



IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 2 of 2016

Being an appeal against a decision of the Nauru Refugee
Status Review Tribunal brought pursuant to s43 of the
Refugees Convention Act 2012

BETWEEN

WET052

APPELLANT

AND

The Republic of Nauru

RESPONDENT

Before: Khan J
Date of Hearing: 1 September 2016
Date of Judgment: 30 October 2017

Case may be cited as: WET052 v The Republic

CATCHWORDS:

Whether the Tribunal was unreasonable or illogical in rejecting or not determining claims or integers of claims – whether the Tribunal was unreasonable or illogical in making findings without any probative evidence – whether the Tribunal failed to provide procedural fairness as defined by the Act – whether the Tribunal failed to make enquiries – whether the Tribunal had regard to irrelevant matters.

Held – appeal dismissed – Tribunal’s decision affirmed.

APPEARANCES:

Counsel for the Appellant: A Krohn
Counsel for the Respondent: C Fairfield

JUDGMENT

INTRODUCTION

1. The appellant filed an appeal against the decision of the Refugee Status Review Tribunal (“the Tribunal”) pursuant to s43(1) of the *Refugees Convention Act 2012* (“the Act”) which states:

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 Tribunal delivered its decision on 1 February 2016 affirming the decision of the Secretary for the Department of Justice and Border Control (“the Secretary”) that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.
3. The appellant filed an appeal in this Court on 6 May 2016 and the grounds of appeal were amended on 14 August 2016.

BACKGROUND

4. The appellant is a 26-year-old man from Sharak e Valiasr, Tehran in Iran. He is of Turkmen ethnicity and is a Shi’a Muslim.
5. He received 12 years of education, completing high school and gaining a certificate in Industrial Technology in 2009. From this time, he lived for brief periods at three other addresses in Iran.
6. He worked in his brother’s shop from 2007 to 2009, as a distributor of detergents from 2009 to 2010, as a painter with another brother from 2010 to 2011 and as a dairy products distributor from 2011 to 2013.
7. His father, mother and six siblings still live in Tehran. The appellant is the youngest child and was the only child remaining at the family home. His father is an alcoholic and a drug user. The appellant was provided with opium by his father and forced to consume it on five to six occasions as a teenager but is not a drug user and hates drugs. There is a large age gap between him and his siblings and his father did not have the same addiction issues when they were young.
8. The appellant was made to feel unwanted by his parents and physically abused by his father since the age of 13. His father would force him to supply drugs to those he worked with. As he grew older he refused his father and suffered abuse as a result. Examples of abuse include being burned by his father’s cigarettes, being cut with a knife, and being hit on the head with a heavy ashtray. He still bears scars from these assaults. The appellant was not allowed to go to university but was forced to go to work by his father, even as a child during school holidays.
9. For three to four years as a teenager the appellant was given drugs in 30 to 50-gram packets to deliver to houses of officials and civilians two to three times a day and sometimes more frequently. He was never caught as he was a teenager travelling on a route frequented by students. If he was caught in possession of 30 grams he could face the death penalty.
10. The appellant’s cousin was also enlisted to deliver drugs when he was unavailable. His father set him up to be arrested as a result of a family dispute and he is in prison and will be hanged.

11. In 2009, the appellant ran away from home and lived in Zanjan for two months. He lived in Tabriz for three months in 2010 and in Mashad for one month in 2011. Each time he left his father would force him to return home for fear of his reputation. His father would initially treat him well, but the abuse would resume. He would return because he feared that his father would use his connections to have him arrested for trafficking and because he was concerned for his mother.
12. The appellant's father has friends in the police force, Basij and Sepah who he consumes alcohol and drugs with. He served in the Iran-Iraq war with people who needed drugs to calm their pain, including high-ranking officials. The appellant took photographs and video of people taking drugs at his house with his father, including the local head of police and another senior officer. His phone was taken from him at Christmas Island. The appellant suspects that the police protect his father from complaints made by neighbours and that the police assisted to track him down each time he left home.
13. Any money saved by the appellant has been taken by his father to spend on drugs and alcohol. It is therefore impossible for him to survive independently of his family.
14. In May 2013, the appellant's father attempted to stab him with a knife. He was protected by his mother and brother, but was struck on the head by an ashtray. He was treated at a clinic. His brother advised him not to return home. His mother urged him to leave the country and, along with his brothers, provided money for him to do so.
15. The appellant departed Iran in June 2013 and arrived at Christmas Island in September 2013 via Indonesia. He was then transferred to Nauru.
16. The appellant fears that if he returns his father will continue to prevent him from studying, take his money and assault or kill him. He holds this fear despite his father telling him over the phone that he misses him and wants him to return. He also fears that he could face prosecution because of his actual or imputed involvement with drugs. The penalties for drug-related offences includes long-term imprisonment and execution. He fears serious harm from the authorities because of his father's connections to them.
17. The appellant's fears arise due to his imputed political opinion against the Iranian regime for reason of his association with his father, a drug user and supplier. Further he has or may be perceived to have contravened Sharia Law because of his activities with drugs. He is also a member of the social groups consisting of family members of his father who engages in anti-Islamic activities and failed asylum seekers returning from the West.
18. The appellant also does not believe that he can relocate because whenever he has attempted to do so, he has been located by his father. He cannot seek protection from the authorities because of his father's connections.
19. While living in Nauru, the appellant has converted to Christianity after seeing two Christians giving sweets to children and being inspired to attend a protestant church at the Menen Hotel. He experienced joy and happiness and attended Bible class and

other activities. He decided to change religion as he had never chosen the Shi'a faith and appreciated the freedom of Christianity. The appellant was baptised by Father Richard in front of some Iranian friends, as well as people from Fiji and the Solomon Islands. He has obtained a Farsi Bible and is still learning about Christianity but is familiar with some parables. He is refraining from committing sins and feels that he is at the beginning of a journey.

