HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER AND NETTLE JJ

DWN027 APPELLANT

AND

THE REPUBLIC OF NAURU RESPONDENT

DWN027 v The Republic of Nauru
[2018] HCA 20
16 May 2018
M145/2017

ORDER

1. *Leave to adduce the additional document produced by affidavit dated 27 April 2018 refused with costs.*

2. *Leave to amend the notice of appeal refused with costs.*

3. *Appeal dismissed with costs.*

On appeal from the Supreme Court of Nauru

Representation

C M Harris SC with M L L Albert for the appellant (instructed by Phi Finney McDonald)

G R Kennett SC with A Aleksov for the respondent (instructed by 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

DWN027 v The Republic of Nauru

Migration – Refugees – Appeal as of right from Supreme Court of Nauru – Where Secretary of Department of Justice and Border Control of Nauru ("Secretary") determined appellant not refugee under *Refugees Convention Act* 2012 (Nr) – Where Secretary determined Nauru did not owe appellant complementary protection under *Refugees Convention Act* – Where Refugee Status Review Tribunal ("Tribunal") affirmed Secretary's determinations on basis appellant could reasonably relocate within country of origin – Where Supreme Court of Nauru affirmed Tribunal's decision – Whether appellant's ability reasonably to relocate within country of origin relevant to claim for complementary protection – Whether Tribunal failed to take into account factors relevant to appellant's ability reasonably to relocate – Whether Tribunal required under Convention on the Rights of the Child (1989) to give primary consideration to best interests of appellant's child.

Words and phrases – "best interests of children", "best interests of the child", "complementary protection", "internal relocation", "reasonable internal relocation", "reasonable relocation", "refugee", "well-founded fear of persecution".

Convention on the Rights of the Child (1989), Arts 2, 3(1).
International Covenant on Civil and Political Rights (1966).
Nauru (High Court Appeals) Act 1976 (Cth), s 5.
Refugees Convention Act 2012 (Nr), ss 4, 43.

1 KIEFEL CJ, GAGELER AND NETTLE JJ. This is an appeal as of right, pursuant to s 5 of the *Nauru (High Court Appeals) Act* 1976 (Cth), from a judgment of the Supreme Court of Nauru (Khan J). The Supreme Court dismissed the appellant's appeal brought under s 43 of the *Refugees Convention Act* 2012 (Nr) ("the *Refugees Act*") against a decision of the Refugee Status Review Tribunal ("the Tribunal"). The Tribunal had affirmed a decision of the Secretary of the Department of Justice and Border Control, made pursuant to s 6 of the *Refugees Act*, to reject the appellant's application to be recognised as a refugee in accordance with the Act or as a person to whom the Republic of Nauru ("Nauru") owes complementary protection under the Act.

The facts

2 As appears from the Tribunal's reasons, at the time of the hearing before the Tribunal the appellant was a 31 year old Sunni Muslim man of Pashtun ethnicity, and the sixth of nine siblings. He was born in the Hashtnagri neighbourhood of Peshawar in the Khyber Pakhtunkhwa (KPK) province of Pakistan and, until leaving on the trip which eventually took him to Nauru, he lived there with his wife, young child, and mother, and one of his younger brothers. Three of the appellant's brothers and two of his sisters resided separately in Pakistan with their own families, while two other brothers resided in the United Arab Emirates. After completing his education, the appellant worked in his father's grocery store, and then took it over when his father retired in 2009. His father died in 2012.

The appellant's case before the Tribunal

3 The appellant's case before the Tribunal was that he was a refugee under the *Refugees Act* or, alternatively, that he was a person to whom Nauru owed complementary protection under the Act because his circumstances engaged Nauru's international obligations under, inter alia, the International Covenant on Civil and Political Rights (1966).

