

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M26 of 2018

BETWEEN:



QLN 146
Appellant

10

and

THE REPUBLIC OF NAURU

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication on the Internet

1. This submission is in a form suitable for publication on the internet.

Part II. Statement of Issues

2. The issue that arises in this appeal is whether the decision of the Nauru Refugee Status Review Tribunal (the **Tribunal**) made on 26 November 2016, that affirmed determinations of the Secretary of the Department of Justice and Border Protection that the appellant is not recognised as a refugee, and is not owed complementary protection (the **Tribunal's decision**), contains a finding that is affected by an error (or errors) of law, and if so, whether such finding is of such materiality that it operates to vitiate the Tribunal's decision. The impugned 'finding' is said to arise, on the appellant's

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argument, primarily from what the Tribunal recorded at paragraph 39 of its written statement.¹

3. The Republic accepts that in some circumstances, adverse findings as to credibility may be amenable to judicial review.² It is nonetheless, a settled principle that the assessment of credit is '*par excellence*' a matter for the Tribunal³ and that considerable caution must be exercised before too readily acceding to an argument that adverse findings as to credit expose legal error.⁴

10 4. Before the Supreme Court, the Republic accepted that the Tribunal's written statement should be construed such that each of the five identified reasons, recorded by the Tribunal at [29] to [49] of its written statement, should be understood as contributing to the Tribunal's conclusion expressed at [50] that it rejected the appellant's claims to have been targeted by Sri Lankan authorities for supporting the LTTE. The Republic did not make the submission, for example, that it would be open to the Court to attempt to quarantine the impugned reason from the other three unchallenged reasons.⁵

20 5. However, the Republic did not embrace the contention (*cf* AS [5]), that if the Tribunal had in fact found it 'difficult to believe' that the appellant would have been able to bribe the army commander, the Tribunal would have made an error of law, nor did the Republic make the submission that the Tribunal had not in fact found it 'difficult to believe' that the appellant would have been able to bribe a local army commander by a payment of Rs 2 lakhs to assist him to flee from Achchuveli. The Republic's argument – which the Supreme Court ultimately accepted – was more nuanced.

6. Instead, the Republic's position before the Supreme Court (and maintained in this appeal) was that on a proper construction of the Tribunal's written statement, the Tribunal should be understood as either accepting that the appellant *may* have

¹ Notice of Appeal, Core Appeal Book (CAB), 45.

² See generally, *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146.

³ *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Durairajasingham* (2000) 168 ALR 407, 425 [67]; *AZAEY v Minister for Immigration and Border Protection* [2015] FCAFC 193, [38]; *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10.

⁴ *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089; (2015) 233 FCR 451, [14]-[15].

⁵ In his Supreme Court appeal, the appellant also sought to challenge the reason (and underlying findings) recorded at [30]-[36] of the Tribunal's written statement.

departed Achchuveli in the manner claimed (which in turn comprehended the claim that the appellant had paid a bribe to an officer of the military to facilitate his escape from local militants) or (to the extent this made any practical difference) had not recorded a definitive finding one way or the other on the bribery claim.⁶ Importantly, on either construction, the argument advanced by the Republic was that the Tribunal did not consider the bribery evidence to be of dispositive significance to the review.

Part III. Section 78B of the *Judiciary Act 1903* (Cth)

1. The Republic has considered whether any notice is required under s 78B of the *Judiciary Act 1903* (Cth) and considers that such notice is not required.

10 **Part IV: Material facts**

2. The Republic does not dispute the appellant's chronology to the extent that, with one exception, it accurately records key dates.⁷
3. Before the Supreme Court (although less so in this appeal), the appellant's analysis of and challenge to the impugned finding concentrated on what appears at [38]-[39] of the Tribunal's written statement. However, the 'reason' reflected (in part) in these paragraphs, is better encapsulated by what appears in [37] of the Tribunal's written statement, where the Tribunal said as follows (emphasis added):

20 [37] Second, the [appellant] claims that he was so terrified by these visits that he did not return to his home and instead hid in the homes of his sister and other people. At the hearing, he told the Tribunal that he would spend the nights sleeping in the roof spaces of these houses, climbing up on tables to get there. From the time of the first visit he did not emerge in public, for fear of being found by the army. These claims are, however, in conflict with his account of the means by which he and his family left Achuveli and travelled to Colombo.