20. The appellant shared footage and news of his baptism on social media and is now concerned that the Iranian authorities may have access to this news. He therefore fears persecution in Iran on the grounds of his religion.

APPLICATION TO THE SECRETARY

21. On 21 February 2014, the appellant attended a Transfer Interview.
22. On 26 May 2014, the appellant made an application to the Secretary for recognition as a refugee and for complementary protection under the Act.
23. On 28 September 2015, the Secretary made a determination that the appellant is not a refugee and is not owed complementary protection.

APPLICATION TO THE TRIBUNAL

24. The appellant made an application for review of the Secretary's decision pursuant to s 31(1) of the Act which provides:

A person may apply to the Tribunal for merits review of any of the following:

- a) a determination that the person is not recognised as a refugee;
 - b) a decision to decline to make a determination on the person's application for recognition as a refugee;
 - c) a decision to cancel a person's recognition as a refugee (unless the cancellation was at the request of the person).
 - d) A determination that the person is not owed complementary protection.
25. On 20 November 2015, the appellant made a statement and on 26 November 2015 his lawyers, Craddock Murray Neumann, made written submissions to the Tribunal.
 26. On 4 December 2015, the appellant appeared before the Tribunal to give evidence and present his arguments with his representative and an interpreter in Farsi and English languages.
 27. Further written submissions were filed by the appellant's lawyers on 19 December 2015.

28. The Tribunal handed down its decision on 1 February 2016 affirming the decision of the Secretary that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.

THIS APPEAL

29. The appellant filed eight grounds of appeal which are:

- 1) The Tribunal made an error of law in that it was unreasonable or illogical in rejecting, or in not determining, certain claims or integers of claims or questions before it, and this was in breach of its obligations under the law including its obligation to conduct merits review under the Refugees Convention Act 2012.
- 2) The Tribunal erred in law in that it made findings on the basis of mere assertion, or doubt, or suspicion, and without any logically probative evidence.
- 3) The Tribunal erred in law in that, it failed properly to consider relevant considerations by failing to consider claims, or integers of claims, or information required by the Act to be considered.
- 4) The Tribunal erred in law in that, it failed properly to have regard to information, or to make determinations on material questions of fact, as required by law, including sections 22, 31, 35, 36, 37, 39 and 40 of the Act.
- 5) The Tribunal erred in law by failing to act according to the principles of natural justice, in breach of the common law and section 22 of the Act.
- 6) The Tribunal erred in law by failing to give the applicant natural justice, in breach of the common law and section 37 of the Act.
- 7) The Tribunal erred in law by failing to get information or to make inquiries.
- 8) The Tribunal erred in law in that it had regard to irrelevant considerations.

SUBMISSIONS

30. In addition to the submissions filed by the appellant and the respondent, they also made oral submissions which were of great assistance to me and I am indeed very grateful to both counsel.

CONSIDERATION

Grounds of Appeal

31. The appellant made submissions on Grounds 1 and 2 as one ground of appeal; on Grounds 3 and 4 as one ground of appeal; on Grounds 5 and 6 as one ground of appeal and made separate submissions on Grounds 7 and 8.

Grounds 1 and 2

32. In relation to Ground 1 the appellant submits that the Tribunal was unreasonable or illogical in rejecting or in not determining certain claims or integers of claims or questions before it.
33. In relation to Ground 2 the appellant submits that the Tribunal made findings on the basis of mere assertions, or doubt, or suspicions and without any logical probative evidence.
34. In relation to Ground 1, the appellant submits that the Tribunal was unreasonable and illogical in rejecting the following claims or questions:
- a) The appellant's father is a drug addict or a drug dealer;
 - b) The appellant's father forced the appellant to use drugs;
 - c) The appellant's father forced the appellant to transport drugs;
 - d) The appellant's father physically abused him, up to and including the period very shortly before the appellant fled from Iran;
 - e) The appellant's father used force to make the appellant return after he had 3 times moved to other parts of Iran;
 - f) The appellant's father had connections with corrupt members of the authorities such as to be able to coerce the appellant into returning home, or otherwise doing his father's will or cause the appellant to have trouble with the authorities;
 - g) The appellant's father had an involvement in the arrest and imprisonment of the appellant's cousin on charges of drug possession;
 - h) The appellant's cousin transported drugs for the appellant's father, or that his father was involved in setting the cousin up;
 - i) The appellant's phone, taken from him by some officials after his arrival on Christmas Island, showed photographs as proof of his claims about his father and his father's connections with members of the authorities in Iran;

- j) The appellant had fabricated claims about his father's drug addiction and trafficking, and its implications for the appellant;
 - k) The appellant's knowledge of Christianity, and the Tribunal's finding of the 'vagueness, brevity, and lack of detail' in the appellant's evidence in support of his claim to have converted to Christianity;
 - l) The cumulative risk to the appellant if he were to return to Iran.
35. With respect to claims (a) to (j) the appellant submits that the Tribunal's reasons for rejecting the claims were being 'not satisfied', 'these claims have been fabricated' and the 'appellant's credibility'. The concerns to the Christianity claim were rejected on the basis of the appellant's knowledge of Christianity, and the reference to assessment of 'cumulative' risk to the appellant is without any exposition of cumulative assessment.
36. In relation to Ground 1, the respondent submits that to describe the findings as 'illogical' or 'unreasonable' is that the appellant does not agree with them; and that Ground 2 as submitted by the appellant is that the findings were not supported by evidence; and the amended Notice of Appeal refers to the integers of the claim in relation to both Grounds 1 and 3.
37. With regards to the claims or integers of the claims, the respondent relies on *Dranichnikov v Minister for Immigration and Multicultural Affairs*¹.
38. In its oral submissions the respondent relied on the following cases:
- a) *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*² where it is stated at page 451:

"... a liberal attitude on the part of the decision-maker is called for, since it is a well-known fact that the person who claims to be a refugee may have difficulties in proving his allegations (cf Gaudron J in *Chan* at 413); and it would go counter to the principle of good faith in the interpretation and application of treaties if a contracting state "should place on a suppliant a burden of proof which he, in the nature of things could not possibly cope with". This should not, however lead to 'an uncritical acceptance of any and all allegations made by the suppliants'."
 - b) *Selvadurai v Minister for Immigration and Ethnic Affairs*³ where the Federal Court of Australia stated at [7]:

"Counsel for the applicant argued that the tribal case for review was made out on five grounds:

¹ (2003) 77 ALR 389, 394 [24]; *NABE v Minister for Immigration and Multicultural Affairs* (No. 2) (2004) 144 FCR 1, 22 [68]

² (1994) 52 FCR 437, 451 [21]

³ (1994) 34 ALD 347 [7]

- i) It was said that there was no material before the Tribunal that supported the conclusion that the applicant's claim that he was regarded as a deserter by the LTTE was exaggerated. In initiating the application this matter appears in par. 3(a)(iii) as an allegation of breach of rules of natural justice. Counsel agreed it was more particularly considered as a 'no evidence' complaint under s.5(i)(h) of the AND (JR) Act. In any event, I do not think there is an arguable case on this ground. As the decider of factual issues, the Tribunal had to assess this particular claim advanced in support of the applicant's case. In substance, the Tribunal came to the conclusion that the claim was exaggerated. The onus was on the applicant. A decision-maker does not have to have rebutting evidence available before he or she can lawfully hold that a particular factual assertion by an applicant is not made out.
- c) *Re: Minister for Immigration and Multicultural Affairs; ex parte Durairajasingham*⁴ where the High Court of Australia stated at [67]:

"In addition, the prosecutor alleges that the Tribunal breached s.430(1) by failing to set out reasons for its finding that the prosecutor's claim that members of PLOTE tried to recruit him were 'utterly implausible'. However, this was essentially a finding as to whether the prosecutor should be believed in his claim – a finding on credibility which is the function of the primary decision-maker par excellence. If the primary decision-maker has stated that he or she does not believe a particular witness, no detailed reasons need to be given as to why that particular witness was not believed. The Tribunal must give the reasons for its decision, not the sub-set of reasons why it accepted or rejected pieces of evidence. In any event, the reason for the disbelief is apparent in this case from the use of the word 'implausible'. The disbelief arose from the Tribunal's decision that it was inherently unlikely that the events occurred as alleged.

- d) *Minister for Immigration and Citizenship v SZMDS*⁵ on the issue of 'unreasonableness' the High Court of Australia stated at [131]:

"What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions. The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If the probative evidence can give rise to different processes of reasoning, and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion."

39. In his oral submissions the appellant addressed each of the claims or questions referred to in [34] above in relation to both Grounds 1 and 2:

⁴ (2000) 58 ALD 609 [67]

⁵ (2010) 240 CLR 611 [131]

a) Father drug addict or drug dealer

(1) The appellant submits the Tribunal rejected that the appellant's father was a drug dealer at [31]⁶ in spite of consistent and detailed evidence from the initial statement after the Transfer Interview. The rejection by the Tribunal was on the basis of three concerns about credibility in the preceding paragraph of its decision; that the Tribunal was concerned that it was not mentioned in the Transfer Interview. The appellant submits that he said in the Transfer Interview that his father was an 'alcoholic and an addict' but that has to be understood in the context of the constraints of the Transfer Interview; and that there is no reason for the Tribunal to say that he is an alcoholic but not a drug addict.

(2) The respondent in response referred to BOD⁷ where at [45] the appellant's representative stated in his submission to the Tribunal at [45] including the claim for conversion to Christianity and the Tribunal referred to the decision at [13]⁸ where it stated:

"In a covering submission of 6 November 2015, the applicant's representative took issues that a number of the Secretary's findings and cites a range of country information concerning the treaty of apostasy in Iran. The representative submits that the applicant has a well-founded fear of persecution on the Convention grounds of:

- His actual or imputed political opinion.
- He is associated with a well-known drug dealer and has engaged in delivering significant quantities of drugs to high ranking officers and others. Drug dealing carries a hefty penalty and contravenes strict principles and the laws of the regime.
- If he is caught with drugs in his possession, including by being set up by his father, he will be seen as contravening strict anti-drug laws of the regime. He has a profile with Basij and is well-known as the son of a drug addict and drug dealer who interacts on a regular basis with police, Basij, Sepah and authorities.
- He will be imputed with a political opinion contrary to the government because he has sought asylum in a non-Muslim country and because of his conversion to Christianity.
- His religion, having converted to Christianity since arriving in Nauru. Iran is ruled by a totalitarian theocratic regime in which conversion to Christianity and proselytization are punishable by death. The representative submits further that if the Tribunal does not accept the

⁶ Tribunal's decision

⁷ Page 81

⁸ Tribunal's decision

appellant's fear of harm relates to a Convention ground they nevertheless engage Nauru's complementary protection obligations.

- (3) The respondent further submits that the claims are put on the basis of the father's drug use and drug dealings and the son being required to transport drugs and being imputed with an adverse political opinion because of that. That is the way the claim was put and that is the claim that was dealt with.

b) & c) Father forced appellant to use and transport drugs

- (2) The appellant submits that there is no reasonable or evidentiary basis for the Tribunal to reject the claims; as the evidence was clear and detailed and circumstantial that the appellant would take 30 to 50 grams of drugs in a packet.

- (3) The respondent in response submits that the Tribunal at [19]⁹ states:

"In his RSD and supplementary statement as well as in the Tribunal hearing, however the applicant introduces a new and significant reason for having left Iran. That his father is not simply an alcoholic but also a drug addict. He has friends among officials in the police, the Basij and Sepah who, like him, were injured in the Iran/Iraq war and used drugs to calm their pain. They regularly come to his house to consume drugs and alcohol with him and on a number of occasions they forced the applicant to take drugs while he was still young. More than this, his father is also a dealer and supplies opium, crystal methamphetamine to his friends in the security services as well as to others. He used the applicant to deliver the drugs to them, beginning when he was eighteen and continuing for three or four years. The applicant would take such deliveries 2 or 3 times per day, and sometimes more frequently, calling at two or three destinations each time and carrying with him packets around 30 to 50 grams of drugs."

