NAURU COURT OF APPEAL
AT YAREN
APPELLATE JURISDICTION

Refugee Appeal No. 10 of 2019
[Supreme Court Refugee Appeal No. 70 of 2015]

BETWEEN: **VEA 028**

APPELLANT

AND: **REPUBLIC OF NAURU**

RESPONDENT

BEFORE: **Justice R. Wimalasena**
Justice C. Makail

DATE OF HEARING: **17/10/2022**

DATE OF JUDGMENT: **9/8/2024**

CITATION: **VEA 028 v. REPUBLIC OF NAURU**

KEYWORDS: **COURT OF APPEAL – Refugee appeal – Appeal against dismissal of appeal by Supreme Court – Appeal to Supreme Court from decision by Refugee Status Tribunal to affirm determination of Secretary to bold applicant not eligible for refugee status and owed complementary protection – Refugees Convention Act, 2012**

COURT OF APPEAL – Practice & Procedure – Application for leave to amend ground – Principles of leave discussed – Adequate explanation for not including ground in notice of appeal – Prospect of success of proposed ground – Prejudice to respondent – Interests of justice

COURT OF APPEAL – Immigration – Application for refugee status – Relocation – Claim of fear to harm to bomb blasts – Use of statistical analysis of risk of harm to appellant – Use of statistics on population of country – Use of statistics on population of Pashtun ethnicity – Whether Tribunal's finding legally irrational - Refugees Convention Act, 2012 – Section 34(4)

LEGISLATIONS: **Refugees Convention Act, 2012, Nauru Court of Appeal Act, 2018**

CASES CITED: **CGA15 v. Minister for Immigration (2019) 268 FCR 362, DZADQ v. Minister for Immigration and Border Protection (2014) FCA 754, Eastman v. R [2000] HCA 29; 203 CLR 1**

APPEARANCES**:**

COUNSEL for the Appellant: **Mr. C Hibbard**

COUNSEL for the Respondent: **Mr. T Reilly**

JUDGMENT

1. This is an appeal from a decision of the Supreme Court of Nauru given on 2nd May 2018. The Supreme Court dismissed an appeal brought by the appellant under Section 43(1) of the *Refugees Convention Act, 2012* (Nr) (*"Refugees Act"*) in respect of a decision of the Nauru Refugee Status Review Tribunal (*"Tribunal"*) of 22nd May 2015, on a point of law. The Tribunal affirmed a decision of the Secretary of Justice and Border Control (*"Secretary"*) not to recognize the appellant as a refugee and that he is not owed complementary protection under the *Refugees Act.*

Brief Facts

2. The background facts are set out in the decision of the Supreme Court which are uncontroversial and respectfully adopted as follows, the appellant is a 32-year-old Suni Muslim man from Pakistan. He was born on 01st December 1984 in Peshawar, Khyber Pakhtunkhwa province. He is of Pashtun ethnicity. His widowed mother and his two sisters live in Pakistan. His two brothers and a sister live in Germany. His father died in 1992.

3. The appellant completed a Bachelor of Arts at the University of Peshawar, speaks Pashto, Urdu and English, and was self-employed in the retail sector from 2006. He was married in 2010 and has two children.

4. The appellant claimed at his Transfer Interview that in December 2010, the appellant was hit on the head with the butt of a gun and kidnapped from a Peshawar Street by members of the Taliban or a similar group while walking with his cousin. His cousin was shot in the leg. The appellant was blindfolded and taken away in a car. He was detained and tortured for seven months until a ransom of $30,000.00 was paid by his family, who sold a shop to raise money. He was released in July 2011. His family was only contacted after three to four months of detention.

5. In the appellant's Refugee Status Review Determination statement, he claimed that the kidnapping had taken place in November 2010, that he was detained for nine months, that the ransom amount was $40,000.00 and that he was released in August 2011. At the Refugee Status Review Determination interview, he claimed that his detention lasted five to six months and that he was released in either June, July, or August 2011. In both the Refugee Status Determination statement and interview, the appellant noted that he could not be certain precisely how long he was detained for.

