HIGH COURT OF AUSTRALIA

BELL, KEANE AND GORDON JJ

ETA067 APPELLANT

AND

THE REPUBLIC OF NAURU RESPONDENT

ETA067 v The Republic of Nauru
[2018] HCA 46
17 October 2018
M167/2017

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Nauru

Representation

G O'L Reynolds SC with J F Gormly and D P Hume for the appellant (instructed by Allens)

G R Kennett SC with A Aleksov for the respondent (instructed by Republic of Nauru)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

ETA067 v The Republic of Nauru

Immigration – Nauru – Refugees – Application for refugee status – Where Secretary of Department of Justice and Border Control determined appellant not refugee – Where Refugee Status Review Tribunal affirmed Secretary's determination – Whether Tribunal failed to act according to principles of natural justice – Whether Tribunal failed to assess evidence provided by appellant in relation to his claim to have a well-founded fear of persecution by reason of his political opinion – Whether Tribunal failed to give appellant an opportunity to comment on evidence concerning membership of political party – Whether Supreme Court of Nauru erred in affirming Tribunal's determination.

Words and phrases – "evidence material to assessment", "principles of natural justice", "well-founded fear of persecution".

Refugees Convention Act 2012 (Nr), ss 5, 22(b), 40(1).

1 BELL, KEANE AND GORDON JJ. The appellant, a 32 year old male, is a citizen of Bangladesh. Until he left Bangladesh, the appellant had always lived in the same suburb in Dhaka.

2 On 19 December 2013, the appellant arrived in Australia as an unauthorised maritime arrival and, on 24 December 2013, the appellant was transferred to the Republic of Nauru. On 20 March 2014, the appellant applied to the Secretary of the Department of Justice and Border Control ("the Secretary") under s 5 of the *Refugees Convention Act* 2012 (Nr) ("the Refugees Act") to be recognised as a refugee on the basis that he feared harm by reason of his affiliation with the Bangladesh Nationalist Party ("the BNP") and his actual or imputed opposition to the political group the Awami League.

3 The appellant claimed that he had been involved with, and worked for, the BNP from 2004 to 2008 and had been physically harmed in violent clashes between the BNP and the Awami League. The appellant ended his involvement with the BNP in 2008 and claimed that this was because he "didn't have the time to devote to the BNP" and he "wasn't interested in politics at [that] time"; he was not enjoying the work that he was doing, the "anarchy" had become worse, and he had had enough. The appellant claimed that, after he ceased his involvement with the BNP, members of the Awami League started "pressuring" him to join them. The appellant claimed to fear persecution by reason of his political opinion (due to his support for, and involvement with, the BNP) and by reason of his imputed political opinion (as a person opposed to the Awami League).

4 On 13 March 2015, the Secretary determined that the appellant was not recognised as a refugee and was not a person to whom the Republic of Nauru owed complementary protection. Following an application for review of the Secretary's decision, the Refugee Status Review Tribunal ("the Tribunal") conducted an oral hearing and, on 30 September 2015, affirmed the Secretary's decision. The Tribunal found that the appellant had not suffered harm amounting to persecution in the past by reason of his imputed political opinion and was also not satisfied that his fear of persecution, by reason of his political opinion, was well-founded. The Tribunal also considered that even if it were to accept that some harm might befall the appellant on return to Bangladesh, that harm would be "very localised" – confined to the suburb of Dhaka where his home is – and limited to harm threatened by local members or supporters of the Awami League. On 13 November 2017, the Supreme Court of Nauru affirmed the decision of the Tribunal.

Bell J
Keane J
Gordon J

5 In this appeal, which is brought as of right[1], the appellant advanced two grounds of appeal. The grounds, in substantially similar terms to the grounds the appellant unsuccessfully advanced before the Supreme Court, were that the Court erred in failing to find that:

(1) the Tribunal breached s 22(b) of the Refugees Act in that it "ignored and failed to assess relevant evidence provided by the appellant" in relation to assaults by supporters of the Awami League against persons who had refused to join, or attend meetings with, the Awami League ("the Awami League Assault Evidence"); and

(2) the Tribunal breached ss 22(b) and 40(1) of the Refugees Act by not giving the appellant an opportunity to ascertain or comment on whether he was ever a formal member of the BNP, and thereby acted contrary to the principles of natural justice.

6 During the hearing, the appellant was granted leave to amend the second ground to include a reference to information from the BNP website to which the Tribunal had regard[2] and to which he alleged the Tribunal failed to give him an opportunity to respond.

7 For the reasons that follow, the appeal should be dismissed.

Statutory obligations

8 The appellant's grounds centre on an alleged failure of the Tribunal to comply with certain provisions – ss 22(b) and 40(1) – of the Refugees Act.

