IN THE SUPREME COURT OF NAURU

AT YAREN

Appeal No. 05 of 2019

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T15/00112 and T1500160 brought pursuant to s43 of the *Refugees Convention Act* 1972

BETWEEN:	**DWN068**	Appellant
AND:	**THE REPUBLIC OF NAURU**	Respondent

Before: Brady J

Dates of Hearing: 20 October 2022

Date of Judgment: 6 December 2022

CITATION: *DWN068 v Republic of Nauru*

CATCHWORDS

APPEAL – *Refugees – Refugee Status Review Tribunal – Whether Tribunal correctly applied notion of "home area" – Whether error in law by failing to apply the correct test and failing to consider important evidence – Tribunal's findings correct in law and no failure to consider relevant evidence – Appeal Dismissed*

APPEARANCES:

Appellant: F. Batten

Respondent: T. Reilly

JUDGMENT

INTRODUCTION

1. The Appellant appeals from a decision of the Refugee Status Tribunal (**Tribunal**) made on 1 April 2019 (**Second Tribunal Decision**). The Tribunal affirmed a decision of the Secretary of Justice and Border Control (**the Secretary**) dated 30 July 2015 (**Secretary's Decision**) not to recognise the Appellant as a refugee and that he is not owed complementary protection under the *Refugees Convention Act* 2012 (**the Act**).

2. The Second Tribunal Decision is the second decision of the Tribunal after this Court, by consent, remitted the matter to the Tribunal for reconsideration.

3. By section 44(1) of the Act, this Court may make either of the two following orders:

   (a) an order affirming the Second Tribunal Decision; or

   (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of this Court.

GROUNDS OF APPEAL

4. By his Amended Notice of Appeal, the Appellant relies upon one ground of appeal:

> "The Tribunal failed to apply correctly the notion of a 'home area', and so, failed to apply the correct test or failed to consider important evidence regarding the appellant's family having recently changed residence."

FACTUAL BACKGROUND

5. The Appellant is a national of Pakistan. He claims to be a Sunni Muslim from [D] in a district of Khyber Pakhtunwkhwa (**KP**). He was born in [D] and resided there his whole life until he left Pakistan. He is in his early 30s. His wife and two children remain in Pakistan.

6. Until shortly before the Second Tribunal Decision, the Appellant's wife and children resided in [D] with the Appellant's uncle. They thereafter moved to [B], a town in Punjab, where they reside with the Appellant's father-in-law.

7. The Appellant left Pakistan in July 2013. He travelled to Christmas Island in August 2013. He was then transferred to Nauru pursuant to a memorandum of agreement between the Republic of Nauru and the Commonwealth of Australia.

THE APPELLANT'S CLAIMS

8. The Appellant claims that he faces a reasonable possibility of persecution in Pakistan, involving serious harm and systematic and discriminatory conduct due to his:

   (a) imputed political opinion in opposition to the Taliban or Islamic State;

   (b) membership of a particular social group of:

      i. failed asylum seekers; and/or

      ii. Pashtuns with mental health problems.

9. By way of summary, the Appellant claims that in 2004 the Taliban detonated a bomb at a wedding at which he and his family members were in attendance. His mother was seriously injured, and his cousin died.

10. In early 2013, the Appellant was approached by some men whilst he was listening to Indian music on his car radio when some men form the Taliban abused him and smashed his car radio.

11. Later in 2013, the Appellant was driving his hire coach near [D]. He had to stop his vehicle behind a number of cars. Some of the men who were unable to fit in the cars asked the Appellant to drive them and to follow the cars to a nearby village. The Appellant claims that he was not aware that the men intended to attack a house in that village which was occupied by the Taliban. He was unaware at that time that the men had destroyed the Taliban's property and base in that village.[1]

12. The Taliban retaliated by kidnapping and killing three men from [D]. The Appellant claims to have been in Peshawar when he received a phone call from his uncle who told him that he should not return to [D] because a threatening letter had been left from the Taliban. The letter said that all the people who had assisted in the attack on their house and property would suffer the same fate as the three villagers who had been killed.

