



IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION]

Case No.39 of 2015

IN THE MATTER OF an appeal
against a decision of the Refugee
Status Review Tribunal TFN 14068
brought pursuant to s43 of the
Refugees Convention Act 1972

BETWEEN

BRF038

Appellant

AND

THE REPUBLIC

Respondent

Before: Crulci J

Appellant: A. Krohn

Respondent: S. Walker

Dates of Hearing: 14, 15 April 2016

Date of Judgment: 22 February 2017

CATCHWORDS

APPEAL - Refugees – Refugee Status Review Tribunal – Whether discrimination amounted to persecution - Degrading treatment sufficient for enliven complementary protection – Rules of Natural justice and procedural fairness complied with – Appeal DISMISSED

JUDGMENT

1. This matter comes to the Court pursuant to section 43 of the *Convention Act 2012* ("the Act") which provides:

'43 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 parties to the appeal are the appellant and the Republic.

...

1. The determinations open to this Court are defined in section 44 of the Act:

44 Decision by Supreme Court on appeal

(1) In deciding an appeal, the Supreme Court may make either of the following orders:

- (a) an order affirming the decision of the Tribunal;
- (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

2. This Court is in accordance with the procedure in relation to the matter of extension of time as outlined by Judge Kahn in *ROD128 v The Republic*¹ where he stated:

"The Republic for the efficient disposal of the case agreed that the appellant be allowed to present his case on merits of the proposed appeal and at the same time present his argument on substantive issue, and if the Court was satisfied that there was merit in the appeal then the extension of time can be granted. However, after the hearing, the Republic and the lawyers for the appellant (in this case, the appellant is unrepresented) have come to an agreement that the extension of time will not be in issue. Accordingly, a consent order was filed whereby the time of appeal was properly extended by the Registrar pursuant to the amendment to the Act on 14 August 2015 (Refugees Convention (Amendment) Act 2015 and consequently the issue of appeal being out of time is no longer an issue."

2. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on the 15 March 2015 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of the 21 September 2014, that the appellant is not recognised as a refugee under

¹ [2017] NRSC 8

the Refugees Convention ² ("the Convention) and is not owed complimentary protection under the Act.

BACKGROUND

3. The appellant is a young man of 25 years. He is from the Awdal Province, Somaliland, and a national of Somalia. He is a Sunni Muslim, identifying ethnically as a member of the Gabooye Tribe.
4. He was in a *de facto* relationship with a woman living in Borama, Somaliland. His father died in 1999. His mother and four brothers live in Somaliland, another brother lives in Ethiopia.
5. In 2004 he was involved in a fight with another player whilst playing soccer. He was threatened with a gun and the other person was only prevented from shooting him by the intervention of others. The appellant went into hiding for a number of days.
6. In 2006 the appellant left Somalia and went to Yemen. He left because he was afraid that he would be harmed or killed because of his tribe, and the ongoing violence and military activity. Whilst in Yemen he registered with the UNHCR, although he was not interviewed nor did he have a right to work or access education
7. In 2009 his mother's shop in Borama was robbed by other men from a higher Clan and she was threatened at gunpoint. Although she recognised the thieves and confronted them the next day she was told that she had no rights as a minority Clan member and the authorities were unable to assist.
8. In Yemen the appellant worked washing dishes and was engaged in other menial tasks.
9. In August 2013 he travelled from Yemen to Malaysia, then Indonesia. In September 2013 the appellant boarded a boat which took him to Christmas Island, Australia. He was subsequently conveyed to Nauru.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

10. The appellant applied to the Secretary to be recognised as a refugee as he feared he would be subjected to racism, forcibly recruited into a militant group, arbitrarily deprived of his life, tortured, subjected to cruel, inhuman or degrading treatment or punishment or killed if he were to return to Somalia. In addition he feared 'threats to his ability to subsist'.
11. The appellant's grounds for fearing this was as follows: membership of the minority Gabooye Clan; membership of a social group being 'Somali's

^{2 2} 1951 Convention and 1967 Protocol, referred to as "the Convention"

who have spent a significant amount of time overseas'; and his imputed political opinion against Al Shabbab, militant groups and violent clans due to his ethnicity.

