



**IN THE SUPREME COURT OF NAURU**

**AT YAREN**

Case No. 16 of 2017

IN THE MATTER OF an appeal  
against a decision of the Refugee  
Status Review Tribunal TFN  
15/00201, brought pursuant to s 43  
of the *Refugees Convention Act*  
2012

BETWEEN

**RUF 021**

First Appellant

**RUF 020**

Second Appellant

AND

**THE REPUBLIC**

Respondent

Before: Judge Marshall

Appellant: Julian Gormly

Respondent: Angel Aleksov

Date of Hearing: 19 February 2018

Date of Judgment: 8 May 2018

**CATCHWORDS**

APPEAL – *Convention on the Elimination of all Forms of Discrimination Against Women* – whether the Tribunal failed to take claims under *CEDAW* into consideration – whether the facts found by the Tribunal engaged *CEDAW* – whether the Tribunal breached procedural fairness by failing to put husband's invalidity to Appellant for comment – APPEAL DISMISSED.

## JUDGMENT

1. This matter is before the Court pursuant to s 43 of the *Refugees 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.

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2. The determinations open to this Court are defined in s 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 3 August 2016 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of 15 October 2014, that the Appellant is not recognised as a refugee under the 1951 Refugees Convention<sup>1</sup> 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 23 March 2017 and an Amended Notice of Appeal on 9 June 2017. On 20 March 2017, the Appellant filed an application for an extension of the 42-day period within which an Appellant is entitled to file a Notice of Appeal, and this order was made at the beginning of the hearing pursuant to s 43(3) of the Act.

## BACKGROUND

5. The first Appellant is an Iranian woman of Kurdish ethnicity and Shia Islam religion born in Ilam, Iran. The second Appellant is the 11 year-old son of the first Appellant and has applied for derivative status. The first Appellant has another son who is 25 years old and has also applied for derivative status, although he is not a party to the appeal. The husband of the first Appellant (herein, "the

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<sup>1</sup> 1951 Refugee Convention and 1967 Protocol, also referred to as "the Refugees Convention" or "the Convention".

Appellant”) was unable to make the journey to Australia because of injuries sustained during his military service in the Iran-Iraq war.

6. The Appellant claims a fear of harm from an Iraqi Kurd involved in a dispute with her husband, and from the Kurds on the basis of her role in the dispute, as well as because of her gender and status as a failed asylum seeker.
7. The Appellants departed Iran in June 2013, and travelled to Australia via Malaysia and Indonesia, arriving on Christmas Island on 26 July 2013. The Appellants were transferred to Nauru on 17 January 2014.

#### INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellant attended a Refugee Status Determination (“RSD”) Interview on 9 July 2014. In summary, the Secretary said the Appellant claimed her husband worked as a tour guide for persons making pilgrimage and business trips to Syria. In 2001, her husband met an Iraqi Kurd named Shouhan who claimed to work for the Iraqi intelligence. After six months of being acquainted, Shouhan asked the Appellant’s husband if he could facilitate the smuggling of people to Europe for the purposes of seeking asylum. The Appellant’s husband said he could not do this work, and referred Shouhan to a person named Hamid.
9. It appears that there was a falling out in Shouhan and Hamid’s business partnership. In 2002, the Appellant’s older son was abducted on his way to school. After three days, the kidnapper contacted the Appellant and demanded 100 million tomans for the release of the son. The police advised the Appellant not to pay the ransom. When the Appellant’s husband returned from Syria, he received a call from a kidnapper, and discovered that the kidnapper was Shouhan. Shouhan threatened to kill the son if the ransom was not paid. Shouhan also falsely alleged that the Appellant’s husband was spying for the US government and involved in people smuggling. The police began to investigate the Appellant’s husband and suspended their operation to rescue the son.
10. The Appellant sought the assistance of relatives, who were senior police officers in Iran, and traced the son to Iraq. The police officers contacted a leader in Kurdistan who sent officers to the address the son was traced to. The police rescued the son, but could not arrest Shouhan as he was an Iraqi citizen.
11. The authorities imposed a travel ban on Shouhan and he did not contact the Appellants for five years. However, from 2007, Shouhan contacted the Appellant and threatened to rape her, and harassed her constantly for the next six years. The Appellant was afraid that if Shouhan raped her, the Kurdish community would kill her to restore their honour. As her husband was recovering from six operations as a result of his participation in the Iran-Iraq war, the Appellant feared that he would not be able to protect his family should Shouhan attack them. In 2013, the Appellant told her husband they should flee Iran, however, the husband was too physically weak to make the journey. Before the Appellant left Iran, an attempt was made to abduct her son.<sup>2</sup>

