



**IN THE SUPREME COURT OF NAURU**

**AT YAREN**

Case No. 30 of 2016

IN THE MATTER OF an appeal  
against a decision of the Refugee  
Status Review Tribunal TFN  
T15/00192, brought pursuant to s 43  
of the *Refugees Convention Act 2012*

BETWEEN

**OPK 049**

Appellant

AND

**THE REPUBLIC**

Respondent

Before: Judge Marshall

Appellant: Julian Gormly  
Respondent: Angel Aleksov

Date of Hearing: 20 February 2018

Date of Judgment: 8 May 2018

**CATCHWORDS**

APPEAL – whether the Tribunal denied Appellant procedural fairness by failing to put information to the Appellant – whether the information was credible, relevant and significant to the decision – UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka – APPEAL DISMISSED.

## JUDGMENT

1. This matter is before the Court pursuant to s 43 of the *Refugees Convention Act 2012* ("the Act") which provides:

### **43 Jurisdiction of the Supreme Court**

- (1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.
- (2) The parties to the appeal are the Appellant and the Republic.

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2. The determinations open to this Court are defined in s 44 of the Act:

### **44 Decision by Supreme Court on appeal**

- (1) In deciding an appeal, the Supreme Court may make either of the following orders:
  - (a) an order affirming the decision of the Tribunal;
  - (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

3. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on 2 August 2016 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of 10 October 2015, that the Appellant is not recognised as a refugee under the 1951 Refugees Convention<sup>1</sup> relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees ("the Convention"), and is not owed complementary protection under the Act.
4. The Appellant filed a Notice of Appeal on 14 October 2016 and an Amended Notice of Appeal on 14 November 2017. On 15 September 2016, an order was made granting an extension of time within which to lodge a Notice of Appeal pursuant to s 43(3) of the Act. On 16 March 2017 a further application for such an order was filed. This was unnecessary in light of the previous order and was dismissed at the beginning of the hearing before this Court.

## BACKGROUND

5. The Appellant is a single male of Tamil ethnicity and Sunni Islam religion from the Northern Province of Sri Lanka. The Appellant completed 11 years of study in his home district of Vavuniya.

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<sup>1</sup> 1951 Refugee Convention and 1967 Protocol, also referred to as "the Refugees Convention" or "the Convention".

6. The Appellant applied for refugee status on the basis of his ethnicity, religion, and imputed political opinion. The Appellant further claims refugee status on account of his membership of the particular social groups of “Tamils from the North”, and “failed asylum seekers”.
7. The Appellant departed Vavuniya in Sri Lanka in 2013. He arrived on Christmas Island on 25 July 2013 and was transferred to Nauru on 6 July 2014.

#### INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellant attended a Refugee Status Determination (“RSD”) Interview on 14 October 2014, and provided post-interview submissions on 17 November 2015. In summary, the Secretary said that the Appellant’s father physically abused him during his childhood, and discouraged him from attending school, beating him when he did so in defiance of his parents’ wishes. After completing his O-levels in 2009, the Appellant told his parents that he wanted to pursue a tertiary education in computer studies. His parents forbid him from pursuing a tertiary education and the Appellant had a big argument with his father about this.
9. The day after this argument, the Appellant’s uncle visited the Appellant’s house, and his father told the uncle that they should kill the Appellant, and the Appellant was then severely beaten. The uncle was well connected with the Sri Lankan police. The Appellant fled to his friend’s house, and stayed there for two nights before fleeing to Colombo. However, after six months in Colombo, the Appellant’s father and uncle located him, and the police visited his workplace in Colombo and threatened him, saying that if he returned home his family would do bad things to him. The police continued to visit the Appellant’s workplace to threaten and harass him on and off until 2012.
10. The Appellant decided to relocate to an area in Vavuniya that was closer to his family home, but in a rural area, so the Appellant thought it would be safer for him to hide from his family. In April 2013, the Appellant’s father, uncle, cousin, and three policemen visited the Appellant’s workplace, and abused the Appellant. The attackers threw stones at him, punched him and pushed him to the ground, and kicked him, although stopped when a crowd gathered to see what was happening. The Appellant’s head and right arm were badly wounded and he needed to go to hospital for stitches to his head. In May 2013, the Appellant’s cousin and his friends started stalking the Appellant at his workplace, and visited his workplace approximately five or six times in May.<sup>2</sup>
11. The Secretary considered the following claims to be credible:
  - The Appellant departed Sri Lanka illegally around July 2013;
  - The Appellant has had no association with the Liberation Tigers of Tamil Eelam (“LTTE”), and has not been involved in any political or criminal activity; and
  - The Appellant’s relationship with his immediate and extended family is strained.<sup>3</sup>

<sup>2</sup>Book of Documents (“BD”) 72 – 75.

