IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION] Case No. 119 of 2015

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN 15033, brought pursuant to s 43 of the *Refugees Convention Act* 1972

BETWEEN

QLN 116 Appellant

AND

THE REPUBLIC Respondent

Before:	Crulci J
Appellant:	Self-represented
Respondent:	R. Knowles
Date of Hearing:	24 May 2017
Date of Judgment:	11 August 2017

CATCHWORDS

APPEAL - *Refugees – Refugee Status Review Tribunal – Point of Law – Relevant considerations – Appeal DISMISSED*

JUDGMENT

1. This matter is before the Court pursuant to section 43 of the *Refugee Convention Act* 2012 ("the Act") which provides:

> **43 Jurisdiction of the Supreme Court**
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> (1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.
>
> (2) The parties to the appeal are the Appellant and the Republic.
> ...

2. The determinations open to this Court are defined in section 44 of the Act:

> **44 Decision by Supreme Court on appeal**
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> (1) In deciding an appeal, the Supreme Court may make either of the following orders:
> (a) an order affirming the decision of the Tribunal;
> (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

3. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on the 29 November 2015 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of the 25 April 2015, that the Appellant is not recognised as a refugee under the 1951 Refugees Convention[1] relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees ("the Convention"), and is not owed complementary protection under the Act.

4. Applications for extensions of time within which to file a Notice of Appeal under s 43 of the Act were lodged on 23 December 2015 and 31 March 2016, granting extensions of time until 31 March 2016, and 29 April 2016 respectively. The original Notice of Appeal was filed on 15 April 2016.

5. The Appellant purported to file an Amended Notice of Appeal on 20 May 2015. On 1 May 2017, the Appellant filed an application for an extension of time up to and including the date on which the order was made. The Respondent indicated at the oral hearing that they consented to a further extension of time to the extent it was required, which validated a Further Amended Notice of Appeal that was filed on 28 March 2017.

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[1] 1951 Refugee Convention and 1967 Protocol, also referred to as "the Refugees Convention" or "the Convention".

BACKGROUND

6. The Appellant is a 19-year old single male from Jaffna District in Northern Sri Lanka. He is a Tamil Hindu. His father owns two businesses; a sound equipment and audio business and a motorbike repair shop. The Appellant himself has never worked.

7. The Appellant claims a fear of persecution on the basis of an imputed political opinion of supporting the Liberation Tigers of Tamil Elam ("LTTE") because of his father's involvement in a "Heroes' Day" event and his uncle's membership of the LTTE. The Appellant also claims a fear of persecution on the basis of his Tamil ethnicity; being a failed asylum seeker; and his membership of the social group of immediate relatives of suspected LTTE supporters.

8. The Appellant claims that the Sri Lankan Army ("SLA") visited his house once or twice a month from June 2012 until he left Sri Lanka and interrogated him, accusing him of being involved with the LTTE. The Appellant wanted to flee but wished to complete his studies first. He completed his studies in November 2013, and fled Sri Lanka for India in December 2013.

9. In July 2014 the Appellant left India for Australia. The Appellant arrived in Australia and was transferred to Nauru on 2 August 2014.

INITIAL APPLICATION FOR REFUGEE DETERMINATION STATUS

10. The Appellant attended a RSD interview on 11 September 2011. The Secretary summarised the Appellant's material claims as follows:

    - *There are many kidnappings of young people in Sri Lanka. They are kidnapped so that their organs can be sold on the black market. In June or July 2013 he witnessed an attempted kidnapping at the bus stop outside his school. This made him extremely anxious for his own safety.*
    - *Since the civil war ended in 2009 Tamils continue to be targeted and persecuted by the authorities in Sri Lanka. They severely torture or kill anyone whom they suspect of being supportive of the LTTE or of having previous involvement with them. They also target the family members of those suspected of having an affiliation with the LTTE.*
    - *His mother's brother was a member of the LTTE.*
    - *Heroes Day is celebrated by the Tamil population every year in November and it commemorates Tamils who died during the civil war. The Sri Lankan authorities do not permit Heroes Day to be celebrated. In 2011 his father was approached by the organisers of their local Heroes Day and asked to supply a sound system. His father agreed to provide the sound system and speakers and attended the celebration to operate the system.*
    - *In June 2012, the army came to his house and apprehended him, his older brother and his father. The Applicant and his brother were*

