

BRF038 v. REPUBLIC OF NAURU (M28/2017)

Court appealed from: Supreme Court of Nauru
[2017] NRSC 14

Date of judgment: 22 February 2017

This appeal is from a judgment of the Supreme Court of Nauru under the *Refugees Convention Act 2012* (Nr) ('the RCA').

The Appellant is an asylum seeker from Somalia who arrived in Christmas Island and was transferred to Nauru in September 2013, where he remains.

On 26 February 2014 the Appellant made an application to Nauru for refugee status determination under the RCA, relying on grounds based on his fear of persecution as a member of the Gabooye tribe. He also sought protection based on his actual or imputed political opinion as an opponent of Al-Shabaab, and feared abduction upon his return to Somalia. He further feared persecution on the basis that his return after a prolonged period of absence from Somalia put him at greater risk of harm at the hands of Al-Shabaab.

On 21 September 2014 the Secretary of the Nauru Department of Justice and Border Control determined that the Appellant was not a refugee and was not entitled to complementary protection.

The Appellant made an application for merits review of that decision to the Refugee Status Review Tribunal ('the Tribunal'). The Tribunal affirmed the Secretary's determination on 15 March 2015. The Appellant then appealed to the Supreme Court of Nauru on points of law comprising a failure by the Tribunal to comply with s 37 of the RCA and thus afford him procedural fairness and the misapplication of the law as to persecution.

At the time of the Tribunal's decision, s 37 of the RCA required the Tribunal to give to the Appellant "clear particulars of information that the Tribunal considers would be the reason, or part of the reason, for affirming the determination that is under review" and to give the Appellant the opportunity to comment on that information. The Supreme Court found that the Tribunal had "made a factual finding in relation to the composition of the police forces in Somaliland" and accepted that the information on which that finding was made had not been put to the Appellant. The Supreme Court further found that the information was "not critical to the decision" and that therefore there was "no breach of procedural fairness...on behalf of the Tribunal."

The Tribunal had accepted that the Appellant suffered significant discrimination on the basis of his Gabooye ethnicity, but found that the discrimination did not amount to persecution under the *Refugees Convention Act* and therefore under the RCA. The Supreme Court upheld the Tribunal's approach in this regard.

The Supreme Court dismissed the appeal and affirmed the Tribunal's decision.

On 8 March 2017, the Appellant appealed to the High Court of Australia pursuant to s 5 of the *Nauru (High Court Appeals) Act 1976* (Cth). This Act implements the Agreement between the Governments of Australia and Nauru relating to appeals to the High Court of Australia from the Supreme Court of Nauru signed on 6 September 1976. It provides that in civil cases in which the Supreme Court of Nauru was exercising its original (rather than appellate) jurisdiction such as this one, an appeal lies to the High Court as of right against any final judgment.

The grounds of the appeal are:

- That the Supreme Court erred in its application of the principles of procedural fairness required by ss 22 and 37 of the RCA, in finding that the Tribunal was not required to put to the Appellant material relating to the tribal composition of the Somali police force before making an adverse finding relating to that information; and
- That the Supreme Court erred in applying the incorrect test for persecution under international law for the purposes of an assessment under s 6 of the RCA.