



IN THE SUPREME COURT OF NAURU
AT YAREN

Case No. 2 of 2017

IN THE MATTER OF an appeal
against a decision of the Refugee
Status Review Tribunal TFN
T15/00275, brought pursuant to s 43
of the *Refugees Convention Act*
1972

BETWEEN

QLN 147

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 the Tribunal failed to consider a claim or significant evidence – whether remand in Sri Lankan prison would breach Nauru’s human rights obligations – complementary protection – 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 on 16 January 2017 under s 43(1) of the Act, and an Amended Notice of Appeal on 30 June 2017. A Further Amended Notice of Appeal was filed on 16 November 2017.

BACKGROUND

5. The Appellant is a Sri Lankan citizen of Tamil ethnicity from the Mannar region of Sri Lanka. After completing seven years of formal education, he worked for his father as a fisherman, and then as a labourer. He is married and his wife, child, mother and four siblings live in Sri Lanka.
6. The Appellant claims he fears harm because he is a Tamil from North Sri Lanka, has the imputed political opinion of a supporter of the Liberation Tigers of Tamil

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

Eelam ("LTTE") because he gave a LTTE member a lift in his boat, and is a member of the particular social groups of "Sri Lankan Tamils from Mannar area", "Tamil failed asylum seekers" and "Sri Lankan Tamils previously resident in India as lawful/unlawful refugees".

7. The Appellant fled from Sri Lanka to India in October 2013, and travelled from India to Australia in July 2014. The Appellant was then transferred to Nauru for the purposes of having his claims assessed.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellant attended a Refugee Status Determination ("RSD") Interview on 11 December 2014. The Secretary summarised the material claims presented at that interview as follows:

- *He is a citizen of Sri Lanka and has no right to return to India since leaving in October in 2013.*
- *He was born in Vankalai, Mannar and is of Tamil ethnicity.*
- *He lived in Batticaloa in the years immediately prior to leaving Sri Lanka. Prior to that the Applicant spent his life alternating between living in Vankalai, Mannar and India.*
- *He fled Sri Lanka as he feared for his safety, as he believed he had or would be imputed as a supporter of the Liberation Tigers of Tamil Eelam (LTTE) as he had given a lift to a member of the LTTE in his boat.*
- *On 17 June 2006, the Applicant claims that following an attack by the LTTE, the Sri Lankan Navy (SLN) came to his village and burnt the residents' fishing nets, engines and boats. The Applicant spent the following three months displaced to Karisal, Mannar.*
- *He earned a living as a fisherman. In February 2008, the Applicant was fishing with a friend named Kanthan when they were approached on a small island by a member of the LTTE who demanded they provide another LTTE member with a ride to Mannar. When the Applicant refused due to his concerns as this would involve crossing SLN checkpoints, the LTTE detained and threatened to shoot the Applicant. Fearing for his safety the Applicant agreed to assist the LTTE, however he negotiated that the LTTE member would jump out of the boat before they reached the SLN checkpoint. The next day the Applicant, Kanthan and the LTTE member left the island and the LTTE member jumped from the boat prior to reaching the checkpoint.*
- *On approximately 6 June 2008, Dilshan told the Applicant that four men had come to Vankalaipadu and asked about Kanthan and the Applicant. Fearing for their safety the Applicant fled to Vankalai while Kanthan fled to Mannar.*
- *On 8 June 2008, the Applicant was told by other villagers that Kanthan had been slain and his body was thrown onto the road.*
- *Fearing for his life, the Applicant fled to Batticaloa on 10 June 2008.*
- *A month later, the Applicant was told by Dilshan that the LTTE member they had given a lift to had been arrested and detained and this information was published in the news. The Applicant learnt that the LTTE member had revealed to the authorities that he and Kanthan had provided help to the LTTE.*
- *The Applicant remained in Batticaloa for 5 years. In that time the CSO would visit his parents' home every six months and search for him. The Applicant's mother had told everyone that the Applicant was in India.*
- *On 4 October 2013, the Applicant returned to Vankalai to attend the wedding of his youngest brother.*

