IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal No. 2 of 2022
Supreme Court Refugee Appeal Case No. 5 of 2019

BETWEEN

DWN 068

AND

APPELLANT

THE REPUBLIC OF NAURU

RESPONDENT

BEFORE: **Justice R. Wimalasena, Acting President**
Justice Sir A. Palmer
Justice C. Makail

DATE OF HEARING: **3 July 2023**

DATE OF JUDGMENT: **23 October 2023**

CITATION:	**DWN 068 v The Republic of Nauru**
KEYWORDS:	Refugee; new ground of appeal not raised in the court below; reasonable explanation for failure; requirement to record proceedings by audio or audio visual means; whether there is an implied obligation on the Tribunal to have regard to the recordings
LEGISLATION:	s.48(1)(a) of the Nauru Court of Appeal Act 2018; Rule 36(1) of the Nauru Court of Appeal Rules; s.23(2), s.43, s.44(1)(b) of the Refugees Convention Act 2012
CASES CITED:	WET054 v The Republic of Nauru Refugee Appeal 07 of 2019; QLN043 v The Republic, Case No. 3 of 2017; Luke Marsh v Australian Capital Territory [2014] ACTS 81 (7 May 2014); ABT17 v Minister for Immigration and Border Protection [2020] 269 CLR 439 at 14; NAJT v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 51; [2005] FCAFC 134.
APPEARANCES:	
COUNSEL FOR the Appellant:	**NM Wood SC**
COUNSEL FOR the Respondent:	**HPT Bevan**

JUDGMENT

1. The Appellant is a citizen of Pakistan. The Appellant left Pakistan on 10 July 2013 and arrived on Christmas Island on 03 August 2013. Later, he was transferred to Nauru on 25 January 2014.

2. On 25 May 2014 the Appellant made an application for Refugee Status Determination. The Secretary for Department of Justice and Border Control (Secretary) made a determination on 30 July 2015 that the Appellant is not a refugee within the Refugees Convention Act 2012 (Refugees Act), and his fear is not well-founded. Further it was decided that Nauru does not have complimentary protection obligations to the Appellant. The Appellant made an application to the Refugee Status Review Tribunal (Tribunal) on 10 August 2015 for merits review. On 11 February 2016 the Tribunal affirmed the decision of the Secretary.

3. Pursuant to section 43 of the Refugees Act, the Appellant filed a notice of appeal on 06 May 2016 to appeal the decision of the Tribunal to the Supreme Court and later, an amended notice of appeal was filed on 20 November 2017. The Respondent conceded the orders sought by the Appellant due to the failure on the part of the Tribunal to act according to principles of natural justice. As a result, the matter was remitted back to the Tribunal pursuant to section 44(1)(b) of the Refugees Act.

4. The second Tribunal conducted its proceedings on 27 and 28 November 2018. Subsequently, the second Tribunal made its decision on 01 April 2019, once again affirming the determination of the Secretary. The Appellant filed a notice of appeal on 18 April 2019 and later, an amended notice of appeal on 17 January 2020, to appeal the second Tribunal to the Supreme Court. As per the amended notice of appeal the Appellant relied on the following ground of appeal:

> "The Tribunal failed to apply correctly the notion of a "home area", and so, failed to apply the correct test or failed to consider important evidence regarding the appellant's family having recently changed residence".

5. On 06 December 2022 the Supreme Court delivered its judgment, rejecting the Appellant's sole ground of appeal and affirming the second

Tribunal's decision made on 01 April 2019. The Appellant, being aggrieved by the said judgment, filed a notice of appeal on 22 December 2023, to appeal to the Nauru Court of Appeal with the following ground of appeal:

> "The Tribunal failed to apply correctly the notion of a "home area", and so, failed to apply the correct test or failed to consider important evidence regarding the appellant's family having recently changed residence".

6. Six months later, on 14 June 2023, the Appellant filed a supplementary notice of appeal, pursuant to Rule 36(1) of the Nauru Court of Appeal Rules (Rules), with a single amended ground of appeal. The amended ground of appeal reads:

> "The primary judge erred by failing to find that the Tribunal's decision is affected by legal error (or in any event the Tribunal's decision is affected by error) on the basis that the Tribunal did not have regard to a recording of the second day of the hearing on 28 November 2018, that being an implied obligation of the Tribunal under s 23(2) of the Refugees Convention Act 2012."

