IN THE SUPREME COURT OF NAURU

AT YAREN

Case No. 38 of 2016

<u>IN THE MATTER OF</u> an appeal against a decision of the Refugee Status Review Tribunal TFN T15/00268, brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

QLN 107 Appellant

AND

THE REPUBLIC Respondent

Before: Justice Freckelton

Appellant: Ms T. Baw
Respondent: Mr A. Aleksov

Date of Hearing: 4 December 2017
Date of Judgment: 19 April 2018

CATCHWORDS

APPEAL – findings contrary to evidence – findings in the absence of supportive evidence – failure to refer to evidence – sexual assault of wife – APPEAL DISMISSED.

JUDGMENT

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

   (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. A "refugee" is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951 ("the Refugees Convention")*, as modified by the *Protocol Relating to the Status of Refugees 1967* ("the Protocol"), as any person who:

   "Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable to or, owing to such fear, is unwilling to return to it ..."

3. Under s 3 of the Act, complementary protection is defined to mean "protection for people who are not refugees but who also cannot be returned or expelled to the frontiers or territories where this would breach Nauru's international obligations."

4. The determinations open to this Court are defined in s 44(1) of the Act:

   (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.

5. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on 31 August 2016 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of 11 October 2015 that the Appellant is not recognised as a refugee under the 1951 Refugees Convention 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.

6. The Appellant filed a Notice of Appeal on 11 November 2016 and an Amended Notice of Appeal on 5 June 2017. The week before the hearing before this Court, the Appellant filed a Further Amended Notice of Appeal that added a particular (f) to the ground of appeal. The Respondent did not object to the filing of the Further Amended Notice, but sought leave to file further written submissions in respect of the additional particular. That leave was granted.

BACKGROUND

7. The Appellant was born in the Kandy district of the Central Province in Sri Lanka. He is of Tamil ethnicity and Christian religion.

8. In 1990, the Appellant and his family fled Sri Lanka for Tamil Nadu, India, where they were registered as Sri Lankan refugees by the Indian government. In 2004, he returned to his former place of residence in Mannar, Sri Lanka, with his wife and children, before fleeing again to Tamil Nadu in March 2006.

9. The Appellant claims a fear of harm on the basis of an imputed political opinion as a supporter of the Liberation Tigers of Tamil Eelam ("LTTE") arising from the alleged involvement of his brother-in-law and uncle with the LTTE. The Appellant also claims a fear of harm because of his Tamil ethnicity, being a failed asylum seeker, departing the country illegally, and his Pentecostal Christian faith.

10. In June 2014, the Appellant departed India for Australia. He was transferred to Nauru for the purposes of having his claims assessed on 2 August 2014.

INITIAL CLAIM FOR REFUGEE STATUS DETERMINATION

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

- *He was born in Kandy district in Sri Lanka and is of Tamil ethnicity. He states he had been told by his mother that the family fled that area when he was five years old due to safety concerns with the Singhalese who lived in the area, who would commit violent acts against Tamils in the area.*
- *After the family moved to Mannar district the Applicant states his memory was filled with Sri Lankan Army (SLA) bombings. In 1990 when his uncle was returning home after working as a fisherman he was arrested by the SLA on suspicion of being an LTTE member. Through the intervention of a church pastor the family was told his uncle had been released but remained missing.*
- *In 1990 the Applicant with his family to Tamil Nadu in India where he lived until April 2004. He married in India in 1997. In 2004 when there was a peace accord between the Sri Lankan and Indian governments the Applicant decided to return to Mannar, Sri Lanka with his wife and daughter while his son and parents remained in India.*
- *In Mannar the applicant started a successful crabbing business but suffered harassment from the SLA and the police. He was accused by them of bringing a slur on Sri Lanka for seeking asylum in India and was asked if he had any LTTE involvement. He was detained and tortured at least three times. He would be beaten and threatened by the police and SLA and was told he should have stayed in India. The Applicant needed to pay bribes to be released.*
- *In January 2006 he was detained by the police and accused of receiving training by the LTTE in India. A gun was put to his head and he was told to leave the country or be killed. He was imprisoned for two days and nights and was released after the intervention of the local priest. After his release he discussed his problems with the priest who encouraged him to leave Sri Lanka again for the safety of him and his family. He fled Sri Lanka with his family for India in March*

2006 where they lived without residence rights until the Applicant departed India in June 2014.[1]

12. The Secretary considered the following elements of the Appellant's claims to be credible:

    - The Appellant is an ethnic Tamil who had been resident in Pesalai, Mannar district, Northern Province, before he fled Sri Lanka for India around 1990;
    - The Appellant was born a Catholic Christian but became a Pentecostal Christian while living in India;
    - There is a reasonable likelihood that the Appellant's paternal uncle was killed in 1990 by the Sri Lankan military;
    - The Appellant's paternal uncle may have provided food and other goods to the LTTE before he died, and the Appellant's father may have accompanied his uncle at times;
    - The Appellant returned to Mannar in 2004;
    - After he returned to Mannar his background was checked by the Sri Lankan authorities;
    - The Appellant was stopped on occasion and his identity checked by the Sri Lankan authorities in the period he lived in Mannar from 2004 to 2006;
    - The Appellant returned to India in 2006 due to the deteriorating security situation in the area where he lived;
    - The Appellant has had no involvement, either in Sri Lanka or in India, with the LTTE or with Sri Lankan or Tamil political issues.[2]

13. However, the Secretary found that the Appellant was never detained by the SLA, apart from being held overnight once during a general cordon in January 2006. In rejecting this element of the Appellant's claim, the Secretary noted that the Appellant's evidence as to when and how often he was detained, and the details of his release, were inconsistent.[3]

14. In light of the Appellant's evidence that he was released from questioning by Sri Lankan authorities between 2004 and 2006 without undue delay,[4] and released from detention in January 2006 one day after his background was verified by the local Catholic priest,[5] the Secretary considered that the authorities had no particular interest in the Appellant, and would not impute to him a political opinion of a supporter of the LTTE.[6] Although his uncle and father may have provided some goods to the LTTE some 25 years ago, and his uncle disappeared in 1990, this low level of support and links to the LTTE was considered by the Secretary to be unlikely to raise the Appellant's profile in any significant way.[7] The Secretary

