IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 37/2016
Being an appeal against a decision of the Nauru Refugee Status Review Tribunal brought pursuant to s43 of the *Refugees Convention Act 2012*

BETWEEN

RUF068 APPELLANT

AND

The Republic of Nauru RESPONDENT

Before: Khan J
Date of Hearing: 12 September 2017
Date of Judgment: 28 February 2018

Case may be cited as: RUF068 v The Republic

CATCHWORDS:
Whether the Tribunal was in breach of section 22(b) of the Refugee Conventions Act 2012 in relying on information adverse to the applicant- whether the information was new and if it was not new -whether the appellant suffered practical injustice by being deprived of the opportunity to comment on adverse information.
Held: Appeal dismissed. The information was not new and the Tribunal was not obliged to give an opportunity to the appellant to respond and the Tribunal was not in breach of section of the Act.

APPEARANCES:

Counsel for the Appellant: J Gormly
Counsel for the Respondent: S Walker

JUDGMENT

INTRODUCTION

1. The appellant filed an appeal against the decision of the Refugee Status Review Tribunal ("the Tribunal") pursuant to s43(1) of the *Refugees Convention Act 2012* ("the Act") which states:

> 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 Tribunal delivered its decision on 3 August 2016 affirming the decision of the Secretary for the Department of Justice and Border Control ("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 10 November 2016 and the grounds of appeal were amended on 28 July 2017.

BACKGROUND

4. The appellant is a 25 year old single male from Iran. He is of Faili Kurdish ethnicity and is a Shi'a Muslim. He speaks Farsi.

5. His father ran an import/export business through Turkey, Syria and Iraq.

6. In 2002 when the appellant was aged 10, he was abducted outside his home in Tehran by two masked men in a car. He lost consciousness and awoke in an unfamiliar place. He was detained for three months in various locations. He was given poor food and dirty water and was rarely allowed to wash. He developed skin problems.

7. The leader of the kidnappers was a Kurdish man called Shouhan. He wrote false allegations against the appellant's father to send to the Iranian authorities. It was alleged that the father was spying for the United States, involved in people and goods smuggling and embezzling US$18 million from Shouhan's business. Shouhan boasted that he worked for Iraqi intelligence and was very powerful. He claimed that he was demanding money from the appellant's family and would kill him if they did not pay.

8. Shouhan was well-known in Iraq and was involved in political groups in 2002. The Sheikh in Kurdistan said that Shouhan was working for Iraqi intelligence in 2002. In response to the suggestion that if this was the case he would not have survived the overthrow of Saddam Hussein, the appellant said that Shouhan was working for the Kurdish people.

9. Shouhan was instructed to report to the office of a Sheikh who was senior to him. He was there detained and ordered to produce the appellant. Shouhan's brother in law brought the appellant to the office. Three Iranian police officers to whom the appellant was related then took the appellant to the Kurds' leader, "Mumjemal" or "Mam Jalal" (Jalal Talabani), who had engineered the appellant's release. The Sheikh preferred the police officers to approach Talabani because Shouhan was very powerful and he wanted to avoid further conflict. From there the appellant was able to go home.

10. The appellant's father was investigated and taken to the Iranian intelligence service to answer questions as a result of the allegations. There were suggestions that the father invented the abduction or was a US spy. There was a newspaper article suggesting that his successful textile business was built in cooperation with Shouhan. He almost lost his textile business, but no evidence was found against him. He was occasionally asked to go to the police station. The appellant's family was under government surveillance for about a month and the government continues to keep an eye on the appellant's father. He tried to have Shouhan arrested but was unsuccessful.

11. After the abduction his father worked with relatives selling crystal and glass in Shoush, Tehran. During his last three years in Iran, the appellant assisted his father in the shop. He was not allowed to go out alone.

12. Four or five years ago, Shouhan began threatening that he would kill a member of the appellant's family or abduct him again or his younger brother. These threats were made from Iraq but were relayed to the appellant's father via two intermediaries called Omar from Iraq and Shahmorad from Iran. They only knew and spoke to the appellant's father, who wanted to know what Shouhan was up to. His father did not share these threats with the family but the appellant overheard his father telling his uncles. More recently, his father only spoke to Omar over the phone. Shahmorad's family had been close to the appellant's family and so was trusted. He passed away a few years ago. He was "kind of involved" in the abduction. He did not know why Shahmorad had stayed in contact with Shouhan.

