IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION] **Appeal No.** 07 of 2019

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T18/00441 brought pursuant to s43 of the *Refugees Convention Act* 1972

BETWEEN: TTY167 Appellant

AND: REPUBLIC OF NAURU Respondent

Before: Wheatley J

Dates of Hearing: 27 October 2022

Date of Judgment: 6 December 2022

CITATION: *TTY167 v Republic of Nauru*

CATCHWORDS:

APPEAL – whether a failure to consider essential integer – whether Tribunal addressed claim, expressly or subsumed in findings of greater generality – whether claim or integer expressly advanced or 'squarely' arises on the material – detailed Tribunal decision – APPEAL DISMISSED

APPEARANCES:

Appellant:	J.F. Gormley
Respondent:	R. O'Shannesy

JUDGMENT

Introduction to the Statutory Framework

1. This is an appeal from a decision of the Refugee Status Review Tribunal (**Tribunal**) pursuant to section 43 of the *Refugees Convention Act 2012* (Nauru) (**the Act**) which relevantly provides:

> *"43 **Jurisdiction of Supreme Court***
>
> *(1) A person may appeal to the Supreme Court against a decision of the Tribunal on a point of law.*
>
> ...
>
> *(2) The parties to the appeal are the appellant and the Republic.*
>
> *(3) The notice of appeal shall be filed within 42 days after the person receives the written statement of the decision of the Tribunal.*
>
> *(4) The notice of appeal shall:*
>
> *(a) state the grounds on which the appeal is made; and*
>
> *(b) be accompanied by the supporting materials on which the appellant relies."*

2. Section 44 of the Act provides that the Court may make the following orders, on such an appeal:

> *"44 **Decision of 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; or*
>
> *(b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.*
>
> *(2) Where the Court makes an order remitting the matter to the Tribunal, the Court may also make either or both of the following orders:*
>
> *(a) an order declaring the rights of a party or of the parties; and*
>
> *(b) an order quashing or staying the decision of the Tribunal."*

3. Section 3 of the Act defines the Tribunal as the Refugee Status Review Tribunal established under section 11 of the Act. Part 3 of the Act establishes the Tribunal. Pursuant to section 31 of the Act, "*a person may apply to the Tribunal for merits review of any of the following*":

> *"(a) A determination made under section 6(1) of the Act; or*
>
> *(b) A decision to cancel a person's recognition as a refugee made under section 10(1) of the Act.*"

4. Pursuant to section 5 of the Act, a person may apply to the Secretary, being, at the relevant time, the Secretary of the Department of Justice & Border Control (**Secretary**) to be recognised as a refugee. Pursuant to section 6, the Secretary shall determine an application made pursuant to section 5 of the Act. Section 3 of the Act defines '*refugee*' as a person who is a refugee under *Refugees Convention* as modified by the *Refugees Protocol* (each of which is relevantly defined in section 3 of the Act). A refugee is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951*

(**Refugees Convention**) as modified by the *Protocol Relating to the Status of Refugees 1967* (**Refugees 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."*

5. The Act also defines *complementary protection* as:

> *"means protection for people who are not refugees as defined in this Act, but who also cannot be returned or expelled to the frontiers of territories where this would breach the Republic's international obligations;"*

6. Without being exhaustive, the following provisions regarding the Tribunal, as comprising part of the relevant statutory framework, are also relevant. Division 1 Part 3 of the Act provides for the establishment and membership of the Tribunal. Section 13 provides for the appointment of members. Section 13(2) provides that a person is eligible for appointment as the Principal Member or as a Deputy Principal Member if that person is qualified to be appointed a Judge of the Supreme Court, has been member of the Tribunal and has been admitted as a barrister or solicitor or legal practitioner (of various jurisdictions), for not less than five years and has not been struck off. Section 13(3) provides that the Regulations may prescribe eligibility requirements for appointment as a member. Section 4 of the *Refugees Convention Regulations 2013* (Nauru) provides, in relation to section 13(3) of the Act, that a person is eligible for appointment as a member of the Tribunal if the person has at least two years' experience in refugee merits review matters at a tribunal or equivalent level and a proven capacity to conduct administrative review, has a thorough knowledge of the UNHCR Refugee Status and Guidelines and has demonstrated skills in:

   (a) research;

   (b) clear oral and written communication; and

   (c) the use of word processing software.

7. Division 2 of Part 3 provides for the constitution, sittings and powers of the Tribunal. Section 19 requires that the constitution of the Tribunal for merits review will be by the Principal Member or a Deputy Principal Member who will preside and two other members. Pursuant to section 20 the Principal Member has a discretionary power to be able to reconstitute the Tribunal if one or more of the three members who constitute the Tribunal stops being a member or for any reason is not available for the purposes of the review, or the Principal Member thinks the reconstitution is in the interests of achieving the efficient conduct of the review.

8. Section 20(2) states:

> *"20 **Reconstitution if necessary***
>
> *(1)* ...
>
> *(2) The Tribunal as reconstituted is to continue to finish the review and may have regard to any record of the proceedings of the review made by the Tribunal as previously constituted."*

9. Section 22 of the Act provides for the overarching way that the Tribunal is to operate, as follows:

> *"22 **Way of Operating***
>
> *The Tribunal:*
>
> *(a) is not bound by technicalities, legal forms or rules of evidence; and*
>
> *(b) shall act according to the principles of natural justice and the substantial merits of the case."*

10. The Tribunal is expressly required to act in accordance with the principles of natural justice.

11. Pursuant to section 34 of the Act the Tribunal may, for the purposes of a merits review of a determination or decision, exercise all the powers and discretions of the person who made the determination or decision. Section 34 allows the Tribunal, on a merits review, to:

> *"(a) affirm the determination or decision;*

(b) *vary the determination or decision;*

(c) *remit the matter to the Secretary for reconsideration in accordance with directions or recommendations of the Tribunal;*

(d) *set the determination or decision aside and substitute a new decision or determination; or*

(e) *determine that a dependant, of the person in respect of whom the determination or decision was made, is recognised as a refugee or is owed complementary protection."*

12. In conducting a review pursuant to section 35, an applicant may give a statutory declaration in relation to a matter of fact that the applicant wishes the Tribunal to consider and may give written arguments as well. Further, the Tribunal may invite a person to provide information pursuant to section 36 of the Act. Where such an invitation is made by the Tribunal, but not responded to, pursuant to section 39 the Tribunal may make a decision on the review without taking further action to obtain information, comment or a response.