[1] Book of Documents ("BD") 63-64.
[2] BD 68.
[3] BD 67.
[4] Ibid.
[5] Ibid.
[6] BD 74.
[7] Ibid.

found that there was no reasonable possibility of the Appellant being harmed on the basis of being a Tamil with the imputed political opinion of a LTTE supporter.[8]

15. As to the Appellant's fear of harm due to his ethnicity, the Secretary noted country information indicating a marked improvement in the situation for Tamils since the end of the civil war in 2009.[9] Eligibility Guidelines issued by the United Nations High Commissioner for Refugees ("UNHCR") in 2010 indicate that there is no longer any need for a presumption of eligibility for refugee status for Sri Lankan Tamils, although the Guidelines indicate that persons suspected of certain links with the LTTE may still be at risk. The Secretary considered that the Appellant had no such links with the LTTE. There was also no country information indicating that persons of Tamil ethnicity continue to be discriminated against systematically because of their race.[10]

16. In relation to the Appellant's claimed fear of harm due to being a returnee from India and a failed asylum-seeker, the Secretary noted that, while some returnees suspected of LTTE involvement may come to the attention of authorities, the UNHCR reports that most returnees to Sri Lanka considered repatriation to be a positive experience and did not report any long-term problems.[11] Given that the Appellant had no political profile of interest, the Secretary found that there was no reasonable possibility of the Appellant facing harm upon return on account of being a returnee from India and a failed asylum-seeker.[12]

17. In relation to the Appellant's claimed fear of harm due to being a Christian, country information suggested that attacks on Christians in the Northern Province were isolated incidents,[13] and there was no reasonable possibility the Appellant would be targeted on the basis of his religion.[14]

18. Having made these findings, the Secretary considered that, as there was no reasonable possibility of the Appellant being harmed, his fear of harm was not well-founded. The Appellant was not granted refugee status.[15] The Secretary further considered that, for the same reasons given for rejecting the Appellant's application for refugee status, the Appellant would not suffer harm amounting to torture, cruel, inhuman or degrading treatment or punishment if returned to Sri Lanka. The Appellant was also not granted complementary protection.[16]

REFUGEE STATUS REVIEW TRIBUNAL

19. The Appellant attended a hearing before the Tribunal on 7 June 2016. In a further statement submitted to the Tribunal, the Appellant claimed for the first time that he was detained and tortured in June 2005, and not January 2006, as part of a

[8] BD 74.
[9] BD 69.
[10] BD 72.
[11] BD 73.
[12] BD 74; BD 76.
[13] BD 65.
[14] BD 75.
[15] BD 78.
[16] Ibid.

"round up" of people. He said that he was detained for three days.[17] At the hearing, the Appellant said he was detained because the Sri Lankan Navy ("SLN") thought his brother-in-law was smuggling goods for the LTTE. When asked why the claim regarding his brother-in-law had not been advanced earlier, the Appellant said he was worried his application for refugee status would be refused on that basis.[18] The Appellant said he mistakenly indicated earlier that he was detained in January 2006 for one night only.[19]

20. In the further statement, the Appellant also added the new claim that members of the SLN raped his wife in December 2005,[20] and, as a result, the Appellant and his wife travelled to India. At the hearing, the Appellant said that he had not advanced this claim previously because during his previous interviews he was disturbed and upset, and did not concentrate properly.[21]

21. At the Tribunal hearing, the Appellant elaborated upon his claims as to travelling to India,[22] the crabbing business he operated with his brother-in-law,[23] and being questioned by Sri Lankan authorities on a number of occasions between 2004 and 2006.[24] The Appellant also reiterated his claims as to his uncle's involvement with the LTTE and his disappearance in 1990.[25]

22. The Tribunal accepted that the Appellant is of Tamil ethnicity, that he fled to India with his family in 1990 as a result of the conflict, and that his family were recognised as refugees after their arrival.[26] The Tribunal also accepted that the Appellant's paternal uncle and father might have provided some limited support to the LTTE, and that his uncle was arrested in 1990 on account of being a LTTE member, and remains missing.[27] The Tribunal further accepted that the Appellant may have been detained as part of a "general cordon", and was often stopped for background checks.

23. However, the Tribunal did not accept that the Appellant was detained and mistreated by the SLN on suspicion of his brother-in-law's involvement in the LTTE. The Tribunal noted that the SLN had not attempted to detain his brother-in-law, and that the Appellant was able to continue operating the business in Mannar for another eight months before fleeing Sri Lanka.[28] The Tribunal also gave weight to the discrepancies in the Appellant's accounts, as identified by the Secretary.

24. The Tribunal further rejected the Appellant's claim that his wife was raped, as this claim was raised for the first time before the Tribunal, and the Appellant's

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[17] BD 226 at [24].
[18] BD 228 at [33].
[19] Ibid at [34].
[20] BD 226 at [25].
[21] BBD 228 at [36].
[22] BD 227 at [29].
[23] Ibid at [30].
[24] Ibid at [32].
[25] Ibid at [31].
[26] BD 230 at [44]-[47].
[27] Ibid at [48].
[28] BD 231 at [51].

explanations for this were unconvincing.[29] The Tribunal considered that the Appellant did not have an actual or imputed LTTE profile at the time of his departure from Sri Lanka, and would therefore not be targeted for this reason.

25. The Tribunal noted, and drew to the Appellant's attention, country information to the effect that that Tamils in the Northern Province are no longer systematically discriminated against, and that the UNHCR Eligibility Guidelines indicate that there is no presumption of protection for Tamils as had been the case previously. While the UNHCR lists "people suspected of certain links with the LTTE" as a category of persons who may require protection, given the Tribunal's finding that the Appellant had an insignificant link to the LTTE through the Appellant's uncle, and the lack of consequences of this link, the Tribunal did not accept that the Appellant fell within the category.[30] The Tribunal therefore found that the Appellant did not have a well-founded fear of persecution on the basis of his ethnicity.[31] The Tribunal considered that this was the case even viewed in combination with his place of origin and former residence in Mannar.

