



IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 113 of 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

ETA067

APPELLANT

AND

The Republic of Nauru

RESPONDENT

Before: Khan ACJ
Date of Hearing: 13 April 2017
Date of Judgment: 13 November 2017

Case may be cited as: ETA067 v The Republic

CATCHWORDS:

Whether the Tribunal failed to discharge its review obligations to act according to the substantial merit of the case under the provisions of section 22(b) by ignoring or assessing the evidence presented by the appellant relevant to his well-founded fear that he may suffer similar harm inflicted on a young person by Awami League for refusal to join them which he had witnessed

Whether natural justice required the Tribunal to give him opportunity to comment on issue of relocation.

Held- dismissing the appeal that the evidence presented by the appellant in relation to the young person was subsumed in the finding of greater generality.

APPEARANCES:

Counsel for the Appellant:
Counsel for the Respondent:

J Gormly
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 30 September 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 29 April 2016 and an amended ground of appeal on 13 April 2017.

BACKGROUND

4. The appellant is a 31 year old single man from Bangladesh. He speaks Bangla.
5. Before his departure, the appellant was living with his family in Shamperah, Dhaka. His older brothers are married and reside in the family home with their wives. Since his departure, his parents have moved to a smaller apartment occupied by another of their sons, Nosrul Islam, in Shavas, Dhaka. His parents moved because his father suffered a stroke. The appellant is the youngest child in the family.
6. In 2002, the appellant completed his eleventh year of education. He worked for eight months in a garment factory in 2009 and for a similar period as a courier in 2010. More recently he worked on a casual basis as needed in a local internet café.
7. His family supports the Bangladeshi Nationalist Party ("BNP"). His brother Nosrul Islam is a member and encouraged his involvement after finishing school. As the appellant has struggled to find work, he was happy to assist with bill-posting, "writing on walls", doing messages, and attending rallies. He was familiar with the BNP office in Shamperah.
8. He was made a member at the local level, which obliged him to go to outdoor meetings and rallies. New members are listed in a book and announced by a leader at the "thana" level. He does not remember the details of this process or when it occurred or if his brother was present.
9. There were many rallies and demonstrations during the period of the caretaker government. He found that he did not enjoy being involved and stopped working in politics before the 2008 election. Awami League ("AL") members would turn up and attack them with sticks. He suffered beatings, some of which required painkillers or bed rest. He described the situation as anarchy and that it was getting worse before he ceased his involvement.

10. He did not formally resign his membership but simply stopped attending events. His friends asked him to come but he declined. His brother did not chide him about his decision. He was able to find some work when he stopped his involvement.
11. The appellant socialised in the streets of Shamperah with a group of about 20 friends. After the election in about early 2009, some AL members would approach them and ask them to join. The AL members sought to intimidate them and sometimes there was a physical confrontation. They threatened to beat or kill them if they did not join, but the appellant did not take this as a literal threat of death. He was also harassed when on his own such as when he was commuting to work.
12. The appellant suggested that AL would seek to recruit him and his friends because of the contribution they could make and because he and his friends were well-known and respected so to recruit them could sway others to also join AL.
13. Over time, his group of friends dispersed as people moved for work or study. The AL members became more aggressive and began approaching them two or three times per week. He developed a "deep-rooted fear" of the AL approaches.
14. Sometimes the AL members would knock on his door and ask if he had decided to join. If someone else answered the door they would leave a message for him. He did not have a phone.
15. His brother Nosrul Islam was not harassed as he was not sitting around in the streets, but at election time all of his brothers were asked for their vote.
16. The appellant decided to leave because of this harassment. He thought that the AL would find out if he simply went to live with family members in other parts of Dhaka. If he went elsewhere he would become known as a BNP supporter and face the same problems.
17. The appellant departed Bangladesh at the end of 2013.
18. Since his departure, a group of men came to his family's house after the election to look for him and his brother. The men broke furniture and intimidated the family before leaving. He was told about this over the phone by his friend's mother. His parents, two brothers and their families were in the house at this time. He did not know when this occurred but was aware that there were lots of fights during the election and lots of houses were broken into.
19. The appellant fears that if he returns to Shamperah he may be beaten. If he goes elsewhere he fears something may happen later once he becomes known as a BNP supporter.