13. The Appellant claims to have continued to live thereafter in Peshawar. He described inquiries being made of his uncle in [D] as to his whereabout by a man his uncle thought was a member of the Taliban.

14. The following morning, the Appellant's uncle received a letter from the Taliban saying that the Appellant was "condemned" to death for helping with the attack. His uncle thereafter travelled to Peshawar accompanied by the Appellant's wife.

15. The Appellant's wife was very upset and remained in Peshawar to ensure that the Appellant did not leave the house. They remained there for two and a half months,

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[1] This is referred to in the material as a "lashkar" which is described as a militia formed by local villagers to fight the Taliban in local tribal areas of Pakistan.

during which time it was decided that the Appellant should leave Pakistan for his safety. His uncle then made travel arrangements for the Appellant, who departed Peshawar on 6 July 2013 and Islamabad on 10 July 2013.

16. The Appellant claims that there is a reasonable possibility that if he was returned to Pakistan, he would be subjected to the type of harm which would place the Republic in breach of its international obligations.

PROCEDURAL HISTORY

Initial Application for Refugee Status Determination

17. On 25 May 2015, the Appellant made an application for refugee status determination (**RSD**) to the Republic, in order to be recognised as a refugee and/or a person owed complementary protection.[2] The Appellant attended an RSD interview on 23 June 2014.

18. On 30 July 2015, the Secretary decided that the Appellant was not recognised as a refugee in accordance with Part 2 of the Act and that he was not a person to whom Nauru owed protection obligations under the Refugee Convention.[3]

First Tribunal Decision

19. The Appellant lodged a Review Application with the Tribunal dated 93 August 2015.[4]

20. On 4 December 2015, the Appellant appeared in a hearing before the Tribunal (**First Panel**), represented by his Claims Assistance Providers (**CAPs**) representative.[5] The Appellant made written submissions and provided further evidence both before and after that hearing.

21. On 11 February 2016, the First Panel made a decision affirming the determination of the Secretary that the Appellant was not recognised as a refugee and was not owed complementary protection under the Act (**First Tribunal Decision**).[6]

22. For present purposes, it is sufficient to note in summary in respect of the First Tribunal Decision that the Tribunal:

    (a) identified various concerns about the Appellant's claims and evidence amounting to "fundamental flaws in his narrative account";[7]

    (b) did not find the Appellant's account to be credible and was not satisfied on the evidence that he had been targeted in the past by the Taliban or any other militant group;[8]

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2 Book of Documents (**BD**) 17 - 106
3 BD 107 - 128
4 BD 131
5 Transcript of hearing at BD 193 - 242
6 BD 26 - 281
7 BD 280 at [78]
8 BD 280 at [78]

(c) found the purported letter from the Taliban to be "bogus" and to have been fabricated to support the Appellant's refugee claims;[9]

(d) rejected as invention the Appellant's claim that he was ever stopped by militants and had his car radio smashed;[10] and

(e) was therefore not satisfied that there was any reasonable possibility of the Appellant being persecuted in Pakistan for the reasons he had identified.[11]

23. The Tribunal did not accept the Appellant's claim to be at risk of persecution or any other significant harm in his home region. It was not satisfied that he faces a reasonable possibility of degrading or other treatment in Pakistan such as to give rise to Nauru's international obligations. The Tribunal therefore was not satisfied that he was owed complementary protection.[12]

Appeal to Supreme Court

24. On 6 May 2016, the Appellant filed a notice of appeal to the Supreme Court from the First Tribunal Decision.[13] An amended notice of appeal was filed dated 28 September 2017[14] and a further amended notice of appeal was filed dated 19 November 2017.[15]

25. On 22 November 2017, the parties proposed consent orders allowing the appeal, quashing the First Tribunal Decision and remitting the matter to the Tribunal for reconsideration.[16]

26. Although a copy of orders in those terms is not included in the Book of Documents, I proceed on the basis that orders were made consistent with the proposed consent orders.

