IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal No. 02 of 2021
Supreme Court Refugee Appeal Case No. 02 of 2019

BETWEEN

CRI020

APPELLANT

AND

THE REPUBLIC OF NAURU

RESPONDENT

BEFORE: **Justice R. Wimalasena**
Justice C. Makail

DATE OF HEARING: **12 October 2022**

DATE OF JUDGMENT: **28 April 2023**

CITATION: **CRI020 v The Republic of Nauru**

KEYWORDS:	Refugee; complimentary protection; irrationality, illogicality and unreasonableness.
LEGISLATION:	s.19(2)(d), 22(1), of the Nauru Court of Appeal Act 2018; s.3,4,5, 31, 43, 44(1)(b) Refugees Convention Act 2012; Refugees Convention 1951; 1967 Refugees Protocol.
CASES CITED:	Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611.

APPEARANCES:

COUNSEL FOR the Appellant:	**A McBeth**
COUNSEL FOR the Respondent:	**C Hibbard**

JUDGMENT

1. The Appellant is a Bangladeshi national born on 01 April 1989. He left Bangladesh on 05 May 2012 and travelled by boat to Thailand without any travel documents. Subsequently, he lived in Thailand, Malaysia, and Indonesia for some time. In December 2013, he was captured by Australian authorities while travelling by boat to Australia. He was then transferred to Christmas Island on 12 December 2013 and later arrived in Nauru on 14 December 2013.

2. On 03 March 2014, the Appellant submitted an application for refugee status determination, requesting recognition as a refugee under Section 5 of the Refugees Convention Act 2012 (Refugees Act), or as a person to whom the Republic of Nauru owes complementary protection under its international obligations.

3. The principle of non-refoulment is enshrined in section 4 of the Refugees Act:

> "(1) The Republic shall not expel or return a person determined to be recognized as a refugee to the frontiers of territories

where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, except in accordance with the Refugees Convention as modified by the Refugees Protocol.

(2) The Republic shall not expel or return any person to the frontiers of territories in breach of its international obligations".

4. As per the definition in section 3 of the Refugees Act, a refugee means *a person who is a refugee under the Refugees Convention as modified by the Refugees Protocol.* According to the amendment to the Refugees Convention 1951 by the 1967 Refugees Protocol [Article 1A(2)]:

> "A refugee is any person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of their nationality and is unable or unwilling to avail themselves of the protection of that country, or who, not having a nationality and being outside the country of their former habitual residence, is unable or unwilling to return to it".

5. Complimentary protection is defined in section 3 of the Refugees Act as; *protection for people who are not refugees as defined in this Act, but who also cannot be returned or expelled to the frontiers of territories where this would breach Nauru's international obligations.*

6. The Secretary for Department of Justice and Border Control (Secretary) decided that the Appellant's fear is not well founded, and he is not a refugee within the meaning of the Refugees Act by its decision dated 25 January 2015. Moreover,

the Secretary decided that Nauru does not have complementary protection obligations to the Appellant.

7. On 02 February 2015, the Appellant made an application for merit review to the Refugee Status Review Tribunal (Tribunal) pursuant to Section 31 of the Refugees Act. Although the Tribunal invited the Appellant to be present at a hearing on 04 June 2015, he did not appear before the Tribunal, nor did he provide any explanation for his non-appearance. Later, on 06 June 2015, the Appellant's representative informed the Tribunal that the Appellant was mentally unwell, and on 08 June 2015, the representative stated that she did not propose to make any further submissions unless instructed to do so within the next two weeks. Having received no further submissions, the Tribunal delivered its decision on 07 August 2015, affirming the determination of the Secretary.

8. On 18 December 2015 the Appellant filed Notice of Appeal to appeal the decision of the Tribunal to the Supreme Court of Nauru pursuant to section 43 of the Refugees Act. It appears that on 26 April 2017 the parties, by consent extended the time for filing Notice of Appeal. By the judgment dated 22 June 2017 the Supreme Court allowed the appeal, and the matter was remitted to the Tribunal under section 44(1)(b) of the Refugees Act for reconsideration according to law.

9. The second hearing before the Tribunal was commenced on 01 August 2017, and the Appellant gave evidence. On 25 September 2017, the Tribunal delivered its decision, affirming the determination of the Secretary.

