HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER AND KEANE JJ

WET044 APPELLANT

AND

THE REPUBLIC OF NAURU RESPONDENT

WET044 v The Republic of Nauru
[2018] HCA 14
11 April 2018
M132/2017

ORDER

1. *Leave to amend the notice of appeal is refused.*

2. *Appeal dismissed.*

On appeal from the Supreme Court of Nauru

Representation

W A Harris QC with M L L Albert and E R Tadros for the appellant (instructed by Russell Kennedy Pty Ltd)

R C Knowles for the respondent (instructed by the Republic of Nauru)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

WET044 v The Republic of Nauru

Migration – Refugees – Appeal as of right from Supreme Court of Nauru – Where Secretary of Nauru Department of Justice and Border Control determined appellant not refugee and not entitled to complementary protection – Where Refugee Status Review Tribunal affirmed Secretary's determination – Where Tribunal adopted reasoning of Secretary – Whether Tribunal failed to consider country information before it – Whether Tribunal acted in way that was procedurally unfair by failing to put to appellant nature and content of country information it relied upon.

Words and phrases – "appeal", "country information", "procedural fairness".

Appeals Act 1972 (Nr), s 44(a).
Refugees Convention Act 2012 (Nr).

1 KIEFEL CJ, GAGELER AND KEANE JJ. The appellant is an Iranian citizen of Faili Kurdish ethnicity. He arrived by boat at Christmas Island in 2013 and was subsequently transferred to Nauru. There he applied under the *Refugees Convention Act* 2012 (Nr) ("the Refugees Act") to be recognised as a refugee or, alternatively, as a person to whom Nauru owed complementary protection under its other international obligations. The appellant's application was refused by the Secretary of the Department of Justice and Border Control ("the Secretary"). That decision was reviewed by the Refugee Status Review Tribunal ("the Tribunal") and affirmed. The Supreme Court of Nauru dismissed the appellant's appeal. The appellant appeals to this Court pursuant to s 44(a) of the *Appeals Act* 1972 (Nr).

2 It was an important aspect of the appellant's claims to refugee status and to complementary protection that he had been harmed by the Iranian authorities, denied basic rights, and discriminated against because he is a stateless Faili Kurd who held no identity documentation. The Secretary and the Tribunal did not accept that he was stateless and found that he is an Iranian citizen who had completed military service in his country and had lawfully departed it on a genuine Iranian passport. That claim is no longer pursued.

3 The Secretary and the Tribunal accepted that the appellant is of Kurdish ethnicity and would be identified as such in Iran. The Tribunal was not satisfied that the appellant had suffered serious harm in the past on account of his ethnicity and did not consider that there was a real possibility that such harm would befall him in the foreseeable future. The Tribunal observed that the appellant had only two brief encounters with the Iranian authorities in 30 years with no adverse consequences.

4 The Secretary and the Tribunal accepted that Kurds, like other minorities in Iran, may face some discrimination, but not discrimination amounting to persecution. The Tribunal observed that serious, systematic discrimination is directed to non-Shia ethnic minorities, which Faili Kurds are not.

5 The Secretary also considered country information concerning the treatment of failed asylum seekers who are returned to Iran. The Secretary accepted that there have been instances of detention and mistreatment of such persons but that "analysis of those reports indicates that, overall, those returnees had some profile of interest other than simply being a failed asylum seeker". The country information suggested that a person's activities while overseas and the person's potential to engage in protest action on their return would be the main considerations of the authorities in determining whether to take action against the person on return.

6 The Tribunal agreed with and adopted the reasoning of the Secretary on this issue. It said that, in light of the country information set out in the Secretary's reasons, it was prepared to accept that failed asylum seekers might constitute a particular social group in Iran. However, it did not accept that mere membership of the group gives rise to a well-founded fear of being persecuted. Having left Iran lawfully, there was nothing to suggest that the appellant would come to the adverse attention of the authorities.

7 The appellant filed a notice of appeal in this Court contending that the Tribunal erred in law by failing to deal with submissions and country information provided by the appellant with respect to the risk of returning to Iran as a failed asylum seeker. The appellant subsequently filed a summons seeking leave to amend his notice of appeal in order to expand the first ground of appeal and insert a new ground contending that the Tribunal acted in a way that was procedurally unfair by failing to put to him the nature and content of country information it relied upon concerning the risk of harm to Kurds who are Shia Muslim. The respondent submits that leave to amend the notice of appeal should not be granted because the grounds lack any merit. Neither ground was raised before the Supreme Court of Nauru[1].

