HIGH COURT OF AUSTRALIA

BELL, KEANE AND NETTLE JJ

HFM045 APPELLANT

AND

THE REPUBLIC OF NAURU RESPONDENT

HFM045 v The Republic of Nauru
[2017] HCA 50
15 November 2017
M27/2017

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Supreme Court of Nauru made on 22 February 2017, and in its place order that:*

   (i) *the appeal be allowed;*

   (ii) *the decision of the Refugee Status Review Tribunal made on 16 January 2015 be set aside;*

   (iii) *the matter be remitted to the Refugee Status Review Tribunal for determination according to law; and*

   (iv) *the respondent pay the appellant's costs of the proceedings before the Supreme Court of Nauru and of the proceedings to date before the Refugee Status Review Tribunal.*

3. *The respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of Nauru

Representation

P J Hanks QC with R Chaile for the appellant (instructed by Holding Redlich)

G R Kennett SC with R C Knowles for the respondent (instructed by Republic of Nauru)

CATCHWORDS

HFM045 v The Republic of Nauru

Migration – Refugees – Appeal from Supreme Court of Nauru – Procedural fairness – Where Refugee Status Review Tribunal must act according to principles of natural justice – Where Refugee Status Review Tribunal did not provide appellant with notice of adverse country information relevant to Tribunal's determination on which it ultimately relied – Whether failure by Tribunal to put substance of information to appellant constituted breach of requirements of procedural fairness.

Words and phrases – "complementary protection", "natural justice", "procedural fairness".

Appeals Act 1972 (Nr), s 44.
Nauru (High Court Appeals) Act 1976 (Cth), s 5, Schedule, Art 1.
Refugees Convention Act 2012 (Nr), ss 37, 40(1).
Refugees Convention (Derivative Status & Other Measures) (Amendment) Act 2016 (Nr), s 24.
Refugees Convention (Amendment) Act 2017 (Nr), s 4.
Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

1 BELL, KEANE AND NETTLE JJ. The appellant is a Nepalese citizen. He has spent most of his life in the Jhapa district of Nepal. He is a member of the Chhetri caste. In May 2013, the appellant left Nepal and arranged through a people smuggler to travel to Australia. He arrived at Christmas Island in September 2013. In early November 2013, he was transferred from Christmas Island to Nauru under the regional processing arrangement between Australia and Nauru.

2 On 29 January 2014, the appellant applied for a refugee status determination. He claimed to fear persecution in Nepal from Maoists on account of his political opinion. He also claimed to fear persecution from Mongols (members of the Limbu tribe in particular) in his home district of Jhapa on account of his membership of the Chhetri caste.

3 The Secretary of the Department of Justice and Border Control ("the Secretary") determined that the appellant is not a refugee, nor would his return to Nepal breach the Republic of Nauru's ("Nauru") international obligations ("complementary protection").

4 The appellant applied unsuccessfully to the Refugee Status Review Tribunal ("the Tribunal") for a merits review of the Secretary's determination. An appeal to the Supreme Court of Nauru (Crulci J) against the Tribunal's determination was dismissed.

5 The appellant appeals to this Court. It is not in issue that the appeal is brought as of right[1]. The appellant contends that the Supreme Court erred in failing to find that the Tribunal denied him procedural fairness in not putting him on notice of certain information, namely: (i) the changed political circumstances in Nepal; (ii) the proportion of Chhetris in the Nepalese army; and (iii) the persons targeted by Limbuwan activists in Jhapa. The appellant's case is that the Tribunal failed to comply with the obligation of procedural fairness imposed by s 37 of the *Refugees Convention Act* 2012 (Nr) ("the Refugees Act") and under the common law. The appellant's second ground of challenge asserts that the Supreme Court erred in failing to find that the Tribunal applied an incorrect test to the determination of his complementary protection claim.

