IN THE SUPREME COURT OF NAURU

AT YAREN

Case No. 23 of 2016

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T15/00273, brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

QLN 139 Appellant

AND

THE REPUBLIC Respondent

Before: Justice I Freckelton

Appellant: Ms T. Baw
Respondent: Mr A. Aleksov

Date of Hearing: 4 December 2017
Date of Judgment: 27 November 2018

CATCHWORDS

APPEAL – failure to take into account a relevant consideration – *Convention on the Elimination of All Forms of Racial Discrimination* – complementary protection in dealing with CERD claims – APPEAL DISMISSED.

JUDGMENT

1. This matter is before the Court pursuant to s 43 of the *Refugees Convention Act* 2012 ("the Act") which provides that:

> *(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. A "refugee" is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951 ("the Refugees Convention")*, as modified by the *Protocol Relating to the Status of Refugees 1967* ("the Protocol"), as any person who:

> "*Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable to or, owing to such fear, is unwilling to return to it …*"

3. Under s 3 of the Act, complementary protection means protection for people who are not refugees but who also cannot be returned or expelled to the frontiers or territories where this would breach Nauru's international obligations.

4. The determinations open to this Court are set out in s 44(1) of the Act:

> *(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.*

5. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on 5 July 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 relating to the Status of Refugees, as amended by the 1967 Protocol, and is not owed complementary protection under the Act.

6. The Appellant filed a Notice of Appeal on 25 November 2016 and an Amended Notice of Appeal on 20 March 2018.

BACKGROUND

7. The Appellant is a Sri Lankan male of Tamil ethnicity and Hindu religion from the Jaffna district of Sri Lanka's Northern Province. He fled Sri Lanka in 1990 for Tamil Nadu, India, with his family, and continued to live there until he made the journey to Australia, aside from a period of about six months from 2010 to 2011, when he resided in Sri Lanka. His father and three siblings continue to live in India. He also has a sister, although he is unsure where she currently resides.

8. The Appellant claims a fear of harm on the basis of an imputed political opinion as a supporter of the Liberation Tigers of Tamil Eelam ("LTTE"), his Tamil ethnicity, his membership of the particular social groups of "immediate family members of suspected LTTE supporters", "Tamils from Sri Lanka who have fled to India", "young Tamil males who have lived in India since childhood", "Sri Lankan Tamils who have applied for asylum in other nations", and "Tamil failed asylum seekers". The Appellant also claimed a risk of torture, cruel, inhuman and degrading treatment if returned to Sri Lanka, such that Nauru's complementary protection obligations are enlivened.

9. The Appellant fled India for Australia on 13 June 2014, arriving on Christmas Island on 27 July 2014. On 2 August 2014, the Appellant was transferred to Nauru for the purposes of having his claims assessed.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

10. The Appellant attended a Refugee Status Determination ("RSD") interview on 12 October 2014. The Secretary summarised the Appellant's material claims presented at that interview as follows:

    - *The Applicant states he is a Tamil Hindu man from Sri Lanka. He states he has never been a member or supporter of the LTTE.*
    - *In 1990, his father's two brothers were shot and killed by the Sri Lankan authorities because they suspected the brothers of being members or supporters of the LTTE. After this, the Applicant's family fled to India to try to save their lives and the Applicant has never returned. He was six years old at the time. Since that time the Applicant has lived in refugee camps in India.*
    - *He has heard that many terrible things have happened to Tamils in Sri Lanka, especially those who have had family members suspected of being members or supporters of the LTTE.*
    - *In the time the Applicant was in India more and more Tamils came to the refugee camps where he lived up until the time he left India. The Applicant was told by these people that the Sri Lankan authorities would come in the middle of the night in a white van and would snatch Tamils away. These people were never heard from again.*
    - *The Sri Lankan authorities assume that anyone who flees to India is a former member or supporter of the LTTE and has tried to escape the repercussions. The Applicant knows that if the Sri Lankan authorities suspected his family of having supported the LTTE he would be killed. For these reasons, he can never return to Sri Lanka*.[1]

11. On the basis of country information on the heavy fighting between the LTTE and Sri Lankan Army ("SLA") in 1990 following the withdrawal of the Indian peacekeeping force from Jaffna, and death certificates presented at the Interview, the Secretary accepted that two of the Appellant's uncles were killed in 1990, and that the Appellant's family fled from Sri Lanka soon after this. The Secretary also accepted that neither the Appellant, nor his immediate family, had any involvement with the LTTE in Sri Lanka, or in any other political issues since the death of the Appellant's uncles in 1990.[2]

[1] Book of Documents ("BD") 76.
[2] BD 79 – 80.

