IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 61/2014
Being an appeal against a decision of the Nauru Refugee Status Tribunal brought pursuant to s43 of the Refugees Convention Act 2012

BETWEEN

MEG026 FIRST APPELLANT

MEG027 SECOND APPELLANT

AND

The Republic of Nauru RESPONDENT

Before: Khan, J
Date of Hearing: 18 March 2016
Date of Judgement: 7 February 2017

Case may be cited as: MEG 026 &027 –v- The Republic

CATCHWORDS:
Whether Tribunal fell into error by failing to consider the appellant's evidence that her ex-husband will take custody of their son upon her return to Iran- whether the Tribunal was in breach of section 34 for failing to set out or refer to the evidence or other material on which it based its finding.

APPEARANCES:

Counsel for the Appellant: T Baw
Counsel for the Respondent: C Fairfield

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 Refugee Convention Act 2012 (the Act) which provides the jurisdiction of the Supreme Court. S43 states:

2. The Tribunal delivered its decision on 26 September 2014 affirming the decision of the Secretary that the appellants are not recognised as refugees and are not owed complementary protection under the Act.

3. The appellants filed grounds of appeal on 11 November 2014 and the grounds of appeal were amended on 14 April 2015.

BACKGROUND

4. The appellants' backgrounds are as follows: -

a) Both appellants were born in Iran. The first appellant's date of birth is 23 November 1962 (54 years old). The second appellant is her son (son) and his date of birth is 16 January 2001 (16 years old).

b) Both appellants are citizens of Iran.

c) The first appellant was divorced in 2002 and she was granted full custody of her son.

d) The first appellant's mother lives in Iran together with her 2 brothers and 3 sisters. At the time of the hearing of this matter in the Tribunal, 1 sister was in the UN camp in Indonesia. Her father is deceased. Her ex-husband still lives in Iran.

e) The first appellant was born in a Shia Muslim family and they were not practicing Muslims except for her mother. The first appellant claims to be agnostic. She does not consider herself to be a Muslim. She believes in one God but does not believe in any religion.

f) Between 1983 and 1984 the first appellant passed her pre-university examination and she had applied to study medicine and the application was rejected because of her family's political activity.

g) The first appellant was employed as a dental assistant between 1989-2000. Between 2001-2004 she left the work force to look after her son. From 2004 until she left Iran she was employed as a preschool teacher. She was not a permanent government employee but was only employed on contract on a casual basis.

h) The first appellant claimed fear due to:

- Her family's political activities;
- Her religion;
- An incident with her boss;
- Being a failed asylum seeker;
- Being a woman and a divorced woman.

i) Her boss Esfandiyar proposed marriage to her as his second wife. She refused the proposal. He tried to kiss her and that was the reason she left Iran.

j) On 21 June 2013, the first appellant departed Iran with her son, her sister, brother-in-law and their child on genuine passports. They flew to Indonesia transiting in Malaysia.

k) On 17 July 2013, the first appellant and her son departed Indonesia by boat bound for Australia, without a valid visa.

l) On 24 July 2013, the appellant's boat was intercepted by Australian authorities and they were transferred to Christmas Island.

m) On 24 August 2013, the appellant was transferred to Nauru pursuant to a memorandum of agreement between the Republic of Nauru and the Commonwealth of Australia.

APPLICATION TO THE SECRETARY

5. On 14 November 2013, the first appellant attended a transfer interview on behalf of herself and her son.

6. On 16 December 2013, the appellant made an application for Refugee Status Determination (RSD). She also submitted a statement in support of her application.

7. On 15 January 2014, the appellant attended a RSD interview together with her lawyer and a Farsi interpreter.

8. On 20 May 2014, the Secretary to the Department of Justice and Border Control (the Secretary) handed down his determination that the appellants were not recognised as refugees and were not owed complementary protection pursuant to the Act.

APPLICATION TO THE TRIBUNAL

9. The appellants made an application to the Refugee Status Review Tribunal (the Tribunal) for a 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.

10. On 20 July 2014, the appellants' lawyers, Craddock Murray Newmann, made written submissions to the Tribunal.

11. On 23 July 2014, the first appellant attended a Tribunal hearing with her lawyer and a Farsi interpreter.

12. On 26 September 2014, the Tribunal handed down its decision affirming the determination of the Secretary that the appellants were not recognised as refugees and nor were they owed complementary protection under the Act.

