



IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION]

Case No. 116 of 2015

IN THE MATTER OF an appeal
against a decision of the Refugee
Status Review Tribunal TFN 15030,
brought pursuant to s 43 of the
Refugees Convention Act 1972

BETWEEN

ETA090

Appellant

AND

THE REPUBLIC

Respondent

Before: Crulci J
Appellant: Self-represented
Respondent: R. Knowles
Date of Hearing: 24 May 2017
Date of Judgment: 2 August 2017

CATCHWORDS

APPEAL - Refugees – Refugee Status Review Tribunal – Point of Law – Relevant considerations – Appeal *DISMISSED*

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 parties 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 Refugee Status Review Tribunal ("the Tribunal") delivered its decision on the 8 December 2015 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of the 25 April 2015, that the Appellant is not recognised as a refugee under the 1951 Refugees Convention¹ relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees ("the Convention"), and is not owed complementary protection under the Act.
4. Applications for extensions of time within which to file a Notice of Appeal under s 43 of the Act against the decision of the Tribunal were lodged on 23 December 2015 and 31 March 2016, granting an extension of time until 31 March 2016, and 29 April 2016. The original Notice of Appeal was filed on 29 April 2016. On 1 May 2017, the Appellant filed an application for an extension of time up to and including the date on which the order was made. An Amended Notice of Appeal was filed on 4 May 2017.

BACKGROUND

5. The Appellant is a 26 year-old single male from a village in the GulpalGANJ district of Bangladesh. The family consists of his parents, an older married sister, two younger sisters and a younger brother. They own farmland

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

about one kilometre from the village and are supported by the proceeds of that farm.

6. The Appellant fears that if he were to be returned to Bangladesh he would be physically abused or even killed, and subjected to cruel and inhuman treatment because of past incidents arising from a land dispute between his father and a person called "Sidique Mina". Before the Tribunal the Appellant also claimed to fear harm as a member of a particular social group, i.e. individuals in dispute with powerful people and/or individuals involved in land disputes, and also by reason of his imputed political opinion, being that of opposition to Mr Mina, who was a member of the Awami League ("AL").
7. The Appellant claims that his father sent him to live with his cousin in Dhaka when he was 12 in 2001 because he was in danger. His father then sent him to Malaysia in 2007. From Malaysia he travelled to Indonesia in December 2013, and shortly following travelled to Australia. He was transferred to Nauru in January 2014.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellant's Refugee Status Determination ("RSD") interview took place on 19 June 2014. The Appellant's key claims are summarised in the Secretary's decision as follows:²
 - The Applicant claimed that this dispute started about 20 years ago when both his father and Sidique Mina laid claim to land at the front of his father's property. Both claimed they purchased the land from a Hindu man. A court case in 2006 found in favour of the Applicant's father who has the documents to prove he is the rightful owner, however Mina has lodged appeals.
 - He explained Sidique Mina is a powerful man who has influence over the administration within the Awami League (AL), the political party currently in power in Bangladesh.
 - The Applicant claimed his father and Sidique Mina occasionally fought over the land and Mina abducted his father and tied him to a tree on one occasion. He claimed that his father went to prison three times for threatening Mina.
 - He stated that his father sent him to Dhaka to stay with a cousin when he was 12 in 2001 because he was in danger, being his father's eldest son. (He also stated he had been working on the family farm during this time.) Mina threatened his father that he would harm his son. The Applicant claimed he remained in hiding in a room for 6 years. Food was brought to him and he had to prepare his own meals. He claimed he started to suffer mentally so his father then sent him to Malaysia in 2007 where he commenced working in construction.

² Book of Documents ("BD") 45-46.

