



**IN THE SUPREME COURT OF NAURU**

**AT YAREN**

Case No. 19 of 2017

IN THE MATTER OF an appeal  
against a decision of the Refugee  
Status Review Tribunal TFN  
T15/00209, brought pursuant to s 43  
of the *Refugees Convention Act 2012*

BETWEEN

**TTY 073**

Appellant

AND

**THE REPUBLIC**

Respondent

Before: Justice I Freckelton

Appellant: Ms Catherine Symons

Respondent: Mr Rogan O'Shannessy

Date of Hearing: 20 – 21 March 2018

Date of Judgment: 14 December 2018

**CATCHWORDS**

APPEAL – identification of dispositive issues to the Appellant – failure to evaluate evidence and country information – APPEAL DISMISSED.

## JUDGMENT

1. This matter is before the Court pursuant to s 43 of the *Refugees Convention Act 2012* (“the Act”) which provides that:
  - (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. A “refugee” is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951* (“the *Refugees Convention*”), as modified by the *Protocol Relating to the Status of Refugees 1967* (“the *Protocol*”), as any person who:

*“Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable to or, owing to such fear, is unwilling to return to it ...”*
3. Under s 3 of the Act, complementary protection means protection for people who are not refugees but who also cannot be returned or expelled to the frontiers or territories where this would breach Nauru’s international obligations.
4. The determinations open to this Court are set out in s 44(1) of the Act:
  - (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.*
5. The Appellant filed a Notice of Appeal on 4 April 2017 against the decision of the Refugee Status Review decision of 12 March 2017 and an Amended Notice of Appeal on 22 February 2018.

## BACKGROUND

6. The Appellant is a man from the Comilla district, Bangladesh, of Bengali ethnicity and Sunni Muslim religion. He claims a fear of harm from supporters of the Awami League (“AL”) due to his actual and/or imputed political opinion, as well as on the basis of his Muslim religion, and membership of the particular social groups of “asylum-seeker returnee” and “returnee who departed Bangladesh illegally”.
7. The Appellant departed Bangladesh for Thailand in May 2013, and travelled to Australia via Malaysia in August 2013. He was transferred to Nauru on 21 June 2014.

## INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellant attended a Refugee Status Determination (“RSD”) interview on 15 October 2014. The Secretary noted that the Appellant claimed the AL had harmed the Appellant’s family for as long as he could remember. His father supported the Jamaat-e-Islami (“JI”), being a leader of the party in a local village, and he owned a fishing warehouse with three others. All three were killed after being extorted for money by the AL. As a consequence, the Appellant’s father helped the Appellant’s brothers to leave Bangladesh – two in 1992, and one in 1993.
9. In around October 2006, the AL asked the Appellant’s father to make a contribution to the party. His father refused, and was tortured by the AL supporters by kicking, punching and hitting him with wooden planks. A few days later, an AL supporter hit the father on the head when he attended a JI meeting in the local market. The father sustained serious injuries and died on 10 October 2006. The Appellant lodged a police complaint, but the police did not take any action.
10. On 28 October 2006, there was a “four party alliance” meeting against the AL. AL supporters attacked attendees with weapons. The Appellant noticed one of his friends being dragged into a nearby mosque, and the Appellant went to his aid, but was stabbed in the shoulder and hit on the head with a hockey stick, and he lost consciousness. The Appellant was taken to hospital, although he does not recall how he got to the hospital, and does not have a clear recollection of the incident because of his injuries.
11. Between 2006 and 2013, the Appellant continued to attend rallies and meetings but nothing major happened to him. In May 2013, he attended a JI meeting in Dhaka, and at the meeting was attacked by AL supporters who threw Molotov cocktails on the congregation. The Appellant was beaten by AL supporters but managed to escape and hide in a nearby building for approximately two hours. He then made his way to a friend’s house, and his friend assisted him.
12. Since his departure from Bangladesh, AL supporters visited the Appellant’s house on two occasions in search of him. When they did not find the Appellant, they damaged his furniture and stole 530,000 Bangladeshi takas and other valuables.<sup>1</sup> In the Appellant’s further submission dated 1 March 2015, the Appellant claimed that his brother-in-law lodged a complaint on the same day as this incident. In this further submission, the Appellant further claimed that there had been a land dispute with Soleiman Bepari up until his father’s death in 2006, which was reignited in December 2014 when one of the Appellant’s brothers purchased land adjacent to Soleiman’s property, resulting in damage to the brother’s property.<sup>2</sup>
13. The Secretary rejected that the Appellant and his father held positions of influence within the party. In this regard, the Secretary noted that the Appellant

---

<sup>1</sup> Book of Documents (“BD”) 80 – 81.

<sup>2</sup> Ibid 88.

was unable to explain the policies of JI in any detail, and gave vague and unconvincing answers to questioning on the matters he addressed in speeches at JI meetings.<sup>3</sup> However, the Secretary accepted the Appellant was a low-level supporter of the JI, and may have attended a meeting on 28 October 2006 that ended in violence involving AL supporters. However, the Secretary did not accept the Appellant had any instrumental role in organising this meeting, or was specifically targeted in the violence. The Secretary considered the medical certificate verifying the Appellant's injuries to be fraudulent, casting doubt upon the Appellant's claims as to the extent of his injuries.<sup>4</sup> The Appellant's account of living in hiding, and constantly relocating to escape the attention of the AL supporters, was also vague and unconvincing,<sup>5</sup> and his account of being specifically targeted by the AL at a meeting in Dhaka was not supported by country information on generalised violence and riots in Dhaka in May 2013.<sup>6</sup>