Second Tribunal Hearing

27. The Appellant's application was remitted to the Tribunal for further consideration.

28. The Appellant filed a further statement and submissions in September 2018.[17]

29. The Appellant appeared before the Tribunal (**Second Panel**) on 27 November 2018 (**Second Tribunal Hearing).**[18]

The Second Tribunal Decision

30. The Second Tribunal Decision was delivered on 1 April 2019.

31. In summary, the Tribunal:

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9 BD 180 at [78]
10 BD 180 at [78]
11 BD 281 at [82]
12 BD 281 at [87]-[88]
13 BD 285
14 BD 287 - 289
15 BD 291 - 293
16 BD 295
17 BD 299 - 344
18 BD 347 - 440

(a) accepted that the Appellant was warned by the Taliban for listening to the radio and that he assisted a village *lashkar* in 2013;[19]

(b) accepted that there were a series of attacks by the Taliban and other militant groups in [D] and surrounding areas at that time in 2013 and 2014;[20]

(c) found that there had been significant improvements in security in the Appellant's home area of [D] following operations by the military;[21]

(d) found that militant groups were still present in the [D] area and attacks have continued to occur, although at a much lower level and primarily against government and security agents;[22]

(e) accepted that the Appellant may genuinely fear returning to Pakistan but, after considering all the evidence, did not accept that his fears are well founded. The Tribunal did not accept that there is a reasonable possibility the Appellant would suffer harm amounting to persecution in Pakistan in the reasonably foreseeable future for reason of his Pashtun race/ethnicity, his actual or imputed political opinion (opposition to the Taliban and application for asylum) , his religion (moderate Muslim), his membership of a particular social group (Pashtuns with mental health problems, persons who sought asylum overseas, moderate Muslims) or his nationality, separately or cumulatively;[23]

(f) was not satisfied that the Appellant would be arbitrarily deprived of his life or would be subject to torture, cruel, inhuman or degrading treatment or punishment by militants or arising from his physical or mental health conditions, separately or cumulatively;[24] and

(g) was not satisfied that returning the Appellant to Pakistan would be a breach of Nauru's international obligations.[25]

32. The Second Tribunal Decision is considered in more detail below.

GROUND OF APPEAL - FAILURE TO CORRECTLY APPLY NOTION OF "HOME AREA"

The Appellant's submissions

33. The Appellant submits that that the Tribunal erred in failing to "apply correctly the notion of a "home area" and so, failed to apply the correct test or failed to consider important evidence regarding the Appellant's family having recently changed residence.

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19 BD 475 at [103]
20 BD 475 at [103]
21 BD 475 at [103]
22 BD 475 at [103]
23 BD 475 at [104]
24 BD 478 at [115]
25 BD 478 at [115]

34. In written submissions, the Appellant submits that he advanced his case on review "upon the hypothesis that he had a home area – D." It is said that this was true in the sense that the Appellant was born in D and spent much of his life there. However, by the time of the Second Tribunal Decision, the evidence was that the Appellant's wife and children had moved to Punjab. Accordingly, the Tribunal could not simply assume that upon return to the frontiers of Pakistan that the Appellant would return to D, his family now having left D and moved to Punjab.

35. The Appellant concedes that he did not squarely identify this point, not make any specific claim about what he would do upon return to the frontiers of Pakistan. Nevertheless, it is said that there was legal error because the Tribunal failed to deal with an "obvious issue in the review". The Appellant submits that the legal error is expressed either as a failure to apply the correct test or as a failure to grapple with important evidence in the case (being the evidence about the Appellant's family's current resident in Punjab).

