IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 43/2015
Being an appeal against a decision of the Nauru Refugee Status Tribunal brought pursuant to s43 of the Refugees Convention Act 2012

BETWEEN

PIN031 APPELLANT

AND

The Republic of Nauru RESPONDENT

Before: Khan, J
Date of Hearing: 21 March 2016
Date of Judgement: 31 March 2017

Case may be cited as: PIN031 v The Republic

CATCHWORDS:
The Tribunal is under no obligation under s 34(4) of the Refugees Convention Act 2012 to set out reasons for rejecting every factual assertion or contention made by an applicant- the Tribunal is required to set out its findings on any material questions of fact and refer to the evidence on which those findings were based.

APPEARANCES:

Counsel for the Appellant: T Baw
Counsel for the Respondent: C Fairfield

JUDGMENT

INTRODUCTION

1. The appellant filed an appeal against the decision of the Refugee Status Review Tribunal (the Tribunal) pursuant to the provisions of s43 of the Refugees Convention Act 2012 (the Act) which states:

(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 Tribunal delivered its decision on 17 March 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.

3. On 30 June 2015, an order was made by the Registrar to extend the time for appeal to be filed against the decision of the Tribunal delivered on 17 March 2015.

APPEAL OUT OF TIME

4. Following the decision of this Court in Kun v Secretary for Justice and Border Control[1] (Kun) the respondent took issue to the appeal being filed out of time.

5. On 30 June 2015, an order was made by the Registrar to extend the time for appeal to be filed against the decision delivered on 17 March 2015 by 31 August 2015.

6. The Registrar on 30 June 2015 purported to extend the time for filing of the appeal. The Republic's position is that following the decision of *Kun* he did not have the powers to grant the extension; and as such there is no valid appeal before the Court.

7. The Republic for the efficient disposal of the case had agreed that the appellant be allowed to present his case on merits on the proposed grounds of appeal and at the same time present his argument on substantive issues. If the Court was satisfied that there was merit in the appeal, then the extension of time could be granted.

8. After the hearing the Republic and the lawyers for the appellant have come to an agreement that the extension of time will not be an issue and a consent order was filed on 14 November 2016. The Registrar extended the time pursuant to the powers vested in him the Refugees Convention (Amendment) Act 2015 which came into force on 14 August 2105.

BACKGROUND

9. The appellant is a citizen of Sudan. His date of birth is 31 December 1973. He has 2 wives and 8 children. Both his parents are deceased. His wife and children live in Sudan together with his other siblings.

10. He is a Sunni Muslim.

[1] [2015 NRCS18[Khan J] 10 December 2015

11. He had lived in Halfa al Gedida in Kassala Province, East Sudan for 36 years.

12. Between 1995 to 2008 the appellant was a self-employed truck driver. He owed a truck called DAF. From 2008 he worked as a farmer.

13. On or about 27 September 2013 he departed Sudan by flying to Yemen on a genuine passport. From there he flew to Indonesia, transiting in Dubai and Malaysia.

14. He left Indonesia on or about 20 October 2013 by boat for Australia. His boat was intercepted by the Australian authorities on 21 October 2013 and he was transferred to Christmas Island.

15. He arrived in Nauru on 28 November 2013 pursuant to a memorandum of agreement entered between the Commonwealth of Australia and the Republic of Nauru.

CLAIMS

16. The appellant claimed that he would be harmed as he is a member of Zaghawa tribe which is perceived to oppose the government and he feared harm from the government authorities.

17. He claimed that in 2008 two political parties namely Justice and Equality Party (JEP) and Liberation of Sudan (LSD) opposed the government and were trying to overthrow the President.

18. Both these parties are closely associated with his tribe and their leaders are also from his tribe.

19. As a result of this attempt to overthrow the President the government authorities have been targeting Zaghawa tribe members.

