IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION] Case No. 107 of 2015

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN 15005, brought pursuant to s43 of the *Refugees Convention Act* 1972

BETWEEN

CRI020 Appellant

AND

THE REPUBLIC Respondent

Before: Crulci J

Appellant: A. Krohn
Respondent: R. Knowles

Date of Hearing: 22 May 2017
Date of Judgment: 22 June 2017

CATCHWORDS

APPEAL - *Refugees – Refugee Status Review Tribunal – Adjournment of Tribunal Hearing Requested – Adjournment refused – Hearing in Absence of Appellant – Legal unreasonableness – Error in Law – Appeal UPHELD*

JUDGMENT

1. This matter is before the Court pursuant to section 43 of the *Refugee Convention Act* 2012 ("the Act") which provides:

> **43 Jurisdiction of the Supreme Court**
>
> (1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.
>
> (2) The asked to the appeal are the Appellant and the Republic.
> ...

2. The determinations open to this Court are defined in section 44 of the Act:

> **44 Decision by Supreme Court on appeal**
> (1) In deciding an appeal, the Supreme Court may make either of the following orders:
> (a) an order affirming the decision of the Tribunal;
> (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

3. The Court notes that the parties, on 26 April 2017, filed consent minutes of order by which the time for the filing of the Notice of Appeal was extended, such that the Notice of Appeal can be treated as being validly filed.

4. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on the 7 August 2015 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of the 25 January 2015, that the Appellant is not recognised as a refugee under the 1951 Refugees Convention[1] relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees ("the Convention"), and is not owed complimentary protection under the Act.

BACKGROUND

5. The Appellant is a 28-year old single Bengali man from the Brahamanbaria district in Bangladesh. His family live in Bangladesh.

6. The Appellant's claim for protection as a refugee is based on the Appellant's fear of harm from the Awami League ("AL") because of his involvement with the student wing of the Bangladesh Nationalist Party ("BNP") in Bangladesh.

[1] 1951 Refugee Convention and 1967 Protocol, also referred to as "the Refugees Convention" or "the Convention"

7. The Appellant left Bangladesh for Thailand in May 2012, and then journeyed to Malaysia in August. In May 2013, the Appellant travelled to Indonesia, before departing for Australia by boat in December 2013. On 12 December 2013, Australian authorities intercepted the boat and the Appellant was taken to Christmas Island. He was transferred to Nauru on 14 December 2013.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellant attended a Refugee Status Determination ("RSD") interview on 18 May 2014. Before the Secretary, the Appellant claimed that he joined the student wing of the BNP, the Bangladesh Jatiotabadi Chatra Dal ("JCD"), in 2006. As a member, he helped arrange meetings, distribute donations and campaign for votes during the election period. On 15 January 2007, members of the AL abducted the Appellant due to his involvement with the BNP. He was kicked and beaten with sticks, becoming unconscious, and then left to die. He was hospitalised for two weeks as a result of the injuries.

9. After this, the Appellant received "protection" from BNP supporters for approximately two to three months, ceasing in around April 2007. The Appellant said that he wanted to leave Bangladesh but did not have the funds, so he was "in hiding" to avoid the AL. In October 2007, the Appellant left his home village as he felt insecure, and travelled between Chittagong and Tongi cities until he left Bangladesh in mid-2012.

Secretary's Decision

10. The Secretary accepted that the Appellant moved between Chittagong and Tongi between 2007 and 2012, but found that this was because the Appellant was working as a driver to save money for his departure, not because he was avoiding AL supporters. In making this finding, the Secretary noted that the Appellant worked as a driver in Malaysia. Upon questioning, the Appellant said he was offered employment in Dhaka as a driver, but did not accept the offer. Instead, the Appellant said he relied on financial assistance from his aunt, uncle, and grandmother during this period.

11. Upon the Country Information before the Secretary, the Secretary was satisfied that there was political violence in Bangladesh; however, "rank and file" members were not routinely targeted. The Appellant lived in his home village for about six months without being targeted by the AL. On the basis of these findings, the Secretary considered that there is not a reasonable possibility that the Appellant would face harm in the foreseeable future if returned to Bangladesh. The Secretary therefore found that the Appellant's fear of harm was not well-founded, and rejected the application for refugee status.

12. The Secretary noted that the Appellant hadn't put before him any claims that would ~~be~~ enliven the question of complementary protection, nor was there any evidence that ~~retuning~~ returning the Appellant to Bangladesh would be in breach of Nauru's international obligations.

