

# IN THE SUPREME COURT OF NAURU AT YAREN

Case No. 17 of 2017

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T16/00330, brought pursuant to s 43 of the Refugees Convention Act 2012

BETWEEN

**HFM 038** 

Appellant

AND

THE REPUBLIC

Respondent

Before:

Freckelton J

Appellant:

Self-Represented

Respondent:

Rogan O'Shannessy

Date of Hearing:

1 December 2017

Date of Judgment:

22 March 2018

### **CATCHWORDS**

Appeal – refugee status – inquisitorial proceedings – duty to make inquiries – APPEAL DISMISSED.

#### **JUDGMENT**

- 1. This matter is before the Court pursuant to section 43 of the *Refugees Convention Act* 2012 ("the Act") which provides:
  - (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. A refugee is defined by Article 1A(2) of the Convention Relating to the Status of Refugees 1951 ("the Refugees Convention"), as modified by the Protocol Relating to the Status of Refugees 1967 ("the Protocol") as any person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable to or, owing to such fear, is unwilling to return to it ..."

- 3. Under s 3 of the Act, complementary protection means protection for people who are not refugees but who also cannot be returned or expelled to the frontiers or territories where this would breach Nauru's international obligations.
- 4. The determinations open to this Court are defined in s 44 of the Act:
  - (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.
- 5. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on 14 March 2017 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of 19 May 2016, that the Appellant is not recognised as a refugee under the Refugees Convention, and is not owed complementary protection under the Act.

#### **BACKGROUND**

- 6. The Appellant is a married man from Koshi Province in Nepal and is of Hindu religion. He has a wife and two children, who remain in Nepal.
- 7. The Appellant claims a fear of harm deriving from his involvement with the Nepali Congress Party ("NCP"). In particular, he fears persecution by Maoists because of anti-Maoist activities in which he took part through the NCP. The Appellant

- also claims a fear of harm based on his Rai ethnicity, his status as a failed asylum seeker, and his illegal departure from Nepal.
- 8. The Appellant departed Nepal for Malaysia, and then Indonesia, in August 2013. On 15 September 2013, the Appellant arrived on Christmas Island, and was transferred to Nauru on 22 July 2014.

# INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

- 9. The Appellant attended Refugee Status Determination ("RSD") Interviews on 23 November 2014 and 30 November 2015. The Tribunal Decision Record indicates that the second interview was necessary because the interviewer ran out of time and needed to conclude the interview before the Appellant had an opportunity to respond to some of the concerns raised. The Secretary summarised the material claims presented at the two interviews as follows:
  - The Applicant has been a member of the Nepali Congress Party since 1989.
  - In 2001, the Applicant was beaten by Maoists in his village. The Maoists accused him of being a spy. His wife and daughter were also injured in the attack. The Applicant was told to flee the area or he would be killed.
  - The Applicant left the following day for Kathmandu, where he established his own farming venture.
  - In 2007, he purchased some land and relocated to Dharan. In June 2012, floods destroyed his farm and family home. He then moved to a rental property.
  - On 29 April 2013, there was a clash between members of the National Congress Party and the Maoists. During the clash, the Applicant burned the Maoist flag and clashed with their members. He claims the Maoists returned the same day with pistols, searching for him. He fled on a scooter, and then travelled by bus to Kathmandu.
  - The Applicant then made arrangements to flee Nepal and he departed the country by air on 10 August 2013. Before he left, the Applicant made an unsuccessful attempt to visit Kirtipur to see if he could take up farming there, but he abandoned the idea when he learned that people from Dharan had come looking for him.
  - The Applicant states that his family is struggling to live in a rental property and his family is barely able to subsist. His children's schooling has been interrupted and he fears for their safety.<sup>2</sup>
- 10. The Secretary also considered the post-interview submissions advanced by the Appellant through Claim Assistance Providers ("CAPs") on 8 February 2015 and 14 December 2015.
- 11. The Secretary accepted the following aspects of the Appellant's claims:
  - The Appellant is a Nepali citizen;
  - · The Appellant is a member of the NCP; and
  - The Appellant was affected by the Maoist violence in 2000.<sup>3</sup>

<sup>&</sup>lt;sup>1</sup>BD 215 at [10].