14. In relation to the Appellant's claims involving his family, the Secretary accepted that his father and brother were subject to extortion in 1992 and 2006, but found that the extortionists were not politically motivated, and were members of criminal groups.<sup>7</sup> While the Secretary accepted as plausible that the Appellant's father may have been the victim of an attack in October 2006, there was no evidence that the attackers were AL supporters motivated by the father's alleged leadership position with the JI.<sup>8</sup> Moreover, in relation to the Appellant's claim that his family were in an ongoing dispute with Soleiman Bepari, who was connected to the AL, the Secretary found that the family had no further contact with Soleiman after the father's death in 2006, and there was no evidence to support the brother's property being damaged simply by virtue of being a JI supporter.<sup>9</sup>
15. In light of these credibility findings, the Secretary found that the Appellant did not possess a sufficient political profile to be at reasonable risk of harm upon return to Bangladesh, and the Appellant's fear of harm was therefore not well-founded. The Appellant did not fit within the Convention definition of refugee.<sup>10</sup> For the same reasons, the Secretary did not accept that there was a reasonable possibility of the Appellant being exposed to harm prohibited by the international treaties ratified and signed by Nauru, and thus did not qualify for complementary protection.<sup>11</sup>

## REFUGEE STATUS REVIEW TRIBUNAL

16. On 22 October 2015, the Appellant applied for review of the Secretary's determination by the Tribunal. The Appellant was invited to a hearing on 9 May 2016, but he failed to attend. The Appellant's representative wrote to the Tribunal requesting that the hearing be rescheduled for medical reasons. The Appellant was invited to a further hearing on 7 July 2016, and the Appellant attended, but

---

<sup>3</sup> Ibid 82 – 83.

<sup>4</sup> Ibid 85 – 86.

<sup>5</sup> Ibid 86.

<sup>6</sup> Ibid 88.

<sup>7</sup> Ibid 83.

<sup>8</sup> Ibid 84.

<sup>9</sup> Ibid 88 – 89.

<sup>10</sup> Ibid 91.

<sup>11</sup> Ibid.

advised that he was not well enough to answer the Tribunal's questions because of his medical issues and distress about the recent death of his sister. The Tribunal invited the Appellant to a further hearing in November, and wrote to him on 31 July 2016 outlining the issues it intended to discuss at the hearing. It invited him to respond in writing before the hearing if he wished.

17. On 7 November 2016, the representative provided further information in response to the Tribunal's letter to the Appellant. On 23 November 2016, the Appellant appeared before the Tribunal to give evidence. While noting medical records indicating that the Appellant was suffering from reduced mental capacity due to what was described as severe stress, depression, a sleeping disorder, and various other health problems, the Tribunal observed that the Appellant appeared to understand the questions asked of him and gave relevant responses. The hearing had been adjourned already on two occasions, and a letter had been received from the Appellant's representative outlining responses to the issues the Tribunal indicated it would address at the hearing. In these circumstances, the Tribunal decided to proceed with the hearing.

18. As with the Secretary, the Tribunal expressed significant concerns about the credibility of the Appellant's claims and evidence, due to inconsistencies in his evidence, the development of his claims, and the provision of fraudulent documents.<sup>12</sup> The key inconsistencies it identified related to the following matters:

- whether the Appellant and his father were in leadership positions with the JI, or were simply ordinary members;<sup>13</sup>
- whether the Appellant's brothers left before or after the father's business partners were killed;<sup>14</sup>
- the circumstances of the Appellant's father's death following an alleged attack by the AL in October 2006;<sup>15</sup>
- the origin of a medical certificate allegedly procured by the Appellant's nephew from the hospital to which the Appellant was taken after an attack by the AL at a "four party alliance" meeting;<sup>16</sup>
- whether the Appellant and family were threatened or harassed between 2006 and 2013;<sup>17</sup> and
- whether the Appellant and his family were involved in an ongoing land dispute with Soleiman Bepari.<sup>18</sup>

19. The Tribunal was not satisfied that the Appellant and his family were in leadership positions with the JI,<sup>19</sup> that the father's three business partners were extorted and killed by the AL due to the father's political activities before his brother's departed Bangladesh,<sup>20</sup> that the Appellant's father was killed by the AL

---

<sup>12</sup> Ibid 253 at [25].

<sup>13</sup> Ibid 254 at [35].

<sup>14</sup> Ibid 255 at [41].

<sup>15</sup> Ibid 256 at [44] – [46].

<sup>16</sup> Ibid 257 at [50] – [53].

<sup>17</sup> Ibid 257 at [55] – BD 258 at [57].

<sup>18</sup> Ibid 260 at [65] – [66].

<sup>19</sup> Ibid 254 at [34].

<sup>20</sup> Ibid 255 at [41].

in the circumstances as claimed,<sup>21</sup> that the Appellant was injured and hospitalised following a “four party alliance meeting” in October 2006,<sup>22</sup> that the Appellant and his family were pursued by the AL between 2006 and 2013,<sup>23</sup> and that the Appellant and family were involved in an ongoing land dispute with Soleiman Bepari.<sup>24</sup> The Tribunal also said the concerns it had about the Appellant’s credibility caused the Tribunal not to accept that the Appellant was involved in the protests in May 2013, described by the Appellant as a JI meeting.<sup>25</sup>

20. Given the Tribunal was not satisfied as to these matters, it found there was no more than a remote chance of the Appellant being seriously harmed by reason of his actual and/or imputed political opinion.<sup>26</sup>

