



IN THE SUPREME COURT OF NAURU
AT YAREN

Case No. 3 of 2018

IN THE MATTER OF an appeal
against a decision of the Refugee
Status Review Tribunal TFN
T15/00030, brought pursuant to s 43
of the *Refugees Convention Act 2012*

BETWEEN

ETA 082

Appellant

AND

THE REPUBLIC

Respondent

Before: Justice I Freckelton

Appellant: A. Aleksov

Respondent: N. Wood

Date of Hearing: 21 May 2019

Date of Judgment: 16 April 2021

CATCHWORDS

APPEAL – findings– reasoning of the Tribunal – misunderstanding of evidence -
failure to provide reasons.

JUDGMENT

1. This matter is before the Court pursuant to s 43 of the *Refugees Convention Act 2012* ("the Act") which provides that:

(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 prescribed in s 44(1) of the Act:

(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 15 January 2018 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of 1 May 2015 that the Appellant is not recognised as a refugee under the *Refugees Convention* as amended by the 1967 Protocol and is not owed complementary protection under the Act.
6. The Appellant filed a Notice of Appeal on 13 March 2018 October 2018 and an Amended Notice of Appeal on 15 March 2019.

BACKGROUND

7. The Appellant is a male born in Mollakandi village in Sharaitpur district in Bangladesh. He arrived in Australia by boat in December 2013 and was transferred to the Republic of Nauru in January 2014 for the purpose of having his claim for asylum status assessed.

8. The Appellant claims to have a well-founded fear of persecution for reasons of actual and/or imputed political opinion and his membership of particular social groups, namely his family and the group of failed asylum seekers.
9. The Appellant has also claimed that he faces a real risk of cruel, inhuman or degrading treatment, and/ or arbitrary deprivation of life if removed to Bangladesh and that returning him to Bangladesh would be in breach of Nauru's international obligations.
10. The Appellant identified his claims to refugee status in a transfer interview conducted on 17 January 2014, and a written statement dated 3 April 2014.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

11. As to the claims giving rise to a fear of harm for a Convention reason, the Secretary identified that the Appellant claimed to be in danger of being harmed by reason of his involvement with the Jamaat e Islami (Jel) political party in Bangladesh, an altercation with a terrorist/mafia figure from Rarikandi, and a blood feud between his family and another family member, RT, over a land dispute.

12. The Secretary summarised the Appellant's claims as follows:

- The Applicant claimed he joined Jel in 2005 attending meetings and encouraging others to attend as well.
- He claimed he was attacked and injured on numerous occasions when attending the Jel meetings in 2007 and 2008 and there were three other similar incidents when the Awami League (AL, the party in power) broke up meetings.
- On 5 May 2013 he was attending a meeting when the AL and police attacked the meeting being held in Dhaka. There was gun fire and teargas and he was shot in the leg and hospitalised for 20 days.
- The Applicant was identified as a member of Jel and he began receiving threats from the AL when he left hospital.
- He claimed he received about 50 threatening calls from AL between February and November 2013.
- The Applicant claimed he was with a friend in 2008 in Sharaitpur town when they were approached by about 6 men dressed in civilian clothes who insisted they go with them. The men climbed on their motorbikes. There were 3 motorbikes, 3 civilian bike owners and the 6 men were later identified as soldiers. The Applicant had 2 other men on his bike and he was directed by them to the house of a notorious person, Julhass Rari who was a terrorist and a known Mafia figure from Rarikandi.
- Other Army personnel arrived dressed in their uniforms and he was beaten, arrested and tortured. The Applicant thought the notorious person, may have had something to do with the incident but he was not sure.
- The Applicant claimed he received at least 20 threatening calls from the notorious person and in 2011 the notorious person threw a knife at him injuring his back while he was riding his motorbike. The last time he was

threatened by the man was in 2012 when the notorious person threatened him with death face-to-face.

- The Applicant claimed that the notorious person joined the AL in 2012 and had considerable power as a result.
- Another problem the Applicant claimed was causing problems involved a distant family member, TR, who had on ongoing property dispute with the Applicant's father. The Applicant claimed his father was the legitimate owner and had the papers to prove it.¹
- This family dispute started over 10 years ago and there had been ongoing clashes between his father the TR. His father and uncle had been physically assaulted. The Applicant claimed he had been threatened over the phone at least 10 times and face to face at least 4 times. He believed he was threatened because he was the eldest son.
- The Applicant claimed on one occasion that TR's brother-in-law tried to abduct him while he was walking on the road. People from the village heard him scream out and came to his rescue.
- The Applicant fears that if he were to return to Bangladesh he would be physically abused, be subjected to cruel and inhuman treatment and possibly killed by members of the AL, the notorious man and TR. The Bangladesh authorities, he claims, are corrupt and will not protect him unless he pays large sums of money and nowhere is safe in Bangladesh.

