HFM043 v THE REPUBLIC OF NAURU (M146/2017)

Court appealed from: Supreme Court of Nauru
[2017] NRSC 76

Date of judgment: 22 September 2017

The appellant was born in Myanmar in 1980. She is a Sunni Muslim of Rohingya ethnicity, who left Myanmar for reasons of asylum when she was 11 years old. She did not hold citizenship in Myanmar. She thereafter lived in Thailand where she married a Rohingya man and they had four children. After living in Thailand for 6 years she moved to Malaysia where she worked. She did not take the children with her, although she visited them. Her husband died when her eldest child was about 10 years old and she never went back to Thailand. She kept in contact with her children but lost touch by early 2015. The appellant decided to save some money so that she could go to Australia. She left Malaysia for Indonesia in December 2012 and arrived in Australia in September 2013 and was later transferred to Nauru.

In January 2014 the appellant made an application for refugee status determination under the *Refugees Convention Act* 2012 (Nr) ("the Act").

The Secretary of the Nauru Department of Justice and Border Control refused the application in September 2014. The appellant made an application for merits review of that decision to the Refugee Status Review Tribunal. In March 2015 the Tribunal found that the appellant was a Rohingya born in Myanmar but was "stateless". The Tribunal found that Thailand and Malaysia were countries of "former habitual residence" and that her claim should be assessed against both countries. Having done so, the Tribunal affirmed the decision of the Secretary that the appellant was not recognised as a refugee and was not owed complementary protection under the Act.

The appellant then appealed to the Supreme Court of Nauru in April 2015. The hearing took place before Judge Khan in March 2016 and the decision was reserved. In April 2016 the appellant married Mr B, who had been recognised as a refugee under Part 2 of the Act. In August 2016 the appellant was granted derivative status pursuant to s 5 of the Act, by way of a "Refugee Determination Record". On 23 December 2016, the *Refugees Convention (Derivative Status and other measures) Amendment Act 2017* (Nr) came into effect, including the introduction of s 31(5) which was deemed to operate retrospectively from 21 May 2014. That section provides: "*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*."

Judge Khan delivered judgment in the appeal in June 2017. The appeal succeeded on the second of the three grounds of appeal, namely that the Tribunal had failed to take into account the appellant's mental health problem. In its decision the Tribunal had noted that during the information session, which the Tribunal conducted before the [appellant's] hearing, she was unable to participate as she cried uncontrollably throughout and that her affect at the hearing was "very depressed". In the decision the Tribunal further noted

"*Although no formal evidence was provided to the Tribunal, it accepts that the applicant has mental health issues and has taken this into account when assessing her claim*." Judge Khan held that given that the matter of her mental health was raised by the appellant in her Statutory Declaration made for the purposes of her claim for refugee status and in light of the Tribunal's own observations of the appellant "*it should have adjourned the hearing and asked the appellant to obtain a full medical report so that it could adequately deal with the review process. The Tribunal failed to do so and therefore it fell into error*."

Judge Khan accordingly adjourned the hearing of the appeal and ordered both parties to file further submissions as to the orders he should make. In its submissions the respondent submitted that the matter should not be remitted to the Tribunal (on the issue of the mental health issues being properly investigated and taken into account) when the appellant had been separately granted derivative status. The appellant submitted that it would be valuable for her to gain independent, individual refugee status and not simply be reliant on the derivative status gained from her husband's status, the legal treatment of which could be subject to change. Judgment was delivered in September 2017 dismissing the appeal on the basis that the Tribunal would now be unable to reconsider the matter and therefore that an order remitting the matter to the Tribunal would be futile.

The appellant appealed to the High Court, invoking its jurisdiction to hear and determine appeals from the Supreme Court of Nauru by virtue of s 5 of the *Nauru (High Court Appeals) Act* 1976 (Cth) and Article 1A(b)(i) of the Agreement between the Governments of Australia and Nauru Relating to Appeals to the High Court of Australia.

The grounds of appeal, should the appellant be granted leave to amend them as she has sought, will be:

- That the Supreme Court of Nauru erred by exercising its discretion not to remit the matter to the Refugee Status Review Tribunal in circumstances where it found jurisdictional error, on the basis that remittal would be futile because the same Tribunal would be unable to consider the matter by the operation of s 31(5) of the *Refugees Convention Act* 2012 (Nr) as amended;

- That the Supreme Court of Nauru erred by failing to find that the Refugee Status Review Tribunal failed to act according to the principles of natural justice. In circumstances where the Secretary of the Department of Justice and Border Control found that Burma (Myanmar) was the appellant's 'place of originand country of reference', natural justice required the Tribunal to inform the appellant that the question of whether Burma (Myanmar) was one of the appellant's countries of former habitual residence was an issue in relation to the review.

The respondent has sought leave to file a Notice of Contention that the judgement of the Supreme Court at first instance should be upheld on an additional or different ground to that held below, including on the ground that:

- The Supreme Court erred in concluding that the failure of the Tribunal to adjourn its hearing and ask the appellant to obtain a full medical report, so that it could adequately deal with the review process, was an error of law.