released and his father was held for 24 hours. His father was severely tortured, which caused his teeth to fall out. His father was interrogated about being supportive and involved with the LTTE because he had attended the Heroes Day and provided sound equipment. His father was released but told that he would continue to be monitored.

- *Once or twice a month, the Sri Lankan army would come to the family home and check on them. They wanted to know his father's whereabouts. He was questioned, interrogated and accused of being involved with the LTTE and asked what armed combat he had participated in.*[2]

11. The Secretary found the following elements of the Appellant's claims to be credible:

    - His father provided sound and speaker equipment for use in Heroes' Day celebrations for six years;
    - His father was questioned and tortured regarding his involvement in Heroes' Day;
    - He and his brother were detained and then released when his father was questioned;
    - He witnessed an attempted abduction.[3]

12. The Secretary did not accept as plausible the following elements of the Appellant's claims:

- His uncle was involved with the LTTE;
- The attempted abduction he witnessed was for organ trafficking.[4]

13. In rejecting these claims as implausible, the Secretary noted that the Appellant was unable to give much information on his uncle's involvement in the LTTE and failed to submit a card as evidence of his uncle's membership as indicated. The Secretary also observed that when the Appellant was asked how he knew the attempted kidnapping he witnessed was an attempted kidnapping for organs; the Appellant said "*I had seen news reports about what happens to people that are kidnapped*".[5] The Appellant had no direct evidence that what he witnessed was such a kidnapping.

14. While accepting that the father provided sound and speaker equipment for use in Heroes' Day celebrations for six years, the Secretary was not satisfied that there was a reasonable possibility the Appellant would be harmed for this conduct.[6] The Secretary noted that the Appellant remained in Sri Lanka for 18 months without being questioned or detained. The family remained at the same address, and his father was

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[2] Book of Documents ("BD") 94.
[3] BD 95.
[4] BD 95.
[5] BD 97.
[6] BD 98.

able to continue running his business. The Appellant did not have a profile in Sri Lanka for which he would face arrest or imprisonment.

15. In relation to the Appellant's claimed fear of persecution for being a failed asylum seeker, the Secretary accepted the Appellant would likely be detained upon re-entry at the airport, but said that this was to enable Sri Lankan authorities to identify the Appellant and mitigate the need for lengthy detention to check the Appellant's identity.

16. The Secretary concluded therefore that there was no reasonable possibility of the Appellant facing harm because of his Tamil ethnicity, imputed political opinion based on a familial link with the LTTE, or being a failed asylum seeker. The Appellant's fear of persecution on these grounds is not well-founded.[7] The Secretary also said there was no evidence pointing to a reasonable possibility the Appellant would face harm on return to Sri Lanka that would constitute a breach of Nauru's international obligations.[8]

REFUGEE STATUS REVIEW TRIBUNAL

17. The Appellant maintained his claims before the Tribunal with respect to the father's involvement in the Heroes' Day celebrations. However the Tribunal did not accept that the Appellant's father provided sound equipment for, or attended, the celebrations in 2011.

18. The reasoning was that as the Sri Lankan authorities banned Heroes' Day celebrations after the end of the civil war in 2009, it was unlikely that celebrations could have been held in defiance of the ban given the high military presence in the North at the time. The Tribunal therefore did not accept that the events that followed in relation to the interrogation of the Appellant, brother and father, and visits to the family home, took place.[9]

19. In relation to the Appellant's uncle, the Appellant said he was a commander in the Sea Tigers (LTTE navy) and he was detained in a rehabilitation camp between 2009 and 2012. After the uncle's release he stayed with the Appellant's family for ten to fifteen days and soon thereafter went to Malaysia. After his departure, the Appellant's family was interrogated and beaten by the SLA because they were angry at the uncle, and believed the family helped him to escape.