- On 6 October 2013, the Applicant returned to his parents' home after visiting his aunt. The Applicant found his mother in tears as the CSO had searched for him. The Applicant immediately fled to Vankalaippadu.
- On 10 October 2013, the Applicant fled from Sri Lanka to India via boat.
- Additionally, the Applicant fears harm on account of having the name [REDACTED], which he shares with the deceased former leader of the LTTE.²

9. The Secretary accepted the following elements of the Appellant's material claims:

- The Appellant is an ethnic Tamil, born and raised in Mannar in the Northern Province of Sri Lanka.
- He departed Sri Lanka illegally in October 2013.
- He had no substantive association or involvement with the LTTE or any paramilitary organisation, and has not been involved in any political or criminal activity in the past.
- He left Sri Lanka illegally and would be considered to be a failed asylum seeker upon return.³

10. However, the Secretary did not accept the following material elements of the Appellant's claims as credible:

- The Appellant was pursued by the Crime Investigation Division ("CID") on account of having given a ride in his boat to an LTTE member.
- The Appellant was of adverse interest to the CID or any other person or party in Sri Lanka at the time of his departure from Sri Lanka.
- The Appellant would face harm on return to Sri Lanka on account of having the name [REDACTED].⁴

11. In finding that these elements of the Appellant's claims lacked credibility, the Secretary considered that:

- It was difficult to accept that the CID would question Dilshan about the Appellant and then not seek out the Appellant;⁵
- It was difficult to accept that the CID would not come to his place of residence until six months after questioning Dilshan;⁶
- Given that the Appellant had registered his address, his marriage and the birth of his child in Batticaloa, it was likely that the authorities would have been able to seek out the Appellant if they had wished to do so;⁷
- It was implausible that the authorities would continue to pursue the Appellant in Mannar when he had registered his residence in Batticaloa;⁸
- The Appellant's evidence regarding the CID search for him in Batticaloa was speculative and unlikely;⁹

² Book of Documents ("BD") 78-79.

³ Ibid 82.

⁴ Ibid.

⁵ Ibid 80.

⁶ Ibid.

⁷ Ibid 81.

⁸ Ibid.

⁹ Ibid.

- The Appellant's contention that he would suffer harm on account of sharing his name with a former leader of the LTTE was speculative and farfetched, given the change of attitudes in the years since the end of the civil war.¹⁰

12. 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.¹¹ As the Appellant and his family had no substantial involvement with the LTTE, the Appellant would not be regarded as someone who poses a destabilising threat in post-war Sri Lanka. The Secretary therefore concluded that the Appellant's profile was not such that he would attract adverse attention because of his race or imputed political opinion.¹²

13. The Secretary accepted that, upon return to Sri Lanka, the Appellant might be identified as a failed asylum seeker. However, given that there was no evidence that the authorities suspected the Appellant of associating with the LTTE, and no evidence to suggest the Appellant had been politically active in Sri Lanka or abroad, there was no credible reason to believe that he would be subject to mistreatment by the authorities upon return.¹³

14. The Appellant therefore had no well-founded fear of persecution on account of his race, imputed political opinion, or being a Tamil failed asylum seeker, meaning he did not qualify as a refugee under the Act.¹⁴ For the same reasons, the Secretary was not satisfied that there was a reasonable possibility of the Appellant being subject to torture, cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life, if he was to return to Sri Lanka, and was not owed complementary protection.¹⁵

REFUGEE STATUS REVIEW TRIBUNAL

15. The Appellant attended a hearing before the Tribunal on 8 July 2016 to give evidence and present arguments. In a supplementary statement dated 23 June 2016, and at the oral hearing, the Appellant elaborated upon and clarified his claim of a LTTE member demanding that he and Kanthan transport another member to Colombo, the CID approaching Dilshan on 6 June 2008, the killing of Kanthan on 8 June 2008 and the Appellant fleeing to Batticaloa, the arresting of the LTTE member who made the demands of the Appellant and Kanthan, and the Appellant fleeing to India via boat.¹⁶ The Appellant added that the LTTE photographed the Appellant and Kanthan before they transported the LTTE member to Colombo, and recorded their personal details, and that they were also compelled to carry a bag of weapons for the LTTE member.

