IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 10/2015
Being an appeal against a decision of the Nauru Refugee Status Review Tribunal brought pursuant to s43 of the *Refugees Convention Act 2012*

BETWEEN

DWN018 APPELLANT

AND

The Republic of Nauru RESPONDENT

Before: Khan ACJ
Date of Hearing: 10 April 2017
Date of Judgment: 6 November 2017

Case may be cited as: DWN018 v The Republic

CATCHWORDS:

Whether section 37 of the Act was repealed retrospectively with effect from 10 October 2012 by the combined effect of Refugees Convention (Derivative and Status & Other Measures) (Amendment) Act 2016 and the Refugees Convention (Amendment) Act 2017.

Whether the Tribunal acted in accordance with the principles of natural justice – adverse inferences made by the Tribunal were not obviously open on the known material – whether the appellant had an opportunity to respond to adverse inferences.

Appeal dismissed – Tribunal not required to give a running commentary on the decision-making process nor is it required to inform an appellant of possible adverse inferences.

APPEARANCES:

Counsel for the Appellant: J Gormly
Counsel for the Respondent: A Aleksov

JUDGMENT

INTRODUCTION

1. The appellant filed an appeal against the decision of the Refugee Status Review Tribunal ("the Tribunal") pursuant to s43(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 28 December 2014 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 27 August 2015 and the grounds of appeal were amended on 2 May 2016, 6 and 28 March and 6 April 2017.

EXTENSION OF TIME

4. The Tribunal's decision was delivered on 28 December 2014 and it was received by the appellant on 21 January 2015. Under s 43(3) of the Act the appellant was required to file the appeal within 28 days of 21 January 2015.

5. The appeal was not filed within 28 days. The appellant with the consent of the respondent made three applications for extensions of time. The Registrar purported to grant extensions on 4 February, 27 April and 30 June 2015, ultimately 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 27 August 2015 was competent. There was some confusion on the part of the respondent that the appeal was not competent but that is not so.

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

9. On 3 April 2017 the appellant filed an applicant for an order to extend time which was not necessary but in any event leave was granted on 10 April 2017 for the appellant to file amended ground of appeal.

BACKGROUND

10. The appellant is a 30-year-old man of Pashtun ethnicity and Sunni religion.

11. He was born on 31 December 1986 in the village of Tari Mangal in Parachinar, Kurram Agency in the Federally Administered Tribal Area of Pakistan. He speaks Pashto, Urdu and Arabic.

12. The appellant was married in 2011 and his wife, parents and brothers are in Peshawar.

13. The appellant worked on the family's farm land in Parachinar for a time before working as a driver. The property was affected by sectarian fighting in 2007. The family moved away and leased out the land.

14. The family spent six to seven months in an Internally Displaced Persons camp in Sadda in late 2010.

15. The appellant continued to spend time in Tari Mangal as it was removed from the fighting. The family eventually returned when the Pakistan Army had properly secured the area.

16. The appellant was in the vicinity of a bomb blast in Tari Mangal in August 2011. In defiance of Taliban orders, he assisted victims by taking them to hospital. The Taliban was looking for him because he defied their orders. Other people who provided assistance were also targeted. The appellant stayed with his sister in Sadda for one to two months after the blast before travelling to Saudi Arabia. He stayed there for 12 months from 2012 to 2013.

17. In February 2012, the appellant's family home in Tari Mangal was destroyed by Taliban shelling. He suspects that this was done because the Taliban could not find him. His family returned to Peshawar.

18. When the appellant returned to Pakistan in 2013, he stayed with his family in Peshawar. The appellant departed Pakistan in September 2013.

19. The appellant fears harm from Shia Muslims in Kurram Agency because he is a Sunni Muslim, from the Taliban because he assisted the Pakistan Army and from neighbours who killed his uncle in Tari Mangal in connection with a land dispute.

APPLICATION TO THE SECRETARY

20. On 12 November 2013, the appellant attended a Transfer Interview.

21. On 19 December 2013, the appellant made an application to the Secretary for recognition as a refugee and for complementary protection under the Act.

22. On 21 June 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 21 September 2014, the appellant made a statement and on 22 September 2014 his lawyers, Craddock Murray Neumann, made written submissions to the Tribunal.

