

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
GAGELER AND NETTLE JJ

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QLN147

APPELLANT

AND

THE REPUBLIC OF NAURU

RESPONDENT

*QLN147 v The Republic of Nauru*  
[2018] HCA 41  
11 September 2018  
M27/2018

## ORDER

*Appeal dismissed.*

On appeal from the Supreme Court of Nauru

### Representation

N M Wood for the appellant (instructed by Robinson Gill Lawyers)

G R Kennett SC with C L Symons for the respondent (instructed by Republic of Nauru)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### QLN147 v The Republic of Nauru

Nauru – Appeal as of right from Supreme Court of Nauru – Refugees – Where Secretary of Department of Justice and Border Control refused application for complementary protection – Where Refugee Status Review Tribunal affirmed Secretary's decision – Where appellant claimed he would be subject to cruel, inhuman or degrading treatment if returned to Sri Lanka – Where basis for claim was that appellant may be remanded in prison if returned to Sri Lanka and prison conditions in Sri Lanka are poor – Whether Tribunal had regard to material before it concerning prison conditions in Sri Lanka – Whether reasons of Tribunal met standard required by s 34(4) of *Refugees Convention Act 2012* (Nr).

Words and phrases – "cruel, inhuman or degrading treatment", "duty to give reasons", "prison conditions".

*Refugees Convention Act 2012* (Nr), ss 5(1), 6(1), 34(4).



1 KIEFEL CJ, GAGELER AND NETTLE JJ. The appellant is a citizen of  
Sri Lanka of Tamil ethnicity from the Mannar region. He travelled from  
Sri Lanka to Australia via India. On arrival he was transferred to Nauru.

2 The appellant's application under s 5(1) of the *Refugees Convention Act*  
2012 (Nr) ("the Act") to be recognised as a refugee was rejected by the Secretary  
of the Department of Justice and Border Control of Nauru ("the Secretary"). The  
Secretary determined under s 6(1) of the Act that the appellant is not a refugee to  
whom protection obligations are owed and is not owed complementary  
protection by the Republic of Nauru. The Refugee Status Review Tribunal of  
Nauru ("the Tribunal") affirmed the Secretary's determination.

3 The sole ground of the appellant's appeal to the Supreme Court of Nauru  
had regard to the complementary protection provided by the Act. It was that the  
Tribunal had failed to consider or have regard to matters put before it concerning  
conditions in Sri Lankan prisons in which he would be held if he was returned or  
expelled to Sri Lanka. Those conditions were such that he would be exposed to  
"cruel, inhuman or degrading treatment", which is prohibited by Art 7 of the  
International Covenant on Civil and Political Rights ("the ICCPR").

4 In submissions made by his lawyer in connection with his application the  
appellant had claimed that if he is returned to Sri Lanka he would be charged  
with an offence because he departed that country illegally and he may be  
remanded in custody for some days pending a hearing before a Magistrate. The  
risk of cruel, inhuman and degrading treatment to which the appellant would be  
exposed was identified by him as poor prison conditions which do not meet  
international standards due to gross overcrowding and lack of sanitary facilities.

5 In his submissions to the Tribunal ("the Document") the appellant  
provided further information concerning the conditions in Sri Lankan prisons  
generally and referred, in a series of footnotes, to three further sources that were  
said to provide support for the propositions that those conditions are recognised  
as likely to breach Art 3 of the European Convention on Human Rights (which is  
phrased in terms equivalent to Art 7 of the ICCPR) and that Sri Lankan prisons  
have been found to suffer from severe overcrowding, antiquated infrastructure,  
and limited access to food and basic assistance.

