



IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 63/2015

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

VEA036

AND

The Republic of Nauru

APPELLANT

RESPONDENT

Before: Khan ACJ
Date of Hearing: 9 March 2017
Date of Judgment: 27 September 2017

Case may be cited as: VEA036 v The Republic

CATCHWORDS:

Whether the Tribunal considered irrelevant material – whether there was an error of interpretation – whether the Tribunal was under an obligation to verify the credibility of the appellant's documentary evidence – whether the Tribunal considered relevant material – whether the Tribunal should have considered factors relevant to relocation.

HELD: no error of law is raised – 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 31 May 2015. Under s 43(3) of the Act the appellant was required to file the appeal within 28 days of 31 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 it became clear that 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 32 year old man from Pakistan.
10. He claims that he was born on 13 October 1984 in Hangu, Khyber Pakhtunkhwa province. Identification documents, which he states are false, indicate a birth date in 1982. He is of Pashtun ethnicity and is a Sunni Muslim.

¹ [2015] NRSC 18 (Khan J).

11. His parents and five siblings live in Pakistan. Two other brothers have lived in Dubai since December 2013.
12. After leaving school in 2001 after year 10, the appellant sold motorcycles with his uncle and cousin until 2013.
13. In the course of their business, the appellant and his family became involved in a dispute with a Taliban militant leader named Mullah Nabi. The dispute arose when some militants purchased one or more motorbikes from the business owned by the applicant's family, but then refused to pay the balance owing. The appellant's uncle filed a First Information Report (complaint) and accompanied police to conduct a raid on Mullah Nabi's house, leading to the discovery of weapons. This impugned the honour of Mullah Nabi, who developed a vendetta against the appellant's family.
14. On 15 March 2015, the appellant was travelling with his cousin on a motorbike, with the cousin driving, when they were attacked by Taliban militants. The appellant's cousin was shot once in the head and twice in the side. They had been travelling on the highway towards Thal and it was dark. His cousin died as a result of the attack.
15. Six to seven months later, the appellant's uncle was lured to mountains and kidnapped. The appellant found his dead body shortly afterwards.
16. The appellant was threatened in person, via telephone and via a letter left at the business premises.
17. The appellant departed Pakistan in August 2013 and arrived in Nauru on 20 November 2013.
18. The appellant fears persecution from Mullah Nabi and his associates because of his imputed political opinion as an opponent of the Tehreek-e-Taliban and his membership of his family group. He believes that State protection is ineffective or unavailable because of the influence of the Taliban over the police.
19. He also does not consider relocation to be possible because of the Taliban's presence throughout his country and because of discrimination against people of his ethnicity.

APPLICATION TO THE SECRETARY

20. On 3 December 2013, the appellant attended a Transfer Interview.
21. On 28 February 2014, the appellant made an application to the Secretary for recognition as a refugee and for complementary protection under the Act.
22. On 31 October 2014, the Secretary made a determination that the appellant is not a refugee and is not owed complementary protection.

APPLICATION TO THE TRIBUNAL

23. 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;
- 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.

24. On 18 February 2015, the appellant made a statement and on 25 March 2015 his lawyers, Craddock Murray Neumann, made written submissions to the Tribunal.

25. On 31 March 2015, the appellant appeared before the Tribunal to give evidence and present his arguments with his representative and an interpreter in Pashto and English languages.

26. On 12 April 2015, the appellant's lawyers made further written submissions.

27. The Tribunal did not accept the appellant's evidence regarding the circumstances of the cousin's death. It had been claimed that he had been shot while riding a motorbike by assailants travelling in the opposite direction in a car.

28. Further, the Tribunal did not accept the appellant's evidence regarding the raid on Nabi's house. No satisfactory explanation was forthcoming as to why the uncle accompanied police on the raid. It was also considered implausible that police would agree to raid the house in relation to a transactional dispute but would not assist in relation to the threat to the appellant's life.

29. The Tribunal also did not accept that the appellant's brothers had fled to Dubai. This fact was only claimed after the Secretary's decision and no satisfactory explanation was given for the delay.

30. The Tribunal noted a number of discrepancies in the appellant's timeline of events. The evidence given at the Transfer Interview was inconsistent with that given at the hearing.

31. It was also noted that the appellant had initially claimed he was kidnapped, before admitting that this was a fabrication. At the Tribunal hearing, he denied the admission of fabrication and suggested that there had been a misinterpretation.