25. On 23 September 2014, 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. The appellant's lawyers provided further written submissions to the Tribunal on 15 October, 20 November and 6 December 2014.

27. The Tribunal handed down its decision on 28 December 2014 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

28. The appellant filed four grounds of appeal which are:

1) In determining that the appellant is not a refugee for the purposes of section 4 of the *Refugees Convention Act 2012* (Nr) (the Act), the Refugee Status Review Tribunal (the Tribunal) failed to comply with s 37 of the Act.

In the alternative to Ground One:

~~In determining that the appellant was not a refugee or owed complementary~~ protection for the purposes of section 4 of the *Refugees Convention Act 2012* (Nr) (the Act), the Refugee Status Review Tribunal (the Tribunal) did not comply with s 22(b) of the Act in that it did not act according to the principles of natural justice.

2) In determining that the appellant was not owed complementary protection for the purposes of section 4(2) of the Act, the Tribunal made an error of law in that it failed to address the appellant's claims that returning him to Pakistan would breach Nauru's international obligations due to the risk of arbitrary deprivation of life would face in his home region in upper Kurram from bomb blasts, attacks on mosques and widespread violence, including on the roads inside and out of Kurram Agency.

3) To the extent the Tribunal's finding of Peshawar to be 'an alternative place of residence' was an attempted application of the internal relocation principles (which is not admitted), the Tribunal erred in law in failing to identify or apply the 'relevance test' correctly or at all, and by failing to address the appellant's claims of unreasonableness of relocation for widespread sectarian and non-sectarian violence within Peshawar, or that he would be perceived to have links to the Taliban as a displaced Sunni Muslim from the tribal regions.

4) The Tribunal made an error of law in misconceiving and misapplying the "internal flight" or "relocation" principles in finding that Peshawar was 'an alternative place of residence', as if that finding was of a 'second home area' and not subject to the relocation principles, including reasonableness.

29. At the hearing of the appeal, the appellant abandoned all grounds except ground one, on the basis of the respondent's position that it would not oppose remittal if the appellant was successful on the ground one.

SUBMISSIONS

30. In addition to the submissions filed by the appellant and the respondent, they also made oral submissions which were of great assistance to me and I am indeed very grateful to both counsel.

CONSIDERATION

31. The appellant pleaded alternative grounds on the basis of its submission that, contrary to the earlier decision of this Court, the provisions of s 37 of the Act were still in force at the time of the Tribunal's decision on 28 December 2014.

32. Section 24 of the *Refugees Convention (Derivative Status & Other Measures) (Amendment) Act 2016* ("Amendment Act") repealed s 37 of the Act. Most of the provisions of Amendment Act came into force on 23 December 2016.[2] However,

[2] Amendment Act, s 2(3).

s 2(2) specifies that s 23 of the Amendment Act had retrospective effect from 10 October 2012.

33. It is clear from the Explanatory Memorandum that the intention of the Nauruan Parliament was for s 2(2) of the Amendment Act to refer to s 24, not s 23. The legislative intention is agreed between the parties.

34. In *DWN066 v Republic of Nauru*, this Court stated:[3]

> This ground is under s.37 of the Act. On 23 December 2016 s.37 was repealed by s.24 of the Refugees Convention (Derivative Status and Other Measures) (Amendment) Act 2016 (the Amending Act). In repealing s.37 of the Act s.24 of the Amending Act now provides that the source of the Tribunal's natural justice obligation is the common law of Nauru. Further, the repeal of s.37 of the Act is deemed to have commenced on 10 October 2012.

35. The appellant submits that this Court does not have the power to correct this error. The appellant cited English authority[4] to the effect that statutory interpretation should not rely on the intention of the Parliament where to do so would require a significant change to the legislation.

36. The appellant at the hearing submitted that:

> – there's no doubt that it was a drafting error and that it was the intention of the parliament to effect a repeal, but … it's beyond the court's power to correct this error, because there's nothing in the Act itself, in the text of the Act itself that would support the cure or the remedy that the Republic proposes; that is, to change the numbering and that if you read the Act as it is, according to the numbering, it's quite a different document to that that would be if the numbering were changed. So it's really a job for the Parliament to fix. I would note that once Parliament does fix the legislation and does then render the repeal of section 37 retrospective…. then the court will be bound by it if the court has not made a decision beforehand.