20. The Tribunal accepted that the Appellant's uncle was a member of the LTTE, and after being detained at a rehabilitation camp stayed with the family after being released.[10] However, it did not accept that the family was interrogated on such a regular basis as claimed by the Appellant, or that the SLA suspected the Appellant and family of helping the uncle

[7] BD 101.
[8] BD 101.
[9] BD 313 at [21].
[10] BD 317 at [46]; BD 318 at [47], [48], [50].

escape.[11] The Tribunal said that if the SLA did hold this suspicion, it would have arrested the Appellant's father. The Tribunal also considered it relevant that the Appellant and family had no previous involvement with the LTTE, and his father was able to continue running his businesses after the uncle disappeared; furthermore the Appellant was only 15 years old at the time of his uncle's disappearance.

21. The Appellant maintained his claims with respect to his claimed fear of persecution on the basis of being a Tamil and a failed asylum seeker. The Tribunal said that, while Tamils may have experienced some discrimination in the past, country information indicated that the security situation for Tamils had much improved.[12] While processing procedures apply for returning asylum seekers, they applied equally to all returnees regardless of ethnicity, and there was no evidence of Tamils returning to Sri Lanka being mistreated generally.[13] It was possible the Appellant would be charged with an offence for leaving Sri Lanka illegally under s 45 of the *Immigrants and Emigrants Act 1945*, and being held in remand for several hours up to several days, but the Appellant's father was capable of paying any fine imposed.

22. Regarding the Appellant's claimed fear of harm from persons who might kidnap him for his organs, the Tribunal found no country information that suggested young people are being kidnapped to have their organs harvested, and therefore considered there to be no reasonable possibility of the Appellant being subject to this harm if returned to Sri Lanka.[14]

23. The Tribunal therefore found:

> "*Having regard to all of the evidence and findings above, the Tribunal finds that the applicant does not have a real possibility of persecution now or in the reasonably foreseeable future in Sri Lanka because of an imputed political opinion of support for the LTTE, his race or his membership of particular social groups comprising his family, young Tamils from the north, failed Tamil asylum seekers, Tamil returnees, Tamil persons who left Sri Lanka illegally or young Tamils, separately and cumulatively. The Tribunal finds that the applicant is not a refugee.*"[15]

24. For the same reasons, the Tribunal found that returning the Appellant to Sri Lanka would not breach Nauru's international obligations.[16]

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[11] BD 319 at [59].
[12] BD 321 at [68].
[13] BD 322 at [74].
[14] BD 327 at [93]-[94].
[15] BD 327 at [95].
[16] BD 328 at [96].

THIS APPEAL

25. The Appellant's Amended Notice of Appeal puts forward two grounds of appeal. Both grounds read:

> "*In determining that the appellant was not a refugee or owed complementary protection for the purposes of section 4 of the Refugees Convention Act (2012) (Nr), the Refugee Status Review Tribunal did not comply with s 22(b) and s 40(1) of the Act in that it did not act according to the principles of natural justice*".

26. The particulars of the first ground state that the Appellant was denied natural justice because the Tribunal "*did not bring to the attention of the appellant or allow him the opportunity to ascertain and comment on issues relevant to its determination*", being that *"it was unlikely that any Heroes Day celebrations could have been held in 2011 in defiance of the ban against these celebrations given the high military presence in the north at the time*".

27. The particulars of the second ground state that the Appellant was denied natural justice because the Tribunal "*did not bring to the attention of the appellant or allow him the opportunity to ascertain and comment on the nature and content of adverse material*", including "*country information that official laws and policies do not discriminate against Tamils on the basis of their race*".

28. The Appellant did not file written submissions but made oral submissions with respect to both grounds at the appeal hearing.