21. The Tribunal accepted that the Appellant was Muslim,<sup>27</sup> departed Bangladesh illegally, and was a failed asylum-seeker.<sup>28</sup> However, it found there was an absence of country information relating to the mistreatment of Muslims in Bangladesh,<sup>29</sup> and noted an Australian Department of Foreign Affairs and Trade (“DFAT”) report that Bangladeshi laws provide that a person who departs Bangladesh without a valid passport may face imprisonment for up to three months or a fine, although DFAT was not aware of these laws being enforced.<sup>30</sup> The Appellant had not provided any evidence that the authorities were now seeking to enforce this law.<sup>31</sup>

22. The Tribunal found that there was no reasonable possibility of the Appellant facing persecutory harm on the basis of his actual and/or imputed political opinion, his religion, or his illegal departure from Bangladesh, and status as a failed asylum-seeker. Thus it determined that the Appellant’s fear of harm was not well-founded and the Appellant was not owed refugee status.<sup>32</sup> Having regard to the evidence and the factual findings made by the Tribunal with respect to the Appellant’s Convention claims, the Tribunal further found that the Appellant was not owed complementary protection.<sup>33</sup>

## THIS APPEAL

23. The Appellant’s Amended Notice of Appeal dated 22 February 2018 asserts that:

1. *The Tribunal made an error of law by not identifying to the appellant the dispositive issues in the review and thereby failing to accord to the appellant natural justice pursuant to s 22(b) and/or s 40(1) of the Act.*

---

<sup>21</sup> Ibid 256 at [46].

<sup>22</sup> Ibid 257 at [54].

<sup>23</sup> Ibid 258 at [58].

<sup>24</sup> Ibid 260 at [67].

<sup>25</sup> Ibid 259 at [59].

<sup>26</sup> Ibid 263 at [79].

<sup>27</sup> Ibid 261 at [59].

<sup>28</sup> Ibid 264 at [86].

<sup>29</sup> Ibid 261 at [69].

<sup>30</sup> Ibid 264 at [82].

<sup>31</sup> Ibid at [86].

<sup>32</sup> Ibid 265 at [89].

<sup>33</sup> Ibid at [93].

### Particulars

- a. *The Tribunal rejected the appellant's claim that he was appointed as one of two ward members from his village. This claim had the potential to bear on the appellant's political profile and attendant risk profile. That the Tribunal might take this view of the claim was not a matter that was 'obviously open on the known material'. The Tribunal did not put this issue to the appellant at any time and it was not an issue that was considered by the Secretary. Accordingly, the Tribunal's failure to identify the issue to the appellant deprived the appellant of an opportunity to ascertain the issue and respond to it and/or adduce further evidence directed at the claim.*
  - b. *The Tribunal made a dispositive finding that the appellant did not participate in the Dhaka protests in May 2013. This departed from the finding of the Secretary that the appellant was present and injured at the protest. The Tribunal was obliged to identify for the appellant that it might depart from the Secretary's findings in this respect. However the Tribunal only alerted the appellant to adverse concerns in respect of the claim he attended a Jamaat-e-Islami party meeting in 2013. This was a different issue to the one that was ultimately found to be dispositive.*
2. *The Tribunal erred on a point of law when it constructively failed to exercise its jurisdiction, or failed to discharge and/or substantively perform its statutory task of review by failing to evaluate the appellant's experiences of past harm in Bangladesh, which infected and vitiated its assessment of the likelihood that the appellant would suffer harm if returned to Bangladesh.*

### Particulars

- a. *The appellant claimed that he had attended and was injured at a Four Party Alliance meeting in October 2006. The Tribunal did not record findings as to whether the appellant attended the Four Party Alliance meeting. This was significant because a finding that the appellant had attended the event might have sustained a finding that the appellant would continue to participate in future political activities and be exposed to political acts of violence.*
- b. *The Tribunal's consideration of the claims arising following the appellant's departure from Bangladesh fixated on the land dispute between the appellant's family and Soleiman. The Tribunal failed to distinguish this claim from the appellant's separate and distinct claim that supporters of the Awami League had come to his home in Bangladesh in pursuit of him, and had looted and stolen from members of his family (Awami League claim). In doing so, the Tribunal failed to consider properly (or at all) the Awami League claim.*
- c. *The Tribunal failed to make an assessment of how the surviving elements of the appellant's profile (which included that the appellant was a member and supporter of the Jamaat-e-Islami party in his village) engaged with country information to the effect that intra-party violence was serious and deteriorating in Bangladesh.*

### Ground One

24. In relation to Ground 1, the Appellant draws the Court's attention to the decision of the Australian High Court in *BRF 038 v The Republic of Nauru* ("BRF 038"),<sup>34</sup>

---

<sup>34</sup> [2017] HCA 44.

which affirmed that the common law principles of procedural fairness apply to the Tribunal in performing merits review. The Appellant submits that a further decision of the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (“SZBEL”)<sup>35</sup> is of particular relevance and was cited with apparent approval in *BRF 038*. In *SZBEL* Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ said:

*“The Act defines the nature of the opportunity to be heard that is to be given to an applicant for review by the Tribunal. The applicant is to be invited “to give evidence and present arguments relating to the issues arising in relation to the decision under review”. The reference to “the issues arising in relation to the decision under review” is important.*

*These issues will not be sufficiently identified in every case by describing them simply as whether the applicant is entitled to a protection visa. The statutory language “arising in relation to the decision under review” is more particular. The issues arising in relation to a decision under review are to be identified having regard not only to the fact the Tribunal may exercise all the powers and discretions conferred by the Act on the original decision-maker... but also to the fact that the Tribunal is to review that particular decision, for which the decision-maker will have given reasons.*

*The Tribunal is not confined to whatever may have been the issues that the delegate considered. The issues that arise in relation to the decision are to be identified by the Tribunal. But if the Tribunal takes no step to identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what the other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are “the issues arising in relation to the decision under review”. That is why the point at which to begin the identification of issues arising in relation to the decision under review will usually be the reasons given for that decision. And unless some other additional issues are identified by the Tribunal (as they may be), it would ordinarily follow that, on review by the Tribunal, the issues arising in relation to the decision under review would be those which the original decision-maker identified as determinative against the applicant.”<sup>36</sup>*

25. In the Respondent’s submission, particular attention must be paid to [47] of the decision, where their Honours state that an applicant may be put on notice of the issues in the case through the matters detailed in the primary decision. Their Honours said:

*“... there may well be cases, perhaps many cases, where either the delegate’s decision, or the Tribunal’s statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor.”<sup>37</sup>*

---

<sup>35</sup> (2006) 228 CLR 152.