<sup>&</sup>lt;sup>2</sup>BD 78.

<sup>&</sup>lt;sup>3</sup>BD 84.

- 12. However, the Secretary was of the opinion that the Appellant tried to adjust and fabricate further evidence to account for the issues of consistency and plausibility identified at the second interview. The Secretary therefore did not accept the credibility of the following aspects of the Appellant's claims:
  - The Appellant was targeted by the Maoists because of his NCP membership: and
  - The Appellant is wanted by the Maoist group in his village or anywhere else in Nepal.4

## 13. In making these findings, the Secretary took into account that:

- The Appellant's response to questioning as to why the Maoists did not target his family still in Kirtipur to get hold of the Appellant was vague;<sup>5</sup>
- The Appellant's response to questioning by the Tribunal as to why he was not targeted by the Maoists in Dharan, namely that the Maoists did not know him in Dharan, contradicted his previous claim that he was an active NCP member in Dharan:6
- In the second RSD Interview in 2015, in relation to the incident in 2013, the Appellant inconsistently claimed that he was identified by the Maoists as an NCP supporter, and subsequently attacked, and then said that he was with a group of NCP members and that a group of Maoists attacked them;<sup>7</sup>
- In the first RSD Interview in 2014, in relation to the same incident in 2013, the Appellant said that he and the NCP members attacked the house of a Maoist member and burnt their flag;8
- It was implausible that the Appellant would have been able to escape from a large group of Maoists intent on seeking revenge for the Appellant beating a Maoist supporter, leaving his wife to confront them;9
- It was difficult to accept that a large group of Maoists seeking revenge did not attack the Appellant's wife when the Appellant escaped. 10
- 14. The Secretary found that, while the Appellant was a member of the NCP, in light of relevant country information, there was no reasonable possibility of harm perpetrated by Maoists upon return to Nepal. 11 The Secretary was therefore satisfied that the Appellant was not a refugee. There was also no evidence before the Secretary pointing to any reasonable possibility of the Appellant facing harm if returned to Nepal that would constitute a breach of Nauru's international obligations, and the Appellant was therefore found not to be owed complementary protection. 12

<sup>&</sup>lt;sup>4</sup>BD 84.

<sup>&</sup>lt;sup>5</sup>BD 80.

<sup>&</sup>lt;sup>6</sup>lbid.

<sup>&</sup>lt;sup>7</sup>BD 81.

<sup>&</sup>lt;sup>8</sup>BD 82.

<sup>&</sup>lt;sup>9</sup>BD 81.

<sup>&</sup>lt;sup>10</sup>lbid.

<sup>&</sup>lt;sup>11</sup>BD 83.

<sup>&</sup>lt;sup>12</sup>BD 85-86.

#### REFUGEE STATUS REVIEW TRIBUNAL

- 15. Before the Tribunal, the Appellant maintained his claims regarding being beaten by Maoists in 2001, and the incident in 2013. He gave further evidence as to his movements and problems with the Maoists between 2001 and 2013, and the circumstances of his wife and family remaining in Nepal.
- 16. The Tribunal accepted that the Appellant was a member and local office bearer of the NCP, that he opposed the Maoists in his village and was targeted by them, and, because of this, that he and his family left the village for Kathmandu. <sup>13</sup> However, the Tribunal did not accept that the Appellant experienced any significant problems with Maoists between 2001 and 2012. In rejecting this claim, the Tribunal noted that the Appellant did not mention the problems during this period until asked why he obtained a passport in October 2012, and that his explanation of being threatened and followed is inconsistent with having remained at the same addresses in Kathmandu and Dharan for five or six years. <sup>14</sup>
- 17. The Tribunal accepted that the Appellant and other NCP members attacked a group of Maoists in 2013, seriously injuring one of them, and causing the Maoists to seek revenge by seeking out the Appellant. By contrast with the finding by the Secretary, the Tribunal considered the Appellant's evidence about these events to have been consistent. However, the Tribunal rejected the claim that the Maoists followed the Appellant to Kathmandu and enquired about him in Kirpati. The Tribunal considered the Appellant's evidence on these matters to be hesitant and unconvincing, and placed no weight on a supportive letter produced to the Tribunal. <sup>15</sup>
- 18. The Tribunal accepted that the Appellant's wife has travelled to Kathmandu to stay with family members on occasion, but did not accept that his wife has been subject to ongoing threats by Maoists. The Tribunal considered that if the Appellant's wife had been subject to such serious threats, she would have permanently relocated to another city where she has relatives. The Tribunal also considered the Appellant's evidence as to the house built by his wife in the village to be confused and contradictory, and that it was "coincidental" that his wife was threatened two days before the Tribunal hearing as claimed.
- 19. In light of relevant country information indicating that there had been no conflict between the NCP and the Maoists since the 2013 elections, the Tribunal did not accept that any conflict continues between the NCP and Maoists, or that the Maoists continue to target NPC supporters in the Appellant's village or anywhere else. The Tribunal was therefore not satisfied that there was any reasonable possibility of the Appellant experiencing persecution because of his involvement

