



**IN THE SUPREME COURT OF NAURU**

**AT YAREN**

**[APPELLATE DIVISION]**

Case No. 23 and 24 of 2015

IN THE MATTER OF appeals  
against a decision of the Refugee  
Status Review Tribunal TFN 14015  
and TFN 1416, brought pursuant to s  
43 of the *Refugees Convention Act*  
1972

**BETWEEN**

**TOX 093 and TOX 094**

Appellants

**AND**

**THE REPUBLIC**

Respondent

Before: Crulci J  
Appellants: C. Symons  
Respondent: R. O'Shannessy

Date of Hearing: 19 June 2017  
Date of Judgment: 5 October 2016

**CATCHWORDS**

*APPEAL - Refugees – Refugee Status Review Tribunal – Point of Law – Admission of Further Evidence – Mistake of Fact – Operative Assumption – Duty of Tribunal to Enquire - 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 28 December 2014 affirming the decisions of the Secretary of the Department of Justice and Border Control ("the Secretary") of the 23 June 2014, that the Appellants are not recognised as refugees 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, and is not owed complementary protection under the Act.
4. The Appellants filed a Notice of Appeal on 31 October 2016, 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. On 6 February 2017 the Appellant filed an Amended Notice of Appeal, and on 31 March 2017 the Appellant filed a Further Amended Notice of Appeal. The parties have filed consent orders to the effect that the Appellants be granted leave under s 43(5) to pursue the grounds of appeal set out in the Further Amended Notice of Appeal.

## BACKGROUND

5. The Appellants are brothers from Iran. The Appellants' parents and a brother and sister reside in Iran, and they have another sister who is living in Australia. The second Appellant is married and his wife lives in Iran.

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

6. The Appellants fear persecution and harm arising from an incident with a neighbour, after they were found drinking alcohol and playing music with Christians in May 2013. The Appellants claim a fear of persecution on account of their (lack of) religion; actual/imputed political opinion; and as members of a social group of failed asylum seekers.
7. The Appellants departed Iran for Dubai by air on 1 June 2013. Travelling to Indonesia later in the month they boarded a boat bound for Australia. The boat was intercepted and the Appellants were taken to Christmas Island on 22 July 2013, and transferred to Nauru on 11 September 2013.

#### INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellants attended a Refugee Status Determination ("RSD") interview on 18 February 2014. The Secretary summarised the Appellants' material claims as follows:
  - *"The Appellants were born and raised as Muslims, however between the ages of 18 and 20 decided they did not believe in the Muslim faith."*
  - *They currently identifies as "non-religious".*
  - *They have friends of different faiths, including Muslims and Christians.*
  - *On 29 May 2013, the Appellants were drinking grappa at the second Appellant's apartment with some of their friends.*
  - *Two or three hours after they had finished drinking, the father of their friends knocked on his brother's door.*
  - *Their friends' are VS and YS. Their friend's father is AS.*
  - *AS is a conservative fundamentalist Muslim.*
  - *VS and YS's father was upset that the boys had been drinking alcohol in the apartment.*
  - *An argument ensued between the AS and the Appellants.*
  - *AS told the Appellants he was going to report them for promoting Christianity, and he presented a petition that the neighbours had signed complaining about the fact that the Appellants frequently had Christian friends at their house and frequently consumed alcohol at these gatherings.*
  - *One hour later, the Iranian police (NAJA) arrived at the second Appellant's apartment.*
  - *AS had filed a formal complaint with the police.*
  - *AS kept yelling at the Appellants in front of the police, saying they were promoting Christianity and they had been consuming and distributing alcohol.*
  - *After two days and two nights, the police put the Appellants in a vehicle to transport them to Court to hear the charges against them.*
  - *On the way to Court, the vehicle they were travelling in stopped at traffic lights.*
  - *Once the traffic next to their vehicle cleared for a few seconds, the second Appellant threw open the door, and the Appellants leapt from the vehicle and ran away.*
  - *The police inside the vehicle did not give chase because their vehicle doors were blocked by other vehicles on either side.*
  - *There was a small gap beside the backdoor of the vehicle allowed a few seconds for the Appellants to escape. Then the traffic moved forward and either side of the police vehicle were then blocked.*
  - *The Appellants ran to their sister Maryam's house. Maryam then took them to their chicken farm, where they used tools to cut off their handcuffs.*

- *They then hid at the chicken farm while their families made arrangements for them to depart Iran.*
- *The Appellants departed Iran one week later in "fear for their lives".*

9. The Secretary accepted the following claims as credible:

- The Appellants are of Azeri ethnicity, and were born and raised in Azarbayjane Ghardi, Iran;
- The Appellants identify as "non-religious";
- The Appellants have friends of different faiths, including Muslims and Christians alike;
- The Appellants departed Iran on 6 June 2013 on genuine passports.<sup>2</sup>

10. However, the Secretary did not accept the following claims as credible:

- The Appellants had an argument with their friends' father who is a conservative Muslim and were accused of consuming and distributing alcohol as well as promoting Christianity;
- The second Appellant was also accused of mocking the Supreme Leader;
- The Appellants were detained for 2 days without charge by the police;
- The Appellants went into hiding after their escape from the authorities;
- The Appellants' family home was raided numerous times after their escape;
- The Appellants escaped from police custody and have since been pursued by the authorities.<sup>3</sup>

11. The reasons given by the Secretary for not accepting the above claims as credible, include that:

- In their written statements dated 17 December 2013, the Appellants said that their friends' father showed them a petition signed by the neighbours complaining that the Appellants frequently had Christians at their house and consumed alcohol. However, at the RSD interview, the Appellants said the petition was not signed at the time it was showed to them by their friends' father;<sup>4</sup>
- If the friends' father was a conservative fundamentalist Muslim, it was unlikely he would allow his sons to interact with the Appellants, and alleged Christian friends, for six months before making a complaint, which according to the Appellants, was how long the Appellants had been socialising with them;<sup>5</sup>
- The Appellants' accounts of their detention and escape from the authorities differed in regards to whether they were kept in the same jail cell, whether another policeman was sitting next to the Appellants in the

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<sup>2</sup>BD 60.