6 For the reasons to be given, the second ground must be rejected but the second particular of the procedural fairness ground succeeds: the Tribunal was under a common law obligation to put the appellant on notice of the information

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1 *Appeals Act* 1972 (Nr), s 44 and *Nauru (High Court Appeals) Act* 1976 (Cth), s 5 and Schedule, Art 1. See also *BRF038 v The Republic of Nauru* [2017] HCA 44.

concerning the composition of the Nepalese army and give the appellant an opportunity to respond to it. The appeal must be allowed and the appellant's application for review of the Secretary's decision must be remitted to the Tribunal to be dealt with according to law.

The appellant's application for protection

7 Section 4 of the Refugees Act provides:

> "(1) The Republic must not expel or return a person determined to be recognised as a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion except in accordance with the Refugees Convention as modified by the Refugees Protocol.
>
> (2) The Republic must not expel or return any person to the frontiers of territories in breach of its international obligations."

8 Section 5(1) of the Refugees Act provides that a person may apply to the Secretary to be recognised as a refugee. In dealing with the claim, the Secretary must determine whether the person is recognised as a refugee[2] or is owed complementary protection under s 4(2)[3]. It is common ground that Nauru's international obligations include those assumed under the Memorandum of Understanding between Nauru and the Commonwealth of Australia, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the CAT").

9 On 29 January 2014, the appellant applied for a refugee status determination. Attached to his application was a statement setting out the details of his claim. On 1 May 2014, this was supplemented by country information which was forwarded to the Secretary on the appellant's behalf by the Claims Assistance Provider. This material included information concerning the persecution of royalists and Chhetris in Nepal.

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2 Section 3 of the Refugees Act defines "refugee" to mean a person who is a refugee under the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 as modified by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967.

3 Refugees Act, s 6(1).

10 In his statement the appellant said that he had fled from Nepal because he feared that "I will be captured and killed by the Maoist rebels and the Maoist ruling party". He stated his opposition to the communist ideals of the Maoist party and referred to his political profile as the President of the local committee of the Rastriya Prajatantra Party Nepal ("the RPP(N)") from 2008 to May 2013. He said the Maoist party was violently opposed to the activities of the RPP(N) because of the latter's "pro-royalist views and objective to return Nepal to a Hindu State". He described Mongols as having attempted to eliminate the Chhetris in his home district of Jhapa. He claimed to have been physically assaulted in 2012 by Mongols and to have had the source of his subsistence (his cattle, buffalo and goats) stolen by them. He said that he had been unable to seek the assistance of the police because of his membership of the RPP(N) and because the police "are controlled by the Maoist Party". The appellant clarified in the course of a later interview that he had been President of the local committee of the RPP(N) for about 10 or 11 months in 2008. Thereafter he was no longer an officeholder but he continued to be a RPP(N) supporter.

The Secretary's decision

11 The Secretary found that there are two distinct racial groups in Nepal: Mongols, who make up 80 per cent of the population, and members of Hindu castes, including Chhetris, who make up the remaining 20 per cent. The Secretary noted country information that in November 2006 a comprehensive peace agreement was signed between the Nepalese Government and the Maoists, formally ending a 10 year Maoist insurgency. The Secretary was satisfied that following the agreement the Maoists had joined the political mainstream in Nepal. The Secretary noted country information that "after decades of turmoil 'Nepal remained completely free of insurgency-related violence through 2013'".

12 The Secretary accepted that the appellant is a member of the Chhetri caste and a supporter of the RPP(N). The Secretary was dubious of the appellant's claim to have a political profile of a kind that had caused him to be harassed by Maoists to the extent that he claimed. He considered that country information did not support the appellant's claim to have suffered harm on account of being a Chhetri.

13 The Secretary was not satisfied that the appellant would be singled out for extortion by Maoists on his return to Nepal and, in the event he was subject to extortion demands, he considered there was no reason to find that the appellant would be denied State protection. The Secretary concluded that the appellant did not have a well-founded fear of persecution, nor was there a reasonable possibility that the appellant would face harm in Nepal such as to put Nauru in breach of its international obligations were he to be returned to that country.

