IN THE SUPREME COURT OF NAURU

AT YAREN

APPEAL NO. 64/2015

Being an appeal against a decision of the Nauru Refugee Status Review Tribunal brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

YAU010 APPELLANT

AND

THE REPUBLIC OF NAURU RESPONDENT

Before: Khan, J
Date of hearing: 22 July 2016
Date of judgement: 31 May 2017

Case may be cited as: YAU010 v The Republic

CATCHWORDS:
Whether the Tribunal failed to consider and properly engage with the appellant's evidence and explanations for developments in his evidence- whether the Tribunal's decisions was unreasonable- whether there was an apprehension of bias.
Appeal dismissed as the appellant was inviting the court to engage in merit of the Tribunal's decision which is the role of tribunal- no apprehension of bias.

APPEARANCES:

Counsel for the Appellant: A Khron
Counsel for second respondent: A Mitchelmore

JUDGMENT

INTRODUCTION

1. The appellant filed an appeal against the decision of the Refugee Status Review Tribunal (the Tribunal) pursuant to the provisions of s 43 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 22 May 2015 affirming the decision of the Secretary that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.

EXTENSION OF TIME

3. At the time of the Tribunal's decision, s 43(3) of the Act provided that a Notice of Appeal against the decision of the Tribunal had to be filed within 28 days after the appellant received the written statement of the Tribunal's decision. At that time, there was no provision in the Act (or otherwise) for an extension of the 28-day period.

4. On 14 August 2015, the Act was amended by the *Refugee Conventions (Amendment) Act 2014* which provided for a period of 42 days in s 43 of the Act for the filing of the appeal and also provided that the Court may extend the period in s 43(3) of the Act if, inter alia, it is satisfied that it is necessary in the interest of administration of justice to make that order (new s 43(5)).

5. On 17 June 2015, the Registrar purported to extend the time for filing of a Notice of Appeal by the appellant to 31 August 2015. Pursuant to the judgment of this Court in *Kun v Secretary for Justice and Border Control*[1] that order was not validly made.

6. On 25 September 2015, the Registrar made an order pursuant to s 43(5) of the Act extending the time for the filing of a Notice of Appeal by the appellant to 31 October 2015.

7. A Notice of Appeal was filed before the valid order extending time was made, and the Notice of Appeal should be taken to have been filed on the date on which the time was extended, namely, 25 September 2015. The appellant's appeal is competent from that time.

AMENDED NOTICE OF APPEAL

8. The appellant filed an amended Notice of Appeal on 6 July 2016 which was further amended on 22 July 2016.

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[1] [2015] NRSC 18 (unreported, Khan J, 10 December 2015).

BACKGROUND

9. The appellant was born in Illam District, in Nepal in 1986. He is married with one child. His wife and child are still in Nepal. His parents and his two siblings also live in Nepal.

10. His religion is Hindu.

11. He received 10 years of education in Amchok, which ended in 2003.

12. He was employed in the family farm from 2003 to 2006, as a shop assistant in the town of Birtamod from September 2006 to May 2007. He was employed as a security guard in New Delhi, India from August 2008 to November 2012, and as a plumber in Kathmandu from January 2013 to September 2013.

13. He travelled by plane from Nepal to Bangkok on a genuine passport in September 2013. In November 2013, he travelled by boat to Indonesia and entered Indonesia illegally. On 24 November 2013, he departed Indonesia by boat and arrived in Christmas Island on 5 December 2013. He was transferred to Nauru on 13 December 2013.

14. The appellant claimed to fear persecution and serious harm by:

    i) Death or serious violence at the hands of Maoists because of political opinion (opposition to the Maoists) and membership of a particular social group (young men targeted for forceful recruitment by the Maoists);

    ii) Death or serious violence at the hands of government forces because of political opinion (suspected or imputed support for the Maoists) and membership of a particular social group (young men targeted for forceful recruitment by the Maoists); and

    iii) Persecution by Maoists because of religion (Hinduism) in the form of denial of religious freedom

APPLICATION TO THE SECRETARY

15. On 8 January 2014, the appellant attended a Transfer Interview.

16. On 4 March 2014, 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.

17. On 31 October 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

18. On 10 November 2014, the appellant made an application to the Tribunal for review of the Secretary's decision pursuant to the provisions of s 31 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.

