IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 62/2015
Being an appeal against a decision of the Nauru Refugee Status Review Tribunal brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

VEA032 APPELLANT

AND

The Republic of Nauru RESPONDENT

Before: Khan ACJ
Date of Hearing: 8 March 2017
Date of Judgment: 21 July 2017

Case may be cited as: VEA032 v The Republic

CATCHWORDS:

Whether there was an error of interpretation – whether the Tribunal erred in not giving weight to the documents presented by the appellant – whether the Tribunal failed to consider the effect of long term detention on the mental ability of the appellant.

Held: the appellant did not take issue with the interpretation at any stage of the proceedings – the Court will not interfere with findings with respect to credibility – the Tribunal took into account a degree of memory loss – appeal dismissed.

APPEARANCES:

Counsel for the Appellant: In person (Ms Montalban as McKenzie friend)
Counsel for the Respondent: R O'Shannessy

JUDGMENT

INTRODUCTION

1. The appellant filed an appeal against the decision of the Refugee Status Review Tribunal ("the Tribunal") pursuant to s 43(1) of the *Refugees Convention Act 2012* ("the Act") which states:

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 Tribunal delivered its decision on 22 May 2015 affirming the decision of the Secretary for the Department of Justice and Border Control ("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.

EXTENSION OF TIME

4. The Tribunal's decision was delivered on 22 May 2015 and it was received by the appellant on 30 May 2015. Under s 43(3) of the Act the appellant was required to file the appeal within 28 days of 30 May 2015.

5. The appeal was not filed within 28 days. The appellant with the consent of the respondent made an application for extension of time on 12 June 2015. The Registrar purported to grant an extension on 17 June 2015 for the appeal to be filed on or before 31 August 2015. Following the decision in *Kun v Secretary for Justice and Border Control*[1] the Act did not confer any powers on the Registrar to extend the time.

6. The appellant filed a further application for extension of time with the consent of the respondent on 28 August 2015. On 25 September 2015 the Registrar made an order granting an extension of time for the appeal to be filed by 31 October 2015.

7. The Act was amended by the *Refugees Convention (Amendment) Act 2015* ("Amendment Act") which came in to effect on 14 August 2015. Under s 43(3) of the Amendment Act, the time for filing of the appeal was increased from 28 days to 42 days and s 43(5) gave the Court discretion to grant an extension beyond the 42 days if it was satisfied that it was in the interests of the administration of justice to do so.

8. The orders made on 25 September 2015 in my view were valid and therefore the appeal filed on 30 October 2015 was competent. There was some confusion on the part of the respondent that the appeal was not competent but that is not so.

BACKGROUND

9. The appellant is a 30 year old Sunni Muslim male from Bangladesh.

10. He was born on 27 October 1986 in Boroo Padthuria, Mirgir Bazar, Kalukhali.

11. He is married with two sons. His family is still living in Bangladesh along with his parents and siblings.

[1] [2015] NRSC 18 (Khan J).

12. The appellant received only three years of education and was self-employed from 2003 to 2007 selling vegetables.

13. From 2003, the appellant also became involved with Jamaat-e-Islami ("JI") because they represented his beliefs as a Muslim. Specifically, he was involved with the student branch, Chatra Shibir. He attended rallies and meetings and was responsible for encouraging other people to join the party.

14. Meetings were regularly broken up by police and on three such occasions he was beaten. One time in 2005 he was taken to hospital. One of the leaders was arrested. From 2004 to 2007, AL members attended his house and warned that he would be killed if he continued his involvement with JI. He spent some time in hiding with his brother and sister. He fled to Malaysia on a four-year visa.

15. From 2007 to 2012, the appellant was employed in a Malaysian furniture factory. After the expiry of his visa he resided illegally because his parents warned it was not safe to return. He travelled to Bangladesh in January 2012 but after being abducted and beaten by a group of AL members he returned to Malaysia in April 2012.

16. The appellant departed Malaysia in July 2013 and arrived in Nauru on 19 November 2013 via Indonesia and Christmas Island.

17. The appellant fears the infliction of serious harm or death from AL members if he returns to Bangladesh. AL is in power throughout Bangladesh and so relocation or protection from authorities is not viable.

APPLICATION TO THE SECRETARY

18. On 6 December 2013, the appellant attended a Transfer Interview.

19. On 27 February 2014, the appellant made an application to the Secretary for recognition as a refugee and for complementary protection under the Act.

