IN THE SUPREME COURT OF NAURU

AT YAREN

APPEAL NO. 58/2014
Being an appeal a decision of the Nauru Refugee Status Tribunal brought pursuant to s43 of the Refugee Convention Act 2012

BETWEEN

(DWN 054 APPELLANT

AND

The Republic of Nauru RESPONDENT

Before:	Khan J
Date of Hearing:	14 March 2016
Date of Judgment:	15 December2016
Case may be cited as:	DWN054 –v- The Republic

CATCHWORDS:
Tribunal failed to consider and deal with claims of discrimination of the appellant to a non-Pashtun area upon relocation and it failed to consider whether appellant would face a risk of harm from the extremists upon relocation.

Section 37 – tribunal relied on a newspaper published after the hearing of the review application and failed to meet its statutory and mandatory obligation of reconvening the hearing and giving the appellant an opportunity of responding thereto.

Appeal allowed and matter remitted to the Tribunal to reconsider the issue of relocation.

APPEARANCES
Counsel for the Appellant: J Gormly
Counsel for the Respondent: L Brown

JUDGMENT

INTRODUCTION

1. Section 43 of the Refugee Convention Act 2012 (the Act) provides:

> "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 the decision on a point of law".

2. The Refugee Status Review Tribunal (the Tribunal) delivered its decision on 26 September 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.

3. The appellant filed an appeal against the decision on 13 November 2014 and filed amended grounds of appeal on 15 January 2016.

BACKGROUND

4. The appellant's details are set out in sufficient detail in the Tribunal's decision[1] which is as follows:-

1) He was born on 2 February 1992 and is now aged 24 years old. He was born in the village Warsak Abad in Bara Bandai, about 7 kilometres from the main town of Mingora, in Swat District, Khyber Panktunhkwa (KPK) Province.

2) He attended school in Saidu Sharif in Swat until 2012.

3) His father owns a house in Bara Bandai and a house in Rawalpindi.

4) His father used to deal in property and 2 of his brothers live in the United Arab Emirates (UAE) where they own a rental car business. His sister is studying physiotherapy in Abbottabad and his younger brother lives in Bara Bandai.

5) He is a member of Mandan Pashtun tribe and of Sunni Muslim religion.

6) He stated that because of insecurity in Swat he and his family were displaced from Swat for 4 to 5 months in 2008 (staying in Gul Abad), 2 months between 2008-2009 (staying in Gul Abad), 3 months in 2009 (staying in Rawalpindi).

7) In 2009 he lived between Swat and Islamabad as follows:

- Swat in 2009, Islamabad from November 2009 to April 2010, Swat from April from April 2010 to December 2011, Islamabad from December 2011 to April 2012, Swat from April 2012 to June 2013 and Islamabad from June 2013 to July 2013.

[1] BOD 242

8) He stated that he lived in a student hostel in Islamabad.

9) He claimed to fear harm from the Taliban in Pakistan because of an anti-Taliban political opinion arising from his membership of Awami National Party (ANP) and a village defence committee (VDC) and his membership of Mandan tribe which opposes the Taliban.

10) He left Pakistan in July 2013 by plane for Malaysia from Lahore and from Malaysia by boat to Indonesia and finally arrived in Christmas Island by boat.

11) He arrived in Nauru on 20 November 2013 pursuant to a Memorandum of Agreement entered into between the Republic of Nauru and the Commonwealth of Australia on 3 November 2013.

APPLICATION TO THE SECRETARY- DEPARTMENT OF JUSTICE & BORDER CONTROL

5. On 8 December 2013 the appellant applied to the Secretary of the Department of Justice and Border Control (the Secretary) for refugee status determination (RSD) for recognition as a refugee and for a complimentary protection under the Act.

6. On 16 January 2014 the appellant was interviewed by an RSD officer about his application.

SECRETARY'S CONCLUSION ON RETURN TO SWAT

7. The Secretary found that should the appellant return to Swat and attend any political rallies or meetings or maintain any direct involvement in the ANP, there was a reasonable possibility that he could be harmed or killed in a Taliban attack.

8. The Secretary also found that there was a reasonable possibility that he could be harmed or killed by the Taliban should he return to his village, especially if he were to continue having any involvement with the VDC.

