IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 65/2015
Being an appeal against a decision of the Nauru Refugee Status Review Tribunal brought pursuant to s 43 of the Refugees Convention Act 2012

BETWEEN

YAU026 APPELLANT

AND

The Republic of Nauru RESPONDENT

Before: Khan, J
Date of Hearing: 25 July 2016
Date of Judgement: 31 May 2017

Case may be cited as: YAU026 -v- The Republic

CATCHWORDS:

Whether the tribunal erred in failing to provide the appellant procedural fairness and natural justice in breach of s. 22 and s.37 of the Act- On 23 December 2016 s.37 was repealed by s 24 of the Refugees Convention (Derivative Status and Other Measures) (Amendment) Act 2016- retrospectively to 10 October 2012- procedural fairness now has to be dealt with under the common law of Nauru.
Appeal dismissed as appellant was not denied procedural fairness.

APPEARANCES:

Counsel for the Appellant: A Krohn
Counsel for the Respondent: A Mitchelmore

JUDGMENT

INTRODUCTION

1. The appellant filed an appeal against the decision of the Refugee Status Review Tribunal (the Tribunal) pursuant to the provisions of s 43 of the *Refugees Convention Act 2013* (the Act) which states:

> (1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against the decision on a point of law.

2. The Tribunal delivered its decision on 22 May 2015 affirming the decision of the Secretary that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.

3. The appellant filed an appeal in this Court on 30 October 2015 and the grounds of appeal were amended on 16 July 2016.

BACKGROUND

4. The appellant is 30 years old, a Muslim. He was born on 30 December 1985 in Murgibar Village, Norshindi District, Shibpur, Bangladesh.

5. He is married with one son.

6. He was educated up to grade 7 which ended in 1997. He also did a brief course in welding.

7. He was employed on the family farm and later as the owner of a souvenir shop and a mobile telephone shop.

8. He was a supporter of Chatra Dal (Jatiotabadi). Chatra Dal is the student wing of Bangladesh National Party (BNP).

9. He joined Chatra Dal in 2007 or 2008 and his father and family had been supporters of BNP. He was appointed to the position of the general secretary of Ward 9, which is one of the nine wards in his local area.

10. He worked for the party, going house to house in different villages to encourage people to join. This provoked the Awami League (AL) members and in particular a man by the name of Arman from a neighbouring village. He and Arman had several arguments about politics.

11. About six months after joining the BNP he received a warning that Arman and a group of AL members had planned to ambush him. The appellant and his friends were going to Arman's village at the time of Eid festival. They took a different route but were confronted by Arman and his seven supporters who were armed with wooden sticks and torches. There was an altercation and Arman threatened to kill him. A local MP was called who managed to defuse the situation.

12. Attack by AL members was quite common and he was beaten several times. Arman and his men frequently visited the appellant's house but he was never there when they came. They told his parents that they would kill him if he continued to follow BNP.

13. One night in 2013, the appellant was ambushed on his way home by a man from the neighbouring village and other men. He was severely beaten with sticks to the extent that he had to go to hospital, and he still bears the scars of this attack. They threatened the appellant that he was doing too much for the BNP, and that if he did not leave the party, they would kill him.

14. He left Bangladesh on 21 July 2013 for Malaysia and after two months he travelled to Indonesia by boat.

15. From Indonesia, he travelled by boat to Christmas Island and then his boat was intercepted by the Australian authorities and they were taken to Christmas Island. From Christmas Island, he was transferred to Nauru in December 2013.

APPLICATION TO THE SECRETARY

16. On 23 December 2013, the appellant attended a Transfer Interview.

17. On 28 February 2014, the appellant made an application to the Secretary of Justice and Border Control (the Secretary for Refugee Status Determination [RSD]) for recognition as a refugee and for complementary protection under the Act.

18. On 2 November 2014, the Secretary made a determination that the appellant is not a refugee and is not owed complementary protection.

APPLICATION TO THE TRIBUNAL

19. The appellant made an application for review of the Secretary's decision pursuant to s 31 of the Act which provides:

> 1) A person may apply to the Tribunal for merits review of any of the following:
>
> a) a determination that the person is not recognised as a refugee;
> b) a decision to decline to make a determination on the person's application for recognition as a refugee;
> c) a decision to cancel a person's recognition as a refugee (unless the cancellation was at the request of the person).
> d) A determination that the person is not owed complementary protection.