37. The appellant further submitted that according to s 22(3) of the *Interpretation Act 2011*, a "written law must not be taken to provide for the law (or another law) to commence retrospectively unless the law clearly indicates that it commences retrospectively".

38. The respondent submitted that the same English authority cited by the appellant considers the correction of plain cases of drafting mistakes to be within the appropriate confines of the power of judicial statutory interpretation. It was submitted that this instance was the "clearest example of a drafting mistake that is possible".

---

[3] [2017] NRSC 23, [32] (Khan J).

[4] *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 592.

39. S.37 of the Act was considered by the High Court of Australia in BRFO38 v The Republic of Nauru [2017] HCA 44 where it was stated at [47], [48], [49], [50], [51], [52], [53] and [54] as follows:

[47] On 23 December 2016, the Refugees Convention (Derivative Status and Other Measures) Amendment Act 2016 (NR) ('the 2016 Act') commenced in operation. Section 24 of the 2016 Act repealed s.37 of the Refugees Act.

[48] Section 5 of the 2016 Act addresses the potential invalidity of a decision of the Tribunal arising from a failure to comply with s.37. It provides:

"For the avoidance of doubt, any decision or purported decision of the Tribunal made with respect to an application to the Tribunal under section 31 of the [Refugees Act] for merits review of a decision or determination of the Secretary, between 10 October 2012 and the commencement date, which would have been validly made if at the time of the application, section 37 of the [Refugees Act] had not been enacted, is taken to have been validly made on the day it was in fact made."

[49] Section 6 of the 2016 Act confirms the requirement that the Tribunal observed the requirements of procedural fairness. It provides:

"For the avoidance of doubt, nothing in this Act displaces any obligation imposed on the Tribunal under the common law of Nauru to act according to the principles of natural justice and to afford procedural fairness with respect to an application to the Tribunal under section 31 of the [Refugees Act] for merits review of a decision or determination of the Secretary."

[50] On 5 May 2017, the Refugees Convention (Amendment) Act 2017 (Nr) ('the 2017 Act') was certified. Section 4 provides:

"The repeal of section 37 of the [Refugees Act], effected by section 24 of the [2016 Act], is taken to have commenced on 10 December 2012. "

[51] Sections 5 and 6 of the 2017 Act make elaborate provision to confirm the validity of the decision made in this regard of the repeal s.37. Section 5 provides:

"(1) For the avoidance of doubt, the rights, liabilities, obligations and status of all persons are, by force of this Act, declared to be the same as if section 37 of the [Refugees Act] had not been enacted.

(2) For the avoidance of doubt, the rights, liabilities, obligations and status of all persons are, by force of this Act, declared always to be the same as if section 37 of the [Refugees Act] had not been enacted."

[52] Section 6 of the Act provides:

(1) For the avoidance of doubt, all proceedings, matters, decrees, acts and things taken, made or done, or purporting to have been taken, made or done under the [Refugees Act] in relation to an application to the Tribunal under section 31 of the [Refugees Act] for merits review of a decision or determination of the Secretary are, by force of this Act, declared to have been the same force and effect after the commencement of this Act, as they would have if section 37 of the [Refugees Act] had not been enacted.

(2) For the avoidance of doubt, all proceedings, matters, decrees, acts and things taken, made or done, or purporting to have been taken, made or done under the [Refugees Act] in relation to an application to the Tribunal under section 31 of the [Refugees Act] for merits review of a decision or determination by the Secretary are, by force of this Act, declared to have been the same force and effect before the commencement of this Act, as they would have had if section 37 of the [Refugees Act] had not been enacted."

[53] Section 7 of the 2017 Act reaffirms the ongoing requirements of procedural fairness. It provides:

"For the avoidance of doubt, nothing in this Act displaces any obligation imposed on the Tribunal under the common law of Nauru to act according to the principles of natural justice and to afford procedural fairness with respect to an application to the Tribunal under section 31 of the [Refugees Act] for merits review of a decision or determination of the Secretary."

[54] The combined effect of the 2016 Act and 2017 Act is that the Tribunal could not have 'breached' s.37 as that provision must be taken to have been repealed prior to the Tribunal making its decision in this case. In addition, any 'breach' of s.37 was deprived of legal consequences by the 2017 Act.

