

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
B E T W E E N:

No M146 of 2017



HFM043
Appellant

and

THE REPUBLIC OF NAURU
Respondent

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APPELLANT'S SUBMISSIONS

Part I: INTERNET PUBLICATION

1 These submissions are in a form suitable for publication on the internet.

Part II: ISSUE

2 Whether it is futile to remit the Appellant's claim for individual protection due to the operation of s 31(5) of the *Refugees Convention Act 2012* (Nr) (**the Act**) to the Refugee Status Review Tribunal (**the Tribunal**) in circumstances where:

- (a) the Supreme Court of Nauru (**Supreme Court**) has concluded that the Tribunal's determination of that application was infected by an error of law;
and
- (b) the Appellant has been given a Refugee Determination Record on the basis of her derivative status under that Act because of her marriage to a person with refugee status.

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Part III: SECTION 78B NOTICE

3 The Appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and has concluded that no notice is required.

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Filed on behalf of: the Appellant

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Part IV: JUDGMENTS BELOW

4 The citation for the decisions of the Supreme Court in respect of this Appellant are:

- (a) *HFM043 v The Republic* [2017] NRSC 43, which concluded that the Tribunal erred as a matter of law; and
- (b) *HFM043 v The Republic (No 2)* [2017] NRSC 76, which concluded that remittal would be futile and therefore dismissed the appeal.

Part V: FACTUAL BACKGROUND

- 5 On 24 January 2014, the Appellant made an application to be recognised as a refugee
 10 or person owed complementary protection pursuant to s 5 of the Act (as in force at
 the time).¹
- 6 On 21 September 2014, the Secretary made a determination that the Appellant was
 not a refugee nor owed complementary protection under s 9 of the Act.²
- 7 On 26 September 2014, the Appellant applied to the Tribunal for merits review of the
 Secretary's determination pursuant to ss 31(1)(a) and (d) of the Act.³
- 8 On 17 March 2015, the Tribunal determined the Appellant's application to it and
 affirmed the Secretary's determination pursuant to s 34(2)(a) of the Act.⁴ This
 determination and date has considerable significance in this appeal, for the reasons
 that follow.
- 9 On 24 April 2015, the Appellant appealed against the Tribunal Decision pursuant to s
 20 43(1) of the Act.⁵

¹ Application for Refugee Status Determination dated 24 January 2014, Court Book in the Supreme Court of Nauru (CB) 17–37.

² Negative Refugee Determination Decision Record and Complementary Protection Assessment Decision Record dated 21 September 2014 (**Secretary's determination**), CB 47–60.

³ Refugee Status Review Tribunal Review Application Form dated 26 September 2014 (**Tribunal Review Application**), CB 65.

⁴ Refugee Status Review Tribunal Decision dated 17 March 2015 (**Tribunal Decision**), CB 177–189.

⁵ Notice of Appeal dated 10 April 2015 (filed 24 April 2015). Ordinarily a notice of appeal must be filed within 28 days of the Tribunal's decision (in this case by 14 April 2015), but an order was made on 15 April 2015 extending the time for the appeal to be filed against the decision to 30 June 2015, which was confirmed by an order made on 30 November 2016: see *HFM043 v The Republic* [2017] NRSC 43 [36]–[41].

10 In April 2016, the Appellant married Mr B who had been recognised as a refugee under Part 2 of the Act.⁶ On 23 June 2016, the Appellant applied for derivative status, pursuant to s 5 of the Act, on the basis that she was a “dependent” of Mr B.⁷

11 On 4 August 2016, the Appellant was granted derivative status by way of a “Refugee Determination Record” in which the Secretary determined that she was recognised as a “refugee under Part 2 of the *Refugees Convention Act 2012* as in force”.⁸ On 5 August 2016, the Appellant was given this Refugee Determination Record.⁹ This date is also particularly significant for the reasons that follow.

12 On 23 December 2016, the *Refugees Convention (Derivative Status and other*
 10 *measures) Amendment Act 2016* (Nr) came into effect. It made significant amendments to the Act, including introducing s 31(5) and the concept of a “Refugee Determination Record”. Those amendments were deemed to operate retrospectively from 21 May 2014.

13 On 9 June 2017, the Supreme Court delivered its reasons on appeal from the Tribunal. It found for the Appellant on one of her grounds of appeal and held that the Tribunal had made an error of law by failing to adjourn the hearing so that the Appellant could obtain a full medical report.¹⁰

14 The Court concluded by noting that the parties had agreed to make further submissions on the orders that the Court should make to give effect to its decision.¹¹

20 15 On 22 September 2017, the Supreme Court considered those further submissions and made final orders dismissing the appeal.¹² That decision concluded that:

If the decision of the Tribunal is quashed, the Tribunal is now unable to reconsider the matter due to the operation of s 31(5). Therefore an order remitting the matter to the Tribunal would be futile.¹³

⁶ Supplementary Statements of Appellant and Mr B dated 15 June 2016 (**Supplementary Statements**).

