



IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION]

Case No.105 of 2015

IN THE MATTER OF an appeal
against a decision of the Refugee
Status Review Tribunal TFN 15014,
brought pursuant to s43 of the
Refugees Convention Act 1972

BETWEEN

VEA002

Appellant

And

THE REPUBLIC

Respondent

Before:

Crulci J

Appellant:

T. Baw

Respondent:

T. Reilly

Dates of Hearing:

21 June 2016

Date of Judgment:

23 March 2017

CATCHWORDS

APPEAL - Refugees – Refugee Status Review Tribunal – Relocation – ‘What happens to appellant upon Relocation?’ – Is Relocation reasonable in all the circumstances – error in law – Tribunal followed principles of natural justice and procedural fairness – Appeal UPHELD

JUDGMENT

1. This matter comes to the Court pursuant to section 43 of the *Refugee 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.

...

2. 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.

3. This Court is in agreement with the procedure in relation to the matter of extension of time as outlined in *ROD128 v The Republic*¹:

"The Republic for the efficient disposal of the case agreed that the appellant be allowed to present his case on the merits of the proposed appeal and at the same time present his argument on the 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... 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 and consequently the issue of the appeal being out of time is no longer an issue."

4. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on the 7 August 2015 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of the 19 March 2015, that the appellant is not recognised as a refugee under the Refugees Convention² ("the Convention") and is not owed complimentary protection under the Act.

¹ [2017] NRSC 8

² 1951 Refugee Convention and 1967 Protocol, also referred to as "the Refugees Convention" or "the Convention"

BACKGROUND

5. The appellant is a 40 year old married man with one child. He was born in Baluchestan Province and lived there with his family. He is a Sunni Muslim, a Pashtun by ethnicity and a citizen of Pakistan.
6. The appellant's mother is deceased and his wife, child, father and siblings live in Baluchestan Province. Having completed his schooling he attended university and was awarded a Bachelor of Arts degree. He worked as a businessman, in a shop retailing clothes. Two of his brothers also have clothing stores in the same street as the appellant's shop.
7. In connection with his business the appellant would travel to Karachi twice a year staying for approximately one week on each visit.
8. In August 2013 after a number of incidents with the Tehrik-i-Taliban Pakistan (TTP) - the Pakistani branch of the Taliban - the appellant fearing for his safety, left his home. He went to Islamabad staying there until October 2013, and then travelled through Thailand, Malaysia and Indonesia where he boarded a boat and arrived at Christmas Island in November 2013. The appellant was transferred to Nauru in December 2013.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

9. The appellant states that he left Pakistan because he believed his life was in danger and he was in fear of the Taliban, in particular the TTP.
10. On the 10th of May, 2013, when he was working in his shop, two Jihadists belonging to the TTP came in and demanded that he pay 50,000 Pakistani rupees each month to the TTP.
11. The appellant told the militants that he did not have money to pay them at that time, but that he would arrange to get it and that they could come another time to collect it; he was threatened not to discuss the incident and he was fearful for his life afterwards.
12. On the 4th of July, 2013 having closed the shop for the evening and taking his usual route home on foot, he was stopped by two men on a motorbike. The men were carrying rifles; they took him blindfolded with them on the motorbike.
13. After being placed in a room he was interrogated and assaulted. There was some discussion as to whether he would be allowed to pay the money or be killed instead. He agreed that he would obtain the money by mid-August after the festival of Eid. He was subsequently set free and made his way home.

14. Contrary to the agreement made with the militants, another Talib came to the shop at the end of July to inform the appellant that the money was now due in the first week of August. As a result of this he feared serious harm to himself or loss of his life from the Taliban and determined to leave the country. The appellant is of the view that the Pakistani authorities are unable to protect him, and that he would not be safe anywhere in Pakistan because the Taliban made it clear that they could locate him anywhere.