13. *"The Tribunal shall invite the applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the determination or decision under review"* pursuant to section 40 of the Act. Such an invitation is not necessary where the Tribunal considers it should decide the review in the applicant's favour on the basis of the material before it or the applicant consents to the Tribunal deciding the review without the applicant appearing before it. Where the applicant is invited to appear before the Tribunal and does not so appear, the Tribunal may make a decision on the review without taking further action to allow or enable the applicant to appear before it, pursuant to section 41 of the Act. However, section 41(2) expressly provides that the section does not prevent the Tribunal from rescheduling the applicant's appearance or from delaying its decision on the review to enable the applicant to appear.

Procedural Background

14. The Appellant first arrived in Nauru on 5 July 2014 and participated in a Transfer Interview on Nauru on 8 September 2014.

15. On 20 September 2014, the Appellant applied to the Secretary for Refugee Status Determination (**RSD**) for recognition as a refugee and for complementary protection pursuant to the Act. As part of that process, the Appellant provided a statement dated 20 September 2014 (**Original Statement**), was interviewed about his RSD application and submitted documents during that interview.

16. On 9 October 2015, the Secretary made a decision (**Secretary's Decision**) on the Appellant's RSD application and determined that the Appellant was not a refugee within the meaning of that term in the Act and was also not a person to whom Nauru owed complementary protection obligations.

17. On 17 December 2015, the Tribunal received an application for merits review of the Secretary's Decision.

18. The Appellant was invited to appear before the Tribunal to give evidence and present arguments. A further statement dated 20 April 2016 (**Further Statement**) and submissions dated 4 May 2016 (**Original Submissions**), were provided to the Tribunal. The Appellant did not attend the scheduled hearing on 6 May 2016 and in those circumstances the Tribunal pursuant to section 41 of the Act, decided the review on 3 July 2016, without taking any further action to allow the Appellant or enable the Appellant to appear before it. The Tribunal affirmed the determination of the Secretary that the Appellant is not recognised as a refugee and is not owed complementary protection under the Act.

19. The Appellant appealed to the Supreme Court of Nauru. On 20 February 2018 that appeal was dismissed. The Appellant, as he was entitled to do at the time, then appealed to the High Court of Australia. On 5 December 2018, the High Court of Australia allowed the appeal, set aside the orders of the Supreme Court of Nauru and quashed the decision of the Tribunal (*TTY167 v Republic of Nauru* [2018] HCA 61). The matter was remitted to the Tribunal for reconsideration according to law.

20. On 18 March 2019, the Appellant was invited to appear before the Tribunal and present arguments on 9 April 2019 at 9.00am. The Appellant provided a further statement to the Tribunal dated 20 March 2019 (**RSRT Remittal Statement**) together with further written submissions (**RSRT Remittal Submissions**). The hearing took place on 9 April 2019. After the hearing, further evidence by way of a Baptism Certificate was provided

to the Tribunal. In addition, post-hearing submissions were also provided to the Tribunal dated 24 April 2019 (**Post-Hearing Submissions**).

21. On 4 July 2019, the Tribunal decided to affirm the determination of the Secretary that the Appellant is not recognised as a refugee and is not owed complementary protection under the Act (**Tribunal Decision**).

22. The Appellant acknowledged notification of the Tribunal decision on 22 July 2019 and filed a Notice of Appeal in this Court on the same day. That Notice of Appeal has subsequently been amended by the Appellant on 17 January 2020 and again further amended, shortly before the hearing of the appeal, on 4 October 2022. That (Further) Amended Notice of Appeal was also the subject of an oral application during the course of the hearing of the appeal for further amendment. That application was not opposed by the Respondent, the Republic of Nauru, and the amendment was allowed.

23. The ground of appeal which is agitated by the (Further) Amended Notice of Appeal is as follows (marked-up with the further amendment):

> *"The Tribunal erred in law by failing to consider integers of the Appellant's claims as a Christian convert, namely the additional risks of harm from those the Appellant faced from the broader community if his comrades from Jamaat-e-Islami (**JI**) in his local area found out that on Nauru the Appellant had been baptised as Christian and attended religious services there as a Christian and was [sic] thereby committed apostasy from Islam.*
>
> *Particulars*
>
> *a. The appellant expressly claimed in his RSRT Remittal Statement that "My comrades from Jel would definitely kill me if they found out what I have done and my changed opinions on Islam. I think they would think I had betrayed them by converting": (the **JI claims**).*
>
> *b. In the context of the RSRT Remittal Statement, the appellant's other claims and the Tribunal's findings:*
>
> *i. "My comrades from Jel" meant those from the appellant's family's home area in Bangladesh with*

whom the appellant had associated when he was an associate or primary member of JI there;

ii. *" ... what I have done" meant what the appellant had done on Nauru in converting to Christianity, including being baptised a Christian and practising Christianity there by attending religious services.*

c. *The Tribunal did not recite or evaluate the JI claims in relation to the appellant's baptism and religious service attendance on Nauru.*

d. *In considering the appellant's claims as a Christian convert the Tribunal made no general findings which subsumed the JI claims, for example that the JI comrades would not find out the appellant had been baptised, or that the appellant's conversion on Nauru was not genuine but undertaken for the purposes of his application for recognition as a refugee.*

e. *The JI claims were not subsumed in the Tribunal's evaluation or findings on the appellant's claims of harm arising from his Christian conversion from the broader Bangladesh community.:"*

24. There are inconsistent references in the material to "JI" and "JeI", however, each is a reference to Jamaat-e-Islami. Both references will appear at various points in this judgment.

Background to the Appellant's Refugee Status Determination Claims

25. The Appellant is a citizen of Bangladesh of Bengali ethnicity from the Panchori district in the Chittagong division of Bangladesh. At the time of his RSD application, he claimed to be of Sunni Muslim religion, but claimed in his RSRT Remittal Statement to be Christian.