19. On 16 March 2015, the appellant's lawyers, Craddock Murray Neumann, made written submissions to the Tribunal.

20. On 27 March 2015, the appellant appeared before the Tribunal at a hearing to give evidence and present arguments. He was assisted by an interpreter in Nepali and English language. The appellant's legal representative also attended the hearing.

21. The Tribunal handed down its decision on 22 May 2015 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

22. The appellant filed grounds of appeal which are as follows:

a) Ground 1 – failure to consider relevant consideration – failure properly to consider and engage with the appellant's evidence and explanation for development in his evidence.

1(a) – The claim government forces questioned him by "sticking their guns in his mouth" or "pointing their guns at him".

1(b) – The explanations of the appellant for development in his evidence.

b) Ground 2 – failure to have regard to information.

2(b) – the claim that government forces questioned him by "sticking their guns in his mouth" or "pointing their guns at him".

2(b) – the explanations of the appellant for development in his evidence.

c) Ground 3 – error of law – failure to interpret or apply the law.

d) Ground 4 – error of law – unreasonable.

e) Ground 5 – reasonable apprehension of bias.

SUBMISSIONS

23. Both counsel have filed very comprehensive written submissions in this matter and have also made oral submissions at the hearing. The submissions were of great assistance to me and I am grateful to both counsel.

CONSIDERATION

Ground 1 – failure to consider relevant consideration

24. The appellant submits that the Tribunal must have regard to relevant consideration and it must have regard to a material question of fact; a necessary and relevant consideration; and integer of the claim: *SZSZW v Minister for Immigration and Border Protection*[2]. In doing so it must engage consciously with the claims, questions and material before it. Perry J stated in *SZSZW v Minister for Immigration and Border Protection*[3] "...the requirement to consider a claim or integers of a claim made by an applicant requires the application of an active intellectual process."

(a) ***The claim that government forces questioned him by "sticking their guns in his mouth" or "pointing their guns at him"***

25. It is the appellant's contention that he claimed in his Statement dated 9 November 2014 that he was questioned at gunpoint by the government forces or had their guns put in his mouth. They wanted to know where the Maoists were, and whether he was one of them. The appellant submits that the Tribunal failed to consider and to determine this claim. If the Tribunal had done so and accepted that this occurred, then it would have been a necessary part of the Tribunal's further consideration of the propensity of violence in Nepal, whether on the part of the government forces or generally.

26. In relation to this ground, the respondent submits that the appellant or his representative did not raise this claim previously at any stage of the RSD determination process. Nonetheless, the Tribunal identified this as a new claim and considered it at [31] of its decision, where it noted the appellant's evidence that the army 'are said to have questioned him at times as to whether he had any connection to the Maoists' and found that the appellant did not claim to have suffered any 'actual harm' during these visits. The respondent further submits that it is well established that the factual conclusions may be implicit in the reasons of an administrative decision maker and relies on *A v Minister for Immigration and Multicultural Affairs*[4].

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[2] [2015] FCA 562 (5 June 2015).
[3] Ibid at [17].
[4] (1999) 53 ALD 545, 556 [47], 557 [54] (per French, Merkel and Finkelstein JJ).

27. The respondent further submits that the appellant wanted the Tribunal to have found that being questioned at gunpoint does constitute actual 'harm' and invites this Court to reach the same conclusion; and in doing so invites this Court to engage in merits review of the Tribunal's decision, which is not the role of this Court under s 43 of the Act. The respondent submits that the Tribunal ultimately rejected the appellant's claim because it was not satisfied that there was any reason to believe that he would be at risk of harm on return to Nepal simply because he is from Amchok village and gave reasons, that is, he did not express any problem when he returned to Nepal in 2012 and lived in Kathmandu; and civil war ended eight years ago and the Maoists were now in a coalition government nationally.

28. The respondent concedes that the Tribunal did not specifically refer to the appellant's evidence that the army questioned him at gunpoint but the Tribunal was not required to set out the appellant's evidence word by word. And further, the Tribunal's failure to do so permits the inference that it failed to consider a claim that is expressly identified and rejected. The respondent relies on *Applicant WAEE v Minister for Immigration and Multicultural Affairs:*[5]

> The inference that the Tribunal had failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on this particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected.

