



IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 66/2015

Being an appeal against a decision of the Nauru Refugee
Status Review Tribunal brought pursuant to s43 of the
Refugees Convention Act 2012

BETWEEN

YAU027

APPELLANT

AND

The Republic of Nauru

RESPONDENT

Before: Khan, J
Date of Hearing: 26 July 2016
Date of Judgement: 5 May 2017

Case may be cited as: YAU027 –v- The Republic

CATCHWORDS:

Whether the Tribunal acted unreasonably and or irrationally – and failed to accord the appellants procedural fairness or natural justice.

Appeal dismissed- held that that the Tribunal accorded the appellants procedural fairness and natural justice.

APPEARANCES:

Counsel for the Appellant: A Krohn
Counsel for the Respondent: A Mitchelmore

JUDGMENT

INTRODUCTION

1. The appellant filed an appeal against the decision of the Refugee Status Review Tribunal (the Tribunal) pursuant to the provisions of s43 of the Refugees Convention Act 2012 (the Act) which states: -

- (1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against the decision on a point of law.

2. The Tribunal delivered its decision on 22 May 2015 affirming the decision of the Secretary that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.
3. The appellant filed an appeal in this Court on 30 October 2015 and the grounds of appeal were amended on 12 July 2016.

BACKGROUND

4. The appellant is a citizen of Bangladesh. His date of birth is 30 December 1985. He is single, a Muslim. (In the appellant's written submission he was described as being a single man in his 20's and also a Hindu.)
5. He received education up to grade 5 and left schooling in 1999.
6. He was employed on the family farm.
7. He left Bangladesh on 15 March 2013 for Indonesia via Malaysia.
8. In November 2013 he travelled to Christmas Island by boat and in December 2013 he was transferred to Nauru.
9. The applicant claimed to fear persecution and serious harm:
 - By the authorities of Bangladesh and by members of the ruling party in Bangladesh, the Awami League (AL) because of political opinion as a member of the Jatiotabida Chatra Daal, the student wing of Bangladesh National Party (BNP).
 - By the authorities of Bangladesh and members of AL because of political opinion (as opposed to them); and
 - By members of the family of a young woman with whom the appellant had an intimate relationship, because of either political opinion (because her family are active members of AL) or membership of a particular social group (as man perceived to have committed sexually immoral acts in Bangladesh).

APPLICATION TO THE SECRETRY

10. On 23 December 2013, the appellant attended a Transfer Interview.
11. On 28 February 2014, the appellant applied to the Secretary for the Department of Justice and Border Control (the Secretary) for Refugee Status Determination (RSD) for recognition as a refugee and for complementary protection under the Act.

12. On 2 November 2014 the Secretary handed down his determination that the appellant was not recognised as a refugee and was not owed a complementary protection under the Act.

APPLICATION TO THE TRIBUNAL

13. The appellant made an application for review of the Secretary's decision pursuant to the provisions of s31 of the Act which provides:

- 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 at the request of the person).
 - d) A determination that the person is not owed complementary protection.

14. On 16 March 2015, the appellant's lawyers, Craddock Murray Newmann, made written submissions to the Tribunal and on 26 March 2015 the appellant appeared before the Tribunal to give evidence and present his arguments. He was assisted by his lawyer and an interpreter in Bangli and English language.

15. The Tribunal handed down its decision on 22 May 2015 affirming the decision of the Secretary that the appellant is not recognised as a refugee and was not owed complementary protection under the Act.

THIS APPEAL

16. The appellant filed one ground of appeal particulars of which is as follows:-

Ground 1 – Error of law – the Tribunal acted unreasonably and irrationally and/or failed to accord the appellant procedural fairness or natural justice.

Grounds (a) and (b) – No evidence at the Transfer Interview that the appellant joined the BNP at the invitation of his father.

Grounds (c) and (d) – No evidence at the RSD stage that the appellant joined the BNP at the invitation of his father.

Grounds (e) and (f) – The appellant's reason for not earlier disclosing his relationship with the woman he loved.

Ground (g) – Whether evidence that the appellant said at the Transfer Interview that his father was still active in politics.

Ground (h) – The appellant's explanation for not earlier being active in politics.

Ground (ha) – Why the appellant was involved with Chatra Daal.

Ground (hb) – Inconsistency – only 2 threats mentioned at the Transfer Interview.

Ground (hc) – Whether significantly differing versions of incident in February 2013.