29. In relation to Ground 1, the Appellant said that in 2009 Heroes' Day celebrations were banned but a celebration was conducted at Jaffna University in a "small way".[17] According to the Amended Notice of Appeal, from the finding that Heroes' Day celebrations could not have been held, it followed that the Appellant's father did not provide the sound equipment, and that the Appellant, his brother and father were not questioned in June 2012, or subsequently monitored and interrogated by the SLA.

30. Natural justice required the Tribunal to bring the matter to the Appellant's attention, and allow him an opportunity to comment on it, because the Secretary accepted the Appellant's claims[18] that his father provided equipment for use in Heroes' Day celebrations for six years, his father was questioned and tortured regarding his involvement in Heroes' Day in 2011, and the Appellant and his brother were detained, and then released, when his father was questioned.

31. In relation to Ground 2, the Amended Notice of Appeal states that the information was adverse to the claims made by the Appellant during the

[17] Supreme Court Transcript p 6.
[18] See [11] above

Tribunal hearing of discrimination against Tamils by Sri Lankan authorities. The Tribunal relied on that information in part to conclude that there was no reasonable possibility the Appellant would be persecuted now, or in the reasonably foreseeable future, for reason of his Tamil race. At the oral hearing, the Appellant submitted that the Tribunal failed to consider other country information put before it, and that it is "*not fair to base the entire decision on one document only and not take into account the other country information reports*".[19]

32. At the hearing of the appeal, the Appellant further submitted that the Tribunal failed to take into account that at the time of the Tribunal hearing the Appellant was a minor i.e. 18 years old.[20] The Appellant also submitted that the Tribunal did not put him on notice that it did not believe his claims. The Appellant said "*If the Tribunal did not believe my story or had any doubt about my credibility, they could ask me during the hearing. I could have and I would have provided some explanation if they had concerns about my credibility*".[21] In addition, the Tribunal did not afford the Appellant adequate time to answer their questions.[22]

33. In considering Ground 1, the Respondent submits that from the exchanges between the Appellant and Tribunal members at the hearing, it was clear that the Appellant was aware the Sri Lankan authorities had imposed a ban on Heroes' Day celebrations. The Appellant was also aware that this might lead the Tribunal to conclude that there was no Heroes' Day celebration in Chandilipai in 2011. The Appellant took the opportunity to comment on and respond to that possible conclusion.[23] In those circumstances, there was no denial of natural justice.

34. In response to Ground 2, the Respondent submits that the country information complained of by the Appellant was contained in a report published by the Australian Department of Foreign Affairs and Trade ("the DFAT Report"). The Appellant's representatives lodged written submissions with the Tribunal on 31 July 2015 that included an appendix setting out its comments with respect to the DFAT Report. While the DFAT Report was not specifically put to the Appellant during the Tribunal hearing,[24] the submissions referenced and responded to the actual sentence complained of by the Appellant in his Amended Notice of Appeal.

35. The Respondent replied to the Appellant's submission at the appeal that the Tribunal failed to consider other country information, by highlighting that the Tribunal did refer to a number of items of country information,

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[19] Supreme Court Transcript p 30 ln 11 – 14.
[20] Supreme Court Transcript p 5.
[21] Supreme Court Transcript p 8 ln 41 – 44.
[22] Supreme Court Transcript p 30 – 31.
[23] Respondent's Submissions at [40].
[24] Supreme Court Transcript p 15 – 16.

such as the UNHCR guidelines about the current situation for Tamils in Sri Lanka.[25]

36. Countering the Appellant's submission that the Tribunal failed to take into account his age, the Respondent drew the Court's attention to [11] of the Tribunal's reasons, which reads "*The Tribunal has had regard to the applicant's young age when assessing his evidence and accepts that he may not have full personal knowledge of all the aspects of his claims*".[26]