- The Applicant claimed his father had told him he could return to Bangladesh when the land dispute court case was resolved.
 - The Applicant claimed he approached the UNHCR in Malaysia and was told only Rohingas were eligible to apply for asylum. He claimed he was declined. It had taken him 7 years to seek asylum elsewhere such as Australia because he wasn't aware that Australia was accepting asylum seekers.
 - Since arriving in Nauru the Applicant claimed his father had been abducted again by Mina and Mina had threatened to cut off one of his father's limbs. In response to this his cousin had killed Mina's son on 23 May 2014.
 - The police then arrested his father as Mina claimed it was because of his father's direction that his son had been killed. The Applicant claimed he had also been charged because he was the eldest son.
 - The Applicant said his mother and three siblings had relocated to Dhaka and they are now in India. His mother is applying to go to Italy where her sister resides.
 - One of the applicant's sisters remains in Gulpganja, Bangladesh where other extended family members also reside. His grandparents and a cousin reside in Dhaka, an uncle resides in Chittagong, his mother has a sister in Japan and a brother in Malaysia and he has other cousins residing throughout Bangladesh.
 - The Applicant claimed he did not go to Malaysia looking for work. He claims his father is very wealthy and would give him the money if he needed it.
 - The Applicant claimed that Sidique Mina is a very rich and powerful man who is associated with the AL and has a large family residing throughout Bangladesh. The Applicant would not be able to go anywhere else in Bangladesh because Mina would find him.
9. The Appellant claimed that his cousin killed Mr Mina's son and the Appellant's father was charged because it occurred at his direction. The Appellant said that because he was his father's eldest son, he had also been charged with murder. The Appellant also stated that the Government owned the land and were leasing it to his father, although they hadn't given the lease papers to his father.³
10. The Secretary accepted as credible the following claims:
- The Appellant's father was involved in a land dispute over a period of time with Mr Mina;
 - There had been court cases relating to this dispute which had found his father to be the rightful owner;
 - The Appellant had relocated to Dhaka sometime before he left Bangladesh to work in Malaysia;
 - The Appellant's father may have fought with Mr Mina during this period of conflict; and

³ BD 47.

- Mr Mina's son may have been killed in a dispute with the Appellant's cousin.⁴

11. However, the Secretary found the following claims not to be credible:

- The Appellant's father was a member of the BNP creating a reason for the land dispute;
- The Appellant had remained hidden in a house or room for 6 years, never venturing outside during this time;
- The Appellant spent 6 years working in Malaysia because he feared for his life;
- The UNHCR had declined his request to apply for asylum because they were only accepting Rohingas;
- The Appellant's father has been charged with the murder of Mr Mina's son and the Appellant has also been charged because he is his father's son;
- The Appellant's mother and 3 siblings are looking to relocate to Italy because of the land dispute; and
- The Appellant, being the eldest son, is in danger from Mr Mina because of the land dispute.⁵

12. In making these findings, the Secretary noted many discrepancies in the Appellant's evidence and said:

*"There are many discrepancies which indicate the Applicant has not been altogether honest in his claims for asylum: his father's political allegiance; that he had been in hiding in Dhaka between 2001 and 2007 and working on the family farm at the same time; that he had remained hidden in a room the entire time he was in Dhaka, never venturing outside; that the Government owned the land and were leasing it to his father when he claimed the dispute over ownership of the land was between his father and Mina; that Mina was able to have his father charged and put in jail for threatening him, yet he was never charged or jailed for threatening the Applicant's father and abducting him; that Mina was wealthy making him more powerful, yet the Applicant's father was also wealthy; that the UNHCR would not permit him to apply for asylum in Malaysia and he hadn't attempted to seek asylum elsewhere in the 7 years he had been residing outside Bangladesh."*⁶

13. The Secretary also found that the Appellant's father could not have been charged with the murder of Mina's son because he was abducted at the time and the Appellant did not provide any documentary evidence that he was charged with murder.

⁴ BD 49.

⁵ BD 49.

⁶ BD 48.

