IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M 27 of 2017

BETWEEN:

HFM045
Appellant

and

Republic of Nauru
Respondent

RESPONDENT'S SUBMISSIONS

10

Filed on behalf of the respondent
Republic of Nauru
Level 30
35 Collins Street
Melbourne VIC 3000

Telephone: 03 9900 6221
E-mail: rogan.oshannessy.nrst@gmail.com
Contact: Rogan O'Shannessy

PART I PUBLICATION

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

PART II ISSUES

2. This Court's jurisdiction is not in issue between the parties. Provided that the appeal does not involve the interpretation or effect of the Constitution of Nauru, the High Court has jurisdiction to hear and determine the appeal.[1] The appellant does not suggest that the appeal involves the interpretation or effect of the Constitution of Nauru.

3. The issues raised by the Notice of Appeal are otherwise accurately stated in the appellant's submissions at [3]-[4].

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. The respondent (the **Republic**) has considered whether or not notices should be given pursuant to s 78B of the *Judiciary Act 1903* (Cth). It considers that no such notices are necessary.

PART IV FACTS

Introduction

5. The appellant is a citizen of Nepal. He arrived at Christmas Island in September 2013 and was transferred to Nauru in November 2013.

The appellant's protection claims

6. On 29 January 2014, the appellant made a claim for protection under the Act.

---

1 Article 57(2) of the Constitution of Nauru; ss 44 and 45 of the *Appeals Act 1972* (Nr); section 76(ii) of the Commonwealth Constitution; ss 5 and 8 of and the Schedule to the *Nauru (High Court Appeals) Act 1976* (Cth). See also *Ruhani v Director of Police* [2005] HCA 42; (2005) 222 CLR 489, 500-051 [10] and [14], 511-512 [49]-[51], 522 [89], 528 [108], 543 [165] and 569 [274]. Cf. paragraphs 2 and 15-17 of the appellant's submissions filed with the High Court on 12 April 2017 (the **appellant's submissions**).

7. In broad terms, the appellant claimed that:

   (a) upon any return to Nauru, he would face serious harm from Maoists and "Mongols" on account of his political involvement with the Nepalese Rastriya Prajatantra Party (the **RPP**) and his membership of the Chhetri tribe;[2]

   (b) he had previously experienced harassment and intimidation by Maoists, and Mongols had assaulted him and stolen his property; and

   (c) the Nepalese authorities would not afford him effective protection.

10 **The Secretary's determination**

8. On 12 September 2014, the Secretary of the Department of Justice and Border Control (the **Secretary**) determined that the appellant is not a refugee and is not owed complementary protection under the Act.

The Tribunal's review

9. On 11 November 2014, the appellant applied to the Tribunal for review of the Secretary's determination. He lodged a statement in support of his review application and made written submissions. He also attended a hearing before the Tribunal on 2 December 2014, at which time he gave evidence and made oral submissions.[3]

20 **The Tribunal's decision**

10. On 16 January 2015, the Tribunal affirmed the Secretary's determination that the appellant is not a refugee and is not owed complementary protection.

11. The Tribunal was not satisfied that the appellant had been harmed in Nepal in the past due to his political opinion or ethnicity. The Tribunal was also not satisfied that the appellant would face persecution if he returned to Nepal and resumed any involvement with the RPP.

---

2 A claim relating to the appellant's Hindu religion was later not pressed by him.

3 At all times before the Secretary and the Tribunal, the appellant was represented.

12. The Tribunal rejected the appellant's claim to have received an extortion demand from members of the Kirat Janabadi Workers Party (the **KJWP**). The Tribunal further found that, even if the appellant had received such an extortion demand and had not complied with it, members of the KJWP had not done anything. In any event, the Tribunal was not satisfied that the Nepalese authorities would be unwilling or unable to provide the appellant with protection from KJWP members.

13. The Tribunal therefore rejected the appellant's claims to be a refugee.

14. The Tribunal also rejected the appellant's complementary protection claims. The Tribunal was not satisfied that the appellant had suffered serious harm in the past, or was likely to suffer such harm in the future, for a reason in the Refugees Convention 'or for any other particular reason'. The Tribunal was not satisfied that the appellant had 'put forward any circumstances or reasons that would engage further protection consideration'.

The proceeding before the Supreme Court

15. The appellant then appealed to the Supreme Court from the Tribunal's decision. Among other things, he claimed that:

    (a) the Tribunal failed to comply with s 37 of the Act or otherwise failed to afford him procedural fairness; and

    (b) the Tribunal misapplied the law relating to complementary protection.

