IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S142/2017

B E T W E E N:

YAU027

Appellant

and

THE REPUBLIC OF NAURU

Respondent

ANNOTATED REPLY OF THE APPELLANT

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I. CERTIFICATION

1. These submissions are suitable for publication on the internet.

II. SUBMISSIONS IN REPLY

Issues

2. The respondent incorrectly submits (RS [2]) that the appellant seeks to deploy the additional transcript evidence only in relation to ground 5. But as the appellant has submitted (AS [43], [48]), that evidence also supports proposed ground 2.

Leave to raise new grounds

3. The respondent submits that a difference of opinion between legal representatives is always "inadequate and unsatisfactory" as an explanation for raising a new point (RS [23]), but there is no absolute rule to that effect and no requirement that leave be refused in all such cases. If the respondent submits that decisions of lower courts have qualified this Court's statement that a new point may be raised where it is "expedient and in the interests of justice" to allow it,[1] that submission or those decisions must be wrong.

4. The public interest in "the timely and effective disposal of litigation" (RS [24]) is of little moment in circumstances where the primary judge, after reserving judgment for almost nine months, delivered reasons for judgment that lacked significant meaningful content. The interests of justice in this case are not served by denying the appellant a full and fair hearing of his appeal. Further, the considerable countervailing interests arising from the potential for very serious consequences to the appellant (AS [25]), the humanitarian dimension, and the rule of law requirement that public power be exercised according to law (AS [24]), outweigh the limited interest pointed to by the respondent.

Leave to adduce further evidence

5. The respondent submits that the evidence should not be received because there is no suggestion that the evidence was not available to be tendered below (RS [39]). That is not a sufficient reason to refuse leave in a case where it is said there could have been no reasonable explanation for the failure to adduce the evidence below (AS [28]-[29]).

Proposed ground 2

6. The respondent's principal contention appears to be that, although the appellant claimed to fear harm at meetings, rallies, and other public events, that claim was limited to harm arising from his active support of and position within the BNP (RS [27]-[28]), and neither expressly nor obviously extended to other risks of harm that might be faced by other persons attending the same meetings, rallies, and public events.

7. The evidence before the Tribunal provided a basis for concluding that all attendees at meetings, rallies, and other public events faced a real risk of harm irrespective of whether the attendees were personally known to the AL or the authorities (AS [45]-[47]). Accordingly, once the Tribunal found that the appellant attended such events, its review could not be completed without considering whether he faces that risk of harm.[2]

8. The respondent's alternative submission, to the effect that the Tribunal's findings dealt with the claim (RS [30]), proceeds upon the misapprehension that the appellant's claim

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1 *Water Board v Moustakas* (1988) 180 CLR 491 at 497 (Mason CJ, Wilson, Brennan and Dawson JJ).

2 *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [58]-[61] (Black CJ, French and Selway JJ).

depended on him being brought to the attention of the AL or the authorities. But the evidence was that attendees faced a risk of harm irrespective of that circumstance, with the result that the absence of attention was not a sufficient basis for rejecting the risk.

9. There was no need for the claim to be based on a Convention ground (cf. RS [29]) given the availability of complementary protection for arbitrary deprivation of life and inhuman and degrading treatment.

Proposed ground 3

10. Although the respondent submits that the appellant is "re-characterising" a Convention claim as a complementary protection claim (RS [31]), that is not a fair or accurate description of this ground of appeal. What is significant is not the appellant's or his representative's juristic classification of the claim, but the erroneous manner in which the Tribunal disposed of the claim.

11. The respondent attempts to resist the proposition that the Tribunal misunderstood the applicable law by describing the erroneous part of the Tribunal's reasons as "merely summarising" the Secretary's findings (RS [35]). But the sentence in which the error appears describes the application made by the appellant to the Secretary, which was necessarily antecedent to the Secretary's findings, and cannot be glossed over as a summary of those findings.[3] The Tribunal erroneously proceeded upon the basis that the appellant had "made an application to be recognised as ... a person owed complementary protection" at a time when the CP Amendment Act was not in force.