20. On 2 November 2014, the Secretary made a determination that the appellant is not a refugee and is not owed complementary protection.

APPLICATION TO THE TRIBUNAL

21. The appellant made an application for review of the Secretary's decision pursuant to s 31(1) of the Act which provides:

> 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;
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> 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.

22. On 6 March 2015, the appellant made a statement and on 17 March 2015 his lawyers, Craddock Murray Neumann, made written submissions to the Tribunal.

23. On 23 March 2015, the appellant appeared before the Tribunal to give evidence and present his arguments with his representative and an interpreter in Bengali and English languages.

24. 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 is not owed complementary protection under the Act.

THIS APPEAL

25. The appellant uses a "dot point" format without numbering the grounds of appeal. The grounds of appeal read as follows:

> The appellant hereby appeals pursuant to section 43 of the Refugees Convention Act 2012 against the decision of the Refugee Status Review Tribunal made on 22nd day of May 2015 on the following grounds:
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> - Ground One - I think I did not receive justice in the decision made in my case.
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> - Ground Two - At my refugee status interview and the review hearing I was told that the decision makers were confused about my claim. I am arguing that without proper investigation into all the evidence I provided, and without a proper opportunity for me to respond and provide further clarification, how can a proper decision have been made.
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> - Ground Three - I had a problem with the interpreters, many of which did not understand what I was saying and did not interpret properly, which added to confusion.
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> - Ground Four - So far the decision makers have expressed concerns about my evidence, and I request that the evidence be reassessed in order to make a proper decision.
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> - Ground Five - One of my claims and related evidence was that I returned to Bangladesh from Malaysia, and then had to flee the country again. This part of my claim was not believed. The decision maker had no basis or evidence for reaching this conclusion.

- Ground Six - I have given evidence of being beaten and this was not believed. I do not feel it was fair that I was expected to provide categorical or documentary evidence of this, and I fell (sic) that my testimony was genuine and truthful in this regard.

- Ground Seven - I was involved with Jamaat-e-Islamic politics in 2003, however in my local area the Awami League is more influential and have power. They occupied or (sic) land forcefully and have been using the land. The decision maker did not accept this testimony and found that my party (Jamaat-e-Islam) was in power at that time. Country information contradicts what the decision maker found. I do not believe that the independent evidence and country information was sufficiently taken into account.

- Ground Eight - The decision maker found that I was a low level activist or political supporter and not at risk of harm, whereas I maintain my claims that low level grass roots activists are at risk and are being harmed in Bangladesh. I do not believe the decision maker took into account fully the country information and independent evidence that supports this claim.

- Ground Nine - Since I have left the country in a state of fear that continues until now, and is worse from prolonged detention. I cannot recall incidences in detail, and struggled to answer questions fully in the manner required. I have no familiarity with the legal process and have never faced such interviews in my life. I do not believe that the effect of these issues was fully taken into account while assessing my claims.

- Ground Ten - Regarding documentation I provided, the decision maker found this to be not sufficient. I do not believe that they took full account of the fact that I left my country in a situation of crisis, and that presently the situation in Bangladesh for my political party and for my family is very difficult. I do not believe that the tribunal took full account of the impact of my situation in my country on my ability to provide documentary evidence.

- Ground Eleven - I request that the Supreme Court of Nauru make a proper investigation of my case, including the documentary evidence and relevant country information.

SUBMISSIONS

26. The appellant was self-represented and did not file any written submissions. He made oral submissions with the assistance of a McKenzie friend at the hearing of the appeal. The respondent filed written submissions and made oral submissions at the hearing which was of assistance to the Court.

CONSIDERATION

Appellant's Submissions

27. Although the appellant filed nine grounds of appeal, in his submissions to the Court, he stated:

    a. during the interview he had issues with interpreters who were not able to explain what he wanted to say and vice versa;

    b. that he invited this Court to review this matter afresh;

    c. that he provided documents to the Tribunal and the Tribunal did not believe those documents and credibility issues generally; and

    d. that he had been in Nauru for a long period of time which affected him mentally to properly articulate his claims as he has forgotten many things.

28. At the hearing I told the appellant that this Court is not empowered to review this matter afresh as its role/jurisdiction is defined by s 43 of the Act whereby a person who is not recognised as a refugee by the Tribunal may appeal against the decision on a 'point of law' and the Tribunal is entrusted with the task of reviewing the decision of the Secretary under s 31 of the Act. So, the Tribunal and this Court perform different roles; and this Court does not have the powers to usurp the functions of the Tribunal and if it were to do so then it would be acting in breach of the Act.

