IN THE SUPREME COURT OF NAURU

AT YAREN

Case No. 2 of 2019

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T17/00380, brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

CRI 020 Appellant

AND

THE REPUBLIC Respondent

Before: Justice I Freckelton

Appellant: A. Aleksov
Respondent: N. Wood

Date of Hearing: 20, 21 May 2019
Date of Judgment: 16 April 2021

CATCHWORDS

APPEAL – findings– reasoning of the Tribunal – irrationality – illogicality - unreasonableness.

JUDGMENT

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

> *(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 such actions would breach Nauru's international obligations.

4. The determinations open to this Court are prescribed in s 44(1) of the Act:

> *(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. On 3 March 2014 the Appellant made an application to be recognised as a refugee or a person owed complementary protection.

6. On 28 January 2015 the Secretary determined that the Appellant is not a refugee and is not owed complementary protection.

7. The Refugee Status Review Tribunal ("the Tribunal") invited the Appellant to give oral evidence and present arguments at a hearing on 4 June 2015. The Appellant did not attend the hearing but requested an adjournment. The Tribunal refused the application and on 7 August 2015 affirmed the Secretary's determination that the Appellant is not a refugee and is owed complementary protection.

8. The Appellant appealed to this Court and in a judgment delivered on 22 June 2017 Crulci J determined that the Tribunal's decision to refuse the

adjournment was not legally reasonable. She quashed the Tribunal's decision and remitted the matter to the Tribunal for reconsideration according to law.

9. On 1 August 2017 the Appellant appeared before the Tribunal with his representative and gave oral evidence. On 25 September 2017 the Tribunal affirmed the Secretary's determination that the Appellant is not a refugee and is owed complementary protection.

10. The applicant appealed the decision once more and on 25 September 2017 this Court issued consent orders quashing the Tribunal's decision and remitting the matter for reconsideration according to law. The basis for its orders was that:

    - The Tribunal found that attacks against Christians in Bangladesh appeared to be isolated and sporadic when compared with the size of the Christian population. That finding was based in part, on a 'reported rapid growth in Christian numbers in the country' for which the Tribunal referred to a document titled *Bangladesh: Christianity Boom Despite Persecution*. That document included information to the effect that Christians in Bangladesh make up at least 10% of the population.
    - The information in the document was credible, relevant and significant to the Tribunal's decision. It was adverse to the applicant, and was also contrary to information discussed with him and his representative at the Tribunal hearing to the effect that Buddhists and Christians together accounted for only 0.5% of the population of Bangladesh.
    - The Tribunal's failure to put that information to the applicant constituted a failure to act according to the principles of natural justice.

11. A further hearing took place before the Tribunal with a decision being delivered on 20 May 2017 affirming the decision of the Secretary of Justice and Border Control that the appellant is not recognised as a refugee and that he is not owed complementary protection under the Act.

12. The Appellant filed a Notice of Appeal on 25 February 2019 and an Amended Notice of Appeal on 24 April 2019 against this decision of the Tribunal.

13. At the outset of this hearing, I made an order for discovery in favour of the Appellant.

BACKGROUND

14. The Appellant is a single Bengali male born on 1 April 1989 in Basharuk Village, Nabinagor, Camilla, Brahambaria district in Bangladesh. His family members remain in Bangladesh, including his father, step-mother and six siblings.

15. The Appellant left Bangladesh on 5 May 2012 by boat, without a passport or any other travel documents. From May 2012 to December 2013, he lived in Thailand, Malaysia and Indonesia before departing for Australia by boat. The boat he took was intercepted by Australian authorities and he was transferred, initially to Christmas Island on 12 December 2013, and then to Nauru where he arrived on 14 December 2013.

16. The Appellant claims to have a well-founded fear of persecution arising, cumulatively and separately, by reason of his:

    - Actual or imputed political opinion, as an active member and supporter of the Jatiobadi Chatra Dal (JCD) and Bangladesh National Party (BNP), and his opposition to the Awami League (AL);
    - Imputed political opinion as a perceived supporter of Jamaat-e-Islami (JEI) and Islamic fundamentalism;
    - Religion, as a convert from Islam to Christianity, his rejection of Islam and opposition to Islamic fundamentalism, and as a member of the Assemblies of God Church;
    - Membership of a particular social group, as an involuntarily returned asylum seeker suspected or accused or opposing the AL, as an involuntarily returned asylum seeker who is a member of the JCD/BNP, and as an involuntarily returned asylum seeker who left Bangladesh illegally.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

17. The Secretary noted that the Appellant claimed that:

    - He was born and lived in Camilla (a village), Brahamanbaria District in Bangladesh.
    - In 2006 he joined the student wing of the BNP, the JCD.
    - As a member of the BNP, he would help to arrange meetings, distribute donations to poor people, encourage others to join the party and canvass for votes during the election period.
    - On 15 January 2007, the Appellant was abducted by members of the AL due to his involvement with the BNOP. He was kicked and beaten with sticks. He became unconscious and was left to die. He was hospitalised for two weeks as a result of the injuries he sustained.
    - After this incident, he wanted to leave Bangladesh but did not have the funds to do so. He kept a low profile to avoid the AL.

