IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION] Case No.109 of 2015

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN 15021, brought pursuant to s43 of the *Refugees Convention Act* 1972

BETWEEN

CRI052 Appellant

AND

THE REPUBLIC Respondent

Before: Crulci J

Appellant: T. Baw
Respondent: T. Reilly

Date of Hearing: 23 June 2016
Date of Judgment: 11 May 2017

CATCHWORDS

APPEAL - *Refugees – Refugee Status Review Tribunal – Adjournment of Tribunal Hearing Requested – Adjournment refused – Hearing in Absence of Appellant -Legal Unreasonableness – Error in 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 can be granted. However, after the hearing, the Republic and the lawyers for the appellant... have come 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 issue of the appeal being out of time is no longer an issue."

4. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on the 31 August 2015 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of the 14 March 2015, that the appellant is not recognised as a refugee under the Refugees Convention[2] ("the Convention") and is not owed complimentary protection under the Act.

BACKGROUND

[1] [2017] NRSC 8

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

5. The appellant is a 29 year old single man. He was born in Jamalapur District and lived there with his family. He is a Sunni Muslim, a Bengali by ethnicity and a citizen of Bangladesh.

6. The appellant's parents and siblings live in his home district in Bangladesh. He attended school but did not complete high school, following which he was employed for a number of years as a welder in construction.

7. The appellant joined the Bangladesh National Party (the "BNP") when he was young because both his elder brother and his father were involved in the BNP. He attended a number of meetings and was involved in incidents between the BNP supporters and the Bangladesh Awami League (the "AL") supporters.

8. In May 2013 a number of local BNP members planned to kill a well-known AL leader. The appellant did not want to be part of this, and as a result he says he fell out with the other BNP supporters. Fearing his life to be at risk he left Bangladesh.

9. The appellant travelled through Malaysia, staying in Indonesia for about six months, and then boarded a boat bound for Australia in December 2013. He was intercepted and taken to Christmas Island transferred to Nauru on the 19 December, 2013.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

10. The appellant states that he would participate in many meetings and gatherings held by the BNP and also organize people to attend such meetings and be active in canvassing for the BNP during elections.

11. In 2001 he was beaten by the AL supporters having had an altercation with them regarding their methods in relation to BNP supporters. In 2008 as a result of his political discussions with a friend being overheard by an AL supporter, he was beaten.

12. There was discussion between members of the BNP in the appellant's village in relation to a plan to kill a prominent AL leader, Mohammad Minto. The appellant told the others that he didn't want to have anything to do with it as it was illegal, against the principles of the BNP, and he was frightened of being implicated in such a plot. Although the other BNP members threatened to kill him, he managed to escape and headed home. Having told his family of what had occurred it was decided that he should leave Bangladesh for his safety and did so within a couple of days.

13. The appellant fears that if he were to return to Bangladesh he may be seriously harmed or killed and would not be able to express his political opinions.

14. He fears harm from the other members of the BNP due to his opposition to violence in the political process. The appellant does not believe that the authorities can protect him because they are controlled by the AL, and the authorities frequently use AL supporters to target BNP supporters.

15. The appellant stated he cannot relocate in any way in Bangladesh because AL supporters target BNP supporters, and BNP have a network throughout Bangladesh.

Secretary's Decision

16. The Secretary accepted that the appellant is a supporter of the BNP and a member of the Jatiyatabadi Chhatra Dal (the "JCD") since 2003. It was also accepted that the appellant was beaten by AL supporters in 2001 in relation to their methods surrounding the election. The Secretary accepted that the appellant was beaten by the AL - on the basis that he provoked the AL members and they reacted.

17. In relation to the 2008 incident, the Secretary accepted that as a result of the appellant's conversation being overheard he was beaten by Mohamed Minto, an AL supporter.

18. Having heard the appellant's responses in interview in relation to the BNP plan to kill Mohamad Minto in May 2013, the Secretary accepts that there may have been such a plan, but he did not accept that the appellant was threatened by his friends that he (the appellant) would be killed for refusing to take part.

