IN THE SUPREME COURT OF NAURU

AT YAREN

APPEAL NO 63 OF 2014

Being an appeal against a decision of Nauru Refugee Status Review Tribunal brought pursuant to s43 of the Refugees Convention Act 2012

BETWEEN: DWNO72 Appellant

AND

THE REPUBLIC OF NAURU Respondent

Before: Khan, J

Date of Hearing: 15 March 2016

Date of Ruling: 19 August 2016

Case may be cited as: DWN072 v Republic

CATCHWORDS

Tribunal hearing is inquisitorial not adversarial – Tribunal inquiries- by virtue of its inquisitorial role – review is not limited to the material, evidence and argument presented- review should be conducted according to 'merits of case'.

Section 37 - Tribunal is obliged to comply with rules of natural justice- by giving information to affirm the Secretary's decision - Tribunal has to ensure that applicant understands the relevance and consequences of the information being relied on - to affirm the decision of the Secretary - this must be shown on the record of proceedings - the obligation on the Tribunal is mandatory - failure to comply - means Tribunal failed to discharge its statutory function.

Section 44 – case remitted to the Tribunal to reconsider – the issue of relocation.

APPEARANCES:

Counsel for the Appellant:	Mr JF Gormly
Counsel for the Respondent:	Mr L Brown

JUDGEMENT

INTRODUCTION

1. Section of the 43 of the Refugee Conventions Act 2012 (the Act) provides:

   "Jurisdiction of the Supreme Court:
   (1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law."

2. The Refugee Status Review Tribunal (the Tribunal) delivered its decision on 26 May 2014 affirming the decision of the Secretary that the Appellant is not recognised as a refugee and is not owed complementary protection under the Act.

3. The appellant filed an appeal against the decision on 13 November 2014 and the grounds of the appeal were subsequently amended on 20 July 2015 and 15 January 2016.

BACKGROUND

4. The Appellant's background is as follows:-

   - The appellant is a citizen of Pakistan. He is 36 years old, married with 4 sons. He has an extended family including his parents and 2 brothers one of whom is partially disabled with a foot injury.

   - His ethnicity is Pashtun and his religion is Sunni Muslim.

   - He is from the village district of Darsamand in Hangu region of Kyber Pakhtunkhwa (KPK). He lived his entire life in Darsamand prior to coming to Nauru.

   - He worked as a farmer and also taught the children in the mosque to read Koran.

   - In May 2013 the Taliban came to the mosque and requested donations. They asked him to assist them to recruit people; they also asked him to

preach for them amongst the people in the village and in return they offered him financial incentives including a car.

- He was frightened to decline their request and asked for some time to think about it and they gave him 4 days.

- When the Taliban returned in 4 days he made an excuse and told them that one of his family members was sick who needed care.

- When he went home he told his family what had transpired and they told him to leave the country otherwise the Taliban would kill him.

- The next day he went to Peshawar with his brother and made plans to leave the country.

- He left Pakistan on 11 June 2013 and went to Malaysia and from there to Indonesia and arrived in Australia by boat on 3 August 2013.

- On 7 September 2013 the appellant arrived in Nauru, having been transferred from Australia pursuant to a Memorandum of Agreement entered into between the Republic of Nauru and the Commonwealth of Australia on 3 August 2013.

Application to the Secretary – Department of Justice and Border Control

5. On 9 December 2013 the Appellant applied to the Secretary of the Department of Justice and Border Control (the Secretary) for Refugee Status and Determination (RSD) for recognition as a refugee and for complementary protection under the Act.

6. On 14 January 2014 the Appellant was interviewed by a RSD Officer regarding his application. In his interview he stated that because he had defied the Taliban there was nowhere in Pakistan where he could be safe from the Taliban.

7. The Secretary accepted that if he were to return to KPK he would face persecution by the Taliban and the State was unable to provide ongoing and consistent protection.

8. The Secretary noted that his profile was highly localised and he could safely relocate to other parts of Pakistan namely Rawalpindi, Karachi, Lahore, Faisalabad or Hyderabad.

9. The Secretary found that it was reasonable for the Appellant to relocate.

10. The Secretary was satisfied that he was not a refugee within the meaning of the Act and he was not owed complementary protection under the Act.

Application to the Tribunal

11. Pursuant to Section 31 of the Act, the Appellant made an application for a review to the Tribunal on 23 May 2014. Section 31 states as follows:

    (1) A person may apply to the Tribunal for merits for review of any of the following:-

    a) a determination that a person is not recognised as a refugee;
    b) a decision to decline to make the determination on the person's application for recognition as a refugee;
    c) a decision to cancel a person's recognition as a refugee (unless the cancellation was at the request of the person);
    d) a determination that the person is not owed complementary protection.

