IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION] Case No. 47 of 2016

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T15/00204, brought pursuant to s 43 of the *Refugees Convention Act* 1972

BETWEEN

SOS 034 Appellant

AND

THE REPUBLIC Respondent

Before: Crulci J

Appellant: Self-represented
Respondent:

Date of Hearing: 9 September 2017
Date of Judgment: 20 October 2017

CATCHWORDS

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

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**
>
> (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**
>
> (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 29 September 2016 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of the 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 16 January 2017. On 9 January 2017, 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 18 January 2017. On 2 August 2017, the Appellant filed an Amended Notice of Appeal. As with similar cases, the Respondent indicated that it did not oppose the granting of an extension of time, and the Court granted leave.

BACKGROUND

5. The Appellant was born in the Comilla district of Bangladesh. He was educated until year 11 level at school, and afterwards worked as a retail trader between 2003 and 2006.

---

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

6. The Appellant claims a fear of persecution based on his membership and support of the Bangladesh Nationalist Party ("BNP"), in that he would be beaten, tortured or killed by supporters of the opposition party, the Awami League ("AL"), if returned to Bangladesh.

7. The Appellant left Bangladesh for Malaysia in 2007. In Malaysia, he worked in a factory and as a cleaner. When his visa expired, he travelled to Indonesia in March 2013, and then to Australia in November 2013, by boat. The Appellant was transferred to Nauru in August 2014.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellant attended a Refugee Status Determination Interview ("RSD") on 5 December 2014. The Secretary summarised the material claims presented at that interview as follows:

- *The Applicant joined the BNP in 2000 having been attracted to their policies.*
- *Following this the Applicant rose to the position of General Secretary in his Union Council area. In this role, the Applicant was responsible for such things as arranging party meetings and the meetings for the president of the Union Council committee.*
- *The Applicant encountered harm on a number of occasions due to his involvement in the BNP.*
- *On 22 June 2001, the Applicant was beaten when violence broke out between Awami League (AL) and BNP supporters at a celebration of 5 years of the AL being in power.*
- *On 6 January 2005, the Applicant was returning home from work when he was abducted. The men made threats against the Applicant to cease supporting the BNP; hence the Applicant is of the belief that the masked men were AL supporters. During the abduction the Applicant was thrown into a vehicle and beaten. The Applicant was beaten to the point he lost consciousness. The Applicant was later told that he was found on the side of the highway and then taken to the hospital.*
- *The Applicant attempted to lodge a complaint regarding the abduction. The Applicant was told by the police that as he was unable to identify the masked men, the police would not be able to pursue any further investigation into the case.*
- *Following this, the Applicant would often stay at a property adjacent to his shop, so to limit his movements and the opportunity for him to be abducted.*
- *The Applicant however continued his involvement in the BNP.*
- *On 4 September 2006, the Applicant's bungalow caught fire. The Applicant was saved by his father and brother, who pulled him from the fire. The Applicant believes the fire was caused by AL supporters in an attempt to kill him. The Applicant suffered burns to his feet and remained in hospital for three months in order to recover.*
- *Fearing for his life, the Applicant went to live with his uncle in Kishorganj. The Applicant's uncle organised a passport Applicant (sic) and then arranged for an agent to facilitate the Applicant to travel to Malaysia. The Applicant subsequently left Bangladesh and travelled to Malaysia where he remained until March 2013.*[2]

9. The Secretary accepted the following claims as credible:

[2]Book of Documents ("BD") 62.