4 The appellant's claim for protection was put on the basis that he had a well-founded fear of being persecuted by the Taliban by reason of, relevantly, his actual or imputed political opinion. He stated that, in or around 2005, one of his older brothers, Abdul Rahim, was kidnapped by the Taliban and badly beaten in an attempt to extort money from him. Abdul Rahim subsequently fled abroad to the United Arab Emirates and remained there at the time of the hearing. In 2010, one of the appellant's younger brothers, Mohammad Bilal, was targeted by the Taliban, when he was in college, in an effort to pressure him to join their cause. He, too, fled abroad and joined Abdul Rahim in the United Arab Emirates. The appellant claimed that, in or around 2009, he was badly injured in a bomb blast close to his father's grocery store which killed some 150 people. He did not

claim to have been specifically targeted in that attack. The appellant said that he was also attacked and robbed in 2012, and was injured in the process, but, although his attackers were bearded and dressed like members of the Taliban, he did not claim that the attack was anything other than a random robbery.

5 The appellant did claim, however, that the risk of being harmed by the Taliban became worse in 2013. He said that, beginning in May 2013, he was targeted in attacks by the Taliban at his business premises in the Minar Bazaar and that the attacks were different, and more significant, because he was targeted personally. He described four incidents. In the first, on 20 May 2013, he said that four Taliban entered his store and demanded that he either join their organisation or pay them 50 lakhs of rupees as "charity". He refused them outright. In the second, which he said occurred on 24 May 2013, some Taliban killed the appellant's friend, Rizwan, the proprietor of a nearby store, who had ignored a similar extortion demand. The appellant took Rizwan to hospital but he died. The appellant said that, on 30 May 2013, he had closed his store for the day and begun making his way home when the four Taliban who had previously threatened him at his store approached with guns and began chasing him. He managed to outrun them and get away. He claimed that, the following day, he locked up his store and thereafter stayed home except when it was necessary to go out for essential supplies. As to the third incident, on 3 June 2013, the appellant said that, while he was out to purchase medicine for his wife, he was fired on from a car in a market called the People Mundai, but that once again he managed to escape. He believed that it was the same Taliban who had previously attacked him who were firing from the car. He added that he had not wanted to return to that area but was unable to find what he needed closer to home. The fourth incident was said to have occurred on 16 June 2013, when the appellant was going out to purchase groceries. He said that he was run down by a car as he attempted to cross a main road, and he believed that those responsible were the same Taliban who had threatened him in his store. Following that incident, he resolved to depart Pakistan for his own safety.

6 On the basis of that evidence, the appellant claimed that his refusal to do the Taliban's bidding gave rise to a well-founded fear of being persecuted for Convention reasons, namely, his actual or imputed political opinion, on the basis that people who do not co-operate with the Taliban are perceived to be their opponents.

The Tribunal's decision

7 The Tribunal found that, on balance, the threat of harm facing the appellant was a real one, and accepted that some Taliban in the appellant's local area maintained an adverse interest in him. The Tribunal also accepted that, if the appellant returned to Peshawar, there was a real possibility that he would

once again encounter those Taliban who had threatened him in the past, in which event he would suffer persecution at their hands for the Convention reasons claimed. Thus, the Tribunal concluded that the appellant did have a well-founded fear of being persecuted for Convention reasons in his home area in Pakistan. But the Tribunal also found that the appellant could practically, safely and legally relocate to another area within Pakistan where he would not be exposed to a risk of being persecuted or of other serious harm, and that such a relocation would be reasonable in the sense that the appellant could, if he so relocated, lead a relatively normal life without facing undue hardship in all the circumstances. On that basis, the Tribunal concluded that the appellant was not a refugee. Based on the same analysis of the evidence, the Tribunal further concluded that, although the appellant would be at risk of persecution in his home area, that would not be the case if he were to relocate to another area within Pakistan and, therefore, that the Tribunal was not satisfied that he faced a real possibility of degrading or other treatment such as would enliven Nauru's international obligations to afford him complementary protection.

The Supreme Court's decision

8 In dismissing the appellant's appeal to the Supreme Court, Khan J held that the Tribunal had not erred in applying a reasonable internal relocation test to the appellant's claim for complementary protection[1] and that the Tribunal had not failed to take into account the interests of the appellant's child in making the finding that the appellant could reasonably relocate within Pakistan[2].