6. After 12 months of recuperation, the appellant reopened his business in late 2012. He was harassed by phone calls demanding $50,000.00. He

changed his phone number in February 2013, but the demands continued by post. He reported this to the police, who told him to come back if he received more threats. In May 2013, the appellant closed in store and went into hiding. The appellant subsequently departed Pakistan on 14th July 2013 and was transferred to Nauru on 20th November 2013.

7. The threats continued against this family after his departure from Pakistan. One week before the appellant's Transfer Interview in Nauru, the appellant became very upset and agitated by news that his cousin in Punjab had refused to shelter his wife and children because he did not think it was safe to do so. Wilson Security and the 'mental health people' were made aware of this incident. In December 2013, his wife and children moved to a different area in Peshawar with a different family member.

8. The appellant fears persecution from the Taliban or a similar group. He fears persecution as a member of a particular social group comprising wealthy Pakistani and Baluchi businessmen. His family is affluent and has relatives abroad who send money home. He also fears persecution for his imputed political opinion as someone who has failed to comply with Taliban demands and as someone has spent time in a Western country. He claims that effective State protection is not available, and relocation would not mitigate the threat as it is present throughout the country. Further, his cousin was recently injured in a bomb blast in Peshawar, and such events are common in Pakistan.

9. On 27th February 2014, the appellant made an application to the Secretary for recognition as a refugee and for complementary protection under the *Refugees Act*. The Secretary did not find the appellant's claim to be credible. On 30th October 2014, the Secretary made a determination that the appellant is not a refugee and is not owed complementary protection.

10. The appellant made an application for review of the Secretary's decision to the Tribunal pursuant to Section 31(1) of the *Refugees Act*. On 1st March 2015, the appellant made a statement and on 16th March 2015 his lawyers Craddock Murray Neumann made written submissions to the Tribunal. On 19th March 2015 the appellant appeared before the Tribunal to give evidence and present his arguments with his representative and an interpreter in Pashto language. On 4th April 2015, the appellant's lawyers made further written submissions to the Tribunal.

11. The Tribunal also concluded that it did not find the appellant's claims to be credible. On 22nd May 2015 the Tribunal handed down its decision affirming the decision of the Secretary that the appellant is not recognized

as a refugee and is not owed complementary protection under the *Refugees Act*.

12. The appellant filed an appeal to the Supreme Court. On 2nd May 2018 the Supreme Court handed down its decision dismissing the appeal and affirming the decision of the Tribunal.

Grounds of Appeal

13. The sole ground of appeal in the notice of appeal is:

> *"1. The primary judge erred by failing to find that the Refugee Status Review Tribunal erred in law in relation to its findings on the Appellant's credibility."*

14. Subsequently, on 10th October 2022, the appellant filed an amended notice of appeal and pleaded two grounds of appeal as follows:

> *"1. The Tribunal did not provide adequate reasons for the conclusion at Reasons [96].*
>
> *a. This paragraph is merely conclusory, and does not explain at all the reasons why the risks which the applicant faces, and less than a possibility.*
>
> *b. This is a failure to comply with s 34(4)(b) of the Refugees Convention Act.*
>
> *2. The Tribunal did not give adequate reasons for the conclusion at Reasons [99].*
>
> *a. This paragraph is essentially conclusory, and does not explain at all the reasons why the risks which the applicant faces, and less than a real possibility. The fact that the applicant is one of 30 million persons is not probative of the risk he faces, in circumstances where hundreds have been killed and thousands injured (many not having been targeted at all) in terrorist attacks in Pakistan.*
>
> *b. This is a failure to comply with s 34(4) of the Refugees Convention Act.*
>
> *c. If the Tribunal reasoned that these numbers are "small" and the appellant is "one in a large population", the risk to him is not to be determined simply by creating a fraction with the*

small number as numerator and large number as denominator."