13. The family began to take the threats seriously about 18 months prior to the appellant's departure from Iran. The family relocated but Shouhan was always able to find them. He targeted them because he thought that they had reported him to police, making him a wanted person. They moved from Baharestan to Janatebad, both in Tehran city. They then moved to Varamin in Tehran province and also lived in Ganaveh, located 1,000km from Tehran in south-west Iran, for six months. While there he studied for an entrance exam. They returned to Tehran for eighteen months. He completed three semesters of dental studies at the Medical Sciences University. They lived in different places in Tehran during this period but lived at his father's mother's home for the last three months before departing Iran.

14. In 2013, a further attempt was made to kidnap the appellant. This occurred four weeks before his departure, but he could not exactly remember the dates due to the pressure he was under. He was leaving a coffee shop in Jamalzadeh Jonoubi Street in Tehran. While his friends were paying, a Zantia car tried to park and the driver remained in the car. Two men, assuming that he was alone, tried to convince him to enter the car by telling him that a friend wanted to talk to him and then by simply ordering him to get into the car. His father's brother and his two friends intervened, and he was able to evade abduction. The car drove away. The whole incident only lasted a couple of seconds. He does not know how the attempted abductors knew what he looked like or where he would be.

15. A document was produced indicating that the appellant's father reported the incident to the head of Police Station 129, Jami Branch in Tehran. The report was acknowledged and forwarded to the crime department. The report was not followed up on despite the appellant trying to convince the police to do so. He was told that because Shouhan was a foreigner they could not do anything about him while he was in another country.

16. The three police officers who had assisted at the time of the first abduction could have asked the police to intervene. One had retired but the other two assisted by sharing information with police in one of the cities in western Iran. His father did not have sufficient influence to ask Jalal Talabani to intervene again. He said that the Iranian government does not care about its citizens.

17. Two days after the attempted abduction, Shouhan rang the appellant's father and said, "did you think about how long you'd be able to run away. One day I will kidnap your wife or one of your children." The father offered him money but Shouhan refused as he wanted to dishonour him. The appellant had no further contact with Shouhan or his associates, but his father said that he received more calls. He did not know why the attention from Shouhan escalated in 2013 and does not know if Shouhan is more or less powerful now than he was in 2002.

18. The appellant left Iran using his Iranian passport in June 2013 with his mother and brother through the Tehran airport. His father remained in Tehran because of his business commitments and poor health. They planned that he would fly to Australia to join them.

19. The appellant had intended to apply for an education visa but realised that it would take a year to meet the conditions. His father considered an investment visa, but the Iranian authorities objected to money being taken out of Iran. The family had previously discussed migrating to Australia but did not due to the appellant's secondary and tertiary studies.

20. The appellant said that his father had a "poker face" and did not share things with the family. He was a "very tough man" but a "nice guy" and the appellant misses him a lot. His parents argued all the time. His mother was very sensitive and blamed her husband for the abduction. She was always worried if the appellant or his brother were late. During the period of his abduction his mother was "kind of crazy" and was given morphine. She could not tolerate the threats made against the family and was frequently seen by doctors until they left Iran.

21. His father paid for and arranged the journey to Australia. He did not know what to think of it at the time but is now glad he is no longer being threatened.

22. The appellant travelled to Australia by boat in 2014 with his mother and brother. They were then transferred to Nauru. His passport was taken by a smuggler in Indonesia.

23. In about April 2015, his father ran away from Tehran to live in Lumar village. This village is nearby Chegeni village, where his father was born. His mother

was born in Zoeheyri village. Both villages are in a mountainous region about 1,200km from Tehran in Ilam province in the west of Iran near the border with Iraq. There are no phones in this area because the people live a simple life so at the time of the Tribunal hearing the appellant had not contacted his father for five to six months.