<sup>36</sup> *Ibid* at [33]-[35].

<sup>37</sup> *Ibid* at [47].



26. The Appellant submits that the questions of whether the Appellant was appointed as one of two ward members from his village, or participated in the Dhaka protests held in May 2013, were “issue[s] arising in relation to the decision under review”, as they had the potential to bear on the critical question of the Appellant’s political profile.
27. The Appellant submits that the Tribunal rejected the claim that he acted as one of two ward members as it was purportedly inconsistent with the Appellant’s claim that he was only a “supporter and ordinary member” of the JI. In the submission of the Appellant, it was not obvious that the Tribunal would have taken this approach to the Appellant’s evidence, particularly given that the exchanges between the Tribunal and the Appellant at the hearing regarding the number of “ward members” in the Appellant’s village, and duties they may perform, gave no indication that the Tribunal was inclined to reject the Appellant’s claims (see BD 211 at In 5 – 24).<sup>38</sup>
28. The Appellant further submits that the Tribunal’s findings at [59], properly interpreted, indicate that the Tribunal also rejected the Appellant’s claims to have been present at, and a participant in, the Dhaka protests. The claim was a significant element of the Appellant’s application for protection, given the Appellant’s claimed apprehension of harm upon return to Bangladesh rested upon his attendance and assault at two key events: the Four Party Alliance meeting in 2006, and the Dhaka protests in May 2013. The Secretary made an affirmative finding that the Appellant was present at the Dhaka protests, meaning the Appellant was not put on notice that the Tribunal may reject this claim through this means.<sup>39</sup>
29. The Respondent notes that the Appellant gave evidence to the Secretary that he was an ordinary member of the JI without any formal leadership role,<sup>40</sup> and the Appellant submitted to the Tribunal through his representative that the Appellant had given consistent evidence in this regard.<sup>41</sup> The Appellant also gave evidence to this effect in his statement to the Tribunal.<sup>42</sup> However, at the hearing, the Appellant claimed that his father was a “ward member”, and the Appellant assumed this position after his death.<sup>43</sup> The Respondent submits that it was “obviously open” to the Tribunal to reject the claim the Appellant was a “ward member”, given it was not made until the hearing, and was inconsistent with earlier evidence that he was an ordinary member.<sup>44</sup>
30. With respect to the question of whether the Appellant was present at the Dhaka protests in May 2013, the Respondent submits that there is no implicit acceptance that the Appellant attended the protests in the Secretary’s statement: *“I do not accept that the Applicant was specifically targeted by the AL Party at the*

---

<sup>38</sup> Supreme Court Transcript 7 at In 5 – 8.

<sup>39</sup> See BD 88.

<sup>40</sup> See BD 81 – 82.

<sup>41</sup> BD 101 at [11], [14].

<sup>42</sup> Ibid 128 at [12].

<sup>43</sup> Ibid 210 at In 21 – 33.

<sup>44</sup> Supreme Court Transcript Part 2 13 at In 25 – 26.

*Hefazat-e-Islam gathering in early May 2013*".<sup>45</sup> In addition, the Respondent says, the Tribunal put the Appellant on notice that his account of events in May 2013 was in issue through questioning at the hearing,<sup>46</sup> and a letter sent to the Appellant prior to the hearing outlining the issues it intended to discuss. That letter read, relevantly:

*"In your RSD application, you state that you attended a Jemaat-e-Islami party meeting in May 2013 where Awami League supporters dropped Molotov cocktails on the attendees from the top of buildings. You state that you tried to run away but you were beaten by supporters of the Awami League with hockey sticks and other weapons and that you ran into a nearby building for shelter where you remained until it was calm when you went to a friend's house. You state that your friend took you to a pharmacy to purchase drugs and you received an injection and purchased some tablets and ointment for your injuries and that you then organised to leave Bangladesh.*

*In your transfer interview you are recorded as stating that the incident took place in October 2013, that you were taken to hospital where you stayed for a month before returning to your village where the people who were targeting you found out and targeted you because you complained to the police. The Tribunal wishes to ask you further questions about this claim and the reasons for the inconsistencies in your claims. On the evidence currently before it, the Tribunal may not accept that you attended a Jemaat-e-Islami party meeting in 2013, nor that you were injured by Awami League supporters as claimed" (emphasis added).<sup>47</sup>*

31. In relation to Ground 2, the Appellant contends that consistently with the Australian Full Court of the Federal Court authority of *Minister for Immigration and Border Protection v MZYTS* ("MZYTS")<sup>48</sup> a review body can only discharge its function of undertaking a review of an administrative decision having considered all central aspects of the Applicant's claims. In *MZYTS*, a visa applicant submitted that, as an "ordinary" member or supporter of a particular political party, he would be at risk of harm upon return to Zimbabwe due to the volatile and dangerous political environment, which was predicted to worsen in the lead up to the 2011 elections. The Appellant's written submissions to this Court summarise the Full Court's findings at [38]-[39] as follows:

- *That task [of assessing what might happen to the visa applicant if he were compelled to return to his home country, at the time of determination or in the near future], could not be lawfully undertaken without a consciousness and consideration of the submissions, evidence and material advanced by the applicant most likely to give the tribunal an accurate picture of the ongoing circumstances on the ground in Zimbabwe for him if he were returned there...*
- *The tribunal's reasons do not disclose that it understood and undertook this task. Rather, the reasons – including what is expressed and what is not – disclose that the tribunal did not assess in a real or active way what the situation would be in mid-to late 2011 or thereafter for an "ordinary" MDC supporter being returned to Zimbabwe. Nor do the reasons disclose any consciousness that what the visa applicant was articulating (through his own statements and the post-hearing*

<sup>45</sup> BD 88; Supreme Court Transcript Part 2 14 at ln 4 – 8.

<sup>46</sup> Supreme Court Transcript Part 2 17 at ln 22 – 23; see BD 220 – 221.

<sup>47</sup> BD 175.

<sup>48</sup> [2013] FCAFC 114; (2013) 230 FCR 431.

*submission of his adviser) was that there was an increased risk of generalised politically-motivated violence due to the foreshadowing by President Mugabe of new elections for later in 2011 and the breakdown of the transitional government's authority; these events arising, critically, after the publication of the 2010 UK Border Agency fact-finding mission report.*<sup>49</sup>

32. The Appellant submits that, analogously with *MZYTS*, the Tribunal failed to consider, and make findings directed at, central aspects of the Appellant's claims.

33. The Appellant submits that the Tribunal fell into error because it did not consider, and make findings directed at the following three matters:

- whether the Appellant was present, and participated in, the "Four Party Alliance" meeting in October 2006;
- whether supporters of the AL had visited the Appellant's house, and looted from family members, since his arrival in Australia, as distinct from considering the narrower claim concerning the purported land dispute with Soleiman;
- whether the Appellant was at risk of persecution, in light of the findings that the Appellant was a member and supporter of the JI, in combination with country information put forward by the Appellant as to the deteriorating political environment in Bangladesh, particularly that the JI had been declared an "unlawful organisation" by the government.

34. In regards to the first point, the Appellant submits that the Secretary accepted the attendance of the Appellant at the "Four Party Alliance" meeting. The Appellant's reliance on this acceptance is reflected in the submissions of the Appellant's representative to the Tribunal, where the representative noted: "*The Secretary accepts that [TTY 073] attended the 2006 meeting and 2013 protest*".<sup>50</sup> Without contrary indication from the Tribunal, the Appellant was entitled to rely on this finding of the Secretary, and refrain from making further submissions on the matter. In regards to the second point, the Appellant submits that the Tribunal essentially conflated the issues of the land dispute with Soleiman, and the claims concerning the AL attacks, evident in the manner in which the Tribunal refers to photographic evidence and a police complaint in the context of assessing the land dispute claims, when that evidence was also directed to the AL attacks.<sup>51</sup> While the Tribunal dealt with the land dispute claims, it did not deal with the distinct claim about the separate occasions on which AL members came to the Appellant's family home and engaged in different acts of violence.<sup>52</sup> In regards to the third point, the Appellant submits that the submission was made to the Tribunal that the Appellant would continue to support the JI, which has now been declared an "unlawful organisation",<sup>53</sup> and cited country information indicating that intra-party violence remains a serious problem in Bangladesh. The Tribunal's reasons demonstrate no engagement with this claim and information.<sup>54</sup>

---

<sup>49</sup> Appellant's submissions at [25].

<sup>50</sup> BD 104 at [38].

<sup>51</sup> Supreme Court Transcript 21 at In 4 – 6.

<sup>52</sup> Ibid 25 at In 4 – 7.

<sup>53</sup> BD 120 at [150].

<sup>54</sup> Supreme Court Transcript 26 at In 23 – 25.

35. The Respondent accepts that a failure by the Tribunal to consider a clearly articulated argument relying on established facts, or a claimed basis upon which a review applicant is said to be a refugee or owed complementary protection, may justify an order under s 44 of the Act remitting the matter to the Tribunal. However, in considering whether the Tribunal has so failed, it asserts that it is critical to recall that the failure to refer to the matter in its reasons alone does not mean that the matter was not considered – some matters may justifiably not require specific mention or be subsumed in findings of greater generality. It is not necessary for the Tribunal to refer to every claim or piece of evidence put before it.<sup>55</sup>

36. With respect to the three matters identified by the Appellant, the Respondent responds as follows:

- whether or not the Appellant attended the “Four Party Alliance” meeting was not significant to the critical issue of the Appellant’s political profile, given the Tribunal had already found that the Appellant was an ordinary member of the JI. The Appellant’s potential attendance at a meeting eight years ago had no bearing on the Tribunal’s decision-making;<sup>56</sup>
- the Tribunal’s final sentence at [68], “*Nor does the Tribunal accept that since the applicant’s departure from Bangladesh in 2013, members of the Awami League have come to his home looking for him as claimed*”, reflects an engagement with the Appellant’s claims regarding his family home being looted and vandalised. The Tribunal’s reasons for this finding are found in the second paragraph of [68];<sup>57</sup>
- the Tribunal’s reasons at [71]-[79] reflect an engagement with the country information put forward by the Appellant, including a 2013 United States Department of State report, and United Kingdom Home Office reports from 2014 and 2015.<sup>58</sup> In any case, the Tribunal is not obliged to set out all the country information before it.<sup>59</sup>

## CONSIDERATION

### *Ground One*

37. The Tribunal’s finding with respect to whether the Appellant was a ward member in his village appears at [35] of the Tribunal Decision Record:

*“The Tribunal does not accept the applicant was appointed as one of two ward members from his village in 2006 as claimed at the Tribunal hearing. In making this assessment the Tribunal notes the applicant has previously claimed to have been an ordinary member only. As set out in paragraphs 14 and 15 of the submissions of the applicant’s representative dated 5 May 2016, the applicant had at that time “stated consistently and on several occasions that he was a supporter and ordinary member of Jel. We submit that he has never purported to be anything other than an ordinary*

---

<sup>55</sup> See *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at [46].

