NAURU COURT OF APPEAL
AT YAREN
APPELLATE JURISDICTION

Refugee Appeal No. 7 of 2018
[Supreme Court Refugee Appeal No. 22 of 2016]

BETWEEN: **QLN 142**

APPELLANT

AND: **REPUBLIC OF NAURU**

RESPONDENT

BEFORE: **Justice R. Wimalasena**
Justice C. Makail

DATE OF HEARING: **11/10/2022**

DATE OF JUDGMENT: **9/8/2024**

CITATION: **QLN 142 v. REPUBLIC OF NAURU**

KEYWORDS: **COURT OF APPEAL – Refugee appeal – Appeal against dismissal of appeal by Supreme Court – Appeal to Supreme Court from decision by Refugee Status Tribunal to affirm determination of Secretary to hold applicant not eligible for refugee status and owed complementary protection – Refugees Convention Act, 2012**

COURT OF APPEAL – Relocation of applicant to country of origin – Claim of fear to being charged for breach of immigration laws for illegal departure at infancy – Fear of harm during period of detention on return – Findings by Tribunal – Evidence to support Tribunal's findings – Refugees Convention Act, 2012 – Section 34(4)(d)

LEGISLATIONS: **Refugees Convention Act, 2012, Nauru Court of Appeal Act, 2018**

CASES CITED: **DNQ18 v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 72, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v. Alex Viane [2021 HCA 41**

APPEARANCES:

COUNSEL for the Appellant: **Mr. A McBeth**

COUNSEL for the Respondent: **Mr. C Hibbard**

JUDGMENT

1. On 22nd March 2018, the Supreme Court of Nauru affirmed a decision made by the Refugee Status Review Tribunal (*"Tribunal"*) on 6th May 2017 under the *Refugees Convention Act,* 2012 (*"Refugees Act"*) that the appellant is not recognized as a refugee and is not owed complementary protection.

2. By an amended notice of appeal filed on 11th July 2022, the appellant appeals from the judgment on two grounds to the following effect:

2.1. Ground 2: The Supreme Court erred in failing to find that the Tribunal made an error of law in finding that there was no realistic possibility that the appellant would be charged with any breaches of the Sri Lankan Immigrant and Emigrant Act in circumstances where he had departed Sri Lanka as an infant ("the Charge Ground).

2.2. Ground 3: The Supreme Court erred in failing to find that the Tribunal made an error of law in failing to consider whether the appellant might suffer harm during any period of detention ("the Detention Ground).

Brief Facts

3. According to the appeal record and confining the facts to those outlined by the appellant's counsel in the written submissions, the appellant is a national of Sri Lanka. He departed Sri Lanka for India, where he thereafter lived in refugee camps in Tamil Nadu, when he was five months old. His parents and sister are deceased. He claimed to fear harm on return to Sri Lanka on the basis that he may be imputed with a pro Liberation of Tamil Tigers Eelam (*"LTTE"*) political opinion.

4. The appellant also claimed to fear that he would suffer harm in poor condition in Sri Lanka, while he was the subject of investigations or while waited to face any charges connected with his having left Sri Lanka illegally. The appellant claimed that he would be at Particular risk, in circumstances where he had no family to assist him. Moreover, importantly, the appellant claimed that due to his health condition (kidney disease), he would be in a "more vulnerable situation" than others in comparable position in his respect.

Tribunal's Decision

5. The Tribunal cited information from the Australian Department of Foreign Affairs and Trade (*"DFAT"*) that "persons who have left Sri Lanka illegally will be arrested at the airport, photographed and fingerprinted and taken to court at the first opportunity, generally within 24 hours unless it is a weekend or public holiday in which case it may be a few days".

6. Then, "in considering whether the applicant was likely to suffer harm on the basis of breaching [Sri Lankan] departure laws", the Tribunal positively found at [99] of its decision that:

"[T]the information before the Tribunal suggested that it was likely he would be detained for a brief period that might be less than a day or at the most several days."

7. The Tribunal went on, in the same paragraph, to find:

"Although sources indicated that prison conditions in Sri Lanka are poor, the information before the Tribunal did not tend to indicate that there was real risk that a person, including a person who is a Tamil and a failed asylum seeker, would suffer degrading treatment if they were only held for a few days or a couple of weeks."