15. Then the appellant filed a further amended notice of appeal and relied on one ground of appeal in the following terms:

"~~The Grounds of Appeal are as follows:~~

~~1. The Tribunal did not provide adequate reasons for the conclusion at Reasons [96]~~

~~a. This paragraph is merely conclusory, and does not explain at all the reasons why the risks which the applicant faces, and less than a possibility.~~

~~b. This is a failure to comply with s 34(4)(b) of the Refugees Convention Act.~~

~~2. The Tribunal did not give adequate reasons for the conclusion at Reasons [99].~~

~~a. This paragraph is essentially conclusory, and does not explain at all the reasons why the risks which the applicant faces, and less than a real possibility. The fact that the applicant is one of 30 million persons is not probative of the risk he faces, in circumstances where hundreds have been killed and thousands injured (many not having been targeted at all) in terrorist attacks in Pakistan.~~

~~b. This is a failure to comply with s 34(4) of the Refugees Convention Act.~~

~~c. If the Tribunal reasoned that these numbers are "small" and the appellant is "one in a large population", the risk to him is not to be determined simply by creating a fraction with the small number as numerator and large number as denominator.~~

1. <u>The Tribunal's reasoning at (AB 231 [99] and [100] gives rise to an error of law on the basis it is irrational or illogical and/or a failure to give adequate reasons and/or a failure to carry out its statutory task.</u>

<u>Particulars</u>

a. <u>The appellant claimed to fear harm due to the risk of being injured or killed in a bomb blast.</u>

b. *The Tribunal found that the "likelihood of the [appellant]being killed or injured in a bomb blast [is] remote" and. Was "not satisfied there is a real possibility of the [appellant] being harmed this way" on the basis that:*

(i) *the appellant is a Pashtun;*

(ii) *there are approximately 30 million ethnic Pashtun across Pakistan; and*

(iii) *the "figures" therefore "do not support the [appellant's] contention".*

c. *The fact that the appellant is one of approximately 30 million ethic Pashtuns in Pakistan is not probative of, and has no rational connection with, the individual risk the appellant faced on return. Rather, the relevant question was the risk of harm the appellant faced from bomb blasts in Peshawar (the part of Pakistan the Tribunal accepted the appellant was from).*

d. *By not accessing the appellant's individual risk of harm in Peshawar, the Tribunal's reasoning was illogical and irrational and/or the Tribunal failed to carry out its statutory task.*

e. *Further and alternatively, in the particular circumstances of this case, the Tribunal's use of statistics failed to comply with s 34(4)(b) of the Refugees Convention Act."*

Application for Leave to Amend and Rely on Fresh Ground of Appeal

16. It is common ground between the parties that this ground of appeal has been pleaded to give greater details to what is being alleged against the decision of the Supreme Court in affirming the Tribunal's decision in the amended notice of appeal. It is also common ground that the amendment sought to the amended notice of appeal is within 14 days of the date fixed for hearing of the appeal and leave is necessary pursuant to Section 48(1)(b) of the *Nauru Court of Appeal Act 2018*. Furthermore, it is common ground that the application for leave, and appeal were heard concurrently.

17. Section 48 states:

*"**48 Amendments***

(1) A notice of appeal or respondent's notice may be amended and served:

(a) without the leave of the Court at any time before 14 days of the date fixed for hearing of the appeal; or

(b) with the leave of the Court at any time less than 14 days of the date fixed for hearing of the appeal.

(2) The amended appeal or respondent's notice shall be by way of Supplementary notice of appeal or respondent's notice."

Explanation for not including the proposed ground in original notice of appeal

18. As to why this ground of appeal was not included in the original notice of appeal, it was submitted by the learned counsel for the appellant that when organizing the documents for inclusion in the Appeal Book, two relevant documents were omitted. These were a letter from the Tribunal addressed to the appellant dated 4th May 2015 and a letter of response from Craddock Murray Neumann Lawyers to the Tribunal dated 15th May 2015. These letters are relevant to the credibility of the appellant's claims of threats of bomb blasts in Pakistan and request for relocation. These documents formed part of the records that were before the Tribunal at the time of making its decision. Secondly, the appellant was self-represented and being an asylum seeker and unaware of the processes, omitted to include these documents in the Appeal Book for hearing.