THIS APPEAL

13. The appellant filed 1 ground of appeal which is as follows:

1) The Tribunal fell into an error of law by:

a) Failing to consider all the first appellant's evidence in support of her claim that her ex-husband would take custody of their son (the second appellant) if they were returned to Iran, in determining if they are refugees or owed complementary protection; and/or

b) Failing to set out the reasons and refer to the evidence or other material on which it based its finding that the first appellant's ex-husband would be unsuccessful in such a custody action, in breach of s.34(4) of the Refugees Convention Act 2012.

PARTICULARS

The first appellant's evidence before the Tribunal included:

a) Her ex-husband only agreed for her to have custody of their son if she agreed not to claim her dowry, he could break that agreement any time and rely on the discriminatory Iranian laws to gain custody of her son;

b) Her ex-husband was very angry that she had taken their son to Australia;

c) He had previously threatened to take her son away from her and he was mentally unstable;

d) The first appellant had serious concerns for the safety of her son if he were placed in his father's custody as he would be exposed to narcotic substances and the Tribunal had accepted that the ex-husband was a long-term drug addict.

SUBMISSIONS

14. Both counsels filed written submissions and subsequently elaborated on the submissions at the hearing. The submissions were of great assistance to me.

CONSIDERATION

Ground 1(a) – Failure to consider the first appellant's evidence in support of her claim that her ex-husband would take custody of the second appellant.

15. Miss Baw submitted that the Tribunal made the following finding at [64] of its decision:

"The Tribunal notes that the applicant has had full custody of her son since he was approximately 12 months old. He is now of an age, 13, where he can have some input into the decision as to who he lives with. Her husband is a long-term drug addict. She said that he agreed to her having custody. He consented to her taking her son out of Iran. In these circumstances the Tribunal does not accept that there is a reasonable possibility that he will take action to obtain custody or be successful in any such action. The Tribunal finds that any fear the applicant has on this basis is not well-founded."

16. Miss Baw submits that the Tribunal uses the word 'not even a reasonable possibility'. The Tribunal is shutting a scintilla of possibility that the appellant's ex-husband will get back the custody of their son. She submits that this finding is an error of law. She relies on *Minister for Immigration and Citizenship –v- SZRKT and another*[1] where Robertson J concluded that the execution of a fact-finding task was so deficient as not to be a lawful exercise of powers and thus was a jurisdictional error. She also relies on Goodwin *–v- Commissioner of Police*[2] it is stated as follows:

"[59] *The primary judge dismissed the appellant's claim on 3 broad bases, namely:*

> *1) The appellant was not diagnosed as suffering from PTSD until February 2013, some 18 months after he was discharged from the Police Force;*
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> *2) The PTSD was not caused by traumatic events encountered during his Police Force, and the work related traumatic events were not a substantial contributing factor with respect to the major depression from which he suffered in July 2001, which was caused by personal domestic circumstances.*
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> *"[104] The assessment made by the primary judge, to the effect that the appellant did not suffer from PTSD, nor was his major*

[1] *2013 [FCA317]*
[2] *[2012] [NSW CA 379 [59, 104 and 108]*

depressive disorder substantially contributed by any work-related stressors needed to confront the following propositions, namely that:

a) There was no doubt that, as at February 2003, the appellant suffered from chronic PTSD;

b) There was no dispute that PTSD could give rise to a major depressive disorder;

c) The only available traumatic stressors capable of having caused PTSD in the appellant were the traumatic events which occurred during police work between 1987 and 1997;

d) There was certainly no relevant traumatic stressors between the date of his discharge in July 2001 and the diagnosis in February 2003;

e) The delayed onset of PTSD was rare and not indicated in the case of the appellant;

f) Traumatic stressors were capable of contributing to a major depressive disorder; and

g) There was uncontroverted evidence from the appellant as to the physical and mental effects of the traumatic events upon him immediately following the events for a significant period thereafter."