8. However, the Tribunal stated that "[g]iven that the applicant was five months old when he left the Tribunal does not accept there is a reasonable possibility that he will be charged with any breaches of the I & E Act arising out of his departure from Sri Lanka in 1990", and that "[a]ny fear of harm on this basis is not well-founded.

9. The Tribunal accepted that the appellant suffered from kidney disease and noted the appellant's claim that he would thereby be in a more vulnerable position in Sri Lanka on his return to Sri Lanka. The Tribunal purported to dispose of this claim in the basis that it did not accept that there was "a reasonable possibility or real risk that the applicant will be detained or imprisoned and/or tortured for any reason".

The Charge Ground

10. Ground 2 on this appeal reagitates ground 4 before the primary judge. In relation to that ground (ground 4), the primary judge found:

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

*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**, and specifically gave the Appellant an opportunity to comment in the issue. 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."*

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."

11. We note it is common ground that the footnote following the text in **bold** referred to [96] of the Tribunal's statement of reasons. However, the Tribunal did not refer to country information in that paragraph. This is where the parties disagree. According to the appellant, no country information was cited in [96] for that proposition. Rather, at [96], the Tribunal simply recorded its assertion to the appellant during the hearing that "*the Sri Lankan authorities were not prosecuting children.*"

12. It was argued that there was a statement made by Deputy Principal Member Boddison at the hearing that "the country information also indicates that they aren't prosecuting children for leaving illegally". However, no source for this supposed "country information" was identified.

13. It was further argued that if the Tribunal was referring to the DFAT country information cited at [98] of its reasons, that is not clear. In any case, the DFAT information cited by the Tribunal did not rationally support a conclusion that no persons were charged with having left Sri Lanka illegally as a child. Rather, it is in very clear terms, that "persons who have left Sri Lanka illegally will be arrested at the airport, photographed and fingerprinted and taken to court at the first opportunity."

14. In essence the appellant's case is that the Tribunal has a duty under Section 34(4)(d) of the *Refugees Act* to refer to the evidence it relied on to make its findings of fact. In this instance, there was no evidence of a country information upon which the Tribunal referred to, to make the finding that the appellant will not be charged for breaching Sri Lankan immigration and emigration laws at the time of his departure from Sri Lanka as a child.

15. As the learned counsel for the appellant puts it in the written submissions, *"In order for the Tribunal to make a positive finding of fact, it "must do so based on some evidence or other supporting material, rather than no evidence or no material, unless the finding is made in accordance with the [Tribunal's] personal or specialized knowledge or by reference to that which is common knowledge" "*.

16. It was further argued that even if there was country information before the Tribunal and the finding by the Tribunal was capable of being supported by country information, it does not support the finding of the Tribunal. We were referred to [98] of the Tribunal's reasons, in particular the last line of bullet-point four which states *"Children are never subject to bail or fines."* According to the learned counsel's submissions, this statement goes to the question of penalty and not penalty that is applied to a 25-year-old man who had departed Sri Lanka illegally when he was a child.

17. To reinforce his submission on this point, the learned counsel for the appellant referred to the judgment of the Federal Court in *DNQ18 v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 72. We accept the appellant's submissions that the Tribunal has a duty to refer to the evidence, in this case, country information to make the finding that the appellant will not be charged for breaching Sri Lankan immigration and emigration laws at the time of his departure from Sri Lanka when he was a child.

18. It is a duty placed on the Tribunal Section 34(4)(d) of the *Refugees Act* states:

> *"(4) The Tribunal must give the applicant for review and the Secretary a written statement that:*
>
> *(a)* .....
> *(b)* .....
> *(c)* .....
> *(d) refers to the evidence or other material on which the findings of fact were based."*

19. However, we accept that the primary judge's reference to "country information" was an error and we would suggest a mistake because that error does not reveal an error of law by the Tribunal. It was more an oversight by the primary judge when he was addressing the Tribunal's finding on the appellant's claim of fear to harm on his return that he may be charged for breaching the Sir Lankan immigration and emigration laws because of his illegal departure. And we note the respondent does not contest the appellant's claim that there was no "country information" before the

Tribunal. Thus, we find no merit in the appellant's submission that the primary judge's decision is flawed and should be set aside and reject it.