24. He does not know why his father left Tehran but assumes it was because of Shouhan's threats. It was common for the appellant's father to not share information with the family. The appellant rarely talked with other relatives in Tehran and so has not found out more information from them. His father has severed his relationships with his friends to make it appear that the family has disappeared. He does not know if his father sold his business and property interests in Tehran but assumes that he did.

25. The appellant confirmed that his father required frequent medical care for his heart and back. The last time that he spoke to his father was when he had travelled to Tehran for a heart operation.

26. The appellant is opposed to the Iranian government and told the Tribunal that for a two-week period while he was in Iran, he and others published anti-government messages on a Kurdish blog. His father told him to stop. The Iranian authorities never found out. He now writes comments on Facebook comparing the current regime to that of the Shah's rule prior to 1979. The comments are not in his own name, but he believes the authorities could find his identity if they wanted to. He is convinced that he will be prosecuted on his return. The Supreme Leader has recently been critical of people who had been unfaithful to their country.

27. His father was issued with a birth certificate and national identification card. This is uncommon for Faili Kurds but occurred because of his father's military service. He is concerned that these documents could be withdrawn, although this has never been suggested by the authorities.

28. The appellant told the Tribunal that if he returned to Iran, Shouhan would find him because it is easy for Kurds to find Kurds. He would not be able to resume his course due to his three-year absence but could reapply for a place.

29. The appellant fears being killed or kidnapped by Shouhan. He claims that the authorities will not protect him because of the allegations made against his father.

30. The appellant further fears being tortured and detained because he has sought asylum abroad.

31. He confirmed that the attempted abduction in 2013 was the reason for his departure from Iran but did not mention it during an earlier stage of his application as he did not want his mother to get upset. His father never shared details of the threats with her. He was very worried about his mother's health. She had been due to have an operation in Iran before their departure. She has

seen a specialist in Darwin, but nothing was done and now she takes a lot of medication.

APPLICATION TO THE SECRETARY

32. On 19 February 2014, the appellant attended a Transfer Interview.

33. On 2 April 2014, the appellant made an application to the Secretary for recognition as a refugee and for complementary protection under the Act.

34. On 15 October 2014, the Secretary made a determination that the appellant is not a refugee and is not owed complementary protection.

APPLICATION TO THE TRIBUNAL

35. The appellant made an application for review of the Secretary's decision pursuant to s 31(1) of the Act which provides:

> 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.

36. On 28 March 2016, the appellant made a statement and on 14 April 2016 his lawyers, Craddock Murray Neumann, made written submissions to the Tribunal.

37. On 15 April 2016, the appellant appeared before the Tribunal to give evidence and present his arguments with his representative and an interpreter in Farsi and English languages.

38. The Tribunal handed down its decision on 3 August 2016 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

39. The appellant filed two grounds of appeal which are:

1) In determining that the appellant was not a refugee for the purposes of section 4 of the Act, the Tribunal failed to comply with s 22(b) of the Act in that it did not act according to the principles of natural justice.

Particulars

i) The Tribunal did not give the appellant the opportunity of being heard in that it 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 at [101] of the Tribunal's decision from a report by UK Home Office, *Country Information and Guidance: Iran; Illegal Exit, July 2016* that:

- A report from the Danish Refugee Council "observed that Kurds who left Iran illegally would be fined on return and would be released if no evidence was found against them".

ii) The information was credible, relevant and significant to the decision to be made and would be a reason for the Tribunal's rejection at [105], [111] and [113] of the appellant's claims that, although he was not a known dissident or had a criminal background, he would be imputed to have an anti-government political opinion as a failed asylum seeker who was also a Faili Kurd and who would therefore be at risk of harm on return to Iran.

2) In determining that the appellant was not a refugee for the purposes of section 4 of the Act, the Tribunal failed to comply with s 22(b) of the Act in that it did not act according to the principles of natural justice.