<sup>13</sup>BD 217 at [23].

<sup>14</sup>BD 218 at [30].

<sup>&</sup>lt;sup>15</sup>BD 221 at [49].

<sup>&</sup>lt;sup>16</sup>BD 224 at [63].

<sup>&</sup>lt;sup>17</sup>BD 223 at [56].

<sup>&</sup>lt;sup>18</sup>lbid at [58].

with the NCP.<sup>19</sup> The Tribunal also found that, in view of country information and that it had not accepted that the Appellant experienced any harm in the past because of his Yakha Rai ethnicity, there was no reasonable possibility of being persecuted on the basis of his race if returned to Nepal.<sup>20</sup> Finally, the Tribunal considered there to be no real possibility of harm amounting to persecution on the basis of the Appellant being a failed asylum seeker,<sup>21</sup> or having departed Nepal illegally.<sup>22</sup>

20. As a consequence, the Tribunal concluded that the Appellant is not a refugee. The Tribunal also concluded that the Appellant was not owed complementary protection, not being satisfied that returning the Appellant to Nepal would breach any of Nauru's international obligations.<sup>23</sup>

#### THE GROUNDS OF APPEAL

- 21.By an amended notice of appeal, dated 17 November 2017 the Appellant raised two issues:
  - 1. The Tribunal failed to consider my claim that I was both a Nepali Congress Party ('NPC') member and spy and the impact of this upon my political profile.

#### **Particulars**

- (a) I my claims I asserted, including at Tribunal, that Maoists considered me to be a spy working for the NPC.
- (b) The Tribunal failed to appreciate this claim by stating the actions I explained were not reflective of 'spying'.
- (c) This finding ignored that being seen to be a spy by Maoists is distinct from claim of actually being a 'spy', therefore it was not materially relevant whether I was in fact a spy.
- (d) As someone considered by the Maoists to be a NPC spy, and long-term member, the Tribunal should not have followed the Secretary's decision that I was a 'low-level' NPC member.
- (e) The Tribunal accepted that the security situation for rival political activists 'differs between the central and grassroots levels' but still did not consider me to be at risk of harm. This suggests to me that the Tribunal followed the Secretary's decision that I was only a low-level member of the NPC as appose to being a regular or high profile member of the NPC.
- 2. The Tribunal failed to make relevant inquiries to understand my claims in respect of being pursued by Maoists after fleeing my home village.

#### **Particulars**

- (a) The Tribunal refused my claim that I was pursued by Maoists because I was 'hesitant' and 'unconvincing'.
- (b) The Tribunal never raised these doubts with me at interview.

<sup>&</sup>lt;sup>19</sup>BD 228 at [81].

<sup>&</sup>lt;sup>20</sup>BD 229 at [88]-[89].

<sup>&</sup>lt;sup>21</sup>BD 230 at [93].

<sup>&</sup>lt;sup>22</sup>BD 231 at [97].

<sup>&</sup>lt;sup>23</sup>BD 232 at [108].

(c) The Tribunal unfairly dismissed me without giving any weight to information I advanced regarding my movements, first to a friend's house in Kirtipur area, then later to other locations and finally to a more long-term home in Kathmandu. I also discussed that I was in danger and fearful.