Grounds 4 and 5

12. No particular judicial standard has been proposed by the respondent for assessing the adequacy of the reasons of the primary judge (cf. RS [36]), and the respondent does not appear to dispute the proposition that the reasons must, at least, be sufficient to enable this Court to perform its task of appellate review (AS [59]). That standard will not be met where "the appeal court is unable to ascertain the reasoning upon which the decision is based", or where "justice is not seen to have been done".[4]

13. It is not the case that "ground 4 does not provide a distinct basis upon which the matter should be remitted" (cf. RS [38]). The tasks of the primary judge at first instance, and of this Court on appeal from the primary judge, are materially different. Under s 5(2) of the Nauru Appeals Act, this Court's jurisdiction is limited to "appeals". If the reasons given by the primary judge do not enable this Court to perform its task of appellate review, by identifying appealable error in the primary judge's reasons, the respondent has not explained why this Court should rehear de novo the grounds advanced at first instance without having detected such error. The appropriate course is to remit the matter to the Supreme Court of Nauru for re-determination by way of rehearing. The nature of the international agreement to which effect is given by the Nauru Appeals Act, and the division of jurisdiction between the Supreme Court of Nauru and this Court, require that this Court scrupulously avoid any usurpation of the role of the Supreme Court of Nauru.

14. The respondent submits that the reasons given by the primary judge were "adequate", notwithstanding their "brevity", because his Honour's decision did not involve the resolution of "complex matters of disputed fact" (RS [37]). Although the facts and issues may not have been "complex", they were certainly in dispute, and they could not fairly or properly be dismissed by the mere recitation of parts of the written submissions.

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3 The paragraph in which the Tribunal actually summarised those findings was AB18 [13].

4 *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 at 18-20 (Gray J with whom Fullagar and Tadgell JJ agreed).

15. To the extent that the primary judge expressed conclusions, the parties and this Court are left to speculate about why and how the primary judge reached those conclusions. In that respect, the conclusions lacked an evident and intelligible justification.[5]

Paragraphs 1(a)-(d): Error of law

16. The respondent submits that the reasons of the primary judge are "not indicative of error" (RS [45]), but has not directly responded to the appellant's submission that the reasons show that the primary judge misunderstood the case (AS [68]-[69]).

17. The submission that the appellant's representative did not take issue with the Tribunal's questions in circumstances where there was "no legislative constraint" on raising such concerns (RS [43]) is apt to distract attention away from the real issue: the Tribunal's powers were conditioned on the observance of the requirements of procedural fairness. The relevant "legislative constraint" was on the Tribunal. Observing that the question "asked the appellant to confirm whether the Tribunal's understanding of his case was correct" does not deny that it was procedurally unfair for the Tribunal to arrive at an adverse conclusion based on an equivocal non-responsive answer given to a compound question asked of an asylum seeker with a low level of education through an interpreter. The conclusion was not obviously open on the known material.[6]

18. The proposition that there was at least a skerrick of evidence before the Tribunal that its misunderstanding of the appellant's evidence during the RSD Interview was in fact a correct understanding of that evidence—ostensibly because the appellant "confirmed" the Tribunal's misunderstanding during the hearing (RS [47])—does not require the conclusion that the Tribunal's misunderstanding was "reasonably open" to it. A fair, rational, and reasonable Tribunal, acting with due appreciation of its responsibilities, and drawing only inferences of fact supported by logical grounds, could not have found that its misunderstanding had been "confirmed" by the appellant.

Paragraph 1(h): The appellant's explanation for not being active in politics

19. The respondent has not sought to defend the adequacy of this part of the primary judge's reasons (cf. AS [83]-[85]), including the primary judge's failure to respond to the argument that the Tribunal's finding about the political activity of minors was "irrational and not founded on probative evidence" (AS [85]), other than in global terms (RS [37]).