20. He sold his truck in 2008 and began to farm crops 35 klms out of town so that the authorities could not find him.

21. Fearful of being detected he travelled 200klms to Al Qadrif where he stayed and worked for 6 to 7 months. He kept a low profile and did not interact with anyone.

22. He would sneak back to his house to visit his wives and children and they informed him that the authorities had visited them and had been looking for him. He feared sleeping in his house and would sleep in other people's houses.

23. The appellant lived with his father in Dafur for a couple of months in 2013 but it became dangerous because Jangaweek militia had taken control.

24. After his father died he returned home only to be told that the authorities were looking for him and that is when he decided to leave Sudan.

APPLICATION TO THE SECRETARY

25. On 26 November 2013, the appellant attended a transfer interview. On 25 January 2014, the appellant completed an application for Refugee Status Determination (RSD) together with a statement in support of his application.

26. On 8 April 2014, the appellant attended an RSD interview and on 21 November 2014 the Secretary to the Department of Justice and Border Control (the Secretary) delivered his determination that the appellant was not recognised as a refugee and was not owed complementary protection under the Act.

APPLICATION TO THE TRIBUNAL

27. The appellant made an application for review of the Secretary's decision pursuant to s.31 of the Act which states:

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 not owed complementary protection.

28. On 19 January 2015, the appellant prepared a statement and on 23 January 2015 his lawyers Craddock Murray Newmann made written submissions on his behalf and submitted it to the Tribunal together with his statement.

29. On 26 January 2015, the appellant appeared before the Tribunal to give evidence and present arguments. He was assisted by his lawyers and an interpreter in Arabic and English languages.

30. The Tribunal handed down its decision on 17 March 2015 affirming the decision of the Secretary that the appellant was not recognised as a refugee and was not owed complementary protection under the Act.

THIS APPEAL

31. The appellant filed the following grounds of appeal:

i) Ground 1 – failure to take into account a relevant consideration;
ii) Ground 2 – failure to consider persecution in the reasonably foreseeable future;
iii) Ground 3 – failed to provide reasons.

SUBMISSIONS

32. In addition to the written submissions filed by both parties, their counsels also made oral submissions which was of great assistance to me.

CONSIDERATION

Ground 1 – failure to take into account a relevant consideration

33. It is the appellant's contention that when the Tribunal overlooks material (a claim or evidence) it may amount to jurisdictional error. The appellant submits that s34(4) of the Act requires the Tribunal to set out its finding and question of fact it considers to be material, together with evidence or other material on which those findings were based. The appellant further submits that s34(4) is identical to s430 of the Migration Act 1958 (Cth) and therefore the Australian authority would be highly irrelevant. The appellant relies on the Minister for Immigration and Border Control v SZSR[2] and Minister for Immigration and Border Protection v MZYTS[3] where at [49] and [50] the Full Court said as follows:

> *"[40] The Court is entitled to take the reasons of the Tribunal as setting out the findings of fact the Tribunal itself considered material to its decision, and as a reciting evidence and other material which the Tribunal itself considered relevant to the findings it made: The Minister for Immigration and Multicultural Affairs v Yusuf[4]. Representing as it does what the Tribunal itself considered important and material, what is present – and what is absent – from the reasons may in a given case enable a court on review to find jurisdictional error: see Yusuf 206 CLR 323 at [10], [44] and [69].*
>
> *[50] The Tribunal's reasons disclose no process of weighing evidence and preferring some over the other. In the context of 2 or more pieces apparently pertinent, but contradictory, evidence and expression of a preference for some evidence*

[2] [2014] FCAFC 16
[3] [2013[FCAFC114
[4] [2001] 206CLR323 (Yusuf) [10], [34], [68].

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 the recitation of country information of material referred in posts – hearing submissions is indicative of omission and ignoring, not weighing and preference."