12. The Secretary accepted that the appellant was of a member of the Gabooye Clan, a minority tribe; that he was threatened at gunpoint following a disagreement at a football game; that he left Somalia for Yemen in 2006 and remained there until departing for Australia in September 2013; and that his mother's store was robbed by neighbours in 2009.

Secretary's Decision

13. It was accepted that members of the Gabooye Clan face an enduring cultural stigma against them, and are relegated to work in the most undesirable and low paying jobs. However, overall the appellant's circumstances suggest that his family have been able to overcome job discrimination and stigma that they may face as members of that clan, with his mother able to earn an income and his brothers gaining in education through school³.
14. Therefore the appellant was not likely to suffer discrimination on account of his Clan membership so as to seriously restrict his ability to earn a livelihood or to deny him the enjoyment of his fundamental human rights. The discrimination the appellant was likely to face is not considered to constitute persecution.
15. In relation to complementary protection the Secretary did not find that the discrimination the appellant may suffer as a member of the Gabooye Clan would affect his ability to subsist, or give rise to other serious threats and as such the appellant can return to Somalia without fear of harm for a non-Convention reason.

REFUGEE STATUS REVIEW TRIBUNAL

16. The Refugee Status Review Tribunal (RSRT) found that although the harm the appellant and his family faced in the past was discrimination, it did not amount to a breach of his non-derogable human rights. The family was able to earn a bare living. The Tribunal did not accept that there was a reasonable possibility that the applicant would be subjected to a threat to his life or physical freedom as a member of the Gabooye tribe in Somaliland.
17. The Tribunal rejected the proposition that the appellant would suffer torture or cruel, inhuman or degrading treatment or punishment in Somaliland. The Tribunal noted that there are police from every tribe in

³ BD page 74

Somaliland⁴ and as such the appellant would have some redress from the acts of others.

18. The Tribunal found that the appellant would have somewhere to live, albeit a basic place, and considered that not being able to study the subject of his choice was not a serious breach of his human rights. As such the Tribunal found that the applicant does not have a well-founded fear of persecution for reasons of his membership of the Gabooye tribe, and therefore is not a refugee on this basis.
19. Considering the country information available and the appellant's evidence, the Tribunal did not accept that Al-Shabaab operated with impunity throughout Somaliland. As such the Tribunal did not accept that the appellant would be harmed or forcefully recruited into that or other militant groups.
20. The Tribunal noted that if the appellant returned to Somaliland he would not have to pass through the area that is controlled by Al-Shabaab, and so there was no reasonable possibility that he would be persecuted on account of having lived outside Somalia for a significant period of time. Therefore he does not have a well-founded fear of persecution based on an imputed political opinion of being opposed to Al-Shabaab because he has lived in a western country.
21. Even considering the appellant's claims cumulatively the Tribunal did not find that the appellant has a well-founded fear of persecution for a Convention reason. Turning to complementary protection, the Tribunal found that as the applicant would not face torture or cruel inhuman or degrading treatment or punishment if returned to Somaliland, his return would not breach Nauru's international obligations and therefore he is not owed complementary protection.

RSRT decision

22. The RSRT affirmed the determination of the Secretary that the appellant was not recognised as a refugee nor owed complementary protection under the Act 2012.

GROUNDS OF THE APPEAL

23. The grounds of appeal can be divided largely into three areas whereby the Tribunal erred in law in determining that the appellant was not a refugee:
 - Firstly, that the Tribunal having found that the appellant may face discrimination, that this discrimination fell short of persecution and as such he was not recognised as a refugee;

⁴ Book of Documents, p 166

- Secondly, that the Tribunal found that the discrimination faced by the appellant fell short of degrading treatment, and as such he was not owed complementary protection;
- Thirdly, in relation to procedural fairness, the Tribunal failed to disclose material adverse to his interest namely that there were police officers representing all tribes, and failed to enquire from the appellant whether he could return to Somaliland safely avoiding risk of harm by Al-Shabaab.