⁷ Application for Derivative Status dated 23 June 2016 containing the Supplementary Statements and Submissions (**Derivative Status application**).

⁸ Refugee Determination Record dated 4 August 2016.

⁹ *HFM043 v The Republic of Nauru* (No 2) [2017] NRSC 76 [5].

¹⁰ *HFM043 v The Republic* [2017] NRSC 43 [64]–[65].

¹¹ *HFM043 v The Republic* [2017] NRSC 43 [71].

¹² *HFM043 v The Republic (No 2)* [2017] NRSC 76.

16 This is an appeal from the order dismissing the Appellant's appeal to the Supreme
 Court. This appeal lies as of right to this Court.¹⁴

Part VI: ARGUMENT

17 Section 31(5) of the Act provides that:

An application made by a person under section 31(1)(a), that has not been
determined at the time the person is given a Refugee Determination Record, is
 taken to have been validly determined at that time. [Emphasis added.]

18 Pursuant to s 6(2A) of the Act, the Secretary must issue a Refugee Determination
 Record to a person who is (a) determined to be a refugee; or (b) given derivative
 10 status; or (c) determined to be owed complementary protection.

19 On its terms, s 31(5) has the effect that if, following the initiation of an application
 for merits review under s 31, the Secretary issues a Refugee Determination Record in
 respect of the claim the subject of the review application, the application is deemed to
 have been determined at that point, it being unnecessary for the Tribunal to consider
 the application further. It would therefore prevent the Tribunal conducting a review
 if:

(a) a Refugee Determination Record is given in respect of a claim for refugee
 status, derivative status *or* complementary protection the subject of an
 application pending before it; and

20 (b) at the time a Refugee Determination Record is given to the person, the
 Tribunal has not already 'determined' that application from that person.

20 A Refugee Determination Record only operates with respect to the particular s 5
 application in respect of which it is made. In this case, the Refugee Determination
 Record the Appellant was given related to her Derivative Status application under s
 5. It did not arise from her application for individual refugee status under s 5, or from
 her s 31 application to the Tribunal for review of the Secretary's determination of
that application. The issue of the Refugee Determination Record in respect of the

¹³ *HFM043 v The Republic (No 2)* [2017] NRSC 76 [29].

¹⁴ *BRF038 v The Republic of Nauru* [2017] HCA 44 at [40]-[41] per Keane, Nettle and Edelman JJ; *HFM045 v The Republic of Nauru* [2017] HCA 50 at [5] per Bell, Keane and Nettle JJ.

Appellant's claim for derivative status could have no effect on, or relevance to, her application in relation to her separate claim for individual refugee status.

21 Further, or alternatively, the preconditions to the operation of s 31(5) would not exist in the circumstances of this Appellant were her matter remitted to the Tribunal by a Court. This is so because:

- (a) the Tribunal would gain jurisdiction by operation of the remittal, not an application under s 31; and
- (b) the Tribunal has already determined her application and did so before she was granted derivative status.

10 22 As always, the questions of statutory construction which lead to this conclusion turn on the words of the Act itself,¹⁵ taking into account the legislative context in which those words appear.¹⁶

23 In analysing whether s 35(1) is engaged or the remittal is otherwise futile, it is relevant to consider whether a person can receive multiple "Refugee Determination Records" under the Act; if they can, it supports the construction of s 31(5) referred to in paragraph 20 above and demonstrates that remittal to the Tribunal following the Appellant's successful appeal would not be futile. Further, the effect of s 35(1) on the Tribunal's jurisdiction upon a remittal by the Supreme Court following a successful appeal depends on the meaning of "determined", "application" and the phrase "validly determined" in the context of the Act. Each of these issues is
20 addressed in this order below.

Meaning of "Refugee Determination Record"

24 Section 3 of the Act defines "Refugee Determination Record" as the certificate issued to a person who is owed protection by Nauru under s 6(2A).

25 Section 6(2A) provides that a Refugee Determination Record *must* be issued to a person who is:

¹⁵ *Zubair v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 248 [21]–[24] and the authorities cited therein, and more recently, *Minister for Immigration and Border Protection v Hossain* [2017] FCAFC 82 [21]–[24]

¹⁶ *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1, 10 [24]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69]; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389.

- (a) determined to be a refugee;
- (b) given derivative status; *or*
- (c) determined to be owed complementary protection. [Emphasis added.]

26 Two points about s 6(2A) must be emphasised:

- (a) The language of s 6(2A) permits multiple Refugee Determination Records to be sought and granted under the Act. The possibility of separate applications being made is confirmed by the use of “or” in ss 5(2), 6(1) and 6(2B) of the Act.
- (b) The mandatory language of s 6(2A) makes clear that the Act allows for, and indeed requires, multiple Refugee Determination Records to be issued if a person successfully makes discrete applications for refugee status or complementary protection, or derivative status.