36. The Appellant submits that this is a "classic example" of the focus upon the "home area" notion leading to error.

37. The Appellant relies upon the decision of the High Court of Australia in *CRI028 v Republic of Nauru*.[26] At [45] – [47] of the judgment of Gordon and Edelman JJ, their Honours said:

> "The concept of a "home area" or a "home region" is not derived from the Refugees Convention. These terms have been used from time to time in judicial reasoning. There is nothing inherently objectionable or remarkable about their use in that context. But their sole function is as concise descriptors, which may be convenient in considering whether a person could reasonably be expected to relocate from one area in the country of their nationality to another. These terms do not displace the relevant and necessary inquiry. And there is no basis in the text or the purposes of the Refugees Convention to treat such descriptors as though they were terms in a statute to which meaning can and must be given. The decision of the Federal Court of Australia in *SZQEN v Minister for Immigration and Citizenship* should not be followed to the extent that it suggests otherwise.
>
> Indeed, the fact that it is not uncommon for a person to have lived in more than one place in a country (whether by reason of displacement or otherwise) or, for that matter, to have no identifiable "home area", reinforces that the concept of a "home area" may not only be a distraction but be inapposite.
>
> Where a person has established a well-founded fear of persecution in their country of nationality, a question may arise as to whether there is a place within that country to which the person could reasonably relocate (being an aspect of the ultimate question of whether the person was outside their country of nationality owing to a well-founded fear of persecution). In seeking to answer that question, it is neither helpful nor correct to interpolate or substitute a free-standing concept of a "home area", and to purport to make

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26 [2018] HCA 24; 92 ALJR 568

> factual findings about whether a particular area is or is not such an area. That approach may lead to legal error." [footnotes omitted]

38. I do not consider that the decision in *CRI028* is helpful for the resolution of this matter. In that case, the review applicant was accepted to be at risk of persecution in his "home area" within Pakistan. However, it was found that he could relocate to another part of Pakistan. Bell J held that the Tribunal was required, given those facts, to consider the possibility that the review applicant's wife and children may not locate with him.[27] Gordon and Edelman JJ held that the Tribunal failed to determine whether the review applicant could relocate to another part of Pakistan.[28] The Tribunal's failure to deal with the material or make findings about whether the review applicant's wife and child could, as a matter of practical reality, relocate with him, amounted to Tribunal's failure to perform a task required of it.

39. Those facts are to be contrasted with the facts of this case where the Tribunal expressly rejected the Appellant's claims to hold a well-founded fear of persecution in the area that he submitted to be his "home area".

40. The Appellant then draws attention to the decision of the Full Federal Court of Australia in *CSO15 v Minister for Immigration and Border Protection*.[29] After reviewing relevant authorities, the Court noted at [40] "the need for clear fact finding, by a decision-maker, if there is reliance on a finding that a particular area is an applicant's 'home area' and is a location which the applicant has no well-founded fear of persecution, or fear of significant harm…". The Court emphasised that the use of the words "home area" does not immediately suggest any error, although caution is needed to ensure that the correct question is addressed by decision-makers.

41. The Court explained the correct question at [42]:

> "The correct question is: to where will an applicant return, or be returned? Identifying a place which may have, in the past, been a person's "home area" or "home region", may assist in answering that question. But it is not, in and of itself, the answer to the question which must be asked for the statutory task to be lawfully performed. That is because under both Art 1A and the complementary protection regime, what is to be examined is the place to which a person will be returned, and what risks a person faces on return to that place. At least one location within a country of nationality must be identified for this task to be undertaken. Ascertaining a person's former "home area" or "home region" may be an important step along the way in a decision-maker's fact finding, but it is not the end of the task. As *SZSCA* illustrates, once a decision-maker has identified a region or place to which it is likely a person will return, an assessment of the risks a person might face on return to that place or region may, in some factual circumstances, require consideration of what is reasonable and practicable in terms of how that person will live and work in that place. Separately, and distinctly, because it is sourced in a different limb of Art 1A… this assessment will invariably be required if the region or place is "new" for the person, and internal relocation (or "internal

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27 At [13]

28 At [57]

29 [2018] FCAFC 14; 260 FCR 134

protection") principles apply. If it is not a "new" area, then decision-makers will need to remain alive to the factual issues raised in cases such as *SZSCA*."

