



IN THE SUPREME COURT OF NAURU
AT YAREN

Case No. 31 of 2017

IN THE MATTER OF an appeal
against a decision of the Refugee
Status Review Tribunal TFN
T15/00211, brought pursuant to s 43
of the *Refugees Convention Act 2012*

BETWEEN

TTY 155

Appellant

AND

THE REPUBLIC

Respondent

Before: Freckelton J
Appellant: Did not appear
Respondent: Catherine Symons
Date of Hearing: 7 February 2018
Date of Judgment: 22 March 2018

CATCHWORDS

Appeal – natural justice – legal unreasonableness – 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.*

BACKGROUND

5. The Appellant is a male of Sunni Muslim religion and Bengali ethnicity from the Meherpur District of Bangladesh. He has a wife and son who remain in Bangladesh. His father and his older brother have been killed, his mother died of natural causes, and he does not know where his two younger siblings are living. He received education up to year ten at high school, and worked in a wholesale fishing business for one year.
6. The Appellant claims a fear of harm arising from his and his family's support for the Bangladesh Nationalist Party, particularly his father's involvement with the party in a leadership position.
7. The Appellant fled Bangladesh in May 2012. From May 2012 to August 2013, the Appellant lived in Thailand, Malaysia and Indonesia. On 19 August 2013, the

Appellant arrived on Christmas Island, and on 21 July 2014 the Appellant was transferred to Nauru.

THE DECISION OF THE SECRETARY

8. The Appellant had attended a Refugee Status Determination (“RSD”) interview on 20 October 2014. The Secretary of the Department of Justice and Border Control (“the Secretary”) summarised the material claims presented at that Interview as follows:

- *His father was the local BNP chairman who would attend all political meetings.*
- *In 2008, the Applicant’s father was attacked, shot and killed by AL Party supporters while he attended a meeting that had been organised in Gangni to oppose the atrocities committed by the AL Party. His body was abandoned at the time of the shooting and has never been found.*
- *The Applicant’s older brother, Arfan joined the BNP to protest the killing of his father. Arfan was attacked, stabbed and killed by AL Party supporters in his hometown of Shulataga in 2009.*
- *The Applicant reported the deaths of his father and brother to the police. However, the police refused to take any action.*
- *After 2009, the AL Party supporters began to harass, threaten and persecute the Applicant and the rest of his family on a regular basis. They took over and occupied the Applicant’s house in Shulataga in 2012.*
- *The Applicant’s two younger brothers fled for safety when their house was taken in 2012. The Applicant has not heard from them since then.*
- *The Applicant fled Bangladesh in late 2012. His wife and son went to live with his in-laws in Majegram.*
- *The AL Party supporters continue to contact the Applicant’s wife two to three times a week and enquire about his whereabouts. The Applicant’s wife has faced mental torture as she is prevented from leaving the area. His son is not permitted to attend school.¹*

9. The Secretary accepted that the Appellant’s father and brother may have been victims of violence,² and the Appellant was a low-level supporter of the BNP.³ However, the Secretary did not accept the other material elements of the Appellant’s claims, namely:

- The Appellant’s father was in any leadership position within the BNP;
- The attacks on the Appellant’s father and brother were politically motivated;
- The Appellant lived in hiding and constantly relocated between 2009 and 2013 to avoid harm from the Awami League (“AL”);
- The Appellant was extorted of huge sums of money and the AL took over ownership of his house;
- The Appellant’s family have been harassed and repeatedly interrogated about the Appellant’s whereabouts since the Appellant’s departure from Bangladesh.⁴

¹ BD 46.

² BD 50.

³ BD 52.

⁴ Ibid.