7. Section 48(1)(a) of the Nauru Court of Appeal Act 2018 (Court of Appeal Act) provides that a notice of appeal can be amended without leave of the Court at any time before 14 days of the date fixed for hearing of the appeal by way of a supplementary notice of appeal. The hearing of the appeal was on 03 July 2023 and the supplementary notice of appeal was filed on 14 June 2023. Therefore, there is no reason for the Appellant to seek leave to amend ground of appeal. Nevertheless, the Appellant now intends to advance a fresh ground of appeal, which was not argued before the Court below. In the case of WET054 v The Republic of Nauru, Refugee Appeal 07 of 2019, this court extensively examined the matters surrounding the amendment of a notice of appeal

and the introduction of fresh grounds of appeal. It was held that the Court should exercise its discretion to grant leave to advance a fresh ground of appeal only in exceptional circumstances, particularly when a serious error is revealed, and when it is expedient and in the interest of justice.

8. To determine if leave can be granted, it is important to first assess whether the Appellant has provided a reasonable explanation for not raising the proposed ground of appeal in the lower court. The Appellant submitted that the new ground of appeal could not be advanced in the court below as it was not perceived at that time. The Appellant aims to introduce the new ground of appeal, relying on a note found within square brackets in paragraph 15 of the second Tribunal decision. Irrespective of the context of the said note and its specific meaning, there is no dispute that the content enclosed within square brackets has formed part of paragraph 15, and it was available since the delivery of the second Tribunal decision. As such the counsel for the Appellant made submissions to explain as to why the proposed ground of appeal was not considered earlier.

9. The counsel for the Appellant submitted three affidavits from two solicitors of the law firm representing the Appellant in an attempt to clarify why the new ground of appeal was not pursued in the lower Court. In the first affidavit, Solicitor Ms. Neha Prasad states, *'Upon my review of the file, I can confirm that the proposed new ground was not conceived during the Supreme Court process.'* In the second affidavit, she further mentions, *'I do not recall anyone discussing the possibility of the ground sought to be advanced at any stage before the Supreme Court hearing on October 20, 2023. The first time any potential ground arising from the apparent absence of the recording on November 28, 2019, was in late May 2023 when I was preparing the brief for this matter. Subsequently, counsel considered it meritorious to advance this ground.'* Another solicitor from the same firm, Mr. Salmaaan Shah, deposed in

his affidavit that *'I do not recall any discussions among the CAPs team or between myself and Ms. Batten concerning the Tribunal's failure to consider the recording of the transcript of the hearing on November 28, 2018. The first time I heard about this potential ground of appeal was in June 2023'.*

10. It is not rare to see distinct interpretations of the same case among different legal practitioners. Furthermore, a particular legal practitioner's perspective on a case may undergo variations throughout different stages of the case. This may lead to inadvertent failures in recognizing specific grounds of appeal or perceiving distinct facets of a case during different instances. This underscores the professional obligation of legal practitioners to exercise due diligence in order to mitigate and prevent such omissions and oversights. The appeal process has a fundamental requirement of bringing finality to cases. Otherwise, courts could be inundated with repeated applications for new grounds of appeal whenever a different legal practitioner, or even the same one, identifies a new argument. Unless it can be demonstrated that such an omission occurred due to highly justifiable reasons and consequently resulted in a serious error, it would not be in the interest of justice to permit a fresh ground of appeal in a final appellate Court.

11. There is no dispute regarding the experience and capability of the Appellant's legal representatives. Undoubtedly, they would have exercised the utmost care and due diligence in handling this matter. Furthermore, paragraph 15 of the second Tribunal decision which lays the foundation for the fresh ground of appeal, was readily available for consideration when the case was appealed to the Supreme Court. Additionally, there is no indication of the surrounding circumstances as to why the legal representatives did not grasp any significance of the notes found within square brackets in paragraph 15. This is clearly not a scenario in which the basis for the new ground was initially

unavailable and only later discovered or came to light. Simply asserting that something which already existed was not perceived does not constitute a reasonable explanation that can be taken into account in the interest of justice. The Respondent's counsel argued that the Appellant's explanation falls short of adequacy, and essentially boils down to a situation similar to a change in legal representation. Even when considering these explanations by the Appellant at their best, they still appear weaker than attributing the explanation for the failure to a change of counsel. In the circumstances, the reasons put forward by the Appellant cannot be regarded a reasonable explanation.

12. Nevertheless, the other main consideration in an application to advance a fresh ground of appeal is whether the new legal arguments have a reasonable prospect of success. According to the Appellant's arguments, the alleged legal error in the proposed new ground of appeal is twofold: first, the Appellant asserts that the Tribunal did not consider the recording of the second day of the hearing, and second, that section 23(2) of the Refugees Act imposes an implied obligation on the Tribunal to have regard to the recordings. We will now consider if there are merits in the proposed new ground of appeal.

