



IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION]

Case No. 13 of 2017

IN THE MATTER OF appeals
against a decision of the Refugee
Status Review Tribunal TFN
T15/00290, brought pursuant to s 43
of the *Refugees Convention Act*
1972

BETWEEN

WET 040

Appellant

AND

THE REPUBLIC

Respondent

Before:	Crulci J
Appellants:	C. Symons
Respondent:	R. O'Shannessy
Date of Hearing:	21 June 2017
Date of Judgment:	28 September 2017

CATCHWORDS

APPEAL - Refugees - Refugee Status Review Tribunal - Point of Law - Implausibility - Rational Basis or Evidentiary Foundation for Findings - Appeal ALLOWED

JUDGMENT

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

43 Jurisdiction of the Supreme Court

- (1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.
- (2) The parties to the appeal are the Appellant and the Republic.

...

2. The determinations open to this Court are defined in section 44 of the Act:

44 Decision by Supreme Court on appeal

- (1) In deciding an appeal, the Supreme Court may make either of the following orders:
 - (a) an order affirming the decision of the Tribunal;
 - (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

3. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on the 4 December 2016 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of the 30 November 2015, that the Appellant is not recognised as a refugee under the 1951 Refugees Convention¹ relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees, and is not owed complementary protection under the Act.
4. The Appellant filed a Notice of Appeal on 2 February 2017 and an Amended Notice of Appeal on 24 May 2017, being beyond the 42-day time limit within which to lodge an appeal of a decision of the Tribunal under s 43 of the Act. The Respondent consented to the application for leave to appeal out of time and leave was granted.

BACKGROUND

5. The Appellant is an Iranian citizen born in Tehran, Iran, in 1983. His parents and four sisters live in Iran. The Appellant has 13 years of education. From June 2002 to March 2004 he was employed as a carpet repairer, and from 2008 he worked as a laser operator.

¹1951 Refugee Convention and 1967 Protocol, also referred to as "the Refugees Convention" or "the Convention".

6. The Appellant claims a fear of harm from his wife's family as a result of the breakdown of his marriage and his refusal to follow strict Islamic teachings. The Appellant further claims a fear of harm based on his lack of belief in Islam; his ethnicity as an Azeri Turk; and his membership of the particular social group of failed asylum seekers.
7. The Appellant left Iran for Malaysia in June 2013. From there he travelled to Indonesia where he boarded a boat for Australia. The Appellant arrived on Christmas Island on 6 August 2013 and was transferred to Nauru on 25 January 2014.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellant attended a Refugee Status Determination ("RSD") interview on 7 July 2014. The Secretary summarised the material claims advanced by the Appellant in his RSD application as follows:
 - *In March 2010 he married his wife, SH in Iran. His mother introduced him to his wife and they subsequently married.*
 - *For the first two years of marriage, there were no real problems although he found his father-in-law to be very difficult, which caused some conflict between him and his wife.*
 - *His father-in-law is a member of the Sepah and Basij, and is an Islamic fundamentalist. The Appellant is a Shia Muslim and observes and practices Islam, but does not believe that politics should be mixed with religion. From the time he married, his father-in-law increasingly pressured him to become more religious and to join the Basij.*
 - *About six months before his departure from Iran, his mother found out that his wife had previously been married and divorced. The Applicant was very surprised and concerned because it is very important in Iran for a man to marry a virgin. He asked his wife if it was true and she admitted to being previously married. The fact that his wife was previously married meant his family had 'lost face' and respect. He was not sure whether it would be better to divorce or remain married. This caused many arguments between him and his wife.*
 - *About three months before his departure from Iran (March 2013), he discovered his car had been covered with acid. He contacted the police who wrote a report. The Applicant did not know who would do this to him as he did not have a dispute with anyone.*
 - *The following day, his sister received a text message from his wife's brother, which said 'this time we put acid on your brother's car. Next time we will put acid on his face'. He was very surprised and did not know why his wife's brother would be contacting his sister. He (sic) mother explained that his sister and his brother-in-law had been introduced by his wife and had been in contact previously.*
 - *He later learnt that his brother-in-law had attempted to rape his sister so that she would be forced to marry him. He realized that his wife had orchestrated the whole thing so that if he divorced her, her brother would be able to divorce his sister in retaliation.*
 - *He told his wife that he did not want to live with her any longer and asked that her father pick her up. His wife's grandfather came and took her away.*
 - *The following day, the wife returned to their home accompanied by a police officer. The police officer gave him a subpoena which required him to attend court in a few days to answer allegations of beating his wife. He could not believe this as he had not harmed his wife.*