- The Appellant is a low-level supporter of the BNP and that he was injured in a fight between BNP and AL supporters in 2001;
- His house may have accidentally caught fire in 2006.[3]

10. However, the Secretary was not satisfied to the credibility of the following claims:

- The Appellant was an actively engaged BNP supporter with a leadership role or with strong associations with the BNP leadership;
- The Appellant has a political or any other profile which would be of interest to the AL Party or any individual(s) and/or group(s) aligned with the AL Party;
- The Appellant was abducted and beaten by AL supporters in 2005;
- The Appellant's house was set alight by AL supporters in 2006;
- The Appellant's father was politically active or attacked on account of his political activity.[4]

11. The Secretary was not satisfied as to the credibility of the above claims because of a number of reasons, including:

- The Appellant's testimony regarding the membership process and decision to join the BNP was lacking in detail;[5]
- The Appellant was unable to demonstrate a working knowledge of the BNP's policies;[6]
- The Appellant's account of the conduct of BNP meetings and his responsibilities was vague;[7]
- The Appellant provided inconsistent information about his role and responsibilities with his Union Council branch of the BNP;[8]
- At the RSD interview, the Appellant initially indicated that the Union Council branch of the BNP usually consisted of a President, Secretary and the members. Later in the interview, the Appellant indicated that his father was the Vice President, and provided an "*elusive and vague*" explanation as to why he did not mention initially that there was a Vice President;[9]
- There was a high likelihood that the letter submitted by the Appellant purportedly from the President of the Muradnagor Upazila Branch of the BNP was fraudulent, noting that it incorrectly identified the BNP as the "*Bangladesh Nationality Party*";[10]
- In regards to the incident on 22 June 2001, the Appellant's evidence was he engaged in a physical confrontation with members of the AL after he believed they were going to attack him. The Appellant was not personally targeted;[11]
- The Appellant gave inconsistent information at the RSD interview in relation to his employment in Bangladesh and gave evasive responses when these inconsistencies were put to him;[12]

---

[3]Ibi 68.
[4]Ibid.
[5]Ibid 63.
[6]Ibid 64.
[7]Ibid.
[8]Ibid.
[9]Ibid.
[10]Ibid.
[11]Ibid 65.

- The Appellant's description of his alleged abduction on 6 January 2005 was inconsistent and lacked sufficient detail;[13]
- The Appellant's contention that the fire of 4 September 2006 was caused by AL supporters was speculative and not supported by eye witness accounts;[14]
- The Appellant gave inconsistent information about the political activities of his family members. In particular, in the Transfer Interview, the Appellant said that his father was not deceased, but in the RSD interview, he said that his father had died in November 2013 following an attack by AL supporters in March 2013.[15]

12. In light of the above, the Secretary considered the Appellant to be a low-level supporter of the BNP, without any political profile that would put him at risk of harm by the AL, or any group(s)/individual(s) aligned with the AL. The fear of harm was not well-founded and the Appellant did not attract refugee status.[16]

13. For the same reasons that the Secretary rejected the Appellant's application for refugee status, the Secretary rejected that there was any reasonable possibility the Appellant would be subject to harm if returned to Bangladesh that would breach Nauru's international obligations. The Appellant was therefore not owed complementary protection.[17]

REFUGEE STATUS REVIEW TRIBUNAL

14. The Secretary's determination that the Appellant is not a refugee or owed complementary protection was handed down on 11 October 2015. The Appellant appealed to the Tribunal for review of the decision, and the Appellant's Tribunal hearing was initially listed for 12 May 2016. The Appellant attended the hearing and sought an adjournment as he received news his friend had recently died and was too upset to participate in the hearing.

15. The rescheduled hearing was set for 21 August 2016. The Appellant attended the hearing listed for that date. The Appellant indicated that he was feeling unwell, but, following a discussion with his representative, confirmed that he wished to proceed with the hearing. The Tribunal record states that the Tribunal had received medical records noting:

    - *On 11 May 2016 he consulted a mental health nurse who noted that he had been diagnosed with detention fatigue and depression and prescribed medication. He complained of impaired memory and concentration. He asked for assistance with the Tribunal hearing scheduled for the following day. It was noted that he was depressed and anxious and struggling with prominent cognitive impairments related to these disorders.*

---

[12] Ibid 66.
[13] Ibid.
[14] Ibid 66 – 67.
[15] Ibid 67.
[16] Ibid 69.
[17] Ibid 70.

