



**IN THE SUPREME COURT OF NAURU**

**AT YAREN**

**[APPELLATE DIVISION]**

Case No. 114 of 2015

IN THE MATTER OF an appeal  
against a decision of the Refugee  
Status Review Tribunal TFN 15051,  
brought pursuant to s43 of the  
*Refugees Convention Act 1972*

**BETWEEN**

**DWN049**

Appellant

**AND**

**THE REPUBLIC**

Respondent

Before: Crulci J

Appellant: J. Gormly

Respondent: L. Brown

Date of Hearing: 9 August 2016

Date of Judgment: 17 July 2017

**CATCHWORDS**

*APPEAL - Refugees – Refugee Status Review Tribunal – Natural Justice – Information Credible, Relevant and Significant to Tribunal's Decision – Appeal ALLOWED*

## JUDGMENT

1. This matter is before the Court pursuant to section 43 of the *Refugee Convention Act 2012* (“the Act”) which provides:

### **43 Jurisdiction of the Supreme Court**

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

(2) The parties to the appeal are the Appellant and the Republic.

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2. The determinations open to this Court are defined in section 44 of the Act:

### **44 Decision by Supreme Court on appeal**

(1) In deciding an appeal, the Supreme Court may make either of the following orders:

- (a) an order affirming the decision of the Tribunal;
- (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

3. The Refugee Status Review Tribunal (“the Tribunal”) delivered its decision on the 10 December 2015 affirming the decision of the Secretary of the Department of Justice and Border Control (“the Secretary”) of the 21 July 2015, that the Appellant is not recognised as a refugee under the 1951 Refugees Convention<sup>1</sup> relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees (“the Convention”), and is not owed complementary protection under the Act.

## BACKGROUND

4. The Appellant is a 37 year-old man from the Kyaibar Pakhtunkhwa Province (“KPK”) of Pakistan. He is married with three children, and identifies as a Shi’a Muslim. His parents reside in Pakistan and his siblings reside variously in Pakistan, China and the United Arab Emirates (“the UAE”).
5. The Appellant’s home village is near to the border where there have been attacks on Shi’a by Taliban militants.
6. At a transfer interview, before the Secretary and before the Tribunal the Appellant claimed to have received threatening letters from the Taliban at home in May 2010 requiring him to come for investigation because he

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<sup>1</sup> 1951 Refugee Convention and 1967 Protocol, also referred to as “the Refugees Convention” or “the Convention”.

helped injured people get to hospital and these actions were not approved of by the Taliban.

7. The Appellant went to the UAE on numerous occasions between 1998 and 2013. Shortly after returning home he received another letter from the Taliban and this prompted his departure from Pakistan.
8. In July 2013 he departed Lahore Airport and travelled through Thailand, Malaysia and Indonesia. The Appellant left Indonesia for Australia in August 2013, and from Christmas Island was transferred to Nauru on 25 January 2014.

#### INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

9. Before the Secretary, the Appellant claimed that if he returns to Pakistan he will be detained seriously harmed or killed by the Taliban for the following reasons:
  - He is a Shi'a Muslim
  - He has been imputed to be an opponent of the Taliban
  - He has been imputed to be a spy for the United States
  - He had sought asylum in a western country.<sup>2</sup>
10. The reasons the Appellant gives for his claims are that in 2008 the Taliban had requested the people of his village to oppose the Pakistan army and NATO forces and support the Taliban. As the village refused to do so, there was immediate retaliation by the Taliban who in March 2008 held their village and killed villagers. The Shi'a and villagers managed to recapture their village. Despite this the village continued to be attacked and the conflict continued.
11. The Appellant received a threatening letter in 2010 which he believes he received because of assistance that he gave by taking people to hospital and helping others to obtain medicine.
12. The Appellant went to the UAE in 1999 and remained there until 2012. When he was back at home in 2012, he and a friend were walking near the village when they were fired upon by the Taliban. Although uninjured, this experience frightened the Appellant and he returned to the UAE and worked there until February 2013, when he and many other Shi'a Muslim had their visas cancelled because of their religion.
13. Shortly after returning home the Appellant received another threatening letter from the Taliban. This prompted him to depart Pakistan and seek asylum in another country.

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<sup>2</sup> Book of Documents ("BD") 62, 63.

