IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal No. 03 of 2022
Supreme Court Refugee Appeal Case No. 07 of 2019

BETWEEN

TTY 167

AND

APPELLANT

THE REPUBLIC OF NAURU

RESPONDENT

BEFORE: **Justice R. Wimalasena, President**
Justice Sir A. Palmer
Justice C. Makail

DATE OF HEARING: **3 July 2023**

DATE OF JUDGMENT: **27 March 2024**

CITATION: **TTY 167 v The Republic of Nauru**

KEYWORDS:	Refugee; sur place claim; failure to consider integers of claim; claim subsumed in findings of greater generality; apostasy
LEGISLATION:	s.19(2)(d) of the Nauru Court of Appeal Act 2018; s.5, s.22, s.31, s.44(1)(a) of the Refugees Convention Act 2012
CASES CITED:	Eshetu v Minister for Immigration and Ethnic Affairs (1997) 142 ALR 474; Hong v Minister for Immigration and Border Protection [2019] FCAFC 55; Immigration and Multicultural Affairs (2003) 214 CLR 496; Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 214 CLR 496 O'Brien v Komesaroff (1982) 150 CLR 310 at 319; WET054 v Republic of Nauru [2023] NRCA 8; WAEE v Minister for Immigration [2003] FCAFC 184; Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham [2000] HCA 1; 74 ALJR 405; NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) [2004] FCAFC 263; 144 FCR 1
APPEARANCES:	
COUNSEL FOR the Appellant:	**NM Wood SC**
COUNSEL FOR the Respondent:	**HPT Bevan**
APPEAL	~~**Allowed**~~ **| Dismissed**

JUDGMENT

1. The Appellant was born on 16 May 1990 and is a citizen of Bangladesh. He was living with his parents and siblings before he left Bangladesh on 19 May 2013. He travelled

from Bangladesh to Indonesia and then departed for Australia by boat. He arrived on Christmas Island on 19 August 2013, and was later transferred to Nauru on 05 July 2014.

2. On 20 September 2014, the Appellant made an application to the Secretary of Justice and Border Control (Secretary) to be recognized as a refugee under section 5 of the Refugees Convention Act 2012 (Refugees Act) or as a person to whom the Republic of Nauru owes complementary protection under its international obligations. On 09 October 2015, the Secretary refused the application, deciding that the Appellant is not a refugee within the meaning of the Refugees Act, and Nauru does not have complementary protection obligations to the Appellant.

3. Pursuant to section 31 of the Refugees Act, the Appellant made an application for merit review to the Refugee Status Review Tribunal (Tribunal) on 17 December 2015. The Tribunal affirmed the decision of the Secretary on 03 July 2016. The Appellant appealed to the Supreme Court against the decision of the Tribunal on 25 November 2016, after obtaining an order for extension of time to lodge notice of appeal. The Appellant was unrepresented in the Supreme Court. On 20 February 2018, the Supreme Court dismissed the appeal and affirmed the decision of the Tribunal pursuant to section 44(1)(a) of the Refugees Act. Being aggrieved by the Supreme Court decision, the Appellant filed a notice of appeal on 12 March 2018 to appeal to the High Court of Australia. The High Court of Australia extended the time for the filing of the notice of appeal and allowed the appeal. Accordingly, the decision of the Tribunal dated 31 July 2016 was quashed, and the matter was remitted to the Tribunal for reconsideration.

4. On 09 April 2019, the matter was re-heard in the Tribunal, following several adjournments. The appeal book contains invitations for appearances at two rescheduled Tribunal hearings on 11 February 2019 and 09 April 2019. Furthermore, as per paragraph 12 of the Tribunal decision, it is evident that the Appellant did not attend a hearing scheduled for 12 February 2019 as well. Be that as it may, the Appellant submitted a further statement to support his application to the Tribunal, and in that statement, he presented new information that had arisen since the previous Tribunal hearing. As such, the Appellant made a *sur place* claim that he converted to

Christianity after arriving in Nauru. The Appellant claimed in his further statement that he was baptized on 22 April 2018. He further stated the following in his further statement:

> *"55. If somebody is born Christian, they may face some problems in Bangladesh, but as a convert, it is very bad. Especially for somebody like me who has been in close association with Jel. They are not friendly to people like me.*
>
> *56. My comrades from Jel would definitely kill me if they find out what I have done and my changed opinion on Islam. I think they would think I had betrayed them by converting. I know that turning away from Islam is a crime and I believe they would punish me with full force.*
>
> *57. I am afraid of other people in Bangladesh harming me if I return. My father and family will harm me."*

