



IN THE SUPREME COURT OF NAURU

AT YAREN  
[APPELLATE DIVISION]

Case No. 16 of 2015

IN THE MATTER OF an appeal against a  
decision of the Refugee Status Review  
Tribunal TFN 14025, brought pursuant to  
s43 of the *Refugees Convention Act 2012*

BETWEEN

DWN113

Appellant

and

THE REPUBLIC

Respondent

Before: Crulci J

Appellant: A. Krohn

Respondent: S. A. Walker

Dates of Hearing: 12, 13 April 2016

Date of Judgment: 9 November 2016

**CATCHWORDS**

APPEAL - *Refugees* – *Refugee Status Review Tribunal* – *Internal relocation* –  
*Appellant's personal circumstances and previous actions are relevant considerations*  
– *Refugees Convention Act 2012*

## JUDGMENT

1. This is an appeal from a decision of the Refugee Status Review Tribunal ('the Tribunal') given on the 28 December 2014 affirming a decision of the Secretary for the Department of Justice and Border Control ('the Secretary') made on the 18 July 2014 that the appellant is not recognised as a refugee as defined under the 1951 Convention relating to the Status of Refugees ('the Convention') and is not a person to whom Nauru owes complimentary protection under the *Refugees Convention Act 2012* ('the Act').
2. The appellant appeals on two grounds - firstly in relation to the Tribunal's findings, as a basis for refusing to recognise him as a refugee, that the appellant could safely and reasonably relocate within Pakistan. The second ground relates to whether the appellant is owed complementary protection in relation to Nauru's international obligations.

### **The Tribunal under the Act**

The Tribunal is a creature of statute and the Act relevantly sets out the establishment, constitution, powers, merits review and procedures.

#### 3. Section 22 Way of Operating

The Tribunal:

- (a) is not bound by technicalities, legal forms or rules of evidence; and
- (b) must act according to the principles of natural justice and the substantial merits of the case.

#### 4. Section 31 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;
- (b) a decision to decline to make a determination on the person's application for recognition as a refugee;
- (c) a decision to cancel a person's recognition as a refugee (unless the cancellation was made at the request of the person)

...

#### 5. Section 36 Tribunal may seek information

6. In conducting a review, the Tribunal may:

- (a) invite, either orally (including by telephone) or in writing, a person to provide information; and
- (b) obtain, by any other means, information that it considers relevant.

#### 7. Section 34 Decision of Tribunal on application for merits

...

(4) The Tribunal must give the applicant for review and the Secretary a written statement that:

- (a) sets out the decision of the Tribunal on the review; and
- (b) sets out the reasons for the decision; and
- (c) sets out the findings on any material questions of fact; and
- (d) refers to the evidence or other material on which the findings of fact were based.

## **Background**

8. The appellant was born and lived in Malakguklrihman Qalai Jamrud, in Kyber Agency, Federally Administered Tribal Areas in Pakistan. He is a married man with two young children, he is a Sunni Muslim of Pashtun ethnicity, and identifies as being a member of the Afridi tribe.
9. In July 2013 the appellant left Pakistan and travelling through Indonesia boarded a boat for Australia seeking asylum. The appellant was detained by the Australian authorities for approximately a month on Christmas Island after which he was moved to Nauru on 7 September 2013.
10. The appellant is well educated, with a Bachelor of Arts degree and subsequently working as a teacher until returning to university for postgraduate study. In addition to working as a teacher he also worked in his father's businesses those being a small furniture factory and a clothing warehouse.
11. The appellant's claims for asylum before the Secretary for Justice and Refugee Status Review Tribunal ('the Tribunal') are based on contacts with the Taliban. The appellant's cousin was killed by the Taliban after refusing to join them and he has brothers residing in three overseas countries having sought asylum as a result of interactions with the Taliban.
12. The appellant believed that he came to the attention of the Taliban as he has a cousin who is a long-time member of the Taliban. He was contacted by telephone instructing him that he join the Taliban or show support financially, and was warned of the consequences of non-compliance. Having later voiced his refusal to join or assist, the appellant was involved in an incident where he was followed in the market and being fearful for his safety he reported the matter to the local police who escorted him home, noting that they could not protect him.
13. The appellant sought safety by relocating to Rawalpindi but later returned home having been contacted in Rawalpindi by the Taliban who indicated that they knew where he was and could locate and kill him anywhere. Not long after returning home the outside of his house was fired upon, killing one of his dogs, and a

telephone call was received to the effect that he was lucky on that occasion not to have been killed. He sent his wife and young children away to live with her family and made arrangements to leave Pakistan and seek asylum.