26. The Tribunal also said that while returning asylum-seekers are likely to be subject to questioning upon return to Colombo airport, such questioning would establish that the Appellant has no adverse profile. There was no reasonable possibility that the questioning would lead to any serious or significant harm.[32] The Tribunal discussed with the Appellant, and the Tribunal accepted, that the Appellant left Sri Lanka without a passport in 1990, and again in 2006, and the Appellant might be charged under the *Immigrants and Emigrants Act*. The Appellant may be held on remand for up to several days awaiting a bail hearing, but, on the information before the Tribunal, there was no real possibility of the Appellant facing torture or mistreatment as part of this process.[33] The Tribunal therefore said:

> "*Given the Tribunal's findings above, it does not accept there to be a reasonable possibility that the applicant will be targeted for serious harm by Sri Lankan authorities on the separate or cumulative bases of his Tamil ethnicity, his actual or imputed political opinion or his membership of the various particular social groups of failed asylum seekers. The Tribunal finds that he does not have a well-founded fear of persecution on these bases.*"[34]

27. The Tribunal also noted that the Appellant had the freedom to attend the local Pentecostal church, and a local priest assisted the Appellant when he was detained in January 2006. The Tribunal did not accept the Appellant would be targeted on the basis of his religion, and found that the Appellant had no well-founded fear of persecution due to this.

28. As a consequence, the Tribunal concluded that the Appellant was not a refugee within the meaning of the Convention.[35] For the same reasons for finding that the Appellant was not a refugee, the Tribunal did not accept there to be any

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[29] BD 231 at [53].
[30] BD 234 at [68].
[31] BD 235 at [74].
[32] BD 237 at [84].
[33] BD 238 at [92].
[34] BD 239 at [96].
[35] BD 240 at [102].

reasonable possibility the Appellant would be subjected to harm or mistreatment that would enliven Sri Lanka's international protection obligations. While the Appellant may be subject to a moderate degree of discrimination because of being a Tamil from the Northern Province, this did not amount to torture or cruel, inhuman and degrading treatment.[36] The Tribunal concluded that the Appellant was also not owed complementary protection.[37]

THIS APPEAL

29. The Appellant's Further Amended Notice of Appeal asserts:

> 1. *The Tribunal erred on points of law, as it failed to consider the Appellant's claims or their component integers, and/or by failing to take into account a relevant consideration.*
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> *Particulars*
>
> a. *The finding in respect of the interrogation of the brother-in-law at D[51] was contrary to evidence and/or failed to take into account the full evidence.*
> b. *The finding in respect of the links of the brother-in-law to the LTTE at D[52] was contrary to evidence and/or failed to take into account the full evidence.*
> c. *The finding in respect of the wife's multiple rapes at D[53] failed to take into account the full evidence, and/or was a misunderstanding or misconstruction of the evidence.*
> d. *The explanation for the changes to his evidence concerning the period and timing of detention was not taken into account.*
> e. *The claim that he did not have a national ID card which would seriously contribute to his risk of persecution if he were to return to Sri Lanka was not dealt with.*
> f. *The claim that he would be detained upon arrival to Sri Lanka and exposed to cruel, inhuman or degrading treatment sufficient to enliven Nauru's non-refoulement obligations under article 7 of the ICCPR D[76].*

30. During the oral hearing, counsel for the Appellant indicated that the Appellant did not press particular (d), the fourth particular to the ground of appeal.[38]

31. Before this Court, the Appellant cited authority in support of the propositions that the Tribunal is required to consider the claims, or integers of the claims, made by the Appellant,[39] and that the failure to make a finding on a "substantial, clearly articulated argument relying upon established facts" can amount to a constructive failure to exercise jurisdiction.[40] The Appellant submitted that, where a Tribunal is required to provide reasons, the failure to advert to a certain matter in the statement of reasons may provide a basis to infer that the matter has not been considered or taken into account.[41] In particular, the Appellant referred to

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[36] BD 241 at [107].
[37] Ibid.
[38] Supreme Court Transcript 41 at ln 43 – 44.
[39] *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* ("*NABE*") (2004) 144 FCR 1 at [61]-[63].
[40] *CDD15 v Minister for Immigration and Border Protection* [2017] FCAFC 65 at [20].
[41] *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1 at [16] citing *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [5] (Gleeson CJ), [37] (Gaudron J), [69], [89] (McHugh, Gummow and Hayne JJ) and [133] (Kirby J).

Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs ("*Applicant WAEE*"),[42] in which French, Sackville and Hely JJ said (at [46]):

> "*It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 at [87]-[97]) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The Tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinised 'with an eye keenly attuned to error'. Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.*"

32. Their Honours continued (at [47]):

> "*The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.*"

33. Counsel for the Appellant also took the Court to the Full Federal Court authority of *Minister for Immigration and Border Protection v CZBP*, in which Gordon, Robertson and Griffiths JJ accepted that the Tribunal "does not require a line-by-line refutation of all the evidence but, ... whenever rejection of evidence is one of the reasons for the decision, the Tribunal must set that out as one of its reasons."[43]

34. By way of the first particular to the ground of appeal, the Appellant complained that the Tribunal's finding in [51] of the Tribunal Decision Record was contrary to the evidence. That paragraph reads as follows:

> "*The Tribunal does not accept that the navy would target and interrogate the applicant about his brother-in-law's involvement in smuggling goods for the LTTE and not pursue his brother-in-law. If the navy suspected the applicant's involvement in this LTTE activity he would not, in the view of the Tribunal, have been released on the basis of a priest vouching for him. Nor would he have been told to return to India.*

[42] (2003) 236 FCR 593.

[43] [2014] FCAFC 105 at [102]; Supreme Court Transcript 34 at ln 39 – 42.

Similarly, the Tribunal does not accept that the applicant would not have remained working in the Mannar district and living with the family of his brother-in-law (the prime suspect) for another eight months if the authorities suspected him of involvement with the LTTE. The applicant's explanation at the review hearing that the authorities did not detain and interrogate his brother-in-law because 'he comes and goes' does not adequately explain the lack of any problems experienced by the brother-in-law, which rather indicates that the authorities were not interested in him as a LTTE supporter."