5. On 04 July 2019, the Tribunal once again affirmed the Secretary's determination. The Appellant filed a notice of appeal on 22 July 2019, followed by an amended notice of appeal on 17 January 2020. Subsequently, on 04 October 2022, the Appellant filed a further amended notice of appeal, and during the hearing, it was amended again following an oral application by adding the words 'and was thereby an apostate from Islam'. Accordingly, the ground of appeal relied on by the Appellant in the court below (as stated in paragraph 22 of the judgment) was as follows:

> *"The Tribunal erred in law by failing to consider integers of the appellant's claims as a Christian convert, namely the additional risks of harm from those the appellant faced from broader community if his comrades from Jamaat-e-Islam (JI) in his local area found out that on Nauru the appellant had been baptised a Christian and attended religious services there as a Christian and was [sic] thereby committed apostasy from Islam.*

Particulars

a. *The appellant expressly claimed in his RSRT Remittal Statement that "My comrades from Jel would definitely kill me if they found out what I have done and my changed opinions on Islam. I think they would think I betrayed them by converting': (the JI claims).*
b. *In the context of the RSRT Remittal Statement, the appellant's other claims and the Tribunal's findings:*
    i. *"My comrades from Jel" meant those from the appellant's family's home area in Bangladesh with whom the appellant had associated when he was an associate or primary member of JI there;*
    ii. *"…what I have done" meant what the appellant had done on Nauru in converting to Christianity, including being baptised a Christian and practicing Christianity there by attending religious services.*
c. *The Tribunal did not recite or evaluate the JI claims in relation to the appellant's baptism and religious service attendance on Nauru.*
d. *In considering the appellant's claims as a Christian convert the Tribunal made no general findings which subsumed the JI claims, for example that the JI comrades would not find out the appellant had been baptised, or that the appellant's conversion on Nauru was not genuine but undertaken for the purposes of his application for recognition as a refugee.*
e. *The JI claims were not subsumed in the Tribunal's evaluation or findings on the appellant's claims of harm arising from his Christian conversion from the broader Bangladesh community."*

6. The Appellant contended in the Supreme Court that the Tribunal, in considering the Appellant's claims as a Christian convert, made no general findings which subsumed the JI claims. The submissions filed on behalf of the Appellant in the Supreme Court stated the following, *inter alia*, in respect of the ground of appeal:

> *"26. The Tribunal erred in law by failing to consider integers of the appellant's claim as a Christian convert, namely the risks of harm additional to those he faced from the broader community if his comrades from JI in his local area were to found out that on*

Nauru the appellant had been baptised a Christian and attended religious services there as a Christian.

35. While the Tribunal adverted to the JI claims at [156], it did not go on to consider or make findings which addressed risk factors in the JI claims which were additional to those from the broader community.

36. These additional risks were inherent in the course of the harm – members of a now banned Islamist party of whom the JI Constitution demanded the passing of examinations on religious texts, observing a strict behaviour code, filing out personal daily report cards and undergoing self-criticism sessions: RSRT [33]. The Tribunal did not take issue with the appellant's claims that the aim of the JI was to see Bangladesh run on Islamic law and principles.

43. The Tribunal's suggestion at RSRT [156] of the appellant's "former JI colleagues" as a particular within the broader community suggests the Tribunal may have been attempting to fashion general conclusions which would be dispositive of the JI claims. However just because the JI comrades might be a part of "the community", does not mean conclusions concerning general risks applicable across the community necessarily take in the additional risks of harm claimed in respect of JI."

7. On 06 December 2022 the Supreme Court dismissed the appeal and affirmed the decision of the Tribunal dated 04 July 2019.

8. Being aggrieved by the Supreme Court decision, the Appellant filed a notice of appeal on 22 December 2022 to appeal to the Nauru Court of Appeal with the following ground of appeal:

"The primary judge erred by failing to find that:

1. *The Tribunal erred in law by failing to consider integers of the appellant's claims as a Christian convert, namely the additional risks of harm from those the appellant faced from the broader community if his comrades from Jamaat-e-Islami (JI) in his local area found out that on Nauru the appellant had been baptised a Christian and attended religious services there as a Christian."*

9. The Appeal was taken up for hearing on 03 July 2023 and the parties made submissions. We will now consider the submissions made by the parties.