12. On 20 July 2014 the Applicant's lawyers Craddock Murray Newman (CAPS lawyers) made written submissions to the Tribunal and on 24 July 2014. The appellant appeared before the Tribunal with his lawyers when he was interviewed in relation to his review application.

Well-founded fear of persecution

13. The Tribunal accepted at [18] that the Taliban approached him and attempted to induce and coerce him in joining them to assist in the recruitment and educating or brainwashing people in the local area. It was accepted by the Tribunal that if he failed to comply then he would be harmed.

14. The Tribunal accepted at [19] that the threat was real and that the Taliban maintained an adverse interest in him in his local area and if he returned to Darsamand there was a real possibility that he would come to the attention of the Taliban and would suffer persecution by them for convention reasons.

15. The appellant contended that his departure from Pakistan had increased the risk of being harmed as he would be perceived to be an ideological opponent of the Taliban. The Tribunal accepted that the Appellant faced a localised risk and the departure had not increased the risk in respect of the issue of relocation.

16.The Tribunal concluded at [21] that it was satisfied that the appellant had a well-founded fear of being persecuted for convention reasons if in the event he returned to his home area.

Relocation

17. The Tribunal considered the issue of relocation in light of UNCHR guidelines on International Protection. It accepted at [22] that "even accepting that the appellant was threatened as claimed the issue remains as to whether the Taliban members responsible have both the ability and inclination to find and harm the applicant if he does not return to his home area but relocates to another part of Pakistan where he would not face such a risk".

18. The Tribunal concluded at [31] that the applicant could "practically, safely and legally relocate to an area within Pakistan where he would not be exposed to a risk of being persecuted or other serious harm".

19. The Tribunal also considered that relocation was reasonable and upon relocation the appellant given time will be able to relocate and would lead a relatively normal life without facing hardship in all the circumstances.

20. Having found that the applicant could avoid persecution by relocating, the Tribunal concluded he is not a refugee and nor was he owed a complementary protection under the Act and the Tribunal confirmed the Secretary's decision.

THIS APPEAL

21. The Appellant filed 3 grounds of appeal which are as follows:-

<u>Ground 1</u>

Whether the Tribunal erred in failing to discharge any review obligations it had under the Act:

a) To consider whether the appellant faced a real risk of persecution from the Taliban at his new location for his religious and political beliefs.

<u>Ground 2</u>

Whether the Tribunal erred in failing to discharge any review obligations it had under the Act:

a) To consider a claim of undue hardship in relation to the reasonableness of the appellant's relocation to one of Pakistan's major cities arising from the ongoing insurgency of the Taliban and its allies in those places.

Ground 3

Whether the Tribunal erred in law,

a) In failing to comply with s37 of the Act in relation to information cited at para [26] of its decision concerning disunity and internal disorder within The Taliban.

Submissions

22. Both counsels filed written submissions and subsequently elaborated on their submissions at the hearing. They also filed further submissions in relation to Ground 3 concerning s44 of the Act which I shall discuss later on. Their submissions were of great assistance to me.

Ground 1

23. The appellant submits that the Tribunal failed to consider whether there was a real risk that his opposition to the Taliban would put him at the risk of persecution as a teacher in the mosque in a place of relocation. His complaint is that the Tribunal failed to discharge its obligations set out in s34 (4) of the Act which states as follows:

> (4) The Tribunal must give the Applicant for review and the Secretary of it in a written statement that:
>
> a) sets out the decision of the Tribunal on review; and
>
> b) sets out the reasons of the decision; and
>
> c) sets out the findings on any material questions; and
>
> d) refers to the evidence or other material on which the findings of fact were based.

24. The respondent's contention is that the claim was never made before the Tribunal. The respondent put it as follows "it was not clearly articulated and was without supporting evidence so did not rise to the level of a claim that the Tribunal needed to consider in the discharge of its duty to review the Secretary's decision." and relies on *Dranichnikov -v- the Minister for Immigration and Multicultural Affairs*[1]

At [22] it was stated as follows:-

[1] [2003] HCA 26; [2003] 197ALR at [22]-[24] [Gummow and Callinan JJ and [88] (Kirby J).

"Mr Dranichnikov wished to raise a number of different matters, but by reason of earlier ruling of the Court, argument was confined to the following question only:

[Whether] the Tribunal erred in allowing and treating the applicant as a member of a social group of entrepreneurs and/or businessmen and not of a more limited group consisting of entrepreneurs and/or businessmen who publically criticised law enforcement authorities for failing to take action against crime or criminals."