APPLICATION TO THE SECRETARY

20. On 14 January 2014, the appellant attended a Transfer Interview.

21. On 20 March 2014, the appellant made an application to the Secretary for recognition as a refugee and for complementary protection under the Act.
22. On 13 March 2015, 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 15 July 2015, the appellant made a statement and on 26 July 2015 his lawyers, Craddock Murray Neumann, made written submissions to the Tribunal.
 25. On 13 August 2015, the appellant appeared before the Tribunal to give evidence and present his arguments with his representative and an interpreter in Bengali and English languages.
 26. The Tribunal handed down its decision on 30 September 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

27. The appellant filed 2 grounds of appeal which are:

- 1) The Tribunal erred by failing to deal with evidence or other material provided by the appellant in breach of s.22(b) of the Act, namely evidence of:
 - i) another young man Rasul who resisted joining the Awami League and was beaten in front of a crowd as a result;
 - ii) several other people whom the appellant identified by name to the Refugee Status Determination officer as persons assaulted by Awami League for refusing to attend Awami League meetings.

- 2) In determining that the appellant could relocate elsewhere in Dhaka the Tribunal did not comply with s.22(b) and s.40(1) of the Act in that it did not act according to the principles of natural justice.

PARTICULARS

- 1) The Tribunal did not give the appellant the opportunity of being heard in that it did not bring to the attention of the appellant or allow him the opportunity to ascertain and comment on an issue the Tribunal found relevant to relocation at [41]:
- a) That the Tribunal would find that the appellant was not ever a formal member of the BNP, and therefore in part had no profile within the BNP that would make him of interest to political activities outside his suburb in Dhaka.

CONSIDERATION

28. In Ground 1 the appellant alleges that the Tribunal failed to discharge its review obligations to act according to the substantial merits of the case; whilst in ground 2 the appellant alleges that the Tribunal failed to afford him natural justice as required by s.22(b) and s.40(1) of the Act by not giving him the opportunity to be heard on adverse findings relating to relocation.
29. The appellant concedes that he must succeed on both grounds to be able to obtain relief in this Court. The respondent submits that if the appellant fails to succeed on Ground 1 then there is no need to consider Ground 2 and the decision of the Tribunal can be affirmed.

Ground 1 – Failure to discharge the review obligations

30. The appellant submits that the Tribunal failed to discharge its review obligations under s.22(b) of the Act in that it ignored or failed to assess evidence presented by the appellant relevant to the well-founded fear that AL had intended to harm him and would harm him in the future¹.
31. The respondent submits that there was evidence of assault by AL supporters against a young man named Rasul who like the appellant had refused to join A L and against others he named in the RSD Interview. The appellant concedes that whilst he did not suffer any physical harm in the past, he knew that he faced such harm in the future because of what happened to Rasul and others². He further submits that the circumstances of the assault against Rasul and others were relevant to the Tribunal's findings at [40] and in particular to the conclusion the Tribunal drew that the appellant would not face persecutory harm from A L in the future because the appellant had not suffered such harm in the past³.

¹ Appellant's written submissions [32]

² Appellant's written submissions [33]

³ Appellant's written submissions [34]

32. The appellant submits that the Secretary had accepted that the appellant had 'witnessed' a person being assaulted for not joining the party around 2010 and that this was very relevant to his claim that the AL had intended to harm him in the future; that the Tribunal did not mention the evidence of assault on Rasul and others in its reasons for its decision or during the hearing⁴.

33. The appellant submits that the Tribunal stated at [29] as follows:

[29] The Tribunal put to the appellant that he had described the situation where the Awami League had approached him up to 500 times in five years (working on an estimate of 1-2 approaches a week initially to 2-3 approaches at the end) and on each occasion had asked him to join the Awami League and threatened him that if he did not – yet nothing had happened. The Tribunal put to the applicant that Awami League clearly did not intend to harm the applicant or it would have done so already. The applicant said he had developed a 'deep-rooted fear' which had increased as his own group diminished with the friends going away.