10. The Appellant submitted that the question at hand was not simply the risks faced by the converts in general, risks to converts from Islamist militants in general or whether 'community members' might harm his as a convert. It was asserted that the Tribunal failed to address the question *'whether the Appellant would be at risk from former JI colleagues, being Islamists, who claimed he would continue to associate with, and who he said would seriously harm for his betrayal by converting'*.

11. In the Appellant's submissions, it was argued that the Tribunal failed to address the Appellant's subjective fear adequately. This was because the Tribunal stated that there was no other information, as per the country information, before it to substantiate the fear. It was emphasized that the only evidence related to this additional risk came from the Appellant. Thus, it was asserted that requiring corroboration is a recognized error, citing Eshetu v Minister for Immigration and Ethnic Affairs (1997) 142 ALR 474 and other cases. In Eshetu (supra) it was stated at page 485:

> *"I cannot emphasise too strongly that the tribunal must not approach its task of merits review on the basis that it will not accept what an applicant for refugee status says unless there is some independent corroboration. To do so would involve a gross error of law".*

12. The Appellant also argued, in relation to the Supreme Court judgment, that the judge made an error by not considering it necessary for the Tribunal to evaluate the Appellant's claim of fearing harm from JI colleagues. The Appellant referred to the following paragraphs of the Supreme Court judgment to highlight this argument:

> *"86. The authorities require that the Tribunal must consider an argument which is substantial and clearly articulated which relies upon established facts. This involves two aspects. First, that the argument must be substantial and clearly articulated or to use the language from NABE that an unarticulated claim must be "squarely" raised; secondly, that it must rely upon established facts.*

87. The Appellant does not identify as express argument or material which expressly raises the claim of an additional risk of harm from his comrades in the JI, if they found out he had been baptised a Christian and attended religious services as a Christian."

13. The Appellant further submitted that the Tribunal should have addressed a claim clearly advanced by the Appellant, arguing that the proposition that the Tribunal was not obligated to consider claims unless they were based on 'established facts' is both circular and leads to absurdity. The Appellant referred to the observations of Logan J in Hong v Minister for Immigration and Border Protection [2019] FCAFC 55 to emphasize that the judgment of Gummow and Callinnon J in Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 214 CLR 496 should not be taken out of context, where it was stated in Hong (supra):

> *"23. The observation made by Gummow and Callinan JJ in Dranichnikov at 1092, [24] that to "fail to respond to a substantial clearly articulated argument relying upon established facts was at least to fail to afford Mr Dranichnikov natural justice" has subsequently been much remarked upon in judgments of this Court, including those to which reference is made in the joint judgment. In my respectful view, that statement needs to be considered against the factual context against which it was made".*

14. In response to the arguments put forward by the Appellant, the Respondent claimed in their submissions that, pursuant to section 19(2)(d) of the Nauru Court of Appeal Act 2018, Refugee appeals from the Supreme Court are confined to questions of law only. Furthermore, it was asserted that the Appellant is bound by the way the trial was conducted. To buttress this position, the Respondent has cited several authorities, including the case of O'Brien v Komesaroff (1982) 150 CLR 310 at 319, where it was observed that:

> *"21. In some cases when a question of law is raised for the first time in an ultimate court of appeal, as for example upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is expedient in the interests of justice that the question should be argued and decided (Connecticut Fire Insurance Co. v. Kavanagh (1892) AC 473, at p 480 ; Suttor v. Gundowda Pty. Ltd. (1950) 81 CLR 418, at p 438 ; Green v. Sommerville (1979) 141 CLR 594, at pp 607-608). However, this is not such a case. The facts are not admitted nor are they beyond controversy. (at*

p319)

22. The consequence is that the appellants' case fails at the threshold. They cannot argue this point on appeal; it was not pleaded by them nor was it made an issue by the conduct of the parties at the trial. (at p319)"

15. Accordingly, the Respondent submitted that the Appellant's case in the lower court was more of a narrow claim: *It was directed to an asserted claim that he would face harm from his former JI colleagues if they found out about the facts of his baptism and Church attendance in Nauru independently of his claimed conversion.* In contrast, it was contended that the claim advanced by the Appellant in the Court of Appeal expanded to cover the risk posed by his former JI colleagues due to his conversion.

16. The Respondent further submitted that the narrow case argued below was rejected by the court below for two reasons: *first, that claim as did not arise squarely on the materials; secondly, that claim was not based on established facts.* The Respondent argued that the submissions made by the Appellant are not directed to the question of law posed in the notice of appeal. Also, the Respondent asserted that if the Appellant argues that the Tribunal decision discloses a different error in impermissibly requiring corroboration, that is a new point, and it requires leave of the Court as per the judgment in WET054 v Republic of Nauru [2023] NRCA 8. Moreover, the Respondent submitted that the Tribunal assessed the risk of harm objectively by reference to country information and therefore it discloses no error.