9 Section 22, in Div 2 of Pt 3 of the Refugees Act, sets out the "[w]ay of operating" for the Tribunal. It provides that the Tribunal is not bound by

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1 s 44 of the *Appeals Act* 1972 (Nr); s 5 of, and Art 1 of the Schedule to, the *Nauru (High Court Appeals) Act* 1976 (Cth). See also *BRF038 v Republic of Nauru* (2017) 91 ALJR 1197 at 1203-1204 [35]-[41]; 349 ALR 67 at 73-74; [2017] HCA 44.

2 See [30]-[31] below.

technicalities, legal forms or rules of evidence[3] and "must act according to the principles of natural justice and the substantial merits of the case"[4].

10 Part 4 governs the procedures for merits review by the Tribunal. Section 40, in Div 2 of that Part, relevantly provides:

> "(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments *relating to the issues arising in relation to the determination or decision under review*.
>
> (2) Subsection (1) does not apply if:
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> (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
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> (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it." (emphasis added)

The Awami League Assault Evidence – Ground 1

11 The appellant contended that the Tribunal breached s 22(b) of the Refugees Act when the Tribunal allegedly "ignored and failed to assess relevant evidence provided by the appellant". That evidence was described in the following terms:

> "(a) The evidence was of assaults by Awami League supporters against:
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> (i) a particular young man named by the appellant who, like the appellant, had refused to join the Awami League; and
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> (ii) others named by the appellant in the Refugee Status Determination interview who had refused to attend Awami League meetings."

12 The appellant contended that this evidence "was relevant to the well foundedness of the appellant's fear that Awami League supporters intended to harm him". The appellant's complaint was that there was no consideration by the

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3 s 22(a) of the Refugees Act.

4 s 22(b) of the Refugees Act.

Tribunal of whether assaults on others by the Awami League gave rise to the appellant's well-founded fear of persecution. The appellant submitted that if the Awami League Assault Evidence had been considered by the Tribunal, it would have been expressly dealt with in the Tribunal's reasons. The contention should be rejected.

13 The absence of an express reference to evidence in a tribunal's reasons does not necessarily mean that the evidence (or an issue raised by it) was not considered by that tribunal[5]. That is especially so when regard is had to the content of the obligation to give reasons[6], which, here, included referring to the findings on any "material questions of fact" and setting out the evidence on which the findings are based. There was no obligation on the Tribunal to refer in its reasons to *every* piece of evidence presented to it.

14 Further, there is a distinction[7] between an omission indicating that a tribunal did not consider evidence (or an issue raised by it) to be material to an applicant's claims[8], and an omission indicating that a tribunal failed to consider a matter that is material: including one that is an essential integer to an applicant's claim[9] or that would be dispositive of the review[10].

15 In this matter, there was no error on the part of the Tribunal in relation to the Awami League Assault Evidence, and the Supreme Court was correct to reject that complaint.

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5 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 605-606 [31]; [2011] HCA 1. See also *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67 at 75 [34].

6 s 34(4) of the Refugees Act.

7 *SZGUR* (2011) 241 CLR 594 at 605-606 [31].

8 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346 [69]; [2001] HCA 30 quoted in *SZGUR* (2011) 241 CLR 594 at 605-606 [31].

9 *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at 447-448 [51]-[52].

10 *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at 604-605 [47].

Tribunal

16 It is common ground that the Tribunal's reasons did not expressly refer to the Awami League Assault Evidence. However, the Tribunal did refer in its decision record to the appellant's evidence concerning his own treatment by the Awami League.

17 In relation to events before the 2008 election, the Tribunal accepted that the appellant had been physically beaten in altercations between BNP supporters and Awami League supporters.

18 In relation to events after the 2008 election, and the cessation of the appellant's involvement with the BNP, the Tribunal acknowledged that there had been many instances of harassment by the Awami League. On the appellant's account, he had been approached and threatened by the Awami League up to 500 times over a period of approximately five years, from early 2009 to the end of 2013.

19 However, the Tribunal observed that the appellant had given no evidence of any actual harm he suffered between 2009 and 2013. That being so, the Tribunal put to the appellant that the Awami League clearly did not intend to harm him or they would have done so on one of their many interactions during this period of time. Nonetheless, the appellant maintained that he had developed a "deep-rooted fear" of being harmed.

20 Moreover, the Tribunal accepted that groups who were perceived as being associated with the BNP or the Awami League engaged in antagonistic behaviour towards their political opposites. Indeed, before the Tribunal, the appellant agreed in response to a Tribunal question that when the BNP was in power, groups of young BNP supporters would harass Awami League supporters; that is, "they were like identifiable gangs".