<sup>3</sup>Ibid 60.

<sup>4</sup>Ibid 55.

<sup>5</sup>Ibid 55.



police car after their arrest, and whether an arrest warrant had been issued;<sup>6</sup>

- The second Appellant did not mention that his home had been raided after he escaped from the police car with his brother at the Transfer Interview, or in the RSD statement of claims;<sup>7</sup>
- Given country information on the gravity of the crimes, it was implausible that the Appellants had not been issued with an arrest warrant until one year after the incident alleged;<sup>8</sup>
- It was implausible that the Appellants would have been able to escape from the police car and run several kilometres while handcuffed, with the police making no effort to follow;<sup>9</sup>
- It was implausible that the authorities, who the Appellants claim to have extensive networks throughout Iran, were unable to locate the Appellants at their sister's home two kilometres from where the Appellants escaped from the police car, or at their place of work;<sup>10</sup>
- The Appellants departed Iran on genuine passports in their own names without attracting any adverse attention.<sup>11</sup>

12. The Secretary considered country information suggesting that those who publicly renounce Islam might be seriously harmed. As the Appellants had not publicly renounced Islam, and had not suffered any harm in the past for being atheists, there was no reasonable possibility that they would face any related harm in the reasonably foreseeable future on the basis of their religious views.<sup>12</sup> Additionally, in circumstances where the Appellants made no mention of political activism or accusations of anti-regime opinion, and the Appellants were able to leave Iran on genuine passports with no adverse attention, there was no reasonable possibility of harm on the basis of actual or imputed anti-regime political opinion.<sup>13</sup>

13. Furthermore, the Secretary considered country information indicating that seeking asylum abroad would not lead to harsh action by the authorities upon return to Iran in cases where the person seeking asylum has no particular public or political profile. There was therefore no reasonable possibility of harm on account of the Appellants seeking asylum abroad.<sup>14</sup>

14. The Appellants' fear of harm was therefore not well-founded and the Secretary was satisfied that the Appellants were not refugees within the meaning of the Act. There was no other information before the Secretary suggesting that there was a reasonable possibility of the Appellants facing harm if returned to Iran that would constitute a breach of Nauru's international obligations.<sup>15</sup>

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<sup>6</sup>Ibid 56.

<sup>7</sup>Ibid 57.

<sup>8</sup>Ibid 58.

<sup>9</sup>Ibid 59.

<sup>10</sup>Ibid 59.

<sup>11</sup>Ibid 59.

<sup>12</sup>Ibid 64 – 65.

<sup>13</sup>Ibid 65 – 66.

<sup>14</sup>Ibid 66.

<sup>15</sup>Ibid 67.

## REFUGEE STATUS REVIEW TRIBUNAL

15. The Appellants' claims concerning the incident with their friends' father, and their subsequent arrest, detention, and escape, were maintained before the Tribunal.
16. The Tribunal expressed similar concerns as the Secretary about the credibility of the Appellants' evidence. In particular, the Tribunal noted inconsistencies in the Appellants' evidence regarding whether the petition was signed at the time the Appellant were confronted by their friends' father;<sup>16</sup> whether the Appellants were kept in the same cell after their arrest;<sup>17</sup> whether there was a policeman in the back of the police car;<sup>18</sup> whether their home had been raided;<sup>19</sup> and whether an arrest warrant had been issued.<sup>20</sup>
17. The Tribunal had concerns regarding the Appellants' evidence that the doors to the police car were unlocked, such that the Appellants were able to escape;<sup>21</sup> that the Appellants were able to run 2 kilometres handcuffed together without the police chasing them;<sup>22</sup> and the fact that the police were unable to find the Appellants before they left Iran, notwithstanding that they were "*hiding*" at the "*obvious places*" of their sister's house and their workplace.<sup>23</sup>
18. In relation to the documentary evidence provided by the Appellants following the RSD interview, including an arrest warrant for both Appellants, a first warning for both Appellants, and a second warning and conviction notice for both Appellants, the Tribunal questioned why the documents provided following the RSD interview, conducted on 18 February 2014, when they were dated well before the interview. The conviction letter also referred to breaches of sections 164, 165 and 175 of the Islamic Penal Code, which are purely procedural provisions.<sup>24</sup> The Tribunal said that, in light of credibility findings described at [16]-[17], the Tribunal did not place any weight on those documents and did not accept they were genuine.<sup>25</sup>
19. The Tribunal said at [31]:

*"Having carefully considered the claims and evidence of both applicants in light of the available country information, the Tribunal does (not?) accept the account of their experience at the hands of the fundamentalist Muslim neighbour and the police. For the reasons set out above, the Tribunal does not accept that the applicants were arrested and detained by the police or that they escaped while being taken to court. The Tribunal does not accept that the applicants were able to avoid detection by hiding at their farm and then travelling to Tehran to depart on genuine passports at the Khomeini International Airport. The Tribunal does not accept that the applicants were convicted in absentia for the alleged crimes as the Tribunal does not accept*

<sup>16</sup>Ibid 212 [18].

