IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal No. 19 of 2018
Supreme Court Refugee Appeal Case No. 23 of 2016

BETWEEN

QLN 139

AND

APPELLANT

THE REPUBLIC OF NAURU

RESPONDENT

BEFORE: **Justice R. Wimalasena, President**
Justice Sir A. Palmer
Justice C. Makail

DATE OF HEARING: **30 July 2024**

DATE OF JUDGMENT: **22 November 2024**

CITATION: **QLN 139 v The Republic of Nauru**

KEYWORDS:	Refugee; non-refoulment obligations; discrimination; complementary protection; persecution; failure to consider evidence
LEGISLATION:	Section 19(2)(d) of the Nauru Court of Appeal Act 2018; Sections 3, 4, 5 and 20 of the Refugee Convention Act 2012; Article 1A(2) of the Refugee Protocol 1967; Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination; Refugees Convention and Migration Act 1958 of Australia
CASES CITED:	SZSSC V Minister for Immigration and Border Protection [2014] FCA 863; 2014 317 ALR; Minister for Immigration and Border Protection v SZSRS (2014) 309 ALR 67; WAEE v Minister for Immigration (2003) 75 ALD 630; REF 001 v Republic of Nauru [2018] NRSC 54; Minister for Immigration and Border Protection v WZAPN (2105) 146 ALD 480
APPEARANCES:	
COUNSEL FOR the Appellant:	**N. Prasad**
COUNSEL FOR the Respondent:	**R. O'Shannessy**
APPEAL	**Dismissed**

JUDGMENT

1. The Appellant is a Sri Lankan national of Tamil ethnicity. He is from Jaffna District of Sri Lanka's Northern Province. His parents were separated, and in 1990, when he was 6 years old his father took him and two of his sisters to India. Another sister, who was six months old at that time, stayed in Sri Lanka with his mother. While in India, his father married his stepmother. The Appellant lived in a refugee camp in Tamil Nadu in India. In 2010, he returned to Sri

Lanka after obtaining a travel document from the Sri Lankan High Commission in Chennai. The Appellant travelled to Colombo by air from Chennai. He stayed in Sri Lanka for about 6 months, and then returned to India after obtaining a passport from Sri Lanka. Thereafter, he lived in India until he travelled to Australia by boat.

2. He arrived in Australia on 27 July 2014 and was transferred to Nauru on 02 August 2014. On 02 October 2014 the Appellant made an application for Refugee Status Determination (RSD) pursuant to section 5 of the Refugees Convention Act 2012 (Refugees Act).

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. 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".

6. On 08 October 2015 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. Also, it was decided that Nauru does not have complementary protection obligations to the Appellant.

7. Subsequently, on 10 October 2015 the Appellant made an application to the Refugee Status Review Tribunal (Tribunal) for merit review pursuant to section 31 of the Refugees Act. The Appellant submitted a further statement revealing that he went back to Sri Lanka in 2010 for around 5-6 months, a detail that he had not disclosed in his previous RSD statement when the RSD application was made. On 05 July 2016 the Tribunal affirmed the determination of the Secretary. The Appellant then filed a notice of appeal on 24 November 2016 to appeal against the determination of the Tribunal. On 27 November 2018, the Supreme Court delivered its judgment affirming the decision of the Tribunal.

8. Aggrieved by the Supreme Court judgment, the Appellant filed a notice of appeal on 18 December 2018 to appeal to the Nauru Court of Appeal with the following grounds of appeal:

1) The primary judge erred by failing to find that the Refugee Status Review Tribunal (the Tribunal) erred on a point of law by failing to consider that the Appellant was able to avoid harm when he returned to Sri Lanka for six months in 2010/2011 because he was accompanied by his Sinhalese family friend, Pradeep.
2) The primary judge erred by failing to find that the Tribunal erred on a point of law by failing to consider, or provide adequate reasons in response to, the Appellant's principal submission that he will suffer racial discrimination of a kind prohibited by the Convention on the Elimination of All Forms of Racial Discrimination (the CERD) if removed to Sri Lanka.
3) The primary judge erred by failing to find that the Tribunal erred on a point of law by applying the wrong test in assessing the Appellant's claim he will face racial discrimination of a kind prohibited by the CERD if he is returned to Sri Lanka.

9. At this juncture, it is important to note that only questions of law are to be considered in refugee appeals according to section 19(2)(d) of the Nauru Court of Appeal Act 2018 (Court of Appeal Act):

> "An appeal shall lie under this Part in any civil proceeding to the Court from 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".