Grounds of appeal

9 The appellant's grounds of appeal to this Court are as follows:

> "1. The Supreme Court of Nauru erred by failing to conclude that the Refugee Status Review Tribunal ('the Tribunal') misapplied the Nauruan law of complementary protection by identifying and applying ... a 'reasonable relocation' test in relation to complementary protection, where there is no such test as a matter of law as set out in s 4(2) of the *Refugees Convention Act* 2012 (Nr).
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> 2. The Supreme Court of Nauru erred by failing to conclude that the Tribunal erred by failing to consider all of Nauru's international

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1 See *DWN027 v The Republic* [2017] NRSC 77 at [41].

2 See *DWN027 v The Republic* [2017] NRSC 77 at [60].

obligations when it determined whether the Appellant could relocate within Pakistan, namely its obligation to give 'primary consideration' to the best interests of the Appellant's child, in light of the Republic of Nauru's ratification of the *Convention on the Rights of the Child* 1989.

3. The Tribunal erred by failing to consider an integer of the Appellant's objections to internal relocation, namely that if the Appellant returned to Pakistan other than to Peshawar he would 'be compelled to go back to the original area of persecution'."

10 The appellant sought leave to restate Ground 3 as follows:

"3. The Supreme Court erred by failing to conclude that the Tribunal erred by failing to consider all integers of the Appellant's objections to relocation."

Relevant statutory and treaty provisions

11 The relevant statutory and treaty provisions are set out in *CRI026 v The Republic of Nauru*[3] and need not be repeated.

Ground 1: Relevance of ability reasonably to relocate to entitlement to complementary protection

12 The arguments advanced by the appellant in support of Ground 1 were substantially the same as those advanced in *CRI026 v The Republic of Nauru*[4]. For the reasons given in that matter, they are rejected.

13 After the hearing of the appeal, the appellant filed an affidavit providing to the Court an advance unedited version of *General Comment No 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, released by the United Nations Committee against Torture, which is said to have replaced *CAT General Comment No 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*[5]. The appellant did not attempt to explain the relevance of this document to the issues that arose in the appeal, and, given its status as an advance, rather than a

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3 [2018] HCA 19 at [12]-[15].

4 [2018] HCA 19 at [16]-[49].

5 16th sess, UN Doc A/53/44, annex IX, (1997).

final, document, it is not apparent whether it has any force or effect. Accordingly, leave to adduce the document is refused.

Ground 2: Failure to take into account Nauru's international obligation to give primary consideration to best interests of children in actions concerning children

14 Section 4(2) of the *Refugees Act* provides that Nauru must not expel or return any person to the frontiers of territories in breach of Nauru's international obligations. Relevantly, Art 3(1) of the Convention on the Rights of the Child (1989) ("the CRC") provides:

> "In all actions concerning children, whether undertaken by ... courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

15 The nub of the appellant's argument in support of Ground 2 was that the Tribunal erred in their determination of the appellant's claim for complementary protection by failing to have regard to the best interests of his child. More specifically, it was submitted that, as a party to the CRC, Nauru is bound by the international obligation in Art 3(1) to make the best interests of the child a primary consideration in all actions concerning children and, therefore, that it would be contrary to s 4(2) of the *Refugees Act* for Nauru to expel a non-resident contrary to the best interests of his or her children. Accordingly, it was contended, the Tribunal were bound to determine the appellant's claim for complementary protection according to the best interests of his young child, but had failed to do so.

16 The argument raises questions as to the construction of both the CRC and the *Refugees Act* which it is unnecessary to address. The appellant did not contend before the Tribunal that the Tribunal were bound to decide his claim for complementary protection by reference to the best interests of his child, and, consequently, he did not adduce any persuasive evidence that his child's best interests would be adversely affected by the refusal of his claim. In the circumstances of this case, that must be regarded as determinative of the issue.