35. The Appellant submitted that, in finding that it was clear the authorities were not interested in the Appellant's brother-in-law because he had not been detained or interrogated, the Tribunal mischaracterised the evidence, as upon a complete and fair reading of the Appellant's testimony, there was a rational explanation for the brother-in-law's avoidance of the authorities. Counsel for the Appellant submitted that the Appellant gave evidence that his brother-in-law "went into hiding" after the Appellant was taken for interrogation, and neither the Appellant nor the Appellant's wife were aware of his whereabouts.[44] At the hearing, the Appellant further framed the ground as a failure to consider that the authorities were always interested in the brother-in-law as a supporter of the LTTE, and interrogated the Appellant about his whereabouts.[45] The Appellant contended there was no evidence that the authorities did not, in fact, detain and interrogate his brother-in-law at some point, unbeknown to the Appellant.[46]

36. The second particular to the ground of appeal also alleged that the Tribunal's finding in [52] of the Tribunal Decision Record was contrary to the evidence. However, at the hearing the Appellant submitted that the ground may be interpreted as equivalent to a "no-evidence" ground of appeal.[47] That paragraph reads as follows:

"The applicant's reason for not disclosing at an earlier stage of his application that he had been detained and tortured in 2005 on account of his brother-in-law's LTTE connections because it would have resulted in his application for refugee status being automatically refused is implausible. As noted above he had no qualms about providing evidence of his uncle's and father's connection with the LTTE. Further, the thrust of his evidence about his contact with the authorities all related to questions about his return from India. Accordingly, the Tribunal does not accept that the applicant was detained and mistreated by the navy on suspicion that his brother-in-law's involvement in the LTTE or that the applicant was accused of involvement."

37. In relation to this finding that the Appellant's explanation for not disclosing his detention in 2005 on account of his brother-in-law's LTTE connections was implausible, the Appellant again submitted that a fair and complete reading of the Appellant's evidence shows the Appellant's explanation, that he was afraid it would result in his RSD application being refused, was rational. The Appellant gave evidence that, when he was residing in India, his experience was that any discussion of the LTTE or family members of the LTTE or LTTE supporters

[44] BD 202 at ln 46 – BD 203 at ln 5; BD 203 at ln 11 – 13; BD 207 at ln 6 – 9; BD 207 at ln 20 – 23; BD 207 at ln 38 – 42.
[45] Supreme Court Transcript 17 at ln 39 – 40; 18 at ln 29 – 40.
[46] Appellant's Submissions at [17].
[47] Supreme Court Transcript 63 at ln 21 – 22.

resulted in arrest and detention.[48] The Appellant further explained that he mentioned his father's involvement in the LTTE because his father was only involved when the Appellant was a child, but his brother-in-law's involvement was more recent.[49]

38. The third particular to the ground of appeal also alleges that the Tribunal's finding in [53] of the Decision Record mischaracterised the Appellant's evidence. That paragraph reads as follows:

> "*The Tribunal also rejects the applicant's claim of his wife being raped by members of the SLN in December 2005. This claim was not made until the Tribunal review despite being assisted by a legal representative to prepare his statement of claims and present his evidence at the RSD interview. The Tribunal does not accept the representative's submission that the applicant did not raise this claim at an earlier stage because he was concerned about confidentiality. The applicant has had access to his legal representative at each stage of the application and the confidentiality of the proceedings explained to him, if not by his representatives then at the TI and RSD interview. The Tribunal does not accept that if navy personnel raped the applicant's wife following a bomb blast that killed large numbers of navy personnel, that he would not have raised it at the outset in the context of why he departed Sri Lanka, and explained how it relates to his own fear of return. The Tribunal notes that the applicant was specifically asked if he was aware of this bomb blast at his RSD interview – and he said it was linked to his detention as part of the cordon and search round-up in January 2006. The Tribunal also notes he gave different accounts of how long he was detained.*"

39. In relation to the Tribunal's rejection of this claim that his wife was raped by Sri Lankan authorities because the claim was raised late in the RSD process, counsel for the Appellant submitted that the Appellant's explanation for the late addition of the claim was more fulsome than simply he was "concerned about confidentiality", as suggested in [53]. The Appellant gave evidence to the Tribunal that he found the rape of his wife to be "very embarrassing, very sad, and very hard for me to talk about", and was a matter that he would prefer to forget.[50]

40. The Appellant further submitted that the Tribunal failed to consider properly and genuinely the Appellant's claims that his lack of a national identification card would diminish his employment prospects, make him susceptible to harassment or arrest, and hinder his ability to obtain a passport and see his family again. The fact that the evidence was dispositive of the review, so the Appellant asserted, meant that the failure to deal with the evidence in the Decision Record raised the strong inference that it was overlooked, and the Tribunal therefore failed to discharge its statutory task of review.

41. The Respondent submitted that the Tribunal only falls into error if it fails to consider or if it misunderstand, a claim or argument if it is centrally relevant and important.[51]

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[48] BD 205 at ln 5 – 9.
[49] Ibid at ln 17 – 19.
[50] BD 87 at [17]; BD 203 at ln 35 – 40.
[51] Respondent's Submissions at [12]; [14].

42. The Respondent took the Court to the summary by Griffith J in *SZSSC v Minister for Immigration and Border Protection* ("*SZSSC*")[52] of the legal principles to be considered in determining whether a Tribunal has fallen into jurisdictional error by failing to evaluate a substantive and clearly articulated submission.

43. The Respondent submitted that the Tribunal did not mischaracterise the Appellant's evidence as to the brother-in-law's avoidance of the authorities. The Tribunal's summary of the Appellant's evidence as that the brother-in-law "comes and goes" recognised that the brother-in-law would "go" into hiding, and then return to the same area as the Appellant. It was apparent that when the brother-in-law did return, he was not detained or interrogated by the authorities.[53] In any event, the Respondent submitted that the evidence was not centrally relevant and important, as the Tribunal's rejection of the Appellant's claimed imputed profile as an LTTE supporter was also grounded on the fact that he was released after being detained by the authorities temporarily, and that he continued working in the same area after being detained for eight months.[54]

44. In relation to the Appellant's complaint concerning the Tribunal's consideration of his failure to disclose his detention in 2005, the Respondent submitted that this complaint, properly construed, does not allege that the Tribunal failed to consider anything; rather, it alleges that the Tribunal's finding that the Appellant's explanation for his failure to disclose this claim was implausible, was wrong on the merits. Such an allegation cannot amount to an error of law.[55] The Respondent further submitted that the ground cannot stand as a "no evidence" ground of appeal, as "the ground cuts out where there is even a skerrick of evidence".[56] There was no suggestion there was no evidence to support the facts analysed by the Tribunal in reaching its conclusion that the Appellant's explanation was lacking in plausibility.