13. The Secretary accepted certain elements of the Appellant's claims as credible. He accepted that during the Appellant's involvement with the Jel party many clashes may have taken place between the AL ruling party and his own Islamic party, and that police would have been involved at times. He accepted that the Appellant may have been injured and accidentally shot when gunfire and tear gas were discharged during the 5 May 2013 riot in Dhaka. However, the Secretary did not accept that what occurred was a targeted attack on the Appellant.

14. The Secretary accepted that the Appellant may have received some threatening calls from AL members but no-one came after him and he did not accept that AL members threatened to kill the Appellant unless he left Bangladesh. He found that the Appellant had exaggerated what had happened and did not accept that the Appellant's life had been in danger.

15. The Secretary accepted that there may have been a feud involving the Appellant's family in relation to a land dispute. However, he found that the feud was between the Appellant's father and TR and that any physical altercation that took place had involved his father, uncle, TR and his brother.

16. The Secretary rejected that the Appellant's motorbike was needed to take members of a military force to arrest a known criminal and that he became a subsequent target of the person.

¹ BD 73.

17. The Secretary did not accept the Appellant's account about the notorious person. He noted too that the Appellant stated he had relocated to Dhaka with his wife and that she and his wife have remained there near her parents. He concluded that the Appellant's anonymity would be secure living in a highly crowded, heavily populated city such as Dhaka.

18. In sum, while the Secretary accepted that the Appellant was involved with the AL party and may have experienced some harassment and threats from the AL, along with any injury from gunfire during a riot, and the Appellant's father was involved in land dispute with a relative, and he may have had some Association with a criminal, TR, he found the following claims not to be credible:

- The Applicant was attacked and injured on numerous occasions in clashes between the Jel and the AL;
- The Applicant's motorbike was used by the army and he was present when they captured Rari;
- As a result of this the Applicant was targeted by Rari who threw a knife and hit him while he was riding his motorbike;
- The land dispute between his father and Bholo will put the Applicant at risk of harm;
- The association both the notorious person and Bholo have with the AL will put the Applicant at greater risk;
- The Applicant has had his life threatened on an excessive number of occasions by the AL, Rari and Bholo for various reasons;
- The Applicant believes he will not be safe anywhere in Bangladesh; and
- The Applicant's departure from Bangladesh was for his safety and to claim asylum, when he could have relocated elsewhere in Bangladesh.

19. The Secretary did not accept that the Appellant's main concern at the time he left Bangladesh in November 2013 related to the political situation in Bangladesh and Bholo. The various findings he made led him to conclude that there was no reasonable possibility that the Appellant would suffer harm for any of the asserted reasons if he were to return to Bangladesh. As he concluded that the Appellant's fear was not well-founded, he did not consider whether the harm the Appellant feared constituted persecution. Thus he was not satisfied that the Appellant was a refugee within the meaning of the Nauru Refugees Convention Act 2012 or that there was a reasonable possibility that the Appellant would face harm if returned to Bangladesh which would constitute a breach of Nauru's international obligations.

REFUGEE STATUS REVIEW TRIBUNAL

20. Before the Tribunal, the Appellant claimed to face serious harm if he returned to Bangladesh because of a long-running land dispute between his family and a distant relative Bholo and Bholo's family. He provided a further statement of claim dated 11 September 2017², together with submissions dated 13 September 2017³.

² BD 87.

³ BD 71, especially para 24.

21. The Tribunal did not accept that the Appellant was threatened or injured by Rari.

22. The Tribunal noted that since the Secretary's decision the Appellant had provided further information about his claim, stating that since he left Bangladesh around the time his father became ill, Bholo forcibly took the land from his family. He stated that he could not go to court as Bholo has power and his family had been financially ruined.

