



IN THE SUPREME COURT OF NAURU

AT YAREN
[APPELATE DIVISION]

Case No. 8 of 2015

IN THE MATTER OF an appeal against a
decision of the Refugee Status Review
Tribunal TFN 14027, brought pursuant to
s43 of the *Refugees Convention Act 2012*

BETWEEN

DWN008

Appellant

and

THE REPUBLIC

Respondent

Before: Crulci J

Appellant: A. Krohn
Respondent: S. A. Walker

Dates of Hearing: 11 and 12 April 2016
Date of Judgment: 12 August 2016

CATCHWORDS

APPEAL - Refugees – Refugee Status Review Tribunal – Whether a decision was based on existence of a particular fact and that fact did not exist– Whether the Tribunal complied with the requirements of Refugees Convention Act 2012 – Refugees Convention Act 2012

Nature of the Appeal

1. This is an appeal from a decision of the Refugee Status Review Tribunal ('the Tribunal') given on the 28 December 2014 affirming a decision of the Secretary for the Department of Justice and Border Control ('the Secretary') that the appellant is not recognised as a refugee and is not a person to whom Nauru owes complimentary protection under the *Refugees Convention Act* 2012 ('the Act').
2. The appellant raises a number of grounds of appeal:
 - (1) The Tribunal erred in failing to have regard to relevant considerations as required by law in failing to take into account the appellants written submissions in making its decision on the review, and whether the decision complied with section 34 of the Act;
 - (2) The Tribunal erred in not giving proper and realistic consideration to the material before it;
 - (3) The Tribunal erred in law in that its reasons disclosed an apprehension of bias in relation to the appellant's evidence and arguments;
 - (4) The Tribunal erred in law in its understanding and/or application of the relocation test;
 - (5) The Tribunal erred in law in that it failed to accord the appellant procedural fairness in accordance with natural justice and its obligations under sections 4, 22 and 37 of the Act,
 - (6) The Tribunal erred in law in its consideration of the appellant's claims for complimentary protection and failed to comply with section 40(1) of the Act by not giving the appellant sufficient opportunity to make submissions in relation to relocation within the complementary protection context; and
 - (7) The Tribunal erred in law by making a finding with no evidence to support that finding.

The Refugee Status Review Tribunal

3. The Tribunal is a creature of statute and the Act relevantly sets out the establishment, constitution, powers, merits review and procedures.
4. Section 22 provides the 'Way of Operating':
The Tribunal:
 - (a) is not bound by technicalities, legal forms or rules of evidence; and
 - (b) must act according to the principles of natural justice and the substantial merits of the case.
5. In function the Tribunal is in part inquisitorial:
Section 36 Tribunal may seek information
In conducting a review, the Tribunal may:

- (a) invite, either orally (including by telephone) or in writing, a person to provide information; and
- (b) obtain, by any other means, information that it considers relevant.

6. Section 37 of the Act requires the Tribunal to give the applicant an opportunity to counter or answer matters determinant to the review:

The Tribunal must:

- (a) give to the applicant, in the way the Tribunal considers appropriate in the circumstances, clear particulars of information that the Tribunal considers would be the reason, or part of the reason, for affirming the determination or decision that is under review; and
- (b) ensure, so far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the determination or decision that is under review; and
- (c) invite the applicant to comment on or respond to the information.

7. The Tribunal having determined the application for merits review of the decision of the Secretary, is required to give a written decision in accordance with the Act :

34(4) The Tribunal must give the applicant for review and the Secretary a written statement that:

- (a) sets out the decision of the Tribunal on the review; and
- (b) sets out the reasons for the decision; and
- (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.

Background

8. The appellant was accepted by the Secretary and Tribunal as being a citizen of Pakistan, born in 1981 in Durani village, Sadda District, Kurram Agency. He is a Sunni Muslim of Pashtun ethnicity, and is married with two young children.

9. In July 2013 he left Pakistan, and travelled through various countries, and in Indonesia boarded a boat bound for Australia, arriving in August 2013. In September 2013 he was transferred to Nauru.

10. The appellant claimed before the Tribunal that he was born in the village of his father, Durani village. After the death of his father he left with his mother and siblings in 1996 to live in Wara-Manduri village (his mother's village) following disputes between his paternal uncles and his mother.