Secretary's Decision

15. The Secretary did not accept the appellants explanations in relation to his not discussing with his own family the TTP's demands, nor was the Secretary satisfied that the appellant was approached, threatened, targeted, kidnapped or otherwise harmed by the TTP prior to his departure from Pakistan. The Secretary did not accept that the appellant has an imputed anti-TTP political opinion.
16. The Secretary did not accept the appellant's explanations as believable and as such was not satisfied that the appellant would face harm on account of his being a shopkeeper in Pakistan. As there was no finding of a reasonable possibility of harm, state protection was not considered, nor was the reasonableness of relocation considered. Having found that the applicants fear is not well-founded the Secretary did not consider whether the harm feared was for on one of the Refugee Convention Grounds.
17. The Secretary determined that as the basis of the appellant's fear was not well-founded he was therefore not a refugee within the meaning of the Act. The Secretary was not satisfied that if the appellant was returned to Pakistan that he would be subject to arbitrary deprivation of life, the death penalty, torture, or cruel, inhuman or degrading treatment or punishment. Therefore the Secretary determined that Nauru did not owe the appellant complementary protection.

REFUGEE STATUS REVIEW TRIBUNAL

18. The Tribunal carefully considered the appellants claims and the evidence he gave at the hearing. The Tribunal came to a different view to that of the Secretary. They did not find the appellants responses evasive, determining instead that he gave detailed accounts of the threats and kidnapping. The appellant in reply to questions asked, said on a number of occasions that he was worried about matters, rather than answering the question asked. However when the question was rephrased the appellant answered the questions asked, and the Tribunal's prior concerns in relation to the appellant's account was alleviated.
19. The Tribunal was prepared to accept the appellant's account of his experiences and that he was targeted for extortion by the TTP. The Tribunal is satisfied that if he returns to his home area there is more than a remote possibility that he will be further threatened or harmed by the Taliban, and that these threats amount to persecution for the Convention

reasons of his actual /or imputed anti-Taliban political opinion, and /or his non-adherence to the Taliban's extreme interpretation of Sunni Islam.

20. The Tribunal accepted that the Pakistani authorities would be unable to protect the appellant from the harm he feared in his home area in accordance with international standards.
21. In relation to relocation, the Tribunal accepts that the Taliban has carried out attacks against its opponents in many different parts of Pakistan. These attacks however generally involve leaders or outspoken high profile people. The Tribunal does not accept that if the applicant were to relocate to another part of Pakistan the local Taliban from his home area would have the capacity to locate and harm him in another part of the country.
22. The Tribunal stated as follows³:

“While the Tribunal does not expect the applicant to live in hiding in order to avoid the threat of persecution, it equally considers it to be a not unreasonable curtailment of his fundamental freedoms to expect the applicant and his immediate family to refrain from telling others where he has located in order to prevent this information from coming to the attention of the Taliban, and thereby further reduce what the Tribunal considers to be the remote risk that they would seek to locate and harm him outside his home area.”
23. The Tribunal considered the appellant's claim that as a Pashtun he would face discrimination in other parts of the country, but rejected this by saying it was at odds with the appellants own successful previous relocation experience.
24. The Tribunal found that if the appellant relocated to another part of Pakistan such as Punjab it would be highly unlikely that the Taliban operatives from his home area will pursue him then, and concludes that there is no reasonable possibility of this happening.
25. In relation to the appellants family the Tribunal stated as follows “*Given that, on the applicant's evidence, his wife and child continue to reside safely with his brothers in the family compound, there would appear to be no urgent imperative concerning the applicants family which would prevent him from re-establishing himself elsewhere in Pakistan and then sending for them when he had done so*”⁴.

Tribunal's decision

26. The Tribunal found that if the appellant relocated to another part of Pakistan he would not be exposed to the risk of persecution by the Taliban or other serious harm, and concluded that he could practically,

³ Book of documents, p 182, para 55

⁴ Book of documents, p 184, para 69

safely and legally relocate elsewhere in Pakistan.⁵ And thus "could lead a relatively normal life without facing undue hardship in all the circumstances."⁶

27. The Tribunal determined that the appellant was not a refugee because he could avoid persecution by relocating within his country. Similarly the Tribunal was not satisfied that the appellant would face serious Human Rights violations amounting to degrading or other treatment within Nauru's international obligations if he were to relocate, and therefore determined that he is not owed complementary protection.

