



IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION]

Case No. 103 of 2015

IN THE MATTER OF an appeal
against a decision of the Refugee
Status Review Tribunal TFN
15020, brought pursuant to s43
of the *Refugees Convention Act*
1972

BETWEEN:

SOS054

Appellant

AND

THE REPUBLIC OF NAURU

Respondent

Before: J. E. Crulci, A/ CJ

Appellant: T. Baw

Respondent: T. Reilly

Date of Hearing: 22 June 2016

Date of Ruling: 17 November 2016

CATCHWORDS

APPEAL - Refugees – Refugee Status Review Tribunal – section 34(4) Refugees Convention Act 2012 – section 37 Refugees Convention Act 2012 – Procedural fairness – Whether failure to consider an integer of the claim.

JUDGEMENT

1. This is an appeal from a decision of the Refugee Status Review Tribunal ('the Tribunal') given on the 12 August 2015 affirming a decision of the Secretary for the Department of Justice and Border Control ('the Secretary') made on the 14 March 2015 that the Appellant is not recognised as a refugee as defined under the 1951 Convention relating to the Status of Refugees ('the Convention') and is not a person to whom Nauru owes complimentary protection under the *Refugees Convention Act 2012* ('the Act').
2. The matter is before this Court by way of section 43 of the Act:
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.
3. The appeal proceeds on two grounds.
 - (a) The Appellant was not afforded procedural fairness in that the Tribunal's decision relied upon articles that were published after the hearing had concluded, and thus section 37 of the Act was not complied with;
 - (b) The Tribunal did not comply with section 34(4) of the act by failing to consider an integer of the Appellant's claim that of being unable to work if returned to Kabul.

The Tribunal under the Act

4. The Tribunal is a creature of statute and the Act relevantly sets out the establishment, constitution, powers, merits, reviews and procedures that govern it.
5. 34 Decision of Tribunal on application for merits review
 - (4) The Tribunal must give the applicant for review and the Secretary a written statement that:
 - (a) sets out the decision of the Tribunal on the review; and
 - (b) sets out the reasons for the decision; and
 - (c) sets out the findings on any material questions of fact; and
 - (d) refers to the evidence or other material on which the findings of fact were based.

37 Invitation to applicant to comment or respond

The Tribunal must:

- (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of information

that the Tribunal considers would be the reason, or a part of the reason, for affirming the determination or decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the determination or decision that is under review; and

(c) invite the applicant to comment on or respond to the information.

Background

6. The Appellant is a young man, single, and has never been married. There is some ambiguity over the year of his birth, being either 1994 or 1997. The day and month are given as 31 December. The Appellant maintains it is 1997. Either way he is between 18 and 21 years of age. He is a citizen of Afghanistan and identifies as a Shi'a Muslim of Hazara ethnicity.
7. Prior to his departure from Afghanistan in September 2013 he was living in Kabul with his father, mother, brother and sisters. His father and brother were killed about a month before his departure, as they travelled from Kabul to another province where they were working as cleaners and drivers for a foreign company.
8. After the death of his father and brother he travelled from Afghanistan to Indonesia where he boarded a boat for Australia. En-route the boat was intercepted and after initially being transferred to Christmas Island the Appellant arrived on Nauru in November 2013.
9. The Appellant attended a Refugee Status Determination Interview at the Nauru Processing Centre, following which the Secretary to the Department and Border Control determined that the Appellant was not recognised as a refugee, nor was he owed complimentary protection under the Act.

Determination by the Secretary

10. The Secretary found that:
 - (1) Shi'as are not being targeted in any systemic way and are not a prime target of insurgency within Kabul..... It appears that there is not a reasonable possibility that the Applicant would be harmed for being a Hazara Shi'a in his home region of Kabul. As such I find that his fear of harm on the basis of being a Hazara, a Shi'a and his

membership of the particular social group 'young Shi'a Hazaras in Afghanistan' is not well founded.¹

- (2) There is not a reasonable possibility the Applicant would be harmed for reasons of his imputed political opinion against the Taliban; his imputed and/ or actual political opinion in support of the West because of his father and brother's work with ISAF²; or his membership of the particular social group 'family'³.
- (3) In the particular circumstances of the Applicant, who has family in the comparatively safe city of Kabul and no expressed need to travel to other areas, there is not a reasonable possibility that he will be harmed for reasons of his membership of the particular social group 'failed asylum seeker returning from the West.'⁴

11. Having determined that the Applicant did not face a reasonable possibility of harm, and that his fear was not well-founded, the Secretary turned to Complementary Protection. It was noted that the Applicant has family in Kabul and therefore will not be an Internally Displaced Person (IDP). His existing family connections negate there being a reasonable possibility of the Applicant facing the risk of becoming an IDP. It was therefore concluded that Nauru did not owe the Applicant complementary protection.⁵