42. At [45] – [47], the Court said:

> "...A decision-maker will not perform the task required of her or him if she or he simply searches for "a place" within a country of nationality where a particular applicant will not have a well-founded fear of persecution. <u>The decision-maker must assess, on the material before her or him, the place or places to which an individual is likely to return. The first step of the decision-maker's assessment is to make findings about, at least, one of those places</u>.
>
> If a decision-maker finds the place to which an individual is likely to return is one where the individual's fear of persecution is well-founded, or where the individual faces a real risk of significant harm, then the decision-maker should determine whether there are any other places to which the individual is likely to return, and then engage in the same fact finding.
>
> It is only if the place or places to which an individual is likely to return are places in which the person has a well-founded fear of persecution or faces a real risk of significant harm, that a decision-maker must look at any other places in the individual's country of nationality where neither of those kinds of risks exist. That is: places that are new or unfamiliar locations for the individual. These must be places to where it is reasonable and practicable to expect that individual to re-locate, if that terminology is to be used. It is not simply a matter of a decision-maker finding "a place" where an individual might not be exposed to persecution for a Convention reason, or to the risk of significant harm. At this final step, there must be an assessment of the reasonableness and practicability of the particular individual living in that (new) place, as the authorities have explained that assessment." [emphasis added]

43. This Court has adopted the approach laid out in *CSO15* in *WET 066 v Republic,*[30] a decision of Marshall J. At [29] his Honour said:

> "For completeness, the Court notes the recent observations of the High Court in *CRI 028 v Republic of Nauru* that the descriptors of "home area" or "home region" are not derived from the Convention, and an examination of whether an area is a "home area" may serve as a distraction from the relevant and necessary inquiry of whether a person could reasonably be expected to relocate from one area in their home country to another. In this appeal, the Tribunal did not embark on any extensive examination of whether Kathmandu was a home area of the Appellant; rather it simply carried out its obligation of assessing the place to which the Appellant would most likely return to for the purpose of assessing the Appellant's Convention claims, as required by *CSO15*." [footnotes omitted]

44. The Appellant submits that here, the Tribunal *assumed* the Appellant's return to [D] and failed to engage with the possibility that he may instead return to his family in

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30 [2018] NRSC 52 at [25]

Punjab. That being so, the Appellant submits that the Tribunal made an error of law in not assessing the place or places within Pakistan to which the Appellant was likely to return.

Respondent's submissions

45. The Respondent submits that there is no such error of law.

46. The Respondent points to various passages in the Second Tribunal Decision where the Tribunal clearly had regard to the fact that the Appellant's family resided in Punjab.

47. Those instances include:

    (a) At paragraph [1] of the Second Tribunal Decision,[31] where the Tribunal observed:

        > "Until recently the [Appellant's] wife and two children resided in [D] with the [Appellant's] uncle. They have since moved to Punjab where they currently reside with the [Appellant's] father-in-law."

    (b) At paragraph [58] of the Second Tribunal Decision,[32] where the Tribunal noted that the Appellant was unaware of the security situation in D "because his family has moved to Punjab and he does not have continuing contact with his uncle." Further, the Tribunal noted that the Appellant's wife and children lived with his uncle until recently but moved to Punjab because his uncle could no longer care for them as some people had come to his uncle's home and asked for land and produce and they took a tractor.

    (c) At paragraph [92] where the Tribunal said:

        > "In his most recent written statement, the applicant stated that his wife and children have moved to live with his father-in-law in [B] in Punjab because his uncle cannot look after them anymore. His father-in-law recently has told him that he should divorce his wife if he cannot support his family. Recently he heard that his father-in-law had a car accident and broke his hand and leg. This has impacted on his father-in-law's ability to work and has made it more difficult for him to accommodate the [Appellant's] wife and children. At the most recent hearing, the [Appellant] confirmed his written statement regarding his family's current circumstances and said that his concern for his family has increased."