19. We also note that these documents were adduced by the appellant at the hearing and were unopposed by the respondent and formed part of the Appeal Book for the purpose of determining the proposed amended ground of appeal. The respondent does not contest the inclusion of these letters. Accordingly, we grant leave to the appellant to rely on them. Next, according to the learned counsel for the appellant, it was necessary to amend the original notice of appeal or moreover, the amended notice of appeal to give greater details in relation to the information that has come to light and what is being alleged against the decision of the Supreme Court for dismissing the appellant's appeal against the Tribunal's decision.

20. We received no submissions from the learned counsel for the respondent on this issue. Nonetheless, we accept the explanation of the appellant for the reasons as set out at [18] and [19] (supra).

Prospect of Success

21. According to the proposed amended ground of appeal, it is generally alleged that the Tribunal did not provide adequate reasons for its conclusion at [99] of its decision contrary to Section 34(4) of the *Refugees Act.* We set out Section 34(4) below:

> *"(4) The Tribunal must give the applicant for review and the Secretary a written statement that:*
>
> *(a) sets out the decision of the Tribunal on the review; and*
>
> *(b) sets oy the reasons for the decision; and*
>
> *(c) sets out the findings on any material questions of facts; and*
>
> *(d) refers to the evidence or other material on which the findings of fact were based."*

22. We discuss the specifics and details of the proposed amended ground below. The proposed amended ground attacks the finding in respect of bomb blasts. The relevant evidence is the letter from the Tribunal to the appellant dated 4th May 2015. This was one of the letters which was not included in the Appeal Book but we have allowed it. We note from this letter, the Tribunal informed the appellant:

> *"In your RDS statement you indicated that you fear being killed in a bomb blast, as your paternal cousin was injured in such a blast in early 2014, and these sorts of attacks happen throughout Pakistan. However country information accessed by the Tribunal suggests that the numbers killed and injured in such attacks are quite low when compared to the size of the population overall."*

23. After referring to four different websites for statistics, the Tribunal further advised the appellant:

> *"This information may lead the Tribunal to conclude that there is only a remote chance that you will be killed or even injured in a bomb blast if you return to Pakistan in the reasonably foreseeable future, and not a reasonable possibility that this might occur such that your fear in this respect can be said to be well-founded. This information may therefore form a reason for the Tribunal to affirm the determination of the Secretary that you are not recognized as a refugee and are not owed complementary protection under the Refugees Convention Act 2012."*

24. In the same letter, the Tribunal invited the appellant to comment on this information in writing and his comments are to be received by the Tribunal by 18th May 2015.

25. On behalf of the appellant Craddock Murray Neumann Lawyers responded to the Tribunal's request in a letter dated 15th May 2015. This is the second letter which was not included in the Appeal Book but we have allowed the appellant to rely on it. At second and third paragraphs of the first page of the letter, the Tribunal was informed of the appellant's position as follows:

> *"Our client instructs that the country information put forward by the Tribunal in your letter dated 4 May 2015 fails to consider our client's ethnicity and tribal links in assessing the risk of harm to him upon relocation. Our client instructs that, if he were to attempt to relocate within Pakistan, he would only be able to attempt to relocate to Pashtun-inhabited area of Pakistan, due to the tribal nature of Pakistan society.*
>
> *Our client instructs that the country information put forward by the Tribunal assesses the number of bomb blasts in the whole of Pakistan, which is not relevant to our client's claims and an assessment of our client's ability to safely relocate within Pakistan. Rather, our client instructs that the Tribunal ought only to consider the prevalence of bomb blasts in Pashtun areas of Pakistan, as these are the only areas to which our client could attempt to relocate."* (Emphasis added).

26. Further on, in the same letter, the Tribunal was informed that:

> *"Our client instructs that the Taliban and associated Sunni extremist militant groups in Pakistan are almost exclusively of Pashtun ethnicity. Therefore, the Taliban are based and concentrated in Pashtun-inhabited areas of Pakistan. These are the areas that they target for bomb blasts (with the minor exception of the Hazara communities in Quetta), and these are the areas where Pakistanis are most at risk of being innocently killed in such bomb blasts.*
>
> *Our client instructs, therefore, that although the numbers killed and injured in bomb blasts throughout Pakistan are quite low when compared to the size of the population overall, this cannot be said to be true of the Pashtun areas of Pakistan, where bomb blasts are prevalent and injure or take lives of a high number of Pashtuns*

when compared to the size of the Pashtun community in Pakistan overall, meaning the chance of our client being killed or even injured in a bomb blast if he returns to a Pashtun area of Pakistan could not be said to be remote.