32. The Tribunal also brought independent information to the appellant's attention that identified that Mullah Nabi had been working with the government against the Taliban since 2008 and that the appellant's brother had never left Pakistan. The appellant disputed the accuracy of this information.
33. In conclusion, the Tribunal found that the appellant and his family had not been targeted by Mullah Nabi or anyone else.
34. 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

35. 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:

- Ground One - The Appellant states that he is not accepting the Tribunal's decision at all;
- Ground Two - The Appellant states that the Tribunal's decision is not a fair decision;
- Ground Three - The Appellant states that the Tribunal relied on Google+ printouts of his brother's internet activity, including photos. Two of the Appellants brothers are not in Pakistan but have fled to Dubai whilst the Appellant was on Christmas Island. The Appellant's brothers fled from Pakistan as, when the Appellant left Pakistan, the Taliban would call the Appellant's brothers and tell them that they had to find him and bring him back to Pakistan to present myself to the Taliban. The Taliban threatened the Appellant's brothers and said that if they didn't present him then they would pay the price of this. The Tribunal did not accept that the Appellant's brothers had fled from Pakistan because they relied on the above Google+ photos believing that they showed that the Appellant's brothers remained in Pakistan. The Tribunal did not accept that the Appellant's younger brother, who remains in Pakistan, uploaded the photos to Google+. The Tribunal did not therefore accept that the Appellant's other brothers remain in Dubai where they have fled to;
- Ground Four - The Appellant states that the Tribunal rejected his claim of his the Appellant's uncle being kidnapped because of the difference in terminology used by his interpreter at the Tribunal hearing. The

Appellant states that he told the interpreter at the hearing that “my uncle was kidnapped and then killed in a very bad way by Taliban” but the interpreter said that “I (meaning the Appellant) was kidnapped and harmed in a very bad way.” The Appellant claims that this difference created an issue with the Tribunal believing his claims of his uncle’s kidnapping;

- Ground Five - The Appellant states that the Tribunal did not accept that he was with his cousin at the time of the attack on the motorbike. The attack resulted in the Appellant becoming unconscious. The Appellant awoke at Hangu hospital. The Appellant asked his uncle as to where his cousin was and he was told that his cousin was injured by a bullet and was taken to Peshawar where he passed away on the way. The Appellant’s cousin was returned to Hangu hospital for a post-mortem examination. The Appellant has therefore provided a Death Certificate from Hangu hospital as this was the place where the post-mortem examination was undertaken on his cousin;
- Ground Six - The documents that the Appellant provided to the Tribunal are all genuine. The Appellant states that it is not fair for the Tribunal to make a decision that these documents are fraudulent based on the fact that there are often fraudulent documents issued in Pakistan. The documents that the Appellant submitted have stamps and signatures that verify they are genuine. The Tribunal did not make any attempt to verify that the documents that the Appellant submitted were genuine;
- Ground Seven - The Appellant states that the Tribunal did not consider evidence submitted to the Tribunal regarding Mulla Nabi, being the First Incident Report from 2013. The Appellant states that this document should have been considered in response to the Tribunal’s own information. The Appellant states that this document shows that Mulla Nabi remains a part of the Taliban post 2008;
- Ground Eight - The Tribunal accepted that the Appellant’s area of Hangu was not safe for him to return to as it was too dangerous and the Taliban have an active presence in the area, however, the Tribunal continued to reject the Appellant’s claim for refugee status;
- Ground Nine - The Tribunal said that the Appellant was able to relocate to another area of Pakistan even when the Appellant told the Tribunal that he could not relocate to another area of Pakistan as he was a target of the Taliban and the Taliban have a big and strong network with informants working for them and because of this, neither

a small nor big city, would be safe for the Appellant to reside in in Pakistan as he remains a target for the Taliban;

- Ground Ten - The Tribunal did not consider the information that the Appellant said to them that the current Prime Minister of Pakistan has said that all Pashtuns are terrorists and they are unable to travel to the Punjab State or any other location in Pakistan; and
- Ground Eleven - The Appellant states that should he return to Pakistan, his life will be in danger. The Appellant states that he remains in the harsh conditions of detention because his life is not safe should he returned to Pakistan. The Appellant requests that the Court consider his situation and accept him as a refugee. The Appellant expects justice from the Court.

SUBMISSIONS

36. 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 also made oral submissions at the hearing which was of assistance to the Court.