14. The Tribunal accepted that<sup>1</sup>:

- the appellant's cousin was killed by the Taliban in 2011;
- another of the appellant's relatives was killed in 2008;
- some of the appellant's brothers may have left Pakistan because of problems with the Taliban;
- one of the appellant's brothers was kidnapped upon returning from the United Kingdom and released upon payment of a ransom;
- a cousin of the appellant is a senior member of the Taliban and a likely source of information about the appellant and his family to the Taliban;
- the appellant was approached by the Taliban either to join them or to provide finance for them 'on pain of punishment potentially including death if he refused';
- the appellant was threatened again a week later and some 10 days later again pursued in the market by Taliban militants;
- as a result he fled to Rawalpindi and there received another threatening phone call that the Taliban could find and kill him anywhere;
- upon the appellant returning home his house was sprayed with gunfire and a phone call made by the Taliban to the appellant warned him that he would be killed.

15. In light of the above findings the Tribunal stated that it found on balance:

"... the threat of harm facing the applicant is a real one, and accepts that some Taliban militants in the Jamrud areas where the applicant resided maintain an adverse interest in him. The Tribunal is satisfied that if the applicant returns to Peshawar there is a real possibility that he will once again encounter those Taliban members who have threatened him in the past, in which eventuality he will suffer persecution at their hands for the Convention reasons of his imputed political opinion and religion.

Conclusion about risk of Convention persecution in the applicant's home area

Having carefully considered the applicant's Convention claims, including cumulatively, the Tribunal is satisfied that he has a well-founded fear of being persecuted for Convention reasons in the event he returns to his home areas in Pakistan." <sup>2</sup>

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<sup>1</sup> Refugee Status Review Tribunal 28 December 2014 [52-55]

<sup>2</sup> Ibid [56, 57]

16. The Tribunal then considered at some length whether relocation within Pakistan was open to the appellant at a location that he could access 'practically, safely and legally'<sup>3</sup>? Whether relocation would be reasonable in that the appellant 'could, if relocated, lead a relatively normal life without undue hardship in all the circumstances?'<sup>4</sup>
17. Based on the written and oral submissions before it the Tribunal made the following determination in relation to the question of the appellant being able to be relocated within Pakistan away from his home area of Malakguklrihman Qalai Jamrud, in Kyber Agency:
- (a) Tribunal does not accept that the appellant fits the at risk higher profile of those who have betrayed militant organisations, rather he is someone who has simply refused the Taliban overtures;
  - (b) the Tribunal does not accept that the Taliban operatives would go to the effort of tracking down the appellant in other parts of Pakistan such as Punjab;
  - (c) even if the Taliban were to try to locate the appellant the Tribunal concluded that there was no reasonable possibility of the appellant being located;
  - (d) the Tribunal rejected the proposition put by the appellant that Pashtuns generally are treated in a way that is, for a Convention reason, discriminatory, or degrading to enliven Nauru's protection obligations;
  - (e) the Tribunal considered the appellants' personal attributes of being well-educated, experienced in different professions and fluent in Urdu, English and Pashto, concluding that 'there would therefore appear to be no financial obstacle to relocation nor any basis for his claim that it would be difficult for him to integrate'<sup>5</sup>.
18. In relation to what could reasonably be expected of the appellant in terms of his behaviour and conduct the Tribunal indicated:
- "...[it] did not expect the applicant to live in hiding in order to avoid the threat of persecution, it equally considers it to be a not unreasonable curtailment of his fundamental freedoms to expect the applicant and his immediate family to refrain from telling the extended family where he has relocated to in order to prevent this information from coming to the attention of the Taliban."<sup>6</sup>
19. The Tribunal concluded that as the appellant could relocate within Pakistan and could 'lead a relatively normal life without facing undue hardship in all the

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<sup>3</sup> ibid [58]

<sup>4</sup> ibid [74]

<sup>5</sup> ibid [62] 963],[76]

<sup>6</sup> ibid [62]

circumstances'<sup>7</sup> that he is not a refugee for Convention reasons. Furthermore having determined that the treatment to Pashtuns does not amount to degrading treatment, Nauru does not owe the appellant complementary protection.