21 Finally, in relation to an alleged attack on the appellant's parents' home after he had left Bangladesh, the Tribunal was not satisfied that the intruders were looking for the appellant or his brother (a member of the BNP), even though the Tribunal accepted that it was plausible that members of the Awami League broke into the homes of known BNP supporters in the wake of the 2014 election.

22 Given those findings, the Tribunal was not satisfied that the appellant had suffered any harm "amounting to persecution at the hands of the Awami League for reason of his imputed political opinion". The Tribunal was also not satisfied that there was any real possibility of persecution of the appellant in the foreseeable future by reason of his political opinion (or imputed political

opinion) and, therefore, the Tribunal concluded that his fears were not well-founded.

Supreme Court of Nauru

23 The complaint in relation to the alleged failure of the Tribunal to assess the Awami League Assault Evidence was raised by the appellant in the Supreme Court. There, the appellant conceded that the Tribunal had identified that he did not claim to have been physically harmed. Khan ACJ considered the Awami League Assault Evidence and concluded that it was not "central" to or "corroborative" of the appellant's evidence. His Honour therefore found that there was no failure on the part of the Tribunal to discharge its review obligations in relation to that evidence. His Honour was correct to so conclude.

Consideration

24 The absence of a reference to the Awami League Assault Evidence in the Tribunal's reasons did not justify an inference that it was not considered. This was not a case where the reasons of the Tribunal were so comprehensive that the omission was indicative of the evidence having been overlooked[11]. Rather, as the respondent submitted, the absence of any express reference was consistent with the Tribunal having not found the Awami League Assault Evidence to be persuasive as to, let alone material to the assessment of, the likelihood of the appellant suffering harm amounting to persecution.

25 The question for the Tribunal was the risk of persecution of the *appellant*. The Tribunal was presented with detailed evidence regarding the appellant's own experiences of being confronted by the Awami League. And, as already noted, the Tribunal challenged the aspects of that evidence which it considered did not stand up to scrutiny.

26 The appellant's own evidence was material to the assessment of the well-foundedness of his fear. The Awami League Assault Evidence was not. At best, the Awami League Assault Evidence *might* have been explanatory of a subjective fear held by the appellant or *might* have added some plausibility to the appellant's suggestion that he may suffer harm. But in circumstances where the Tribunal was presented with detailed evidence of the appellant's own treatment by the Awami League, including evidence of threats but no actual physical violence, over a five year period, the Awami League Assault Evidence was not central to the determination of the appellant's claims.

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11 Cf *SZSRS* (2014) 309 ALR 67 at 75 [34]-[35].

27 Any perceived failure of the Tribunal to consider that evidence further did not cause the Tribunal to breach its obligations under s 22(b) to "act according to the principles of natural justice and the substantial merits of the case".

28 For those reasons, Ground 1 should be dismissed.

Formal membership of the BNP – Ground 2

29 The appellant contended, in substance, that the Supreme Court should have found the Tribunal breached ss 22(b) and 40(1) of the Refugees Act by not giving the appellant an opportunity to ascertain or comment on whether he was ever a formal member of the BNP.

30 Specifically, the appellant alleged:

> "(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 or comment on an issue the Tribunal found relevant to relocation:
>
> (i) That, contrary to the appellant's claim, the appellant was not ever a formal member of the BNP, and because of this (in part) the appellant had no profile within the BNP that would make him of interest to political activists outside his own suburb in Dhaka.
>
> (b) The Tribunal did not give the appellant the opportunity to be heard on the information in paragraph [24] of its reasons, which was information on which the Tribunal relied adversely to the appellant."

31 Paragraph 24 of the Tribunal's reasons was in the following terms:

> "The Tribunal notes from the BNP official website that membership of the BNP normally requires the new member, who must be over the age of 18, to fill in a prescribed membership form available at the party office and to pay a membership fee of five *taka* on joining and annually thereafter." (footnote omitted)

Tribunal

32 As to particular (a), during the course of the hearing the Tribunal directly asked the appellant whether or not he was a member of the BNP. The appellant was then asked a series of questions about the differences between being a supporter of the BNP and a member of the BNP, what was required to become a

member, and what had occurred at the time that he said he became a member. The appellant claimed that when a person becomes a member of the BNP, local officials list the new members' names in a book and this is announced by a leader at the *thana* level. The Tribunal's reasons record that the appellant could not recall any details of when his membership was so listed and announced, or who was present at any such occasion.

33 As to particular (b), the Tribunal opened its discussion of the appellant's claim that he was a member of the BNP in the terms of its par 24, set out above. The Tribunal then observed that the appellant's description of the process for membership of the BNP did not conform with "this official version" (that is, the information on the website) and that it was not satisfied that the appellant was ever formally a member of the BNP.