Ground 1 – the failed asylum seeker claim

8 In the period following the Secretary's decision, and prior to the hearing before the Tribunal, the appellant's legal representative sent a letter to the Tribunal which contained a further statement by the appellant, further submissions on his behalf, and material in support of those submissions. It was submitted that independent country information indicated that failed asylum seekers are at risk if returned to Iran. The country information upon which the appellant relied was contained in an appendix to the submissions.

9 The appellant identifies six pieces of country information as relevant to the Tribunal's statutory function of considering and evaluating information under the Refugees Act. He contends that most of the information was not before the Secretary. He further argues that it may be inferred that the Tribunal did not consider this information and relied only upon the Secretary's opinion and the material upon which it was based because the Tribunal did not expressly refer to the information when much of it contradicts the Secretary's findings.

10 In its reasons the Tribunal identified the evidence before it to include the appellant's further statement and the written submissions which had been

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1 *WET044 v The Republic* [2017] NRSC 66.

received by it to which the country information was appended. It recorded that, in the course of the hearing, it put to the appellant that "the available country information tends to show that ordinary failed asylum seekers do not suffer harm amounting to persecution on return: while they will be questioned by the authorities, the only ones who would suffer harm would be those with a profile such as political activists" and, it observed, the appellant had made no such claim. The appellant and his legal representative were given an opportunity to consider these observations before responding. The response of the legal representative was to again refer the Tribunal to the written submissions and reiterate the appellant's claim that he would suffer harm if he was returned because of the political opinion which would be imputed to him as a failed asylum seeker.

11 It is not readily to be inferred in these circumstances that the Tribunal, having read the appellant's statement and the further submissions, would ignore the material to which they referred. In any event the information upon which the appellant relies is not such as to have required the Tribunal to comment upon it. Most of it was before the Secretary in one form or another and does not contradict the opinions stated by the Secretary.

12 One report by Amnesty International to which the appellant refers suggests that returned asylum seekers can be prosecuted in Iran for falsifying accounts of alleged persecution and contains observations made by an unnamed Iranian judge that failed asylum seekers are interrogated on their return to Iran. It was before the Secretary. Accepting that the Secretary had this report and cited it, the appellant contends that it was not referred to in the context of asylum seeker claims. It is not shown how this report could be said to contradict the conclusions reached by the Secretary that several European countries (he named six, including the United Kingdom) reported having forcibly returned failed asylum seekers to Iran and that no information could be located to suggest that there had been any adverse treatment of such persons upon return to Iran.

13 It may be correct that the Secretary did not cite the Iran Human Rights article to which the appellant refers, but he did refer to another news article containing the same story about the imprisonment of a young male Kurdish asylum seeker who was detained on his return from Norway. The Secretary made specific mention of this story. Further, the Secretary referred to a report by the Immigration and Refugee Board of Canada which summarised the Iran Human Rights statement.

14 The Secretary did not refer to the 2014 report of the United States Department of State to which the appellant draws attention. It predated the Secretary's determination by only a few months. However, it contains only general information concerning the treatment of detainees in Iran. It does not

touch upon the question whether failed asylum seekers are to be detained. In any event, the Secretary referred to the Department of State's 2013 report, which contained substantially the same information.

15 Another Amnesty International report to which the appellant refers would not appear to have been before the Secretary. Like the report just discussed, it contains only general information about detention conditions and the ill-treatment of detainees in Iran.

16 A report by the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) refers to the Swiss Refugee Council describing the Iranian authorities' practice of dealing with returned asylum seekers as "arbitrary" and "unpredictable". The report further provides two examples of returned asylum seekers being arrested after their deportation back to Iran, despite apparently having no political profile. As the appellant contends, it was not before the Secretary. However, the material referred to in the report was. The same source cited by the report was referred to by the Secretary, as were the two examples. The only part of the report that was not before the Secretary would appear to be the opinion about how the Iranian authorities deal with returned asylum seekers.

