IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION] Case No.104 of 2015

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN 15019, brought pursuant to s43 of the *Refugees Convention Act* 1972

BETWEEN

CRI028 Appellant

AND

THE REPUBLIC Respondent

Before: Crulci J

Appellant: J. F. Gormly
Respondent: L. Brown

Date of Hearing: 26 July 2016
Date of Judgment: 11 May 2017

CATCHWORDS
APPEAL - *Refugees – Refugee Status Review Tribunal – Relocation principles – Home Area(s) – Reasonableness of Relocation – Family Unity – Appeal DISMISSED*

JUDGMENT

1. This matter comes to the Court pursuant to section 43 of the *Refugee Convention Act* 2012 ("the Act")) which provides:

    43 Jurisdiction of the Supreme Court

    (1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.

    (2) The parties to the appeal are the appellant and the Republic.

    ...

2. The determinations open to this Court are defined in section 44 of the Act:

    44 Decision by Supreme Court on appeal
    (1) In deciding an appeal, the Supreme Court may make either of the following orders:
    (a) an order affirming the decision of the Tribunal;
    (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

3. This Court is in agreement with the procedure in relation to the matter of extension of time as outlined in *ROD128 v The Republic*[1]:

    "The Republic for the efficient disposal of the case agreed that the appellant be allowed to present his case on the merits of the proposed appeal and at the same time present his argument on the substantive issue, and if the Court was satisfied that there was merit in the appeal then the extension of time can be granted. However, after the hearing, the Republic and the lawyers for the appellant... have come to an agreement that the extension of time will not be in issue. Accordingly, a consent order was filed ...whereby the time of appeal was properly extended by the Registrar pursuant to the amendment to the Act and consequently the issue of the appeal being out of time is no longer an issue."

4. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on 13 August 2015 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of 14 March 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 relating to the Status of Refugees ("the Convention"), and is not owed complimentary protection under the Act.

[1] [2017] NRSC 8

BACKGROUND

5. The appellant is a 32 year old married man with one child. He was born in the Chakwal District. He is a Sunni Muslim, a Punjabi by ethnicity and a citizen of Pakistan. The appellant's wife is Shiaa.

6. The appellant's father is deceased and his mother and siblings live in his home village. He attended school until grade nine and then worked variously as a Mechanic apprentice, Boiler-fitter, Welder and Loader. He went to Karachi to look for work in 2004 and remained for a couple of years. He went back to his home village for one year working in a cement factory, and then returned to Karachi for work. On the second occasion in Karachi he met and married his wife. She is a Shiaa Muslim and it was not an arranged marriage, rather a 'love match' which did not have the approval of his family.

7. On many occasions whilst living in Karachi he was forced to attend demonstrations, meetings, various events and contribute money to the Muttahida Quami Movement (the "MQM") cause. In order to ensure attendance at the various events, the MQM would confiscate people's national ID cards, only returning them after the event. If he refused to attend he was assaulted and told that it would go badly for him and that he would be in trouble. He was unable to go to the police for protection because many members of the police force were also MQM supporters.

8. In May 2013 some MQM supporters came to his house demanding that he attend a demonstration and threatened him with harm if he did not attend. As a result the appellant decided to flee Pakistan as he feared that if he remained he would be detained, harmed or killed in the on-going civil and political violence. In August 2013 he travelled to Malaysia, then on to Indonesia where after a period of a couple of months he boarded a boat for Australia. This was intercepted and he was taken to Christmas Island arriving in December 2013; a few days later he was transferred to Nauru.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

9. The appellant states that MQM is very active in Karachi and frequently hold events and demonstrations which people are forced to attend. Attendance is ensured by the MQM supporters seizing national ID cards, which are returned at the end of the meeting. Members supporting the MQM terrorise people and he was on occasions slapped around.

10. The appellant was approached at home by supporters of the MQM and was told to attend a forthcoming demonstration and that if he did not do so he would be harmed. The appellant fearing harm if he were to remain in Pakistan left the country in August 2013. He is opposed to the MQM ideals and has frequently objected to attending their demonstrations.

