**IN THE SUPREME COURT OF NAURU**

**AT YAREN**

[APPELLATE DIVISION] Case No. 11 of 2016

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T15/00170, brought pursuant to s 43 of the *Refugees Convention Act* 1972

BETWEEN

**WET 071** Appellant

AND

**THE REPUBLIC** Respondent

Before: Crulci J

Appellant: Self-represented
Respondent: S. Walker

Date of Hearing: 7 September 2017
Date of Judgment: 20 October 2017

**CATCHWORDS**

APPEAL - *Refugees – Refugee Status Review Tribunal – Point of Law – Relevant considerations – Appeal DISMISSED*

## 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.
>
> ...

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 31 March 2016 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of 28 September 2015, that the Appellant is not recognised as a refugee under the 1951 Refugees Convention[1] 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.

4. The Appellant purported to file an initial Notice of Appeal on 21 July 2016, and an Amended Notice of Appeal on 7 August 2017, containing grounds identical to those in the initial Notice. On 7 August 2017, the Appellant filed an application for an extension of time under s 43(5) of the Act extending the time for lodgement of a Notice of Appeal up to and including the hearing date. The Respondent has indicated its consent to the extension of time, thereby validating the Notice of Appeal dated 7 August 2016, and the Court extended the time.

BACKGROUND

5. The Appellant is an Indian Hindu born in Gujarat, India, in 1986. He is single, has no children and his widowed mother and brother remain in India. He has 12 years of education.

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[1] 1951 Refugee Convention and 1967 Protocol, also referred to as "the Refugees Convention" or "the Convention".

6. He left India in 2009 because he had been offered a work permit in Malaysia. He opened a shop in Malaysia with a Malaysian business partner. The Appellant claims a fear of harm from a broker who loaned money to the Appellant in India because he was unable to repay that loan. The Appellant further claims that, because of his past involvement with Sadar Sena (a group supporting the National Congress Party) he will be imputed with a political opinion of opposition to the Bharatiya Janta Party ("BJP"), of which the broker was a member.

7. On 29 July 2013, the Appellant departed Indonesia. On 2 August 2013, the Appellant arrived on Christmas Island, and on 26 January 2014, the Appellant was transferred to Nauru for the purposes of having his claim for refugee status and complementary protection assessed.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellant attended a Refugee Status Determination ("RSD") interview on 17 July 2014. The Secretary summarised the Appellant's material claims presented at that interview as follows:

    - *He left India in 2009 because he was offered a work permit for Malaysia which offered him a better chance to subsist than in India.*
    - *While in Malaysia, he borrowed Rs. 27 lakh from an illegal finance broker to open a shop.*
    - *In partnership with a Malaysian national, Yousaf, he opened a clothing shop for men and children which was quite successful. In 2011, he went back to India to visit his mother for about one month before returning to Malaysia.*
    - *From 2011 and 2013 his business in Malaysia was still good. He returned to India to visit his mother again. When he returned to Malaysia, he discovered that Yousaf had closed down the business and sold all the stock.*
    - *He asked Yousaf for his share of the profits from the sale of the stock but Yousaf refused. Instead, Yousaf beat him, threatened to kill him, took his passport from his pocket and destroyed it.*
    - *He was so scared that he went to his friend's place. When he told his friend what happened, he suggested that the Applicant flee Malaysia because it was not safe because he did not have a passport. The Applicant was scared that Yousaf would find him and kill him.*
    - *His friend made arrangements with a people smuggler to help him flee Malaysia and seek asylum in another country. He had some money and his friend also helped provide him some funds.*
    - *His mother and friends have informed him that the broker is looking for him.*[2]

9. The Secretary noted in addition to the above that during the RSD interview the Appellant claimed that he and his friends had a fight with a group of BJP supporters in 2005. He was active with the Sadar Sena from 2004 to 2006. His role was to tell people to vote for the National Congress Party.

10. The Secretary accepted the following material elements of the Appellant's claim as credible:

[2]Book of Documents ("BD") 63.