- (4) The respondent further submits that whilst the case put by the appellant as to why he was at risk and at [20] the Tribunal recites comprehensively the explanation that was given where it stated:

"When the applicant was asked at the hearing why he had not mentioned this aspect of his claims about his father in his transfer interview he said in summary that he was not questioned about it and had only responded to the questions that were put to him. He suggested, alternatively that there may have been a problem of interpretation, so that when he said his father was addicted, it was interpreted that his father was an alcoholic. In submissions to the Tribunal he instructs, additionally, that he was confused and stressed at the time of the Transfer Interview as well as in his RSD interview. He did not understand the purpose of the questions or that he was required to provide evidence or satisfy a burden of proof in this situation. He attempted to answer the questions as fully as possible, but did not comprehend that the interviewer might require more substantiating

⁹ Tribunal's decision

information or might not have found his claims to be plausible. The transfer interview was brief and he had tried to mention some aspects of what happened in Iran. He was asked only one question (that is, why it was that he had left Iran) and he spoke about domestic violence. The next question related to military service and he did not expand on the situation that led to him to leaving. Later with the aid of his representative, he provided further information in the RSD statement. In his transfer interview he had stated what happened to him physically while in the second interview with his representative he described how these things came about.

- (5) The respondent submits that it was the appellant's central claim 'that he was at risk because of his father's drug use and dealing'; and that inference was open to the Tribunal and therefore it is not unreasonable.

d) Father's physical abuse

- (1) The appellant submits that the Tribunal rejected his claim for being physically abused by his father despite the appellant showing scars on his hands at the transfer interview and being attacked with a knife and a cigarette ashtray being thrown at him which caused bleeding on the head and required him to go a clinic. The appellant submits that the Tribunal does not make any finding about that particular incident; that the Tribunal does not say that 'I don't believe you'; all the Tribunal says is that it does not accept that the father was abusive until he left Iran.
- (2) The respondent submits that the Tribunal made a finding of fact as to when harm had ceased; it refers to [30]¹⁰ where the Tribunal states:

"...while the Tribunal is prepared to accept that his father may have been an alcoholic who was physically abusive towards him in his younger years, it has some difficulty in accepting this level of abuse could have continued to the point when the appellant was a young adult and the father was approaching his sixtieth year."

And further at [58]¹¹ the Tribunal put to him that it accepts that he was abused by his father as a child and young teenager, but it was not satisfied that this would re-occur if he were to return to Iran.

e) Applicant's father forced him to return 3 times

- (1) The appellant submits that his father forced him to return three times after he moved to other parts of Iran and refers to BOD¹² where he mentioned that '...my mother was in the house and I was always reluctant to leave her'. He submits that he went back to his father as he was afraid he would take it out on his mother; that the Tribunal did not deal with that evidence in its

¹⁰ Tribunal's decision

¹¹ Tribunal's decision

¹² Page 115 [18]

reasons and the Tribunal's failure in not accepting or rejecting that claim is unreasonable.

- (2) The respondent submits that the Tribunal referred to the claim at [12]¹³ where it stated, 'the applicant was reluctant to leave his mother in the house as he feared his father would harm her if he himself was not present'.
- (3) The respondent further submits that the Tribunal accepted that the applicant is now 25 years old, is educated, had some life experience in travelling in the world and he would not need to go back to his family home. The respondent submits that the appellant is simply inviting the Tribunal to take a different view on merits and further the Tribunal does not have to give a line by line refutation of why it did not accept the appellant's claim.

f) Father's connections with authorities

- (1) The appellant submits that he made it very clear to the Tribunal that he was not claiming that his father could manipulate the government at the highest level; but his father had friends who fought in the Iran/Iraq war together; that they were veterans; they went through terrible experiences; some got to the position of influence; and that they frequently visited his father's home.
- (2) The appellant submits that there is nothing other than either assertion or perhaps groundless scepticism for the Tribunal to reject the possibility that there is that level of connection¹⁴.
- (3) The respondent in response refers to [25]¹⁵ where it is stated:

"The applicant's response to this objection is to the effect that corruption in the legal and judicial system in Iran is rife. If he were arrested his father's friends in the police, Basij and Sepah would make sure that nobody believed what he said and his statements under interrogation would not carry any weight or even be recorded. The representative submits that the offence would be heard in a Revolutionary Court where defendants do not necessarily receive access to counsel, do not have a procedural right to be heard and are subject to harsh and arbitrary punishments. As put to the applicant at the hearing, however, the Tribunal finds it implausible that his father's alleged friendship with a small group of corrupt and drug addicted officials would translate into influence over the whole of the Iranian judiciary and security apparatus sufficient to guarantee him immunity from such serious charges. The Tribunal finds it similarly implausible that officials who are said to be friends could feel themselves completely safe from scrutiny and detection by other colleagues who did not share their addiction to drugs. The Tribunal also notes that in all this the applicant's father is said to be prepared to risk detection, imprisonment and execution for no more substantial a reason than a simply grudge against his son. The

¹³ Tribunal's decision

¹⁴ Transcript pg 21 line 35

¹⁵ Tribunal's decision

Tribunal is not satisfied it is at all plausible, even if the applicant's father were prepared to contemplate such an unlikely risk, that his alleged friends would also consider putting themselves in danger of disgrace and severe punishment on such flimsy and illogical grounds.

- (4) The respondent submits that the Tribunal at [25] took into account that his father's contacts were not high-level officials.

