IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION] Case No. 29 of 2016

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T15/00180, brought pursuant to s 43 of the *Refugees Convention Act* 1972

BETWEEN

EMP 050 Appellant

AND

THE REPUBLIC Respondent

Before:	Crulci J
Appellant:	Self-represented
Respondent:	Mr S. Walker
Date of Hearing:	7 September 2017
Date of Judgment:	20 October 2017

CATCHWORDS

APPEAL - *Refugees – Refugee Status Review Tribunal – Point of Law – Tribunal Hearing in Absence of Appellant – Conduct of Legal Representative – 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:
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> (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 3 July 2016 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of the 23 October 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. The Appellant filed a Notice of Appeal on 14 October 2016. On 15 September 2016, the Registrar made an order by consent that the time for the lodgement of a Notice of Appeal under s 43(3) of the Act be extended up to and including 14 October 2016. On 8 August 2017, the Appellant filed an Amended Notice of Appeal accompanied by a further application for an order to extend time up to the date on which the order is made. The Respondent indicated in its written submissions and upon commencement of the oral hearing that it consents to the extension of time such that the Amended Notice of Appeal becomes competent. Leave was granted by the Court to proceed with the appeal.

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

BACKGROUND

5. The Appellant is a single male from the Lakshmipur district of Chittagong in Bangladesh. He is of Bengali ethnicity and is a Muslim. He was educated to grade 10 level, later assisting his father with his retail shop. His parents and two of his siblings remain in Chittagong, and his eldest brother lives in India.

6. The Appellant claims a fear of harm deriving from his involvement in *Jamaat Shibir*, the student wing of the *Jamaat-e-Islami* political party that has been banned by the current ruling party in Bangladesh, the Awami League. He further claims that he fears for his life because of his Muslim religion; membership of the particular social group of "family"; and the particular social group of people who have sought asylum in another country.

7. The Appellant left Bangladesh in April 2011 and travelled to Thailand and Indonesia. On 12 September 2013, the Appellant arrived in Australia by boat. He was transferred to Nauru on 21 July 2014.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellant attended a RSD interview on 6 July 2014. The Secretary summarised the material claims presented at that interview as follows:

    - *He joined the Jamaat-e-Islami (Jel) in 2005 and participated in meetings and rallies. He canvassed votes and members. His uncle was also a supporter of Jel and encouraged his political involvement.*
    - *He could not practice his Muslim faith in Bangladesh because of the high risk of attack by Awami League (AL) members during days that they attended the mosque.*
    - *He participated in a Jel party meeting that was attacked by AL supporters and many were beaten and injured in 2007.*
    - *He was prevented from registering his name in the electoral role, and prohibited from voting at the polling booth in the national election on 28 December 2008 by AL supporters because of his support for Jel.*
    - *He organised a cricket tournament and invited Jel presidents and vice presidents at ward and union levels in May 2009. The tournament was disrupted by AL supporters carrying weapons.*
    - *He was severely injured and hospitalised and his uncle was murdered. He did not report these incidents to the police as the authorities will not assist members of the Jel.*
    - *He moved to Dhaka on 8 April 2010. His father was assaulted at their shop in (sic) by the local chairman of his village and police. The Applicant moved to Chittagong and could not continue his schooling so could not sit for his Year 10 School Certificate.*
    - *He was approached by AL activist (sic) at his retail store and money was demanded of him in March 2011. He refused to pay and the following day he was assaulted and the store was set alight. When the police came to the scene they advised the Applicant to produce business registration documents. He could not access these because he could not approach local authorities or the police for appropriate documentation due to his Jel involvement.*

- *He feared for his safety and departed Bangladesh unlawfully on 24 March 2011 and remained in Indonesia unlawfully for over 2 years.*[2]

9. The Secretary accepted the following material elements of the Appellant's claims to be credible:

   - The Appellant is from Dalta village, Laksmi Pur district, Bangladesh.
   - The Appellant was illegally resident in Indonesia from 2011 to 2013.
   - The Appellant supports Jel.[3]

