IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No S46 of 2018

B E T W E E N:

TTY167

Appellant

and

THE REPUBLIC OF NAURU

Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: INTERNET PUBLICATION

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

Part II: SUBMISSIONS

2. The Appellant requires leave to raise the grounds now before the Court. Leave should be granted because the Appellant had no legal representation below and, the grounds are meritorious.

3. The Appellant also seeks an enlargement of time for the filing of the Notice of Appeal, under rule 42.01 of the *High Court Rules* 2004 *(Cth)*. To the extent that the latter raises a question of the jurisdiction of the Court, the Appellant endorses the submissions of the Respondent in this matter at [8]-[9], and adopts the written submissions of the Appellant in the case of *WET040*. He only adds that, unlike in *WET040*, the Notice of Appeal in this case was filed the day before the termination of the treaty, by which time there was limited opportunity to obtain an order for enlargement.

Ground 1: Failure to comply with s. 40 of the *Refugee Convention Act 2012 (Nr)*

4. Section 40(1) of the *Refugee Convention Act* 2012 (Nr) (the **Act**) provided in plain terms that the Tribunal was required to invite "the applicant" to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review **[JBA Vol 1, 24-25].**

5. This section was not complied with. The only invitation, to the only hearing of the Tribunal in this case, was sent to "Blaise Alexander, Team Leader CAPS" **[AFM 47].** There is no provision in the Act to permit service upon another person. In the result, there was an error of law [**s 43(1) the Act, JBA Vol 1, 26**].

6. The material impact of this error of law in this case is unclear. To the extent that the materiality of the error might impact on relief, and given that this ground was not raised below, the appropriate course is to remit the matter to the Supreme Court of Nauru for that question to be tried, pursuant to s 8 of the *Nauru (High Court Appeals) Act 1976 (Cth)* **[JBA Vol 1, 220; *Clodumar* JBA Vol 2, 244 [35]-[37], 257 [77]-[78]].**

Ground 3: Unreasonableness

7. Section 22 of the Act required the Tribunal to act according to the principles of natural justice and the substantial merits of the case **[JBA Vol 1, 17]**. It is well recognised that an oral hearing is an important part of this process.

8. Section 41 permitted, but did not require, the Tribunal to decide a case before it without having heard from the protection claimant **[JBA Vol 1, 25]**. That discretionary power must be exercised in a way that is legally reasonable **[JBA Vol 2, *SZVFW* [4], [53], [89]]**.

9. The Tribunal did not articulate reasons for its decision to proceed without taking any further action, other than to state that no information had been provided as to why the Appellant had failed to attend the hearing, nor had it received an application to reschedule the hearing. **[Tribunal decision CAB 19 [9]]**

10. The Appellant lost the opportunity to address the concerns which the Tribunal ultimately noted in its decision, which concerns formed a material part of its lack of satisfaction as to his claims. **[Tribunal decision CAB 25 [32], 26 [34], [35], 27 [37], [39], 28 [41]]**.

11. The Tribunal's decision was infected by legal unreasonableness. That conclusion can only be reached by looking at the particular circumstances of the case **[*SZVFW* [9], [59], [82]-[84]]**, as well as the particular statutory context **[*SZVFW* [12], [54], [68], [69], [79], [80], [88]]**.

12. The decision was unreasonable, given the following factors which, together, indicate that the Appellant was heavily engaged in the process of pursuing his protection claims, and that his non-attendance was out of character **[*Kaur* JBA Vol 2, 277 [50]; *SZVFW* [121]]**:

    (a) The Appellant made an application for a Refugee Status Determination (**RSD**), on 20 September 2014 **[AFM 17-33]**, made a statement in support of his claims **[AFM 35-39]**, and participated in a Transfer Interview with a departmental officer, on 8 October 2014 **[AFM 4-16]**;

    (b) He asked, through his then legal representative, for his RSD interview to be rescheduled on the basis that he was unwell, saying that he was eager to attend his interview **[AFM 40]**, provided documents to the RSD Officer **[AFM 42-43]**, and later attended a RSD interview, on 11 December 2014 **[RSD decision CAB 8, ln. 45]**;

    (c) He applied to the Tribunal on 15 December 2015 **[AFM 45]** and later provided a Further Statement to the Tribunal, taking issue with the primary decision, and amplifying his claims; **[AFM 49-52]**;

    (d) A detailed submission was filed by a solicitor from the firm Craddock Murray Neumann, dated 4 May 2016 **[AFM 54-92]**. This was two days before the scheduled hearing. The submission made clear that the Appellant proposed to avail himself of the opportunity to appear before the Tribunal **[AFM 79 [180]]**.

13. The Tribunal was aware that the Appellant claimed to have a history of mental illness, which included a claim that his memory had deteriorated **[Tribunal decision CAB 24**

[27]]. It said it was unclear as to why the Appellant was putting this forward: whether it went to explain the difficulty he had recounting his claims during his RSD interview, or would have difficulty participating in a Tribunal hearing. **[Tribunal decision CAB 25 [31]]**. Acting reasonably, this uncertainty would have been resolved.

14. The Tribunal's decision to proceed in the Appellant's absence was also unreasonable having regard to the following facts, which the Court can and should accept on judicial notice [***Deaido,* JBA Vol 2, 260**]:

    (a) Nauru is a small island,

    (b) There were only three places at which the Appellant could be residing, being Regional Processing Centre 1, 2 or 3;

    (c) There were limited places that the invited lawyer, or someone from her office, could be;

    (d) It was a simple task for the Tribunal to make an inquiry about where the Appellant and/or his legal representative might be, so as to determine the reason for his non-attendance.

15. There was no reason for the Tribunal to think that such an inquiry would be futile, that is, that he had abandoned his claims for protection, or no longer wished to engage with the Tribunal **[*SZVFW* [70], [141]]**.

16. The statutory context supports the conclusion that the decision of the Tribunal was legally unreasonable:

    (a) Section 22 of the Act does not contain an "efficiency[1]" provision (contra s. 420 of the *Migration Act*, **[*SZVFW* [13], [14], [68], [69], [140]]**);

    (b) There is no provision to permit deemed service of an invitation to appear upon an applicant for protection (contra ss. 441 and 441C of the *Migration Act*);

    (c) There is no provision to permit service of an invitation to appear upon an authorized representative and/or for that service to be taken as having been served on an applicant (contra ss. 379G, 441G, 473HG and 494D of the *Migration Act*);

    (d) There is no obligation to notify the decision maker of a change of address (no doubt because, under Nauruan law, asylum seekers are required to reside at a limited number of places) (contra s 52(3B) of the *Migration Act*, ***SZVFW* [141]**).

Dated: 7 November 2018

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1 If it be said that s. 33(1) of the Act was such a provision, the Tribunal did not send its hearing invitation until after the 90 day period had elapsed, further, s. 33(2) provides that non-compliance does not affect the validity of the Tribunal's decision.