

HIGH COURT OF AUSTRALIA

GAGELER, KEANE AND EDELMAN JJ

WET052

APPELLANT

AND

THE REPUBLIC OF NAURU

RESPONDENT

WET052 v The Republic of Nauru
[2018] HCA 47
17 October 2018
S267/2017

ORDER

1. *Leave to amend the notice of appeal is refused.*
2. *Appeal dismissed with costs.*

On appeal from the Supreme Court of Nauru

Representation

S A Beckett with M L L Albert for the appellant (instructed by Banki Haddock Fiora)

N M Wood for the respondent (instructed by Republic of Nauru)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

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CATCHWORDS

WET052 v The Republic of Nauru

Nauru – Appeal as of right from Supreme Court of Nauru – Refugees – Where Secretary of Department of Justice and Border Control determined appellant not refugee and not owed complementary protection – Where Refugee Status Review Tribunal affirmed Secretary's determination – Where Tribunal made adverse finding as to credibility of appellant – Where Supreme Court of Nauru affirmed Tribunal's decision – Whether Tribunal's adverse finding made without logical foundation – Whether Tribunal failed to properly consider appellant's claims relating to treatment in Iran as a returned asylum seeker.

Words and phrases – "adverse credibility finding", "country information", "failed asylum seeker", "political profile", "well-founded fear of persecution".

Refugees Convention Act 2012 (Nr), ss 3, 5, 6, 31.

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1 GAGELER, KEANE AND EDELMAN JJ. The appellant was born in Tehran, Iran, in 1990. His ethnicity is Turkmen and his religion Shi'a Islam. After graduating from high school and gaining a certificate in industrial electricity, he was employed in various jobs in Iran. He arrived on Christmas Island in September 2013. He was transferred to the Republic of Nauru in February 2014.

2 On 21 February 2014, the appellant participated in a transfer interview. In the course of that interview, he stated as follows:

- He left Iran because his father was an alcoholic who physically abused him. For instance, his father had burned his hands with cigarettes and cut him with a knife.
- He had run away from home three times but each time his father found him and brought him home.
- His father had forced him to go to work and bring money home, when the appellant wanted to study at university.
- On one occasion, his father had taken a knife, intending to stab the appellant. His brothers and mother intervened, but his father then threw an ashtray, which struck the appellant on the head.
- He was not feeling safe at home. His mother had urged him to flee Iran, and, with money she gave him, he was able to leave.
- He feared that if he were returned to Iran he would be subjected to further physical abuse by his father, and might be killed by him.

The appellant's application for refugee status

3 On 26 May 2014, the appellant applied to the Secretary of the Department of Justice and Border Control ("the Secretary") for recognition as a refugee under the *Refugees Convention Act* 2012 (Nr) ("the Refugees Act").

4 As at the date of the Secretary's decision, the Refugees Act relevantly provided:

"3 Interpretation

In this Act, unless the contrary intention appears:

...

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'complementary protection' means 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;

...

'refugee' means a person who is a refugee under the Refugees Convention as modified by the Refugees Protocol;

...

5 Application for refugee status

(1) A person may apply to the Secretary to be recognised as a refugee.

...

6 Determination of refugee status

(1) Subject to this Part, the Secretary must determine whether an asylum seeker is recognised as a refugee or is owed complementary protection."

5 The Refugees Convention, as modified by the Refugees Protocol, provides that a refugee is a person who¹:

"owing to 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 his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

6 The appellant claimed to be a refugee because he feared that if he returned to Iran, he would be persecuted by the Iranian authorities by reason of:

1 Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967), Art 1A.

3.

- (a) his imputed political opinion against the Iranian regime, for reason of his association with his father, an alcoholic, drug addict and drug supplier, who was engaged in acts directly contravening Sharia law;
- (b) his actual or perceived contravention of Sharia law by assisting his father to supply drugs, by being associated with a drug dealer and by consuming drugs while young;
- (c) his membership of the particular social group consisting of his family "because I could be placed at peril for reason of being my father's son given his serious anti-Islamic activities"; and
- (d) his membership of the particular social group of failed asylum seekers returning to Iran from the West.