12. The Secretary noted a "marked improvement" in the overall situation for Tamils in Sri Lanka since the end of the civil war in 2009,[3] and that guidelines of the United Nations High Commissioner for Refugees ("UNHCR") indicate that there is no longer any need for a presumption of eligibility for protection for Sri Lankan Tamils, although "persons suspected of certain links with the Liberation Tigers of Tamil Eelam" may still be at risk.[4] The Guidelines do not list Tamils, young Tamil men from the Northern Province, Tamil returnees from India, or failed asylum-seekers, as being at risk. To the contrary, a repatriation program run by the UNHCR in co-operation with the Sri Lankan government has successfully resettled a substantial number of Tamil refugees from India, and most found the repatriation and reintegration process to be a "positive experience".[5] While Tamils may be subject to discrimination and harassment, the country information suggests Tamils are no longer subject to harm amounting to persecution.[6]

13. The Secretary noted that neither the Appellant nor any other member of his family has had any political involvement in the past,[7] and there was no country information to suggest the Appellant would be imputed with the political opinion of an LTTE supporter because of having fled for India.[8] As a consequence, the Secretary did not consider the death of the Appellant's uncles in 1990 to create any risk profile for the Appellant. There was no reasonable possibility the Appellant would be harmed or face persecution on account of his association with his uncles, being a Tamil man from the Northern Province, or a returnee from India.[9]

14. With respect to the Appellant's claimed fear of harm as a failed asylum-seeker, the Secretary noted the Appellant may be subject to routine security and background checks upon arrival at Colombo airport, however, given the Appellant has no adverse risk profile, the Appellant would not come to any harm. In addition, while he may be charged with unlawful departure from Sri Lanka, the usual penalty was a fine, and there were no reports of returnees being jailed on this basis.[10] There was also no reasonable possibility the Appellant would face persecutory harm on account of being a failed asylum-seeker.[11]

15. In light of the aforementioned findings, the Secretary concluded the Appellant had no well-founded fear of harm, on neither the individual grounds the Appellant raised, nor cumulatively, and did not qualify for refugee status.[12] For the same reasons the Secretary rejected the Appellant's Convention claims, the Secretary also found that the Appellant did not qualify for complementary protection.[13]

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[3] BD 81.
[4] BD 82.
[5] BD 82, 85.
[6] BD 83.
[7] BD 86.
[8] BD 87.
[9] BD 88.
[10] BD 89.
[11] BD 90.
[12] Ibid.
[13] BD 91.

REFUGEE STATUS REVIEW TRIBUNAL

16. On 5 May 2016, the Appellant appeared before the Tribunal. The Tribunal accepted the Appellant's evidence as to his origin from the Northern Province, and his flight to India by boat in 1990 with his father and brothers, leaving his mother and younger sister in Sri Lanka.[14] The Tribunal accepted the Appellant's evidence that two of his paternal uncles were killed in 1990, and his father had told him they were shot by the SLA on suspicion of involvement with the LTTE because one of them lost his leg in a landmine blast in 1983 or 1984.[15] The Tribunal also accepted the Appellant's evidence that his cousin had been involved with recruiting people to the LTTE and was detained and tortured in 2009, but did not accept that the authorities suspected any member of the Appellant's immediate family of being supporters of the LTTE.[16]

17. At the hearing, the Appellant gave evidence as to the circumstances of his return to Sri Lanka in 2010, and the Tribunal accepted he was questioned upon arrival at Colombo airport, and his father's friend, Pradeep, helped to explain he had been living in a refugee camp in India and was returning to visit his mother. While in India, he resided mostly with Pradeep, and Pradeep helped him to obtain a National Identity Card and passport. In acquiring the passport, in accordance with the UNHCR Handbook, the Tribunal found the Appellant voluntarily availed himself of the protection of Sri Lanka, and therefore ceased to be a refugee recognised by India pursuant to Article 1C(1) of the Convention.[17] The Tribunal further found Article 1C(5) to be applicable to the Appellant, given its findings that the "circumstances in connexion with which he has been recognised as a refugee have ceased to exist".[18]

