



HIGH COURT OF AUSTRALIA

18 October 2017

BRF038 v THE REPUBLIC OF NAURU [2017] HCA 44

Today the High Court unanimously allowed an appeal from the Supreme Court of Nauru. The High Court held that the Supreme Court erred in failing to hold that the Refugee Status Review Tribunal ("the Tribunal") had failed to accord the appellant procedural fairness.

The appellant is from the Awdal province in Somaliland, an autonomous region in Somalia. He is a Sunni Muslim and a member of the Gabooye tribe. In September 2013, the appellant arrived by boat at Christmas Island. He was subsequently transferred to the Republic of Nauru. There he applied to the Secretary of the Department of Justice and Border Control of Nauru ("the Secretary") for refugee status. As part of that application, the appellant stated that the Somalian authorities were unwilling to assist him and his family due to their ethnicity. His application was refused by the Secretary. The appellant's application to the Tribunal for review of the Secretary's determination failed, as the Tribunal found that the harm that the appellant and his family faced constituted discrimination, but did not rise to the level of persecution. In the course of directly addressing the question whether the appellant had a well-founded fear of persecution as a result of his membership of the Gabooye tribe, the Tribunal observed that there was country information indicating that there are "police from every tribe in Somaliland, so [the appellant] would have some redress from the acts of others". An "appeal" to the Supreme Court pursuant to s 43(1) of the *Refugees Convention Act 2012* (Nr) was dismissed.

The appellant appealed to the High Court on the grounds that the Supreme Court erred in failing to hold that (i) the Tribunal applied the wrong test in determining whether the appellant suffered "persecution" within the meaning of the Convention relating to the Status of Refugees by requiring the total deprivation of the appellant's human rights in order to find that he faced persecution, and (ii) the Tribunal's failure to put the substance of the country information relating to the tribal composition of the Somaliland police to him constituted a breach of the requirements of procedural fairness contemplated by s 22 of the *Refugees Convention Act*.

The High Court held that the Supreme Court of Nauru was exercising its original jurisdiction in conducting judicial review of the Tribunal's decision. Accordingly, the appeal to the High Court lay as of right. The Court held that the Tribunal did not purport to articulate an exhaustive test for persecution that could only be satisfied by the total deprivation of a person's human rights and that it was open to the Tribunal to conclude that the appellant was not faced with a well-founded fear of "persecution" within the meaning of the Refugees Convention. Finally, the Court held that the Tribunal's reliance on the tribal composition of the Somaliland police force was integral to the Tribunal's reasons for its conclusion, and therefore its failure to bring the country information to the appellant's attention amounted to a failure to accord him procedural fairness. The Court therefore allowed the appeal, set aside the order of the Supreme Court and ordered that the decision of the Tribunal be quashed and the matter be remitted to the Tribunal for reconsideration according to law.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*