<sup>3</sup>Ibid 82.



12. However, the Secretary considered the following claims to lack credibility:

- The Appellant's parents prevented him from attending school, or the Appellant completed 11 years of education without the support of his parents;
- The Appellant was beaten or mistreated by his parents for attending school;
- The Appellant stayed at a friend's house on a regular basis to avoid mistreatment from his father for attending school;
- The Appellant's parents prevented him from doing his A-levels and left home in 2009 for this reason;
- The Appellant could have pursued a tertiary education in computer studies without completing his A-levels;
- The Appellant's relationship with his family is so volatile so as to provoke his family members to pursue, harm and possibly kill him;
- The Appellant was of adverse interest to the Sri Lankan authorities prior to departing Sri Lanka, and he was unable to obtain assistance or protection from the authorities; and
- The Appellant is unable to relocate within Sri Lanka.<sup>4</sup>

13. In making these credibility findings, the Secretary took into account the following:

- The Appellant did not mention being prevented from attending school in the Transfer Interview;<sup>5</sup>
- The Appellant had been able to attain primary and secondary level schooling;<sup>6</sup>
- Country information indicates that students must complete their A-levels before pursuing tertiary education, but the Appellant had only completed his O-levels;<sup>7</sup>
- The Appellant's account of the harassment and attacks he experienced at his workplaces in Colombo and Vavuniya was vague and unconvincing;<sup>8</sup>
- The Appellant experienced no harm during his first two years in Colombo, indicating that his family did not seek him out to verbally and physically assault him;<sup>9</sup>
- The Appellant was a healthy young man, with 11 years education, some proficiency in English, and experienced in living in an urban environment, and was therefore not unable to relocate within Sri Lanka.<sup>10</sup>

14. While the Secretary recognised that persons of Tamil ethnicity may be experience discrimination or harassment, Tamils are no longer systematically targeted, and, given the Appellant has no LTTE association, the Appellant was not in need of protection on the basis of his ethnicity.<sup>11</sup> The Appellant's illegal departure from Sri Lanka was insufficient to give rise to an anti-government

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<sup>4</sup> Ibid.

<sup>5</sup> Ibid 76.

<sup>6</sup> Ibid 77.

<sup>7</sup> Ibid 79.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid 80.

<sup>10</sup> Ibid 81-82.

<sup>11</sup> Ibid 83 – 85.

profile that would result in the Appellant being subject to marked discrimination and harassment from the authorities.<sup>12</sup> In addition, while anti-Muslim sentiment has increased in Sri Lanka in recent years, most attacks against practising Muslims have occurred in the context of mob violence, and the Appellant is unlikely to be specifically targeted due to his Muslim religion.<sup>13</sup>

15. In relation to the Appellant's claims regarding being a failed asylum seeker and departing Sri Lanka illegally, the Secretary noted that the Appellant would likely be subject to routine security checks upon return. However, given the Appellant's lack of LTTE association or political involvement, these checks were unlikely to expose anything problematic, and the Appellant would be allowed to enter without further action.<sup>14</sup> While the Appellant may be fined for departing illegally, he would not be subject to harm.<sup>15</sup>

16. The Secretary concluded that there was no reasonable possibility that the Appellant would be harmed on the basis of his ethnicity, religion, imputed political opinion, or being a failed Tamil asylum seeker, or a Tamil returnee who departed Sri Lanka illegally. The Appellant's fear of harm on these bases was therefore not well-founded and the Appellant did not meet the definition of refugee set out in the Convention.<sup>16</sup> For the same reasons the Secretary found the Appellant to meet the definition of refugee, the Secretary considered that the Appellant was not owed complementary protection.<sup>17</sup>

#### REFUGEE STATUS REVIEW TRIBUNAL

17. The Appellant attended a hearing before the Tribunal on 6 June 2016. The Appellant reiterated his claims regarding his strained relationship with his father, uncle, and cousins, the refusal of his family to pay for his education beyond 2009, his travel to Colombo, his harassment by his cousin and policemen in Colombo, returning to Vavuniya to live with a friend, and being assaulted by his father, uncle and cousin after returning to Vavuniya.