CONSIDERATION

General Observations

Grounds One and Two

37. In relation to these grounds of appeal, the appellant submits that he does not accept the Tribunal's decision because he does not think that it was a fair decision. The decision of the Tribunal is binding on the appellant subject to the filing of an appeal under the provisions of s 43(1) of the Act and then succeeding on the appeal. Under s 43(1), an appeal can be filed when the Tribunal by its decision does not recognise the person to be a refugee; the grounds of appeal are only on a 'point of law'. If an appellant does not succeed on the appeal on a point of law then the decision of the Tribunal stands and the appellant is bound by the decision; and has to accept it regardless of how he feels about it.
38. The appellant has filed a total of 11 grounds of appeal in dot point form and all grounds of appeal are linked to each other in one way or the other and are an attack on the Tribunal's findings.
39. Mr O'Shannessy for the respondent gives a very succinct version in his oral submissions which is:
- a. the appellant worked at his family's motorcycle shop;

- b. his uncle had some disagreement with a member of the Taliban by the name of Mullah Nabi about payment for a motorcycle;
 - c. his uncle reported the matter to the police and accompanied them to search the premises of Mullah Nabi;
 - d. this led to the appellant and his family receiving threatening calls from the Taliban;
 - e. in March 2013, the appellant's cousin was shot and killed while riding a motorcycle and the appellant was a passenger;
 - f. in May 2013, the appellant's uncle was abducted and killed by the Taliban;
 - g. in June 2013, the appellant had argument with the Taliban militants at the motorcycle shop which led to a shooting and the appellant fled; and
 - h. the appellant fled Pakistan in August 2013.
40. Mr O'Shannessy further submits that the Tribunal rejected the appellant's claim entirely or in its assessment of the appellant's credibility. The Tribunal found that the appellant's claim was not credible, that he and his family were not targeted by the Taliban or anyone else in relation to the motorcycle business or for any other claim ([25] of the decision).

Grounds Three to Eleven

41. I shall now examine the remaining grounds to see if the Tribunal was justified in making its decision or whether it fell into an error of law.

Ground Three – Google+

42. The appellant submits that his brothers left for Dubai after his departure for Pakistan as the Taliban were making calls to them and demanding that the appellant present himself to their headquarters and if not, then they will be kidnapped.
43. The respondent in response submits that the second last sentence of ground three (the Tribunal did not accept that the appellant's younger brother, who lives in Pakistan, uploaded the photos on Google+) was not given to the Tribunal either at the hearing or in the post hearing submissions and in any event it would not have made any difference.
44. The appellant is now seeking to raise a new factual matter at this stage of the proceedings and this Court is not in a position to conduct a reassessment of the appellant's evidence on an appeal on a point of law.
45. There was overwhelming evidence before the Tribunal which cast real doubt on the appellant's evidence that his brothers had departed in December 2013. The Tribunal stated at [67] as follows:

The Tribunal acknowledges that some of the information on the website, such as the posting of the link to Qureshi Motorcycle Bargain in March 2013, predates the more serious problems described by the applicant, at least according to the version of event advanced at the RSD stage. However, this does not account for the fact that the biographical details such as the photo were updated more recently, in September 2014, which suggests that at that time, at least, Mohammad was residing in Hangu. Consistent with this interpretation is the posting of a restaurant review for the Shiraz restaurant in Peshawar, which at the date the website was accessed was said to have been made "six months ago" which is also around September 2014.

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

Ground Four – Uncle being kidnapped

47. The appellant submits that because of misinterpretation by an interpreter at the Transfer Interview stage in relation to the kidnapping by the Taliban, his appeal was decided against him.

48. The respondent in response submits that the issue of kidnapping of the appellant was dealt at [53] of the decision where it was stated:

This incident was specifically detailed in the [Transfer Interview] as having taken place on 28 December 2012. However, in the [Refugee Status Determination] statement there is no mention of the applicant having been kidnapped. At the RSD interview when he was asked about this discrepancy, the applicant explained that *probably there was a mistake, a misunderstanding between my kidnapping and my uncle's kidnapping... I was not kidnapped for sure*. In the written statement provided to the Tribunal the applicant clearly and expressly concedes that he had lied about the kidnap claim at the TI: *I pressured myself into adding an incident that I could say directly happened to me. I didn't put this claim forward in my RSD application because it wasn't true*. He also states that when this was put to him at the RSD interview *I came clean that I had made up the story*, whereas in fact he had done no such thing. At the Tribunal hearing it was pointed to the applicant that he had not in fact come clean about anything at the RSD interview, but rather had insisted that there was a misunderstanding attributable to the interpreter. The applicant then reverted to this position, claiming that he *clearly said he had never been kidnapped, and there was a misinterpretation*. In other words, the applicant has not even been consistent about whether he invented this claim or not.

