IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 60/2016
Being an appeal against a decision of the Nauru Refugee Status Tribunal brought pursuant to s43 of the Refugees Convention Act 2012

BETWEEN

DWN 066 APPELLANT

AND

The Republic of Nauru RESPONDENT

Before: Khan, J
Date of Hearing: 17 March 2016
Date of Judgement: 31 March 2017

Case may be cited as: DWN066 –v- The Republic

CATCHWORDS:
Section 37 of the Act was repealed by section 24 of the Refugee Convention (Derivative Status & Other Measures) (Amendment) Act 2016- which came into force on 23 December 2016- the amendment is retrospective to 10 October 2012- with the repealing of section 37 the Tribunal's source of natural justice obligations is the common law of Nauru.

APPEARANCES:

Counsel for the Appellant: T Baw
Counsel for the Respondent: C Fairfield

JUDGMENT

INTRODUCTION

1. The appellant filed an appeal against the decision of the Refugee Status Review Tribunal (the Tribunal) pursuant to the provisions of s43 of the Refugees Convention Act 2012 (the Act) which states: -

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

2. The Tribunal delivered its decision on 26 September 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 in this Court on 11 November 2014 and the grounds of appeal were amended on 12 June 2015.

4. BACKGROUND

a) The appellant is a citizen of Pakistan. He is 28 years old and his date of birth is 31 December 1988.

b) He is from the sub-village of Azimabad in the village of Darsaman in Hangu District of Khyber Pakhtunkhwa (KPK) province.

c) He is a Sunni Muslim of Pashtun ethnicity. He married in 2008 and has 2 infant children. His wife and children live in Pakistan. He had only resided in the village of Azimabad prior to departing Pakistan.

d) He attended the school up to year 10.

e) He is a taxi driver. The taxi is owned by his father.

f) The appellant and his father own land in Darsaman which is leased to a farmer on a share farming basis. They are paid half of the profit derived from the land.

g) There are about 200-250 people living in Azimabad and about 20,000-25,000 people in Darsaman.

h) Since 2008 there has been a strong Taliban presence in his area and they control the area and there has been constant violence.

i) There was an election held in May 2013. The Taliban had issued orders that women were not to vote in the election and in defiance of that orders the appellant took his wife and mother to vote in the election which was held at a local high school.

j) A few days after the election, he received a phone call from his father that the Taliban had visited his home and were asking for him. They told his father that he was required to attend to a Taliban base, and if he failed to do so then he would be responsible for his and his father's fate.

k) The appellant arranged for a cousin to drive his taxi and he returned home in another vehicle. He was in hiding at his home for a few weeks whilst his maternal uncle made arrangements for him to leave Pakistan as he feared that the Taliban would carry out their threat against his life.

l) On or about 10 or 11 June 2013, he departed Pakistan from Lahore on a genuine passport to Malaysia. From there he travelled to Thailand and he travelled by boat to Australia via Indonesia.

m) He arrived in Christmas Island on or about 3 August 2013 after his boat was intercepted. He was transferred to Nauru pursuant to a memorandum of agreement entered between the Republic of Nauru and the Commonwealth of Australia on or about 7 September 2013.

APPLICATION TO THE SECRETARY

5. On 22 November 2013, the appellant attended a transfer interview.

6. On 8 December 2013, the appellant applied to the Secretary for the Department of Justice and Border Control (the Secretary) for Refugee Status Determination (RSD) for recognition as a refugee and for complementary protection under the Act.

7. On 15 January 2014, the appellant was interviewed by a RSD officer regarding his application. In the interview, he stated that in defiance of the Taliban's order he took his wife and mother to vote in the election held in March 2013, and he subsequently was summoned to attend the Taliban base which he refused and went into hiding and then left Pakistan.

8. On 19 May 2014, the Secretary handed down his determination that the appellant was not recognised as a refugee and was not owed a complementary protection under the Act.

APPLICATION TO THE TRIBUNAL

9. The appellant made an application for review of the Secretary's decision pursuant to the provisions of s31 of the Act which provides:

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

a) a determination that the person is not recognised as a refugee;
b) a decision to decline to make a 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.

10. On 26 May 2014, the appellant made a statement in which he corrected that the elections were held in May 2013 and not March 2013.

11. On 20 July 2014, the appellant's lawyers, Craddock Murray Newmann, made written submissions to the Tribunal and on 25 July 2014 he appeared before the Tribunal with his lawyer and he was assisted by an interpreter in Pastho and English language.