### **Issues raised on appeal**

20. The first ground relates to Tribunal's findings that the appellant could safely and reasonably relocate within Pakistan and therefore is not recognised as a refugee. It was submitted on appeal that the Tribunal finding that the appellant could safely live outside of his home area, views the harm to him as localised. This finding overlooks, it is submitted, the probability of future harm to appellant arising from his beliefs and willingness to speak out. The appellant contends that is a real possibility that the appellant will oppose Taliban outside FATA and thereby be seriously harmed. As he has a well-founded fear of persecution within his home area, this well-founded fear extends to his whole country of nationality and internal relocation is not a safe option; therefore he is a refugee for a Convention reason.

21. The appellant's previous response to the Taliban's attempt at recruitment should have raised an apprehension by the Tribunal that the appellant would be likely to react the same way when he was faced with similar situations elsewhere; similarly it was submitted that he has a risk profile that places him in Taliban's sights as an employed person, earning money wherever he may be in Pakistan. Furthermore, the appellant's counsel submitted that the Tribunal failed to contend with the question of relocation with family (and only looked at relocation of the appellant as a single man). The Tribunal's statement that the appellant and his wife's family could essentially be 'discrete' in not disclosing their new address in Pakistan coupled with the Taliban's networks of informers throughout Pakistan militates against successful relocation.

22. In relation to ground two, the appellant argued that the Tribunal did not grapple with Nauru's complementary obligations under international law; failed to consider how degrading treatment can form serious discrimination; nor did the Tribunal consider whether there was an infringement of Nauru's international agreements.

23. The respondent resists the appellant's claims firstly by asserting that they are criticisms of the Tribunal's failure to consider or have regard to items of evidence and this does not amount to an error of law. If however this Court were to find that the issues raised by the appellant regarding internal protection were legally relevant then the respondent submits that the appellant gave no evidence of a past 'protest' in relation to the Taliban. As no future intention to do so<sup>8</sup> was

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<sup>7</sup> Ibid [77]

<sup>8</sup> Respondent's written submissions, 2 March 2016 [85]

raised before the Tribunal, there was consequently not a failure on behalf of the Tribunal to respond. Moreover the appellant did not raise before the tribunal difficulties of relocating with his family.

24. The respondent accepts that there are circumstances where a misinterpretation or misapplication of the relevant law may amount to an error of law under the Act, but submits that in this matter it is an attempt to have this Court encroach upon the area of fact-finding, and that this is not permitted. This case is to be distinguished from *S395*<sup>9</sup>, as requiring the appellant to '*refrain from telling the extended family*' the relocation destination is not an infringement of one of the grounds protected by the Convention.
25. In relation to ground two the respondent submits that the Tribunal's consideration of whether the appellant was owed complimentary protection continued on from its factual findings in relation to recognition as a refugee and did in fact consider the international obligations against the facts found; the Tribunal was under no obligation to enumerate each international obligation in turn.

### Considerations

26. In determining whether the appellant is to be recognised as a refugee or not, the Tribunal considered the inclusion clause Article 1(A)(2) of the Convention whereby the term "refugee" shall apply to any person who:
27. '*...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 his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...*'
28. The question of whether there is somewhere else in the country of citizenship that an applicant can safely and reasonably live, only arises once an applicant has been determined to have a 'well-founded fear' where they live, for Convention reasons. The second step then is to consider whether an apppellant is able to be protected from the risk of persecution for the Convention reason in another part of the country of citizenship.
29. This has been variously referred to as an internal flight, internal relocation or internal protection alternative and the criteria for determining whether this is an avenue open to the appellant has been the subject of much academic and extra-judicial debate<sup>10</sup>.

