IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal No. 17 of 2018
Supreme Court Refugee Appeal Case No. 17 of 2017

BETWEEN

HFM038

APPELLANT

AND

THE REPUBLIC OF NAURU

RESPONDENT

BEFORE: **Justice Dr. Bandaranayake, Acting President**
Justice R. Wimalasena
Justice C. Makail

DATE OF HEARING: **14 September 2022**

DATE OF JUDGMENT: **28 April 2023**

CITATION: **HFM038 v The Republic of Nauru**

KEYWORDS: Refugee; complimentary protection; natural justice; failure to refer to material on which findings of facts were based; opportunity to respond to matters averse to the applicant's claim.

LEGISLATION: s.19(2)(d), 22(1), 22(3)(b), 27(c) of the Nauru Court of Appeal Act 2018; s.3,4,5, 31, 34(4), 43, 44(1)(b) Refugees Convention Act 2012; Refugees Convention 1951; 1967 Refugees Protocol.

CASES CITED: PIM061 v The Republic Case No 29 of 2017; Australian Capital Territory Revenue v. Alphaone pty Ltd [1994] FCA 293; 49 FCR 576; Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 136 ALR 481

APPEARANCES:

COUNSEL FOR the Appellant: **P Knowles**

COUNSEL FOR the Respondent: **R O'Shannessy**

JUDGMENT

1. The Appellant is a married Nepalese citizen with two children. His wife and the two children remain in Nepal. On 10 August 2013 he flew from Nepal to Malaysia, and from there, to Indonesia. He arrived on Christmas Island by boat on 15 September 2013, and was transferred to Nauru on 20 July 2014. The Appellant claimed that his passport was confiscated by a smuggler in Indonesia. On 17 September 2014 the Appellant made an application for Refugee Status Determination pursuant to section 5 of the Refugees Convention Act 2012 (Refugees Act).

2. Section 4 of the Refugees Act recognizes the principle of non-refoulment as follows:

"(1) The Republic shall not expel or return a person determined to be recognized as a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, except in accordance with the Refugees Convention as modified by the Refugees Protocol.

(2) The Republic shall not expel or return any person to the frontiers of territories in breach of its international obligations".

3. As per the definition stipulated in section 3 of the Refugees Act, a refugee means *a person who is a refugee under the Refugees Convention as modified by the Refugees Protocol.* According to the amendment to the Refugees Convention 1951 by the 1967 Refugees Protocol [Article 1A(2)]:

> "A refugee is any person who, owing to a 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 their nationality and is unable or unwilling to avail themselves of the protection of that country, or who, not having a nationality and being outside the country of their former habitual residence, is unable or unwilling to return to it".

4. Complimentary protection is defined in section 3 of the Refugees Act as; *protection for people who are not refugees as defined in this Act, but who also cannot be returned or expelled to the frontiers of territories where this would breach Nauru's international obligations.*

5. On 19 May 2016 the Secretary for the Department of Justice and Border Control (Secretary) decided that the Appellant's fear is not well-founded, and he is not

a refugee within the meaning of Refugees Act. Moreover, it was decided that Nauru does not have complementary protection obligations to the Appellant.

6. On 30 May 2016, the Appellant made an application to the Refugee Status Review Tribunal (Tribunal) for merit review pursuant to section 31 of the Refugees Act. The Tribunal affirmed the decision of the Secretary on 14 March 2017. The Appellant filed a Notice of Appeal on 31 March 2017 to appeal the decision of the Tribunal to the Supreme Court of Nauru pursuant to section 43 of the Refugees Act. By its judgment dated 22 March 2018, the Supreme Court affirmed the decision of the Tribunal. The Appellant filed a Notice of Appeal on 23 October 2018 to appeal against the Supreme Court judgment to the Nauru Court of Appeal.

7. Section 19(2)(d) of the Nauru Court of Appeal Act 2018 (Court of Appeal Act) stipulates that only questions of law shall be considered in refugee appeals:

> "An appeal shall lie under this Part in any civil proceeding to the Court form any final judgment, decision or order of the Supreme Court sitting under the Refugees Convention Act 2012 in its appellate jurisdiction on questions of law only".

8. Section 22(1) of the Court of Appeal Act provides that; *where a person desires to appeal under this Part, he or she shall file and serve a notice of appeal within 30 days of the date of the delivery of the final judgment, decision or order of the Supreme Court.* The Appellant filed an application to extend time to appeal before a single justice of appeal on 23 October 2018, by way of a consent order application. Accordingly, leave to appeal out of time was granted pursuant to section 22(3)(b) and 27(c) of the Court of Appeal Act.