#### **Ground One**

22.A Full Court of the Federal Court of Australia in Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs held that:

"If the Tribunal fails to consider a contention that the applicant fears persecution for a particular reason which, if accepted, would justify concluding that the applicant has satisfied the relevant criterion, and if that contention is supported by probative material, the Tribunal will have failed in the discharge of its duty, imposed by s 414, to conduct a review of the decision. This is a matter of substance, not a matter of the form of the Tribunal's published reasons for decision.

It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 at [87]-[97]) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The Tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinised `with an eye keenly attuned to error'. Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.

The inference that the Tribunal has 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 a 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. Where however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked."<sup>24</sup>

- 23. It is apparent that the Tribunal considered the Appellant's evidence that he was considered by the Maoists as a spy. This is clear from:
  - Where it noted that the Appellant gave evidence in his transfer interview that in 2001 "Maoists captured him and accused him of spying";<sup>25</sup>

<sup>&</sup>lt;sup>24</sup>(2003) 236 FCR 593 at [45]-[47]. <sup>25</sup>BD 215 at [13].

- Where it noted that the Appellant gave evidence in his RSD statement that in 2001 "he was assaulted with swords and knives by Maoists who accused him of spying on them and reporting to the police";<sup>26</sup>
- Where it noted that the Appellant gave evidence in a statement to the Secretary that on one occasion prior to the 2013 incident some Maoists "started to assault him and it became obvious they recognised him as they accused him of spying on Maoists back in village";<sup>27</sup>
- Where it noted that the Appellant had provided a Nepali language document, and a translation, that referred to "Maoist cadres having threatened the applicant's life time and again, accusing him of spying and bashing party cadres and burning their flag".<sup>28</sup>
- 24. It is apparent that not only was the Tribunal alert to the fact that the Appellant claimed that the Maoists regarded him as a spy, but that it correctly appreciated that his evidence was that he was "accused" rather than that he actually was a spy for the NPC.
- 25. The Tribunal accepted that the Appellant was a longstanding member of the NPC and that if he returned to Nepal he would resume his engagement but it did not accept that conflict continued between the NPC and the Maoists or that the Maoists were targeting their enemies as a result of former conflicts, either in Dharan or elsewhere. It noted that the Appellant had adduced no country information to the contrary. <sup>29</sup> This meant that it was not satisfied that "if the applicant returns to Nepal and resumes his involvement in party politics on behalf of the NC, that there is any reasonable possibility that he will experience serious or significant harm amounting to persecution for that reason ..."<sup>30</sup>
- 26. These findings dealt explicitly and comprehensively with the Appellant's claimed fears as to reprisals from the Maoists. Thus, the assertion that the Tribunal failed to consider the claim by the Appellant that he was a NPC Member and spy is contradicted by the decision of the Tribunal. The particulars of the ground do not advance the contention. This ground is not established.

#### **Ground Two**

- 27. This ground involved an assertion that the Tribunal failed to make relevant inquiries to understand the claims by the Appellant in respect of being pursued by Maoists after fleeing his home village. However, ultimately it is misconceived.
- 28. It is correct that the role of the Tribunal when conducting a review is essentially inquisitorial but this does not displace the general principle identified by the Full Court of the Federal Court of Australia in Randhawa v Minister for Immigration, Local Government and Ethnic Affairs<sup>31</sup> that the "extent of the decision-maker's task will be largely determined by the case sought to be made out by the

<sup>&</sup>lt;sup>26</sup>BD 215 at [14].

<sup>&</sup>lt;sup>27</sup>BD 220 at [38].

<sup>&</sup>lt;sup>28</sup>BD 221 at [44].

<sup>&</sup>lt;sup>29</sup>BD 227 at [80].

<sup>&</sup>lt;sup>30</sup>BD 228 at [81].

<sup>&</sup>lt;sup>31</sup>(1994) 52 FCR 437 at 443.

applicant." The notion of onus of proof does not have a part to play.32 The inquisitorial function of the Tribunal is such that it "is required to determine the substantive issues raised by the material and evidence before it";33 that is a fundamental incident of the inquisitorial function of the Tribunal.