11. In 2010 his home in the Wara-Manduri village was destroyed as a result of fighting between Shia militants and the Taliban. He and his family stayed for a few days at the UNHCR camp for internally displaced persons in Peshawar and were issued with a ration card.
12. On leaving the camp they lived in Durani village. From then until 2013 the appellant would travel to Peshawar to collect rations from the UNHCR. The appellant was not working and they lived in a shelter near to his paternal uncle, who out of charity assisted the family. There was no income to be derived from his mother's family as the land was under the control of Shia.
13. On his way to and from Peshawar he passed through checkpoints manned by the Taliban. In order to secure safe passage the appellant was required to give up some of the rations. At some point he spoke to others in the village and the elders in relation to the Taliban's demands.
14. The Tribunal did not accept that the appellant house was destroyed because he was Sunni¹; nor that the appellant faced a real possibility of future harm from the Shia militias.² The Tribunal considered the claim of harm from Taliban and found that the appellant was not a target for such groups³, nor that he would be harmed as a failed asylum seeker⁴
15. The Tribunal considered the matter of relocation and considered that as a young man who speaks Urdu, has run his own business and lived and worked overseas the appellant could safely and reasonably relocate within Pakistan⁵, and that returning the appellant to Pakistan would not be in breach of Nauru's international obligations⁶. In so doing the Tribunal affirmed the decision of the Secretary that the appellant is not a refugee and in not owed complementary protection.

Issues in the Appeal

Was the Tribunal's decision in compliance with section 34(4) of the Act?

16. The appellant's first ground at 2(1) above centres in the main on the failure of the Tribunal to comply with section 34 of the Act wherein the Decision Record of the Tribunal disclosed a material defect in two places where the phrase 'Refer subs' appears⁷.

¹ Court Book 155, Tribunal Decision Record (28 December 2014), para 20

² Ibid, para 21

³ Ibid, 158 para 37

⁴ Ibid, para 38

⁵ Ibid, para 50

⁶ Ibid, para 52

⁷ Court Book, 156 and 158

17. The first appearance of the phrase is as the last paragraph in the section '*Harm from Shia militants*'. This section runs from paragraphs 10 to paragraph 22. Paragraphs 10 – 21 consist of summaries of evidence from the appellant, references to various sources of information and the Tribunal accepting and rejecting propositions made by the appellant.
18. Paragraph 22 has no text other than:
"22.
Refer subs"
19. The second appearance of the phrase is at the end of the last paragraph under the section titled '*Harm from Taliban*'. The section encompasses paragraphs 23 to 37.
20. Paragraph 37 appears as follows:
"The country information indicates that the Sunni militant groups present in lower Kurram target the Shia tribes, not the local Sunnis. The Tribunal finds that the applicant is not a target for such groups – he is not associated with the security forces, he is not engaged in political action against the Taliban or other militant groups, he is a Pashtun and Sunni Muslim – and the Tribunal does not accept that there is a real possibility he will suffer harm amounting to persecution from local militants.

Refer Subs."
21. Counsel for the appellant submitted to the Court compliance with section 34(4) of the Act enables the applicant seeking review of the Secretary's decision and understanding of the decision of the Tribunal, what the reasons for the decision were, the material findings of fact and reference to the evidence or other material upon which the Tribunal's findings are based.
22. This compliance enables the appellant to understand the reasoning and process of the Tribunal and also affords the appellant the opportunity to properly construct an appeal against the decision if an error or errors of law are disclosed. However if the record is incomplete as evidenced by the sections containing the phrase 'Refer Subs', it is not possible for the appellant to determine if the Tribunal complied with the requirements of section 34 of the Act.
23. The respondent urged the Court to view these instances of 'Refer subs' as unfortunate omissions on behalf of the Tribunal when it came to prepare the record of decision. The Court was invited to read the decision in total, and

view the matter holistically. Further, it was argued, that the Tribunal had made its decisions, and reasons for these decisions, plain in the body of the text and the concluding paragraphs.

24. The difficulty with this submission is that without sight of what was clearly intended to be included at paragraphs 22 and 37, neither the appellant, respondent or Court can form any view on the missing material.

25. The result of the omissions is that the Tribunal has not complied with the requirements of section 34 of the Act. This ground of appeal succeeds.

Did the Tribunal making a finding of fact with no evidence to support that finding?

26. I turn next to the ground of appeal listed at paragraph 2(7) above. The appellant was granted leave to file an amended notice of appeal to add this ground.

27. The appellant submits that the Tribunal erred in law in making a finding that the appellant had 'lived and worked overseas' and this determination was of significance in satisfying the Tribunal that the appellant could reasonably relocate within Pakistan. On the contrary, it is argued that all the evidence before the Tribunal indicated that the appellant had lived his whole life in one of two villages prior to departing from Pakistan, and had not 'lived and worked in Saudi Arabia'⁸ or overseas.