34. The appellant submits that the Tribunal relied heavily on country information to conclude that in Eastern Sudan did not have the same conflict against the Zaghawa tribe as in Dafur; whereas the country information stated otherwise; and the appellant gave evidence that since the attacks in Khartoum capital people have started to move to other states or regions and attacks on Zaghawa people have spread to home regions. That the Tribunal referred to the country information which confirmed the appellant's evidence that at least 750,000 people of Zaghawa tribe have been displaced due to the conflict in Dafur.

35. The appellant at [19] of his written submission states:

(a) The international crisis group stated:

"Since this time [2006] although fresh conflict has not broken out, insistence Sudan's social and economic conditions have deteriorated, raising concerns that the peace in the region may not be enduring." The Tribunal did not cite this part of the report.

(b) The same report stated:

"The government is allowing local tribe militias to arm, as communal relations deteriorate. The residents worry that Eastern Sudan will become the next Dafur, with conflicts developing between local collectors over claims to land and resources, some backed by the State." The Tribunal did not cite this part of the report at all.

(c) There was also reference in the same report to an earlier report called *Sudan's Spreading Conflict.*

(d) The Tribunal cited reports of government using militia to constantly attack, raid, assault, abduct and kill civilians in Dafur with impunity.

36. The respondent's response to the appellant's submissions at [19] of his written submissions is:

a) That the Tribunal expressly recited the extract of the report from the International Crisis Group;
b) In relation to 19(b) of the appellant's submission the respondent submits that the appellant appears to recite what at best may be called 'a speculative extract'. In any event the Tribunal referred to a further 2013 report from the International Crisis Group and extracted part of that report. It was open to the Tribunal to rely on that report including that since 2005 '*there is no country information which would suggest insurgent activity by JEM in Kassala or, more relevantly, retribution by the Sudan authorities in the eastern part of the country.*'

37. In [25] of his submission the appellant submits that:

> "A failure to refer to the entirety of the country information which the Tribunal so heavily relied is a serious error."

37. The respondent submits that the appellant appears to make reference to the matters contained at [19] of his submission which summarises parts of a report from the International Crisis Group dated 26 November 2013; and that the Tribunal footnoted a reference to that report in its reasons for the decision at [27]; and that the appellant's complaint is that the Tribunal did not refer to other references in that report. It is submitted by the respondent that these reports were not provided to the Tribunal by the appellant or his representative and no submissions were made in the appellant's written submissions to the Tribunal.

38. It is the respondent's submission that the appellant's complaint is not that the Tribunal failed to take the country information into account, but rather that the Tribunal ought to have come to a different finding on the material before it. However, that was a matter for the Tribunal. I agree with these submissions. So, this ground of appeal is dismissed.

Ground 2 – failure to consider persecution in the reasonably foreseeable future

39. It is the appellant's submission that the Tribunal relied on the present or the past situation in Sudan and not on the foreseeable future. The appellant further submits that there was country information which contradicted the Tribunal's presumption that the current circumstances would continue in the future. The Tribunal failed to engage with the country information which indicated a real risk of changing circumstances in Eastern Sudan, which was

consistent with the appellant's evidence and submissions. The appellant relies on the authority of Chan v Minister for Immigration and Ethic Affairs[5] which states that a fear of being persecuted is well founded if there is a ***'real chance'*** of being persecuted.

40. In regards to the appellant's evidence the Tribunal made a finding that he was not a credible witness it stated at [50] of its decision as follows:

> *"While the claim has been consistent the accounts given have been implausible and run counter to available country information. The Tribunal did not find the applicant to be a credible witness."*

41. Further, at [52] of its decision the Tribunal stated as follows:

> *"[52] On the evidence before it, including the country information cited, the Tribunal does not accept that there is a reasonable possibility that the applicant will be harmed in Kassala Province, Sudan, for reasons of his imputed political opinion as an opponent of the Sudanese Government because he is a member of Zaghawa tribe."*

42. At [54] of its decision the Tribunal states:

> *"[54} The Tribunal has found that the applicant does not have a well-founded fear of persecution because of his race as a member of Zaghawa tribe or because of an imputed political opinion as an opponent of the Sudanese Government in Kassala Province, Sudan. For the same reason it does not accept that he will suffer physical violence amounting in its severity to arbitrary deprivation of life, torture or cruel or inhuman treatment or punishment on return to Sudan as submitted. The Tribunal does not accept that he will suffer degrading treatment because of his race and his imputed political opinion."*

43. Mr Fairfield submits at [40] of his written submissions as follows:

> *"[40] ...in truth the appellant's submission is that the Tribunal ought to have attributed more weight to some of the country information to which it referred to in its reasons for their decision. That was a matter for the Tribunal.*

This ground of appeal fails.

