IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 44/2015
Being an appeal against the decision of the Nauru Refugees Status Review Tribunal both pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

HFM043 APPELLANT

AND

THE REPUBLIC OF NAURU RESPONDENT

Before: Khan J
Date of hearing: 22 March 2016
Date of judgement: 9 June 2017

Case may be cited as: HFM043 v The Republic

CATCHWORDS:

Whether the Tribunal misunderstood the concept of former habitual residence as defined in the Convention - whether the Tribunal could properly make an assessment of the appellant's mental health issues in the absence of a medical report - whether the Tribunal should have adjourned the proceedings and require the appellant to obtain a medical report as to her mental health status - for it to carry out its statutory task.
Appeal allowed - held that the Tribunal should have adjourned the hearing and asked the appellant to produce a medical report as to the extent of her mental health issues.

APPEARANCES:

Counsel for the appellant: T Baw
Counsel for second 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 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 17 March 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.

BACKGROUND

3. The appellant was born 31 December 1980 in Myanmar. She does not have any citizenship in Myanmar.

4. She is a Sunni Muslim of Rohingya ethnicity.

5. The appellant left Myanmar for asylum when she was 11 years old in 1991.

6. The appellant did not work in Myanmar. She had no intention to return after she left.

7. When she was 15 years old she went to the Thai/Myanmar border and heard that her grandmother had died and Muslims were mistreated, so she did not enter Myanmar and remained in Thailand.

8. She married a Rohingya man. They had four children. The first child was adopted.

9. The appellant gave different versions of her residency in Thailand. She stated that she resided there from age 11, and the other version was from age 15 or 16, or according to her evidence to the Tribunal until her first child was five or six years old.

10. The appellant worked in Thailand doing housework and after she married she helped her husband selling roti by the roadside and lived with her husband and his sister. She lived in three or four different places in Thailand.

11. The business was not good in Thailand and the police were targeting them as they did not have any documentation.

12. There were conflicting versions of where her children were born but the Tribunal accepted that her three children were born to her and one was adopted. The three children were born in Thailand by caesarean.

13. There was also conflicting evidence as to whether the children attended school in Thailand. The appellant claimed that her sister's husband paid for the children to go to

school in Thailand and that was one of the reasons why she did not bring the children with her to Malaysia. The other version was that her sister-in-law was a widow at the time of their marriage and the children did not go to school.

14. She told the tribunal that she did not take the children to Malaysia because she had no money and there were a lot of arrests there and she did not have anyone to look after them.

15. According to the version given to the Tribunal, the appellant travelled to Thailand about five or six times by bus, on two occasions to give birth and to visit her children. She would cross the border on bicycle and then catch a bus again.

16. The appellant lived with her husband for one and a half years. He died in a car accident in Thailand when her eldest child was about nine or 10 years old and she never went back to Thailand. She kept in contact with her children but lost contact about five years ago (at the time of the Tribunal hearing on 30 January 2015).

17. The Tribunal found that the appellant lived and had accessed medical treatment there.

18. After having lived in Thailand for six years she moved to Malaysia where she worked. She had the intention of returning to Thailand, but after her husband's death she lost contact with her children and did not return to Thailand and instead decided to save some money so that she could go to Australia.

19. The Tribunal suggested to the appellant that she lived in Malaysia for a period of nine years and she said it was much longer than that.

20. The appellant went to Malaysia as it was good for work. She lived with ladies from Burma in a flat which belonged to a Chinese person and the rent was paid by a woman who she called a "sister" or "cousin". All the ladies worked in the same market.

21. The appellant collected vegetables that had been thrown away at the wholesale market and sold them at the "old market". She always did the same job and she earned better money in Malaysia than Thailand. She was able to send money to her children through friends.

22. The appellant went to UNCHR about a year after she arrived in Malaysia and she was given documentation which was subsequently changed to a card. Being a card holder the police did not arrest her.

23. The appellant left Malaysia for Indonesia in December 2012 and arrived in Australia in September 2013 and was later transferred to Nauru.

<u>APPLICATION TO THE SECRETARY</u>

24. On 28 November 2013, the appellant attended a Transfer Interview.

25. On 24 January 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.

26. On 21 September 2014, the Secretary handed down his determination and was not satisfied that the appellant was a Muslim Rohingya because of her credibility and inconsistencies in the number of children she had, inconsistencies in her claimed ethnicity, her evasiveness and vagueness at the interview and her lack of knowledge of Muslim religion. The Secretary accepted that she was born in Myanmar. The Secretary's decision was that the appellant was not recognised as a refugee and was not owed complementary protection under the Act.