18. The Tribunal rejected the Appellant's claim to fear harm because of his Tamil ethnicity on the same basis as the Secretary. The Tribunal noted country information that the security situation for Tamils has improved greatly for those not suspected of LTTE involvement, and that Appellant's relationship with his two uncles and cousin was not close enough to give rise to any such risk profile.[19] Of further significance was that the Appellant was able to return in 2010 to 2011 without being mistreated.[20] Given the focus of authorities is now on persons involved in separatist activity who may destabilise post-conflict Sri Lanka, it found that Tamils, including young Tamils from the Northern Province, or failed Tamil asylum-seekers, are not subject to any reasonable possibility of harm.[21] This is also the case taking into account any political opinion that may be imputed to the Appellant because of having this profile.[22]

19. Given the Tribunal's findings regarding the Appellant's relationship with his uncles and cousin, it also found that there was no reasonable possibility of the

[14] BD 310 at [14]-[15].
[15] BD 311 at [18].
[16] Ibid at [19]-[20].
[17] BD 313 at [31].
[18] BD 314 at [33].
[19] BD 318 at [51].
[20] BD 319 at [52].
[21] Ibid at [54]; BD 320 at [57].
[22] BD 320 at [57]-[56].

Appellant being harmed by virtue of being a member of the group of "immediate family members of suspected LTTE supporters or members".[23] The Tribunal also rejected the Appellant's claimed fear of harm on the basis of being a failed asylum-seeker, who sought asylum in Australia and Nauru,[24] for similar reasons as the Secretary, and noted that the Appellant's claimed fear on the basis of his illegal departure was misconceived, given he departed Sri Lanka in 2010 lawfully on his own passport.[25] Consequently, the Appellant's claimed fear of persecutory harm on the basis of his ethnicity and origin, and membership of the specified social groups relating to his relationship to his uncles and cousin, time in India, and being a failed asylum-seeker, was not well-founded, and the Appellant was not a refugee under the Convention.

20. In assessing the Appellant's claim to complementary protection, the Tribunal referred to its reasons for rejecting the Appellant's claim for refugee status, and found that there was no reasonable possibility of harm befalling the Appellant that was prohibited by the treaties ratified and signed by Nauru.[26] In relation to the Appellant's claims based on the *Convention on the Elimination of All Forms of Racial Discrimination* ("CERD"), the Tribunal accepted the Appellant "may be subjected to a moderate level of societal discrimination" because of his ethnicity and origin, but did not consider that such discrimination would amount to torture, cruel, inhuman or degrading treatment or punishment, and therefore did not found a claim for complementary protection.[27]

THIS APPEAL

21. The Appellant's Notice of Appeal reads:

> 1. *The Tribunal erred on a point of law by failing to consider that the appellant was able to avoid harm when he returned to Sri Lanka for six months in 2010/2011 because he was accompanied by his Singhalese family friend, Pradeep.*
> 2. *The Tribunal erred on a point of law by failing to consider, or provide adequate reasons in response to, the appellant's principal submission that he will suffer racial discrimination of a kind prohibited by the Convention on the Elimination on All Forms of Racial Discrimination (the CERD) if removed to Sri Lanka.*
> 3. *The Tribunal erred on a point of law by applying the wrong test in assessing the appellant's claim he will face racial discrimination of a kind prohibited by the CERD if he is returned to Sri Lanka.*
>
> *Relief*
>
> *The appeal on a "point of law" under section 43(1) should be allowed on any one or more of the grounds identified above, and the Court should make orders:*
>
> a. *under section 44(1)(b) of the Act, remitting the matter for reconsideration by the Tribunal, with directions that the Tribunal be reconstituted, and that it conduct a further hearing; and*
> b. *under section 44(2)(b), quashing the purported decision of the Tribunal.*

[23] BD 322 at [66].
[24] BD 324 at [75].
[25] BD 325 at [76].
[26] Ibid at [79]-[80].
[27] BD 326 at [81].