REFUGEE STATUS REVIEW TRIBUNAL

13. The Appellant applied for review by the Tribunal on 2 February 2015. The Appellant submitted that his fear of harm was shown to be well-founded by his previous experiences of harm and by independent country information. The Appellant said that he was only able to avoid harm in his home village between 2007 and 2012 because he remained in hiding, and, if he were returned to Bangladesh, he would be at an even higher risk of harm because the AL now hold power throughout Bangladesh, whereas a caretaker government held power in 2007.

14. The Tribunal considered that the Appellant provided conflicting accounts of his education and residential history, and that the claims made before the Secretary were "vague and unsubstantiated". In particular, the Tribunal said that there was no information regarding the following:[2]

    (1) What activities he specifically undertook for Jatiyatabadi Chehatra Dala (JCD) which is the student wing of the BNP and his role within JCD;
    (2) When he ceased to be an active member;
    (3) Why he did not take the job he was offered in Dhaka;
    (4) Details of the abduction in 2007, in particular the alleged assault, who abducted and assaulted him, and if other members with his profile received similar treatment;
    (5) Details of the protection he received after he was released from hospital;
    (6) Details of any further threats after 2007;
    (7) Details of his period of "hiding" from 2007 to 2012 – where he lived, how he spent his time, who he had contact with and why he moved every three months;
    (8) Why he made return visits to his village if he feared for his safety and how he managed to avoid local AL supporters;
    (9) The circumstances – such as timing and funding – of the applicant's departure from Bangladesh;
    (10) The reasons why he did not undertake paid employment in the five years prior to his departure; and
    (11) What harm he fears if he returns to Bangladesh, including the reason why he fears for his life, and whether this relates to his own locality only, or all of Bangladesh.

15. In light of the lack of information, the Tribunal was not satisfied of the truth and nature of the Appellant's claims, or that the Appellant genuinely fears

[2] Book of Documents, p 114, 115 at [17]

harm from the authorities or anyone in Bangladesh if he were returned. In addition, the Tribunal was not satisfied that the Appellant in the past experienced, or would in the future, a reasonable possibility of serious harm amounting to persecution from the authorities or anyone else in Bangladesh for a Convention reason. The Tribunal therefore affirmed the Secretary's finding that the Appellant is not a refugee.

16. In relation to whether the Appellant is owed complementary protection the Tribunal stated as follows:

> "*The Tribunal's lack of satisfaction about the facts in this case affects its assessment of the applicant's eligibility for complementary protection. ... the Tribunal is not satisfied that the applicant has a well-founded fear for a Convention reason. For the same reasons, the Tribunal is not satisfied he has a reasonable possibility of being subjected to torture or to cruel, inhuman or degrading treatment or punishment if he were to return to Bangladesh.*[3]

17. The Tribunal found nothing before it to find that the Appellant should be granted complementary protection, nor was there any evidence that ~~retuning~~ returning the Appellant to Bangladesh would be in breach of Nauru's international obligations.

GROUNDS OF THIS APPEAL

18. The Appellant filed his Notice of Appeal on 18 December 2015. The Grounds of Appeal provide as follows:

    1. After the appellant did not appear before the Tribunal on the day on which, or at the time and place at which, he was scheduled to appear, the Tribunal erred in law in that, in determining pursuant to section 41 of the Act whether to make a decision on the review without taking further action to allow or enable the applicant to appear before it, the Tribunal failed to have regard to relevant considerations as required by law.

    2. After the appellant did not appear before the Tribunal on the day on which, or at the time and place at which, he was scheduled to appear, the Tribunal erred in law in that, in determining pursuant to section 41 of the Act whether to make a decision on the review without taking further action to allow or enable the applicant to appear before it, the Tribunal erred in law in that it failed properly to have regard to information, or to make determinations on material questions of fact, as required by law, including sections 22, 31, 35, 36, 37, 39 and 40 of the Act.

[3] Book of Documents, p 115 [22]

3. Further or in the alternative, the Tribunal erred in law in that it failed to exercise its power under section 24 or section 36 of the Act to seek information when it had a duty in law to do so.

4. Further or in the alternative, the Tribunal erred in law in that it acted unreasonably in the exercise of its discretion, pursuant to section 41 of the Act, to make a decision on the review without taking further action to allow or enable the applicant to appear before it.

5. The Tribunal, in asserting that there was "no information" with regard to aspects of the appellant's claims for protection, erred in law, by making a finding on the basis of no evidence, or by failing to have regard to the information before it (whether this error is regarded as being a failure to take account of relevant considerations or as a failure to discharge its obligation under the Act (including sections 22, 31, 35, 36, 37, 39 and 40 of the Act) to have regard to information.

