HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER AND NETTLE JJ

HFM043 APPELLANT

AND

THE REPUBLIC OF NAURU RESPONDENT

HFM043 v The Republic of Nauru
[2018] HCA 37
15 August 2018
M146/2017

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Supreme Court of Nauru made on 22 September 2017 dismissing the appellant's appeal and, in its place, order that:*

   (a) *the appeal to the Supreme Court of Nauru be allowed; and*

   (b) *the appellant's application for review be remitted to the Refugee Status Review Tribunal, differently constituted, for determination according to law.*

3. *The respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of Nauru

Representation

C L Lenehan with M L L Albert and E R Tadros for the appellant (instructed by Allens)

C J Horan QC with P M Knowles for the respondent (instructed by Republic of Nauru)

CATCHWORDS

HFM043 v The Republic of Nauru

Migration – Refugees – Appeal as of right from Supreme Court of Nauru – Where Secretary of Department of Justice and Border Control determined appellant not refugee – Where Refugee Status Review Tribunal affirmed Secretary's determination – Where Supreme Court of Nauru held Tribunal made error of law – Where Supreme Court of Nauru dismissed appeal – Whether Supreme Court of Nauru erred holding remittal to Tribunal futile.

Words and phrases – "dependant", "derivative status", "futile", "refugee", "Refugee Determination Record", "remit", "taken to have been validly determined".

Refugees Convention Act 2012 (Nr), ss 3, 5, 6, 31(5).
Refugees Convention (Amendment) Act 2014 (Nr).
Refugees Convention (Derivative Status & Other Measures) (Amendment) Act 2016 (Nr).

1 KIEFEL CJ, GAGELER AND NETTLE JJ. This appeal from the Supreme Court of Nauru concerns the proper construction of s 31(5) of the *Refugees Convention Act* 2012 (Nr) ("the Act"), which was introduced into the Act by the *Refugees Convention (Derivative Status & Other Measures) (Amendment) Act* 2016 (Nr) ("the 2016 Amendment Act").

2 In January 2014 the appellant applied to the Secretary of the Department of Justice and Border Control of Nauru ("the Secretary") to be recognised as a refugee. Section 5(1) of the Act then provided that:

> "A person may apply to the Secretary to be recognised as a refugee."

Section 6(1) required that:

> "… the Secretary must determine whether an asylum seeker is recognised as a refugee."

Section 9 required that notice be given of that determination.

3 On 21 May 2014 the Act was amended by the *Refugees Convention (Amendment) Act* 2014 (Nr) ("the 2014 Amendment Act"). Section 5(1A) was inserted into the Act. It provided that in an application under s 5(1):

> "A person may include family members and dependents [sic] in an application for refugee status."

4 The notion of dependants of an applicant for refugee status having derivative status was confirmed by the definition of that term which was inserted in s 3:

> "***'derivative status'*** means the status granted to a family member of or dependant of a person who has been determined to be a refugee."

5 Section 6(1) was amended by inserting the words "or is owed complementary protection" after the words "as a refugee". Section 6 was further amended by inserting a new sub-s (2), which provided:

> "Dependents [sic] of an asylum seeker recognised as a refugee or owed complementary protection must be given derivative status."

6 In September 2014 the Secretary made a determination that the appellant was not a refugee and was not owed complementary protection. The appellant applied to the Refugee Status Review Tribunal for merits review of the determination under s 31(1)(a) of the Act. The Tribunal affirmed the Secretary's

determination in March 2015. The appellant appealed from that decision to the Supreme Court of Nauru.

7 In April 2016 the appellant married Mr B. He had been recognised as a refugee under Pt 2 of the Act. On 23 June 2016 the appellant's solicitors sent an email to the Republic of Nauru's Refugee Status Determination Lawyer stating that she "has recently wed and wishes to inform the Government of Nauru of her dependency on her husband". Three documents were attached to the email: a letter containing submissions in support of her "Application for Derivative Status" and supporting statements by the appellant and her husband.

8 On 4 August 2016 a document entitled "Refugee Determination Record" was issued. It stated that the Secretary had determined that the appellant is "recognised as a refugee" under Pt 2 of the Act. There is no dispute that this refers to her derivative status.

9 On 23 December 2016 the definition of "derivative status" was amended by the 2016 Amendment Act in terms:

> "'***derivative status'*** means the status given to a person, who is a dependent [sic] of a person who has been recognised as a refugee, given derivative status, or found to be owed complementary protection".

10 Section 5 was amended by substituting sub-s (1A) and inserting new sub-ss (1AA) and (1B):

> "(1A) A person may include one or more dependents [sic] 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."