22. In the Appellant's Further Statement dated 19 April 2016, the Appellant claimed that "[t]he reason why I was able to avoid harm is because Pradeep was always with me, he used his contacts to obtain documents and I stayed inside the house all the time in Colombo and in Jaffna".[28]

23. The Appellant points to the fact that the Tribunal gave "significant weight to the fact that the applicant returned lawfully to Sri Lanka for six months in 2010/11, being questioned for about 15 minutes on his arrival at Colombo airport before being allowed to leave the airport".[29] At various points throughout the Tribunal Decision Record, the Tribunal notes that the Appellant was able to make this return trip without coming to any harm from the authorities.[30] The Appellant submits that the Decision Record indicates the Tribunal failed to engage with the Appellant's claims that he was only able to avoid problems during his return trip because of Pradeep, he would not have gone back to Sri Lanka without Pradeep, and it would not be possible for Pradeep to be with him if he returned to Sri Lanka in the future.[31]

24. The Appellant cites authority in support of the proposition that a failure to deal with substantial and consequential evidence,[32] and give the evidence genuine consideration,[33] amounts to an error of law in the sense of a constructive failure to exercise jurisdiction. Given the Decision Record does not reflect any genuine consideration of the Appellant's evidence regarding his dependence on Pradeep, the Tribunal made an error of law.[34]

25. The Appellant also advances claims relying on Articles 2 and 5 of the CERD. Article 2 provides:

> "*States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.*"

26. Article 5 provides, relevantly, as follows:

> "*In compliance with the fundamental obligations laid down in article 2 of the Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race,*

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[28] BD 103 at [36].
[29] BD 318 at [52].
[30] BD 319 at [52]; 323 at [69].
[31] Appellant's Submissions at [6].
[32] *SZSSC v Minister for Immigration and Border Protection*; *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [11]; *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67 at [47]-[54].
[33] *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51 at 92-93.
[34] Appellant's Submissions at [14].

colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a). The right to equal treatment before the tribunals and all other organs administering justice;
(b). The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
(c). Political rights,…;
(d). Other civil rights [particularly those which are then specified];
(e). Economic, social and cultural rights [particularly those which are then specified];
(f). The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks."

… "

27. In relation to the Appellant's claims regarding the CERD, the Appellant's submissions to the Tribunal dated 4 May 2016 claimed (at [57]):

"*[QLN 139] fears that he will be discriminated against if removed to Sri Lanka. It is our submission that discrimination on the basis of race may amount to a form of 'degrading treatment' (or alternatively to cruel, inhuman or degrading treatment), and hence violate Nauru's non-refoulement obligations under article 7 of the ICCPR.*

If removed to Sri Lanka, [QLN 139] will suffer racial discrimination, of a kind prohibited by CERD. CERD does relate to Nauru's non-refoulement obligations in some respects; article 5(b) of CERD, for example, has been declared by the Committee on the Elimination of Racial Discrimination (the principal UN body charged with the interpretation and monitoring of CERD) to require nations to ensure "that the principle of non-refoulement is respected when proceeding with the return of asylum-seekers to countries". The text of article 5(b) states that States Parties are required to ensure '[t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution'.

a. It is our principal submission that Nauru's obligations under article 5 of the CERD to 'guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law' and to the enjoyment of specified rights (including economic, social and cultural rights) extends to an obligation not to remove persons to conditions where they would be denied such rights.
b. However, if the Tribunal finds that CERD gives rise to only more limited non-refoulement obligations, it is our submission that article 5(b) requires Nauru to respect the principle of non-refoulement in extending protection to [QLN 139] if his removal to Sri Lanka would endanger his right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution."[35]

28. The Tribunal considered the Appellant's CERD claim in assessing the complementary protection claims:

[35] BD 117 at [56]-[57].