18. As with the Secretary, the Tribunal accepted the Appellant has a strained relationship with his family.<sup>18</sup> However, the Tribunal said that the fact that no serious harm had befallen the Appellant in the three-year period between the Appellant leaving his home and departing Sri Lanka, and the fact he returned to an area of Vavuniya closer to the family home in 2012, showed that he did not have a well-founded fear of persecution from his family.<sup>19</sup>

19. In relation to the Appellant's claimed fear of harm on the basis of his Tamil ethnicity, and any subsequent imputed political opinion, the Tribunal noted that the security situation in Sri Lanka has improved significantly since the end of the civil war in 2009, and that guidelines issued by the United Nations High

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<sup>12</sup> Ibid 85.

<sup>13</sup> Ibid 86.

<sup>14</sup> Ibid 87.

<sup>15</sup> Ibid 88.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid 89.

<sup>18</sup> Ibid 267-268 at [28]-[30].

<sup>19</sup> Ibid 268 at [33].

Commissioner for Refugees (“UNHCR Eligibility Guidelines”) indicate that there is no longer any need for a presumption of eligibility for protection in respect of Sri Lankan Tamils from the Northern Province.<sup>20</sup> In addition, the Appellant had no LTTE association, and was unlikely to be imputed with the political opinion of a supporter of the LTTE given he was of Muslim religion, and country information indicated the Muslim community was victimised by the LTTE.<sup>21</sup>

20. While no claims were advanced regarding any fear of harm on the basis of the Appellant’s religion at the hearing, the Tribunal dealt with the possibility of the Appellant facing harm on this basis, and considered that country information indicated only a low risk of violence towards Muslims, and that Muslims are free to practise their faith in Sri Lanka.<sup>22</sup>
21. In relation to the Appellant’s fear of harm due to being a failed asylum seeker, as with the Secretary, the Tribunal noted that, while the Appellant may be subject to security checks upon return, this was unlikely to lead to any harm being inflicted on the Appellant, given the Appellant had no adverse political profile, and country information suggested most returnees visited by UNHCR officials considered repatriation to be a positive experience.<sup>23</sup> In relation to the Appellant’s illegal departure, the Tribunal accepted that the Appellant departed Sri Lanka by boat, and that there was a reasonable possibility of the Appellant being charged under the *Immigrants and Emigrants Act* (“*I&E Act*”).<sup>24</sup> Country information indicated that the Appellant may be detained until he could be brought before a Magistrate, although the period of detention was unlikely to be more than a few days, and the Appellant would then be fined or released on bail, depending on whether the Appellant pleaded guilty or not guilty.<sup>25</sup> The Tribunal did not accept that there was any reasonable possibility the Appellant would face torture or mistreatment during questioning upon arrival.<sup>26</sup>
22. Consequently, the Tribunal did not consider that there was any reasonable possibility of the Appellant facing harm amounting to persecution upon return to Sri Lanka on account of the Appellant’s ethnicity, imputed political opinion, religion, being a failed asylum seeker, or departing Sri Lanka illegally. The Appellant’s fear of harm was not well-founded and he was not a refugee within the meaning of the Convention.<sup>27</sup> In light of there being no reasonable possibility of the Appellant facing harm upon return, including any mistreatment or torture after being charged under the *I&E Act*, the Appellant was also not owed complementary protection.<sup>28</sup> While the Appellant may experience a moderate level of discrimination upon return, this would not amount to torture, cruel, inhuman or degrading treatment or punishment.<sup>29</sup>

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<sup>20</sup> Ibid 269 at [37]; BD 270 at [41].

<sup>21</sup> Ibid 270 at [42].

<sup>22</sup> Ibid 271 at [46]-[47].

<sup>23</sup> Ibid 272 at [50]-[53].

<sup>24</sup> Ibid 273 at [57].

<sup>25</sup> Ibid 274 at [60].

<sup>26</sup> Ibid at [62].

<sup>27</sup> Ibid 275 [69].

<sup>28</sup> Ibid.

<sup>29</sup> Ibid 276 at [74].