10. In rejecting these elements of the Appellant's material claims, the Secretary took into account the following:

- At the RSD Interview, the Appellant claimed that he was a member of the BNP, like his father and brother. The Appellant had not previously made this claim;⁵
- The Appellant was not able to give basic information about the structure and principles of the BNP;⁶
- The Appellant was not able to provide details as to his role and participation in BNP activities;⁷
- The Appellant was not able to provide details as to his father's and brother's role and participation in BNP activities;⁸
- At the RSD interview, the Appellant claimed that members of the AL Party killed his father. The Appellant had previously claimed that the family never found out who was responsible for the death;⁹
- At the RSD interview, the Appellant claimed that his brother was killed for protesting against the death of their father. The Appellant later claimed that the murderers could not be identified because it was dark when he was killed at the family home;¹⁰
- The Appellant was unable to provide any details of any instances of being personally harassed or persecuted by AL members;¹¹ and
- At the RSD interview, the Appellant claimed that his brothers had been kidnapped when the AL attacked the family home in 2012. In the RSD application and Transfer Interview, the Appellant said his brothers had fled.¹²

11. While recognising the high levels of political violence in Bangladesh, the Secretary was not satisfied that the Appellant possessed a sufficient profile to put him at risk of harm from the AL.¹³ The Appellant's fear of harm was therefore not well-founded, and the Appellant was not eligible for refugee status.¹⁴ Given the Appellant's fear of harm was not well-founded, the Appellant was also not at risk of torture, cruel, inhuman or degrading treatment or punishment, and was not eligible for complementary protection.¹⁵

12. On 9 October 2015, the Secretary found the Appellant not to be recognised as a refugee under the Convention, and not to be owed complementary protection under the Act.¹⁶

THE DECISION OF THE REFUGEE STATUS REVIEW TRIBUNAL

⁵ BD 47.

⁶ Ibid.

⁷ BD 48.

⁸ Ibid.

⁹ BD 49.

¹⁰ Ibid.

¹¹ BD 50.

¹² BD 51.

¹³ BD 53.

¹⁴ BD 54.

¹⁵ Ibid.

¹⁶ BD 43-54.

13. On 22 October 2015 the Appellant filed an application for review with the Refugee Status Review Tribunal ("the Tribunal").¹⁷
14. On 15 April 2016 the Tribunal invited the Appellant to appear before the Tribunal on 9 May 2016 "to give evidence and present arguments". The Tribunal advised that: "if the applicant does not appear before the Tribunal on the date and time specified, the Tribunal may make a decision on the review without taking further action to allow the applicant to appear."¹⁸
15. A statement dated 28 April 2016 addressing issues raised by the Secretary was taken on 28 April 2016.¹⁹ The Appellant indicating that he had been suffering from poor health, stating:

"I take this opportunity to explain that my physical health is deteriorating. I have terrible headaches and breathing problems. I was kept in isolation for two weeks to be monitored. I have been diagnosed with diabetes and I am now taking medication and being medically monitored. My mental health has also been impacted by events in Bangladesh. I see an OSTT Counsellor in Hope House and a Mental Health Nurse in OPC1. These health issues and the stress of thinking about events in Bangladesh make me feel very tired. I can't concentrate and sometimes I can't think clearly. I feel confused."
16. On 5 May 2016, Craddock Murray Neumann, representing the Appellant, delivered extensive submissions to the Tribunal.²⁰ The submissions affirmed the Appellant's fear of harm on the basis of an imputed political opinion, addressed the Secretary's credibility concerns because of vagueness or lack of detail, discrepancies or inconsistencies, and provided country information on violence in Bangladesh on the basis of political affiliations.
17. No indication was given prior to 9 May 2016 that the Appellant did not intend to appear before the Tribunal.
18. No explanation was given on 9 May 2016 when the Appellant did not appear before the Tribunal and no further submissions were received by the Tribunal before the time of making its decision.²¹
19. On 20 May 2015 Craddock Murray Neumann provided copies of the Appellant's medical records to the Tribunal, asking for them to be taken into account in an assessment of his claims.²²
20. On 3 July 2016 the Tribunal handed down its decision. It reviewed the reservations expressed by the Secretary as to the credibility of the Appellant, and indicated as follows:

¹⁷ BD 57.

¹⁸ BD 59.

¹⁹ BD 61-65.

²⁰ BD 67-105.

²¹ BD 116.

²² BD 107-113.