RELOCATION

9. The Secretary having referred to the Refugee Status Determination Handbook (RSD Handbook) considered relocation to another part of Pakistan on the basis of the test that the relocation was both reasonable and relevant.

10. The Secretary said that the cities of Islamabad and Rawalpindi in Punjab were relatively safe from militant attacks. He relied on a 2013 report that Punjab province had experienced declining militant attacks in recent years, particularly in Islamabad and Lahore, but that the report "does indicate that the infrastructure of terrorism remains and militants still have capacity to launch attacks".

11. The Secretary referred to militant attacks in 2013 in Islamabad and Rawalpindi, but noted these attacks were either high profile revenge attacks or targeted sectarian violence. He considered the Taliban operated in the area and had capacity to launch attacks, but he did not accept that the appellant had a profile which would put him at risk of being targeted by the Taliban outside of Swat.

12. The Secretary found that there were areas in Pakistan like Rawalpindi and Islamabad where the appellant could relocate safely and on this basis he found that it was reasonable and relevant for the appellant to relocate and was therefore not satisfied that the appellant was a refugee within the meaning of the Act and nor was he owed a complimentary protection under the Act.

APPLICATION TO THE TRIBUNAL

13. The Appellant made an application for review to the Tribunal on 5 June 2014 pursuant to s. 31 of the Act which states as follows:

1) 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 owed complimentary protection.

14. On 20 July 2014 the appellant's lawyers Craddock Murray Neumann (CAPS) made written submissions to the Tribunal on his behalf.

15. On 24 July 2014 the appellant appeared before the Tribunal to give evidence. He was assisted by an interpreter in the Pastho and English language. He was represented by his lawyers at the hearing.

MANDAN TRIBE CLAIM

16. The Tribunal did not accept the Mandan Tribe had any affinity with the ANP which was greater than any other Pashtun tribe. The Tribunal said that the evidence before it did not indicate that members of the Mandan Tribe had been targeted by the Taliban because of their membership of that Tribe and did not accept that there was a reasonable possibility he would be harmed because he was a member of that Tribe.

SPECIFIC CLAIMS OF ABDUCTION OF THE TALIBAN IN 2009 AND OTHER FAMILY CLAIMS

17. The Tribunal accepted that the appellant's uncle had been killed (and his brother injured) in fighting between the militants and the army or because they had opposed the militants or engaged in behaviour perceived to be un-Islamic.

18. The Tribunal did not accept that either the Appellant or his cousin was kidnapped by the Taliban in November or September 2009. The Tribunal came to the conclusion on the basis of country information that the army had by then secured Swat and the Taliban had fled the district and had no base there. The Tribunal accepted that the Taliban may have sought to recruit the Appellant at an earlier time.

VDC CLAIMS – FINDING OF RISK OF HARM FROM TALIBAN IN SWAT

19. The Tribunal accepted that the appellant had some non-organisational involvement with the VDC when he was in Bara Bandai between April 2010 – December 2011 and between April 2012 – 2013, and he may have undertaken some patrols and attended some meetings with the army. The Tribunal also found that State protection would not be available to the applicant in Swat as the Taliban had been able to continue to carry out hit and run attacks on military and security targets and opponents such as VDC leaders and members.

RELOCATION

20. The Tribunal found that the appellant could locate to another part of Pakistan, away from Swat in order to avoid harm from such militants. It did not accept that he had a profile which would cause local militants to track him down and target him outside his local area.

21. The Tribunal identified the cities of Rawalpindi and Lahore within the Province of Punjab and Islamabad as places to where the Appellant could reasonably relocate.

22. Having found that the appellant could avoid persecution by relocation, the Tribunal concluded that he is not a refugee and nor was he owed a complimentary protection under the Act and confirmed the Secretary's decision.

THIS APPEAL

23. The appellant filed 2 grounds of appeal which are as follows:-

Ground 1

The Tribunal made errors in determining that the appellant should not be recognised as a refugee. In particular, the Tribunal erred in applying the internal relocation principle under the Refugees Convention and Refugees Protocol in that:

a) The Tribunal failed to consider whether the Appellant faced a risk of serious discrimination in Rawalpindi or Islamabad, as a Pashtun, or in Pakistan generally as a person from Swat valley; and

b) The Tribunal failed to consider whether the Appellant faces a real risk of harm from the extremist groups or otherwise in Lahore; and

c) The Tribunal failed to consider credible evidence that was important to the issue of relocation to Rawalpindi and Islamabad, namely, reports of attacks

by extremist groups in those cities in 2013 and 2014 as described in the Primary Decision Record and Appendix IV to the Appellant's written submissions before the Tribunal.