<sup>56</sup> Supreme Court Transcript Part 2 17 at ln 43 – 18 ln 1.

<sup>57</sup> *Ibid* 22 at ln 1 – 21.

<sup>58</sup> BD 262 at [74] – [75].

<sup>59</sup> Supreme Court Transcript Part 2 23 at ln 26 – 27.

*member.” Similarly in the information provided by the applicant’s representative on 7 November 2016 in response to the Tribunal’s letter setting out the issues, it is stated that the applicant and his father were active local members, but that he had never claimed that he or his father were leaders of Jemaat-e-Islami.”*

38. The Tribunal discussed the Appellant’s role as a “ward member” in his village with the Appellant at the hearing:

*“THE INTERPRETER:... So my responsibility was to invite people living in that suburbs and invite them to attend political meeting, invite them to come to mosque. So that was my responsibility at that time.*

*TRIBUNAL MEMBER: And would there be lots of people in your village with similar roles?*

*THE INTERPRETER: Yes.*

*TRIBUNAL MEMBER: Would they also have been called ward members?*

*THE INTERPRETER: Yes. They were called ward member and some people used to do some activities in – started by party and they just used to do the activities.*

*TRIBUNAL MEMBER: And can you tell us roughly how many ward members there would be in the village?*

*THE INTERPRETER: Yes. They were called ward member and some people used to do some activities in – started by party and they just used to do the activities.”<sup>60</sup>*

39. There is an apparent tension in this exchange between the Appellant’s response that there were “lots” of people in his village in similar roles to that with which he held, and his response that there were only two ward members in his village. This was not a tension that the Tribunal attempted to resolve.

40. The Appellant gave evidence to the Secretary that he was an ordinary member of the JI without any formal leadership role,<sup>61</sup> and also gave evidence to this effect in his statement to the Tribunal.<sup>62</sup> However, at the hearing the situation changed, with the Appellant claiming that his father was a “ward member”, and the Appellant assumed this position after his death.<sup>63</sup> In these circumstances it was “obviously open” to the Tribunal to reject the claim that the Appellant was a “ward member”, given it was not made until the hearing, and was inconsistent with earlier evidence that he had given as to his status.<sup>64</sup>

41. The Tribunal’s finding with respect to the Appellant’s attendance and assault at the Dhaka protests in May 2013 is recorded in two paragraphs at [59]:

*“The applicant claims that he was next attacked at a Jemaat-e-Islami party meeting in Dhaka in May 2013 where Awami League supporters dropped Molotov cocktails*

---

<sup>60</sup> BD 211 at In 5 – 17.

<sup>61</sup> Ibid 81 – 82.

<sup>62</sup> Ibid 128 at [12].

<sup>63</sup> Ibid 210 at In 21 – 33.

<sup>64</sup> Supreme Court Transcript Part 2 13 at In 25 – 26.

on the attendees from the top of buildings. He does not claim to have been specifically targeted by Awami League supporters, but states he tried to run away and was beaten by supporters of the Awami League with hockey sticks and other weapons and he ran into a nearby building for shelter where he remained until it was calm then went to a friend's house. He states his friend took him to a pharmacy to purchase drugs and he received an injection and purchased some tablets and ointment for his injuries and then arranged to leave Bangladesh.

Independent sources cited in the Secretary's decision confirm that large scale political protests erupted in Dhaka in May 2013 causing widespread vandalism, arson and destruction of property and that those protests were ruthlessly contained by security forces who opened fire, and spraying tear gas and using sound grenades and rubber bullets to disperse the crowd. At least 58 people are reported to have died, including even members of the security forces. Although the applicant described the protests as a Jemaat-e-Islami political meeting, that information that the protests were initiated by Hefazat-e-Islam, a coalition of a dozen Islamist organisations including Jemaat-e-Islami who were campaigning for strict adherence to Islamic teachings. The Secretary's decision notes that while the applicant was able to say that the May 2013 meeting was about Hefazat-e-Islam, he was unable to provide any further detail about that organisation or the purpose of the meeting. The concerns that the Tribunal has about the credibility of the applicant's claims causes the Tribunal not to accept that he was involved in these protests as claimed.<sup>65</sup>(emphasis added)

42. There is an issue of construction arising from these paragraphs, regarding whether the paragraphs reflect a finding that the Appellant did not attend the protest *at all*, or whether the Appellant merely did not attend and participate in the protests in the manner claimed. As to the issue of construing a tribunal's reasons in the event of ambiguity, the Appellant took the Court to *SZCBT v Minister for Immigration and Multicultural Affairs*,<sup>66</sup> in which Stone J referenced *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,<sup>67</sup> where the Full Court of the Australian Federal Court found that the reasons of the delegate were "entitled to a beneficial construction", and noted in particular paragraph [26]:

*"The phrase 'beneficial construction', as used in Wu Shan Liang has a specific meaning, and was certainly not intended to mean that any ambiguity in the Tribunal's reasons be resolved in the Tribunal's favour. Rather, the construction of the Tribunal's reasons should be beneficial in the sense that the Tribunal's reasons would not be over-zealously scrutinised, with an eye attuned to error. In this sense a 'beneficial' approach to the Tribunal's reasons does not require this Court to assume that a vital issue was addressed when there is no evidence of this and, indeed, the general thrust of the Tribunal's comments suggest that the issue was overlooked."*

43. In response, the Respondent relied upon *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs*<sup>68</sup> at [47]:

*"The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not*

---

<sup>65</sup> BD 258 – 259 at [59].