12. The Tribunal handed down its decision on 26 September 2014 affirming the decision of the Secretary that the appellant is not recognised as a refugee and was not owed complementary protection under the Act.

THIS APPEAL

13. The appellant filed 5 counts of appeal which are as follows:

a) Ground 1: Taking into account relevant consideration;

b) Ground 2: Failure to consider reports of repercussions against women who voted;

c) Ground 3: Erroneous finding on period in hiding;

d) Ground 4: Erroneous finding that the Taliban did not return to the appellant's home;

e) Ground 5: Denial of procedural fairness.

SUBMISSIONS

14. In addition to the submissions filed by the appellant and respondent in this appeal they also filed supplementary written submissions addressing the following issues:

1) When does an error of fact by the Tribunal mean that the Tribunal has failed to discharge its statutory duty?

2) What is the Tribunal's statutory task?

The submissions were of great assistance to me and I am grateful to both counsels.

CONSIDERATION

15. The appellant's counsel combined Grounds 2, 3 and 4 into one category, namely, "a failure to take into account a relevant consideration." She presented submissions on Ground 3 first and went on to discuss the other grounds later. I will discuss the grounds in the order of the submissions made by the counsel for the appellant.

Ground 3 - Erroneous finding on period in hiding

16. The counsel for the appellant submitted that the evidence was that the appellant was in hiding for a period of 20 days whereas the Tribunal made a finding that he was in hiding for a period of 3 months. The Tribunal stated in its determination at [24] as follows:

> *"The Tribunal does not accept that the Taliban visited the applicant's home and demanded that he report to their base within 3 days, however. Firstly, the Tribunal does not accept that the applicant's wife and mother were the only women who voted in Darsaman and therefore does not accept that the applicant was targeted for allowing his wife to vote. Secondly, the Tribunal does not accept that the Taliban demanded that the applicant present himself at their base within 3 days yet did not return to the applicant's home to find him when he did not attend and did not take any action against the applicant's father when he did not attend. The applicant remained living in the family home for 3 months after taking his wife and mother to vote without coming to any harm leading the Tribunal to conclude that he was not being sought by the Taliban. For these reasons, the Tribunal does not accept that the applicant has been targeted by the Taliban for allowing his wife to vote or that he will be targeted on return to Pakistan because he allowed his wife to vote or because he did not obey a Taliban order."*

17. Ms Baw submitted that the applicant corrected the date in his affidavit dated 26 May 2014 and in particular at [35][1] where he stated "my previous

[1] BODp102

statement indicates that the elections occurred in March 2013. This date is incorrect; I do not know why this date has been incorrectly recorded. The elections occurred in May 2013. [10], [12], [13] and [14] should be corrected to May 2013." The counsel for the appellant also referred to the transcript[2]. The following exchange took place between the Tribunal and the appellant:

> *"Miss Hearn-Mackinnon; maternal uncle. Yet you – the Taliban had come and made an order for you to go to the – their base you didn't go to the base and yet you were home for 20 days but – they didn't come back to your home looking for you. See, it seems that – I would have thought that if the Taliban had come for you, looking for you, ordered your father to send you to the base – to report to the base, you don't – you didn't go to the base, that they would come back to your home, they would speak to your father or they would look for you.*
>
> *The interpreter: Well, during this timing they were patrolling and they were coming and they were looking for me, and even people were asking about – from my father, 'where is he?'. So my father was telling them, 'even now I don't have – I don't – I can't trace him where he is. He has not returned back to home.' During that time they would keep coming and looking and patrolling the area.*

18. Miss Baw further submits that the 3-month period was part of the Tribunal's reason in concluding that the Taliban had not visited the appellant's home and demanded that he report to their base within 3 days.

19. The respondent conceded that the Tribunal misunderstood the period of time the appellant claimed he was in hiding in his home, however, Mr Fairfield submits that it is an error of fact; and there is no error of law; and further there is no error of law simply in making a wrong finding of fact and the critical issue is whether the Tribunal considered the appellant's claim; as that is its statutory obligation. The claim was whether the Taliban came to look for him. He relied on the case of *Minister for Immigration and Citizenship – v- SZNPG*[3] *that:*

> *An error of fact based on a misunderstanding of evidence or even overlooking an item of evidence in considering the appellant's claims is not jurisdictional error, so long as the error, whichever it be, does not mean that the RRT has not considered the applicant's claims."*

[2] BODp154
[3] 2010 115ALD 303,309 [28]

20. Miss Baw disagrees with Mr Fairfield's contention and relies on the *Minister for Immigration and Citizenship –v- SZRKT and another*[4] *that:*