(g) &h) Father's involvement in cousin's arrest

- (1) With respect to the father's involvement in the arrest of the cousin, the appellant submits that the Tribunal seemed to be more concerned with the issue when the appellant came to know about it; that the Tribunal's assertion at [27]¹⁶ is that if the father had taken action to harm the cousin then the whole family would have known about it; and that there is no basis for the Tribunal to make that assertion. The appellant submits that the Tribunal laid great stress on rejecting this and used three reasons for doing so. Firstly, no claim of drugs was mentioned in the transfer interview; secondly, the cousin's arrest; and thirdly the father could have forced the appellant to return.

- (2) The respondent submits that the appellant first mentioned his cousin at RSD interview at [26]¹⁷ where it is stated:

"...he first mentioned his cousin in his RSD interview when he stated he had been in jail for a number of years after he was arrested in possession of a very large quantity of drugs. He had been distributing drugs for the applicant's father....."

- (3) There is no mention of his father being responsible for the cousin's arrest. It only came about when the appellant had a conversation with his brother in May 2015; at the hearing it was put to the appellant that if the father was responsible for the cousin's harm then the whole family would have known about it and he would not have needed to be told by his brother. The respondent submits that the appellant seems to suggest that it was not open to the Tribunal to infer that because there was a family dispute, the cousin would not have known about it; and the respondent submits that it was open to the Tribunal to make that inference and the appellant is again inviting this court to engage in merits review.

- (4) The respondent further submits that his cousin would have been well aware of this himself and the appellant's response that he had not spoken to his cousin. The respondent refers to [27]¹⁸ where it is stated:

"At the hearing it was put to the applicant that if his father had taken such an action to harm his cousin as a result of a family dispute it would be

¹⁶ Tribunal's decision

¹⁷ Tribunal's decision

¹⁸ Tribunal's decision

something well known to the family, so he would not have needed to be told about it by his brother. It would have been well known to his cousin himself, a person to whom he had spoken since his arrest. His response was to deny that he had in fact spoken to his cousin. Asked about the nature of the family dispute he told the Tribunal that it arose because his cousin wished to stop working for his father but his father refused to release him from the arrangement as there was nobody else to help him. In the post-hearing submission, it is contended that his brother remains the only person in the family who knows the truth about the father's involvement, as a result of having contact with his cousin. He does not know why his family did not know the truth and believes his brother told him about it in order to warn him that the same thing could happen to him. It is denied once more that the applicant ever stated that he contacted the cousin in prison."

- (5) The respondent refers to [28]¹⁹ and submits that there was a clear conflict in what he told the Tribunal what he stated earlier. At [28]²⁰ it is stated:

"Having reviewed the audio recording of the applicant's RSD interview the Tribunal is satisfied that as put to him at the hearing, his evidence was that he had spoken to his cousin in prison a number of times and was told by him that conditions were very bad. On this basis the Tribunal is not satisfied as to the truth of his present claim that he had never spoken to his cousin since his arrest. The Tribunal finds it implausible that his father's alleged involvement in his cousin's arrest would not have been known to his cousin himself or to other family members if it had, as he claims, occurred after the cousin refused to distribute drugs for his father any longer. On this basis the Tribunal is not satisfied that the applicant did, in fact, learn of his father's alleged involvement for the first time in a telephone conversation from his brother in May 2015...."

i) Appellant's phone

- (1) The appellant submits that this ground is also tied up with Ground 7 of the appeal that there was a failure by the Tribunal to make enquiries and that it is unreasonable. The appellant made submissions at BOD 114 [9] where he stated:

"I had a phone with me when I arrived on Christmas Island, but despite my best efforts I have not been able to get SERCO or the Australian Government to send me my property, even though I made it clear it was to support my claims. I didn't mention this to the case officer when I was interviewed because I was assured by the Government that I would receive my phone from Christmas Island imminently, so I am going to add the footage later. But that didn't happen."

¹⁹ Tribunal's decision

²⁰ Tribunal's decision

- (2) The appellant wanted the phone to be part of the evidence as it contained corroborative material of ‘the dodgy characters known to his father’ and the Tribunal did not make enquiries.
- (3) The respondent submits that the Tribunal did not have the phone before it so it could not attribute any weight to what was in it and it was entirely reasonable for the Tribunal to do so.

k) Conversion to Christianity

- (1) The appellant submits that there are two important aspects of conversion to Christianity firstly, that the appellant was consistent in his written and oral evidence what attracted him to Christianity initially was an action of compassion that he witnessed which he followed it up and found it to be a welcoming and warm situation. He wanted to learn more about Christ and the religion itself. Secondly, he had converted some seven months before the Tribunal hearing. The appellant submits that he had limited knowledge about Christianity and the Tribunal considered the appellant’s claim cumulatively at [54]²¹ and it is not clear that it had done so.
- (2) The respondent submits that the Tribunal took into account what was said and that is clear from [35] of the Tribunal’s decision where it is stated:

“The Tribunal accepts that a person’s religious belief and the manner in which he or she comes to that belief is a deeply personal issue and that no two persons may experience a conversion in the same way. In assessing an applicant’s knowledge about the religion he or she claims to have embraced, it is necessary to give full weight to the individual circumstances, including factors such as the length of exposure to the new religion, the applicant’s maturity and the level of education and any legal restrictions or risks which might inhibit access to sources of information.”
- (3) The respondent further submits that at [36]²² the Tribunal took the appellant’s explanation as to why he was attracted to Christianity into account and at [37]²³ the Tribunal notes that he did not have firm knowledge about Christianity. At [39]²⁴ the Tribunal had further concerns and at [45]²⁵ it took into account the way the appellant gave evidence and made a finding. The respondent submits that there is no error in the finding.
- (4) In relation to taking matters into account ‘cumulatively’ the respondent submits that at [52]²⁶ the Tribunal said ‘taking these matters together’ and at [53]²⁷ the Tribunal said ‘in light of all the information’. The respondent

²¹ Tribunal’s decision

²² Tribunal’s decision

²³ Tribunal’s decision

²⁴ Tribunal’s decision

²⁵ Tribunal’s decision

²⁶ Tribunal’s decision

²⁷ Tribunal’s decision

submits that there is no basis to suggest that the Tribunal did not consider the claims cumulatively.