- The Appellant and his friends were involved in a fight with BJP supporters in 2005;
- The Appellant has not been involved in any incidents with BJP supporters since 2005;
- The Appellant lived in Malaysia from 2009 to 2013.[3]

11. However, the Secretary did not accept the following material elements of the Appellant's claim as credible:

- He has borrowed money from an illegal finance broker;
- He has been targeted by the broker or members of the BJP Party for his involvement with the Sadar Sena and National Congress Party.[4]

12. In making these findings with respect to the credibility of the Appellant's claims, the Secretary noted the following:

- It was implausible that the broker would grant the Appellant a loan at an interest rate of 2% per annum. The claim was also inconsistent with country information indicating that the interest rate of the Bank of India has not dropped below 7.25% since July 2011;[5]
- The Appellant's evidence on the nature of the Appellant's claimed relationship with the broker was inconsistent;[6]
- It was unlikely that a broker would be willing to lend 2.7 million Indian Rupees (~US $44,279 in September 2014) to someone he has never met, with no business track record, based on verbal assurances that the money would be repaid if profit was made;[7]
- The Appellant claimed that while he received the loan money in June 2010, he did not sign any documentation until he returned to India in 2011; it was unlikely that a broker would be willing to loan such a large sum without documentation being signed;[8]
- It was not logical that the Appellant would open his shop in Malaysia two months before receiving the loan money;[9]
- The amount of security for the loan did not appear to be sufficient for the size of the loan. The Appellant's explanation for this was internally inconsistent, inconsistent with country information, and implausible;[10]
- In the RSD interview, the Appellant claimed that the broker was angry at the Appellant because of his National Congress Party connections and his canvassing for the Party when he returned to India. It was "strange" the broker became angry at the Appellant after the money was loaned;[11]

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[3]Ibid 63 – 64.
[4]Ibid 64.
[5]Ibid.
[6]Ibid 65.
[7]Ibid.
[8]Ibid.
[9]Ibid.
[10]Ibid 66
[11]Ibid 67.

- The claim that the Appellant returned to India to canvass for the National Congress Party was inconsistent with his claim made earlier in the RSD interview that he returned to India to visit his mother.[12]

13. In light of the Secretary's findings that the Appellant did not borrow money from a broker in India, the Secretary did not accept that there was a reasonable possibility that the Appellant faced harm from the broker. In addition, since the Appellant did not claim a fear of harm from BJP supporters other than in connection with the loan, and the Appellant lacked any political profile, it was very unlikely that the Appellant faced harm from the BJP in the reasonably foreseeable future.[13] The Appellant's fear of harm was not well-founded and the Secretary rejected the Appellant's application for refugee status.[14]

14. For the same reasons, the Secretary found that there was no reasonable possibility the Appellant would face harm if returned to India, that would constitute a breach of Nauru's international obligations and the Appellant was not owed complementary protection.[15]

REFUGEE STATUS REVIEW TRIBUNAL

15. Prior to the Tribunal hearing, the Appellant submitted a written statement which sought to address the credibility issues identified by the Secretary. The Tribunal summarised the Appellant's statement as follows:

- *That the lender Vijay Sriwastra had given the loan initially because he trusted the applicant's friend Biren. He also said that at the time of the loan the total value of the 3 bighars used as security was 21-22 lakhs. The land was now worth around 20 lakhs.*
- *He had not said during the RSD interview that it was worth 20 lakhs per bighar.*
- *Vijay kept a record of the interest accruing and expected the applicant to start repayments once the applicant's shop started paying off. No deadline was set.*
- *During his 2011 visit to India the applicant canvassed for the Congress Party.*
- *In 2012 Vijay found out that the applicant was not just a Congress Party supporter, but a member. He did not think Vijay would have made the loan if he had known the applicant was a member.*
- *By 2013 Vijay had harassed his mother and was making threats about the applicant, so his mother had moved to her sister's house.*
- *When he visited India in 2013 the applicant was still a member of Sadar Sena but did not actively participate in any specific political activities.*
- *He tried to see his mother in 2013 but it was too risky to stay there.*
- *In the previous 6 months [being the second half of 2015] there had been conflict between the Congress and BJP parties, which involved the Patel caste in particular. Vijay and his politician brother had been involved in assaults and abductions of people (it was not claimed members of this caste were assaulted or abducted).*[16]

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[12]Ibid.
[13]Ibid 68 – 69.
[14]Ibid 69.
[15]Ibid 70.
[16]Ibid 172 at [30].

16. The Appellant's representative submitted written submissions to the Tribunal that aimed to address the credibility issues arising from the Appellant's testimony before the Secretary.

17. At the Tribunal hearing, the Appellant gave additional evidence as to his business in Malaysia; his relationship with his business partner; the terms and timing of the loan from the money lender; the Appellant's relationship with the money lender; and his membership and involvement with the Sadar Sena.