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27 The Act also allows for separate applications to be made:

- (a) to be recognised as a refugee pursuant to s 5(1);
- (b) to be given derivative status pursuant to s 5(1AA);
- (c) pursuant to s 8(2), where the Secretary permits a subsequent application because the grounds of the application have either:

- (i) not been substantially determined by the Secretary, nor by the Tribunal; or

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- (ii) are based on a change in the person’s circumstances since the previous application was finally determined.

28 Given that the Act allows for separate s 5 applications and multiple Refugee Determination Records to be issued, s 31(5) (and s 6(2B)) must be taken to only operate with respect to the particular s 5 application that has been determined by the Refugee Determination Record.

29 That is to say that, in this case, the Refugee Determination Record given to the Appellant on 5 August 2016 relates to the Appellant’s Derivative Status application made under s 5(1AA), not her individual refugee protection application made under s 5(1) on 24 January 2014 and her Tribunal Review Application for refugee status and complementary protection under s 31. Accordingly, s 31(5) is not engaged in the

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Appellant's circumstances and the Court erred in finding that s 31(5) operated to prevent meaningful remittal of the matter to the Tribunal.

30 The judgment below interpreted s 31(5) as applying to 'every' or 'any' application made by a person under s 31(1)(a). One difficulty with this interpretation, however, is that section s 31(5) does not state what shall be the outcome of the 'valid determination'. If there is more than one application on foot, and one application is determined in accordance with the Refugee Determination Record, are the other applications all 'validly' determined:

- 10 (a) in favour of the applicant;
- (b) against the applicant; or
- (c) in the same manner as the Refugee Determination Record?

No such ambiguity arises with the Appellant's interpretation of s 31(5). The particular application is deemed to be determined in accordance with the particular Refugee Determination Record, and other applications remain on foot.

Meaning of "Determined"

31 The terms "determined"¹⁷ and "determination"¹⁸ are used throughout the Act. The term "determined" is also used in conjunction with other terms such as "substantially determined" and "finally determined" (in s 8(2)). No statutory definition is provided for any of these terms.

20 32 In every case where "determined" is used either on its own or with an adverb, the ordinary meaning of "determined" appears to be intended to be used, namely "decided upon"¹⁹ or "the decision arrived at or pronounced".²⁰

33 The term "decision" is also used throughout the Act. For the most part, "decision" is used to refer to an outcome adverse to a claimant.²¹ However, it is also used neutrally in respect of the Tribunal²² and the Supreme Court.²³ As such, decision and

¹⁷ The Act, ss 4(1), 6(1), 6(2A), 6(2B), 7(4), 13(5), 19(2) and 31(5).

¹⁸ The Act, ss 6(3), 7(1), 8(1), 9, 31(1), 31(2), 32(2), 33(1), 34, 35, 40(1), 42, 43(1A) and 48.

¹⁹ *Macquarie Dictionary Online*, definition of "determine", meaning 9.

²⁰ *Macquarie Dictionary Online*, definition of "determination", meaning 5.

²¹ The Act, ss 8, 9, 10, and 31(b).

²² The Act, ss 14, 27, 34(4), 39, 41, 43, 44, 46, 47, and 51.

determination are used interchangeably in the Act - a determination can also be a decision under the Act, and vice versa.

34 Nothing in the Act suggests that the term “determined” in s 31(5) should be restricted to mean “determined lawfully”.²⁴ The legislature could have added, but did not add, an adverb as it did with the terms “substantially determined”, “finally determined” and “validly determined”. This indicates that it was Parliament’s objective intention to distinguish the mechanical act of determination by the Tribunal from the legal characterisation of a determination of the same Tribunal as valid or lawful.

10 35 It follows from the above two paragraphs that the term “determined” in s 31(5) is not restricted to mean “determined lawfully”, or the term can be used interchangeably with the term “decision”.

36 Accordingly, while quashing the Tribunal Decision would have legal consequences, it would not negate the factual consequence for the purpose of s 31(5) that, as at 5 August 2016, the Tribunal had determined the Appellant’s application under s 31(1)(a) by virtue of its decision on 17 March 2015. That is, an act is a “determination” for the purposes of the Act whether or not that determination is ultimately found to be have been lawful.

20 37 In this case, such a determination was made by the Tribunal before the Refugee Determination Record, with the result that a precondition to the operation of s 31(5) did not exist.

Meaning of "Application"

38 Section 31(5) also refers to an “application made by a person under section 31(1)(a)”. Section 31(1)(a) relevantly provides that "A person may apply to the Tribunal for merits review of ... a determination made under section 6(1)". The making an application under s 31(1)(a) is one of the ways in which the Tribunal has jurisdiction under the Act.

²³ The Act, s 44.

²⁴ *Zubair v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 248 [28].

39 Section 44 of the Act provides that:

- (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.
- (2) If the Court makes an order remitting the matter to the Tribunal, the Court may also make either or both of the following orders:
 - (a) an order declaring the rights of a party or of the parties;
 - (b) an order quashing or staying the decision of the Tribunal.