Particulars

i) The Tribunal did not give the appellant the opportunity of being heard in that it 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 at [106] of the Tribunal's decision taken from a decision of the UK Upper Tribunal (Immigration and Asylum Chamber), *SSH and HR (illegal exit: failed asylum seeker) Iran CG* [2016] UKUT 308 (IAC), 10 May 2016, that:

- The evidence did not show a risk of ill-treatment to returnees with no relevant adverse interest factors other than their Kurdish ethnicity.

ii) The information was credible, relevant and significant to the decision to be made and would be a reason for the Tribunal's rejection at [105], [111] and [113] of the appellant's claims that he would be imputed to have an anti-government political opinion

as a failed asylum seeker who was also a Faili Kurd and who would therefore be at risk of harm on return to Iran.

SUBMISSIONS

40. 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

41. Both parties based submissions on *DWN066 v The Republic*[1] (DWN066) as being correctly decided. In *QLN151 v The Republic (QLN151) Appeal No 21 of 2016* I stated that *DWN066* was subject to an appeal in the High Court of Australia and the appeal was allowed by consent on 18 August 2017. This was not known to both counsels including myself.

42. I therefore adopt what I stated in *QLN151* at [32], [33], [34], [35], [36], [37] and [38]:

> 32. Both parties made submissions that the common law requirements of natural justice are set out in *DWN066 v The Republic*[2] *(DWN066).* In *DWN066* this Court adopted the test outline in *Kioa v West* where Brennan J of the High Court of Australia said[3]:
>
> *A person whose interests are likely to be affected by the exercise of the power must be given an opportunity to deal with the relevant matters adverse to his interest which the repository of the power proposes to take into account in deciding its exercise [citing Ridge v Baldwin]. The person whose interest is 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...*
>
> *Nevertheless in the ordinary case when 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.*
>
> 33. In *DWN066* it was stated at [34] as follows:
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> *"Notwithstanding the error by the Tribunal in regards to the time the appellant was at home after the threat by the Taliban, I find there is no denial of natural justice as that was not the material finding. The material finding was whether the appellant came to harm after the 3-day ultimatum by the Tribunal."*
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> 34. Having stated the above at [38] the grounds of denial of natural justice was dismissed. DWN066 was subject to an appeal to the High Court of Australia and on 18 August 2016 the appeal was allowed by consent and the matter was remitted to the Tribunal for reconsideration. Neither the counsels nor I was

[1] [2017] NRSC 23 ("*DWN066*")
[2] *DWN066.*
[3] (1985) 159 CLR 550, 628-9.

aware of the appeal to the High Court of Australia and consequently both counsels based their submissions on DWN066 as being correctly decided.

35. The counsel for the appellant submits that:

"If an appellant was not informed of the case he had to meet that is sufficient to establish practical injustice and relies on *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs*[4] where it is stated:

"If a breach of the rules of natural justice is established an applicant would ordinarily be entitled to relief unless the Court was satisfied that the breach could not have had no bearing on the outcome: Stead v State Government Insurance Commission at 161 CLR 141 at 147; the Refugee Review Tribunal; ex parte Mansour Aala (supra) at 116 – 117. Accordingly, I reject the submission put by the solicitor for the Minister that this application must fail because of the failure on the part of the applicant to demonstrate by evidence that some practical unfairness accrued to him as a result of the procedures that were adopted. If the applicant was not informed of the case which he had to meet, that is sufficient to establish 'practical injustice' without the applicant having to prove what he would have done had he been informed of that case."

36. The counsel for the respondent submits that if a breach of natural justice is established then an applicant will not be entitled to the relief unless the court was satisfied that it could have had no bearing on the outcome of the decision made by the Tribunal as there was no practical injustice and relies on *Stead v State Government Insurance Commission*[5] where the High Court stated:

'That general principle is, however, subject to an important qualification which Bollen J plainly had in mind in identifying the practical question as being:

"Would further information possibly have made any difference?"

