

## **DWN042 v. REPUBLIC OF NAURU (M20/2017)**

Court appealed from: Supreme Court of Nauru  
[2017] NR SC 4

Date of judgment: 7 February 2017

This appeal raises issues of whether Nauru's processes for determination of the Appellant's application for refugee status by the Refugee Status Review Tribunal pursuant to the *Refugees Convention Act 2012* (Nr) ('the RCA') breached the principles of natural justice, were unconstitutional because the Appellant was unlawfully detained at the time and whether the High Court has jurisdiction to hear any of the first 3 grounds of the appeal.

The Appellant is a man of Pakistani citizenship who has unsuccessfully applied to the Republic of Nauru for refugee status determination. He left Pakistan in July 2013 and was intercepted by Australian authorities on a boat from Indonesia on 3 August 2013 and transferred to Christmas Island where he was detained. He was transferred to Nauru on a regional processing centre visa on 7 September 2013 where he remains.

On 8 December 2013 the Appellant made an application to Nauru for refugee status determination under the RCA, relying on grounds based on his alleged fear of persecution and extortion by the Taliban.

On 17 July 2014 the Secretary of the Nauru Department of Justice and Border Control determined that the Appellant was not a refugee and was not entitled to complementary protection. The Appellant made an application for merits review of that decision to the Tribunal. The Tribunal affirmed the earlier determination on 29 December 2014. It did not accept that the First Appellant had a well-founded fear of persecution in Pakistan on the claimed grounds.

The Appellant then appealed to the Supreme Court of Nauru on points of law comprising the following grounds:

- Whether, in conducting the case in a place where the Appellant was 'unlawfully' detained, there was a breach of natural justice;
- That the hearing was unconstitutional as he was unlawfully detained at the time in breach of s5 of the Constitution of Nauru which provides an absolute prohibition on deprivation of liberty subject to specified exceptions which in the Appellant's case did not apply as the Appellant had entered Nauru lawfully;
- That the Tribunal had erred in not finding the Appellant entitled to complementary protection; and
- That the Tribunal had erred in relying on an unsigned, unsworn transfer interview form which the Appellant had allegedly disavowed.

On the day of the Supreme Court hearing the Court struck out the first two grounds of appeal on the application of the Respondent Republic of Nauru on the basis that as they related to matters concerning the Constitution of Nauru they were 'filed

without any basis...did not disclose any cause of action' and were 'frivolous and vexatious'.

The Appellant then sought leave to appeal from that interlocutory decision (striking out appeal grounds 1 and 2) from the High Court of Australia pursuant to s5 of the *Nauru (High Court Appeals) Act 1976 (Cth)*. At the hearing of the application for leave on 16 December 2016, the High Court dismissed the application after having sought and been given assurances by the Respondent Republic of Nauru to the effect that the Respondent accepted that the reasoning of the Supreme Court in the interlocutory decision was plainly wrong, and that the Respondent would not seek to rely on that reasoning in any future proceeding or in opposition to an application by the Appellant to reopen the present case to further amend the grounds of appeal.

On 6 February 2017 the Appellant sought to file a Notice of Motion in the Supreme Court of Nauru seeking to reinstate appeal grounds 1 and 2 and an order to 'open the appeal to further amend the grounds of appeal'. On 7 February 2017 the Supreme Court of Nauru dismissed the appeal and affirmed the Tribunal's decision. The judgment did not refer to the Appellant's Notice of Motion.

The grounds of the appeal to the High Court of Australia are essentially the same as those that were before the Supreme Court of Nauru.

In addition there is a preliminary issue raised by the Appellant as to whether the Supreme Court erred in failing to consider the Appellant's Notice of Motion seeking reinstatement of appeal grounds 1 and 2 in light of the assurances given by the Republic of Nauru to the High Court on 16 December 2016.

The written submissions filed by the Respondent raise the issue of whether the High Court has jurisdiction to hear any of the first 3 grounds of the appeal, given that if they involve the interpretation or effect of the Constitution of Nauru, the appeal is incompetent because of Article 2 of the 6 September 1976 Agreement between the Governments of Australia and Nauru implemented by the *Nauru (High Court Appeals) Act 1976 (Cth)*.