- When his wife left, she took 10 million tomans and all the gold jewellery. He went to court. The court referred him to the police. He was told it would take four days to obtain the order to regain the goods. When he questioned how his wife had been able to obtain a subpoena in relation to the alleged assault so quickly, the police officer noted the name 'Mahmoudi' on the subpoena and said they must have friends in high places. He believed this as he had heard his father-in-law speak about the way he used his connections in the Sepah and Basij to harm enemies in the past.
- Three or four days later, he attended court to answer the alleged assault charge. The judge told him to return in four days.
- He returned to court. His wife had a few bruises. The judge would not allow him to speak. His wife had not produced a witness to the assault. He told the judge about his wife taking the money and gold. The judge asked him if he had a witness but he did not. The judge told him that without a witness there was no case to answer, found him guilty and he was detained for a few hours before his father brought the house deeds and bailed him out.
- The final sentence was delivered while he was on Christmas Island. He was fined one million tomans which his father subsequently paid.
- Several days later, his wife came with a police officer to his house to claim her dowry. When he originally signed the dowry it entitled his wife to 57 items, however the documents she had presented that day had been altered to entitle her to whatever he had purchased in the time they were together. He challenged the document in court, however as soon as the judge saw the name 'M' he yelled at him and told him that he must pay.
- On one of the occasions he was in court, his father-in-law said that his son had thrown acid on his car and the next time it would be on his face. He asked the judge if he heard this and the judge said his father-in-law was only joking.
- In the two months before his departure from Iran he noticed men on motorcycles following him. On each occasion he managed to escape in the crowd but was very frightened that his father-in-law was using his connections in the Basij to follow him. He realised it was only a matter of time until his father-in-law used his connections to have him imprisoned or until his brothers-in-law used their connections to kill him or have acid thrown on him.²

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

- He was married to SH;
- He separated from his wife when he found out that she had been previously married and divorced;
- On 20 April 2013, he reported damage to his car due to acid to the police and that he believes the damage was caused by his in-laws;
- The breakdown of his marriage was acrimonious;
- His wife claimed that the Appellant had failed to pay spousal maintenance during the marriage and that he had assaulted her;
- Court orders were made against the Appellant and in favour of SH for the payment of unpaid maintenance, the return of her dowry and for the payment of a fine for assaulting her;
- His father has paid the fine for his assault conviction.³

² BD 74 – 75.

³ BD 76.

10. However, the Secretary did not accept the following elements of the Appellant's claim as credible:

- He has not divorced his wife, SH;
- His sister was approached after he left Iran.⁴

11. In finding that the claim that the Appellant had not divorced his wife was not credible, the Secretary gave weight to the fact that the Appellant said his wife had returned to collect the dowry, and in Iran when a couple divorces, the dowry is returned to the wife.⁵ There was also no reason why the wife's parents would be concerned with the Appellant divorcing his wife given he had been to court over domestic violence and dowry related matters,⁶ and the fact his wife had been divorced previously suggests her family is not averse to divorce.⁷

12. The Secretary further noted country information indicating that, if the Appellant had experienced the issues with his wife as claimed, he would have had the means to divorce her, and the claims of his wife's family seeking to harm him without the Appellant actually taking steps to divorce his wife casts doubt over the genuineness of his claims.⁸

13. The Secretary also expressed concern that the Appellant claimed to not know many details about his wife's ex-husband given it was such a big issue for him.⁹ The Secretary said *"it follows that, if his claim to fear harm from her family because they do not want him to divorce his wife is not credible because he has already divorced her and orders have been made against him for the payment of maintenance and dowry, it seems unlikely that the Applicant would continue to be pursued by his now former wife's family"*.¹⁰

14. The Secretary therefore found that there was no reasonable possibility that the Appellant would face harm from his wife's family in the reasonably foreseeable future because the Appellant may divorce his wife, or for reasons relating to the marriage breakdown.¹¹

15. In regards to the claim that the Appellant would be harmed for seeking asylum abroad, the Secretary noted country information that there have been a few incidents of returning asylum seekers being mistreated and detained. However, those asylum seekers had some profile of interest, and the Appellant in this case has no such profile. There was therefore no reasonable possibility of the Appellant facing harm upon return based on being a failed asylum seeker who applied for asylum in a western country.¹²

⁴ BD 76.

⁵ BD 76.

⁶ BD 77.