- *On 6 August 2016 the applicant consulted a mental health nurse who noted that he presented as having clinical signs and symptoms of depression with melancholic features. He was referred for psychiatric review.*[18]

16. Prior to the Tribunal hearing the Appellant provided a statement outlining additional information as to his membership and role in the BNP, the incident in which he lost consciousness on 6 January 2005, and his family's involvement in politics. The Tribunal noted this additional information, as well as further information put forward at the Tribunal hearing as to the Appellant's role in the BNP, the incident on 22 June 2001, the incident on 6 January 2005, the house fire on 4 September 2006, and the involvement of his father and brothers in the *Jamaat-e-Islami* and the BNP.

17. The Tribunal stated the following in regards to the credibility of the Appellant's claims.

- At the Tribunal hearing, the Appellant said initially that he was a member of the student wing of the BNP, the *Jatiyatabadi Chhatra Dal* ("*JCD*"), before transferring to the BNP after he finished studying. Later in the hearing, the Appellant said he had never joined the JCD, before later again confirming that he had, in fact, joined the JCD;[19]
- The Appellant's evidence on his role in the election campaign was vague and lacking in detail, and he was unable to explain the BNP's policies;[20]
- The Appellant was unable to recall details of the "*big dispute*" between the BNP and JCD towards the end of 2000;[21]
- At the Tribunal hearing, the Appellant said that, at the meeting on 22 June 2001, the AL said "*bad things*" about the BNP, and the Appellant warned them that the "*leader and a number of BNP people were present*". The Appellant did not make this claim at the RSD interview;[22]
- At the Tribunal hearing, the Appellant said that the persons who abducted him on 6 January 2005 told him to leave the BNP and attacked him. At the RSD interview, the Appellant said his abductors did not say anything to him;[23]
- It was implausible that, despite evading any threats or violence during the election period in 2001, he would then be abducted in 2005;[24]
- The newspaper articles relating to the fire purportedly sent to the Appellant by his mother appeared to have been "cut and pasted" and incorrectly described the Appellant as a BNP leader;[25]
- The Appellant's explanation for not reporting the fire to the police, that party leaders told him the party would take the matter up after the upcoming election, was implausible. The BNP was in power and as such had control over the police;[26]

---

[18]Ibid 221 at [12].
[19]Ibid 224 at [35], [40]; BD 225 at [47].
[20]Ibid 233 at [101].
[21]Ibid 224 at [36]-[37].
[22]Ibid 226 at [55].
[23]Ibid 227 at [62].
[24]Ibid 234 at [105].
[25]Ibid 229 at [76].
[26]Ibid 234 at [108].

- The letterhead on the letters from the National Human Rights Society, which was approached by the Appellant regarding his abduction and the fire incident, spells "*Society*" incorrectly as "*Socity*";[27]
- At the Tribunal hearing, the Appellant said that his father died following an attack by AL supporters, however, this was not mentioned in the Transfer Interview or RSD application;[28]
- At the Tribunal hearing, the Appellant gave inconsistent information as to when his father died, and when his family told him about his father's death;[29]
- At the Tribunal hearing, the Appellant said that the last time the AL came looking for him was in 2014. The Appellant later said in March 2016 one of his brothers was kidnapped, and the AL was continuing to look for the Appellant at this time;[30]
- It was implausible that the AL would track down the Appellant's brother after a 10-year absence from Bangladesh in a different town from where the Appellant lived.[31]

18. In relation to the medical evidence provided, and the submissions made by the Appellant's representative that the Appellant's age and mental state should be taken into account, the Tribunal said:

> *"The Tribunal has taken into account the applicant's representative's submissions in relation to assessing credibility. The Tribunal accepts that the applicant has spent a lengthy period away from this (sic) family and a considerable period in detention. The Tribunal accepts that an applicant may not be able to support his statements by documentary or other proof and that there is no requirement that evidence provided by an applicant must be independently corroborated before it can be accepted by the Tribunal.*
>
> *The medical evidence provided to the Tribunal did not indicate that the applicant was unfit to take part in the hearing and the Tribunal has taken the medial (sic) evidence regarding his mental state into account when assessing his claims."*[32]