17 Although an administrative tribunal's process is to some extent inquisitorial and, depending on the nature and circumstances of a given application, a tribunal may be obligated to go beyond the case articulated by the applicant, the obligation to do so is confined to unarticulated claims which are apparent on the face of the material before the tribunal[6]. As Kirby J emphasised

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6 See, in particular, *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at 18-19 [58], [60].

in *Dranichnikov v Minister for Immigration and Multicultural Affairs*[7] in relation to the tribunal in that case:

> "The Tribunal acts in a generally inquisitorial way. This does not mean that a party before it can simply present the facts and leave it to the Tribunal to search out, and find, any available basis which theoretically the [statute creating the Tribunal] provides for relief. This Court has rejected that approach to the Tribunal's duties. The function of the Tribunal, as of the delegate, is to respond to the case that the applicant advances. A fortiori this is the function of the [appellate court] in determining any application to it for judicial review of a decision of the Tribunal." (footnotes omitted)

18 Counsel for the appellant argued that there was evidence before the Tribunal that the appellant had a family including a young child, who, self-evidently, would need to accompany the appellant if he relocated to another place in Pakistan. In counsel's submission, that was enough to require the Tribunal to consider the best interests of that child in accordance with Arts 2 and 3 of the CRC.

19 That argument should be rejected. The evidence before the Tribunal was that, prior to the appellant's departure from Pakistan, he had resided with his wife, young child and mother and one of his younger brothers in Peshawar. The appellant's case before the Tribunal was that it was not reasonable to expect the appellant to relocate to another place in Pakistan because the appellant's ethnicity, family commitments and lack of resources would prevent him from relocating, even if it were safe to do so. In support of that contention, the appellant gave evidence that he would be subject to racism in the place of relocation because of his ethnicity and that, because he would have to provide a guarantee to lease a house in another area, as opposed to continuing to live in the house which he owned, he would be subjected to an added financial burden. Alternatively, he said that, if he sold his house in order to finance the purchase of another house, it was possible that the Taliban would get wind of the sale and that would expose him to further risk of a Taliban attack. He also claimed that he did not know anyone living in any other cities in Pakistan and that it would be impossible for him, as a Pashtun, to establish himself in a new city without existing support networks. The appellant did not depose, however, that there was any other respect in which the best interests of his child would or could be compromised by accompanying the appellant to the place of relocation. To the

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7 (2003) 77 ALJR 1088 at 1100 [78]; 197 ALR 389 at 405; [2003] HCA 26.

contrary, he gave evidence that he regarded it as being undesirable that he should be separated from the child.

20 In the result, the appellant's case as to the unreasonableness of expecting him to relocate within Pakistan went no further than that it would be difficult because of his ethnicity, added financial burdens and the fact that his family, like him, would never be safe from risk of harm from the Taliban. And to that case the Tribunal responded, fully, as follows:

> "While the Tribunal acknowledges that it might take the [appellant] some time to re-establish himself in a different part of Pakistan before he would be able to have his own family join him, the Tribunal notes that the [appellant] gave evidence that his family own their home as well as the shop underneath, from which they draw rental income, and that his brothers in Peshawar are also assisting them. While the [appellant] objected to the suggestion that he might sell assets such as his shop, claiming that if he did so people would know that he had money and target him, this does not explain how anyone with such ambitions would know how to locate the [appellant], nor why such a transaction could not be carried out through an agent acting on his behalf. The Tribunal notes that the [appellant] has considerable experience as a small trader, and that according to his [refugee status determination] application form, in addition to speaking Pashto he speaks reads and writes Urdu, and also speaks and writes some English, suggesting little practical impediment to the [appellant's] relocation.
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> With respect to the suggestion that a newly arrived Pashtun would face difficulty integrating, the Tribunal notes that Furthermore, [sic] in a recent study entitled *Social Adjustment of Pathan migrants with Punjabis in Lahore (Pakistan)* ... the authors found that the majority of Pathans (Pashtuns) who had moved to Lahore from KPK: want to remain living in Lahore; have renown for the local people; are satisfied with their social and cultural position; are satisfied with their life in Lahore; have good relations with their Punjabi neighbours; and consider [Punjabis] to be their co-operative friends.
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> For these reasons, the Tribunal concludes that relocation would be reasonable for the [appellant] reasonable in the sense that he could, if he relocated, lead a relatively normal life without facing undue hardship in all the circumstances."