¹⁰ Ibid.

¹¹ Ibid 90.

¹² Ibid 91.

¹³ Ibid 87.

¹⁴ Ibid.

¹⁵ Ibid 88.

¹⁶ Ibid 267-268 at [15].

16. The Tribunal accepted, on the basis of demonstrated knowledge of area in which the Appellant claimed to have worked, that the Appellant had worked as a fisherman, that he had a friend called Kanthan, and that Kanthan suffered a violent death.¹⁷
17. However, the Tribunal doubted the credibility of the Appellant's claim to have transported a member of the LTTE in his boat. In forming this doubt, the Tribunal was guided by the implausibility of the Appellant dropping the LTTE member in the sea on his way to Vankalaipadu, the implausibility of being entrusted with the dangerous task of smuggling weapons past the Navy checkpoint at Vankalaipadu,¹⁸ that the claim concerning the bag of weapons was not raised until his supplementary statement of 23 June 2016,¹⁹ the implausibility of the Appellant escaping the authorities by living in Batticaloa for five years,²⁰ and the implausibility of the Appellant returning to his home village if he was genuinely fearful that he would be killed like Kanthan if the CID found him.²¹
18. Given the Tribunal's finding that the Appellant did not transport a member of the LTTE by boat, and noting that the Appellant does not claim to have supported the LTTE in any other way, the Tribunal did not accept that the Appellant would be imputed with an adverse political opinion as a supporter of the LTTE.²² Further, there was nothing in the information before the Tribunal to indicate that the Appellant's surname would lead to the imputation of an adverse political opinion in post-war Sri Lanka.²³ The Tribunal also found that the Appellant would not be imputed with an adverse political opinion by virtue of his Tamil ethnicity, origins from the Northern Province,²⁴ and having sought asylum abroad.²⁵ The Tribunal therefore found that there was no reasonable possibility of the Appellant suffering persecution because of any imputed political opinion.
19. Further, while the Tribunal noted that during the civil war and some time thereafter Tamils could be at risk of severe harm because of their ethnicity, the Tribunal was not satisfied that Tamils continue to face harm simply because of their ethnicity. The Tribunal also noted some reports of returning asylum seekers being mistreated, but found that these instances are limited to those who have criminal convictions or LTTE links. As the Appellant had no such profile, there was no reason to believe that the Appellant would be subject to anything more than the standardised questioning at the airport upon arrival.²⁶ The Tribunal also did not accept that the Appellant would be jailed or subject to any penalty beyond a fine for his illegal departure from Sri Lanka.²⁷ There was therefore no reasonable possibility of the Appellant facing persecution in the reasonably foreseeable future if returned to Sri Lanka.

¹⁷ Ibid 268-269 at [18]-[19].

¹⁸ Ibid 270 at [24].

¹⁹ Ibid at [26].

²⁰ Ibid at [27].

²¹ Ibid 271 at [28].

²² Ibid 272 at [32].

²³ Ibid 273 at [34].

²⁴ Ibid at [35].

²⁵ Ibid 274 at [39].

²⁶ Ibid 277 at [54].

²⁷ Ibid 278 at [58].