APPLICATION TO THE TRIBUNAL

27. On 26 September 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); or

d) A determination that the person is not owed complementary protection.

28. On 29 January 2015, the appellant's lawyers, Craddock Murray Neumann, made written submissions to the Tribunal.

29. On 30 January 2015, the appellant appeared before the Tribunal at a hearing to give evidence and present arguments. She was assisted by an interpreter in Rohingya and English languages. The appellant's legal representative also attended the hearing.

30. The Tribunal handed down its decision on 17 March 2015 and found that the appellant was born in Myanmar and was a Rohingya and left Myanmar without any travel documents.

31. Based on the appellant's evidence and the contrary information, the Tribunal found that she was a Rohingya born in Myanmar but was "stateless".

32. The Tribunal found that Thailand and Malaysia were countries of "former habitual residence" and it assessed her claim against Thailand and Malaysia. Having assessed her claim against both Thailand and Malaysia, the Tribunal affirmed the determination of the Secretary that the appellant is not recognised as a refugee and was not owed complementary protection under the Act.

THAILAND

33. In relation to Thailand, the Tribunal found at [55] and [56] of its decision as follows:

> [55] The Tribunal finds that the applicant was able to make a living in Thailand. She was able to access housing and medical treatment. The Tribunal does not accept, due to the discrepancy in her evidence, that her children did not attend school in Thailand.
>
> [56] The Tribunal accepts that they had to move residence because they were illegally resident and harassed by the authorities. There was only one occasion when the lack of documentation resulted in harm. This was when the applicant had been in dispute with the landlord, as noted in paragraph 54 above. The impression the Tribunal gained from the applicant's evidence was that the police detained them because they had no right to be in Thailand and nowhere to immediately live, but were then unsure what to do with them. They held them in a room that the applicant maintained was not a gaol and provided them with food and after the applicant and her family pleaded with the police they eventually let them go. They did not try to deport them or prosecute them. Although this treatment was a curtailment of their liberty, in the circumstances the Tribunal does not regard it as persecution. The applicant expressed no fear of returning to Thailand and the Tribunal finds that the applicant does not have a well-founded fear of persecution for convention reasons in relation to Thailand.

MALAYSIA

34. In relation to the Malaysia, the Tribunal found at [61], [62] and [64] of its decision as follows:

> [61] The Tribunal accepts that there as an occasion when she was a victim of an attempted robbery. It appeared that it was an isolated incident by an opportunistic attacker. The applicant said no other bad things happened to her in Malaysia. The Tribunal accepts that the applicant may have had difficulty accessing health care due to the cost. The Tribunal finds that despite having to pay a bribe to the police and regular money to gangsters, the applicant was able to earn a living in Malaysia. She was able to save money to send to her family in Thailand and save money to leave Malaysia.
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> [62] The Tribunal does not accept that she had been subjected to degrading and inhumane treatment and punishment in Malaysia.
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> [63] The applicant told the Tribunal that she borrowed money to pay for the cost of going to Australia. She understood that she may have to pay it back but there were no specific arrangements. She said she did not think that the people she borrowed money from would cause her harm if she returned to Malaysia. The applicant had requested to return to Malaysia which suggested she does not have a subjective fear of returning there.

35. The Tribunal in its decision on 17 March 2015 affirmed the decision of the Secretary that the appellant is not recognised as a refugee and was not owed complementary protection under the Act.

APPEAL OUT OF TIME

36. At the time of the Tribunal's decision, s 43(3) of the Act provided that a Notice of Appeal against a decision of the Tribunal had to be filed within 28 days after the appellant received a 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.

37. On 14 August 2015, the Act was amended by the *Refugees Convention (Amendment) Act 2015* which provides for a period of 42 days in s 43 of the Act for 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 in the interest of the administration of justice to make that order (new s 43(5)).

38. On 15 April 2015, an order was made by the Registrar to extend the time for appeal to be filed against the decision delivered on 17 March 2015 to 30 June 2015.

39. The Notice of Appeal was filed on 24 April 2015.

40. The Republic for the efficient disposal of the case had agreed that the appellant be allowed to present his case on merits on the proposed grounds of appeal and at the same time present her argument on substantive issues. If the Court was satisfied that there was merit in the appeal, then the extension of time could be granted.