Secretary's Decision

11. The Secretary accepted that the MQM are active in Karachi but did not accept that the appellant ever attended their demonstrations rallies or meetings, nor that he had ever been threatened or assaulted by them.

12. The Secretary noted the appellant response to why he remained in Karachi was that his wife is from there and does not want to move, furthermore that his family did not get along with his wife and he struggled to find employment in his home area.

13. The Secretary found that the appellant is not political, is not a member of a religious minority, and he does not have a profile that would lead him to be targeted in Karachi. Therefore the appellant in the Secretary's view does not face a reasonable possibility of harm in Karachi. In relation to his home region the Secretary stated as follows "*I have not considered whether he faces a reasonable possibility of harm in his alternative home region ... in Chakwal District of Punjab Province of Pakistan.*"[2]

14. The Secretary did not make a finding on the availability of state protection, as he found there was no real possibility that the appellant would face harm, similarly he did not make a finding on the reasonableness of relocation. Having found that there was no reasonable possibility that the appellant would be harmed, the Secretary determined that the appellant's fear was not well-founded. The appellant is not found to be a refugee under the Act. The Secretary furthermore determined that for similar reasons Nauru does not have complementary protection obligations to the appellant.

REFUGEE STATUS REVIEW TRIBUNAL

15. The Tribunal having questioned the appellant in the hearing accepted that for a period of four years to May 2013 that the appellant was coerced into attending meetings and paying money to the MQM thugs as they demanded.

16. The Tribunal considered the issues of the appellant's mixed marriage, he being Sunni and his wife Shiaa. The Tribunal noted that although the appellant's wife did not want to go to his home area, the appellant held no fear of returning to Chakwal accompanied by his wife. The Tribunal formed the view that the reluctance to return to Chakwal was based on the wife's wish not to leave her own family in Karachi.

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[2] Book of Documents, page 60 para 8

17. In looking at the appellant's 'home area' the Tribunal was guided by the Federal Court of Australia decision in the *SZQEN*[3], summarising the English cases and jurisprudence as follows: '*where a person has more than one home area, the decision-maker is not required to assess whether it or not it is reasonable to relocate from one area to the other, merely whether that person has a well-founded fear of persecution in each of the home areas.*'[4]

18. The Tribunal considered that the appellant was born and raised in Chakwal, and prior to departing Pakistan aged 30 years, had spent 22 years living in his home area of Chakwal. He lived in Karachi for the previous six years, where he had married, had a child and was working. The Tribunal accepted that Karachi is the home area for the appellant and family; also that Chakwal is a home area for the appellant alone, noting that *"it might not to be a home area for his wife, who has never lived there"*.[5]

19. Whilst the Tribunal accepted that the appellant made well be subject to threats or harm from the MQM, which amounts to persecution for a Convention reason of his actual or imputed political opinion, they view this threat to be restricted to the Karachi area. As the appellant is found not to have a reasonable possibility of persecution in his home in area of Chakwal he does not have a well-founded fear of persecution, including fears arising from his mixed Shia-Sunni marriage.

20. The applicant was found by the Tribunal to have two home areas, and applying the principles of *SZQEN* they find 'the ordinary principles of relocation to not apply in the situation' of having two home areas[6].

21. Notwithstanding the Tribunal's determination noted above, they went on to consider whether relocation was appropriate in the appellant's case. The Tribunal found that the appellant's profile was not such as to attract the attention of the MQM throughout Pakistan. They concluded therefore that if he did not return to Karachi and went to some other part of Pakistan (such as Chakwal) that he could safely, practically, and legally relocate within Pakistan.

Tribunal's decision

22. Having determined that he could return and lead a normal life within Pakistan the Tribunal found that the appellant is not a refugee. When considering complementary protection the Tribunal found that as the appellant did not face a real possibility of degrading or other treatment violating his human rights he was not owed complementary protection.