37. The Respondent submitted that the Tribunal also had regard to the Appellant's youth in a substantive sense, through assessing the harm the Appellant may suffer by being charged with departing Sri Lanka illegally,[27] and the occurrence of abductions to harvest the person's organs,[28] with reference to the Appellant's young age.[29] The Respondent also said that the Appellant's assertion that he was not afforded adequate time to respond to the Tribunal's questions is not supported by the Tribunal transcript.[30]

CONSIDERATIONS

Ground 1

38. *Kioa v West* has been approved of by this Court when considering the principles of natural justice in the context of an appeal against a decision of the Tribunal.[31] As was held in that case by Brennan J:

> *"A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise...*[32] *The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance. Administrative decision-making is not to be clogged by enquiries into allegations to which the repository of the power would not give credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made.*
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> ....
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> *Nevertheless in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made. ...*

[25] Supreme Court Transcript p 31.
[26] Supreme Court Transcript p 23.
[27] BD 326 at [89].
[28] BD 327 at [93].
[29] Supreme Court Transcript p 23.
[30] Supreme Court Transcript p 31.
[31] *DWN066 v R* [2017] NRSC 23; *ROD122 v R* [2017] NRSC 39
[32] *Kioa v West* (1985), Brennan J, cites *Kanda v. Government of Malaya* [1962] UKPC 2; (1962) AC 322, at p 337; *Ridge v. Baldwin*, per Lord Morris at pp 113-114; *De Verteuil v. Knaggs*, at pp 560,561

There was nothing in the circumstances of the case - neither in the administrative framework created by the Act nor in any need for secrecy or speed in making the decision - which would have made it unreasonable to have given Mr and Mrs Kioa that opportunity. The failure to give Mr Kioa that opportunity amounts to a non-observance of the principles of natural justice." [33]
(emphasis added)

39. The Australian High Court case of *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*,[34] found that the delegate had failed to accord the Applicant natural justice by not informing him of the new information the delegate relied on in making his decision. Mc Hugh J said:

> *"Examples of material that would not require comment by the applicant would include non-adverse country information, favourable or corroborative information in the public domain and information based on the circumstances already described in the application. But there are cases where the exercise of this power does require that the applicant be given an opportunity to comment on the material. An example is where the delegate proposes to use new material of which the applicant may be unaware and which is or could be decisive against the applicant's claim for refugee status. The need for disclosure by the delegate is even stronger where the material concerns considerations that have changed since the date of application and is being used after considerable delay. It is stronger still when the material is equivocal or contains information that the applicant could not reasonably have expected to be used in the way the delegate uses it."*[35]

40. At the Tribunal hearing, the Appellant was questioned on whether Heroes' Day ceremonies were allowed to take place after 2011:

> TRIBUNAL MEMBER: ... I understand what Heroes' Day is about or Martyrs' Day is about. But I also understand that after 2011 there weren't any Heroes' Day ceremonies allowed to happen.
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> THE INTERPRETER: Yes, before 2008 in all the places this was celebrated. But after 2008 only – only a few place because most of the places were controlled by the army.
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> TRIBUNAL MEMBER: Can I – that was my understanding too. Sorry, did you want to continue.[36]

41. The Appellant proceeded to provide further details in relation to whether his father attended Heroes' Day ceremonies after 2008:

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[33] *Kioa v West* (1985) 159 CLR 550 at 38.
[34] *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.
[35] *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [141].
[36] BD 223 at ln 29 – 38.

THE INTERPRETER: It was [the Heroes' Day ceremonies] – it was happening even after 2008 but not in the big scale. My – my father was providing the sound system for those celebrations.

TRIBUNAL MEMBER: But was that the time that he did not go down himself personally and set it up. He just gave the equipment to someone who came to the shop or came to your house and they set it up?

THE INTERPRETER: Yes.

TRIBUNAL MEMBER: Okay.

THE INTERPRETER: They – they come to my home and collect those stuffs and then my father goes there and do the connections – and do the set up and then he comes back. Won't stay.