Ground (hd) – Whether the AL would find the appellant’s hiding place.

Ground (he) – Timing of the claim to have had an intimate relationship with the unmarried daughter of an AL supporter.

Ground (hf) – Whether the appellant had a love affair and an intimate relationship with the unmarried daughter of an AL family.

SUBMISSIONS

17. Both counsels have filed very comprehensive written submissions in this matter and have also made oral submissions at the hearing. The submissions were of great assistance to me and I am grateful to both counsels.

CONSIDERATION

Ground 1 – Error of law - the Tribunal acted unreasonably and irrationally and/or failed to accord the appellant procedural fairness or natural justice.

18. The appellant submits as follows:

On this ground of appeal at [32], [33], [34], [35], [36], [37] and [38] as follows:

[32] The question of the satisfaction of the Tribunal as to a matter of fact is in general a matter for the Tribunal provided it proceeds reasonably and on the basis of some evidence.

[33] It is well established, however, that if a statutory Tribunal is required to act judicially, it must act ‘rationally’ and ‘reasonably’ – *Australian Broadcasting Tribunal v Bond*¹.

[34] While the Tribunal in the present matter is inquisitorial in the sense of engaging in review on merits with powers (and their duty) to enquire, without being bound by the rules of evidence and without a contradictor, it is also judicial in that it is required to give reasons and therefore by necessary implication, to act reasonably in the sense of rationally on the basis of logically probative evidence.

[35] An error about the evidence before the Tribunal can be a reason for the Tribunal to err in law by basing a finding on the evidence which does not exist.

¹ [1990] HCA33; [1990] 170CLR321 at p367 per Dean J

- [36] Unreasonable, therefore in proceeding without evidence for a finding, or in the sense of Wednesbury unreasonableness indicates a failure by the Tribunal to discharge its statutory task and therefore error of law.
- [37] For the reasons set out below, in relation to each particulars of the amended notice of appeal, the Tribunal was unreasonable in this sense.
- [38] At its heart, the unreasonableness of the Tribunal lay in the following kind of error, namely, that the Tribunal made some critical findings (which were the foundation for its ultimate rejection of the credibility of the appellant's central claims) without having probative evidence for those findings – or even, in some cases, having contrary evidence only for those findings. In some cases, the Tribunal based its findings not on evidence, nor on matters of which it was entitled to take notice but assumption and presumption.

Grounds (a) and (b) – no evidence at the Transfer Interview that the appellant joined the BNP at the invitation of his father

19. The appellant submits that the Tribunal found that the appellant had given evidence at the Refugee Determination stage that he joined the BNP at the invitation of his father. The appellant submits that he did not give this evidence and that there was no basis for the finding that he gave such evidence.
20. The respondent submits that the Tribunal listened to the hearing of the RSD interview and then put to the appellant that he was invited to join BNP by his father and the appellant accepted that:

[Tribunal member]: Why I'm asking this ... is because your original interview when you first arrived in Nauru, you gave a very definite reason for interest in Chatra Daal or BNP. I mean, that there was a very definite reason. It was because your father was a member of the BNP ... not only that he was on a committee of 10 people in the village and you said that you and your father would go along to BNP meetings. And, then, following that, at your second interview, you said, in fact, your father invited you to join the BNP. So, I mean I just find it a little hard to understand why you wouldn't have mentioned that when I was asking you what lead you to the BNP. Could you comment on it?

[The Interpreter]: I don't remember. I couldn't recollect.

[Tribunal Member]: Right. But that's right is it, that your father was a member of the BNP and he used to go along to BNP meetings and he invited you to join the party?

[The Interpreter]: I just followed my father. Whatever he wanted to do, I just tried to follow those things. (BOD p114).

21. The respondent further submits that the above reveals that the Tribunal considered that the extent of the appellant's evidence at the Transfer Interview was that his interest in Chatra Daal or BNP arose because his father was a member of the BNP. This ground of appeal has no basis and is dismissed.

Grounds (c) and (d) – No evidence at the RSD stage that the appellant joined the BNP at the invitation of his father

22. The ground was addressed in paragraphs 19, 20 and 21 above, so there is no need for me to deal with this ground any further.

