

HIGH COURT OF AUSTRALIA

GAGELER, NETTLE AND EDELMAN JJ

THE REPUBLIC OF NAURU

APPELLANT

AND

WET040

RESPONDENT

The Republic of Nauru v WET040
[2018] HCA 56
7 November 2018
M154/2017

ORDER

The time fixed for the filing of the notice of appeal is enlarged to 13 October 2017.

On appeal from the Supreme Court of Nauru

Representation

G R Kennett SC with N M Wood for the appellant (instructed by Republic of Nauru)

No appearance for the respondent

R Merkel QC with S A Beckett and M L L Albert for the Refugee and Immigration Legal Centre, as amicus curiae (instructed by Allens)

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

CATCHWORDS

The Republic of Nauru v WET040

High Court – Practice and procedure – Original jurisdiction – Appeal from Supreme Court of Nauru – Where High Court had original jurisdiction under s 5 of *Nauru (High Court Appeals) Act 1976* (Cth) to hear and determine appeals from Supreme Court of Nauru provided for in Agreement between Government of Australia and Government of Republic of Nauru – Where Agreement terminated on 13 March 2018 – Where termination of Agreement did not affect hearing and determination of appeals "instituted" in High Court before date of termination – Where appellant filed notice of appeal before date of termination but one day outside period fixed by r 42.03 of *High Court Rules 2004* (Cth) – Where appellant filed summons seeking order under r 4.02 of *High Court Rules* enlarging time for filing of notice of appeal – Where affidavit accompanying summons explained delay in filing notice of appeal – Where notice of appeal, summons and affidavit served on solicitors who acted for respondent in Supreme Court of Nauru – Where notice of appeal, summons and affidavit later served personally on respondent – Where order enlarging time for filing of notice of appeal not made before date of termination of Agreement – Where respondent did not enter appearance and did not appear at hearing of High Court appeal – Whether appeal "instituted" before date of termination of Agreement – Whether, if appeal instituted, High Court should exercise jurisdiction to hear and determine appeal.

Words and phrases – "appeal", "institute", "irregularity", "jurisdiction", "notice of appeal", "rule-making power", "service", "with such variations as are necessary".

High Court Rules 2004 (Cth), rr 2.03.1, 4.02, 9.01.5, 42.03, Pts 42, 43.

Judiciary Act 1903 (Cth), ss 77T, 86.

Nauru (High Court Appeals) Act 1976 (Cth), ss 5, 6, 10(3).

1 GAGELER, NETTLE AND EDELMAN JJ. The Republic of Nauru has invoked the jurisdiction conferred on this Court by s 5 of the *Nauru (High Court Appeals) Act 1976* (Cth) to appeal from a decision of the Supreme Court of Nauru made on 28 September 2017 in the exercise of the jurisdiction conferred on that Court by Pt 5 of the *Refugees Convention Act 2012* (Nr)¹. By that decision, the Supreme Court quashed a decision of the Refugee Status Review Tribunal, which affirmed a determination of the Secretary of the Department of Justice and Border Control that the respondent was not a refugee and was not owed complementary protection, and remitted the matter to the Tribunal for reconsideration.

2 The Republic invoked the jurisdiction of this Court by filing in the Melbourne office of the Registry on 13 October 2017 a notice of appeal together with a summons seeking an order under r 4.02 of the *High Court Rules 2004* (Cth) enlarging the 14 day period for the filing of a notice of appeal fixed by r 42.03. The summons was accompanied by an affidavit affirmed by a solicitor contracted by the Republic explaining the Republic's one day delay in filing the notice of appeal. The explanation was that time was taken first to obtain the advice of senior counsel on the prospects of the appeal and then to complete the drafting by junior counsel of the notice of appeal.

3 On 16 October 2017, the notice of appeal, the summons and the affidavit were served by the solicitor for the Republic on the solicitors who had acted for the respondent in the Supreme Court of Nauru proceedings by leaving the documents at the address for service in Sydney shown on the memorandum of appearance which those solicitors had entered for the respondent in the Supreme Court of Nauru.

4 Much later, on 7 October 2018, the notice of appeal, the summons and the affidavit were given by the solicitor for the Republic to the respondent personally in Nauru. That was at a time when the appeal had already been scheduled for hearing today. The respondent was informed at that time that, because he had not entered an appearance in the appeal, there was a likelihood that the appeal would proceed in his absence. He was informed that, if he wished to be heard in the appeal, he should contact a lawyer immediately. He was given the name of the solicitors in Nauru who had acted for him in the Supreme Court of Nauru. He was also given the name and contact details of lawyers in Australia.

5 The respondent having failed to enter an appearance in this Court, and having failed to appear at the time scheduled for the hearing of the appeal today,

1 *WET 040 v The Republic* [2017] NRSC 79.

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the Refugee and Immigration Legal Centre has been granted leave to appear as amicus curiae to raise issues concerning this Court's jurisdiction to hear and determine the appeal and the propriety of doing so in the absence of the respondent.

6 The jurisdiction conferred on this Court by s 5 of the *Nauru (High Court Appeals) Act* is to hear and determine appeals for which provision is made in the Agreement between the Government of Australia and the Government of the Republic of Nauru relating to appeals to the High Court of Australia from the Supreme Court of Nauru ("the Agreement"), which was signed on 6 September 1976. It has been held in *Ruhani v Director of Police*² and *Clodumar v Nauru Lands Committee*³ that the jurisdiction is original jurisdiction conferred pursuant to s 76(ii) of the *Constitution*.