13. The Appellant's argument relies solely on the notes found within square brackets in paragraph 15 of the second Tribunal decision. For convenience of reference, paragraph 15 is reproduced below:

> "15. The applicant attended a further hearing with the Tribunal as presently constituted on 27 November 2018 **[**the recording seems to indicate that the Tribunal ran out of time to ask the applicant about all aspects of his claims on this date and it was adjourned to a date later in that week? I cannot however see any evidence of this on the CMS**]**. An interpreter in the Pashto and English languages assisted the Tribunal. The applicant's representative attended the hearing".

14. In light of the notes found within square brackets, the Appellant's counsel argued that the Tribunal *'lost track of the recording of the second day of the hearing and did not take it into account when making its decision'*. However, the Appellant's counsel conceded that the Tribunal may have relied on some notes made during the second day of the hearing. At no point did the Appellant claim that the Tribunal disregarded any evidence presented on the second day of the hearing and thereby it affected the outcome of the case. Nevertheless, the Appellant's counsel tried to strengthen his argument based on the notes found within brackets in paragraph 15, emphasizing that the references in the Tribunal's decision to the evidence presented on the second day were not verbatim records. Therefore, the Appellant's counsel contended that it is an indication that the Tribunal did not have regard to the recording of the second day of the hearing. Against this backdrop, it appears that the argument exclusively revolves around the assertion that the Tribunal did not have regard to the recording of the second day's proceedings, which is distinctly different from not considering the evidence presented. Moreover, there is no contention that a recording was, in fact, made of the proceedings on the second day, regardless of the notes contained within square brackets in paragraph 15.

15. The Appellant relies on section 23(2) of the Refugees Act to lay the foundation for his argument that there is an implied obligation on the part of the Tribunal to have regard to the recordings of the proceedings. Section 23(2) reads as: *'An audio or audio visual recording shall be made of a hearing.'* The Appellant's counsel asserted that apart from the expressed requirement of section 23(2) to do a recording, it impliedly requires the recording to be considered by the Tribunal in making its decision. To further this argument, the Appellant relies on the Supreme Court judgment in the case of QLN043 v The Republic, Case No. 3 of 2017, where Justice Marshall remitted a case back due to the absence

of a recording, stating that it amounted to a breach of section 23(2) of the Refugees Act.

16. It is undeniably clear that a significant difference exists between QLN043 (supra) and the current matter. In the present case, there is no dispute that the proceedings were recorded, and the recordings remain available. The key issue asserted by the Appellant's counsel is whether the Tribunal had access to or indeed considered the recording. It is important to note that such recordings serve various purposes, and if the Tribunal requires access to them, they can be of significant assistance. But the question is whether there is an implied obligation on the Tribunal to necessarily rely on the recording.

17. In QLN043 (supra) the Supreme Court discussed the issue of not recording the proceedings as follows in arriving at its conclusion:

> "[41] The Appellant can never know what aspects of his evidence, submissions and claims were not recorded. The Tribunal did not have the benefit of the evidence that was not recorded in coming to its decision. There is no evidence that even the incomplete hearing notes were relied on by the Tribunal in addition to the transcript of the recording in coming to its decision.
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> [43] Having found that the Tribunal made an error of law in breaching s 23(2) of the Act, the question arises as to whether relief should be granted and the matter remitted to a differently constituted Tribunal. I consider it appropriate for such an order to be made. It cannot be known whether the breach of s 23(2) could not have made a difference to the outcome of the application. No one can be sure what was omitted from the recording and thus the transcript."

18. Thus, it is clearly discernible that the Supreme Court's conclusion in QLN 043 (supra) was not solely based on the breach of section 23(2) but on the consequential effect of the Tribunal not considering the evidence at all, which impacted procedural fairness. But that is not the case here. The counsel for the Respondent in the present case argued that the Tribunal referred to evidence adduced during the second day of the hearing in their decision. The counsel for the Respondent asserted that there is no complaint about denial of procedural fairness or a failure to consider the substance of the Appellant's claim at the Tribunal. The counsel for the Respondent referred to paragraphs 57, 59, 94, 95 and 96 of the Tribunal decision as examples of how the Tribunal referred to the evidence presented on the second day of the hearing. Thereby the counsel for the Respondent asserted that regardless of the note found within square brackets in paragraph 15, the Tribunal had in fact considered the evidence given by the Appellant on the second day.