Grounds (e) and (f) – The appellant’s reason for not earlier disclosing his relationship with the woman he loved

23. The appellant submits that the Tribunal did not find that the appellant’s explanation as to why he did not describe his relationship with the woman he loved until the application to the Tribunal was ‘implausible’ and further in making that finding the Tribunal did not consider the appellant’s explanation for his failure to disclose the relationship earlier, namely that his parents would be tortured if people in Bangladesh came to know about this relationship.
24. The respondent submits that there was an exchange between the Tribunal and appellant which is as follows:

[Tribunal member]: This was a very dramatic and memorable situation. You had a love affair which is broken up by the girl’s parents. They want to kill you. They tried to do it once. Then you hear that they are going to hire somebody to kill you, and they’ve given pictures to the people to help. So why don’t you make any mention of it in your Transfer Interview when you first arrived in Nauru, or first statement, or your RSD interview?

[The Interpreter]: Because – because of fear. Because if somehow they learn about this then they are going to torture my parents.

[Tribunal member]: But I mean, this is when you are in Nauru why wouldn’t you talk about it when you are in Nauru?

[The Interpreter]: Because I’m – I’m in love with her, because I had sexual relationship with her, I didn’t want to relive this because I wanted to keep it - ... I didn’t tell it. Because now I’m facing the problem and facing the danger, yes, so I don’t have a choice. I have to disclose. I’ve told you what has happened. All things about me to you.

25. The respondent further submits at [50] of its written submissions:

[50] Further, and in any event, the Tribunal was not required to refer separately, in its reasons, to the various explanations given by the appellant for each and every inconsistency and implausibility in his evidence. The Tribunal considered the appellant’s explanation for his failure to raise the relationship earlier in the process, but found that it was not plausible that the appellant’s reluctance to do so would prevent him explaining a vital concern affecting his safety. The Tribunal was required to give the reasons for its decision, not the

sub-set of reasons why it accepted or rejected pieces of evidence. *Durairajasingham*².

26. I accept the respondent's submissions and therefore this ground of appeal is dismissed.

Ground (g) – Whether evidence that the appellant said at the Transfer Interview that his father was still active in politics

27. The appellant submits that the Tribunal found inconsistency in the appellant's evidence whether his father was still politically active. In coming to this conclusion the appellant submits that the Tribunal relied on the Transfer Interview which was not recorded verbatim. The Transfer Interview states:

“My father is involved in politics. Local member committee of village members. There is 10 of them and my father is one of them.”

And your father a member, you are also a member. You both attend meetings? And yes.” (Transfer Interview, page 8, part C, Q.1”

28. It is submitted that given the limitations of the Transfer Interview the use of the present tense to narrate a state of affairs is not correct.
29. The respondent in response submits that the Tribunal's statement, that the evidence '(the appellant) offered at his TI ... appeared to indicate that his father was still involved in politics with BNP and that he and the applicant both attended meetings. (DR [19] was accurate, fair and unexceptional. It was not made in the absence of evidence or foundation.
30. I accept the respondent's submission so this ground of appeal is dismissed.

Ground (h) – the appellant's explanation for not being active in politics.

31. The appellant submits at [48], [49], [50] and [51] as follows:

[48] In considering reasons why the appellant 'is unable to be satisfied that [the appellant's] claims are credible' (DR [17], it noted the appellant's suggestions that he did not earlier become active in politics because of his young age and work on the farm but said that:

“... the Tribunal is not satisfied that I provide a convincing explanation as to why, he had genuinely followed a pathway to political activism through his politically committed father, his only involvement with his chosen party before the age of 18 would have been to attend occasional meetings and rallies.” (Decision, [20])

² (2000) 58 ALD 609, 625 [67]

[49] This finding by the Tribunal was unreasonable, irrational and not founded on probative evidence for two reasons.

[50] First, it was not founded on probative evidence because the Tribunal had no evidence for the Tribunal's premise that the appellant 'had genuinely followed a pathway to political activism through his politically committed father'.

[51] Secondly, this finding was unreasonable because the Tribunal made an assumption or presumption, with no evidence at all, about the necessary form of political expression which the appellant must have engaged in before the age of 18 if he were later a supporter of the Chatra Daal and, at the age of about 20, invited to be an organising secretary of his ward of the Chatra Daal. There is absolutely no basis for the Tribunal to make such an assumption in order to found a finding damaging to the appellant's credibility and the credibility of his claims.

32. The respondent in its response submits that the Tribunal put to the appellant to why he did not join the BNP before age 18 and the respondent's response was that he was working on the farm and did not have the time. The respondent further submits that there was a shift in explanation which the Tribunal did not find to be convincing, that is, if he was genuinely following his father then he would have been involved well before he was 18.