20. On 7 March 2015, the appellant made a statement and on 22 March 2015 his lawyers, Craddock Murray Neumann, made written submissions to the Tribunal.

21. On 26 March 2015, the appellant appeared before the Tribunal to give evidence and present his arguments with his representative and an interpreter in Bangli and English languages.

22. The Tribunal handed down its decision on 22 May 2015 affirming the decision of the Secretary that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.

THIS APPEAL

23. The appellant filed four grounds of appeal which are:

1) Ground 1 – the Tribunal erred in law by failing to give the applicant procedural fairness and natural justice in breach of the common law and in breach of s 22 and s 37 of the Act.
2) Ground 2 – The Tribunal erred in law in that, it failed to act according to natural justice, in breach of common law and s 22 of the Act.

3) Ground 3 – The Tribunal erred in law in that, it failed properly to consider relevant considerations by failing to consider claims, or integers of the claims. The Tribunal erred in law in that it failed properly to have regard to information or to make determinations on material questions of fact, as required by law, including ss 22, 31, 35, 36, 37, 39 and 40 of the Act.

4) Ground 4 – Error of law – the Tribunal acted unreasonably and illogically or without probative evidence.

SUBMISSIONS

24. In addition to the submissions filed by the appellant and the respondent, they also made oral submissions which were of great assistance to me and I am indeed very grateful to both counsel.

CONSIDERATION

Ground 1

25. There are two limbs to this ground of appeal which are:

a) Canadian Report;
aa) Information about the relationship between membership of the BNP or Chatra Dal and taking an executive position.

(a) The Canadian Report

26. The appellant's submission is set out at [34], [35], [36], [37], [38], [39] of his written submissions which is as follows:

[34] The Tribunal ultimately rejected the appellant's claims to have had any political involvement at all, even at the level of basis support for BNP. (Decision [30]). In reaching this conclusion, the Tribunal gave three reasons:

> 19. The Tribunal notes that the Secretary was prepared to accept that the applicant was a supporter of Chatra Dal and held a position of general secretary of Chatra Dal in his local area. However, having considered all the information before it the Tribunal is unable to be satisfied as to the credibility of the applicant's claims about these matters, for the following reasons:
>
> 20. First, the applicant has given significantly varying accounts of his political activities and membership ...
>
> 27. Second, the Tribunal is not satisfied that the appellant's evidence about his activities as general secretary in Ward 9 supports his claims to have held this position ...
>
> 29. Finally, the Tribunal finds it generally implausible the appellant's evidence at the hearing that, despite his youth and generally limited education, he was able to approach strangers considerably older than himself and aired his political views upon them ...
>
> 30. Taking these findings together, the Tribunal is unable to be satisfied that the applicant was, in fact a member or supporter of the BNP or the Chatra Dal or that he was appointed to the position of the secretary of Chatra Dal in Ward 9...

[35] In considering the first of these three reasons for rejecting the credibility of the central claims by the appellant to have been a supporter and an office bearer of the Chatra Dal – namely 'significantly varying accounts of his political activities and memberships' (Decision [20]) – and after rehearsing a summary of its questions, the appellant's evidence, and points which the Tribunal found 'hard to believe', and 'hard to understand' and 'difficult to understand' (Decision [21 – 22]), the Tribunal made its finding on the appellant's evidence about the relationship between the BNP and Chatra Dal, about why the appellant, not being a student, joined the Chatra Dal rather than the BNP, and his claims to be have been the organising secretary of his Ward of the Chatra Dal.

[36] On these points, the Tribunal said:

> The Tribunal accepts that Chatra Dal is the student wing of the BNP, one of a number of subsidiary bodies which help to mobilise support and work closely with the party in support of its aims. It is, however, not identical with BNP itself, and according to contrary information, it maintains separate membership documents***. The Tribunal finds that the applicant's evident confusion as to whether it was Chatra Dal or the

> BNP which he joined cast doubt over his claims of political involvement***.
>
> NOTE: At this point ***, the Tribunal inserted a footnote with an internet address and a citation from a report, 'Canada: Immigration and Refugee Board of Canada, Bangladesh, report of fraudulent documents, 20 September 2010, ("the Canadian Report").

[37] The Tribunal, therefore relied on the Canadian Report as a basis for a formal finding, 'that the applicant's evident confusion as to whether it was Chatra Dal or BNP which he joined cast doubt over his claims of political involvement', which was one of the foundational findings for rejecting the appellant's claim to have been a supporter of the BNP, and a member and office bearer of Chatra Dal.