The Supreme Court's decision

16. On 22 February 2017, the Supreme Court delivered its judgment. The Supreme Court dismissed the appellant's appeal.

17. In respect of the claimed failure to afford procedural fairness, the appellant complained that the Tribunal had not given him country information mentioned in its decision. That country information related to improved stability and security in Nepal and the representation of Chhetris in the Nepalese army. The Supreme Court was generally

satisfied that the Tribunal had given the appellant a proper opportunity to be heard. The Supreme Court did not refer to s 37 of the Act. Nor did the Supreme Court make any specific finding about the country information relating to the composition of the Nepalese army. The Supreme Court found that, in respect of improved stability and security in Nepal, the Tribunal had discussed this issue with the appellant at the hearing before the Tribunal, made him aware of its preliminary views, and invited his response.

18. In relation to the claimed misapplication of the legal test for complementary protection, the appellant asserted that the Tribunal's findings did not involve any assessment of what, if any, 'real chance' or 'real possibility' of harm might exist in Nepal. He asserted that the Tribunal had imposed a stricter requirement of 'likelihood' of harm and had therefore erred. The Supreme Court rejected these assertions and found that, read fairly and as a whole, the Tribunal's decision did not disclose any misunderstanding of the relevant legal test.

The appeal to the High Court

19. On 8 March 2017, the appellant appealed to the High Court.

PART V LEGISLATION

20. The Republic may refer to certain legislative provisions other than or in addition to the legislative provisions annexed to the appellant's submissions filed on 12 April 2017. Those further legislative provisions are the *Refugees Convention (Derivative Status and Other Measures) Act 2016* (Nr) and the *Refugees Convention (Amendment) Act 2017* (Nr).

PART VI ARGUMENT

Introduction

21. In broad terms, the appellant advances the following two grounds of appeal before the High Court:

    (a) he claims that the Supreme Court erred in failing to find that the

Tribunal did not comply with s 37 of the Act and therefore denied him procedural fairness;

(b) he claims that the Supreme Court erred in holding that, in determining his complementary protection claims, the Tribunal did not misapply the law.

22. In respect of the first ground, the appellant makes two main arguments. First, he argues that the Supreme Court erred in failing to consider s 37 of the Act and the Tribunal's compliance with that provision. Secondly, he argues that the Supreme Court erred in holding that, in relation to certain 'country information', the Tribunal did not deny him procedural fairness.

23. In respect of the second ground, the appellant argues, among other things, that the Tribunal did not distinguish between the legal tests relating to, on the one hand, protection as a refugee and, on the other hand, complementary protection.

The first ground – procedural fairness

24. The appellant first claims that s 37 of the Act applied to the Tribunal's review in this instance. Section 37 stated that the Tribunal must:

(a) give to an applicant for review 'clear particulars of information that the Tribunal considers would be the reason, or a part of the reason, for affirming the determination or decision that is under review';

(b) ensure that the applicant 'understands why it is relevant to the review, and the consequences of it being relied on in affirming the determination or decision that is under review'; and

(c) invite the applicant in writing to comment on or respond to it.

25. Contrary to the appellant's claim otherwise, s 37 did not apply to the Tribunal's review.

26. Section 24 of the *Refugees Convention (Derivative Status and Other Measures) Act 2016* (Nr) repealed s 37 of the Act. There was, at the time

of that enactment, some uncertainty about the date of effect of the repeal of s 37.[4]

27. As a result of that uncertainty, the *Refugees Convention (Amendment) Act 2017* (Nr) (the **amending Act**) was enacted. Section 4 of the amending Act provides:

> **Retrospective commencement of the repeal of section 37**
>
> The repeal of section 37 of the principal act, effected by section 24 of the *Refugees Convention (Derivative Status and Other Measures) Act 2016*, is taken to have commenced on 10 October 2012.[5]

28. The appellant applied to the Tribunal on 11 November 2014. However, s 37 has been repealed with retrospective effect from 10 October 2012. In this regard, s 4 of the amending Act is unequivocal. Section 37 did not apply to the Tribunal's review in this instance.

29. The Supreme Court therefore did not err in considering the appellant's procedural fairness arguments by reference to general principles and not by reference to s 37. Further, the specific failures by the Tribunal to comply with requirements of s 37, alleged in the appellant's submissions, do not constitute errors of law.