18. The Tribunal found that the Appellant's claimed fear of harm arising from his inability to repay a debt to a money lender lacked credibility for a number of reasons, including:

- At the Tribunal hearing, the Appellant amended his previous evidence and said the interest rate offered by the lender was 24%. It was implausible that the Appellant would have accepted this without making enquiries about alternative loans;[17]
- It is inconsistent with the claimed ruthless character of the lender for the lender to have loaned the sum without signed documentation;[18]
- The Appellant's "*sanguine attitude*" to loan repayments was inconsistent with the Appellant's claimed fear of harm as a result of failure to repay the loan;[19]
- There was no claim that the Appellant's friend who introduced the Appellant to the lender was threatened or harmed, and the friend has made no attempt to contact the Appellant in relation to the loan repayments;[20]
- The Appellant's evidence about the value of the 3 *bighars* of land provided as security was vague and internally inconsistent;[21]
- It is implausible that the lender would not have sold off the Appellant's land provided as security for the loan;[22]
- Despite the Appellant's claimed fear of harm by the lender, the Appellant showed no apparent interest in how much he owed.[23]

19. While the Tribunal accepted that the Appellant was a member of the Sadar Sena, and was involved in a fight with members of the BJP on one occasion in 2005, the Tribunal found that there was no reasonable possibility that the Appellant would be harmed in the reasonably foreseeable future because of his support for Sadar Sena.[24] In making this finding, the Tribunal had regard to the fact that the Appellant remained in his hometown for four to five years after the incident in 2005 without any difficulty, and willingly returned to India to visit in 2011 and 2013. There was also no evidence that Sadar Sena members were being harmed in Gujarat.[25]

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[17] Ibid 179 at [101].
[18] Ibid at [102].
[19] Ibid 180 at [103].
[20] Ibid at [104].
[21] Ibid at [105].
[22] Ibid at [106].
[23] Ibid at [107].
[24] Ibid 181 at [115].
[25] Ibid at [117].

20. The Tribunal therefore concluded that the Appellant did not have a well-founded fear of persecution and is not a refugee.[26] The Tribunal further concluded that the Appellant would not be subject to harm if returned to India that would enliven Nauru's complementary protection obligations.[27] As such, the Appellant was not owed complementary protection.

THIS APPEAL

21. The Appellant's Amended Notice of Appeal filed on 7 August 2017 reads as follows:

- *There was a mistake in my case;*
- *The Tribunal did not listen to me properly and did not consider relevant information;*
- *The Tribunal only considered official government policy but this does not properly reflect the situation in my case;*
- *The information the Tribunal relied on does not accurately reflect the dangers I face in my country;*
- *I was not believed even though I was telling the truth.*

22. The Appellant did not file any written submissions and did not appear at the oral hearing. Upon commencement of the hearing, the Appellant's Claim Assistance Provider ("CAP") representative handed up a signed affidavit indicating that the Appellant had said that he would not be attending as "*his mind is no good at the moment and he has no motivation to go*".[28] The Court proceeded with this appeal in the absence of the Appellant, noting that the Appellant was aware of the hearing and had not indicated that he was too ill to attend, or otherwise sought an adjournment.

23. The Respondent filed written submissions dated 30 August 2017. The Respondent submitted that the five grounds of appeal can be summarised as follows:

- Ground 1: Whether the Tribunal erred in law in making a "mistake".
- Ground 2: Whether the Tribunal erred in law by failing to consider relevant information.
- Ground 3: Whether the Tribunal erred in law by considering only official government policy.
- Ground 4: Whether the Tribunal erred in law in relying on information that did not accurately represent the dangers the Appellant faced in India.
- Ground 5: Whether the Tribunal erred in law in failing to believe the Appellant's claims.

24. In relation to Ground 1, the Respondent submits that it is unclear what mistake the Tribunal allegedly made and also emphasises, with reference to various Australian and English authorities, that a wrong finding of fact does not constitute an error of law. In relation to Ground 2, the Respondent points out that the Appellant does not particularise the information the Tribunal is alleged to have

[26]Ibid 181 at [119].
[27]Ibid 182 at [126].
[28]Supreme Court Transcript p 2 ln 29 – 30.

failed to consider. The ground of failure to take into account a relevant consideration is only established where the decision-maker fails to take into account a consideration that he was bound to take into account. The Respondent submits that the Tribunal did not fail to take into account any factor or consideration that it was bound to take into account.

25. In response to Ground 3, the Respondent submits that it is unclear what information the Appellant is referring to in this ground. Aside from some external information as to the party in power at the time of the Appellant's alleged fight with BJP members, and some information as to interest and inflation rates at the time of the alleged loan, the Tribunal made no reference to any other external information or "*official government policy*" impacting the Appellant. In any event, the Tribunal did not fetter its discretion in any way, including by reference to government policy.