> "*In relation to the claim that the applicant will face racial discrimination of a kind prohibited by the Convention on the Elimination of All Forms of Racial Discrimination (the CERD) if he is returned to Sri Lanka, the Tribunal has accepted that he may be subjected to a moderate degree of societal discrimination because of his profile as a Tamil from the north and from a formerly LTTE-controlled area. However the Tribunal does not accept on the evidence before it that it would endanger his right to security of person and protection by the State against violence or bodily harm, nor that there is a reasonable possibility that such discrimination will amount to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty*."[36]

29. In the Appellant's submission, this assessment of the Tribunal fails to engage with the Appellant's "principal submission" regarding Article 5 of the CERD, and only engages with the subsidiary claim regarding non-refoulement. In failing to engage with this claim, the Tribunal neglected a submission "worthy of serious consideration".[37]

30. Regarding grounds 2 and 3, the Appellant submits the Tribunal only considered whether being returned to Sri Lanka "would endanger his right to security of person and protection by the State against violence or bodily harm", reflecting the erroneous understanding that Nauru's obligations under the CERD encompass only civil and political rights, and not the various other economic, social and cultural rights enumerated in Article 5 of the CERD.[38]

31. The Appellant submits that, in accordance with the Vienna Convention on the Law of Treaties, the CERD should be interpreted in its context, in light of its object and purpose. This requires a consideration of the preamble of the CERD, emphasising "universal respect for and observance of human rights and fundamental freedoms", and the obligation to take "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them" found in Article 2.

32. The Appellant's case is that the CERD, read in its context, in light of its object and purpose, puts an obligation not only to refrain from acting in a manner inconsistent with the rights in Article 5 within its territory, but to exercise due diligence and take necessary steps to prevent a person from being subjected to foreseeable restrictions on the those rights in the country to which they are to be returned.[39] Such a reading would also be consistent with the "humanitarian character and objective" of the Convention.[40] The Appellant therefore submits that Article 5 ought to be seen as imposing an obligation not to remove persons to territory where they would be subject to violation of the rights specified in Article 5, including the right to equality before the law in the enjoyment of economic, social and cultural rights.

33. In support of the submission that the CERD has extraterritorial application, counsel for the Appellant cites two authorities: *R (European Roma Rights*

[36] BD 326 at [81].
[37] Appellant's Submissions at [20].
[38] Ibid at [21]. Supreme Court Transcript p 55 – 56.
[39] Ibid at [27].
[40] Ibid at [30].

Centre) v Immigration Officer at Prague Airport ("*Roma*"),[41] and *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)* ("*Georgia v Russian Federation*").[42] In *Roma*, immigration officials from the United Kingdom were posted at Prague airport to help prevent any nationals of the Czech Republic travelling to the United Kingdom and making claims for asylum. The complainants said that the officials applied the regulations in a racially discriminatory fashion. Lady Hale, with whom other members of the House of Lords agreed, did not consider that the officials were acting extra-territorially to be fatal to the claims advanced under the CERD.[43] In *Georgia v Russian Federation*, the Republic of Georgia claimed before the International Court of Justice ("ICJ") that the Russian Federation acted discriminately in a tax against a mass expulsion of Georgians in the Republic of Georgia. The ICJ observed "there is no restriction of a general nature in CERD relating to its territorial application; whereas it further notes that, in particular, neither Article 2 nor Article 5 of CERD, alleged violations which are invoked by Georgia, contain a specific territorial limitation".[44] The Respondent's response to these authorities is that, while the conduct occurred outside the territory of the racially discriminatory state, it was nonetheless pursuant to a policy implemented by the state charged with acting contrary to the CERD.[45]

34. The Respondent submits that the Appellant's statement in his Further Statement of 19 April 2016 (see [22] above) is to be interpreted as an explanation for why he was able to avoid harm during his return in 2010 to 2011, rather than a claim in the sense of a basis on which the Appellant feared harm.[46] To characterise the error in the manner the Appellant is to ask the Court to engage in impermissible merits review.[47]

35. The Tribunal also engaged with the aspects of the Appellant's evidence involving Pradeep, particularly finding that:

    - Pradeep assisted when the Appellant was questioned by authorities upon arrival at Colombo airport;[48]
    - Pradeep assisted the Appellant to obtain a National Identity Card and a passport;[49]
    - the Appellant travelled with Pradeep to Jaffna, passing through army checkpoints on the way, before returning to Pradeep's home in Colombo where he remained until his return trip to India; and
    - the Appellant was not living "in hiding" with Pradeep in Colombo.