<sup>17</sup>Ibid 212 [20].

<sup>18</sup>Ibid 212 – 213 [21].

<sup>19</sup>Ibid 213 [25].

<sup>20</sup>Ibid 214 [27].

<sup>21</sup>Ibid 213 [21].

<sup>22</sup>Ibid 213 [22].

<sup>23</sup>Ibid 213 [24].

<sup>24</sup>Ibid 215 [28].

<sup>25</sup>Ibid 215 [29].

*that the claimed incidents took place. For these reasons, the Tribunal does not accept that there is a reasonable possibility that the applicants will be harmed by the authorities for reason of their political profiles."*

20. The Tribunal determined that the Appellants would not be harmed because of their religious beliefs, or dress codes,<sup>26</sup> nor that they would face persecution by reason of seeking asylum abroad.<sup>27</sup> The Tribunal therefore concluded that the Appellants were not refugees, nor owed complementary protection.

## THIS APPEAL

21. The Appellants filed a Further Amended Notice of Appeal on 31 March 2017, as follows:

1. *The Refugee Status Review Tribunal ("the Tribunal") made an error of law when it constructively failed to exercise its jurisdiction, or failed to discharge and/or substantively perform, its statutory task of review in circumstances where:*

### Particulars

- i) *The Appellant had provided documents to the Tribunal, namely, an arrest warrant (BD 169), two warning letters (BD 171 and 172) and a conviction letter (BD 170 and 173-174), that were relevant, cogent and important to the Appellant's claims to be a person recognised as a refugee or a person to whom the Republic of Nauru owed complementary protection (or capable of possessing this character);*
- ii) *In relation to the conviction letter, the Tribunal rejected this evidence for reasons that included the substantial reason that the offences recorded in the conviction letter did not correspond with the offences related to alcohol consumption that appeared in the version of the Islamic Penal Code that was 'adopted on April 21, 2013' (2013 Islamic Penal Code) (BD 215 [28]-[29]);*
- iii) *The Tribunal in making this finding and/or adopting this analysis, relied on an assumption that the date on which the 2013 Islamic Penal Code came into force was the same date on which the 2013 Islamic Penal Code was adopted (operative assumption) (BD 130 and 215 [28]-[29]);*
- iv) *The operative assumption was incorrect; instead, the 2013 Islamic Penal Code came into force on a date subsequent to April 21, 2013 and critically, after the date on which the Appellant committed the offences to which the conviction letter related, with the result that the earlier version of the Islamic Penal Code relied upon by the Appellant, applied in relation to the conviction letter;*
- v) *The Tribunal in these circumstances acted under a significant mistake of fact or mixed question of fact and law and excluded critical factual material on the erroneous basis that it was irrelevant;*
- vi) *In so doing, the Tribunal was diverted in a material sense from its statutory task of review;*
- vii) *Further, the Tribunal did not translate all documents that the Appellant provided to it (BD: 169, 171, 172)*
- viii) *The Tribunal should have translated those documents so it could properly understand them. The Appellant is a vulnerable asylum seeker and the Tribunal has an obligation to ensure he is given a fair and proper hearing.*
- ix) *In failing to have the documents translated, the Tribunal did not properly consider the information in them and made a purported assessment of the Appellant's claims without a correct or complete understanding of how the Appellant's claims were articulated.*
- x) *In these circumstances, the Tribunal failed to carry out its statutory task of review.*

<sup>26</sup>Ibid 216 [32]-[33].

<sup>27</sup>Ibid 217 [34].



2. *The Tribunal made an error of law when it constructively failed to exercise its jurisdiction, or failed to discharge and/or substantively perform, its statutory task of review by failing to make an obvious inquiry about a critical fact.*

Particulars

- i) *The Tribunal rejected material evidence constituted by the conviction letter by adopting an analysis that was informed and underscored by the operative assumption (BD 215 [28]-[29]):*
- ii) *The validity of the operative assumption was placed in issue by the material and submissions provided by the Appellant to the Tribunal that, amongst other things, appended a copy of an earlier version of the Islamic Penal Code (BD 148 and BD 175-206), and a decision of the Secretary that referred to the earlier version of the Islamic Penal Code (BD 58). The provision by the Appellant of a translation of the conviction letter that recorded different provisions of the Islamic Penal Code served to further obscure the issue.*
- iii) *There was no evidence one way or the other as to whether the operative assumption was correct.*
- iv) *The Tribunal's rejection of the conviction letter was crucially important to the issue of whether the Appellant had been charged for offences related to the consumption of alcohol which in turn, provided a critical and direct link to the outcome of the review;*
- v) *In these circumstances, where an enquiry made by the Tribunal as to the validity or otherwise of the operative assumption would not have been difficult and would have yielded at least some relevant information on issues that were critical to the outcome of the Tribunal's review, the failure by the Tribunal to undertake such inquiry had the consequence that the Tribunal failed to carry out its statutory task of review.*