[38] The Canadian Report was therefore an important piece of information which the Tribunal found to be adverse to the applicant's claims. In fairness, it should have been put before the appellant for his understanding and a response. The Tribunal, however, failed to give the appellant an opportunity whether at the hearing or at any other time, whether in writing or orally, to know about the Canadian Report, to understand its relevance for the review and that it may be part of the reason for the Tribunal to affirm the Secretary's decision, and to respond to it. Nevertheless, the Canadian Report was clearly part of the reason for the Tribunal to affirm the decision and the review.

[39] The Tribunal thereby failed to give the appellant clear particulars of the Canadian Report as information before the Tribunal, failed to explain the relevance of the information to the appellant and failed to give him an opportunity to respond, as are required by section 37 of the Act.

27. Section 37 was repealed by s 24 of the *Refugees Convention (Derivative Status and Other Measures) (Amendment) Act 2016* (the Amending Act) which came into effect on 23 December 2016. Further, the repeal of s 37 is deemed to have commenced on 10 October 2012. In the case of *DWN066 v the Republic*[1] it was held at [32] that:

> ... further, the repeal of s.37 of this Act is deemed to have commenced on 10 October 2012. This is provided for by s.23 of the Amending Act so I cannot deal with this ground under s.37 of the Act and must deal with it under the principles of natural justice as provided for by the common law of Nauru.

28. After the enactment of the Amending Act I enquired whether the parties wanted to make further submissions in regards to the repealing of s 37. I was informed by both parties on 8 March 2017 that they did not wish to make further submissions.

29. The respondent's submission on s 37 is at [27, 29 and 31] of its written submissions which is:

[1] [2017] NRSC 23 (Khan J).

[27] Section 37 of the Act must be construed in the context of, and consistently with, the procedural fairness obligations owed by the Tribunal as a matter of common law, to the extent that the requirements of s 37 of the Act overlap with the Tribunal's common law procedural fairness obligations. That does not mean, however, that the requirements in s 37 of the Act and the common law procedural fairness obligations are interchangeable or indistinguishable. Rather, the requirements of s 37 of the Act qualify the Tribunal's procedural fairness obligations with respect to a particular class of information.

[29] The Report of the Immigration and Refugee Board of Canada, titled 'Bangladesh: Reports of Fraudulent Documents (the Canadian Report)', contains no information related to the BNP, the Chatra Dal, nor the maintenance of separate membership documents by either of them. Rather, the Canadian Report deals with the ready availability in Bangladesh of false and fraudulent documents. The Tribunal put clear particulars of that information to the appellant in a letter dated 29 April 2015 (BOD 159-160).

[31] In so far as the Tribunal might be referring to other information about the BNP and Chatra Dal maintaining separate membership documentation, that information does not meet the description of information that the Tribunal could consider 'would be the reason, or part of the reason, affirming the decision under review'. It does not 'contain in their terms a rejection, denial or undermining of [an] appellant's claims to be persons to whom Australia owed protection obligations: *SZBYR v Minister for Immigration and Citizenship*[2] (SZBYR). The information does not relate to the appellant at all, but rather to information regarding the political parties in Bangladesh; and the Tribunal relied upon it not because, in terms, it rejected, denied or undermined the appellant's claims, but rather because it affected the appellant's credibility: *ATP15 v Minister for Immigration and Border Protection*[3] (*ATP15*).

30. I accept that the Canadian Report was only referred to in relation to the prevalence of fraudulent documents in Bangladesh and the appellant was asked to comment on it by letter dated 29 April 2015 and that information does not relate to the appellant at all. That information only affected the appellant's credibility. So this ground of appeal has no merit and is dismissed.

(aa) Information about relationship between membership of BNP or Chatra Dal and taking an executive position

31. In relation to this ground the appellant submits that at [24] of its decision the Tribunal stated:

> The information before the Tribunal indicates that formal membership of the BNP or Chatra Dal and the holding of positions on executive bodies within them are separate matters, but the applicant's evidence gave a strong appearance that he believed them to be equivalent.

[2] (2007) 235 ALR 609, 615 [17] (per Gleeson CJ, Gummow, Callinan, Heyden & Crennan JJ).
[3] [2016] FCAFC 53, [42] (unreported, Tracey, Flick and Griffiths JJ, 5 April 2016).