10. However, the Secretary did not consider the following material elements of the Appellant's claim to be credible:

    - The Appellant was a Jel Shibir (student wing) member from 2005 to 2011.
    - The Appellant was actively involved with Jel and attended Jel party meetings from 2005 to 2011 and responsible for organising meetings, rallies and demonstrations.
    - The Appellant was attacked by AL supporters, suffered extortion and was harassed by authorities because of his Jel membership and political profile.
    - The Appellant could not practice his Muslim faith in Bangladesh because of the high risk of attack by AL members during days that they attended the mosque.
    - That because of their support of Jel, his uncle was killed and he was attacked by AL supporters.[4]

11. The Secretary questioned the credibility of these claims for a number of reasons, including:

    - In the RSD interview, the Appellant provided limited detail about his and his uncle's involvement with the Jel and did not address his claims in the RSD application that he, his father, and his uncle were subject to attacks or extortion by AL supporters because of their Jel political profile;[5]
    - In the Appellant's RSD application, he said that he and his uncle were attacked together by AL supporters. At the RSD interview, the Appellant said that his mother had told him by phone that his uncle had been killed by the supporters;[6]
    - In the Appellant's RSD application, he claimed to be a member of the Jel. However, upon questioning at the RSD interview, the Appellant said that he was "*not a member*" but a "*Jel strong supporter*";[7]
    - In the Appellant's RSD application, he stated that his sister was married. At the RSD interview, the Appellant said that authorities would not allow his sister to marry unless the Appellant was found. The Appellant then said his sister had to get married from his grandparent's home in the next village;[8]

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[2]BD 76.
[3]BD 85.
[4]BD 85 – 86.
[5]BD 83.
[6]BD 85.
[7]BD 79.
[8]BD 80.

- The Appellant's account of attending Jel party meetings restricted to members was inconsistent with the Appellant's claim that he was only a "*strong supporter*";[9]
- The Appellant's claim of attending Jel party meetings was also implausible given country information that the structure of Jel is similar to revolutionary cadre-based parties;[10]
- The Appellant's claim of being a student member of Shibir was implausible given he only studied until year 10 and country information indicated that the membership process was highly selective;[11]
- At the RSD interview, the Appellant claimed that he attended a madrassa for five years. However, this claim was not included in his RSD application and was inconsistent with his claim to have been recruited by the Shibir in 2005 when he was 18 years-old;[12]
- The Appellant's account of AL leaders omitting his name from the voter registration list for the 2008 election was inconsistent with country information that the 2008 voter registration list was the most accurate in Bangladesh history, and was the voter registration project conducted by the Bangladesh Electoral Commission with assistance from the United Nations Development Program;[13]
- The Appellant did not detail any campaigning on behalf of Jel candidates in any Bangladeshi election that would warrant AL leaders omitting his name from the voter registration list for the 2008 election;[14]
- The Appellant could not identify the aim of the Jel in Bangladesh, the membership process, the party's organisational tiers, requirements for fees and donations, members of the Shibir or Jel party leadership, or specific political issues that involved Shibir and the Jel party;[15]
- The Appellant's claim at the RSD interview that his Jel involvement led to his targeting in Dhaka by police and the AL chairman was inconsistent with his claim in the RSD application that the local village chairman and police assaulted his father at their shop, the AL attempted to extort him, assaulted him and the store was set alight.[16]

12. While the Secretary noted country information supporting the claim that there is political violence in Bangladesh, the Secretary considered that merely being a Jel member was not sufficient to find that there was a reasonable possibility the Appellant would face harm in the reasonably foreseeable future if returned to his home region.[17]

13. The Secretary further concluded that, given country information on the availability of assistance to returning asylum seekers, and the volume of irregular migration from Bangladesh, there was no reasonable possibility of the Appellant facing

[9]BD 81.
[10]BD 84.
[11]BD 81.
[12]BD 84.
[13]BD 82.
[14]BD 85.
[15]BD 84.
[16]BD 85.
[17]BD 89.

harm upon his return on account of seeking asylum in a western nation.[18] The Appellant therefore had no well-founded fear of harm and was not owed refugee status.

14. For the same reasons, the Secretary was not satisfied the Appellant had a reasonable possibility of being subjected to torture, cruel, inhuman or degrading treatment or punishment, to arbitrary detention, or the death penalty, if returned to Bangladesh. Nauru's international obligations were therefore not enlivened and the Appellant was not owed complementary protection.[19]

REFUGEE STATUS REVIEW TRIBUNAL

15. On 23 October 2015, the Secretary made the determination that the Appellant was not a refugee or owed complementary protection. On 28 October 2015, the Appellant applied to the Tribunal for review of the Secretary's determination. On 15 April 2016, the Tribunal wrote to the Appellant through his representative to invite him to appear before the Tribunal on 10 May 2016. The letter advised that if the Appellant did not appear before the Tribunal, it may make a decision on the review application. The Appellant did not attend the hearing on 10 May 2016, and the Tribunal decided the review without taking any further action to allow the Appellant to appear before it.

