



IN THE SUPREME COURT OF NAURU
AT YAREN

Case No. 22 of 2016

IN THE MATTER OF an appeal
against a decision of the Refugee
Status Review Tribunal T15/00263
brought pursuant to s 43 of the
Refugees Convention Act 2012

BETWEEN

QLN 142

Appellant

AND

THE REPUBLIC

Respondent

Before: Freckelton J
Appellant: Self-represented
Respondent: Rogan O'Shannessy
Date of Hearing: 1 December 2017
Date of Judgment: 22 March 2018

CATCHWORDS

Appeal – refugee – cessation clause – procedural fairness - error of law – APPEAL
DISMISSED.

JUDGMENT

1. This matter is before the Court pursuant to section 43 of the *Refugees Convention Act 2012* ("the Act") which provides:
 - (1) *A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.*
 - (2) *The parties to the appeal are the Appellant and the Republic.*...
2. A refugee is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951* ("the *Refugees Convention*"), as modified by the *Protocol Relating to the Status of Refugees 1967* ("the *Protocol*") as any person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable to or, owing to such fear, is unwilling to return to it ..."
3. Under s 3 of the Act complementary protection means protection for people who are not refugees but who also cannot be returned or expelled to the frontiers or territories where this would breach Nauru's international obligations.
4. The determinations open to this Court are defined in s 44 of the Act:
 - (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.*
5. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on 13 July 2016 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of 9 October 2015, that the Appellant is not recognised as a refugee under the 1951 *Refugees Convention* relating to the Status of Refugees, as amended by the 1967 *Protocol* relating to the *Refugees Convention*, and is not owed complementary protection under the Act.

BACKGROUND

6. The Appellant is a single-male from Jaffna, Sri Lanka. He is of Tamil ethnicity and Hindu religion. The Appellant fled to India in 1990 with his mother and older sister when he was five months old. They stayed in refugee camps in Tamil Nadu. His father remained in Sri Lanka. His mother and sister are now deceased, and the Appellant claims that his father also died in 2009.

7. The Appellant claims a fear of harm deriving from being imputed with the political opinion of being a supporter of the LTTE for various reasons, including his Tamil ethnicity, and membership of a number of social groups, including "failed asylum seekers", "returnees from the west", "Sri Lankan Tamils from the north of Sri Lanka", "member of his family", and "expatriate Tamil Sri Lankans". The Appellant also claims a fear of harm deriving from fleeing Sri Lanka illegally.
8. The Appellant left India for Australia in June 2014, arriving on 27 July 2014. On 2 August 2014, he was transferred to Nauru for the purposes of having his claims assessed.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

9. The Appellant attended a Refugee Status Determination ("RSD") interview on 8 December 2014, at which he claimed to have travelled to India with his mother in 1990 when he was only a few months old. The Appellant lived in India for a large part of his life. In 2009, the Appellant's father disappeared, and the Appellant does not know what happened to him. He is concerned that he may have been involved with the LTTE. The Appellant fears that he will be imputed with the political opinion of a LTTE supporter because he comes from the North of Sri Lanka, his father was possibly involved with the LTTE, and because he spent most of his life in India as an expatriate.
10. The Secretary noted that the Appellant gave a detailed description of his life in a refugee camp in India, and accepted that he lived in India as a refugee since he was a few months old.¹ The Secretary also accepted that the Appellant believes his father may have been involved with the LTTE, and he fears returning to Sri Lanka because of this.
11. While the Secretary accepted that the Appellant held this fear, it was considered to be unfounded. While acknowledging that Tamils continue to be subject to some forms of discrimination, the Secretary found that the security situation has stabilised and the risks posed to Tamils have reduced considerably.² The Secretary therefore considered that the Appellant's claimed fear based on his Tamil ethnicity and membership of the particular social group of "Sri Lankan Tamils from the North of Sri Lanka" was not well-founded.³
12. The Secretary also considered the Appellant's claimed fear of harm due to his father's possible involvement with the LTTE to be unfounded. The Secretary found that, even if his father was involved with the LTTE, the Appellant would not be of adverse interest to the authorities because of his connection to a man he has not seen since his infancy. The documents available to the Appellant would in any case enable the Appellant to prove that he had no connection to his father.⁴

¹ BD 122.