## THIS APPEAL

23. The Appellant's Amended Notice of Appeal dated 14 November 2017 reads as follows:

1. *In determining that the appellant was not a refugee for the purposes of section 4 of the Act, the Tribunal failed to comply with s 22(b) of the Act in that it did not act according to the principles of natural justice.*

### *Particulars*

- a. *The Tribunal did not give the appellant the opportunity of being heard in that it did not bring to the attention of the appellant or allow him the opportunity to ascertain and comment on the nature and content of adverse information at [50] of the Tribunal's decision, that:*
  - i. *the UNHCR had assisted the return of thousands of Tamil refugees living in India to Sri Lanka since 2009 and monitored them after their return, visiting returnees in their homes to ask them about their experiences and the problems they encountered.*
  - ii. *the UNHCR had stated that in general the returnees reported that repatriation had been a positive experience with few ranking security as their top or second ranked challenged.*
- b. *The information was credible, relevant and significant to the decision to be made because it was adverse to the appellant's claims that he would face persecution in his home area after his entry into Sri Lanka for reason of the suspicion or imputation by the Sri Lankan authorities of a political opinion of support for the LTTE as a Tamil who had sought asylum in Nauru.*
- c. *The information was also adverse to the appellant's submissions that information from a report by Australian Department of Foreign Affairs and Trade, DFAT Country Information Report – Sri Lanka, 18 December 2015, on what failed Tamil asylum seekers faced from the Sri Lankan authorities upon return to their home areas was unreliable. The appellant had submitted that DFAT returnee information was unreliable as DFAT had not monitored the return of failed asylum seekers.*

24. It is not in dispute that procedural fairness requires the Tribunal to give an Applicant a proper opportunity to deal with adverse material by ensuring the right to rebut or qualify such adverse material by the provision of further information; see *BRF 038 v Republic of Nauru*<sup>30</sup> ("*BRF 038*") at [83]. In *BRF 038*, and also in *HFM 045 v Republic of Nauru*<sup>31</sup> at [39], the High Court of Australia emphasised that procedural fairness requires a person to be given the opportunity to deal with all information that was "credible, relevant and significant" to the decision.

25. The Appellant contends that the Tribunal failed to afford him an opportunity to be heard because it did not bring to his attention or allow him to comment on adverse material that was credible, relevant and significant to the decision made.

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<sup>30</sup> (2017) 333 ALR 653.

<sup>31</sup> [2017] HCA 50.



26. The adverse material is said to be the country information referred to briefly at [21] above, and relied on by the Tribunal at [50] of its reasons. At [50], the Tribunal said:

*“At hearing the Tribunal discussed with the applicant that the UNHCR had assisted thousands of Tamils refugees (sic) living in India return to Sri Lanka since 2009 and monitored them after their return, visiting returnees in their homes to ask them about their experiences and the problems they encountered. The UNHCR states that in general the returnees reported that repatriation had been a positive experience with few ranking security as their top or second ranked challenge.”*

The Tribunal footnoted a reference to “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka (21 December 2012)”.

27. The Appellant contends that this material was adverse to his claim to fear harm on return to his home district as distinct from immediately at the airport on return. The Appellant observes that that claim was rejected by the Tribunal which found at [55] that there is no reasonable possibility that the Appellant will be targeted for harm by Sri Lankan authorities in his home area on the basis of being a Tamil who has sought and failed to achieve asylum in Nauru.
28. The Appellant’s advisors had submitted to the Tribunal that information about Sri Lankan returnees held by the Australian Department of Foreign Affairs and Trade (“DFAT”) was limited to monitoring the treatment of returnees at the airport and does not relate to their safety in their areas of origin. The advisors also referred to the observation of the Swiss Refugee Council about limits on monitoring by the International Organisation for Migration of failed asylum seekers in Sri Lanka following their return.
29. Counsel for the Appellant submits that the Tribunal erred at [50] when it said it discussed the UNHCR information with the Appellant at the hearing. Counsel also submits that the Tribunal was mistaken in saying that the information at [50] is to be found in the footnoted Guidelines. Counsel submits that the information at [50] was adverse to the Appellant’s claims about safety on return to his home district and was used to reject these claims.
30. Counsel for the Republic refers the Court to the transcript of the hearing before the Tribunal where a member of the Tribunal referred to the “United Nations Guidelines” of 2012. That was in the context of returnees not necessarily being at risk of harm as a young Tamil male by reason of having had some contact with the LTTE. Counsel also observes that the written submissions of the Appellant before the Tribunal refer to the Guidelines.
31. Counsel refers to pp 7 and 8 of the UNHCR Eligibility Guidelines where it is mentioned that the UNHCR had assisted Tamil refugees from India to return to Sri Lanka and that it conducts monitoring of them on their return. The Republic accepts that the Guidelines do not support the last proposition in [50] of the Tribunal’s reasons, that in general the returnees had reported repatriation to be a positive experience with few ranking security as their top or second ranked challenge. That proposition is found in a document published by the UK Home



Office in December 2012, "Sri Lanka – Bulletin: Treatment of Returnees". The Republic also accepts that the Tribunal did not give a copy of this document to the Appellant or tell the Appellant it may refer to those facts in its decision. Nonetheless, counsel for the Republic submits that the Tribunal did not deny the Appellant procedural fairness.