26 Regarding Ground 4, the Respondent contends that the country information relied upon is a matter for the Tribunal, and this cannot be challenged by the Appellant upon appeal. In relation to Ground 5, the Respondent contends that the Tribunal gave cogent reasons for disbelieving the Appellant's claims, and the Appellant has not identified any flaw in those reasons. The credibility of an Applicant is a matter for the primary decision maker, and any credibility findings are generally not to be disturbed by a court upon appeal. This Ground appears to invite the Court to engage in impermissible merits review under s 43 of the Act.

CONSIDERATIONS

*Grounds 1 and 5*

27. Under s 43(1) of the Act, an appeal to the Supreme Court from a decision of the Tribunal must be on "*a point of law*".

28. In *Waterford v Commonwealth*,[29] the High Court of Australia considered whether the Administrative Appeals Tribunal ("AAT") made an error of law in dismissing an application for documents that were purportedly exempt under the *Freedom of Information Act 1982* (Cth). In considering this question, Brennan J said:

> "*A finding by the AAT on a matter of fact cannot be reviewed on appeal unless the finding is vitiated by an error of law. Section 44 of the AAT Act confers on a party to a proceeding before the AAT a right of appeal to the Federal Court of Australia "from any decision of the Tribunal in that proceeding" but only "on a question of law". The error of law which an appellant must rely on to succeed must arise on the facts as the AAT has found them to be or it must vitiate the findings made or it must have led the AAT to omit to make a finding it was legally required to make. There is no error of law simply in making a wrong finding of fact.*"[30]
> (emphasis added)

29. In *Attorney-General (NSW) v Quin*,[31] Brennan J said:

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[29] *Waterford v Commonwealth* (1987) 163 CLR 54.
[30] Ibid at 77-78.
[31] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

> *"The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of the administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."*[32]
> (emphasis added)

30. As part of the power reposed in an administrative decision-maker to make findings as to the merits and facts of the case, the decision-maker is empowered to make findings as to the credibility of the Applicant. These credibility findings are findings of fact. In *Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham,*[33] in relation to the finding that it was "*utterly implausible*" that members of a party tried to recruit the Appellant, McHugh J said:

> *"this was essentially a finding on credibility which is the function of the primary decision maker par excellence. If the primary decision maker has stated that he or she does not believe a particular witness, no detailed reasons need to be given as to why that particular witness was not believed. The Tribunal must give reasons for its decision, not the sub-set of reasons why it accepted or rejected individual pieces of evidence".*[34]
> (emphasis added)

31. This statement of authority has been approved by prior decisions of this Court,[35] as well as by the Federal Court of Australia.[36]

32. The Appellant has not elaborated upon the nature of the "*mistake*" that he alleges the Tribunal made in his Amended Notice of Appeal. In the absence of further information, the making of a "*mistake*" does not constitute a "*point of law*" for the purposes of s 43(1) of the Act. As the above-mentioned authorities make plain, it is for the repository of the power of review to make findings as to the merits and facts of the case, and those are not to be disturbed upon appeal. If the Appellant intended to allege by Ground 1 that the Tribunal made a "*mistake*" of law, the Amended Notice of Appeal does not specify the nature of the mistake, and unparticularised assertions of mistake cannot constitute a jurisdictional error.[37]

33. The allegation that the Tribunal erred by not believing the Appellant's claims also does not constitute a "*point of law*". It is for the Tribunal to make findings as to the credibility of the Appellant, and whether the evidence given by the Appellant in

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[32] Ibid at 35-36. See also *WET 044 v Republic of Nauru* [2017] NRSC 66 ("*WET 044*") at [31] (per Crulci J)
[33] *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407.
[34] Ibid at [67]. See also *HFM 045 v Republic of Nauru* [2017] NRSC 12 at [43] (per Crulci J).
[35] *WET 044*, Supra note 32 at [34].
[36] *SZKJU v Minister for Immigration and Citizenship* [2008] FCA 802 at [19] (Gordon J); *SZKSU v Minister for Immigration and Citizenship* [2008] FCA 610 at [14] (Flick J).
[37] *WZAVW v Minister for Immigration and Border Protection* [2016] FCA 760 at [35] (per Gilmour J); *SZQSA v Minister for Immigration and Border Protection* [2016] FCCA 3057 at [16] (per Judge Lucev).

support of his claims is capable of being believed. The Tribunal gave comprehensive reasons for finding that the Appellant's claimed fear of harm due to being unable to repay a money-lender, and his membership of the Sadar Sena, lacked credibility (see [18]-[19] above), and the subsequent finding that the Appellant did not have a well-founded fear of persecution was therefore open to it. Grounds 1 and 5 of the Amended Notice of Appeal fail.