30. The appellant's statement of the issues, and the substantive arguments advanced in his submissions at [37]-[56], appear to rely solely on the terms of s 37. To the extent that any other denial of procedural fairness is alleged, the Republic would respond as follows.

31. The Tribunal was obliged to give the appellant procedural fairness.[6] The nature and content of that obligation depended upon the particular circumstances of this case.[7] Procedural fairness often requires that a

---

4 See ss 2, 5, 23 and 24 of *Refugees Convention (Derivative Status and Other Measures) Act 2016* (Nr). Cf. the Explanatory Memorandum to the Refugees Convention (Derivative Status and Other Measures) Bill 2016.

5 See also the Explanatory Memorandum to the Refugees Convention (Amendment) Bill 2017. See further ss 5 to 7 of the amending Act, which concern the effect of the retrospective appeal of s 37.

6 See s 22 of the Act.

7 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*

person be given the opportunity of ascertaining the relevant issues and commenting on adverse information that is credible, relevant and significant.[8]

32. The appellant first claims that the Tribunal failed to give him an opportunity to comment on a country information report about changed circumstances in Nepal in relation to, in particular, improved stability and security (the **changed circumstances report**). The Tribunal referred to the changed circumstances report in the reasons for its decision.[9]

33. The Supreme Court found that, at the hearing before the Tribunal, the Tribunal put the substance of the changed circumstances report to the appellant for his response.[10] That finding was, having regard to the transcript of the Tribunal's hearing, well open.[11]

34. In any event, procedural fairness did not require the Tribunal to put the changed circumstances report to the appellant for his response. Prior to applying to the Tribunal for review of the Secretary's determination, the appellant was on notice of the existence, contents and potential relevance of the changed circumstances report. In particular, the Secretary expressly referred, in his determination, to the changed circumstances report on a number of occasions.[12] Moreover, the Secretary referred to the changed circumstances report in support of his assessment of the current circumstances in Nepal.

35. Secondly, the appellant claims that the Supreme Court failed to consider his argument that the Tribunal did not give him an opportunity to

---

[2006] HCA 63; (2006) 228 CLR 152, [26]; *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* [2001] HCA 22; (2001) 206 CLR 57, [30]-[32]; *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* [1963] HCA 41; (1963) 113 CLR 475, 504.

8 *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550, 628; *Commissioner for ACT Revenue v Alphaone Pty Ltd* [1994] FCA 1074; (1994) 49 FCR 576, 590-592.

9 See paragraph 43 of the Tribunal's decision.

10 *HFM045 v Republic of Nauru* [2017] NRSC 12, [40].

11 Ibid. See the transcript of the hearing before the Tribunal on 2 December 2014 and, in particular, pages 44 to 49.

12 See, for instance, pages 4, 9 (footnote 4) and 10 (footnotes 6 and 7) of the Secretary's determination.

comment on country information about representation of Chhetri in the Nepalese army (the **Nepalese army information**). The Supreme Court referred to this argument in its decision.[13] The Supreme Court then generally rejected any claimed denial of procedural fairness.[14] That general finding addressed the appellant's specific argument about the Nepalese army information.

36. No appealable error attends the Supreme Court's rejection of the appellant's argument about the Nepalese army information. The Tribunal referred to the Nepalese army information in the reasons for its decision. In this regard, the Tribunal stated that:

> The applicant wrote in his last statement to the Tribunal that that [sic.] "since 2007, members of the Maoist militia were absorbed into the Nepali police force and army. These are militants who used to kill royalists in support of the Maoists. ... These Maoists would still have retained their positions throughout the police force and the army since the recent November 2013 election, which means they would be Maoist supporters. There it is very unlikely they would protect me from harm from the Maoists who are persecuting me." The Tribunal rejects this as a mere assertion by the applicant. It also notes that of the government security forces overall, "Chhetris are heavily represented in the army, accounting for 43.64 per cent of personnel as of 2009.[15]

37. At the conclusion of this paragraph, a footnote referred to a page on the Nepalese army's website entitled 'State of inclusiveness in Nepalese Army'.

38. Any failure by the Tribunal to give the Nepalese army information to the appellant does not give rise to a denial of procedural fairness. It is not clear that the Nepalese army information was adverse to the appellant. In any event, and for two reasons, that information was only capable of bearing on the issue of state protection and, in that regard, was not 'significant'.

---

13 *HFM045 v Republic of Nauru* [2017] NRSC 12, [37] and [41].