20. In relation to the Appellant's claimed fear of harm due to having lived in India as a refugee put forward in his representatives' letter to the Tribunal,²⁸ at the hearing, the Appellant said that this was not a "big issue", and the Tribunal was satisfied that the Appellant does not, in fact, fear persecution because of having lived in India as a refugee.²⁹

21. In light of the factual findings made by the Tribunal, it concluded that the Appellant is not a refugee. The Tribunal further concluded that the Appellant was not owed complementary protection, as while he may encounter some discrimination arising from his Tamil ethnicity, there was no reasonable possibility of the Appellant suffering harm of a nature prohibited by the international treaties ratified by Nauru.³⁰

ISSUES ON THE APPEAL

22. There is one ground of appeal before the Court. It is whether the Tribunal failed to consider a claim or significant evidence in support of the claim. The claim was one to invoke the Republic's complementary protection obligations. The significant evidence in support of the claim which the Tribunal allegedly failed to consider concerned the harm the Appellant would suffer during any period on remand in a Sri Lankan prison as a consequence of having left Sri Lanka illegally.

23. The particulars of the ground of appeal are set out in the Further Amended Notice of Appeal as follows:

Particulars

- a. *The appellant claimed that he had left Sri Lanka illegally.*
- b. *The appellant gave evidence, and made submissions, as to the conditions in Sri Lankan prisons, including that a lack of adequate sleeping accommodation, extreme heat, insufficient ventilation, limited access to medical treatment, lack of adequate food or water, and other matters. In particular, the appellant gave evidence, and made submissions, including in reliance on an opinion of the UN Special Rapporteur on Torture, that conditions in Sri Lankan prisons breach Article 7 of the ICCPR.*
- c. *Accordingly, in summary, and without limitation, the appellant submitted that "[g]iven such, if [the appellant] is detained upon removal to Sri Lanka (for any reason), the conditions in which he may be detained may cause him to suffer cruel, inhuman or degrading treatment sufficient to enliven Nauru's non-refoulement obligations under article 7 of the ICCPR".*
- d. *In its decision, the Tribunal:*
 - i. *found that the appellant had departed Sri Lanka illegally; and*
 - ii. *found that he would be arrested on return to Sri Lanka, and may be detained "for some days" before he would be brought to a magistrate.*
- e. *The Tribunal purported to conclude at [60] that there is no "credible evidence" that "any brief period spent in remand awaiting a hearing in the magistrates court would rise to the level of persecution or other harm such that to return him to Sri Lanka would amount to a breach of Nauru's international obligations".*

²⁸ *Ibid* 112.

²⁹ *Ibid* 279 at [61]-[62].

³⁰ *Ibid* 280 at [65]-[68].

- f. The Tribunal also purported to conclude at [67] that “[w]hile it is possible that he could be held on remand for a small number of days awaiting a hearing in a magistrates court, in cramped and unsanitary conditions, the Tribunal does not accept that this in itself would constitute... cruel, inhuman or degrading punishment of a kind prohibited by Nauru’s international human rights commitments”.
- g. However, the Tribunal did not refer to the appellant’s evidence and submissions in this respect, and did not deal with them. In particular, the Tribunal made no findings about the actual conditions in Sri Lankan prisons by reference to various matters addressed by the appellant, and gave no explanation for why returning the appellant to Sri Lanka where he might be exposed to those (cumulative or combined) conditions (even for a short duration) would not amount to a breach of Nauru’s international obligations.
- h. The Tribunal’s error may be explained in various ways. It may, for example, be explained as: (a) a failure to lawfully consider relevant evidence and serious submissions given and presented to the Tribunal; (b) a failure to regard certain matters – including the cumulative or combined conditions in Negombo Prison by reference to the various specific matters alleged by the appellant – as being material to Nauru’s obligations under Article 7 of the ICCPR, or (c) a failure to give adequate reasons for its decision.