> *"[111] in my opinion there is no clear distinction in each case between claims and evidence: CSHKB –v- Minister for Immigration and Multicultural and Indigenous Affairs at [24], set out at [69] above. The fundamental question must by the importance of the material to the exercise of the Tribunal's function and thus the seriousness of any error. In my opinion the distinction between claims and evidence provides a tool of analysis but is not the discriman itself. Further, it is important not to reason that because of failure to deal with some (insubstantial or inconsequential) evidence will, in some circumstances, not establish jurisdictional error, then a failure to deal with any (substantial and inconsequential) evidence will also not establish jurisdictional error."*

> *"[113] In NABE –v- Minister for Immigration and Multicultural and Indigenous Affairs (2) 2004 144 FCR 1, referred to in MZXSA – v- Minister for Immigration and Citizenship (2010) 117 ALD 441 at [83], the Full Court discussed extensively errors of facts and jurisdictional error in the Tribunal. The Court said at [63] that the failure by the Tribunal to deal with the claim raised by evidence and the contentions before it which, if resolved in any one way, would or could be dispositive of the review, can constitute a failure of procedural fairness or a failure to conduct the review required by the Migration Act and thereby a jurisdictional error. It follows that if the Tribunal makes an error of fact in misunderstanding or misconstruing a claim advance by the applicant and bases its conclusion in whole or in part upon the claim so misunderstood or misconstrued its error was tantamount to a failure to consider the claim on the basis can constitute jurisdictional error. I do not regard that decision or stating or attempting to state exhaustively the circumstances in which error may or does go to the jurisdiction."*

21. Miss Baw further relied on *the Minister for Immigration and Border Protection –v- MZYTS and another*[5] *[38] and [46] that*:

---

[4] 2013 FCA317[111] and [113]

[5] [2013] FCA FC114

"That task could not be lawfully undertaken without a consciousness and consideration of the submission, evidence and material advanced by the Visa applicant most likely to give the Tribunal an accurate picture of ongoing circumstances on the ground in Zimbabwe for him if he were to the return there."

[46] Although in one sense this might be described as a 'failure to consider' most recent country information, or a failure to consider a claim about increased risk of persecution on return to Zimbabwe, in our opinion the error is, fundamentally a failure to form the state of satisfaction (one way or the other) required for the purposes of the review in respect of the criterion in s36(2)(a). Judicial review of the formation, by an inferior Tribunal, of the state of the satisfaction required by the empowering provision may be, as the High Court pointed out in Kirk –v- Industrial Court (NSW) (2010) 239CLR 531 (Kirk) (at [64]) best described as 'functional exercise' citing Jaffe (1957). Affixing a pre-death existing label or matter description to what a decision maker did interpreted exercise of a statutory power, for example 'a failure', may assist the analysis, although it may provide a distraction. To the extent Robertson J made similar observations in SKRKT at [98] and [111], we respectfully agree.

22. The appellant's claim or evidence that he was in hiding for a period of 20 days and the Tribunal misunderstood the period as 3 months (90 days) and used that period in deciding that the Taliban did not visit his home and demanded that he report to the base and in doing so the Tribunal committed an error of law.

23. Although the Tribunal mistook the period of 20 days for 3 months, the critical issue was whether the Tribunal discharged its statutory obligation in dealing with the appellant's claim. In my view, it did and made a finding that the Taliban did not return to look for him or caused him any harm. So, this ground fails.

Ground 4 – Erroneous findings that the Taliban had not returned to the appellant's home.

24. In [24] of the decision mentioned above the Tribunal stated that "...the Tribunal does not accept that the Taliban demanded that the applicant present himself at the base within 3 days yet did not return to the applicant's home to find him when he said he did not attend and did not take any action against the applicant's father when he did not return."

25. Miss Baw refers to the transcript[6] where there is an exchange between the Tribunal and the appellant and she submits that the appellant said that the Taliban came back in response to the question by the Tribunal, and that he was at home. Mr Fairfield submits that the appellant did not say that he was at home.

26. Having perused the transcript at BOD page 154 the appellant was home when the Taliban came looking for him and his father was able to make excuses for him. The Tribunal did not refer to this piece of evidence. Mr Fairfield submits that under s34(4) of the Act does not oblige the Tribunal to refer, or give a reason for referring to every piece of evidence before it. He relies on *Applicant WAEE –v- Minister for Immigration and Multicultural and Indigenous Affairs*[7]. The Full Court stated as follows:

> *"it may be unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is effectual premise upon which a contention rests which has been rejected."*

27. The Tribunal did not make any reference to this evidence as it made a finding of "greater generality", in that the Taliban never visited the applicant's home and demanded that he report to the base. So, this ground of appeal fails.