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<sup>2</sup> Book of Documents (“BD”) 87.

12. The Secretary was satisfied that the following claims advanced by the Appellant were credible:

- She is a Kurdish Iranian;
- Her son was abducted by criminal elements in 2002 and a ransom was demanded; and
- Her son was freed from the kidnappers through the assistance of Iranian police officers who were related to her family.<sup>3</sup>

13. However, the Secretary found that the following claims lacked credibility:

- Her family continued to receive threats from the kidnapper about five years prior to his departure from Iran; and
- An attempt was made to abduct him about one month before he departed from Iran.<sup>4</sup>

14. In making these credibility findings, the Secretary gave weight to the following factors:

- The Appellant inconsistently claimed in her written statement that Shouhan wanted her husband to be involved in the smuggling operation, but in the Interview claimed Shouhan only asked her husband for contacts;<sup>5</sup>
- The Appellant did not claim in her written statement that Shouhan kidnapped her son to recover the money he lost under his deal with Hamid, as was claimed in the Interview;<sup>6</sup>
- The Appellant inconsistently claimed in her written statement that the family had lived in the same residence since 2002, but in the Interview claimed that the family had to move residences many times to avoid Shouhan;<sup>7</sup>
- The Appellant's son continued to attend school after his abduction until their departure from Iran;<sup>8</sup>
- The Appellant left her husband with relatives in Iran without much protection against any attack from Shouhan;<sup>9</sup>
- It was implausible that Shouhan would wish to harm the Appellant's son when he had failed to do so in his initial attempt;<sup>10</sup>
- It was implausible that Shouhan would turn his attention to the Appellant when her husband was the original target and was left in Iran without much protection;<sup>11</sup> and
- The Appellant did not claim in the Transfer Interview or written statement that there was an attempt to abduct her son prior to their departure, as was claimed in the Interview.<sup>12</sup>

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<sup>3</sup> Ibid 88.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid 89.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid 90.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid 91.

15. The Secretary found that a number of factors pointed towards the lack of any genuine fear of Shouhan by the Appellant, including that Shouhan had been rendered incapable of inflicting harm on the Appellant and her family due to the travel ban, the lack of evidence as to the threats since 2007 and the attempted abduction, the six-year period between when the threats began and the Appellant's departure from Iran with her two sons, and the husband's lack of protection back in Iran.<sup>13</sup> The lack of such a fear is also illustrated through that the Appellant did not seek the protection of the authorities, who would likely be willing to assist given country information suggesting the Iranian government was wary of Kurds crossing the border from Kurdistan.<sup>14</sup> It was therefore not reasonably possible that the Appellant would experience harm from Shouhan upon return to Iran.<sup>15</sup>
16. There was further no reasonable possibility of the Appellant experiencing harm from the Kurds due to her conflict with Shouhan, given the Appellant had returned to Kurdish Iran after the kidnapping of her son and did not face any harm or threat of harm, and there was no evidence she was threatened with serious harm by any Kurd elsewhere, or that Shouhan had any influence amongst the Kurdish community.<sup>16</sup>
17. While not explicitly raised by the Appellant, the Secretary addressed the possibility of harm on the basis of the Appellant's ethnicity, recognising that Kurds continue to face discrimination in Iran. However, there was no indication the Appellant would face persecutory harm upon return given she was not a Sunni Muslim or involved in political activism, the two attributes likely to make the Appellant a target for harm.<sup>17</sup>
18. In relation to the Appellant's claimed fear of harm due to being a failed asylum seeker, the Secretary gave weight to country information indicating that seeking asylum in itself does not expose a failed asylum seeker to harm, and that the Appellant did not have a political profile that would make her of adverse interest to the Iranian authorities.<sup>18</sup> While the Appellant may be questioned upon return due to using a *laissez-passer* to re-enter, country information indicates that returnees are not prosecuted because of this.<sup>19</sup> In relation to the Appellant's claimed fear of violence based on being an Iranian woman, the Secretary considered there was no indication that the Appellant had experienced such violence in the past, and was no reasonable possibility of her experiencing gender-based violence upon return.<sup>20</sup>
19. There being no reasonable possibility of the Appellant experiencing harm upon return on the basis of her conflict with Shouhan, or her gender, ethnicity, or status