Bell J
Keane J
Nettle J

The Tribunal's determination

14 Under s 31(1) of the Refugees Act a person has a right to apply to the Tribunal for the merits review of a determination that the person is not recognised as a refugee or that the person is not owed complementary protection. The Tribunal may affirm or vary the determination, remit the matter to the Secretary for reconsideration or set the determination aside and substitute a new determination[4].

15 On 1 October 2014, the appellant applied to the Tribunal for a review of the Secretary's determination. A solicitor acting on the appellant's behalf wrote to the Tribunal on 29 November 2014 detailing the basis of his claims and providing country information about the persecution of royalists and members of the Chhetri caste in Nepal. The material about the persecution of the latter group referenced a report by the International Crisis Group ("the ICG") dated 27 August 2012. The submission asserted that the appellant was in fear of harm from Maoists, who were said to "operate throughout Nepal with impunity", and drew the Tribunal's attention to material which was said to evidence the extent to which Maoists had infiltrated the Nepalese police and security forces.

16 The Tribunal was required to invite the appellant to appear before it and give evidence and present arguments relating to the issues arising in respect of the determination under review[5]. On 2 December 2014 the appellant gave evidence at a hearing before the Tribunal.

17 At the time of the Tribunal's review, s 37 of the Refugees Act provided:

"The Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of information that the Tribunal considers would be the reason, or a part of the reason, for affirming the determination or decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the determination or decision that is under review; and

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4 Refugees Act, s 34(2).

5 Refugees Act, s 40(1).

(c) invite the applicant to comment on or respond to the information."

18 The appellant gave evidence that he had joined the Rastriya Prajatantra Party ("the RPP") in 1990, when it was first established. Following the Maoist uprising in 1995, the RPP's activities had been subdued and the appellant had not suffered any harm. The party later split into two and in 2006 the appellant joined the RPP(N). His level of political activity increased after this.

19 The appellant described Maoists coming to his village and demanding donations and asking people to join them. This had prompted him to leave the village and travel to India. He had worked in Calcutta as a security guard for 18 months before returning to Nepal. Some years later he had travelled to Darjeeling for a few months during another period of Maoist tension in his district. While he was in Darjeeling he heard the news of the comprehensive peace agreement and this prompted him to return to the family farm.

20 Following his return to Nepal, the appellant described conflicts between Maoist guerrillas and the army. He said that both sides were dreadful and that each attempted to extort money or goods from the locals. He said that he had kept up his membership of the RPP(N) even though the monarch had been deposed. In early 2008, he had been asked to become the President of the local committee of the RPP(N). His duties as President required him to promote Hinduism and the RPP(N)'s platform. He claimed to have been targeted as the leader of the RPP(N). He described the "main war" as with the Limbu, an ethnic Mongol group. The Limbu were antagonistic to the appellant because he is a Chhetri and, to a lesser extent, because of their antagonism to RPP(N) members.

21 Following the dissolution of Parliament in May 2012, the appellant said a Maoist group, the Kirat Janabadi Workers Party ("the KJWP"), had demanded money from him, warning him that there would be consequences if he did not pay. About six weeks after receiving this demand he had decided to leave his farm and go to Kathmandu. He had remained in Kathmandu for about two months before leaving Nepal and travelling to Christmas Island.

22 The Tribunal rejected the appellant's account of having been subject to extortion demands by the KJWP as inconsistent, implausible and fabricated to assist his claims. It was not persuaded that the appellant had been targeted by the KJWP. The Tribunal referred to an ICG report dated 27 August 2012 and accepted that Limbuwan activists, including the KJWP, had been involved in the occasional targeting of government representatives. It reasoned that as the appellant is not a government representative he is unlikely to be a target for these groups. It also reasoned that the State would not be involved in the persecution of government representatives and would not be unwilling or unable to protect individuals from the activities of groups who are.