36. The Respondent submits that in light of this consideration of the Appellant's claims, ground 1 cannot be sustained.

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[41] [2004] UKHL 55.
[42] ICJ Reports 2008, 353.
[43] *Roma* at [101].
[44] ICJ Reports 2008, 353 at [109].
[45] Supreme Court Transcript p 77 at ln 1 – 14.
[46] Respondent's Submissions at [21].
[47] Supreme Court Transcript p 67 ln 13 – 15.
[48] BD 311 at [22].
[49] BD 312 at [23]-[24]; BD 313 at [30]; BD 318 at [52].

37. Turning to grounds 2 and 3, the Respondent submits that Article 5 does not impose any non-refoulement obligation on Nauru, and simply requires that Nauru respect the terms of Article 5 within its territory. The highest the Appellant's argument can go with respect to Article 5 is that if Nauru was to expel or return a person using processes that distinguished between returnees on the basis of race, colour or national or ethnic origin, Nauru may breach an international obligation under the CERD.

38. The Respondent contends that the Appellant's claim that Nauru is to exercise "due diligence" to prevent a person being refouled to a country where their rights under the CERD may be compromised should fail for a number of reasons. First, this submission is contrary to the terms of the Act and Nauru's non-refoulement obligations. Second, it is contrary to the terms of the CERD. Third, the Tribunal made findings that directly answer the guarantee of equality before the law found in Article 5, saying:

> *"DFAT reports that there are currently no official laws or policies in Sri Lanka that discriminate on the basis of ethnicity or language including in relation to education, employment or access to housing…"*[50]

39. The Tribunal then proceeded to acknowledge the likelihood of a "moderate level of societal discrimination", but found that this would not be so severe as to activate Nauru's complementary protection obligations. In turning its mind to these matters, the Respondent submits that the Tribunal properly carried out the evaluative and qualitative task required of it.[51] The Respondent also contends that the Tribunal did not fail to give adequate reasons for rejecting the Appellant's complementary protection claims.

CONSIDERATION

Ground 1

40. In *Minister for Immigration and Border Protection v SZSRS*,[52] the question before the Full Federal Court was whether the failure by the Tribunal to consider a particular piece of evidence, a letter, constituted a jurisdictional error. The Full Court considered that that question was to be answered by considering the importance of the letter to the Tribunal's decision-making. Their Honours held that this was "inevitable in light of his [the primary judge's] ultimate acceptance of the correctness of Robertson J's analysis of this kind of error in *SZRKT*".[53]

41. In *Minister for Immigration and Citizenship v SZRKT*,[54] Robertson J found that the Tribunal fell into jurisdictional error by failing to consider an academic transcript that supported a claim that the Applicant had studied Persian, in circumstances where the Tribunal rejected the Applicant's claims due to adverse

[50] BD 322 at [63].
[51] Respondent's Submissions at [45].
[52] [2014] FCA 16.
[53] Ibid at [47].
[54] (2013) 212 FCR 99.

credibility findings grounded in a finding that the claim to have studied Persian was "implausible". His Honour said (at [111]):

> "*In my opinion there is no clear distinction in each case between claims and evidence: see SHKB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 545 at [24], set out at [69] above. The fundamental question must be the importance of the material to the exercise of the Tribunal's function and thus the seriousness of any error. In my opinion the distinction between claims and evidence provides a tool of analysis but is not the discrimen itself. Further, it is important not to reason that because a failure to deal with some (insubstantial and inconsequential) evidence will, in some circumstances, not establish jurisdictional error, then a failure to deal with any (substantial and consequential) evidence will also not establish jurisdictional error".*

42. The submissions of the Appellant emphasise that it is not useful to analyse whether the Appellant's statements concerning Pradeep are in the nature of claims or evidence or an explanation.[55]

43. There is no merit in the claim that the Tribunal failed to consider the reason why the Appellant was not harmed when he returned to Sri Lanka in 2010, namely the presence of his friend, Pradeep. On the contrary, the Tribunal considered and, in fact, accepted many parts of the Appellant's evidence in relation to Pradeep. For instance, the Tribunal accepted that Pradeep had helped him obtain his identity card and passport and that he was with him when passing through army checkpoints when travelling to and from Jaffna. It also found that Pradeep helped him to explain where he had previously been living in India and the purpose of his return visit to Sri Lanka. As was open to it, the Tribunal did not accept the claim by the Appellant that he had been in hiding while living with Pradeep in Colombo or that he had paid a bribe to obtain his National Identity Card.