Admission of Further Evidence

22. At the hearing of the appeal on 19 June 2017, the Appellant sought to admit further evidence in the form of a report of Mr Mohammad Nayyeri, an expert in the Iranian legal system and Islamic law. The Appellants seek to have the report admitted to prove the date on which the New Penal Code came into effect for the purpose of demonstrating that the Tribunal was incorrect to find that the New Penal Code was in effect when the Appellants claim to have been arrested on 29 May 2013.
23. The expert report of Mr Mohammad Nayyeri explains that the New Penal Code did not include an explicit commencement date. It was published in the Official Gazette in Iran on 27 May 2013. According to the general rule and the passage of 15 days since its publication in the Official Gazette, it came into force on 12 June 2013. Under the Old Penal Code, the "consumption of intoxicant" was dealt with in Articles 165 to 182. Under the New Penal Code, the offence was dealt with in Articles 264 to 266. Therefore, given the purported date of the Appellants' arrest, the Appellants would have been charged and convicted under the Old Penal Code. The Tribunal made an error by assuming the New Penal Code came into force on 21 April 2013, being the date on which it was adopted by Judicial and Legal Affairs Commission of Parliament.
24. The Respondent opposes the grant of leave for the purpose of determining the first ground of appeal because they argue that this ground does not raise any appellable point of law but rather seeks to establish a mistake of fact.



25. However, the Respondent does not oppose leave to determine the second ground because this ground does not seek to establish a mistake of fact, but whether there was an inquiry the Tribunal could have conducted.
26. By the Further Amended Notice of Appeal on 21 March 2017, the Appellants submit in reply that the first ground does raise an appellable point of law, and refer to *Green v Minister for Housing*,<sup>28</sup> and *Chava v Minister for Immigration and Border Protection*,<sup>29</sup> to argue that the evidence should be admitted as it casts light on the constructive failure of the Tribunal to exercise its jurisdiction.<sup>30</sup>
27. The authorities indicate that the admission of fresh evidence upon appeal is subject to the principles from *Ladd v Marshall*,<sup>31</sup> although there is an overriding discretion to admit the evidence in exceptional circumstances in the interests of justice.<sup>32</sup> The Respondent submits,<sup>33</sup> and the Appellant appears to concede,<sup>34</sup> that the first of the *Ladd* principles cannot be satisfied, i.e. that the evidence could not have been adduced at first instance.
28. However, the Appellants submit that “*exceptional circumstances*” exist in the case for the following reasons:
- the serious consequences of the decision for the Appellants;<sup>35</sup>
  - the nature of the material before the Tribunal, i.e., the conviction letter, being “*critical evidence that could assist the Appellants in a substantial way*”, given that “*the essence of their case before the Tribunal was that they had been involved in a particular event that had certain repercussions, including that they were the subject of an arrest and conviction*”;<sup>36</sup>
  - the evidence was not easy to procure and it was not in relation to a question the Appellants were in a position to answer.<sup>37</sup>
29. In *Clodumar v Nauru Lands Committee*<sup>38</sup> the High Court of Australia admitted new evidence in a proceeding described as an “appeal” from the Supreme Court of Nauru, but where the High Court in fact exercised original jurisdiction. The new evidence was characterised as follows:

<sup>28</sup> *Green v Minister of Housing* [1967] 2 QB 606.

<sup>29</sup> *Chava v Minister for Immigration and Border Protection* [2014] FCA 313 (“Chava”).

<sup>30</sup> Appellants’ submissions at [9].

<sup>31</sup> *Ladd v Marshall* [1954] 1 WLR 1489, 1465. Denning LJ said: “In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible”.

<sup>32</sup> *R v Secretary of State for the Home Department; Ex parte Momin Ali* [1984] 1 All ER 1009; *E and R v Home Secretary* [2004] QB 1044; *London Borough of Richmond Upon Thames v Kubicek* [2012] EWHC 3292 (“E and R”).

<sup>33</sup> Respondent’s submissions at [37].

<sup>34</sup> Supreme Court Transcript P-16 In 20 – 21.

<sup>35</sup> *Ibid* In 17 – 18.

<sup>36</sup> *Ibid* In 27 – 31.

<sup>37</sup> *Ibid* In 20 – 23.

<sup>38</sup> *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561.

- “fresh evidence not known to the appellant and not discoverable by the exercise of reasonable diligence on his part at the time of the proceedings the subject of the appeal” (first Ladd principle); and
- “evidence directly negating the critical finding of fact upon which the decision of the Supreme Court, adverse to the appellant, was based”.

30. The majority found that these characteristics existed and admitted the evidence.

31. On an appeal from a decision of the Federal Circuit Court, in *Chava v Minister for Immigration and Border Protection*<sup>39</sup> the matter for consideration when the Appellant sought to adduce new evidence (taking the form of a transcript of the Tribunal proceedings and three items of documentary evidence) was whether the evidence was sought to be adduced purely to challenge the factual findings of the Tribunal. Here Mortimer J said:

*“Applications to adduce evidence of the kind made in this proceeding stand on a different footing. This is because a transcript of a tribunal hearing is simply a record of what occurred in the very decision-making process under review. The documentary evidence sought to be adduced by the appellant (i.e. the “correct” certificate of enrolment and the two cancelled certificates of enrolment) are adduced for the purpose of making good the submission that, if the Tribunal had conducted itself in the way the appellant contends the law required, there was in fact further material the Tribunal could have considered in its review and which might have led it to a different outcome. Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs”.*<sup>40</sup>  
(emphasis added)

32. Her Honour therefore concluded that the Appellant should be allowed to adduce the new evidence in the hearing of the appeal.<sup>41</sup>

33. This Court is competent to admit further evidence subject to the provisions of the *Courts Act 1972* (Nr)<sup>42</sup> and the *Civil Procedure Rules 1972* (Nr).<sup>43</sup> The material relied upon by the Tribunal has been shown to be erroneous and as such this Court finds that the corrected evidence should be admitted in the interests of justice. It is material on which the Tribunal relied on to determine the credibility of the Appellants’ claim, and the determination of the claim has a profound consequence for the Appellants’ future existence<sup>44</sup>. As such the exceptional circumstances are made out.