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid 91 – 92.

<sup>14</sup> Ibid 93.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid 93 – 94.

<sup>17</sup> Ibid 94 – 95.

<sup>18</sup> Ibid 95 – 96.

<sup>19</sup> Ibid 97.

<sup>20</sup> Ibid 94.

as a failed asylum seeker, the Appellant had no well-founded fear of persecution and did not attract refugee status.<sup>21</sup> For the same reasons, the Secretary considered there was no reasonable possibility of the Appellant experiencing harm prohibited by the international treaties ratified and signed by Nauru, and as such was also not granted complementary protection.<sup>22</sup> The Appellant's sons who applied for derivative status also did not attract refugee status or complementary protection.

## REFUGEE STATUS REVIEW TRIBUNAL

20. The Appellant sought review of the Secretary's determination with respect to herself and her younger son. Her older son made a separate review application.

21. At the Tribunal hearing, the Appellant reiterated her claims regarding her husband's business, Shouhan approaching her husband for assistance in a people smuggling venture, the kidnapping of her older son by Shouhan in 2002, the false allegations made against her husband, the threats from Shouhan against the Appellant and her family from 2007, the need to continually move residences in Tehran to avoid Shouhan, and the Appellant's journey from Iran to Australia with her sons. The Appellant added that her relationship with her husband had problems and her husband was often violent towards her, although he had encouraged and paid for their travel to Australia.<sup>23</sup> She also added that, not only had Shouhan began making threats against her family again from 2007, but friends had also told her that Shouhan had been seen near Tehran.<sup>24</sup>

22. The Tribunal accepted that the Appellant's older son had been kidnapped in 2002, noting that the accounts of the Appellant and her son of this incident were consistent and cogent, and accepted the kidnapping for ransom arose out of a business dispute between the Appellant's husband and Shouhan.<sup>25</sup> However, for a number of reasons, the Tribunal did not accept that Shouhan began threatening the family again from 2007, including that there was no apparent reason why Shouhan would wait five years before making the threats,<sup>26</sup> the Appellant gave inconsistent evidence as to the number of residences the family had between 2007 and 2013,<sup>27</sup> and the claim that friends had told the Appellant Shouhan had been sighted near Tehran was vague and improbable.<sup>28</sup> In addition, it was implausible that the Appellant's older son would be under continual guard when the Appellant's younger son was not protected,<sup>29</sup> that the family would have maintained contact with intermediaries of Shouhan between 2007 and 2013,<sup>30</sup> and the Appellant would not have sought protection from their police officer relatives or other leaders against the threats.<sup>31</sup> Following on from this finding, the

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<sup>21</sup> Ibid 97.

<sup>22</sup> Ibid 98.

<sup>23</sup> Ibid 251 at [33]; BD 257 at [89]-[90].

<sup>24</sup> Ibid 254 at [61].

<sup>25</sup> Ibid 258 at [96] – [97].

<sup>26</sup> Ibid 259 at [100].

<sup>27</sup> Ibid at [101].

<sup>28</sup> Ibid at [104].

<sup>29</sup> Ibid at [102].

<sup>30</sup> Ibid at [103].

<sup>31</sup> Ibid at [105].

