



IN THE SUPREME COURT OF NAURU
AT YAREN

Case No. 1 of 2017

IN THE MATTER OF an appeal
against a decision of the Refugee
Status Review Tribunal TFN
T15/00274, brought pursuant to s 43
of the *Refugees Convention Act*
1972

BETWEEN

QLN 146

Appellant

AND

THE REPUBLIC

Respondent

Before: Marshall J
Appellant: Nick Wood
Respondent: Catherine Symons
Date of Hearing: 21 November 2017
Date of Judgment: 20 February 2018

CATCHWORDS

APPEAL – Refugee Status Review Tribunal – whether credibility findings affected by error of law – whether the Tribunal failed to set out its reasons for its decision – s 34(4) of the *Refugees Convention Act 2012* (Nr) – APPEAL DISMISSED.

JUDGMENT

1. This matter is before the Court pursuant to section 43 of the *Refugees 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 26 November 2016 affirming the decision of the Secretary of the Department of Justice and Border Control (“the Secretary”) of 11 October 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. The Appellant filed a Notice of Appeal with this Court pursuant to s 43(1) of the Act on 16 January 2017, and an Amended Notice of Appeal in July 2017.

BACKGROUND

5. The Appellant is a male from the Jaffna District of Sri Lanka. He is of Tamil ethnicity and Christian religion. The Appellant is separated and his wife and two children live in India. His mother and three siblings live in Sri Lanka, and his father is deceased.
6. The Appellant claims a fear of harm deriving from his provision of buses to the Liberation Tigers of Tamil Eelam (“LTTE”) to use during their political campaign for the 2005 Presidential election, as he fears that he would be imputed with the

¹1951 Refugee Convention and 1967 Protocol, also referred to as “the Refugees Convention” or “the Convention”.

political opinion of a supporter of the LTTE. He also fears harm on the basis of being a Tamil from North Sri Lanka, and being a member of the particular social group of failed asylum seekers.

7. The Appellant departed Sri Lanka for India in 2008, and boarded a boat in India that arrived in Australia on 27 July 2014. The Appellant was transferred to Nauru on 2 August 2014.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellant attended a Refugee Status Determination (“RSD”) Interview on 11 December 2014. Before the Secretary, the Appellant claimed that he owned a small bus business in Jaffna and he would employ a driver to transport groups of people to various areas. Members of the LTTE would use the Appellant’s bus service, and the Appellant allowed them to do so because he would have run into trouble should he have denied them access. In the lead up to the 2005 Presidential election, members of the LTTE requested buses and drivers to assist in their election campaign and the Appellant complied with the request, believing that the LTTE would have not allowed any of the buses to run should the request be refused. The Appellant allowed the LTTE to utilise his buses approximately two to three times each month.
9. After the Sri Lankan Army (“SLA”) took control of the Jaffna area in July 2006, they began rounding up supporters of the LTTE. In June 2007, the SLA visited the Appellant’s home. The Appellant was not at home, and the militants questioned the Appellant’s wife as to his whereabouts. One week prior, the SLA had shot dead one of the other bus proprietors who allowed the LTTE to utilise his buses, and the Appellant was terrified and fled from his home. In July 2007, the SLA visited the Appellant’s home again. The militants told the Appellant’s wife that they would take revenge against her if they did not find the Appellant. The SLA visited again four or five days later, and attacked his wife when she said that she did not know where the Appellant was.
10. The Appellant, his wife, and his children, then fled to Colombo and stayed in rented accommodation. It was the practice of the local police to inspect the residences of new residents to ensure they had not fled to Colombo because they were guilty of anti-government activity. In December 2007, the police visited the Appellant’s rented home, and when they saw he was a Tamil from Jaffna, they apprehended him. The police officers began beating the Appellant in his jail cell and the Appellant sustained severe head injuries and an injury to his left hand. The following day, the Appellant was interrogated. The Appellant’s wife then visited the station and paid an exorbitant bribe for his release.
11. The Appellant then obtained passports for his family and they left Sri Lanka on 12 January 2008. Since their departure from Sri Lanka, the Appellant’s mother has told him that the SLA had been to her home in search of him.