17. Before delving into the arguments put forward by the parties, it is worthwhile to highlight the fundamental principles that are mandated to be adopted in the Tribunal to contextualize the construction of arguments. Section 22 of the Refugees Act stipulates the core principles that should be adhered to by the Tribunal as follows:

"22. Way of operating
The Tribunal:
(a) Is not bound by technicalities, legal forms or rules of evidence; and

(b) Shall act according to the principles of natural justice and the substantial merits of the case."

18. At this juncture it would be pertinent to note that a decision of the Tribunal should also be looked at in the same context that it is expected to conduct hearings by law. One should not expect such a decision to be involved with overly complex constructions of factual and legal theories that a legal mind might be inclined to dissect and derive complex arguments by interpreting subtle nuances. The idea here is that when evaluating a decision made by the Tribunal, one should not anticipate sophisticated theories and interpretations, that a legal mind might be predisposed to delve into. The Tribunal while not bound by technicalities, legal forms, or rules of evidence is primarily expected to adhere to the fundamental principles of natural justice. In other words, the emphasis should be on principles of natural justice rather than deciphering excessively convoluted interpretations of terminology or what was referred to during the hearing of the appeal as 'hair-splitting' interpretations.

19. There is no obligation for the Tribunal to mention every piece of evidence and every argument put forth by an applicant in its determination, as it might be unnecessary to make a specific determination on a particular issue when it is already encompassed within broader findings. The manner in which a Tribunal decision should be scrutinized has been emphasized time and again in various authorities. In WAEE v Minister for Immigration [2003] FCAFC 184 it was observed:

"[46] It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 at [87]-[97]) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The Tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the

applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinized "with an eye keenly attuned to error". No is it necessarily required to provide reasons of the kind that might be expected of a court of law.

[46] *The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may rise a strong inference that it has been overlooked".*

20. Moreover, in Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham [2000] HCA 1; 74 ALJR 405 the High Court of Australia stated that it would be contrary to the direction in section 420 of the Immigration Act, which is identical to section 22 of the Refugees Act, for a Tribunal to give line by line refutation of the evidence. It stated at para [65]:

> *"...it is not necessary for the Tribunal to give a line-by-line refutation of the evidence for the claimant either generally or in those respects where there is evidence that is contrary to findings of material fact made by the Tribunal".*

21. Also, it has to be noted that only if a claim is squarely raised based on the available material that a Tribunal is obligated to consider it. In NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) [2004] FCAFC 263; 144 FCR 1 this was discussed as follows:

[58] The review process is inquisitorial rather than adversarial. The Tribunal is required to deal with the case raised by the material or evidence before it – Chen v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 157 at 180 [114] (Merkel J). There is authority for the proposition that the Tribunal is not to limit its determination to the 'case' articulated by an applicant if evidence and material which it accepts raise a case not articulated – Paramananthan v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 28 at 63 (Merkel J); approved in Sellamuthu v Minister for Immigration and Multicultural Affairs (1999) 90 FCR 287 at 293 – 294 (Wilcox and Madgwick JJ). By way of example, if a claim of apprehended persecution is based upon membership of a particular social group the Tribunal may be required in its review function to consider a group definition open on the facts but not expressly advanced by the applicant – Minister for Immigration and Multicultural Affairs v Sarrazola (No 2) (2001) 107 FCR 184 at 196 per Merkel J, Heerey and Sundberg JJ agreeing. It has been suggested that the unarticulated claim must be raised 'squarely' on the material available to the Tribunal before it has a statutory duty to consider it – SDAQ v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 199 ALR 265 at 273 [19] per Cooper J. The use of the adverb 'squarely' does not convey any precise standard but it indicates that a claim not expressly advanced will attract the review obligation of the Tribunal when it is apparent on the face of the material before the Tribunal. Such a claim will not depend for its exposure on constructive or creative activity by the Tribunal."

22. The counsel for the Appellant articulated his argument in such a way, differentiating the levels of the risks faced by Christians in general, converts from Islam to Christianity and converts who had been members of an Islamist political organization in Bangladesh. However, it raises a question whether this approach was consistent with how the case was presented below. In addition, it appears that the argument of the Appellant in the submissions has been somewhat expanded beyond the plain reading of the ground of appeal, where it only states about '*the additional risks of harm from those the appellant faced from the broader community if his comrades from Jamaat-e-Islami (JI) in his local area*'.