34. The appellant elaborated that implicit in the decision at [29] is that the Tribunal's reasoning in that 'no harm in the past means no harm in the future'; that the Tribunal's decision at [29] incorrectly states that it put the proposition to the appellant that AL clearly did not intend to harm the appellant or it would have done so already; and the appellant said he had a 'deep-rooted fear'⁵; further that the transcript of the hearing does not show that this proposition about 'intention' was put to the appellant. The appellant concedes that the Tribunal had identified that he did not claim to have been physically harmed and refers to the transcript to show that it was not put to the appellant to show that this meant that the AL did not intend to harm him⁶. The transcript is as follows:

Miss Zelinka: I don't – if you know – this – being harassed by people on the street, by men on the street, why don't you join Awami League, you must join Awami League, this does not seem to be serious enough to make somebody leave their family and leave their country. The things that have happened to you, being approached often by Awami League boys saying 'you have to join us; we will beat you if you don't join us' – even if it happens often, this does not seem to me to be a serious enough reason to leave all your family and to leave your country.

Interpreter: Once somebody has got fear from something, and if it is deeply rooted inside, then it's very difficult to overcome this situation.

35. The appellant submits that from what is stated at the hearing above it appears that the Tribunal seems to doubt whether harassment had occurred at all as the appellant had never been harmed [29]; and the Tribunal eventually in its decision accepted that the

⁴ Appellant's written submissions [36]

⁵ Appellant's written submissions [37]

⁶ Appellant's written submissions [37]

appellant's testimony of harassment and 'pushing and shoving'; and found at [31] that this did not amount of persecution.

36. The appellant submits that at [31] the behaviour treated by the Tribunal did not arise above harassment and mocking, or 'harassment and pushing' in the appellant's case; and it was not clear as to whether the consideration of assaults on Rasul and others is dealt with or subsumed in the Tribunal's findings at [31] on 'antagonistic behaviour' between BNP and AL supporters in the suburb.
37. The appellant submits⁷ that s.34(4) of the Act required the Tribunal to set out its findings on the material question of fact and its failure to make findings on certain questions may be assumed that the Tribunal did not find those questions to be material and may consequently disclose a reviewable error⁸.
38. The appellant submits that under s.22(b) the Tribunal must act according to the substantial merits of the case and the scope of merits and the scope of the review obligation under s.40(1) of the Act to invite the applicant to appear to give evidence and present arguments in relation to the determination or decision under review⁹; and the failure of the Tribunal to refer to the evidence of assault on Rasul and others indicates that the Tribunal ignored this evidence, despite its importance to the issue whether the AL ever intended to harm him; and to the well-foundedness of the appellant's fear of future harm¹⁰. The appellant relies on *MZYTS v Minister for Immigration and Citizenship*¹¹ where the Federal Court of Australia stated:

"The Tribunal's reasons disclose no process of weighing evidence and preferring some over the other. In the context of the two or more pieces of apparently pertinent, but contradictory, evidence an expression of a preference for some evidence over the other generally requires an articulation of the different effects of the evidence concerned, and then some indication as to why preference is given. All these are matters for the trier of fact. The absence from recitation of country information of the material referred to in the post hearing submission is indicative of omission and ignoring, not weighing and preference."

39. The appellant submitted that the Court in *MZYTS* at [46] approved what the Federal Court of Australia said in *Minister for Immigration and Citizenship v SZRKT*¹² where it was stated:

"In my opinion there is no clear distinction in each case between claims and evidence: see *SHKB v Minister for Immigration and Multicultural and*

⁷ Appellant's written submissions [41]

1. ⁸ *Minister for Immigration v Yusuf* [2001] HCA 30; (2001) 2006 CLR 323 at [36], per Gaudron J of the similarly worded s.430 in the Australian Migration Act 1958.

⁹ Appellant's written submissions [42]

¹⁰ Appellant's written submissions [43]

¹¹ [2013] FCAFC 114 [50]

¹² [2013] FCA 317; (2013) 212 FCR 99 at [111]

Indigenous Affairs [2004] FCA 545 at [24], set out at [69] above. The fundamental question must be the importance of the material to the exercise of the Tribunal's function and thus the seriousness of any error. In my opinion the distinction between claims and evidence provides the tool of analysis but is not the discriemen itself. Further, it is important not to reason that because a failure to deal with some (insubstantial or inconsequential) evidence will, in some circumstances, not establish jurisdictional error, then a failure to deal with any 'substantial and consequential' evidence will also not establish jurisdictional error."