7

In support of the appellant's application for refugee status, he participated in a refugee status determination interview. The Refugee Status Review Tribunal ("the Tribunal") records the claims made by the appellant in his application and interview as follows:

- His father is an alcoholic and a drug addict who forced him to supply drugs to those he worked with. As the appellant grew older and started to refuse his father's demands, his father physically abused him.
- His father has friends in the Sepah, the Basij and the police who, the appellant believes, helped his father to find him each time he ran away. He was afraid that his father would use his connections with the authorities to accuse him of drug trafficking and have him put in jail. The family's neighbours had filed complaints against his father in the past but he has been protected by his connections with the authorities.
- He cannot find safety by relocating elsewhere in Iran because of his father's connections.
- He feared that his father would continue to take all his money and prevent him from pursuing further education, limiting his employment opportunities and denying him his basic human rights.
- He feared being severely punished for assisting his father to deliver drugs in the past and consuming drugs as a young person. These offences carry penalties ranging from long-term imprisonment to execution. He feared being tortured and subject to inhumane prison conditions.

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The decision of the Secretary

8 On 28 September 2015, the Secretary determined that the appellant was not a refugee, and was not owed complementary protection.

9 The Secretary accepted that the appellant was a citizen of Iran, that his identity was as he claimed it to be, that his father was an alcoholic and drug addict, and that his cousin was jailed for dealing drugs. On the other hand, the Secretary did not accept that the appellant's father was involved in drug trafficking, that the appellant had been compelled to engage in drug trafficking on his father's behalf, that on each occasion he had attempted to flee home the appellant had been forced to return home, or that his father has close personal connections with the Iranian authorities which he could use to threaten the appellant's safety.

The decision of the Tribunal

10 On 2 October 2015, the appellant applied to the Tribunal for review of the Secretary's determination. In that regard, at relevant times s 31 of the Refugees Act relevantly provided:

"Application for merits review by Tribunal

- (1) 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;
 - ...
 - (d) a determination that the person is not owed complementary protection."

11 In a supplementary statement signed on 20 November 2015, the appellant made further statements detailing his father's drug addiction and its impact upon him and his family. The appellant also said that he had converted to Christianity in Nauru in about April 2015, and that he had been regularly attending church and Bible classes after being baptised. He said that a number of friends who had learnt of his conversion through friends in Nauru and Australia sent him congratulatory messages over the Internet. The appellant claimed to fear return to Iran, where apostasy is punishable by death, and to believe that he would, at least, be sent to jail.

5.

12 On 1 February 2016, the Tribunal affirmed the Secretary's decision. The Tribunal accepted, "in the absence of any evidence to the contrary", the appellant's claims concerning his citizenship and identity. On the other hand, the Tribunal did not accept that the appellant would be at risk of persecution in Iran on grounds of an adverse political opinion imputed to him through association with his father, or that he would be at risk of persecutory harm because he distributed illicit drugs for his father.

13 The Tribunal expressed concern as to the credibility of several aspects of the appellant's account:

- First, in his transfer interview the appellant had made no reference to his father's involvement with the use and supply of illicit drugs when explaining why he left Iran. The Tribunal did not accept that the appellant had satisfactorily explained that omission.
- Secondly, the Tribunal found implausible the appellant's claim to fear that his father would deliberately implicate him in drug dealing by setting him up with planted drugs, particularly the notion that his father would thereby accept the related danger of disgrace and severe punishment to himself.
- Thirdly, the Tribunal found it difficult to accept that the appellant's father could have forced him to distribute illicit drugs on an almost full-time basis over a period of three or four years.

14 The Tribunal concluded in relation to the aspect of the appellant's claim based on his involvement with his father's alleged illegal activities:

"On the information before it, the Tribunal is not satisfied as to the credibility of the [appellant's] claim that his father is a drug addict or drug dealer, or that he forced the [appellant] to use drugs and transport drugs to his friends and others. ... The Tribunal finds that these claims have been fabricated by the [appellant] to strengthen his case for protection.

As these are not minor or marginal aspects of the [appellant's] account, but instead lie at the heart of his claim to fear harm in Iran, the Tribunal considers that these findings cast strong doubt over the credibility of his claims in general.

Given these findings the Tribunal does not accept that the [appellant] would be at risk of persecution in Iran on ... Convention ground[s]."

15 In addition, the Tribunal dismissed the appellant's claim to fear persecution as a returned asylum seeker, finding that, on the evidence provided,

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including relevant country information, there was "nothing ... to indicate that the act of applying for asylum in itself attracts harm".

16 The Tribunal also dismissed the appellant's remaining claims, concerning his purported conversion to Christianity, and his claim for complementary protection. These claims are not material to the issues pursued in this Court.