At [24] it was stated as follows:

"To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice. A failure to accord natural justice did not produce a statutory basis for a review of a decision of the Tribunal. This followed from language of s476 (2)(a) of the Act (as it was when the applications were made) which provides as follows:

(2) the following are not grounds upon which an application may be made under subsection 1;

That the breach of the rules of natural justice occurred in connection with the making of the decision."

At [88] it was stated as follows:

"Obviously, it is not every mistake in understanding the facts, in applying the law or in the reasoning to a conclusion that will amount to a constructive failure to exercise jurisdiction. But where, as here, the mistake is essentially definitional, and amounts to basic misunderstanding of the case brought by the applicant the resulting flaw are so serious as to undermine the lawfulness in the decision in question in a fundamental way".

What was the claim made by the Appellant?

25.The appellant claimed that he would be targeted for persecution if he were to relocate because the Taliban is able to target, those whom it opposes with ease throughout Pakistan and have a 'sophisticated network' to target people who oppose them and refuse to follow their demands. This claim was put in [20] of the appellant's written submissions to the Tribunal.

26. The Tribunal dealt with the issue of 'sophisticated network' at [26] and [27]. At [26] the Tribunal stated as follows:

"The Applicant's assertion that Taliban spies will identify him in any mosque he attends seems to be premised on the assumption that the Pakistani Taliban is a unified and co-ordinated monolith with a highly effective communication network throughout Pakistan. The Tribunal does not accept this, as country information indicates that the organisation is in fact riven with internal strife. For example, on 26 August 2014, the *New York Times* published a report entitled *'Hard–Line Splinter Group', Galvanised by* ISIS, *Emerges from Pakistan Taliban...* The Pakistani Taliban has suffered its second major split in 3 months, with militant leaders confirming the emergence of hard-line splinter group inspired by the success of Islamic State in Iraq and Syria.

At [27] it was stated as follows:

"For the foregoing reasons, the Tribunal finds that if the Applicant does not return to his home earlier but relocates to another part of Pakistan such as Punjab the Taliban is most unlikely to pursue him, or to be able to locate him even in the unlikely event that it did pursue him, as a consequence in which the Tribunal concludes that there is no reasonably possibility of this happening."

Was the claim which is the subject of Ground 1 made?

27. The appellant's Counsel submits at [57] of his submissions that the appellant appears to have attempted to develop this claim but was diverted by the Tribunal in its continued inquiry about the motivation and ability of the Taliban to track him down for his refusal to co-operate in Darsamand. The respondent's submission is that the claim was not made at the Tribunal hearing and the Court should be guided by the transcript. I have perused the transcript and am satisfied that the claim was not made at the Tribunal hearing.

28. The appellant's counsel submitted that the review process is inquisitorial rather than adversarial and the Tribunal is required to deal with the case raised by the material or evidence before it and relied on the case of *Chen –v- Minister for Immigration and Multicultural Affairs*[2]. **There is authority for the proposition that the Tribunal is not to limit its determination to the 'case' articulated by the applicant if the evidence and material which it**

[2] [2000] FCA1901(2000) 106 FCR 157 at 180[114] (Merkel J)

accepts raise a case not articulated - *Paramananthan –v- Minister for Immigration and Multicultural Affairs*[3]. It was stated as follows at page 28:

> "Material in evidence, as well as arguments, may be presented to the RRT but its inquisitorial procedures or inquiries are not limited to or by the materials, evidence, arguments presented to it. In an appropriate case the RRT may undertake its own inquiry and, in some instances, may be obliged to do so.......Similarly, RRT is not to limit its determination to the case and cases articulated by the applicant if the evidence and material which it accepts or does not reject, raises a case on a basis not articulated by the applicant.... but cannot affect the fundamental duty of the RRT, acting inquisitorially, to review the decision before it according to the 'merits of the case'.
>
> In my view the inquisitorial function of the RRT and the combined effect of the provisions to which I have referred is such that the RRT is required to determine the substantive issues raised by the material and the evidence before it. That duty, which was recognised by Brennan J in Bushell, is a fundamental incident of inquisitorial function of an administrative tribunal such as RRT"

29. The appellant's claim was that no matter where he went to in Pakistan he would be identified as the Pakistani Taliban was a unified monolith with effective network. This was rejected by the Tribunal and it held based on the country information that it had suffered major split and therefore it was unlikely to pursue him and therefore it was reasonable for him to relocate. Obviously, the claim was not made that he would be harmed because of his religious and political view. It was submitted by the appellant's counsel that that the appellant attempted to make the claim but was diverted by the Tribunal in its inquiry. I accept that the claim was not made, however, I adopt the principles stated in *Paramananthan* and I find that the Tribunal was under a duty because of its inquisitorial procedures to make inquiries whether the appellant would be harmed because of his religious and political views. The Tribunal failed to discharge this obligation and the appellant succeeds on this ground.