Ground 1 – Taking into account irrelevant consideration

28. The Tribunal at [24] states "*...firstly, the Tribunal does not accept that the applicant's wife and mother were the only women who voted in Darsaman and therefore does not accept that the applicant was targeted for allowing his wife to vote.*"

29. Miss Baw submits that it was never contended by the appellant that his wife and mother were the only women who voted in Darsaman; it was neither a claim nor did the appellant give evidence to that effect. She further submitted that it is an irrelevant consideration. Mr Fairfield submitted that the appellant never made a claim that only his wife and mother were the only women who voted so the Tribunal was entitled to make a finding that other women also voted and it made that finding correctly. I agree with Mr Fairfield and this ground of appeal is dismissed.

Ground 2 – failure to consider report of repercussions against women

30. The Tribunal at [17] stated as follows:

---

[6] BOD 154

[7] (2003 75 ALD 630, 641 [46])

> "Despite the circumstances, however, there was 40% turnout of women voters across Pakistan which was considered unprecedented. According to a Pushtun website, women turned up to vote in KPK 'in the face of blatant and frequent threats from the Taliban'. Women formed long queues at polling stations at Peshawar, even in areas where women were usually not allowed out of their homes" although in some districts men did not "allow" women to vote as per the "local tradition". Elsewhere in KPK women generally participated across the province although the female turnout at some polling stations was very low. The Tribunal did not locate any reports of repercussions against women who voted.

31. Miss Baw complains about the fact that the Tribunal stated that it did not locate any report of repercussions against women who voted. Her complaint is that the appellant's lawyers had made written submissions to the Tribunal annexing a copy of an article from the Sydney Morning Herald dated 12 May 2013[8] and if the Tribunal had considered that article then it would not have made the aforementioned statement. Mr Fairfield submitted that the Tribunal was not required to refer to every single piece of contrary information before it and that the Tribunal reasoned that it could not find any reports of repercussions against women and that comment was made in the context of KPK province where the appellant resided. I agree with Mr Fairfield submissions and this ground of appeal is dismissed.

Ground 5 – denial of procedural fairness – s 37

32. This ground is under s.37 of the Act. On 23 December 2016 s.37 was repealed by s.24 of the Refugees Convention (Derivative Status and Other Measures) (Amendment) Act 2016 (the Amending Act). In repealing s.37 of the Act s.24 of the Amending Act now provides that the source of the Tribunal's natural justice obligation is the common law of Nauru. Further, the repeal of s.37 of the Act is deemed to have commenced on 10 October 2016. This is provided for by s.23 of the Amending Act so I cannot deal with this ground under s.37 of the Act and must deal with it under the principles of natural justice as provided for by the common law of Nauru.

33. After the enactment of the Amending Act on 23 December 2016 I refrained from delivering this judgment and enquired as to whether the parties wanted to make further submissions. I was informed by both parties that they did not wish to make any further submissions so I will deal with this ground on the principles of natural justice under the common law of Nauru.

[8] BOD 67

34. The Customs Adopted Law Act 1971 which came into effect on 5 January 1972 adopted the principles of common law in force in England on 31 January 1968.

35. Under the principles of natural justice the following principles are to be observed:

a) Impartiality

Under the Common Law it is imperative that anybody or person making decisions that had an effect on the rights of another person be independent, impartial and of a mind that is open to persuasion. In his speech in *Metropolitan Properties Co. (F.G.C.) Ltd v Lannon*[9], Lord Denning MR said:

> *"There must be circumstances for which a reasonable man would think it likely to probable that the Justice, or Chairman, as the case may be, or did, favour one side unfairly at the expense of the other. The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice in that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when fair minded people go away thinking: 'The Judge was biased'.*

b) Fair Hearing

i) In *Ridge v Baldwin*[10], Lord Read applied the principles of natural justice in the context of a dismissal of a constable, as follows:

> *"I find an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his evidence or explanation...*
>
> *So I would hold that the power of dismissal in the Act of 1882 could not have been exercised and cannot be exercised until the Watch Committee have informed the Constable of the grounds they propose to proceed and have given him a proper opportunity to present his case in defence."*