*Ground 2*

34. This Court has previously approved[38] of the formulation of the ground of failure to take into account a relevant consideration by Brennan J in *Minister for Aboriginal Affairs v Peko-Wallsend*, in which his Honour said:

> "*The failure of a decision-maker to take into account a relevant consideration in the making of an administrative decision is one instance of an abuse of discretion entitling a party with sufficient standing to seek judicial review of the ultra vires administrative action.*
>
> ...
>
> *The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is bound to take into account in making that decision...*
>
> *What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act..."*

35. The Appellant also has not elaborated upon the information that he alleges the Tribunal failed to consider in his Amended Notice of Appeal. The Court is however satisfied that the Tribunal took into consideration the information that it was bound to take into account. Over 86 paragraphs, the Tribunal comprehensively set out the claims and information before it. The Tribunal then proceeded to consider the Appellant's claimed fear of harm due to being unable to repay a debt to a money lender, and his membership of the Sadar Sena, with reference to those claims and information.

36. In light of this, and the fact that the Tribunal is not required to refer in its decision to all the matters that it may conceivably be regarded as relevant,[39] the Court finds that the Tribunal has discharged its duty to take into account all relevant information. This ground fails.

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[38] *ETA 090 v Republic of Nauru* [2017] NRSC 61 at [33]-[34] (per Crulci J); *WET 044,* Supra note 32 at [36]; *ETA 080 v Republic of Nauru* [2017] NRSC 45 at [32] (per Crulci J).

[39] *Sean Investments v MacKellar Pty Ltd* (1981) 38 ALR 363 at 375 (per Deane J).

*Ground 3*

37. The Amended Notice of Appeal further asserts that the Tribunal erred by only considering "*official government policy*". The Court recognises that inflexibly applying official government policy without due regard to the merits of the case may give rise to an error of law.[40] However, in this case the Tribunal made no reference to any "*official government policy*" in its decision. As noted by the Respondent, the only external information referred to related to the party in power at the time of the Appellant's alleged fight with BJP members, and the interest and inflation rates applicable in India at the time of the alleged loan. This information was clearly relevant to the Appellant's case. This ground fails.

*Ground 4*

38. The submission that the country information relied upon by the Tribunal does not accurately reflect the situation of the Appellant, does not give rise to an appealable point of law. This Court has previously found that "*the country information that the Tribunal chooses to rely on is a question of fact for the Tribunal*".[41]

39. This Court has also approved[42] of the Full Court of the Federal Court authority of *NAHI v Minister for Immigration and Multicultural Affairs,*[43] which clarifies that the country information relied upon is a matter for the Tribunal. Gray, Tamberlin and Lander JJ said:

> "*The appellants also complained that the Tribunal made an incorrect assessment of the foreseeable future, by making a 'mere guess' and by relying on 'country information' that did not present a true picture. It is clear from its reasons for decision that the Tribunal did rely on 'country information' in making its assessment of the future, and that the conclusion it reached was open to the Tribunal on the basis of the material it used. Both the choice and the assessment of the weight of such material were matters for the Tribunal. The Court cannot substitute its own view of the material, even if it had a different view from that reached by the Tribunal*".[44]
> (emphasis added)

40. Ground 4 of the Amended Notice of Appeal is therefore an invitation for the Court to reconsider the merits of the Appellant's case. This ground also fails.

ORDER

41. (1) The Appeal is dismissed

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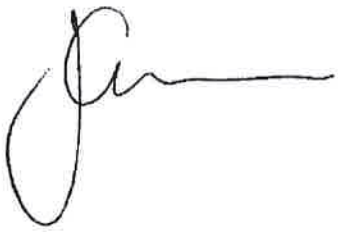
[40] *Neat Domestic Trading Pty Ltd v AWB Limited* (2003) 216 CLR 277 at [150] (per Kirby J); *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173.
[41] *ROD 128 v Republic of Nauru* [2017] NRSC 8 (per Khan J); *QLN 110 v Republic of Nauru* [2017] NRSC 55 at [51] (per Crulci J).
[42] *DWN 111 v Republic of Nauru* [2017] NRSC 56 at [33] (per Khan J).
[43] *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10.
[44] Ibid at

(2)The decision of the Tribunal T15/00170 dated 31 March 2016 is affirmed pursuant to the provisions of s 44(1)(a) of the Act.



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Judge Jane E Crulci

Dated this 20th day of October 2017