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[3] *SZQEN v Minister for Immigration and Citizenship* (2012) 202 FCR 514

[4] Book of Documents, p 176, para 77

[5] Ibid., p 176 para 81

[6] Ibid., p179, para 94

23. The Tribunal affirmed the Secretary's decision that the appellant is not a refugee, nor Is he owed complimentary protection under the Act.

GROUNDS OF THIS APPEAL

24. The appellant's amended application raises three grounds of appeal, the first two in the alternative, in relation to the Tribunal finding that the appellant is not recognised as a refugee :

1) Whether a person can have more than one 'home area' and thus negate the principles of the relocation alternative, and whether it is correct in law to say that the decision-maker is not required to assess the reasonableness of relocation from one home area to another; and/ or
2) If the existence of a second home area negates the requirement of a reasonableness of relocation question, does this second area need to be considered for the appellant on his own or as appropriate for him and his family together; and
3) If there is not a second home area exception, was the Tribunal required to and did it take into consideration the appellant's claim that the family as a unit could not relocate to Chakwal from Karachi.

Relocation principles – 'two home areas'?

25. The appellant submits to the Court that the Tribunal was incorrect in asserting that *SZQEN*,[7] and the United Kingdom cases referred to, were authority for the proposition that the asylum seeker could have two home areas, and that relocation from one to the other was not a matter to be considered under the relocation principles.

26. The Court is referred to the following from the Judgment of Yates J who stated as follows:

> "I propose to apply the statement of principle in *Randhawa*[8] by Black CJ (at 440-441) which plainly proceeds on the basis that the relocation principle concerns relocation from a claimant's home region to another place in the claimant's country of nationality that is not the claimant's home region. This position is supported by the United Kingdom authorities to which I have referred. In proceeding on this basis I do not think that the reference in the cases to "home region" or "home area" (or similar expressions) is to be given a narrow or restrictive meaning to refer, for example, only to the place where the claimant happens to be living at the time of the feared persecution, or that a "home region" or "home area" is necessarily limited to one location if similar and substantial ties exist at another location that would also appropriately characterise that location as a

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[7] (2012) 202 FCR 514

[8] *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437

"home region" or "home area" of the claimant. Whether such ties exist and whether a particular location can be appropriately characterised as a "home region" or "home area" are matters of fact."[9]

27. The appellant submits that the case mentioned above does not talk in terms of multiple home areas rather, that the determination of what is the 'home area', is a matter to be considered taking into account the circumstances of the person. By the Tribunal determining that there was in existence two home areas and that this then negated their need to consider relocation principles, the Tribunal fell into error.

28. The respondent argues that it was open to the Tribunal to find that the appellant had two home areas in Pakistan, against which they should assess his claims of persecution. The respondent states that if there is an area in a part of the country to which the appellant could reasonably move to live safely then it follows that according to well established principles he does not have a fear of persecution.

29. It was found by the Tribunal that in one of the appellant's home regions he did not face a well-founded fear of persecution. As such say the respondents the appellant was not outside Pakistan on the basis of a well-founded fear of persecution for a Convention reason. Therefore the respondent submits that the question of relocation within Pakistan did not arise.

30. In the case of *SZQEN*, and in particular the section cited at paragraph 27 above, the Court is of the view that what is being put forward is that when assessing the situation it may be that there is more than one place to which the claimant can have a substantial tie or links. The Court in *SZQEN* noted that whether these links exist or not is a matter of fact determined by the reviewer.

31. In order to be recognised as a refugee the appellant must be outside his home country because of a well-founded fear of persecution for a Convention reason. It is up to the Tribunal to determine whether the appellant has a well-founded fear in a particular area.

32. If an appellant has ties or links to more than one area, as in this case, then the Tribunal can rightly assess whether the appellant has a well-founded fear of persecution in each area where he has been residing or is able to take up residence because of those ties. The question of relocation only arises if the appellant is living outside of his country and cannot return to an area in which he was living, or an area in which he has ties, due to a well-founded fear of persecution for a Convention reason.