12. The Secretary accepted that the Appellant was the proprietor of a private bus business in Jaffna,² and the SLA visited the Appellant's home on multiple occasions in June and July 2007. The Secretary further accepted that the Appellant relocated to Colombo on account of his fear of being harmed by the SLA,³ and was interrogated, beaten and tortured by the police in Colombo because of being a Tamil from Northern Sri Lanka.⁴ The claim that the Appellant would present as a failed asylum seeker upon return to Negombo airport was also accepted.⁵

13. In accepting these claims, the Secretary took in account that:

- The Appellant gave significant details regarding the operation of his bus business and spoke at length without being prompted;⁶
- Country information indicated that a number of bus drivers and owners were killed in 2006 and 2007;⁷
- The Appellant provided a detailed and spontaneous account of his efforts to travel to Colombo;⁸
- Country information indicated that there was frequent harassment and arbitrary arrests by the police in Colombo during 2008, particularly of Tamil occupants of low budget accommodation.⁹

14. The Secretary acknowledged that while country information suggests that Tamils may suffer some discrimination and harassment, it does not indicate that Tamils are systematically targeted and subject to serious harm amounting to persecution.¹⁰ As the Appellant and his family had no substantial involvement with the LTTE, the Appellant would not be regarded as a destabilising threat in post-war Sri Lanka. The Secretary therefore concluded that the Appellant's profile was not such that he would attract the adverse attention of the authorities because of his race or imputed political opinion.¹¹

15. The Secretary accepted that, upon return to Sri Lanka, the Appellant might be identified as a failed asylum seeker. However, given the Appellant had no substantial involvement with the LTTE, and had not been politically active abroad, there was no reason to believe that the Appellant would be of ongoing interest to the authorities. While the Appellant may be questioned upon arrival, there was no evidence that the Appellant would be subject to harm upon arrival that would amount to persecution.

16. The Secretary therefore concluded that, in light of all the information, the Appellant did not have a well-founded fear on persecution on account of his race,

²Book of Documents ("BD") 87.

³Ibid.

⁴Ibid 88.

⁵Ibid 89.

⁶Ibid 87.

⁷Ibid 87.

⁸Ibid 88.

⁹Ibid.

¹⁰Ibid 90.

¹¹Ibid 91.

imputed political opinion or being a Tamil failed asylum seeker.¹² Consequently, the Appellant did not attract refugee status. For the same reasons, the Secretary also concluded that the Appellant was not owed complementary protection.¹³

REFUGEE STATUS REVIEW TRIBUNAL

17. On 15 July 2016 the Appellant attended a hearing before the Tribunal. The Appellant maintained his claimed fear of harm on the basis of his race, actual or perceived political opinion and membership of the particular social group of “failed asylum seekers” and/or “Tamil men who have spent considerable periods in Indian refugee camps”.

18. In the Appellant’s statement dated 9 June 2016, and at the hearing, the Appellant provided further details about his bus business, the “rounding up” of people thought to be involved with the LTTE in 2006, the attack on his wife by the LTTE, and the move to Colombo to arrange their departure from Sri Lanka.¹⁴

19. The Tribunal considered that the Appellant’s evidence of the bus company was generally consistent with previous claims,¹⁵ and was therefore satisfied that the Appellant had a bus business, the LTTE made use of his bus two or three times a month until the end of the 2005 ceasefire, and that the authorities would have been aware that the LTTE were using the Appellant’s services.¹⁶ The Tribunal accepted the Appellant’s claims regarding the alleged visits by the SLA, his escape to Colombo, and his beating and interrogation by authorities in Colombo, were generally consistent with the claims advanced by the Appellant upon arrival in Nauru.¹⁷ However, the Tribunal considered that there were sound reasons to doubt the credibility of these claims, including that:

- The Appellant provided differing descriptions of the persons who visited his home in 2007 (i.e. army, militants etc);¹⁸
- The Appellant’s evidence as to the visits to his home was vague, brief and lacking in circumstantial detail;¹⁹
- It was implausible that the person who attended the Appellant’s home would not have entered the house to search for him as claimed;²⁰
- The Appellant’s claim that he hid in the homes of relatives or friends after the first visit by the SLA to his home was inconsistent with his claim to have travelled to Colombo from the local airport;²¹
- The Appellant’s account of fleeing to Colombo because of being terrified of being arrested by the LTTE was not consistent with his renting

¹²Ibid 93.