40. In light of my above discussions I am satisfied that the Tribunal was justified in rejecting the appellant's claims or integers of claims or questions based on the evidence and material before it. The appellant's contention that the Tribunal was unreasonable or illogical or that the Tribunal erred in making findings based on mere assertion, or doubt, or suspicion and without any logically probative evidence has no basis as all the findings were supported by evidence.

41. In the circumstances, Grounds 1 and 2 of the appeal are dismissed.

Grounds 3 and 4

42. Before I deal with these grounds I just want to make one observation about s.37 of the Act that it was repealed with effect from 10 October 2012 by the Refugees Convention (Derivative Status and Other Measures) (Amendment) Act 2016. After the Amendment I enquired whether parties wanted to make further submissions in relation to the repealing of s.37; I was informed by both parties that they did not wish to do so. S.37 is no longer applicable to this appeal but I shall consider the other sections referred to under this ground except s.22 which is the subject of a separate and specific ground of appeal under Ground 5. In the circumstances I will not deal with Ground 4 and will only deal with Ground 3.

Ground 3

43. The appellant submits that the Tribunal must consider each material question of fact, a necessary and relevant consideration²⁸. Failure to do so is a failure to discharge the Tribunal's jurisdiction and is an error of law²⁹.

44. The appellant submits at [41] of its written submission:

‘That the Tribunal must have regard to relevant considerations. In doing so it must engage consciously with the claims, questions and material before it. As Perry J said *SZSW v Minister for Immigration and Border Protection* [2015] FCA 562 (5 June 2015, at [17]:

“...the requirement to consider a claim or integers of a claim made by an applicant requires the application of an active intellectual process. As the Full Court held in *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114; 92013) 136 ALD 547 (*MZYTS*) at 559 [38], ‘[t]hat task could not be lawfully undertaken without a consciousness and consideration of the submissions, evidence and material advanced by the visa applicant ...’,”

A) SPECIFIC CLAIMS NOT DETERMINED BY THE TRIBUNAL

²⁸ See eg *Minister for Aboriginal Affairs v Peko – Wallsen Limited* (1986) HCA 40; (1986) 162 CLR 24 (31 July 1986 per Mason J, at [15] of His Honours Judgment and an integer of the claim *SZSW v Minister for Immigration and Border Protection* [2015] FCA 562 (5 June 2015), per Perry J at [13] – [18]

²⁹ Appellant's written submissions [41]

45. The appellant submits that critical matters were raised by the material before the Tribunal but it did not have regard to or determine them, although it potentially affected the assessment of the appellant's risk of suffering harm such as to entitle him to recognition as a refugee or complementary protection³⁰. The Tribunal failed properly or at all to consider and determine the following necessary and relevant questions:
- a) Whether the appellant's father physically abused him, up to and including the period in 2013 very shortly before the applicant fled Iran; (decision [30])
 - b) Whether the appellant's father used force or manipulation to make the appellant return after he had 3 times moved to other parts of Iran; (decision [30])
 - c) Whether there was a real possibility that the appellant's father, having abused and injured him in the past, may do so again if the appellant were to return to Iran, by a combination of manipulation and violence, as he had previously done;
 - d) Whether the appellant's phone taken from him by some officials after he arrived on Christmas Island, showed or may have showed photographs as proof of his claims about his father and his father's connections with members of the authorities in Iran;
 - e) Whether the appellant may have a well-founded fear of persecution, or be owed complementary protection by reason of cumulative factors including his father's violence and corrupt connections.
46. The respondent submits³¹ that the Tribunal will only have erred in law if it has failed to consider him for refugee status or complementary protection expressly articulated by the appellant or a claim which clearly arose on the material before the Tribunal in a sense that if all elements of it were accepted the appellant would be found to be a refugee or make complementary protection³².
47. The respondent further submits that a failure to refer to or make findings about a particular piece of evidence or matter does not of itself disclose any error of law unless it demonstrates a failure by the Tribunal to consider the claim which the appellant made³³.
- a) *Whether the appellant's father physically abused him, up to and including the period in 2013 very shortly before the applicant fled Iran*
48. In the oral submission the appellant submitted that the physical abuse by his father was dealt with at [30] by the Tribunal; that the Tribunal only considered the abuse up

³⁰ Appellant's written submissions [43]

³¹ Respondent's written submissions [28]

³² *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALR 389, 394 [24]; *NABE v Minister for Immigration and Multicultural Affairs* (No. 2) (2004) 144 FCR 1, 22 [68]

³³ *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 394, 423 [79] (per Allsop, J, 428 [95]) (per Heerey J; see also applicant *WAEE* (2003) 75 ALD 630, 641 [46])

- to the teenage years; and that the Tribunal did not make any findings about it after that.
49. The appellant submits that the claim was made by him that the father abused him severely up until the time he fled Iran and the Tribunal did not deal with that claim.
50. The respondent submits that the Tribunal accepted that the appellant had been abused by his father as a child and as a young teenager but was not satisfied it would recur if he returned to Iran. It gave reasons at [58] for doing so. The Tribunal found that the appellant was now aged 25 years. It found that he would have no need to contact or associate with his father if he did not wish to do so. The Tribunal was not satisfied that in the future the appellant would be at risk from his father³⁴.
- b) *Whether the appellant's father used force and manipulation to make the appellant return after he had 3 times moved to other parts of Iran*
51. The appellant submits the question whether the appellant's father used force and manipulation to make him return 3 times after he moved to other parts of Iran; that the Tribunal did not deal with the claim mentioned in BOD at page 115 [19] where it is stated:
- "I left home 3 times, but my father forced me to go back. My father would find me no matter where I would go. My father wanted to use me for his drug trafficking business. My father wouldn't care about my well-being, he just wanted to use me for his business. I grew up being abused by him since my childhood. I was afraid of my father. My cousin (Nader Akbariyan) is in Rajae Shar Prison now for drug trafficking charges and sooner or later he would be hanged."
52. The respondent submits that this issue was dealt with at [58] of the Tribunal's decision and where the Tribunal stated:
- "...the Tribunal is not satisfied that in these circumstances there is any reason why the applicant would need to return to his family home if he went back to Iran or why he would be unable to find employment and establish himself in his own accommodation, including his former suburb in Tehran. There would be no need for him to contact or associate with his father if he did not wish to do so, so the Tribunal is not satisfied he would be at risk of harm from him."
- c) *Whether there was a real possibility that the appellant's father, having abused and injured him in the past, may do so again if the appellant were to return to Iran, by a combination of manipulation and violence, as he had previously done*
53. The appellant submits that the Tribunal did not make a finding on the question whether there is a real possibility that the father having abused and injured him in the past may do so again by a combination of manipulation and violence³⁵.
54. The respondent again submits that this issue was dealt with at [58] of the Tribunal's decision.