- In October 2007 he felt insecure in his home village and travelled between Chittagong and Tongi cities until his departure from Bangladesh.
- He departed Bangladesh in May 2012.
- He fears he will be seriously harmed or killed by members of the AL as a result of his political opinion in support of the BNP and imputed and/or actual political views against the AL, if he returns to Bangladesh.

18. The Secretary entertained doubts about the credibility of the Appellant's claim that he moved between Tongi and Chittagong to avoid harm from AL members, instead concluding that he did so due to the nature of his employment.

19. The Secretary also formed the view that the Appellant was working from 2007 to 2012 to save funds to leave Bangladesh.

20. He also concluded that the Appellant remained in his village between April and October 2007 without protection and did not suffer harm from AL members after the incident in January 2007 until his departure from Bangladesh some five years later.

21. He accepted the Appellant's claim of political violence in Bangladesh but he noted that the Appellant continued to live in his village for about six months and returned to visit his village for several years without protection and did not receive negative attention from the AL.

22. The Secretary accepted that the Appellant suffered harm from AL supporters in the past but having regard to the country information, concluded that he was not an activist or influential member of the opposition, he was no longer an active member or supporter of the JCD or BNP, his reservations about the credibility of the Appellant, and that he continued to reside and visit his village for five years after the incident in January 2007, he did not consider there was a reasonable possibility that the Appellant faces harm in the reasonably foreseeable future if returned to Bangladesh, in particular his home region of Brahamanbaria District. Thus he found the Appellant's fears of persecution not to be well founded and in light of the Appellant not raising any non-Convention grounds and the absence of any which were implicit in the information provided, he found there not to be a reasonable possibility that he would face harm if returned to Bangladesh which would constitute a breach of Nauru's international obligations.

REFUGEE STATUS REVIEW TRIBUNAL

23. Before the Tribunal, the Appellant maintained that he joined the student wing of the BNP, the JSD and that his family were longstanding supporters of the BNP. However, the Tribunal did not accept that the Appellant held formal membership of the BNP. It found that he ceased his political activities by around January 2007.

24. In respect of the assault to which the Appellant said he had been subject, and for which he thought he had spent about 20 days in hospital, the Tribunal was concerned about discrepancies in accounts given by the Appellant. It raised with him that he had not given a satisfactory explanation as to why the kidnapping and assault that he claimed had taken place was not reported to the police. He claimed that police did not investigate reported crimes and that they were known to be corrupt, not taking action unless paid money. He said that people in his party told him not to bother reporting.

25. The Tribunal accepted that under pressure of a transfer interview the Appellant may not have recalled the precise date of the incident/ It accepted that he was the victim of political violence, possibly at the hands of AI supporters because he was known to be a BNP supporter who undertook small scale activities for the party.

26. The Tribunal concluded that his claim about the likely inaction of the police as a reason for failing to report the kidnap and assault was supported by independent country information and that police inaction could explain why a kidnap and assault might not be reported to police. However, it concluded that his failure to report called into question the alleged seriousness of the assault. It observed that the country information to which it had made reference related to recent years and not 2006 when the claimed kidnap and assault occurred, which was at a time when the BNP was in power and "it is reasonable to conclude that an allegation of kidnapping and a charge of serious assault of even a low level BNP supporter, requiring hospitalisation for around 20 days, would be taken seriously."[1]

27. The Tribunal also stated that it considered it improbable that no-one, including the Appellant's parents, his influential uncle, or members of his own political party, then in power, would have failed to make an attempt to report to the police a kidnap and assault of the severity that the Appellant described.[2] It also noted that there was no independent evidence that support his claim that he was hospitalised for 20 days. For these reasons the Tribunal accepted only that some form of assault on the Appellant had occurred and that it may have been for reasons associated with his low-level political involvement. It did not accept that the assault was of the severity that the Appellant claimed.

THIS APPEAL

28. The Appellant's Amended Notice of Appeal filed on 24 April 2019 advanced the following grounds:

    1. *The Tribunal's reasoning at [53] is illogical or irrational, or is affected by some legal error the precise identification of which is unknown, or legal unreasonableness.*
    2. *The Tribunal failed to act on the most current information available to it.*

[1] Tribunal decision, a [53].
[2] Tribunal decision, at [54].