48. The Respondent then submitted that the Appellant's own evidence consistently was that he *would not* relocate to Punjab on his return to Pakistan.

49. In submissions made on his behalf to the First Panel on 29 November 2015 (before his family moved to Punjab), the Appellant addressed the issue of his potential relocation within Pakistan. In those written submissions, the Appellant's solicitor said:

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31 BD 450

32 BD 462

(a) The Appellant believes he would face severe discrimination and harassment if he was to relocate to other areas in Pakistan. The Appellant had previously experienced the discriminatory treatment faced by Pashtuns, particularly those identified as being from Taliban dominated areas, in major cities in Pakistan. He mentioned a particular incident where the Appellant was detained in Islamabad after the police stopped him when they determined that he was from [D].[33]

(b) In light of the country information that they cited and the Appellant's limited education and experience, it would be very difficult for him to obtain employment should he relocate within Pakistan. That would make it extremely difficult for him to subsist. The submission was made that the Appellant would be subjected to undue hardship should he attempt to relocate from [D] to some other place within Pakistan.[34]

50. In a supplementary statement dated 21 October 2015 (at a time before his family had moved) the Appellant said:[35]

> "I also do not believe I would be able to live with my family in Pakistan in a city, like Karachi, that I am not familiar with and that is so far away from my tribe. I have a wife and two children to care for. I do not believe that I could successfully move my family and myself to the city and properly care for them without the family or tribal links I have relied on throughout my life in Pakistan.
>
> Moving to an unfamiliar area in Pakistan would be a lot different for me then would be experienced by people living in other countries like Nauru or Australia. Family and tribe would be essential for Pashtuns, like my family and I, to survive. ..."

51. Before the First Panel on 4 December 2015 (again, before the Appellant's family had moved to Punjab), the Appellant was asked why he would not be able to go and live and work in a Pashto-speaking community in Karachi or another major city in Punjab with a large Pashto population.[36] His response was to the effect that because he is a driver, he would not be able to make a living from the sort of salary he would make outside [D]. He also noted that he would be working long hours and there would be no-one to look after his wife and children. Further the rent and utility bills in other places would be much higher.[37]

52. On 9 September 2018, the Appellant signed a further supplementary statement explaining, amongst other things, that his wife and children were now living in Punjab with his father-in-law. About 9 months earlier, his uncle had told the Appellant's wife that he could not look after her and his children anymore. The Appellant's wife told him this. After this, she moved with the children to her father's house. After a few months, the Appellant's father-in-law told him that he cannot look after the Appellant's wife and children. The Appellant's father-in-law told the Appellant by

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33 BD 154 - 155

34 BD 159

35 BD 142 at [55]-[56]

36 BD 223 lines 12 - 17

37 BD 223 lines 19 - 45

phone that they are not the father-in-law's responsibility and that if the Appellant could not support his wife and children, they would have to get a divorce.[38]

53. In submissions made on behalf of the Appellant dated 11 September 2018 (that is, after the Appellant's family's relocation to Punjab) the Appellant's solicitors said that the Appellant had raised in detail in previous statements why relocation outside of [D] would be both "an irrelevant and unreasonable option".[39]

54. At the Second Tribunal Hearing on 27 November 2018, the Appellant was asked about the relocation of his family. Member Pinto asked the Appellant who his wife and children were living with at that time and the Appellant confirmed that they lived with his father-in-law in [B] which is about 8 or 9 hours' drive from [D] and that [B] is in the Punjab province.[40]