16. The Tribunal rejected the Appellant's claims that:
    - he was a member or "*strong supporter*" of the Shibir or Jel;
    - his uncle had an official position in the Shibir or Jel;
    - he was prevented from registering on the electoral role and voting in the 2008 election;
    - he organised a cricket match attended by leadership of the Shibir or Jel, and the match was attacked by AL supporters who killed his uncle;
    - his village Chairman or AL supporters threatened the Appellant or his father in Dhaka because of his involvement with Shibir or Jel;
    - AL activists assaulted the Appellant ten days before his departure from Bangladesh and set his cousin's store on fire;
    - charges had been laid against the Appellant and his family because of his political activities;
    - his brother left Bangladesh in 2011 after being assaulted in his home village because of the Appellant's political activities.

17. The Tribunal questioned the credibility of these claims for some similar reasons as the Secretary, including that independent sources indicated the 2008 voter registration list was the most accurate in Bangladesh's history,[20] and voter registration was conducted by the Bangladesh Electoral Commission in partnership with the United Nations Development Program, rather than being controlled by the AL as claimed by the Appellant.[21]

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[18]BD 91.
[19]BD 92.
[20]BD 155 at [22].
[21]BD 155 at [22].

18. When considering the claims in relation to the attack at the cricket match, the Tribunal noted that there were no independent reports confirming the attack.[22] The Tribunal further noted that, at the RSD interview, the Appellant said that he did not know the village Chairman well and had not seen him much, leading the Tribunal to question why the Chairman would pursue the Appellant in Dhaka, having apparently not done so when the Appellant lived in Dalta village.[23]

19. Of further concern was that the Appellant did not mention the incident at his cousin's shop in his RSD application, despite it occurring ten days before his departure from Bangladesh,[24] and the documents outlining the charges against the Appellant's family were not put before the Tribunal.[25]

20. The Tribunal therefore concluded that the Appellant had not at any time faced harm in Bangladesh because of his political opinion, and there was no reasonable possibility the Appellant would face harm amounting to persecution in the reasonably foreseeable future if returned to Bangladesh, because of his political opinion, or membership of the particular social group comprising of his family. The Appellant's fear of persecution was not well-founded.[26]

21. In relation to the Appellant's fear of persecution on the basis of his religion, the Tribunal noted that, as a Muslim, he is not a member of a religious minority in Bangladesh and citizens are generally free to practice the religion of their choice.

22. Given the Appellant said he experienced difficulties at the mosque because of his involvement with the Shibir and Jel, the Tribunal found he does not have a well-founded fear of persecution on the basis of his Muslim religion alone.[27] In relation the Appellant's fear of persecution on the basis of his membership of the social group of people who have sought asylum in another country, the Tribunal said that, in light of its findings relating to the Appellant's membership of the Shibir or Jel, the Appellant would not attract adverse attention on re-entry to Bangladesh, and would not be targeted merely for reason of seeking asylum abroad.[28] The Appellant therefore does not have a well-founded fear of persecution on this basis.[29]

23. Given that there was no reasonable possibility of the Appellant suffering harm if returned to Bangladesh, the Tribunal further found that Nauru would not breach its international obligations by returning the Appellant to Bangladesh, and the Appellant was not owed complementary protection.[30]

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[22]BD 156 at [24].
[23]BD 156 at [25].
[24]BD 157 at [28].
[25]BD 157 at [32].
[26]BD 158 at [33].
[27]BD 159 at [37]-[38].
[28]BD 160 at [40]-[41].
[29]BD 160 at [42].
[30]BD 161 at [47]-[48].