20. On the other hand, we find merit in the learned counsel for the respondent's submissions that there is nothing in the scheme of the *Refugees Act* that prevents the Tribunal from making decisions based on its personal or specialized knowledge, or commonly accepted knowledge. For this reason, we are of the view that it was open to the Tribunal to make its decision/finding according to its personal or specialized knowledge, or commonly accepted knowledge.

21. The manner in which the Tribunal approached the appellant's claim to fear of being charged by basing its finding on its personal or specialized knowledge, or commonly accepted knowledge is not a concept that is foreign to Immigration Authorities in Australia. In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v. Alex Viane* [2021 HCA 41, the High Court of Australia recently explained, in relation to a decision-making power conferred by Section 501CA(4) of the Australian Migration Act, 1958 (Cth):

> *"17. If the Minister exercises the power conferred by S501CA(4) and in giving reasons makes a finding of fact, the Minister must do so based on some evidence or other supporting material, rather than no evidence or no material, unless the finding is made in accordance with the Minister's personal or specialised knowledge or by reference to that which is commonly known. By "no evidence" this has traditionally meant "not a skerrick of evidence."*
>
> *18. There is otherwise noting in the statutory language of s 501CA(4) of the Act that prohibits the Minister from using personal or specialised knowledge, or commonly accepted knowledge, for the purpose of considering the representations made by an applicant, and in determining whether the Minister is satisfied that there is "another reason" for revocation. Indeed, there are simply no limitations on the sources of information that may be considered prescribed by S 501ca(4)(b)(ii). Nor is there any express requirement that the Minister disclose whether a material finding was made from personal knowledge.....*
>
> *19. In exercising the power conferred by s 501CA(4) of the Act, the Minister is free to adopt the accumulated knowledge of the Minister's Department....."*

22. We note that was a case *"……where no evidence or other material has been identified in support of the Minister's findings about the speaking of English and the availability of services in American Samoa and Samoa, it can be assumed that the findings proceeded from the Minister's personal or specialized knowledge or were matters commonly known."* Based on that, the Minister decided not to revoke the cancellation of the appellant's visa.

23. In the same way, there was nothing preventing the Tribunal from relying in its own specialised knowledge, or matters of common knowledge, in reaching its decision. This was a case where the Tribunal noted that "persons who have left Sri Lanka illegally will be arrested at the airport, photographed and fingerprinted and taken to court at the first opportunity." While the Tribunal noted that since the appellant left Sri Lanka illegally as an infant (five months old) with his parents, it was likely that he will be treated leniently by the Sri Lankan authorities on his return, which will include checking his identity against the immigration and intelligence databases. But the Tribunal relied on a matter of common knowledge which is States do not prosecute offences committed by children and in the appellant's case, he was an infant when he left the country. It may be that he will be returning to Sri Lanka as a 25-year-old adult but put simply, it is beyond human comprehension that he would be charged for an offence when he was an infant. This was the Tribunal's point at [108] of its reasons:

> *"Given that the applicant was five months old when he left the Tribunal does not accept there is reasonable possibility that he will be charged with any breaches of the I& E Act arising from his departure from Sri Lanka in 1990."*

24. Finally, as to the judgment of the Federal Court in *DNQ18,* we note that it can be factually distinguished from this case. That was a case of a family of five comprising of parents and three children who were refused Safe Haven Enterprise visas by the second respondent (Immigration Assessment Authority). While in both cases it was indicated that the Tribunal referred to DFAT report where *"children are never subject to bail or fines"*, in the *DNQ18* case the Federal Court did not consider the point raised in this case that it was open to the respondents to rely on their own specialized knowledge, or common knowledge, in reaching the decision. For this reason, we conclude that it was open to the Tribunal to assess the appellant's claim to fear of being charged in the manner as it did, and no error can be attributed to its finding against the appellant.

25. We are not satisfied that the power exercised by the Tribunal under Section 34(4)(d) of the *Refugees Act* and affirmed by the primary judge in his conclusion that, *"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……" is unlawful.