26. In the Secretary's Decision dated 9 October 2015, the Appellant's material claims were summarised as follows:

- *"In August 2007 while at school, the Applicant, joined Chatra Shibir (CS), which is the student wing of Jel.*

- *After the completion of his schooling, the Applicant continued to participate with Jel. During this time the Applicant was supported by his Father who was a leader of Jel in the local area. The Applicant's brother was a Jel activist.*
- *The Applicant worked as a volunteer at the offices of Jel in Panchori 3 to 4 times a week. The Applicant would undertake administrative duties, canvassed votes and members, as well as assisted in organizing demonstrations and party meetings.*
- *In 2009, the Awami League (AL) formed government. Not long after this, they began oppressing the supporters of the Jel.*
- *On 2 August 2009, member of the AL raided the home of the Applicant's family. The Applicant's mother and younger siblings were beaten and the family members were threatened that they would be killed if they continued to support Jel. The Applicant's house was vandalised and their personal items destroyed. The Applicant's family was unable to seek the assistance of the police as they were controlled by AL.*
- *The Applicant's family decided to move as they felt vulnerable to attacks by the AL and they did not have the resources to ensure their safety. On 10 August 2009, the Applicant and his [sic] moved to another city. During this time the family moved regularly.*
- *The Applicant amended his religious practices as he became fearful that he would be identified as a Jel supporter.*
- *In November 2001, Jel leader Delwar Hussain Sayedi was arrested simply due to being a member of Jel. The Applicant felt that it was his responsibility to protest against the government. The Applicant participated in countless protests. The Applicant's life was threatened on many occasions.*
- *On 5 May 2013, the Applicant attended a large peaceful protest against the Government in Dhaka city. Many people were killed and the Applicant was severely beaten by AL members and supporters. The Applicant spent three days in hospital before being released.*

- *The Applicant's father was also beaten and injured. The Applicant's brother has been missing since the protest and it is feared he has been killed.*
- *When the Applicant returned home, his father made arrangements for him to leave as he believed he would be identified and harmed by AL supporters."*

27. From the Appellant's Original Statement, the following original claims should be noted:

"Why I left Bangladesh

*7. I fled Bangladesh because of my involvement with Jamaat-e-Islami (**JI**) political party and because I am a Muslim.*

*8. JI is an Islamist political group that promotes equality and peace. It doesn't discriminate between people. JI aims to create an Islamic state. It has a strong alliance with the Bangladeshi National Party (**BNP**).*

9. JI has now been banned by the Bangladeshi government and the government prosecutes and executes those that follow JI. There has been long-standing conflict and violence between Awami League and JI.

10. It is part of the Bangladeshi culture, to join a political party – for safety and enjoyment of human rights. I feel that it is the right of every citizen to choose their political party.

11. In August 2007, while in school, I joined JI's student wing named Chatra Shibir. After I finished school, I continued my involvement with JI. My father supported me. He was a leader in JI in our local area Panchori. My brother [Brother's Name] *was also a JI activist.*

12. I would volunteer my services at the offices of JI in Panchori 3 to 4 times a week. I undertook administrative duties, canvassed votes and members as well as assisted organising demonstrations and party meetings.

13. ..."

28. The Secretary did not find the Appellant to be a credible witness however did accept that the Appellant was a low-level supporter of the JI. More specifically, the Secretary did not accept that:

- the Appellant was an actively engaged JI supporter with a leadership role or with strong associations with the JI leadership;
- the Appellant's father was in any leadership position within the JI or in any position of influence, which could potentially be considered a threat by the ruling Awami League Party;
- the family of the Appellant was specifically targeted by Awami League members or police on account of their political involvement in August 2009;
- the Appellant attended the 5 May 2013 protests in Dhaka and was injured during an outbreak of violence;
- the Appellant has a political or other profile which would be of interest to the Awami League or any individual(s) and/or group(s) aligned with the Awami League.

29. The Further Statement of the Appellant again claimed involvement with the student wing of JI, by attending meetings and participating in activities in the area where he resided. The Further Statement also sought to address the Secretary's findings. The Appellant restated and provided further details regarding his claims concerning JI. The Appellant claimed if he returned to Bangladesh, he would continue to associate with members and supporters of JI. The Appellant clarified his claim in relation to JI that it was in the area in which he lived and he was only claiming to have involvement or a profile in his local area. Further, that the interest that the Awami League had in the Appellant's father and brother was a claim referring to local members and supporters of the Awami League in his local area, not to important Awami League leaders. The Appellant claimed it was not safe for him to return to Bangladesh and he was at risk of being harmed by authorities and members and supporters of the Awami League in his local area.

30. The Original Submissions were also made on behalf of the Appellant to the Tribunal on the basis that he claimed a well-founded fear of persecution for reason of his:

(a) political opinion, membership and involvement in JI;

(b) imputed political opinion of supporting or being part of JI due to the involvement of his father and brother in JI;

(c) religion as a Muslim and/or the consequent imputed political opinion of supporting JI.

31. In addition, the Original Submissions made a claim of complementary protection.

32. On 3 July 2016 the Tribunal affirmed the determination of the Secretary. The Appellant did not attend the hearing before that Tribunal and the Tribunal noted that many of his claims were lacking in details and unsupported by other evidence.

33. As is outlined above that decision of the Tribunal was quashed after a successful appeal to the High Court of Australia.

34. On the remittal to the Tribunal the Appellant was again invited to appear before the Tribunal. The Appellant provided the RSRT Remittal Statement and the RSRT Remittal Submissions, in support of the remitted review by the Tribunal of his RSD application.

35. The Appellant provided further details about when he claimed to have joined JI, his association with JI, threats received by the Awami League to his family, his father's and brother's involvement in JI, including that his father was a local JI leader and received threats from the Awami League. The Appellant also provided further details in relation to his brother, who the Appellant claimed went missing after the 5 May 2013 protest.