THIS APPEAL

24. The Appellant's Amended Notice of Appeal filed on 8 August 2017 reads as follows:

    1. *The Tribunal made an error because they had the hearing without me and did not give me an opportunity for a real and meaningful chance to talk about my case. I told my lawyer that I needed more time because I was unwell mentally and physically. I told my lawyer to obtain mental health records to produce to the Tribunal to request for more time.*

        (a). The lawyer told me that they had received some medical documents and I expected them to provide to the Tribunal.
        (b). The Tribunal did not consider the medical documents to provide me with more time.
        (c). The Tribunal should have tried harder to invite me to the hearing.
        (d). The Tribunal could have adjourned the hearing when I did not attend but it didn't. This was my first hearing and it was very important. They should have given me another opportunity.

    2. *The Tribunal made an error because they had the hearing without me. I told my lawyer that I needed more time because I needed to obtain some supporting documents from Bangladesh. The lawyer did not request the Tribunal for a postponement.*

    3. *The Tribunal did not consider some of my documents that I gave to the lawyer because the lawyer did not submit them to the Tribunal even though I instructed them to.*

25. The Appellant did not file written submissions. At the oral hearing, the Appellant said that at the time of the Tribunal hearing he was suffering from high blood pressure and mental health issues. He was seeing a counsellor with Overseas Services to Survivors of Torture and Trauma, and his counsellor said that he would forward a written report to the Appellant's legal representative for the purpose of submitting it to the Tribunal. The Appellant also said that he did not have any accessible reports in relation to his treatment for high blood pressure. He intended to seek out some documentation from Bangladesh, but was unable to do so because of his physical and mental condition.[31]

26. The Respondent submits that the grounds of appeal advanced by the Appellant suggest the Appellant has two major areas of complaint, being that:

    - the Tribunal proceeded to a decision on the appeal without hearing the Appellant or considering his medical documents; and
    - the conduct of the Appellant's representative.[32]

27. Regarding the first major area of complaint, the Respondent submits that it is not clear what medical documents exactly the Appellant is referring to in his Amended Notice of Appeal. The only medical documents referred to by the

[31] Supreme Court Transcript at pp 24 – 25.
[32] Respondent's submissions at [33]

Tribunal were documents purporting to be evidence of the death of the Appellant's uncle. The Respondent submits that there can be no error in the Tribunal not considering some documents that it did not have before it.[33]

28. In addition, the Respondent submits that, considering neither the Appellant nor his representatives made any attempt to contact the Tribunal in relation to re-scheduling the hearing, the Tribunal was under no obligation to "*try harder*" to invite the Appellant to a hearing. There was no suggestion that the Appellant was not aware of the date and time of the hearing,[34] and the Tribunal advised the Appellant by letter that if he did not appear at the scheduled date and time, the Tribunal might proceed to make a decision on the review.

29. In any event the Tribunal had before it comprehensive written submissions from the Appellant's representatives, as well as the transfer interview, the Appellant's application for RSD status, two statements furnished to the RSD officer, and a third furnished to the Tribunal.[35]

30. The Respondent further submits that the facts in this case can be distinguished from those in earlier decisions of this Court[36] (in which error was found where the Tribunal failed to accede to an adjournment request where no earlier request had been made, and timing was not in issue), because no adjournment request was made in this case.

31. Regarding the second major area of complaint, the Respondent submits that the alleged issues with the Appellant's legal representative do not give rise to a point of law under s 43 of the Act. The Respondent notes that the Appellant does not allege that his representatives' behaviour amounted to fraud on the Tribunal, but rather to negligence or failure to obey instructions.

32. Even if the Appellant did allege fraud, the Australian High Court authority of *SZFDE v Minister for Immigration and Citizenship* ("*SZFDE*")[37] reflects that the fraud must have been on the Tribunal as well as the Applicant, and, as a result, the processes of the Tribunal must have been stultified.[38] It also reflects the "*high bar*" that the common law sets with respect to an error of law arising from allegations based on the conduct of a legal representative.