TRIBUNAL MEMBER: And that was in 2011.

THE INTERPRETER: Yes.[37]

42. The Tribunal also questioned the Appellant on whether Heroes' Day celebrations took place in Jaffna in 2010:

TRIBUNAL MEMBER: 2010? Everything I've read says that the army didn't allow any celebrations anywhere in Jaffna in 2010.

THE INTERPRETER: Yes, actually – yes, this was taking place in 2011 and even in – in some place it's still taking place.

TRIBUNAL MEMBER: So more recently it has been taking place... the ceremony has been happening in 2013/2014. Just to clarify for me. Where – where exactly was this ceremony for Heroes' Day held in 2011?

THE INTERPRETER: In Jaffna.

TRIBUNAL MEMBER: In Jaffna. And can you tell me whereabouts in Jaffna?

THE INTERPRETER: A place called Chandilipai.[38]

43. The Appellant was also questioned about a Heroes' Day celebration that took place at the University of Jaffna:

TRIBUNAL MEMBER: I don't... takes a bit of research about Heroes' Day 2011. The only thing I could find about any Heroes' Day

[37] BD 223 at ln 40 – BD 224 at ln 9.
[38] BD 224 at ln 11 – 25.

celebration taking place in Jaffna was that a very small ceremony took place at the University of Jaffna. That same report said that there had been – no other ceremonies took place in the Jaffna district in 2011. A lot of places planned to have them but the army stopped them from going ahead.

THE INTERPRETER: Shall I answer to you?

TRIBUNAL MEMBER: Yes, because my next – my next sentence was saying why are you so sure that the ceremony took place.

THE INTERPRETER: Actually, yes, at – in that year that was – took place in Chandilipai and there my father provided sound system support. But they don't celebrate in one place. So one year they celebrate in one place and then the next year they move to the different place. Just to get – just to avoid the – army interferences.[39]

44. The Tribunal therefore turned the attention of the Appellant to its understanding that Heroes' Day celebrations were not allowed to occur after 2011. The Tribunal also questioned the Appellant specifically on whether Heroes' Day celebrations took place in Jaffna, being part of the Northern Province of Sri Lanka, because the army stopped them from going ahead.

45. In light of the above, the likelihood of Heroes' Day celebrations occurring in 2011 because of the high military presence was not a matter on which the Appellant was denied any opportunity to comment. The Appellant was given the opportunity to comment and took that opportunity. Ground 1 is therefore dismissed.

Ground 2

46. By Ground 2, the Appellant complains that the Tribunal failed to afford the Appellant an opportunity to comment on the statement that "*country information that official laws and policies do not discriminate against Tamils on the basis of their race but that there is a moderate level of societal discrimination between ethnic groups largely as a result of the civil war and its causes*".[40]

47. The information referred to by the Tribunal was drawn from the DFAT report that said "*there are currently no official laws or policies that discriminate on the basis of ethnicity or language*".

48. The Appellant's representatives, in the submissions sent by them to the Tribunal referred to this statement from the DFAT Report and said "*We submit that though such discrimination may have been prohibited officially, Tamils continue to be discriminated against in practice.*"[41]

[39] BD 225 at ln 30 – 25.
[40] BD 122 – 123.
[41] BD 123.

49. In the submissions the representatives also noted that the DFAT Report said "*there is only a low-level of discrimination in the implementation of laws and policies" on the basis of ethnicity and language, and only a "moderate level of discrimination between particular[r] ethnic groups ('societal discrimination'), largely as a result of the civil conflict and its causes*".[42]

50. The representatives responded by submitting that this information was inconsistent with country information supplied by the representatives to the Tribunal, and with DFAT's own conclusions in regards to discrimination in the implementation of Sri Lankan law in the past. The information supplied by the representatives, totalling in excess of 30 pages, largely consisted of information from reports by organisations such as the United Nations High Commissioner for Refugees, Amnesty International, and Human Rights Watch.[43]

51. The information that there were no laws or policies that discriminate against Tamils on the basis of their ethnicity was therefore not new material of which the Appellant was unaware. The Appellant was aware of the information and presented material that was purportedly inconsistent with the information in his extensive written submissions.