Determination by the Tribunal

12. Before the Tribunal the Appellant argued that he has a well-founded fear for Convention reasons of minority ethnicity and religion. He placed numerous documents before the Tribunal citing risk of harm, including persecution of failed asylum seekers returned to Afghanistan⁶.
13. In relation to Nauru's international obligations, it was argued by the Appellant that civilians are at risk in Afghanistan citing "threats of violent attacks against individuals including abductions, extortion, torture, terrorist attacks and executions"⁷. The Appellant argued that the state was unable to protect its citizens and that the country information provided enlivened Nauru's complementary protection obligations.
14. The Tribunal found that:
 - (1) There is no country information available to the Tribunal that suggests that when the Taliban kill someone who is connected to the

¹ Book of Documents, 104, 105

² International Security Assistance Force

³ Ibid, 105

⁴ Ibid, 106

⁵ Ibid, 106

⁶ Ibid, 116 [28]

⁷ Ibid, 120 [46]

government and /or foreign forces that they also target the immediate family⁸;

- (2) It does not accept that he would be imputed with a political opinion against the Taliban in support of the West, because his father and brother worked with ISAF...or that he would face a reasonable possibility of being persecuted on this basis.⁹
- (3) The applicant does not have a well-founded fear of persecution, for the reasons of an actual or imputed political opinion or his membership of the particular social group of family members of those associated with the west.¹⁰
- (4) When Hazaras travel on the roads outside of Kabul they are at risk of harm....virtually all people are at risk...Hazaras are at an increased risk.¹¹
- (5) Hazara Shi'a can be at risk in areas where the Taliban is in control or there is little government control. This is not the situation in Kabul. The Taliban is present in Kabul but they concentrate on high level government employees, high level politicians or high level employees of the Defence Ministry.¹²

15. Regarding suicide bombings the Tribunal said as follows:

Although there are suicide bombings, the information set out above suggests that they are targeted towards high profile targets and not directed towards Hazara Shi'a. The Tribunal also refers to the recent suicide attacks in Kabul¹³ and notes that the attacks were towards the ANP, Foreign forces (a NATO base), the government ANA army base and the airport. Civilians were harmed but there is nothing to suggest that the attacks were directed towards any particular religious or ethnic group.¹⁴ (emphasis mine)

...

The Tribunal finds that the applicant does not have a well-founded fear of persecution for his race or religion, an imputed political opinion in opposition to the Taliban or because of his membership of the particular social group of young Hazara Shi'as.¹⁵

⁸ Book of Documents, 276 [26]

⁹ Ibid, 278 [33]

¹⁰ Ibid, 278 [34]

¹¹ Ibid, 279 [38]

¹² Ibid 281 [43]

¹³ Ibid, 283, Footnote '18' referring to article in *The Guardian* dated 8 August 2015

¹⁴ Ibid, 283 [51]

¹⁵ Ibid, 284 [54]

16. In relation to discrimination regarding the Appellant's inability to work, and work experience, the Tribunal held:

The applicant claimed that as he had no education and work experience he would have trouble gaining employment. Further as the last remaining male relative his is culturally compelled to provide for his family...The applicant did not attend school because he did not want to go despite his parents trying to convince him to go. He was not denied an education for a Convention reason. He had no work experience because he said he was young and did not need to work as he was supported by his family...The applicant's mother is able to earn a living and support herself and her daughters without assistance from extended family.¹⁶

17. The Tribunal concluded that it:

... has considered the applicant's circumstances cumulatively that is whether a young, male, Hazara, Shi'a and who has no education or work experience, who would be returning from a western country as a failed asylum seeker and whose family members worked for foreign forces and were killed by AGEs, but finds that even when the applicant's claims are considered cumulatively he does not have a well-founded fear of persecution for a Convention reason and is not a refugee.¹⁷

Appellant's submissions

18. In Ground One the Appellant points to the Tribunal's reference to an article published after the close of the hearing, cited at paragraph 15 above. The hearing before the tribunal concluded on the 8 June 2015, the articles were published on the 8 and 10 August 2015¹⁸ and the Tribunal's decision handed down on the 12 August 2015. For the Tribunal to rely on this, the Appellant argues, is contrary to the requirements of procedural fairness as there was no opportunity for the Appellant to consider the material and formulate a response.
19. In support of this ground the Appellant draws the Court's attention to a number of Australian authorities¹⁹ and submits that the similarity between this appeal and the facts of *MZYRD*²⁰ are persuasive. In that case Murphy J held:

¹⁶ Book of Documents, 287 [70]