23 The Tribunal rejected the appellant's account that Maoist militia had been absorbed into the police force and army as "mere assertion". It referred to a report published on the website of the Nepalese army ("the army report") which stated that "Chhetris are heavily represented in the army, accounting for 43.64 per cent of personnel as of 2009". The Tribunal took into account country information concerning the improved political conditions in Nepal following the comprehensive peace agreement. It had reservations about the veracity of much of the appellant's evidence. It rejected his account of having fled from Nepal to India because of his political opinion. The Tribunal found that the appellant's decision to live and work in India was an economic one. The Tribunal was not satisfied that the appellant faces a real possibility of persecution for a Convention reason in the event of his return to Nepal and it was not satisfied that he was owed complementary protection by Nauru. It affirmed the determination of the Secretary in each respect.

The appeal to the Supreme Court

24 Section 43(1) of the Refugees Act confers a right of appeal on a point of law from a decision of the Tribunal to the Supreme Court of Nauru. In deciding an appeal, the Supreme Court may quash the decision and remit the matter to the Tribunal to be determined according to law[6]. On 20 July 2015 the appellant filed a notice of appeal in the Supreme Court. His amended notice of appeal contended, relevantly, that the Tribunal erred in law by failing to give him clear particulars of the information on which it relied concerning the changed circumstances in Nepal and the representation of Chhetris in the police force and by applying the wrong test to the determination of his claim to complementary protection. The procedural fairness challenge was particularised as a breach of the obligation imposed by s 37 of the Refugees Act and by the common law. It is evident that on the hearing of the appeal in the Supreme Court the second particular of this challenge was not concerned with the composition of the police force but with the Tribunal's use of the army report.

25 Crulci J concluded, in light of an exchange between the appellant and the Tribunal during the course of the hearing, that the appellant had been on notice of the significance of the information which the Tribunal took into account as to the changed political circumstances in Nepal. Her Honour noted Nauru's submission that the information about the composition of the Nepalese army was factual and there was little that the appellant could have said in response to it. Her Honour concluded that the Tribunal had not denied the appellant procedural fairness

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6 Refugees Act, s 44(2)(b).

without making any finding as to the Tribunal's use of this material. Her Honour did not advert to the obligations imposed by s 37 of the Refugees Act.

26 Turning to the complementary protection ground, Crulci J observed that "a certain looseness of language in phrasing, '*that the appellant would be persecuted if he were to return to Nepal*'" (emphasis in the original) should not lead to the conclusion that the Tribunal applied an incorrect test in determining the appellant's complementary protection claim. Her Honour went on to say[7]:

> "In relation to this ground I am satisfied that taken as a whole the Tribunal considered whether the appellant's '*life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion*' were he to be returned to Nepal. These considerations were continuing from the determinations in relation to whether he was recognised as a refugee for a Convention reason as to whether he would suffer such prohibited treatment if returned to Nepal.
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> The Tribunal determined on the evidence before it that as the appellant had not been harmed previously (or 'persecuted'); nor was there anything to indicate, in all the circumstances of the situation now pertaining in the country, that such harm would befall him in the future."

27 Crulci J held that the Tribunal's reasons when read as a whole did not reveal that a wrong, "higher" test was applied to the determination of the complementary protection claim.

The appeal to this Court

The complementary protection ground

28 On the hearing of the appeal the focus of the appellant's challenge to the Tribunal's determination of his complementary protection claim was on the contention that the Tribunal wrongly applied a test of *likelihood* of harm. In written submissions he also asserts that the Tribunal failed to appreciate the distinction between his claim to be a refugee and his claim to engage Nauru's complementary protection obligation in that it required him to demonstrate that he was entitled to protection as a refugee before he could be considered for complementary protection. He submits that far from appreciating the Tribunal's error in each of these respects, Crulci J perpetuated it in the passage extracted above.

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7 *HFM045 v The Republic* [2017] NRSC 12 at [57]-[58].

Bell J
Keane J
Nettle J

29 The argument is based on the penultimate substantive paragraph of the Tribunal's reasons:

> "The Tribunal is not satisfied that the applicant has suffered serious harm in the past, nor is likely to in the future, for a Convention reason or any other particular reason or that he has put forward any circumstances or reasons that would engage further protection consideration."