## *Secretary's Decision*

14. The Secretary accepted that the Appellant originates from the area in Pakistan as claimed, however the Secretary was unable to find reports of violence in that area at the time as claimed. The Secretary noted that there were many reports of Taliban activities around that time and so determined that if the incidents had occurred, as claimed, there would be some reports of them.
15. The Secretary found the Appellant to be evasive when he was asked "what the situation of other villagers was as regards to the Taliban",<sup>3</sup> and further the Secretary found the Appellant to be evasive in relation to the incidents of the villagers ejecting the Taliban from their village in 2008.
16. The Secretary concluded that the Appellant was not a credible witness in relation to his claims to have been threatened and targeted by the Taliban, and did not find that the document presented by the Appellant to be authentic and determined that the document was a fabrication.
17. The Secretary did not accept that the Appellant had ever been threatened by the Taliban, or that he had been fired upon in 2012. For those reasons the Secretary was not satisfied that the Appellant had a genuine fear of returning to Pakistan.
18. The Secretary notes that although Shi'a Muslims are in the minority they in fact made up 20% of a population of around 187 million people.<sup>4</sup> Furthermore the Secretary commented that the Appellant's area has been peaceful since 2008 and that there was no indication that his home area would be at risk of a deteriorating security situation such that the Appellant would face a reasonable possibility of harm. Therefore the Secretary found that the Appellant's fear is not well-founded and he is not recognised as a refugee under the Act.
19. For similar reasons the Secretary was satisfied that the Appellant did not face a reasonable possibility of harm and there was no real risk that he would be subjected to torture or cruel inhuman or degrading treatment or punishment if returned to Pakistan. As such, the Secretary did not find that Nauru's international obligations towards the Appellant would be enlivened, and found that Nauru did not owe the Appellant complementary protection.

## REFUGEE STATUS REVIEW TRIBUNAL

20. At the hearing before the Tribunal in September 2015 the Appellant restated his claims in relation to the actions of the Taliban in capturing his

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<sup>3</sup> BD 68.

<sup>4</sup> BD 69.

village in March 2008. Villagers were killed and they were continually bombarded by the Taliban from the nearby mountains.

21. The Appellant said that this continued from 2008 to 2013, and he believed that he received the threatening letter because he was assisting injured people.
22. When he returned to his village on the 5 to 6 occasions between 1999 and 2013 security was always an issue because of the Taliban actions. Although he escaped when he was fired upon in 2012, he was in constant fear and had to travel in secrecy.<sup>5</sup>
23. In both the Appellant's transfer and RSD interviews he outlined a suicide attack when he was in Peshawar near to his car. The statement to the Tribunal raised a new claim that whilst he was in the UAE the Taliban had killed his cousins. Upon his return to Pakistan in 2012 he and his family carried out an investigation as to who was responsible and one of the perpetrators was subsequently arrested and sentenced to death (this was commuted to imprisonment). Sometime later the jail the man was being held in was attacked by the Taliban and his cousin's killer escaped.
24. Further at the at the Tribunal hearing the Appellant explained in relation to a question by the Tribunal that he would be regarded as a U.S. spy because when he was working in the UAE, part of his employment entailed transporting U.S. Servicemen.<sup>6</sup>

#### *Tribunal's decision*

25. The Tribunal accepted that the Appellant is a Shi'a Muslim; and based on country information before it accepted that in 2008 there was fighting between the Taliban and local Shi'a militias in the Appellant's village. The Tribunal extended the Appellant the benefit of the doubt that although neither he nor his family were involved in the fighting, that the Appellant had assisted in caring for those who were injured and taking them to hospital.
26. At the Tribunal hearing the subject of fake documents was discussed with the Appellant, and the Tribunal did not accept that the Appellant received threatening letters from the Taliban in 2010, 2013 or at any point in time.<sup>7</sup>
27. The Tribunal found it to be implausible that someone who had not fought against the Taliban and had spent a great deal of time over the previous 15 years living in the UAE would be the subject of threat letters from the Taliban; they also noted that no action was taken by the Taliban when the Appellant ignored the request of the letters.

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<sup>5</sup> BD 236 at [13].

<sup>6</sup> BD 236 at [18].

<sup>7</sup> BD 240 at [30].