41. After the hearing the Republic and the lawyers for the appellant have come to an agreement that the extension of time will no longer be an issue and a consent order was filed on 14 November 2016. On 30 November 2016, the Registrar extended the time pursuant to the powers vested in him the *Refugees Convention (Amendment) Act 2015*.

THIS APPEAL

42. The appellant filed three grounds of appeal which are:

a) Ground 1 – Did the Tribunal misunderstand or misinterpret the word "habitual residence" as used in the Refugee Convention?

b) Ground 2 – Did the Tribunal fail to take into account "the appellant's mental health problem"?

c) Ground 3 – Did the Tribunal fail to consider and fail "to consider a claim of an absence of State protection" in Malaysia and Thailand?

SUBMISSIONS

43. In addition to the written submissions filed by both parties, their counsel also made oral submissions which were of great assistance to me.

CONSIDERATION

Ground 1 - Did the Tribunal misunderstand or misinterpret the word "habitual residence" as used in the Refugee Convention?

44. The appellant submits that the Tribunal erred in determining Thailand and Malaysia to be the countries of former "habitual residence". The appellant further submits that the appellant holds "no bonds that approximate the relationship between a Thai and Malaysian citizen and their states". She holds no degree of security, status or entitlement to remain in those countries. She was deprived of the rights offered to the nationals in those countries namely.

    a) In Thailand, she was harassed by the police as she was living there illegally, kept in detention for 40 days without being charges;

    b) In Malaysia, she had to pay police bribes to set up her roadside stall, after being assaulted in an attempted robbery, she could not go to the police. She was unable to access medical treatment or health care; and

    c) The appellant has no entitlement to remain or return to either country, so she would be unable to return to Thailand or Malaysia.

45. The appellant further submits that she claimed that the country of former habitual residence from which she claims persecution in Myanmar and neither Thailand or Malaysia are signatories to the UN Convention relating to the Status of Refugees, and therefore they cannot be considered responsible for re-admitting her and dealing with her refugee status.

46. The respondent submits that this ground of appeal has no merit for the following reasons:

    a) That she has not submitted that the test of "habitual residence" as set out at page 25 of the Nauru RSD Handbook (the Handbook) on which the Tribunal relied or the propositions taken from the Law of Refugee Status 2nd Edition by James Hathaway and Michelle Poster are legally erroneous;

    b) That the Tribunal's exposition and application of the concept of "habitual residence" is correct in law, as it is consistent with the approach taken by the High Court in *Tahiri v Minister for Immigration and Citizenship*[1]. Wigney J in the Full Court held that: [2]

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[1] (2012) 293 ALR 526.
[2] *SZUNZ v Minister for Immigration and Border Protection* [2015] FCAFC 32 at [118].

The question of habitual residence plainly calls for a broad factual inquiry, not an inquiry limited to laws of the relevant country. Relevant factors in the factual inquiry would no doubt include the period of time the person has resided in the country, the basis and purpose of his or her residency and the strength of the person's ties with the country. This is consistent with the interpretation given to the expressions "usual residence" and "habitual residence" in other statutory (and international law) contexts; see *Tahiri v Minister for Immigration and Citizenship* [2012] HCA 61 (2012) 293 ALR 526 at [16].

c) The respondent also relies on *Taiem v Minister for Immigration and Multicultural Affairs*[3]. Carr J stated:

> The current state of authority seems to be that a person may, for Convention purposes, have more than one country of former habitual residence. I agree, respectfully, with the view by Lehane J in *Al-Anezi v Minister for Immigration and Multicultural Affairs* [1999] FCA 355 at [21] that in principle there is no obvious reason why this should be regarded as impossible. A person may have more than one nationality. The object of the Convention is to treat uniformly persons seeking refugee status and relevantly to equate nationality with country of habitual residence where a person has no nationality - see *Rishmawi v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 421 at 427.

d) That the extract from Hathaway and Goodwin Gilly were taken out of context in relation to the obligations owed by the state person not an indicium of "habitual residence"; and

e) The Australian courts have not adopted the approach that in order to find a country of habitual residence, the fact finder must find that the claimant must enjoy the rights and entitlements similar to those of a citizen of that country. Such an approach would not be consistent with the application of the Convention under the Act.