- The questions it would have asked the Appellant about his family support of the BNP and his knowledge of its aims and activities, but in the absence of the opportunity to do so, “due to the vague and inconsistent nature of the evidence, is unable to be satisfied that there is a reasonable possibility that the applicant had any role with the BNP at any level that would represent his having the profile he claimed or that the applicant and his brother made complaints to the police, the BNP or the Awami League about the death of their father, resulting in their becoming of interest to the Awami League.”²³
- That it would have asked why in the pre-hearing submissions it was stated that the Appellant was known to be a member of the family group, which since his father’s death had engaged in outspoken attempts to seek justice for the conduct of members of the AL, yet he had not at any stage explained what those efforts were. In the absence of the opportunity to do so it stated that it was unable to be satisfied that there was a reasonable possibility that the Appellant’s father was killed by the AL members as claimed, or that his father’s death had given him the claimed profile with members of the AL. It was not satisfied that there was a reasonable possibility that he would be harmed as claimed.²⁴
- That it would have asked the Appellant why he believed that his brother had been killed by the AL given the only protests made had been to the local leadership of the BNP not to the AL, and why he thought it was not a random act of violence. It would also have asked him why at his RSD interview he said he had not reported his brother’s death to the police but in his statement he said he had. In the absence of the opportunity to do so it stated that it was unable to be satisfied that there was a reasonable possibility that the Appellant’s brother was killed by AL members as claimed, and that he would be harmed by members of the AL because of his brother’s death. It was not satisfied that there was a reasonable possibility that he would be harmed as claimed.²⁵
- That it would have asked the Appellant to clarify what he meant by harassment by the AL that he said had started in 2009, whether his surviving brothers had been harassed, details of his wife’s alleged harassments and about inconsistencies in his accounts in respect of these matters. It found it was not satisfied that the Appellant as a low level supporter of the BNP would have been a target of interest to the AL. In the absence of being able to do so, it was not satisfied that there was a reasonable possibility that the AL had harassed the Appellant since 2009 as claimed or that on this ground he would be harmed by the AL if he returned to Bangladesh.²⁶
- That it would have asked the Appellant where he was when his family home was ransacked, who was living there at the time, whether he was now the legal owner of the house and whether his pre-hearing statement meant that he was now stating that the AL had moved into his house temporarily as he still owned the property. It would also have asked why he had said earlier that his surviving brothers had been kidnapped when

²³ BD 119 at [28].

²⁴ BD 120 at [30].

²⁵ BD 120-121 at [34] – [45]

²⁶ BD 122 at [43].

he had said they had fled overseas. In the absence of the opportunity to ask such questions, and in light of “the confusing and incoherent evidence provided earlier in the process”, the Tribunal was unable to be satisfied that there was a reasonable possibility that this incident happened as claimed and concluded it did not give rise to a well-founded fear of persecution.²⁷

- That it would have asked the Appellant why his extortion claim was not made before the RSD interview, where he was living at the time, why he was a target for extortion when he had been unemployed most of his life, and how he was able to raise the extortion money. In the absence of the opportunity to ask such questions the Tribunal was unable to be satisfied that there was a reasonable possibility that the extortion demands were made or, if they were made, whether they were made for political, as against criminal, reasons. It found his fears in this regard were not well-founded.²⁸
- That it would have asked the Appellant to explain what he meant when he stated that his wife was subject to mental torture after she had moved back to her parents’ home and who was causing the torture, as well as how he thought this strengthened his claims. In the absence of an opportunity to ask such questions and in the context of the Appellant’s credibility it was unable to give this claim any weight.²⁹
- That he would have asked the Appellant when it was that he was prevented from attending his mosque by the Awami League and how he thought this was relevant to his claims. In the absence of any opportunity to do so, it was not satisfied that there was a reasonable possibility that he would be harmed by reason of his religion if he was to return to Bangladesh.³⁰
- That it would have asked the Appellant why he had a fear for his safety by reason of his illegal departure from Bangladesh given that every year thousands of Bangladeshis went abroad to work and many also claimed asylum. In the absence of an opportunity to do so, and given the lateness of his claim, it was unable to be satisfied that there was a reasonable possibility that the Appellant would be harmed for a Convention ground because of his illegal departure from Bangladesh.³¹
- That it would have asked the Appellant about his ongoing treatment for Type 2 diabetes and what regular testing and monitoring he was doing, as well as why he thought he would not be able to access the same treatment if once again in Bangladesh. In the absence of this opportunity it was not satisfied that there was a reasonable possibility that the Appellant would be deprived of the medication he needs to treat his diabetes if he were to return to Bangladesh.³²

21. The Tribunal was also not satisfied there was any reason raised by the Appellant, or open on the evidence put before the Tribunal, that warranted the

²⁷ BD 123 at [46]-[48].