36. In addition to these matters, the Appellant also made new claims and provided new information in the RSRT Remittal Statement of matters that had arisen since his first Tribunal hearing regarding his claimed conversion to Christianity since being in Nauru. The Appellant claimed to have been baptised on 22 April 2018 and specifically stated the following in the RSRT Remittal Statement:

> *"54. If I go back to Bangladesh and tell people I have become a Christian and try to recruit other Christians to my faith, as I am required to do, I believe people in Bangladesh may harm me.*

55. *If somebody is born Christian, they may face some problems in Bangladesh, but as a convert, it is very bad. Especially for somebody like me who has been in close association with JEL. They are not friendly to people like me.*

56. *My comrades from JEL would definitely kill me if they find out what I have done and my changed opinions on Islam. I think they would think I had betrayed them by converting. I know that turning away from Islam is a crime and I believe they would punish me with full force.*

57. *I am afraid of other people in Bangladesh harming me if I return. My father and family will harm me.*

Opposition to Islam and JEL

58. *As a former member of JEL, I used to believe Bangladesh should be an Islamic state. I no longer think Bangladesh should be an Islamic state. I do not think Muslims in Bangladesh easily accept people from other religions. I think that should change. We should be tolerant and helpful to one another and I do not believe that is the approach taken by most Muslims in Bangladesh.*

59. *I would be harmed if I spoke about my opposition to Islam in Bangladesh. I know that Bangladeshi society is extremely sensitive to blasphemy or words against Islam. I fear that even if I entered a normal conversation with friends about our beliefs I would be at risk of harm.*

60. ...

State protection

61. ...

62. *I cannot seek protection from the authorities in my country as they are the ones from whom I fear harm. The Awami League are the political party in power in Bangladesh and they are the ones who persecuted me in the first place. They may still think that I am a member of JEL and harm me.*

63. *Furthermore, I fear harm from the authorities because Bangladesh is a Muslim country and the authorities may persecute me for my apostasy and conversion to Christianity.*

64. *I will neither be a member of JEL or Awami League if I return, and as a Christian convert I will be exposed to harm from both of these groups."*

37. The RSRT Remittal Submissions advanced his previous claims as follows:

- His risk of persecution arises (cumulatively and separately) from his:
  - Imputed political opinion in support of Jamaat-e-Islami (Jel); and
  - Membership of the particular social group: 'People who departed Bangladesh illegally'.

38. The RSRT Remittal Submissions also advanced submissions based on the Appellant's new claims that he faces a real risk of harm due to his:

- Religion (Christianity both apostasy and conversion);
- Membership of the particular group '*Christian converts from strict Islamic families*'; and
- Membership of the particular social group '*people who are anti-Islam in Bangladesh*'.

39. Claims for complementary protection were also advanced.

40. The RSRT Remittal Submissions also addressed matters, effectively in response to the first Tribunal decision addressing inconsistencies and credibility, in relation to his poor knowledge of the JI party and explaining his father's role within JI. The RSRT Remittal Submissions also addressed the Appellant's credibility regarding his claims in relation to Christianity. In addition to these matters, updated country information and detailed submissions regarding the bases of the Appellant's claims of persecution, were also made in the RSRT Remittal Submissions.

41. In relation to the particular submissions made regarding the Appellant's fear of harm arising from conversion to Christianity, it was submitted that there is a difference in Bangladesh between somebody who is descended from a Christian or Catholic family and someone who has converted from an Islamic family. The submission contended

that the Christians who have access to all of the services in society are descendants of colonisation or indigenous people who converted sometime ago. Those Christians who have converted from Islamic families, still suffer discrimination at a local level, it was submitted. It was further submitted that apostasy is one of the most serious sins within Islam and consequently carries the punishment of death under Shari'a Law (the Quran was also referenced). The RSRT Remittal Submissions contended that the Appellant faced a heightened risk of harm from his family and local community for his conversion away from Islam and to Christianity, as well as from the authorities. The Appellant claimed he would come to the attention of state actors and non-state actors in the practicing of his faith. In so doing, he will face threats, ostracism and societal pressure as an apostate and Christian convert.

42. In addition to the fear of harm arising from conversion to Christianity, the Appellant also made submissions regarding harm arising from his anti-Islam opinion. The Appellant claimed that his risk of harm in this regard was heightened due to his strong family links to JI. The Appellant's rejection of Islam was said to be a blasphemy by his family and community. The penalties for blasphemy in Bangladesh were referred to as part of this claim.

43. As part of his complementary protection claims, submissions were also advanced in the RSRT Remittal Submissions in relation the prison conditions in Bangladesh. This was on the basis that if the Appellant was returned to Bangladesh, he would face arrest and imprisonment on the basis of his imputed political affiliation with JI, his illegal departure from Bangladesh and his Christian conversion, together with anti-Islam opinion.

44. After the hearing, later that day, the Tribunal gave written citations for the country information discussed with the Appellant at the hearing. Further, shortly after the hearing, the Appellant's representatives provided a copy of his Certificate of Baptism dated 22 April 2018 and also provided the Post Hearing Submissions. Those submissions addressed under the heading, "*Adverse Country of Origin Information Identified by the Tribunal*", Christians in Bangladesh and Christian Converts in Bangladesh and the JI.

45. The Tribunal affirmed the determination of the Secretary that the Appellant is not recognised as a refugee and is not owed complementary protection. The Tribunal

provided the following summary of the Appellant's claims in the Tribunal Decision (at [20]-[21]):

> ***"Summary of Claims***
>
> *The (Appellant's) claims for refugee status, as summarised in his representative's written submissions dated 13 February 2019 are that he fears persecution arising (cumulatively and separately) by reason of his:*
>
> - *Imputed political opinion, in support of Jamaat-e-Islami (**JI**);*
> - *Religion, namely Christianity, both apostasy and conversion;*
> - *Membership of a particular social group, namely Christian converts from strict Islamic families;*
> - *Membership of a particular social group, namely people who are anti-Islam in Bangladesh;*
> - *Membership of a particular social group, namely "People who depart Bangladesh Illegally".*
>
> *In his statement dated 20 September 2014, the applicant also claimed he fears persecution by reason of his:*
>
> - *Muslim religion;*
> - *Membership of a particular social group, being someone who has sought asylum in another country."*

46. The Tribunal considered in detail the Appellant's claims based on actual or imputed political opinion: support of JI in its decision (over some 80 paragraphs) and concluded that the Appellant was only a low-level JI supporter and that was only for a short period of time. The Tribunal was satisfied that the Appellant would not again become a member or supporter of JI. As such the Tribunal concluded that there is not a reasonable possibility of harm to the Appellant in the future if he was to return to his family's home area in Bangladesh because of any past association with JI or because of his past association that his family has had with JI.