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<sup>9</sup> *Applicant S395 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473

<sup>10</sup> International Journal of Refugee Law, various articles; *The Refugee in International Law*, G.S. Goodwin-Gill and J. McAdam, 3<sup>rd</sup> Edition at 123; *The Law of Refugee Status*, J.C Hathaway and M. Foster, 2<sup>nd</sup> Edition, at 332; *The Meaning of "Protection" within the refugee definition*, Hugo Storey, Refugee Survey Quarterly, Aug 2016

30. Hathaway and Foster in *The Law of Refugee Status*, adopted the terminology 'protection' in the Convention and proposed four questions for consideration in determining whether another location within the country of nationality offers a real alternative available to an applicant:

(a) is the proposed site of internal protection *in fact* accessible to the applicant? (ie practically, safely, and legally accessible)

(b) does it provide an antidote to the well-founded fear of being persecuted identified in the applicant's place of origin?

(c) is the quality of the internal protection available such that the applicant would not face a new risk of being persecuted or of being effectively forced back to her place of origin?

(d) is the home country able to provide affirmative state protection in line with international standards to the applicant in the proposed place of internal protection? <sup>11</sup>

This Court finds much merit in their proposed assessment method.

31. The fourth question posited above accords with the observations made in *Yogathas*<sup>12</sup> by Lord Bingham:

*"The appellant's second contention relates to what has been called, not very happily, "internal flight". I agree with Lord Hope and Lord Scott that "internal relocation" is a better expression because it focuses attention on the real question, which is whether a person liable to persecution in one part of the country would be adequately protected by the state if relocated in another part to which he would in practice be returned."*

32. Kirby J in *Wu Shan Liang*<sup>13</sup> laid out the principles for consideration when conducting reviews of decisions of like tribunals, highlighting the dangers of 'combing through the words of the decision maker with a fine appellate tooth-comb' and the dangers of 'turn(ing) a case of judicial review into, effectively, a reconsideration of the merits'.

33. While the principles to be applied on appeal of matters from tribunals have a commonality, cases in relation to the determination of recognising refugee status have a discrete element as noted by Lord Bridge of Harwich in *Bugdaycay*:<sup>14</sup>

*"I approach the question raised by the challenge to the Secretary of State's decision on the basis of the law stated earlier in this opinion, viz that the resolution of any issue of fact and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State subject only*

<sup>11</sup> *The Law of Refugee Status*, J.C Hathaway and M. Foster, 2<sup>nd</sup> Edition, at 342

<sup>12</sup> *R(Yogathas) v Secretary for State for the Home Department*, [2003] 1 AC 920 (UKHL, Oct. 17, 2002), at 926 [6]

<sup>13</sup> *MIEA v Wu Shan Liang* (1996) 185 CLR 259, at 291

<sup>14</sup> *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514 at 531F



*to the court's power of review. The limitations on the scope of that power are well known and need not be restated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."*

34. This appeal falls to be considered under section 43(1) of the Act 'against that decision on a point of law.' An error of law may arise if the Tribunal fails to comply with the requirements of the Act. Or an error of law may arise in how the Tribunal determined a question of fact, by for example misinterpreting the applicable law; showing bias; failing to take account of relevant matters; or demonstrating unreasonableness in its determinations. In determining whether the appellant could safely and reasonably move to live in another part of Pakistan, the Tribunal was required to take into account the appellant's circumstances as a whole.
35. It was accepted by the Tribunal that the appellant's previous defiance of the Taliban placed him within Article 1(A)(2) of a well-founded fear of persecution for a Convention reason. The appellant stated: "*The reasons I gave them was that I feared for my life if I helped them and told them they were cruel and unjust to harm people and forcefully recruit people. I said I wanted peace and could not help them because they were against humanity*"<sup>15</sup>. As a result of this refusal the appellant had been pursued and the Taliban subsequently threatened him that he would not be safe anywhere in Pakistan, and they could kill him wherever he went.<sup>16</sup>
36. The appellant raised concerns relating to his family's welfare stating that he went into hiding and "*could not even see my wife as I feared she would be harmed by the Taliban*"<sup>17</sup> and clarified this by "*Prior to my departure from Pakistan, I was afraid to spend too much time with my wife and children because I feared that the Taliban would follow and target me, and that they might get caught up in the Taliban's attack on me. By staying away from my family, I minimised the risk to them*".<sup>18</sup>