52. The Court further notes that the Tribunal in its reasons did refer to other country information, including a report by Landinfo and UNHCR guidelines, which acknowledge "*there is a moderate degree level of societal discrimination between ethnic groups largely as a result of the civil war and its causes*".[44] However, previous decisions of this Court have found that it is not the role of the Court to decide whether certain country information ought to be preferred over other country information; that is the role of the Tribunal.[45] The Tribunal is also not required by s 34(4) to set out reasons for rejecting certain country information, or finding it not to be persuasive.[46]

53. Ground 2 is therefore also dismissed.

Other Claims made at Supreme Court Hearing

54. In relation to the other claims advanced by the Appellant at the Supreme Court hearing, the Court accepts the Respondent's submission that the Tribunal took into account the Appellant's young age in making its decision, in a procedural and substantive sense. It is also accepted that there is no indication from the Tribunal transcript that the Tribunal did not afford the Appellant adequate time to answer its questions.

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[42]BD 123.
[43]BD 127 – 165.
[44]BD 320 – 322 at [72].
[45]*ROD 124 v The Republic of Nauru* [2017] NRSC 8. See also *NAHI v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 10 at [11], [13].
[46]*Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 74 ALD 630, 641 at [46]-[47].

55. In relation to the claim that the Tribunal failed to put the Appellant on notice that it did not believe his claims, it is apparent from the passages of the Tribunal transcript set out at [40] – [43] above, that the Tribunal indicated to the Appellant that it had difficulty accepting that a Heroes' Day celebration was held in Jaffna in 2011.

56. The point arose as to whether the Tribunal was required to put the Appellant on notice that it found his claims in relation to subsequent interrogations and monitoring to be credible. In consideration of this the Court notes the following passage from *Commissioner of the Australian Capital Territory Revenue v Alphaone Pty Ltd*[47]:

> *"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, and 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 the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question".*

57. When looking at the decision-makers processes French CJ and Kiefel J said in *Minister for Immigration v SZGUR*[48]:

> *"Procedural fairness requires a decision-maker to identify for the person affected any critical issue not apparent from the nature of the decision or the terms of the statutory power. The decision-maker must also advise of any adverse conclusion which would not obviously be open on the known material. However, a decision-maker is not otherwise required to expose his or her thought processes or provisional views for comment before making the decision. That is not to say that the Tribunal cannot or should not, in the exercise of its discretion, invite an applicant for review to make supplementary submissions in relation to apparent inconsistencies, contradictions or weaknesses in his or her case which have been identified by the Tribunal".*

58. In this appeal the Tribunal's questioning and statements expressing its view (that Heroes' Day celebrations did not take place in Jaffna in 2011) did put the Appellant on notice that the Tribunal was minded to draw the adverse conclusion that the Heroes' Day celebration did not occur.

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[47] *Commissioner of the Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592.

[48] *Minister for Immigration v SZGUR* (2011) 241 CLR 594 at [9].

59. Although the Tribunal did not express any view as to whether the events said to follow that celebration occurred (i.e. whether the father provided the sound equipment used at the celebration; whether the Appellant, his brother and father were questioned about the celebration in June 2012; and subsequently monitored and interrogation by the Sri Lankan Army), the authorities referred to above clarify that the Tribunal does not need to expose it's thought processes or provisional views to the Appellant.

60. Following this line of authorities in relation to this aspect of the Appellant's claim, the Court holds that the Tribunal was not required to put the Appellant on notice that it did not believe his claims about events following the Heroes' Day celebration.

ORDER

61. (1) The Appeal is dismissed.

(2) The decision of the Tribunal TFN 15033 dated 29 November 2015 is affirmed under section 44(1) of the Act.

Judge Jane E Crulci

Dated this 11 August 2017