28. Although the Tribunal accepted that perhaps the Appellant had been fired upon in 2012, they did not accept that it was a targeted shooting. Similarly in relation to the bomb attack in Peshawar in June 2013, whilst the Tribunal accepted that the Appellant may have been nearby, they did not accept that he was a specific target.
29. Country information indicated that the Taliban was involved in an attack on the prison and that a large number of those prisoners were released. The Tribunal did not accept that with the limited amount of time the Appellant spent at home between 1999 and 2013, that he would be a target for the Taliban as a result of this. Considering the incident in relation to his cousin in total, the Tribunal held that if the incident did occur at all, that the Appellant himself was not involved in either reporting the matter to the police or identifying those involved. This finding was also based on the lateness of the claims and that it appeared to be an elaboration of a previous incident.
30. The Tribunal considered whether the Appellant would face persecution due to his membership of Shi'a Muslims from the KPK, his political profile, and his Shi'a religion. The Tribunal looked at considerable country information and found that there had been attacks on Shi'a Muslims by the Taliban in the Appellant's home area, and that a reasonable possibility exists of increasing sectarian violence in the future and determined that the Appellant would face harm amounting to persecution for reasons of his religion should he return to his home area in Pakistan.<sup>8</sup>
31. On the question of whether the state would be able to protect the Appellant, the Tribunal took into account that although there had been some improvement in the security situation in the KPK, in effect there was inadequate state protection available to the Appellant in his home area and the Tribunal concluded that the harm feared by the Appellant is "Convention-related persecution".<sup>9</sup>
32. The Tribunal turned to the question of an internal relocation alternative and found that attacks against Shi'as fall into three categories: firstly high profile community members (e.g. doctors, lawyers and judges); secondly Shi'a religious processions and Pilgrims; and thirdly Hazara Shi'as in the city of Quetta.
33. Taking into account a 2014 UK guidance note, which refers to an Australian DFAT assessment of November 2013, the Tribunal concluded that the Appellant could safely relocate to Islamabad where there are millions of Shi'a living, and that there would only be a remote chance that the Appellant would be harmed there.<sup>10</sup> Furthermore, the Tribunal was satisfied that when the Appellant's daughter was studying in Islamabad she resided with her mother's relatives and that the Appellant and his wife

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<sup>8</sup> BD 247 at [59].

<sup>9</sup> BD 249 at [61].

<sup>10</sup> BD 251 at [75].

have also stayed for periods in Islamabad. For these reasons, as the Tribunal found that it would be reasonable for the Appellant and his family to relocate to Islamabad, and thereby avoid the risk of a Convention-related persecution, the Appellant was not found to be a refugee within the meaning of the Convention.

34. The Tribunal considered whether the Appellant was owed complementary protection, and whether returning him to Pakistan would breach Nauru's international obligations. As an internal relocation alternative is available to the Appellant, the Tribunal affirmed that the Appellant is not owed complementary protection.

## THIS APPEAL

35. The Appellant filed his first Notice of Appeal on 5 February 2015. Ground 1 of the Notice of Appeal agitated arguments in reliance on s 37 of the Act.

36. On 23 December 2016, the *Refugees Convention (Derivative Status and Other Measures) (Amendment) Act 2016* was enacted ("Amending Act"), which provided in s 24 that s 37 of the Act was repealed. On 9 March 2017, in light of the Amending Act, Khan J made orders granting the parties leave to file amended pleadings and supplementary submissions on the amended grounds of appeal.

37. The Amended Notice of Appeal was filed on 28 March 2017. That Notice provides as follows:

1. In determining that the Appellant is not a refugee for the purposes of section 4 of the *Refugees Convention Act 2012* (Nr) (the Act), the Refugee Status Review Tribunal (the Tribunal) made an error of law in that it failed to comply with s 37 of the Act.

### Alternative Ground 1

In determining that the Appellant is not a refugee for the purposes of section 4 of the *Refugees Convention Act 2012* (Nr) (the Act), the Refugee Status Review Tribunal (the Tribunal) failed to comply with s 22(b) of the Act in that it did not act according to the principles of natural justice.

