



IN THE SUPREME COURT OF NAURU  
AT YAREN

APPEAL NO. 12/2015

Being an appeal a decision of the Nauru Refugee Status  
Review Tribunal brought pursuant to s43 of the Refugees  
Convention Act 2012

BETWEEN

DWN 042

APPELLANT

AND

The Republic of Nauru

RESPONDENT

Before: Khan, J  
Date of Hearing: 5 May 2016  
Date of Judgment: 7 February 2017

Case may be cited as: DWN042 –v- The Republic

**CATCHWORDS:**

Whether the Tribunal dealt with the issue of arbitrary deprivation of life when it made a finding that the appellant did not have a well-founded fear of persecution in the event of his return to his home area in Pakistan-whether unsigned transfer document could be relied on by the Tribunal- section 22 provides that the Tribunal is not bound by technicalities or legal form and rules of evidence.

**APPEARANCES:**

Counsel for the Appellant: M Albert (pro bono)  
Counsel for the Respondent: A Aleksov

JUDGMENT

INTRODUCTION

1. The appellant filed an appeal against a decision of the Refugee Status Review Tribunal (the Tribunal) pursuant to the provisions of s43 of the Refugees Convention Act 2012 (the Act) which provides the jurisdiction of the Supreme Court. S43 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 29 December 2014 and was received by the appellant on 21 January 2015.
3. The appellant filed grounds of appeal in person on 24 April 2015.
4. Mr Albert filed an amended notice of appeal on 5 May 2016 on behalf of the appellant. The appeal is out of time and the appellant requires an extension of time to proceed with the appeal.

#### AMENDED GROUNDS OF APPEAL

5. The amended grounds of appeal are as follows: -
  - 1) The Tribunal acted in a way that was in breach of the principles of natural justice, contrary to s22(b) of the Act, by conducting its hearing when at the place where the appellant was unlawfully detained in breach of s5 of the Constitution of Nauru.
  - 2) The Tribunal’s hearing in respect of the appellant was unconstitutional because he was unlawfully detained at the time.

#### PARTICULARS

- a. The appellant gave evidence at the Tribunal hearing at the Refugee Processing Centre 1 held on 25 September 2014 (“the hearing”).
- b. Section 5 of the Constitution provides for an absolute prohibition on deprivation of personal liberty, except, inter alia, ‘for the purpose of preventing his unlawful entry to Nauru, or for the purpose of affecting his expulsion, extradition or other lawful removal from Nauru.’
- c. The appellant entered Nauru lawfully on a regional processing visa issued by the Principal Immigration Officer of Nauru under Regulation 9 of the Immigration Regulations 2013 (Nauru). It follows that at the hearing, the appellant was not deprived of his liberty ‘for the purpose of preventing his unlawful entry into Nauru’.
- d. The appellant was, at 25 September 2014, and continues to be, the subject of a process for the purpose of which is to determine whether Nauru owes him obligations under s4 of the Act. Nauru cannot lawfully remove him unless and until it is finally determined that Nauru has no such obligations to the



appellant. It follows that he was not, on 25 September 2014, deprived of his liberty 'for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru'.

- e. The Constitution generally, s 5 specifically, conditions all of the powers, and exercise of those powers, including the power to conduct a hearing of the Tribunal.
  - f. It follows from the above that the appellant was unlawfully detained contrary to the Constitution at the time of the hearing.
3. The Tribunal erred in determining that the appellant is not owed complementary protection in that the Tribunal failed to respond to the appellant's claim that returning him to Pakistan would breach Nauru's international obligations due to the risk of arbitrary deprivation of life.
  4. The Tribunal erred by relying on the transfer interview form contrary to s22(b) in circumstances where it was unsigned and unsworn, was not made available to his representative when he prepared his statement of claims and was expressly disowned as a record of his claims.

#### APPLICATION FOR STRIKE OUT

5. The respondent filed a notice of motion pursuant to Order R15 rule 19 of the Civil Procedure Rules 1972 to strike out grounds 1 and 2 of the amended notice of appeal. The substantive matter was set down for hearing on 5 May 2016. I heard the strike out application on 5 May 2016 on the basis that if I were to strike out grounds 1 and 2, then I will just make orders for the strike-out; and give my reasons at a later date; and further grounds 3 and 4 were to be heard on 5 May 2016. If I were to reject the strike-out application, then the Republic was going to seek an adjournment to obtain further instructions.
6. Having heard the submissions on the strike-out application, I ordered that grounds 1 and 2 were to be struck out and I continued to hear the submissions on grounds 3 and 4.
7. I gave my reasons for the strike-out application on 20 May 2016.

