



IN THE SUPREME COURT OF NAURU  
AT YAREN

APPEAL NO. 8/2016

Being an appeal against a decision of the Nauru Refugee  
Status Review Tribunal brought pursuant to s43 of the  
*Refugees Convention Act 2012*

BETWEEN

WET072

APPELLANT

AND

The Republic of Nauru

RESPONDENT

Before: Khan J  
Date of Hearing: 11 September 2017  
Date of Judgment: 19 March 2018

Case may be cited as: WET072 v The Republic

**CATCHWORDS:**

Whether the Tribunal reached a factual conclusion unsupported by any evidence - whether there was some evidence for the Tribunal to make the factual finding - whether the Tribunal has the statutory requirement to give a review applicant a written statement in compliance with section 34(4) of the Refugee Convention Act 2012 - whether the Tribunal decision is in compliance with its statutory requirement under section 34(4) of the Act.

Held: Appeal dismissed. The Tribunal made its findings on the evidence given by the appellant and in doing so it complied with the provisions of section 34(4)(d) of the Act.

**APPEARANCES:**

Counsel for the Appellant: J F Gormly  
Counsel for the Respondent: S Walker

**JUDGMENT**

## INTRODUCTION

1. The appellant filed an appeal against the decision of the Refugee Status Review Tribunal ("the Tribunal") pursuant to s 43(1) of the *Refugees Convention Act 2012* ("the Act") which states:

*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 Tribunal delivered its decision on 17 March 2016 affirming the decision of the Secretary for the Department of Justice and Border Control ("the Secretary") that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.
3. The appellant filed an appeal in this Court on 15 July 2016.

## BACKGROUND

4. The appellant is a thirty eight year old male from Ahmedabad in the state of Gujarat, India. He can speak, read and write in Gujarati and Hindi. His parents, married sister, wife and two children still live in Gujarat. His father had a brother in Canada and his mother had a brother in the United States.
5. Since birth, the appellant lived near the municipality office in Mataji Street, Chaklasi in the municipality of Nadiad, Kheda district. His parents still live at this address, which is in his father's name. He completed grade 12 education.
6. From 1997 to 2009, the appellant sold plastic bags and packaging material in his father's business in Nadiad. The business was set up with the assistance of loans from a co-operative society. That debt had been repaid. He took over the business in 2000, though it remained in his father's name. From 2009 to 2011, he worked at Kotak Mahindra Bank as a collection executive. From 2011 to 2013, he worked as a construction supervisor in Nadiad for his maternal uncle. During this time he was also self-employed working from home as a supplier of packaging material for businesses.
7. The appellant owed 13 lakhs (about A\$28,000) at 24% interest per annum to Divyesh Rau, a Gujarati financier. He borrowed eight lakhs to expand his father's business in 2002 and a further four and a half lakhs to pay for his sister's wedding in 2006. The appellant was the only person in his family who knew Mr Rau as he visited an office above Mr Rau's premises. The appellant knew other people who had borrowed from Mr Rau but had not heard of anyone having any problems or failing to repay Mr Rau. The loan was made to him rather than his father as Mr Rau knew the appellant was responsible for running the business. The appellant borrowed from Mr Rau rather than a bank because he needed the money urgently and did not have time for paperwork. He had previously borrowed from money lenders and had not had any problems.
8. There was no arrangement to repay the principal sum. Initially his repayments were 16,000 rupees per month. This increased to 26,000 rupees per month after his sister's wedding. It was agreed that if the appellant failed to make repayments, his father's

business could be taken away by Mr Rau and he would be expected to repay the principal sum. He offered no security but was required in 2002 to sign a blank document of which he received no copy. He was further required to sign a blank cheque to Mr Rau when he borrowed the money for his sister's wedding, but it was never cashed. He thinks that this was an attempt to intimidate him.