21 In matters like this, it is important to bear in mind Gleeson CJ's admonishment in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[8] that the system of judicial review of administrative action which operates in matters of this kind means that by the time a case reaches this Court it may be at the fifth level of decision making (or, as in this case, the fourth) after the appellant has failed at each level below. That being so, there is a real danger of an appellant seeking to put his or her case before this Court in a way that it was not put below and of the appellant criticising the reasoning of the decision maker in a manner that overlooks the forensic context in which the reasoning was expressed. For that reason, as Gleeson CJ emphasised[9], the position which this Court has taken, and to which it adheres, is that, upon judicial review, the decision of the decision maker must be considered in light of the basis on which the application was put before the decision maker and not upon some entirely different basis that may only occur to the appellant's lawyers at this later stage of the process.

22 Upon that basis, Ground 2 must be rejected.

Ground 3: Failure to consider all integers of claim for complementary protection

23 Nauru did not oppose the grant of leave to advance the restated Ground 3, but leave should be refused and Ground 3 should be rejected.

24 The argument advanced in support of Ground 3 was that the Tribunal erred in their consideration of all of the "integers" of the appellant's claim for complementary protection in the following three respects:

(1) Having made the "incomplete" statement of "[w]ith respect to the suggestion that a newly arrived Pashtun would face difficulty integrating, the Tribunal notes that Furthermore", the Tribunal then referred with apparent approval to a 2012 study of Pashtuns who had moved to Lahore, which concerned a different point from that raised in the incomplete statement.

(2) The Tribunal's acceptance of the 2012 study of Pashtuns was inconsistent with one of the Tribunal members' apparent acceptance, in the course of the hearing, that there was discrimination against Pashtuns.

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8 (2003) 216 CLR 473 at 478-479 [1]; [2003] HCA 71.

9 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 479 [1].

(3) The Tribunal's reasons did not refer to any of the appellant's evidence as to why he specifically would face difficulty integrating in another area within Pakistan.

25 None of those points is persuasive, either separately or in combination. The first wrongly equates the typographical error which appears in the quoted section of the Tribunal's reasons to a substantive failure to consider a relevant issue. Reading the subject passage as a whole, there can be no doubt that the Tribunal did not intend to include the word "Furthermore". Plainly, it should have been deleted in final proofing of the reasons. Contrary, too, to the appellant's contention, the words which precede "Furthermore" are not an "incomplete" statement. When "Furthermore" is read as if deleted, as it is apparent it was intended to be, the subject passage presents as a plain statement of the appellant's claim that a newly arrived Pashtun would face difficulty integrating, followed by the Tribunal's rejection of the claim by invocation of the results of the 2012 study of Pashtuns which found that the majority of Pashtuns who moved to Lahore successfully integrated, were satisfied with the social and cultural position, and considered Punjabis to be their co-operative friends.

26 The second point is also misconceived. The observation by the member of the Tribunal that was said to have evidenced an acceptance of the proposition that there was discrimination against Pashtuns was as follows:

> "And one of the reports suggests that in fact where Pashtuns are targeted, it usually seems to be Turi Shia Pashtuns. So that's relevant to the degree of risk and the probability of them tracking you down and harming you because of what has happened up in Peshawar. The other point I guess about the problems you might face, you know, in terms of discrimination by Punjabis if you were to relocate that may – well, it's not clear that there's any country information suggesting that the level of that would rise above discrimination, whether there would actually be any risk of persecution."