47. The Tribunal considered the Appellant's claims based on religion: conversion from Islam to Christianity and separately, rejection of Islam. The Tribunal considered these

claims in detail (over some 62 paragraphs) and concluded, having regard to the findings made and the country information, that it does not accept there is a reasonable possibility that the Appellant will face harm amounting to persecution because of his religion including apostasy; his membership of a particular social group, namely Christian converts from strict Islamic families; or his membership of a particular social group of people who are anti-Islam in Bangladesh (assuming that such a particular social group exists).

The Ground of Appeal

48. The only ground of appeal now advanced can be summarised as that the Tribunal is claimed to have erred by failing to consider the integer of the Appellant's claims as a Christian convert being the additional risks of harm (to those that the Appellant claimed from the broader community), arising if his comrades from JI in his local area, found out he had been baptised as a Christian and attended religious services as a Christian.

The Appellant's Submissions

49. The Appellant's submissions to the Court addressed the Appellant's claimed conversion to Christianity, after setting out the Appellant's claims concerning his fears from the Awami League for his involvement in JI and what were claimed to be the established facts concerning JI membership and involvement. Of particular emphasis by the Appellant was the Tribunal's omission in its decision (at [110]) of the phrase, "*what I have done*".

50. The Appellant submitted that these words, which were omitted by the Tribunal, were of particular importance. These words were a reference to what the Appellant *had done*, being his conversion to Christianity on Nauru, and further, or in the alternative a reference that he had been baptised and he had been attending Christian religious services, as a Christian.

51. The Appellant then referred to the Tribunal's decision at [156] which states:

> *"156. The (Appellant) claims that, as a former Muslim who has converted to Christianity, he will be at risk of harm from his family and the broader community, particularly from his former JI colleagues."*

52. Although the Tribunal does appear, at least to some extent, to recognise the Appellant's claims to fear harm from his former JI colleagues, the Appellant submits that it should be noted that during the Tribunal hearing the Appellant was not asked about his fears from his former JI colleagues in this respect.

53. The Appellant also refers to paragraph [158] of the Tribunal Decision and again makes the submission that the Tribunal does not expressly refer to fears of his JI colleagues. The Appellant submits that it is the Tribunal's failure to address these additional risks of harm from JI because of what the Appellant had done on Nauru which are the subject of the ground of appeal.

54. The Appellant submitted the error of the Tribunal was by failing to consider these essential integers of the Appellant's claims as a Christian convert, namely the risks of harm additional to those he faced from the broader community if his comrades from JI in his local area were to find out that on Nauru the Appellant had been baptised as a Christian and attended religious services as a Christian.

55. The Appellant relied upon the finding of the Tribunal (at [145]) where the Appellant submits that the Tribunal accepted that the Appellant had been attending the All Nations House of Refuge Church for at least one year. The Tribunal also accepted that the Appellant had been baptised a Christian on 22 April 2018.

56. The Appellant submits that the Tribunal considered some aspects of the relevant country information (at [153] and [155]) and made some findings in relation to the Appellant's claimed religious faith as a Christian. However, the Appellant submits that these findings did not deal with the apostasy claim arising from the Appellant's claimed conversion to Christianity.

57. The Appellant submits that although the Tribunal addresses some of the conversion and apostasy claims (at [156]-[165]) the Appellant submits that the Tribunal did not go on to consider or make findings which addressed risk factors in the JI claims which were additional to those from the broader community. The Appellant submits that the Tribunal assessed the Christianity conversion claims by reference to '*specific factors*' of risk (at [156]-[165]) and country information, neither of which disposed of the JI claims specifically or generally.

58. In the Appellant's submission, there was no finding that JI was an Islamic militant group. Further, according to the Appellant, there was no separate evaluation of the JI

claims and that any more general findings in relation to the possibility of harm from community members or from the community were not dispositive of the JI claims in the sense discussed in *Applicant WAEE v Minister for Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at [47].

59. Further, the Appellant submits that the Tribunal made no general findings which subsumed the JI claims that, for example, the JI comrades would not find out that the Appellant had been baptised or that they would not find out that the Appellant was attending religious services.

60. As such, the Appellant submitted that the Tribunal failed to consider an essential integer of the Appellant's claims.

The Respondent's Submissions

61. With reference to paragraph [56] of the RSRT Remittal Statement, the Tribunal Decision at [110] and [156] the Respondent submits that the Appellant expressed a particular fear of harm from his (former) comrades from JI and the Tribunal rejected the entire premise of that claim.

62. The Respondent submits that the Tribunal expressly found that the Appellant's involvement with Christianity would cease if he were to return to Bangladesh and as such the Tribunal was not required to then identify each of the persons or groups from whom the Appellant claimed to fear harm as a result of his claimed conversion. That finding, according to the Respondent, was sufficient. The Tribunal rejected the factual premise of the claim to fear harm as a result of the claimed conversion to Christianity, including aspects of the claim involving a fear of harm from his former JI colleagues.

63. The Respondent submitted that the Tribunal did not make a finding expressly accepting that the Appellant had converted to Christianity.

64. The Respondent also submitted that the claim which is now advanced was not a claim that was put forward by the Appellant to the Tribunal and further was not squarely raised in terms of a substantial clearly articulated claim.

65. The Respondent submitted that the Appellant's claim was that the fact of the baptism and the fact of his attendances at church services were put forward as evidence of his conversion to Christianity. Those matters were not advanced as separate claims or

integers of the Appellant's claims, such that those matters, in and of themselves, would be the basis of a well-founded fear of persecution in Bangladesh and not from additional risks of harm from his former JI comrades.