9. Mr Rau was based in Nadiad and an active member of the Bharatiya Janata Party ("BJP"). The BJP office was in Nadiad. The appellant had previously joined the BJP in 2010 at the encouragement of his cousins. He was involved for five to six months and helped with elections and attended meetings. He had encountered Mr Rau there and around Nadiad. He ceased his involvement with BJP because he was humiliated by Mr Rau when he could not make his repayments.
10. Mr Rau's role in the BJP was as a "leader of the young generation". He organised 400 to 500 young people, meeting with them at election time and instructing them how to work for the party. He campaigned for the party, particularly for Pankaj Desai, the local representative.
11. From 2007, the appellant's father's business started to struggle. From February 2008, the appellant was unable to make the repayments to Mr Rau. The appellant later told the Tribunal that payments only paused at this time and that he was making payments until 2010. He said that the business was not taken over because Mr Rau was in the business of loaning money rather than being a person who took over businesses. In 2009, the business was sold and five lakhs repaid to Mr Rau. The appellant's parents asked relatives for money but they declined to assist.
12. The appellant trusted Mr Rau and only kept intermittent records of his repayments.
13. On 20 December 2010, Mr Rau asked the appellant to meet him at the BJP office. At the meeting, Mr Rau verbally abused him and threatened that he would not let him go unless he repaid the amount owed, which had increased to 15 lakhs. The appellant explained that he did not have capacity to repay in full as he had already sold his business and undertook to pay in instalments. He asked for time to settle his finances. At this time he was still a member of BJP.
14. Three or four members of BJP including Mr Rau took the appellant to a farmhouse where he was beaten and burned with cigarette butts. They demanded payment and did not refer to politics. He was tied up overnight. The next day they made him call his father and demanded payment, who agreed to repay some money and subsequently made frequent payments. The appellant was released and three or four days later he and his father paid Mr Rau four lakhs.
15. He ceased his involvement with BJP after this incident. He was harassed for several years after this for money rather than any political reason. Mr Rau used offensive language and threatened to abduct the appellant. He was too scared to contact the police because of Mr Rau's influence. The appellant lost his job at Kotak Mahindra Bank around 24 December because he did not attend work immediately after the beating.

16. He made repayments when he was able to but was frequently contacted and harassed by Mr Rau. His financial situation deteriorated and on 26 April 2013 his wife left him due to personal issues between them, a poor relationship with his mother and the fear of Mr Rau. His wife and children now live 12 to 13km from town with her aunt. She has had no contact with Mr Rau. The appellant's wife does not speak to him and he considers their separation to be permanent. He can only contact his children through their school.
17. The appellant was then harassed and threatened until he left India. Sometimes BJP supporters came to his house and beat him and on one occasion they stole a refrigerator. Sometimes he received phone calls from Mr Rau or other BJP supporters who threatened to kill him. He also received threatening letters and sometimes Mr Rau would follow him home. He did not move away because he was confident that he would eventually repay the money. He was hopeful that some land issues between his father and brother would be resolved and the debt could be paid.
18. On one occasion in June 2013, Mr Rau rang the appellant and told him that he must repay 18 lakhs within three days, otherwise he would be killed. Mr Rau made it clear that this was his final chance. The appellant did not know why Mr Rau would suddenly demand full payment but departed India a few days later by plane using his own passport. His passport was stolen in Indonesia.
19. After his departure, his father told Mr Rau that the appellant had left because of the threats made against him. His family had not been threatened and would not leave their own village. A cousin of the appellant told him that Mr Rau is still lending money in Gujarat. If he returned to India he would have to live with his parents as he must respect them.
20. The appellant feared that BJP had connections everywhere and so they or the police could locate him anywhere in India. They have a photograph of him and many BJP members know the appellant. He would require an aahdaar card which contains an address and is available online. He had no connections in other parts of India and would have language problems.
21. The appellant told the Tribunal that he did not think of travelling to Nepal but that Mr Rau would be able to find him there regardless as it is only a small country.
22. The appellant contacts his parents fortnightly. Mr Rau visits them sometimes but at the time of the Tribunal hearing they had not seen him in five to six months. The appellant assumes that Mr Rau is keeping an eye on things. He estimates that he and his father have paid about 18 lakhs to Mr Rau.
23. The appellant feared being seriously harmed or killed by Mr Rau and members of BJP. He also feared that he would not be able to subsist because of the large loan repayments he was required to make.
24. He also feared that his failure to make repayments to Mr Rau would result in an imputed political opinion in opposition to BJP. The authorities would not protect him

because BJP was in power. Mr Rau would be able to use his connections with BJP to track him down wherever he went in India.