In support of our client's instructions, we note that the overwhelming majority of bomb blasts listed in the country information provided in your letter dated 4 May 2015 took place in Pashtun-inhabited area of Pakistan, particularly the tribally administered areas of FATA and KPK. As such, the likelihood of our client being affected by such an attack ought to be assessed against the populations of those particular affected areas, rather than the general population of Pakistan overall. We therefore submit that there is certainly a chance of our client being killed or even injured in a bomb blast in the foreseeable future if he returns to a Pashtun area of Pakistan."

27. We note that the Tribunal considered the matters in the letter of 15th May 2015 and found that the appellant did not have a well-founded fear of persecution. At [41] of its decision, the Supreme Court affirmed the finding of the Tribunal as follows:

"At [98] the Tribunal concluded that, based on this country information there is only a remote chance that the appellant would be killed or injured in a bomb blast if he returned to Pakistan in the foreseeable future. Further at [99] the Tribunal, having considered the country information in population demographics of Pakistan, and again made a similar finding……"

28. The appellant contested part of the Tribunal's decision at [99] which states:

"The Tribunal acknowledges that such incidents do appear to be more somewhat prevalent in Pashtun areas, although they are by no means confined to them and as the applicant himself asserted in his RDS statement such incidents happen throughout Pakistan. The Tribunal nevertheless considers on the basis of the country information before it that regardless of whether the risk is assessed by reference to Pakistan as a whole or only to the Pashtun population, the figures do not support the applicant's contention. As noted above, the population is currently estimated to be in excess of 199 million. Pashtuns are Pakistan's second largest ethnic group, considerably behind Punjabis and marginally ahead of Sindis, comprising approximately 15.4% of the population according to a 2014 estimate: see the Pakistan Demographics

Profile 2014 published by Index Mundi at http://www.indexmundi.com/pakistan/demographics_profile.html and accessed on 18 May 2015. This means that there are approximately 30 million ethnic Pashtuns in Pakistan, and within that demographic the Tribunal finds the likelihood of the applicant being killed or injured in a bomb blast to be remote."

29. According to the learned counsel for the appellant, the Tribunal adopted the statistical approach to assess the credibility of the claim of fear to harm to bomb blasts. It was argued that there are two major problems with using a statistical approach. These problems constitute a legal error. First is that the Tribunal did not consider the appellant's circumstances at all in deciding whether he was at risk of a bomb blast. The learned counsel for the appellant submitted that it was established that the appellant is from Peshawar, and it was apparently accepted that any return to Pakistan would see the appellant return to living in that city. In this context, the appellant made a substantial claim against the complementary protection criteria based on a fear of being harmed in a bomb blast (essentially as a bystander).

30. It was further argued that the Tribunal responded to this claim in a manner that is not distinguishable from that found to be unlawful in *CGA15 v. Minister for Immigration* (2019) 268 FCR 362, in that it deployed a statistical approach at Reasons [99], irrationally. Since the appellant would live in Peshawar, it was not probative to determine the total number of people in Pakistan, or the total number of Pashtun in Pakistan. The only relevant question was the risk of harm to bomb blasts for the appellant in Peshawar. This was the method the Federal Court held in *CGA15* if the Tribunal were to use population statistics of an appellant's country of origin to assess the risk of fear to harm to bomb blasts.

31. However, it was argued that in this case the Tribunal completely ignored the basis of the claim that was before it and did not address where the appellant was likely to be on his return to Pakistan because the statistic given was for all of Pakistan rather than particular areas, including Pashtun areas. The learned counsel emphasized that the Tribunal did not address any heightened risk that Pashtun people might have and there was no actual consideration of the risk that Pashtun people might face of a bomb blast. The Tribunal relied on mathematical arithmetic to address the risk generally across Pakistan as a whole and this constitutes a clear error of law.