Relevant Legal Principles

66. The reasons of the Tribunal are not to be scrutinised *"with an eye keenly attuned to error"*.[1] Neither is it necessary for the Tribunal *"to give a line-by-line refutation of the evidence for the claimant either generally or in those respects where there is evidence that is contrary to findings of material fact made by the tribunal"*.[2] It may be *"unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected."*[3]

67. Further, the Tribunal has no general duty to inquire or investigate an applicant's claim.[4] It is for an applicant to present evidence and arguments to the Tribunal. If an applicant could have presented a more compelling case, that does not give rise to jurisdictional error.[5] The concepts of jurisdictional error and point of law, in terms of section 43 of the Act, are discussed further below.

68. The High Court of Australia, when it was the ultimate appellate Court, observed the following in *ETA067 v Republic of Nauru* [2018] HCA 46 at [13]-[14] (footnotes omitted):

> *"[13] The absence of an express reference to evidence in a tribunal's reasons does not necessarily mean that the evidence (or an issue raised by it) was not considered by that tribunal. That is especially so when regard is had to the content of the obligation to give reasons, which, here, included referring to the findings on any "material questions of fact" and setting out the evidence on which the findings*

[1] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272; *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 (***WAEE***) at [46]
[2] *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at [65]; *QLN 107 v Republic* [2018] NRSC 23 (***QLN 107***) at [52].
[3] *WAEE* at [47].
[4] *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at [1] and [25]; *DWN 080 v Republic* [2018] NRSC 49 at [62]-[63]; *QLN 107* at [52].
[5] *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575 at [30], [35]-[36] and [87].

are based. There was no obligation on the Tribunal to refer in its reasons to every *piece of evidence presented to it.*

[14] Further, there is a distinction between an omission indicating that a tribunal did not consider evidence (or an issue raised by it) to be material to an applicant's claims, and an omission indicating that a tribunal failed to consider a matter that is material: including one that is an essential integer to an applicant's claim or that would be dispositive of the review."

69. That passage from the High Court of Australia, refers to a number of authorities, including, relevantly, *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67 (***SZSRS***) at [34] and *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 (***WAEE***) at [47].

70. It is worth setting out these passages (and *WAEE* at [46]) in full, given the ground of appeal.

71. The Full Court of the Federal Court in *SZSRS* at [34] (footnotes omitted) stated the following:

"[34] The fact that a matter is not referred to in the Tribunal's reasons, however, does not necessarily mean the matter was not considered by the Tribunal at all: SZGUR at [31]. The Tribunal may have considered the matter but found it not to be material. Likewise, the fact that particular evidence is not referred to in the Tribunal's reasons does not necessarily mean that the material was overlooked. The Tribunal may have considered it but given it no weight and therefore not relied on it in arriving at its findings of material fact. But where a particular matter, or particular evidence, is not referred to in the Tribunal's reasons, the findings and evidence that the Tribunal has set out in its reasons may be used as a basis for inferring that the matter or evidence in question was not considered at all. The issue is whether the particular matter or evidence that has been omitted from the reasons can be sensibly understood as a matter considered, but not mentioned because it was not material. In some cases, having regard to the nature of the applicant's claims and the findings and evidence

set out in the reasons, it may be readily inferred that if the matter or evidence had been considered at all, it would have been referred to in the reasons, even if it were then rejected or given little or no weight: MZYTS at [52]."

72. In *WAEE* the Full Court stated at [46]-[47]:

"[46] It is plainly not necessary for the tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323; 62 ALD 225; 180 ALR 1 at [87]–[97]) and a failure by the tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinised "with an eye keenly attuned to error". Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.

[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 too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where, however, there is an

issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked."

73. In addition, consideration must be given to legal principles articulated by the Full Court of the Federal Court in *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 (***NABE***) and the High Court of Australia in *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 26; (2003) 197 ALR 389 (***Dranichnikov***). These principles have been applied by Freckelton J in this Court, in *QLN 107 v Republic* [2018] NRSC 23 at [47]-[52] (***QLN 107***).

74. The principles to be derived from these cases are that if the Tribunal fails to make a finding on "*a substantial, clearly articulated argument relying upon established facts*" that failure can amount to a failure to accord procedural fairness and a constructive failure to exercise jurisdiction.[6] In the Australian context, such errors have been considered in determining whether a Tribunal has fallen into jurisdictional error. Implicit in the submissions of the parties that these principles are applicable to an appeal under section 43 of the Act is that a jurisdictional error would satisfy the requirements of it being "*on a point of law*". There is good reason to accept such a proposition. Although the "*point of law*" would involve a question of law,[7] it is not confined to jurisdictional error but extends to a non-jurisdictional point of law (or question of law).[8] As such, the submitted principle to be applied that a failure to make a finding on a substantial, clearly articulated argument relying upon established facts should be accepted as one which, if established, would amount to a point of law for the purposes of section 43 of the Act.

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[6] *NABE* at [55]; *Dranichnikov* at [24].
[7] See *Kowalski v Repatriation Commission* [2011] FCAFC 43 at [16] per Logan J with whom Dowsett and Cowdroy JJ agreed.
[8] See *Haritos v the Commissioner of Taxation* (2015) 233 FCR 315 at [62], [135] and [202].

75. The review by the Tribunal is inquisitorial rather than adversarial.[9] As such, the principles articulated by the Full Court of the Federal Court in *NABE* at [58] are apposite in this context. That is:

> *"...it has been suggested that the unarticulated claim must be 'squarely' on the material available to the Tribunal before it has a statutory duty to consider it: SDAQ v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 129 FCR 137 at [19] per Cooper J. The use of the adverb 'squarely' does not convey any precise standard but it indicates that a claim not expressly advanced will attract the review obligation of the Tribunal when it is apparent on the face of the material before the Tribunal. Such a claim will not depend for its exposure on constructive or creative activity by the Tribunal."*

76. The Tribunal is not obliged to deal with claims which are not articulated and which do not clearly or '*squarely*' arise from the materials before it (*NABE* at [60]). The decision of the Tribunal must be considered in light of the basis upon which the application was made and not upon an entirely different basis which may occur to an applicant or to an applicant's lawyer at some later stage in the process (*NABE* at [62]).