47. The respondent further submits at [28], [29], [30], [31] and [32] of its submissions as follows:

[28] Recently, the Full Federal Court of Australia held that there is no requirement to be a "habitual resident" of a country, that the status is to be determined solely by reference to the laws of that country (there may well be no relevant law) or that the claimant has a lawful right to reside in that country. A claimant may be habitually resident in a country in which he or she is unlawful. Wigney J held that it would be an "absurd" construction and contrary to the objects and provisions of the Australian Migration Act relating to the application for refugee status if a claimant were required to have a legal right to enter and remain in a state in order to have been habitually resident in that state.

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[3] [2001] FCA 611, [9].

[29] It would be contrary to the objectives and processes of the Convention and therefore the Act. The claimant would be relying upon conduct by authorities of a country to support a claim of persecution by them which conduct would necessarily oblige the fact finder to find that persecuting country was not a claimant's country of habitual residence. It is submitted that there is no support for that construction in the authorities or the texts on the subject. Moreover, the extract from Goodwin-Gilly at paragraph 17 of the appellant's submissions makes plain that it is dealing with two different concepts. It is the first that is relevant here. The second is relevant only after an affirmative answer to the first. As noted by Hathaway at page 75:

> Statelessness then is not per se the basis for recognition of Convention refugee status. However, where a stateless person has a national home to which he cannot return owing to a risk of being persecuted there, refugee status is the appropriate international response.

[30] The appellant's submissions are also contrary to the approach taken in the UNHCR Guidelines that the country of "a former habitual residence" is the country "in which he has resided and where has suffered and fears he would suffer persecution if he returned". Further, "once a stateless person has abandoned the country of former habitual residence for the reasons indicated in the definition (the Convention definition of refugee)" he is usually unable to return.

[31] The Tribunal did not err in its construction of whether Malaysia or Thailand were each the appellant's country of habitual residence nor did it err in finding that Myanmar was not.

[32] In any event, at paragraph [32] of its reasons for the decision, the Tribunal expressly cited and considered the appellant's submissions as to what she submitted were "relevant factors" in determining "habitual residence". The Tribunal also took into account at paragraph [48] of its reasons for the decision that the appellant had no right to return to Thailand. At [50] of its reasons for the decision it expressly took into account that the appellant had no right to return or reside in Malaysia.

48. I find that the Tribunal did not err in determining Thailand and Malaysia to be the appellant's countries of former habitual residence.

49. This ground of appeal has no merit and is dismissed.

Ground 2 – failure to take into account the appellant's mental health problem

50. The Tribunal dealt with the appellant's mental state at [9], [10] and [11] of its decision where it stated:

[9] The Tribunal noted that during the information session which the Tribunal conducted with several applicants 12 days before the applicant's hearing, she

was unable to participate as she cried uncontrollably throughout the meeting. The Tribunal observed her effect at the hearing was very depressed.

> [10] In her statutory declaration dated 29 January 2015 she explained how the relatives she had travelled with from Indonesia to Australia and on to Nauru had been medivaced to Australia and she was having difficulty being separated from them. This resulted in her falling into a deep depression and she was prescribed strong anti-depressant medication. This medication affected her during her RSD interview. She stated that:
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> > I have stopped taking any anti-depressant pills for around the last 4 months in a bid to become sufficiently lucid so as to express myself properly at my RSD hearing. Although I think I can speak better when I have not taken my pills, it means that I often cry uncontrollably and have trouble controlling my emotions.
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> [11] Although no formal evidence was provided to the Tribunal, it accepts that the applicant has mental health issues and has taken this into account when assessing her claim.

51. Based on the information contained in the appellant's statutory declaration dated 29 January 2015, the Tribunal accepted that the appellant had "mental health issues" and took that into account when accessing her claim, although no formal evidence was provided to the Tribunal.

52. In relation to Thailand, the Tribunal stated at [55] of its decision that the appellant was able to earn a living and was able to access housing and medical treatment.

53. In relation to Malaysia, the Tribunal found at [61] of its decision that the appellant was able to earn a living and she was able to save money to send to her family in Thailand and also save money to leave Malaysia for Australia. However, the Tribunal found that the appellant would have difficulty in accessing health care in Malaysia due to the cost.

54. The appellant submits in her written submissions at [24] as follows:

> [24] The Tribunal accepted that she could not access health care services in Malaysia. It found she was able to access medical treatment in Thailand, but that was based on the evidence that it had occurred in emergency situations when she was about to give birth and had become unconscious. At those times, she was helped by some Thai people. There is no evidence that she had access to medical treatment at any other time, especially not for treatment of any psychiatric condition. Further the appellant's evidence was that she was only able to earn enough to subsist in Thailand. This would be exacerbated by the fact that her mental health issues may undermine her ability to even earn a living to survive and therefore make her ability to afford any treatment for her severe depression even more remote. There is no evidence that she could access any health care services to treat her severe depression in either Malaysia or in Thailand, if she were able to return there. A denial of access of such treatment

would involve a significant departure from the standards of a civilised society. The failure by the Tribunal amounted to a failure to consider all of her claims.