Ground 3

In determining that the Appellant could reasonably relocate to Punjab Province, the Tribunal erred in law. In particular:

e) The Tribunal failed to comply with s.37 of the Refugees Convention Act in relation to the sources cited at footnote 76 in paragraph [66] of its decision.

SUBMISSIONS

24. Both Counsels filed written submissions and subsequently elaborated on their submissions at the hearing.

GROUND 1(a)

25. The appellant submits that if he were to relocate to a "non- Pashtun area" he would be exposed to serious discrimination as a Pashtun (including as a Pashtun from Swat Valley who would therefore be perceived to be a Taliban) possibly amounting to degrading treatment and a denial of human dignity.

26. The appellant's claim was that he would be discriminated against if he were relocated to a place where Pashtuns are in minority. He claims that the Tribunal dealt with his claim in relation to the city of Lahore at [65] of its decision but did not consider the claim in relation to his relocation to Islamabad and Rawalpindi.

27. He further claimed that the Tribunal was confused in including Islamabad the capital of Pakistan in Punjab Province when at [62] of the decision it is stated that:

"The Applicant could easily relocate to Rawalpindi in Punjab Province or Islamabad or another city in the Punjab Province such as Lahore."

28. The respondent's counsel accepts that Islamabad was not in Punjab and submits that the appellant's claim of being discriminated as a Pashtun was dealt with at [62], [63], [64] and [65] of the Tribunal's decision and the Respondent's Counsel also submitted that it was not a clearly articulated claim and relied on *Dranichnikov –v- Minister for Immigration and Multicultural Affair* [2].

29. The claim of being a Pashtun and being discriminated against upon relocation to other cities was clearly made and the Tribunal only dealt with the claim in relation to the city of

[2] 2003 197 ALR 389

Lahore at [65] of its decision. It did not mention the claim in relation to Islamabad and Rawalpindi. So this ground of appeal succeeds.

GROUND 1(b)

30. The Tribunal failed to consider whether the Appellant faces a real risk of harm from extremist groups or otherwise in Lahore.

31. The appellant submits that the Tribunal only dealt with the claim of risk from extremist groups in Islamabad and Rawalpindi but not Lahore at [66] of its decision.

32. The respondent's Counsel concedes that the Tribunal failed to deal with the issue of risk in Lahore but dealt with other parts of Punjab. This was a relevant issue and the Tribunal made a finding in [62] that the appellant could easily relocate to Lahore. So the Tribunal failed to deal with this issue and the Appellant succeeds on this ground as well.

GROUND 1(c) –

33. The Tribunal failed to consider credible evidence of relocation to Rawalpindi and Islamabad of attacks by extremist groups in 2013 and 2014.

34. The appellant's complaint is that the Tribunal was provided with information of attacks by his legal representatives in 2013 and 2014 in Rawalpindi and Islamabad respectively and the Tribunal failed to consider and deal with them and only dealt with 3 attacks in Rawalpindi in 2012 and 1 in Islamabad in 2011. The Tribunal dealt with attacks in [66] of its decision where it stated:

> *"Whilst extremist groups operate in Punjab Province, Rawalpindi is relatively secure with 3 attacks reported in 2012, including one sectarian attack which targeted a Shia procession, killing many people. Only one terrorist attack was reported in Islamabad in 2011. According to a recent report, the Punjabi Taliban, responsible for a number of terrorist attacks in Punjab, has abandoned its armed struggle and announced it will focus on a peaceful campaign calling on Pakistan to adopt Islamic law."*

35. The appellant's counsel submits that since the Tribunal was provided with this later material it was obliged to consider it and relies on the case of *Minister for Immigration and Citizen –v- SZRKT and another* [3] and in particular at [102] and also relies on the case of *Minister for Immigration –v- MZYTS* [4] [67], [68], [69] and [70]. At [70] it was stated as follows:-