29. The appellant's submissions can be put in the following categories;

    a. issues with interpretation;

    b. the Tribunal not believing the documents he presented and general credibility issues; and

    c. long term detention affecting mental ability to remember things and properly articulate claims.

Respondent's Submissions

30. The respondent's submission is that the Tribunal's decision is based entirely on its assessment of the appellant's credibility; and that the Tribunal had good reasons to reject his claims on the basis of credibility.

Issues with Interpretation

31. I have perused the submissions made by the appellant's lawyers to the Tribunal, including his statement and the transcript of proceedings. I did not find any issues were taken with respect to the interpretation during the Transfer Interview, the Refugee Status Determination application, the hearing before the Secretary or the hearing before the Tribunal.

32. The relevant principles for this ground of appeal are set out in *SZOYU v Minister for Immigration and Citizenship*[2]:

> [30] The relevant principles may be stated briefly. The standard of interpretation is not one of perfection. It need not be at the very highest standard of a first-flight interpreter but it must express in one language, as accurately as the language and circumstances permit, the idea or concept as it has been expressed in the other language: *Perera* at [26] to [29]; *WACO* at [66].
>
> [31] Importantly, not every departure from the standard of interpretation denies an applicant the opportunity to obtain a hearing under s 425 so as to give rise to jurisdictional error. The onus is on an applicant to demonstrate that the departure related to a matter of significance to his or her claims and that there was a sufficient connection between the inadequate translation and the Tribunal's decision: *Perera* at [38], [45]; *Applicant P 119/2002* at [16] to [18]; *WACO* at [69]; see also *ZJBD v Minister for Immigration and Citizenship* (2009) 179 109 a [72] to [73] (Buchanan J).
>
> [32] Whether any inadequacy in translation has been such as to deprive an applicant of the opportunity to have a hearing in accordance with s 425 involves a qualitative assessment of the conduct of the hearing before the tribunal as a whole: *SZHEW v Minister for Immigration and Citizenship* [2009] FCA 783 at [52] (Jagot J).

33. In this matter the appellant has not taken any issues with respect to interpretation at any stage of the proceedings. In the circumstances, this ground of appeal has no merit and is dismissed.

Not Believing the Documents and Credibility Generally

34. In relation to the document that the appellant claims that the Tribunal did not believe, this is discussed at [32] and [33] of the decision, where it is stated:

> [32] The Tribunal notes that at the hearing the applicant submitted a document in Bengali which, he said, was evidence of his [JI] membership. A translation by the interpreter indicated this to be a letter, on the letterhead of the Bangladesh

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[2] [2012] FCA 936 (Jacobson J).

JI, Kalukhali Upazila Branch, Rajbari, dated 13 April 2014. The writer, Maulana Md, Nazrul Islam, certifies that the applicant is a worker of JI and was in charge of Salwal Union no.9. When the Tribunal put to him that it seemed unusual for an official letter issued by JI not to include the party emblem or logo in the letterhead he said he was outside Bangladesh and had told his younger brother he needed this document. His brother may not have understood what was required. When the Tribunal put to him again that an official document from the party could be expected to display its emblem he repeated that he had handed on what he had received from his younger brother.

[33] Given these conclusions the Tribunal is not satisfied the applicant's evidence is consistent with his claim to have joined JI and supported it over a period of some years, either as a general member of as someone who was given a position of responsibility over as many as a hundred party members in his area. The Tribunal is not satisfied that any weight can be placed on the document said to have been issued by a local JI leader as support for these claims.

35. In relation to the issue of general credibility, this is discussed at [19], [20], [29] and [31] where it is stated:

[19] The Tribunal is not satisfied as to the credibility of the applicant's claim to have made a return visit to Bangladesh in January 2012.

[20] At the hearing the Tribunal put to the applicant that there was no mention in his entry interview of the return visit described in his later statements and interviews. Although the entry interview provided a number of obvious opportunities to mention such a visit, in particular when he was invited to explain why it was that he left Bangladesh, he failed to do so. Moreover, some of the information he did provide appears inconsistent with his having made such a visit. This includes the detail that he lived in Malaysia from 2007 to 2013, that he was employed there over the same period and that when his visa expired two years before his departure for Australia he was unable to obtain another, forcing him to live unlawfully in Malaysia for the last two years of his time there. The information about his immigration status in Malaysia is directly inconsistent with his claims that he returned to Bangladesh while his visa still had some months' validity remaining and that he was able to travel on the same visa when he returned to Malaysia in April 2012.