¹³Ibid.

¹⁴Ibid 264 at [17].

¹⁵Ibid 266 at [23].

¹⁶Ibid 267-268 at [27].

¹⁷Ibid at [29].

¹⁸Ibid at [30].

¹⁹Ibid 268 at [36].

²⁰Ibid at [36].

²¹Ibid 269 at [38].

accommodation in Colombo and presenting himself at Colombo airport with a passport in his name;²²

- While the Appellant may have been beaten and interrogated in Colombo, his release after a day and a half is not consistent with any genuine suspicion that the Appellant was a member or supporter of the LTTE;²³
- It was implausible that the Appellant would not have made some effort to sell his bus to assist his financial situation.²⁴

20. The Tribunal therefore did not accept that the Appellant was targeted for supporting the LTTE, or that the Appellant was of any adverse interest to the police, military, or other authorities when he left Sri Lanka.²⁵ In light of this finding, the Tribunal was not satisfied that the Appellant would now be regarded as a person with a political opinion favourable to the LTTE if he were to return home.²⁶ The Tribunal also did not accept that the Appellant would be imputed with an anti-government political opinion because of being a young Tamil male from the Northern or Eastern Province during the civil war, or because of having sought asylum abroad.²⁷ This being the case, the Tribunal concluded that there was no reasonable possibility of the Appellant suffering persecution on the basis of any adverse political opinion.²⁸

21. Further, the Tribunal said that, taking all the information before it into account, it was not satisfied that Sri Lankan Tamils face harm simply because of their ethnicity or associated factors such as being a male or having geographic origins in the North of the country.²⁹ The Tribunal was similarly dissatisfied that the Appellant would face harm on the basis of being a failed asylum seeker. The Tribunal noted that returnees are subject to standardised questioning at the airport, but given that the Appellant had no criminal convictions or political profile of note, the questioning would not uncover any information that would result in the Appellant being harmed.³⁰ As to the Appellant's final claim, upon the country information before the Tribunal, it was not satisfied that there was any more than a remote chance of the Appellant being harmed due to living in a refugee camp in India for some years.³¹

22. The Tribunal concluded that, having considered the Appellant's claims individually and cumulatively, there was no reasonable possibility of the Appellant suffering harm amounting to persecution upon return to Sri Lanka on the basis of political opinion, or membership of the specified social groups.³² The Appellant was not a refugee. For the same reasons that the Tribunal was satisfied that the Appellant was not a refugee, the Tribunal considered that the Appellant would not face harm of such a nature that Nauru would breach its international obligations

²²Ibid 270 at [45].

²³Ibid 271 at [46].

²⁴Ibid 271-272 at [49].

²⁵Ibid 272 at [51].

²⁶Ibid 276 at [64].

²⁷Ibid at [68].

²⁸Ibid 277 at [71].

²⁹Ibid 278 at [78].

³⁰Ibid 279 at [81].

³¹Ibid 280 at [88].

³²Ibid 282 at [95].

by returning the Appellant to Sri Lanka, and the Appellant was not owed complementary protection.³³

ISSUES ON THE APPEAL

23. The Appellant submits that the Tribunal made two errors of law in its decision to reject his application for review of the decision of the Secretary, Department of Justice and Border Control.

24. The Tribunal set out five reasons which cumulatively led it to reject the Appellant's claim to have been targeted by the authorities for his support of the LTTE. Those reasons concerned the Appellant's credibility. The Appellant contends that the first two of those five reasons are affected by errors of law.