### Substantive Grounds of Appeal

<sup>39</sup> *Chava*, Supra note 39.

<sup>40</sup> Ibid at [35].

<sup>41</sup> Ibid at [38].

<sup>42</sup> *Courts Act 1972* (Nr) s 48.

<sup>43</sup> *Civil Procedure Rules 1972* (Nr) O 32, rr 1 and 2.

<sup>44</sup> Lord Bridge of Harwich in *Ex p Bugdaycay* [1987] AC 514 at 531F: “The most fundamental of all human rights is the individual’s right to life and when an administrative decision under challenge is said to be one which may put the applicant’s life at risk, the basis of the decision must surely call for the most anxious scrutiny.”.



34. In relation to ground 1, the Appellants drew the Court's attention to the Full Court of the Federal Court authority of *Minister for Immigration and Border Protection v MZYTS*.<sup>45</sup> In relation to the duty of the Administrative Appeals Tribunal to conduct a review and reach a state of satisfaction about criteria for the grant of a protection visa, the Full Court said:

*"lawful formation of that state of satisfaction (one way or the other) involves, first, a correct understanding of the basis (or bases) on which the visa applicant says she or he has a fear of persecution in her or his country of nationality, and second, a correct understanding of how, in respect of each of the bases articulated, it is to be determined whether that fear is objectively well founded."*<sup>46</sup>

35. The Appellants submit that the Tribunal had an incorrect understanding of the bases for their fear of persecution, revealed by the reasoning process set out in the particulars to the first ground of appeal.

36. The Appellants further submit that the Tribunal's failure to procure translations of the supporting documents had the result that the Tribunal did not properly consider the information in the documents and made a purported assessment of the Appellants' claims without a correct or complete appreciation of how such claims were articulated.

37. The Respondent contends the Appellants' argument that the Tribunal "*acted under a significant mistake of fact*", even if true, provides no basis for remittal under s 44(1)(b) of the Act. While making an error as to the existence of a jurisdictional fact may give rise to an appellable error, the relevant fact in this case was not a jurisdictional fact, as the existence of the fact is not a precondition to the Tribunal's exercise of power. The only jurisdictional fact in this case was whether there was an application for merits review.<sup>47</sup>

38. In addition, the proposition that by acting "*under a significant mistake of fact*" the Tribunal was "*diverted in a material sense from its statutory task of review*" has no basis in authority. The Tribunal's statutory task of review required it to assess the conviction letter and decide what weight to give it. The Tribunal carried out this task by assessing the letter against the offences the Appellants claim they were charged with, and deciding that the letter should not be given any weight.

39. The Respondent further submits that the Tribunal is under no general obligation to obtain translated copies of documents. In any event, in this case, the Tribunal generally understood what was put forward in the arrest warrant, first warning, and the second warning and conviction letter. The Appellants failed to put forward translated copies of the arrest warrant and first warning, although they evidently had the capacity to translate the conviction letter, and did not even request that the Tribunal obtain translated copies of the other documents.

40. Turning to ground 2, the Appellants submit that an inquiry into a critical fact is warranted where there is insufficient information or material before the decision

<sup>45</sup> *Minister for Immigration and Border Protection v MZYTS* (2013) FCR 431.

<sup>46</sup> *Ibid* at [34].

<sup>47</sup> Supreme Court Transcript p 23.



maker to allow it, lawfully, to make a decision. In particular, the Appellants make reference to the Australian High Court authority of *SZIAI v Minister for Immigration and Citizenship* (“SZIAI”),<sup>48</sup> in which the High Court acknowledged:

*“a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could in some circumstances, supply a sufficient link to the outcome to constitute a failure to review and a constructive failure to exercise jurisdiction.”*<sup>49</sup>

41. The Appellants submit that the material and submissions put before the Tribunal revealed that the version of the Islamic Penal Code applicable to the Appellants’ conviction was a matter in issue and further information was required. Had the Tribunal made relevant inquiries, it would have become apparent that the operative assumption was incorrect. Therefore, the Tribunal failed to carry out its duty to conduct and complete a review under the Act.

42. In relation to ground 2, the Respondent makes a number of points with respect to the Appellants’ reliance on *SZIAI*, including that the cited comments were *obiter dictum*; the inquiry made to the expert witness could not be deemed “*obvious*”; and there was no evidence that the critical fact could be “*easily ascertained*”. The Respondent submits that *SZIAI* stands for the proposition that there must be an absence of information to give rise to a duty to inquire, and places reliance on the following passage of Katzmann J in *Jahangir v Minister*:<sup>50</sup>

*“Moreover, SZIAI is concerned with situations in which there is insufficient information or material before a decision-maker and where, in the absence of such information or material, the making of a decision might constitute jurisdictional error”.*

43. Contrary to the Appellants’ submissions, there was no evidence before the Tribunal indicating the date the Islamic Penal Code came into effect was in issue. Even if there was such evidence, it could not give rise to a duty on the Tribunal to make further inquiries to clarify the ambiguity.

