



IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION]

Case No.111 of 2015

IN THE MATTER OF an appeal
against a decision of the Refugee
Status Review Tribunal TFN 15038,
brought pursuant to s43 of the
Refugees Convention Act 1972

BETWEEN

DWN034

Appellant

AND

THE REPUBLIC

Respondent

Before: Crulci J

Appellant: T. Baw

Respondent: T. Reilly

Dates of Hearing: 22 June 2016

Date of Judgment: 23 March 2017

CATCHWORDS

APPEAL - Refugees – Refugee Status Review Tribunal – Relocation – Consideration of an Integer of the Claim – Principles of natural justice and procedural fairness – Error of law - Appeal UPHELD

JUDGMENT

1. This matter comes to the Court pursuant to section 43 of the *Refugee 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. This Court is in agreement with the procedure in relation to the matter of extension of time as outlined in *ROD128 v The Republic*¹:

"The Republic for the efficient disposal of the case agreed that the appellant be allowed to present his case on the merits of the proposed appeal and at the same time present his argument on the substantive issue, and if the Court was satisfied that there was merit in the appeal then the extension of time would be granted. However, after the hearing, the Republic and the lawyers for the appellant... came to an agreement that the extension of time will not be in issue. Accordingly, a consent order was filed ...whereby the time of appeal was properly extended by the Registrar pursuant to the amendment to the Act and consequently the appeal being out of time is no longer an issue."

4. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on the 23 October 2015 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of the 26 June 2015, that the appellant is not recognised as a refugee under the Refugees Convention² ("the Convention") and is not owed complimentary protection under the Act.

¹ [2017] NRSC 8

² 1951 Refugee Convention and 1967 Protocol, also referred to as "the Refugees Convention" or "the Convention"

BACKGROUND

5. The appellant was born in 1991 in Darsamand, Hangu District, and lived there with his family. He is single, a Sunni Muslim, a Pashtun by ethnicity and a citizen of Pakistan.
6. The appellant's father and elder brother ran a well drilling business which included drilling wells for the Pakistan government at schools. His father was killed in 2010 due to his association with the government.
7. Subsequent to his father's death the appellant became more involved in the family's well drilling business, working with his elder brother. In 2012 they had a contract to drill a well for an army school. His brother was killed in connection with this work.
8. The appellant claims that his father and brother were killed by the Taliban, after having been warned by the Taliban in relation to working for the Pakistan government.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

9. The appellant claims that if he returns to Pakistan he would be killed, abducted or seriously harmed by the Taliban because of his imputed political opinion in opposition to them as his work involved the Pakistan government and schools.
10. The appellant fears that he would be assumed to be a spy by the Taliban because he has been away from Darsamand.
11. The appellant's father and elder brother were killed in relation to the work they were doing, which was drilling wells for the government, army and schools. The Taliban sought to harm those working for the government and warned his father and his brother not to continue with the work; however his father and brother continued working because they had contracts for the jobs.
12. Concerned that he too would be killed as he was working in the family business, the appellant left Pakistan shortly after his brother's death.

Secretary's Decision

13. Having heard from the appellant the Secretary found much of it to have been embellished to strengthen his claims, and other parts of it inconsistent. The Secretary did not find his claims to be credible.
14. The Secretary concluded that the appellant's claim that he was also involved in drilling wells not credible. Furthermore the Secretary did not accept the appellants claims that his brother and father were killed by the

Taliban in relation to their work, nor that the appellant had subsequently gone into hiding following his brother's death.

15. As the Secretary did not accept that the appellant or his family members had been targeted by the Taliban in relation to the imputed political opinion because of their work for the Pakistan government and schools, the Secretary found that there was no reasonable possibility that such harm would occur to the appellant on this basis.
16. The Secretary considered whether the appellant would be safe if he returned to Darsamand Village and referring to various news reports. The Secretary accepted that the appellant may face a reasonable possibility of being killed or seriously injured by members of local militant groups due to their activity in the appellant's home area.
17. In relation to state protection, the Secretary concluded that there was a reasonable possibility that the appellant could be killed or seriously injured by local militants because of perceptions of being a political opponent due to his being a resident of Darsamand (an area in which the population is known to oppose Taliban ideology).
18. Having considered the UNHCR guidelines on Internal Protection³ the Secretary considered Karachi as a relevant area of relocation for the appellant.
19. Karachi was considered suitable as, notwithstanding that he is unable to read or write, he is a single adult male who has experience in operating technical machinery and can speak Pashtun, Urdu and some English. Furthermore the appellant would be able to relocate as he is not a person of adverse interest to the Pakistan Taliban, nor would he be targeted because of being a Pashtun because there are many Pashtuns there.
20. The Secretary was not satisfied that there was a reasonable possibility that the appellant would be harmed if relocated; therefore he does not have a well-founded fear of harm. As the fear is not well-founded the harm does not amount to persecution for a Convention ground.
21. In relation to Nauru's international obligations, the Secretary found that although there is a reasonable possibility that the appellant could face harm if returned to his home region, the Secretary found that it is reasonable for the appellant to relocate to other areas within Pakistan, and therefore Nauru does not have complementary protection obligations towards the appellant.