19. The Tribunal concluded that the Appellant was not a member or supporter of the BNP.[33] While it accepted the Appellant may have been injured in some altercation in 2005, it did not accept that this was a result of the Appellant being kidnapped or beaten because of his political activity.[34] In addition, while the Tribunal accepted that the Appellant was injured in a house fire in 2006, it did not accept the AL started the fire because of the Appellant's involvement with the BNP.[35]

---

[27] Ibid 225 at [48].
[28] Ibid 231 at [87].
[29] Ibid at [88]-[89].
[30] Ibid at [90].
[31] Ibid 235-236 at [115].
[32] Ibid 232 at [96]-[97].
[33] Ibid 236 at [116].
[34] Ibid at [117].
[35] Ibid at [119].

20. The Tribunal rejected the Appellant's claims relating to his family's involvement in politics and the death of his father as a result of an AL attack.[36] The Tribunal concluded that the Appellant is not an opponent of the government and there is no reasonable possibility he would be harmed because of his political opinion, real or imputed. The Tribunal found that the Appellant's fear of harm on this basis was not well-founded.[37]

21. The Tribunal also found that the Appellant had no well-founded fear of harm on the basis of his membership of the particular social group of his family, leaving Bangladesh illegally, or being a failed asylum seeker.[38] While the Appellant did not press any claims at the Tribunal hearing in relation to the breach of data by the Department of Immigration and Border Protection ("DIBP"), whereby personal information of asylum seekers was published inadvertently on the DIBP website, the Tribunal nonetheless considered the claim and said that this would not lead to a risk of harm to him upon return to Bangladesh.[39]

22. The Tribunal further concluded that there was no reasonable possibility of real risk that the Appellant would be subjected to prohibited harm or mistreatment if returned to Bangladesh for any of the reasons claim. Returning the Appellant to Bangladesh would not breach Nauru's international obligations and the Appellant is not owed complementary protection.[40]

THIS APPEAL

23. The Appellant's Amended Notice of Appeal was filed on 2 August 2017:

    1. *It is unfair that the Tribunal proceeded with the hearing even though I said I was feeling unwell. I felt pressured by the lawyer and the tribunal members that I had to continue the hearing because they kept on telling me I could not postpone that day.*
    2. *During the hearing, I told the Tribunal that I cannot continue the interview but the Tribunal kept saying "a little more", "just a little bit more" and kept going. The interview lasted more than 5 hours and it is unfair that the Tribunal did not stop when I requested.*
    3. *I submitted medical documents saying my mental health is not well. The Tribunal did not consider it properly.*
    4. *I submitted documents to support my claims. The Tribunal did not consider it properly.*

24. The Appellant was self-represented and did not file written submissions. At the hearing, the Appellant did not add anything in support of his Amended Notice of Appeal, and asked the Court to "*look at the documentation properly and give me a fair decision*".

25. The Respondent submits that the grounds identified in the Appellant's Amended Notice of Appeal can be grouped into four distinct issues:

---

[36] Ibid at [120].
[37] Ibid at [122].
[38] Ibid 237 at [122]-[124].
[39] Ibid 238 at [126].
[40] Ibid 239 at [133].

1) the Tribunal unfairly proceeded with the hearing even though the Appellant said he was feeling unwell, and unfairly failed to stop the hearing when he requested it to do so;
2) the Tribunal and the Appellant's lawyer pressured the Appellant to continue the hearing even though he said he was feeling unwell;
3) the Tribunal failed to properly consider documents relating to the Appellant's mental health; and
4) the Tribunal failed to properly consider documents submitted by the Appellant to support his claims.