24. At [58] to [60] of its reasons for decision the Tribunal said:

“DFAT reporting cited in the Secretary’s decision indicates that Sri Lankan citizens, whatever their ethnicity, who return to Sri Lanka and who are believed to have left the country in breach of the Immigrants and Emigrants Act are arrested at the airport and brought before a magistrates court. There, if they plead guilty, they are subjected to a fine determined on a case-by-case basis which they can pay off in instalments. Those who plead not guilty are routinely given bail and will need to return to the court at a later date for the matter to be heard when, if convicted they are fined. If the arrival occurs over a weekend or on a public holiday the returnee is placed in the remand section of Negombo prison, possibly for some days, until the next opportunity for magistrates court appearance arises. Although the Act provides for penalties of both imprisonment and fines on conviction for illegal departure, the information before the Tribunal indicates that magistrates and judges have discretion in imposing penalties, and that in practice those who have breached the terms of the Act in the method of their departure are only fined. The Tribunal does not accept there is a reasonable possibility that the applicant would be jailed or subjected to any other form of penalty beyond a fine for this offence.

When the applicant was invited to comment on this information he said he remembered a New Zealand government report from 2015 which found that many of those who return to Sri Lanka go missing. One woman had been raped by the authorities while in custody. Asked about the more specific issue of the treatment of those who leave the country illegally he reiterated his claim about this incident, adding that the authorities are trying to hide the information. In his situation his life would be at risk because the authorities would question him and discover his background.

On the information before it the Tribunal finds that Sri Lanka’s Immigrants and Emigrants Act is a law of general application, adopted for the legitimate and unexceptional purpose of regulating the movement of people across the country’s borders. There is no credible evidence to indicate that the law would be imposed on the applicant in a discriminatory way, such as with a harsher penalty or treatment, because of his Tamil ethnicity or for any other reason. Nor is there any credible

evidence that the fine which would be imposed on him or any brief period spent in remand awaiting a hearing in the magistrates court would rise to the level of persecution or other harm such that returning him to Sri Lanka would amount to a breach of Nauru's international obligations, or that they would be imposed on him for one of the Convention reasons.

25. At [67] the Tribunal gave its conclusions on the complementary protection claims as follows:

"As noted, the Tribunal accepts that on return to Sri Lanka the applicant could be arrested and charged with a breach of the Immigrants and Emigrants Act over his illegal departure for India in 2013. The Tribunal accepts that he would be fined if convicted of such an offence but does not accept there is a reasonable possibility of his being sentenced to a term of imprisonment because of it. While it is possible that he could be held on remand for a small number of days while awaiting a hearing in a magistrates court, in cramped and unsanitary conditions, the Tribunal does not accept that this in itself would constitute torture or cruel, inhuman or degrading treatment or punishment of a kind prohibited by Nauru's international human rights commitments. While there are reports of prisoners having been tortured in Sri Lankan jails, the evidence before the Tribunal does not indicate that returnees who have been charged with illegal departure and remanded in custody have been tortured whilst on remand and the Tribunal does not accept that the applicant will be tortured whilst being held on remand". (emphasis added)

26. Counsel for the Appellant submits that the Tribunal failed to consider certain evidence and submissions as to why the anticipated period of remand would breach Nauru's international human rights obligations.

27. If the Tribunal did consider such claims and evidence, counsel contends that if the Tribunal considered the conditions referred to in the material beyond "cramped and unsanitary" were not relevant, the Tribunal committed an error of law by not referring to the relevant material.

28. The Appellant also claims that if his material was taken into account, the Tribunal failed to give adequate reasons to reject it.

29. Counsel for the Republic submits that the Tribunal did consider the Appellant's material but characterised that material as general and not relevant to the conditions the Appellant may experience on a short remand in Negombo prison in Colombo. During the hearing a member of the Tribunal put to the Appellant what would most likely happen to him if returned to Sri Lanka. At p 47 of the Tribunal transcript the member said:

"So what happens is that in that situation those people will be arrested on a charge of leaving the country illegally and they will be taken from Katunayake across the road to Negombo and taken before a Magistrates Court in Negombo for a bail hearing. Bail is granted and then the person has to come back at some later time, probably months later, to face the charge of having left unlawfully. If that person is convicted of charge of having left unlawfully. If that person is convicted of charge of leaving illegally then they're fined. The fine will usually go up to 50,000 rupees."³¹

³¹ Ibid 253 at ln 1- 8.