33. I find that the Tribunal's finding to be reasonable and this ground of appeal is dismissed.

Ground (ha) – Why the appellant was involved with Chatra Daal.

34. The appellant submits that the Tribunal's finding at [17] of the decision that 'it is unable to be satisfied that the appellant's claims are credible' that the invitation by the BNP to be made the organising secretary. The appellant submits that the Tribunal was illogical or unreasonable in dismissing this invitation by the BNP.

35. The respondent submits that the reason was given at [21] of the decision where it is stated:

“Fourth, the Tribunal is not satisfied that the applicant has provided any plausible explanation as to why he would choose to involve himself with Chatra Daal, an organisation aimed at mobilising support among students at mainly secondary and tertiary levels to advance the BNP's aims both on campus and more widely in the community. The Tribunal notes here that he does not claim that he ever formally joined the Chatra Daal or, for that matter, the BNP. All that happened, so he claimed at the hearing was that in 2007 the leaders recognised his worth and called him to their office to tell him that he had been appointed to the position of the organising secretary of Chatra Daal in his ward, with responsibilities for bringing people to meetings and rallies. However, whether he claims to have joined 'in' through an official membership application or through some less formal process by which he was recognised by party leaders and appointed to a position in Ward 9, the Tribunal finds it difficult to

understand why he would choose the student wing of the BNP rather than the party itself or one of its affiliated bodies such as the youth wing. As put to him at the hearing he left school in 1999 having reached grade 5 and he had thus been out of education for 8 years by the time of his claim the appointment of the position of organising secretary. There is nothing to indicate that he was politically active in any way while he was at school and, given that he was only 12 years old when he left, this seems unlikely. Nor is there any evidence that he engaged in any political activity in the period from 1999 to 2005, apart from attending a few BNP meetings in the company of his father. Against his background, it is difficult to understand what connection he could have had with Chatra Daal or its constituents in the student body. It is difficult to understand why his background would recommend him to the leaders of the BNP or Chatra Daal as a person who could wield influence among student and mobilise them to the party cause. The Tribunal notes here that there is nothing in the applicant's evidence about his claimed political activities to suggest that there had been anything to do with students, either on campus or elsewhere."

36. I find that there was nothing illogical or unreasonable in the Tribunal's dismissal of the invitation offer by BNP and, besides that the Tribunal made a finding that the appellant's explanation was not plausible.

Ground (hb) – Inconsistency – only 2 threats mentioned at the Transfer Interview.

37. The appellant submits that the Tribunal perceived an inconsistency between the appellant's evidence at the Transfer Interview and his subsequent evidence, because at the Transfer Interview:

"He speaks of only two incidents where he was threatened by AL, receiving injuries in only one, and his subsequent and oral evidence in which he speaks of a number of serious physical attacks..." (Decision [29])

38. The appellant further submits that this was unreasonable perception of inconsistency because the Transfer Interview record shows that the appellant was lead by the interviews question and responded to it. The interviewer in the brief Transfer Interview went on to other topics after the appellant spoke of the second attempt to attack him.

39. The respondent in response submits that at [40] of its written submissions as:

[40] Rather, the appellant asserts that the Tribunal's 'perception' of the self evidence inconsistency between those two statements is somewhat unreasonable. The fact that the appellant now provides a different explanation for the inconsistency than the explanation he gave to the Tribunal cannot remedy this inconsistency. In circumstances where the appellant's first explanation was addressed and rejected by the Tribunal, his new explanation cannot raise a point of law for the purposes of s.43 of the Act.

40. I accept that the new explanation cannot raise a point of law and therefore this ground of appeal is dismissed.

Ground (hc) – Whether significantly differing versions of incident in February 2013.