26. The Respondent addressed the first two issues identified together, followed by the second two issues.

27. In relation to the first two issues, the Respondent notes that both involve an allegation that the Appellant was denied a fair hearing, contrary to the Tribunal's obligation to act according to the principles of natural justice. This involves extending to the Applicant a "*real and meaningful*" invitation to appear before it to give evidence and present arguments.[41] With reference to previous decisions of this Court and the Federal Court of Australia, the Respondent argues that there is nothing to suggest that the Appellant was denied natural justice in this case because of a lack of a "*real and meaningful*" invitation to appear.

28. In addition, the Respondent notes that the factual allegations made by the Appellant in the Amended Notice of Appeal are not consistent with the Tribunal transcript, being the allegations that the Tribunal and his representative kept telling the Appellant that he "*could not postpone that day*", and that, during the hearing, the Appellant told the Tribunal that he could not continue, but the Tribunal kept saying "*a little more*", "*just a little bit more*", and kept going.

29. In respect of the Appellant's allegation that his representative pressured him to continue the hearing, the Respondent suggests that, as there is no indication of this on the Tribunal transcript, the allegation presumably relates to the private conversation between the Appellant and his representative during a brief adjournment. However, there is no evidence to support that allegation. Even if it could be established that "pressure" had been applied, this could only amount to an error of law if it could be shown that the representative's conduct amounted to a fraud on the Tribunal. However, the Appellant has not advanced such a claim.

30. In relation to the second two issues, the Respondent notes that it is not apparent which documents the Appellant is referring to in the two relevant grounds of appeal. If the Appellant is asserting that the Tribunal was aware of, but either ignored or failed to give adequate weight to medical reports and notes, this cannot constitute a point of law. The Respondent submits that those matters are matters of fact, and a wrong finding of fact is not an error of law.

CONSIDERATIONS

Whether the Tribunal unfairly proceeded with the hearing

[41] See s 40(1) of the Act and *ROD 122 v Republic of Nauru* [2017] NRSC 39 ("*ROD 122*") at [53].

31. As recognised by the Respondent, for the Tribunal to uphold its obligation to act according to the principles of natural justice, the Tribunal is required to extend to an Applicant a "*real and meaningful*" invitation to appear before it.

32. The Respondent referred the Court to *Minister for Immigration and Multicultural Affairs v SCAR* ("*SCAR*"),[42] in which the Full Court of the Federal Court of Australia held that the invitation to the Applicant from the Refugee Review Tribunal ("RRT") under s 425 of the *Migration Act 1958* (Cth) "*was not a meaningful one*". The Applicant put evidence before the Federal Court that, unbeknown to the Tribunal, the Applicant was on medication and suffering from extreme distress following the death of his father. The Court found as follows:

> "*Given the findings of fact made by the primary judge that the respondent was not in a fit state to represent himself before the Tribunal it is clear that the invitation he received under s 425 of the Act was not a meaningful one. Through no fault of the Tribunal it was not aware of this. Even so, the Tribunal did not comply with s 425 of the Act. It did not extend a meaningful invitation to the respondent [the Applicant for review]*".[43]
> (emphasis added)

33. Allsop J, as his Honour then was, subsequently found in *Minister for Immigration and Multicultural Affairs v SZFDE*[44] that *SCAR* is a "*authority standing for the proposition that if an applicant before the Tribunal is not in a fit state to represent herself or himself then there has been a failure to provide the applicant with an invitation that accords with s 425*".[45]

34. In *ROD 122 v Republic of Nauru*,[46] this Court considered whether the Tribunal failed to afford the Appellant a "*real and meaningful hearing*" by failing to consider whether the Appellant might have a medical condition that would affect his capacity to give evidence, and what affect the medical condition had on the Appellant.[47] The Court noted that the Appellant's ill-health was visible to the Tribunal, as the Tribunal remarked that:

   a. *The Appellant did not make normal eye contact, and mostly stared at the floor and repeated a chant or mantra repetitively;*
   b. *The Appellant frequently responded to questions by saying that "he could not remember";*
   c. *A psychiatrist said on 22 January 2015 (the hearing took place on 27 January 2015), that the Appellant was "currently acutely psychotic", and incapable of instructing lawyers;*
   d. *The Appellant had suffered two acute psychotic episodes in two months;*