The decision of the Supreme Court of Nauru

17 On 6 May 2016, the appellant filed a notice of appeal in the Supreme Court of Nauru, raising eight grounds of appeal on questions of law from the decision of the Tribunal. On 6 November 2017, the Supreme Court dismissed the appeal, rejecting all these grounds².

The appeal to this Court

18 In the appeal to this Court, which is brought as of right³, the appellant submitted that:

- (a) the Tribunal's adverse credibility finding, in respect of the appellant's claims for protection arising out of his alleged involvement in his father's drug trafficking, was both without logical foundation and wrongly treated as determinative against his claim for refugee status; and
- (b) the Tribunal erred by failing properly to consider his claims to protection that:
 - (i) he had a political profile which would lead him to be at particular risk of persecution on his return to Iran as a failed asylum seeker from the West; and
 - (ii) he was at risk of persecution on his return to Iran as a failed asylum seeker per se.

19 Leave was necessary to enable the appellant to raise the contention in (b). At the hearing of the appeal, this Court reserved the question of leave and allowed argument to proceed upon the merits of that ground. Leave to amend

2 *WET052 v The Republic* [2017] NRSC 96.

3 *Appeals Act* 1972 (Nr), s 44; *Nauru (High Court Appeals) Act* 1976 (Cth), s 5. See also *BRF038 v Republic of Nauru* (2017) 91 ALJR 1197 at 1203-1204 [35]-[41]; 349 ALR 67 at 73-74; [2017] HCA 44.

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should be refused on the basis that the proposed ground is entirely without merit. The reasons for that view will be explained in due course; but first it is necessary to consider the appellant's argument in relation to the Tribunal's adverse credibility finding.

The Tribunal's adverse credibility finding

20 The appellant's argument under this heading focused on the reference in the Tribunal's reasons to the circumstance that the appellant made "no reference to drugs" in his transfer interview when explaining why he left Iran. The Tribunal did not accept that the appellant satisfactorily explained "why so important an area of [his] claims would not have been mentioned by him at the first opportunity he was given to do so".

21 The appellant submitted that the Tribunal's adverse credibility finding was not logical or supported by probative evidence. In particular, he argued that:

- The transfer interview was a general interview on transfer from Australia to Nauru and was not part of his application for refugee status, that application being made later.
- The appellant was not asked to provide the basis for his claim for refugee status at the transfer interview. Those questions were left until his refugee status determination interview. The Tribunal could not reasonably reject the appellant's credibility on the basis that he had not stated his claims fully when he had not been asked to state his claims to refugee status.
- The appellant was not assisted by a legal representative or a claims assistant at the transfer interview as he was later.
- The appellant's claims relating to his father's drug trafficking were detailed in his statement as part of his refugee status determination interview, and were not inconsistent with his answers in the transfer interview.
- The appellant told the Tribunal he was confused and stressed at the time of the transfer interview. Caution was required on the part of the Tribunal in comparing the statements at the transfer interview with statements made later.
- The Tribunal's task should have been approached with a degree of solemnity, and it should not effectively dismiss his primary claim on the basis of an omission at his first interview.

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8.

22 The appellant's submissions cannot be accepted. They proceed upon a distinctly unreasonable misunderstanding of the Tribunal's reasons and an artificially rigid view of the constraints upon the fact-finding function of the Tribunal.

23 The Tribunal did not find that the appellant's claims as to his father's drug use and trafficking were untrue because they had not been mentioned at the transfer interview; rather, the Tribunal said that the appellant's failure to refer to these claims at the first opportunity "casts strong doubt" on their truth. The Tribunal's ultimate conclusion that it was not satisfied as to the credibility of his claims was based on the accumulated concerns summarised above. There was nothing illogical or irrational about that conclusion.

24 The Tribunal was entitled to consider that it was inherently unlikely that the appellant's father would risk bringing the attention of the authorities to his own unlawful activities by accusing the appellant. It was also open to the Tribunal to regard the appellant's assertion that his father was able to force him to distribute illicit drugs on an almost full-time basis for a period of three or four years as testing credulity too far.

