

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

I. INTERNET PUBLICATION

1. This outline is in a form suitable for publication on the Internet.

II. OUTLINE OF PROPOSITIONS THE APPELLANT INTENDS TO ADVANCE

The narrow issue

2. This appeal raises the narrow point as to the precise bases upon which the Tribunal did not accept claims made by the appellant to have fled his home town of Achchuveli in Sri Lanka to escape local militants who suspected him of involvement with the LTTE.
- 10 3. It is uncontroversial that the Tribunal identified *multiple* reasons that cumulatively led to the rejection of the claim (AS [4]; RS [4]; Supreme Court Transcript, p 30 lines 9-14; 43-45, BFM p 104). The appellant submitted to the Supreme Court that *one* of those reasons was that it was “difficult to believe” (i.e., implausible) that he would have been able to bribe a local army commander by paying Rs 2 lakhs to assist him to flee his home town of Achchuveli (Reasons, [39], [50]-[51]). The appellant submitted that this finding or aspect of the Tribunal’s reasons involved any one or more of three errors of law.
4. The Republic resisted the premise to the appellant’s argument, contending 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 to assist him to flee from Achchuveli, or that it
- 20 made “no finding one way or the other” (Supreme Court transcript p 25.16-20 BFM99; p 27.22-27 BFM101).
5. The Supreme Court agreed, finding that the Tribunal “accept[ed] that [the appellant] may have left his local area in the way he described” (Judgment, [37]) and that it “did not make a finding 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” ([38]).

Having concluded that the Tribunal did not **make** a finding, the Court did not address the errors of law contended by the appellant to flow from the finding or reasoning.

6. The Republic, reflecting its approach below, has not filed a notice of contention to the effect that the Court ought to have affirmed the Tribunal’s decision for any other reason.

The Tribunal’s reasoning

7. What the Tribunal included in its written statement should be inferred to have been material to its decision – that is, it recorded an aspect of the Tribunal’s reasoning. See *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [69].
8. What the Tribunal included in its written statement can also be inferred to be responsive to the duty in the *Refugees Convention Act 2012*, s 34(4) to prepare a statement that “sets out the reasons for the decision”, “sets out the findings on any material questions of fact”, and “refers to the evidence or other material on which findings of fact were based”.
9. Read as a whole, the Tribunal’s reasons demonstrate that it did **not** accept that the appellant had paid a bribe to facilitate his travel from Achchuveli to Colombo, and that this was one of multiple matters that cumulatively led to its adverse finding at [50].
10. The Tribunal recorded at [39] that it had “put to the applicant that it seemed difficult to believe” that such a bribe would have been effective to persuade the local army commander. At [51], the Tribunal made clear that it did not in fact believe it: it stated that it was “not satisfied that the concerns about the credibility of the applicant’s claims *which it put to him at the hearing* can be dismissed ... as simple or mere speculation”. (CAB 18)
11. The Tribunal also stated at [50] that it did not accept that the appellant “*went into hiding in Achuveli to avoid capture or that it was for this reason that he and his family travelled to Colombo* and later left Sri Lanka to go to India, paying large bribes to be able to do so”. The words “or that it was for such a reason” did not, contrary to the Republic’s submission (Transcript p 27.24-27; BFM p 101) mean that the Tribunal found only that the appellant did not pay the commander a bribe for a particular reason (to escape Achchuveli because he feared militants). It could not because the *only* reason the appellant gave for paying the bribe to facilitate his flight to Colombo was to escape Achchuveli because he feared militants there. It is also artificial to suggest that the Tribunal made no finding “one way or the other” (Response at [6]) as to whether or not the appellant paid a bribe, when it had clearly rejected the *only* basis upon which he claimed to have paid such a bribe.
12. The Supreme Court reduces [37]-[39] of the Tribunal reasons to identifying only the “*inconsistency* seized upon by the Tribunal [being] on the one hand hiding out from

authorities and on the other hand making a bribe to an army commander” (Judgment, [37] and [34]). This is said by the Respondent to be the reason for rejection of the appellant’s claims (Response at [3] on p 3).

13. That inconsistency is addressed by the Tribunal at [38]. The Supreme Court did not address [39] of the Tribunal’s written statement where it addresses the separate issue of the *implausibility* of the bribe. These were *separate* concerns raised in the hearing:
- a. one “*question that [arose]*” was as to the consistency of the appellant’s claims: see transcript at T36.39-44 (BFM 39), dealt with at [37] and [38] of the Reasons;
 - b. “*another aspect*” was the plausibility of the appellant’s claims that the commander was amenable to a bribe: transcript at T38.23-28, dealt with at [39] of the Reasons.
14. The Tribunal’s reasons at [45], dealing with the appellant’s arrangements in Colombo and flight to India and whether the manner of doing so was “consistent with that of a person who was terrified of being detected by the authorities” are relied on by the Supreme Court at [35]-[36] and the Respondent on appeal (Response, [8]). This deals only with the consistency issue which was not “dispositive” (cf Response, [8]) but, with the plausibility of the bribe, one of the Tribunal’s *cumulative* reasons for rejecting the appellant’s claims. It does not justify the Supreme Court’s conclusion that the Tribunal “did not make a finding that the army commander would not accept the bribe” ([38]) or “accept[ed] that [the appellant] may have left his local area in the way he described” ([37]).

20

11 September 2018



CLAIRE HARRIS
Owen Dixon Chambers West
T: (03) 9225 6393
claireharris@vicbar.com.au



NICK WOOD
Owen Dixon Chambers West
T: (03) 9225 6392
nick.wood@vicbar.com.au