chance of persecution in the future on the basis of that employment. So, ground 1(a) is dismissed.

Ground 1(b) - Whether a risk of harm as a failed asylum seeker at the hands of Lashkar-e-Islam or Tehrik-e-Taliban

33. The appellant concedes that the Tribunal considered whether the appellant may face harm from Pakistan authorities as failed asylum seeker, but it failed to consider and determine the appellant's claim to face harm as a failed asylum seeker at the hands of

[4] (20013) 75 ALD 630, 641 [47] (per Tracey and Foster JJ)

LI or TPP. It is submitted that this was a claim so raised by the material before the Tribunal.

34. The respondent in response to this claim submits that the appellant in his evidence had stated that if he were to return to Pakistan he would suffer at the hands of LI or TPP as he refused to help LI and would be perceived to be against them. The respondent further submits that the Tribunal considered his claim as a failed asylum seeker and then went on to consider the threat of harm to be a failed asylum seeker at the hands of extremists at [37] of the decision where the Tribunal rejected the proposition that the appellant would be harmed in Wah Cantt because he had returned from a western country, in part because Wah Cantt was close to Islamabad or Abbottabad, which were both urbanised and relatively affluent districts and not 'a remote tribal area under the controls of the extremists'.

35. The respondent submits that the assertion that the Tribunal failed to consider and determine his claim to fear harm as a failed asylum seeker at the hands of LI or TPP is without foundation.

36. I agree with that and so, ground 1(b) is dismissed.

Ground 1(c) – Whether constraints at Transfer Interview, and the reasons why the appellant had not mentioned some matters at the Transfer Interview

37. The appellant submits that his Transfer Interview was brief (1 hour 19 minutes) which was conducted through an interpreter in question and answer form. He was under the belief that he should not be giving full details of his claim at the Transfer Interview and there are a number of reasons which is stated at [38], [39], [40], [41] and [42] of his written submissions which are:

a) That the Transfer Interview and the Refugee Application were announced to the applicant as different processes;

b) The main purpose of today's interview is to collect background information on you and your circumstances;

c) The information that you will give will also be read and used by people who will be assessing your claim for refugee status. It may be compared against the information you give in your refugee application.

d) The applicant was told to keep his answers brief and the information he provided was only a brief summary of the claim for protection.

e) The appellant was nervous and stressed and he had a slight stutter.

40. At [43] of his submissions the appellant stated as follows:

> "Despite the elliptical note by the Tribunal that 'the Transfer Interviews are brief and not intended to explore a person's protection claims in detail' (Decision [24]), the Tribunal did not in fact in reality grapple with the various aspects of the Transfer Interview noted above, or the details of the explanations given by the

appellant, which separately and together may have accounted for claims not being mentioned at the Transfer Interview. To this extent the Tribunal failed to have 'a consciousness and consideration of the submissions, evidence and material advanced by the visa applicant...". It did not engage consciously with the claims, questions and material before it. (See CZSW, cited above.)

41. The respondent in response submits that the Tribunal rejected the appellant's evidence that members of LI asked him to take their people into Gurguri oil fields. The submissions at [26] and [27] of the written submission is as follows:

> [26] The Tribunal characterised the appellant's failure to mention the threats he received in his Transfer Interview, as a separate and further reason why it had concluded that they did not occur (DR [24]). Accordingly, even if the Tribunal's conclusion were incorrect (which is denied), any error with respect to a separate and further reason would not vitiate the independent and factual finding by the Tribunal (DR [23]) that the threats and demands did not occur.
>
> [27] In any event, the Tribunal expressly referred to the appellant's explanation for his failure to raise this claim at the Transfer Interview, but rejected it and gave reasons for the rejection (DR [24]). To the extent that the appellant contends that the Tribunal failed to 'properly consider' this matter, the contention implicitly acknowledges that the Tribunal had considered it. Courts should be cautious in their use of epithets such as 'proper', lest they encourage the slide into impermissible merits review: see *Minister for Immigration and Citizens v SZJSS*[5].

