



**IN THE SUPREME COURT OF NAURU**

**AT YAREN**

Case No. 36 of 2016

IN THE MATTER OF an appeal  
against a decision of the Refugee  
Status Review Tribunal TFN  
T15/00269, brought pursuant to s 43  
of the *Refugees Convention Act 2012*

BETWEEN

**QLN 132**

Appellant

AND

**THE REPUBLIC**

Respondent

Before: Judge Marshall

Appellant: Julian Gormly

Respondent: Angel Aleksov

Date of Hearing: 20 February 2018

Date of Judgment: 8 May 2018

**CATCHWORDS**

APPEAL – whether the Tribunal denied Appellant procedural fairness by failing to put information to the Appellant – whether the information was credible, relevant and significant to the decision – UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka – APPEAL DISMISSED.

## JUDGMENT

1. This matter is before the Court pursuant to s 43 of the *Refugees 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.

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2. The determinations open to this Court are defined in s 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. The Refugee Status Review Tribunal (“the Tribunal”) delivered its decision on 5 September 2016 affirming the decision of the Secretary of the Department of Justice and Border Control (“the Secretary”) of 8 October 2015, that the Appellant is not recognised as a refugee under the 1951 Refugees Convention<sup>1</sup> relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees (“the Convention”), and is not owed complementary protection under the Act.
4. The Appellant filed a Notice of Appeal on 10 November 2016 and an Amended Notice of Appeal on 16 January 2018.

## BACKGROUND

5. The Appellant is a married man from Sri Lanka of Tamil ethnicity and Catholic religion. The Appellant was born in Pesalai, Mannar Island, and lived there for the first ten years of his life. At various times between 1985 and 2014, the Appellant lived in India as a refugee. He has four children, who remain in a refugee camp in Tamil Nadu, India, with his wife. The Appellant has worked in the construction industry and as a fisherman.

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<sup>1</sup>1951 Refugee Convention and 1967 Protocol, also referred to as “the Refugees Convention” or “the Convention”.

6. The Appellant claims a fear of harm upon return to Sri Lanka on the basis of his Tamil ethnicity, imputed political opinion as a supporter of the Liberation Tigers of Tamil Eelam ("LTTE"), and his membership of various social groups including "Tamils from the Northern Province", "Tamil failed asylum seekers", and "Sri Lankan asylum seekers previously resident in India as refugees".
7. The Appellant fled India for Australia in June 2014, arriving on Christmas Island on 27 July 2014. He was transferred to Nauru on 2 August 2014.

#### INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellant attended a Refugee Status Determination ("RSD") Interview on 8 December 2014. The Secretary summarised the material claims put forward at that Interview as follows:
  - *He is a citizen of Sri Lanka and has no right to return to India since leaving on 13 June 2014.*
  - *He was born in Pesalai, Mannar and is of Tamil ethnicity.*
  - *The Applicant was living in Pesalai, Mannar until he left Sri Lanka in July 2006. The Applicant has shifted between living in Sri Lanka and India on a number of occasions prior to this.*
  - *The Applicant fled Sri Lanka as he feared for his safety as he believed he had or would be imputed as a supporter of the Liberation Tigers of Tamil Eelam ("LTTE") due to him participating in the smuggling of goods for the LTTE.*
  - *While working as a fisherman, the Applicant was forced to provide logistical support to the LTTE between 1994 and 1995. The Applicant would transport goods such as cement, food and fuel for the LTTE. The Applicant would transfer up to four loads of goods per week.*
  - *When the Sri Lankan authorities became aware of the LTTE logistical network, they started to target local fisherman. Fearing he would be harmed by the Sri Lankan authorities, the Applicant, along with his mother and sister fled to India in 1996.*
  - *In 2003, the Applicant returned to Sri Lanka as there was a peace agreement between the LTTE and the Sri Lankan government. The Applicant also believed he would no longer be targeted as he was now married and with a child.*
  - *When hostilities resumed between the LTTE and the Sri Lanka authorities, fishermen in the local area again became to be targeted. The Sri Lankan authorities placed restrictions on fishing and warned the fishermen that they would be prosecuted if they participated in the transport of goods for the LTTE.*
  - *These restrictions impacted greatly on the Applicant as it prevented him from earning and (sic) income.*
  - *During this period the Sri Lankan Army ("SLA") would question and interrogate the local fishermen. The Applicant was questioned and interrogated six or seven times by the SLA. The Applicant was beaten and tortured on each time he was interrogated in an attempt to have him admit to his or others involvement with the LTTE.*
  - *Following the disappearance of a number of local fishermen, the Applicant and his family fled from Sri Lanka to India on 26 July 2006.<sup>2</sup>*
9. The Secretary accepted the following claims to be credible:

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<sup>2</sup> Book of Documents ("BD") 69.

- The Appellant is an ethnic Tamil, born and raised in Pesalai, Mannar, in the Northern Province of Sri Lanka;
- The Appellant assisted the LTTE in smuggling goods from Mannar Island to the mainland from 1994 to 1995; and
- The Appellant departed Sri Lanka illegally in July 2006 and would be considered a failed asylum seeker upon return to Sri Lanka.<sup>3</sup>

10. However, the Secretary considered the following claims to lack credibility:

- The Appellant was detained and tortured on account of being suspected of smuggling goods for the LTTE;
- The police or the SLA were aware that the Appellant had smuggled goods for the LTTE; and
- The Appellant was of adverse interest to the SLA, the Crime Investigation Department (“CID”) or any other person or party in Sri Lanka at the time of his departure.<sup>4</sup>

11. In making these credibility findings, the Secretary noted that the Appellant’s testimony regarding the LTTE members involved in smuggling operations, and the coercion and physical violence experienced by the Appellant, lacked detail and spontaneity.<sup>5</sup> The Appellant had not mentioned any physical violence in his Transfer Interview, and inconsistently claimed that he was questioned by the SLA two to three times in his Transfer Interview, and six to seven times in his RSD application, and three times in his RSD Interview.<sup>6</sup>

12. The Secretary accepted that, while Tamils in Sri Lanka continue to experience human rights violations, the security situation for Tamils had improved significantly since the end of the civil war in May 2009, and persons of Tamil ethnicity were no longer systematically targeted. Tellingly, guidelines issued by the United Nations High Commissioner for Refugees (“UNHCR Eligibility Guidelines”) indicate that there is no longer a presumption of eligibility for protection for Sri Lankan Tamils.<sup>7</sup>

13. In addition, while the Appellant may be subject to routine security checks upon return, and possibly charged with illegal departure under the *Immigrants and Emigrants Act* and held on remand pending hearing before a Magistrate, there was no reasonably likelihood of harm befalling the Appellant as a result of this given the Appellant had no adverse political profile.<sup>8</sup>

14. The Secretary concluded that the Appellant had no well-founded fear of persecution on account of his Tamil ethnicity, imputed political opinion, or being a Tamil failed asylum seeker.<sup>9</sup> On the basis of the same reasoning, the Secretary further concluded that the Appellant was not owed complementary protection.

<sup>3</sup> Ibid 72.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid 71.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid 73.

<sup>8</sup> Ibid 75 – 76.

<sup>9</sup> Ibid 76.