The Appellant responded:

“We have mentioned that – no reports mentioned about the people harmed or missing while they were in the gaol but I do remember that last year there was a report by the New Zealand government. There was a government officer lady visited Sri Lanka and she gave a report that many people who returned back to Sri Lanka went missing and one lady who was in custody was raped by the authorities. So that was an official report by the New Zealand government. So do you say that that was wrong information?”³²

30. The submissions of the Appellant before the Tribunal included evidence about conditions in Sri Lankan prisons. That evidence went beyond the Tribunal’s finding that conditions in Negombo would be “cramped and unsanitary”. That evidence referred to conditions in “all” Sri Lankan prisons, including deficient infrastructure, inadequate sleeping accommodation, inadequate lighting, inadequate clothing, extreme heat, inadequate ventilation, inadequate access to medical treatment, inadequate food and water and inadequate access to exercise facilities.
31. The Appellant’s submissions included reference to a BBC news report about the experiences of a Tamil man who had been deported from Australia after unsuccessfully seeking asylum. The man was detained for three days in prison on return. The Appellant’s agent submitted that detention in Sri Lanka, even for brief periods, exposes detainees to real risks of torture and cruel, inhuman and degrading treatment. The Appellant’s material referred to a US State Department report on Sri Lanka which mentioned that prison conditions in Sri Lanka were poor and do not meet international standards “due to gross over-crowding and the lack of sanitary facilities”.
32. In a submission to the Tribunal, the Appellant referred to comments made by the United Nations (“UN”) Special Rapporteur on Torture made in May 2016. His counsel emphasised the following passage on the appeal:
- “I am deeply concerned, however, about the conditions of life in all prisons. All are characterised by a very deficient infrastructure and pronounced overcrowding. As a result, there is an acute lack of adequate sleeping accommodation, extreme heat and insufficient ventilation. Overpopulation also results in limited access to medical treatment, recreational activities or educational opportunities. These combined conditions constitute in themselves a form of cruel, inhuman and degrading treatment”.³³ (emphasis supplied)*
33. In further submissions, the Appellant’s representatives referred the Tribunal to “risks arising from prison conditions” and to the United Kingdom Home Office’s note on Sri Lanka in April 2012 that prison conditions are likely to breach Article 3 of the European Convention on Human Rights, which is in identical terms to Article 7 of the International Covenant on Civil and Political Rights (“ICCPR”) which binds Nauru. The submission referred to numerous decisions of the UN

³² Ibid at In 19 – 25.

³³ Ibid 123.

Human Rights Committee which found that Article 7 of the ICCPR is breached by inhumane prison conditions.³⁴