²⁸ BD 123 at [52]-[53].

²⁹ BD 124 at [55].

³⁰ BD 124 at [59].

³¹ BD 124-125 at [61]-[63].

³² BD 126 at [71] – [72].

Appellant being found to have a well-founded fear of persecution or being granted complementary protection. It affirmed the Secretary's determination.³³

THE APPEAL

22. The Appellant filed a Notice of Appeal with this Court on 2 August 2017, with the sole ground of appeal being that the "Tribunal made errors of law in its decision". The Appellant is self-represented and did not file written submissions.
23. The Respondent submitted that the issues presented by the appeal are, firstly, whether the Tribunal failed to act according to the principles of natural justice by proceeding to decide the review pursuant to s 41(1) of the Act, and, secondly, whether the Tribunal's decision was unreasonable.
24. The Respondent submitted that, in the circumstances, the Tribunal discharged its duty to accord the Appellant natural justice. The relevant circumstances include:
- the fact that Appellant was represented by lawyers before the Tribunal;
 - the fact that the Appellant was advised of the consequences of failing to appear before the Tribunal;
 - the absence of any request to adjourn the Tribunal hearing;
 - the absence of any explanation for the Appellant failing to appear at the hearing;
 - the fact that the Appellant sought merits review of the Secretary's determination, indicating that the Appellant wanted the review to be determined; and
 - the Tribunal is obliged to complete its review within 90 days of receiving the relevant documents from the Secretary under s 33(2) of the Act.
25. In addition, the Respondent submitted that there was nothing unreasonable about the Tribunal's decision. The Appellant was on notice that his claims may not be accepted, given the Secretary's adverse credibility findings, and in light of that the Tribunal was not required to conduct a hearing if the Tribunal considered that it should decide an applicant's review in favour of the applicant on the basis of the written material before it.
26. The Appellant also failed to appear at the hearing before this Court on 7 February 2018. Attempts to contact the Appellant via his Claim Assistance Provider were unsuccessful. There was no indication that the Appellant was not aware of the date and time of his hearing. In these circumstances, the Court proceeded to hear the submissions of the Respondent.
27. The Respondent indicated that it relied upon its written submissions. It further submitted that the issues before the Tribunal were substantively the same as those before the Secretary, except for the issues relating to the Appellant's physical and mental health. These claims were raised for the first time in the Appellant's pre-hearing statement, and dealt with by the Tribunal at [64]-[72] of

³³ BD 127 at [77],

the Decision Record. In these circumstances, the Appellant was not denied natural justice by proceeding to decide the review.³⁴

28. The Respondent submitted that, upon the medical records provided to the Tribunal, there was no indication that the Appellant's health was such that he would have been unable to attend a hearing, and there was no request for adjournment on this basis. The Tribunal dealt with the Appellant's claims afresh upon the evidence before it. There was therefore no error of law made by the Tribunal under s 41(1) of the Act or more generally in the way the claims were dealt with.

CONSIDERATION

29. The Appellant's assertion that the Tribunal "made errors of law in its decision" is unparticularised. In the absence of particulars, the appeal falls to be determined on the basis of whether the Tribunal failed to accord the Appellant natural justice by proceeding to decide the review without taking any further action, or whether the decision made by the Tribunal was legally unreasonable.