## REFUGEE STATUS REVIEW TRIBUNAL

15. On 9 May 2016, the Appellant provided a further statement to the Tribunal. In that statement, the Appellant said that about three months after returning to Sri Lanka in April 2003, the police told him they had information he had worked for the LTTE in the past and was doing so again. One or two months later, the Appellant was asked to report to the local police station, and upon doing so he was hit on his shoulder with a rifle butt, damaging his shoulder so he still needs a sling at times. The Appellant also said that the police and SLA singled him out during a round up in late 2003, made him kneel on the road in the hot sun for further questioning, before being released and told to report any LTTE members. The Appellant also described an incident in April 2006 in which there was an explosion and attack against residents taking shelter in the church, killing one person and injuring many others. After this, the Appellant could not find his fishing partner, who had been questioned by the police and SLA on several occasions, and no one knew what had happened to him. The Appellant slept at the church to avoid night time round ups, but his elderly neighbours told him people had visited his house during the evening in search of the Appellant.
16. The Appellant attended an oral hearing before the Tribunal on 14 June 2016. At the hearing, the Appellant gave evidence as to being approached by the police or CID about assisting the LTTE in 2006, a bomb blast and round up as part of which everyone was forced to kneel in the hot sun, a round up following an attack on a bus carrying navy officers as part of which he was singled out for further questioning, the attack on the church, and subsequent disappearance of his fishing partner.
17. The Tribunal accepted that the Appellant provided some limited assistance to the LTTE prior to departing Sri Lanka in 1996. Further, in light of the Appellant's seemingly plausible accounts of rounds ups, the Tribunal accepted that the Appellant had been caught in two round ups: the first following a bomb in the local area, and the second following the attack on the bus carrying navy officers.<sup>10</sup> The Tribunal accepted the Appellant may have been mistreated on these occasions, but considered that the Appellant was of no ongoing interest to the authorities.<sup>11</sup> Given the Appellant's vague and inconsistent accounts of being called to the police station for questioning, and "embellishments" of being told by elderly neighbours that people were "looking for him", the Tribunal did not accept that the Appellant was of specific interest to the authorities.<sup>12</sup>
18. As with the Secretary, the Tribunal gave weight to the UNHCR Eligibility Guidelines,<sup>13</sup> and country information that Sri Lankan authorities are primarily concerned with identifying persons likely to pose a threat to the unity of post-war Sri Lanka.<sup>14</sup> Noting that the Appellant does not pose such a threat, the Tribunal found that there was no reasonable possibility of the Appellant being harmed

<sup>10</sup> Ibid 225 at [52]-[53].

<sup>11</sup> Ibid 226 at [53].

<sup>12</sup> Ibid at [54].

<sup>13</sup> Ibid 227 at [64].

<sup>14</sup> Ibid 228 at [67].

because of his ethnicity, or any political opinion imputed to him as a result of his ethnicity, origin from the Northern Province, status as a failed asylum seeker, or illegal departure from Sri Lanka.<sup>15</sup> Also in concurrence with the Secretary, the Tribunal accepted country information that there are no laws or policies in Sri Lanka that discriminate on the basis of ethnicity, and found there to be no reason that the Appellant would be unable to obtain work, leading the Tribunal to find no reasonable possibility of the Appellant facing harm because of his Tamil ethnicity alone, or in combination with any imputed political opinion.<sup>16</sup>

19. In relation to the Appellant's fear of harm due to being a failed asylum seeker, as with the Secretary, the Tribunal noted that it was unlikely that mandatory security checks would lead to any harm befalling the Appellant, given the Appellant did not have an adverse political profile,<sup>17</sup> and that most returnees reported repatriation to be a "positive experience".<sup>18</sup> In relation to the Appellant's illegal departure, the Tribunal accepted that the Appellant departed Sri Lanka with his family three times by boat without a passport,<sup>19</sup> and that there was a reasonable possibility of the Appellant being charged under the *Immigrants and Emigrants Act* ("I&E Act").<sup>20</sup> The Appellant may be detained until he could be brought before a Magistrate, although the period of detention was unlikely to be more than a few days, and the Appellant would then be fined or released on bail, depending on whether the Appellant pleaded guilty or not guilty.<sup>21</sup> The Tribunal therefore did not accept that there was any reasonable possibility the Appellant would face torture or mistreatment during questioning upon arrival.<sup>22</sup>
20. The Tribunal therefore found that, as there was no reasonable possibility of the Appellant being subject to harm on account of his imputed political opinion, Tamil ethnicity, or membership of the various particular social groups identified by the Appellant, solely or cumulatively, the Appellant's fear was not well-founded, and the Appellant was not a refugee.<sup>23</sup> The Tribunal further found that neither the conditions likely to be experienced during remand, nor any societal discrimination likely to be faced, amounted to torture or cruel, inhuman or degrading treatment or punishment. In light of these findings, and those made with respect to the Appellant's Convention claims, the Tribunal further found that the Appellant was also not owed complementary protection.<sup>24</sup>

## THIS APPEAL

21. The Appellant's Amended Notice of Appeal dated 16 January 2018 reads as follows:

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<sup>15</sup> Ibid at [69].