### Particulars

- i. The Tribunal did not give Appellant the opportunity of being heard because it did not bring to the attention of the Appellant or allow him the opportunity to ascertain and comment on the nature and content of adverse material, namely:

- a. the country information at [74] of the Tribunal's decision from the United Kingdom Home Office *Country Information and Guidance – Pakistan: Background Information* 6 October 2014 which cited an assessment of the Australian Government Department of Foreign Affairs and Trade of November 2013 that: "In most cases, there are options available for members of mostly ethnic and religious minorities to be able to relocate to the areas of relative safety elsewhere in Pakistan."
  - b. The country information at [75] of the Tribunal's decision from the *Nauru Policy Guidance Note no. 2 – Relocation for Shi'a Muslims in Pakistan* that: "Islamabad is generally considered to be among Pakistan's most secure areas, and there have been very few reported attacks upon its Shi'a population. The last known instance of Shi'a casualties in a sectarian attack in Islamabad was the May 2005 attack on the Sufi shrine of Bari Imam..."
  - ii. The Tribunal relied on the information in its consideration of the 'relevance' of relocation to Islamabad to conclude at [76] that "there is only a remote chance that the applicant would be harmed for being a Shi'a in Islamabad; and that there is no reasonable possibility that he would be harmed therefore being a Shi'a or a Shi'a from Kohat the area or any other reason".
2. The Tribunal made an error of law in its consideration and determination of the internal flight/relocation alternative principle:

#### Particulars

- i. the Tribunal failed to consider credible evidence that was important to the issue of relocation to Islamabad, namely, reports of attacks on Shia's in Islamabad since 2005 which contradicted country information relied on by the Tribunal at [75] that the last known instance of Shia casualties in a sectarian attack in Islamabad was in May 2005.
  - ii. At the Tribunal hearing in support of his claims against relocation to Islamabad the Appellant handed to the Tribunal country information of an attack on a Shia mosque in Islamabad in August 2013, and the assassination of a top Shia scholar in Islamabad in 2014. This information of these attacks was new to the review process and was not before the delegate and not referred to in the Appellant's advisor's submissions.
38. At the time of producing the supplementary submissions, there was an error in s 2(2) of the Amending Act such that s 23 was deemed to have had effect from 10 October 2012, being when the original Act was



enacted, rather than s 24, as presumably intended. The Appellant's supplementary submissions therefore maintain arguments with reference to s 37 in the event that it continued to stand at the time of judgment. However, on 5 May 2017, the Parliament passed the *Refugees Convention (Amendment) Act 2017*, which provides that the repeal of s 37 is deemed to have had effect from 10 October 2012. The appeal therefore falls to be determined on whether the conduct of the Tribunal breached the principles of natural justice in the common law. In deciding this question, the Court has had regard to the original and supplementary submissions, and the oral submissions made at the hearing.

## RELEVANT LAW

### Section 22: Way of Operating

The Tribunal:

- (a) is not bound by technicalities, legal forms or rules of evidence; and
- (b) must act according to the principles of natural justice and the substantial merits of the case.

### Section 40: Tribunal must invite applicant to appear

- (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the determination or decision under review.

...

### *Party's Submissions*

39. In relation to Ground 1, the Appellant submits that the information relied upon by the Tribunal relating to relocation within Pakistan and the security situation in Islamabad is highly relevant and adverse to the Appellant's claimed fear of serious harm upon relocation to Islamabad.

40. The information was used by the Tribunal to reason that there was "*no reasonable possibility that the Appellant would be harmed in Islamabad by the Taliban or other groups for being a Shi'a or a Shi'a from Kohat area or for any other reason*"<sup>11</sup>. Aside from one mention by the Tribunal of country information that the Taliban only exercise their capacity to track down "high level people who are against them", the Tribunal made no reference to country information with respect to relocation generally, or to relocation to Islamabad in particular. Such information was also not referred to by the Secretary or in the written submissions, although the Nauru Guidelines referred to by the Tribunal<sup>12</sup> were listed under the heading "Material Before the Decision Maker" in the Secretary's decision record.<sup>13</sup>

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<sup>11</sup>BD 252 at [76].

<sup>12</sup>BD 251 at [75].

<sup>13</sup>BD 61 at [3].