14 *HFM045 v Republic of Nauru* [2017] NRSC 12, [44]. In any event, the High Court is now able to consider for itself the appellant's argument about the Nepalese army information.

15 See paragraph 39 of the Tribunal's decision.

39. First, and irrespective of any finding about the adequacy of Nepalese state protection, the Tribunal did not accept that the appellant would face a real possibility of serious harm in Nepal in the reasonably foreseeable future.[16] The Tribunal's finding about the effectiveness of state protection concerned a separate, distinct and independent basis for its decision. Any error in respect of the Tribunal's finding about the effectiveness of state protection could not affect the exercise of power by the Tribunal.[17]

40. Secondly, and in any event, the Tribunal rejected, as 'mere assertion', the appellant's claim that he could not obtain state protection in Nepal. It was entitled to do so.[18] The Tribunal therefore did not need to consider, at all, the Nepalese army information – any reference to that information was otiose.

41. The appellant otherwise argues that there was a denial of procedural fairness because the Tribunal stated that it had 'sought independent information'.[19] The appellant alleges that the Tribunal failed to invite him to comment on that information.

42. The appellant concedes that this argument was not advanced before the Supreme Court.[20] He should not be permitted to advance this argument for the first time on appeal to the High Court. The appellant was represented before the Supreme Court and has given no explanation for his failure to advance the argument at that time. Had the argment been raised below, evidence might have been adduced by the republic.[21]

43. In any event, and in the absence of any indication of what 'independent information' was sought and obtained by the Tribunal, the argument

---

16 See paragraphs 37 and 45 of the Tribunal's decision.

17 Cf. *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323, [82].

18 See, for instance: *Selvadurai v Minister for Immigration and Ethnic Affairs* [1994] FCA 1105; (1994) 34 ALD 347, 348; *Kopalapillai v Minister for Immigration and Multicultural Affairs* [1998] FCA 1126; (1998) 86 FCR 547, 558-559.

19 See paragraph 34 of the Tribunal's decision.

20 See paragraph 51 of the appellant's submissions.

21 *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1, 7-8.

cannot succeed. For instance, in the absence of any identification of the information, it cannot be said that that information was:

(a) adverse information that was credible, relevant and significant; or

(b) information of which the appellant was unaware.

The second ground – complementary protection

44. The appellant claims that the Supreme Court erred in finding that the Tribunal's decision discloses no misunderstanding of the legal test relating to complementary protection. On a fair reading of the Tribunal's decision as a whole,[22] the Tribunal did not misapply the law relating to complementary protection. Such a reading of the Tribunal's reasons shows that the Tribunal was aware that the test involved a 'real possibility' of harm in Iran and the Tribunal did not impose any stricter requirement.

45. In its decision, the Tribunal correctly referred to the definition of 'complementary protection' in s 3 of the Act.[23] The Tribunal dealt separately with, on the one hand, the appellant's claimed status as a refugee and, on the other hand, the existence or otherwise of complementary protection obligations. It recognised the distinction between those two concepts.

46. The Tribunal was nonetheless entitled, when assessing the appellant's complementary protection claims, to adopt findings of fact made earlier in its decision. The appellant's complementary protection claims relied on the same facts as his refugee claims. That is, the appellant did not, in respect of his complementary protection claims, advance factual matters additional to the factual matters the subject of his refugee claims.[24] In finding that it was not satisfied that the appellant:

---

22 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259, 271-272 and 291.

23 See paragraph 4 of the Tribunal's decision.

24 See, in this regard, the written submissions prepared by the appellant's representative and lodged with the Tribunal on or around 29 November 2014.

(a) would face a risk of serious harm in the future "for any Convention reason *or any other particular reason*" (emphasis added); or

(b) had put forward any circumstances or reasons that would engage further protection consideration;[25]

the Tribunal did not, in this context, misapply the law. The Supreme Court was correct to find as much.

Conclusion

47. The appeal should therefore be dismissed.

PART VII TIME ESTIMATE FOR THE RESPONDENT'S ORAL ARGUMENT

48. The estimated duration of the presentation of the respondent's oral argument is 1.5 hours.

Dated: 10 May 2017

GEOFFREY KENNETT
Telephone: 02 9221 3933
E-mail: kennett@tenthfloor.org
Facsimile: 02 9221 3724

RICHARD KNOWLES
Telephone: 03 9225 8494
E-mail: rknowles@vicbar.com.au
Facsimile: 03 9225 8668

[25] See paragraph 49 of the Tribunal's decision.