77. In this context, the observations from *SZSRS, WAEE* and *ETA067* must also be applied.

Consideration

78. In the Tribunal Decision at [103]-[165] the Tribunal considered the Appellant's claims based on religion "*conversion from Islam to Christianity; rejection of Islam*". The Tribunal considered the RSRT Remittal Statement of the Appellant and his claims to have converted to Christianity since being in Nauru. Given the importance placed on a particular aspect of the Appellant's RSRT Remittal Statement, although set out in more detail above, it is worth setting out paragraph [56] again, which states:

> *"56. My comrades from JEL would definitely kill me if they find out **what I have done** and my changed opinions on Islam. I think they would think I had betrayed them by converting. I know that turning away from Islam is a crime and I believe they would punish me with full force."*

(emphasis added)

[9] *DWN 080 v Republic* [2018] NRSC 49 at [27] and the authorities referred to therein.

79. Relevantly, at [110] the Tribunal Decision states:

> *"[110] If he goes back to Bangladesh and tells people he has become a Christian and he tried to recruit others to his faither, as he is required to do, people in Bangladesh may harm him. As a convert, it is bad, especially for someone like him who has been associated with JI.* ***His comrades from JI would definitely kill him if they found out he had changed his opinions about Islam****. They would think he had betrayed them. Turning away from Islam is a crime and he would be punished with full force. He is also afraid other people, including his father and his family would harm him."*
>
> (emphasis added)

80. This paragraph from the Tribunal Decision is a consideration of the Appellant's RSRT Remittal Statement at paragraphs [54]-[57], which includes paragraph [56]. The Appellant emphasises the absence of the words "*what I have done*" to support the ground of appeal. However, this paragraph in the Tribunal Decision should not be considered in isolation.

81. The Tribunal Decision continues and considers the matters put forward by the Appellant in relation to his claimed conversion to Christianity. This included his claim and evidence of being baptised (at [106], [129] and [145]).

82. The Tribunal considered these claims in detail and relevantly concluded as follows:

> *"[145] However, the Tribunal accepts that the applicant has been attending the All Nations House of Refugee Church for at least one year, possibly longer, given his written statement that he commenced attending church in late 2017. He produced a baptism certificate signed by Reverend Richard Rima showing that he was baptised on 22 April 2018, which confirms his involvement in the church. The Tribunal accepts that the applicant has been baptised into the Christian faith.*
>
> *[146] The Tribunal has considered whether the applicant has a genuine, ongoing commitment to the Christian faith. ...*
>
> ...

[149] The Tribunal accepts that in the applicant's current circumstances he may find comfort in attending church but finds that he does not have a deep spiritual commitment to the Christian faith. In these circumstances, the Tribunal does not accept the applicant's current involvement with Christianity would be maintained if he returned home to his own family and community.

[150] Even if the Tribunal had accepted that the applicant would practice the Christian faith if he returned to Bangladesh, it does not accept that he would openly proselytize or attempt to convert others to Christianity.

...

...

[156] The applicant claims that, as a former Muslim who has converted to Christianity, he will be at risk of harm from his family and the broader community, particularly from his former JI colleagues.

[157] The submission dated 13 February 2019 asserts that the applicant faces a heightened risk of harm from his family and local community, as well as from authorities, because of his conversion to Christianity. This claim has been put in a number of ways, fear of harm due to the applicant's apostasy (abandonment of Islam) and conversion; membership of a particular social group, namely Christian converts from strict Islamic families; and membership of a particular social group, namely people who are anti-Islam in Bangladesh.

...

[162] The Tribunal is not satisfied that there is a reasonable possibility that he applicant will be harmed by his own family or by community members as a Christian convert. The country information does not support these claims. ... ...

[163] The Tribunal has carefully considered whether there are specific factors that would make the applicant a person who would be at risk of harm or persecution because of this conversion from Islam to Christianity, in the context of the available country information. It finds he has a low-level of commitment to Christianity and is not likely

to pursue it upon his return to Bangladesh. It is not satisfied he would proselytise or seek to convert to others. Even if he attends a Christian church of his choosing, which the Tribunal does not accept he will, it may cause some disapprobation, but the Tribunal is not satisfied having regard to the country information above, that there is a reasonable possibility it would result in serious harm from his family, the community or authorities.

[164] The applicant has not publicly expressed anti-Islamic views or views opposed to Islamic fundamentalism or claimed that he would do so in the future. On the evidence before it, the Tribunal does not accept the applicant will express anti-Islamic or anti-fundamentalist's views that would bring him to the attention of authorities and subject him to the risk of arrest for blasphemy or apostasy or bring him to the attention of Islamic militants. In any event, the likelihood of any attack by Islamic militants is remote given the sporadic nature of such attacks in Bangladesh and the recent actions taken by authorities to address militant activity.

[165] Having regard to the findings and country information above, the Tribunal does not accept there is a reasonable possibility the applicant will face harm amounting to persecution because of his religion including apostasy; his membership of a particular social group, namely Christian converts from strict Islamic families; or his membership of a particular social group of people who are anti-Islam in Bangladesh (assuming that such a particular social group exists in Bangladesh)."

83. The Tribunal does not make a separate express finding that the Appellant had converted to Christianity or that he had undergone a process of conversion to Christianity. The Tribunal does not use the language of 'conversion'. However, as is evident from the above passages, the Tribunal did consider the claims regarding his claimed Christianity and found that the Appellant:

(a) has been attending the All Nations House of Refuge Church for at least one year, possibly longer;

(b) was baptised into the Christian faith on 22 April 2018;

(c) does find some comfort in attending church;

(d) has a low-level commitment to Christianity;

(e) does not have a deep spiritual commitment to the Christian faith;

(f) would not maintain his involvement with or pursue Christianity, if he was returned to Bangladesh; and

(g) would not proselytise or seek to convert others, if he was returned to Bangladesh.

84. The Tribunal also found that even if the Appellant did attend a Christian church of his choosing in Bangladesh (which the Tribunal did not accept he would), that conduct may cause some disapprobation, but the Tribunal was not satisfied that there was a reasonable possibility that it would result in serious harm from his family, the community or authorities.