Tribunal found that Shouhan did not attempt to kidnap the older son again prior to departure from Iran in 2013.<sup>32</sup> The Tribunal further found there was no real possibility of Shouhan seeking to kidnap either son, or seeking to sexually assault or otherwise harm the Appellant, in the future.<sup>33</sup>

23. In regard to the Appellant's claimed fear of her husband, the Tribunal noted the Appellant's vague accounts about the level and frequency of violence, her initial statement that the main problem with her husband was that he brought strangers to their home, the absence of any reference to domestic violence prior to the hearing, and her son's evidence that he was unaware of such violence.<sup>34</sup> In light of these observations, and the Appellant's evidence that her husband is now physically weak and vulnerable, the Tribunal considered there to be no reasonable possibility of the Appellant facing persecutory harm from her husband if returned to Iran.<sup>35</sup> On the basis of similar reasoning to that employed by the Secretary, the Tribunal considered there was no reasonable possibility of the Appellant facing harm from the Kurds because of the conflict with Shouhan,<sup>36</sup> or on account of her gender,<sup>37</sup> or status as a failed asylum seeker.<sup>38</sup>

24. In light of the above findings, the Tribunal found that the Appellant had no well-founded fear of harm and was not eligible for refugee status.<sup>39</sup> While the Appellant may be compelled to return to an unhappy marriage, and may be questioned upon arrival in Iran due to her status as a failed asylum seeker, the circumstances of the marriage or the questioning would not amount to torture, cruel, inhuman or degrading treatment or punishment, and the Appellant was not eligible for complementary protection.<sup>40</sup> It followed that the second Appellant was similarly not eligible for refugee status or complementary protection.<sup>41</sup>

## THIS APPEAL

25. The Appellants' Amended Notice of Appeal filed on 9 June 2017 reads as follows:

1. *The Tribunal made an error of law by failing to take into account a relevant consideration in determining whether the first appellant was owed complementary protection, namely whether the return of the first appellant to Iran would be in breach of The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) as part of Nauru's international obligations under s 4 of the Act.*

### *Particulars*

- i. *Nauru acceded to CEDAW on 23 January 2011.*
- ii. *The duties under Article 2(d) CEDAW encompass the obligation of States parties to protect women from being exposed to real, personal and*

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<sup>32</sup> Ibid at [106].

<sup>33</sup> Ibid 260 at [107]-[108].

<sup>34</sup> Ibid at [110]-[113].

<sup>35</sup> Ibid 261 at [113]-[117].

<sup>36</sup> Ibid at [119]-[120].

<sup>37</sup> Ibid 262 at [121]-[123].

<sup>38</sup> Ibid 263 at [125].

<sup>39</sup> Ibid 264 at [137].

<sup>40</sup> Ibid 265 at [139]-[140].

<sup>41</sup> Ibid at [141]-[143].

*foreseeable risks of serious forms of discrimination against women, which includes the obligation to ensure that no woman will be expelled or returned to another state where, inter alia, she would risk suffering serious forms of discrimination, including gender based violence.*

*iii. The first appellant claimed she was owed complementary protection in that her return to Iran in the circumstances of forced marriage and domestic violence pleaded in Ground 2 would be in breach of Nauru's international obligations under CEDAW.*

2. *The Tribunal made an error of law in that it failed to consider claims for complementary protection made by the first appellant that her return to Iran would be in breach of Nauru's international obligations under CEDAW in the circumstances of her return to a forced marriage and domestic violence.*

#### *Particulars*

*i. The first appellant claimed that upon return to Iran she would be pressured to return to her marriage because of Iranian divorce and family laws which discriminated against women and under which she could not initiate a divorce and would lose physical custody of her younger son to her husband if she separated or divorced.*

*ii. Article 16 CEDAW provides States parties take appropriate measures to eliminate discrimination in all matters relating to marriage and family relations rights and responsibilities during marriage and at its dissolution, and in relation to children.*

*iii. The first appellant claimed that upon return to Iran she would be forced to return to her marriage and face domestic violence from her husband.*