---

[42] *Minister for Immigration and Multicultural Affairs v SCAR* (2003) 128 FCR 553 ("*SCAR*").
[43] Ibid at [41] (per Gray, Cooper and Selway JJ).
[44] *Minister for Immigration and Multicultural Affairs v SZFDE & Ors* [2006] FCAFC 142.
[45] Ibid at [134]. See also *SZVGN v Minister for Immigration and Border Protection* [2015] FCA 860 at [28] (per Katzmann J); *SZTJG v Minister for Immigration and Border Protection* [2015] FCA 1085 at [30] (per Rares J); *SZMSF v Minister for Immigration and Citizenship* [2010] FCA 585 at [12] (per Flick J).
[46] *ROD 122*, Supra note 41.
[47] Ibid at [53].

e. *The Appellant said that he had come off his medication three days before the hearing.*[48]

35. Despite that the Appellant's representative obtained instructions to proceed with the hearing, the Court considered that the Appellant's condition was such that he "*lacked the capacity to give an account of his experiences, present arguments in support of his claims and respond to questions put to him*", meaning that he was deprived of a "*real and meaningful hearing*".[49]

36. The question of whether the Tribunal unfairly proceeded with the hearing in this case, by failing to extend to the Appellant a "*real and meaningful*" hearing or invitation to appear, therefore turns on whether the Appellant "*was in a fit state to represent himself*", or had the capacity to give an account of his experiences, present arguments in support of his claims and respond to questioning.

37. The Tribunal noted in the Decision Record (see [15] above) medical reports from 11 May 2016 indicating that the Appellant had "*detention fatigue*", and was "*depressed and anxious and struggling with prominent cognitive impairments related to these disorders*". On 6 August 2016, shortly before the Tribunal hearing on 19 August 2016, a mental health nurse said the Appellant had "*clinical signs and symptoms of depression with melancholic features*".[50]

38. Upon commencement of the Tribunal hearing, the Tribunal asked whether the Appellant wanted to take an oath or affirmation, and the Appellant said "*Actually I'm not interested to make oath because my brain if (sic) not functioning properly so I want to do the other one*".[51] Subsequent to this, the following exchange occurred:

> TRIBUNAL MEMBER:... Now, you've just said that your brain is not working properly. Are you feeling unwell today?
>
> THE INTERPRETER: Yes, I'm feeling unwell but I have to attend this interview, that's why I'm attending.
>
> TRIBUNAL MEMBER: Okay. Have you been to see a doctor in the last day or two?
>
> THE INTERPRETER: I can't remember. As far as I can remember just one week ago I saw the doctor.
>
> ...
>
> TRIBUNAL MEMBER: So you're able to proceed today?
>
> THE INTERPRETER: I'll try.
>
> THE INTERPRETER: Is there anything you wanted to say?
>
> REPRESENTATIVE: [The Appellant's] medical records I believe may have been submitted to the Tribunal... They do indicate ongoing depression, anxiety and

[48]Ibid at [57].
[49]Ibid at [59].
[50]BD 221 at [12].
[51]Ibid ln 3 – 4.

attention fatigue. And [the Appellant] has instructed this does Impact his cognitive function and his memory recall. He has however instructed prior to the hearing he did want to go ahead. If I may just have a quiet word with him now just to confirm it. Do you think that's appropriate?

TRIBUNAL MEMBER: Just – if you want we can have a very short break, yes. [52] (emphasis added)

39. After a brief adjournment, the representative advised the Tribunal that "*[the Appellant] instructs that he does wish to proceed today to avoid any further delays*".[53]

40. At the conclusion of the hearing, the Appellant indicated that he was struggling to express himself coherently, and the following exchange occurred:

THE INTERPRETER: Actually, I'm not able to tell me story.

TRIBUNAL MEMBER: Okay.