4. This inconsistency (and concern which devolved from it) was apparent (and apparently operating on the mind of the Tribunal) at the time that the Tribunal engaged in the

⁶ Supreme Court Transcript p 25.16-20, reproduced in the appellant's book of further material (BFM) at p 99 and Supreme Court Transcript p 27.22-27, BFM 101.

⁷ The date on which the notice of appeal was filed in the Supreme Court was 16 January 2017 and the date on which the amended notice of appeal was filed in the Supreme Court was 10 July 2017.

following line of questioning with the appellant, related to the appellant's travel from Achuveli to Colombo:⁸

TRIBUNAL: Yes. So I suppose a question that does arise here is the following: if you were so scared of the army that you had to stay in hiding for a period of some weeks, never going out for fear that you'd be shot, sleeping up in the ceiling in different houses, why was it that you felt able to go out in public to a military controlled airport, get on a plane and fly to Katunayake Airport?

10 APPELLANT: That's a good question. I have spent a lot of money for that. Because I spent a lot of money through someone I knew for the – who knew the army commander very well and through – he organised someone and I had to pay a lot of bribe and he was bribed and I don't know where the ticket was or what happened. A (indistinct) came and all I had to do was sit in it and then everything was arranged.

5. Relatedly, toward the end of the hearing, the Tribunal noted for the appellant as follows:⁹

20 TRIBUNAL: All right. Now, that's all I needed to talk to you about on country information. Just regarding the claims that you've made about things that happened to you, I just wanted to talk to you very briefly about that. Now, of course, as a tribunal, as a panel, we'll need to talk about these issues at some length, and come to some decisions and we've certainly reached no decision at all, but I do need, I think, to say that I believe it is possible to have some doubts about the truth of some of the things that you claim have happened to you, in particular, the claim that you were – or your house was visited on three occasions by army and paramilitary people, that you were so terrified of this that you had to remain in hiding for some weeks and yet you were prepared to travel from Achuveli, Palaly to Colombo by air.

30 In fact, you were prepared to do things while you were in Colombo which would have brought you to the notice of the authorities, including by registering at a lodge, leasing a house and applying for passports for yourself – renewal of passport for yourself and passports for your wife and children. And, finally, that you were prepared to go through all of the security checking that was involved in getting on a plane and flying from Colombo to India.

6. The inconsistency that the Tribunal had identified (and related concern) also found expression in the reasons recorded at [47] of the Tribunal's written statement, where

⁸ The relevant exchange is reproduced in BFM at 39, lines 39-44 and BFM 40, lines 1-6.

⁹ The relevant exchange appears at BFM 58, lines 9-26.

the Tribunal stated as follows (in connection with the appellant's claim to have stayed in a lodge, rented a house and presented himself at the airport using a passport issued in his own name) (emphasis added):

[45] ...The Tribunal notes that a recurrent theme of [the appellant's] explanations in this area, as with his explanation of his ability to leave Acheveli by air, is that he was able to escape the controls applying in war time simply by paying bribes. The Tribunal does not underestimate the extent of corruption in Sri Lanka, even during the war years, and is willing to accept that the [appellant] may have had access to some wealth, even though he claimed at the hearing that he was running low on funds toward the end of his time in Colombo. Even giving these considerations due weight, however, the Tribunal is not satisfied that this conduct is consistent with that of a person who was terrified of being detected by the authorities.