30 Under Art 3 of the CAT, Nauru assumes an obligation not to return a person to another State where there are "substantial grounds for believing that [the person] would be in danger of being subjected to torture". Under cl 19 of the Memorandum of Understanding with Australia, Nauru assumes an obligation not to return a person to another State where there is "a real risk" that the person will be subjected, inter alia, to torture, or to cruel, inhuman or degrading treatment. Each obligation, as the appellant observes, requires an assessment of the risk of relevant harm as distinct from the likelihood of its occurrence.

31 Crulci J's criticism of the Tribunal's language as "loose" responded to the appellant's submission that the Tribunal's use of the phrase "would be persecuted" evidenced the application of an erroneous, overly demanding test[8]. Her Honour's conclusion, that the Tribunal's reasons when read as a whole do not suggest that it misapplied the law in this way, necessarily accepts that the test is not one of likelihood of relevant harm. Earlier her Honour had noted various formulations of the test given in an authoritative text: "reasonable possibility"; "real and substantial danger"; "serious possibility"; and "real chance"[9]. In this instance, her Honour observed, the Tribunal applied the test of "real possibility" to the determination of the appellant's claim to be a refugee[10]. In circumstances in which the same facts were relied upon to support the appellant's claim to complementary protection, Crulci J considered there was no reason to conclude that the Tribunal had adopted a different, higher test[11].

32 The Tribunal rejected the factual basis of the appellant's claims to be at risk of harm from Maoists or ethnic groups in Nepal. It found that he was an unreliable witness whose account was in some respects "inconsistent, implausible

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8 *HFM045 v The Republic* [2017] NRSC 12 at [47].

9 *HFM045 v The Republic* [2017] NRSC 12 at [46] citing Hathaway and Foster, *The Law of Refugee Status*, 2nd ed (2014) at 110-115.

10 *HFM045 v The Republic* [2017] NRSC 12 at [55].

11 *HFM045 v The Republic* [2017] NRSC 12 at [53]-[56].

and fabricated". The findings negatived the real possibility that on return to Nepal he might be persecuted for reasons of his political opinion or race. The findings also negatived the existence of a real risk that he might be subjected to torture, or to cruel, inhuman or degrading treatment or punishment, or the existence of substantial grounds for believing that he would be in danger of being subjected to torture in Nepal. It was open to the Supreme Court to find that the Tribunal's reasons read as a whole do not support a conclusion that it misapplied the law respecting Nauru's complementary protection obligations.

Section 37 of the Refugees Act

33 It will be recalled that the appellant's procedural fairness challenges are formulated under s 37 of the Refugees Act and the common law. On the hearing of the appeal the appellant faintly pressed the former. It must be rejected.

34 Section 37 was repealed by the *Refugees Convention (Derivative Status & Other Measures) (Amendment) Act* 2016 (Nr) ("the 2016 Act")[12], which commenced on 23 December 2016. Section 5 of the 2016 Act provides:

> "**Validation of Tribunal decisions**
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> For the avoidance of doubt, any decision or purported decision of the Tribunal made with respect to an application to the Tribunal under section 31 of the principal act for merits review of a decision or determination of the Secretary, between 10 October 2012 and the commencement day, which would have been validly made if at the time of the application, section 37 of the principal [A]ct had not been enacted, is taken to have been validly made on the day it was in fact made."

35 Any uncertainty as to the date on which the repeal of s 37 came into effect was addressed by the enactment of the *Refugees Convention (Amendment) Act* 2017 (Nr) ("the 2017 Act"), which commenced on 5 May 2017. Section 4 of the 2017 Act provides:

> "The repeal of section 37 of the principal [A]ct, effected by section 24 of the *Refugees Convention (Derivative Status and Other Measures) (Amendment) Act 2016*, is taken to have commenced on 10 October 2012."

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12 2016 Act, s 24.