55. The appellant relies on *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs*[4] and *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)*[5] (*NABE*) the Full Court in *NABE* stated at [63]:

> It is plain enough, in light of *Dranichnikov*, that the failure by the Tribunal to deal with a claim raised by the evidence and the contention before it which if resolved in 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 Act and therefore a jurisdictional error.

56. The appellant also relies on *NAVK v Minister for Immigration and Multicultural and Indigenous Affairs*[6] Allsop J said at [15]:

> The Full Court in *NABE v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 263 at [55]–[63] dealt with the question of what claims must be dealt with by the Tribunal to complete its statutorily required task (its jurisdiction) even though they may not be expressly articulated. See also *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 26; (2003) 197 ALR 389, 394 [24], 408 [95] and *Applicant S395/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 71; (2003) 203 ALR 112. From *NABE* I take it that the Tribunal is not required to consider a claim that is not expressly made or does not arise clearly on the materials before it: *NABE* at [61]. As the Full Court said at [63] much depends on the circumstances. Whatever adverb or adverbial phrase is used to describe the apparentness of the unarticulated claim, it must, it seems to me, either in fact be appreciated by the Tribunal or, if it is not, arise sufficiently from the material as to require a reasonably competent Tribunal in the circumstances to appreciate its existence. **A practical and common sense approach to everyday decision-making requires the unarticulated claim to arise tolerably clearly from the material itself**, since the statutory task of the Tribunal is to assess the claims by reference to all the material, not to undertake an independent analytical exercise of the material for the discovery of potential claims which might be made, but which have not been, and then subjecting them to further analysis to assess their legitimacy.
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> (emphasis added)

57. The appellant further submits at [10] of her reply in the submissions:

> [10] Accordingly, on a fair reading of the material, the issue of whether the appellant would be unable to access critical or essential health care or medical treatment

[4] (2003) 197 ALR 389

[5] [2004] FCAFC 263 at [63]

[6] [2004] FCA 1695.

for her medical health issues was taken before the Tribunal and should have been considered by it. It is a claim which arises "tolerably clearly from the material" (to use Alsop J's phrase in *NAVK*). The Tribunal was clearly conscious that the appellant had fallen "into a deep depression and she was prescribed strong anti-depression medication" at D[10] CB179. Furthermore, the Tribunal even acknowledged at D[11] CB179 that: "it accepts that the applicant had mental health issues and has taken this into account in assessing her claim". If the Tribunal had in fact taken it into account, then:

a) It would have given consideration to the impact on the ongoing need for treatment of the appellant's psychiatric health; and

b) It might have recognised and accepted this claim as providing a convention basis for the appellant's current fears.

58. The respondent submits that the claim of the mental health issue was not made by the appellant; and that the appellant is now attempting to construct a claim which was never made; it did not clearly emerge on the material before the Tribunal. Further, if such a claim was made and the respondent denies it, however, upon a fair reading of the Tribunal's reasons, the Tribunal had taken into account that the appellant had "mental health issues" when assessing her claim.

59. The respondent further submits that the Tribunal found that the appellant could access health care in Thailand; it made a finding that the appellant did not have a well-founded fear for a Convention reason of being denied access to health care in Thailand and Malaysia. The Tribunal did not accept that the appellant's circumstances in Malaysia – including her accepted difficulty accessing health care due to cost – amounted to "degrading and inhumane treatment and punishment in Malaysia" for the purposes if its complementary protection determination.

60. The Tribunal accepted that the appellant had mental health issues, although no formal evidence was provided and it that took into account in assessing her claim. In respect of both Thailand and Malaysia, the evidence before the Tribunal was that the appellant had no real medical issues except for the caesarean operation to deliver her babies. The appellant was able to earn a reasonable living in Thailand and the only reason she left for Malaysia was that she had the potential to earn a far greater earning and she could save money to send to her family in Thailand and later to save money to go to Australia.