23. However, the Tribunal observed that at the hearing the Appellant was unable to explain why Bholo would seek to harm him if he returned given that Bholo now had the land he wanted. The Tribunal observed that the Appellant maintained that Bholo was the leader of AL in the district and thus had power. The Appellant expressed concern that if he returned Bholo would think he was returning to try to regain the land. The Appellant said that his younger brother had told Bholo that if the Appellant returned Bholo would not be able to hold the land. The Appellant maintained that his family was too scared to go to court and his brothers had not taken any action as they had no power. When asked why it would be different, he said it would be different like day and night. The Tribunal observed that:

He struggled to explain why his return, even as the eldest brother, would change the current situation, saying that he had more power than his brothers but being unable to explain how or why. He said that they believe he can rescue the land but he did not know why they think that.⁴

24. The Tribunal noted that the Appellant claimed for the first time at the hearing before it that a relative had died because of the land dispute after being stabbed many times but that he could not remember when this had happened and that no one was charged because of the power of Bholo.

25. The Tribunal recorded that at the end of the hearing the Appellant's representative submitted that when the Appellant used language like "power" what he was trying to explain was the cultural understanding of the power of the eldest brother compared to younger brothers, and the right of an older brother to claim the land back if he were to return: "It was submitted the reason this would be of concern to Bholo was that if the applicant was to return he would have a legitimate claim to pursue the land claim, and Bholo would eliminate the threat by harming or killing the applicant."⁵

26. However, the Tribunal concluded that the claim that Bholo would harm the Appellant was "problematic":

While the Tribunal is willing to accept that there may be a land dispute between the applicant's family and a distant relative called Bholo Molla, the

⁴ Tribunal decision at [57]; BD, at 289.

⁵ Tribunal decision at [59]; BD at [290].

prospect of Bholo harming the applicant appears remote. This is, firstly, because Bholo has now taken control of the disputed land and has held this for at least a year since the applicant's father's death. While the applicant's family may hold documents relating to the land, the applicant states in his further statement that his family cannot take Bholo to Court given the power differential between the families. He has been unable to explain why his return to Bangladesh would change this situation. Despite the submission of the representative the applicant has been unable to establish why he would have a legitimate claim different to that of his brothers or other family, nor has the Tribunal been presented with evidence of the cultural understanding of power of the eldest brother compared to the other brothers. The Tribunal does not accept that the applicant returning to Bangladesh would cause Bholo, locally politically powerful and having now seized the land, to feel threatened such that he would seek to harm the applicant in any way.⁶

THIS APPEAL

27. The Appellant's Amended Notice of Appeal filed on 15 March 2019 advanced two grounds:

- 1. The Tribunal misunderstood important evidence or a submission of substance, and in part based its decision on that misunderstanding, regarding the appellant being "powerful" enough to cause consternation to Bholo Molla.*
- 2. The Tribunal failed to give adequate reasons for why it did not accept important evidence or a submission of substance regarding the appellant being "powerful" enough to cause consternation to Bholo Molla.*

The First Ground

28. The Appellant submitted that the Tribunal erred in stating that the Appellant had not presented evidence of any cultural understanding of power relevant to him as the eldest brother, when at pages 55-62 of the transcript these matters were the subject of evidence.

29. The Appellant also argued that the statement in paragraph [6] of the reasons by the Tribunal, that: "Despite the submission of the representative ... " together with what followed, suggested that the Tribunal had not genuinely engaged with the submission

30. However, a careful analysis of the pages of evidence upon which the Appellant relied shows that the Appellant postulated that if he returned, the persons associated with Bholo Molla might think that he had returned to rescue the land and that "they are the leaders of the Awami League" in the district. In answer to questions from the Tribunal that given his status Bholo Molla might not be

⁶ Tribunal decision at [60]; BD at [290].

concerned if the Appellant returned to Bangladesh, the Appellant did not engage with the issue save to repeat his assertions about what Bholo Molla might think and to make assertions about the stabbing of his uncle and the injuries to his father for which he said there was only an investigation but no charges because the family did not have power.