55. Later during the Second Tribunal Hearing, the following exchange occurred:[41]

> "MS PINTO: Okay. Well, the Department – that's confirmed by information with the Department of Foreign Affairs and Trade and this EASO report, is that Punjab experiences fewer incidents than in other areas, and that fatalities are lower, also because of Punjab's security operations in the area. Okay. So is there any reason that – why you wouldn't be able to live in Punjab with your family?
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> THE INTERPRETER: There are three things I want to tell you about Punjab. First, there is no Pashto at all in Punjab. They are speaking in…it is very, very hard for me to live there, and my job is like, driver job, and I'm bring driver in delivery…driving… First, I just want to – that it will be very hard for me to learn the language over there, and then how long will it take to learn the language, and also to familiar with the area, to – to drive? And my – my family need me to support them over there.
>
> Then how am I going to support them over there? As I told you before, that my father-in-law told me, "If you are unable – unable to support your family, then it would – it would be better to divorce your wife." That's mean if I go there, my – my father-in-law is not happy with me, and there are two reason. One reason, that he may scared that it maybe something happen to him because of me, I – and the other reason that I won't be able to – to support my family, and he is not happy with me.
>
> MS PINTO: Okay.
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> THE INTERPRETER: And I'm a target person, and if I go there, I will be scared from everyone. In case if I go back to… they're not – there is – there will be some people that I know them, but in Punjab, I don't know anyone

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38 BD 300 at [14]

39 BD 326 at [114]

40 BD 352- 353

41 BD 410 lines 14 - 40

Consideration

56. The Appellant concedes that he advanced a case that [D] was his home area for the purposes of assessing where he would live if he was returned to Pakistan. He accepts that he made no claim that [B], the place where his wife and children lived in Punjab at the time of the Second Tribunal Decision, might also be a place to which he would go if he was returned to Pakistan.

57. However, the Appellant submits, the fact that the Appellant did not advance a case that [B] was also a home area did not relieve the Tribunal from the burden of determining that question. Its failure to determine whether [B] was also a home area is said to amount to an error of law.

58. In my view this was not a case simply of the Appellant failing to make a submission on this point. In fact, as the extracts of the evidence and submissions above demonstrate, the Appellant squarely rejected any notion that he could or would go to live in [B] if he was returned to Pakistan. This was consistent with his evidence and arguments even before his family moved; that is, he would not be able to live anywhere in Pakistan other than in or around [D].

59. The effect of the Appellant's argument in this appeal is not just that the Tribunal had an obligation to consider a case that the Appellant did not put before it. It goes further to suggest that the Tribunal was also *obliged to consider a case which the Appellant expressly and consistently rejected* in his evidence and submissions.

60. There was no obligation on the Tribunal to consider a case that the Appellant disclaimed. The Appellant consistently denied that he would return to [B], even after his family moved there.

61. Accordingly, there was no legal error on the part of the Tribunal in failing to consider a case that the Appellant did not argue, and which was inconsistent with his evidence and submissions.

62. The Appellant puts his argument on two grounds: firstly, that there was a failure to consider relevant evidence, and secondly that the Tribunal failed to apply the correct test.

63. As to the first point, for the reasons explained in paragraphs [47] and [55] above, the Tribunal did consider the evidence as to the Appellant's family's move to [B]. That evidence is canvassed at several points in the Second Tribunal Decision. It is also consistent with the questions asked by the Tribunal during the Second Tribunal Hearing as to why the Appellant could not return to live in [B].

64. As to the second point, there was no failure to apply the correct test. The Tribunal's finding that [D] was the Appellant's "home area" for these purposes was justified on the evidence before it and was consistent with the case put by the Appellant. There was no reason for the Tribunal to consider whether [B] might also have been a home area in light of the Appellant's clear and consistent evidence that he would not go to live there.

65. Nothing in the cases cited by the Appellant requires a contrary conclusion.

66. Accordingly, the Appellant has failed to make out his sole ground of appeal.

CONCLUSION AND DISPOSITION OF THE APPEAL

67. I find that the Appellant has failed to make out his sole ground of appeal.

68. Pursuant to s.44(1) of the Act, I make an order affirming the decision of the Tribunal made on 1 April 2019. I make no order as to costs.

JUSTICE MATTHEW BRADY

6 December 2022