61. The respondent submits that the onus was on the appellant's lawyers to provide a medical report and they failed to do so, despite making further submissions some two weeks after the hearing. In light of the matters contained in the appellant's statutory declaration I agree that the lawyers should have made some effort to obtain a medical report and they failed to do so. So, in this situation what is the role of the Tribunal?

62. The Tribunal review process is inquisitorial rather than adversarial. The Tribunal is required to deal with the case raised by material or evidence before it"- *Chen v Minister for Immigration and Multicultural Affairs*[7] and *NABE* where it was stated at [63] as:

[7] [2000] FCA 1901; (2000) 106 FCR 157 at 180 [114] (Merkel J).

> It is plain enough, in light of *Dranichnikov*, that the failure by the Tribunal to deal with a claim raised by the evidence and the contention before it which if resolved in 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 Act and therefore a jurisdictional error.

63. The appellant's ability to earn money was completely dependent on her good health. The Tribunal had the benefit of observing the appellant some 12 days before the hearing when it noted that she was unable to effectively participate and she cried uncontrollably and she was "very depressed" at the hearing. Further, the appellant in her statutory declaration stated that she stopped taking anti-depressant pills for around four months so that she could become lucid at the hearing and that she often cried uncontrollably and had trouble controlling her emotions.

64. The extent of the appellant's mental health issue was vital for the Tribunal to assess whether she could still engage in her employment to be able to earn a living in Thailand and Malaysia. In the absence of a proper medical report, the Tribunal could not have determined as to whether her mental health issues would affect her ability to continue employment without which she would not have been able to maintain herself let alone have access to medical treatment.

65. In the circumstances, when this matter was raised by the appellant in her statutory declaration and when the Tribunal made its own observation of the appellant it should have adjourned the hearing and asked the appellant to obtain a full medical report, so that it could adequately deal with the review process. The Tribunal failed to do so and therefore it fell into an error of law.

66. For the reasons given above the appellant succeeds on this ground of appeal.

Ground 3 – failure to consider a claim of State protection

67. The appellant submits that in Malaysia she had to pay police bribe money to set up her roadside stall, and after being assaulted in an attempted robbery/abduction she was unable to go to the police and authorities for any protection. With respect to Thailand the appellant's ability to earn a living was compromised because police continually harassed her as she was living there illegally. At one point she and her family, including her new born baby, were detained by the police in a locked room for 40 days, in which they were just given a small amount of rice to eat. The Tribunal accepted that evidence. Accordingly, there is a real chance that in either of these countries she would not be protected against the risk of serious harm. Or in the case of Thailand, she is at risk at being randomly and arbitrarily being detained by the police.

68. The respondent submits that the appellant's submission is misconceived in that the Tribunal failed to consider her claim that she would be unable to avail herself of State protection in Malaysia and Thailand. The respondent submits at [49] of its submissions as follows:

> [49] The respondent submits that this submission is misconceived because of the wording of the definition of refugee itself contained in the Convention. The definition distinguishes between a refugee who is "outside the country of his nationality", on the one hand, and on the other hand a refugee who is "outside the country of his former habitual residence", "stateless refugee". The expression "unwilling to avail himself of the protection" is not relevant to stateless refugees – in respect of them it is replaced with the words "unwilling to return to it".

69. The respondent further submits that the appellant's contention that the Tribunal is required to consider whether or not the State was willing to protect the appellant (as a stateless refugee) and that its State protection is a convention ground is not correct. The respondent relies on UNCHR Handbook at paragraphs [101] and [102] where it is stated:

> [101] The phrase, which relates to stateless refugees, is parallel to the preceding phrase, which concerns refugees who have a nationality. In the case of a stateless person, the "country of nationality" is replaced by "country of his former habitual residence", and the expression "unwilling to avail himself of the protection ..." is replaced by the words "unwilling to return to it". In the case of a stateless refugee, the question of "availment of protection" of the country of his former habitual residence does not, of course arise. Moreover, once a stateless person had abandoned the country of his former habitual residence for the reasons indicated in the definition, he is usually unable to return.
>
> [102] It will be noted that not all stateless persons are refugees, they must be outside the country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee.

70. I accept that the UNHCR Handbook correctly states the status of "stateless person" in terms of state protection and find that the appellant's contention on this ground is misconceived and is therefore dismissed.

CONCLUSION

71. On 13 April 2017 both counsel had agreed that I shall give my reasons for the appeal which I have and thereafter the parties will be making further submissions as to what orders I shall make. I now await further submissions.

DATED this 9th day of June 2017

Mohammed Shafiullah Khan
Judge