THE INTERPRETER: I'm not in that position now. And actually I'm not able to share my feelings what's going on, how I getting along, this type of thing. Last month I lost my friend.

...

REPRESENTATIVE: [The Appellant} I believe is expressing his current capacity issues regarding his ability to give information in a coherent and cogent manner. Living as an asylum seeker for nine years in a number of countries while facing constant danger and risk of deportation has had a real impact.[54]

41. At various points throughout the hearing, the Appellant also gave answers to questions that were dramatically contradicting. Following a Tribunal member putting to the Appellant that he had previously said he joined the "student wing" of the BNP (the *Jatiyatabadi Chhatra Dal*), and then said that he had only joined the "main wing" of the BNP, the following discussion occurred:

THE INTERPRETER: No, no, I never joined the student wing of BNP.

TRIBUNAL MEMBER: So did you ever join the Chatra Dal?

THE INTERPRETER: No.

TRIBUNAL MEMBER: So is there any reason why you said at the beginning of the interview that you had? Beginning of this hearing, sorry, not interview.

THE INTERPRETER: When did I tell you about this?

TRIBUNAL MEMBER: The first few questions today.

THE INTERPRETER: So I'm not sure what I told you.

[52]Ibid 165 ln 20 to 166 ln 13.
[53]Ibid 166 ln 29 – 30.
[54]Ibid 214 ln 40 – 215 ln 39.

TRIBUNAL MEMBER: You've explained that you joined the student wing because you were in your last year at the Majasa and when you finished at school then you joined the main party.

THE INTERPRETER: When did I tell you about this?

TRIBUNAL MEMBER: About half an hour ago.

THE INTERPRETER: Did you ask any question in regards to this?

TRIBUNAL MEMBER: Yes. So we might move on...[55]
(emphasis added)

42. Following a brief adjournment, the Appellant said "*I'm very sorry because I did tell you some wrong information. Actually, I was always with the main BNP. Because my brain is not functioning properly now*".[56] Still further into the hearing, a Tribunal member put it to the Appellant that there was a letter from the Bangladesh National Student Party indicating that the Appellant did, in fact, join the "student wing" in 1999, and in 2000 was transferred to the BNP. The Appellant said "*Actually, I already mentioned that I don't know what I'm telling now because I can't remember things*", before confirming that he did join the "student wing" initially, and then was transferred to the BNP.[57]

43. At another point in the hearing, the Appellant said there was an election "*a few days after*" he joined the BNP in 1999. When a Tribunal member indicated that country information showed that the election was not until 2001, the Appellant responded "*I can't remember these things*".[58]

44. Later in the hearing, the Appellant was questioned about his brother living in Dhaka, his release from arrest, and the length of his detention. Following the Appellant's response, a Tribunal member interjects saying "*Have another break. We'll just have a break for the moment*". The Appellant says "*I am not feeling well*", and the hearing adjourned for approximately seven minutes.[59] Upon conclusion of the hearing, the Tribunal questioned the Appellant on his claimed fear of harm arising from the breach of data by the DIBP (see [18] above), and the Appellant responded by asking "*when did I mention about this data leak thing and about my concern?*", before proceeding to indicate that he could not remember anything about it.[60]

45. Therefore, while it may be that the factual allegations made by the Appellant in his Amended Notice of Appeal are not consistent with the Tribunal transcript, it is apparent from the combination of the medical notes indicating "*cognitive impairment*", the Appellant's request for a break, statements by the Appellant that his "*brain is not functioning properly*" and he "*can't remember*", and his confused

[55]Ibid 173 ln 25 – 174 ln 6.
[56]Ibid 174 ln 26 – 28.
[57]Ibid 209 ln 26 – 34.
[58]Ibid 171 ln 34 – 172 ln 5.
[59]Ibid 205 ln 39 – 206 ln 5.
[60]Ibid 213 ln 1 – 18.

responses to questions that the Appellant was not in a "*fit state to represent himself*",[61] and lacked the capacity to give an account of his experiences, present arguments in support of his claims and respond to questioning.[62]

46. In the view of the Court, the Tribunal unfairly proceeded with the hearing, and failed to afford the Appellant a "*real and meaningful*" hearing or invitation to appear, with the result that the Appellant was not accorded natural justice. The elements of grounds 1 and 2 that give rise to this issue succeed.