31. The Appellant maintained that his younger brother had no power and that his brothers could not do anything because they have no power whereas “Me and them are – are big difference like day and night”. However, when asked why this was so, his response was: “An example if Tony Abbott and Tony Abbott’s brother standing in the election it will not be the same result.” When asked why Bholo Molla would believe he could rescue the land, the Appellant’s response was: “I don’t know why.” When asked about why he said that he had more power than his brother, he said that because he was the eldest son “I used to look after my business ... More ability to do things. When I used to run the business and they’re running the business so they’re actually 50 per cent less. The business is running 50 per cent less than what I used to run.” He then stated that: “If I am still alive then somewhere I can find out the way to rescue the land.”
32. The Appellant conceded that it could not be said that the Tribunal altogether failed to consider the Appellant’s submission and evidence, but asserted that the Tribunal failed to understand the submission and evidence and to that extent should be regarded as having constructively failed to consider it.
33. In submissions it was asserted on behalf of the Appellant that the Tribunal failed to engage with the issue: “[It is essentially sitting back and saying, ‘We don’t really understand exactly what you’re saying, and we’re not satisfied that what you have said persuades us. We don’t feel the mental affirmation necessary to find in your favour on this point’, but that’s done without a performance of the task that’s required. ... It needed to evaluate whether or not it believed or thought there to be some such understanding as the additional power of the eldest brother...”⁷
34. However, the Respondent contended that the Tribunal understood and considered what was an unsubstantiated and vague claim by the Appellant. Its position was that the Tribunal recorded the explanation of its reasons and simply was unpersuaded by the assertions of the Appellant, as was open to it. It referred to the analysis of the relevant principles in *QLN047 v Republic*.⁸
35. A review of the transcript of the hearing before the Tribunal reveals that it went to significant lengths to elicit from the Appellant a lucid explanation of what he was asserting was the power that he could wield toward Bholo Molla if he returned to Bangladesh. However, aside from repeated assertions, without more, that Molla could be concerned that he would be attempting to rescue his landholding, the Appellant did not provide an explanation of the threat that he might pose to Molla such that Molla might behave in a dangerous fashion toward him.

⁷ Transcript, at p7.

⁸ [2018] NRSC 23 at [47]ff.

36. In my view, the Tribunal made proper efforts to understand what the Appellant was asserting in relation to being powerful enough to cause consternation to Bholo Molla. However, the Appellant was serially unresponsive or evasive. The upshot was that the Appellant failed to explain the reasons for his asserted concerns and fears and the Tribunal was unpersuaded by them. There is no basis for concluding that the Tribunal misunderstood the explanation proffered by the Appellant and it recorded its explanation at paragraph [59] of its reasons. Aside from diffuse and vague assertions in relation to the role of the eldest brother, the Appellant provided no evidence about cultural understanding of the power of siblings in relation to different levels of seniority within the family unit. Unsurprisingly, in these circumstances, the Tribunal was not persuaded by the assertions advanced by the Appellant. This ground is not established.

The Second Ground

37. The Appellant relied upon the High Court decision of *Wingfoot Australia Partners Pty Ltd v Kocak*⁹ for the proposition that a failure to give adequate reasons, in the face of an obligation to do so, amounts to an error of law and contended that this applies to a deficit in reasons by the Tribunal which by s34(4)(b) of the *Refugees Convention Act 2012* (Nauru) is obliged to set out the reasons for its decision. In *Wingfoot* at [55] the High Court stated:

The statement of reasons must explain the actual path of reasoning by which the Medical Panel in fact arrived at the opinion the Medical Panel in fact formed on the medical question referred to it. The statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law. If a statement of reasons meeting that standard discloses an error of law in the way the Medical Panel formed its opinion, the legal effect of the opinion can be removed by an order in the nature of certiorari for that error of law on the face of the record of the opinion. If a statement of reasons fails to meet that standard, that failure is itself an error of law on the face of the record of the opinion, on the basis of which an order in the nature of certiorari can be made removing the legal effect of the opinion.

38. In particular, the Appellant asserted that the Tribunal is obliged to determine each and every claim by an applicant as to why they might obtain a favourable outcome in the review. It was said that the issue of the Appellant's status as the eldest brother and apex male of the family fell into this category.

39. While the Respondent conceded that a failure by the Tribunal to comply with s34(4) has the potential to constitute an error of law enabling a s43 appeal¹⁰, it contended that there was no foundation for the Appellant's contention that the Tribunal failed to comply with s34(4) of the Act and had given its reasons for not being satisfied about the claim of the Appellant.

⁹ [2013] 252 CLR 480 at [55].

¹⁰ See *PIM061 v Republic* [2018] NSRC 56 at [51]-[53].

40. It is apparent in the wording of the Tribunal's reasons, at paragraph [60], that it concluded that the failure by the Appellant to give a clear explanation why his return to Bangladesh would impact upon the inability of his family to take Bholo to court because of the power differential between the families. As a result, this ground too is not established.

CONCLUSION

41. Under s 44(1) of the Act, I make an order affirming the decision of the Tribunal and make no order as to costs.



Justice Ian Freckelton
Dated this 16th day of April 2021