85. The claims made both in the RSRT Remittal Statement and in the Remittal Submissions and Post-Hearing Submissions put forward on behalf of the Appellant refer to the claim that the Appellant will face a real risk of harm due to his religion are based on apostasy and conversion to Christianity as well as memberships of particular social groups, which also involve the conversion to Christianity and people who are anti-Islam. The Remittal Submissions detail this claim (Remittal Submissions at [62]) by claiming a fear of harm due to his conversion to Christianity and refer to his undergoing formal conversion in the following months of attending church and learning about Christianity. The formal conversion is after a reference to his baptism on 22 April 2018. In this context, the reference and evidence of the Appellant's baptism seeks to support the claimed conversion to Christianity. The Remittal Submissions contain many references to the concept of conversion or converts to Christianity.

86. The authorities require that the Tribunal must consider an argument which is substantial and clearly articulated which relies upon established facts. This involves two aspects. First, that the argument must be substantial and clearly articulated or to use the language from *NABE* that an unarticulated claim must be "*squarely*" raised; secondly, that it must rely upon established facts.

87. The Appellant does not identify an express argument or material which expressly raises the claim of an additional risk of harm from his comrades in the JI, if they found out he had been baptised a Christian and attended religious services as a Christian.

88. As such, it is necessary to consider whether the claim is "*squarely*" raised on the material before the Tribunal. Whether that claim does arise on the Appellant's material before the Tribunal does not require some constructive or creative activity by the Tribunal. The Tribunal's obligations do not extend to having to consider claims which do not clearly or "*squarely*" arise on the materials before it (*NABE* at [62]).

89. The Appellant relied upon his baptism as a Christian and his attendance at religious services to demonstrate or to evidence his conversion to Christianity. The Appellant's materials did not "*squarely*" raise the fact of the baptism of itself or the fact of attendance at Christian religious services, of itself (or even together with the fact of the baptism – but not as evidence of his conversion to Christianity) as matters which would mean the Appellant was at risk of additional harm from his former JI comrades. I do not accept that such claims (as now advanced) in and of themselves were "*squarely*" raised on the material before the Tribunal.

90. The emphasis sought to be placed upon the words "*what I have done*" from paragraph [56] in the RSRT Remittal Statement are equally open to be interpreted, consistent with his RSRT Remittal Submissions and his RSRT Remittal Statement, that what he has done is converted to Christianity and thereby "*changed opinions on Islam*". This was the approach of the Tribunal and open to it in all of the circumstances.

91. Further and secondly, in terms of the *Dranichnikov* test that the failure to make findings must relate to "... *established facts*". The Tribunal did not make an express finding that the Appellant had converted to Christianity or would be considered, on his return to Bangladesh, as a Christian convert. However, the Tribunal clearly considered this claim and made relevant findings regarding his claimed conversion. I do not suggest by this observation that the Tribunal was required to make a specific finding about the claimed conversion to Christianity, it was open for the Tribunal to consider the claims and make the findings it actually made.

92. As the reasons of the Tribunal disclose, it found that the Appellant would not pursue Christianity upon his return to Bangladesh. The Tribunal was also not satisfied that the Appellant would convert or attempt to convert (proselytise) others. Implicit in these

findings, was that he would not be considered a Christian convert in Bangladesh. This is also consistent with the Tribunal's finding that it did not accept he will attend a Christian church upon his return. However, the Tribunal found that even if he did attend a Christian church of his choosing, there is no reasonable possibility it would result in serious harm, from his family, the community or authorities (Tribunal Decision at [163]).

93. Further, (Tribunal Decision at [164]) the Tribunal did not accept that the Appellant would express anti-Islamic views on his return to Bangladesh, that would bring him to the attention of the authorities and subject him to the risk of arrest for blasphemy or apostasy. Insofar as the ground of appeal was amended during the hearing to allege this integer of the Appellant's claim of committing apostasy from Islam was not considered, I reject that submission on this basis.

94. In addition to these matters, the Tribunal found that the Appellant's involvement in JI activities was negligible. He was a low-level supporter and not an active member of JI and any involvement ceased in 2009 (Tribunal Decision at [34]). The Tribunal also found that he would not be involved in JI should he be returned to Bangladesh (Tribunal Decision at [90] and [97]). Therefore, insofar as the ground of appeal seeks to advance the fear of harm from his former JI colleagues, the findings that he was only a low-level supporter not a member, he would not engage in JI upon his return and he would not pursue Christianity, do not provide the necessary "*established facts*".

95. In any event, the Tribunal did consider the claims as articulated by the Appellant. Insofar as a claim was raised that his claimed conversion to Christianity meant he would be at risk from his former JI colleagues, that was articulated and considered (Tribunal Decision at [156]). At paragraph [156], the Tribunal refers to "*the broader community, particularly from his former JI colleagues*". The framing of the issue in this way by the Tribunal means that reading the Tribunal Decision as a whole, the later reference (at [163]) to the community should be read as including the former JI colleagues. Further to this is the finding (at [165]) of greater generality. In that paragraph the Tribunal finds that the Appellant will not face harm amounting to persecution because of his religion including apostasy, his membership of a particular social group, namely Christian converts from strict Islamic families or membership of a particular social group, namely people who are anti-Islam. This is a finding that the Appellant would not face any harm amounting to persecution. This is a finding of

greater generality and any claimed harm from former JI comrades, would be subsumed into this finding. As would the basis of the claimed harm, being because of his religion, including apostasy. Stating the claims at this higher level of generality, again would subsume (if such claims "*squarely*" arose, which I do not accept they did) any specific claims based on the fact of the baptism or the fact of attending Christian church services.

96. As such, the claimed integer, the subject of the ground of appeal, was not an argument which the Tribunal was obliged to consider because it did not "*squarely*" arise and it was not based upon "*established facts*". However, if I am wrong about that, the findings that the Tribunal did make, were sufficient to subsume this particular aspect of the Appellant's claims. On either basis, the ground of appeal as advanced does not constitute an error of law. The appeal must be dismissed.

Conclusion

97. Under section 44(1) of the Act, I make an order affirming the decision of the Tribunal dated 4 July 2019 and make no order as to costs.

JUSTICE AMELIA WHEATLEY

Dated: 6 December **2022**

SUPREME COURT OF NAURU