37. The High Court of Australia dealt with the issue of practical fairness *in BRF038 v The Republic of Nauru*[6] on an appeal from the Supreme Court of Nauru and stated at [57], [58], [59], [60] and [64] as follows:

> *[57] The appellant argued that the hearing before the Tribunal was concluded without reference to the appellant's capacity to avail himself of effective police protection against mistreatment by reason of the fact that Somaliland police force included members of his tribe. The appellant argued that the country information relating to the tribal composition of the Somaliland was credible, relevant and significant to the decision the Tribunal would make. It followed that fairness required that the Tribunal ought to have put the substance of that information to him. Its failure to do so, the appellant argued, constituted a breach of the requirements of procedural fairness contemplated by s.22 of the Refugees Act.*
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> *[58] In Minister for Immigration and Border Protection v SZSSJ, this Court held that procedural fairness requires that a person whose interests is*

[4][2003] SCAFC 298 [91].
[5][1986] 161 CLR 141 at 145-146.
[6][2017] HCA 44.

apt to be affected by a decision to be put on notice of 'the nature and content of the information that the repository of power undertaking the enquiry might take into account as a reason for coming to a conclusion adverse to the person'[7].

[59] In SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs[8] *Gleeson CJ, Kirby, Hayne and Callinan and Heydon JJ referred with the evident approval to the following statement by the Full Court of the Federal Court in Commissioner for Australian Capital Territory v Alphaone Pty Limited*[9]*:*

"Where the exercise of a statutory power attracts a requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information in 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."

[60] The respondent accepted, correctly, that procedural fairness requires a person to be given the opportunity to deal with all information that was "credible, relevant and significant" to the decision[10]*. The respondent sought to argue that disclosure of such information was required only in relation to "the critical issue or factor on which the administrative decision is likely to turn'*[11]*, and that the information to the tribal composition of Somaliland police was not a factor on which the Tribunal's decision was likely to turn. It was said to be apparent from the Tribunal's reasons that the Tribunal had already made findings sufficient to dispose of the appellant's claim, namely, that he had no well-founded fear of persecution*[12]*, before its reference to the tribal composition of the Somaliland police.*

[64] Finally, it is to be noted that the respondent did not suggest, either in the Supreme Court or in this Court, that compliance by the Tribunal with this aspect of the requirements of procedural fairness could not possibly have made any difference to the outcome of the review by the Tribunal.[13]

38. The issue of procedural fairness was also dealt with recently by the High Court in *HFM045 v the Republic of Nauru*[14]*(HFM 045)* where the High Court stated at [46], [47] [49] as follows:

[46] *The first way in which Nauru put the argument relies on R v The Chief Constable of the Thames Valley Police; Ex parte Cotton*[15]*. Cotton involved judicial review of a decision of the Deputy Chief Constable of*

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[7](2016) 90 ALJR 901 at 915 [83]; 333 ALR 653 at 670; [2016] HCA 29.
[8](2006) 228 CLR 152 at 161-162 [29]; (2006) HCA 63.
[9] (1994) 49 FCR 576 at 591-592.
[10]*Kioa v West* (1985) 159 CLR 550 at 629; [1985] HCA 81. See also *SZBEL* (2006) 228 CLR 152 at 162 [32]; and *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 256 [2] - 261 [19]; [2010] HCA 23.
[11]*Kioa v West* (1985) 550 at 587. See also *Alphaone*(1994) 49 FCR 576 at 591.
[12]*BRF 038*, unreported Refugee Status Review Tribunal, 15 March 2016 at [47] – [48].
[13]Cf *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-146; [1986] HCA 54.
[14] [2017] HCA 50, 15 November 2017.
[15] [1999] IRLR 344.

the Thames Valley Police Force to dispense with Cotton's services on the ground that he was not fit physically to perform the duties of a constable. The Deputy Chief Constable had acted on the basis of the recommendation in a report, which was not shown to Cotton. Slade LJ (with whom Stocker LJ agreed) considered that in the circumstances, the primary Judge had been entirely justified in dismissing the application because 'there would have been no real, nor sensible, no substantial chance of any further observation on the applicant's part in any way altering the final decision of this case'[16]*. Bingham LJ, agreeing in the result, allowed that cases may arise in which the denial of an adequate opportunity to put a person's case is not unfair, but observed that such cases may be expected to be of 'great rarity'*[17]*.*