17 The last article relied upon by the appellant was not before the Secretary. It is entitled "Iran Needs Guarantee of Human Rights, Not Retweets" and was published by Article 19. It cites a case of a political activist who was returned to Iran and imprisoned. It is relied upon by the appellant as contradicting a piece of country information cited by the Secretary which reported an Iranian Minister announcing the formation of a committee to facilitate the return of political activists to Iran but guaranteeing that "any individual who has not committed a violation will not have a problem". Rather than contradict the article relied upon by the appellant, this information is consistent with the Secretary's opinion, with which the Tribunal agreed, that the persons at risk on return to Iran are failed asylum seekers with a pre-existing political profile.

18 There is no substance to Ground 1.

Ground 2 – want of procedural fairness

19 The Tribunal did not accept the appellant's claim to be stateless, as mentioned earlier, and was therefore not satisfied that he had a well-founded fear of being persecuted in Iran by reason of his nationality. The Tribunal then turned to consider whether he may nevertheless suffer serious harm or discrimination on account of his race or, more particularly, his ethnicity.

20 The Tribunal noted[2] two pieces of country information, which said:

> "It was considered that generally, no matter what ethnic or religious background, an individual has, if he or she plainly accepts and lives by the Islamic regime, he or she will be left alone. However, there is institutional discrimination in Iran and it would for example be harder for a Kurd to get a job compared to a Persian Iranian … it was considered that Kurds would be subject to harsher treatment from the authorities than ethnic Persians".
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> "While the constitution grants equal rights to all ethnic minorities and allows for minority languages to be used in the media and in schools, minorities did not enjoy equal rights, and the government consistently denied their right to use their languages in school. In addition, the Gozinesh (selection) law prohibits non-Shia ethnic minorities from fully participating in civic life. The law and its associated provisions make full access to employment, education, and other areas conditional on devotion to the Islamic republic and the tenets of Shia Islam".

21 The Tribunal went on to make the point that whilst Kurds and other ethnic minorities may face discrimination in Iran, the more serious discriminatory provisions are directed to non-Shia Muslims. It observed that: Shia Muslims are in the majority in Iran; the appellant is part of that majority; the appellant has been dutiful to the State in the military service that he had undertaken; and there was nothing to suggest that he does not accept and live by the Islamic regime.

22 The appellant contends that he was denied procedural fairness by the use made of this country information by the Tribunal. In particular, he was not given an opportunity to respond to whether he was in fact, and would be identified as, devoted to the Islamic Republic and Shia Islam or to respond to the country information in so far as it demonstrated that Faili Kurds are not subject to discrimination to the same extent as other minorities. He had had no notice of the Tribunal's reliance on his religious identification because the Secretary had not rested his opinion concerning the discrimination of Kurds in Iran upon it.

23 The appellant himself relied upon his ethnicity as a Faili Kurd to support his claim to systematic persecution and the Secretary and the Tribunal dealt with it on this basis. The material which the appellant put before the Tribunal acknowledges that Faili Kurds are Shia Muslim Kurds. The appellant identified himself as a Shia Muslim in the form he completed at his initial Transfer Interview with the assistance of an interpreter. He made the same statement in

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2 *WET044* unreported, Refugee Status Review Tribunal, 1 February 2016 at [90].

his Application for Refugee Status Determination. These statements no doubt account for the Secretary's finding to this effect.

24 The appellant suggests that an inference was nevertheless open that he might not be religiously observant given that he declined to take an oath when giving evidence before the Tribunal and selected the "non-religion" option. This is not to the point. So far as concerns the possible treatment of the appellant in Iran, the question is not whether he is in fact religious but rather whether he is perceived to be part of an ethnic group which is identified with Shia Islam.

25 The appellant's argument that he was not referred to the country information upon which the Tribunal relied also founders. The first piece, quoted above, was set out in the reasons of the Secretary when dealing with the question of discrimination against Kurds.

26 The second piece of country information was known to the appellant. It was contained in a report to which the appellant referred in his submissions to the Tribunal. Whilst the appellant did not cite this passage, his legal representative, who prepared the excerpts from the country information, must be taken to be aware of it. The rules of natural justice did not require the Tribunal to bring it to the appellant's attention.

27 There is no merit to this ground.

Conclusion and orders

28 Leave to amend the notice of appeal should be refused. The appeal should be dismissed.