Part V: Argument

7. The Republic accepts that the Tribunal's written statement should be read as a whole, but not in the confined and selective sense promoted by the appellant (*cf* AS [22]). Instead, the Tribunal's reasons recorded under the heading 'Targeting of the applicant', should all be understood as directed at the conclusion expressed by the Tribunal at [50]; so much flows from the Tribunal's reference to 'taking these matters together'.
8. The Tribunal's written statement makes plain that the central narrative (and dispositive element) that underscored the Tribunal's rejection of the appellant's claim to fear harm from authorities as a result of his LTTE connections was that it formed a view (open to it and not directly impugned by the appellant) that there was an inconsistency between, on the one hand the appellant's claim that he took to hiding because his fear of attack and reprisal was so great, and the appellant's claim on the other hand, that he was prepared to interact with members of the military (who he claimed to fear) so as to facilitate his travel from Acheveli to Colombo. Indeed, this inconsistency was one that resonated across a number of the findings recorded by the Tribunal (see, e.g. [45]).
9. The concern (which the Tribunal was unable to reconcile) led it to find, that whatever measures the appellant took to leave Acheveli, and ultimately Sri Lanka, were not taken 'for the reason' that the appellant feared relevant harm ([50]). On this analysis, which

is borne out on a close but not over zealous reading of the Tribunal's written statement, it was not strictly necessary for the Tribunal to record a precise finding about whether a bribe was made, only that the payment of a bribe to authorities was inconsistent with the appellant being in fear of such institutions. The Supreme Court's approach to the construction of the reasons, which reflects this analysis, is unexceptional.¹⁰

10. The appellant's argument is not advanced by what is recorded at [51] of the Tribunal's written statement (*cf* AS [22]). The fact that the Tribunal was 'not satisfied that the concerns about the credibility of the [appellant's] claims which it put to him at the hearing can be dismissed', is better explained as a reference to the overriding and pervasive concern the Tribunal identified for the appellant during the hearing (see [5] above), that the preparedness of the appellant to do things that put him in proximity to the authorities was fundamentally inconsistent with his claims to also fear them.
11. It is also not to the point (*cf* AS [24]) that the Tribunal did not engage expressly with the 'only reason' provided by the appellant as to why he paid a bribe to the local army commander to facilitate his flight to Colombo. This submission misunderstands the manner in which the Tribunal determined to resolve the appellant's claims. The Tribunal was not satisfied that there was a nexus between the appellant's travel within and away from Sri Lanka (including the arrangements to procure it) and his propounded fear of the authorities. It was not required in such circumstances to consider further the bribe evidence, including so as to postulate a separate theory as to why the appellant might have paid a bribe, or to resolve any tension between the so-described incentive and disincentive for the commander to accept any bribe.¹¹
12. The appellant overstates the significance of [39] of the Tribunal's written statement and the operation of s 34(4) of the RC Act. This provision stipulates a *minimum* obligation on the part of the Tribunal to (amongst other things), 'set out findings on any material questions of fact' and to 'refer to the evidence or other material on which the findings of fact were based'. It does not preclude the Tribunal from referring to matters that are

¹⁰ See in particular at [36]-[38].

¹¹ On the appellant's argument, this was a matter that the Tribunal was required to deal with and to expose its reasons for, in its written statement. See [33] of the decision of the Supreme Court.

not ultimately considered to be dispositive. At [38] the Tribunal noted the substance of the exchange that had occurred during the hearing on the topic of the payment of the bribe, but did not make any finding (responsive to this exchange and for reasons that have earlier been identified) that an army commander would not accept the bribe to compensate for the risk of corruptly facilitating the escape of a person suspected of LTTE involvement.¹²

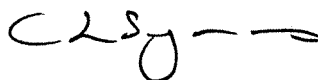
Part VI: Notice of contention/cross-appeal

13. The Republic does not intend to file a notice of contention or a notice of cross-appeal.

Part VIII: Oral argument

10 14. The Republic estimates that it requires 30 minutes to present oral argument.

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¹² See [38] of the decision of the Supreme Court.