*iv. The definition of discrimination under Art 1 CEDAW includes gender based violence such as the domestic violence feared by the first appellant.*

*Further or in the alternative to Ground 2*

3. *The Tribunal made an error of law and breached s 22(b) of the Act by failing to act according to the principles of natural justice.*

#### *Particulars*

*i. The Tribunal did not give the first appellant the opportunity of being heard because it did not bring to the attention of the first appellant or allow her the opportunity to comment on or ascertain that an issue relevant to its determination was the limited physical capacity of the first appellant's husband to inflict violence on her.*

#### **FOUNDATIONS 1 AND 2**

26. The Appellant contends that the Tribunal made an error of law by failing to take into account a relevant consideration in determining whether the Appellant was owed complementary protection. That matter was whether the Appellant's return to Iran would be in breach of the *Convention on the Elimination of all Forms of Discrimination Against Women* ("CEDAW"). CEDAW was ratified by Nauru in 2011. The relevant provision pointed to by the Appellant is Art 2(d), which provides that "State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means... to refrain from engaging in any act or practice of discrimination against women...". The Appellant also points to General Recommendation 32 of the United Nations Committee on the



Elimination of Discrimination Against Women ("the Committee"), and the explanation at [22] that the duty imposed by Art 2(d) "encompasses the obligation of States parties to protect women from being exposed to a real, personal and foreseeable risk of serious forms of discrimination against women".<sup>42</sup>

27. Section 4(2) of the Act provides that:

*"The Republic must not expel or return any person to the frontiers of territories in breach of its international obligations".*

28. The Appellant claimed that if returned to Iran she would be returned to a "forced marriage" and be subject to domestic violence. She claimed before the Tribunal that she would be forced to return to an unhappy marriage and would be at risk of domestic violence from her husband. The Tribunal dealt with these claims at [110] to [117] of its reasons for decision under the heading "Fear of her husband".

29. The Tribunal accepted that if returned to Iran, the Appellant may return to live with her husband, but said that this was not a certainty. At [116] it referred to the fact that it is likely she will have the protection of her adult son. At [114] the Tribunal made a finding that it was satisfied that physical violence will not be a feature of her marriage if she returned to live with her husband.

30. It can be seen from the foregoing that the Tribunal rejected her claims to fear persecution as a result of being returned to Iran and forced to live with her husband, including her claim to be subject to domestic violence.

31. At [138] to [140], the Tribunal considered the Appellant's complementary protection claims. At [138] the Tribunal said:

*"If an applicant is not found to be a person to whom Nauru has obligations under the Convention, they may nonetheless be found to be owed complementary protection."*

The Tribunal then referred to various international instruments from which those obligations arise. It did not mention *CEDAW*.

32. At [139], the Tribunal said that it:

*"... accepts that the applicant may feel compelled to return to an unhappy marriage but does not accept, for the reasons set out above, that the circumstances of the marriage amount to torture or cruel or inhuman treatment or punishment such that returning the applicant to Iran would amount to a breach of Nauru's international obligations."*

33. The Appellant's return to an unhappy marriage argument would only be relevant, in the context of a breach of Nauru's international obligations, to a submission that returning the Appellant to Nauru would be in breach of *CEDAW*. The omission by the Tribunal to mention *CEDAW* in [138] should not detract from the fact that it was addressing at [139] the international obligations created by

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<sup>42</sup>United Nations Committee on the Elimination of Discrimination Against Woman, *General Recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 59<sup>th</sup> sess, UN Doc CEDAW/C/GD/32 (15 November 2014).

*CEDAW* in dealing with the Appellant's claim that she would feel compelled to return to an unhappy marriage.