[29] In this context the Tribunal also notes that at the RSD interview the applicant was asked about the identity of JI's national leader and the nature of its flag or emblem but was unable to provide any significant information. When this matter was raised with him at the Tribunal hearing he said he had been unable to recall the information under the stress of the interview, an explanation the Tribunal finds difficult to credit if, as he claims, he was closely involved with

the party over a period of four years and frequently participated in rallies and meetings in which the party's flag was paraded.

[31] Having considered these matters the Tribunal is not satisfied that the applicant's evidence supports his claim to have had a relatively lengthy political involvement as a member of JI. The Tribunal is not satisfied that his responses at the hearing reflected any first-hand, authentic experience. It considers that the knowledge of [JI] he revealed was no more than might be expected of a member of the general public, and that it was not consistent with the insights which might be expected from someone who had had four years of membership and political activism.

36. In relation to the credibility issue, the respondent in its written submission submits at [19] as follows:

> The respondent submits that the task of appraising the material in support of a claim to be recognised as a refugee and determining the questions of fact for that purpose has been given to the Tribunal: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-6 (Brennan J). Further, the findings made by the Tribunal with respect to the credibility of some of the appellant's evidence were a mere function of the Tribunal '*par excellence*', with which this Court should not interfere in an appeal on a point of law: *Re Minister for Immigration and Multicultural Affairs Ex parte Durairajasingham* (2000) 58 ALD 609, 625 [67].

37. The Tribunal was justified in making the credibility findings against the appellant and in the circumstances this ground of appeal is dismissed.

<u>Long Term Detention</u>

38. In relation to the issue of long term detention affecting the appellant mentally, the Tribunal discusses at [21], [22] and [23] where it is stated:

[21] The applicant's response was to maintain that he had, in fact, mentioned the visit in his entry interview and that he could not understand why it was not recorded. He claimed, more generally, that his experiences since leaving Bangladesh, in particular the rigours of his stay in Nauru, have affected his ability to recall things that happened to him.

[22] The applicant also indicated at the hearing, through his advisor, that he would welcome a review of the audio recording of his Entry interview. That recording is not among the materials available to the Tribunal but the Tribunal notes that the written record includes considerable detail and sets out, apparently verbatim, the responses the applicant made to questions about his reasons for leaving Bangladesh. The Tribunal also notes that the interview was

conducted with the assistance of an interpreter in the Bengali and English languages.

[23] Having considered the written record of the entry interview the Tribunal is satisfied that if the applicant had made any reference to a return visit to Bangladesh this would have been noted in it. The Tribunal finds that he did not, in fact, refer to such a visit. The Tribunal is not satisfied this can be explained by a simple omission or a lapse of memory. If, as he now claims, he had suffered a severe beating at the hands of the AL while he was back in Bangladesh, sufficient to force him to leave the country once more and try to find safety in Australia, it is difficult to understand why he would not have mentioned this visit at any point during the interview. It is also difficult to reconcile his recorded remarks about the expiry of his visa and his two-year overstay with his subsequent claim, reiterated at the hearing, that he returned to Bangladesh in January 2012 while his visa was still current and then, using the same visa, went back to Malaysia in April of that year. While the Tribunal is prepared to accept that his experiences since leaving Bangladesh may have affected his memory to some degree, it is not satisfied this explanation adequately accounts for his failure to mention such an important and relevant episode in his life if it had, in fact, occurred.

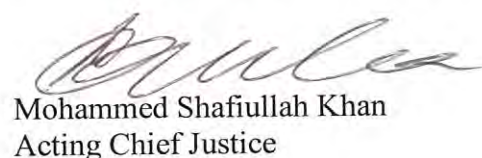
39. The Tribunal accepted that the appellant's stay in Nauru may have affected his memory to some degree but it was not satisfied by his explanations for his failure to mention important and relevant episodes in his life, if in fact they did occur. So again, raising the issue of credibility.

40. This ground of appeal has no merit and is dismissed.

CONCLUSION

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

DATED this 21st day of July 2017



Mohammed Shafiullah Khan
Acting Chief Justice