32. The appellant further submits that the Tribunal did not at the hearing, in its reasons for the decision, nor anywhere else identify this 'information' and as such the appellant was denied procedural fairness and natural justice.

33. The respondent in its response submits that it is not possible to discern, from the Tribunal's reasons, precisely what information the Tribunal was referring to and refers[4] where the following exchange took place:

> [Tribunal member]: Well many people join in political parties, such as the BNP or Chatra Dal, without taking an executive position, such as general secretary of a ward. So the question is why wouldn't you join the party without taking a position on the executive committee?
>
> [The interpreter]: So as you've seen, I then joined Chatra Dal without the position. So this ... student's. The first year you join the BNP party, and then the BNP party leaders will realise that you are capable. They then recruit you.

34. The respondent further submits that the information was relevant to the Tribunal's assessment of the appellant's credibility, but did not in terms constitute a rejection, denial or undermining of his claims: *SZBYR*[5] and *ATP15*[6].

35. I accept the respondent's submission and this ground of appeal is dismissed.

Ground 2 – The Tribunal erred in law in that, it failed to act according to natural justice, in breach of the common law and of s 22 of the Act

(a) The Canadian Report

36. The appellant reiterates that the Tribunal relied on the Canadian Report and submits that it was a basis for its ultimate rejection of the appellant's central claims to have been a supporter of the BNP and a member and office bearer of Chatra Dal; and he was not given an opportunity to know of this report, nor to understand its relevance, nor to respond to it; and denied natural justice.

37. The respondent concedes that s 22(b) of the Act explicitly obliges the Tribunal to act in accordance with the principles of natural justice and that he was given the opportunity to respond to it. It relies on *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*[7] where the Full Court of the Federal Court of Australia put it thus at [28 – 30]:

> It is a fundamental principle that where the rules of procedural fairness apply to a decision making process, the party liable to be directly affected by the

[4] BOD 121.
[5] (2007) 235 ALR 609, 615 [17].
[6] [2016] FCAFC 53, 42 (unreported, Tracey, Flick and Griffiths JJ, 5 April 2016).
[7] (1994) 49 FCR 576, 590 - 2.

decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining relevant issues and to be informed of the nature and content of adverse material. ....

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, the comment by way of submission, upon adverse material from other sources which is put before the decision maker. It also extends to require the decision maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on known material. Subject to this qualification however, a decision maker is not obliged to expose his or her mental processes or provisional views to comment for making the decision in question.

38. I accept that the appellant was given sufficient opportunity to respond to the Canadian Report. So, this ground of appeal is dismissed.

(aa) Information about membership of BNP or Chatra Dal and holding of position on executive positions.

39. The appellant submits at [51] of its written submission:

> [51] Similarly, as set out in relation to Ground 1 of the appeal the Tribunal 'relied' on information before the Tribunal [which] indicates that formal membership of BNP or Chatra Dal and holding of positions on executive bodies within them are separate matters as a basis for its ultimate rejection of the appellant's central claims to have been a supporter of the BNP, and an office bearer of Chatra Dal. It did not give the appellant an opportunity to know this report nor to understand its relevance, nor to respond to it.

40. The respondent submits that the appellant was sufficiently on notice of this issue and the Tribunal was not obliged to take the further step of identifying the specific information and that he was not denied procedural fairness.

41. I accept that the appellant was on notice on this issue and the Tribunal was not obliged to identify this specific information and thus he was not denied procedural fairness. In the circumstances this grant of appeal is dismissed.

Ground 3 – The Tribunal erred in law in that it failed properly to consider relevant considerations

42. The appellant submits that the Tribunal must consider each material question of fact, and necessary and relevant consideration of integers of the claim.

43. The appellant further submits at [54] that:

[54] The Tribunal must have regard to the relevant considerations. In so doing, it must engage consciously with the claims, questions and materials before it and relies on the case of *SZSZW v Minister for Immigration and Border Control*[8] where Perry J stated:

> ...the requirement to consider claims or integers of claim made by an applicant requires the application of an active intellectual process. As the Full Court held in *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114; (2013) 136 ALD 547 (MZYTS) at 559 [39], 'that task could not be lawfully undertaken without a consciousness and consideration of the submissions, evidence and material advanced by the visa applicant ...'.

