IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No S46 of 2018

TTY 167
Appellant

and

REPUBLIC OF NAURU
Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

1. This outline is in a form suitable for publication on the internet.

Grounds not raised below

2. Ground 1 in the Notice of Appeal should not be entertained. Had it been raised in the Court below, it might have been met by evidence (RS [12]-[14]). Further, the Appellant should not be heard to contradict the argument he advanced below, that he had asked his representative to have the hearing date adjourned (CAB 31).

3. Ground 3 also has the first of these difficulties, to the extent that it relies on factual propositions concerning the Tribunal's ability to find the Appellant (RS [37]).

Ground 1

4. The material before the Court does not establish that the Appellant did not know the time and place of the Tribunal hearing. Rather, it strongly suggests that that information had reached him. Thus, the power in s 41 of the *Refugees Convention Act 2012* was available to the Tribunal even if there had not been full compliance with the requirements of s 40 (RS [26]-[28]).

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5. In any event s 40 does not prescribe the form of an invitation or the manner in which it is to be conveyed. It was open to the Tribunal to send an invitation to CAPS (which had acted for the Appellant: BFM 40) on the understanding that it would be conveyed to the Appellant. Section 40 was satisfied at least if the substance of the invitation at BFM 47 was conveyed to the Appellant; and it is not established that that did not occur (RS [22]).

6. Alternatively, s 40 was satisfied by transmitting the invitation to the Appellant's legal representative or agent (RS [23]). The proper inference from BFM 47 is that arrangements existed in Nauru under which CAPS received invitations of this kind on behalf of review applicants and passed them on. If direct evidence is needed for that proposition, it confirms that Ground 1 should not be entertained (RS [24]).

Ground 3

7. This ground proceeds on the basis that the power in s 41(1) was available to the Tribunal.

8. The power is exercisable for purposes consistent with those of the statutory scheme. In that regard, the power arises on the premise that the applicant has been invited to attend the hearing. Other relevant features of the scheme included that the Tribunal was required to complete its review within a certain time frame (s 33) (RS [32]), and the general principle that it is not the task of a merits review body to make an applicant's case for him or her, or to elicit a case that the applicant does not seek to put.

9. In the present case, the Tribunal had every reason to think that the Appellant was aware of the hearing, and it knew that he had legal assistance. He had recently provided a further statement and his solicitors had made a detailed written submission. No request was made, either before or after the hearing date, for the hearing to be rescheduled.

10. In these circumstances reasonableness did not require the Tribunal, on its own motion, to go looking for the Appellant and invite him to request a rescheduled hearing. As to the factors stressed by the Appellant:

    a) His previous participation merely served to confirm that he was aware of the review process (including the hearing), had some assistance and could be expected to seek a rescheduling if that was what he wanted (RS [34]).

b) His claims about his own mental state were not supported by medical evidence and were not made the basis of a request by the Tribunal to adapt its procedure in any way (RS [35]).

c) No doubt the Tribunal could have sent a message to the Appellant, but that does not make its failure to do so unreasonable. There is no evidence as to the ease (or otherwise) with which the Tribunal could have physically located the Appellant on the hearing date.

Geoffrey Kennett

Patrick Knowles

7 November 2018