³ UNHCR *Guidelines on Internal Protection No. 4: "Internal Flight or Relocation Alternative"*, HCR/GIP/03/04, 23 July, 2003

REFUGEE STATUS REVIEW TRIBUNAL

22. The Tribunal considered the appellants claims and the evidence he gave at the hearing on the 18 August 2015, and came to a different determination in relation to credibility to those found by the Secretary.
23. Having heard from the appellant the Tribunal accepted that the Taliban killed his father in 2010 as a result of his association with the government by drilling a well at a school⁴. Although the Tribunal was concerned about the lack of steps taken by the appellant and his brother after this incident with the father, to protect themselves, the Tribunal accepted that the appellant's brother may have been shot and killed by the Taliban in 2012⁵.
24. When considering future harm to the appellant by the Taliban the Tribunal did not accept that there had been enquiries made by the Taliban about the appellant after his departure from his home area of Darsamand.
25. However the Tribunal did accept (as did the Secretary) that there was a reasonable possibility that the appellant would suffer harm, loss of life or liberty if he were to return to Darsamand taking into account both his past employment, family relationships and that the area that he comes from actively opposes the presence of Taliban and other military groups.⁶
26. Having accepted that should the appellant be returned to Darsamand he may be the recipient of unwelcome Taliban attention and thereby be harmed, the Tribunal went on to consider relocation within Pakistan.
27. The appellant told the Tribunal at the hearing that he was unable to live elsewhere in Pakistan because the Taliban has far-reaching connections and would locate him.
28. The Tribunal rejected these concerns finding as follows:

“... the threat of harm to the applicant because of his business was localised to the local, Darsamand area where he and his brother were conducting a business...The Tribunal accepts that the Taliban has the information networks across Pakistan but does not accept that the applicant has a profile which would cause the Taliban to be interested in him or pursue him elsewhere in Pakistan.”⁷
29. The Tribunal considered the ethnic diversity of Pakistan and that Pashtuns form the second largest group; noting DFAT Country Information that the urban areas for example Lahore are 'relatively free from politically motivated, terrorist and sectarian violence'.⁸

⁴ Book of Documents, p 177, para 16

⁵ Ibid., p179, para 28

⁶ Ibid., p 180, para 36

⁷ Ibid., p181, para 40

⁸ Ibid., p181, para 43

30. The Tribunal noted the appellants views in relation to relocation as follows:

“... He has never lived anywhere other than Azimand. He claims to have no family outside his home area of Darsamand...and not to know anyone living in the any of the other major cities of Pakistan. He claims he will be isolated from the tribal or familial support he needs to lead a relatively normal life without undue hardship; and that, as he is now the oldest male in the family, he will be expected to relocate his mother and younger siblings and they will be extremely vulnerable and uncomfortable in the city. He claims that his only employment experience was in the family business which has now been sold and that there is a significant level of unemployment and under employment in Pakistan and that he will not be able to find a job. The applicant did state at the hearing that his family receives an income from four acres of family land currently leased to a farmer.”⁹

*Tribunal's decision*¹⁰

31. The Tribunal relied on various country information which indicates that there are over two million Pashtuns living in Punjab, and that many Pashtuns live contentedly in cities outside of their tribal lands
32. The Tribunal determined that although the appellant has limited education, he can speak some Urdu and is a young man with technical skills and experience from working in the family business. The Tribunal therefore finds that he has the skills which would enable the appellant to be employed. Additionally the income from the family farm could assist the appellant to establish himself in Lahore.
33. Therefore having found that the appellant could safely and reasonably relocate within Pakistan, the appellant is not found to be a refugee as he does not have a well-founded fear of persecution elsewhere in Pakistan.
34. In determining complementary protection the Tribunal found that if the appellant relocated within Pakistan there was not a real risk that he would be subjected to torture, cruel, inhuman or degrading treatment or punishment such as to enliven Nauru's international obligations.

GROUPS OF THIS APPEAL

35. The appellant appeals against the decision of the Tribunal on two grounds (1) that there was an error of law in failing to consider the appellants claim that any relocation would involve not just himself as a single man, but as

⁹ Book of documents, p183, para 48

¹⁰ *Ibid.*, p183-185

the eldest surviving son of the family his responsibility extends to his mother and younger siblings; and

(2) that there was an error of law in failing to consider the appellants claim that the Taliban have informants throughout Pakistan which would pass on information as to his whereabouts; and that the Taliban had been contacting his family asking about the appellant, and the Tribunal erred in failing to put to the appellant material they had contrary to his claim.