(a) Whether there were constraints at the Transfer Interview and the reasons why the appellant had not mentioned some matters at the Transfer Interview

44. The appellant submits at [65] and [66] of the written submission:

> [65] The Tribunal was unable to be satisfied about the credibility of the written claims about his political involvement in part because of inconsistencies the Tribunal saw in his evidence, including the answers at the Transfer Interview. In assessing this aspect of inconsistencies, however, the Tribunal did not consider the constraints of the Transfer Interview, though clearly it was obliged to do so in order to come at a fair assessment of the significance of any omissions and inconsistencies.
>
> [66] Indeed, the Tribunal did not in fact in reality grapple with the various aspects of the Transfer Interview noted above or the details of the explanations given by the appellant, which separately and together may have accounted for claims not being mentioned at the Transfer Interview. To this extent, the Tribunal failed to have a 'consciousness and consideration of the submissions, evidence and material advanced by the visa applicant ...' It did not engage consciously with the claims, questions and material before it.[9]

45. The respondent in response submits that the Tribunal made a reference to the Transfer Interview, firstly, that he was a supporter of Chatra Dal and then compared it to the RSD Application, the RSD Interview, the written statement to the Tribunal. The Tribunal then identified that the account given by the applicant of his political activities and membership at different stages varied significantly ([20] of the Decision); and noted that the Transfer Interview did not contain any mention of the appellant having been physically harmed in Bangladesh at any time, but rather that he was able to escape uninjured when the AL tried to attack him. Further, the Tribunal found it difficult to understand why the appellant's claim to have been hospitalised in 2008 which was a dramatic and significant matter, would not have been mentioned earlier in the RSD Interview. The late emergence of the claim casts doubt on its credibility. The respondent further submits at [47] and [48] as follows:

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[8] [2015] FCA 562, [17] (5 June 2015).
[9] *SZSZW v Minister for Immigration and Border Control* [2015] FCA 562.

[47] It follows that the appellant did not give an explanation for the inconsistencies between the evidence he gave in the Transfer Interview and the evidence he gave on subsequent occasions. In those circumstances, the Tribunal could not be found to have failed to have regard to any such explanation.

[48] In order to establish the pleaded error, the appellant sought to rely on various 'constraints' of the Transfer Interview to account for claims not being mentioned at the time. He relies in words and assumption that the Tribunal was required to refer in its reasons to the material the appellant advanced to mitigate the degree of difference between his claims at various stages of the process, which assumption is misplaced. A tribunal is not required in its reasons to engage in a line by line rejection of the applicant's evidence: *Re The Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham*[10].

(b) Motive for joining Chatra Dal

46. The appellant submits that the Tribunal found at [25] of its decision that it is 'not satisfied the applicant has provided any plausible explanation for his motives in joining the Chatra Dal, an organisation aimed at mobilising support amongst students ...'; and the Tribunal failed to consciously engage with his evidence that he joined Chatra Dal as he was invited to do so by the party leadership; and that the Tribunal had no information about the working of the leadership of the BNP and Chatra Dal, except for speculation.

47. The respondent submits that the Tribunal was not satisfied that the appellant had provided any plausible information for joining Chatra Dal and the question of implausibility arose in the context of the fact that Chatra Dal is an organisation 'aimed at mobilising support amongst students at mainly secondary and tertiary levels', while the appellant's evidence was that he had 'completed primary school and one year of secondary school', some 10 years prior to joining Chatra Dal.

48. The respondent further submits at [51] and [52] as:

[51] What is clear from the above is that the Tribunal rejected the appellant's claim to have been invited by the leadership of the party to join Chatra Dal, because it was implausible...

[52] In the present case, the Tribunal referred in its reasons to the appellant's explanations, but found them to be unsatisfactory (Decision [26]). In circumstances where the Tribunal rejected the factual premise on which the 'relevant consideration' of which the appellant now complains was based, the Tribunal was not required to give further consideration to whether that factual premise might explain some other implausibility in the appellant's evidence. As the Full Court of the Federal Court of Australia stated in *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs*[11]:

[10] (2000) 58 ALD 625, [65].
[11] (2003) 75 ALD 630, 641 [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 drawn where 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.

(c) Evidence of frequent beatings – whether AL had carried out threats against the appellant

49. The appellant submits at [70] and [73] as follows:

> [70] The Tribunal was concerned about AL not coming to attack the appellant in his shop or at home at night, if they really wanted to kill him (Decision [40]). In coming to its conclusion at this point, the Tribunal confined its assessment to whether the threat to kill can have been made, because in five years surely it could have been carried out at home at night or at work by day.
>
> [73] A proper consideration of the claim to fear and have suffered serious physical harm required the Tribunal to consider and to weigh all the evidence about past harm, including frequent beatings; not to weigh some evidence about threats to kill, and exclude other, relevant evidence about having been beaten.