³⁴ Appellant's written submissions [33]

³⁵ Transcript p.26 l.25

d) *Whether the appellant's phone taken from him by some officials after he arrived on Christmas Island, showed or may have showed photographs as proof of his claims about his father and his father's connections with members of the authorities in Iran*

55. The appellant submits that the Tribunal should have considered whether the phone showed or may have shown photographs as proof of his claim.

56. The respondent submits that the Tribunal considered the appellant's evidence that his phone had video footage and photographs at [40] of the decision and that the Tribunal was not obliged to accept that assertion. It was open to the Tribunal not to attribute weight to that assertion in light of its other findings and the absence of that material being before it³⁶.

e) *Whether the appellant may have a well-founded fear of persecution, or be owed complementary protection by reason of cumulative factors including his father's violence and corrupt connections*

57. The appellant concedes that this issue was addressed in relation to Grounds 1 and 2 of the appeal. I have made a finding in relation thereto so there is no need for me to consider it again.

B) *CONSTRAINTS AT THE INTERVIEW*

58. The appellant submits that the Tribunal did not grapple with the various aspects of the Transfer Interview. Firstly, that the Transfer Interview and the Refugee Application were announced to the appellant as different processes; secondly, that the appellant was told at the Transfer Interview that the main purpose of the interview was to collect background information; thirdly, the Transfer Interview forms did not suggest that comparison may lead to a conclusion that a lack of detail at the Transfer Interview may cause the protection application to be rejected if something not said at the Transfer Interview is said later.

59. The respondent states that the Tribunal took into account the constraints of the interview and that it is apparent from its reasons stated at [60] – [61] where it fully recited the appellant's explanation why he had not referred to critical parts of his claim at the first opportunity including that the appellant said that the Transfer Interview was brief and that he tried to mention some aspects of what had happened³⁷.

60. The respondent further submits that at [21] of the decision the Tribunal found that the appellant had not satisfactorily explained why 'so important an area of the appellant's claim' would not have been 'mentioned' by him at the first opportunity or that it would not at least have been 'touched on'; that the Tribunal attributed weight to the absence of the appellant to make any reference to these central important aspects of his account at the first opportunity. The respondent submits that at [22]³⁸ that the Tribunal took into account the appellant's explanation.

³⁶ Appellant's written submissions [34]

³⁷ Appellant's written submissions [36]

³⁸ Appellant's written submissions [37]

61. For the reasons set out above, I find that the Tribunal properly considered the relevant considerations; that it determined the relevant claims or integers of the claim or material and questions of fact that it was required to do.

62. In the circumstances, Ground 3 of the appeal is dismissed.

Ground 4

63. The appellant submits that the Tribunal failed to have regard to the information and questions canvassed in Ground 3 and therefore erred in law.

64. I have addressed each of the matters raised in Ground 3 and dismissed those grounds. So in the circumstances, Ground 4 is also dismissed.

Grounds 5 and 6

65. For the reasons mentioned in paragraph 42, s.37 is no longer applicable to this appeal and I do not have to consider Ground 6.

Ground 5 – Procedural Fairness- s 22

66. In relation to the issues of procedural fairness/natural justice, the appellant submits that there were questions at the hearing as to how there were posts on Facebook congratulating him on his conversion to Christianity; and that was not put to the appellant. The appellant submits that the issue was not put to the appellant that ‘you contrived this or it is a put up job’. The Tribunal stated at [46]³⁹ as follows:

“In reaching this conclusion the Tribunal accepts that the applicant maintains a Facebook account as the documents he submitted at the hearing indicate, he has received four brief and undated messages on his Facebook page from other Iranians expressing congratulations for his having converted to Christianity. There is no other substantive information about these friends, however, and having regard to the nature of this evidence and its overall concerns about his credibility, the Tribunal is unable to be satisfied that he did not simply contrive for the messages to be sent to him, with the assistance of others. The Tribunal is not satisfied that any evidentiary weight can be placed on these documents.”

67. The appellant submits that the rejection of the conversion to Christianity was ‘fraudulently contrived’ and the Tribunal was required to put to him for a comment and it failed to do so. That issues were also raised about the Baptism Certificate not being given by Father Richard; the issue of printing problems which according to the appellant’s legal representative was quite common; and the Tribunal made a finding that it would not attach any weight to it and the Tribunal stated that ‘it was fabricated’⁴⁰. That the Tribunal failed to accord the appellant natural justice in accordance with the principles in s.22 of the Act.