#### APPLICATION TO THE SECRETARY

25. On 11 March 2014, the appellant attended a Transfer Interview.
26. On 24 May 2014, the appellant made an application to the Secretary for recognition as a refugee and for complementary protection under the Act.
27. On 28 September 2015, the Secretary made a determination that the appellant is not a refugee and is not owed complementary protection.

#### APPLICATION TO THE TRIBUNAL

28. The appellant made an application for review of the Secretary's decision pursuant to s 31(1) of the Act which provides:

*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.*
29. On 13 January 2016, the appellant made a statement and on 22 January 2016 his lawyers, Craddock Murray Neumann, made written submissions to the Tribunal.
  30. On 4 February 2016, the appellant appeared before the Tribunal to give evidence and present his arguments with his representative and an interpreter in Hindi and English languages.
  31. The Tribunal handed down its decision on 17 March 2016 affirming the decision of the Secretary that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.

#### THIS APPEAL

32. The appellant filed one ground of appeal which is:
  - 1) *The Refugee Status Review Tribunal (the Tribunal) made an error of law in that it reached a factual conclusion unsupported by any evidence which was*

*critical to the ultimate conclusion of the Tribunal that the appellant was not a refugee for the purposes of section 4 of the Refugees Convention Act 2012 (Nr) or owed complementary protection.*

### SUBMISSIONS

33. In addition to the submissions filed by the appellant and the respondent, they also made oral submissions which were of great assistance to me and I am indeed very grateful to both counsel. The transcript for the appeal hearing was not available after the hearing and both appellant and respondent filed additional written submissions on 5 December 2017 and 21 December 2017 respectively.

### CONSIDERATION

34. The appellant submits that the Tribunal made an error of law in that it came to its ultimate conclusion upon a 'fact' for which there was no evidence, that the appellant had given evidence that despite no payments being made to the lender since 2013, the lender has not subjected his parents to demand moneys since the appellant left India.<sup>1</sup>
35. The appellant submits that this ground of appeal arises from the Tribunal's findings at [93] which misunderstands the appellant's evidence. The Tribunal stated:

*[93] Further, the appellant has given evidence that, despite no payments having been made since 2013, neither his parents nor his wife have been subjected to any harm, threats or demands for money directed at them since he left India almost 3 years ago.*

36. The appellant submits that the finding of 'fact' that the appellant's parents had not been subjected to demands for money since the appellant left India [in 2013] was a critical step to the inferences drawn by the Tribunal at [94]-[96], that if there was a debt, the lender was not one who used violence to get his money, that the appellant was not abducted or tortured in 2010 or left India because of a threat to kill him in 2013, or that the lender intends to harm him. These findings were in turn critical steps to the Tribunal's ultimate finding that the appellant was not a refugee (at [102]) and was not owed complementary protection (at [107]).<sup>2</sup>

37. The Tribunal stated:

*[94] The Tribunal infers that, if there was a debt, the lender was not one who used violence to get his money.*

*[95] Having considered all these matters, the Tribunal is not satisfied, and does not accept, that [the appellant] was abducted and tortured in 2010 because of a debt, was being harassed and threatened until 2013 or left India because of a threat to kill him in 2013.*

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<sup>1</sup> Appellant's written submissions dated 3 July 2017 at [25].

<sup>2</sup> Appellant's written submissions dated 3 July 2017 at [27].