6 Both the Secretary and the Tribunal appear to have accepted it to be likely  
that the appellant would be arrested on his return to Negombo airport and that it  
is possible that he might be held on remand until the next sitting of the  
Magistrate's Court in that area depending on when he arrived. In the hearing  
before it the Tribunal suggested to the appellant that a person who cannot be  
taken immediately to a Magistrate's Court may be held on remand in Negombo  
prison for a period of one to three days. The Tribunal expressed the view that

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whilst the prison was "not a very nice place" and is "old", "dirty" and "crowded", there was no information which indicated that people who are held on remand there for this "fairly brief period" have been harmed. The observation invited a response. The appellant responded, through an interpreter, to the effect that there had been a report of a woman in custody being raped by the authorities.

7 In its reasons the Tribunal referred to the reports of the Commonwealth Department of Foreign Affairs and Trade which had been cited in the Secretary's decision, from which it appeared that Sri Lankan citizens who have left that country illegally are arrested at the airport and brought before a Magistrate's Court. If they plead guilty a fine is imposed; if they plead not guilty they are routinely given bail and are required to return to the court at a later date. If arrival occurs over a weekend or a public holiday they may be held in the remand section of Negombo prison possibly for some days until they can be brought before the court.

8 The Tribunal did not accept that there was a reasonable possibility that the appellant would be jailed for his offence. It said there was no credible evidence that he would be subjected to a harsher penalty because of his ethnicity or that any brief period spent in remand would amount to a breach of Nauru's international obligations. The Tribunal noted the submission of the appellant's representative that imprisonment in unacceptable conditions amounts to the treatment prohibited by the ICCPR but it did not accept that being held for a short time in cramped and unsanitary conditions constitutes such treatment.

9 The Supreme Court described the material put before the Tribunal by the appellant as general in nature and not addressed specifically to the remand section for short term prisoners of Negombo prison, where he might be held, and said that the Tribunal's reference to "cramped and unsanitary conditions", although brief, "captures the flavour of that material". It held that it was open to the Tribunal to find that detention in such conditions for a number of days would not constitute cruel, inhuman or degrading treatment. The Supreme Court affirmed the Tribunal's decision<sup>1</sup>.

10 On his appeal to this Court the appellant contends that the conditions referred to in his material were referable to all Sri Lankan prisons; that the Tribunal was obliged to refer to each aspect of them; and that the Tribunal was obliged to refer to that information if it is not to be inferred that it failed to consider the information or regarded it as irrelevant to its decision. A third

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1 *QLN147 v The Republic* [2018] NRSC 2.

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possibility is that the Tribunal failed to give reasons as it is required to do under s 34(4) of the Act.

11           The respondent, the Republic of Nauru, submits that the Tribunal's duty to give reasons does not encompass any obligation to canvass evidence upon which it chooses not to rely. Section 34(4) of the Act relevantly requires the Tribunal to set out "the evidence or other material *on which the findings of fact were based*" (emphasis added). This requirement does not provide a basis for the inferences for which the appellant contends.

12           The Republic further submits that, in any event, there is no foundation in fact for the inferences. The Tribunal expressly stated that it had had regard to the country information cited in the Document "as discussed with the applicant at the hearing" and referred to that country information in connection with returning asylum seekers. The Tribunal referred specifically to the appellant's oral evidence relating to prison conditions in canvassing the question whether it would constitute treatment of the kind prohibited by the ICCPR. The reference by the Tribunal to the conditions in Negombo prison "captures the flavour" of the information in the Document, as the Supreme Court found. The only inference to be drawn from the Tribunal's consideration of the appellant's information and the conclusions it expressed is that in so far as that information might have pointed to a different conclusion, the Tribunal did not find it to be persuasive.

13           The respondent's submissions should be accepted. In oral argument the appellant relied upon the specific omissions of references to the availability of food and medical assistance in Sri Lankan prisons to support the inference that the Tribunal failed to consider these additional factors. The summary given by the Tribunal of prison conditions may be explained by its primary focus being on the short period that the appellant might be held on remand. If the period had been more substantial, one might have perhaps expected a more detailed reference to each aspect of those conditions.

14           Clearly enough, the Tribunal was apprised of the matters regarding prison conditions which the appellant raised and considered them in determining whether complementary protection was owed to him. No further reasons were required.

15           The appeal should be dismissed.