41. The Appellant asserts that the Tribunal failed to afford the Appellant natural justice by not bringing the information to his attention or allowing him the opportunity to comment on it.
42. The Respondent submits that the Appellant was clearly aware of the fact that one issue in the review was whether it was reasonable for him, as a Shi'a Muslim, to relocate from his home area to avoid harm. Before the Tribunal, the Appellant made submissions and gave evidence in support of his argument that it was not reasonable for him to relocate. In any case, says the Respondent, the common law does not require the Tribunal, to fulfil its obligation to afford procedural fairness, to describe to the Appellant all the evidence before it. A summary of the substance of the material (or the inferences that are open on the material) is sufficient to put the Appellant on notice of the case to be met.<sup>14</sup>
43. In relation to Ground 2, the Appellant submits that the Tribunal fell into legal error in failing to consider credible evidence important to the issue of whether it was reasonable for the Appellant to relocate to Islamabad, namely, reports of attacks on Shia's in Islamabad since 2005 handed up at the Tribunal hearing. These attacks included information of an attack on a Shi'a mosque in Islamabad in August 2013, and the assassination of a top Shi'a scholar in Islamabad in 2014.
44. The Appellant submits that the information was important enough to engage the Tribunal's review obligations because it supported the Appellant's claimed fear of serious harm as a Shi'a upon relocation to Islamabad, was more recent than the information relied on by the Tribunal,<sup>15</sup> and, being a governmental Policy Guidance Note, is authoritative. Therefore, the Appellant asserts that, in failing to consider the material, the Tribunal failed to discharge its statutory duty to review issues arising from the Secretary's decision.
45. The Respondent submits that it is for the Tribunal to assess the weight to be given to evidence before it and make findings of fact on the basis of that evidence. The absence of reference to the evidence in the decision record does not mean the Tribunal failed to consider the evidence in question, but did not consider the evidence to be material to the decision. In any event, the evidence the subject of the Appellant's claims supports the Tribunal's finding that attacks on Shi'as in Islamabad were "sporadic". At its highest, the material suggested an attempted attack on a Shi'a target in 2013 and the assassination of a Shi'a cleric in 2014.

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<sup>14</sup>Citing *Kioa v West* (1985) 159 CLR 550, 587 (Mason J); *Minister for Immigration and Citizenship v SZQHH* (2012) 200 FCR 223, 233–4 [29]–[30].

<sup>15</sup>See note 12 above.

## CONSIDERATIONS

46. The Appellant submits to the court that there was no opportunity given and the in accordance with section 20 to be of the Act for the Appellant to comment on the nature and content of the adverse material determinate to the Tribunal's decision.

47. The court has considered the transcript of the Tribunal hearing, and notes the following:<sup>16</sup>

- a) Tribunal member: Yes. Well, I just wanted to ask you – you stayed in your home after you received the second letter until you left Pakistan. Is that right?

The Interpreter: Yes.

Tribunal member: And that was a period of three months. So why were you – if you thought you were in danger, in sufficient danger to have to leave the country, why did you stay in your home where the Taliban knew you lived for a whole three months?

The Interpreter: I also wished to go outside, and it was like a jail for me staying at home for three months. But I was looking for a chance to – to get a chance and be able to get out of the house.

Tribunal member: Why didn't you at least go to Islamabad or somewhere just for the three months? Anywhere was safer than your home address, wasn't it?

The Interpreter: Islamabad is also not safe for our people. There was so many killed in Islamabad as well.

Tribunal member: Yes, but that's – that's a different issue. You were – if you were looking for somewhere to be safe temporarily, anywhere would have been safer than your home address, wouldn't it? So I'm just wondering why you didn't go somewhere else, anywhere else.

The Interpreter: Yes. So the reason just staying at home was because – was because my kids and wife, they were alone as well and – and, yes, and ... could have – could have been anywhere so – also the house, or inside the house but – and the same would have been in any other area, like, if I go – if I went, I had to stay inside and not be able to go out.

- b) Tribunal member: We have to consider whether or not you face a reasonable possibility of being harmed in your home village. And if we think you do, we then have to look at whether there's

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<sup>16</sup> BD 209 line 42 onwards; BD 211 line 18 onwards.

somewhere else in Pakistan that you could live where you wouldn't face a reasonable possibility of being harmed. We also have to look at whether or not in your circumstances it would be reasonable for you to move to a place that we thought you were going to be safe... So I suppose we think why couldn't you go to one of the major towns in Pakistan and establish yourself there? Say Islamabad, Rawalpindi or somewhere like that?

The Interpreter: Yeah. I did work in Rawalpindi, you know, run a business. But it can only happen when it's – there's security. And in Pakistan, it's not possible. You have to have security for – to have a business or work. And this difficulty is everywhere in Pakistan for the Shias and everyone understands that.