14. The Secretary therefore found that the Appellant's claims in relation to the land dispute had been exaggerated and the Appellant's main motivation for leaving Bangladesh was for economic reasons.⁷ In any event if the Appellant had any concern for his own safety, he could relocate elsewhere in Bangladesh such as in Dhaka.⁸

REFUGEE STATUS REVIEW TRIBUNAL

15. Before the Tribunal, the Appellant maintained his claims with respect to the purchase of the land, the subsequent court case, and that his mother and 3 younger siblings had gone to Italy, where the mother had a sister and they were making an application for refugee status.⁹
16. The Appellant also maintained his claims with respect to his relocation to Dhaka for 6 years, during which he remained in hiding. He said that during the period of relocation, Mr Mina threatened his family and abducted his father and tied him to a tree on the land. He added that his mother and male cousins attempted to rescue his father, and violence broke out between the Appellant's family and the relatives and friends of Mr Mina. The Appellant's cousin, Sentu, hit Mr Mina's nephew on the head and he fell to the ground. The police arrived and it was realised that Mr Mina's nephew was dead. The Appellant's father was charged with instructing his nephew (who, at the time of the Tribunal hearing, was in India) to murder Mr Mina's nephew and was sentenced to 6 years imprisonment.
17. The Tribunal found that the Appellant would not have encountered any harm if he lived openly in Bangladesh. This finding was based on the lack of harm and specific threats against the Appellant throughout the 26-year history of the land dispute.¹⁰
18. In respect of the Appellant's claimed fear of persecution on the basis of being a member of a particular social group, the Tribunal found that the groups of "individuals in conflict with powerful people" or "individuals involved in land disputes" are not recognisable groups bound together by factors other than fear of harm.¹¹ It did not accept that there is a reasonable possibility of persecution for reason of being the son of a man involved in a property dispute, or the son of a man in a dispute with a powerful person.¹²
19. The Tribunal also considered the Appellant's claimed fear of persecution on the basis of his imputed political opinion derived from his father's opposition to Mr Mina, who is an important local figure in the AL, or his father's own secret support for the Bangladesh Nationalist Party ("BNP"). The Tribunal found that, given the political opinion of the Appellant's father

⁷ BD 49.

⁸ BD 53.

⁹ BD 193 – 195.

¹⁰ BD 198 at [36]-[37]

¹¹ BD 198 at [38].

¹² BD 198 at [39]-[40].

was unknown to Mr Mina, party politics would have played no role in the continuation of the land dispute. Therefore, there was no reasonable possibility of the Appellant's encountering harm by reason of imputed political opinion.¹³

20. The Tribunal further considered that Dhaka may constitute a "home area" for the Appellant, given the Appellant lived there for nearly 6 years, it was his last place of residence before leaving Bangladesh, and he has friends and family there. If the Appellant were to return to Dhaka, there is no reasonable possibility that Mr Mina would know he was there, considering that the Appellant has a different surname to his father.

21. In light of the above findings, the Tribunal concluded that the Appellant does not have a well-founded fear of persecution for a Convention reason, and, for the same reasons, does not qualify for complementary protection.

THIS APPEAL

22. The Appellant is self-represented. His Amended Notice of Appeal reads as follows:

1. I do not agree with the Tribunal's decision and I think that they have made a mistake;
 2. The Tribunal made a mistake by not taking into account the fact that my father was in custody when they assessed the likelihood of myself suffering mistreatment or harm;
 3. The Tribunal made a mistake when they said that the experiences I had of my parents and close family suffering harm was not a basis for me fearing harm if I were to return to Bangladesh. I have a well-founded fear of harm based on the events that happened to people close to me and my relationship to them means I will suffer harm if I return;
 4. I told the Tribunal that my mother, younger brother and two sisters had fled to Italy but the Tribunal did not take this information into account as evidence that my family and myself are genuinely at risk of harm;
 5. I told the Tribunal that when I was young I was threatened, so my parents sent me to Dhaka to live and hide there. The Tribunal said I didn't face harm in Dhaka. The reason I didn't face harm was because I was in hiding, the Tribunal did not consider this.
23. The Appellant did not file written submissions. At the oral hearing, the Appellant explained that he was sent to Dhaka to avoid harm in his hometown. After six years, the Appellant told his mother that he was unable to stand the confinement anymore and asked her to send him abroad. About six months later, the Appellant was sent to Malaysia to live with his uncle. The uncle said the Appellant should not continue to live with him because he did not have a visa.