⁷ BD 80.

⁸ BD 79.

⁹ BD 78.

¹⁰ BD 80.

¹¹ BD 81.

¹² BD 84.

16. This being the case, the Appellant had no well-founded fear of persecution and was not granted refugee status. The Secretary further considered that there was no evidence to indicate a reasonable possibility of the Appellant facing harm if returned to Iran that would breach Nauru's international obligations.¹³

REFUGEE STATUS REVIEW TRIBUNAL

17. Before the Tribunal, the Appellant maintained his claims regarding the breakdown of his marriage, and threats and attacks from his wife's family. The Appellant added further details regarding his father-in-law's membership of the Sepah and Basij.¹⁴ He said that he also feared harm upon return to Iran on the basis of his religious beliefs; Azeri ethnicity; and status as a failed asylum seeker.
18. The Appellant said that his father-in-law had written reports on him that would lead the authorities to believe that he was against Islam,¹⁵ and he would be accused of apostasy and severely punished upon return, including by being executed.¹⁶ The Appellant said that society "*puts Azeris down*" and they face discrimination in finding employment.¹⁷
19. The Appellant further explained that the wife had collected her *Jahizieh*, being her contribution to the marital household, and the *Jahizieh* possessions can be collected upon separation or divorce.¹⁸ The Appellant did not initiate a divorce while in Iran but attended court proceedings regarding the domestic violence and dowry so his in-laws would not suspect that he was planning to leave.
20. The Tribunal accepted that the Appellant is of Azeri ethnicity and, in 2010, having signed a contract to marry SH, they wed in 2011, and set up a house together. The marriage broke down in early 2013, and the wife retrieved her dowry, and legal cases were commenced against the Appellant, including for domestic violence and non-payment of marital support.¹⁹
21. However, the Tribunal found that there was "*good reason to doubt*" the Appellant's claims concerning the threat of harm from his wife's family. These reasons included that:
- It was implausible that the wife's family could have intended to prevent the Appellant divorcing his wife by throwing acid on the car, being joint matrimonial property;²⁰
 - The wife's family could not have accepted that it would be possible for the Appellant to remain married to the Appellant if they threw acid at his face;²¹

¹³ BD 84.

¹⁴ BD 245 [14].

¹⁵ BD 255 [53].

¹⁶ BD 255 [55].

¹⁷ BD 256 [60].

¹⁸ BD 246 [14].

¹⁹ BD 260 [67].

²⁰ BD 260 [71]-[72].

²¹ BD 260 [72].

- The Appellant told the Tribunal that he did not report his brother-in-law's confession that he had thrown acid on the car in a SMS message to the police because the brother-in-law had thrown the SIM card away after the message. He then said he did report the message but the police told him that a message would not be regarded by the courts as good proof;²²
- It was implausible that, if the police had gone the trouble of visiting the Appellant's house to report an incident involving an unknown perpetrator, they would ignore evidence of the perpetrator's identity and confession;²³
- The various court cases brought by the wife's family are not consistent with the wish for the marriage to continue and not end in divorce;²⁴
- It was implausible that the wife's brother would have sought out a relationship with the Appellant's sister with the purpose of preventing the Appellant divorcing the wife. It is further implausible that the brother-in-law would have held any appeal to the sister, given his drug addiction and criminal history;²⁵
- It is implausible that the sister could have started a relationship with the brother-in-law when she was only 18 or 19 years old, given she was living with her parents at the time;²⁶
- In the Appellant's statement to the Tribunal, and at the Tribunal hearing, there was a shift in emphasis to the role of religious differences in motivating the threats from the wife's family;²⁷
- When first asked about the time period over which the marriage was negotiated, the Appellant said it took no more than a week. He then said it took about two months, followed by a period over which the Appellant and his wife got to know each other;²⁸
- It was implausible that the wife's family would have been prepared to accept a marriage between the Appellant and wife given their fanatical views;²⁹
- It is implausible that the father-in-law could have believed that the Appellant could be "trained" to share his fanatical views;³⁰
- There were inconsistencies in the Appellant's evidence that the wife's previous marriage was a secret, and she had falsified a birth certificate to prevent it being discovered, and that neighbours knew about the marriage;³¹
- It is implausible that the father-in-law wanted to kill or seriously harm the Appellant because the Appellant knew "secrets" relating to the father-in-law's abuse of power, as the father-in-law's abuse of power would have been obvious to anyone in authority.³²

22. The Tribunal therefore said:

"The Tribunal is, however, not satisfied as to the credibility of key parts of the applicant's evidence concerning the attitude of his wife's family toward him. It does

²² BD 261 [73].