#### EXTENSION OF TIME

8. The parties agreed that the application for an extension of time and that grounds 3 and 4 should be heard together with the substantive matter, and if the Court was satisfied that there were merits in the grounds of appeal, then the extension of time could be granted.

9. However, after the hearing of the matter, the lawyers for the Republic and the appellant represented by Craddock Murray Neumann have reached agreement that the extension of time for filing of an appeal will no longer be in issue; and that consent orders will be filed by the parties to enable the Registrar to grant the extension of time. Although the appellant was not represented by Craddock Murray Neumann consent orders were filed and the Registrar made an order for an extension of time on 22 November 2016.

#### BACKGROUND

10. a) The appellant is 31 years old. He is a Sunni Muslim of Pashtun ethnicity from Ghaundai village in Janrud district, Khyber Agency, Pakistan which is in Federally Administered Tribal Areas (FATA) and is not in Kyber Pakhtunkhwa Province.
- b) The appellant is a citizen of Pakistan.
- c) His parents live in Pakistan and he has 6 other siblings, 2 brothers and 3 sisters live in Pakistan and 1 brother lives in Saudi Arabia.
- d) He is married with 2 young children and his wife and children still live in Pakistan with his parents in the family home.
- e) He received 15 years of education, attaining a Diploma of Commerce from a Government college. He speaks, reads and writes Pashtun, Urdu and English.
- f) He initially worked in a clerical role in the transport industry near the Afghan border at a town named Prangsun. He left his job on the advice of his parents after several people were killed and injured in Taliban attacks.
- g) Between 2008 and 2011 he worked for NLC in Nowshera.
- h) In 2011 he set up a fabric retailing and tailoring business in Jamrud market with capital from his father and the money that he had saved. He was required to make overnight trips to Lahore to buy the fabric.
- i) He ran a thriving business. The appellant witnessed dreadful events in Pakistan including several bombings. In one incident, a cousin was injured.
- j) Since early 2013 he was personally targeted. On 20 February 2013, the appellant was first contacted by phone demanding money from him. He was told that they were from Tehrek-E-Taliban (Tehrek-E-Taliban Corp TTP) and demanded that he pay them 1 million rupees. The appellant refused to pay questioning why he should pay them as they were not doing business with him.
- k) He felt that he was targeted as the Taliban focussed on people who had money. He believed that the Taliban noted his business and his way of life



and the fact that he lived in a good house. He felt that they got his number from the shopfront or from his business cards which he had distributed. He knew of other people who had been kidnapped for ransom.

- l) At the time the appellant received the phone calls he was at a cousin's wedding. He stated that the Taliban came to his house the same evening and threw hand grenades and fired shots at his house and from the sound he could tell that it was from Kalashnikovs. The Taliban departed in a car when the neighbours arrived, but the attack left some bullet holes in the wall, a hole in the garden and destroyed some plants. Some 10 minutes later he received another phone call warning him that he had one more chance to pay or they would kill him or plant a bomb in his car.
- m) The appellant lodged a complaint with the police who carried out an investigation and advised him that the telephone calls were from Afghanistan, Waziristan and from his local area. He turned his mobile phone off for a period of 15-20 days to avoid those calls and when he turned it on again the calls started coming again. He stopped going in his car and hid in his house. He was unable to run his business. Then he went to Peshawar where he stayed in hiding with his uncles.
- n) His life was under threat and he made an application for a passport as his original passport had expired. When he applied for the passport he was advised that the government had run out of passports and it took him 2 months to obtain the passport, although he paid extra money to expedite the process. He said that he applied for the passport on 13 December 2013 and the date of issue is 13 December 2013 as well despite the fact that it took him 2 months to obtain it.
- o) He left Pakistan on 16 July 2013 for Indonesia via Dubai. Having arrived in Indonesia he left for Australia on 3 August 2013 on a boat code named 'Dawsan'. He was transferred to Nauru on 7 September 2013 pursuant to a memorandum of agreement between the Commonwealth of Australia and the Republic of Nauru.