GROUND OF THIS APPEAL

28. The appellant raises two grounds of appeal in relation to the Tribunal finding that the appellant could relocate: Firstly that the Tribunal misapplied the relocation test by asking itself the wrong question; and secondly whether the Tribunal failed to properly consider whether it is reasonable for the appellant to relocate.

Relocation – Question to be determined

29. In relation to Ground One the appellant draws the Court's attention to the Tribunal's conclusion referenced above at paragraph 27:

"While the Tribunal does not expect the applicant to live in hiding in order to avoid the threat of persecution, it equally considers it to be a not unreasonable curtailment of his fundamental freedoms to expect the applicant and his immediate family to refrain from telling others where he has located in order to prevent this information from coming to the attention of the Taliban, and thereby further reduce what the Tribunal considers to be the remote risk that they would seek to locate and harm him outside his home area."

30. The appellant submits that the Tribunal's reasoning is contradictory in that whilst it rejected the proposition that the appellant should live in hiding, it simultaneously determined that he and his immediate family could keep their new location a secret.
31. The Court was referred to the case of *SZATV*⁷ where the High Court of Australia considered and rejected the requirement of "living discreetly". The appellant says that this approach of the High Court corresponds with the UNHCR Guidelines on International Protection⁸ ("the Guidelines"):
- "Claimants are not expected or required to suppress their political or religious views or other protected characteristics to avoid persecution in the internal flight or relocation area. The relocation

⁵ Ibid, para 65

⁶ Ibid, para 70

⁷ *SZATV v Minister for Immigration and Citizenship* [2007] 233 CLR18

⁸ UNHCR, HCR/GIP/03/04, 23 July, 2003, at 19

alternative must be more than a "safe haven" away from the area of origin."

32. In S395⁹ the Court is referred to the views expressed by Gummow and Hayne JJ:

"If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of the adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. ...The question to be considered in assessing whether the applicant's fear of persecution is well-founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant to live in that country without attracting adverse consequences."
33. The appellant states that the Tribunal has found that the appellant could relocate safely within Pakistan as long as he and his immediate family were to refrain from telling their family and friends in their home area where they are now living.
34. In essence the appellant says the Tribunal is requiring that the place of relocation should be hidden from their family (or require their family to keep it secret from others) in order to avoid persecution. In so doing the Tribunal has erred in its determination as it has not asked 'what may happen if' the appellant relocates', rather the Tribunal has said relocation is possible if the location is kept secret.
35. The respondent argues that Ground One does not raise a point of law. The passage complained of¹⁰ is part of an explanation of the Tribunal's reasoning of why, if relocated, the appellant would not face a well-founded fear of persecution.
36. The respondent distinguishes the authorities relied upon as in those cases the applicant was 'expected to avoid persecution by concealing a Convention attribute'. Whereas in this case the respondent replies that the Tribunal was expecting the appellant had taken a reasonable step to avoid coming to the attention of the Taliban upon relocation, in the same way as it is reasonable not to return to an area of the country where there is a well-founded fear of persecution. There is no error of law in the Tribunal's reasoning.