"[108] In the circumstances there has been a constructive failure to exercise the jurisdiction conferred on the Court. There was a failure to deal with central elements of the appellant's case. Rather, a conclusion was reached which was inconsistent with the facts and opinions which were recounted and not rejected. It was also reached without any coherent analysis of the appellant's own evidence as to the effects of traumatic events on him."

17. Mr Fairfield in response relied on the case of *Minister for Immigration and Ethnic Affairs –v- Wu Shan Liang and others*[3] *where it is stated at pages 271 and 272 as follows:*

> *"When the Full Court referred to 'beneficial construction', it sought to adopt an approach mandated by a long series of cases, the best exemplar of which is Collector of Customs –v- Pozzolanic [35]."*

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[3] *(1996) (185 CLR 259)*

In that case the Full Court of the Federal Court (Meaves, French and Cooper JJ) collected authorities for various propositions as to the practical restraint on judicial views. It was said that the Court should not be "concerned with looseness in language .... nor would unhappy phrasing" of the reasons of an administrative decision maker [36]. The Court continued [37]:

> *"These reasons for the decision under review are not to be construed minutely and finally with an eye keenly attuned to the perception of error."*

He also relied on the judgement of Kirby J at page 291 where it is stated:

> *"(1) The reasons and the challenge must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach, combing through the words of the decision-maker with a fine appellate tooth-comb against the prospect that a verbal slip will be found warranting the interference of an error of law (88).*
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> *(2) The admonition has particular application to the review of the decisions which by law are committed to lay the decision-makers, tribunals, administrators and others (89). This is not to condone double standards within the reasons and decisions of legally qualified persons and others. It is simply to recognise the fact that where, by law, a decision is to be made by a person with a different, non-legal expertise, or non-special expertise, a different mode of expression of the decision may follow. It must be taken to have been contemplated by the law maker."*

18. Mr Fairfield also relied on applicant *WAEE –v- Minister for Immigration and Multicultural Indigenous Affairs*[4] where it is stated:

> *"It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the Tribunal failing to avert to evidence which, if accepted, might have led it to make a different finding of fact (cf Minister for Immigration and Multicultural Affairs –v- Yusuf*[5]*) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a convention reason. The Tribunal is not a Court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a Court and its reasons are not to be scrutinised "with an eye keenly attuned to error". Nor is it*

[4] [2002] FCAFC 184[46]]
[5] [2001] 206CLR 322; 62 ALD 225; 180 ALR 1 at [87-97]

necessarily required to provide reasons of the kind that may be expected of a court of law."

19. Mr Fairfield further submitted that the Tribunal considered in sufficient detail the appellant's claim that she feared harm due to her family's political profile, her religion, her incident with her boss, being a failed asylum seeker and being a woman and divorced. He further submitted that the Tribunal correctly summarised the evidence in reasons for the decision and referred to [61, 62 and 63] of the decision where the Tribunal discusses the issue of custody dispute and the Court will decide based on the welfare of the child and the child has been with the appellant since he was 12 months old; that the ex-husband is a long-term drug addict. He submitted that in those circumstances the Tribunal found that it did not accept that there was a reasonable possibility he will be able to obtain custody. For the above reasons, I am satisfied that there is no error of law and the appeal on this ground is dismissed.

Ground 1(b) – failure to set out reasons or refer to the evidence

20. Miss Baw submits that the Tribunal failed to set out or refer to the evidence or other material on which it based its finding that the first appellant's ex-husband would be unsuccessful in such a custody action and was thus in breach of s.34(4) of the Act. She relies on *Minister for Immigration and Border Protection –v- SZSRS and other*[6] where it is stated:

"The fact that the matter is not referred to in the Tribunal's reasons, however, does not necessarily mean the matter was not considered by the Tribunal at all: SZGUR at [31]. The Tribunal may have considered the matter but found it not to be material. Likewise, the fact that particular evidence is not referred to in the Tribunal's reasons does not necessarily mean that the material was overlooked. The Tribunal may have considered it but given it no weight and therefore not relied on it in arriving at its finding of the material fact. But where a particular matter, or a particular evidence, is not referred to in the Tribunal's reasons, the finding and evidence that the Tribunal has set out in its reasons may be used as a basis for inferring that the matter of evidence in question was not considered at all. The issue is where a matter or evidence that has been omitted from the reasons can be sensibly understood as a matter considered, but not mentioned because it was not material. In some cases, having regard to the nature of the applicant's claims and the findings and the evidence set out in the reasons, it may be readily inferred that if the matter or evidence had been considered at all, it would have been referred to in the reasons, even if it were rejected or given little or no weight: MZYTS at [52]."