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[9] (2012) 202 FCR 514, at [38]

33. This Court is of the view that if proper consideration is given to each area in which an appellant has ties and can safely live without a well-founded fear of persecution, then a determination that there is such an area to which he can return is not 'operating to defeat the relocation alternative principles'. These principles only arise when there is a well-founded fear of persecution for a Convention reason.

34. The Tribunal in the matter before the Court found that Chakwal was an area in which the appellant had lived for 22 of his 30 years; that his family lived there; and that he had suffered no well-founded fear of persecution whilst living there, nor was likely to in the future. Furthermore the Tribunal found that relations between Sunni and Shiaa in that area were good and that there appeared to be no reason to believe that the appellant could not return there with his family. As such questions pertaining to the 'relocation principles' do not arise.

35. The Court agrees with the appellant's submission that the UK cases referred to in *SZQEN* consider the question of relocation when the home area (singular) is the place of the claimants well-founded fear of persecution, rather than the proposition that a claimant can have more than one home area. However this misinterpretation does not affect their ultimate conclusion that the appellant could safely live in Chakwal.

36. That this was a 'home area' in which the appellant could live was a finding of fact by the Tribunal and (unless it is a decision based on erroneous interpretation of other facts) it cannot be the subject of an appeal on a point of law to this Court. This ground of appeal fails.

'What is a home area?' – Did the Tribunal ask the right questions?

37. The appellant argues that in considering whether Chakwal is a 'home area' for the appellant they considered him in the singular and not as a unit with his immediate family. The appellant highlight's the section in the Tribunal's determination which reads as follows:

> "The Tribunal also finds Chakwal to be a home area for the purposes of this assessment. While it may not be a home area for his wife, who has never lived there, it is the applicant's claim the Tribunal is assessing."[10]

38. It is argued that this is a misconception on behalf of the Tribunal as it disregards the facts that he is married and has a child, and that his wife and child have always lived in Karachi. The appellant cites UNHCR Refugees Convention Article 12(2) and the International Covenant on Civil and Political Rights which state that the rights of the marriage be respected, and that the family is a fundamental group or unit of society and entitled to protection.

[10] Book of Documents, page 176, para [81]

39. The appellant had told the Tribunal at the hearing that his wife and child had always lived in Karachi and that his wife was determined not to leave Karachi to move to another part of Pakistan which included the appellant's home area of Chakwal.

40. The respondent underlines that it is the Tribunal's role to determine whether Chakwal was the appellant's home area, and that this finding of fact was open to the Tribunal based on the material and the evidence before it. The appellant is being assessed as to whether he has a well-founded fear of persecution in his home area and this was found not to be the case.

41. The respondent highlights the Tribunal's determination under the heading "*Marriage, wife's situation, and threat to Shias*"[11] and notes that the Tribunal discussed at some length with the appellant about his wife and the relationship with his family in Chakwal.

42. The Tribunal found that the appellant has no fear of returning to Chakwal whether with his wife or not. They accepted that his marriage is mixed Sunni-Shia, and noted country information that "*Sunnis and Shias coexist so harmoniously in Chakwal that it is considered an exemplary model of Shia-Sunni brotherhood*".[12] The Tribunal rejected the appellant's claim that this had led to any particular problems with his family in Chakwal. Rather the Tribunal found that it was that his wife who did not want to leave her family in Karachi.[13]

43. The Court finds that the Tribunal did consider the appellant's family situation and in particular whether his wife would be safe in Chakwal. There is nothing in the Tribunal's determination (on the material before it and relevant country information referred to) to suggest that the appellant's wife and family were disregarded when considering Chakwal as a home area for the appellant; no legal error is evident. Ground two of the appeal fails.

Move to Chakwal a threat to family unity?

44. This ground is based on the appellant's contention that claim that his wife refused to move from Karachi to Chakwal; that the Tribunal did not consider the reasonableness of relocation in the light of maintaining family unity.