¹³ BD 199 at [45].

24. The Appellant said that if he were returned to Bangladesh “*they would obviously look for an opportunity to inflict physical harm on me*”.¹⁴ He said that he could not stay in a country where his mother, brother and sister were not safe.¹⁵
25. The Respondent submits that the Appellant has not identified any proper basis on which the Tribunal’s decision was affected by an appealable point of law. According to the Respondent, the Tribunal did, in fact, take each of the matters into account said by the Appellant in his Amended Notice of Appeal not to have been considered.
26. In relation to the father’s imprisonment, the Respondent highlights that the Tribunal referred to the Appellant’s father being in jail and sentenced to 6 years imprisonment, and that he was not appealing the sentence.¹⁶ The Tribunal also referred to the father’s “enforced absence from the land”,¹⁷ and took his imprisonment into account when considering whether the Appellant would return to Zuria or Dhaka.¹⁸ However, according to the Respondent, the Tribunal did not consider the father’s imprisonment as indicative of the risk of any future harm to the Appellant.
27. In relation to the experiences of the Appellant’s close family, the Respondent argues that the Tribunal did consider the harm suffered by the Appellant’s family, and found that that harm did not give rise to a well-founded fear of persecution in Bangladesh on the part of the Appellant. The Respondent submits that the Tribunal noted the harm suffered by the father as a result of the land dispute, and that the Appellant’s mother and younger siblings fled to Italy and applied for refugee status.¹⁹ However, the Tribunal noted that the mother and siblings did not encounter any harm despite living in close proximity to AL for many years.²⁰
28. In response to the flight of the Appellant’s mother and siblings to Italy, the Respondent highlights that the Tribunal referred to their travel to Italy in the context of a discussion of the present state of the disputed land,²¹ and also in the context of whether the Appellant would return to Zuria or Dhaka.²²
29. Finally, in response to the Appellant’s allegation that he only avoided harm in Dhaka because he was “hiding”, the Respondent submitted that the Tribunal considered the Appellant’s living arrangements with an older married couple in Dhaka, and the fact that the Appellant “*was not sent to*

¹⁴ Supreme Court Transcript p 10 ln 34 – 35.

¹⁵ Supreme Court Transcript p 11 ln 5 -6.

¹⁶ BD 196 at [28].

¹⁷ BD 197 at [35].

¹⁸ BD 200 at [46]-[47].

¹⁹ BD 197 at [29].

²⁰ BD 198 at [39].

²¹ BD 197 at [33].

²² BD 200 at [47].

school but stayed at the couple's home, mainly watching television or just sitting in the courtyard".²³

CONSIDERATIONS

30. Under s 43(1) of the Act, any appeal to the Supreme Court from a decision of the Tribunal must be on "a point of law".

31. Australian courts have considered the need for courts performing judicial review to confine their review to whether the decision made by the Tribunal was made within the legal limits of the relevant power. In the often cited authority of *Attorney-General (NSW) v Quin*,²⁴ Brennan J said:

"The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; by the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone".²⁵
(emphasis added)

32. In *Minister for Aboriginal Affairs v Peko-Wallsend* ("Peko-Wallsend"),²⁶ Mason J, as his Honour then was, said:

"The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned".²⁷
(emphasis added)

33. The grounds of review put forward by the Appellant in his Amended Notice of Appeal also raise the judicial review ground of failing to take a relevant consideration into account. Preceding the passage cited above in *Peko-Wallsend*, Mason J expanded upon this ground of judicial review. His Honour noted:

"The failure of a decision-maker to take into account a relevant consideration in the making of an administrative decision is one instance of an abuse of discretion entitling a party with sufficient

²³ BD 193 at [12].

²⁴ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

²⁵ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.

²⁶ *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 66 ALR 299.

²⁷ *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 66 ALR 299 at 309.

standing to seek judicial review of the ultra vires administrative action.”²⁸

34. His Honour continued:

“The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is bound to take into account in making that decision...”

What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act...”