48. The Tribunal then goes on to suggest that generally just high-profile Shias are targeted:<sup>17</sup>

The Interpreter: Yeah. It's not just high profile people. There were so many Shias around Pakistan getting killed after 2011 and '12. And they were not even high ranking Shia leaders or Shia group people. They were just ordinary people they were chasing and ...

Tribunal member: Yeah. I understand some ordinary people have been killed but they don't seem to be tracked down to other parts of Pakistan. Ordinary people have been killed when incidents have happened... Bombing in mosques...

The Interpreter: There are incidents that are... it was in the news, some of the Pakistani News, that... newspaper that people were tracked to the airport or trapped when they came back at the airport. And they were – came – they had been kidnapped, they had been killed and...

49. The questions then move on to a discussion about Appellant being out of the country and come back to:<sup>18</sup>

Tribunal member: So why don't you think you could establish yourself in Islamabad?

The Interpreter: Yeah. There are difficulties in Islamabad as with many of the peoples of Shia community or Shia religion. A lot is hard for the Shia people.

50. The Tribunal moves on to ask the Appellant questions about how long the Appellant had spent in Islamabad and discusses his daughter having studied there; when she returned back to the village in 2013; and when the situation Islamabad got worse. The Appellant stated that his daughter had

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<sup>17</sup> BD 212 at line 10 onwards.

<sup>18</sup> BD 213 at lines 9 onwards.

originally stayed with family in Peshawar and then they moved to Islamabad and she moved with them.

51. The Appellant was asked about his sister who had lived in Islamabad and the Tribunal were told that his sister returned to live in the village after the incident that happened in 2013. The Appellant stated: *“When there was fighting in and Islamabad she .....and that shrines were burnt and this sort of thing happened.”*<sup>19</sup>
52. The Appellant’s representative restates that the Appellant had provided with his statement about the security situation in Islamabad in relation to relocation.<sup>20</sup> The Appellant then tells the Tribunal that he and his wife had visited his daughter when she was at school in Islamabad and stayed with one of his wife’s mother’s cousins.
53. Subsequently however all the relatives left Islamabad and returned to the village, and the Appellant gave the following reasons:<sup>21</sup>

The Interpreter: So yeah, because the village is majority Shia and whatever happens to them, they can get together and defend themselves. That’s why people feel safer when they are together in the village, although they could be attacked and there are groups around that can anytime attack them. But that’s how they feel, that – because they are majority Shias and they know each other so they feel a little bit safer. But in the cities there are more like separated from each other and don’t live close to each other. So that’s how they prefer villages instead of living in a city.

Tribunal member: But you did say that they have been there for a very long time, in Islamabad, those relatives. You said they were long-term residents of Islamabad. So when did they leave Islamabad and why did they leave?

The Interpreter: So in 2013 the situation in Islamabad was really bad for Shias, and it was insecure. There were some attacks on Shia as happened in villages... which was is in 20 days again, and there were fights. So that’s how they decided to go back to the village.

Tribunal member: You’ve said that one of the reasons why you left was because you received this – or the main reason that triggered your flight was that you received this letter in 2013. Is that right?

54. The Tribunal member and the Appellant then discuss the letters he received, the death of his cousin, and the genuineness or otherwise of

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<sup>19</sup> BD 215 lines 20, 21.

<sup>20</sup> BD 215 line 30.

<sup>21</sup> BD 218 lines 27 onwards.

letters in Pakistan. The Appellant is asked about the situation of his own security in his home village.<sup>22</sup>

Tribunal member: Given that you've said a lot of people have moved from Islamabad back to the village, why do you think you would be at risk in your village?

The Interpreter: There is a difference between being in a city and being in a village. Villages sort of – people's thinking is that it's unsafe and everywhere, whether it's village or city. But if we die, we better die in the village with all our relatives and family members. So that's why they want to be together, keep themselves altogether and – otherwise they don't – it doesn't mean that they feel ... secure, they feel secure in the village. It's just they – that they want to be together and, if they die, they – whatever happens to them, attack, they're together.