25 The concern expressed by the Tribunal in relation to the appellant's failure to mention his involvement in his father's illicit drug activities in Iran is one familiar to any tribunal of fact, namely, that the failure to mention a matter of obvious significance when one is afforded the opportunity to do so is a reason for scepticism when the matter is asserted at a later time. It may be that any scepticism is readily dispelled by the balance of the evidence. But whether or not it *should* be dispelled depends on the cogency of the explanation in the circumstances of the case as well as the significance of the evidence to the claim. It was open to the Tribunal to regard the appellant's failure to refer to these aspects of his claim at the first opportunity as reason to be sceptical of the truth of his claims. And the Tribunal had the opportunity to weigh the appellant's explanations for the differences in his accounts.

26 At the hearing, the Tribunal raised its concern that the appellant had not made the claims concerning his father's involvement with illicit drugs at the transfer interview. The appellant offered a variety of explanations for why he didn't mention these things. Whether those explanations were cogent or not was a matter for the Tribunal. The extent to which considerations of the kinds urged on behalf of the appellant should be taken into account by a tribunal of fact necessarily varies with the circumstances of the particular case. And there is nothing in the circumstances of the present case to suggest that the Tribunal did not take into account the language difficulties facing the appellant, or his lack of representation at the transfer interview.

9.

27 The appellant's argument seeks to minimise the differences between the appellant's account of the reasons for leaving Iran given in his transfer interview and that given in his refugee status determination interview by suggesting that the only significant difference was his failure at the transfer interview to mention that his father was a "drug addict". On any fair reading of the record of the two interviews, the differences are much more substantial and significant.

28 The written record of the transfer interview, which was before the Tribunal, contained a section, "Part A", which advised the interviewee that "[t]he purpose of this interview is to gather information about you and your circumstances for the Government of Nauru". It also stated that "the information that you give will ... be read and used by the people who will be assessing your claim for refugee status. It may be compared against the information you give in your refugee application." "Part C" includes Question 1 – "Why did you leave your country of nationality (country of residence)?" In this case, the completed box under Question 1 recorded a reasonably detailed answer given by the appellant, and further questions from the interviewer including "What do you think would happen to you if you were to return to Iran?" It can be seen that the appellant's answer not only described abuse by his father, but gave an explanation as to *why* he had been abused. The appellant explained that his father was an "alcoholic", and that his father "forced [the appellant] to go and work, bring money home". In his refugee status determination interview, the appellant made different claims concerning his father's drug use and trafficking; thereafter, such claims assumed central significance in his claim to be a refugee. It was open to the Tribunal to be concerned that, while the appellant volunteered details of the domestic violence that he suffered at his father's hands in his transfer interview when the issue of why he left Iran was squarely raised, it did not occur to him to mention that this domestic violence took place in the context of the appellant's being embroiled in his father's illegal drug trafficking.

29 Finally under this heading, it is simply not to the point to argue that the transfer interview was not part of the refugee status determination process. No-one suggested that it was – certainly not the Tribunal. While it may be that the appellant did not turn his mind consciously to the pursuit of his claim for refugee status at the time of the transfer interview, the Tribunal was entitled to note, and weigh the significance of, his failure to volunteer that his father had embroiled him in the distribution of illicit drugs in Iran.

The Tribunal's consideration of the appellant's claims

30 In this Court the appellant submitted that he had a political profile that meant that he would face a real possibility of harm on return to Iran as a failed asylum seeker from the West. His argument in support of this claim, referred to as "the particular claim", was focused upon the statement in his transfer interview

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that he had been involved in the 2009 demonstrations against the outcome of the Iranian election. As to "the general claim" that he faced a real risk of harm as a failed asylum seeker per se, there was country information before the Secretary and the Tribunal which indicated that persons returning to Iran were persecuted by Iranian officials because they were failed asylum seekers per se. The appellant argued that neither of these matters was properly considered by the Tribunal, and that the Tribunal erred by failing to consider these integers of his claim for protection.

31 The respondent submitted that the appellant did not make the particular claim, and that the Tribunal considered and determined the general claim. The respondent's submissions must be accepted.

The particular claim

32 At the transfer interview the appellant stated that "[i]n 2009 I was involved in demonstrations, mainly in the evening – about the election". This was evidently a reference to the controversial election in Iran in 2009, and the popular demonstrations that ensued. The appellant's involvement in the 2009 demonstrations was not mentioned specifically by the Secretary in his reasons or at all in the Tribunal's reasons.

33 The Secretary found that "the likelihood of a returned asylum seeker coming to harm on return to Iran is proportionate to the political profile that they have". The Secretary observed further that:

"in all examples [of failed asylum seekers facing 'difficulties' on return] it related to people who had partaking [sic] in activities either in Iran or outside Iran that were clear illustrations of anti-government sentiment such as well covered demonstrations. A person such as the [appellant], who was not politically active or had a profile [sic], will not be a person of particular interest to the authorities in Iran."