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40 Section 44(1)(b) confers power on the Supreme Court to make an order remitting a matter to the Tribunal for reconsideration. The Tribunal obtains jurisdiction over the matter by force of that remittal.

41 While the Supreme Court may have derived its jurisdiction under s 43(1) from a determination of the Tribunal which had been instituted by an application under s 31(1)(a), this power of the Supreme Court to confer jurisdiction to the Tribunal is in addition to, and not dependent upon, s 31(1)(a). This interpretation is reinforced by s 42 of the Act which provides that:

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The rights of a person provided under this Part for a review of a determination or decision are in addition to, and not in derogation of any other right that the person may have for review of the determination or decision.

That is to say, an order of the Supreme Court remitting the matter back to the Tribunal under s 44 is a distinct process and is the source of jurisdiction for the Tribunal from making an application to the Tribunal under s 31(1)(a) of the Act.

42 Given the above, even if the Supreme Court remitted the matter to the Tribunal under s 44(1)(b) of the Act,

- (a) the Tribunal's jurisdiction would be enlivened by the remittal, not by an application; and

(b) the Appellant's application under the Act would still have been determined at the time that she was given a Refugee Determination Record (on 5 August 2016),

such that s 31(5) would not apply.

The test for futility

43 The Supreme Court appears to uncritically accept the Respondent's submissions on the issue of futility that a Court would refuse relief where it "would have no useful or practical consequence for the parties..."²⁵

44 This is the wrong test for futility. A narrower and more stringent test applies in the
10 context of the Act.

45 In the context of the *Migration Act 1958* (Cth) (on which the Act is partly modelled), it has been held that:

before a Court will exercise its discretion to refuse relief on the ground of futility, it must be quite clear that a rehearing or reconsideration is or will be futile.²⁶ [Emphasis added.]

When applying this test, the Full Federal Court has held that it is appropriate to apply a "forward-looking test", meaning that "relief should not be refused on the ground of futility... unless it is clear that a rehearing will be futile".²⁷ [Emphasis added.]

46 In her submissions to the Supreme Court, the Appellant outlined the reasons why it
20 would be valuable for her to gain independent, individual refugee status. With derivative status she is exposed to the whims of two forms of potentially life-changing government policies, not laws.

(a) The policy of Nauru is currently favourable to her in that it treats holders of derivative status the same as those with individual status, including when the relationship on which the derivative status depends ends. That policy could

²⁵ *HFM043 v The Republic (No. 2)* [2017] NRSC 76 [27].

²⁶ *Lee v Minister for Immigration and Citizenship* [2007] FCAFC 62 [48].

²⁷ *Ibid* [53]; see also *Minister for Immigration and Border Protection v Hossain* [2017] FCAFC 82 [21]-[31], [96]-[100].

change at any point and if it did, without an individual determination, she would be exposed to the effect of this change.²⁸

- (b) The policies of potential resettlement countries often require an individual determination of refugee status to allow access.²⁹ That is, the Appellant could lose her partner by his resettlement elsewhere as well as losing her chance at resettlement, if she only holds derivative status and unless she hold individual status.³⁰

47 In circumstances where the Tribunal has jurisdiction to consider the matter if
remitted and it is not clear that a rehearing would be futile, the Supreme Court erred
10 by exercising its discretion to refuse to remit the matter for reconsideration on the
basis that it would be a “futile” exercise.

48 For the reasons outlined above, it is respectfully submitted that the High Court ought,
pursuant to s 8 of the *Nauru (High Court Appeals) Act 1976* (Cth), make the orders
set out in Part VIII below.

Part VII: STATUTORY PROVISIONS

49 The applicable statutory provisions are set out in Annexure A.

Part VIII: ORDERS SOUGHT

20 50 The orders sought by the Appellant are:

- (a) The appeal be allowed.
- (b) The orders of the Supreme Court of Nauru made on 22 September 2017 be set aside and in lieu thereof it be ordered that the appeal to the Supreme Court be allowed.
- (c) The matter be remitted to the Refugee Status Review Tribunal for reconsideration according to law.

²⁸ Appellant’s Submissions on the Issue of Derivative Status filed 13 April 2017 [27] and [fn 5].

²⁹ Albert, M., *Prima facie determination of refugee status*, Working Paper Series No 55, Refugee Studies Centre, University of Oxford, 17.

³⁰ Appellant’s Submissions on the Issue of Derivative Status filed 13 April 2017 [30], [35]–[36] and [fn 15].

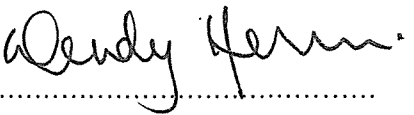
- (d) The Respondent pay the costs of the Appellant of this appeal to the High Court of Australia.
- (e) Such further or other orders as the Court deems appropriate.