#### APPLICATION TO THE SECRETARY

11. The appellant attended a transfer interview on 28 November 2013.
12. On 8 December 2013, the appellant made an application for Refugee Status Determination (RSD) to the Department of Justice and Border Control (the Secretary). He also submitted a written statement in addition to the application.
13. The Secretary made a determination on 17 July 2014. He made the following findings: -
  - That the appellant owned a business;

- That the received phone calls in which the caller demanded money;
  - That the callers identified themselves as from Taliban (TTP) but the Secretary's finding was that the callers were not from Taliban;
  - That the appellant's home was attacked in February 2013. And he ceased his usual activities and lived in different villages/houses over the subsequent 4 months;
  - That the phone numbers provided were not traced to known or perceived (Taliban) phone numbers.
14. The Secretary was satisfied that the appellant could face harm in his home region, however, he could safely and reasonably relocate to another area within Pakistan. The Secretary's findings were that the appellant was not a refugee nor was he owed complementary protection under the Act.

#### APPLICATION TO THE TRIBUNAL

15. The appellant made an application to the Refugee Status Review Tribunal (the Tribunal) for a review of the Secretary's decision pursuant to s31 of the Act which provides:
- “(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 the 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.
16. On 24 September 2014, the appellant's lawyers, Craddock Murray Neumann, made written submissions to the Tribunal and also submitted a sworn statement prepared by the appellant on 21 September 2014 addressing the issues raised in the Secretary's findings.
17. On 25 September 2014, the appellant attended a Tribunal hearing with his lawyer and gave evidence, with the assistance of a Pashto interpreter.
18. The Tribunal having heard the appellant's evidence, after listening to the records of the RSD interview and considering his evidence, made the finding that it did not accept his claims were credible inter alia for the following reasons:



- a. The date of issue of passport was at odd with the date of the first threat from the Taliban;
  - b. Date of application and issue of passport;
  - c. The police print out of the telephone calls did not correspond with the evidence the Taliban first contact with him;
  - d. Date of complaint to the police;
  - e. Blocking of phone did not correspond with the police phone print out;
  - f. Appellant's initial complaint was against him personally and after the Secretary's decision it was expanded to his extended family members;
  - g. Issue and prevalence of forged documents.
19. The Tribunal was not satisfied that appellant had a well-founded fear of being persecuted for the Convention claimed in the event of his return to home area in Pakistan. The Tribunal affirmed the decision of the Secretary that the appellant was not recognised as a refugee nor was he owed complementary under the Act.

Ground 3 – Arbitrary Deprivation of Life

20. The Tribunal at [56] of its decision stated:

*“However, for the reasons as set out above with respect to Convention persecution, the Tribunal is not satisfied that returning or expelling the applicant to the frontiers of Pakistan would give rise to any breach of Nauru’s international obligations.”*

21. It is the appellant's submission that the claim of 'arbitrary deprivation of life' is not dealt with when [56] of the Tribunal's decision is considered. It only deals with claims in respect of the appellant being targeted by the Taliban. It is submitted that the claim of 'arbitrary deprivation of life' was not dealt with although that arose on the material provided. Reference is made<sup>1</sup> where it is stated:

*“For the reasons outlined above I fear that if I am returned to Pakistan I would be arbitrarily deprived of my life, tortured and/or subjected to cruel, inhuman or degrading treatment or punishment.”*

22. The appellant's counsel referred to the transfer interview<sup>2</sup> where it is stated:

*“Local group activities [8]. Were there are any armed groups, political groups or religious groups operating in the area you live?”*

*‘Yes’*

---

<sup>1</sup> BOD43

<sup>2</sup> BOD 13

*'Provide details.'*

*'Yes it did.*

*A lot of them, Tarik Taliban, Mangalbagh Group (terrorist group), Misc. And a smaller group running around in my area, they shoot, they decapitate people, they murder people.'*

23. Then further reference is made to<sup>3</sup> where it is stated:

*"All these situations I mention to you, this is unfortunate and the reason I had to leave, and also for my family and that's why I seek asylum. Also, I witnessed in Jamrod seaside bombing at a gas station, I went to the scene to check my father, and the people warned me to stop and not go unless a second blast, I witnessed scattered body limbs around the area. Lucky my father had left earlier. Another I witnessed there was an area exploded in a Mosque, my cousin was injured together with dead bodies and injured people. The third I witnessed in Jamrod, there was another explosion that 3 Afghani passengers that were coming from Pakistan and as Afghani 3 car got caught and because of the explosion the cars, a bike and there were people helping the few started to leave, and we had to run back, they were incinerated, we came back but they already died and only skulls were left."*