²³ BD 261 [73].

²⁴ BD 261 [75].

²⁵ BD 261 [76].

²⁶ BD 262 [76].

²⁷ BD 262 [78].

²⁸ BD 262 – 263 [82].

²⁹ BD 263 [83].

³⁰ BD 263 [83].

³¹ BD 263 [85].

³² BD 265 [93].

not accept that his father-in-law or other members of the family have been motivated to harm him by religious fanaticism, a desire to prevent a divorce, a desire to keep secret his wife's first marriage or a fear that he would divulge information about his father-in-law's wrong-doing. The Tribunal does not accept there is any credible evidence that his wife's family ever took action to physically harm him or that they sought to go outside the sphere of the courts to seek restitution from him. For the same reason, the Tribunal does not accept that after he left Iran threats were made to his sister or other members of his family that he would be killed or that they themselves would be killed or harmed if he could not be found. Nor does the Tribunal accept there is any credible basis for his claim that he would be killed or otherwise harmed by his wife's family, or those acting for them including members of Sepah and the Basij, if he were to be returned to Iran".³³

23. The Tribunal therefore did not accept that, if the Appellant was returned to Iran, his wife's family would denounce him to the authorities as opposing the regime, and, as a consequence, considered that there was no reasonable possibility that the Appellant would be harmed because of his political opinion.³⁴ The Tribunal further doubted that, in light of the adverse credibility findings, his religious beliefs had changed in any significant way since arriving in Nauru, i.e. that he now completely rejects Islam. It was satisfied that he might not be fully observant, particularly in relation to praying, but was not satisfied that this would distinguish him from a large portion of the Iranian population. There was no real possibility of the Appellant being harmed upon return to Iran because of his religious beliefs.³⁵
24. In regards to the Appellant's claimed fear of harm on the basis of his Azeri ethnicity, the Tribunal also noted country information that Azeris are generally well integrated into Iranian society, and found that there was no reasonable possibility of harm on this basis.³⁶ In addition, in light of the Appellant's lack of involvement in anti-regime activities, there was also no reasonable possibility of the Appellant suffering harm on account of having sought asylum abroad.³⁷
25. Noting that the threat of harm said to activate Nauru's complementary protection obligations arose from the same circumstances as the claim for refugee status, the Tribunal similarly found that there was no reasonable possibility that if the Appellant were returned to Iran that he would face harm in breach of Nauru's international obligations.³⁸

THIS APPEAL

26. The Appellant's Amended Notice of Appeal dated 23 May 2017 reads as follows:

1. *The Tribunal made errors of law in its decision when it constructively failed to exercise its jurisdiction, or failed to carry out and/or complete its statutory task of review by recording findings that were material to the disposition of the Appellant's*

³³ BD 266 [95].

³⁴ BD 266 [96]-[98].

³⁵ BD 266 [101]-[102].

³⁶ BD 267 [105]-[106].

³⁷ BD 268 [111].

³⁸ BD 269 [116].

application for review and that it did not possess and/or disclose a rational basis or evidentiary foundation.

Particulars

- i. the Tribunal recorded findings in its decision at [72], [74] and [76] by which it described the Appellant's claims as 'implausible' and discredited them on that basis;
 - ii. the Tribunal's findings, referred to at (i), were material to the disposition of the Appellant's review application for the reason that they contributed to the Tribunal's rejection of the Appellant's significant claim that he feared harm upon a return to Iran because of the enmity of his in-laws;
 - iii. the Tribunal's findings, referred to at (i), did not possess and/or disclose a rational basis or evidentiary foundation.
2. The Tribunal erred on a point of law when it failed to afford the Appellant natural justice pursuant to section 22(b) of the Act and failed to comply with its obligations under section 40(1) of the Act.