Part IX: ESTIMATE OF TIME

51 The Appellant estimates that she will require 1 hour to present oral argument.

Dated: 17 November 2017

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Annexure A (Part X – Relevant legal provisions)

Refugees Convention Act 2012 (Nr) (as at 24 January 2014)

5 Application for refugee status

- (1) A person may apply to the Secretary to be recognised as a refugee.
- (2) The application must:
 - (a) be in the form prescribed by the Regulations; and
 - (b) be accompanied by the information prescribed by the Regulations.
- (3) No fee may be charged for the making or processing of the application.

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Refugees Convention Act 2012 (Nr) (as at 26 September 2014)

31 Application for merits review by Tribunal

- (1) 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.

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- (2) The application must be made:
 - (a) within 28 days after the person receives notice of the determination or decision; and
 - (b) in the form prescribed by the Regulations.
- (3) The Principal Member may extend the time in which an application for review can be lodged if the Principal Member is satisfied that there are compelling circumstances.
- (4) No fee may be charged for the making or hearing of the application.

Refugees Convention Act 2012 (Nr) (as in force currently, including amendments made on 23 December 2016)

3 Interpretation

In this Act, unless the contrary intention appears:

‘asylum seeker’ means:

- (a) a person who applies to be recognised as a refugee under section 5; or
- (b) a person, or persons of a class, prescribed by the Regulations;

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‘complementary protection’ means protection for people who are not refugees as defined in this Act, but who also cannot be returned or expelled to the frontiers of territories where this would breach Nauru’s international obligations;

‘corresponding law’ means a law of another jurisdiction that provides for a person to apply for recognition as a refugee under the Refugees Convention as modified by the Refugees Protocol;

‘dependent’ of a person means:

- (a) the person’s spouse other than a spouse from whom he or she is formally separated; or
- (b) the person’s child under the age of 18 years; or
- (c) someone dependent on the person for financial, emotional, psychological or physical support;

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‘Deputy Principal Member’ means a Deputy Principal Member of the Tribunal;

‘derivative status’ means the status given to a person, who is a dependent of a person who has been recognised as a refugee, given derivative status, or found to be owed complementary protection;

‘member’ means the Principal Member, a Deputy Principal Member or any other member of the Tribunal;

‘personal identifier’ means any of the following (including any of the following in digital form):

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- (a) fingerprints or handprints of a person, including those taken using paper and ink or digital technologies;
- (b) a measurement of a person’s height and weight;

- (c) a photograph or other image of a person or of the face and shoulders or other part of a person;
- (d) an audio or video recording of a person;
- (e) an iris scan;
- (f) a person's signature;
- (g) any other identifier prescribed by the Regulations;

'Principal Member' means the Principal Member of the Tribunal;

'refugee' means a person who is a refugee under the Refugees Convention as modified by the Refugees Protocol;

10 **'Refugee Determination Record'** means the certificate issued to a person who is owed international protection by Nauru under section 6(2A);

'Refugees Convention' means the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951;

'Refugees Protocol' means the Protocol Relating to the Status of Refugees done at New York on 31 January 1967;

'Secretary' means the Head of Department;

'Tribunal' means the Refugee Status Review Tribunal established under section 11.

4 **Principle of non-refoulement**

- 20 (1) The Republic must not expel or return a person determined to be recognised as a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion except in accordance with the Refugees Convention as modified by the Refugees Protocol.
- (2) The Republic must not expel or return any person to the frontiers of territories in breach of its international obligations.

5 **Application for refugee status**

- (1) A person may apply to the Secretary to be recognised as a refugee.
- 30 (1A) A person may include one or more dependents in an application made under section 5(1).
- (1AA) A person may apply to the Secretary to be given derivative status.

- (1B) A person included in an application for refugee status under section 5(1A) is taken to have applied to be given derivative status.
- (2) An application to the Secretary to be recognised as a refugee made under section 5(1), or to be given derivative status under section 5(1AA), must:
- (a) be in the form prescribed by the Regulations; and
 - (b) be accompanied by the information prescribed by the Regulations.
- (3) No fee may be charged for the making or processing of an application made under this section.

6 Determination of refugee status

- 10 (1) Subject to this part, the Secretary must determine:
- (a) an application to be recognised as a refugee made under section 5;
 - (b) an application to be given derivative status made under section 5; or
 - (c) whether a person who has made an application under section 5 is owed complementary protection.
- (2) [Repealed]
- (2A) A Refugee Determination Record must be issued to a person who is:
- (a) determined to be a refugee;
 - (b) given derivative status; or
 - (c) determined to be owed complementary protection.
- 20 (2B) Any application made by a person under section 5(1), section 5(1AA) or section 5(1A), that has not been determined at the time the person is given a Refugee Determination Record, is taken to have been validly determined at that time.
- (3) The determination under section 6(1) must be made as soon as practicable after the application is received.