6. The Tribunal erred in law in that it failed to act according to the principles of natural justice as required by law, including section 22(b), of the Act.

Grounds 1 to 4: The Tribunal's refusal of the Appellant's adjournment request

19. The Appellant submits that failure to take account of relevant considerations and to have regard to information constitutes a jurisdictional error. The Appellant notes that the Tribunal said:

> "*No explanation for the non-appearance was offered at the time but the applicant's representative advised the Tribunal on 6 June 2015 that the applicant instructed them that he is mentally unwell after hearing that his brother ~~his~~ had disappeared following a fight in his village between the AL and the BNP. No further details or supporting evidence were provided*".[4]

20. The Appellant says that this reflects that the Tribunal failed to have regard to relevant considerations, or information before it, in determining whether to postpone the hearing, including the circumstances surrounding the request for an adjournment, such as that:

(1) the news about the Appellant's brother was conveyed shortly before the hearing on 26 and 27 May 2015;
(2) the brother was present at the fight in his village;
(3) the Appellant has since had no further contact with his family;
(4) the Appellant's early attempts to raise with his welfare officer that he was feeling unwell.

[4] Book of Documents, p 112 at [3]

21. The Appellant further submits that the Tribunal made an error on a point of law within the meaning of s 43 of the Act by failing to exercise its powers in ss 24 and 36 to make further inquiries about factors affecting the ability of the Appellant to appear before the Tribunal, including the Appellant's mental health, and the length of the requested adjournment. In addition, given all the material before the Tribunal relating to the distress of the Appellant, by not making further inquiries, the Tribunal acted so unreasonably that no reasonable Tribunal could so have acted, and therefore made an error of law (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).

22. The Respondent submits that the ground of failure to take into account a relevant consideration can only be made out if the decision-maker was bound to take into account that consideration. The Appellant has not pointed to any consideration that the Tribunal was bound to take into account.

23. In any case, submits the Respondent, the Tribunal did take into account the request by the Appellant and the information provided. Section 34(4) of the Act is only concerned with findings of fact made by the Tribunal for its final decision on the review therefore, the Tribunal was not required to consider in its reasons every piece of information provided by the Appellant.

24. In relation to the Appellant's argument that the Tribunal ought to have made further inquiries under ss 24 or 36 of the Act, the Respondent submits that this obligation only arises in limited circumstances, and these circumstances do not exist in this case. The Respondent further submits that the refusal of the Appellant's request for an adjournment was not legally unreasonable.

25. The Respondent points to the facts that prior to the hearing, the Tribunal warned the Appellant that if he did not attend the hearing and a request for an adjournment was not granted, the Tribunal could decide the matter without further notice.

26. The Tribunal also gave the Appellant an additional three weeks to submit further material, and this material was not received, moreover the Tribunal did not receive any supporting material in determining whether to postpone the hearing - such as an affidavit from the Appellant, medical evidence on the Appellant's mental health, evidence from the Appellant's family in Bangladesh, or from the Appellant's welfare officer.

Ground 5: The Tribunal's Consideration of the Appellant's Claims

27. The Appellant submits that the Tribunal erred in law by finding that there was "no evidence" with regard to aspects of the Appellant's claims for protection (see [12] above). In his submissions, the Appellant sets out the evidence that was put before the Tribunal in relation to each aspect of the

claim, including the submissions to the Tribunal on 24 May 2015, the Appellant's statement annexed to these submissions (dated 20 April 2015) and the Appellant's statement annexed to the RSD application (dated 3 March 2014).

28. The Respondent submits that, firstly, a reading of the evidence as a whole, particularly paragraphs [12][5] and [16][6], demonstrates that the Tribunal was aware of the Appellant's claims and evidence. Secondly, the Tribunal's reference to no information means no "sufficient information", and "infelicity of expression" by the Tribunal does not give rise to an appealable error on a point of law.

Ground 6: Natural Justice

29. The Appellant submits that the Tribunal failed to afford him natural justice by failing to alert the Appellant to the fact it was not necessarily going to accept his claim that he had been abducted and tortured by AL members, despite that the Secretary accepted this claim. The Respondent submits that this claim was not made out, as procedural fairness does not require the Tribunal to make known its preliminary views of mental processes.

CONSIDERATIONS

30. In light of previous decisions of this Court, notably in the matter of *CRI052 v R*[7] which raises comparable grounds of appeal to this case, the Court will firstly consider Ground 4.

31. The relevant sections of the Act provide as follows:

> **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.
>
> **41 Failure of applicant to appear before Tribunal**
> (1) If the applicant:
> (a) is invited to appear before the Tribunal; and
> (b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear;

[5] Ibid., p 113
[6] Ibid., p 114
[7] [2016] NRSC 28

the Tribunal may make a decision on the review without taking further action to allow or enable the applicant to appear before it.