45. In relation to the Tribunal's rejection of the Appellant's claim that his wife was raped multiple times by Sri Lankan authorities, the Respondent submitted that the Appellant's assertion that the Tribunal rejected this claim because it did not accept the submission that the Appellant was concerned about confidentiality also misreads the Tribunal's reasons. The Respondent submitted that a correct construction of [53] reveals that the Tribunal rejected the claim because it was not raised until the Tribunal review, being very late in the RSD process. The Tribunal's rejection of this claim was not founded on any explanation by the Appellant as to why the claim was not advanced earlier. In any event, the Respondent contended that the Tribunal's description of the Appellant's explanation for the late addition of the claim as being that he was "concerned about confidentiality" is a fair summary of what was being submitted,[57] and the evidence was not centrally relevant and important, given it has no connection to the Appellant's own application for refugee status or complementary protection.[58]

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[52] [2014] FCA 863.
[53] Respondent's Submissions at [27].
[54] Ibid at [29].
[55] *Minister for Immigration v Wu Shan Liang* (1996) 185 CLR 259.
[56] Respondent's Further Submissions at [3].
[57] Supreme Court Transcript 52 at ln 8 – 9.
[58] Respondent's Submissions at [38].

46. In response to the claim that the Tribunal failed to give his claims relating to his lack of a national identification card proper, realistic and genuine consideration, the Respondent argued that it was unable to identify where in the written submissions this claim was advanced.[59] The Respondent submitted that, even if this claim was properly advanced, the highest it could be taken is that the Appellant may have some difficulty navigating daily life without such a card.[60] On no view could it be said that this evidence was centrally relevant and important to the claims of the Appellant.[61] The Appellant's evidence on this claim had no bearing on whether he may or may not suffer serious or significant harm upon return to Sri Lanka, and there is no error of law in the Tribunal not referring to a point of evidence that is irrelevant; see *SZSSC*, *Applicant WAEE*.[62]

LEGAL PRINCIPLES

47. I approach the decision-making in this case, mindful of the pertinent observations made by the Full Court of the Australian Federal Court in *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs*.[63]

48. The Tribunal is not required to refer in its written reasons to every piece of evidence and every contention made by an applicant.[64] There is an important distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. This goes to the significance of evidence and its role in the reasoning process of the Tribunal in any given case

49. The failure by the Tribunal to make a finding on a "substantial, clearly articulated argument relying upon established facts" has the potential to amount to a failure to accord procedural fairness and can also constitute a constructive failure to exercise jurisdiction.[65] If the task of the Tribunal cannot be undertaken "without a consciousness and consideration of the submissions, evidence and material advanced by the visa applicant", that may constitute an appealable error.[66]

50. If the Tribunal makes an error of fact in misunderstanding or misconstruing a claim brought by an applicant and, importantly, if it bases its conclusion in whole or in part upon the misunderstood or misconstrued claim, its error is "tantamount

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[59] Respondent's Submissions at [44].
[60] Supreme Court Transcript 56 at ln 27 – 29.
[61] Respondent's Submissions at [45].
[62] Supreme Court Transcript 56 at ln 39 – 43.
[63] [2003] FCAFC 184 at [46].
[64] *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at [46].
[65] See *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALJR 1088 at [24] per Gummow and Callinan JJ; at [95] per Hayne J agreeing; *NABE* at [55].
[66] *Minister for Immigration and Border Protection v MZYTS* (2013) 136 ALD 547; [[2013] FCAFC 114 at [38]; see too SZRBA v Minister for Immigration and Border Protection (2014) 308 ALR 280; [2014] FCAFC 81 at

to a failure to consider the claim and on that basis can constitute jurisdictional error."[67]

51. However, in general it is not the role of an appellate court to deal with error of fact by the Tribunal. It depends on the facts how significant such an error is to the exercise of jurisdiction. This means that every case in this context must be considered according to its circumstances. There are scenarios in which an error of fact is no great import to the outcome. As the Full Court of the Australian Federal Court put it in *Applicant WAEE*,[68] "It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected."

52. The summary of principles given by Griffiths J in *SZSSC v Minister for Immigration and Border Protection*[69] is a useful analysis of the Australian law and in broad terms is appropriately to be applied in Nauru:

(a) *as the High Court stated in Minister for Immigration and Citizenship v SZIAI [2009] HCA 39; (2009) 83 ALJR 1123 (per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [25]):*

> *... The duty imposed upon the Tribunal by the Migration Act is a duty to review.*
>
> *In my opinion, the duty to review obliges the Tribunal to consider and deal with submissions of substance which are clearly articulated. As noted above, in assessing whether a submission is one of substance it may be relevant to take into account whether it relies upon an established fact, but that is not the only way in which that requirement may be met. Substantiality might also be established by the fact that, for example, a submission has been made in direct response to an important issue which the Tribunal has raised which bears upon the state of the satisfaction which it is required to meet under s 65 of the Act. In my view, that is the case here as the written submissions dated 20 February 2013 were provided in direct response to the Tribunal's stated concerns regarding the credibility of the extortion claims and the appellant's ignorance of the CID officer's identity;*

(b) *merely because the Tribunal fails to deal with a submission does not necessarily amount to jurisdictional error. Similarly, the Tribunal's failure to ignore relevant evidence or other material does not necessarily establish jurisdictional error (see the pertinent observations of Robertson J in SZRKT at [97]);*

(c) *there is no requirement for the Tribunal to refer to every piece of evidence or every contention made by an applicant in its statement of reasons because it may be that some evidence is irrelevant and some contentions may be misconceived. However, as the Full Court held in Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 184; (2003) 75 ALD 630 at [46]:*

> *... there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact*

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[67] See *NABE* at [63].
[68] [2003] FCAFC 184
[69] [2014] FCA 863 at [81].

