YAU027 v REPUBLIC OF NAURU (S142/2017)

Court appealed from: Supreme Court of Nauru
[2017] NRSC 29

Date of judgment: 5 May 2017

The appellant is a citizen of Bangladesh who left that country for Malaysia early in 2013. Later that year he travelled from Malaysia to Indonesia and then to Christmas Island, from where he was transferred to Nauru.

The appellant applied for a determination that he was a refugee, claiming that he feared for his life due to persecution in his home country. That was on the basis that he had been active in the Chatra Dal, the student wing of the Bangladesh Nationalist Party ("the BNP"). His father was also a member of the BNP. The appellant claimed to have been attacked and beaten on several occasions by members of the rival (and ruling) Awami League, members of which had also threatened to kill him and had repeatedly visited his family's home looking for him. He also claimed to have had his leg slashed on one occasion by a knife-wielding police officer.

The appellant first gave information about his reasons for leaving Bangladesh during an interview conducted by a Nauruan officer twelve days after the appellant's arrival in Nauru ("the Transfer Interview"). He was interviewed again on 14 May 2014, as part of his application for a refugee status determination ("the RSD Interview").

On 21 May 2014 the *Refugees Convention (Amendment) Act* 2014 (Nauru) commenced operation. It introduced into the *Refugees Convention Act* 2012 (Nauru) ("the Act") an obligation on the Secretary of the Nauruan Department of Justice and Border Control ("the Secretary") to determine, in respect of any applicant not recognised as a refugee, whether Nauru nevertheless owed the person "complementary protection", such protection being owed where any expelling or returning of the person would breach Nauru's international obligations.

On 2 November 2014 the Secretary determined that the appellant was not entitled to refugee status, as his fear of persecution in Bangladesh was not well-founded. The Secretary also determined that Nauru did not owe the appellant complementary protection.

The appellant applied to the Refugee Status Review Tribunal ("the Tribunal") for a review of the Secretary's decision. Before the Tribunal the appellant gave an additional reason for his fearing harm in Bangladesh. He claimed that a girl whom he loved, and with whom he had a sexual relationship, had told him that her parents had threatened to have him killed. The appellant stated that the girl's parents were active members of the Awami League and that her uncles and cousins had tried to attack him.

On 22 May 2015 the Tribunal affirmed the Secretary's determination. The Tribunal found that the appellant's claims, in respect of both the BNP and his

relationship with the daughter of Awami League members, were not credible. The appellant had not plausibly explained why he became involved in Chatra Dal eight years after he had left school (where he had reached only year five of primary school). His answers to questions about his role in Chatra Dal were also generalised and lacking in circumstantial detail. The Tribunal doubted the appellant's claim about his girlfriend, as he had first raised it only in a supplementary statement and submission to the Tribunal. It was also implausibly foolhardy for a supporter of the BNP to begin a relationship with the daughter of committed supporters of the Awami League.

An appeal by the appellant to the Supreme Court of Nauru was dismissed by Judge Khan. His Honour held that various findings made by the Tribunal impugned by the appellant were not unreasonable. Judge Khan also rejected one of the appellant's grounds of appeal on the basis that it could not raise a point of law as required by s 43 of the Act. That ground was that it was unreasonable for the Tribunal to have found inconsistency in the appellant's claims, on account of his alleging certain incidents during the RSD Interview and before the Tribunal which he had not raised during the Transfer Interview, because at the Transfer Interview the appellant had been constrained by the interviewer's questions. His Honour held that that ground could not raise a point of law, as it was merely a different explanation of inconsistency from one which the appellant had given before the Tribunal.

On 19 May 2017 the appellant appealed to the High Court, which has 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 an agreement between the governments of Australia and Nauru relating to such appeals that was signed on 6 September 1976.

The grounds of appeal are:

- The primary judge erred in law in failing to hold that the Tribunal failed to identify and ask itself the right question, namely, whether the appellant is a refugee or is owed complementary protection by reason of a real risk of future harm arising from his attendance at meetings, rallies, and other public events arranged by the BNP or Chatra Dal;

- The primary judge erred in law, and constructively failed to exercise jurisdiction under s 43 of the Act, in dismissing ground (hb) of the appellant's amended notice of appeal on the sole basis that the ground "cannot raise a point of law": [40].

The appellant has applied for leave to amend his notice of appeal (by adding two grounds and amending the second ground set out above) and for leave to rely upon further evidence (transcripts of both the Transfer Interview and the RSD Interview).