² BD 124.

³ BD 125.

⁴ Ibid.

13. In relation to the Appellant's claimed fear of harm due to being a failed asylum-seeker who had sought asylum in a western country, the Appellant noted that returnees undergo a questioning and screening process upon return. While some returnees had been subject to torture upon arrival, these cases were limited to those where the victim had a real or perceived connection with the LTTE or opposition politicians. Given the Appellant had no such adverse profile, and the Appellant left Sri Lanka at the age of four months, and therefore never consciously chose to leave, the Secretary was satisfied that the Appellant did not have a well-founded fear of harm due to being a failed asylum-seeker or leaving Sri Lanka illegally.⁵ As a consequence of the above findings, the Secretary found that the Appellant was not a refugee within the meaning of the Act.

14. Upon the same findings, the Secretary was not satisfied that the Appellant had a reasonable possibility of being subjected to torture, cruel, inhuman or degrading treatment or punishment, or to arbitrary deprivation of life, if he were returned to Sri Lanka. This being the case, returning the Appellant to Sri Lanka would not be in breach of Nauru's international human rights obligations, and the Appellant was not owed complementary protection by Nauru.⁶

REFUGEE STATUS REVIEW TRIBUNAL

15. At the hearing before the Tribunal, the Appellant's representative submitted that the Appellant was recognised as a refugee in India in 1990 and has not since ceased to be a refugee because the cessation clauses in Art 1C of the Refugees Convention do not apply. Article 1C(5) of the Convention provides that the Convention ceases to apply where the circumstances in connection with which the refugee was recognised as a refugee have ceased to exist.

16. The Tribunal concluded that there had been such fundamental changes to living conditions for persons including the Appellant that the Appellant's case engages Article 1C(5). In reaching this conclusion, the Tribunal referred to country information on the improved human rights and security situation for Tamils from the north of the country.⁷ The Tribunal therefore noted that, in light of this finding, it needed to determine the claim for refugee status afresh.

17. The Tribunal accepted that the Appellant's father remained in Sri Lanka after sending his wife and the Appellant to India, and that the Appellant's father moved to Vanni and was not heard of again.⁸ However, it did not accept that simply because the Appellant's father lived in an area controlled by the LTTE, the father was a supporter of the LTTE with a profile that would result in the Appellant being imputed with the political opinion of a supporter of the LTTE.⁹ Based on the Appellant's past conduct, the Tribunal was also not satisfied that the Appellant would be politically active if returned to Sri Lanka, and the Appellant would therefore also not suffer harm based on his actual opinion.¹⁰

⁵ BD 126.

⁶ BD 128.

⁷ BD 273 at [24].

⁸ BD 276 at [42].

⁹ *Ibid.*

¹⁰ BD 277 at [45].

18. The Tribunal further accepted that some Tamils and non-Tamils continue to face harm and persecution by the Sri Lankan authorities. However, the UNHCR Eligibility Guidelines suggest that being a Tamil in and of itself does not warrant refugee status, and further circumstances are required to substantiate a claim, including suspected connection with the LTTE.¹¹ The Tribunal did not accept that the listed circumstances applied to the Appellant or the Appellant's father, and found that there was no reasonable possibility the Appellant would be subject to serious harm in the reasonably foreseeable future because of his or his father's Tamil ethnicity, or because he would be imputed with an adverse political opinion because of his ethnicity or origin from the North of Sri Lanka.¹² The Tribunal considered that the Appellant did not have a well-founded fear of persecution because of his membership of social groups related to his Tamil ethnicity.¹³

19. In addition, while the Tribunal accepted that the Appellant lived in a refugee camp in India from 1990 to 2014, and it was possible that some members of the camp would have been former fighters and members of the LTTE, the Tribunal did not consider that the Appellant would attract the attention of authorities because of this.¹⁴ It concluded that the Appellant did not have a well-founded fear of persecution for this reason, or because of any imputed political opinion as a supporter of the LTTE on this basis.