25. The first reason was "the vagueness, brevity and lack of circumstantial detail of his account" of the three visits to his house in June to July 2007. At [36] in its reasons for its decision, the Tribunal said:

"The Tribunal accepts that these alleged visits are said to have occurred a number of years ago and to have done so in the applicant's absence so that he was reliant on his wife's description for his own knowledge of them. Nevertheless, they could reasonably be expected to have been dramatic and memorable for him, as the first indication that his life was in danger and as the developments which drove him into hiding in Achuveli and then in Colombo. The Tribunal finds that the vagueness, brevity and lack of circumstantial detail in his account of them casts doubt on the credibility of his claim in this area. Further, the Tribunal is not satisfied that it is plausible that if the applicant had been targeted by the authorities, whether or not including elements of paramilitary forces, for a matter which was sufficiently serious to bring them to his house in force on three occasions they would not think to enter the house to search for him and instead take his wife's word that he was not there. The Tribunal has considered the applicant's explanation for this – to the effect that it is a practice of the army to avoid making a fuss when searching for someone in case they scare him or her away – but it is not satisfied that this is at all plausible. In this context the Tribunal finds it generally implausible that the army would beat the applicant's wife in circumstances which would attract the attention of the public if their practice was to pursue their targets quietly so that they were not put to flight".

26. Counsel for the Appellant submitted that it was irrational of the Tribunal to expect the Appellant to have a vivid memory of events which he did not witness. Counsel contends that it is not possible to accurately remember the "circumstantial details" of an event which the Appellant did not witness.

27. Counsel for the Republic refers to the reasons of the Tribunal being informed by "different descriptions of the persons who are said to be involved". Counsel refers to the Tribunal's acceptance at [36] that the Appellant was not present at the time of the alleged visits and that he was reliant on his wife's descriptions of them. Counsel contends that the Tribunal's comments about "vagueness, brevity and lack of circumstantial detail" relate to the Appellant's recounting of events based on what his wife had told him.

³³Ibid at [98].

28. There is much force in the submissions of the Republic. It was the Appellant who raised the question of the visits based on what his wife told him. There is no suggestion by the Appellant that the Tribunal misunderstood that evidence. It was also open to the Tribunal to find that that evidence was deficient, brief, vague and lacking in detail. I see no reason to consider the Tribunal's approach to credibility on this issue to be irrational. The Tribunal was plainly aware that the Appellant was recounting what he said his wife told him. But the Tribunal considered the visits to be so important to the Appellant that it would be expected that he would have a greater grasp of their detail, even though the detail would have been recounted by his wife.
29. I reject the submissions of the Appellant that the first reason for doubting his credibility involved an error of law. The assessment of credibility is a matter for the Tribunal as long as its assessment does not reveal any legal error by the Tribunal. In the current circumstances the alleged ground of irrationality appears to be a disguised attempt to engage in merits review.
30. The second reason relied on by the Tribunal to doubt the Appellant's credibility was that it found his claim concerning the circumstances of his departure from his home region "difficult to believe". The Appellant claimed that he and his family had left from the airport near his hometown and flown to Colombo. The Appellant said he paid a bribe equal to \$1,750 AUD to a local army commander to allow him to escape.
31. This aspect of the Tribunal's reasoning is set out at [37] to [39] of its decision where the following is said:

"Second, the applicant claims that he was so terrified by these visits that he did not return to his home and instead hid in the homes of his sister and other people. At the hearing he told the Tribunal that he would spend the nights sleeping in the roof spaces of these houses, climbing up on tables to get there. From the time of the first visit he did not emerge in public, for fear of being found by the army. These claims are, however, in conflict with his account of the means by which he and his family left Achuveli and travelled to Colombo.

Asked at the hearing about his travel to Colombo he told the Tribunal that he and his family left about a week after the last visit. He confirmed that they left from Pallaly airport, within three kilometres of Achuveli, which at the time was under the control of the military. Asked why he would do such a thing if he had been hiding from the army for weeks he agreed this was a good question but said he had spent a lot of money, through a person he knew, to bribe the local army commander, an officer named Mahendran, to organize his departure. Asked how much he had paid for this he said it was Rs 2 lakhs. Asked if he had thought of simply bribing the commander to stop the visits to his house he said the paramilitaries were also involved. To the suggestion that the army would be able to protect him from the paramilitaries he said sometimes the paramilitaries abduct people in white vans, without the army's knowledge. Further, the army commander might be posted away and a new commander might take his place.