¹⁷ Ibid, 288 [73]

¹⁸ *The Guardian* Kabul: death toll rises in deadliest 24 hours Afghan capital has seen in years, 8 August 2015; *BBC Afghanistan: Taliban suicide bomb attack near Kabul airport, 10 August 2015*

¹⁹ *Minister for Immigration and Citizenship v SZGUR* (2001) 241 CLR 594; *Re Refugee Tribunal and Another; ex parte Aala* (2000) 204 CLR 82; *VAAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 117

²⁰ *MZYRD v Minister for Immigration and Citizenship* [201] FCA 830

I consider that the appellant was not given the opportunity to respond to information which was credible, relevant and significant to the reviewer's decision. ... I am satisfied that the procedure which should have been followed is either that the country information which came to light after the hearing should have been put before the appellant for his consideration and comment, or it should not have been considered by the Reviewer at all. ... It...appears unfair for a Reviewer to take into account recent country information which indicates an improvement in the situation for failed asylum seekers, without the claimant having the opportunity of refuting it. The appearance of unfairness in this case is magnified by the fact that the information was not even available until after the hearing.²¹

20. At the interview with Tribunal members the Appellant was asked about whether Hazaras were targeted in Kabul:

Tribunal member: But in Kabul the Taliban's not running Kabul or running the government there. And although there are Taliban there the security's better. And the Taliban aren't targeting Hazaras in Kabul. They have more strategic targets like the government and other things in Kabul.

Interpreter: I have news here I can prove or show you that they are targeting Hazaras.²²

...

Tribunal member: ... And I would just suggest that the country information suggests that although the Taliban does carry out attacks in Kabul they tend to be much more strategic against the government and not against Hazaras, but we will look at all the information that you've provided us. Do you think that the fact you've been outside of Afghanistan will cause you problems if you had to go back?

Interpreter: Yes. If I return I know that my life would be in danger.

Tribunal member: But would it be in danger because you've been out in Nauru for about a year, I think it is?

Interpreter: I – I'm – I'm not worried only about being here in Nauru – that my life would be in danger because of that but also because I'm Hazara, because I'm Shiah.²³

...

Interpreter: They target Hazaras and Shias²⁴

²¹ Ibid, at [50]

²² Book of documents, 233 [41 - 47]

²³ Ibid, 235 [30 - 47]

²⁴ Ibid, 236 [3]

21. It is argued on behalf of the Appellant that the Tribunal made its determination based on information sourced after the hearing ended. The information referred to was therefore not put to the Appellant, and this by failure to do so the Tribunal offends against the principles of procedural fairness and sec 37 of the Act.
22. On the second ground of appeal it is submitted that the Tribunal failed to consider the claim that the Appellant needs to work and that there is no work for him in Kabul:
- Interpreter: ...But if I have to go I need to work somewhere. I need to survive on something and I have to go and beg those people again to give me a job to survive or to live.
- Tribunal member: But there's other jobs in Kabul besides working for foreign forces.
- Interpreter: There are no jobs in Afghanistan. What sort of jobs? Everywhere you go it's not safe. I'm not literate. I cannot work in the office because of my education. I have no education.
- Tribunal member: But you could – your father and brother worked as labourers in the bazaar. You would be able to do that sort of work, wouldn't you?
- Interpreter: There is no work, no. There is no work, no job in Kabul. If there was I would have worked there. There's a lot of pressure from the Taliban as well. The situation's getting worse. There are work – that you have to work for the foreign agencies or companies. And people go there and then they get killed.²⁵
- Tribunal member: ...previously your father and brother had done some construction work. But if your mother and sister are able to mete out a living why do you think it wouldn't be possible for you to get any work?
- Interpreter: Because the situation is very different and difficult. And also it's not safe over to – you have to know – you have to know someone in there to get a job or you have to go and work for a foreign agencies or ISAF.²⁶
23. In failing to set out its findings on questions of material facts together with the evidence on which the findings were made, the Appellant submits that the Tribunal has erred in not addressing his claims in relation to being able to work.
24. The Tribunal has not complied with the requirements of sec 34(4) of the Act by omitting to set out the material findings in relation to the Appellant's expressed claim of 'needing to work'. The Appellant says

²⁵ Ibid, 233 [11 – 27]

²⁶ Ibid, 246 [13 – 19]

that is insufficient for the Tribunal to note "...the situation of the applicant who... will not be required to travel outside Kabul in Afghanistan."²⁷

Respondent's submissions

25. In relation to ground one the respondent accepts that procedural fairness requires that information be disclosed that is '*credible, relevant and significant*'²⁸.
26. The material referred to in ground one of the appeal, relates to information not substantially different to that which the Appellant was already aware of, nor was it adverse to his claims. The issue of suicide bombs was aired with the Appellant in interview and there was no requirement to discuss the details of the most recent suicide attacks. Consequently the respondent refutes that there was a breach of procedural fairness or failure to comply with sec 37 of the Act.
27. Turning to the second ground of the appeal the respondent submits that a fair reading of the Tribunal's decision is that the Appellant would not be discriminated against in seeking employment to the extent of amounting to persecution. Moreover the Tribunal did consider the Appellant's claims that he would have difficulty finding work and the dangers inherent in travel outside Kabul.