42. I agree that the Tribunal expressly referred to the applicant's explanation for his failure to raise this claim and rejected and gave its reasons. So, this ground of appeal is dismissed.

Ground 1(b) – Future employment – whether some employment of the appellant in the future might take him again within reach of Lashkar Islam

43. The appellant submits at [44] of the submissions as follows:

> "On the material before the Tribunal, the appellant had a history of employment in Pakistan. The Tribunal accepted that the appellant had worked as he said at a particular gas company. (Decision [9]). Further, if he returned, it was an obvious point that the appellant would need some employment. The Tribunal however failed to consider whether some employment of the applicant in the future might take him again within the reach of Lashkar Islam. The Tribunal's finding that the appellant would have no reason to travel in the area where Lashkar Islam is active (Decision [27]) was therefore reached without consideration of the relevant questions or claims.

44. The respondent submits that the appellant concedes that no such claim was made, the appellant appears to contend that it arose on 'the material before the Tribunal'. The respondent in its written submissions at [29], [30] and [31] states as follows:

[5] (2010) 243CLR164, 176-176 [26] – [33]

"[29] In *NABE v Minister for Immigration and Multicultural Affairs (No 2)*[6] *applying Dranichnikov v Minister for Immigration and Multicultural Affairs*[7], *the* Full Court of the Federal Court of Australia stated:

It is however significant that the precise ground of failure to consider an implied claim ... was not the subject of any express claim before the Tribunal. It seems to have emerged by way of submission in this second round appellant hearing.

Although such a claim might have been seen as arising on the material before the Tribunal, it did not represent, in any way, 'a substantial clearly articulated argument relying on the facts' in the sense in which that term was used in *Dranichnikov*. A judgement that the Tribunal has failed to consider a claim not expressly advanced is ... not likely to be made. The claim must emerge clearly from the materials before the Tribunal.

[30] In this case, neither the appellant not his representatives mentioned, at any stage of the RSD process that he might be harmed in the course of some, as yet unidentified, future employment for an unidentified employer. Nor is a claim to that effect apparent either on the documents provided to the RSD officer, and/or to the Tribunal, or to the Tribunal hearing. The Tribunal's failure to refer to a speculative possibility reveals no error.

45. I accept the respondent's contention and dismiss this Ground as it has no basis.

Ground 1(f) – Complementary protection

46. The appellant submits at [48], [49] and [50] of his submissions as follows:

[48] Although the Tribunal accepted that the appellant had been injured in a bomb attack in his home town and also in Peshawar, and that he may have been Lahore when Benazir Bhutto was killed (Decision [32]), and therefore the appellant had moved around in his country and had been affected by violence in different places, the Tribunal confined its consideration of the risk to the appellant by insurgent attacks or by generalised violence to considering the risk in harm only 2 times where the appellant had lived. (Decision [33] – [35])

[49] The Tribunal failed properly or at all to consider the question of the appellant's entitlement to complementary protection, giving only the barest discernible consideration of complementary protection, with no consideration of the basis of Nauru's international obligations and no real grappling with the question of generalised insecurity in the context of these obligations.

[50] For the reasons set out above, the Tribunal does in fact fail to consider relevant considerations in that it failed to determine relevant claims, integers

[6] (2004) 144FCR1, 22 [67] – [68]
[7] (2003) 197ALR389, 394 [24]

of claims or material questions of fact, raised squarely on the material before it.