33. Here there is no basis upon which the Appellant could satisfy the Court that his solicitors were instructed to seek an adjournment, provide the Tribunal with certain documents, or seek certain documents from Bangladesh, and failed to do

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[33] Supreme Court Transcript p 9 ln 3 – 5.
[34] Supreme Court Transcript p 11 ln 22 – 34.
[35] Supreme Court Transcript p 12 ln 8 – 28.
[36] *CRI 052 v Republic of Nauru* [2016] NRSC 33 ("*CRI 052*"); *CRI 020 v Republic of Nauru* [2017] NRSC 41 ("*CRI 052*").
[37] *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 ("*SZFDE*").
[38] See also *SZHVM v Minister for Immigration and Citizenship* (2008) 170 FCR 211 at [47] (per Middleton J); *SZNNJ v Minister for Immigration and Citizenship* [2009] FCA 1356 at [21] (per Cowdroy J); *SZFNX v Minister for Immigration and Citizenship* [2007] FCA 1980 at [33]; *Minister for Immigration and Citizenship v SZLIX* (2008) 245 ALR 501 at [18] (per Tamberlin, Finn and Dowsett JJ).

so, given there is no affidavit evidence, or anything in the Tribunal transcript, to support these contentions.[39]

CONSIDERATIONS

First major area of complaint: Tribunal proceeded to determine matter without hearing

34. This Court has previously decided that the failure to grant an adjournment may be legally unreasonable. In *CRI 020 v The Republic* and *CRI 052 v The Republic*[40], it was found that it was unreasonable not to grant an adjournment where there was no previous request for an adjournment, timing was not in issue, there was minimal prejudice on the administrative side as hearings were still taking place, but there was significant prejudice to the Appellant as an adjournment would have been fatal to the success of his application.[41] However, the circumstances in the case currently before the Court are different to those prevailing in the previous decisions of this Court in that the Appellant in this case made no application for an adjournment of the Tribunal hearing.

35. The question of whether an error of law results from the failure of a Tribunal to adjourn a hearing where the review Applicant fails to attend, or make any application for an adjournment, has been considered by English and Australian courts. In *Priddle v Fisher & Sons* ("*Priddle*"),[42] Lord Parker CJ, with whom Melford Stevenson and Bridge JJ agreed, said:

> *"... a tribunal is acting wrongly in law if, knowing that an appellant has all along intended to turn up and give evidence and support his claim, and being satisfied, as they must have been, that he was unable for one reason or another to attend, they refuse to adjourn merely because he had not asked expressly for an adjournment. Before deciding to continue the tribunal should be satisfied that he was inviting them to continue in his absence".*[43]

36. In *Sullivan v Department of Transport*,[44] the Appellant, who had applied for review by the Administrative Appeals Tribunal ("AAT") of a refusal to renew his pilot's licence, sought to question a doctor who had treated the Appellant in the past. At the hearing, the doctor was not present, and the Appellant did not seek an adjournment. The Appellant appealed the decision of the AAT to the Federal Court. Deane J, with whom Smithers and Fisher JJ agreed, said:

> *"A refusal to grant an adjournment can constitute a failure to give a party to proceedings the opportunity of adequately presenting his case. If the Tribunal had, in the present matter, refused an application by the appellant for an adjournment to enable him to procure Dr Evans' attendance as a witness, that refusal may well have constituted such a failure. No such application for an adjournment was, however, made. If it had been made, it is highly probable that the Tribunal would have acceded*

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[39] Supreme Court Transcript p 23 ln 9 – 13.
[40] [2017] NRSC 41; [2017] NRSC 33
[41] *CRI 052*, Supra note 38 at [38]; *CRI 020,* Supra note 38 at [55]-[58].
[42] *Priddle v Fisher & Sons* [1968] 3 All ER 506.
[43] Ibid at 508.
[44] *Sullivan v Department of Transport* (1978) 20 ALR 323.

to it; indeed, counsel who appeared for the appellant stated that he did not dispute that, if the appellant had applied for an adjournment, the Tribunal would have granted it. The absence of any application for an adjournment does not, however, necessarily conclude the issue adversely to the appellant. The failure of a tribunal which is under a duty to act judicially to adjourn a matter may, conceivably, constitute a failure to allow a party the opportunity of properly presenting his case even though the party in question has not expressly sought an adjournment (see Priddle v Fisher & Sons [1968] 1 WLR 1478; [1968] 3 All ER 506). In this regard, however, it is important to remember that the relevant duty of the Tribunal is to ensure that a party is given a reasonable opportunity to present his case. Neither the Act nor the common law imposes upon the Tribunal the impossible task of ensuring that a party takes the best advantage of the opportunity to which he is entitled".[45]
(emphasis added)

37. Their Honours considered that there was no failure to ensure the Appellant had a reasonable opportunity to present his case or otherwise observe the requirements of natural justice.[46]

38. Australian courts have subsequently approved of the statement of authority from Deane J in *Sullivan*.[47] However, the circumstances in which an error of law results from the failure to adjourn a matter, where no adjournment has been expressly requested, are arguably limited.