44. It is quite clear that the role of Pradeep was regarded as an important issue by the Tribunal and that it considered the evidence before it in relation to Pradeep carefully, accepting part of what was asserted by the Appellant and rejecting part. There is no merit in the proposition that it failed to consider that the Appellant was able to avoid harm when he returned in Sri Lanka in 2010/2011 because the Appellant was accompanied by Pradeep. Ground 1 therefore cannot be sustained.

<u>Grounds 2 and 3</u>

45. The Appellant has argued that the Tribunal erred in misunderstanding the nature of Nauru's obligations in respect of the CERD. It is necessary in this context to have regard to the definition of "complementary protection" in s 3 of the Act, namely "protection for people who are not refugees as defined in this Act, but who cannot be returned or expelled to the frontiers of territories where this would breach Nauru's international obligations."

[55] See, eg, Supreme Court Transcript p 27 at ln 1 – 5.

46. Section 4(2) of the Act precludes the Republic of Nauru expelling or returning any person to the frontiers of territories "in breach of its international obligations."

47. The question that arises therefore is whether a foreseeable breach of Article 5 of CERD by the country to which the Appellant would be returned would constitute a breach of the Republic of Nauru's international obligations. Article 5 requires States Parties to prohibit and eliminate racial discrimination and to guarantee a variety of rights. This applies to Nauru but it does not mandate Nauru to guarantee that the proscribed conduct will not occur in a country to which an asylum-seeker is returned.

48. The Appellant argues that the CERD imposes an obligation on Nauru "to exercise due diligence and take necessary steps to prevent a person from being subjected to foreseeable restrictions on the enjoyment of such rights in the country to which they are liable to be returned."[56] However, this is not in accordance with legal principle and was not the subject of authoritative decision by Crulci J in *QLN 133 v The Republic.*[57]

49. Most importantly in terms of the arguments advanced by the Appellant, it is significant that the Tribunal responded to the argument by the Appellant on the basis that the breach of CERD as a basis for complementary protection was open and needed to be the subject of a decision by the Tribunal. It was for that reason that it engaged with the arguments advanced by the Appellant as to the level of racial discrimination that the Appellant might face in Sri Lanka. It is quite apparent that the Tribunal thereby grappled with and considered the arguments of the Appellant. In so doing the Tribunal engaged with the Appellant's principal submission about the risk of his suffering racial discrimination of the kind prohibited by the CERD if he was removed to Sri Lanka. Thus, ground two must fail.

50. The Tribunal rejected the argument of the Appellant referring to its earlier findings based on country information, about the absence of discrimination at official and legal levels. Put another way, it determined that there was equality in the law in Sri Lanka "including in relation to education, employment or access to housing", consistent with the requirement of Article 5. It accepted that there is a moderate level of societal discrimination in Sri Lanka between ethnic groups as a result of the earlier conflicts but it is apparent from its reasoning that it concluded that such discrimination did not rise to the level of severity that warranted protection under Nauru's complementary protection obligations.

51. It is orthodox law that the relevant harm to qualify for persecution or the need for complementary protection must be such that it is intolerable for the person by reference to its intensity, duration or severity. Not every breach or apprehended breach of human rights reaches such a point.[58]

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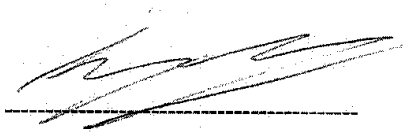
[56] Submissions of Appellant at para 27.
[57] [2017] NRSC 82.
[58] See *Minister for Immigration and Border Protection v WZAPN* (2015) 224 CLR 610 at [71] per French CJ, Kiefel, Bell and Keane JJ, and at [97] per Gageler J. See too *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

52. The evidence before the Tribunal did not persuade it that the discrimination postulated would reach the requisite level of seriousness. It made no legal error in this interpretation of the law so this ground also must be rejected.

CONCLUSION

53. Under s 44(1) of the Act, I make an order dismissing the appeal and affirming the decision of the Tribunal and make no order as to costs.



Justice Ian Freckelton
Dated this 27th day of November 2018