50. The respondent in response submits at [54] and [55]:

> [54] The appellant now complains the Tribunal failed to consider these claims – that the appellant was beaten many times by AL, sometimes severely – in finding that the appellant's claim that members or supporters of AL frequently appeared at his family home without ever managing to catch him while he was there (Decision [40]), was implausible. However, the appellant never claimed that he had been beaten by AL members or supporters at his home; rather, he consistently claimed that these beatings occurred at BNP rallies.
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> [55] The appellant's claim to have been frequently, severely beaten by AL members and supporters at BNP rallies, even if accepted, did not undermine, contradict or otherwise affect the Tribunal's rejection of his claim that AL frequently appeared at his home to threaten his parents that they would kill him if he did not cease his support for Chatra Dal. The appellant's contention that the former claim was a 'relevant consideration' for the purposes of the Tribunal's assessment of the later claim must be rejected.

(d) Whether the appellant may suffer harm if in future he were to support BNP

51. The appellant submits that the Tribunal had accepted that he may have been present at public activities organised by the BNP or Chatra Dal in his area; and it should have considered whether the appellant if he were to return to Bangladesh may do this again and may suffer harm for imputed political opinion.

52. The applicant further submits that the Tribunal did not consider whether the appellant's family were BNP supporters and whether in the future may lead the appellant to become politically active and thus have a real chance or a real possibility of a well founded fear of persecution.

53. The respondent in his response submits at [59], [60] and [61]:

> [59] The difficulty with this ground is that none of the matters raised in this particular were claims made by the appellant at any stage of the RSD process. Rather, they are hypotheses that proceed not on evidence, but conjecture as to the appellant's possible future behaviour. There is nothing in the Tribunal's statutory task that requires it to conduct such a speculative exercise.
>
> [60] In any event, even if the appellant had made that claim, which he now contends the Tribunal failed to consider, each of them would have been disposed of by reason of the Tribunal's rejection of the harm the appellant claimed to have suffered in the past. The Tribunal rejected those claims of harm notwithstanding that it accepted that the appellant may have been present at public activities organised by BNP or Chatra Dal...
>
> [61] Not only did the appellant not make any of the claims now contended for in this particular, there is nothing on the material particular before the Tribunal that suggested the appellant might fear harm on return to Bangladesh because of change of some circumstance or other that would mean the appellant would be harmed in the future although he had not been so harmed in the past.

(e) Whether the appellant had scars compatible with being beaten

54. The appellant submits that he had scars from the beating that put him in hospital in 2013 and it was important corroborative evidence and the Tribunal failed to have regard to this.

55. The respondent submits that it would have been implausible for an experienced medical professional, let alone the Tribunal, to have ascertained for example:

a) Whether the scars were incurred in 2013;
b) Whether the scars were incurred as a result of a beating; or
c) Whether the scars were caused by members of AL.

56. The respondent further submits at [57]:

> [57] The mere fact – if it were established that the scars were consistent (or, not inconsistent) with the appellant's claim does not mean that they relevantly corroborated his account of what happened to him in 2013. The appellant's scars were not probative of his claim, such that the Tribunal could have said to have made an error by law by failing to refer to them in its reasons: *Minister for Immigration and Border Protection v SZRKT*[12].

[12] (2013) 212 FCR 99, 120 [17].

57. Ground 3 has no merit and is dismissed.

Ground 4 – Error of Law – the Tribunal acted unreasonably or illogically or without probative value

58. The appellant submits at [84], [85], [86], [87] and [88] as follows:

> [84] It is well established, however, that if a statutory Tribunal is required to act judicially, it must act 'rationally and reasonably'[13].
>
> [85] While the Tribunal in the present matter is inquisitorial in the sense of engaging in review on merits with powers (and their duty) to enquire, without being bound by the rules of evidence and without a contradictor, it is also judicial in that it is required to give reasons and, therefore by necessary implication to act reasonably in the sense of rationally and on the basis of logical probative evidence.
>
> [86] An error about the evidence before the Tribunal can be a reason for the Tribunal to err in law by a basing of findings on evidence which does not exist.
>
> [87] Unreasonableness, therefore in proceeding without evidence for a finding, or in the sense of *Wednesbury* unreasonableness, indicates a failure by the Tribunal to discharge its statutory task, and therefore error of law.
>
> [88] For the reasons set out below in relation to each particular notice of appeal, the Tribunal was unreasonable in that sense.