Discrimination amounting to persecution?

24. In relation to the first ground the appellants raise the meaning of persecution within the definition of 'a refugee'. Although the Tribunal accepted that the appellant as member of the Gabooye Clan had faced and would continue to face serious discrimination because of his ethnic identity (which is a reason for race within the meaning of the definition of a refugee under the Refugees Convention), the Tribunal found that this fell short of persecution within the meaning of the Convention.
25. The appellant submitted the Tribunal made an error of law, as humiliation of a person can be such as to amount to degrading treatment. The Court was referred to the book by Hathaway and Foster⁵, which discusses that the right not to be subjected to degrading treatment is a non-derogable right under international law; that discrimination as suffered by the appellant because of his membership of the minority clan is humiliating and as such has been found to be persecution.
26. Being referred to as 'dirty' and the humiliation suffered as a result has been considered by the House of Lords in the case of *Hoxha*⁶. This is analogous, says the appellant, to the Gabooye tribe being treated as dirty in Somalia culture.
27. The appellant submitted that given the patterns of constant and repeated discrimination found by the Tribunal, the Tribunal should have found this level of discrimination to be persecution. The Tribunal therefore applied a more stringent test than what was required and erred in law by saying that the findings were discrimination but not persecution.
28. The appellant directed the Court to the case of *Hoxha*⁷. In this matter Baroness Hale was considering a case of a woman who had been raped by Serbian forces, and as a result of ill-treatment she was now regarded as 'dirty' by her own community, this humiliation was enough as to amount to degrading treatment. The appellant before the court is of a lower tribe in his country; however there is no evidence before the court that he is singled out and regarded *within* that tribe in a particularly discriminatory way.

⁵ J.C. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd ed., Cambridge University Press, 2014, p211

⁶ *R(Hoxha) v. Special Adjudicator*, [2005] 1WLR 1063 (UKHL, Mar. 10, 2005) at 1074 [36]

⁷ *Supra, Hoxha*

29. The respondent argued that the appellant is asking the court to second guess the Tribunal and this amounts to a merits review; drawing the courts attention to the evidence before the Tribunal that the appellant's mother and two elder brothers were working in Somaliland and that another brother lives across the border in Ethiopia helping a man with his shop.
30. The respondents say that the appellant's mother and brothers have been able to maintain themselves despite their membership with the Gabooye tribe. The discrimination that all Gabooye face in Somaliland is not a level of persecution pursuant to the Convention. As such the Tribunal was correct in saying that on this claim the appellant is not recognised as a refugee.
31. In relation to this ground I am satisfied that the Tribunal's findings were open to it on the basis of the evidence before it, and that it did not apply 'a more stringent test' regarding what constitutes persecution. This ground fails.

Degrading treatment sufficient for complementary protection?

32. The second area of appeal raised by the appellant concerns complementary protection. The Tribunal found that the appellant was discriminated against because of his lowly tribe status, and that people of this tribe suffered negative treatment in relation to employment opportunities and in many other areas of everyday life. This should have, the appellants submit, enlivened Nauru's obligations of *non-refoulement* and afforded the appellant complementary protection.
33. In particular the appellants noted the link between the denial of human dignity and basic needs as a human being, and the psychological harm such degrading treatment could cause⁸, such that a return to that country would be in breach of Nauru's *non-refoulement* obligations.
34. The respondent argues that contrary to the cases cited by the appellant there was no evidence before the Tribunal that the appellant if returned to Somaliland would be treated as less than human, or denied the most basic needs of a human being, or would be treated in such a way by the majority of society that he would suffer harm to his mental health. No claim of psychological harm was put forward on behalf of the appellant should he return to Somaliland. Although the Tribunal noted, for example, that there are societal taboos on intermarriage between tribes, in this case the appellant is in a *de facto* relationship with a woman of his own tribe.