7 Powers of Secretary in determining refugee status

- (1) For the purposes of making a determination under section 6(1), the Secretary:
- (a) may require the asylum seeker:

- 10 (i) to provide one or more personal identifiers to assist in the identification of, and to authenticate the identity of, the asylum seeker; and
- (ii) to attend one or more interviews; and
- (iii) to provide information required by the Secretary, within the period specified, for the purposes of the determination; and
- (iv) to consent to the release by any other person of relevant documents or information relating to the asylum seeker; and
- (v) if the Secretary believes on reasonable grounds that the asylum seeker has in his or her possession or control a document relating to the asylum seeker (including a passport or a travel document) – to produce the document; and
- (vi) to verify, by statutory declaration or on oath or affirmation, information provided to the Secretary; and
- (b) may seek information from any other source and for that purpose may, if the Secretary believes on reasonable grounds that a person has in his or her possession or control a document relating to the asylum seeker (including a passport or travel document) – require the person to produce the document; and
- 20 (c) may rely, without further enquiry, on a determination made under the Refugees Convention or a corresponding law.
- (3) However, the Secretary:
- (a) is not obliged to seek information, evidence or submissions further to that provided by the asylum seeker; and
- (b) may make the determination as to whether the asylum seeker is recognised as a refugee on the basis of the information, evidence and submissions provided by the asylum seeker; and
- (c) may decline to make a determination if the asylum seeker has declined to provide a personal identifier reasonably required by the Secretary.
- 30 (4) If an asylum seeker which is required to attend an interview fails to attend the interview, the Secretary may determine whether the asylum seeker is recognised as a refugee without conducting the interview.

8 Subsequent asylum claim

- (1) A person may not make an application under section 5 if a determination has previously been made under section 6(1) with respect to that person.

- (2) Despite section 8(1), the Secretary may permit a person to make an application under section 5 if the Secretary is satisfied that the grounds of the application either:
- (a) have not been substantially determined by the Secretary, nor by the Tribunal; or
 - (b) are based on a change in the person's circumstances since the previous application was finally determined, including the circumstances in a territory to which the applicant may be expelled or returned.
- (3) The Secretary is not under a duty to consider whether to exercise the power under section 8(2) in any circumstances.
- 10 (4) Neither the Tribunal, nor the Supreme Court, has any jurisdiction in respect of a decision of the Secretary not to exercise, or not to consider the exercise of, the Secretary's power under section 8(2).
- (5) A request that the Secretary exercise, or consider the exercise of the Secretary's power under section 8(2) is not, for the purposes of section 11 of the Immigration Act 2014, an application to the Secretary to be recognised as a refugee or to be given derivative status.

9 Notice of determination

20 As soon as practicable after making a determination as to whether an asylum seeker is recognised a refugee or is owed complementary protection, or a decision to decline to make a determination, the Secretary must give the asylum seeker a notice specifying:

- (a) the relevant determination or decision; and
- (b) [Repealed]
- (c) if the asylum seeker has not been recognised as a refugee or is found to be owed complementary protection, or the Secretary declined to make a determination, the reasons for the determination or decision and details of the claimant's right to merits review.

10 Cancellation of refugee status

- 30 (1) The Secretary must cancel a person's recognition as a refugee if the Secretary is satisfied that:
- (a) the Refugees Convention as modified by the Refugees Protocol ceases to apply to the person; or
 - (b) the recognition given by the Secretary was procured by fraud, forgery, false or misleading representation, or concealment of relevant information.

- (2) As soon as practicable after cancelling a person's recognition as a refugee, the Secretary must give the person a notice specifying:
- (a) the decision; and
 - (b) the reasons for the decision; and
 - (c) details of the person's right to merits review.
- (3) The Secretary may cancel a person's recognition as a refugee if requested by the person while in Nauru.

13 Appointment of members

- 10 (1) The members of the Tribunal must be appointed by Cabinet in consultation with the Chief Justice.
- (2) A person is eligible for appointment as the Principal Member or as a Deputy Principal Member if the person meets one or more of the following requirements:
- (a) the person is qualified to be appointed a judge of the Supreme Court.
 - (b) the person is or has been a member of the Tribunal.
 - (c) the person has been admitted as:
 - (i) a barrister or solicitor in England, Northern Ireland or the Republic of Ireland, as an advocate, law agent or writer to the Signet in Scotland, as a barrister or solicitor, or as a barrister and solicitor, in Australia or New Zealand; or
 - 20 (ii) a legal practitioner (whether described as a barrister, a solicitor or in any other way) in any other country duly notified by the Minister for the purposes of section 5(a) of the Legal Practitioners Act 1973;

and the person has:

 - (iii) has been so admitted for not less than five years; and
 - (iv) not been struck off the roll of practitioners, or equivalent list, maintained by any Court in which the person was so admitted.
- (3) The Regulations may prescribe other eligibility requirements for appointment as a member.
- 30 (4) Subject to this Part, a member holds office for the period, not exceeding 5 years, specified in the instrument of appointment, and is eligible for reappointment.