## CONSIDERATIONS

### Ground 1

44. The Appellants characterise the error of law not merely as a “*significant mistake of fact*”, but as a failure to exercise jurisdiction by the Tribunal, and look to the consequences of the “*operative assumption*”, being that it led the Tribunal to reject potentially significant evidence.<sup>51</sup> The Appellants’ description of the ground of failure to exercise jurisdiction<sup>52</sup> appears to frame the question of whether an Applicant meets the criteria for refugee status as a “*jurisdictional fact*”, being a necessary precondition to the Tribunal’s exercise of statutory power.

<sup>48</sup> *SZIAI v Minister for Immigration and Citizenship* (2009) 259 ALR 429.

<sup>49</sup> *Ibid* at [25].

<sup>50</sup> *Jahangir v Minister* (2014) 222 FCR 91 at [56]; Supreme Court Transcript p 46.

<sup>51</sup> Appellants’ Reply Submissions at [23].

<sup>52</sup> *Ibid* at [19]-[20].

45. The Court considers therefore whether a “significant error of fact” constitutes an appellable “point of law” for the purposes of s 43(1) of the Act. Although in Australia, the prevailing view in the common law appears to be that mistake of fact is not an error of law,<sup>53</sup> in other Commonwealth jurisdictions the matter maybe an appellable point of law.

46. In the United Kingdom, for example, the ground of material mistake of fact may be made out where the four matters articulated in *E and R v Home Secretary* are satisfied:<sup>54</sup> Carnwath LJ identified four “ingredients” that would enable a decision to be overturned due to mistake of fact:

*“First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been “established”, in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal’s reasoning”.*<sup>55</sup>  
(emphasis added)

47. Carnwath LJ reviewed relevant case law and academic publications.<sup>56</sup> In particular, his Honour considered the decisions of Lord Slynn in *R v Criminal Injuries Compensation Board ex parte A*<sup>57</sup> (“CICB”) and *R v Secretary of State for the Environment ex p Alconbury*<sup>58</sup> (“Alconbury”).

48. Carnwath LJ noted that in *Alconbury*, Lord Slynn referred to the jurisdiction to quash for “misunderstanding or ignorance of an established and relevant fact” in coming to the conclusion that the Court’s powers of review met the requirements of the European Convention on Human Rights. Lord Nolan said:

*“But a review of the merits of the decision-making process is fundamental to the Court’s jurisdiction. The power of review may even extend to a decision on a question of fact. As long ago as 1955 your Lordships’ House, in Edwards v Bairstow [1956] AC 14, a case in which an appeal (from General Commissioners of Income Tax) could only be brought on a question of law, upheld the right and duty of the appellate court to reverse a finding of fact which had no justifiable basis”* (para 61).  
(emphasis added)

38. His Honour therefore concluded “the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law”.<sup>59</sup>

<sup>53</sup> *Waterford v Commonwealth* (1987) 163 CLR 54; *Tarrant v Australian Securities and Investments Commission* [2015] FCAFC 8.

<sup>54</sup> *E and R*, Supra note 32 at [66].

<sup>55</sup> *Ibid* at [66].

<sup>56</sup> *Ibid* at [44] – [60].

<sup>57</sup> *R v Criminal Injuries Compensation Board ex parte A* [1999] 2 AC 330.

<sup>58</sup> *R v Secretary of State for the Environment ex p Alconbury* [2003] 2 AC 295, [2001] UKHL 23 para 53.

<sup>59</sup> *E and R*, Supra note 32 at [66].



40. In New Zealand the matter has been considered in a number of cases, including *Attorney-General v Moroney*.<sup>60</sup> Here, the second Respondent, H, had a history of mental illness and criminal behaviour. A Tribunal reviewed a decision that H was a “restricted patient” under the *Mental Health (Compulsory Assessment and Treatment) Act 1992* (NZ). The Tribunal found that H no longer suffered from a disorder of volition or cognition. The Director of Mental Health sought judicial review of the Tribunal decision.
41. The Applicant submitted that the Tribunal operated under a material mistake of fact, in that one clinician reported that H had a “disorder of mood and cognition”. It was said that this report was of no direct relevance as H’s condition had changed significantly since his examination by this clinician. In response, Rodney Hansen J said:

*“The precise scope of judicial review for error of fact is still uncertain: see the comments of Elias CJ in Lewis v Wilson & Horton Ltd [2000] 3 NZLR 546 at para [92]. But it is clear that in order to make out the ground the error must be sufficiently material to be described as the basis or the probable basis of the decision: Glaxo Group Ltd v Commissioner of Patents [1991] 3 NZLR 179 at p 184. Or, as was said in Lewis at para [92] in response to an argument that would have permitted any conclusion of fact to be reopened on application for judicial review:*

*“The supervisory jurisdiction does not go so far, except where the decision of fact is a condition precedent to the exercise of power or where the error of fact results in a decision which is unreasonable. In such cases, the decision-making process will have miscarried.”*

*I note also that it is not a mistake of fact to prefer one available view of the facts over another: New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries [1988] 1 NZLR 544 (CA) at 552.<sup>61</sup>*

42. Rodney Hansen J was satisfied that any mischaracterisation of the condition had no material bearing on the decision of the Tribunal. The fact was also not a condition precedent to the exercise of its power nor could be said to have resulted in a decision that was unreasonable.<sup>62</sup>
43. The Hong Kong case of *Building Authority v Appeal Tribunal (Buildings)*<sup>63</sup> found that there was a mistake of fact leading to unfairness. Here the Building Authority applied for judicial review of the determination of the Appeal Tribunal (Buildings). The Tribunal found that the building was not permitted to only have a single staircase based on the usable floor area of the building being above the specified maximum of 2,500 square feet.