19. The Secretary bases this determination on three reasons: firstly the appellant said that the others were his good friends, and that they were together all the time. The Secretary did not believe that the appellants close friends would threaten him with death in the circumstances. Secondly the appellant gave evidence that he escaped by climbing through a bathroom window. The Secretary did not believe that if the others were planning to kill the appellant for his refusal to take part in the plan that they would have allowed him to go to a bathroom unsupervised. Thirdly, the appellant told the Secretary he was at home with his family for a day following this incident. The Secretary took into account that this is in the village which he and his friends live and did not believe that if the appellant was in danger as stated, that the others would not have come and looked for him at his home after he had escaped from them.

20. Taking all matters into consideration the Secretary did not find that the appellant was an activist or influential member of the BNP and JCD, and although involved at a low level, the appellant does not have a profile to be targeted by all supporters of the government. The Secretary is not satisfied that the appellant faces harm from his own BNP supporters. Therefore the Secretary does not find that the appellant would face a

reasonable possibility of harm if he returned to his home region in Bangladesh.

21. Having found that the appellant does not face a reasonable possibility of harm, the Secretary did not make a finding as to whether state protection is available, nor consider reasonableness of relocation.

22. The Secretary found the appellant's fear not to be well-founded, and therefore has not considered whether the harm feared constitutes persecution. In relation to complementary protection the appellant has not raised any non-Convention related claims and as such has not enlivened Nauru's international obligations towards the appellant.

REFUGEE STATUS REVIEW TRIBUNAL

23. The Tribunal noted as follows in the outline of its decision dated 31 August 2015:

> "On 31 of March 2015 the applicant applied to the Tribunal for review of the Secretary's determination. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing on 12 June 2015. The applicant was advised through his representative that if he did not attend the hearing and a postponement was not granted, the Tribunal may make a decision on his case without further notice. The applicant did not appear before the Tribunal at the scheduled hearing. On 12 June 2014 the applicant's representative advised the Tribunal that no further instructions had been received from the applicant and that he would update the Tribunal with any further evidence or submissions. No response was received. The representative has not contacted the Tribunal as at the date of decision. In these circumstances, and pursuant to section 41 of the *Refugees Convention Act* 2012 (the Act), the Tribunal has decided on the review without taking any further action to allow or enable the applicant to appear before it."[3]

24. The Tribunal then set out the relevant law under the Act, the background of the appellant, the consideration of the appellant's claims and the evidence. The Tribunal finds the claims to be 'inconsistent and unsubstantiated' and lists 10 points where information is lacking:

    1) When the applicant left school and his employment history. Whether his education and employment was in his district or elsewhere and how these impacted on his role as an active BNP member. When he was president of the JCD and his role within the student wing;
    2) Details of the incidents in 2001 and 2008 when he was beaten by AL supporters and why the applicant was targeted at such a young age;

[3] Book of Documents, p128, para 2

3) Details of the plot to kill Minto, in particular, why the applicant's friends would have asked him to be involved if he was not involved in the planning and he did not want to participate; why his long standing friends would threaten to kill him after he refused to participate;
4) Details of the meeting with his friends and why he gave different versions of where it took place and how he escaped – why they would allow him to escape by letting him go to the toilet unescorted or not pursue him when he fled from the school yard;
5) Why he gave different versions of whether the group searched for him after he escaped from his family home; and how he avoided being detected when they searched his family home if he was hiding under his bed;
6) Details of the alleged killing of Minto, the arrest of his friend and Court proceedings – if a warrant has been issued for the applicant's arrest;
7) Why the police would accept that he was the organiser of the killing of Minto;
8) Details of the attack on his family home and why the AL would have destroyed his family home in search of the applicant more than a year after he had departed;
9) The circumstances – such as timing and funding – of the applicant's departure from Bangladesh; and
10) What harm he fears if he returns to Bangladesh, including the reason he fears for his life, and whether this relates to his own locality only, or all of Bangladesh.

25. The Tribunal stated that because of the extent of the missing information it is unable to be satisfied of the truth and nature of the appellant's claims or if he genuinely fears harm from the authorities or anyone else in Bangladesh should he return to his home country.

Tribunal's decision

26. Due to the limited information before the Tribunal it was unable to be satisfied that the appellant had either in the past or would in the future face a real chance of serious harm amounting to persecution for a Convention reason. Therefore the Tribunal is not satisfied on the evidence before it that the appellant is a refugee.