> *"With respect, we consider this is a conclusion reached by Robertson J in SZRKT, most directly expressed at [98], where His Honour states that the identification of jurisdictional error cannot "put out of account the actual cause of decision making by the Tribunal" and cannot proceed "by reference to categories or formulas", observing that 'there are many ways, actual or constructive, of failing to consider the claim". His Honour develops at [111] by*

[3] 2013 FCA 317
[4] 2013 FCR 41

disavowing any jurisdictional/non-jurisdictional distinction between claims and evidence and instead finding, correctly in our respectful opinion, that 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". We agree with His Honour's analysis."

36. The respondent's counsel submission is that the cases of *SZRKT* and *MZYTS* do not apply as the material that the appellant is complaining about is not highly relevant or central to the claims that were being made and no errors were committed by the Tribunal.

37. I note that at [66] of the Tribunal's decision also contains material which is subject to Ground 3 of the appeal which in itself is a substantive ground of appeal so instead of spending time on the determination of this ground of appeal, I will move on to deal with Ground 3 because of the overlap contained in [66].

GROUND 3(e) – s. 37 Natural Justice –

38. In determining that the appellant could reasonably relocate to Punjab Province erred in law. In particular:

    (e) The Tribunal failed to comply with s. 37 of the Refugee Conventions Act in relation to sources cited at Footnote 76 in [66] of its decision.

39. Footnote 76 contained an article in Sydney Morning Herald dated 15 September 2014 with the caption 'Pakistani Taliban Factions Abandon Armed Struggle', Sydney Morning Herald 15 September 2014. This article precedes the decision by some 9 days and the hearing, as I said earlier, took place on 23 July 2014.

40. The appellant was not given an opportunity to respond to the said article and thus this ground of appeal is based on s. 37 of the Act.

41. I dealt with the issue of s. 37 in the matter of DWN072 –v- The Republic of Nauru Appeal No. 63 of 2014; NRSC 18 in which both counsels in this matter were also counsels in that matter.

42. I reiterate what I said at [41], [42] and [43] and I repeat:

"[41] Section37 is almost identical to s424(A) in respect of sub-paragraphs (a), (b) and (c). Under s37 the mode of giving of information to the applicant is not provided for while s424(A) has the prescribed mode of giving information. There is significant different in subparagraph (b) of the two sections. In s37(b) the additional requirement is "and the consequences of it being relied on in affirming the determination or decision for review."

[42]S424(A) as discussed in SAAP places a mandatory requirement on the Tribunal to give the information where it stated: "If the requirement particulars is mandatory then failure to comply means the Tribunal has not discharged its statutory function". Under s37(b) the Tribunal must ensure: "the consequences

of it being relied in affirming the determination or decision that is under review" is made known to the applicant. In my view this is a "mandatory requirement" on the Tribunal to inform the applicant of the consequences of relying on the information (e.g if the Tribunal has the information that it intends to rely on then it is required to go through two sets of processes, firstly, it must ensure that the applicant understands it, and secondly, he/she realises the consequences of it being relied on). So the Tribunal record must show that those two steps have been taken and if it does not show it, then the Tribunal would have failed to discharge its statutory obligations.

[43] The Tribunal relied on information in the New York Times published on 26 August 2014, information acquired post hearing date, which in itself is in breach of all rules of procedural fairness. It relied on it without complying with the requirements of s37(b) and failed to discharge its statutory obligations. Under s37(b) the Tribunal could not fulfil its obligation by simply writing to the applicant or his lawyer and obtaining a written response. It had no choice but to reconvene the hearing and ensure that the applicant understood the relevance and consequences of the information being relied on and then invite the applicant to comment or respond to the information."

43. In this case, the Tribunal relied on this article published in the Sydney Morning Herald some nine days before it delivered its decision and it failed to comply with the requirements of s. 37 of the Act. So the Appellant succeeds on this ground of appeal as well.

44. Under s. 44 of the Act, I make the following Orders:

a) The matter is remitted to the Tribunal for reconsideration or redetermination according to law on the matter of the appellant's relocation from his home district.

DATED this 15 day of December 2016

Mohammed Shafiullah Khan
Judge