3. *The Tribunal did not afford procedural fairness to the appellant, in that not every item of information available to the Tribunal and potentially to be relied upon was made known or available to the appellant*

29. Ultimately, Ground Two was abandoned and Ground Three proceeded without argument on the basis of a discovery decision which I(had previously made.

Ground One

30. The Appellant accepted that he bore the onus of establishing irrationality in the Tribunal's reasoning and framed it in terms of the reasoning not being open to the Tribunal.

31. Counsel for the Appellant emphasised that in paragraph [51] the Tribunal stated it was "prepared to accept that [the Appellant] was the victim of physical violence, possibly at the hands of AL supporters because he was known to be a BNP supporter who undertook small scale electoral activities for the party." In paragraph [53] the Tribunal stated that it accepted that "the likely police inaction could explain why a kidnap and assault might not be reported to the police", referring to reports about corruption amongst police and public mistrust of them.

32. It was pointed out on behalf of the Appellant that then in paragraph [53] the Tribunal stated: "however, the applicant's failure to report it calls into question the alleged seriousness of the incident." After this the Tribunal stated (still in paragraph [53]):

> The Tribunal notes that the above country information relates to recent years and not 2006 when the claimed kidnap and assault occurred. At the time of the claimed kidnap and assault, the BNP was in power, and it is reasonable to conclude that an allegation of kidnapping and a charge of serious assault of even a low level BNP supporter, requiring hospitalisation for around 20 days, would be taken seriously.

33. The Appellant argued that the two positions of the Tribunal were incompatible – first, it accepted that a person may not report a crime because of their perception of likely police unresponsiveness and then a determination that because of the seriousness of the crime it should have been reported. Counsel for the Appellant denounced the juxtaposition of these two propositions as absurd and illogical.

34. Counsel for the Republic contended that the Tribunal found that the explanation for the failure by the Appellant to report was supported "in

general terms" (at paragraph [52]) by the country information but then had regard to the fact that the country information was from many years later and at the relevant time the Appellant's own political party was in power. In these circumstances, the Respondent defended the reasoning of the Tribunal as "perfectly rational."

35. The Respondent also drew to the Court's attention the fact that at paragraph [54] the Tribunal stated that it considered "it improbable that no one, including the applicant's parents, uncle, members of his own party then in power, would have failed to make an attempt to report to the police a kidnap of the severity described." He contended that the thought process of the Tribunal was essentially as follows: "I think it is improbable that neither you nor any one of your family, nor anyone in your political party then in power would have failed to make a report of that scale and that significance to the authorities."[3] He argued that the words should be read as compounding the other reservations expressed by the Tribunal, including that there was no independent evidence that the Appellant was hospitalised for 20 days

CONSIDERATION

36. Irrationality such as to amount to legal error must involve reasoning which no rational or logical decision-maker could arrive at on the same evidence. The correct approach for this Court is to ask "whether it was open to the Tribunal to engage in the process of reasoning in which it did engage and to make the findings which it did on the material before it."[4] Put another way, "If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another conclusion."[5]

37. The argument of the Respondent is compelling. While the Tribunal was prepared in principle to accept (at paragraph [51]) that the Appellant was a victim of physical violence and that there was at the time a level of

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[3] Transcript, at p42.
[4] *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [133] per Crennan and Bell JJ.
[5] *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [131] per Crennan and Bell JJ.

community mistrust in the reliability and independence of the police, the Tribunal took into account that the assault claimed by the Appellant was very serious, and required lengthy hospitalisation. Most importantly, it was said to have been effected at a time when the Appellant's own political party was in power. Therefore the Tribunal (at paragraph [53]) concluded that it would have been reasonable in such circumstances, notwithstanding the quality of policing at the time, for a report to have been made and (at paragraph [54]) it considered it improbable that no-one within the Appellant's family unit would have failed to report so serious an assault. The Tribunal also took into account in failing to accept the assertions of the Appellant that there was no independent evidence to corroborate his claim of so serious an assault requiring such lengthy hospitalisation. In these circumstances, it was not illogical, irrational or unreasonable for the Tribunal to conclude (at [55]) that:

> For these reasons, while the present Tribunal is prepared to accept that some form of assault on the applicant occurred and that it may have been for the reasons associated with his low-level political involvement, it is not satisfied that it was of the severity he claims.

No argument having been pressed on Ground Three as a result of my ruling on discovery, it is dismissed.

CONCLUSION

38. Under s 44(1) of the Act, I make an order affirming the decision of the Tribunal and make no order as to costs.

Justice Ian Freckelton
Dated this 16th day of April 2021