47. The respondent in its reply submits at [34] and [35] of their written submissions as:

> [34] The Tribunal rejected the appellant's claim with respect to threats and demands from LI (Dr [25]), and found that LI was not active outside Khyber agency or Peshawar and LI does not have a presence in Wah Cantt or Abbottabad (Dr [27]). The Tribunal also found that the appellant did not claim to be involved in any activity that would make him a target of extremist groups such as the TTP (the Pakistani Taliban). Finally, the Tribunal found that the appellant would not be harmed in Wahcantt or Abbottabad as a failed asylum seeker, in part because those areas were not under the control of the extremists.
>
> [35] The Tribunal's findings in this regard addressed the appellant's complementary protection claims. Although the Tribunal's conclusion with respect to complementary protection was brief, it was grounded on the factual findings it had made with respect to the basis on which the appellant claimed to fear harm – whether for convention reason, or otherwise. Not only do the Tribunal's reasons not support an inference that the Tribunal 'failed to consider' the appellant's claim with respect to complementary protection, the reasons demonstrate that the Tribunal gave full consideration to what the appellant advanced in support to complementary protection.

48. I accept that the Tribunal dealt with the issue of complementary protection on the basis of what the appellant advanced in support of his claim, so this ground of appeal is dismissed.

Ground 2 – The Tribunal erred in law in that, it failed properly to have regard to information or to make determination on material questions of fact as required by law, including s.22, 32, 35, 36, 37, 39 and 40 of the Act

Ground 3 – The Tribunal erred in law by failing to give the applicant procedural fairness and natural justice, in breach of common law and in breach of s.22 and s 37 of the Act.

49. There is an overlap between Grounds 2 and 3 and I deal with these two together. Ground 3 relates to the breaches of s.22 and s.37 of the Act.

50. S.37 was repealed on 23 December 2016 by s.24 of the Refugees Convention (derivative status and other measures) (Amendment) Act 2016 (the Amending Act). In repealing s.37 of the Act, s.24 of the Amending Act now provides that the source of the Tribunal's natural justice obligation is the common law of Nauru. Further, the repeal of s.37 of the Act is deemed to have commenced on 10 October 2012. This is provided for by s.23 of the Amending Act so I cannot deal with this Ground under s.37 of the Act and must deal with it under the principles of natural justice as provided for by the common law of Nauru. In *DWN066 v The Republic of Nauru*[8] I made the finding that s.37 was repealed on 10 October 2016 when it should have read 10 October 2012. I

[8] [2017 NRSC23]

have since amended the error of 10 October 2016 by slip rule and the repeal date of s.37 should read 10 October 2012.

51. The comments in relation to DWN066 in relation to s.37 equally applies in this case.

52. The Tribunal made a finding that there was some distance from LI's power base of Khyber Agency from Peshawar making it unlikely that LI sought entry at the oil fields.

53. The appellant took issue with the finding in that the Tribunal failed to give him an opportunity to know and to respond to the issue whether the distance whether of the oil fields from the power base of LI made it unlikely that they would want to seek to enter the oil fields, but this was part of the Tribunal's reasons for affirming the decision it was required to review.

54. The respondent submits at [48] and [49] of its written submissions as:

> [48] The 'relevant issue', in the present case, was whether the appellant had received threats and demands from LI. The issue was critical to the Tribunal's decision, but so much was apparent from the course of questioning of the appellant before the Tribunal. Equally the distance of the Gurguri oil fields from LI's power base in Khyber Agency and Peshawar was not 'adverse material' that undermined the appellant's claim – rather, it was a matter of geographical fact that was, in any event, open on the known material, noting that the appellant had travelled to Gurguri oil fields.
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> [49] Finally, the respondent notes that no breach of procedural fairness can be established where the appellant has failed to identify or demonstrate some practical unfairness, or lost opportunity, resulting from the Tribunal's conduct. In *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs; ex parte* lam[9], Gleeson CJ stated that the more fundamental problem facing the applicant, however, relates to the matter of unfairness ... no attempt is made to show that the applicant held any subjective expectation in consequences of which he did, or omitted to do, anything. Nor is it shown that he lost that opportunity to put any information or argument to the decision maker, or otherwise suffered any detriment.
>
> A common form of detriment suffered where a decision maker has failed to take a procedural step is loss of an opportunity to make representations - ... Fairness is not an abstract concept. It is essentially practical. When one talks in terms of procedural fairness of natural justice, the concern of the lawyers to avoid practical injustice.