[9] [1969] 1QB 577
[10] [1964] AC 40,66,79

ii) Several of the judgments in Ridge v Baldwin cited with approval of the judgment of Selbourne LC of the UK Court of Appeal in Spackman v Plumstead Board of Works[11] in which those principles were observed in the context of administrative decision making as follows:

> *"No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word but he must give the parties an opportunity of being heard before him and stating the case and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom authority it is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of the sort done contrary to their sense of justice."*

c) Nauruan Cases

i) In *Scotty v Nauru Lands Committee*[12] van Doussa J, 18 June 2013 [19] the Court held that:

> *"The [Nauru Lands] Committee as a public body carrying out statutory functions must comply with the rules of natural justice. It must give those who have a direct interest, i.e. as potential beneficiaries, notice of the Committee's intention to determine the distribution of the intestate estate. It must give interested persons the right to be heard. And it must act fairly and independently in reaching a conclusion that is open on the evidential material which it has assembled."*

ii) In *Cook v Fritz*[13] Eames CJ (30 March 2013), [93] the Court held that:

> *"The Nauru Lands Committee was obliged to give to all those with an interest in its decision a fair opportunity to present their*

[11] (1885 10AC Cas 229, 240)
[12] [2013]NRSC 9
[13] [2013] NRSC 2

claims [citing Adiedabwe v Bill[14]]. What constitutes a fair hearing must be judged by the circumstances of the case.

iii) In *Deiye v The Republic*[15], Khan J (16 June 2015), [23] in the context of the Court's inherent power to stay criminal proceedings cited with approval the following extract of the judgment of Mason P in the Court of Appeal in the Supreme Court of New South Wales in *DPP v Shirvanian*[16]:

> *"The duty to observe fairness, at least in its procedural sense, is a universal attribute of the judicial function. Those aspects of a fair trial as the principles of natural justice apply by force of common law and the presumed intent of Parliament unless clearly excluded in a particular context."*

(d) Australian Cases

In *Kioa v West*[17] Brennan J of the High Court of Australia held that:

"*A person whose interests are likely to be affected by the exercise of the power must be given an opportunity to deal with the relevant matters adverse to his interest which the repository of the power proposes to take into account in deciding its exercise [citing Ridge v Baldwin]. The person whose interest is likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance...*

Nevertheless in the ordinary case when no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made."

36. I accept that there is a huge difference between 20 days as opposed to 90 days.

37. Mr Fairfield submits that the period of 90 days as opposed to 20 days was not the material finding for the Tribunal. He submits at [59] in his submissions:

> *"...the material finding was that the appellant did not come to any harm despite living in the family home following the demand, and following the expiry of 3-day time period given by the Taliban for*

[14] [1969-1982] NLR (B)131
[15] [2015] NRSC 5 (unreported)
[16] [1998 44NSWLR 129, 134-5]
[17] (1985) 159 CLR 550, 628-9

compliance. The Tribunal member clearly put to the appellant her concerns that he remained at home and that the Taliban did not come to look for him."

38. Notwithstanding the error by the Tribunal in regards to the time the appellant was at his home after the threat by the Taliban, I find that there is no denial of natural justice as that was not the material finding. The material finding was whether the appellant came to harm after the 3-day ultimatum by the Taliban.

39. So this ground of appeal is dismissed.

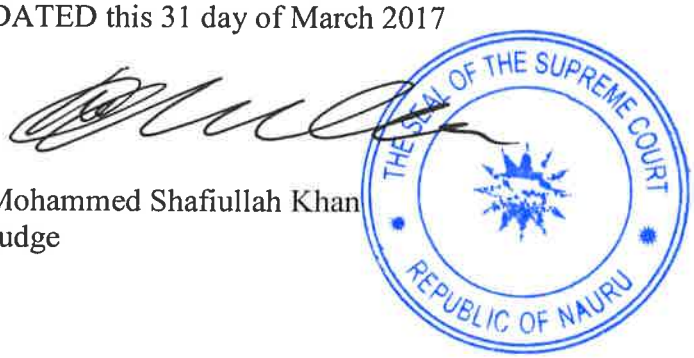
CONCLUSION

40. Under s.44(1) of the Act, I make an order affirming the decision of the Tribunal.

ACKNOWLEDGMENT

41. After the enactment of the Amending Act Mr Rogan O'Shannessy, the Senior Appeals Lawyer for the Republic with the consent of the solicitors for the appellant provided the court with a list of cases on common law principles of natural justice and some commentary. I found this research to be helpful and I thank him for his assistance.

DATED this 31 day of March 2017



Mohammed Shafiullah Khan
Judge