(b) ***The explanations of the appellant for development in his evidence***

29. The appellant submits that it is apparent from the Tribunal's decision that it would not accept his explanation of development over time in detail of his evidence, but regarded this as a basis for doubting, and then completely rejecting his claims. The appellant accepts that the Tribunal considered that the role of the Maoist leader 'has been progressively expanded with the telling' ([20] of the decision) but submits at [22] of the decision that it found the failure to mention earlier than his statement of 9 November 2014 of having attended a Maoist meeting 'cast doubt on his credibility of the claim'; it [23] – [26] found the appellant's failure to mention earlier than 9 November 2014 that he joined the Maoist party was implausible and found that 'the claim was no more than an invention'.

30. The appellant submits that the Tribunal was obliged to not merely recite the appellant's claim and evidence but was obliged to properly and generally be engaged with all of the appellant's evidence in respect of his claim, which included his reasonable and plausible explanation for the earlier omissions in his evidence.

31. The appellant further submits that the Tribunal failed to consider with a degree of conscious engagement required, the evidence and the material before it, and thus failed to carry out its specific task to review the Secretary's decision. A failure to do

[5] (2003) 75 ALD 630, 641 [47] (per Tracey and Foster JJ).

so is a failure to have regard to the relevant considerations as considered in *SZSZW v Minister for Immigration and Border Protection,* and an error in law.

32. The respondent in response submits as follows at [32], [33], [34] and [35] of its submissions:

> [32] The Tribunal found that they were aware of 'good reasons to doubt the truth' of the appellant's claim about his experiences in Nepal. The reasons it gave for finding are summarised at [15] above. Ultimately, the Tribunal did not believe that the appellant would not have raised several significant matters in relation to his claim, fear of persecution in Nepal earlier in the RSD process, had they in fact occurred. This was a finding with respect to the appellant's credibility, which is 'the function of the primary decision-maker par excellence'[6] as His Honour Justice McHugh of the High Court of Australia held in *Durairajasingham*:
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> > If the primary decision-maker has stated that he or she does not believe a particular witness, no detailed reasons need to be given as to why that particular witness was not believed. The Tribunal must give reasons for its decision, not the sub-set of the reasons why it accepted or rejected the individual piece of evidence.

33. In this case, the Tribunal did provide detailed reasons for its findings that the appellant lacked credibility. Essentially, those reasons were the appellant's failure to raise significant or 'fundamental' matters earlier in the RSD process; his evidence on those matters developed progressively with each opportunity afforded to him. The Tribunal referred in its reasons to the various explanations the appellant advanced for this phenomenon, but rejected each of them.

34. The appellant now contends that the Tribunal failed to take the fact that:

> ... the development of the appellant's evidence was fundamentally the organic development, in a consistent way, of the same account, though told in greater detail.'

35. This contention is no more than a further explanation of the progressive development of the appellant's evidence over time. Whether or not the Court finds this further explanation persuasive, it cannot, in an appeal on a point of law, demonstrate legal error in the Tribunal's decision, nor does it constitute the consideration or information that the Tribunal was required, but failed, to consider.

36. I accept the respondent's submissions, so this ground of appeal is dismissed.

Ground 2 – failure to have regard to information

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[6] *Re: Minister for Immigration and Multicultural Affairs; ex parte Durairajasingham* (2000) 58 ALD 609, 627 [67] ("Durairajasingham").

37. There is an overlap between Ground 1 and 2 and I have dealt with most of the issues raised in Ground 2 which are:

a) The claim that government forces questioned him by 'sticking their guns in his mouth' or 'pointing their guns at him'; and

b) The explanations of the appellant for the developments in his evidence.

38. The issues raised in Grounds (a) and (b) are the same as in Ground 1 and having dealt with those issues it is unnecessary for me to consider them again.

39. The appellant also raised that the Tribunal was required by its task under the Act to have regard to all the material and information under s 22, 31, 35, 36, 37, 39 and 40 of the Act.

40. Section 37 of the Act was repealed on 23 December 2016 by s 24 of the *Refugees Convention (Derivative and Status and Other Measures) Amendment Act 2016* (the Amending Act). Since s 37 of the Act has been repealed, I cannot deal with this ground under s 37 as the Amending Act now provides that the Tribunal must deal with the issues of natural justice under the common law of Nauru. In *DWN066 v The Republic of Nauru*[7] I made a finding that s 37 was repealed on 10 October 2016 and the comments in *DWN066* apply to this case as well.