45. The appellant has been consistent in his claim in relation to his wife and any move to Chakwal:
    a) In his transfer interview he said as follows: "*I married for love in Karachi (not an arranged marriage). When I married my wife she*

[11] Book of Documents, page 169 - 172
[12] Ibid., page 176, para [75]
[13] Ibid., para [76]

didn't want to move to any other address when I lived there there is targeted killing and he didn't want to move anywhere else"[14];

b) In his statement to Tribunal members: "*Our client instructs that although he originates from Chakwal, Punjab, his wife's family are in Karachi. Our client instructs that he is not welcome in his home area of Chakwal with his family, as our client entered into a love marriage against the wishes of his family. Our client is Sunni, and his wife is Shia. Therefore, without the support of his family in Chakwal, the only place where our client has tribal and familial support networks are in Karachi, where his wife's family live.*"[15]

c) In his second statement to the Tribunal he said as follows: "*I married a woman from Karachi in a love marriage and it was against the wishes of my family. My wife is Shia and I am Sunni. As a result, I have very little contact with my family. My wife has never visited my family in Punjab, we could not move there because we do not have the support of my family. My wife was reluctant to move because she does not have any family outside of Karachi.... We would be vulnerable to harm as an interfaith couple isolated from the support networks.*"[16]

d) In the interview the appellant explained that his relationship with his family is not good because he went against their wishes and did not have an arranged marriage, but rather a love marriage[17], that his wife had grown up in Karachi and studied there.[18]That his wife does not want to go because her whole family is in Karachi and that his wife feels safe with her family in Karachi. [19]

46. The appellant draws the Courts attention to the lack of reference by the Tribunal to the appellant's threat of family unity in relation to their moving to Chakwal, stating this is contrary to the requirements of the Act section 34 (4) which requires the Tribunal to give written reasons and findings on material questions of fact.

47. This failure of the Tribunal to consider the threat of family unity is a jurisdictional error because the wife's refusal to move is a material claim for the Tribunal to review, but it did not do so, and by failing to do so fell into error.

48. The case of *Yusuf*[20] is cited to the Court in relation to the discussion around s430 *Migration Act 1958* which is similar in construction to section 34(4) of the Act :

[14] Ibid., page 11, Q1
[15]Ibid., page 86, 87 at (vi)
[16] Ibid., page 106, para [17]
[17] Ibid., page 113 lines 33-47
[18]Ibid., page 118, lines 1-3
[19] Ibid., 129, lines 26 on and page 132 lines 16 on
[20] *Minister for Immigration, Multicultural and Indigenous Affairs v Yusuf* [2001] HCA 30

"The provision entitles a Court to infer that any matter not mentioned in the s430 statement was not considered by the Tribunal to be material. This may reveal some basis for judicial review... The Tribunal's identification of what *it* considered to be at the material questions of fact may demonstrate to that it took into account some irrelevant consideration or did not take into account some relevant consideration."[21]

49. As the Tribunal's determination is silent on the question of family unity in relation to a return to live in Chakwal, the appellant says the inference can be drawn that the Tribunal did not consider this to be a material claim. Further the appellant points to the statement by the Tribunal as evidence that they did not consider family unity to be a material claim, when the Tribunal held in relation to Chakwal: "While it may not be a home area for his wife, who has never lived there, it is the appellant's claim the Tribunal is assessing."

50. The appellant points to the importance of the family and family unit under various International Instruments and says that considerations in accordance with section 34 of the Act in relation to its review obligations are central to the role of the Tribunal.

51. The respondent counters the appellant's argument by saying that at no time did the appellant's wife say she would *not* leave Karachi, rather for various reasons she did not *wish* to do so. Furthermore that the appellant had claimed that both he and his wife would be harmed if they went to Chakwal. These claims of the appellant were aired before the Tribunal and the Tribunal made a determination that there was not a risk of harm to the appellant and his wife should they go to Chakwal.

52. It is the view of this Court that this was a determination open to the Tribunal on the evidence before it. This ground of appeal has no merits.

ORDER

The appeal is dismissed. The decision of the Tribunal TFN 15019 on the 15 August 2015 is affirmed pursuant to the provisions of sec 44(1)(a) of the Act.

Judge Jane E Crulci

DATED this 11`th day of May 2017

[21] Ibid., 346 at [69]