



**IN THE SUPREME COURT OF NAURU**

**AT YAREN**

Case No. 49 of 2016

IN THE MATTER OF an appeal  
against a decision of the Refugee  
Status Review Tribunal TFN  
T15/00220, brought pursuant to s 43 of  
the *Refugees Convention Act 2012*

BETWEEN

**WET 066**

Appellant

AND

**THE REPUBLIC**

Respondent

Before: Judge Marshall

Appellant: Mr Nick Wood

Respondent: Ms Anna Mitchelmore

Date of Hearing: 8 May 2018

Date of Judgment: 27 November 2018

**CATCHWORDS**

APPEAL – whether the Tribunal was required to consider whether relocation to Kathmandu was reasonable – whether the Tribunal failed to consider critical evidence as to where the Appellant would return – whether the Tribunal failed to give adequate reasons – the internal relocation principle – APPEAL DISMISSED.

## JUDGMENT

1. This matter is before the Court pursuant to s 43 of the *Refugees 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 s 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 24 August 2016 affirming the decision of the Secretary of the Department of Justice and Border Control (“the Secretary”) of 11 October 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.
4. The Appellant filed a Notice of Appeal with this Court on 30 January 2017, an Amended Notice of Appeal on 2 August 2017, and a Further Amended Notice of Appeal on 1 May 2018.

## BACKGROUND

5. The Appellant is a married man of Nepalese ethnicity and Buddhist religion from Khothang Village, Sagarmatha Province, Nepal. He is married and has two children who live with his wife’s parents in Solu, a village that is close to Khotang. The Appellant’s parents and four married sisters continue to live in Khotang. He worked with his father on the farm in Khotang, and opened a small restaurant (called a “store” by the Appellant) when he moved to Kathmandu.

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

6. The Appellant claims a fear of harm arising from his slaughtering of a cow in Khotang. The Convention nexus was put in the Appellant's submissions to the Tribunal as being upon the ground of religion, given the slaughter of cows is a practice permitted by the Appellant's Buddhist faith, but prohibited by Islam.<sup>2</sup>
7. The Appellant departed Nepal for Malaysia in April 2013, and then travelled to Indonesia where he boarded a boat for Australia, that was intercepted and directed to Christmas Island, arriving on 6 August 2013. He was transferred to Nauru on 20 July 2014.

#### INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellant attended a Refugee Status Determination ("RSD") Interview on 24 November 2014. The Secretary summarised the material claims presented at that Interview as follows:
  - *In 2003, the Applicant slaughtered a cow for his family to eat at his village in Khotang. His surrounding Hindu neighbors were upset and forced the Applicant to leave the village after humiliating him and threatening to kill him.*
  - *The Applicant then moved to Kathmandu in 2003 with his wife and two children and started a business, a convenience store.*
  - *About three or four years later, the villages found out his location, and began to threaten his life again. They would make the threats over the telephone, and sometimes he was threatened on the street and in his store.*
  - *The Applicant claims a similar vendetta was waged upon another man from his village who ran a convenience store in Kathmandu. He was murdered two or three years before the Applicant fled.*
  - *The Applicant claims that his cousin reported the threats to the local newspaper after he had fled Nepal.*
  - *The Applicant fears that the local gangsters may be acting on behalf of the villages from Khotang.*
  - *The Applicant he will be physically abused (including being subjected to torture) or even killed if he returns to Nepal.*<sup>3</sup>
9. At the Interview, the Appellant provided the Secretary with a newspaper article from the *Dabab Weekly* dated 30 May 2013, in the Nepalese language, which, when translated, said that the Appellant was attacked when returning to his hotel room at the Summer Hotel.<sup>4</sup>
10. The Secretary found that there were serious credibility problems with the questions of when the cow was slaughtered; when the Appellant was forced to leave his village; the newspaper article submitted by a family member; why his brother reported him missing without asking the Appellant's wife, who lived in the same village as the brother, about the Appellant's whereabouts; why the Appellant did not tell his brother or other family members that he planned to flee the country; and why an incident that happened 11 years ago poses an ongoing threat to the Appellant.<sup>5</sup>

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<sup>2</sup> Book of Documents ("BD") 66.