<sup>66</sup> [2007] FCA 9.

<sup>67</sup> (1996) 185 CLR 259.

<sup>68</sup> [2003] FCAFC 184.

*too readily drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point.”*

44. In any event, the question of whether the ambiguous statement of the Tribunal in the final sentence of [59] reflected a finding that the Appellant did not participate in the protests at all, or merely that he did not participate as claimed, may be irrelevant.
45. In the Tribunal’s pre-hearing letter dated 31 July 2016, the Tribunal said under the heading “Attack on you in 2013”, “On the evidence currently before it, the Tribunal may not accept that you attended a *Jemaat-e-Islami* party meeting in 2013, nor that you were injured by Awami League supporters as claimed”.<sup>69</sup> At the hearing, the Tribunal also indicated to the Appellant that one of the purposes of the hearing was to give the Appellant an opportunity to address the Secretary’s credibility concerns,<sup>70</sup> before proceeding to question the Appellant on the Dhaka protests in May 2013.<sup>71</sup>
46. The Tribunal’s reasons are broadly comprehensive and the issues were delineated either in the Tribunal’s pre-hearing letter to the Appellant dated 31 July 2016, or during the hearing; an example is the exchange between the Tribunal member and Appellant set out at [38] above regarding the Appellant’s purported status as a “ward member”, and the Tribunal’s statement in the pre-hearing letter regarding the Appellant’s alleged attendance at the “party meeting in 2013”. This statement identifies both the issues of whether the Appellant did not participate in the protests, and whether he was not injured in the particular circumstances as claimed.
47. In these circumstances, and bearing in mind the need not to construe the reasons of the Tribunal over-zealously or too readily with an eye for error, the Appellant has not established an error of law by the Tribunal failing to identify to him the issues asserted to be dispositive in the review or established a failure to accord to him natural justice pursuant to s 22(b) and/or s 40(1) of the Act.

## *Ground Two*

48. Ground 2 alleges that the Tribunal omitted to make findings properly with respect to three matters, and, in doing so, failed constructively to carry out its statutory task. The first of those matters is whether the Appellant attended the Four Party Alliance meeting in 2006. Paragraph [47] of the Decision Record identifies the claim that “on 28 October 2006, three weeks after his father’s death, he attended a Four Party Alliance meeting which was attacked by armed AL supporters and was stabbed in the shoulder and hit on the head with a hockey stick, spending approximately a month in hospital following the incident.”<sup>72</sup> At [48] to [53], the Tribunal discusses the authenticity of a medical report relating to the Appellant’s stay in hospital. At [54], the Tribunal records its conclusion:

---

<sup>69</sup> BD 175.

<sup>70</sup> Ibid 219 at ln 39 – 45.

<sup>71</sup> Ibid 221 at ln 23 – 33.

<sup>72</sup> Ibid 256 at [47].

*“These anomalies in the medical reports and the applicant’s inconsistent evidence about when he obtained the reports lead the Tribunal to conclude that the reports are not genuine documents and the Tribunal places no weight on them. As the Tribunal does not accept that the medical reports provided by the applicant in support of his claim to have been assaulted and hospitalised are genuine documents, the Tribunal does not accept the applicant was injured and hospitalised at a Four Party Alliance meeting on 28 October 2006 as claimed.”*

49. The failure of the Tribunal to make an express finding on the issue needs to be viewed in the context that whether or not the Appellant attended the “Four Party Alliance” meeting was of very modest relevance to the critical issue of the Appellant’s political profile, given the Tribunal had already found that the Appellant was an ordinary member of the JI. The Appellant’s potential attendance at a meeting many years previously had no significant bearing on the Tribunal’s decision-making.<sup>73</sup> Accordingly, no error is established in this respect.

50. The second of the matters is whether AL supporters visited the home of the Appellant’s family after his departure, and stole from his family. At [62] of the Decision Record, under the hearing “Land dispute”, the Tribunal identifies the Appellant’s claim that he would “face serious harm if he returns to Bangladesh because of a long-running land dispute with his father’s neighbour, Soleiman”. At [63] to [67] the Tribunal analyses the Appellant’s evidence, including that mango trees were uprooted and cut down by members of Soleiman’s family, and other damage was done to the family home.<sup>74</sup> The Tribunal proceeds to find that:

*“On the evidence before it, the Tribunal does not accept the applicant’s family are currently involved in a land or political dispute with their neighbour Soleiman or his family or that Soleiman and his associates are continuously harassing and threatening the family as claimed.”*

51. In the Appellant’s statement accompanying his RSD application to the Secretary, the Appellant claimed that AL supporters “looted the house and took money in amount of 530,000 Takas and broke all the furniture” and “left with jewellery and other things from the house”,<sup>75</sup> and in an additional statement included a police complaint filed by the Appellant’s brother-in-law with the police.<sup>76</sup> In the Appellant’s further statement to the Tribunal, the Appellant deposed to a further recent assault by members of the AL:

*“Recently members of the Awami League came to my house and demanded money. My brother-in-law came to our house and talked to this people and told them that there were only females living in our house they should not be harassing them. They asked him why is he involved and why he went to our place. Shortly after, while my brother-in-law, my sister and nephew were having breakfast in their house, Awami League members attacked them with hockey sticks. My brother-in-law and nephew have broken bones and other injuries. My sister was also assaulted, they pushed her and grabbed her hair. My brother-in-law and nephew are in hospital and my sister cannot stay in their home because she is scared”.<sup>77</sup>*

<sup>73</sup> Supreme Court Transcript Part 2 17 at In 43 – 18 In 1.