- (5) A member holds office on such other terms and conditions as are determined by the Minister in writing.

14 Principal Member

- (1) The Principal Member is the executive officer of the Tribunal and is responsible for the overall operation and administration of the Tribunal.
- (2) The Principal Member is responsible for allocating the work of the Tribunal among the members (including himself or herself).
- (3) The Principal Member may give directions in writing, not inconsistent with this Act, as to:

- 10 (a) the operations of the Tribunal; and
- (b) the conduct of reviews by the Tribunal.

- (4) The Tribunal should, as far as practicable, comply with the directions.
- (5) However, non-compliance by the Tribunal with a direction does not affect the validity of a decision of the Tribunal.

19 Constitution for merits review

- (1) For the purpose of a particular review, the Tribunal is to be constituted by:
- (a) the Principal Member or a Deputy Principal Member, who will preside; and
- (b) 2 other members.

- 20 (2) The Principal Member must determine who is to constitute the Tribunal for the purpose of a particular review.

27 Certain Tribunal decisions to be published

- (1) A decision of the Tribunal that the Principal Member thinks is of general interest may be published.
- (2) The published decision must not identify an applicant or a relative or other dependent of an applicant.

31 Application for merits review by Tribunal

- (1) A person may apply to the Tribunal for merits review of any of the following:
- (a) a determination made under section 6(1);

- (b) a decision to cancel a person's recognition as a refugee made under section 10(1).
- (2) The application must be made:
 - (a) within 28 days after the person receives notice of the determination or decision; and
 - (b) in the form prescribed by the Regulations.
- (3) The Principal Member may extend the time in which an application for review can be lodged if the Principal Member is satisfied that there are compelling circumstances.
- 10 (4) No fee may be charged for the making or hearing of the application.
- (5) An application made by a person under section 31(1)(a), that has not been determined at the time the person is given a Refugee Determination Record, is taken to have been validly determined at that time.

32 Secretary to be notified of application and to provide information

- (1) If an application for review is made to the Tribunal, the Registrar must, as soon as practicable, give the Secretary written notice of the making of the application.
- (2) The Secretary must, within 10 working days after being notified of the application (or such longer period as the Presiding Member may allow), give to the Registrar the prescribed number of copies of a statement about the determination or decision under review that:
 - (a) sets out the findings of fact made by the person who made the determination or decision; and
 - (b) refers to the evidence on which those findings were based; and
 - (c) gives the reasons for the determination or decision.
- (3) The Secretary must, as soon as is practicable after being notified of the application, give to the Registrar each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the determination or decision.

33 Period within which Tribunal must conduct merits review

- 30 (1) The Tribunal must complete a review of a determination or decision within 90 days after the day on which the Secretary gives the Registrar the documents relevant to the review.

- (2) Failure to comply with this section does not affect the validity of a decision on an application for merits review.

34 **Decision of Tribunal on application for merits review**

- (1) The Tribunal may, for the purposes of a merits review of a determination or decision, exercise all the powers and discretions of the person who made the determination or decision.

- (2) On a merits review of a determination or decision, the Tribunal may:

- (a) affirm the determination or decision; or
 (b) vary the determination or decision; or

- 10 (c) remit the matter to the Secretary for reconsideration in accordance with directions or recommendations of the Tribunal;

- (d) set the determination or decision aside and substitute a new determination or decision.

- (e) determine that a dependent, of a person in respect of whom the determination or decision was made, is recognised as a refugee or is owed complementary protection.

- (3) If the Tribunal:

- (a) varies the determination or decision; or

- 20 (b) sets aside the determination or decision and substitutes a new determination or decision;

the determination or decision as varied or substituted is taken (except for the purpose of appeals from the decisions of the Tribunal) to be a determination or decision of the Secretary.

- (4) The Tribunal must give the applicant for review and the Secretary a written statement that:

- (a) sets out the decision of the Tribunal on the review; and

- (b) sets out the reasons for the decision; and

- (c) sets out the findings on any material questions of fact; and

- 30 (d) refers to the evidence or other material on which findings of fact were based.

- (5) A decision on a review is taken to have been made on the date of the written statement.

35 Parties may give information or written arguments to Tribunal

- (1) An applicant for review by the Tribunal may give the Registrar:
- (a) a statutory declaration in relation to a matter of fact that the applicant wishes the Tribunal to consider; and
 - (b) written arguments relating to the issues arising in relation to the determination or decision under review.

- 10 (2) The Secretary may give the Registrar written argument relating to the issues arising in relation to the determination or decision under review.

39 Failure of applicant to respond

If a person is invited by the Tribunal to give information or to comment or respond to information but does not do so as required, the Tribunal may make a decision on the review without taking further action to obtain the information, comment or response.