41. For the reasons set above, ground 2 is also dismissed.

Ground 3 – error of law – failure correctly to interpret and apply the law

42. The appellant submits as follows at [59], [62] and [63] of his submissions:

> [59] The determination of the claim by the Tribunal requires the consideration and determination of questions which may involve, and are required by law to take account of, an element of doubt. To be recognised as a refugee means to be accepted as having a well-founded fear of persecution. A well-founded fear of persecution has been considered in many jurisdictions, with different formulations essentially expressing the same concept, in which, intrinsically, there is an element of some doubt. In Australia, a well-founded fear of persecution is made out if there is a real chance of persecution in the reasonable foreseeable future. (*Chan Yee Kim v Minister for Immigration & Ethic Affairs* [1989] HCA 62; (1989) 169 CLR 379 (9 December 1989)). It is submitted analogously that a real risk or a real possibility of harm if the appellant is returned in breach to his country is sufficient to breach Nauru's international obligations, and it is sufficient for a claim of complementary protection to be made out under the Act. Certainty of harm, even likelihood of harm, is not required.
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> [62] While the Tribunal is not required to accept as true all evidence put before it, nevertheless it has an obligation to allow in cases of doubt that there may be a real chance – even a small chance – that what is said is true and therefore the

[7] [2017] NRSC 23 (*DWN066*).

appellant has a real chance of persecution, and therefore a well-founded fear of persecution.

[63] The Tribunal did not allow as required by law for the real chance that even doubtful testimony may be true, and in this way erred in law in interpreting or applying the law.

43. The respondent in response submits at [37], [38] and [39] or its submissions as follows:

[37] The passage in Hathaway cited by the appellant reflects on the leading authority as what is 'the threshold of concern required to substantiate a claim to refugee status.' The cases cited (from the United States, United Kingdom, Canada and Australia) support the proposition that an applicant for refugee status need not demonstrate that the persecution he fears will materialise 'beyond reasonable doubt', nor even 'on the balance of probabilities'. Rather, the appellant must demonstrate that there is (for example) a 'reasonable possibility', 'real and substantial danger' or a 'real chance' of persecution or that the risk or chance is not 'remote', 'fanciful' or 'insubstantial'. As Hathaway notes, 'This relatively low threshold of risk reflects both the inherent uncertainties of refugee status assessment and the grave risk of error'.

[38] However, the allowance for doubt in the 'threshold of concern' with respect to whether a fear of persecution is well-founded is a separate and distinct concept from that apparently contended by the appellant, namely, that an appellant's evidence ought to be accepted notwithstanding doubts about the credibility of that evidence. No authority is cited in support of the latter proposition.

[39] For the reasons set out in [32] above, the assessment of a review of the applicant's credibility is a matter for the Tribunal. Neither international law, nor any other law, requires the Tribunal to make a particular test in making that assessment in this case. The Tribunal's assessment of the appellant's credibility may be a matter with which the appellant disagrees, but the Tribunal gave cogent reasons for making it and the appellant has not identified any error with respect to it.

44. I accept the respondent's submissions and this ground of appeal is dismissed.

Ground 4 – unreasonableness

45. The appellant submits at [64] and [65] of his submissions:

[64] The question of satisfaction of the Tribunal as a matter of fact is in general a matter for the Tribunal provided it proceeds reasonably and on the basis of some evidence.

[65] Unreasonableness, however, in proceeding without evidence for a finding, or in the sense of *Wednesbury* unreasonableness, indicates a failure by the Tribunal to discharge its statutory task, and therefore error of law.

46. The respondent submits that the appellant has not identified:

a) The findings that the Tribunal made for which there was no probative evidence; or

b) In what respect(s) the Tribunal acted in a manner that was inconsistent with a reasonable Tribunal.

47. The respondent further submitted that Ground 4 cannot succeed and should be struck out pursuant to *Civil Procedure Rules 1972*.

48. I agree that the respondent has not identified as to how the Tribunal's decision was unreasonable and therefore this ground is dismissed.

Ground 5 – reasonable apprehension of bias

49. The appellant submits at [68], [69], [70] and [71] of his submissions:

[68] The Tribunal fell into jurisdictional error in that there was a reasonable apprehension that the Tribunal was biased in the sense of not having a mind open to the applicant's claims.