(2) This section does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review, in order to enable the applicant's appearance before it as rescheduled.
(emphasis mine)

32. The following matters are noted in which *CRI 052 v the Republic*[8] are comparable with the Appellant's case:

(1) The instructing solicitors for the Appellant were informed by the Appellant on 7 June 2015 that he had been unable to contact his family in Bangladesh for about one month, and this had been causing him anxiety, meaning that he was feeling unprepared and unfocused.

(2) On 12 June 2015, the solicitors wrote to the Tribunal to request that the hearing be adjourned from that day to the sitting in August. The Tribunal said that "*Based on the information before it, the Tribunal is not prepared to re-schedule the appellants hearing*". However, the Tribunal gave the Appellant until 29 June 2015 to provide any further submissions. The Appellant did not do so.

(3) The request was the first time the Appellant requested an adjournment of the hearing and was made in circumstances in which the Tribunal had been informed of the difficulties with the Appellant's mental state.

(4) There was "*nothing apparent in the Tribunal's decision as to the need to determine reviews in a particularly short time frame or any other pressing time constraints particular to this review*" (at [56]).

(5) "*The Tribunal's decision not to afford the appellant an opportunity to attend a hearing at later date was to all intents and purposes fatal to the success of the appellant's review application before them*" (at [57]).

(6) In these circumstances, the reasons did not disclose any "*evident and intelligible justification*" for refusing the adjournment. The decision was legally unreasonable and the Tribunal erred in law (at [58]).

33. Two cases, those of *Li*[9] *and Singh*[10] were considered. Firstly, Ms Li, an applicant for a Skilled Independent Overseas Student visa, sought review of the delegate's decision to refuse her visa application. By the time of her review by the Migration Review Tribunal she had obtained further work experience and sought a fresh skills assessment. The assessment

[8] Ibid.
[9] *Minister for Immigration and Citizenship v Li* [2013] CLR 332
[10] *Minister fro Immigration and Border Protection v Singh* [2014] FCAFC 1

contained errors in it and Li asked for it to be reconsidered. The Tribunal refused to adjourn the hearing until the assessment had been reconsidered.

34. All members of the High Court considered that the decision was unreasonable. As cited in Appeal Case 109 of 2015, Hayne, Kiefel and Bell JJ said (at [76]) "*Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification*".

35. In *Singh* the Full Court of the Federal Court found that the Tribunal's refusal of an adjournment was, in the circumstances, legally unreasonable. The issue was that Mr Singh had sought the adjournment to have his English language test remarked, which the Tribunal accepted he should undertake before it made its decision.

36. The Court found that the Tribunal had not given an "objective or intelligible" justification in circumstances where the adjournment was for a specific purpose, there was a reasonable basis to doubt the accuracy of the result, the period required for the re-mark was unlikely to be long, and there would be significant and inevitable prejudice to Mr ~~Sign~~ Singh if the adjournment was refused (at [73]-[76]).

37. This Court again[11] echoes the views of Lord Bridge of Harwich in *Bugdaycay*:[12] as to the singular nature of appeals in refugee status determinations:

> *"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 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*

[11] *DWN113 v Republic* [2016] NRSC 28, at [33]
[12] *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514 at 531F

life at risk, the basis of the decision must surely call for the most anxious scrutiny."

38. Likewise in the case of *CRI052 v R,* this Court finds as follows:
    1) The Tribunal hearing was a review of a negative determination made by the Secretary on the 25 January 2015, and was the first scheduled hearing before the Tribunal.
    2) The Appellant had not previously appeared before the Tribunal, nor previously requested an adjournment of his hearing.
    3) There is nothing in the Tribunal's determination to indicate that timing was in issue in relation to scheduling the hearings.
    4) The Tribunal continued to hold hearings as such there was minimal prejudice from the administrative side.
    5) Conversely there was significant prejudice to the Appellant in that refusal of the adjournment was effectively fatal to the success of the review application.

39. In all the circumstances the Court holds that the Tribunal's decision was not legally reasonable and Ground 4 of the appeal. Having so determined the Court will not go on to consider the other grounds raised.

ORDER

40. (1) The Appeal is allowed.
    (2) The decision of the Tribunal TFN 15005, dated 7 August 2015 is quashed.
    (3) The matter is remitted to the Refugee Status Review Tribunal under section 44(1)(b) for reconsideration according to law.

Judge Jane E Crulci

Dated this 22 June 2017