32. Counsel for the Republic submits that the information referred to in the decision at [50] is not "credible, relevant and significant" to the actual decision. He observes that the information appears in the section of the Tribunal's reasons which deal with whether the Appellant may face harm on return to Sri Lanka by reason of being a failed asylum seeker. In his written submissions to the Court, counsel submitted that:

*"The Tribunal's reasons must be read in the context that the appellant, the Secretary and the Tribunal operated on the shared understanding that if the appellant were to fall within one of the risk profiles set out in the UNHCR Eligibility Guidelines 2012, then the risks identified in that document for returning asylum seekers would be applicable to the appellant's circumstances (see BD 84.120-121, 248.36-248.36-248.43, 258.11-258.12, Reasons [43]-[45]). Read in that context, paragraphs 51-55 of the Tribunal's reasons reveal engagement with the question whether any feature of the appellant's case placed him within the scope of the risk profiles set out in the UNHCR Eligibility Guidelines 2012. The reason why the appellant's claims to protection on the ground of being a failed asylum seeker were rejected was that, based on the factual findings made by the Tribunal, none of those risk profiles were applicable to the appellant's circumstances."*

33. Counsel contends that the Tribunal at [51] to [55] was engaging with the issue whether any feature of the Appellant's case put him within the risk profiles set out in the Guidelines. At [45] the Tribunal had earlier identified that the Appellant did not come within any of the risk profiles set out in the Guidelines. That is the reason, counsel submits, that the Appellant's claim to protection based on being a failed asylum seeker was rejected. Counsel submits that the final proposition at [50] in the Tribunal's reasons was an "introductory observation" and not integral to the Tribunal's reasons.

## CONSIDERATION

34. As counsel for the Republic submits, the central issue before the Tribunal was whether the Appellant fell within one of the risk profiles set out in the UNHCR Eligibility Guidelines document. One of those risk profiles was "Persons suspected of having links with the LTTE".
35. At [45], the Tribunal found that the Appellant did not come within the categories of persons identified by UNHCR as being in need of its protection under the 2012 Guidelines.
36. At [49] to [56], the Tribunal dealt with the Appellant's claim to face a well-founded fear of persecution for reason of his membership of a particular social group of failed Tamil Muslim asylum seekers who departed Sri Lanka illegally. After identifying the claim, the Tribunal made its comments at [50] about UNHCR assistance to thousands of Tamil refugees returning from India. It then referred to

DFAT advice that involuntary returnees from Australia would not face a reasonable possibility of harm on that basis alone. At [52], the Tribunal accepted that there is no systematic monitoring of returnees and implicitly recognised the limited value of the DFAT material. At [53], the Tribunal accepted that the Appellant may be identified as a failed asylum seeker returning from Nauru but did not accept there would be a reasonable possibility that he would be imputed with a political opinion supportive of the LTTE. At [55], given earlier findings that the Appellant had not engaged in any political or separatist activism since departing Sri Lanka, the Tribunal did not accept that there was any reasonable possibility the Appellant would be targeted for harm by authorities in his home area on the sole basis of being a Tamil who has sought asylum in Nauru.

37. Viewed in the context of these considerations, the country information at [50], although credible and relevant, was not sufficiently material to the question of whether the Appellant fell within one of the risk profiles in the UNHCR Eligibility Guidelines and therefore would have a reasonable possibility of being harmed on the basis of being a failed asylum seeker.
38. The Guidelines discuss the numbers of returnees repatriated to India. That was not new material for the Appellant. The new material was the report about, in general, returnees reporting repatriation as a positive experience. That was not information which was sufficiently material to the circumstances of the Appellant given his failure to fit within any of the risk profiles identified in the 2012 Guidelines.
39. For the foregoing reasons, the appeal must be dismissed.
40. The Court orders as follows:
1. The decision of the Tribunal is affirmed pursuant to s 44(1)(a) of the *Refugees Convention Act 2012* (Nr).
  2. The appeal be dismissed.
  3. There be no order as to costs.

Shane Marshall

Judge Shane Marshall  
Dated this 8<sup>th</sup> of May 2018