40 Tribunal must invite applicant to appear

- (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the determination or decision under review.
- 20 (2) Subsection (1) does not apply if:
- (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
 - (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it.
- (3) An invitation to appear before the Tribunal must be given to the applicant with reasonable notice and must:
- (a) specify the time, date and place at which the applicant is scheduled to appear; and
 - (b) invite the applicant to specify, by written notice to the Tribunal given
- 30 within 7 days, persons from whom the applicant would like the Tribunal to obtain oral evidence.

- (4) If the Tribunal is notified by an applicant under subsection (3)(b), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice.

41 Failure of applicant to appear before Tribunal

- (1) If the applicant:
- (a) is invited to appear before the Tribunal; and
 - (b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear;

10 the Tribunal may make a decision on the review without taking further action to allow or enable the applicant to appear before it.

- (2) This section does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review, in order to enable the applicant's appearance before it as rescheduled.

42 Rights conferred by this Part additional to other rights

The rights of a person provided under this Part for a review of a determination or decision are in addition to, and not in derogation of, any other right that the person may have for review of the determination or decision.

43 Jurisdiction of the Supreme Court

- 20 (1) A person may appeal to the Supreme Court against a decision of the Tribunal on a point of law.
- (1A) Despite section 43(1), the Supreme Court has no jurisdiction in respect of a determination by the Tribunal that a person is not to be given derivative status.
- (2) The parties to the appeal are the appellant and the Republic.
- (3) The notice of appeal must be filed within 42 days after the person receives the written statement of the decision of the Tribunal.
- (4) The notice of appeal must:
- (a) state the grounds on which the appeal is made; and
 - (b) be accompanied by the supporting materials on which the appellant relies.
- 30 (5) The Supreme Court may by Order, through the Registrar or a Judge, extend the period in subsection (3) as may be considered appropriate if:

- (a) an application for the Order has been made in writing to the Supreme Court specifying that the appellant considers it necessary in the interest of the administration of justice to make that Order; and
- (b) the Supreme Court is satisfied that it is necessary in the interests of the administration of justice to make that Order.

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.

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(2) If the Court makes an order remitting the matter to the Tribunal, the Court may also make either or both of the following orders:

- (a) an order declaring the rights of a party or of the parties;
- (b) an order quashing or staying the decision of the Tribunal.

46 **Period within which Tribunal must reconsider matter remitted**

(1) If a matter is remitted to the Tribunal for reconsideration, the Tribunal must complete its reconsideration within 90 days.

(2) Failure to comply with this section does not affect the validity of a decision on an application for merits review.

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47 **Rights conferred by this Part additional to other rights**

The rights of a person provided under this Part for an appeal against a decision are in addition to, and not in derogation of, any other right that person may have for review of the decision.

48 **Confidentiality**

(1) The Secretary and the Supreme Court must maintain confidentiality at all times as to:

- (a) the identity of an asylum seeker whose application as a refugee is being considered under this Act; and
- (b) the particulars of the determination of the application or any other matter relevant to the determination.

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(2) Subsection (1) does not prevent disclosure of particulars:

- (a) to a person necessarily involved in determining the relevant determination, including any appeal; or
- (b) to a public officer whose functions in relation to the asylum seeker require knowledge of those particulars; or
- (c) to the United Nations High Commissioner for Refugees or a representative of the High Commissioner; or
- (d) in dealing with government officials of other countries, not being the country of feared persecution.

10

- (3) Subsection (1) does not apply if an asylum seeker has waived his or her rights under that subsection.

51 Principal Member's obligation to report to Minister

- (1) The Principal Member must give a report to the Minister, within 45 days after the end of each reporting period, about each occasion on which the Tribunal has not been able to complete a review or reconsideration of matters remitted to the Tribunal within the required period (see section 33 and section 46).

- (2) A report must include:

- (a) the date of each application for review or the date on which the matter was remitted to the Tribunal; and
- (b) the reasons why the decisions were not reviewed or the matters reconsidered within the required period.

20

- (3) A report must not include:

- (a) the name of any current or former applicant for review; or
- (b) information that may identify such an applicant; or
- (c) the name of any other person connected in any way with an application for review; or
- (d) information that may identify that other person.

- (4) A report may include other information that the Principal Member thinks appropriate.

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- (5) The Minister must cause a copy of a report under this section to be tabled in Parliament within 4 sitting days after the day on which the Minister receives the report from the Principal Member.

- (6) For the purposes of this section, each of the following is a reporting period:

- (a) the period that starts on the day that the Tribunal is first constituted and ends 4 months after that day;
- (b) each subsequent period of 4 months.

Nauru (High Court Appeals) Act 1976 (Cth) (as in force currently)

8 Form of judgment on appeal

10 The High Court in the exercise of its appellate jurisdiction under section 5 may affirm, reverse or modify the judgement, decree, order or sentence appealed from and may give such judgement, make such order or decree or impose such sentence as ought to have been given, made or imposed in the first instance or remit the case for re-determination by the court of first instance, by way of a new trial or rehearing, in accordance with the directions of the High Court.