(cf Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 at [87]-[97]) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason....

(d) *there is a long line of authority which deals with requirements of s 430 of the Act and the circumstances in which a failure by the Tribunal to refer to particular evidence or make a particular finding such as to give rise to jurisdictional error can be inferred from the absence of any reference to those matters in the Tribunal's statement of reasons (see, for example, Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham [2000] HCA 1; (2000) 168 ALR 407 at [60]- [68] per McHugh J; Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323 at [67]- [69] per McHugh, Gummow and Hayne JJ; Minister for Immigration and Citizenship v SZGUR [2011] FCA 1; (2011) 241 CLR 594 at [32] per French CJ and Kiefel J and at [69]-[70] per Gummow J). However, in my view, different considerations may arise in a case where there is a failure to deal with a submission of substance (and not a failure to take into account a relevant consideration, consider evidence or make a finding of fact). As noted above, s 430 does not explicitly require the Tribunal to set out or summarise submissions which are made to it. Having said that, however, it is clear, as the Minister acknowledged, that a failure to deal with a submission of substance could amount to procedural unfairness. I would add that such an error might also be described as a constructive failure to exercise jurisdiction, noting that the Tribunal's core statutory task is to conduct a review. In either case, jurisdictional error may be present;*

(e) *notwithstanding that s 430 does not in its terms impose any obligation on the Tribunal to set out or summarise submissions of substance which are clearly articulated and made to it, in considering whether the Tribunal has in fact failed to consider and determine such a submission, it is appropriate to have regard to the Tribunal's statement of decision and reasons and, in particular, the manner in which that document describes and deals with submissions made to the Tribunal which it has received. In an appropriate case this might involve a consideration of any part of the Tribunal's statement of reasons which summarises the submissions it has received, as well as the parts of the Tribunal's reasons which purport to consider and determine the submissions it has received. Accordingly, it may be appropriate to pay careful attention to the structure of the Tribunal's reasons;*

(f) *in SZRKT, in considering whether the Tribunal is obliged to consider a document, Robertson J said, consistently with VAAD v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 117 at [77], that much depends on the circumstances of the case and the nature of the document. Justice Robertson added that relevant factors to be considered where the question is whether there was a failure to consider corroborative evidence, include the cogency of the evidentiary material and also the place of that matter in the assessment of the applicant's claims. In my view, similar factors are also relevant in considering whether the failure to deal with a submission of substance gives rise to a jurisdictional error (at [112]);*

(g) *the appellant carries the burden of persuading the Court to draw an inference that the failure to deal with a submission which the Tribunal was obliged to consider amounts to a jurisdictional error (see, for example, MZYTS at [53]); and*

(h) *it is important not to lose sight of the now well-established principle that the Tribunal's reasons are not to be approached with an eye keenly attuned to the detection of error (see Wu Shan Liang and also the recent observations of Flick J in Salahuddin v Minister for Immigration and Border Protection [2013] FCAFC*

141; (2013) 61 AAR 531 at [19]- [20] (with whom Katzmann and Wigney JJ relevantly agreed))."

CONSIDERATION

The First Particular

53. The Appellant has argued that the Tribunal erred on points of law, as it failed to consider the Appellant's claims or their component integers, and/or by failing to take into account a relevant consideration, in that the finding in respect of the interrogation of the brother-in-law at [51] was contrary to evidence and/or failed to take into account the full evidence.

54. In essence the grievance in this respect is that the Tribunal focused on just the one part of the Appellant's explanation for the conduct of the Appellant's brother-in-law "which misleadingly supported the inference of an implausible reason".[70]

55. The paragraph about which complaint is made needs to be viewed overall and in context. In its evaluation of the Appellant's LTTE claims, the Tribunal analysed the extent of the Appellant's father's involvement with the LTTE and concluded that there was no evidence that the Sri Lankan authorities imputed his family with an LTTE profile on the basis of the Appellant's missing uncle.[71]

56. The Tribunal observed that the Appellant returned with his wife to the northern province of Sri Lanka in mid-2004 and remained there until 2006, registering with the district administration.[72]

57. The Tribunal then reviewed the claims by the Appellant that he had latterly claimed to have been detained and interrogated about the involvement of himself and his brother-in-law in smuggling goods for the LTTE. It found that his accounts were contradictory and noted that the Appellant accepted he made "some mistakes" in his earlier evidence.[73]

58. The Tribunal did not accept that the navy would target and interrogate the Appellant about his brother-in-law's involvement in smuggling and refrain from pursuing him. It also found that if the LTTE suspected the Appellant of smuggling he would not have been released because of a priest vouching for him.

59. The Tribunal also rejected the proposition that the Appellant would have been told to return to India.[74]

60. It was with all of this background that the Tribunal stated that it "does not accept that the applicant would not have remained working in the Mannar district and living with the family of his brother-in-law (the primes suspect) for another eight

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[70] Appellant's Submissions at [16].
[71] BD 230 at [48].
[72] BD 231 at [49].
[73] Ibid at [50].
[74] Ibid at [51].

months if the authorities suspected him of involvement with the LTTE".[75] It stated that it did not accept his explanation that the authorities did not detain and interrogate his brother-in-law because "he comes and goes" as that explanation "does not adequately explain the lack of any problems experienced by the brother-in-law".[76] It observed that the absence of such problems suggested that the authorities did not regard his brother-in-law as an LTTE supporter.[77]

61. The Tribunal then classified as implausible the reasons proffered by the Appellant for failing to disclose earlier that he had been detained and tortured in 2005 on account of his brother-in-law's connections with the LTTE.[78]

62. Thus, viewed in context, the Tribunal identified multiple reasons for declining to accept that the Appellant was detained and mistreated by the navy on suspicion of either the involvement of his brother-in-law in the LTTE, or on the basis of the Appellant himself being accused of such involvement.[79]