39. In *Priddle*, the Appellant had advised the industrial tribunal that he intended to attend the hearing along with his representative. The representative was unwell and the Appellant intended to appear himself. However, he was unable to complete the journey because of snow, and the Appellant conveyed a message to the tribunal office explaining the situation. However, no express request for an adjournment was made and the tribunal refused to adjourn. The Queen's Bench Division considered that an error of law had been made out.[48]

40. In *Burringbar Real Estate Centre Pty Limited v Anthony John Ryder & Ors* ("*Burringbar*"), the New South Wales Supreme Court granted an order of certiorari quashing a decision of the Consumer Trader and Tenancy Tribunal because of a failure to grant a short adjournment to enable inquiries to be made as to the whereabouts of the review Applicant. Hall J considered that the failure to do so, in circumstances where the Tribunal member had been informed that the Appellant's director had been seen several minutes previously waiting outside the hearing room, meant the Appellant was not accorded the opportunity of participating in the hearing.[49]

41. In the case currently before the Court, there is no evidence of circumstances on par with those in *Priddle* and *Burringbar*. The Tribunal Decision Record indicates that a letter was sent to the Appellant via his representative inviting him to appear, and that letter made clear that if he failed to attend, the Tribunal might

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[45] Ibid at 343.
[46] Ibid at 344.
[47] *Burringbar Real Estate Centre Pty Limited v Anthony John Ryder & Ors* [2008] NSWSC 779 ("*Burringbar*") at [82]-[84]; *Italiano v Carbone & Ors* [2005] NSWCA 177 at [107].
[48] *Priddle*, Supra note 41 at 508.
[49] *Burringbar*, Supra note 46 at [90]-[91].

proceed to decide the review without taking further action to allow him to appear. The Tribunal also had before it sufficient documentation to enable it to decide the review upon the merits. In these circumstances, the Court gives heed to the principle that it is not for the Tribunal to ensure the review Applicant took the best advantage of the opportunity to which he is entitled.[50]

42. In relation to the Appellant's complaint regarding a failure on the part of the Tribunal to consider medical documents, there is no evidence as which documents the Appellant is referring to in this claim. The Amended Notice of Appeal, and statements and written submission to the Tribunal, do not suggest that there are any accessible medical documents relating to the medical condition of the Appellant. There can be no error of law resulting from a failure to consider documents before the Tribunal. This ground fails.

Second major area of complaint: Conduct of Appellant's representative

43. In the Amended Notice of Appeal, the Appellant appears to allege that he instructed his representative to provide documents to the Tribunal, including unidentified medical documents, and to request an adjournment of the Tribunal hearing, but his representative failed to do so. The conduct in question therefore appears to amount to no more than negligence or failure by the representative to obey the Appellant's instructions. The Appellant does not appear to allege that his representative acted fraudulently. Even if such an allegation was made, an analysis of the current state of the law on the validity of a decision of an administrative tribunal affected by third party fraud indicates that it would likely fail.

44. In *SZFDE*,[51] the Australian High Court considered the question of whether a decision of the Refugee Review Tribunal ("RRT") was vitiated by fraud. The Appellant family employed an adviser believed to be a migration agent and solicitor, although the adviser had, in fact, been struck off both rolls. The adviser advised the Appellant not to attend the RRT hearing because the Tribunal was "*not accepting any visa applications at all at the moment*". The High Court considered that the advice not to attend the hearing provided for by ss 425 and 426A of the *Migration Act 1958* (Cth) stultified the operation of the legislative scheme for review. The High Court was careful to emphasise that the outcome of the appeal was entirely dependent upon the particular facts of the case before it:

> "*The significance of the outcome in this appeal should not be misunderstood. The appeal has turned upon the particular importance of the provisions of Div 4 of Pt 7 of the Act for the conduct by the Tribunal of reviews and the place therein of the ss 425 and 426A. In the Full Court French J correctly emphasised that there are sound reasons of policy why a person whose conduct before an administrative tribunal has been affected, to the detriment of that person, by bad or negligent advice or some other mishap should not be heard to complain that the detriment vitiates the decision*

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[50] *Sullivan*, Supra note 43 at 343. See also *Secretary, Department of Family and Community Services v Verney* [2000] FCA 570 at [45] (per Cooper J); *Goodricke v Comcare* [2011] FCA 694 at [60] (per Flick J); *Kenso Marketing (M) SDN BHD v Chief Executive Officer of Customs* [2011] FCAFC at [45] (per Keane CJ, Downes and Gordon JJ).