<sup>74</sup> Ibid 260 at [66].

<sup>75</sup> Ibid 39 – 40 at [20].

<sup>76</sup> Ibid 66 at [8].

<sup>77</sup> Ibid 130 at [23].



52. The Tribunal addresses the Appellant's claims of looting and vandalising his family home in the context of the land dispute with Soleiman at [68]:

*"...the Tribunal does not accept the applicant's specific claims that his family home has been broken into or vandalised, that people have come looking for the applicant at his family home or that other family members in Bangladesh including his brother Jos, sister Shokina and nephew Shojib or any other member of their families have been harassed, threatened, abducted or forced into hiding by the Awami League for any reason relating to a land dispute with Soleiman or that Soleiman has complained to the authorities that Jos and other family members are terrorists who are involved in harassing civilians and extorting money from people or that the authorities are investigating the family for any such reasons. The Tribunal does not accept that the applicant, or any member of his family, has made complaints to the authorities about a land dispute with Soleiman or that the authorities have failed to follow up any such complaints. Nor does the Tribunal accept that since the applicant's departure from Bangladesh in 2013, members of the Awami League have come to his home looking for him as claimed.*

*In the further information provided by the Tribunal on 7 November 2016, it was stated that the applicant believes his family is in danger from the Awami League because of the applicant's own political activities. Given the Tribunal's findings above, the Tribunal does not accept that the applicant's family has been threatened, harmed or harassed in the past as a result of the applicant's political activities, nor that there is a real risk that they will be subjected to such harm in the foreseeable future."* (emphasis added)

53. This paragraph disposes of the Appellant's distinct claims that, since his departure from Bangladesh, AL supporters have looted from and vandalised his home by way of the final sentence. The reasons for this finding are found in the paragraph commencing "*In the further information provided...*". While this is a poorly structured section, and would read more clearly if the final sentence of the first paragraph of [68] was combined with the second paragraph of [68], ideally with an additional subheading, the essence of the Tribunal's reasoning is clear enough. No error on the part of the Tribunal is established.

54. The third of the matters is whether the Tribunal, in assessing the risk of future harm to the Appellant upon return, considered submissions advanced by the Appellant's representatives as to the political environment in Bangladesh. At [72] the Tribunal identifies the characteristics pertaining to the Appellant that may put him at risk of harm. At [73] - [76], the Tribunal considers the submissions and relevant country information. At [77] the Tribunal notes that it had accepted that the Appellant was a member of the JI, and had been involved in recruiting members and organising meetings, but it did not accept that the Appellant or his family members were targeted because of his political activities. At [79], the Tribunal reaches the conclusion:

*"In these circumstances the Tribunal finds there is no more than a remote chance of the applicant being seriously harmed for the separate or combined reasons of his political opinion and/or Muslim religion if he returns to Bangladesh now or in the reasonably foreseeable future."*

55. Before the Tribunal, the Appellant's representative submitted:

*"[TTY 073]'s evidence to date has shown that he was a visible active grassroots member of Jamaat and one that could be readily recognised by the people in his village as a supporter of Jamaat and he instructs that if he were to return to Bangladesh he will continue to support Jamaat in the ways that he did. We would also like to refer to some of the recent country information on current political situation of Bangladesh that supports his fear of persecution on political grounds.*

*The United States Department of State 2015 Human Rights Report on Bangladesh says that:*

*Politically motivated and intra-party violence remains a serious problem and official corruption remained a problem.*

*This is consistent with Human Rights Watch World report of 2016 that reports that:*

*The opposition Jamaat-e-Islami party claims its activists were arrested and tortured by the police. Several Jamaat supporters said that the police took them into custody and deliberately shot them in the knee or chin to disable them.*

*Also Freedom in the World 2016 report on Bangladesh stated:*

*The Islam Jamaat-e-Islami party faced harassment and restrict moves from the authorities and Awami League in addition to ongoing proceedings against its leaders by the International Crimes Tribunal. Ruling party harassment of the opposition BNP and JI parties remained widespread."<sup>78</sup>*

However, these were matters for the Tribunal. It is not established that there was an abrogation of its responsibilities or a failure to have regard to its obligations.

56. In general, the Tribunal's reasons at [71] – [79] reflect an engagement with the country information provided by the Appellant, including a 2013 United States Department of State report, and United Kingdom Home Office reports from 2014 and 2015.<sup>79</sup>

57. It is not reasonably open in the circumstances to conclude that the Tribunal did not advert to or engage with the relevant matters in arriving at its findings pursuant to ss 22(b) and 40(1) of the Act in accordance with its obligation to carry out its statutory task of review. This ground too is not made out.

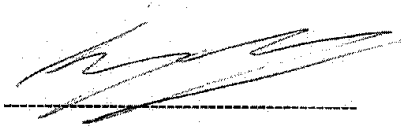
---

<sup>78</sup> Ibid 245 at 7 – 32.

<sup>79</sup> BD 262 at [74] – [75].

## CONCLUSION

58. Under s 44(1) of the Act, I make an order dismissing the appeal and affirming the decision of the Tribunal and make no order as to costs.

A handwritten signature in black ink, appearing to read 'Ian Freckelton', is written over a horizontal dashed line.

Justice Ian Freckelton  
Dated this 14<sup>th</sup> day of December 2018