9. Consequently, the Appellant filed the Notice of Appeal on 23 October 2018 with the following ground of appeal:

> "The Refugee Status Review Tribunal erred on a point of law by:

1. Denying the Appellant natural justice by failing to put the Appellant the nature and content of;
2. Failing to comply with its obligations under s34(4)(d) of the Refugee Convention Act 2012, by failing to refer to material on which findings of fact were based, namely,

Country information that it relied upon and which was adverse to the assessment of the Appellant's claims concerning the future risk of harm to him because of his Yakha Rai ethnicity and/or his anti-separatist political opinion which is contrary to the political party of the Rai ethnicity (at paragraph [88] of its reasons).

10. When the appeal was taken up for hearing, the counsel for the Appellant sought the Court's permission to advance this ground of appeal, which was not raised in the lower court. The counsel for the Appellant explained that the reason for the failure to raise this ground was that the Appellant was unrepresented in the Supreme Court. The Respondent did not oppose the application to raise the fresh ground of appeal, in fairness to the Appellant, as he was unrepresented in the lower court. Accordingly, on 14 September 2022, this Court granted permission to advance the fresh ground of appeal.

11. We will now examine the ground of appeal raised by the Appellant. The sole contention of the Appellant revolves around paragraph [88] of the Tribunal's decision, where it mentions at the last line: "*The country information does not, in the view of the Tribunal, assist the applicant's claim to be at risk of harm for this reason in the future.*" For ease of reference, paragraph [88], which contains the findings of the Tribunal in respect of its discussion regarding 'persecution based on race and corresponding imputed political opinion,' is reproduced below:

"[88] The applicant only raised this claim before the Tribunal, and it appeared speculative. He had evidently not previously felt strong enough about these matters to identify them as significant concerns when his claims were being advanced. At the Tribunal hearing he

provided only one example of having experienced any difficulties of this nature, when the bus he was travelling on was stopped for a time by separatist who eventually allowed it to continue. There was no suggestion the applicant himself was individually targeted. While the Tribunal is prepared to accept that this incident occurred, it does not accept that the applicant has been targeted in the past for reason of his Yakha Rai ethnicity or any related political opinion imputed to him, whether by Limbu, Khambu, Madhesi or any other group, and whether as a proponent or opponent of separatism. The country information does not, in the view of the Tribunal, assist the applicant's claim to be at risk of harm for this reason in the future."

12. The counsel for the Appellant asserted that the Tribunal erred in law on two fronts. Firstly, the counsel argued that by referring to country information in paragraph [88], the Tribunal has referred to information that was never put to the Appellant for an opportunity to comment, as such information was evidently averse to the Appellant's claim. Secondly, the counsel alleged that the Tribunal did not comply with section 34(4)(d) of the Refugees Act by failing to refer to the evidence or other material on which the findings of facts were based. It should also be noted at this juncture that, during submissions, the counsel for the Appellant went on to discuss various ethnic groups and separatist groups in Nepal, consideration of which, in our opinion, slightly goes beyond the scope of error of law permitted to be considered in a refugee appeal.

13. In any event, the counsel for the Respondent submitted that the Tribunal did not breach natural justice or denied the Appellant procedural fairness. It was argued that the Tribunal was merely referring to the totality of the country information when it stated that the country information does not assist the Appellant's claim. Furthermore, the counsel for the Respondent contended that although it is obligatory for the Tribunal to provide written reasons for its decision, those reasons do not require every matter raised by a party to be

referred to, evaluated, and made the subject of explicit acceptance or rejection as stated in paragraph [54] of PIM061 v The Republic, Case No. 29 of 2017.

14. The counsel for the Appellant referred to Commissioner for the Australian Capital Territory Revenue v. Alphaone Pty Ltd [1994] FCA 293; 49 FCR 576 where the full court of the Federal Court of Australia discussed the principle of natural justice, where it was observed:

> [28] It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material - Dixon v. Commonwealth (1981) 61 ALR 173 at 179. However, as Lord Diplock said in F Hoffman-La Roche and Co. A.G. v. Secretary of State for Trade and Industry (1975) AC 295 at 369:
>
> "...the rules of natural justice do not require the decisionmaker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If that were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would be abolished."
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> A person likely to be affected by an administrative decision to which requirements of procedural fairness apply can support his or her case by appropriate information but cannot complain if it is not accepted. On the other hand, if information on some factor personal to that person is obtained from some other source and is likely to have an effect upon the outcome, he or she should be given the opportunity of dealing with it - Kioa v. West (supra) at 587 (Mason J), 628 (Brennan J). Within the bounds of rationality a decision-maker is generally not obliged to invite comment on the evaluation of the subject's case - Sinnathamby v.