<sup>16</sup> Ibid 229 at [75].

<sup>17</sup> Ibid 231 at [84].

<sup>18</sup> Ibid 230 at [79].

<sup>19</sup> Ibid 231 at [88].

<sup>20</sup> Ibid at [88].

<sup>21</sup> Ibid 232 at [91].

<sup>22</sup> Ibid 274 at [93].

<sup>23</sup> Ibid 233 at [97]-[100].

<sup>24</sup> Ibid 234 at [103]-[105].

1. *In determining that the appellant was not a refugee for the purposes of section 4 of the Act, the Tribunal failed to comply with section 22(b) of the Act in that it did not act according to the principles of natural justice.*

*Particulars*

- a. *The Tribunal did not give the appellant the opportunity of being heard in that it did not bring to the attention of the appellant or allow him the opportunity to ascertain and comment on the nature and content of adverse information at [79] of the Tribunal's decision, that:*
    - i. *the UNHCR had assisted thousands of Tamil refugees living in India return to Sri Lanka since 2009 and monitored their experiences and the problems they encountered; and*
    - ii. *the UNHCR reported that in general the returnees reported that repatriation had been a positive experience with few ranking security as their main challenge.*
  - b. *The information was credible, relevant and significant to the decision to be made because it was adverse to the appellant's claims that he would face persecution in his home area after his entry into Sri Lanka for reason of the suspicion or imputation by the Sri Lankan authorities of a political opinion of support for the LTTE as a Tamil who had sought asylum in Nauru.*
  - c. *The information was also adverse to the appellant's submissions that information from a report by the Australian Department of Foreign Affairs and Trade, DFAT Country Information Report – Sri Lanka, 18 December 2015, on what failed Tamil asylum seekers faced from the Sri Lankan authorities upon return to their home areas was unreliable. The appellant had submitted the DFAT returnee information was unreliable as DFAT had not monitored the return of failed asylum seekers.*
22. *These reasons for judgment should be read together with the reasons in OPK 049 v Republic of Nauru ("OPK 049"). The two appeals were heard together and raise the same issue.*
  23. *As in OPK 049, the Appellant contends that the Tribunal failed to afford him an opportunity to be heard because it did not bring to his attention or allow him to comment on adverse material which was credible, relevant and significant to the decision made by the Tribunal.*
  24. *The adverse material is identified by the Appellant as country information referred to briefly at [19] above, and relied on by the Tribunal at [79] of its reasons for decision. That paragraph is in very similar terms to [50] of the Tribunal's decision in OPK 049. The Tribunal was constituted by the same members in each case and the decisions were published one month apart.*
  25. *At [79], the Tribunal said:*

*"At hearing the Tribunal discussed with the applicant that the UNHCR had assisted thousands of Tamil refugees living in India return to Sri Lanka since 2009 and monitored their experiences and the problems they encountered. The UNHCR reports that in general the returnees reported that the repatriation had been a positive experience with few ranking security as main challenge".*

As in *OPK 049* there is a footnote to the UNHCR Eligibility Guidelines.

26. For the reasons expressed in *OPK 049*, this appeal must fail as well.

27. The Court orders as follows:

1. The decision of the Tribunal is affirmed pursuant to s 44(1)(a) of the *Refugees Convention Act 2012* (Nr).
2. The appeal be dismissed.
3. There be no order as to costs.

Shane Marshall

Judge Shane Marshall  
Dated this 8<sup>th</sup> of May 2018