First ground of appeal

10. The Appellant submitted that the Tribunal fell into error by not engaging with the evidence that it was Pradeep's Sinhalese ethnicity and language skills that enabled the Appellant to travel through checkpoints or avoid adverse scrutiny from authorities. It was asserted by the Appellant that such failure amounts to

denial of procedural unfairness as described in SZSSC V Minister for Immigration and Border Protection [2014] FCA 863; 2014 317 ALR at [75]-[78].

11. However, the Respondent contended that the particular evidence relating to association with Pradeep, which was claimed to have enabled the Appellant to avoid harm, was neither a submission of substance nor important evidence. The Respondent submitted that the Appellant's travelling with Pradeep had no bearing on the Sri Lankan authorities' decision not to search the Appellant and inflict harm upon him.

12. This issue regarding the failure to consider particular evidence was discussed in Minister for Immigration and Border Protection v SZSRS (2014) 309 ALR 67, where it was decided that the tribunal's failure to consider a letter constituted a jurisdictional error. But it was clarified that jurisdictional error does not automatically arise from ignoring any relevant evidence, but it depends on the significance of the evidence to the decision making process.

13. In this appeal the Tribunal considered the circumstances relating to the Appellant's return to Sri Lanka in 2010 for about 5-6 months. The Tribunal accepted that upon his arrival at the Colombo airport he was questioned by the authorities for about 15 minutes and Pradeep helped him to explain that he had been living in a refugee camp in India. The Tribunal accepted that Pradeep helped him to obtain a National Identity Card and a Sri Lankan passport. The Tribunal further accepted that the Appellant went to Jaffna to visit his mother passing through army checkpoints and most of the time he spent in Sri Lanka he was staying with Pradeep. However, the Tribunal did not accept that the Appellant was living in hiding. The Tribunal clearly noted that, after considering the evidence submitted by the Appellant, the Sri Lankan authorities had no adverse interest in the Appellant.

14. In this regard, the Supreme Court referred to the findings of the Tribunal in paragraph 18 of its judgment as follows;

"The Tribunal rejected the Appellant's claim to fear harm because of his Tamil ethnicity on the same basis as the Secretary. The Tribunal noted country information that the security situation for Tamils has improved greatly for those not suspected of LTTE involvement, and that Appellant's relationship with his two uncles and cousin was not close enough to give rise to any such risk profile. Of further significance was that the Appellant was able to return in 2010 to 2011 without being mistreated. Given the focus of authorities is now on persons involved in separatist activity who may destabilise post-conflict Sri Lanka, it found that Tamils, including young Tamils from the Northern Province, or failed Tamil asylum-seekers, are not subject to any reasonable possibility of harm. This is also the case taking into account any political opinion that may be imputed to the Appellant because of having this profile."

15. The Respondent relied on the following paragraphs of WAEE v Minister for Immigration (2003) 75 ALD 630 to contend that the Tribunal had, in fact, considered the evidence relating to the overall circumstances surrounding Pradeep's association in evaluating the claim by the Appellant:

> [46] It is plainly not necessary for the tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 ; 62 ALD 225 ; 180 ALR 1 at [87]–[97]) and a failure by the tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of

applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinised "with an eye keenly attuned to error". Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.

[47] The inference that the tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where, however, there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.

16. We find no merit in the argument that the Tribunal failed to consider the assistance provided by Pradeep. In fact, the Tribunal adequately considered the evidence regarding the association with Pradeep during the period the Appellant was in Sri Lanka. However, the Tribunal based its decision on the finding that the authorities had no adverse interest in the Appellant. It cannot be asserted that the Tribunal failed to consider the evidence simply because it did not have a reason to make a finding that the Appellant avoided harm due to his association with Pradeep. The absence of a favourable finding for a party does not imply that the Tribunal disregarded the evidence. There is no failure on the part of the Tribunal in considering material evidence, as the consideration of evidence in paragraphs [22] to [24] of the Tribunal determination clearly demonstrates that the role played by Pradeep is

subsumed in the overall analysis. Furthermore paragraph [52] of the Tribunal determination assessed the evidence on this issue as follows:

> "The Tribunal gives significant weight to the fact that the applicant returned lawfully to Sri Lanka for six months in 2010/11, being questioned for about 15 minutes on his arrival at Colombo airport before being allowed to leave the airport. While in Sri Lanka the applicant lived in Colombo with his father's friend Pradeep and applied for and was issued a National Identity Card and a Sri Lankan passport. He travelled to Jaffna by car with Pradeep and gave evidence that he passed through army checkpoints. He departed Sri Lanka lawfully using his own genuinely issued passport and was again questioned about 15 minutes by Sri Lankan authorities at the airport. It is not suggested that any of his interactions with the Sri Lankan authorities during his return in 2010/2011 were anything other than routine, nor that he was harmed or mistreated during any of those interactions."