30. I reiterate that I accept the principles in *Paramananthan* regarding the Tribunal's that "inquiries are not limited to the material, evidence, arguments presented to it and the Tribunal acting inquisitorially, to review the decision before it according to the 'merits of the case' to be applicable in the cases before the Tribunal in this country.

31. <u>Ground 2</u> paragraph 27 – This ground deals with the issue namely:

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[3] [NG533 of 1998] – [1998 160ALR24]

Whether the appellant upon relocation, would lead a relatively normal life without facing undue hardship in all the circumstances? The Tribunal dealt with the issue of his extended family obligations at [33] where it found that although his elder brother had some impairment but was coping and thus was not dependent upon him and for all practical purposes if he were to relocate he only needs to take care of his wife and children. It further found that he can get financial assistance from his family as he had no difficulty raising $15,000 to come to Australia.

32. This ground was mainly about his reasonableness of relocation to another city because of ongoing insurgency of the Pakistani Taliban. The appellant submitted that this claim was clearly made by the CAP lawyers in their submissions at page 86 of the court book.

33. It is submitted that whilst the issue of insurgency was a clearly articulated claim; there is nothing in the Tribunal's decision to suggest that the Tribunal gave it any consideration when dealing with the issue of reasonableness of relocation. The respondent submitted the issue of insurgency if that was the claim which emerges from the material that it would be unreasonable for the Appellant to relocate to Punjab because of the risk to this personal safety due to insurgency; then that was dealt with by the Tribunal at [29] where it is stated as follows:

> "While the country information cited by the Applicant does indicate that Karachi is affected by ethnic conflict between Mohajirs and Pashtuns, the situation appears to be far less volatile in Punjab, for example, where according to the Joshua Project at .... there is significant Pashtun population of more than 2,000,000 people."

I am satisfied that the Tribunal dealt with the issue of insurgency adequately as it was required to do.

34. Ground 3- Natural Justice -section 37:

Section 37 of the Act states as follow:

Invitation to applicant to comment or respond

The Tribunal must:

(a) give the applicant, in the way that 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, as 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.

35. The appellant contends that the Tribunal fell into an error when it relied on information for its consideration of relocation. The information was derived from an article in New York Times on 26 August 2014, after the date of hearing which was on 24 July 2014.This article stated that the Pakistani Taliban was riven with disunity and intense disorder.

36. The appellant at the Tribunal hearing contended that the Taliban was '*unified and co-ordinated monolith with highly effective communication network through Pakistan*' which would allow the local Taliban to identify, pursue and find him because of his refusal to co-operate with them in Darsamand.

37. The appellant complains that the Tribunal did not disclose this information to him or otherwise give him an opportunity to comment or respond to it and used that information as part of the reasons for framing the Secretary's decision.

38. The respondent submits that the appellant was aware of the issues arising from the review and that neither under the common law or under the provisions of s37 the Tribunal was obliged to give that information to the appellant.

39. The appellant in reply submits that s37 of the Act places a mandatory obligation of disclosure on the Tribunal and further submitted that s424A (1) Migration Act 1958 (Cth) is substantially the same as s37 of the Act, and the High Court of Australia in *SAAP -v- Minister for Immigration and Multicultural Affairs*[4] found at [77-78] that its effect was mandatory, and in that a breach of the section constituted jurisdictional error. S424 was considered at [47] on page 311 where it is stated as follows:-

"s424A obliges the Tribunal in certain circumstances to give the Applicant 'particulars of any information that the Tribunal considers to

[4] *(2005HCA24: 2005(228CLR294)*

be the reason, or part of the reason for affirming the decision that is under review'. The section provides:

Applicant must be given certain information
(1) Subject to subsection 3, the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers to be the reason, or part of the reason for framing the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the Applicant understands why it is relevant to the review; and

(c) invite the Applicant to comment on it."