44. Chu J said:

<sup>60</sup> *Attorney-General v Moroney* [2001] 2 NZLR 652 (HC) (“*Moroney*”).

<sup>61</sup> *Ibid* at [81].

<sup>62</sup> *Ibid* at [82].

<sup>63</sup> *Building Authority v Appeal Tribunal (Buildings)* [2005] HKCFI 1123.



*"In the present case, the Tribunal was mistaken as to the usable floor area of the storeys above ground floor and the mistake was material to its determination. The issue was to the usable floor area only came about towards the end of the closing submission for the appellants. The Tribunal had invited the representative of the Authority to address on the point. The response of the Authority's representative was that he did not take the position that the subject building complied with the 1959 Code of Practice. Instead, he focused on the danger posed by the unauthorised building works. Unfortunately, this had led the Tribunal to labour under the impression that the Authority's representative "did not disagree" with the contention of the appellants' representative on the usable floor area. Although it can be said that the Authority's representative could have elucidated the position for the Tribunal, this is not the same as saying that the Authority was responsible for the mistake. The appellants' representative was the author of the mistake.*

*Applying the principle in E v Secretary of State for the Home Department, the Tribunal's mistake on the usable floor area of the storeys above ground floor per se constitutes a ground for judicially reviewing the Tribunal's determination".<sup>64</sup>*  
(emphasis added)

43. Here the mistake of fact as to the usable floor area of 2,434 square feet, rather than the 4,500 square feet as found by the Tribunal, lead to unfairness as in *E v Secretary of State for the Home Department*.
44. Canadian decisions are governed by application of the *Federal Courts Act* 1990, here:

#### **Section 18(4)**

The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

...

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

...

45. *Re Rohm & Haas Canada Ltd v Anti-Dumping Tribunal*<sup>65</sup> was an application to set aside a decision of the Anti-dumping Tribunal that the "dumping" of a class of acrylic sheet "has not caused, is not causing nor is likely to cause material injury to the production in Canada of like goods". The Applicant argued that the Tribunal based its decision on an erroneous finding of fact. Jackett CJ said:

- (a) "In considering an attack based on s. 28(1)(c) it should be kept in mind that, for such an attack to succeed, there are, according to the wording of s.28(1)(c), three conditions precedent, viz: the Tribunal must have made an "erroneous" finding of fact;
- (b) that erroneous finding must have been made
  - (i). in a perverse or capricious manner, or
  - (ii). without regard for the material before the Tribunal, and

<sup>64</sup>Ibid at [23]-[24].

<sup>65</sup>*Re Rohm & Haas Canada Ltd v Anti-Dumping Tribunal* (1978) 22 NR 175.

(c) the decision attacked must be “based” on the erroneous finding.<sup>66</sup>

46. Jackett CJ considered that none of the alleged “erroneous” findings were made in a perverse or capricious manner, or without regard to the material before the Tribunal. The application was dismissed.
47. In the matter before this Court, the Tribunal formed a view as to which version of the Islamic Penal Code was applicable to the Appellants. The Tribunal considered the claims made by the Appellants set out at [16]-[17] above and, in light of their findings in relation to those claims, goes on to reject the way in which the documents were put before the Tribunal and their content; the decision making steps are intertwined.
48. The Court finds that the decision was based on an erroneous finding and that the Appellants were not responsible for this mistaken finding. For the Appellants to succeed, “*the mistake must have played a material (not necessarily decisive) part in the Tribunal’s reasoning*”<sup>67</sup> and be “*sufficiently material to be described as the basis or the probable basis of the decision*”.<sup>68</sup>
49. The Court finds that the Tribunal’s disbelief of the Appellants’ evidence was linked to the reasons set out above and that the “*operative assumption*” made by the Tribunal has played a sufficiently material part in the Tribunal’s reasoning. The Court considers therefore that a “*significant error of fact*” constitutes an appealable “point of law” for the purposes of s 43(1) of the Act, and this ground of appeal succeeds.

## Ground 2

50. The author Matthew Groves, in “*The Duty to Inquire in Tribunal Proceedings*”<sup>69</sup> stated in respect to an “obvious inquiry” (at pp 200 – 201):

*“In SZLGP v Minister for Immigration and Citizenship (‘SZLGP’), Logan J stated that ‘reasonable minds might reasonably differ as to whether a particular inquiry was ‘obvious’’. Although this suggests that a requirement of obviousness may be inherently uncertain, some principles are reasonably settled. An inquiry will not be obvious simply because it is requested by a party, or would have been a sound or reasonable course for a tribunal to take. Several cases that have considered when a tribunal might be obliged to look beyond the material filed by the parties suggest an inquiry is obvious when the reason for it is self-evident. A tribunal is normally entitled to rely upon the material lodged by the parties, but not when it contains ‘some obvious omission or obscurity that needs to be resolved before a decision is made’. That is not the case, however, if the material is equivocal rather than plainly flawed, or it is unclear how the tribunal could seek further information or what source it could pursue.”*

(citations omitted, emphasis added)

<sup>66</sup>Ibid at 214-215.