20. The Tribunal also rejected the Appellant's claims for refugee status by reason of having reported his father's disappearance to the International Committee of the Red Cross ("ICRC"),¹⁵ or because he left Sri Lanka illegally.¹⁶ In making the latter finding, the Tribunal considered that the Appellant would not be charged with any breach of the *Immigrants and Emigrants Act* because he was only five months old when he left, and any fear of harm on that basis was therefore not well-founded.¹⁷ Further, country information indicates that, while returned asylum seekers who left Sri Lanka illegally may be subject to questioning and security checks, such returnees are not subject to harm amounting to persecution.¹⁸ The Tribunal therefore concluded that:

*"as a Tamil who originated from Jaffna in the north, who left Sri Lanka illegally when he was 5 months old, who resided in India for most of his life in camps where there were LTTE member and sympathisers, whose father remained in Sri Lanka and disappeared in the Vanni region of Sri Lanka, who asked the ICRC to trace his father, who applied for asylum in India, Australia and Nauru, he does not have a well-founded fear of persecution for a Convention reason and it [sic] is not a refugee."*¹⁹

21. In relation to the Appellant's claim for complementary protection, the Tribunal said that, for the same reasons for rejecting the Appellant's claim for refugee

¹¹ BD 279 at [58].

¹² BD 281 at [64].

¹³ *Ibid* at [65].

¹⁴ BD 282 – 283 at [72] to [73].

¹⁵ BD 284 at [85].

¹⁶ BD 289 at [108].

¹⁷ *Ibid*.

¹⁸ BD 288 at [106].

¹⁹ BD 290 at [113].

status, it did not accept there to be any reasonable possibility that the Appellant would be subject to harm of a nature that is prohibited by the international treaties ratified by Nauru. The Appellant made a further claim for complementary protection based on his kidney disease, in that he would be subject to greater harm than an average healthy person if he were mistreated upon return. The Tribunal found that there was nothing to indicate that the Appellant would be denied medical treatment, and that a WHO report positively described access to medical care in Sri Lanka.²⁰ The Tribunal therefore also found that the Appellant was not owed complementary protection.

THE APPEAL GROUNDS

22. The Appellant appealed against the decision of the Tribunal on the following grounds:

1. *The Tribunal wrongly decided the cessation of my refugee status:*

(a) *The Tribunal agreed that I received refugee status in India. The Tribunal should have had very good reasons for taking away my refugee status but their decision is all about whether or not they should give me refugee status and not about why refugee status should be taken away.*

(b) *The Tribunal should have proven to me that the circumstances in Sri Lanka had improved so that they could justify taking away my refugee status. If other Tamil are still getting refugee status, how can the Tribunal say circumstances in Sri Lanka have changed so much that my refugee status should have been taken away?*

2. *The Tribunal should have adjourned my hearing and used its power to request reports on my medical condition or get a person from IHMS to provide my medical records:*

(a) *In my statement provided to the Tribunal I said that I suffered from kidney disease and was waiting to find out from the doctor whether I needed further surgery. I said that any mistreatment I might experience in Sri Lanka would put me at risk because of my kidneys.*

(b) *At my hearing I also discussed my medical condition with the Tribunal. The Tribunal said during my hearing that it would wait until they received medical records before making a decision but then made a decision without having the records.*

3. *The Tribunal failed to take into account my medical condition in connection with the harm I would suffer if detained on return to Sri Lanka:*

(a) *On 22 June 2015 I had surgery in Australia. In April 2016 I had an appointment with the urologist because I had blood in my urine. I said in my statement that I was waiting to find out if I needed a further surgery.*

(b) *At the time of the Tribunal hearing, I was still not mentally or physically fit enough to face the interview but they did not postpone my hearing. I had a lot of mental issues at the time they did not consider. I also told the Tribunal I*

²⁰ BD 291 at [124].

took medication three times a day for my kidneys. The Tribunal accepted in its decision that I had kidney disease and was being treated for kidney stones.