17. In the circumstances, it was correct for the Supreme Court to decide that no error was constituted in respect of this ground of appeal.

18. Accordingly, the first ground of appeal fails.

Second and Third Grounds of appeal

19. We will consider the second and third grounds of appeal together as they relate to claims based on Convention on the Elimination of All Forms of Racial Discrimination (CERD). In ground two, the Appellant claims that the Tribunal failed to consider the submissions regarding CERD and in ground three, the Appellant alleges that the Tribunal erred by essentially limiting the forms of racial discrimination capable of giving rise to obligations of complementary protection.

20. According to the Appellant's submissions dated 04 May 2016, the following claims were advanced with regard to CERD:

> "If removed to Sri Lanka, [The Appellant] will suffer racial discrimination, of a kind prohibited by CERD. CERD does relate to Nauru's non-refoulement obligations in some respects; article 5(b) of CERD, for example, has been declared by the Committee on the Elimination of Racial Discrimination (the principal UN body charged with the interpretation and monitoring of CERD) to require nations to ensure "that the principle of non-refoulement is respected when proceeding with the return of asylum-seekers to countries". The text of article 5(b) states that States Parties are required to ensure '[t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution'.
>
> a. It is our principal submission that Nauru's obligations under article 5 of the CERD to 'guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law' and to the enjoyment of specified rights (including economic, social and cultural rights) extends to an obligation not to remove persons to conditions where they would be denied such rights.
> b. However, if the Tribunal finds that CERD gives rise to only more limited non-refoulement obligations, it is our submission that article 5(b) requires Nauru to respect the principle of non-refoulement in extending protection to [The Appellant] if his removal to Sri Lanka would endanger his right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.

21. The Appellant submitted that Tribunal only dealt with the narrower claim in paragraph (b) above which relates to the security and protection against harm and violence. The Appellant further submitted that their argument is wider in scope as Nauru's obligations of complimentary protection under CERD are not limited to the types of harm referred to in Article 5(b). The main contention of the Appellant is that the Tribunal did not consider the wider aspect of the argument which relates to expanding the non-refoulment obligation to encompass discrimination in the context of economic, social and cultural rights etc as stated in paragraph (a) above. Therefore, the Appellant stated that the Tribunal fell into error when it failed to engage with a submission of substance and by limiting the forms of racial discrimination under CERD, that could give rise to obligations of complimentary protection.

22. For convenience of reference Article 5 of the CERD is reproduced below:

> "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
>
> (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
>
> (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
>
> (d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

23. The Respondent contended that both grounds should fail as CERD does not operate to prohibit the expulsion of a person who is not a refugee on the basis that they would, on expulsion, be returned to a place or situation where they may be deprived of rights guaranteed by State Parties to the CERD. The

Respondent relied on REF 001 v Republic of Nauru [2018] NRSC 54 where it was stated:

> "[66] Article 5(b) does not impose a non-refoulement obligation. Nor can any such obligation be inferred.
> [67] Article 5(b) does no more than to provide that were Nauru were to expel or return a person to a country where they were exposed to a risk of serious harm and the expulsion or return were effected because of a distinction as to race, colour or national origin, then Nauru may be in breach of its international obligations under the *CERD*.
> [68] However, the assertion by the Appellant, for which authority is not relied upon, is that the Appellant is owed complementary protection if his return to Iran would violate the *CERD*.
> [69] First, this is a novel proposition that is unsupported by authority and is not accepted.
> [70] Second, as a matter of fact the Tribunal concluded that there was not a reasonable possibility that the Appellant would be subject to torture or cruel or inhuman treatment or punishment or any other mistreatment on return to Iran arising from his race or political views or status as a failed asylum seeker or for any other reason. The legitimacy of its arriving at this conclusion was not impugned by the Appellant. No error was committed by the Tribunal in this regard."