Whether the Tribunal Failed to accord Natural Justice

30. Previous decisions of this Court have found that the common law principles of natural justice apply unless clearly excluded in a particular context.³⁵ These principles include that an applicant for administrative review be given a fair opportunity to present their claims.³⁶

31. In *Sullivan v Department of Transport*, the Appellant whose suitability for a pilot's licence was questioned failed to attend a hearing at the Administrative Appeals Tribunal. The Appellant did not seek an adjournment. Deane J, with whom Smithers and Fisher JJ agreed, said:

*"A refusal to grant an adjournment can constitute a failure to give a party to proceedings the opportunity of adequately presenting his case. If the Tribunal had, in the present matter, refused an application by the appellant for an adjournment to enable him to procure Dr Evans' attendance as a witness, that refusal may well have constituted such a failure. No application for an adjournment was, however, made. If it had been made, it is highly probable that the Tribunal would have acceded to it; indeed, counsel who appeared for the appellant stated that he did not dispute that, if the appellant had applied for an adjournment, the Tribunal would have granted it. The absence of any application for an adjournment does not, however, necessarily conclude the issue adversely to the appellant. The failure of a tribunal which is under a duty to act judicially to adjourn a matter may, conceivably, constitute a failure to allow a party the opportunity of properly presenting his case even though the party in question has not expressly sought an adjournment (see *Priddle v Fisher & Sons* [1968] 1 WLR 1478; [1968] 3 All ER 506). In this regard, however, it is important to remember that the relevant duty of the Tribunal is to ensure that a party is given a*

³⁴ *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [35].

³⁵ *Deiye v Republic* [2015] NRSC 5 per Khan J at [23] citing Mason P with approval in *Department of Public Prosecutions v Shirvanian* (1998) 44 NSWLR 129, 134-5.

³⁶ *Cook v Fritz* [2013] NRSC 2 at [93] per Eames CJ.

reasonable opportunity to present his case. Neither the Act nor the common law imposes upon the Tribunal the impossible task of ensuring that a party takes the best advantage of the opportunity to which he is entitled.³⁷

32. The Tribunal in this case ensured that the Appellant was given a reasonable opportunity to present his case. The Appellant was notified of his hearing date three weeks in advance, and advised that failure to attend may result in his review being decided without the Tribunal taking any further action to enable the Appellant to give evidence to the Tribunal. No error by the Tribunal in this respect is established.

Whether the Tribunal's Decision was Unreasonable

33. A decision is legally unreasonable if it is so unreasonable that no reasonable decision-maker could have come to the same decision.³⁸

34. This Court has previously found that it was legally unreasonable not to grant an adjournment where there had been no previous request for an adjournment, timing was not in issue, and there was minimal prejudice administratively as hearings were still taking place, given that the consequences of failing to grant the adjournment would have been fatal to the success of the Applicant's application for refugee status or complementary protection.³⁹ However, in this case, no such application for an adjournment was made, whether on the ground the health of the Appellant or for any other reason.

35. The Appellant was on notice that his claims may not be considered credible, given the Secretary's clear adverse credibility findings. The Tribunal was not required to accept uncritically the claims advanced by the Appellant,⁴⁰ nor was it required to ensure the Appellant took best advantage of the opportunity he was given to seek review of his claims.⁴¹

36. In these circumstances, and in light of the factors adverted to by the Republic, it was not unreasonable for the Tribunal to proceed to decide the review without taking any further action. This ground too is not made out.

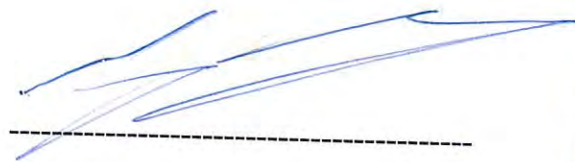
³⁷ *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343. This has been approved in *Burringbar Real Estate Centre Pty Limited v Anthony John Ryder & Ors* [2008] NSWSC 779 ("Burringbar") at [82]-[84]; *Italiano v Carbone & Ors* [2005] NSWCA 177 at [107].

³⁸ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230, 234.
³⁹ *CRI 052 v the Republic* [2016] NRSC 33; *CRI 020 v the Republic* [2017] NRSC 41

⁴⁰ *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 596; *Nagalingham v Minister for Immigration* (1992) 38 FCR 191; *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-170.

⁴¹ *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343.

37. 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