35. In *WAE v Minister for Immigration and Multicultural and Indigenous Affairs*,²⁹ French, Sackville and Hely JJ noted that the Tribunal is not required to refer to material considered irrelevant to the fact being assessed by the Tribunal. Their Honours said:

*“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 to it make a different finding of fact (cf *Minister for Immigration and Multicultural Affairs v Yusuf*) 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”.*
(emphasis added)

36. In relation to the claim that the Tribunal erred in not taking the father’s imprisonment into account in assessing the likelihood of the Appellant suffering mistreatment, it is apparent upon reading of the Tribunal’s reasoning that this was a matter of which the Tribunal was well aware.

²⁸ *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 66 ALR 299 at 308-309.

²⁹ *WAE v Minister for Immigration and Cultural and Indigenous Affairs* [2003] FCAFC 184.

37. However, the Tribunal did not explicitly refer to the father's imprisonment in assessing the likelihood of the Appellant being mistreated if returned to Bangladesh. It can be inferred from this that the Tribunal found that the matter was not relevant to this assessment. This was a finding the Tribunal was entitled to make.
38. The Tribunal gave sound reasons for finding that it was not likely that the Appellant would be mistreated, including that:
- a) the land dispute was between Mr Mina and the Appellant's father, and not the Appellant;
 - b) the Appellant had not encountered any harm in Zuaria, despite some general threats that were made when the Appellant was a child;
 - c) Mr Mina had not come looking for the Appellant while he was living in Dhaka;
 - d) no specific threats had been made against the Appellant;
 - e) the Appellant was not the owner of the disputed land and had no power to dispose of it;
 - f) there is no reason Mr Mina would regard the Appellant as a threat, given Mr Mina had been for some time occupying and using the land without opposition.³⁰
39. Regarding the claim that the Tribunal erred in saying that the harm suffered by the Appellant's family was not a basis for the Appellant fearing harm if returned to Bangladesh, this is an invitation to the Court to consider the merits of the Appellant's case. This is the role of the Tribunal and not of the Court.³¹ The Tribunal was entitled to find that the harm suffered by the Appellant's family did not give rise to a well-founded fear of persecution on the behalf of the Appellant.
40. Regarding the departure of the Appellant's mother and younger siblings to Bangladesh, the Tribunal referred to this matter at various points throughout its reasons. However, it did not specifically refer to this in considering whether the Appellant and his family would genuinely be at risk of harm in Bangladesh. It can be inferred from this that the Tribunal did not consider this matter relevant to the risk of harm to the Appellant. The Tribunal was entitled to do so. As set out at [36] above, the Tribunal gave sound reasons for finding that the Appellant would not be genuinely at risk of harm if returned to Bangladesh.
41. In relation to the claim that the Tribunal failed to consider that the Appellant did not face harm in Dhaka because he was "in hiding", the Tribunal did take this matter into account. At [36] of its reasons, the Tribunal noted that there were no claims that Mr Mina ever came looking for the Appellant in Dhaka, nor that any threats were made against him, and, on this basis, did not accept based on the evidence that "any harm would have befallen the applicant even if he had lived openly in

³⁰ BD 198 – 200 at [36]-[46].

³¹ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 66 ALR 299 at 309.

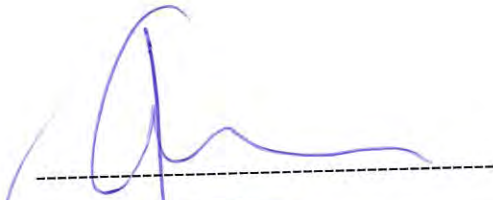
Bangladesh”³² It is apparent from this that the Tribunal had considered the Appellant’s claim that he was in hiding in Dhaka.


42. This appeal does not raise a point of law in relation to the Appellant’s refugee status determination decision made by the Tribunal.

ORDER

43. (1) The Appeal is dismissed.

- (2) The decision of the Tribunal TFN 15030 dated 8 December 2015 is affirmed under section 44(1) of the Act.



Judge Jane E. Crulci
Dated this 2nd August 2017


³² BD 196 at [36].