27. Turning to complementary protection, the Tribunal's lack of information about the facts impacts on its assessment as to whether Nauru's international obligations towards the appellant are enlivened. The Tribunal finds there is no evidence before it that the appellant would face a reasonable possibility of being subject to cruel, inhuman or degrading treatment or punishment if returned to Bangladesh.

28. The Tribunal affirmed the Secretary's decision that the appellant is not a refugee, nor is he owed complimentary protection under the Act.

GROUNDS OF THIS APPEAL

29. The appellant raises two grounds of appeal in relation to the Tribunal finding that the appellant is not recognised as a refugee :
    1) That the Tribunal denied the appellant procedural fairness because his request for an adjournment of the Tribunal hearing was refused and/or the circumstances in which the Tribunal refused the adjournment were legally unreasonable;
    2) The Tribunal's finding that a number of claims were unsubstantiated was incorrect as many of the factual matters raised were supported by the appellant's evidence before the Tribunal.

Legal unreasonableness and/ or a denial of procedural fairness?

30. The appellant refers to an excerpt from the Tribunal's decision quoted above at paragraph 22. The appellant draws the Courts attention to the inaccuracy of the Tribunals recitation of facts in relation to the non-appearance of the appellant. There is no identification or consideration of the appellant's application for adjournment.

31. On 12 June 2015 at 15:26 the instructing solicitors acting for the appellant sent an e-mail to the Tribunal seeking an adjournment of the hearing from the June 2015 to the August 2015 sitting because the appellant had not attended for his pre-hearing appointment.

32. The instructing solicitors informed the Tribunal that they were notified on the 7 of June 2015 by the appellant that "*he has been unable to contact his family in Bangladesh for approximately one month now and this is causing him a great deal of anxiety, to the point where he has been feeling unprepared and not sufficiently focused for his Hearing this week. While we encourage[d] the appellant to attend his Hearing to explain this issue to the Tribunal, he instructed that although he would try he may feel unfit to attend.*" [4]

33. Although the instructing solicitors didn't have any independent evidence or medical records to support what the appellant was telling them nonetheless the Tribunal was asked to consider adjourning to the later sitting date. The appellant informs the Court that the Tribunal responded at16:49 the same day as follows: "*.., The Tribunal has considered the appellants request for a postponement of his hearing. Based on the material before it, the Tribunal is not prepared to re-schedule the appellants hearing.*"

34. However a few days later on 19 June 2015 the Tribunal advised the instructing solicitors "*I advise that the Tribunal will not make the decision on these matters until 29 June 2015. The Tribunal will consider any*

[4] Appellant's written submissions 2 June 2016, p3 para 2

further material you provide in relation to the request to re-schedule the hearings prior to that date."

35. The appellant is critical of the Tribunal's process for not presenting *any* notation in its reasoning that there had been a request for an adjournment, or as to why the next sittings would not be available for a hearing, nor as to why the request for an adjournment was not acceded to.

36. The appellant draws the Courts attention that this was the first time there had been a request for an adjournment for the appellant's hearing with the Tribunal, and that the request was made in circumstances in which the Tribunal was advised of difficulties with the appellant's mental state. The Tribunal is incorrect, says the appellant, as there was an indication of a request to adjourn and there was a response received by the Tribunal. However none of this is disclosed in the Tribunal's written reasons.

37. The Courts attention is drawn to sections 22 and 41 of the Act which provided relevantly as follows:

> **22 Way of operating**
> The Tribunal:
> (a) is not bound by technicalities, legal forms or rules of evidence; and
> (b) must act according to the principles of natural justice and the substantial merits of the case.
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> **41 Failure of applicant to appear before Tribunal**
> (1) If the applicant:
> (a) is invited to appear before the Tribunal; and
> (b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear;
> the Tribunal may make a decision on the review without taking further action to allow or enable the applicant to appear before it.
>
> (2) This section does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review, in order to enable the applicant's appearance before it as rescheduled.

38. The appellant draws the courts attention to the High Court of Australia case of *Li*[5] And the full Federal Court of Australia case of *Singh*[6] which considered procedural fairness and legal unreasonableness.