40. The appellant submits that in ignoring the relevant evidence of assaults on Rasul and others the Tribunal failed to discharge its statutory duties to review the decision before it according to the merits of the case: *DWN072 v The Republic*¹³.
41. The respondent accepts that the Tribunal did not refer to the evidence about Rasul; but it does not justify an inference that it was not considered¹⁴; the appellant submitted that what happened to Rasul was an example of what might happen to him if he returned to Bangladesh; and the Tribunal responded to this argument by noting at [29] that AL approached him 500 times without inflicting any harm and therefore AL did not intend to harm him, or it would have done so already¹⁵.
42. The respondent submits at¹⁶ that having dealt with the substance of the appellant's argument about his interactions with AL meant that the escalation was not a real possibility; and that dealt with the claim at the level of generality that made specific mention of evidence regarding Rasul otiose¹⁷.
43. The respondent in response to the appellant's submission on *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 submits that the principle to be derived is that a failure to refer to a piece of 'apparently pertinent, but contradictory evidence' may indicate that the relevant evidence has been ignored; and in relation to *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 is that a Tribunal may be required to consider 'independent corroborative evidence' that is cogent and that is objectively important or 'central' to the review claims.
44. The respondent submits that both *MZYTS* and *SZRKT* are distinguishable from the present case on its facts. The respondent accepts that where the Tribunal does not mention it in its reasons some evidentiary material that bears significantly upon material claims, the Court might infer that the material was not considered; which may amount to 'a point of law' justifying remittal¹⁸.
45. The respondent submits that the inference will not be available in every case, and further that the Tribunal is not obliged to refer to every piece of evidence in its

¹³ [2016] NRSC 18; Appeal No. 63/2014 at [30]

¹⁴ Respondent's written submissions [9]

¹⁵ Respondent's written submissions [10]

¹⁶ Respondent's written submissions [11]

¹⁷ Applicant *WAEF v Minister for Immigration* (2003) 236 FCR 593, [46] - [47]

¹⁸ Respondent's written submissions [15]

decision; nor to refute line by line every point made by an appellant¹⁹; the relevant factors in determining whether this inference should be made are to consider:

- 1) The cogency of evidentiary material;
- 2) The place of that material in assessment of appellant's claims.

It is only where evidentiary material was cogent and objectively important, or 'central' to the appellant's claim that an inference of the kind urged by the appellant is justified.

46. The respondent submits that in the present case:

- (a) the claim that Rasul had been beaten did not contradict the appellant's evidence that he had not been harmed over 5 years with up to 500 altercations with Awami League and its supporters; the two pieces of evidence did not require the Tribunal to weigh and express a preference for one over the other as the appellant's evidence of what happened to Rasul was separate from his evidence of what happened to him. Therefore, it followed that the Tribunal's reasons do not enable an inference that it 'ignored' the evidence with respect to Rasul.
- b) The evidence with respect to Rasul did not 'corroborate' the appellant's evidence, nor was it 'central' to those claims. That having regard to the Tribunal's acceptance of the appellant's evidence that he had not been harmed in the past for 5 years and with up to 500 interactions with Awami League members and supporters it should be inferred that the Tribunal considered that the evidence with respect to Rasul to be peripheral to the appellant's claims and therefore the inference urged by the appellant is not available.

47. The whole basis of the appellant's claim was that considering what happened to Rasul might happen to him as well, however, the Tribunal concluded by saying that it has not happened to him over a period of 5 years with a total of 500 interactions and nothing would happen to him in the future. That is '*the factual premise*'. In this regard [47] of applicant *WAE v Minister for Immigration and Multicultural and Indigenous Affairs*²⁰ is relevant where it is stated:

"The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in the finding of greater generality, or because there is a factual premise upon which a contention rests which has been rejected. Where, however there is an issue raised by the evidence advanced on behalf of an applicant and the contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegates decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked."

¹⁹ Re: *Minister for Immigration and Multicultural Affairs*; ex parte Durairajasingham (2000) 58 ALD 609, 625;

²⁰ [2003] FCAFC 184

48. I accept that the evidence of Rasul was neither 'corroborative' nor 'central' to the appellant's evidence and that evidence became peripheral to the Tribunal's conclusion or was subsumed in the finding of greater generality.
49. In the circumstances, I am satisfied that there was no failing on the part of the Tribunal in the discharge of its review obligations and this ground of appeal is dismissed.
50. The appellant had agreed that in order for him to succeed in this matter he had to succeed on both grounds and since he has failed to succeed on Ground 1 there is no need for me to consider Ground 2.

CONCLUSION

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

DATED this 13 day of November 2017



Mohammed Shafiullah Khan
Judge