Particulars

- i. by reason of matters arising from the Tribunal's findings (or parts of its findings) recorded at [70], [72], [74], [78]-[80] and [87] of the Tribunal decision, which disclosed 'issues' relevant to the disposition of the Appellant's application for review, the Tribunal was required to identify such issues for the Appellant and to provide him an opportunity to make submissions or adduce evidence directed at the issues.
 - ii. the Tribunal failed to identify the issues for the Appellant, including at the Tribunal hearing, and the Appellant did not address the Tribunal on the issues.
27. In regards to ground 1, the Appellant referred the Court to the following passage from *W148/00A v Minister for Immigration and Multicultural Affairs*:³⁹

*"Where the question of credibility is determinative of a tribunal decision, to simply assert that the tribunal considers the applicant's account to be "implausible" or "highly unusual" does not constitute a finding on the question raised. Such expressions are more in the nature of observations or side comments, rather than findings."*⁴⁰

28. The Appellant submits that, where a Tribunal purports to base its decision on credibility, the Tribunal must do more than simply assert that the Appellant's account is "implausible". Given that the Tribunal is required to determine the factual questions of whether an Applicant meets the criteria for refugee status, or has a real possibility of suffering serious harm, the process of determining the facts is an integral part of the Tribunal's statutory review function.
29. Where the process miscarries, the Tribunal fails to conduct the review it was required by the Act to conduct. In this case, the process miscarried because the Tribunal made findings on significant matters without identifying an objective

³⁹ *W148/00A v Minister for Immigration and Multicultural Affairs* (2001) 185 ALR 703 ("W148/00A").

⁴⁰ *Ibid* [67].

basis or a cogent evidentiary founding. Here, the Appellant submits, in relation to the three matters identified in the particulars to ground 1, there was no such evidentiary basis.

30. The Respondent rejoins that the Tribunal is not required to provide a separate explanation for finding the Appellant's evidence to be implausible. The relevant passage of *W148/00A* cited by the Appellant highlights that there is a distinction between an observation that evidence is "implausible", and a finding. The Respondent asserts that the Tribunal found the Appellant's evidence to be implausible for good reason, including discrepancies in the Appellant's evidence, and inconsistencies between his evidence and what the Tribunal inferred was likely to have occurred. In any case, findings of credibility are reserved for the primary decision-maker: *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham*.⁴¹
31. In response to the Appellant's submission that there was no evidentiary basis for the Tribunal's findings that aspects of the claims were "implausible", the Respondent submits that, even if the Court were to agree, the cumulative weight of other matters properly referred to by the Tribunal provided a sufficient basis for the Tribunal to reject the Appellant's evidence.
32. In regards to ground 2 the Appellant draws on principles set out in the Australian authorities of *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*,⁴² and *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*,⁴³ to contend that an Appellant is entitled to be informed about the issues that are dispositive or determinative to the review where those are not obvious on the known material. Those issues included the plausibility of the claims that the brother-in-law threw acid over the car, the plausibility of the relationship between the brother-in-law and Appellant's sister, and the shift in emphasis in the Appellant's evidence from the primary motivation of the in-laws "enmity" toward the Appellant being the prevention of the divorce, to the Appellant's refusal to follow strict Islamic teachings.
33. The Respondent submits that the Tribunal is not required to put the Appellant on notice that evidence may be implausible, or that inconsistent evidence might lead the Tribunal to reject the evidence entirely. The Tribunal is not required to put the Appellant on notice of its thought processes as to do so would expose the Tribunal's provisional views for comment before making its decision. Natural justice does not oblige the Tribunal to act in this way.

CONSIDERATIONS

34. When considering ground 1, the Australian authorities provide guidance that when making a credibility finding, a bare assertion that a claimed event is

⁴¹*Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 58 ALD 609, 625 [67].

⁴²*Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 ("Alphaone").

⁴³*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 ("SZBEL").

"implausible" will only stand if the event is "*inherently unlikely*"⁴⁴ or "*inherently improbable*"⁴⁵ or "*so far out of accord with what was likely to occur*".⁴⁶

35. Absent this, the Tribunal must point to "*basic inconsistencies*" in the evidence, or "*probative material*" or "*independent country information*", which led the Tribunal to conclude that the claimed event was "implausible".⁴⁷ In *W64/01A v Minister for Immigration and Multicultural Affairs*, there were three aspects of the Appellant's evidence that the Refugee Review Tribunal found to be "implausible". Lee J explored those aspects and said:

"The context in which the word "implausible" was used by the Tribunal shows that, at its highest, the meaning attributed to the word by the Tribunal was, as counsel for the Minister submitted, that the Tribunal considered the events "unlikely to have occurred".

...

It is necessary to examine in turn each of the claimed events and the effect of the Tribunal's opinion that it "consider[ed] it implausible.

...