[47] The appeal does not present the occasion to consider any difference between the law of England and the law of Australia respecting the content of the obligation of procedure fairness in its application to Nauru[18]*. Cotton was decided in circumstances in which the Deputy Chief Constable's decision that Cotton was not physically fit to perform his duties could not be seen to be affected by any response Cotton might make. As the English Court of Appeal has more recently observed, the decision in Cotton was all but inevitable*[19]*. This is to be contrasted with the Tribunal's assessment of the credibility and reliability of the appellant's claim to fear persecution or other significant harm in Nepal. The Tribunal's understanding that Chhetris are heavily represented in the Nepali's army cannot be quarantined from this conclusion that the appellant is not at risk of harm on return to Nepal. Bound up in that conclusion is an assessment not only of the prospect of Maoist or other ethnic groups inflicting harm on the appellant, but of the willingness and capacity of the Nepalese authorities to take action to protect the appellant from threatened harm.*

[49] The Tribunal was obliged to put the appellant on notice of the significance that it was disposed to attach to the reported level of representation of Chhetris in the Nepalese Army and to give him the opportunity to address the issue. The premise for Nauru's alternative submission, the denial of natural justice, could not have deprived the appellant of a different outcome, is not made good. There is no good reason to decline to grant the relief that the appellant claims.

39. *From the decisions in BRF 038 and HFM 045, it is clear that the High Court does not approve of the appellant's approach that to establish practical injustice all an appellant has to do is to establish that he was not informed of the case. To comply with the requirements of procedural fairness under s.22 of the Act the Tribunal is required to put the substance of the information to an applicant which is credible, relevant and significant and give him an opportunity to address the issue.*

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[16] *R v The Chief Constable of the Thames Valley Police; Ex parte Cotton* [1999] IRLR 344 at 350.
[17] *R v The Chief Constable of the Thames Valley Police; Ex parte Cotton* [1999] IRLR 344 at 352.
[18] Section 4(1) of the *Custom and Adopted Laws Act* 1971 (NR) provides, relevantly, that the common law and statutes of general application which were in force in England on 31 January 1968 are adopted as laws of Nauru.
[19] *R v Lichfield District Council* [2001] EWCA CIV 304 at [23].

THIS APPEAL

APPELLANT'S SUBMISSIONS

1. The appellant submits that in relation to both grounds of appeal the adverse information was relevant and significant to the decision as it undermined Faili Kurd integer of appellant's return claims; that although he was not an unknown dissident and did not have a criminal background; the appellant would be imputed to have an anti-government political opinion as a failed asylum seeker who was also a Faili Kurd; and as a result will be at risk of harm on return to Iran[20].

2. The appellant further submits that the information on both grounds of appeal was new; and that it was not used in the Secretary's decision; nor did it form part of the material referred to in the appellant's submissions[21].

RESPONDENT'S SUBMISSIONS

3. The respondent accepts that the information contained in the material in respect of both grounds of appeal was not brought to the appellant's attention; and that the information was adverse to the appellant, and it was credible, relevant and significant; and that the information was relied on by the Tribunal to reject the appellant's claim as Faili Kurd returning claim[22].

4. The respondent disputes that the information was new and submits that the appellant was already aware of the nature, content and significance of the information in relation to both grounds of appeal.

ISSUES FOR DETERMINATION

5. So, the only issue for determination is whether the information relied on by the Tribunal was new; and if the issue was not new then it has to be considered whether the appellant suffered practical injustice by being deprived of the opportunity to comment on the adverse information.

6. With the issues being narrowed, I shall now deal with the two grounds of appeal and the two grounds of appeal are almost identical in terms of legal issues except that they refer to different reports; and for the sake of clarity I shall deal with the two grounds separately.

Ground One – Appellant's contention

7. This ground deals with the UK Home Office Report of 2016 and the information which is subject to this ground is at [101][23] where it is stated:

[20] Appellant's written submissions [30] .
[21] Appellant's written submissions [31].
[22] Respondent's written submissions [42], [43] and [44].
[23] BD 252.

[101] The Home Office refered to a report from the Danish Refugee Council which observed that Kurds who left Iran illegally would be fined on return and would be released if no evidence was found against them. The Tribunal infers from this that Kurds with no known dissident or criminal background and who have left Iran legally would be of very little interest to the Iranian authorities.