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<sup>15</sup> Appellant's statement to the Secretary for Justice in support of his application to be recognised as a refugee, 11 December 2013 [16]

<sup>16</sup> *Ibid* [24]

<sup>17</sup> *Ibid* [27]

<sup>18</sup> Appellant's further statement to the Secretary for Justice in support of his application to be recognised as a refugee, 5 August 2014 [25]

37. As noted by the High Court of Australia in *Guo*:

“In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future. It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events.”<sup>19</sup>

38. The appellant has demonstrated a willingness to speak out and refuse the Taliban in the past. He has lived separately from his family in Pakistan to ensure their safety. It is no antidote to the well-fear of persecution for the Tribunal to suggest that “*While the Tribunal does not expect the applicant to live in hiding in order to avoid the threat of persecution, it equally considers it to be a not unreasonable curtailment of his fundamental freedoms to expect the applicant and his immediate family to refrain from telling the extended family where he has relocated to in order to prevent this information from coming to the attention of the Taliban.*”<sup>20</sup>

39. In effect the Tribunal is saying that it is reasonable for the appellant's safety to be based on the discretion of his and his wife's family or friends not to discuss their location within Pakistan (and by extension the restrain his young children from disclosing where their home area is), so as to keep their location hidden from the Taliban in his home area; or in the alternative that it is reasonable for the appellant to live in Pakistan estranged from his wife and children so as to minimise any collateral harm that may come to them as a result of being with the appellant. Both of these scenarios envisage that the appellant will modify his past behaviour and react differently if approached in the new location by the Taliban.

40. The respondent submitted that the appellant did not raise with the Tribunal concerns about relocation with his family. It is the view of this Court, having considered *Htun*<sup>21</sup>, that it cannot be said that the appellant abandoned his claim as to concerns regarding his family's safety and ability to relocate because the Tribunal did not question him about it; these concerns were in the submissions placed before the Tribunal.

41. In determining whether the question of possible relocation/ internal flight/ internal protection the Tribunal was required to take into account the appellant's circumstances as a whole. The appellant's previous defiance of the Taliban and his personal family circumstances are both relevant considerations in deciding

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<sup>19</sup> *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* [1997] HCA 22 (13 June 1997), at 575

<sup>20</sup> *Ibid* [62]

<sup>21</sup> *Htun v Minister for Immigration and Multicultural Affairs* (2001) 199 ALR 244

whether the appellant could live elsewhere in Pakistan and be free from persecution for a Convention reason.

42. It is the opinion of this Court that the tribunal failed to adequately explore these material and relevant considerations, and in failing to do so, erred in its determination that the appellant 'could, if relocated, lead a relatively normal life without undue hardship in all the circumstances'.<sup>22</sup> For the reasons above, ground one of the appeal succeeds, and the appeal is allowed. Having made a determination in relation to ground one it is not necessary to go on and consider the matter of Nauru's complementary obligations under international law and / or whether there was an infringement of Nauru's international agreements.

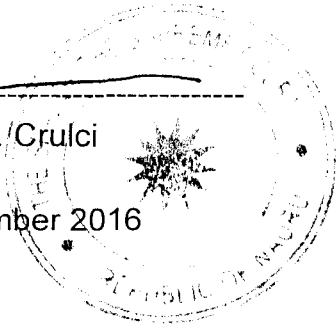
43. The Court wishes to convey its gratitude to Mr. Anthony Khron and Mr. Stephen Walker, and those instructing them, for their comprehensive and careful submissions which considerably assisted in the disposition of the matter.

#### Order

- (1) The Court extends the time for the appellant to file a notice of appeal pursuant to section 43(5) of the *Refugees Convention Act 2012*
- (2) The appeal is allowed.
- (3) The decision of the Tribunal dated the 28 December 2014 is quashed.
- (4) The matter be remitted to the Refugee Status Review Tribunal for reconsideration according to law.

Judge J. E. Crucci

Dated: 9 November 2016



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<sup>22</sup> Paragraph 17 above