36 Two further provisions of the 2017 Act should be noted:

> "**5 Declaration of rights, liabilities, obligations and status**
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> (1) For the avoidance of doubt, the rights, liabilities, obligations and status of all persons are, by force of this Act, declared to be the same as if section 37 of the principal [A]ct had not been enacted.
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> (2) For the avoidance of doubt, the rights, liabilities, obligations and status of all persons are, by force of this Act, declared always to have been the same as if section 37 of the principal Act had not been enacted.
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> **6 Force and effect of proceedings, matters, decrees and acts**
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> (1) For the avoidance of doubt, all proceedings, matters, decrees, acts and things taken, made or done, or purporting to have been taken, made or done, under the principal [A]ct in relation to an application to the Tribunal under section 31 of the principal Act for merits review of a decision or determination of the Secretary are, by force of this Act, declared to have the same force and effect after the commencement of this Act, as they would have if section 37 of the principal [A]ct had not been enacted.
>
> (2) For the avoidance of doubt, all proceedings, matters, decrees, acts and things taken, made or done, or purporting to have been taken, made or done, under the principal Act in relation to an application to the Tribunal under section 31 of the principal Act for merits review of a decision or determination by the Secretary are, by force of this Act, declared to have had the same force and effect before the commencement of this Act, as they would have had if section 37 of the principal Act had not been enacted."

37 The appellant relies on the absence of reference to the exercise of judicial power by the Supreme Court. He argues that while the 2017 Act may have immunised the Tribunal's review of the appellant's claim if the Supreme Court were considering that review *after* its enactment, it cannot have this effect when the 2017 Act had not been enacted at the time the Supreme Court gave judgment.

38 The combined effect of the 2016 Act and the 2017 Act is that the Tribunal cannot be held to have breached the obligation in s 37 of the Refugees Act because s 37 must be taken to have been repealed before the Tribunal conducted

the review. Nauru submits, correctly, that the circumstance that ss 5 and 6 do not address the exercise of judicial power by the Supreme Court is not to the point: s 37 formed no part of the obligations of the Tribunal and the Supreme Court's conclusion that the Tribunal did not err in law cannot be successfully challenged on the ground that it failed to consider s 37. It smacks of the absurd to contemplate allowing the appeal on the ground of the Supreme Court's failure to address s 37 in circumstances in which, on remitter, the Supreme Court would not be required to consider the provision.

39 The focus on s 37 in the appellant's written submissions is a distraction. It is not in issue that the Tribunal was required to act according to the principles of natural justice[13]. Section 6 of the 2016 Act and s 7 of the 2017 Act each affirm the Tribunal's obligation under the common law to afford procedural fairness to an applicant for review. Nauru did not contest that procedural fairness in the circumstances required that the appellant be given the opportunity of ascertaining the relevant issues and commenting on any adverse information that is credible, relevant and significant[14]. As earlier explained, the appellant particularises three respects in which the Tribunal failed to discharge this obligation.

Changed circumstances in Nepal

40 The first respect is the Tribunal's use of country information concerning the changed political circumstances in Nepal. The Tribunal rejected the appellant's claim to fear persecution as a supporter of the RPP(N) taking into account a report published on the South Asia Terrorism Portal, which recorded, among other matters, that "[i]n a remarkable achievement after decades of turmoil, [Nepal] remained completely free of insurgency-related violence through 2013" ("the changed circumstances report"). The changed circumstances report noted that there had been incidents of political violence in which activists of political parties had clashed with each other. It concluded that the successful election of the second constituent assembly in November 2013 was a critical development which had transformed the political environment of the country.

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13 Refugees Act, s 22(b).

14 *Kioa v West* (1985) 159 CLR 550 at 628; [1985] HCA 81; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 69 [30]-[32]; [2001] HCA 22; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 160-161 [26]; [2006] HCA 63; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 256 [2], 261 [19]; [2010] HCA 23.