40. In the circumstances, I find that s.37 was repealed on 10 October 2012 and it has no application to this appeal.

ALTERNATIVE GROUND ONE – DENIAL OF PROCEDURAL FAIRNESS – S.22 OF THE ACT

41. The appellant submits that the Tribunal breached s 22(b) of the Act, which states that the Tribunal "must act according to the principles of natural justice and the substantial merits of the case."

42. The appellant states in his written submissions that he was not given an opportunity to comment on adverse inferences drawn by the Tribunal that were not obviously open on the known material. These inferences were:

a) That it was not common for ordinary Sunnis to have been the victims of targeted attacks by Shias in upper Kurram;

b) That it is overwhelmingly the Shias in upper Kurram who are being targeted and harmed by Sunni militants in continuing attacks;

c) That Shia militias are focussed on defending Shias from Sunni attacks; and

d) That because the appellant is not involved in a militant Sunni group there is not a real possibility he faced persecution from Shias in upper Kurram because he was a Sunni.

43. The appellant submits that the closest the Tribunal came to disclosure of the information it would rely on, or the adverse conclusion it would reach, is the country information it gave in the course of the hearing of attacks on Shias by the Taliban and the information of Shia tribal militias in upper Kurram 'to defend the Shia tribe against the Taliban. The Tribunal summarised this information[5]. The appellant relies on statements made by the Tribunal during the hearing that purportedly indicate that at that time, it had not formed the above adverse inferences. The passage in question is as follows:

> So I understand that there are some Shia tribal militias that have formed in Upper Kurram and they have been formed to defend the Shia tribes against the Taliban. So that's the situation in Kurram Agency as I understand it. So it seems – that country information indicates that yes, there has been fighting between Sunni and Shia in Kurram.
>
> And then in October 2011 a peace deal was negotiated. But there have been continuing attacks on Shia – sorry, but militant groups like the Taliban and Lashkar-e-Jhangvi are targeting the Shia tribes in Kurram because of their refusal to allow militants access to Afghanistan across their land. Do you think – do you agree with that or not agree with that?
>
> ...
>
> So I accept that there is fighting between Shia and Sunni tribes in Kurram, but outside of Kurram there doesn't seem to be any information that indicates that Shias are attacking Sunnis.

44. The appellant submitted[6] and also significantly the Tribunal at the hearing; also relies on a later passage as follows:

> So I guess some of the issues that we would have to consider in your case are whether, you know – and some of these matters have already been raised with you. It's about whether the army would have been moving around your village in the way that you've described. About whether the Taliban would continue to – would threaten you for, you know, 12 months after you – for 12 months just because you drove two people to hospital and *really whether you can relocate to a different part of Pakistan to escape any sectarian conflicts in Kurram Agency, whether that's Peshawar or somewhere else*. Anything else?

[5] Appellant's written submissions dated 6 March 2017 [39]
[6] Appellant's written submissions dated 6 March 2017 [40]

(emphasis added)

45. The appellant submits that he has not had an opportunity to respond to the position the Tribunal ultimately took. The Tribunal's relevant findings were set out in paragraphs [19] to [22] of its decision:

> [19] Whilst there are reports of ordinary Sunnis having been the victims of targeted attacks by Shias in upper Kurram, this is not common. Rather, the vast majority of targeted attacks in upper Kurram have targeted Shias and the violence in upper Kurram and on the Parachinar to Thall Road since early 2007 has primarily affected Shias…
>
> [21] … In February 2012 the TTP set off a bomb in front of a Shia mosque in Parachinar which killed 12 people and injured 30 and in July 2013, the TTP set off another bomb at a market in Parachinar which killed 60 people and injured 200. The country information also indicates that Shia militias are focused on defending Shias from Sunni attacks.
>
> [22] As the applicant is not involved in a militant Sunni group and not targeting Shias, the Tribunal does not accept that he faces a real possibility of persecution from Shias in upper Kurram because he is a Sunni. The applicant's claim that the Taliban perceive Sunni tribal elders as opponents is inconsistent with the country information that it is the Shia Turi and Bangash tribes of upper Kurram who have refused to allow the Taliban and other militant groups access across their lands into Afghanistan…