23. When the Appellant filed the notice of appeal in the court below, they coupled the particular risk they now claim, '*harm from JI colleagues*', with the '*harm from the broader community*'. Therefore, we do not see any flaw in considering harm in general, as the

manner in which the ground of appeal was advanced, suggests that the claim of harm from JI colleagues is subsumed within the Tribunal's findings on the harm from broader community.

24. It appears that the Tribunal in its decision under the heading "Claims based on religion: conversion from Islam to Christianity; rejection of Islam" discussed the Appellant's evidence that speaks of his tendency towards aligning with Christianity from paragraph [103] to [137]. Particularly, the Tribunal discussed the evidence in relation to the Appellant's claim of becoming a Christian and the harm he may face due to his involvement with JI comrades as follows:

> *"[110] If he goes back to Bangladesh and tells people he has become a Christian and he tries to recruit others to his faith, as he is required to do, people in Bangladesh may harm him. As a convert, it is bad, especially for someone like him who has been associated with JI. His comrades from JI would definitely kill him if they found out he had changed his opinions about Islam. They would think he had betrayed them. Turning away from Islam is a crime and he would be punished with full force. He is also afraid other people, including his father and his family, would harm him" (emphasis added)".*

25. This amply manifests that the Tribunal did consider the question whether the Appellant would be at risk from his former JI colleagues as a convert. The Appellant's claim was further addressed in the Tribunal decision under the heading "Future risk of harm because of the applicant's conversion from Islam to the Christianity faith" from paragraphs [156] to [165]. On the other hand, we are not inclined to accept the assertion of the Appellant that the Tribunal looked for corroborating country information. The Tribunal considered the claim by the Appellant in detail and came to the conclusion that he would not face serious harm due to what the Appellant had done in Nauru. It does not appear that the said conclusion was reached at as a result of lack of corroboration by country information.

26. Also, we are satisfied that the court below adequately considered the ground of appeal, and it was right for the primary judge to decide that the Tribunal addressed the claim put forward by the Appellant. Furthermore, we do not find any error in the primary

judge's finding that the claim did not arise squarely on the materials and the claim was not based on established facts. The primary judge held that the Tribunal was not obliged to consider the integers of the Appellant's claim as it did not squarely arise, and it was not based upon established facts. Nevertheless, it was further held that the Appellant's claim was subsumed in the findings of the Tribunal and the Tribunal in fact thoroughly considered it. The gist of the consideration of this aspect is found in paragraph 95 of the judgment as follows;

> *"[95] In any event, the Tribunal did consider the claims as articulated by the Appellant. In so far as a claim was raised that his claimed conversion to Christianity meant he would be at risk from his former JI colleagues, that was articulated and considered (Tribunal decision at [156]). At paragraph [156], the Tribunal refers to "the broader community, particularly from his former JI colleagues". The framing of the issue in this way by the Tribunal means that reading the Tribunal Decision as a whole, the later reference (at [163]) to the community should be read as including the former JI colleagues. Further to this is the finding (at [165]) of greater generality. In that paragraph the Tribunal finds that the Appellant will not face harm amounting to persecution because of his religion including apostasy, his membership of a particular social group, namely Christian converts from strict Islamic families or membership of a particular social group, namely people who are anti- Islam. This is a finding that the Appellant would not face any harm amounting to persecution. This is a finding of greater generality and any claimed harm from former JI comrades, would be subsumed into this finding. As would the basis of the claimed harm, being because of his religion, including apostasy. Stating the claims at this higher level of generality, again would subsume (if such claims "squarely" arose, which I do not accept they did) any specific claims based on the fact of the baptism or the fact of attending Christian Church services."*

27. For the reasons discussed above we are of the view that the Tribunal in fact considered the claim by the Appellant, in greater generality in which the integers of the Appellant's claim as per the ground of appeal were subsumed in the findings. As such, it was correct for the primary judge to decide that no error was constituted in the Tribunal decision. For those reasons we find no error in the primary judge's decision to affirm the Tribunal decision.

28. Accordingly, the appeal is dismissed with costs.

Dated this 27 March 2024.

Justice Rangajeeva Wimalasena

President

Justice Sir Albert Palmer

I agree

Justice of Appeal

Justice Colin Makail

I agree

Justice of Appeal