[51] *SZFDE*, Supra note 37.

made. The outcome in the present appeal stands apart from and above such considerations".[52]

45. Since the judgment in *SZDFE* was been delivered, a number of Australian authorities have also stressed that negligence of a legal representative in failing to request an adjournment is insufficient to vitiate a decision of an administrative tribunal. In *SZHVM v Minister for Immigration and Citizenship*,[53] Middleton J said:

> *"SZFDE does not stand for the proposition that a failure by an applicant to attend a tribunal hearing due to the fault or conduct of a third person bears the result that the tribunal's decision to proceed is always vitiated by error".*[54]

46. In *Minister for Immigration & Citizenship v SZLIX*,[55] the Full Court of the Federal Court considered whether a decision of the RRT was vitiated by third party fraud. The Full Court of Tamberlin, Finn and Dowsett JJ noted that neither the *Migration Act*, nor the common law, has evolved to address the adverse consequences that may be suffered by an Applicant upon reliance on the assistance of an unregistered migration agent, and said:

> *"This said, an agent may be fraudulent in his dealings with a visa applicant in such a manner as results directly in a fraud on the tribunal in relation to the due discharge of its particular functions. SZFDE is testament to this. But SZFDE requires that the agent in question is fraudulent in a way that effects the tribunal's part 7 decision-making process. An omission to notify the date of a hearing to a visa applicant may have adverse consequences for that applicant if, as here, the tribunal proceeds to make a decision in the applicant's absence. But before that omission can properly be said to have occasioned a fraud on the tribunal, it must itself be able properly to be described as a fraudulent omission vis-à-vis the visa applicant. The simple fact of a failure to inform or bare negligence or inadvertence will not necessarily be sufficient to give rise to fraud on the tribunal."*[56]
> (emphasis added)

47. In *SZNNJ v Minister for Immigration and Citizenship*, the appeal centred on the failure of the Appellant's migration agent to communicate to the Appellant his hearing date, Cowdroy J stressed that *"Even if there was bare negligence or inadvertence on the part of the agent, this has been held not to be sufficient to give rise to a fraud by a migration agent on the tribunal"*, referring to *SZLIX*.[57]

48. It is therefore apparent that, even if the Appellant had alleged that his representative acted fraudulently, this argument would be bound to fail, as the Appellant has failed to demonstrate any conduct by the representative amounting to fraud on the Tribunal in the sense described by *SZDFE*. Rather, the conduct of the representative, at most, amounts to "*bare negligence or inadvertence*". This ground fails.

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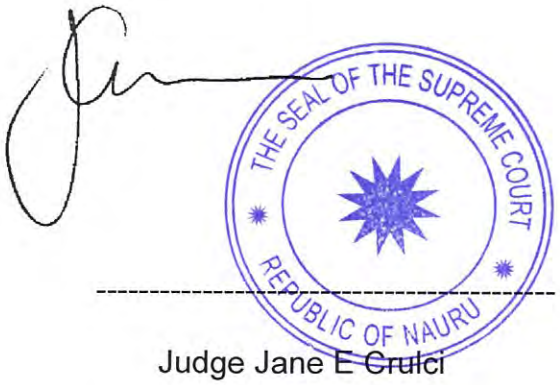
[52] Ibid at [53].
[53] *SZHVM v Minister for Immigration and Citizenship* (2008) 170 FCR 211.
[54] Ibid at [47].
[55] *Minister for Immigration and Citizenship v SZLIX* (2008) 245 ALR 501.
[56] *Minister for Immigration and Citizenship v SZLIX* (2008) 245 ALR 501 at [33].
[57] *SZNNJ v Minister for Immigration and Citizenship* [2009] FCA 1356 at [21].

ORDER

49. (1) The Appeal is dismissed.

(2)The decision of the Tribunal T15/00180 dated 3 July 2016 is affirmed pursuant to the provisions of s 44(1)(a) of the Act.



Judge Jane E Crulci

Dated this 29 October 2017