⁹ S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473, at 80

¹⁰ At 27 and 34

37. The respondent notes that in SZSCA¹¹ the Court found that the applicant could avoid harm by refraining from driving his truck outside Kabul; here the appellant could avoid harm by not disclosing his new location. This 'non-disclosure' is a reasonable action on behalf of the appellant and his family, to avoid harm.
38. The Court notes that the Tribunal accepted the appellant's ideological opposition to financially supporting the Taliban in his home region resulted in the possibility that he would be further threatened or harmed by the Taliban, and that these threats amount to persecution for the Convention reasons of his actual /or imputed anti-Taliban political opinion, and or his non-adherence to the Taliban's extreme interpretation of Sunni Islam. The appellant was targeted because he is a businessman who had a shop and therefore could reasonably be expected to have access to money.
39. When looking at relocation as a reasonable alternative to living in the home area (where there is a fear of harm amounting to persecution for a Convention reason) the Tribunal is conducting a forward-looking assessment.¹²
40. A forward looking assessment as to the reasonableness of relocation includes those matters laid out in the Guidelines:
- Is the area of relocation practically, safely and legally accessible to the individual?
 - Is the agent of persecution the State?
 - Is the agent of persecution a non-State agent?
 - Would the claimant be exposed to risk of being persecuted or other serious harm upon relocation?
 - Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?
41. In determining this answer the Tribunal is required to consider the appellant's circumstances as a whole: he is a family man with a young child; a businessman; his actual /or imputed anti-Taliban political opinion, and /or his non-adherence to the Taliban's extreme interpretation of Sunni Islam which led to his previous refusal to pay the jihadists.
42. The Tribunal has determined that relocation is reasonably open to the appellant based on the premise that if he and his family refrain from disclosing their location to those in their home area they could lead a relatively normal life.
43. At the Tribunal hearing the appellant was asked a number of questions in relation to relocation as to 'whether the Taliban would be able or willing to find him, given his low profile'¹³ and 'whether it would be reasonable for

¹¹ *Minister for immigration and border protection V SZSCA* (2014) 254 CLR 317

¹² UNHCR, HCR/GIP/03/04, 23 July, 2003, at 8

¹³ Book of Documents, p155 line 10

him to relocate assuming he could avoid the risk of harm by doing so¹⁴. At no point in the hearing did the Tribunal posit the proposal to the appellant for his views on keeping a relocation site secret from his and his wife's family.

44. I find that the Tribunal has erred in law in determining that it was reasonable for the appellant to relocate based on the unconfirmed and assumed premise of successful non-disclosure. The question for the Tribunal to determine is "What may happen to the appellant if he relocates, taking into account all the circumstances as they pertain to him?"
45. Ground One of the appeal succeeds.

Relocation – Reasonableness

46. In relation to Ground Two and whether it is reasonable to relocate, the appellant draws the Court's attention to the judgment of Kirby J in *SZATV*¹⁵:

"In some circumstances, having regard to the age of the applicant and the absence of family networks or other local support, the hypothesis of internal relocation may prove unreasonable. In each case, the personal circumstances of the applicant, the viability of the propounded place of internal relocation and the support mechanisms available if the applicant has already been traumatised by actual or feared persecution will need to be weighed in judging the realism of the hypothesis of internal relocation."

47. The issue of absence of family networks was considered a factor in assessing whether relocation is reasonable in *MZYPW*¹⁶ and in accord with UNHCR guidelines:

Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?

It is necessary to assess the applicant's personal circumstances, the existence of past persecution, safety and security, respect for human rights, and the possibility of economic survival."¹⁷

Personal circumstances

...Factors which may not on their own preclude relocation may do so when the cumulative effect is taken into account. Depending on individual circumstances, those factors capable of ensuring the material and psychological wellbeing of the person, such as the presence of family members or other close social links in the proposed area, may be more important than others.

¹⁴ Ibid., lines 21 and 22

¹⁵ Supra, at 81

¹⁶ *MZYPW v Minister for Immigration and Citizenship* (2012) 289 ALR 541, at 9

¹⁷ UNHCR, HCR/GIP/03/04, 23 July, 2003, at 24, 25

Economic survival

...It would be unreasonable, including from a human rights perspective, to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence. At the other end of the spectrum, a simple lowering of living standards or worsening of economic status may not be sufficient to reject a proposed area as unreasonable. Conditions in the area must be such that a relatively normal life can be led in the context of the country concerned. If, for instance, an individual would be without family links and unable to benefit from an informal social safety net, relocation may not be reasonable, unless the person would otherwise be able to sustain a relatively normal life and more than just a minimum subsistence level."¹⁸

48. The appellant states that the Tribunal failed to consider whether
 - (a) the members of the appellants immediate family could relocate with him;
 - (b) whether they could lead a normal life without a family network in the place of relocation;
 - (c) whether they could relocate without their family members revealing their new home whereabouts;
 - (d) whether such relocation would in effect require a permanent separation from the appellants immediate family and their extended family in order to maintain the secrecy of the new location

49. The appellant submits that tribal and family connections play a significant and important role in the lives of Pashtun people, and that without such networks the appellant and his immediate family would be unable to lead a relatively normal life without undue hardship in Pakistan. By the Tribunal failing to refer to these facts it is inferred that the Tribunal did not consider them.