27 As is apparent from the appellant's counsel's final submission to the Tribunal, the appellant accepted before the Tribunal that there was a lack of reports regarding discrimination and relied on what he asserted to be claims made by other applicants before the Tribunal:

> "Regarding discrimination ..... that the lack of reports regarding this issue [sic], but we believe the [T]ribunal has the experience of listening to a lot of clients and all they suggest is the fact that because of their ethnicity and their religion how they have been discriminated. And that is not something that they chose. It is something that is opposed to them. In our submission we instructed [sic] that the Taliban are able to target our client

> whether he relocates within Pakistan and we further instruct [sic] that the Taliban have a sophisticated intelligence network which allows the Taliban to target people who are opposed to them no matter where they are going and relocate within Pakistan. Therefore we submit relocation is not reasonable as an alternative option for our client. Returning our client to the country that he fears a well-founded – he has a fear – a well-founded fear of persecution is breaching the Nauru International Obligations."

28 It should also be observed that members of a tribunal are entitled to make statements in the course of a hearing which might, ultimately, contradict the views to which they finally come after hearing and considering all of the evidence. More often than not (as in this case), such statements are in effect questions designed to elucidate the basis of an applicant's claim in relation to a particular issue[10].

29 The third point is wrong in fact. The evidence and submissions which the Tribunal are said to have failed to take into account are:

(1) The appellant's child, who was only 18 weeks old when the appellant left Pakistan, his wife and his dependent mother remained in Peshawar.

(2) The appellant did not speak Punjabi, the predominant language in Punjab.

(3) The appellant would need a guarantor to rent a house.

(4) There was an "inconsistency" between the Tribunal's acceptance of the possibility that the appellant's family (who continued to depend upon the house and rented store in Peshawar) might need to remain in Peshawar for some time before moving to another area within Pakistan, and the Tribunal's reasoning that the appellant could sell his house with the store underneath it in order to finance the purchase of a new house in the place of relocation.

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10 See and compare *Tanner v Hall* (1988) 82 ALR 109 at 112-113; *Bond v Australian Broadcasting Corporation* (1988) 19 FCR 494 at 511; *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [4] per Allsop CJ, [27], [33]-[34] per Flick J. See also *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; [2000] HCA 48.

30 As should be apparent from the discussion of Ground 2 above, the Tribunal dealt comprehensively with the first three of those four concerns.

31 As to the fourth, it is necessary to recall that when the matter was before the Tribunal, the only concerns which the appellant identified regarding moving to another area within Pakistan were his fear of discrimination by reason of his ethnicity; the fact that, unless he purchased a house in the place of relocation, he would have to provide a guarantee to obtain a lease; and that, if he sold his existing house in order to purchase a house in the place of relocation, the Taliban might learn of the sale and somehow trace him. Further, the only evidence which the appellant adduced as to the burden of having to arrange a lease guarantee was the bare assertion that he would have to arrange a lease guarantee. He did not suggest that he would be unable to do so or advance any reason as to why it would be unreasonable to expect him to do so, and even now none has been identified.

32 In those circumstances, there was no inconsistency between the Tribunal's acceptance of the possibility that the appellant's family might need to remain in Peshawar for some time before moving to another area within Pakistan and the Tribunal's reasoning that the appellant could sell his house and the store underneath it to finance the purchase of a new house in another area within Pakistan. The kind of burden which one might expect to be involved in arranging a lease guarantee for single-person accommodation in the place of relocation would hardly make it an unreasonable burden for the appellant to bear. As a matter of ordinary experience, it is the kind of burden which many people are likely to face when selling one house in order to fund the acquisition of another. And if the burden of arranging such a guarantee were greater than what one might naturally expect it to be, or if there were factors which otherwise made it unreasonable to expect the appellant to bear that burden, then, for the reasons already given in relation to Ground 2, it was incumbent on him to identify what they were and to adduce evidence to establish their existence. In the absence of such identification and evidence, the Tribunal were not required to analyse, and in effect they could not have analysed, the issue to any greater extent than they did.

Conclusion

33 It follows that the appeal should be dismissed with costs.