This was not a case where the Tribunal could point to basic inconsistencies in accounts given by the applicant or his wife on previous occasions and nor was there probative material before the Tribunal to show that any part of the applicant's claims was untrue. There was no independent country information inconsistent with the applicant's claims regarding the events he said caused him to flee with his family. By describing the three events as "implausible" and by relying upon that statement to dismiss the applicant's claims in their entirety, the Tribunal misapprehended and incorrectly applied the relevant law".⁴⁸ (emphasis added)

36. In *W148/00A v Minister for Immigration and Multicultural Affairs*,⁴⁹ Tamberlin and R D Nicholson JJ made observations as to the use of the language of "implausibility" in making credibility findings. Their Honours said:

"The reasoning process and supporting evidence that forms the basis on which a finding that evidence is rejected should be disclosed and clear findings made in direct and explicit terms. It is not sufficient simply to make general passing comments on general impressions made by the evidence where the issue is important or significant."⁵⁰

37. The Tribunal must not make findings that are "*largely speculative*", a "*matter of conjecture*" or "*somewhat inconclusive*".⁵¹ If the Tribunal made any findings that claimed events are "implausible" without a rational basis, the Court must

⁴⁴ *W148/00A*, Supra note 39, [21].

⁴⁵ *W64/01A v Minister for Immigration and Multicultural Affairs* [2002] FCA 970 at [31] ("*W64/01A*").

⁴⁶ *W148/00A*, Supra note 39, [66].

⁴⁷ *W64/01A*, Supra note 45, [31].

⁴⁸ *Ibid.*

⁴⁹ *W148/00A*, Supra note 39.

⁵⁰ *W148/00A*, Supra note 39, [66].

⁵¹ *W148/00A*, Supra note 39, [68].

consider whether the cumulative weight of the findings supported by a rational basis was sufficient to permit the Tribunal to reject the Applicant's claim.⁵²

38. Here the Appellant submits that the language of "implausibility" is used in relation to three key findings without any rational basis. Firstly at [72] – the Tribunal was not satisfied that an attack on their joint property could "plausibly" have intended to prevent them from divorcing.
39. There is nothing in the evidence to point to the car being joint matrimonial property. Conversely, the Appellant's evidence was that it belonged to him alone. The Tribunal appears to accept this in other parts of the decision record:
- a. At BD 243, when setting out the Appellant's material claims before the Secretary, the Tribunal said "*someone poured acid on his car*";
 - b. At BD 250 [30], the Tribunal said at the hearing the Appellant affirmed his account "*of an incident in which acid was thrown on his car*";
 - c. At BD 260 [71], the Tribunal said the Appellant claimed that the determination to prevent the Appellant divorcing his wife motivated "*the acid attack on his car*".
40. It is possible (as opposed to "*implausible*" or "*inherently improbable*") that acid could have been thrown over the car to deter the Appellant from obtaining a divorce, especially if the car was owned solely by the Appellant.
41. Secondly at [74] – the Tribunal found it "*generally implausible*" that if the police had gone to the trouble of visiting the Appellant's house to make a report of an incident involving an unknown perpetrator, they should then ignore the evidence supplied of the perpetrator's identity and confession, on the grounds that the means by which he had discovered it did not constitute legal proof. The following exchange occurred at the Tribunal hearing in relation to the SMS message said to reveal the perpetrator's identity and confession:

TRIBUNAL MEMBER: There was just one other thing. In your statement you explain that you went to the police and reported this attack on your car, but you said that you didn't know who it was; you had no idea who would want to do something like that. And they said, "Well, you know, we can't do anything about it then." But then you learned, in fact, that it was your brother-in-law who has done this, and he has actually sent a text message admitting that. Did you take this information back to the police?

THE INTERPRETER: No. They've used a SIM card that we couldn't trace. Yes. Maybe they have bought a SIM card which is very cheap, they put it, and then they have threatened and they throw it away afterwards. SMS is not recorded as a proof or anything. This is what the police told us.

TRIBUNAL MEMBER: So you did take that information back to the police.

THE INTERPRETER: Yes, but the said SMS is not recorded as evidence. And they said, "If you take him to the court, complain against him and you cannot prove it, then

⁵²ibid [19].

he can take you to the court, because of the defamation and you would be in trouble."

TRIBUNAL MEMBER: Okay.

TRIBUNAL MEMBER: But the police didn't even think they might investigate, even if it might not eventually prove to be able to – it might not produce proof that could stand up in court?

THE INTERPRETER: No, we called – we called that SIM card and nobody was answering, so we couldn't find who the person... that was use this. We couldn't follow up and find out.

TRIBUNAL MEMBER: But what was the point of calling it? Didn't you – you said all along that you knew who it was, that it was the brother-in-law who sent the message. Why would you call it?