[9] [2003] 214CLR1, 13-14 [36]-[38] (per Gleeson CJ)

No practical injustice has been shown. The applicant lost no opportunity to advance his case ... It has not been shown that there was a procedural unfairness.

55. I agree that the relevant issue in this case was whether the appellant received threats and demands from LI and the distance of the oil fields to LI's power base was not the adverse material that undermined the appellant's claim. So this ground of appeal has no basis and is dismissed.

Ground 4 – Error in interpreting or applying the law

56. The appellant on this ground submits at [61] and [62] as follows:

[61] The Tribunal also said:

"The Tribunal accepts that the transfer interviews are brief and not intended to explore a person's protection claims in detail. According to the notes of the Transfer Interview, however, the applicant was specifically asked why he left Pakistan and he referred only to generalised violence. The Tribunal does not accept that the applicant would not have mentioned a specific demand and subsequent threats from insurgent groups that had already occurred ..."

[61] The Tribunal was required to consider if the appellant had well-founded fear of persecution or if he return to Pakistan would breach Nauru's international obligations. It was therefore required to consider whether there was a 'real chance' or a 'real possibility' of the applicant suffering persecution or harm. (See e.g. *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*[10]).

57. The respondent submits that whether the Court prefers the terminology of Australia, UK, US or Canadian Courts, the appellant's task before the Tribunal is to demonstrate that there is (for example) a 'reasonable possibility', 'real and substantial danger', or 'real chance', of persecution or that the risk or chance is not 'remote', 'fanciful' or 'insubstantial'.

58. The respondent further submits that the appellant in the present case makes no attempt to explain how the Tribunal's use of the term 'unlikely', and 'would' demonstrate that it deviated from this accepted test and that the several findings made by the Tribunal with respect to his evidence are inconsistent with this conclusion and that there is not a reasonable possibility that the appellant would be harmed by insurgents in Wah c Cantt. No inconsistencies appear on the face of the Tribunal's reasons, and none is identified on which the appellant could ground the submission that the Tribunal 'could not have made the findings it did if it had correctly understood and applied the law'.

[10] [1989] HCA62; [1989] 169CLR379

59. I accept the respondent's submission that no inconsistency is apparent on the face of the Tribunal's reasons, and none is identified by the appellant on which to base this ground. So, this ground of appeal fails.

Ground 5 – Unreasonableness - illogicality

60. The appellant submits at [65] that the decision was in significant respects without rational basis, or was unreasonable in the *Wednesbury* sense and being unreasonable and illogical is affected by error of law.

61. The respondent submits in response that the appellant has made no attempt to identify how or which aspect of the Tribunal's decision was:

a) 'without rational basis';
b) 'unreasonable in the *Wednesbury* sense'; nor
c) 'unreasonable and illogical'.

62. The respondent relies on the case of *Minister for Immigration and Multicultural and Affairs; Ex parte Applicant sS20/2002*[11] Gleeson CJ observed by reference to comments he made in a joint judgment with McHugh J in *Minister for Immigration v Eshetu*[12] that 'to describe reasoning as illogical, or unreasonable, or irrational, may merely be an emphatic way of expressing disagreement with it. If a legal consequence is suggested 'it may be necessary to be more precise as to the nature and quality of the error attributed to the decision maker, and to identify the legal principle or statutory provision that attracts the suggested consequence'.

63. I accept that the appellant had to be more precise as to the nature and quality of the error attributed to the decision maker. So, this ground of appeal fails.

CONCLUSION

64. Under s.44(1) of the Act, I make an order affirming the decision of the Tribunal.

DATED this 5 day of May 2017

Mohammed Shafiullah Khan
Judge

SEAL OF THE SUPREME COURT
REPUBLIC OF NAURU

[11] [2003] 198ALR59 [59]
[12] [1999] 197CLR611, 626 [40]