(a) Unreasonable to dismiss – confused or conflicting evidence is not necessarily untrue

59. On the issue of the appellant joining Chatra Dal or BNP, the Tribunal found this to be confusing or conflicting. It is submitted by the appellant that the Tribunal's finding is unreasonable and that the appellant had little formal education, he had been away from his wife and child and may have been confused in explaining to foreigners and strangers through interpreters.

60. The respondent submits that the Tribunal discharged its task and further the characterisation by the Tribunal of confused and conflicting was based on the explanation given by the appellant. Further, if the Tribunal were to consider all possible explanations, then its task would never be discharged.

(b) Unreasonable for the Tribunal to dismiss the appellant's evidence about his doings and those of other members of the Ward's executive committee as 'notably generalised and uninformative'

61. The appellant submits at [92] it is unreasonable for the Tribunal to dismiss the appellant's evidence about his doings and those of other members of the Ward's

[13] *Australian Broadcasting Tribunal v Bond* (1990) HCA 33; (1990) 170 CLR 321.

committee as notably generalised and uninformative. The Tribunal's own summary of evidence covers calling meetings, distributing responsibilities among members; approaching others to persuade them to join BNP or to vote for it, including by approaching people in teahouses or knocking on doors, and highlighting comparative achievements of BNP and AL (Decision [28]). The appellant also gave evidence in detail about approaching people older than himself and about notifying people about meetings, about how many meetings were held in a year and how close together. (Transcript pp 22 23). He gave an example of an issue about a price rise which he would speak about (Transcript pp 26, lines 44 42ff). Throughout his evidence on his activities in Chatra Dal he also answered the questions asked, and followed the line of questioning of the Tribunal.

62. The respondent submits that the appellant disagrees with the Tribunal's description, however the assessment of the appellant's evidence was a matter for the Tribunal.

(c) Unreasonable for the Tribunal to dismiss appellant's evidence about approaching people older than himself to speak of political views

63. The appellant submits that this finding is unreasonable and illogical based on assumption rather than on any evidence about the pattern of ages of political activities and evangelism in Bangladesh. Even as an assumption it is not reasonable, indeed it is contradicted by a common enough phenomenon of committed young evangelists for a cause speaking to their elders.

64. The respondent submits that the appellant complained that the Tribunal did not consider or refer to any evidence about the pattern of ages of political activists and evangelists in Bangladesh. It further submits that it was for the appellant to satisfy the Tribunal of the disclaims and that the Tribunal is not required to find, and refer in its reasons to evidence that this proved the appellant's evidence, rather, it was entitled to find that the appellant's evidence was implausible and the respondent relies on the case of *Durairajasingham* where it was stated:[14]

> If the primary decision maker has stated that he or she does not believe a particular witness, no detailed reasons need to be given as to why that particular witness was not believed. The Tribunal must give reasons for its decision, not the sub-set of reasons why it accepted or rejected the individual pieces of evidence.

(d) The Tribunal was unreasonable in not considering whether there were constraints at the Transfer Interview, the reasons why the appellant had not mentioned some matters at that interview

65. The appellant submits that the Tribunal was unreasonable in not having regard to the constraints of the Transfer Interview in assessing the weight to be given to any inconsistencies or omissions in evidence at the interview.

66. The respondent submits that the appellant provides no basis for his assertion that the Tribunal failed to consider the constraints at the Transfer Interview.

[14] (2000) 58 ALD 625, [67].

(e) Unreasonable to ignore or exclude from assessment some of the whole evidence – evidence of frequent beatings – whether AL had carried out threats against the appellant

67. The appellant submits that the Tribunal was unreasonable in not including in its process of assessing the appellant's claim to have been threatened by AL, his evidence that he had frequently been beaten.

68. The respondent submits that the appellant provides no basis for his assertion that the Tribunal failed to consider the appellant's evidence that he was frequently beaten in assessing his claim to have been threatened by the AL.

69. Ground 4 of the notice of appeal is devoid of any merit and is dismissed.

CONCLUSION

70. Under s 44(1) of the Act, I make an order affirming the decision of the Tribunal.

DATED this 31 day of May 2017

Mohammed Shafiullah Khan
Judge