The Tribunal put to the applicant that it seemed difficult to believe he would have been able to bribe the army commander, even with a sum of Rs 2 lakhs, to allow him to escape to Colombo if he had genuinely been suspected of involvement with the

LTTE. Many political leaders, including Ministers, had been assassinated by the LTTE in Colombo and if he were to be involved in such an incident there would be very severe repercussions for military officers who corruptly facilitated his travel. In response he suggested there had been an incident elsewhere in which the LTTE had attacked an army camp after bribing the commander to obtain a map of it. In Sri Lanka money can buy anything, up to a certain point. If he had not had money he would have been killed. Asked if he had been able to pass through identity checking on arrival in Colombo he said the army commander had organised the other end of his travel as well and everything was set up for him. Asked if he meant that the army commander was able to bribe officers in a completely different unit in Colombo he said he did not know exactly what the commander did.”

32. Counsel for the Appellant contends that the Tribunal erred in not making any findings in light of the Appellant's evidence that money can buy anything in Sri Lanka. Also he submits that the Tribunal failed to give reasons for finding that an army commander would not take the bribe. Finally, he submits that the Tribunal had no evidence for the finding that there was no real chance an army commander would accept the bribe to compensate for the visit of “corruptly facilitating” the escape of a person suspected of involvement with the LTTE.
33. Counsel submits that either the Tribunal had no reasons for concluding the disincentive would outweigh the incentive or if it did have such reasons it failed to set them out.
34. Counsel for the Republic emphasises [37] of the Tribunal's reasons set out above and especially the concluding sentences which state that the Appellant's method of evading the authorities was inconsistent with his account of how he left his local area and travelled to Colombo.
35. At [44] of the Tribunal's reasons it notes that the Appellant “paid a very large amount of money to travel to India, taking into account the bribe paid to the army commander in Achuveli, rental costs in Colombo, the bribe paid to secure his release from the police station and the amount he paid his agent”. At [45], the Tribunal said:

“Having considered the applicant's response to these issues the Tribunal is not satisfied they explain why, if he had genuinely been searched for by the military and paramilitary forces in his home town for supporting the LTTE, terrifying him to the point that he feared to return to his house and was forced to flee with his family to Colombo, he would nevertheless have been prepared to bring himself to the attention of the authorities over a period of five or six months by staying in a lodge, renting a house and finally presenting himself at the airport so that he could fly to India using a passport issued in his own name. The Tribunal notes that a recurrent theme of his explanation in this area, as with his explanations of his ability to leave Achuveli by air, is that he was able to escape the controls applying in war time simply by paying bribes. The Tribunal does not underestimate the extent of corruption in Sri Lanka, even during the war years, and is willing to accept that the applicant may have had access to some wealth even though he claimed at the hearing that he was running low on funds toward the end of his time in Colombo. Even giving these considerations due weight, however, the Tribunal is not satisfied that this conduct is consistent with that of a person who was terrified of being detected by the authorities”.

36. Here, the Tribunal observes, without making a precise finding about whether a bribe was made, that paying bribes to authorities to leave Sri Lanka is inconsistent with being in fear of authorities.
37. Reading the reasons of the Tribunal as a whole and fairly,³⁴ it is clear that at [37] to [39] the Tribunal records the question it put to the Appellant and the answers he gave but nonetheless it went onto accept that he may have left his local area in the way he described. However the inconsistency seized upon by the Tribunal was on the one hand hiding out from authorities and on the other hand making a bribe to an army commander.
38. Counsel for the Republic rightly points out that the Tribunal did not make a finding that an army commander would not accept the bribe to compensate for the risk of corruptly facilitating the escape of a person suspected of LTTE involvement. It is trite that there is no requirement to give reasons for a finding that was not made.
39. The Tribunal complied with its obligation under s 34(4) of the Act to set out its reasons for decision, its finding on any material questions of fact and to refer to the evidence on which findings of fact were made.
40. There is no error of law contained in the second reason for doubting the Appellant's credibility.
41. The appeal must be dismissed. The Court will order that the decision of the Tribunal be affirmed under s 44(1) of the Act, with no order as to costs.

ORDERS

42. Having regard to the foregoing the Court will order as follows:

1. The decision of the Tribunal is affirmed pursuant to s 44(1)(a) of the *Refugees Convention Act 2012* (Nr).
2. There be no order as to costs.

Shane Marshall

Judge Shane Marshall
20 February 2018



³⁴See *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291, per Kirby J.