- (c) The Tribunal told me that country information indicated I would be detained for a brief period that might be less than a day or at most several days and that prison conditions were poor.*
 - (d) Even if I was in jail for a short time I would be harmed. I told the Tribunal that I feared that my medical condition might cause me to be affected more than a healthy person if I was detained. I informed the Tribunal if I was kicked I would be more affected than [sic] a healthy person.*
 - (e) The Tribunal did not consider that my medical condition raises my chance of being harmed if I am detained.*
4. *The Tribunal had no basis for its decision about my claims of being imprisoned if I return to Sri Lanka and considered irrelevant factors:*
- (a) The Tribunal said to me that although I left the country illegally the prison sentence I would face on return to Sri Lanka would "quite minimal or non-existent" because I left Sri Lanka when I was five months old.*
 - (b) I told the Tribunal that I would be treated as an adult. The Tribunal described me in its decision as a 25-year old man but concluded that because I was five months old when I left Sri Lanka I would be treated leniently. The information the Tribunal took into account suggesting that children would not be prosecuted is irrelevant because I am not a child.*
 - (c) The Tribunal had no evidence that I would not be prosecuted because I was a child when I left Sri Lanka as opposed to a child when I returned to Sri Lanka.*
 - (d) Because of this the Tribunal did not properly assess my case.*
5. *The Tribunal did not properly consider my claim that I would face harm in prison:*
- (a) I do not understand how the Tribunal can agree I will be imprisoned but not harmed. There is no clear reason for this in the decision.*

PRELIMINARY MATTERS

23. The Appellant applied for an order to extend time to file his Notice of Appeal pursuant to subsection 43(3) of the Act in the interest of the administration of justice. No objection was taken. Leave was granted.

24. At the commencement of the hearing, the Appellant sought to tender correspondence between his Claims Assistance Providers ("CAPs") on his behalf and the Tribunal, as well as certain medical records. No objection was made to this course by the Respondent, although it was urged that any medical records that post-dated the hearing before the Tribunal were irrelevant. On that basis they were received.

GROUND ONE

25. The issue raised by Ground One was whether the Tribunal's conclusion that the cessation clause in Art 1C(5) of the Convention applies in relation to the Appellant give rise to an appealable error.

26. Article 1C of the Convention provides that the Convention shall cease to apply to a person in circumstances where:

- (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
- (2) Having lost his nationality, he has voluntarily re-acquired it; or
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
- (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.
- (6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;
Provided this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

27. The Tribunal stated that it considered that there had been fundamental changes in Sri Lanka since the end of the conflict in 2009 such that Article 1C(5) applied to the case of the Appellant "as the circumstances in connexion with which he was recognized as a refugee by the Republic of India in 1990 have ceased to exist".²¹ However, the Tribunal then stated that: "Having concluded that the cessation clause contained in Article 1C(5) apply to the applicant, *the Tribunal must determine afresh his claims to be a refugee under s 6 of the Act.*"²²

28. The position of the Respondent was that the Tribunal was not competent to deprive the Appellant of a status afforded to him by the authorities of another country, in this instance India. Rather, the question was whether the Appellant should be recognised as a refugee for the purposes of the Act by Nauru.

29. The Respondent's contention was that the Tribunal's extraneous consideration of Article 1C(5) of the Convention did not affect its determination of the review. The way in which the Tribunal has expressed itself shows this to be correct.