³⁹ Tribunal’s decision

⁴⁰ Appellant’s oral submissions Transcript 28 line 10

68. The respondent in response submitted that in relation to the grounds of ‘procedural fairness’ the appellant’s credibility was in issue before the Secretary; that the Tribunal’s questioning of the appellant at the hearing and the post hearing submissions confirm this. The respondent submits⁴¹ as follows:

“A significant issue for the delegate was the appellant’s credibility. The Tribunal’s questioning of the appellant at the hearing and the post hearing submissions confirm that the appellant was well aware that his credibility was in issue before the Tribunal. Moreover, the Tribunal’s questioning of the appellant at the hearing clearly put him on notice that an issue for the Tribunal was the genuineness of his alleged conversion to Christianity. The Tribunal was under no obligation to provide a running commentary of its assessment of the material he provided in support of that claim or to disclose its subjective ‘appraisals, thought processes or determinations’.”⁴²

69. The respondent further submits that the Tribunal expressly put to the appellant at the hearing that it had concerns about the reasons why he had posted on the Facebook; the genuineness of the Facebook post was clearly a matter which was brought to his attention; the appellant’s representative provided a post hearing response in which he stated that the messages of support on the Facebook to the appellant had been ‘sent to him’ not elicited from others⁴³; and that the appellant was plainly on notice that his credibility was one of the determinative issues on review and accordingly the Tribunal did not fail to act according to the principles of natural justice in breach of s.22 of the Act⁴⁴.
70. The respondent further submits⁴⁵ that the Tribunal expressly put to the appellant that it had concerns as to why had posted on Facebook; the genuineness of the Facebook was clearly brought to the appellant’s attention. The appellant’s legal representative provided a post hearing written submission in which it was stated that the messages of support on Facebook to the appellant had been ‘sent to him’ and ‘not elicited from others’.
71. I am satisfied that the appellant was put on notice that his credibility was in issue; the genuineness of the Facebook was brought to his attention and his legal representative in the post hearing submissions stated that the messages of support on the Facebook had been ‘sent to him’ and ‘not elicited from others’⁴⁶. By bringing these matters to the attention of the appellant I am satisfied that the Tribunal complied with the rules of procedural fairness.
72. In the circumstances both Grounds 5 and 6 are dismissed.

⁴¹ Appellant’s written submissions [42]

⁴² *Hoffman-La Roche v Trade Secretary* [1975] AC 295, 396 (Lord Diplock); cited with approval by the High Court of Australia in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 166 [48]; *SZGUR* (2011) 241 CLR 594, 598 [9], 601 [18]; *Commissioner for ACT Revenue v Alphone Pty Limited* (1994) 49 FCR 576, 590-1

⁴³ BD 185

⁴⁴ Appellant’s written submissions [43] and [44]

⁴⁵ Respondent’s written submissions [43]

⁴⁶ BD 185

Ground 7 – That the Tribunal erred in law by failing to get information to make enquiries

73. The appellant submits that the Tribunal has inquisitorial power to make inquiries and obtain information; that it was required to make obvious inquiries about the appellant's telephone taken from him on Christmas Island which the appellant referred to as having photographic evidence of some of his claims⁴⁷.
74. This was a matter where the failure to make such an inquiry, given the critical issue was the appellant's credit was a failure to discharge the Tribunal's jurisdiction and an error of law⁴⁸.
75. The respondent submits at [49]⁴⁹ that the Act does not impose an obligation on the Tribunal to make any particular inquiry with respect to evidence that might support the appellant's claims; that the word 'inquisitorial' does not appear in the Act; nor does the common law impose a 'free standing obligation to make inquiries'⁵⁰. The respondent further submits at [50]⁵¹ that in any event:
- a) Neither the appellant nor his representative requested that the particular inquiry should be made;
 - b) There was no information before the Tribunal about to whom such a particular inquiry should be made;
 - c) Any inquiry would not have been either obvious or straightforward;
 - d) There was no information before the Tribunal how long the inquiry might take;
 - e) There was nothing before the Tribunal to indicate that the inquiry would have yielded a useful result;
 - f) In any event, the issue of whether the appellant's phone contained images of the appellant, his father or other officers in uniform at his house was not critical to the Tribunal's rejection of the appellant's claims.
76. I accept that there was no information before the Tribunal as to whom the inquiry was to have been made and in any event the tribunal was not obliged to make the alleged inquiry and therefore the Tribunal did not err in failing to make the enquiries.
77. This ground of appeal has no merit and is dismissed.

Ground 8 – Irrelevant consideration

⁴⁷ Appellant's written submissions [71]

⁴⁸ Appellant's written submissions [72] (*Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39 (23 September 2009), [25] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ)

⁴⁹ Respondent's written submissions

⁵⁰ *Minister for Immigration and Citizenship v SZIAI* (2009) HCA 39 [25]

⁵¹ Respondent's written submissions

78. The appellant submits that the Tribunal attached weight to the fact that the appellant presented some claims later rather than earlier; that the Act required the Tribunal to invite the appellant to appear before it to give evidence and present arguments in relation to the issues on review; that the appellant was entitled to rely on his right under the Act; he explained to the Tribunal at the hearing that he had been responsive to the questions asked of him earlier; that the Tribunal was therefore not permitted effectively to penalise the appellant for waiting until the hearing to give evidence including further evidence of new claims or new details⁵².
79. The Tribunal in having regard to the late time for some claims or some details of claims being made attached weight to the consideration made irrelevant by the Act. The appellant relies on *MZZSK v Minister for Immigration and Another*⁵³.
80. The respondent in response submits that the Act does not preclude the Tribunal in conducting a merit assessment of the veracity of the claims made, to consider when those claims were raised. Indeed, it would be contrary to the assessment process contemplated by the Act if it were precluded from considering the timing of the claims in relation to their veracity⁵⁴.
81. I accept that there is no restriction placed on the Tribunal by the Act as to how it should assess claims and to determine its veracity and the Tribunal is not precluded from considering the timing of the claim to ascertain its veracity.
82. In the circumstances, I find that this ground of appeal has no merit and is dismissed.

CONCLUSION

83. Under s44(1) of the Act, I make an order affirming the decision of the Tribunal.

DATED this 30 day of October 2017

Mohammed Shafullah Khan
Judge



⁵² Appellant's written submissions [74]

⁵³ [2014] FCCA 883 at [57] – [60]

⁵⁴ Respondent's written submissions [52]