11 Section 5(1B) was deemed to have commenced on 21 May 2014.

12 Section 6 was amended by substituting sub-s (1), repealing sub-s (2) and inserting new sub-ss (2A) and (2B) as follows:

> "(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.

…

(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.

(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."

13 Section 6(2B) was also deemed to have commenced on 21 May 2014.

14 The definition of "Refugee Determination Record" was inserted in s 3:

"… the certificate issued to a person who is owed international protection by Nauru under section 6(2A)".

15 The 2016 Amendment Act further inserted a new s 31(5), which was deemed to have commenced on 21 May 2014:

"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."

16 The Explanatory Memorandum to the 2016 Amendment Act said (page 3) that ss 6(2B) and 31(5) "give legislative effect to the existing practice, whereby the issue of a Refugee Determination Record to a person is taken to conclude the determination of all protection claims made by that person". It went on to say that the insertion of those sub-sections was made retrospective to the time when the concept of derivative status was introduced to the regime by the 2014 Amendment Act, namely 21 May 2014, "in order to ensure legislative support for the existing practice".

17 On 9 June 2017 the Supreme Court (Khan J) delivered its reasons on the appellant's appeal from the Tribunal. It 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[1]. His Honour sought and considered further submissions from the parties as to the orders which should be made in the matter. His Honour made an order dismissing the appellant's appeal because in his Honour's view[2]:

> "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."

18 The respondent concedes that the Supreme Court should also have found that the Tribunal failed to act according to the principles of natural justice by failing to inform the appellant that the question whether Burma (Myanmar) was one of the appellant's countries of former habitual residence was an issue in relation to the review, as the appellant alleges. But the respondent contends that Khan J was correct to hold that s 31(5) had the effect of rendering any orders allowing the appellant's appeal and remitting the matter to the Tribunal for rehearing futile.

19 On the hearing of this appeal a threshold question emerged. The question is whether s 31(5) applies to the appellant. The answer to this question is that it does not. It follows that Khan J erred in holding that s 31(5) meant that it would be futile to remit the matter to the Tribunal.

20 Section 31(5) applies only to persons who have been given a Refugee Determination Record as defined by s 3 of the Act following the 2016 Amendment Act. That definition confines the meaning of a Refugee Determination Record to a document that is issued to a person who is owed international protection by Nauru under s 6(2A). The document that the appellant was given in August 2016 was not and could not be a document given under s 6(2A), which came into effect on 23 December 2016. Unlike other provisions of the 2016 Amendment Act, neither s 6(2A) nor the definition of Refugee Determination Record was given retrospective effect. The document given to the appellant appears to be one which was in practice given in recognition of a dependant's derivative status but which had no basis in statute, as the Explanatory Memorandum referred to above recognised.

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1 *HFM043 v The Republic* [2017] NRSC 43 at [64]-[65].

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

21 The respondent contends for a purposive construction of s 31(5) on the basis that the Explanatory Memorandum discloses that s 31(5) was intended to apply both to a document issued under s 6(2A) and to a document of the kind given to the appellant. The obvious difficulty with this construction is that it is not one which the terms of s 31(5) admit. Its reference to a Refugee Determination Record can only be to that term as defined in the Act. There is no question as to the meaning of that term such that a circumstance for the use of extrinsic materials arises[3].

22 In order for s 31(5) to apply in the way for which the respondent contends it would be necessary to read additional words into it in terms which appear in italics below:

> "An application made by a person under section 31(1)(a), that has not been determined at the time the person is given *a document entitled Refugee Determination Record in the period between 21 May 2014 and 23 December 2016 or* a Refugee Determination Record *as defined by this Act*, is taken to have been validly determined at that time."

23 So much was conceded by the respondent.

24 The task of construction of a statute is of the words which the legislature has enacted. Any modified meaning must be consistent with the language in fact used by the legislature[4]. Words may be implied to explain the meaning of its text[5]. The constructional task remains throughout to expound the meaning of the statutory text, not to remedy gaps disclosed in it or repair it[6]. On any view, as was conceded, to construe s 31(5) in the manner contended for the respondent would go far beyond any implication of legislative intention that may be

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3 *Interpretation Act* 2011 (Nr), s 51(1).

4 *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 548-549 [39]; [2014] HCA 9.

5 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 310-311; [1981] HCA 26.

6 *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 548 [38], 556-557 [65].

ascertained from the provisions of the statute, including the policy discernible from those provisions[7]. The respondent's construction cannot be accepted.

25 There should be orders that the appeal from the Supreme Court of Nauru be allowed with costs; the order of that Court set aside; and in lieu thereof it be ordered that the appellant's application for review be remitted to the Refugee Status Review Tribunal, differently constituted, for determination according to law.

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7 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321.