[96] *Even if he has an outstanding debt, the Tribunal is not satisfied that the lender, or associates of the lender, intends to harm him at all in the reasonably foreseeable future.*

38. The appellant cited the *Minister for Immigration and Multicultural Affairs v Al-Miahi* (“*Al-Miahi*”)<sup>3</sup>, as approved in the matter of *DWN 008 v The Republic* (“*DWN 008*”)<sup>4</sup> by Crulci J:

*“A decision may be based upon the existence of many particular facts. It will be based upon the existence of each particular fact that is critical to the making of a decision. A small factual link in a chain of reasoning, if it is truly a link in a chain and there are no parallel links, may be just as critical to the decision, and just as much a fact upon which the decision is based, as a fact that it is of more obvious immediate importance. If a decision is in truth based, in that sense, on a particular fact for which there is no evidence, and the fact does not exist, the decision is flawed, whatever the relative importance of the fact...”*

*It is sufficient to demonstrate that the relevant fact played a part in the process of reasoning of the Tribunal in the sense that the fact is one without which the Tribunal would not have reached the conclusion that it did...”*<sup>5</sup>

39. In *DWN088* there was no evidence that the “appellant had lived or worked in Saudi Arabia or lived or worked overseas generally prior to his departure from Pakistan and the Tribunal had erred by making the finding without evidence to support it”.<sup>6</sup> At [40] of *DWN088*, Crulci J stated that:

*“The Tribunal in making its determination as to the reasonableness of relocation for this appellant relied on the fact that he had ‘lived and worked overseas’.”*

No evidence that the parents had been subjected to demands

40. On the matter of the no evidence ground, the appellant relies on *SZNV v Minister for Immigration and Citizenship* (“*SZNV*”),<sup>7</sup> where Kenny J said at [37] – [38]:

*“As the appellant acknowledged in his written submissions a no evidence ground for jurisdictional error cannot succeed unless there is no evidentiary basis at all for challenging the finding. A no evidence challenge will fail where there is even a slight evidentiary basis to support the Tribunal’s finding: see *VAS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 350 at [18] – [19] and *WAJS v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 139 at [11] – [12].”<sup>8</sup>*

<sup>3</sup> [2001] FCA 744 at [38], [40] (Sundberg, Emmett and Finkelstein JJ).

<sup>4</sup> [2016] NRSC 13.

<sup>5</sup> *Ibid* at [39].

<sup>6</sup> [2016] NRSC 35.

<sup>7</sup> [2010] FCA; (2010) 118 ALD 232.

<sup>8</sup> Appellant’s written submissions dated 3 July 2017 at [32].

41. The appellant submits that there is nothing in the transcript which gave the Tribunal a basis for finding that the appellant's parents had not been subjected to demands since he left India in 2013; and further, that the Tribunal was "mistaken" in saying that the appellant gave evidence that his parents had not been subjected to demand from the money lender. The appellant relies on the Tribunal transcript at page 31 line 41 where it is stated:

*Ms Murphy: Has he made any threats to your father or other family members?*

*Interpreter: Yes, he didn't threaten them, but he keeps reminding them and asking them, since they promised that when there is a solution, they will pay him back, but my dad says, "There is no solution, so whenever there is some, we will pay you back."*

42. The appellant submits that the Tribunal misunderstood his evidence, apparent through the Tribunal's statement that "Mr Rau is not contacting your father now to get money...", to which the appellant replied:

*"The interpreter: Yes. I've told you that he – he contacts my father. He asks about me, but my father just told him that whenever we have a solution we will pay you, and if you want to talk to Hiren when he comes back you can speak to him."<sup>9</sup>*

#### CHAIN OF REASONING

43. The respondent submits that at [94] of the decision the Tribunal drew the inference from its accounts of the appellant's evidence at [93] that the lender had not subjected his parents to demand for money since he left India.
44. The appellant further submits that it was open to the Tribunal to characterise the appellant's evidence as evidence that the lender did not harm or threaten the appellant's family, but the Tribunal did not express those matters the absence of harm or any threats of harm to be a sufficient or independent basis for its inference at [94] that the lender was not one who used violence to get his money.<sup>10</sup>
45. The respondent submits that the appellant's "no evidence finding" had to be understood in the context of the Tribunal's statutory requirement to give a review applicant a written statement in compliance with s 34(4) of the Act; and that s 34(4) of the Act draws the distinction between "findings on any material question of fact" (s 34(4)(c)) on the one hand, and on the other "the evidence or other material on which the findings were based" (s 34(4)(d))<sup>11</sup>.
46. The respondent submits that the Tribunal's decision at [93] refers to the evidence given by the appellant on which the Tribunal based some of its findings of fact which

<sup>9</sup> Appellant's written submissions dated 4 July 2017 at [35].