10. It appears that the Appellant appealed the decision of the Tribunal once again to the Supreme Court by filing a Notice of Appeal on 05 October 2017. On 07 May 2018, the matter was remitted to the Tribunal by way of a consent order quashing the Tribunal decision. Accordingly, on 09 November 2018, the Appellant was invited to attend the third Tribunal hearing scheduled for 29

November 2019. As per the appeal book the hearing commenced on 02 December 2018, and the Appellant gave evidence again. On 25 January 2019, the Tribunal once again affirmed the determination of the Secretary. It should be noted at this point that the dates mentioned in the sequence of events stated in the paragraph 12 of the Tribunal decision, as reproduced by Justice Freckelton, seem to be incorrect in paragraphs 10 and 11 of the Supreme Court judgment.

11. Be that as it may, the Appellant filed a Notice of appeal against the decision of the Tribunal and an amended Notice of Appeal on 24 April 2019, to appeal to the Supreme Court. By the judgment dated 16 April 2021, delivered on 17 June 2021, the Supreme Court dismissed the appeal and affirmed the decision of the Tribunal.

12. Being aggrieved by the said judgment of the Supreme Court, the Appellant filed Notice of Appeal on 06 July 2021 to appeal to the Court of Appeal. Section 22(1) of the Nauru Court of Appeal Act 2018 (Court of Appeal Act) provides that; *where a person desires to appeal under this Part, he or she shall file and serve a notice of appeal within 30 days of the date of the delivery of the final judgment, decision or order of the Supreme Court.*

13. Section 19(2)(d) of the Court of Appeal Act stipulates that:

> "An appeal shall lie under this Part in any civil proceeding to the Court form any final judgment, decision or order of the Supreme Court sitting under the Refugees Convention Act 2012 in its appellate jurisdiction on questions of law only".

14. Subsequently on 01 July 2022 the Appellant filed an amended Notice of Appeal with the following ground of appeal:

"The Supreme Court erred in not accepting ground 1 below, in that the decision of the Tribunal is affected by irrationality, illogicality, or legal unreasonableness.

a. The findings at Reasons [53] - [54] are based on a supposition that despite community mistrust of the police leading to reluctance to report crimes thereto, more serious crimes (especially against politically connected people) were more likely to be reported, than less serious crimes (and people not so connected).
b. There is no probative material to support this reasoning.
c. There is no valid inference from the probative material, or ordinary lived experience, to support this reasoning. Importantly, there is just no apparent reason why more serious offending would more likely be reported than less serious offending.

Further, the notion that the appellant's political party were "in power" was dubious in the extreme, given the country information discussed at paras 49-50."

15. The Appellant's ground of appeal is based on the claim that he was kidnapped and assaulted as a result of his affiliation with a political party (BNP) in Bangladesh. The counsel for the Appellant submitted that the Appellant was kidnapped and assaulted by the supporters of the opposing party (AL). It was further submitted that the Appellant did not report this incident to the Police, and it was highlighted that the reason for not reporting is reflected in paragraph 42 of the Tribunal's decision as the inability to identify the assailants:

"[42] The second Tribunal asked the applicant if he reported the incident to the police, given that he maintained that the police were always aligned with the governing party (suggesting they should not have been antagonistic to complaint from a BNP member against the

AL). He replied that he did not report it; it seemed pointless, as he was unable to identify any of his assailants."

16. The counsel for the Appellant argued that the reason for not reporting was not related to political power, but rather due to the inability to identify the assailants. It was also submitted that the Tribunal accepted that the attack had occurred as stated in paragraph 51:

> "Despite doubts about the applicant's account of his kidnap and assault, the present Tribunal is prepared to accept that he was the victim of physical violence, possibly at the hands of AL supporters because he was known to be a BNP supporter who undertook small scale electoral activities for the party. In accepting that the incident occurred, the Tribunal has taken into account the likelihood of such an event occurring in the context of the political events unfolding around that time, and the reports of violence associated with those events."