24. It is submitted that the 'deprivation of life' was an integer of the claim and was clearly articulated and was not dealt with by the Tribunal. Mr Albert relies on the case of *Dranichnikov –v- Minister for Immigration and Multicultural Affairs*<sup>4</sup> at [24] where it is stated:

*"To fail to respond to a substantial, articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice."*

25. The respondent counsel's submission is that this claim of 'deprivation of life' was never made. He submitted that the appellant's claim was only in relation to fear of harm from the Taliban and the Tribunal dealt with that claim saying that 'we do not believe you' and 'that the Taliban is not interested in you.' He relied upon *MZAJC –v- Minister for Immigration and Border Control*<sup>5</sup> where His Honour Mortimer J stated:

---

<sup>3</sup> BOD 16

<sup>4</sup> [203] 197 ALR 389 [24], [32]

<sup>5</sup> [2016] FCA 208 (3 March 2016) at [10] and [11]



*"[10] ... the Tribunal is not required to divine a claim out of country information, nor to apply its own analytical skills to articulate claims that a person might conceivably make.*

*[11] Rather in my opinion, what is occurring here is that after the fact of the Tribunal's decision, a possible process of reasoning has been constructed, which might flow one of the Tribunal's findings in favour of the applicant. This is not the approach that authorities such NAVK requires this court to adopt. The assessment of what a Tribunal might reasonably be expected to appreciate should be undertaken by a review in court as best as it can without the advantage of hindsight."*

26. I agree with Mr Aleksov's submissions that the appellant's claim was only in relation to the fear of harm from the Taliban and no additional claims were made so the Tribunal was not required to consider it. I therefore hold that this ground of appeal has no merit and is dismissed.

Ground 4 – Tribunal erred in relying on the transfer interview when it was unsigned and unsworn

27. It is Mr Albert's submission that 'transfer interview' appearing at pages 3-17 of Book of Document was not signed by the appellant, nor was it sworn, that anybody took ownership of it; and the Tribunal relied on it.
28. Before I deal with the issues raised by Mr Albert at [27] above, I must confess that I find his submissions very intriguing as he referred to the transfer documents to pages 13 and 16 in relation to ground 3.
29. It is Mr Albert's submission that the transfer interview was not signed by the appellant. Mr Albert concedes that the appellant in his sworn statement at [2]<sup>6</sup> stated:

*"Shortly after I arrived in Nauru I was interviewed ("the transfer interview"). During the transfer interview, I was asked a number of questions including about my reasons for fleeing Pakistan. I was not aware before or during the transfer interview that the information I provided during the transfer interview would be used for the purposes of assessing my claims for protection. The information I provided during the transfer interview was only a summary of my claims for protection."*

30. Mr Albert's contention is that the appellant had no idea why he was interviewed, he was not given a copy of the interview and he did not know that it was going to be used in the assessment of his claim. He further submitted that the Tribunal

---

<sup>6</sup> BOD 41

referred to it on numerous occasions in the review application and therefore is in breach of s22 of the Act where it is provided:

*“The Tribunal:*

- a) *Is not bound by technicalities, or legal forms or rules of evidence; and*
- b) *Must act according to the principles of natural justice and the substantial merits of the case.”*

31. Mr Aleksov in response submitted that the appellant in [2] of his statement stated<sup>7</sup>:

*“The information I provided during my transfer interview was only a summary of my claim for protection.”*

He stated that the appellant did not disown any part of it or say that it was wrong, nor did he want to add anything to it; and now he is submitting that it should be rejected based on procedural fairness.

32. Mr Aleksov further submitted that the Tribunal is not bound by rules of evidence or technicalities and it does not require a signed statement, nor is there any provision made under the Act that it should take sworn evidence. He further submitted that what the Tribunal did in dealing with the transfer interview was a question of fact and not a question of law. I find that there is merit in his submissions and I reject the appellant’s submissions and therefore this ground of appeal is also dismissed.

### CONCLUSION

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

DATED this 7 day of February 2017



Mohammed Shafiullah Khan

Judge



---

<sup>7</sup> BOD 41