Whether the Appellant's lawyer pressured the Appellant to continue

47. The Tribunal transcript does not reflect that the Appellant's representative pressured the Appellant to continue the hearing despite the Appellant indicating that he was feeling unwell. It is therefore presumed that the Appellant by way of this allegation submits that the pressure was applied in the brief adjournment during which the representative confirmed that the Appellant wished to continue with the hearing

48. The first issue in relation to this ground is the lack of any evidentiary basis for finding that the Appellant's representative pressured him to continue the hearing during the adjournment. The second issue is whether such pressure could conceivably amount to a point of law. There is no basis for finding that the Tribunal was aware of any pressure on the Appellant to continue the hearing, and proceeded with the hearing regardless, resulting in a failure to provide a fair hearing and accord the Appellant natural justice.

49. It has not been submitted that the representative's conduct amounted to fraud on the Tribunal, such that the Tribunal was misled, and it's processes stultified, meaning the Tribunal failed to provide a fair hearing. In *EMP 050 v Republic of Nauru*,[63] this Court considered the decision in *SZFDE v Minister for Immigration and Citizenship*,[64] and subsequent authorities approving of that decision, indicating and affirming that mere misleading or negligent conduct on the part of a representative does not give rise to a fraud on the Tribunal.[65] Therefore, even if there were evidence that the representative acted misleadingly or negligently in pressuring the Appellant to continue the hearing, this would not be sufficient to make out a point of law. The element of ground 1 giving rise to this issue is dismissed.

Whether the Tribunal failed to properly consider documents

50. The Appellant submits that the Tribunal failed to consider medical documents and other documents submitted to support his claims. In the Decision Record, the Tribunal indicated that it had been provided with extracts from the Appellant's

---

[61] *SCAR*, Supra note 43 at [41].
[62] *ROD 122*, Supra note 41 at [59].
[63] *EMP 050 v Republic of Nauru* [2017] NRSC 85
[64] *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189
[65] *Minister for Immigration and Citizenship v SZLIX* (2008) 245 ALR 591 at [32]-[33] (per Tamberlin, Finn and Dowsett JJ); *SZNNJ v Minister for Immigration and Citizenship* [2009] FCA 1356 at [21] (per Cowdroy J).

medical records, and summarised the content of those records (see [13] above). The Tribunal further indicated that it had taken the medical evidence of the Appellant's mental state in assessing his claims (see [16] above). There is no evidence that the Tribunal failed to consider any additional medical documents, or documents of any other nature, before it. There is no point of law arising from the failure to consider documents not before the Tribunal.

51. If the Appellant is submitting that the Tribunal failed to give adequate weight to the medical records before it, this too does not raise a point of law. The question of the weight to be given to documentary evidence is a question of fact to be determined by the Tribunal. As previously found by this Court,[66] a court performing judicial review must confine the review to whether the decision by the Tribunal was made within the legal limits of the relevant power, and must not re-determine the matter upon the merits. Grounds 3 and 4 are dismissed.

ORDER

52. (1) The Appeal is allowed.
(2) The decisions of the Tribunal in T15/00204 dated 29 September 2016 is quashed.
(3) The matter is remitted to the Refugee Status Review Tribunal under section 44(1)(b) for reconsideration according to law.

Judge Jane E Crulci

Dated this 20th day of October 2017.

[66] *ETA 090 v Republic of Nauru* [2017] NRSC 61 at [31]-[32] ; *CRI 026 v Republic of Nauru* [2017] NRSC 67 at [38]-[39]; *WET 044 v Republic of Nauru* [2017] NRSC 66 at [32]-[33], citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 (per Brennan J) and *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 66 ALR 299 at 309 (per Mason J).