28. Evidence before the Tribunal as to where the appellant had lived and worked prior to departing Pakistan and seeking asylum is to be found in the documentation of the:

- (a) Transfer Interview (10 November 2013)⁹;
- (b) the Application for Refugee Status Determination to the Secretary for Justice and Border Control (18 December 2013)¹⁰;
- (c) Appellant's statement (18 December 2013) in support of application for recognition as a refugee¹¹ (Book of Docs 42);
- (d) Interview with Refugee Status Review Tribunal (25 September 2014)¹²

29. The evidence before the Tribunal is as follows:

(a) Transfer Interview (10 November 2013)

Part B¹³

Address History

⁸ Court Book, 159 and 160

⁹ Ibid, 3

¹⁰ Ibid, 19

¹¹ Ibid, 42

¹² Ibid, 99

¹³ Ibid, 4

Q12 *Most recent address in country of Citizenship or in country of residence. Include dates*

A12: from 2010 (approximately) to July /August 2013 Durani Village, Sadda District, Kuram Agency, Pakistan

Previous Address History

Q13 *Previous address history – include all addresses during the past twenty years including any addresses outside the country of Citizenship*

A13: 1990 (approximate) to 2010 (approximately) Mandoori Village, Kuram Agency, Pakistan

1981 (birth) to 1990 (approximately) Durani Village, Sadda District, Kuram Agency, Pakistan

Q14 *Have you ever lived anywhere else?*

A: **No** (*emphasis added*)

Part C¹⁴

Travel Route Details

Q15 Snapshot of the travel taken

A16: Pakistan (plane), Colomobo, Sri Lanka (plane), – Bangkok, Thailand (train) – Kuala Lumpur, Malaysia (Boat), Medan, Indonesia (plane), Jakarta, Indonesia (boat), Christmas Island, Australia

Q16(c) (d) *When did you arrive/leave?*

A16: July/ August/ September 2013

30. (b) the Application for Refugee Status Determination to the Secretary for Justice and Border Control (18 December 2013)

Q34: *Give details of all addresses where you have lived for 6 months or more during the last ten years*

Response to Question 34 – Places of Residence¹⁵

From	To	Country	Address for 6 months or more	Reason for moving
2/9/2013	Present	Nauru	Nauru RPC	Flee persecution
3/8/2013	2/9/2013	Australia	Christmas Island IDC	Flee persecution
8/7/2013 (approx)	1/8/2013	Indonesia	Bogor	Flee persecution
2010	3/6/2013 (approx)	Pakistan	Durani Village, Sadda District, Kuram Agency	Home area

¹⁴ Ibid, 15

¹⁵ Court Book, 40

1996	2010	Pakistan	Wara-Manduri Village, Sadda District, Kurram Agency	Family dispute with uncles
BIRTH 231.12.81	1996	Pakistan	Durani Village, Sadda District, Kurram Agency	Home area

31. (c) Appellant's statement (18 December 2013) prepared in support of application for recognition as a refugee

10. From birth until 1996 I resided in my birth village. In approximately 1995 my father passed away...a dispute began with my mother and paternal uncles. As a result of this dispute ... my mother, my siblings and I moved to Wara-Munduri Village, Sadda District, Kurram Agency¹⁶

11. I resided in Wara-Munduri village until 2010 ... my house was destroyed as a result of fighting between Shias and Taliban ...my wife and I fled the village ... saw Shia militants had set fire to all the Sunni houses.

14. In 2010 immediately after the destruction of our village my wife and I went to stay at a UNHCR camp in Peshawar for four days...

15. In 2010 I left the UNHCR camp and moved back to Durani village ... Aside from Durani and Wara-Mandari I have never lived anywhere else in Pakistan. I resided in my home village from 2010 up until the time I fled Pakistan in 2013.

18. On approximately 1 June 2013 the Taliban left a threat letter outside my house that was addressed to me personally...¹⁷

20. From approximately 3 June 2013 I kept moving around to different places in Pakistan... I eventually made it to Karachi Airport and in fear for my life on approximately 1 July 2013 I fled Pakistan.