34 The answer given in his transfer interview, that he was involved in the 2009 demonstrations against the election, is the foundation for the appellant's contention that he advanced the particular claim. However, at no stage did the appellant suggest, whether in his transfer interview, his application for refugee status, his refugee status determination interview, or any of his later statements, that he had an actual fear of being harmed by Iranian authorities as a result of a political profile associated with his participation in the 2009 demonstrations. It might be said that it is hardly surprising that he made no such suggestion, given that the demonstrations had occurred four years before he left Iran and he had apparently suffered no retaliation by the authorities. It would also strain too far to suggest that such a fear, if actually entertained, was well-founded.

11.

35 The appellant did not offer further information about his participation in Iranian politics at the transfer interview. In his application for refugee status, he advanced only the general claim to fear harm as a failed asylum seeker; the only "imputed political opinion against the Iranian regime" was said to arise from his association with his father. Moreover, the appellant's submissions to the Tribunal, to the extent that they were critical of the Secretary's decision, said nothing concerning the Secretary's failure to consider the 2009 demonstrations, notwithstanding the identification of several bases for why the appellant feared harm from Iranian authorities for his "actual/imputed political opinion" and as a failed asylum seeker, nor was the point raised by the appellant during the Tribunal hearing or in the further submissions to the Tribunal filed after the hearing.

36 In truth, the appellant did not advance a claim to fear persecution in Iran as a result of a political profile generated by his involvement in the 2009 demonstrations. There was no such claim for the Tribunal to consider. As Gleeson CJ said in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*⁴:

"on judicial review, a decision ... must be considered in the light of the basis upon which the application was made, not upon an entirely different basis which may occur to an applicant, or an applicant's lawyers, at some later stage in the process".

The general claim

37 The Tribunal, having said that it considered "the country information cited in the Secretary's decision" and "the submissions together with more recent DFAT reporting", rejected the appellant's claim that asylum seekers per se faced discrimination on return to Iran. The appellant put country information to the contrary effect before the Tribunal. In this Court, he submitted that he had raised an issue which the Tribunal was duty-bound to resolve, and that it had failed to do so.

38 The country information provided on behalf of the appellant to the Tribunal included an Amnesty International report of 2012, quoting an Iranian judge who said that "[a]sylum seekers are interrogated on return, whether or not they have been political activists in Iran or abroad". The appellant also provided detailed examples of asylum seekers who were arrested, detained for extended periods and beaten, without an apparent history of political involvement.

4 (2003) 216 CLR 473 at 479 [1]; [2003] HCA 71.

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39 The Tribunal found that persons possessing certain profiles, including "student activists, Arab political activists, criminals and asylum seekers who have received Western media attention", may be subject to harm on return to Iran; but that there was "nothing in the information to indicate that the act of applying for asylum in itself attracts harm or that those who [are] without these identified profiles are at risk of harm".

40 In its reasons, the Tribunal accepted that some failed asylum seekers may be subject to harm on their return to Iran, but was not satisfied that the act of applying for asylum itself would attract harm, without a pre-existing political profile. The Tribunal found there was "no other evidence before [it] to indicate that [the appellant had] come to the adverse attention of the authorities or that he would do so following his return".

41 It is to be noted that the lawyers representing the appellant in the hearing before the Tribunal stated in written submissions to the Tribunal:

"The Tribunal referred to country information to indicate that [the appellant] did not have a sufficient profile to attract adverse attention of Iranian authorities should he be returned. We agree that failed asylum seekers per se may not face harm solely on the basis of seeking protection; however, case law indicates that the Tribunal should not look at the client's circumstances in isolation."

42 The country information as to the likelihood that failed asylum seekers, without a political profile, would suffer persecution was not all one way. It was necessary for the Tribunal to come to a conclusion on the issue. And it did. In that regard, the Tribunal was justified in acting upon the appellant's lawyers' written submission as an acknowledgment that the Tribunal was not bound to regard the mere fact that he would return to Iran as a failed asylum seeker as a basis for a well-founded fear of persecution.

43 Accordingly, it was open to the Tribunal to reject the general claim.

Orders

44 The application for leave to amend the notice of appeal should be refused.

45 The appeal should be dismissed with costs.

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