THE INTERPRETER: Well, they – on the – during those heated period, I called to say, "Why do you make threat and why have you called my sisters as well?" and they just didn't answer. Yes. This is what lots of people do. They say the SIM card doesn't cost much in Iran. They get it. They do call, do this and throw it away.

TRIBUNAL MEMBER: So are you saying there was – no one was answering the call – answering the call or are you saying that you couldn't even get the call through?

THE INTERPRETER: Yes. It was like the telephone is off.

TRIBUNAL MEMBER: I will have to think about that. Initially when I asked you the question, "Did you take the information back to the police", you just said, "No, they wouldn't use a SIM card we can trace".

THE INTERPRETER: No. So you mean that I didn't take the SIM card to police, because they had the SIM card. They could use the SIM card... they called – they used the SIM card to contact us. We didn't take the SIM card anywhere.

TRIBUNAL MEMBER: No. Did you take the information about the SIM card to the police, I meant.

THE INTERPRETER: No. I raised the information with the police, but they said, "No. This sort of information, a text message and the SIM card is not an evidence that you could use. Legally it's just useless, so ---"⁵³
(emphasis added)

42. The Tribunal said that the Appellant inconsistently claimed that he did not report the SMS message because the brother-in-law had used a cheap SIM card and then disposed of it, but then said he did report the message and the police advised that it would not be regarded as proof by the court. However, the Tribunal transcript suggests that the Appellant may have intended to convey that he reported the message to the police, but did not provide the message as evidence.⁵⁴

43. It is not "*inherently improbable*" that the police would ignore the evidence of the identity of the perpetrator and the confession, because the means through

⁵³BD 221 – 222.

⁵⁴BD 261 at [73].

which this had been conveyed did not constitute legal proof. In relation to the finding at [74], this was nothing more than a bare assertion and there was no supporting evidence for this finding, including any “*basic inconsistencies*” in the Appellant’s evidence.

44. Thirdly, at [76] – the Tribunal found the claim that the Appellant’s wife plotted to have her brother marry the Appellant’s sister to prevent the Appellant divorcing her “*inherently implausible*”. The Tribunal also observed that it seemed “*implausible*” that the Appellant’s sister could have had any interest in the brother-in-law, who was described by the Appellant as an abuser of methamphetamines and alcohol and had been jailed many times. The Tribunal found it “*additionally implausible*” that the Appellant’s sister would associate herself with a family that had deceived her family, and it was “*implausible*” that the sister would have been able to begin a relationship with the brother-in-law when she was 18 or 19 years old and living with her parents.
45. These findings by the Tribunal findings are not supported by inconsistencies in the Appellant’s evidence, or probative material or independent country information.⁵⁵ The Tribunal put to the Appellant at the hearing that it was “*a very elaborate and rather unlikely plot*”, and the Appellant maintained it was true.⁵⁶ There are no reasons given by the Tribunal as to why it is “*inherently improbable*” that the sister would have had any interest in the brother-in-law given his addiction problems and criminal record; pursued the relationship despite knowing about her sister-in-law’s first marriage; or would have been able to engage in such a relationship while living with her parents. The findings are “*speculative*” and “*matters of conjecture*”.⁵⁷
46. These findings, along with other findings identified at [21] led the Tribunal to say that it was “*not satisfied that the applicant’s wife’s family damaged his car or threatened him with an acid attack, or that the legal actions they launched against him were motivated by a desire to prevent him from divorcing her*”.⁵⁸ The Court is not satisfied that the cumulative weight of the findings made by the Tribunal supported by a rational basis was sufficient to permit the Tribunal to reach the conclusion that the Appellant’s claims were fabricated.⁵⁹ This ground of appeal succeeds.
47. Turning to ground 2, Australian authorities provide that a Tribunal is not required to expose its “*mental processes*” or “*provisional views*”,⁶⁰ or “*give an applicant a running commentary upon what it thinks about the evidence*”.⁶¹ However, a Tribunal may be required to convey to the Applicant that aspects of his or her account may be in issue, and this may be conveyed through

⁵⁵ W64/01A, Supra note 45, [31].

⁵⁶ BD 185 In 16 – 17.

⁵⁷ W148/00A, Supra note 39.

⁵⁸ BD 262 at [77].

⁵⁹ W148/00A, Supra note 39, [19].

⁶⁰ Alphaone, Supra note 42, 591-2; SZBEL, Supra note 43, [29].