28. I have only ever lived in Durani and Wara-Manduri villages. I am unfamiliar with other parts of Pakistan and do not possess networks I could rely on for support or protection in other parts of Pakistan. Further, my wife and children are dependent upon me, if I were to attempt to relocate within Pakistan I would be forced to take them with me which would expose both them and myself to an increased risk of

¹⁶ Ibid, 43

¹⁷ Court Book, 44

harm. For these reasons I fear that my family and I would be unable to safely and effectively relocate within Pakistan.¹⁸

32. (d) Interview with Refugee Status Review Tribunal (25 September 2014)

MS HEARN-McKINNON: Okay. And what about your brothers? Were they working?¹⁹

THE INTERPRETER: Yes, they are working.

MS HEARN-McKINNON: So what were they doing? What work were they doing? So, I mean when you went back in 2010 and you were all still living there, what work were your brothers doing?

THE INTERPRETER: Well, I have one brother who is a teacher, and one of my brothers is in overseas in Saudi Arabia. is also in Saudi Arabia, so the other brother is staying at home and he has some mental disability.

MS HEARN-McKINNON: Yes. So you've got one, two, three, four brothers, yes?

THE INTERPRETER: Five including me.

MS HEARN-McKINNON: Yes, five sons. Yes. So you said – okay. When you were living in Durrani, were your brothers living in Durrani?

THE INTERPRETER: So – well, yes, they were working. Just want to clarify. Are you referring to before 2010 or after 2010?

MS HEARN-McKINNON: No, no. I'm only talking about after 2010. When you went back to Durrani from Warramanduri. **When you were living in Durrani between 2010 and 2013.**

THE INTERPRETER: Yes, they were working the same kind of job.

MS HEARN-McKINNON: Yes.

THE INTERPRETER: **I was still in Saudi Arabia and the other one is a teacher.**²⁰

MS HEARN-McKINNON: So one was a teacher in Durrani or somewhere else?

THE INTERPRETER: No. He is not in the Durrani Village. He's a teacher in Kayun Village.²¹

¹⁸ Ibid, 45

¹⁹ Ibid, 105 Lines 14 onwards

²⁰ Court Book, 105 line 45

MS HEARN-McKINNON: Is that nearby or

THE INTERPRETER: It's not very close, like the village, but it's still in the Sadda area.

MS HEARN-McKINNON: Okay.

THE INTERPRETER:

MS HEARN-McKINNON: Okay. And how – the two brothers in Saudi Arabia, how long have they been working in Saudi Arabia?

THE INTERPRETER: The one of – one of the brothers is staying in Saudi Arabia about six to seven years. They're – the other brother came back almost two years ago with accident and fracture, he's receiving treatment and he's staying at home because of the accident he had.

(emphasis added)

33. The appellant gave evidence to the Tribunal that rural Pashtun's from the mountainous regions suffer discrimination when in other areas in a number of ways, including the ability to rent accommodation and find employment. It was put to him once that he 'had travelled overseas' in the following terms:

MS HEARN-McKINNON: I've looked for evidence, information about this, because I've heard from many tribal people that, you know, they cannot live in Punjab or anywhere else in Pakistan including – sorry, they cannot live anywhere else in Pakistan, including Punjab. And have not found – sorry let me finish – and have not found any information that when some Punjabis think Pashtuns, because they have come from the tribal areas, are backward or less sophisticated, and there is some discrimination against them on that basis. But that's the only information I have located, and you're – you know you're a young man. You speak Urdu, you've run your own business. **You've travelled overseas.** I just – it would seem that you would have the capacity to settle in another place and establish yourself and make an income.²²

(emphasis added)

THE INTERPRETER: Well, if that was the – whether that option available for me, I wouldn't take this journey, I wouldn't risk my life. Definitely I'm facing these problem. It's not only – the life is there.

²¹ Ibid, 106line 1 onwards

²² Court Book, 144 line 38 onwards

You've got family, you've got children, you've got your education for your children. There's a lot of things you have to consider.²³

34. The Tribunal then made the following determinations based on the evidence before it:

42. The Tribunal has considered whether it is reasonable to require the applicant to relocate. Peshawar is a predominately Pashtun city of approximately 3 million people and is the administrative centre of FATA. The applicant is a young man who has previously run his own business in Pakistan **and lived and worked in Saudi Arabia**. He speaks Pashto and receives an income from his family farm and had access to UNHCR rations. The Tribunal is satisfied that the applicant could establish himself in Peshawar, obtain accommodation and employment and live a normal life in Peshawar.²⁴

49. The applicant is young, speaks Urdu, has run his own business **and lived and worked overseas**.

50. In view of the information above, the Tribunal is satisfied that relocation is reasonably available to the applicant.