[69] It is not submitted that the Tribunal member was in fact biased, but only that the reasons that the Tribunal raised a reasonable apprehension that the Tribunal was not open to persuasion on at least some aspects of the matter before it.

[70] In *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28; (2001) 179 ALR 425; (2001) 75 ALJR 982 (24 May 2001), in a unanimous judgment by Gleeson CJ, Gaudron and Gummow JJ, the High Court of Australia said:

[27] The test for apprehended bias in relation to curial proceeding is whether a fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the questions to be decided. That formulation owes much to the fact that the Court proceedings are held in public. There is some incongruity in formulating a test in terms of "a fair-minded lay observer" when, as in the case the Tribunal proceedings are held in private.

[28] Perhaps it would be better, in the case of administrative proceedings held in private, to formulate the test for apprehended bias by reference to a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, matters in issue and the conduct which is said to give rise to an apprehension of bias. Whether or not that be the appropriate formulation, there is, in our view, no reason to depart from the objective test of possibility, as distinct from probability, as to what will be done or what might have been done. To do otherwise, or to risk confusion of apprehended bias with actual bias by requiring substantially the same proof.

[29] Though the test in administrative proceedings, as in curial proceedings, is in our view, one of objective possibility, the non-curial nature of the body or Tribunal in question and the different corrector of proceedings must, as already indicated, be taken into account.

[71] The applicant submits that the matter set out in support of other grounds of the application show that as so many doubtful questions were resolved against the applicant, including questions which the Tribunal regarded as 'good reasons to doubt the truth of his claims' (Decision [19]), rather than prove that his claims were almost certainly untrue, there is a reasonable apprehension that the Tribunal was not open to the appellant's evidence and claims, and that in this sense a fair-minded lay observer might reasonably apprehend that the Tribunal might not bring an impartial mind to the review before it.

50. The respondent in its submissions at [42]. [43], [44], 45], [46], [47] and [48] states:

[44] The first submission may involve a typographical error, as it appears to involve a contention that the Tribunal should have found that the appellant's claims were almost certainly untrue. To the extent that the appellant contends that the sheer number of doubts that the Tribunal expressed in his reasons about his evidence, or number of issues on which it made adverse findings, it cannot found an allegation of apprehended bias.

[45] The second submission wilfully mischaracterised one reason 'of several' that the Tribunal gave for its rejection of the appellant's evidence. There is no evidence that the Tribunal proceeded on the basis contended by the appellant, in the Tribunal's written statement or elsewhere.

[46] The first submission contends that the Tribunal's reason for rejecting the appellant's evidence on a particular issue – which on its face appears sound and rational – itself suggests that the mind of the Tribunal was not open to the appellant's claim.

[47] Other than these submissions, the allegation of apprehended bias is not supported by any evidence at all. In *Ex parte H*, for example, the High Court extracted large parts of transcripts of the Tribunal hearing where the Tribunal had described the review of the applicant's evidence as 'laughable', 'absolutely laughable', and 'nonsense'. The High Court went on to hold that a properly informed lay person ... might infer from the constant interruptions of the male prosecutor's evidence and the constant challenges to his truthfulness and to the plausibility to his account of events, that there was nothing he can say or so to change the Tribunal's preconceived view that he has fabricated his account of events upon which he based his application for a protection visa.

[48] In the present case, the appellant does not point to a single exchange in the transcript of the Tribunal hearing that supports the allegations of apprehended bias. Insofar as he relies on the Tribunal's reasons for that status, it is important to bear in mind that the reasons for decision 'reflect conclusions reached at the end of the decision-making process, and as the decision is against the party complaining, the expression of adverse finding on credit and

fact are an indivertible part of the expression of reasons'. Accordingly, 'the mere fact of an adverse finding at the end of the matter give rise to no influence as to the state of mind of the decision maker before and whilst a matter was under consideration, nor of pre-judgement of the issues that fell for decision': *SCAA v Minister for Multicultural and Indigenous Affairs*[8].

51. This ground has no basis and is dismissed.

CONCLUSION

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

DATED this 31 day of May 2017

Mohammed Shafiullah Khan
Judge

THE SEAL OF THE SUPREME COURT
REPUBLIC OF NAURU

[8] [2002] FCA 668.