46. The appellant submits that the following information was not given to him and consequently he was denied the opportunity to make submissions on this information and the Tribunal's conclusion that:

> *'As the applicant is not involved in a militant Sunni group and not targeting Shias, the Tribunal does not accept that he faces a real possibility of persecution from Shias in upper Kurram because he is a Sunni'('**the issue'**).*

47. The relevant starting point for the Tribunal's natural justice obligations arising under common law is stated in *Kioa v West*:[7]

> A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise (*Kanda v. Government of Malaya*[1962] UKPC 2; (1962) AC 322, at p 337; *Ridge v. Baldwin*, per Lord Morris at pp 113-114; *De Verteuil v. Knaggs*, at pp 560,561). The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance…

[7] [1985] HCA 81, [38] (Brennan J).

> Nevertheless in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made.

48. Further, it was stated in *Commissioner for the Australian Capital Territory Revenue v Alphaone Pty Ltd*("*Alphaone*"):[8]

> It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material.

49. This raises an obligation on the Tribunal to provide the appellant with an opportunity to comment on relevant issues and adverse material that is credible, relevant and significant.

50. The respondent submits that the first substantive topic addressed by the Tribunal in its decision was '***harms from Shias'*** *(paragraphs 13-22)*; that the appellant was aware of '***the issue'*** in the review regarding the situation in his home region, and in particular, any risk of harm he may face at the hands of Shia militia; and the Tribunal squarely put to him what it thought was the current position (BD 153-157). The Tribunal allowed the appellant an opportunity to respond to this issue and he took up the opportunity to respond by providing post hearing written submissions (BD 191-193). The Tribunal was not required to go into any further detail to identify for the appellant the possible paths of reasoning that was reasonably open to it on this material. That would have involved giving the appellant a running commentary on the decision-making process, or revealing to the appellant the reasoning process of the Tribunal[9].

51. The respondent submits[10] that the appellant is confusing the notion of 'relevant issues' and 'adverse material' with 'adverse inferences'. That an administrative Tribunal such as the Tribunal is not required to give a 'running commentary' on the decision-making process, nor to reveal to a person its 'reasoning processes'. That is, a person is not entitled to be told of possible 'adverse inferences' that may be made against him[11].

52. This is supported by the decision of Lord Diplock cited in *Alphaone*:[12]

> ...the rules of natural justice do not require the decision-maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If that were

---

[8] [1994] FCA 1074, [28] (Northrop, Miles and French JJ).
[9] Appellant's written submissions [6] and [33]
[10] Respondent's written submissions [32]
[11] *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609, 616 [18]
[12] *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 369.

a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would be abolished.

53. At the Tribunal hearing, the appellant was made aware of the relevant issue of whether he was at risk from attacks on Sunnis perpetrated by Shias. From the passage above, it is clear that the Tribunal told the appellant that the country information indicated that in Kurram, there was conflict between Shia militia and Sunni groups such as the Taliban and Lashkar-e-Jhangvi. The Tribunal asked the appellant for comment on that understanding.

54. The appellant was provided with an opportunity to present further evidence on whether violence in Kurram between Sunnis and Shias extended beyond the conflict described by the Tribunal

55. The principles of natural justice did not require the Tribunal to take any further steps beyond providing the appellant with an opportunity to respond to the relevant issue.

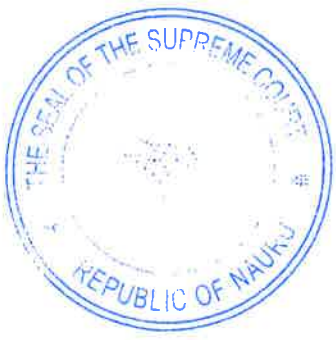
56. Further, the Tribunal was not required to put the actual documents comprising the country information before the appellant, only the substance.[13]

57. For the reasons given above, this ground of appeal has no merit and is dismissed.

CONCLUSION

58. Under s44(1) of the Act, I make an order affirming the decision of the Tribunal.

DATED this 6th day of November 2017



Mohammed Shafiullah Khan
Judge

[13] *Minister for Immigration and Citizenship v SZQHH* [2012] FCAFC 45, [30]-[31].