



HIGH COURT OF AUSTRALIA

13 December 2017

DWN042 v THE REPUBLIC OF NAURU [2017] HCA 56

Today the High Court unanimously allowed an appeal from the Supreme Court of Nauru. The High Court held that the Supreme Court had failed to accord the appellant procedural fairness by failing to consider a notice of motion.

In August 2013, the appellant, a Sunni Muslim of Pashtun ethnicity and a Pakistani national, arrived by boat at Christmas Island. In September 2013, he was transferred to the Republic of Nauru ("the Republic") under a Memorandum of Understanding reached between Australia and the Republic. In November 2013, the appellant attended a transfer interview. As part of that interview, a form was completed which was not signed by the appellant. In December 2013, the appellant applied to the Secretary of the Department of Justice and Border Control of Nauru ("the Secretary") for refugee status. As part of the application, the appellant claimed that he was at risk of arbitrary deprivation of life at the hands of the Taliban. His application was refused by the Secretary. The appellant applied unsuccessfully to the Refugee Status Review Tribunal ("the Tribunal") for review of the Secretary's determination. The Tribunal concluded that there was a less than reasonable possibility that the appellant would be targeted by the Taliban in the reasonably foreseeable future. The appellant appealed from the decision of the Tribunal to the Supreme Court. At the appeal hearing, counsel for the respondent sought to be heard on a motion to strike out grounds 1 and 2 of the amended notice of appeal. The primary judge struck out those grounds, with reasons to be given at a later date. Arguments proceeded on grounds 3 and 4, and judgment was reserved on those grounds. On 20 May 2016, the primary judge gave his reasons for striking out grounds 1 and 2, which both parties accepted were "plainly wrong". The appellant sought leave to appeal to the High Court from the interlocutory decision of the primary judge striking out grounds 1 and 2. In light of assurances given to the High Court by the respondent, and due to the interlocutory nature of the application, the High Court refused leave to appeal. On 6 February 2017, the day before final judgment on grounds 3 and 4 was to be delivered, the appellant filed a notice of motion to reinstate grounds 1 and 2, and to reopen the appeal to further amend those grounds. On 7 February 2017, the primary judge delivered final judgment without hearing that notice of motion.

The appellant appealed to the High Court as of right on five grounds. The first ground alleged error by the primary judge in failing to consider the appellant's notice of motion. The second and third grounds concerned the allegedly unconstitutional nature of the appellant's detention at the time of the Tribunal hearing. The fourth ground alleged error by the primary judge in failing to conclude that the Tribunal erred in failing to consider part of the appellant's claim to complementary protection. The fifth ground alleged that the primary judge erred in failing to conclude that the Tribunal erred by relying on the appellant's unsigned and unsworn transfer interview form. The High Court dismissed four of the five grounds of appeal but held that, in all of the circumstances of the case, the Supreme Court's failure to consider the appellant's notice of motion involved a denial of procedural fairness. The High Court therefore allowed the appeal, set aside the order made by the Supreme Court and ordered that the matter be remitted to the Supreme Court of Nauru for reconsideration according to law.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*