21. She also relied on *NAJT –v- Minister for Immigration and Multicultural and Indigenous Affairs*[7] where it is stated:

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[6] [2014] FCAFC 16 [34]

[7] [2005] FCAFC 134 [212]

"... a decision-maker cannot be seen to "have regard" to all of the information to hand when he or she is under statutory obligation to do so, without at least really and genuinely giving it consideration. As Sackville J noticed in Singh –v- Minister for Immigration and Multicultural Affairs (2001)109 FCR 152 [58], a "decision-maker may be aware of information without paying any attention to it or giving it any consideration.

In my opinion, it would be very surprising if the delegate had genuinely paid attention to the letter and given it genuine consideration – heard in Black CJ's phrase in Tickner –v- Chapman [1995] 5 FCR 451 [462] engaged in "an active intellectual process" in relation to the letter – yet remain silent about such consideration in the reasons he gave. I am satisfied that he did not do so."

22. Miss Baw further submitted that s.430 of the Migration Act is a replica of s.34(4) of the Act and that the Tribunal did not give its reasons for rejecting the appellant's evidence in finding that the ex-husband would not be successful in the custody application.

23. Mr Fairfield in response submitted as follows in his written submissions at [46], [47], [48], [49]and [50] which is as follows: -

"[*46] – In truth, the appellants' complaint is not that the Tribunal did not give reasons for the decision but failed to give reasons for rejecting evidence or material before it. However, the appellants identified no authority to support the proposition that a failure to do so constitutes a breach of s.34(4) of the Act. Rather, the Australian Authorities to which the appellants refer stems from a different proposition.*

[47] – The appellants also refer to the s.430 of the Australian Migration Act and, in that context, to the judgment of the High Court of Australia and Minister for Immigration and Multicultural Affairs –v- Yusuf (2001) 206 CLR 323 ("Yusuf") in which the High Court considered, amongst other things, the meaning of s.430(1). S.41(1) is in similar terms to s.30(4) of the Act.

[48] – Section 34(4)(c) requires the Tribunal to set out findings on any material questions of fact. As Gleeson CJ observed in Yusuf at 331 ([10]) in relation to s.430(1) "it is impossible to read the expression 'the findings' as meaning anything other than the findings which the Tribunal has made." In the same case, McHugh, Gummow and Hayne JJ stated at 346 ([68]):

"Neither expressly nor impliedly does this section require the Tribunal to make, and set out, some findings additional to those which it actually made .... all that s.430(1)(c) obliges the Tribunal to do is to set out its finding on those questions of fact which it considered to be material to the decision which it made and to the reasons it had made for reaching the decision." (Original emphasis)

[49] – There is therefore no obligation under s.34(4) to set out reasons for rejecting every factual assertion or contention made by an applicant. As the High Court put it in relation to s.430:

"It is not necessary for the Tribunal to give a line by line refutation of the evidence for the claimant either generally or in those respects where there is evidence that is contrary to the finding of material fact made by the Tribunal."

[50] – Plainly, s.34(4) of the Act did not require the Tribunal to set out its written statement, the evidence or other material on which its finding effect were not based. Rather, s.34(4) required the Tribunal to set out its finding on any material questions of fact and refer to the evidence on which its findings were based. To the extent, if at all, that the claim that the appellant's ex-husband would or could obtain custody of the first appellant's son was material to her claim or for well-founded fear of persecution for convention reason, the Tribunal made a finding about the claim and referred to the evidence on which the finding was based at [64] and [67] of its reason for the decision."

24. I accept Mr Fairfield's submissions and reject the submissions of the appellants and the appeal on this ground is dismissed.

CONCLUSION

25. The appeal is dismissed and I order that the decision of the Tribunal is affirmed pursuant to the provisions of s.44(1)(a) of the Act.

DATED this 7 day of February 2017

Mohammed Shafiullah Khan
Judge

THE SEAL OF THE SUPREME COURT
REPUBLIC OF NAURU