50. The respondent states the Tribunal did consider whether the appellant's family could join him once he had relocated, evidenced as follows:

"Given that, on the applicant's evidence, his wife and child continue to reside safely with his brothers in the family compound, there would appear to be no greater urgent imperative concerning the applicant's family which would prevent him from re-establishing himself elsewhere in Pakistan and then sending for them when he had done so¹⁹."

51. In relation to the appellant's lack of a family or tribal links in the new location, the respondent submits that it is not unreasonable for an appellant to contend with such difficulties, and that the Tribunal

¹⁸ UNHCR, HCR/GIP/03/04, 23 July, 2003, at 30

¹⁹ Book of documents, p 184, para 69

considered this and found that the appellant could lead a relatively normal life if relocated within Pakistan.

52. The respondent distinguished the case referred to by the appellants of *RT (Zimbabwe)*.²⁰ In that matter the applicant would have had to lie about their political beliefs in order to avoid harm.
53. The Tribunal asked the appellant about relocation within Pakistan and he answered through the interpreter as follows:

"The reason I'm here and the reason I have left home is to save my life, not to start a business or deal with the money. And that's why I'm here. If I felt that Pakistan was not safe at all for me and I fled all the way here to take – to secure my life, I don't know why you suggesting Pakistan again to me.

I don't know why you're suggesting me relocating in Pakistan and living my life in Pakistan there if I'm already here and I have – that means if I'm here then there was no way to live in Pakistan. Now, with my five million rupees waiting there all I can start business with it or something like that, well, I'm not looking into it the way you do. My money is there, so what? There's – that money is not going to save my life.

*If I – if I knew that I could live there and there was a safe place for me I wouldn't ever lived in this harsh life in Nauru for a year and a half.*²¹

54. It is the view of the Court that the Tribunal concentrated in the main on the question of whether the appellant (singular) could safely relocate within Pakistan. It was clear on the evidence before the Tribunal that he is a married man with a young child, and the questions pertaining to the relocation of a family as opposed to a single man are quite different.
55. The matters to be considered when determining whether it is reasonable for a single man to maintain the secrecy surrounding his new location from his family for extended periods, or reasonable for him to assimilate into a new area without family networks, are different to the considerations as to whether a family could successfully be discrete or integrate.
56. If the Tribunal was of the view that it was reasonable for the appellant to relocate and once established, send for his family and be re-united with them as a unit, it should, as a matter of procedural fairness, have put this to him.

²⁰ *RT (Zimbabwe) v The Home Secretary* (2013) 1 AC 152

²¹ Book of Documents, p 156, lines 9 -28

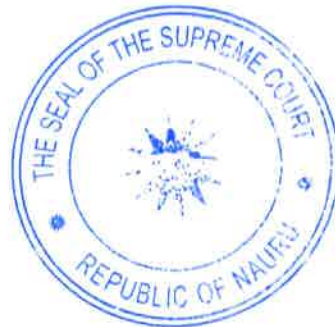
57. I find that the Tribunal failed to take into account the relevant considerations for relocation in relation to the appellant. Ground Two of the appeal succeeds.

ORDER

58. (1) The appeal is allowed.
(2) The decision of the Tribunal TFN 15014, dated the 7 August 2015 is quashed.
(3) The matter is remitted to the Refugee Status Review Tribunal under section 44(1)(b) for reconsideration according to law.



Judge Jane E Crulci



DATED this 23rd day of March 2017