41. The appellant submits that he was seriously injured at an attack by police and AL on a demonstration by BNP in February 2013. The Tribunal regarded his evidence on different occasions as ‘significantly differing versions’, both because he variously said it was a police officer or a member of AL who cut him – although he said that the police and AL act together – and because he gave different accounts of being taken to hospital and escaping when police came looking for injured demonstrators (Decision [30]).
42. The appellant further submits that the Tribunal was therefore unreasonable in regarding the appellant’s accounts of incidents in February 2013 as ‘significantly differing versions’, where in relation to who injured him – police or AL – or in relation to the details of his escape from the hospital.
43. The respondent submits that what the Tribunal was concerned about was, that since arriving in Nauru he had given three differing accounts of this incident in which he was taken to a private hospital for treatment and escaped when police came looking for injured demonstrators, and; his response was to assert that he had forgotten some things because of tension which was dealt with by the Tribunal at [24] of its decision. The respondent further submits that the fact that he doesn’t repeat its reasons there as part of the reasons does not mean that it hasn’t been considered and that his claim was true. Ultimately the Tribunal found that it was just implausible and there is no prospect of that reasoning that is open to challenge in terms of being unreasonable or illogical.
44. The Tribunal’s finding was correct therefore this ground of appeal is dismissed.

Ground (hd) – Whether AL would find the appellant’s hiding place

45. The appellant submits that the Tribunal was unreasonable in that it had no evidence for its finding that AL ‘would, sooner or later, find his hiding place (in a storage shed on or near the family farm)’. (Decision [30]).
46. The respondent’s response is that it relies on [31] of the Tribunal’s decision where it is stated:

[31] Finally, the Tribunal finds implausible the appellant’s claim that he was usually able to avoid the attentions of AL by the expedient of spending nights in a storage shed or on or near the family farm. As put to him at the hearing the Tribunal considered that in the setting of a rural or semi rural village, it would be well known that his family owned such a building. If AL supporters came frequently to his farm but were unable to find him there at night, the Tribunal is satisfied that they would sooner or later discover his hiding place and does not accept that such flimsy attempts at concealment could have saved him.

47. The respondent further submits that the Tribunal's reasoning is correct and that one is dealing with a shed which is on the appellant's own evidence was on the same land, as was the family house. And that the idea that they couldn't find him sooner or later when one is looking at a period of some 5 years is well open to the Tribunal to find implausible.
48. I accept the respondent's submission and this ground of appeal is also dismissed.

Ground (he) – Timing of the claim to have an intimate relationship with an unmarried woman daughter of a AL family

49. The appellant said that he loved the daughter of an AL family and she loved him and that they had an intimate relationship, that her family opposed their marriage, and; that through the fear of his safety he left her in Bangladesh with her family who wanted to marry her to someone else. It is further submitted that in such circumstances the Tribunal was unreasonable in rejecting the appellant's claim that he did not disclose this intimate relationship earlier with the unmarried daughter of an AL family because he was reluctant to discuss an intimate relationship.
50. The respondent submits that the Tribunal put to him that it's a claim of significance given though he may have been reluctant to mention it earlier. The respondent further submits that this was dealt with at [38] which states as follows:

[38] Having considered this explanation the Tribunal accepts that if the applicant had been in an intimate relationship with a person whom he still loved he might well have felt some reluctance, at least initially, to talk about it. However, the Tribunal does not find it plausible that he would allow his reticence, over events in another country and involving a person who is not in Nauru, to prevent him explaining a vital concern affecting his safety if he were to return to Bangladesh. The fact that he did not do so until the time of his supplementary statement casts a strong doubt over the credibility of the claim.

51. I do not find that the Tribunal was unreasonable in rejecting the applicant's claim that he did not disclose this intimate relationship earlier. So this ground of appeal is dismissed.

Ground (hf) – whether the appellant had a love affair and an intimate relationship with an unmarried married of an AL family

52. The appellant submits that the Tribunal rejected as implausible as 'foolhardy' the appellant's claim that he and the daughter of an AL family member had a love affair which was sexually intimate. This is to reject an implausible a common enough experience in human history and the stuff of classic tales in many cultures because it is precisely plausible. The appellant therefore submits that the Tribunal was unreasonable in rejecting the appellant's claim that he had a love affair and intimate relationship with an unmarried daughter of an AL family.
53. The respondent submits that this was a reasoning that was open to the Tribunal to engage in because if someone is committed to an opposition party it does seem

foolhardy to take up a relationship with somebody who is a daughter of the supporters of the opposing party, and; further this was a conclusion that was open to the Tribunal to reach. And therefore, the rejection by the Tribunal of the appellant's claim that he had a love affair and intimate relationship with an unmarried daughter of an AL family was not unreasonable.

54. So, this ground is dismissed.

CONCLUSION

55. Under s.44(1) of the Act, I make an order affirming the decision of the Tribunal.

DATED this 5 day of May 2017