⁶¹ SZBEL, Supra note 43, [48].

challenging the Applicant's evidence or asking the Applicant to expand upon the matter in issue.⁶²

48. In this case, the Tribunal said that throughout the RSD process there was a shift in emphasis, from the primary motivation of the in-laws "*enmity*" towards the Appellant being preventing the divorce, to his refusal to follow strict Islamic teachings.⁶³ The following exchange occurred at the Tribunal hearing in relation to the role of religion in motivating the divorce of the Appellant and his wife:

TRIBUNAL MEMBER: But my – unless I've misunderstood everything, I thought that your father-in-law wanted you to stay married to his daughter because it doesn't look good for his daughter if she's, you know, living alone or divorced or whatever.

THE INTERPRETER: You know ---

TRIBUNAL MEMBER: Therefore – hang on, I haven't finished my sentence. Therefore, the point is to have you back in one piece, not harmed, but living in the same house with her. So why would they want to kill you? Because you would – then you would never be able to live with her.

THE INTERPRETER: Yes, that would have been the case if I accepted to be like them, a fanatic Muslim, and follow what they wanted, but I didn't want to be like that. All of this about the dowry, etcetera, etcetera, was that they can have me as a person who they use as the – as the undercover or something like that to be one of them, and I didn't want to do that.

TRIBUNAL MEMBER: Well, I don't think that has been very evident so far. They put up with you for three years knowing you weren't a devout Muslim. I mean, from the time of the marriage contract your father-in-law knew that you weren't devout, and he made no, you know – he didn't try to harm you until such times as you wanted to get a divorce. So if you stopped wanting a divorce, then they would stop wanting to harm you.

THE INTERPRETER: How come you said we didn't have any difficulties with my father? I have explained that we have problems from day 1? From the – from day 1 they were – forced me to go to their – their Friday prayer, other prayers, go and – and join Basij activities or other things. That was a constant thing. They would push me to prayer. Why should I pray – why should I pray in the Arabic language with a God they want?

TRIBUNAL MEMBER: I didn't say you didn't have any difficulties. I said they didn't harm you until such time as you started saying, "I want a divorce".

THE INTERPRETER: Yes, they didn't harm me because I was their son-in-law and they wanted me to live with their daughter, but if at the time that I had divorced her after that, just like what they did to the car, they would do to me. So then because they were – haven't had lost hope while I was their son-in-law.⁶⁴
(emphasis added)

50. In the above exchange, the Tribunal questioned the Appellant closely on the motivation of his refusal to follow strict Islamic teachings, challenging the

⁶²Ibid [43].

⁶³BD 262 at [78].

⁶⁴BD 205 ln 42 – 206 ln 32.

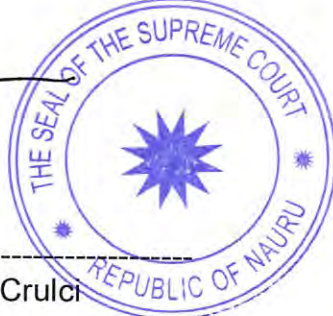
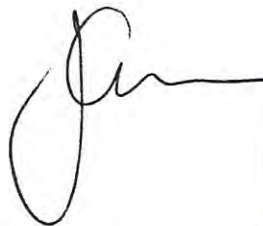
Appellant's evidence and prompting him to expand on his claims. At other stages the Tribunal hearing, the Tribunal also closely questioned the Appellant on the plausibility of the Appellant's sister's relationship with the brother-in-law.⁶⁵ These issues were therefore sufficiently identified to the Appellant by the Tribunal, and the Appellant was given opportunity to comment.

51. Although the Tribunal did not specifically put it to the Appellant that it was implausible that the brother-in-law would throw acid over the car, being "*joint property*",⁶⁶ as previously noted the Tribunal is not required to give a "*running commentary*", on its thought processes. The Tribunal has discharged its obligations and this ground fails.

ORDER

52. The Appeal is allowed.

- (1) The decision of the Tribunal TFN T15/00290, dated 4 December 2016 is quashed.
- (2) The matter is remitted to the Refugee Status Review Tribunal under section 44(1)(b) for reconsideration according to law.



The seal is circular with a blue border. Inside the border, the words "THE SEAL OF THE SUPREME COURT" are written in a circle at the top, and "REPUBLIC OF NAURU" is written at the bottom. In the center of the seal is a blue star with eight points.

Judge Jane E Crulci

Dated 28th September 2017

⁶⁵ BD 185 ln 16 – 17.

⁶⁶ See BD 180 – 181.