<sup>3</sup> Ibid 49.

<sup>4</sup> Ibid 45.

<sup>5</sup> Ibid 51.

11. In finding that there were serious credibility problems with the Appellant's testimony, the Secretary considered that the Appellant had given inconsistent evidence as to when the cow was slaughtered, ranging from 2003 to 2011; the article was written and published over a month after the Appellant fled; it was difficult to accept that the brother would write the article in attempt to locate the Appellant as claimed, rather than simply contacting the Appellant's family; it was implausible that the Appellant would not have told his family of his intention to flee; and it was implausible that villagers would seek retribution from the Appellant when there was no outrage in the village at the time the cow was slaughtered.<sup>6</sup> The Secretary considered that it was not appropriate to apply the benefit of the doubt to the Appellant's testimony and did not accept the material elements of the claim as true.<sup>7</sup>
12. Given the Secretary rejected the Appellant's claims as credible, the Secretary considered there was no reasonable possibility of the Appellant being subjected to harm upon return to Nepal, either for a Convention reason, or of such a nature that Nauru's international obligations would be engaged. The Appellant therefore was found not to be a refugee or owed complementary protection.<sup>8</sup>

#### REFUGEE STATUS REVIEW TRIBUNAL

13. On 11 April 2016, the Appellant appeared before the Tribunal to give evidence and present arguments in relation to his slaughtering of a cow in Khotang, his move to Kathmandu, the threats received in Kathmandu, and the article written by the Appellant's cousin and published in a local newspaper. The Appellant further claimed that his father had been assaulted about four or five months before the Tribunal hearing, after receiving continuous threats in connection with the slaughter of the cow, and that the person murdered in Kathmandu was a friend of the Appellant who also participated in the slaughtering of the cow.
14. The Tribunal accepted the Appellant may have killed a cow to eat, given country information indicates there is no prohibition on eating beef in certain groups in Nepal,<sup>9</sup> and found that the killing occurred in 2006, being the date provided in the Transfer interview, and the date that is most consistent with the Appellant's other evidence.<sup>10</sup> The Tribunal also accepted that the Appellant had to leave the village because of slaughtering the cow.<sup>11</sup> However, the Tribunal did not accept that the Appellant received threats via telephone or in person for any reason relating to his slaughtering of the cow, drawing on that the Appellant provided no plausible explanation for how the callers obtained his telephone number, and why he did not simply change his number, and that the alleged behaviour of persons visiting his restaurant and not paying was consistent with a general trend at the time of persons extorting business owners in such a way.<sup>12</sup> The Tribunal also did not

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<sup>6</sup> Ibid 50 – 51.

<sup>7</sup> Ibid 52.

<sup>8</sup> Ibid 52 – 53 .

<sup>9</sup> Ibid 140 at [21].

<sup>10</sup> Ibid at [22].

<sup>11</sup> Ibid 141 at [23].

<sup>12</sup> Ibid 143 at [35] – [36].

accept that the person murdered in Kathmandu was the Appellant's friend who slaughtered the cow with him, noting the late addition of this claim.<sup>13</sup>

15. The Tribunal considered that the article provided by the Appellant was contrived to bolster the Appellant's claims,<sup>14</sup> given the cousin would logically have reported the Appellant's disappearance to the police if he were concerned about this, or telephoned the Appellant's wife or parents.<sup>15</sup> In relation rejecting the further claim regarding the harm, and threats of harm, to the Appellant's parents, the Tribunal noted that the Appellant's father was not punished at the time of the slaughter, or harmed during the ten year intervening period between the killing of the cow and the alleged assault.<sup>16</sup>
16. Given the Appellant complied with his penalty of leaving Khotang shortly following the slaughter, and has not come to any harm since, the Tribunal did not accept there was any real possibility of harm befalling the Appellant upon return to Kathmandu.<sup>17</sup> This was the case even if the Appellant returned to Kathmandu and opened another store, similar to that operated previously.<sup>18</sup> The Tribunal also did not accept that any violation of the Appellant's religious and cultural values due to the prohibition on slaughtering cows in Nepal rose to the level of persecution.<sup>19</sup>
17. These findings led the Tribunal to the conclusion that the Appellant had no well-founded fear of persecution for any reason that would make him eligible for refugee status,<sup>20</sup> and also faced no reasonable possibility of encountering harm prohibited by the treaties signed and ratified by Nauru, and the Appellant was not eligible for complementary protection.<sup>21</sup>