⁸ *R v. Secretary of State for the Home Department, ex parte Adam* [2005] UKHL, 22 January 2005, p10; *SCAT v. Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC80 (30 April 2003); *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs* [2000] HCA 19; 20CLR 293

35. The court was reminded that the appellant's mother and brothers are maintaining themselves in employment, and attend school as appropriate in Somaliland.
36. Although members of the Gabooye tribe do suffer discrimination from other tribes in Somaliland, the appellants family has been able to sustain themselves and earn a living there. I am satisfied that the Tribunal understood the appellant's position upon a return to Somaliland in light of Nauru's international obligations and I find no error in the decision of the Tribunal that the appellant is not owed complementary protection.

Denial of natural justice and procedural fairness?

37. Turning to the third area or ground raised by the appellant two instances were placed before the court in which it is said the Tribunal failed to comply with natural justice and procedural fairness.
38. Firstly, the Tribunal made reference to there being Somali police personnel from every tribe in Somaliland. Secondly the Tribunal held that the appellant could return by air to Somaliland and thus arrive home in safety. The appellant contends that this was critical to the Tribunal's decision in relation to its findings, however that neither of these propositions was placed before the appellant, and as such he did not have the opportunity to address the accuracy of the information or any consequences for him. This failure is put to the court as a breach of the Tribunal's obligations to act in accordance with the principles of natural justice and so the Tribunal erred in law.
39. In reply it was accepted by the respondents that the Tribunal appears to have made a factual finding in relation to the composition of the police forces in Somaliland, and that there is nothing on the transcript to indicate that this matter was brought to the appellant's attention. This failure on behalf of the Tribunal is not critical to the decision, submit the respondents, as it is something that is "merely peripheral" to the Tribunal's review of the general question in relation to the appellant being recognised as a refugee or owed complementary protection.
40. Additionally as the Tribunal found that the appellant would not suffer harm amounting to persecution for the purposes of the Convention⁹ if returned to Somaliland, it was not obliged to put to him the composition of the police force as this had no real bearing on the Tribunal's determination.
41. In relation to the appellants return to his home by air to Hargeisa, and in so doing avoid any contact with Al-Shabaab, this echoed the appellants own submissions¹⁰ that such a manner of travel generally involves no risk.

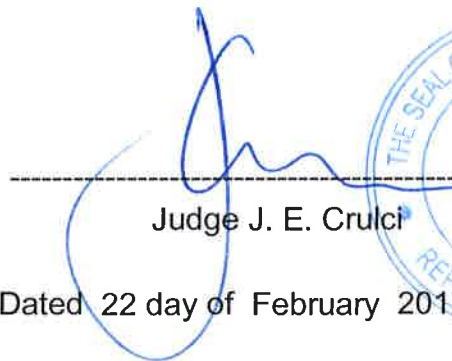
⁹ At 5 above

¹⁰ Book of Documents, p110


42. In relation to this third area or ground the court finds that there was no breach of natural justice on behalf of the Tribunal in not raising the matter of mode of safe return to Somaliland as this determination was in accordance with the appellants own submissions. Whilst it is accepted that the Tribunal did not put to the appellant that all tribes are represented in the Somali police force, this observation by the Tribunal is not seen to be critical to the decision that the appellant did or did not suffer discrimination so as to amount to persecution for a Convention reason. There was therefore no breach of procedural fairness or of natural justice on behalf of the Tribunal. This ground of appeal has no merits and fails.

ORDER

43. The appeal is dismissed. The decision of the Tribunal TFN 14068 of the 15 March 2015, is affirmed pursuant to the provisions of s.44(1)(a) of the Act.



Judge J. E. Crulci



Dated 22 day of February 2017