Minister for Immigration and Ethnic Affairs (1986) 66 ALR 502 at 506 (Fox J), 513 (Neaves J). In Ansett Transport Industries Ltd v. Minister for Aviation (1987) 72 ALR 469 at 499, Lockhart J expressly agreed with the observations of Fox J in Sinnathamby on this point. See also Geroudis v. Minister for Immigration Local Government and Ethnic Affairs (1990) 19 ALD 755 at 756-7 (French J) and Somaghi v. Minister for Immigration, Local Government, and Ethnic Affairs (supra) at 103 (Keely J), 119 (Gummow J).

[30] Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question. For a statutory exception to the latter proposition see the pre-decision conference process provided for in the Trade Practices Act 1974 (Cth)."

15. Further, the Appellant brought to the notice of the Court that section 22(b) of the Refugees Act requires the Tribunal to act according to principles of natural justice. Section 22 of the Refugees Act provides for the way of operating the Tribunal:

"The Tribunal;

(a) Is not bound by technicalities, legal forms or rules of evidence; and

(b) Shall act according to the principles of natural justice and the substantial merits of the case.

16. Although the counsel for the Appellant contended that the country information mentioned in paragraph [88] was never put to the Appellant in breach of the principles enunciated in the Alphaone case (supra), we are not inclined to accept that contention. While we acknowledge that it is a rule of natural justice to afford an opportunity to respond to material, which results in an adverse decision for the Appellant, we believe that it has no relevance at this instance. It is crystal clear that the Tribunal did not refer to any specific country information to which the Appellant was not privy. Therefore, the need to afford an opportunity to response does not arise, as claimed by the Appellant, in our opinion.

17. When the Tribunal's decision is considered in its entirety, it is clear that paragraph [88] merely refers to the generality of country information and not to any material that was undisclosed to the Appellant for comment. Although the counsel for the Appellant argued this point by focusing on the relevant line in the paragraph in strict isolation, it should be viewed in a broader context to understand the Tribunal's actual reasoning. Moreover, the Tribunal has not relied on any country information as such; instead, it has only commented on the resultant position due to the absence of any country information specific to the Appellant's claim. Therefore, we believe that the Appellant has not been denied of natural justice.

18. There is no gainsaying that failure to give reasons constitutes denial of natural justice. Section 34(4) of the Refugees Act acknowledges this fundamental principle in the following manner:

> "The Tribunal shall give the applicant for review and the Secretary, a written statement that:
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> (a) sets out the decision of the Tribunal on the review;
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> (b) sets out the reasons for the decision;

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or other material on which the findings of fact were based."

19. Particularly, section 34(4)(d) mandates the Tribunal to refer to the evidence or other material upon which the findings of facts were based. The counsel for the Appellant argued that the Tribunal's decision was tainted by a breach of natural justice, as the Tribunal failed to identify the information upon which it relied. However, as mentioned earlier, this issue should be assessed within a wider context rather than being confined to a single sentence in the Tribunal's decision. The Tribunal has provided comprehensive reasons for its decision, particularly addressing the claim of persecution based on race and the corresponding imputed political opinion of the Appellant from paragraphs [82] to [87] of the Tribunal's decision.

20. At this juncture, it would be pertinent to note Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 136 ALR 481, where it was observed that a decision under review must not be looked at with an overly critical eye:

> "[30] When the Full Court referred to "beneficial construction", it sought to adopt an approach mandated by a long series of cases, the best exemplar of which is Collector of Customs v Pozzolanic (22). In that case, a Full Court of the Federal Court (Neaves, French and Cooper JJ) collected authorities for various propositions as to the practical restraints on judicial review. It was said that a court should not be "concerned with looseness in the language ... nor with unhappy phrasing" of the reasons of an administrative decision-maker (23).
> The Court continued (24):
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> "The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error"."

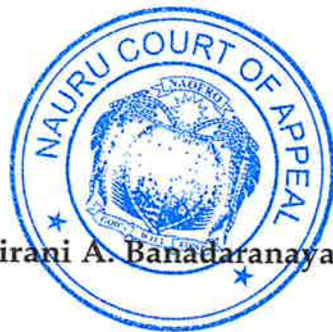
21. When the Tribunal's decision is considered in its entirety, it is clearly discernible that the country information mentioned in paragraph [88] is simply general country information. The Tribunal has provided comprehensive reasons and referred to evidence and other materials upon which its findings of fact are based. Even if the appellant's argument is taken at its highest, as the Respondent argued, it still falls short of showing inadequate reasons for the decision.

22. We believe that no error of law is evident in the Tribunal's decision for the reasons stated above. There was no denial of natural justice or procedural fairness that affected the Tribunal's decision. Consequently, the appeal must fail.

23. Accordingly, the appeal is dismissed with costs.

Dated this 28th day of April 2023

Justice Rangajeeva Wimalasena
Justice of Appeal



Justice Dr. Shirani A. Banadaranayake
I agree.

Acting President of the Court of Appeal

Justice C. Makail
I agree.

Justice of Appeal