34. Counsel for the Appellant submitted that in Nauru, unlike in Australia under the *Migration Act 1958* (Cth), no intention to cause harm needs to be demonstrated for an asylum seeker to avail himself of complementary protection in reliance on Article 7 of the ICCPR. So much is not in dispute on this appeal.
35. Counsel for the Republic accepts that the Tribunal is required to consider relevant and serious submissions put to it. However, she contends that the material presented to the Tribunal didn't possess the character attributed to it by the Appellant. Counsel submits that the material provided evidence of poor conditions expressed generally without regard to the type of prison or period of detention. Counsel contends that the Tribunal was aware of information about prisons in Sri Lanka at a general level but had no information about conditions for a prisoner on remand at Negombo for one to three days.
36. I accept the submission of counsel for the Republic that the failure of the Tribunal to make specific reference to the material provided by the Appellant about the conditions in prisons in Sri Lanka was unremarkable. That material was very general. It did not relate to the specific matter required to be considered by the Tribunal. That is, whether detention for up to three days on remand in Negombo prison would amount to cruel and inhumane treatment. The material did not address that issue so the Tribunal was not required to expressly refer to it in coming to its decision on complementary protection. An assessment of whether Article 7 of the ICCPR has been breached is a relative one; see *United Kingdom v Ireland*³⁵ at [162], concerning the equivalent Article 3 of the European Human Rights Convention.
37. The Tribunal specifically considered it possible that the Appellant would be held on remand "for a small number of days" in "cramped and unsanitary conditions". It did not accept that this "in itself" would amount to "torture or cruel, inhuman or degrading treatment or punishment of a kind prohibited by Nauru's international human rights commitments". This finding was open to the Tribunal on the material before it. The reference to being held on remand, consistently with the transcript of the hearing at p 47, is one to Negombo.
38. The material relied on by the Appellant did not address conditions in Negombo in the remand section for short term prisoners. The passage relied on by the Appellant from the UN Special Rapporteur on Torture did refer to "all prisons" but made no distinction for prisoners held on remand. Like the Tribunal's reference to "cramped conditions" the report referred to "pronounced overcrowding". Like the Tribunal's reference to "unsanitary conditions", the report referred to "extreme heat and insufficient ventilation". The report also dealt with the consequences of overcrowding. There is nothing untoward in the Tribunal's briefer reference to conditions which the Appellant may experience to those expressed in the report.

³⁴ Ibid 130 – 131 at [100]-[101].

³⁵ (1978) 25 Eur Court HR (5er A).

In any event, the focus of the Tribunal's consideration was the experience of such conditions on a short term basis while the prisoner is on remand.

39. There was nothing before the Tribunal to indicate that short term remand prisoners at Negombo would suffer "cruel, inhuman or degrading treatment" at a minimum level of severity to fall within the scope of the ICCPR. The Court was referred to a decision of the UN Human Rights Committee in which the detention in allegedly inhuman conditions in an overcrowded cell for 50 hours was held to breach Art 7; see *Portorreal v Dominican Republic*.³⁶ However in that case there was evidence about conditions in the specific prison concerned.
40. The Tribunal does not specifically refer to the material relied on by the Appellant, including the report of the UN Special Rapporteur on Torture. However, its reference to "cramped and unsanitary conditions", although brief, captures the flavour of that material for reasons expressed earlier. There is no basis for the contention that the Tribunal failed to consider certain evidence and submissions as to why the anticipated period of remand would breach Article 7 of the ICCPR.
41. Counsel for the Appellant submits that if the Tribunal considered conditions beyond "cramped and unsanitary" were not relevant, it made an error of law. There is no basis for the contention that the Tribunal considered conditions beyond "cramped and unsanitary" to be irrelevant. Reference to "very deficient infrastructure", "pronounced overcrowding" are elements of "cramped and unsanitary conditions". The other conditions referred to by the UN Special Rapporteur are the consequence of "deficient infrastructure" and "pronounced overcrowding". This is demonstrated by the next sentence of the report commencing with the words "As a result". As to which, see [32] above.
42. Finally, counsel submitted that the Tribunal failed to give adequate reasons for its decision. This is just another way of contending that the Tribunal should have made specific reference to the Appellant's material on the claimed breach of Article 7 of the ICCPR. At [16] of its reasons for decision, the Tribunal referred to the submission of the Appellant's representative, including the fact that it cited "a range of country information relative to human rights conditions in Sri Lanka... and the forms of harm the applicant claims to fear on return". There was no requirement to deal with each item of that material that touched on prison conditions in Sri Lanka in the absence of material directly relevant to short term remand prisoners held at Negombo. This aspect of the Appellant's contentions is also rejected.

ORDERS

43. 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.

³⁶Human Rights Committee, *Views: Communication No 188/1984*, 31st sess, UN Doc CCPR/C/31/D/188/1984 (5 November 1987).

Shane Marshall

Judge Shane Marshall
20 February 2018