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[5] *Minister for Immigration and Citizenship v Li* [2013] CLR 332
[6] *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1

39. The matter of *Li* concerns the decision of the Tribunal to refuse to delay its decision pending the provision of further relevant material and whether exercise of the discretion was unreasonable such as to create jurisdictional error.

40. The appellant took the Court to the judgment of Chief Justice French, who quoting Professor Galligan stated: "*the requirement that officials exercising discretion comply with the canons of rationality, means, inter alia, that their decisions must be reached by reasoning which is intelligible and reasonable and directed towards and related intelligibly to the purposes power.*"[7]

41. Looking at inferences that a court sitting on appeal may draw, the Court was referred to the determinations of Hayne, Kiefel and Bell JJ: "*Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.*" [8]

42. The appellant referred the Court to the case of *Singh*[9] where the Full Court comprising Allsop CJ, Robertson and Mortimer JJ considered the exercise of statutory discretion and underlying principles:

> "There is then the question whether in assessing a contention of legal reasonableness, the court on review is confined to the reasons given by the decision-maker, where there are reasons. Certainly in *Li* the approach taken by the High Court was to examine the reasons, and justification, given by the Tribunal. In the present appeal, some of the justifications put forward by the minister for the Tribunal's refusal of the adjournment were not matters mentioned by the Tribunal in its reasons.
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> ...
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> This question highlights the distinctions made between reasonableness review which concentrates on the outcomes of the exercise of power, and reasonableness review which concentrates on an examination of the reasoning process by which the decision maker arrived at the exercise of power. Although it is not necessary for the purposes of this appeal to resolve the question whether those should be seen as two different kinds of review and what might flow from that, we are inclined to the opinion that, where there are reasons for the exercise of a power, it is those reasons to which a supervising court should look in order to understand why the power was exercised as it was. The "intelligible justification" must lie within

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[7] *Minister for Immigration and Citizenship v Li* [2013] CLR 332, 349 at [25]
[8] Ibid., 367 at [76]
[9] [2014] FCAFC 1

the reasons the decision-maker gave for the exercise of that power – at least where a discretionary power is involved. That is because it is the decision-maker in whom parliament has reposed the choice, and it is the explanation given by the decision-maker for why the choice was made as it was which should inform review by a supervising court."[10]

43. The appellant states that the Tribunal is not correct in stating that 'no response was received'[11] (paragraph 23 above), as there was an email exchange between the appellant solicitors and the Tribunal.

44. In this matter before the court, the appellant says that the Tribunal did not outline the request for the adjournment, the reasons for the request, nor that the Tribunal considered the request and the reasons for their refusal.

45. Counsel for the appellant stressed that this was the first time that an adjournment had been requested, and that the Tribunal was made aware of the appellant's concern for his family's welfare and his own mental ability to present his case.

46. This court, the appellant submits, is not able to consider the reasonableness of the refusal by the Tribunal to exercise its discretion in refusing to adjourn the appellants hearing. Furthermore even taking into account the email exchange between the solicitors and the Tribunal, no intelligible justification is shown for the refusal to grant an adjourned hearing.

47. The Tribunal is critical of the appellant in relation to missing information, however the appellant submits that if he had had an opportunity to attend the hearing the information sought may have been furnished to the Tribunal's satisfaction.

48. The respondent rejects the appellant's argument that there was no reason for the Tribunal to refuse the request for an adjournment because the Tribunal's phrase 'based on material before it' points to the email between the Tribunal and the appellant solicitors.

49. The Tribunal rejected the appellant's request for an adjournment having been told that the appellant was 'unprepared and not sufficiently focused' to attend a hearing. And that a combination of the material before the Tribunal and the email correspondence did provide, the respondent submits, an intelligible justification for the Tribunal to refuse to adjourn the appellant's hearing before it.