20. Although the respondent submits that "[a]ll that the Tribunal was otherwise doing" was "evaluating the explanations that the appellant advanced for his delayed involvement" in politics (RS [49]), the proposition that the appellant's involvement had been "delayed" rested on the unproven premise that all minors in Bangladesh whose fathers are strong supporters of a party are politically active absent a convincing reason to the contrary. Without that premise, there was nothing for the appellant to explain.

21. The respondent is driven to submit (RS [50]) that the Tribunal's finding that minors in Bangladesh are politically active at a much earlier age than 18 is not one "for which it needed to refer to specific evidence", because the omission to refer to "the evidence or other material" on which the finding was based would otherwise fall afoul of s 34(4)(d) of the Refugees Convention Act and a *Yusuf* inference that there was no such evidence. The Tribunal's description of the BNP student wing as aimed at "mobilising support

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5 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76] (Hayne, Kiefel and Bell JJ).

6 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592 (Northrop, Miles and French JJ); *SZBEL v Minister for Immigration & Citizenship* (2006) 228 CLR 152 at [29]-[32] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

among students" is not capable of supporting that finding (RS [50]), and rather suggests there are many students who have not been mobilised and who are not politically active.

Paragraph 1(hb): Inconsistency between Transfer Interview and subsequent statements

22. The respondent has not sought to defend the adequacy of this part of the primary judge's reasons (cf. AS [96]-[97]), including the primary judge's conclusion that "the new explanation cannot raise a point of law" (AS [98]), other than in global terms (RS [37]).

23. It is not accurate to say that "the appellant had not indicated in the transfer interview that he had been harmed as a result of any attack" (RS [51]). He said: "I was assaulted." (**AB121**.18; RS [6]) Even the Tribunal accepted that the appellant had said he received injuries in one of the attacks. (**AB22** [29])

24. The cursory statement at the start of the Transfer Interview (RS [54]) about its purpose was not capable of overcoming the circumstances described at AS [101]-[102], and the Tribunal in fact made no finding that the effect of that statement was such that it was reasonable to expect the appellant to have made a comprehensive and exhaustive statement of his claims in the circumstances of his arrival. The Tribunal erred in rejecting the appellant's accounts of harm without making such a finding and without considering those circumstances, and erred in giving more weight than was reasonably necessary to the perceived omissions of the appellant during the Transfer Interview.

Paragraphs 1(he)-(hf): Error in rejecting appellant's claim about relationship with girlfriend

25. The respondent has not sought to defend the adequacy of this part of the primary judge's reasons (cf. AS [107]-[109]) other than in global terms (RS [37]).

26. It was not open to the Tribunal to reject the appellant's claim "as one that simply did not make sense if the appellant was as committed a supporter of the BNP as he claimed to be" (cf. RS [60]). His claim to fear harm because of his relationship with his girlfriend was not limited to harm arising from his politics. The Tribunal recorded the appellant's claim in terms that his girlfriend's family "will target him because of his political opinion *and the fact that she slept with him and still loves him*". (**AB18**.34 [14]) As the respondent accepts (RS [11]), the appellant himself had said: "They will target me because of my political opinion, *because their daughter is in love with me, and because I slept with their daughter when we were not married.*" (**AB198** [21]) It was when they "discovered that [she] and I had been sexually intimate during our relationship" that they became extremely angry. (**AB197** [16]) The Tribunal itself referred during the hearing to "all of the implications that [a sexual relationship outside marriage] carries in a conservative Islamic society" and described the relationship as "dangerous at the best of times". (**AB246**.25-26) The only reason given by the Tribunal for rejecting that part of the claim was its perception that the appellant should have raised the claim before he applied to the Tribunal for review, which has been addressed elsewhere (AS [51]-[57], [100]).

Unreasonableness

27. The respondent has not addressed the appellant's argument that an inference of unreasonableness may be objectively drawn even where a particular error cannot be discerned. That inference should be drawn in this case (AS [113]-[114]).

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