8. The appellant submits that the relevant part of the UK Report reads[24]:

5.1.9 The Danish Council and Immigration service fact finding mission on Iranian Kurds and Conditions for Iranian Kurdish parties in Iran and KRI Activities in the Kurdish Area of Iran, Conditions in Border Area and Situations of Returnees from KRI to Iran 30 May to 9 June 2013 dated 30 September 2013 consulted UNHCR Ebril who informed the delegation that:

'The Iranian Kurds know the illegal paths across the border. If a Kurd who has left Iran illegally goes back, the consequences of his illegal exit will not be severe: If he was gone for less than 6 months, he would most likely be punished by a fine amounting to 80 USD and if has gone for more than 6 months the fine will be 120 USD. A person who goes back to Iran will be interrogated and then released unless there is evidence found against him."

9. The appellant submits that the relevance and significance of the information to the Tribunal's decision to reject the Faili-Kurd integer of the returnee claim in apparent from the inference the Tribunal explicitly drew from the information at [101] that:

> "The Tribunal infers from this that the Kurds with no known dissident or criminal background and who have left Iran legally would be of very little interest to the Iranian authorities."[25].

10. The appellant submits that the initial report is concerned with the return of the Iranian Kurds across the border with Kurdish region of Iran (KRI)[26].

Ground Two

11. The information which is the subject of this ground was country information at [106] of the Tribunal's decision, taken from a decision of the UK Upper Tribunal (Immigration and Asylum Chamber) on 10 May 2016,[27] that the evidence did not show a risk of ill treatment to returnees with no relevant adverse interests factors other than their Kurdish ethnicity[28].

12. The appellant submits that the Tribunal used the information in both grounds to support the general conclusion that it drew under the heading 'Failed Asylum Seeker', at [105], [111] and [113], which acknowledge and refute the Faili Kurd integer of the return claim[29] where it is stated:

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[24] BD 220-221.
[25] Appellant's written submissions [35].
[26] Appellant's written submissions [36].
[27] UK Upper Tribunal (Immigration and Asylum Chamber), *SSH and HR (illegal exit: failed asylum seeker) Iran CG* [2016] UKUT 308 (IAC), 10 May 2016.
[28] Appellant's written submissions [38].
[29] Appellant's written submissions [31].

[105] *....The Tribunal is satisfied that the applicant was of no interest to the authorities because of his political opinion imputed to him either because he had expressed political opinions or because of his Kurdish race or for any other reason at the time he left Iran.*

[111] *... The evidence before the Tribunal does not suggest that his having sought asylum will revive allegations about his father's history which were resolved in 2002 or which might be treated harshly on return because of his race particularly given lack of his political profile.*

[113] *... the Tribunal finds that there is no reasonable possibility that the applicant would be subjected to harm constituting persecution because he is a failed asylum seeker, because of political opinion imputed to him as a failed asylum seeker or because of his father, because he is a Kurd or because of a combination of these factors.*

13. The appellant's contention is that the Tribunal failed to inform him of its intention to rely on the information subject to grounds one and two in the way that it amounted to a failure to afford natural justice in breach of s 22(b) of the Act.

RESPONDENT'S CONTENTION

14. The respondent points out that the Danish report which is at Book of Documents page 213 was not before the Tribunal, and the appellant does not dispute that. The appellant agrees that in complying the Book of Documents he included the Danish report in it.

15. The respondent submits that the Home Office Report is contained in the Book of Documents at pages 207 to 224, and that the Home Office Report refers to the Danish report at page 213 of the Book of Documents, which in turn refers to the information provided by the International Organisation for Migration (IOM) Tehran Office, where IOM stated:

> *"Iranians who return with their passports will not face any problem at the airport when they return after a long stay abroad. It was added that a long stay abroad in itself, is not an issue as long as the person has left the country legally. ... Iranians who have left the country on their passports and are returned on Laissez-Passer will be questioned by the Immigration Police at the airport. The questioning may take a few hours, but according to IOM nobody has been arrested when travelling back on Laissez-Passer."*

16. The respondent refers to [100] to [102] of the Tribunal's decision and submits that the Tribunal drew reference from the Home Office Report. The respondent also refers to the Secretary's decision at page 99 where the Secretary addressed under the heading '*Fear of being discriminated for being a Faili Kurd*' [30]:

[30] BD [99].