7 The jurisdictional issue raised by the amicus curiae arises from the termination of the Agreement which followed from a notice of intention to terminate given by the Nauruan Government to the Australian Government under Art 6(1) of the Agreement on 12 December 2017. It is common ground that the date of termination of the Agreement can be taken to have been 13 March 2018.

8 Article 6(2)(a) of the Agreement provides that termination of the Agreement is not to affect "the hearing and determination of an appeal from the Supreme Court of Nauru instituted in the High Court before the date of the termination". Notwithstanding that the notice of appeal was filed some five months before the date of termination of the Agreement, the submission of the amicus curiae is that the appeal was not "instituted" before the date of termination within the meaning of Art 6(2)(a) because the time for filing the notice of appeal had not been enlarged before the date of termination.

9 The submission must be rejected. Article 1(A)(b)(i) of the Agreement provides for appeals to lie to the High Court in civil cases as of right from any final judgment of the Supreme Court of Nauru given in the exercise of its original jurisdiction. Article 3(1) of the Agreement provides that "procedural matters relating to appeals from the Supreme Court of Nauru to the High Court of Australia are to be governed by Rules of the High Court". Section 6 of the *Nauru (High Court Appeals) Act* extends the rule-making power conferred by s 86 of the *Judiciary Act 1903* (Cth) to allow rules governing such procedural matters to be made.

2 (2005) 222 CLR 489; [2005] HCA 42.

3 (2012) 245 CLR 561; [2012] HCA 22.

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10 The *Nauru (High Court Appeals) Act* contains no equivalent to s 77T of the *Judiciary Act*, which, like s 37 of the former *High Court Procedure Act 1903* (Cth), considered in *Delph Singh v Karbowsky*⁴ and *R v Owens and Farrington; Ex parte Seaton*⁵, applies to appeals in the appellate jurisdiction of the Court under s 73 of the *Constitution* and provides that appeals shall be instituted not only in such manner but also within such time as is allowed by the *High Court Rules*. Rather, the procedure by which an appeal from the Supreme Court of Nauru is to be instituted is left entirely to the *High Court Rules* that are made in the exercise of the rule-making power as extended by s 6.

11 Part 43 of the *High Court Rules* has been made in the exercise of the rule-making power as so extended. Relevantly, r 43.02 makes the provisions of Pt 42 applicable to appeals from the Supreme Court of Nauru to this Court "with such variations as are necessary". Part 42, as applied by r 43.02, is necessarily to be read with the general rules within Ch 1 of the *High Court Rules* to the extent that those rules are in their terms applicable.

12 By operation of r 42.01 as applied by r 43.02, an appeal from the Supreme Court of Nauru to this Court is instituted simply by filing a notice of appeal. That is what in fact occurred in the circumstances of the present appeal before the date of termination of the Agreement. And that fact is sufficient for Art 6(2)(a) of the Agreement to be engaged and thus to preserve the jurisdiction of this Court to hear and determine the appeal.

13 Within the structure of Pt 42, as applied with necessary variations by r 43.02, compliance with the 14 day period fixed by r 42.03 is not a precondition to the filing of a notice of appeal under r 42.01. Non-compliance with r 42.03 is rather an irregularity which r 2.03.1 makes clear does not render the appeal a nullity. Hence, compliance with r 42.03 is neither a condition precedent nor a condition subsequent to the institution of an appeal.

14 The period fixed by r 42.03 is a period which r 4.02 permits to be enlarged or abridged by order of the Court or a Justice whether made before or after the period's expiration. There being an acceptable explanation for the minor delay which occurred in the circumstances of the present appeal, there is no reason why an order enlarging time should not now be made. There was no necessity for the Republic to seek and obtain such an order in advance of the time fixed for the hearing of the appeal, and the delay was not of such a nature as would make the imposition of any conditions on the order appropriate.

4 (1914) 18 CLR 197 at 201-202; [1914] HCA 30.

5 (1933) 49 CLR 20 at 24; [1933] HCA 20.

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15 The service of the notice of appeal which occurred on 16 October 2017 was in a manner permitted by r 42.05.4 as applied by r 43.02. No further notice to the respondent of the institution of the appeal was required in order to comply with the *High Court Rules*.

16 As to the service of the summons and accompanying affidavit, nothing in the *High Court Rules* required that they be served personally on the respondent. They are documents which r 9.01.5 permitted to be served by ordinary service. That form of service would have been possible only if the respondent, following service of the notice of appeal in the manner permitted by r 42.05.4, had filed a notice of appearance in accordance with r 42.06.1.

17 Section 10(3) of the *Nauru (High Court Appeals) Act* provides that this Court may hear and determine an appeal from the Supreme Court of Nauru notwithstanding that a party to the appeal is not present in person and is not represented at the hearing of the appeal. The Court being satisfied that its jurisdiction has been invoked by the institution of an appeal and satisfied that appropriate notice of the institution of the appeal has been given to the respondent, there is no reason why the Court should not proceed now to the discharge of its duty to exercise the jurisdiction conferred on it to hear and determine the appeal.

18 The appropriate order accordingly is that the time fixed for the filing of the notice of appeal is enlarged to 13 October 2017.