26. This ground is dismissed.

The Detention Ground

27. We note Ground 2 (the Detention Ground) stands independently of Ground 2 (the Charge Ground). Relevantly, the primary judge held as follows:

> *"[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 the most several days". However, this must be read in 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. However, the Tribunal concluded that such questioning would quickly establish that he departed with his family in 1990 as an infant and therefore would not expose him to the harm about which he is apprehensive."*

28. The learned counsel for the appellant submitted that the appellant brought to the notice of the Tribunal not only a concern with harm he may suffer while in custody in prison *per se,* but he also brought to the notice of the Tribunal a concern with how he may be treated while in detention. This included his particular vulnerability arising from his kidney disease. He made that clear in the following to the Tribunal:

> *"If removed to Sri Lanka (QLN142] may be detained or imprisoned....even if such detention or imprisonment is purely for the purposes of further investigation, or because of [QLN142's] prior unlawful departure from Sri Lanka……"*

29. It was argued that the primary judge's reasoning is flaw because the reasoning failed to address this claim and if his Honour did, he would have recognized that the Tribunal had positively found that the appellant "likely.....would be detained" for up to several days. This is where the primary judge misapprehended the appellant's claim to fear to harm in prison or detention because the Tribunal did not properly deal with his claim to fear harm in prison or detention on the basis that the Tribunal concluded "he was not likely to be placed in prison". The learned counsel submitted that the claim must be properly addressed because of the appellant's particular vulnerability where he is suffering from kidney disease. It did not do so.

30. It was even submitted that the Tribunal's reasoning displayed a clear and obvious contradiction because it purported to dispose of the appellant's claim on the basis that it did not accept that he will be "detained.....for any reason" at [125] of its reasons and yet the primary judge recognized that the Tribunal had in a previous reason at [99] positively found that it was 'likely he would be detained". For this further reason, it was submitted that the Tribunal failed to provide adequate reasons for its decision to explain which one of the two contradictory findings was the Tribunal's real finding.

31. However, we are of the opinion that the appellant's submissions in relation to both contentions are misconceived. The relevant question to answer the question of the appellant's claim of fear of harm in detention or prison is the duration of his detention or imprisonment by the Sri Lankan authorities. This is because the Tribunal did find that the appellant was likely to be detained on his return to Sri Lankan because of his illegal departure from Sri Lanka when he was an infant. The Tribunal assessed the appellant's claim to fear harm, in particular his vulnerability of suffering from kidney disease in the context of how long (duration) he will be held in detention or prison on his return.

32. This is clearly set out in the Tribunal's reasons at [99] where the Tribunal summarized the country information that was put to the appellant in the course of the hearing before the Tribunal. [99] is part of a passage from [93] to [102], which described matters the Tribunal put to the appellant during the hearing. The Tribunals' actual and only, finding on this topic is at [125] where it stated:

> *"The Tribunal does not accept there to be a reasonable possibility or real risk that the appellant will be detained or imprisoned or mistreated and/or tortured for any reason. The Tribunal does not accept the submissions that he will be detained or imprisoned for the purposes of 'further investigation', noting that it is inconsistent with the country information regarding returnees in Sri Lanka. It follows that the*

Tribunal does not accept that the applicant if the applicant was detained was mistreated in detention or whilst being questioned he would face a heightened risk of harm he suffers from kidney disease."

33. That finding was open to the Tribunal because as we have pointed out, it was about the duration of detention given that he had left Sri Lanka when he was an infant and based on the Tribunal's reasoning at [103] – [105] any questioning of the appellant on arrival in Sri Lanka would "quickly establish that the applicant departed Sri Lanka with his family in 1990 as an infant". The primary judge also viewed the appellant's claim to fear harm in detention in that context when he affirmed the Tribunal's decision at [47] of the judgment:

"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." 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." Underlining added).

34. For these reasons, we are satisfied that it was open to the Tribunal to conclude and affirmed by the Supreme Court, in the circumstances of this case, that there was no reasonable possibility or real risk that the appellant would be detained.

Conclusion

35. We conclude that the appellant has failed to establish any error of law in the judgment of the Supreme Court in affirming the Tribunal's decision.

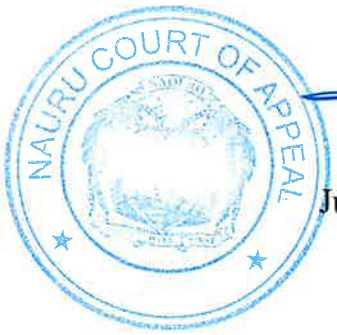
Order

36. The final terms on the order of the Court are:

a) The appeal is dismissed.

b) No order as to cost.

Dated this 9th day of August 2024.



Justice Colin Makail
Justice of Appeal

Justice Rangajeeva Wimalasena

I agree.

President
Justice of Appeal