17. The counsel for the Appellant argued that, having accepted that the Appellant was attacked, the Tribunal found in paragraph 53 that police inaction, according to the country information, was the reasons for not reporting to the police. However, the counsel argued that the Tribunal's reasoning became irrational, when it stated that "*However, the applicant's failure to report it calls in to question the alleged seriousness of the incident*" in paragraph 53 itself. Additionally, the counsel for the Appellant contended that the Tribunal introduced a new issue as to why it was a serious attack that would have been reported:

> "[53] The Tribunal accepts that likely police inaction could explain why a kidnap and assault might not be reported to the police. However, the applicant's failure to report it calls into question the alleged seriousness of the incident. The Tribunal notes that the above country information relates to recent years and not 2006

when the claimed kidnap and assault occurred. At the time of the claimed kidnap and assault, the BNP was in power, and it is reasonable to conclude that an allegation of kidnapping and a charge of serious assault of even a low level BNP supporter, requiring hospitalization for around 20 days, would be taken seriously."

18. The counsel for the Appellant asserted that the Tribunal made an error of law by reaching conflicting conclusions in paragraph 53, which was irrational. It was argued that after stating it was reasonable not to report the attack to the police, the Tribunal also expected the Appellant to go to the police, which was contradictory. It was also argued that the Tribunal's reasoning, that the more serious a crime is, the more likely it is to be reported, was irrational.

19. On behalf of the Respondent, it was argued that the Tribunal properly reasoned its decision. The counsel for the Respondent argued that police inaction was acknowledged by the Tribunal as a possible reason why an incident might not be reported. However, the counsel argued that the Tribunal went on to explain its reasoning in paragraph 53, and there was nothing contradictory about its findings. Additionally, the counsel for the Respondent contended that it was rational and logical to conclude that it was unlikely for the Appellant not to report a more serious crime when the political party he was affiliated with was in power. The counsel also argued that the Tribunal comprehensively addressed the claim that the assailants were not identified in paragraph 53 by acknowledging the inaction of the police, as the police would not identify the assailants through their investigations.

20. The counsel for the Respondent requested this Court to look at Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611 where irrationality was discussed:

"[132] .....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 of finding to be made on evidence upon which the decision is based. If 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."

21. The question that this Court should ask is, as it was stated in Minister for Immigration and Citizenship v SZMDS (supra) at [133]; *whether it was open to the Tribunal to engage in the process of reasoning in which it did engage and to make the findings which it did on the material before it.* To answer that, it is important that the Tribunal findings in the proceeding paragraphs should also be considered. Accordingly, the Tribunal gave reasons for its findings as follows:

> [54] The Tribunal also considers it improbable that no one, including the applicant's parents, his influential uncle, or members of his own political party, then in power, would have failed to make an attempt to report to the police a kidnap and assault of the severity described by the applicant. Moreover, there is no independence evidence to support his claim that he was hospitalised for 20 days.
>
> [55] For these reasons, while the present Tribunal is prepared to accept that some form of assault on the applicant occurred and that it may have been for reasons associated with his low-level political involvement, it is not satisfied that it was of the severity he claims.

22. Also, it was held in Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611:

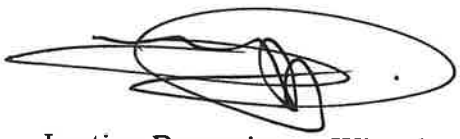
"[135] On the probative evidence before the Tribunal, a logical or rational decision maker could have come to the same conclusion as the Tribunal. Whilst there may be varieties of illogicality or irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker....."

23. We are of the view that, based on the evidence it was reasonable for the Tribunal to arrive at the reasoning in its decision. Although the Appellant argued that the Tribunal's decision was affected by irrationality, illogicality or unreasonableness we believe that the Appellant failed to demonstrate any error of law along those lines.

24. In the circumstances, we conclude that the reasoning found in paragraphs [51]-[55] of the Tribunal's decision is not illogical, irrational or unreasonable.

25. Accordingly, the appeal is dismissed with costs.

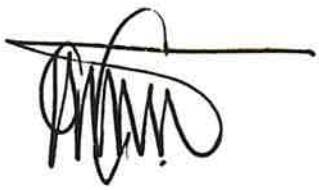
Dated this 28th day of April 2023



Justice Rangajeeva Wimalasena
Justice of the Court of Appeal

Justice Colin Makail

I agree.



Justice of the Court of Appeal