(2) The information and the invitation must be given to the applicant:
(a) except where paragraph (b) applies-by one of the methods specified in section 441A; or
(b) if the applicant is in immigration detention – by a method prescribed for the purposes of giving documents to such a person [(23)].
(3) This section does not apply to information:
(a) that is not specifically about the applicant or another person and is just about a class of persons of which the application or other person is a member; or
(b) that the applicant gave for the purpose of the application; or
(c) that is non-disclosable information.

40. At [77] and [78] of *SAAP* it is stated as follows:-

"However, because the Act compels the Tribunal in the conduct of the review to take certain steps in order to accord procedural fairness to the applicant for review, before recording a decision, it would be an anomalous result if the Tribunal's decisions were found to be valid, notwithstanding the Tribunal has failed to discharge its obligation. It is not to point that the Tribunal may have given the applicant particulars of adverse information orally. It is not to point that in the same cases it might seem unnecessary to give the Applicant certain particulars of adverse information (for example, if the applicant is present when the Tribunal receives the

adverse information as evidence from another person and the Tribunal there and there invites the Applicant orally to comment on it). If the requirement to give written particulars is mandatory, then failure to comply means that the Tribunal has not discharged its statutory function. There can be no "partial compliance" with a statutory obligation to accord procedure fairness. Either there has been compliance or there has not. Given the significance of the obligation in the context of the review process (the obligation is mandated in every case), it is difficult to accept the proposition of the decision made despite the lack of strict compliance is a valid decision under the Act. Any suggestion by the Full Federal Court in *NAHV* to the contrary should not be accepted. Parliament has made the provisions of s424A one of the centrepieces of its regime of statutory fairness. Because that is so, the best view of the section is that failure to comply with it goes to the heart of the decision making process. Consequently a decision made after breach of s424A is invalid.

Breach of general law requirements procedural fairness

[78] If it is accepted that breach of s424A gives rise to jurisdictional error, it is not necessary to consider whether the breach also resulted in failure to accord procedural fairness under the general law."

41. Section 37 is almost identical to section 424 (A) in respect sub- paragraphs (a),(b) and (c). Under s 37 the mode of giving of information to the applicant is not provided for, whilst s424 (A) has the prescribed mode of giving information. There is a significant difference in sub-paragraph (b) of the two sections. In s37 (b) the additional requirement is *"and the consequences of it being relied on in affirming the determination or decision for review."*

42. Section 424 (A) as discussed in *SAAP* places a mandatory requirement on the Tribunal to give the information where it stated: *"If the requirement particulars is mandatory then failure to comply means that the Tribunal has not discharged its statutory function."* Under s 37 (b) the Tribunal must ensure that: *"the consequences of it being relied on in affirming the determination or decision that is under review"* is made known to the applicant. In my view there is a *'mandatory requirement'* on the Tribunal to inform the applicant of the consequences of relying on the information (e.g. if the Tribunal has the information that it intends to rely on then it is required to go through two sets of processes, firstly, it must ensure that the applicant understands it, and secondly, he/she realizes the consequences of it being relied on). So the Tribunal record must show that those two steps have been

taken and if does not show it, then the Tribunal would have failed to discharge its statutory obligation.

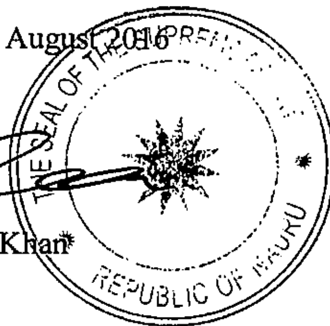
43. The Tribunal relied on information in the New York Times published on 26 August 2014, information acquired post hearing date, which itself is in breach of all rules of procedural fairness. It relied on it without complying with the requirements of s37(b) and failed to discharge it statutory obligations. Under s37 (b) the Tribunal could not fulfil its obligation by simply writing to the applicant or his lawyer and obtaining a written response. It had no choice but to reconvene the hearing and ensure that the applicant understood the relevance and consequences of the information being relied on and then invite the applicant to comment on or respond to the information.

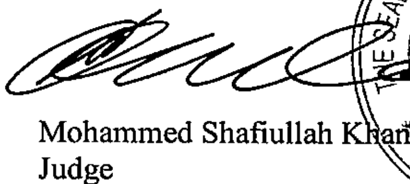
44. Both grounds 1 and 2 deals with the information in the New York Times dated 26 August 2014 and I direct that under section 44 of the Act that the whole issue of relocation has be reconsidered.

45. Under section 44 I make the following orders:

(a) The matter is remitted to the Tribunal for reconsideration or redetermination according to law on the matter of appellant's relocation from his home district.

DATED this 19 day of August 2016





Mohammed Shafiullah Khan
Judge