Failure to consider an integer of the claim – the appellant relocating with his family

36. The appellant draws the Courts attention to the documentation and statements submitted to the Tribunal prior to his hearing in support of his claim for refugee status.

37. In relation to relocation the appellant stated as follows:¹¹

“I have also maintained that I cannot relocate as I am now the oldest male in the family and I would be expected to relocate with my mother and siblings, including my younger brother. I am illiterate and have only limited education and employment experience which was relied on a family business that we have now had to sell. I am not a single adult male from my perspective, and do not believe that I could successfully move myself and my family to the city and properly care for them.”

38. The appellant submits to the Court that the Tribunal was focused on the appellant as a ‘singular’ person rather than in consideration of him as a ‘family unit’. There is no explanation as to whether the Tribunal considered and/or rejected the proposition that the appellant was considered as head of his family and had consequently responsibilities for them.

39. The case of *Htun*¹² was cited by the appellant in considering whether a Tribunal has carried out it’s task when an integer of the claim has been overlooked:

“This is not merely one aspect of evidence not been touched. It is not a failure to find a “relevant” fact. The Tribunal failed to address and deal with how the claim was put to it, at least in part. The requirement to review the decision under section 414 of the Act requires the Tribunal to consider the claims of the applicant.¹³ To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on. The claim or claims and its or their component integers are considerations made mandatorily relevant by the Act....It is to be distinguished from the errant fact finding.”¹⁴

¹¹ Book of Documents, p127, para 39

¹² *Htun v Minister for Immigration and Multicultural Affairs* 2001 194 ALR 244

¹³ Analogous to s31 ‘Application for Merits Review by the Tribunal’ of the Act

¹⁴ *Htun*, 259 [42]

40. The appellant cites further cases¹⁵ in support of the contention that the Tribunal is required to make a finding on 'a clearly articulated argument,' whether or not it accepts or rejects the claim made, and set out reasons for the findings.
41. Here, that appellant argues, although the Tribunal made mention of the appellants claim in its determination in this way "*as he is now the oldest male in the family, he will be expected to relocate his mother and younger siblings and they will be extremely vulnerable and uncomfortable in the city*" the Tribunal failed to give any reasons or make any findings as to whether it accepted or rejected the claim in relation to the appellants need to relocate with his family.
42. In reply the respondent says that it does not follow that the Tribunal overlooked the appellants claim, because the appellants concern was outlined by of the Tribunal in their considerations (referred to in paragraph 30 above).
43. The respondent accepts that the Tribunal refers to the appellant in the singular in relation to relocation. The Court is referred to a number of cases to support this contention¹⁶ that the Tribunal's reasoning's deal with the appellants objections to relocation and there is no need for consideration of 'all theoretical possibilities': on a fair reading of the decision, the concerns of the appellant have been considered and the Tribunal has made its determinations.
44. The respondent argues that had the appellant been successful in his claim to be recognised as a refugee this recognition would have been based on him as a single person. Therefore it follows that for the Tribunal to consider whether relocation was appropriate as a single man was a reasonable consideration. The Court is referred to *Applicant WAEE*, where French, Sackville and Hely JJ held¹⁷:

"The inference that the Tribunal has failed to consider an issue may be drawn on from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn whether 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 findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected."

¹⁵ *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389; *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 14; *Minister for Immigration and Border Protection v SZSRS* 2014 FCAFC 16; *Minister for Immigration and Border Protection v CZBP* 2014 FCAFC 105

¹⁶ *Minister for immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; *SZMCD v Minister for Immigration and Multicultural Affairs* (2009) 1974 FCR 415

¹⁷ *Applicant WAEE v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 184, 630 at 641 [47]

45. This Court notes that the passage cited by the respondent continues as follows:

“Where, however, there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that the 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.”

46. The appellant had clearly raised in his statement to the Tribunal that he is now the eldest male member of the family and he is responsible for his mother and younger siblings. When questioned about relocation by the Tribunal in the hearing he again raised his family responsibilities saying as follows :

“And then I have a responsibility and I have and the small younger sisters and brother. And if I’m looking for a house, sorry, work then does the area who is being looking after my family?”¹⁸

47. The Tribunal discussed with the appellant the question of what work he thought he would do when he was sent away from home overseas to a strange place, in light of the appellant’s limited work experience and ignorance of the language. The appellant replied as follows:

“Yes. I agree with you. But I didn’t come here for the sake of looking for – other – other reason, work. I just got my – I just ask here for the protection to save my life. I wasn’t crazy to come all the way on this ocean.”¹⁹

48. The Court accepts the appellant’s argument that there is a difference between the recitation of a claim and a consideration of it. If the Tribunal considered the appellant’s claim as to his family responsibilities and their impact upon his relocation and rejected them and went on to consider him as a single man in terms of relocation, then the onus is on the Tribunal to deal with this in their reasons.