51. For all the reasons above, the Tribunal does not accept that the applicant has a well-founded fear of persecution in Pakistan and therefore does not accept that he is a refugee.

52. For all the reasons above, the Tribunal does not accept that returning the applicant to Pakistan would be a breach of Nauru's international obligations.²⁵
(*emphasis added*)

35. It was submitted on behalf of the appellant that there was nothing before the Court upon which the Tribunal could find that the appellant had lived and worked in Saudi Arabia or lived and worked overseas generally prior to his departure from Pakistan and that the Tribunal had erred in law by making the finding without evidence to support it.

36. Counsel for the Respondent accepted that the passage in the transcript of the Tribunal hearing as "*I was still in Saudi Arabia and the other one is a teacher*"²⁶ is the only matter before the court which may be said to be evidence of the appellant having 'lived and worked in Saudi Arabia'. Counsel

²³ Ibid, 145, line onwards

²⁴ Ibid, 159

²⁵ Court Book, 160, 161

²⁶ Court Book, 105 line 45

submitted to the Court that this is sufficient evidence for the Tribunal to come to the conclusions in paragraph 34 above.

37. The Court has heard the tape recording, read the transcript, and considered the extract '*I was still in Saudi Arabia and the other one is a teacher*' in light of the questions put to the appellant preceding and those following the extract. The Court is satisfied that the content and context of the questions put to the appellant before and after the extract clearly identifies where the appellant's *brothers* were living at the material time; the Tribunal having made it clear in its questioning that time referred to was when the *appellant* was living in Durani after 2010.

38. As stated in *Minister for Immigration and Multicultural Affairs v Al-Miahi*²⁷ "[t]he question whether there is any evidence of a particular fact is question of law."

39. When looking at the weight to place on a fact (for which there is no evidence) composite to a decision, and the consequences for the determination made, that Court stated:

A decision may be based upon the existence of many particular facts. It will be based upon the existence of each particular fact that is critical to the making of a decision. A small factual link in a chain of reasoning, if it is truly a link in a chain and there are no parallel links, may be just as critical to the decision, and just as much a fact upon which the decision is based, as a fact that is of more obvious immediate importance. If a decision is in truth based, in that sense, on a particular fact for which there is no evidence, and the fact does not exist, the decision is flawed, whatever the importance of the fact.

...

It is sufficient to demonstrate that the relevant fact played a part in the process of reasoning of the tribunal in the sense that the fact is one without which the tribunal would not have reached the conclusion that it did.²⁸

40. The Tribunal in making its determination as to the reasonableness of relocation for this appellant relied in part on the fact that he had 'lived and worked overseas'. Whilst the Tribunal put to the appellant '*you know you're a young man. You speak Urdu, you've run your own business. You've travelled overseas*'²⁹ when exploring the reasonableness of tribal Pashtun's living elsewhere in Pakistan, this cannot be taken by the appellant, in light of the evidence placed before the Tribunal, as being anything other than reference

²⁷ *Minister for Immigration and Multicultural Affairs v Al-Miahi* [2001] FCA 744, 141 at [34]

²⁸ *Ibid.* at [38] and [40]

²⁹ Court Book, 144 line 46

to his journey from Pakistan to Nauru. The appellant's answer "*I wouldn't take this journey, I wouldn't risk my life*" confirms this.

41. As this particular finding was part of the reasoning that the appellant could reasonably relocate, the Tribunal is required under section 37 of the Act to put that to him and afford him the opportunity to respond in accordance with the section. The Tribunal failed to do so in a way that ensured that the appellant understood its relevance to the determination of their decision.
42. The Court finds that there was no evidence before the Tribunal to support the finding that the appellant had 'lived and worked in Saudi Arabia or overseas'. The Tribunal has erred in law. This ground of appeal succeeds.

Conclusion

43. The Court having made a determination in relation to grounds of appeal one, five and seven, remits this matter to the Tribunal for reconsideration; it is therefore unnecessary for a determination to be made on the remaining grounds of appeal.

Order

- (1) The Court extends the time for the appellant to file a notice of appeal pursuant to section 43(5) of the *Refugees Convention Act 2012*
- (2) The appeal is allowed.
- (3) The decision of the Tribunal dated the 28 December 2014 is quashed.
- (4) The matter be remitted to the Refugee Status Review Tribunal for reconsideration according to law.


Justice J. E. Crulci

Dated this 12 day of August 2016