[10] P59,60 [46,47]
[11] Book of Documents, p128, para 2

50. The respondent draws the Court's attention to the 2014 Federal Court of Australia case of *Pandey*[12] which underlines the high threshold to be applied, and found the Tribunal's decision not legally unreasonable:

> "Minds may differ and reasonable decision-makers may reach different conclusions about the correct or preferable decision. The decision did not fall outside the range of possible, acceptable outcomes which are defensible in respect of fact and law. Nor could the Tribunal's decision be described as arbitrary, capricious, lacking in common sense or plainly unjust.
>
> Whilst the Tribunal's reasons are short and could perhaps have been expressed in clear returns, the decision could not be described as a lesson in an evident and intelligible justification."[13]

51. The court in this appeal also considers whether the Tribunal's decision not to adjourn the hearing was arbitrary, capricious, without common sense, plainly unjust; do the reasons disclose any evident and intelligible justification for refusal? It is not for this Court to engage in guesswork as to what the Tribunal did or did not take into account in its decision making process, and the reasonableness or otherwise is determined by reference to its written decision.

52. The Tribunal stated that *"...The applicant did not appear before the Tribunal at the scheduled hearing. On 12 June 2014 the applicant's representative advised the Tribunal that no further instructions had been received from the applicant and that he would update the Tribunal with any further evidence or submissions. No response was received."*[14]

53. As submitted by the appellant's counsel and accepted by the respondent there was a response received and information given to the Tribunal via the emails outlined above. In their reasoning as to the refusal of the adjournment request the Tribunal makes no mention of the content of the emails and what weight, if any, the Tribunal gave to the appellant's concerns in relation to his family's safety and his own ability to present his case.

54. Considering the case of *Li,* in which Hayne, Kiefel and Bell JJ stated as follows:

> "It cannot be suggested that the Tribunal is under an obligation to afford every opportunity to an applicant for review to present his or her best possible case and improve on the evidence. Of course it may decide, in an appropriate case, that "enough is enough", but it is not apparent how this conclusion was reached in the present case, having regard to the facts and to the statutory purpose to which the discretion to adjourn is directed."[15]

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[12] *Minister for Immigration and Border Protection v Pandey* [2014] FCA 640,

[13] Ibid., at [52, 53]

[14] Book of Documents, p128, para 2

[15] *Minister for Immigration and Citizenship v Li* [2013] CLR 332, 368 at [82]

55. The matter before the Tribunal was a review of the negative determination by the Secretary of the application for recognition of the appellant as a refugee. This was the first occasion that the appellant had a hearing scheduled before the tribunal, and his first request for an adjournment of that hearing. The Act provides for rescheduling in order to enable to appellant to appear before the Tribunal.[16]

56. The appellant's hearing was set in June 2015, at that time there were future hearings scheduled in August 2015. There is nothing apparent in the Tribunal's decision as to the need to determine reviews in a particularly short time frame or any other pressing time constraints particular to this review.

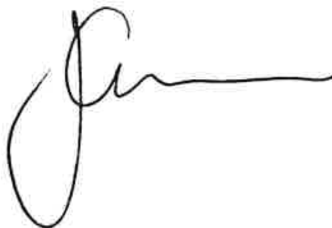
57. The Tribunal's decision not to afford the appellant an opportunity to attend a hearing at later date was to all intents and purposes fatal to the success of the appellant's review application before them.

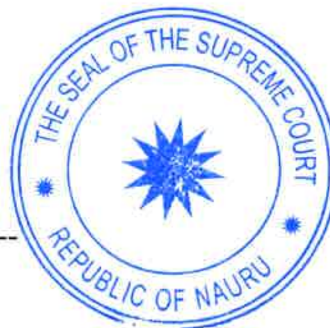
58. I find that in all the circumstances that the reasons outlined by the Tribunal did not disclose any evident and intelligible justification for refusing to allow the appellant the opportunity of a re-scheduled hearing date to the next sitting.

59. The Tribunal's decision was not legally reasonable. Ground One of the appeal succeeds; it is unnecessary to consider the failure to take into account a relevant consideration (Ground Two).

ORDER

60. (1) The appeal is allowed.
(2) The decision of the Tribunal TFN 15021, dated the 31 August 2015 is quashed.
(3) The matter is remitted to the Refugee Status Review Tribunal under section 44(1)(b) for reconsideration according to law.





Judge Jane E Crulci

DATED this 11th day of May 2017

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[16] s41(2) *Refugee Convention Act* 2012