<sup>10</sup> Appellant's written submissions dated 4 July 2017 at [38].

<sup>11</sup> Respondent's written submissions dated 21 December 2017 at [7].



were given for the purposes of s 34(4)(d) of the Act, and that the finding at [93] does not record a finding or a material question of fact for the purposes of s 34(4)(c) of the Act. That “finding” is not open to challenge on a “no evidence” basis, and [93] of the Tribunal’s decision, presents a summary of evidence of the “evidence or other material” on which it based “in part, the findings made at [95] and [96] of its decision” and the respondent submits that the appellant cannot succeed on a ‘no evidence’ ground in respect of [93] of the Tribunal’s decision.<sup>12</sup> The respondent further submits that the appellant seeks to dissect [93] in order to craft a proposition for which he says there was no evidence, and to do so would be to ignore the fact that the Tribunal’s reasons are meant to inform, and “not to be scrutinized upon overzealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed”.<sup>13</sup>

47. The respondent submits that the Tribunal’s finding at [93] was a summary of the appellant’s evidence which was in compliance with s 34(4)(d) of the Act and that the summary was fair and accurate. The appellant’s contention that the Tribunal mistook or misapprehended the appellant’s evidence that the money lender “was not contacting your father” was put to the appellant and denied. The respondent submits that it is a wilful misconstruction of the relevant exchange set out at [42] above.
48. The respondent submits that the Tribunal put to the appellant that “Mr Rau is not contacting your father now to get the money” and the appellant agreed with that and said Mr Rau contacted his father to ask about his whereabouts. The respondent submits that it was implicit in the appellant’s response that the only reason Mr Raul contacted his father was to ask about the appellant, and not “to get money”<sup>14</sup>.
49. The respondent further submits that the exchange between the Tribunal and the appellant provides at least the “slight evidentiary basis” to support the Tribunal’s summary at [93] which the appellant concedes is sufficient to defeat a “no evidence” challenge.<sup>15</sup>
50. As noted at [40] above, the appellant in his written submissions relied on *SKNKV*,<sup>16</sup> in which it was stated that a “no evidence challenge will fail where there is even a slight evidentiary basis to support the Tribunal’s findings”. The respondent relies on *Judicial Review of An Administrative Action* where it is stated:

*“... there must be absolutely no evidence. If there is some evidence, no matter how unconvincing, no matter how overwhelmed it might have been by evidence to the contrary, the traditional approach is to treat the complaint as being factual (although that is not to preclude the possibility of there being a jurisdictional error). The ‘no evidence’ ground cuts out when even a skerrick of evidence appears. Perverse results from which there was some evidence do not amount to errors of law.”<sup>17</sup>*

<sup>12</sup> Respondent’s written submissions dated 21 December 2017 at [8].

<sup>13</sup> *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

<sup>14</sup> Respondent’s written submissions 21 December 2017 at [15].

<sup>15</sup> Respondent’s written submissions 21 December 2017 at [16].

<sup>16</sup> [2010] FCA; (2010) 118 ALD 232 at [37] – [38].

<sup>17</sup> *Judicial Review of An Administrative Action* (5<sup>th</sup> Edition), 2013, Law Book CO at [4.600] pp 245 – 246.

CONCLUSION

51. In *DWN 008* there was no evidence that the appellant had lived and worked in Saudi Arabia or abroad but in this matter, there is evidence that no payments have been made since 2013, when the appellant left India and yet neither his parents nor his wife have been subjected to any harm or demands. The Tribunal at [93] of its decision gave a summary of the appellant's evidence and the Tribunal in doing so was complying with the provisions of s 34(4)(d) of the Act.
52. I therefore find that the appellant's ground of appeal on a "no evidence basis" is misconceived and is dismissed.
53. Under s 44(1) of the Act, I make an order affirming the decision of the Tribunal.

DATED this 19<sup>th</sup> day of March, 2018



Mohammed Shafiullah Khan  
Judge

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