63. Counsel for the Appellant pointed to several statements by the Appellant at the Tribunal hearing:

- "*After I was taken for interrogation then he went to on hiding and we didn't have any contact with him or I didn't see him afterwards. Actually, yes, I was living in a friend's house and he was living in another one, so we did not have good terms so I didn't talk to him much*";[80]
- "*He gave me that arrangement but I did not work with him or we did not have any relationship. I did not know whether – or where he goes or what he was doing at the time*";[81]
- "*[the brother-in-law] he just comes and goes but he's not, heavily present in our area, but authorities approach me and during their interrogation they ask me about [the brother-in-law]'s whereabouts and the details. So after they had released me I told my wife that they questioned about [the brother-in-law] as well*";[82]
- "*Actually, he was in hiding. Even my wife did not know the details about him but my – even when I ask my wife she said that she did not have any contact with him, but I knew that he was in Sri Lanka but he was in hiding*";[83] and
- "*Actually, they arrested me to interrogate me and they have questioned me but during the interrogation they ask about [the brother-in-law] as well. So after I had been released I told my wife regarding the questions about [the brother-in-law] and probably she would have told him about the questions and that's why he would have decided to go in hiding*".[84]

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[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid at [52].
[79] Ibid.
[80] BD 202 at ln 46 to 203 at ln 5.
[81] BD 203 at ln 11 – 13.
[82] BD 207 at ln 6 – 9.
[83] BD 207 at ln 20 – 23.
[84] Ibid at ln 38 – 42.

64. The criticism levelled at the reasoning of the Tribunal centred on the description by the Tribunal of the Appellant's account that his brother was "com[ing] and go[ing]". However, it is notable that in fact the Appellant did say that his brother-in-law "comes and goes" and was "not heavily present in our area". The Appellant also accepted that, although his brother-in-law spent a period of time in hiding at the time the Appellant was arrested and interrogated, he was operating his boat and working normally.[85] It was after that, according to the Appellant, that his brother-in-law went into hiding.[86]

65. Viewed in context, the accounts provided by the Appellant in relation to his brother-in-law were less than coherent. The Tribunal did not clearly mischaracterise the evidence. Moreover, the issue of the coming and going of the brother-in-law constituted but one of the reasons why the Tribunal was not satisfied that the Appellant was detained and mistreated by the navy on suspicion of his brother-in-law's involvement in the LTTE, or that the Appellant was accused of involvement.

66. There is no error of law emerging from this particular to the Appellant's ground. It is not established.

<u>The Second Particular</u>

67. The second particular advanced by the Appellant contended that the Tribunal erred on points of law, as it failed to consider the Appellant's claims or their component integers, and/or by failing to take into account a relevant consideration in its finding in respect of the links of his brother-in-law to the LTTE at [52] as this was contrary to evidence and/or failed to take into account the full evidence.

68. The issue that arises in respect of the second ground is in respect of the Tribunal's finding of implausibility in relation to the Appellant's claim advanced late that he had been detained in 2005 on account of the connections of his brother-in-law with the LTTE, when he had "no qualms" about providing details about what he said was the connection between his father and his uncle with the LTTE.[87]

69. The Appellant drew attention to the fact that he had stated the following:

- *"Actually I had a fear that I would tell his involvements then the authorities may think that I'm also had some involvement with the LTTE and that would affect my case"*;[88]
- *"I had experienced when I was in India that even if you talk about LTTE or even the family members of the LTTE or people have involvement they were simply arrested and gaoled by the authorities in India, so I had that*

[85] Ibid at ln 25 – 30.
[86] Ibid at ln 40 – 42.
[87] BD 231 at [52].
[88] BD 203 at ln 46 –48.

fear in my mind, so even after I came here also I thought that that would be the situation here and I thought that it would affect my case";[89] and

- The Appellant explained, in relation to why he mentioned his father's connection with the LTTE, "*Actually, my father's involvement was when I was a child, when I was very small, but this one happened when I was an adult, so that's what I thought it would affect my situation as well*".[90]

69. In substance, this argument goes to the merits of the decision by the Tribunal. It is not a matter of law and thus is not an issue that can properly be traversed by this Court. This particular to the Appellant's ground fails.

The Third Particular

70. The Appellant asserted that the Tribunal erred on points of law, as it failed to consider the Appellant's claims or their component integers, and/or by failing to take into account a relevant consideration in its finding in respect of his wife's multiple rapes at [53] the full evidence, and/or misunderstood or misconstrued the evidence.

71. The Tribunal did not accept the claim by the Appellant that his wife was raped multiple times by members of the Sri Lankan authorities in December 2005 because it was not raised earlier. It engaged intellectually with the assertions of the Appellant but, as was its entitlement, did not accept his explanation that he did not raise the issue because he was concerned about confidentiality.

72. The argument on behalf of the Appellant is that this ascription misrepresented what was said by the Appellant in his evidence:

- Once the Appellant's wife told him about the rape, "*I felt so sad that I thought we should end our lives. I told her that there is no point living in this world and we will end our life. My wife was saying what about our children, who will be orphans... I am living for my children, so that they can have a better future. I never had told anyone about this incident because this is very embarrassing, very sad, and very hard for me to talk about. My wife told me that I should never tell this to anyone. I did not want to mention it at the RSD interview*";[91] and
- "*... but that's happened to my wife and I was trying to forget about those (indistinct) so I did not want to recollect those memories or recollect those details, so that's what I did not provide those information in my previous interviews, but now the (indistinct) almost end of my life so this is the last opportunity, so there's no other way to hide those types, so I decided to bring up everything.*"[92]

73. The argument on behalf of the Appellant was that his evidence before the Tribunal was that he had endeavoured to suppress his memory of the sexual assault to his wife, which was consistent with the request from his wife that he not

[89] BD 205 at ln 5 – 9.
[90] Ibid at ln 17 – 19.
[91] BD 87 at [17].
[92] BD 203 at ln 35 – 40.

tell anyone. It was the rape of his wife that was said to be the motivation for him and his wife leaving Sri Lanka in February 2006 after having been in hiding since the rapes in December 2005.

74. On behalf of the Appellant, the argument put by Ms Baw was that the Tribunal had not thought about evidence given by him other than the issue of confidentiality – put another way, it did not consider the suppression of his memory about the assaults on his wife or the request by his wife that he not tell anyone about what had happened to her.