29. This does not equate to an independent duty on the part of the Tribunal itself to search out information which may assist the applicant. As the High Court held in Minister for Immigration and Citizenship v SZIAI:

"Mason CJ and Deane J in Teoh also rejected the proposition that failure by a decision-maker to initiate inquiries could constitute a departure from common law standards of natural justice or procedural fairness. ...

Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a "duty to inquire", that term is apt to direct consideration away from the question of whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case." 34

- 30. In this instance the Appellant was afforded, and in fact availed himself of, the opportunity to present arguments. There was no error of law by the Tribunal in this respect.
- 31. The Appellant also expressed aggrievement that the Tribunal failed to put to him its doubts about his evidence in respect of being pursued by the Maoists after leaving his home village. However, this is contradicted by interactions during the hearing between the Tribunal and the Appellant, and in particular questions posed by Tribunal members:
  - TRIBUNAL MEMBER: I don't understand why these officials from Dharan would be conducting an investigation into your claims all the way away in Kathmandu. You know, we might wonder whether these just been produced in order to bolster your claims. Do you want to say anything about that?35
  - TRIBUNAL MEMBER: So you say the Maoists will find you if you go to Kathmandu. You say that they actually did come looking for you after this. But in your latest statement, you say something different. You say not that the same Maoists will be targeting you if you relocate, but it's more than

Merkel J. See too DWN 072 v Republic of Nauru [2016] NRSC 18 at [28] per Khan J. <sup>34</sup>[2009] HCA 39; 259 ALR 429 at [24]-[25], applied by Crulci J in *TOX093 and TOX094* [2017] NRSC

80 at [40].

<sup>35</sup>BD 154 ln 18 – 22.

<sup>&</sup>lt;sup>32</sup>See Bushell v Repatriation Commission (1992) 175 CLR 408 at 424-425 per Brennan J. <sup>33</sup>Paramananthan v Minister for Immigration and Multicultural Affairs (1998) 160 ALR 24 at 56 per

that if you become involved in Nepali Congress politics again and you will inevitably come into conflict with other Maoists.<sup>36</sup>

• TRIBUNAL MEMBER: The country information does indicate that from time to time there are violent clashes between the parties, or their members or supporters. This seems to have happened in the heat of the moment in political – in Nepal when political parties meet one another, but the country information that I referred to earlier doesn't suggest that Maoists are still pursuing these old enmities, tracking people down and killing them across the country. It doesn't suggest the Maoists have killed anyone in the past three or four years.<sup>37</sup>

THE INTERPRETER: If I were there in — during the — the problem with Constitution in 2014, then I would have been dead by them, when there was a fight when they — when they announced the Constitution, and in — I think it's March — and this March there's going to be the local government election so and then they ... there will be a — fight. There will be a problem there.

TRIBUNAL MEMBER: But that's a separate issue. You're talking about people with a particular focus on you, chasing you and tracking you down, and I'm saying that's not really supported — that sort of claim — by the country information.

- TRIBUNAL MEMBER: So we have to consider that you might speak in a rather exaggerated way and, you know, say things like: "running, running, running when it's not really true. So we then have to think is it really true that people are chasing you and trying to kill you".<sup>38</sup>
- 32. While Tribunal members are not obliged to expose their mental processes or provisional views during a hearing, still less to give a running commentary on what they are thinking<sup>39</sup>, the Tribunal in this instance was clear in its enunciation of reservations about the position being asserted by the Appellant. He was squarely put on notice of the issues that were concerning the Tribunal and was in a position to meet them. The contentions advanced by the Appellant in this regard were factually incorrect.
- 33. The Appellant has not established an error in this regard so this ground fails.

<sup>&</sup>lt;sup>36</sup>BD 161 ln 12 – 17.

<sup>&</sup>lt;sup>37</sup>BD 172 in 44 – BD 173 ln 13.

<sup>&</sup>lt;sup>38</sup>BD 173 ln 33 – 36.

<sup>&</sup>lt;sup>39</sup>[2006] HCA 63; (2006) 231 ALR 592 at [48].

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

Justice Ian Freckelton
Dated this 22<sup>nd</sup> day of March 2018