## THIS APPEAL

18. The Appellant's Further Amended Notice of Appeal reads as follows:

1. *The Tribunal erred by failing to consider and determine whether the appellant faced a real chance of harm in the village of Khotang in Nepal, and failing to consider and determine whether relocation to Kathmandu was reasonable.*

### *Particulars*

- a. *The appellant claimed to fear harm from Khotang villagers – in either or both of Khotang (where he previously lived) or Kathmandu (where he lived more recently before coming to Australia) – as a result of him having killed a cow in Khotang.*
- b. *The Tribunal determined that the appellant did not face a real chance of harm from Khotang villagers in Kathmandu. But it did not consider or determine*

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<sup>13</sup> Ibid at [38].

<sup>14</sup> Ibid at [46].

<sup>15</sup> Ibid at [46].

<sup>16</sup> BD 145 at [49].

<sup>17</sup> Ibid at [52].

<sup>18</sup> BD 146 at [53].

<sup>19</sup> Ibid at [56].

<sup>20</sup> BD 146 at [57].

<sup>21</sup> Ibid 147 at [60].

- whether the appellant faced a real chance of harm from Khotang villagers in Khotang.*
- c. The Tribunal was required to consider and determine this issue. And, if the Tribunal determined that the appellant's claim to fear harm in Khotang was made out, it would have needed to consider whether it was "reasonable" for the appellant to return to Kathmandu to avoid that harm, including in light of the objections which the appellant had advanced to returning there.*
  - d. The Tribunal could not lawfully avoid determining these issues by concluding, as it did, that Kathmandu was "also his home area".*
2. *The Tribunal erred by failing to consider critical evidence in making any finding as to where the appellant would in fact return to, or by failing to give adequate reasons in that regard.*
- a. The particulars to ground 1 are repeated.*
  - b. The Tribunal's reference to Kathmandu being "also [the appellant's] home area" did not represent a finding as a step along the way to determining where the appellant was in fact likely to return. Instead, the Tribunal believed (wrongly) that the mere fact that Kathmandu was "also [the appellant's] home area" necessarily relieved it of the need to consider questions of reasonableness and practicability of relocation there.*
  - c. Even if the Tribunal did purport to consider where the appellant in fact was likely to return to, it failed to deal with critical evidence of the appellant which was relevant both to whether: (i) the appellant would in fact return there; or (ii) it would be reasonable for him to do so.*
  - d. This included for example evidence that: (a) the appellant's wife and children lived in the village of Solu (near Khotang); and (b) he had sold his business in Kathmandu.*

## CONSIDERATION

19. The Appellant alleges that the decision of the Tribunal is affected by errors of law. The Appellant's Amended Notice of Appeal contains two grounds. The first ground contends that the Tribunal erred by failing to consider and determine a claim of the Appellant. The second ground complains of a failure to consider critical evidence and of inadequate reasoning.

### Ground 1

20. The Appellant alleges that the Tribunal failed to consider whether the Appellant faced a real chance of harm in a village in the district of Khotang in Nepal and failed to consider whether relocation to Kathmandu is reasonable.
21. At [10] of its reasons for decision, the Tribunal noted the Appellant's claim to fear harm from people in Khotang because he killed a cow to eat. He was excluded from Khotang by a decision of the Village Development Council ("VDC"). He told the Tribunal he had no problems in the village in the month he was given to leave and has not returned to Khotang. The Tribunal accepted that the Appellant may have killed a cow. The Tribunal also accepted that he remained in the village for a further month without suffering any harm. Killing a cow at the time, in 2006, was unlawful in Nepal. The Tribunal observed that the Appellant was not reported to the police.