Considerations

28. Dealing with the last ground first. During interview the Tribunal discussed with the Appellant his claim in relation to his inability to find work. The Tribunal found on the facts before it that there was no Convention reason amounting to persecution why the Appellant would not be able to find some work as his mother and sister have done, and thereby earn a living and support himself.
29. The question before this Court is whether the Tribunal erred in law and failed to comply with the requirements of sec 34(4) of the Act. The Tribunal set out its reasons and findings on the question of employment, and referred to the evidence for its reasons. There was no failure to consider an integer of the claim. The Tribunal has complied with the requirements of sec 34(4) of the Act, and this ground of appeal fails.
30. Turning to the material sourced after the hearing. Is the information referred to credible, relevant and significant to the decision; additionally is it information that is adverse to the interests of the Appellant?

²⁷ Book of Documents, 279 [39]

²⁸ As discussed in *Minister for Immigration and Citizenship v SZQHH* (2012) 200 FCR 223

31. The Appellant stated in submissions and his interview with the Tribunal, that in Kabul the Taliban target Hazaras and Shi'a.²⁹ The Tribunal found that the Appellant is not recognised as a refugee as he did not have a well-founded fear of persecution for a Convention reason (being as a member of a social group of Hazara Shi'as).
32. Part of the Tribunal's reasoning in coming to this conclusion was in citing the information from the articles in dated 8 and 10 August 2015³⁰ that the recent suicide attacks were attacks "towards the ANP, Foreign forces (a NATO base), the government ANA army base and the airport. Civilians were harmed but there is nothing to suggest that the attacks were directed towards any particular religious or ethnic group".³¹
33. I cannot comment regarding the credibility of the information, other than to note it is from a source relied upon by the Tribunal. It is relevant and significant because it supports the Tribunal's findings that the attacks were not targeting particular religious or ethnic factions. It is adverse to the Appellant's claim as it is information contrary to that which he had put before the Tribunal (that Hazara Shi'a are targeted).
34. The respondent's contention that the information is not 'new' is accepted in so far as it is in line with the views previously expressed. However, what use was made of this additional information by the Tribunal? Did the additional information tip the balance against the accepting the Appellant's claims that Hazara Shi'a are targets? If the answer to these questions could be yes, then the Appellant was entitled to have an opportunity to consider the information, form a view on it, and respond if he wished to do so.
35. The information is adverse to the Appellant's claim. If the information played no part in the determination by the Tribunal then why was it included? It was information at variance to the Appellant's claim that Hazara Shi'a are targeted in Kabul. By referring to the information in support of the Tribunal's view to reject the Appellant's claim and find that he has no well-founded fear for a Convention reason, without first allowing the Appellant an opportunity of comment or rebuttal, the Tribunal has erred.
36. In the High Court of Australia case of *SAAP*³² it was held by McHugh J: "If the requirement to give written particulars is mandatory, then failure to

²⁹ Paragraph 20 above

³⁰ Paragraph 18 above

³¹ Paragraph 15 above

³² *SAAP v Minister for Immigration and Multicultural Affairs* (2005) HCA 24


*comply means that the Tribunal has not discharged its statutory function. There can be no "partial compliance" with a statutory obligation to accord procedural fairness. Either there has been compliance or there has not. Given the significance of the obligation in the context of the review process (the obligation is mandated in every case), it is difficult to accept the proposition that a decision made despite the lack of strict compliance is a valid decision under the Act.*³³

37. The requirements of sec 37 of the Act include the phrase 'The Tribunal must'. This is mandatory and failure to comply with the requirements of the section by the Tribunal is a failure to discharge its statutory function. Ground one of the appeal succeeds.

Decision

38. ORDER

- (1) The appeal is allowed
- (2) The Tribunal's decision for TFN 15020 dated 12 August 2015 is quashed.
- (3) The matter to be remitted to the Refugee Status Review Tribunal for reconsideration according to law


J.E. Crulci, Acting Chief Justice


Dated 17 November 2016

³³ SAAP v Minister for Immigration and Multicultural Affairs (2005) HCA 24, at [77] The High Court was considering the provisions of section 424A Migration Act 1958