30. The Respondent submitted that the jurisdiction of the Tribunal was enlivened by the lodging, pursuant to s 31(1)(a) of the Act, of an application for merits review of the determination of the Secretary that the Appellant had not been recognised as a refugee. Article 1C states that the Convention "shall cease to apply to any person" who falls within the definition of a "refugee" in Article 1A. The issue of refugee status arises for the contracting state in whose territory the person applies for recognition of refugee status.²³ A decision made some years previously by another country when circumstances were different was in no way binding upon the Republic of Nauru when it came time for the Secretary and then

²¹ BD 273 at [24].

²² *Ibid* at [25] (emphasis added).

²³ See *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063, 1080 at [58].

the Tribunal to evaluate whether he satisfied the preconditions for determination of refugee status in Nauru.

31. The Tribunal erred in “depriving the Appellant of his refugee status” in India. However, it is apparent that the Tribunal made its own decision to “determine afresh” the Appellant’s claim for refugee status in Nauru. Therefore, there is no proper reason to conclude that the error of the Tribunal in depriving the Appellant of his prior refugee status granted by Indian authorities contaminated its fundamental discharge of its task. This means that it made no material error of law.

32. In argument the issue arose as to what, if any, significance should attach for Nauru to the fact that India had recognised the Appellant as a refugee. Mr O’Shannessy relied upon the decision of *R (Hoxha) v Special Adjudicator*²⁴ to establish the fact that recognition of a person’s refugee status does not transmogrify a person into a refugee – it is simply a question of recognition.²⁵ He conceded that the fact that India had recognised the Appellant as a refugee was something which the Tribunal could take into account but it was not a basis upon which he could claim refugee status in Nauru. He emphasised that nothing in Article 1A(2), which defines a refugee, suggests that recognition of refugee status in one country is relevant to, still less determinative of, an assessment by another country of the same issue.

33. The submissions by the Respondent are sound. The issue for the Tribunal was whether the Appellant satisfied the criteria for refugee status in Nauru. Ultimately, that is the approach taken by the Tribunal. Accordingly, it did not err in law.

GROUND TWO

34. The second ground advanced by the Appellant contended that the Tribunal should have adjourned the hearing in order to obtain for itself reports on the medical condition of the Appellant; and that the Tribunal, having advised him that it would not make a decision until it had received the medical reports that had been promised, should have waited until it had such information before making its decision.

35. However, importantly, the Appellant never sought to adjourn or reschedule the hearing. While the Tribunal had power of its own motion to adjourn the hearing, it remained subject to the obligation under s 33(1) of the Act to determine the review within 90 days of receiving the relevant documents from the Secretary. Notably, it made two inquiries at the commencement of the hearing as to whether the Appellant was “okay” to proceed with the hearing. It was reassured on each occasion that he was.²⁶

36. Importantly, the Appellant was assisted through the RSD process by legal representatives who undertook to provide “medical documents” in relation to the

²⁴ Supreme Court Transcript p 24.

²⁵ [2005] 1 WLR 1063, 1082 at [60].

²⁶ BD 229 - 230.

"health issues (kidney disease)" of the Appellant. They did so in writing,²⁷ and orally.²⁸ However, no documents were ultimately provided. In such circumstances, it is misconceived to contend that the Tribunal had an obligation itself to seek and obtain documentation which those representing the Appellant had committed to provide.

37. Further, a notice was provided to the Appellant by the Tribunal by an email of 7 June 2016, stating that:

"If the medical records are not provided in the next two weeks, the Tribunal will proceed to make decisions on these cases,²⁹ unless you can indicate what relevant material is contained in the medical records and how in the individual case, the medical records are relevant to the applicant's claims."

38. The Appellant did not demonstrate in any way how he was denied a reasonable opportunity to be heard in respect of this documentation so this ground fails.