22. The Tribunal went on to deal with other matters before returning to the topic of Khotang under the heading “future harm”. It noted that the Appellant said he could not return to Khotang because the person he bought the cow from still lives there. But it observed at [50] that the Appellant lived in Kathmandu from 2007 until 2013 and ran a business there. For these reasons, the Tribunal considered that “Kathmandu is also his [the Appellant’s] home area”.
23. The Tribunal found that the Appellant would not face a real possibility of persecution were he to return to Kathmandu. In the absence of evidence that the Appellant intended to return to Khotang, the Tribunal was not required to consider whether the Appellant faced a real chance of persecution in Khotang. The Appellant said he could not return to Khotang and did not give evidence that he wanted to return there.
24. The Appellant next alleges, under this ground, that the Tribunal failed to consider whether relocation to Kathmandu was reasonable. The Tribunal found that the Appellant had relocated to Kathmandu in 2006 and lived there until he left Nepal in or about April 2013. It found Kathmandu to be his home area. The Tribunal found that there is no real possibility that the Appellant would suffer harm from villagers or people acting on their behalf if returned to Kathmandu. The Tribunal found that it is possible that the Appellant may open a new business if returned to Kathmandu.
25. In these circumstances, the Tribunal was not required to consider whether relocation to Kathmandu was reasonable because it had found that Kathmandu was the place from where the Appellant had come and the place to which he would return. In so finding, the Tribunal complied with its obligation, articulated by the Full Court of the Federal Court of Australia in *CSO15 v Minister for Immigration and Border Protection* (“CSO15”), that “[t]he decision-maker must assess, on the material before her or him, the place or places to which an individual is likely to return”.<sup>22</sup>
26. This submission of the Appellant presupposes that Khotang is the Appellant’s home area and that he would return there. In the absence of evidence that he intended to do so the Tribunal was not required to make a finding on whether relocation to Kathmandu was reasonable. The Tribunal was entitled to take the view that, if returned to Nepal, the Appellant would resume residence in the place where he lived for 7 years before departure.

#### General observations on the relocation issue

27. In submitting that it was incumbent on the Tribunal to consider whether it would be reasonable to return to Kathmandu, the Appellant referred to a judgment of the High Court of Australia in support of a proposition that the principle of relocation operates on the basis that there is any area in the Appellant’s country where he may be safe from harm; see *Minister for Immigration and Citizenship v*

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<sup>22</sup> [2018] FCAFC 14 at [45].

SZSCA (“SZSCA”) at [25].<sup>23</sup> In that case, the Court held that the impact of the Applicant remaining in Kabul and not driving trucks should be assessed. SZSCA was recently considered by the Full Court of the Federal Court in *CSO15* at [27], where it was said that SZSCA stands for the proposition that “in some factual situations” the Tribunal may have to consider “whether it is reasonable to expect, or assume, as a matter of fact, that a claimant can or should act in a particular way, or live, or work in a particular place or in particular circumstances”.

28. As counsel for the Republic submits, the Appellant did not identify any expectation that the Tribunal had imposed on him or any assumptions on which the Tribunal proceeded, other than that the Appellant would return to Kathmandu, without restriction on what activities he may undertake there. The Tribunal found that the Appellant had not been harmed in Kathmandu and had not received threatening phone calls. Having found that the Appellant had no well founded fear of persecution if returned to Kathmandu, the Tribunal was not required to consider what might happen if he returned to his village; see *CSO15* at [22].

29. For completeness, the Court notes the recent observations of the High Court in *CRI 028 v Republic of Nauru*<sup>24</sup> that the descriptors of “home area” or “home region” are not derived from the Convention, and an examination of whether an area is a “home area” may serve as a distraction from the relevant and necessary inquiry of whether a person could reasonably be expected to relocate from one area in their home country to another.<sup>25</sup> In this appeal, the Tribunal did not embark on any extensive examination of whether Kathmandu was a home area of the Appellant; rather it simply carried out its obligation of assessing the place to which the Appellant would most likely return to for the purpose of assessing the Appellant’s Convention claims, as required by *CSO15*.