"There does not appear to be any indication to support a claim that the Applicant will face persecutory harm on return to Iran due to him being a Faili Kurd. The two reasons why Kurds are targeted in Iran do not apply to him. He is not a Sunni Muslim and he is not involved in any form of political activism. He has not claimed having been involved in any political activity advancing the interest of the Kurds. Given this, I am not satisfied that there is a reasonable possibility he will face serious harm on account of being a Kurd."

17. The respondent also refers to page 99 of the Book of Documents, under the heading '*Fear of Harm of Being a Failed Asylum Seeker*', where the applicant claimed that as a failed asylum seeker he will be questioned, detained and possibly tortured on return to Iran as he is a failed asylum seeker and the Secretary found the claim to be plausible in light of the country information. The Secretary was satisfied that there is a real possibility that will face harm on account of his Kurdish ethnicity.

18. The respondent refers to page 100 of the Book of Documents where the Secretary stated:

"It was reported by Amnesty International that failed asylum seekers may risk arrest if they return to Iran, especially if they were forcibly returned and where their asylum application is known to the Iranian authorities. There have been several reports of incidents when return failed asylum seekers were mistreated and detained. One of the most talked about cases is that of Mohammad Reza Fakhravar, an asylum seeker in France who was arrested on his return to Iran on 29 April 2011. It was reported that 'he took part in demonstrations against the Iranian government in March and April 2011, in France and this must have been known to the Iranian authorities. He was arrested on return to Iran. Another case is that of Rahim Rostami, a member of Iran's Kurdish minority, who was a failed asylum seeker deported to Iran from Norway. He was reportedly imprisoned upon return to Iran in February 2011 and charged with 'actions against a nation's security'. However, it is obvious that it was not only his asylum seeker which is resulted in his imprisonment upon his return to Iran. According to reports, his 'asylum seeker application and participation in opposition rallies in Norway are basis for the charges.' It appears then that his act of asylum seeker was aggravated by his participation in opposition rallies whilst in Norway."

19. The respondent quite fairly concedes that the appellant did not put at the RSD stage a claim as a Faili Kurd returnee and will be persecuted as a result but he had put in a number of claims; and the Secretary in reviewing the appellant's claim at that stage relying on the country information points out in discussing Mr Rostami's case states that if a failed asylum seeker who has a political profile faces a real risk of being imprisoned upon return.

20. The respondent further submits that the Secretary stated at page 100 of the Book of Documents:

"... in respect of the applicant I have noted that he did not have an adverse political profile while he was in Iran. There is no evidence that he gained an adverse political opinion whilst outside Iran. This being the case, I find that he

will not be of interest to the authorities on return to Iran on the basis of an imputed political opinion."

21. The respondent further submits that at [107] of the decision the Tribunal stated that the appellant did not have an anti-government profile nor was wanted on criminal charges; and at [108] the Tribunal stated that it was satisfied that any questioning and official checking when he returns to Iran will show that he departed legally, was not politically active before his departure and was not facing criminal charges.

22. In respect of the UK Report which is subject to Ground One of the appeal, the respondent submits that at [106] the Tribunal referred to a returnee who is Kurdish. The respondent submits that it is exactly what the Secretary referred to in respect of Mr Rahim Rostami.

23. The respondent submits that the Tribunal made reference to the Home Office and Upper Tribunal Reports and did not draw the appellant's attention to the contents of those reports and that there was no need for it to do so as they did not state anything that was new.

24. Having perused the Secretary's findings and the comments made at pages 98, 99 and 100, I am satisfied that the material contained therein is almost identical to the information contained in the Home Office and Upper Tribunal Reports and therefore the Tribunal was not obliged to bring those matters to the attention of the appellant and give him an opportunity to respond to them. I am accordingly satisfied that the Tribunal did not breach s.22 of the Act in failing to do so.

25. In the circumstances both grounds of appeal are dismissed.

DATED this 28th day of February 2018

SEAL OF THE SUPREME COURT
REPUBLIC OF NAURU

Mohammed Shafiullah Khan
Judge