GROUND THREE

39. The essence of the issue raised by the Appellant under Ground Three was that his kidney condition would place him in a more vulnerable condition in Sri Lanka were he to face ill-treatment; that he was likely to be mistreated either by being tortured or put in prison; and that his health vulnerabilities raised the threat level to him to a level above what it would otherwise be.

40. However, the Tribunal dealt with this issue by findings at a factual level. It determined on the basis of country information that the Appellant would not be denied adequate medical treatment for his kidney condition.³⁰ It also found that he would not be at heightened risk of harm by reason of his kidney condition, if he were mistreated, because there was no reasonable possibility that he would be "detained or imprisoned or mistreated and/or tortured for any reason" on return to Sri Lanka.³¹ These were findings that were reasonably open to the Tribunal.

41. Put another way, the Tribunal concluded there was no risk of harm arising from the Appellant's health condition that would be exacerbated. Accordingly, the Appellant has not identified a claim or an integer of a claim that the Tribunal failed to consider. This means that Ground Three does not succeed.

GROUND FOUR

42. Ground Four contends that the Tribunal erred in finding that the infancy of the Appellant when he left Sri Lanka would make it unlikely that he would face charges under the *Immigration and Emigration Act* (SL) arising from his illegal departure in 1990.

²⁷ BD 140 at [12].

²⁸ BD 264 ln 3 – 5.

²⁹ For relevant purposes, the Appellant's case was one of "these cases."

³⁰ BD 291 at [124].

³¹ BD 292 at [125].

43. However, the Appellant was unable to point to a specific error in the Tribunal's conclusion that the Sri Lankan authorities would have regard to the age of the Appellant when the breaches of its legislation occurred in determining whether or not to charge him upon his return as a 25 year old. It had regard to country information to this effect,³² and specifically gave the Appellant an opportunity to comment on the issue.³³ Its conclusion that it was unlikely that the Appellant would be prosecuted in the circumstances was reasonably open to it. As Mason CJ observed in *Australian Broadcasting Tribunal v Bond*:

"... at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference or in other words, the particular inference is reasonably open – even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place."³⁴

44. In this instance, there was a sound basis for the inference drawn by the Tribunal. Moreover, it was not illogical. Accordingly no error of law for the purposes of s 43 of the Act is made out. This ground fails.

GROUND FIVE

45. The fifth of the grounds advanced by the Appellant contended that the Tribunal fell into error by failing properly to consider his claim that he would face harm in prison.

46. The fallacy in this argument was that there was no obligation on the part of the Tribunal to consider whether the Appellant would face harm in prison because in extensive reasons it had concluded that he was not likely to be placed in prison upon return to Sri Lanka.

47. It is correct that the Tribunal observed on the basis of information before it that "it was likely he would be detained for a brief period that might be less than a day or at most several days."³⁵ However, this must be read in the context of the clear finding by the Tribunal that there was not a reasonable possibility that the Appellant would be charged with any breaches of the relevant legislation. It was implicit in the reasoning of the Tribunal that the Appellant may be detained briefly for questioning at the airport about his activities while abroad.³⁶ However, the Tribunal concluded that such questioning would quickly establish that he departed Sri Lanka with his family in 1990 as an infant and therefore would not expose him to the harm about which he is apprehensive.

48. The Appellant has not established an error in this ground so this ground fails.

³² BD 286 at [96].

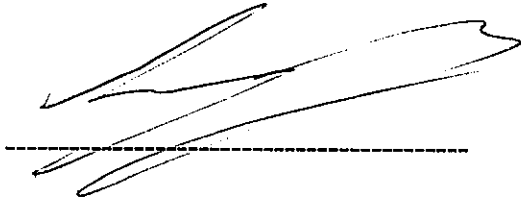
³³ BD 253-254.

³⁴ (1990) 170 CLR 321, 356.

³⁵ BD 287 at [99].

³⁶ BD 288 at [105].

49. Under s 44(1) of the Act, I make an order affirming the decision of the Tribunal.



Justice Ian Freckelton
Dated this 22nd day of March 2018