Bell J
Keane J
Nettle J

41 The substance of the changed circumstances report was set out in the Secretary's reasons for determining that the appellant is neither a refugee nor a person to whom Nauru owes complementary protection. The appellant was in possession of a copy of the Secretary's reasons at the time he applied to the Tribunal for a review of the determination. Nonetheless, the appellant complains that the Tribunal failed to draw to his attention the significance it was minded to attach to the changed circumstances report in the determination of his claims. That submission is to be considered in the context of the following exchange between one of the Tribunal members and the appellant at the hearing:

> "[TRIBUNAL MEMBER]: ... I mean, it was now, by this stage, a government of National Unity waiting for the elections. I mean, things were already changing at the time that you left.
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> ...
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> [TRIBUNAL MEMBER]: Well, I know you've been away from Nepal now for some time, but it seems to us, when we were reading information about Nepal, that there have been some very substantial changes which might – you know, which you may not have considered. You know, the elections went off quite well, the government has been formed, it seems that all the country is sick of the fighting and the political instability, and even the main Communist Party is now working in government – not in government – as the opposition, but working with the - - -
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> THE INTERPRETER: It seems Maoist are – they are working in different way. We can find in the news that they have got – Maoist, they are not cooperating with other parties. We can find in the news also.
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> …
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> [TRIBUNAL MEMBER]: … When we look at information, we have to use authoritative sources that we know are reliable and impartial. So, you know, our information indicates that there have been no insurgency attacks at all during last year. Now, it's not to say that there are not some little breakaway groups or some who might call themselves Maoists or even some criminal groups who might call themselves Maoist, but these are small groups. It doesn't seem to be a big insurgency any more. And, you know, I see that your parents and your brother are still on the same farm. That hasn't been harmed. Your wife and your children are not harmed. I don't know what you think is going to happen to you if you return. Do you want to take a natural justice break at this point?"

42 Following this exchange the Tribunal member raised with the appellant's lawyer the Tribunal's concern that "there is a substantial change in Nepal and, whatever has happened in the past, we think there's a substantial change of circumstances". The lawyer requested a "natural justice break" and the Tribunal agreed to adjourn the proceeding to enable the lawyer to confer with the appellant. On the resumption of the hearing the lawyer made submissions to the effect that, notwithstanding the country information, Maoists were still operating throughout Nepal and the appellant continued to fear persecution on account of his high profile in the RPP(N).

43 The Supreme Court's conclusion that there was no denial of procedural fairness in relation to the Tribunal's consideration of the change in circumstances in Nepal was well open.

Composition of the Nepalese army

44 The second issue raised by the appellant is the Tribunal's use of the army report, describing the heavy representation of Chhetris in the army, to discount his evidence that Maoist militia have been absorbed into the army. Nauru acknowledges that the Tribunal did not put the appellant on notice of the army report or the significance it was disposed to attach to it. In written submissions, Nauru contended that this failure did not amount to a denial of procedural fairness because the information was not adverse to the appellant. The argument was not pressed on the hearing of the appeal. Nor did Nauru embrace the submission made below that there was "little that the appellant could have said other than he agreed or disagreed" with the information in the army report. Nauru acknowledges that it is not known what the appellant might have been able to say had the issue been raised with him. Nauru contends that the appellant's challenge should nonetheless be dismissed.

45 The starting point for the submission is that the relevance of the army report was confined to Nepal's capacity to afford the appellant State protection from non-State actors. Nauru argues that the Tribunal had rejected the appellant's claim to be at risk of persecution or other significant harm in Nepal from Maoists or ethnic groups before it came to consider State protection. In light of these findings, Nauru submits that any determination of the sufficiency of State protection was unnecessary. On this analysis, it is contended either that there was no denial of procedural fairness because there was no need to put the appellant on notice of the army report or, if the appellant was denied procedural fairness, the Court should decline to grant relief because the denial could not have deprived him of a successful outcome on the review.