34 But that was not the extent of the Tribunal's findings. The Tribunal immediately went on to find that it accepted that the appellant was involved in the BNP through his older brother, himself a member of the BNP. The Tribunal found that he had spent time doing jobs for the party at the direction of his brother and local officials between 2003 and 2008. The Tribunal further found that the appellant would have been identified by members of his local community as a supporter of the BNP because of his visibility putting up posters and attending public rallies. It was therefore unsurprising that the Tribunal considered that, even though the appellant was affiliated with the BNP, he had not suffered harm amounting to persecution by reason of his political opinion, and was not satisfied that his fear of persecution in the future for reason of his political opinion was well-founded.

Supreme Court of Nauru

35 This ground was not considered by the Supreme Court. In that Court, the respondent submitted[12] that the appellant would need to succeed on both grounds in order to obtain relief. Having found that the appellant had failed in relation to ground 1, the Court considered it was unnecessary to address ground 2.

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12 The decision of the Supreme Court records that the appellant "concede[d]" this issue. However, in oral argument before this Court, the respondent clarified that the appellant's concession was subsequently withdrawn in the Supreme Court and that, accordingly, what is recorded in the Supreme Court's reasons is inaccurate: see *ETA067 v The Republic of Nauru* [2018] HCATrans 114 at 19; *ETA067 v The Republic* [2017] NRSC 99 at [29].

Consideration

36 The appellant's complaints in this Court are, in substance, that the Tribunal did not bring to his attention or allow him to ascertain that his formal membership of the BNP was in issue so that he could comment or provide further evidence, and did not put to him the evidence from the BNP website.

37 Section 40 of the Refugees Act directs attention to the "issue[] arising in relation to the determination or decision under review". The language of s 40(1) makes it clear that the subject of inquiry is the issue and not individual pieces of evidence. The Tribunal is not required to refer to every piece of evidence and every contention made by an applicant under s 5 of the Refugees Act.

38 Here, the issue, properly framed, was the appellant's affiliation, or purported affiliation, with the BNP. The appellant contended that the Tribunal should have "put [him] on notice of its doubts that [he] was ever a formal member of the BNP by at least asking him why his account of his formal membership should be accepted". That contention should be rejected.

39 The appellant was on notice that the Tribunal doubted that he was a BNP member. The Tribunal asked him to respond to questions based on his account of what was required for membership, including whether and when his name was listed or announced, and whether his brother (himself a BNP member) was present. Accordingly, and consistent with s 40(1), the appellant was "invite[d] … to give evidence and present arguments relating to" his involvement with the BNP, including his formal membership.

40 Moreover, the Tribunal's assessment of the appellant's potential political profile was conducted, correctly, on the basis of the *totality* of his political activities, not solely the question of formal membership. Indeed, throughout its reasons, the Tribunal considered the appellant's involvement and affiliation with the BNP and accepted that he would be recognised among members of the local community as being part of the BNP. It was therefore plausible that members of the local community would impute him with the political opinion of the BNP, and his formal membership status would be unlikely to alter that position. But despite his visibility and affiliation with the BNP, the Tribunal nonetheless found that the appellant had not suffered any harm amounting to persecution and did not risk suffering harm amounting to persecution in the foreseeable future. That conclusion was correctly reached. Put in different terms, the appellant's membership or lack of formal membership of the BNP was not determinative of the outcome of the Tribunal's review.

41 Ground 2 in this Court, and therefore the question of formal membership, was, however, primarily framed by reference to the issue of relocation.

Bell J
Keane J
Gordon J

The argument, so far as it goes, was that the appellant's formal membership would have had an impact on his profile within the BNP, meaning that, were he found to be a member, there would have been a greater chance that he would have been identified as holding an opposing view to the Awami League in other parts of Bangladesh, such that even if he were to relocate to another area (within Dhaka or elsewhere in the country) he would have still faced a risk of harm. That argument should be rejected. The argument was predicated (as was the finding of the Tribunal to which it relates) on it being established that the appellant had a well-founded fear of persecution. For the reasons stated earlier, there was no error in the Tribunal's conclusion that the appellant did not have a well-founded fear of persecution, including in the suburb of Dhaka where he lived.

42 Moreover, even if the appellant's well-founded fear of persecution was found to exist, it was isolated to the suburb in which he lived, meaning he could safely return to another part of Dhaka, or Bangladesh, without harm and therefore would not be afforded protection.

43 Accordingly, the issues relevant to relocation need not be considered.

Order

44 For those reasons, the appeal should be dismissed with costs.