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[5] (1989)169CLR379

Ground 3 – failure to provide reasons

44. The appellant submits that s.34(4)(a) to (d) of the Act substantially replicates s.430(1)(a) to (d) of the Migration Act 1958 (Cth). Subsections 34(4)(b), (c) and (d) requires the Tribunal to set out the reasons for the decision; to set out the findings on any material question of fact; and to refer to the evidence or other material on which the findings of fact were based. The High Court has held a failure to comply with s.430 alone may not be a ground of review: Multicultural Affairs v Yusuf[6], however where there is a result of another error by the Tribunal then it may amount to a ground of review.

45. The appellant relies on Minister for Immigration and Border Control v CZBP[7]. Then at [31] of his submission the appellant submits in this case the Tribunal mainly made a brief reference to the appellant hiding to evade capture, then simply concluded that it considered the account was not plausible. The Tribunal failed to explain why it was not plausible, it failed to 'deal with' the claim and evidence in the sense of disclosing the process by which it arrived at its conclusion. They also ignored important parts of the appellant's evidence on how he avoided detection, including that:he travelled further away 200klms to Al Qadrif where he would stay for work for a season of 6-7 months; whilst there he would keep a low profile and not interact with anyone; he did not sleep in his own house; he travelled in the night; and was kept informed of when any raids on his home had occurred.The failure to consider the entire evidence and explain why the appellant's account of avoiding detection was in breach of s.34(4)(b), (c) and (d) of the Act it amounts to an error in law.

46. In response Mr Fairfield submits at [42] of his written submissions as follows:

> The Tribunal found:
>
> a) It did not accept the appellant's claim that because he owned a DAF truck he was imputed with a political opinion in opposition to the Sudanese government.
>
> b) The appellant contradicted himself when he claimed all Zaghawa were targeted.

[6] (2001) 206CLR 323
[7] [2014] FCAFC105.

c) The appellant gave contradictory statements during the course of the hearing.

d) The Tribunal did not find this account of how he evaded capture to be plausible.

e) The Tribunal found implausible the appellant's competing statements about how he managed to evade capture whilst at the same time claiming that all Zaghawa people in Halfa al Gedida were monitored by the Sudanese security forces.

f) Although the claim of evading capture was consistent, it was implausible and ran counter to available country information. The Tribunal found the appellant was not a credible witness.

g) In making that finding, the Tribunal took into account the UNHCR Handbook about not always requiring information to refute an assertion and when the benefit of doubt should be given.

47. Mr Fairfield further submits that there is nothing in the Act that states that a failure to comply with s.34(4) invalidates the Tribunal's decision. Any failure to comply is procedural and does not of itself constitute an error in the application of law to the task of review which the Tribunal is required to undertake.

48. The respondent submits at [52] of his written submissions as follows:

> "There is therefore no obligation under s.34(4) to set out reasons for rejecting every factual assertion or contention made by the applicant. Rather s.34(4) required the Tribunal to set out its finding on any material questions of fact and refer to the evidence to which those findings were based. I agree with Mr Fairfield's submission so this ground of appeal is dismissed.

CONCLUSION

49. I affirm the decision of the Tribunal under s.44(1)(a) of the Act.

DATED this 17 day of March 2017

Mohammed Shafiullah Khan
Judge

THE SEAL OF THE SUPREME COURT
REPUBLIC OF NAURU