55. The Appellant was asked to explain to the discrepancies in his evidence, and states as follows:<sup>23</sup>

*"Well, at the moment this interview has been going for almost 3 hours, and I won't remember what I said you later on today, because mentally we are not feeling well here. Whatever the details at any time anybody ask me, I can respond to that in details*

*.....*

*When I said that my children are living in the village I meant – I didn't mean my daughter, because I wasn't asked about each of them – each of my children. They said – they asked me, "Where are your children?" I said in the village, and they didn't ask about the details of each of them."*

56. The Appellant's representative made this statement at the end of the Tribunal hearing:

*"The significance here is that his daughter fled from Islamabad in 2013, returning to her village together with the extended family members that were caring for her. It's the issue that Islamabad, from 2013 to present, is unsafe for Shia from tribal areas. And again, country information does dictate that the tribal and family support networks are vital for survival in Pakistan, hence a return to a village where this exists, regardless of the fact that that village, as country information supports, is surrounded by an unsafe and volatile situation..."*

*On the issue of relocation, as we've spoken about today and with country information that we've provided, the issue of returning our*

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<sup>22</sup> BD 223 at lines 9 onwards.

<sup>23</sup> BD 224 at line 30 onwards.

*client to either... or any other area in Pakistan is unsafe for the grounds – convention grounds on which he is claiming”.*<sup>24</sup>

57. The Tribunal is obliged under section 22(b) of the Act, to operate in accordance with the principles of natural justice. This Court<sup>25</sup> has adopted the test outlined by Brennan J in *Kioa v West*<sup>26</sup> - whether the adverse information that is credible, relevant and significant was put to the Appellant.
58. The Tribunal touched on the security situation in Islamabad (as outlined by the excerpts above), and the Appellant answered questions as to why his daughter and other family members had left Islamabad and returned to the village. Whilst it could be argued that the Appellant was on notice that the Tribunal was considering the issue of relocation generally, the Appellant was not expressly put on notice that the Tribunal considered that the conditions in Islamabad were now safe for Shi’a Muslims, in the terms that the Tribunal stated in its determination.<sup>27</sup>
59. This was credible, relevant and significant information and directly impacted on the question of relocation as a safe and practical alternative for the Appellant. As stated previously by this Court in *ULA0007 v The Republic*,<sup>28</sup> the following are to be determined<sup>29</sup> when considering if there is an internal relocation alternative for an applicant:
- (1) Can the applicant safely, legally and practically access an internal site of protection?
  - (2) Will the applicant enjoy protection from the original risk of being persecuted?
  - (3) Will the site provide protection against any new risks of being persecuted or of any indirect refoulement?
  - (4) Will the applicant have access to basic civil, political and socio-economic rights provided by the home country or State?<sup>30</sup>  
(emphasis added)
60. The information should have been put directly to him by the Tribunal in accordance with the requirements of section 22(b) of the Act. It was not, and this ground of appeal succeeds.
61. In considering Ground Two, and the reliance on country information by the Tribunal, the Court finds that it is a matter for the Tribunal as to which country information is relied upon by it, and the weight given to that information.

<sup>24</sup> BD 28, 229 line 42 onwards.

<sup>25</sup> *DWN 066 v The Republic* [2017] NRSC 23; *ROD122 v The Republic* [2017] NRSC 39.

<sup>26</sup> *Kioa v West* (1985) 159 CLR 550.

<sup>27</sup> BD 251, 252 at [74]-[76].

<sup>28</sup> *ULA007 v The Republic* [2017] NRSC 40.

<sup>29</sup> Hathaway, J.C. and Foster, M *The Law of Refugee Status*, Cambridge University Press, 2<sup>nd</sup> Ed. at p361 lines 14 – 17.

<sup>30</sup> *AC (Russia)* [2012] NZIPT 800151 [110(d)].

62. Australian High Court authorities, such as *SZGUR*,<sup>31</sup> have held that it does not follow that the absence of reference to country information supplied in the review decision means that this information has been overlooked by the Tribunal; rather that the Tribunal has considered it not to be material to the matters under review. This second ground of appeal is not made out.

## ORDER

63. (1) The Appeal is allowed.

(2) The decision of the Tribunal TFN 15051 dated 10 December 2015 is quashed.

(3) The matter is remitted to the Refugee Status Review Tribunal under section 44(1)(b) for reconsideration according to law.

  
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Judge Jane E Crulci

Dated this 17 July 2017



<sup>31</sup> *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594.