<sup>67</sup>E and R, Supra note 32.

<sup>68</sup>Moroney, Supra note 60 at [81].

<sup>69</sup>Matthew Groves, “*The Duty to Inquire in Tribunal Proceedings*” (2011) 33 Sydney Law Review 177.

51. Groves also considered the phrasings “readily available” or “easily ascertained” (at pp 201 – 202):

*“The requirement that information be easily ascertained has been interpreted to demand relatively little effort of decision-makers. The classic example is a simple phone call or email, which might clarify an uncertain point. To require such relatively limited effort may reconcile any duty to inquire with the apparently conflicting principle that a tribunal or other decision-maker is not obliged to make an applicant’s case. In *Khant*, Cowdroy J explained an inquiry in these circumstances ‘would not make the appellant’s case for him. Rather, it would seek clarification of the grounds already provided to the delegate, in the circumstance where the delegate’s record was wholly unsatisfactory.’”*  
(citations omitted, emphasis added)

52. In the decision under consideration in *SZIAI*, the Federal Court quashed a decision of the RRT on the basis that it had committed jurisdictional error by unreasonably failing to undertake its own inquiries into certain matters. Those matters related to the authenticity of documents provided by the review Applicant.
53. The majority of the High Court of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ referred to the decision of Wilcox J in *Prasad*, and noted:

*“The discussion by Wilcox J in *Prasad* has been adopted or cited in a number of later cases in the Federal Court. The decisions, not all of which were founded upon the ADJR Act, were collected by Kenny J in *Minister for Immigration and Citizenship v Le*. In the course of deciding to grant prohibition and certiorari in *Ex parte Helena Valley/Boya Association (Inc)*, the Full Court of the Supreme Court of Western Australia cited *Prasad* as authority for the necessity for a decision-maker to make inquiries in order to discover appropriate material if it be readily available.”<sup>70</sup>*

...

*“It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error.”<sup>71</sup>*  
(emphasis added)

54. Their Honours further expressed doubt that there would be any basis upon which the failure to make an inquiry could breach the requirements of procedural fairness at common law,<sup>72</sup> and considered that the RRT discharged its obligations and dismissed the appeal.
55. In *Minister for Immigration and Citizenship v SZGUR*,<sup>73</sup> the Applicant had told the RRT that he was suffering from depression, bipolar and forgetfulness. The

<sup>70</sup> *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 at [22].

<sup>71</sup> *Ibid* at [24].

<sup>72</sup> *Ibid* at [25].

<sup>73</sup> *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594.



migration agent provided the information to explain inconsistencies in the Applicants evidence. The agent asked the RRT to arrange an “*independent assessment of his mental health, if required*”. The RRT did not exercise its powers. The Federal Court held that the RRT committed jurisdictional error by failing to consider whether to use its statutory powers to arrange an assessment. Upon appeal to the High Court, the majority of French CJ, Kiefel and Heydon JJ, held that s 424(1) of the *Migration Act 1958* (which is substantially similar to s 36 of the *Nauruan Act*) did not require the RRT to seek further information. Heydon J said:

*“If it were accepted that the Tribunal was seeking, and received, information as to the first respondent’s mental health under s 424(1), then it was required to have regard to that information in making the decision on review. It did so. Section 424(1) is not the source of any obligation on the Tribunal to go further and seek more information that might enhance, detract from or otherwise be relevant to information which it has already received.”<sup>74</sup>*  
(emphasis added)

56. The majority further found that since there was no obligation on the RRT to exercise its power under s 427 (which is substantially similar to s 24 of the *Nauruan Act*) there could be no obligation on the RRT to consider whether to exercise that power:

*“The question whether s 427(1) imposes a legal duty on the Tribunal to consider whether to exercise its inquisitorial power under that provision was answered in the negative by the Full Court of the Federal Court in WAGJ v Minister for Immigration and Multicultural and Indigenous Affairs. The Court held that absent any legal obligation imposed on the Tribunal to make an inquiry under s 427(1)(d) “by a parity of reasoning... there is no legal obligation to consider whether one should exercise that power”. That view is correct. That is not to say that circumstances may not arise in which the Tribunal has a duty to make particular inquiries. That duty does not, when it arises, necessarily require the application of s 427(1)(d).”<sup>75</sup>*  
(emphasis added)

57. Taking into account the above excerpts, it does not appear that the inquiry undertaken by the Appellants since the Tribunal decision was “*self-evident*” or that there was some “*obvious omission or obscurity*” to be clarified, given that the Iran Human Rights Documentation Center translation of the New Penal Code indicated the Code was adopted in April 2013, and there was no evidence before the Tribunal suggesting otherwise.<sup>76</sup> The inquiry undertaken by the Appellants also went beyond a “*simple phone call or email*”, and involved identifying and contacting several experts in various countries.<sup>77</sup> This ground of appeal fails.

## ORDER

43. (1) The Appeal is allowed.

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<sup>74</sup>Ibid at [86].

<sup>75</sup>Ibid at [22].

<sup>76</sup>See BD 130 In 35-44.

<sup>77</sup>See Cross-Examination of Ms Montalban at Supreme Court Transcript p 42.

- (2) The decisions of the Tribunal in TFN 14015 and TFN 14016, dated 28 December 2014, are quashed.
- (3) The matter is remitted to the Refugee Status Review Tribunal under section 44(1)(b) for reconsideration according to law.

Judge Jane E. Crulci

Dated this 5 October 2017