Bell J
Keane J
Nettle J

46 The first way in which Nauru puts the argument relies on *R v The Chief Constable of the Thames Valley Police; Ex parte Cotton*[15]. *Cotton* involved judicial review of a decision of the Deputy Chief Constable of the Thames Valley Police Force to dispense with Cotton's services on the ground that he was not fit physically to perform the duties of a constable. The Deputy Chief Constable had acted on the basis of the recommendation in a report, which was not shown to Cotton. Slade LJ (with whom Stocker LJ agreed) considered that, in the circumstances, the primary judge had been entirely justified in dismissing the application because "there would have been no real, no sensible, no substantial chance of any further observation on the applicant's part in any way altering the final decision in his case"[16]. Bingham LJ, agreeing in the result, allowed that cases may arise in which the denial of an adequate opportunity to put a person's case is not unfair, but observed that such cases may be expected to be of "great rarity"[17].

47 The appeal does not present the occasion to consider any difference between the law of England and the law of Australia respecting the content of the obligation of procedural fairness in its application in Nauru[18]. *Cotton* was decided in circumstances in which the Deputy Chief Constable's decision that Cotton was not physically fit to perform his duties could not be seen to be affected by any response Cotton might make. As the English Court of Appeal has more recently observed, the decision in *Cotton* was all but inevitable[19]. This is to be contrasted with the Tribunal's assessment of the credibility and reliability of the appellant's claims to fear persecution or other significant harm in Nepal. The Tribunal's understanding that Chhetris are heavily represented in the Nepalese army cannot be quarantined from its conclusion that the appellant is not at risk of harm on return to Nepal. Bound up in that conclusion is an assessment not only of the prospect of Maoists or ethnic groups inflicting harm on the

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15 [1990] IRLR 344.

16 *R v The Chief Constable of the Thames Valley Police; Ex parte Cotton* [1990] IRLR 344 at 350.

17 *R v The Chief Constable of the Thames Valley Police; Ex parte Cotton* [1990] IRLR 344 at 352.

18 Section 4(1) of the *Custom and Adopted Laws Act* 1971 (Nr) provides, relevantly, that the common law and statutes of general application which were in force in England on 31 January 1968 are adopted as laws of Nauru.

19 *R v Lichfield District Council* [2001] EWCA Civ 304 at [23].

appellant, but of the willingness and capacity of the Nepalese authorities to take action to protect the appellant from threatened harm.

48 The point is underlined in the Tribunal's analysis of the appellant's claim to fear harm from Limbuwan activists. The Tribunal observed that persecution implies involvement of the State, or, where it occurs at the hands of a non-State actor, the unwillingness or inability of the State to protect the individual targeted. The Tribunal relied on the ICG report in finding that Limbuwan activists target "government representatives". As the appellant is not a government representative, the Tribunal concluded that there is no reason to find that the State will be unwilling or unable to protect the appellant. In the succeeding paragraph, the Tribunal went on to note the heavy representation of Chhetris in the Nepalese army.

49 The Tribunal was obliged to put the appellant on notice of the significance that it was disposed to attach to the reported level of representation of Chhetris in the Nepalese army and to give him the opportunity to address the issue. The premise for Nauru's alternative submission, that the denial of procedural fairness could not have deprived the appellant of a different outcome, is not made good. There is no reason to decline to grant the relief that the appellant claims.

50 This conclusion makes it unnecessary to determine the appellant's third procedural fairness complaint, which, in the way it was finally distilled on the hearing, concerns the Tribunal's use of the ICG report to find that he is not at risk of being targeted by Limbuwan activists and which, over objection, is sought to be raised for the first time in this Court.

Orders

51 For these reasons there should be the following orders:

1. Appeal allowed.

2. Set aside the order of the Supreme Court of Nauru made on 22 February 2017, and in its place order that:

   (i) the appeal be allowed;

   (ii) the decision of the Refugee Status Review Tribunal made on 16 January 2015 be set aside;

   (iii) the matter be remitted to the Refugee Status Review Tribunal for determination according to law; and

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(iv) the respondent pay the appellant's costs of the proceedings before the Supreme Court of Nauru and of the proceedings to date before the Refugee Status Review Tribunal.

3. The respondent pay the appellant's costs of the appeal to this Court.