49. The conclusion drawn by this Court from the failure by the Tribunal to specifically deal with the claim by the appellant that he is not ‘single’ is that the Tribunal has not considered an integer of the claim. Ground One of the appeal succeeds.

Failure to consider the appellant’s claim in relation to the Taliban networks in Pakistan

50. The appellant submits to the Court that the Tribunal failed to consider the claim made by the appellant that the Taliban have a network of informers throughout Pakistan which would be able to locate him and that they have been making inquiries of his family at his home. Furthermore that the Tribunal failed to put to the appellant material contrary to his claim, in breach of the requirements of the Act.

¹⁸ Book of Documents, p167, lines 12-14

¹⁹ Ibid., p168, lines 7-9

51. At the Tribunal hearing there was discussion between the Tribunal members and the appellant about whether the Taliban would try and find him in other areas of Pakistan when considering whether relocation would be a viable alternative for the appellant.
52. The appellant gave evidence that there are people currently making enquiries as to his whereabouts²⁰, and that there had been numerous enquiries about him since he had been away from home.²¹
53. The Tribunal asked the appellant why he hadn't mentioned this before? The appellant responded that he hadn't been asked a question previously, and that in the previous hearing there had been a problem in understanding between himself and the other interpreter.²²
54. The appellant is critical of the Tribunals reasoning's as to why the Taliban would not pursue the appellant elsewhere in Pakistan; that the Tribunal did not give the appellant an opportunity to comment on his profile with the Taliban. Furthermore that pursuant to section 34 the Act the Tribunal must give written reasons as to what findings of fact are based upon and the evidence as to what formed this view.
55. The appellant says that by the Tribunal failing to comply with section 34(4), it has fallen into error.

s34 Decision of Tribunal on application for merits review

- (4) The Tribunal must give the applicant for review and the Secretary a written statement that:
 - (a) sets out the decision of the Tribunal on the review; and
 - (b) sets out the reasons for the decision; and
 - (c) sets out the findings on any material questions of fact; and
 - (d) refers to the evidence or other material on which the findings of fact were based.
56. The respondent submits to the Court that there is no substance to this ground of appeal as the Tribunal expressly finds that there has been no inquiry about the appellant's whereabouts by the Taliban since he left Darsamand. The Tribunal gives the following reasoning "*the applicant would have mentioned such enquiries earlier in the RSD process if they had been occurring*".²³
57. Rebutting the appellant's submissions the respondent refers the Court to the hearing where the matter of Taliban networks throughout Pakistan was discussed:

TRIBUNAL MEMBER: If we went back to Darsamand it may be possible that, you know, the local Taliban would remember and harm you. But it seems far less possible that they would track you down in

²⁰ Ibid., p162, line 32 onwards

²¹ Ibid., p164, lines 1-3

²² Ibid., p164, lines 8-10

²³ Ibid., p180, para 35

some other part of Pakistan, say in one of those big Punjab cities in order to harm you. It just doesn't seem that you have a profile that would cause the Taliban to try to find you in some other part of Pakistan.

INTERPRETER: As I left my area and if I go anywhere they have contacts everywhere and they can pass on that information to their people that this person is in that area and do not leave it and shoot him straight away.²⁴

58. The respondent states that although the Tribunal did not identify individually the Country Information and put each article to the appellant at the hearing, the Country Information referred to in the Tribunal's reasoning accorded in substance to that put to the appellant at the hearing (and to which the appellant had an opportunity to respond to at the time).
59. The Court finds on balance that the Tribunal did afford the appellant an opportunity to put forward his views as to the Taliban's ability to locate him throughout Pakistan. The Tribunal was entitled to weigh the evidence given by the appellant and make a determination as to his credibility and whether they accept or not the evidence given by the appellant in connection with his assertion as to the Taliban making recent enquiries with his family as to his whereabouts.
60. In relation to Ground Two the Court finds that the Tribunal did give the appellant the opportunity to put his case and respond, and that the Tribunal noted its reasons in the determination as per the requirements of the Act. Ground Two of the appeal fails.

ORDER

61. (1) The appeal is allowed.
(2) The decision of the Tribunal TFN 15038, dated the 23 October 2015 is quashed.
(3) The matter is remitted to the Refugee Status Review Tribunal under section 44(1)(b) for reconsideration according to law.

²⁴ Book of Documents, p162, lines 19 - 28



Judge Jane E Crulci

DATED this 23rd day of March 2017