19. At this juncture it would be pertinent to refer to Luke Marsh v Australian Capital Territory [2014] ACTS 81 (7 May 2014) where the Supreme Court of Australian Capital Territory dealt with a situation where no recording was done in an inquiry before the Sentence Administration Board due to a power failure. Section 211 of the Sentence Administration Act requires the Director General to ensure that a sound or audio-visual recording is made for the inquiries before the Sentence Administration Board. Due to a power failure no such audio or audio-visual recording was made, but a record of the meeting and a statement of reasons for the decision was available. The Supreme Court held that failure to record the proceedings did not invalidate the proceedings. Despite factual differences, Luke Marsh case demonstrates that there is no additional implied condition in the procedural requirement similar to that found in section 23(2) of the Refugees Act, beyond the explicit legal requirement to record the proceedings.

20. The Appellant's counsel further argued that the recording would have been necessary for the Tribunal to assess the demeanour of the Appellant. The Appellant relied on the High Court of Australia decision in ABT17 v Minister for Immigration and Border Protection [2020] 269 CLR 439 at 14 where it was stated:

> "An informational gap of that nature has potential to impact on the Authority's assessment of the credibility of an account given by the referred applicant during the audio recorded interview and in turn has the potential to impact on the Authority's assessment of the referred applicant's overall credibility. "Impressions formed by a decision-maker from the demeanour of an interviewee may be an important aspect of the information available to the decision maker". That has "long been recognized" and continues to be appreciate despite awareness on the part of sophisticated decision-makers that "an ounce of intrinsic merit or demerit" measured by reference to objectively established facts and the apparent logic of events "is worth pounds of demeanour."

21. It was argued that an informational gap was created because the Tribunal supposedly did not have access to the recordings of the second day hearing. It should be noted that the circumstances of ABT17 are clearly distinct from this case. The counsel for the Respondent submitted that it has no relevance to this case because the procedure in the Immigration Assessment Authority is completely different as it is generally conducted on the papers. It was submitted that unlike in the Immigration Assessment Authority, the Appellant in the present case appeared before the Tribunal and the Tribunal members had the opportunity to observe the Appellant throughout the proceedings in both days. There is a clear contrast in the circumstances in ABT17 (supra) and the present case, as the Tribunal had the privilege of observing the Appellant during the hearing. Therefore, we cannot agree that it has any relevancy to the present case.

22. Although the counsel for the Appellant argued that section 23(2) of the Refugees Act imposes an implied obligation on the Tribunal to consider the audio or audio-visual recordings of the proceedings, we are not inclined to agree with that assertion. Section 23(2) simply requires the Tribunal to record proceedings for purposes such as for future reference in appeals, etc., as rightly submitted by the Respondent. There is no contention that the Tribunal can access the recordings for reference if needed. But it does not impose an implied obligation on the Tribunal to necessarily consider the recordings of the proceedings or to have regard to the recordings. The law does not require anything more than ensuring the proceedings are recorded by audio or audio-visual means and that the Tribunal adequately considers the evidence presented. The scope of section 23(2) is very clear, and it does not imply anything more than what it plainly states. Therefore, we are not inclined to accept that there is an implied obligation as claimed by the Appellant.

23. Advancing a fresh ground of appeal is not specifically provided for in the Nauru Court of Appeal Act. However, this Court has acknowledged in its previous decisions that the Court has a discretion to allow a fresh ground of appeal on a point of law in exceptional circumstances, particularly when a serious error is uncovered. In WET054 (supra) this Court adopted the test formulated in NAJT v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 51; [2005] FCAFC 134 at [166] in considering whether to grant leave to advance a fresh ground of appeal. Given the Appellant's failure to provide a satisfactory explanation for not advancing the proposed ground of appeal in the lower court and the lack of prospects for success, we see no need to address the remaining questions outlined in the test formulated in NAJT (supra).

24. In view of the matters discussed above we are of the opinion that the proposed ground of appeal does not disclose an error of law. Section

23(2) of the Refugees Act does not impose an implied obligation on the Tribunal to have regard to the audio or audio-visual recording of the Tribunal proceedings. Therefore, the proposed ground of appeal lacks merit.

Orders

25. Leave to raise the new ground of appeal is refused.

26. The appeal is dismissed with costs.

Dated this 30 October 2023

NAURU COURT OF APPEAL

Justice Rangajeeva Wimalasena

Acting President

Justice Sir Albert Palmer

Justice of Appeal

Justice Colin Makail

Justice of Appeal