32. In the second case *DZADQ v. Minister for Immigration and Border Protection* (2014) FCA 754, it was submitted that it is a decision of a

single Judge of the Federal Court, but it was adopted with approval by the Full Court of the Federal Court in *CGA15* case. The slight factual distinction is unlike the *CGA15* case where it was about relocation of the appellant from one place to Islamabad or Rawalpindi, there is no question of relocation. It is about returning to the appellant's home city, by coincidence, was Peshawar.

33. The learned counsel for the appellant submitted that the second major problem is that the Tribunal failed to give reasons because there is no reasoning that describes precisely what the Tribunal did. A failure to give reasons constitutes a failure to comply with the Tribunal's duty under Section 34(4)(b) of the *Refugees Act* and constitutes a clear error of law. Furthermore, the Tribunal did not make any findings of fact that can be drawn from the evidence that it relied on. A failure of this description constitutes a failure to comply with the Tribunal's duty under Section 34(4)(d) of the *Refugees Act* and constitutes a further clear error of law.

34. We note it is not contested that the Tribunal may engage in a statistical analysis of the claim of fear to determine whether an applicant for complementary protection and refugee status will be exposed to harm or killed if returned to his home province in his country of origin. In the present case the Tribunal used the statistical approach based on the estimated population of the Pakistan of more than 199 million and out of which approximately 30 million are ethnic Pashtuns and concluded that the like-hood of the appellant being killed or injured in a bomb blast if he returns to Pakistan is remote.

35. It is necessary to point out that while the learned counsel for the appellant strongly argued that the only relevant question for the tribunal to determine was the risk of harm from bomb blast for the appellant in Peshawar, we note that the appellant did not inform the Tribunal to assess the risk of harm or being killed in a bomb blast in Peshawar. This is abundantly clear at the second paragraph of the letter to the Tribunal of 15th May 2015 where the Tribunal was informed that *"....if he were to attempt to relocate within Pakistan, he would only be able to attempt to relocate to a Pashtun-inhabited area of Pakistan, due to the tribal nature of Pakistani society."*

36. Where exactly in Pashtun-inhabited area of Pakistan, he does not say, nor did he ask the Tribunal to consider Peshawar. He left it open to the Tribunal to assess any exposure of fear to harm or being killed in a bomb blast in Pashtun-inhabited area of Pakistan. Now as the learned counsel for the respondent puts it, if there was some misunderstanding by the appellant or not, the Tribunal was entitled to proceed in the basis of what

was put to it. What was put to it is at the third paragraph of page one of the letter to the Tribunal of 15th May 2015. It states:

> *"Rather, our client instructs that the Tribunal ought only to consider the prevalence of the bomb blasts in Pashtun areas of Pakistan, as these are the only areas to which our client could attempt to relocate."*

37. This is the factual difference between this case and the *CGA15* case. In *CGA15* case the appellant was of Pashtun ethnicity and Shia Muslim faith who lived in Parachinar in Kurram Agency in Pakistan. Since 2007 there had been conflict between Sunni and Shia Muslims in the area of Parachinar and it was very dangerous. The Sunnis supported the Taliban and in Parachinar the Taliban have been responsible for many kidnappings, suicide bombs and other bombs targeting Shias. At [6] of the judgment, the Federal Court noted:

> *"The appellant claimed that there is no other safe place for him in Pakistan and that if he returned to that country he will continue to be at risk due to being a Shia. He says that there are bomb attacks in many different cities in Pakistan in which Shias are killed, including bomb blasts and killings of Shias in large cities such as Islamabad and Karachi."*

38. The Tribunal used statistics on the population of Pakistan to assess the risk of harm to the appellant and found that, to return him to Pakistan, there was not a real chance that, as a Shia, the appellant would face such harm outside the cities such as Islamabad and Rawalpindi. At [53] of its judgment, the Federal Court explained why statistical analysis is not always reliable:

> *"The problem with that approach includes that the Shia population of Pakistan will incorporate areas with a high population of Shias, such as Kurram Agency, and also areas with a much lower population of Pakistan does not assist in understanding the proportion or number of Shias in Islamabad or Rawalpindi. There was no evidence before the Tribunal about how many Shias live in those cities, or what proportion Shias comprise of the population of those cities. There was also no evidence of what proportion of Shias attend the religious festivals and parades, nor indeed how many Shias attend them."*

39. The Federal Court did not accept the Tribunal's conclusion that the appellant will face a remote risk of harm in those cities can reasonably be

based on the fact that Shias make up quarter of Pakistan's population. Thus, that case and *DZADQ* were cases where the Tribunal had engaged in reasoning about the whole of Pakistan when the issue was actually a fear in some individual city (Islamabad or Rawalpindi or Peshawar) and it was held that it is legally irrational. It is not the case here. The appellant did not make a claim to fear harm only in Peshawar from bomb blasts. He made a claim of fear to harm from bomb blasts in Pakistan generally or in Pashtun areas of Pakistan.

40. Furthermore, the learned counsel for the respondent argued and we accept that the claim is not based on fear that the appellant will be killed in Peshawar in one of the bomb blasts. What he was claiming is that bomb blasts happen throughout Pakistan. If the claim is read fairly, it is either the appellant is saying he will be killed in one of these bomb blasts in Peshawar or somewhere else in Pakistan because they happen throughout Pakistan. Finally, we accept the further argument advanced by the learned counsel for the respondent that there is no evidence to support the fear of being targeted, that is a fear of a targeted bomb blast. On the other hand, as the Tribunal characterized it, it is a fear of a random bomb attack.

41. As to the second ground, we accept, as a matter of law, as a decision-making authority, the Tribunal has a duty to give reasons for its decision. The duty to give reasons is reinforced by Section 34(4)(b) of the *Refugees Act.* We also accept that a failure to give reasons constitutes a failure to comply with the Tribunal's duty under Section 34(4)(b) of the *Refugees Act* and constitutes an error of law. Similarly, we accept that the Tribunal has a duty to make any findings of fact that can be drawn from the evidence that it relied on under Section 34(4)(d) of the *Refugees Act.* A failure to do that constitutes a failure to comply with the Tribunal's duty under Section 34(4)(d) of the *Refugees Act* and constitutes an error of law.

42. However, after having examined what the Tribunal had done, we accept the submissions of the learned counsel for the respondent that unlike what the Tribunal did not do in *CGA15* case at [50] of the judgment, in this case there is no basis to infer that the Tribunal did not have regard to its findings about the appellant's circumstances when doing so. Ultimately, the Tribunal gave its reasons at [99] of its decision. As the learned counsel for the respondent argued and we accept, *"....the issue was the level of risk to the appellant from random bombings, and a statistical analysis of such a risk to the population generally or to the Pashtun population was logically relevant to assessing such risk to the appellant."*

43. For the foregoing reasons, we are not satisfied that the proposed amendment to the grounds of appeal raise serious errors of law and have a reasonable prospect of success.

Prejudice to the Republic

44. The learned counsel for the appellant argued that the appellant will be the party who stands to lose the most because if leave is not granted, he will be returned to Pakistan.

Conclusion

45. However, as the Court in *Eastman v. R* [2000] HCA 29; 203 CLR 1 held, the Court will grant leave to advance a fresh ground of appeal only in exceptional cases. Given our finding that the proposed ground of appeal does not raise serious errors of law and that it does not have a reasonable chance of success, we are not satisfied that this is an exceptional case, and that it would be in the interests of justice that leave should be granted to the appellant to amend and to advance the proposed ground of appeal. The application for leave is refused.

Order

46. The final terms on the order of the Court are:

a) The application for leave to amend and to advance the proposed ground of appeal in the further amended notice of appeal is refused.

b) The appeal is dismissed forthwith.

c) No order as to costs.

Dated this 9th day of August 2024.

Justice Colin Makail
Justice of Appeal

NAURU COURT OF APPEAL

Justice Rangajeeva Wimalasena

I agree.

President
Justice of Appeal