34. The Republic submits that the Tribunal's decision sets out factual findings which dispose of the Appellant's claims for complementary protection, including those which are available as a result of any obligations owed by Nauru under *CEDAW*. Those findings, the Republic contends, leave no room for any broader non-refoulement obligation under *CEDAW* to have been sustained. I find those submissions persuasive. The Tribunal dealt with the Appellant's claims that she would be returned to a forced marriage and to domestic violence. It rejected those claims. It rejected the proposition that the circumstances of her return to her husband would amount to persecution or any breach of Nauru's international obligations, which include *CEDAW*. It is unfortunate, but not fatal on the appeal, that the Tribunal did not specifically mention *CEDAW* at [138] because it effectively dealt with it at [139]. In my view, the Tribunal has disposed of any arguments which may have engaged *CEDAW*. Therefore I reject the contention that the Tribunal failed to consider whether returning the Appellant to Iran would result in a breach of *CEDAW*. In taking the above view, I am mindful of that the reasons for decision of the Tribunal are required to be read beneficially; see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*.<sup>43</sup>
35. Counsel for the Republic submitted that only the domestic violence claim and not the return to a forced marriage claim engaged *CEDAW*. To that effect he referred to the decisions of the Committee, such as *MNN v Denmark*.<sup>44</sup> At [8.10] in *MNN*, the Committee referred to Art 2(d) of *CEDAW* obliging state parties to "refrain from engaging in any act or practice of discrimination against women...". The Committee went on to say that that clearly encompassed an obligation to protect women from being exposed to "a real, personal and foreseeable risk of serious forms of gender based violence". The Appellant, in reply, submitted that General Recommendation 32 indicates that non-refoulement obligations are engaged in respect of "serious forms of discrimination", not limited to gender-based violence.
36. In its above comments, the Committee was not seeking to limit the reach of Art 2(d) to gender based or domestic violence. Article 2(d) refers to State parties refraining from engaging in any act or practice of discrimination against women.
37. Even on the broadest construction of the reach of *CEDAW*, its provisions were not engaged on the facts of the Appellant's case, given the Tribunal rejected the Appellant's claims that she would return to a forced marriage and domestic violence. Appeals grounds 1 and 2 are rejected.

### GROUND 3

38. The Appellant submits that she was denied procedural fairness because the Tribunal did not bring to her attention, and allow her to comment on, a relevant issue. That issue was said to be her husband's limited ability to inflict violence on her given his physical condition.

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<sup>43</sup> (1996) 185 CLR 259.

<sup>44</sup> Committee on the Elimination of Discrimination against Women, *Views: Communication No 33/2011*, 55<sup>th</sup> sess, UN Doc C/55/D/33/2011 (15 July 2013) ("*MNN v Denmark*").

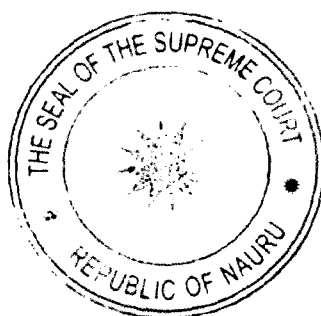
39. The evidence about the husband's invalidity came from the Appellant. It was not a new issue raised by the Tribunal. It was a piece of information which was before the Tribunal. It was a piece of information relevant to a known issue before the Tribunal. That issue was whether the Appellant would experience domestic violence if returned to Iran. That issue was raised by the Appellant as one of her claims. The fact that a piece of evidence raised by the Appellant was relied on by the Tribunal adversely to her on that issue does not mean that she was denied natural justice. The real complaint of the Appellant is that it did not raise with her how it might take into account evidence of her husband's invalidity in dealing with the domestic violence issue.

40. As counsel for the Republic submits, whatever the extent of the obligation of the Tribunal to put the Appellant on notice of a potentially decisive issue, the obligation does not apply to issues that are obviously open on the known material before the Tribunal; see, e.g, *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*.<sup>45</sup>

41. There is no merit in ground 3 of the appeal. The appeal is dismissed.

42. The Court orders as follows:

1. The decision of the Tribunal is affirmed pursuant to s 44(1)(a) of the *Refugees Convention Act 2012* (Nr).
2. The appeal be dismissed.
3. There be no order as to costs.



Shane Marshall

Judge Shane Marshall  
Dated this 8<sup>th</sup> of May 2018

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<sup>45</sup> (2007) 228 CLR 152 at [29].