### Conclusion on Ground 1

30. Ground 1 of the Amended Notice of Appeal is not made out. The Tribunal did not identify Kathmandu as an area where the Appellant may be safe provided he remained there. This is not a SZSCA type scenario where the Tribunal was required to take into account considerations analogous to those encompassed in the internal relocation principle as there was no evidence the Appellant would be confined to the bounds of Kathmandu, or required to alter his lifestyle in any way, to avoid any reasonable risk of harm in Kathmandu. The Tribunal did not find that he faced a real chance of harm anywhere in Nepal and observed that the Appellant had said he would not return to Khotang.

### Ground 2

31. This ground alleges that the Tribunal failed to consider critical evidence in making findings as to where the Appellant would return to or by failing to give adequate reasons in that regard. It is closely related to ground 1.

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<sup>23</sup> (2014) 254 CLR 317.

<sup>24</sup> [2018] HCA 24.

<sup>25</sup> *Ibid* at [45].



32. The first piece of evidence allegedly ignored was the Appellant's claim to fear harm from Khotang villagers as outlined in ground 1. The Tribunal did not ignore that evidence. It specifically referred to it, as is discussed in dealing with ground 1.
33. The Appellant next refers to the Tribunal's reference to Kathmandu being the Appellant's home area. The Appellant contends that the Tribunal still needed to consider the reasonableness of his return there. The Tribunal considered the Appellant's evidence on his existence in Kathmandu and conditions there, and found that he did not face a risk of harm in Kathmandu. It rejected his claim that he would not be able to subsist, and found that if the Appellant set up a new business and was not paid for goods or food in the future that would not amount to serious harm.
34. As an aspect of this claim, the Appellant also says that the Tribunal failed to consider evidence or make findings about:
- a. whether the Appellant's wife and children lived in the village of Solu (near Khotang) and;
  - b. whether he had sold his business in Kathmandu.
35. As to (b), the Tribunal accepted that the Appellant had sold his business but said that that did not mean he would not open another business there.<sup>26</sup> As to (a), the Tribunal stated that the Appellant is married and has two children and that his wife and children live with his wife's parents in Solu, near Khotang.<sup>27</sup> The fact of that evidence does not mean that the Appellant would not return to Kathmandu and does not bear on the issue whether it would be reasonable for him to do so.
36. Consequently, it cannot be said that the Tribunal failed to deal with evidence about whether the Appellant was likely to return to Kathmandu or whether it would be reasonable for him to do so. The Tribunal's reasons are not inadequate and do not fail to disclose a reasoning process.
37. The submissions of the Appellant view the decision of the Tribunal through a different prism than the approach taken by the Tribunal. This was not a case which called for the examination of "the internal relocation principle". If the Tribunal had found Khotang to be the Appellant's home area different considerations would have applied. It then would have been necessary to consider whether internal relocation to Kathmandu was reasonable. But that was not what the Tribunal found on the evidence before it.
38. The Tribunal did not fail to comply with its obligations under s 34(4) of the Act to set out its findings on any material questions of fact and refer to evidence to which its findings were based.

### Further Ground of Appeal

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<sup>26</sup> BD 139 at [9].

<sup>27</sup> Ibid at [8]; BD 146 at [53].