24. Furthermore, the Respondent argued that the most that can be said of the obligation in Article 5(b) of CERD, in the context of expulsion or return, is that if Nauru were to expel or return a person to a country because of a distinction as to race, colour or national or ethnic origin, then Nauru may be in breach of CERD, based on REF 001 (supra).

25. CERD does not explicitly impose a non-refoulment obligation. We are not persuaded by the argument that the non-refoulment obligation can be expanded to encompass the broader rights afforded by CERD, as claimed by

the Appellant. Nevertheless, we are of the view that the Tribunal adequately considered the submissions by the Appellant with regard to CERD. On the other hand, the Tribunal was not obliged to respond to multiple variations of the same claim, as such claims are subsumed in the main findings. But it is very clear that the Tribunal gave due consideration to those matters in the following paragraphs of its decision:

> "[63] The applicant claims to fear discrimination and harassment in Sri Lanka because of his long time away from the country, his Indian Tamil accent and the fact that he is from Mandaithivu. DFAT reports that there are currently no official laws or policies in Sri Lanka that discriminate on the basis of ethnicity or language including in relation to education, employment or access to housing but that more generally there is a moderate level of societal discrimination between ethnic groups, largely as a result of the civil conflict. The Tribunal accepts that the applicant may be subject to a moderate level of societal discrimination because of his profile as a Tamil from the north and from a formally LTTE-controlled area.
>
> [64] The Tribunal has had regard to the Nauru Refugee Status Determination Handbook which sets out that that differences in the treatment of various groups exist to a greater or lesser extent in many societies and that persons who receive less favourable treatment as a result of such differences, are not necessarily the victims of persecution. While the Tribunal accepts that the applicant fears the prospects of returning to the country that his family fled in 1990, it does not accept there to ne a reasonable possibility that any discriminatory conduct faced by the applicant will rise to the level of persecution. The Tribunal notes that the applicant has been educated to year 12 level in India and worked as a labourer in India and does not accept that he will be unable to subsist if returned to Sri Lanka.

> [81] In relation to the claim that the applicant will face racial discrimination of a kind prohibited by the Convention on the Elimination of All Forms of Racial Discrimination (the CERD) if he is returned to Sri Lanka, the Tribunal has accepted that he may be subject to a moderate level of societal discrimination because of his profile as a Tamil from the north and from a formerly LTTE-controlled area. However, the Tribunal does not accept on the evidence before it that it would endanger his right to security of person and protection by the State against violence or bodily harm, nor that there is a reasonable possibility that such discrimination will amount to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty. For these reasons the Tribunal finds returning the applicant to Sri Lanka would not breach Nauru's international obligations and therefore he is not owed complimentary protection."

26. The Tribunal in fact accepted that the Appellant might be subject to moderate level of societal discrimination. Yet, the Tribunal did not find that such moderate societal discrimination met the required threshold for complimentary protection. Moreover, we agree with the submission advanced by the Respondent, based on the decision in Minister for Immigration and Border Protection v WZAPN (2105) 146 ALD 480, that not every breach or apprehended breach of human rights in the Appellant's country of nationality will constitute persecution involving serious harm. Although this authority relates to the nature of persecution for the purposes of Refugees Convention and Migration Act 1958 of Australia, we see no reason why the same rationale cannot be applied in the circumstances of this case. The Supreme Court observed the same as follows:

> [51] It is orthodox law that the relevant harm to qualify for persecution or the need for complementary protection must be such that it is

intolerable for the person by reference to its intensity, duration or severity. Not every breach or apprehended breach of human rights reaches such a point.

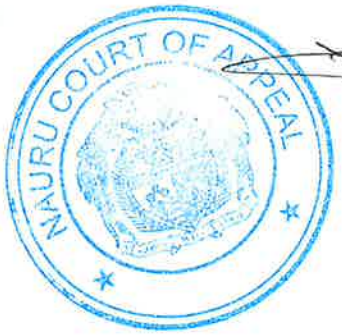
27. In the circumstances we are of the view that no error of law was established in the judgment of the Supreme Court in respect of the second and third grounds of appeal.

28. Orders of the Court:

a) The Appeal is dismissed.
b) No orders as to costs.

Dated this 22 November 2024

Justice Rangajeeva Wimalasena



President

Justice Sir Albert Palmer

I agree

Justice of Appeal

Justice Colin Makail

I agree

Justice of Appeal