75. However, at the heart of the account given by the Appellant as to why he had not given information until late in the juncture about his wife having been sexually assaulted was that she had asked him not to do so – essentially, confidentiality. There is no indication in the Tribunal's decision that it failed to consider the matters put by the Appellant and its short form summary of them is not unreasonable.

76. Moreover, the conduct toward the Appellant's wife does not immediately go to the circumstances of the Appellant – non-refoulement obligations are personal to an applicant.

77. This particular to the Appellant's ground is not made out.

<u>The Fourth Particular</u>

78. The fourth particular was not pressed by the Appellant.

<u>The Fifth Particular</u>

79. The Appellant contended that the Tribunal erred on points of law, as it failed to consider the Appellant's claims or their component integers, and/or by failing to take into account a relevant consideration, namely the claim that he did not have a national ID card which would seriously contribute to his risk of persecution if he were to return to Sri Lanka was not dealt with.

80. The Appellant took the Court to the oral submissions of the Appellant's representative at the Tribunal hearing who submitted:

> "*... in fact, the absence of an (indistinct) national ID card puts him at profound disability in navigating even just daily, for example, road blocks or anything like that, or, indeed in employment...*
>
> *Actually, a lot of people didn't have their – weren't able to get national ID cards, according to that survey, I believe. I will just check that. There'd be no guarantee that my client would be able to get access to any of his family land and he does face a real prospect of being destitute...*
>
> *That's a co-report of voluntary returnees, but, nonetheless, 11 per cent of them didn't possess a national ID card, so even after returning they still had not managed to obtain one and I would submit that that would make it very impossible for my client to get along the process to even obtain a passport in order to go and see his wife, and*

he would be forced to illegally depart – well, attempt to illegally depart the country again".[93]

81. In this respect the argument put by the Appellant was that the Tribunal had not considered this argument at all.

82. However, properly construed, the Appellant simply gave evidence that he did not have a national ID card and his representative submitted that this would cause him day-to-day difficulties.

83. This evidence was not centrally relevant and important to the LTTE claims, which were at the heart of the Appellant's claim for refugee status. It was not therefore an argument which the Tribunal was obliged to consider and its failure explicitly to do so does not constitute an error of law. This particular to the Appellant's ground is not made out.

<u>The Sixth Particular</u>

84. The Appellant contended that the Tribunal erred on points of law, as it failed to consider the Appellant's claims or their component integers, and/or by failing to take into account a relevant consideration, namely that he would be detained upon arrival to Sri Lanka and exposed to cruel, inhuman or degrading treatment sufficient to enliven Nauru's non-refoulement obligations under article 7 of the International Covenant on Civil and Political Rights ("ICCPR").

85. It was contended on behalf of the Appellant that a claim had been raised before the Tribunal that if removed to Sri Lanka the Appellant may be detained or imprisoned and that the conditions of such detention or imprisonment were likely to breach article 7 of the ICCPR to which Nauru is a signatory.

86. The Tribunal found that "the applicant will be questioned at the airport upon his return to Sri Lanka, that he will likely be charged with departing Sri Lanka illegally and that he may be held on remand for a period as long as several days while awaiting a bail hearing."[94] It stated that it had had regard to the sources referred to in the submissions from the Appellant but did "not accept on the information before it that there is a reasonable possibility that the applicant will face torture, either during his questioning at the airport or during any period he spends on remand." It gave reasons and then accepted that the prison conditions in Sri Lanka are "generally poor" but concluded that if the Appellant is convicted of charges he would be "treated leniently given that he was merely a passenger in a people-smuggling boat and does not accept there to be a reasonable possibility that he will be sentenced to a jail term."[95]

87. However, the Tribunal was entitled to adopt reasoning from one part of its reasons and apply it to another,[96] as occurred in this instance at [105] of the

[93] BD 220 at ln 42 – 45; BD 221 at ln 29 – 32; BD 221 at ln 36 – 41.
[94] BD 238 at [92].
[95] BD 239 at [93].
[96] See *SZSHK v Minister for Immigration and Border Protection* (2013) 138 ALD 35; [2013] FCAFC 125 at [35]; *SZSGA v Minister for Immigration and Citizenship* [2013] FCA 774 at [54]-[56].

Tribunal's reasons where the Tribunal under the heading of "Complementary protection claims stated:

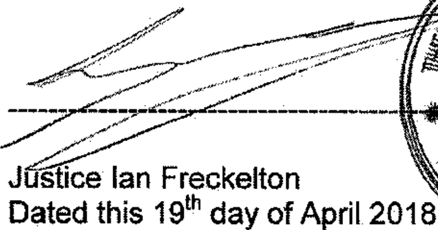
> "*However, for the reasons set out at length above, the Tribunal does not accept there to be a reasonable possibility or real risk that the applicant will be subjected to physical harm of mistreatment if he returns to Sri Lanka for any of the reasons claimed.*"

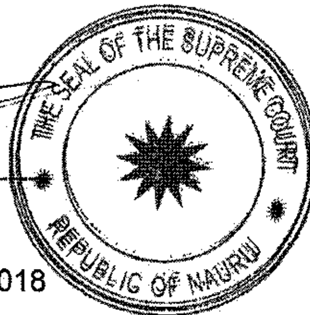
88. In the succeeding paragraph ([106]), the Tribunal reiterated that while "the prison conditions in Sri Lanka are poor and over-crowded, it does not accept there to be a reasonable possibility that the applicant will be subjected to prohibited treatment during this period."

89. It is apparent that the Tribunal actively engaged intellectually with the issues at hand in respect of complementary protection. The analysis was not contaminated by Refugee Convention-related thinking. It is simply that the factual basis for the Appellant's claim was not accepted by the Tribunal. Reading the judgment as a whole, the Tribunal addressed the arguments raised on behalf of the Appellant and did not commit legal error. This particular to the Appellant's ground also fails.

CONCLUSION

90. Under s 44(1) of the Act, I make an order affirming the decision of the Tribunal and make no order as to costs





Justice Ian Freckelton
Dated this 19th day of April 2018