49. The appellant having considered that he lied about kidnapping is now blaming the interpreter for misinterpreting, which led the Tribunal to doubt the appellant's veracity as to the kidnapping claim and generally.

50. This ground of appeal has not merit and is dismissed.

Ground Five

51. The appellant submits that the Tribunal was wrong in rejecting this claim as he was with his cousin on the motorbike as a passenger when he was shot and killed.
52. This matter is discussed in detail at [27] of the decision where the Tribunal deals with the issue of his cousin being shot at. The appellant gave different versions of how this incident occurred. His first version was that the cousin was shot at from the opposite direction in darkness and was identified by the headlights of the oncoming car in which the assailants were; his second version was that the assailants were not in an oncoming car but were waiting for them and the other version was that they had been shot from somewhere else.
53. As a result of the different versions given by the appellant, the Tribunal concluded that the veracity of the claim was in doubt and in my view it was justified in coming to the conclusion. So this ground of appeal is dismissed.

Ground Six - Documents

54. The appellant submits that the documents provided by him were genuine and the Tribunal was wrong in rejecting them and that the Tribunal should have made an attempt to verify the documents.
55. The respondent submits that there was no onus on the Tribunal to verify the documents and that the onus was on the appellant to satisfy the Tribunal and he failed to do so. The Tribunal concluded that the documents were rejected.
56. The Tribunal deals with the issue of the documents at [69] where it is stated:

...Similarly, and bearing in mind the available country information about fraudulent document being readily available in Pakistan, the Tribunal does not find the documents tendered in support of the applicant's claims to be reliable, at least not to the extent that they appear to support his claims. In particular, the Tribunal finds that the Taliban letter is bogus, and has been fabricated to support his refugee claim.
57. The Tribunal was correct in rejecting the documents so this ground of appeal is dismissed.

Ground Seven – Mullah Nabi

58. The appellant submits that the Tribunal did not consider the evidence submitted to it regarding Mullah Nabi being the First Incident Report from 2013 and the document should have been considered in response to the Tribunal's own information. The appellant further states that this document shows that Mullah Nabi remained as part of the Taliban post-2008.
59. The respondent submits that Mullah Nabi's role was discussed by the Tribunal at [62] where it is stated that Mullah Nabi was opposed to the Taliban at the time the

appellant claims he was a Taliban commander and further, that Mullah Nabi split from the group in 2008 and formed his own government militia, which was violently opposed by the Taliban.

60. The Tribunal based its finding on the country information it accessed which clearly indicated that Mullah Nabi was once linked to the Taliban but in 2008 he started supporting the Pakistani government in its fight against the Taliban.
61. This ground of appeal is devoid of any merit and is dismissed.

Grounds Eight and Nine - Hangu

62. The appellant submits at ground eight that his area of Hangu was not safe and at ground nine that the Tribunal stated he was able to relocate to another area of Pakistan.
63. The respondent in response submits that the Tribunal did not make a finding that Hangu was not safe for him to return to; and nor did it deal with the issue of relocation simply for the reason that it found that Hangu was safe.
64. Both these grounds of appeal have no merit and are dismissed.

Ground Ten

65. In relation to this ground the appellant complains that the Tribunal did not consider what the Prime Minister said, that all Pashtuns are terrorists and are not able to travel to the Punjab State or any other location in Pakistan.
66. The respondent submits that this ground of appeal is in the context of relocation and the Tribunal made no such finding, so therefore it is not relevant. I agree with the respondent's submission and this ground of appeal is dismissed.

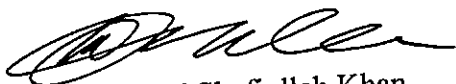
Ground Eleven

67. The appellant submits that should he return to Pakistan his life will be in danger.
68. The Tribunal made a clear finding that Hangu was safe and therefore it was safe for him to return there. In the circumstances, this ground of appeal has not merit and is dismissed.

CONCLUSION

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

DATED this 27th day of September 2017


Mohammed Shafiullah Khan
Judge