39. At the hearing before this Court, the Appellant put forward an additional argument not encapsulated in the Further Amended Notice of Appeal. The Appellant sought leave to file a Second Further Amended Notice of Appeal so to bring the argument within the scope of the Notice of Appeal. The Republic consented to the filing of a Second Further Amended Notice of Appeal and leave was granted.
40. The Second Further Amended Notice of Appeal filed on 15 May 2018 included an additional “Ground 1A” that reads as follows:

*“Ground 1A – expectation or assumption by the Tribunal*

- 1A. *Alternatively to ground 1, the Tribunal erred by expecting or assuming that the appellant would stay in Kathmandu, and by not considering whether that expectation or assumption was reasonable.*

Particulars

- a. *The particulars to ground 1 are repeated.*
- b. *The Tribunal expected or assumed that the appellant would stay in Kathmandu.*
- c. *The Tribunal did not consider whether the appellant faced a real chance of harm if he were to rejoin (or even visit) his family in the Khotang area, nor did the Tribunal consider whether its expectation or assumption that the appellant would stay in Kathmandu was reasonable.*
- d. *The Tribunal thereby erred.”*

41. The Appellant contends that, contrary to the Republic’s submissions, the Tribunal did impose an “expectation”, or made an “assumption”, as to how the Appellant would live in Nepal, in that it expected or assumed that the Appellant would stay in Kathmandu and not return to the Khotang area to visit his wife, children, parents, and siblings. The Appellant distinguished the facts of the current case from those under consideration in *SZVWD v Minister for Immigration and Border Protection*,<sup>28</sup> *SZUXT v Minister for Immigration and Border Protection*,<sup>29</sup> and *CCF16 v Minister for Immigration*,<sup>30</sup> in that, unlike in those cases, the Appellant’s family do not live in the area deemed to be the Appellant’s “home area”, and the Tribunal made no positive finding that the Appellant would not face any risk of harm if he was to rejoin his family in the area in which the Appellant complains of a real chance of persecution.

42. The Appellant says that the Tribunal erred in failing to assess whether its expectation or assumption that the Appellant would remain in Kathmandu was reasonable, considering that his family continue to live in the Khotang area. The fact the Tribunal made no finding as to the risk of harm to the Appellant in Khotang does not relieve the Tribunal of its obligation to make this assessment.

43. The Respondent contends that, as a preliminary issue, there was no evidence before the Court that Solu, where the Appellant’s wife and children currently reside, is within the “Khotang area”. Rather, the Appellant’s own evidence was

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<sup>28</sup> [2017] FCA 563.

<sup>29</sup> [2017] FCA 688.

<sup>30</sup> [2017] FCCA 2826.

that Solu is not in the Khotang district; see BD 88 at Ins 22 – 41. This issue aside, the Tribunal could not have erred in failing to consider whether the Appellant would face a real chance of harm if he rejoined or visited his family in the Khotang area as the Appellant made no claim that he would rejoin or visit his family in Solu, or that he would face a real chance of harm if he were to do so. The Respondent further posits that, since the Appellant had not been threatened by the villagers in Khotang, or otherwise suffered any harm, since he left Khotang in 2007, the Tribunal had no reason to expect or assume the Appellant would need to remain in Kathmandu to avoid harm.

44. In circumstances where the Appellant had expressed no desire to live in Solu, and had no well-founded fear of persecution in Kathmandu, where he had lived safely for 7 years prior to his departure,<sup>31</sup> the Tribunal was entitled to assume that the Appellant would return to Kathmandu to stay, and was not obliged to engage in any assessment of the reasonableness or otherwise of the Appellant remaining in Kathmandu, as opposed to rejoining his family in Solu.

#### Conclusion on the Additional Ground

45. The Appellant contends that the Tribunal did not take into account the reasonableness of the Appellant living in Kathmandu due to his wife and daughters living in Solu. Here the Appellant had not expressed a desire to live in Solu in his evidence before the Tribunal. The Tribunal considered that the Appellant did not have a well-founded fear of persecution if returned to Nepal. It considered where he had lived for 7 years prior to his departure and assessed that place as his home area. That place was Kathmandu. There is no substance in the Further Amended Ground of Appeal.

#### Orders

46. The Court orders as follows:

1. The decision of the Tribunal is affirmed pursuant to s 44(1)(a) of the *Refugees Convention Act 2012* (Nr).
2. The appeal be dismissed.
3. There be no order as to costs.

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Judge Shane Marshall  
Dated this 27<sup>th</sup> of November 2018

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<sup>31</sup> BD 146 at [53].

