IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 18/2015
Being an appeal against a decision of the Nauru Refugee Status Review Tribunal brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

EMP144 APPELLANT

AND

The Republic of Nauru RESPONDENT

Before: Khan J
Date of Hearing: 6 May 2016
Date of Judgment: 27 September 2017

Case may be cited as: EMP144 v The Republic

CATCHWORDS:

Whether the Tribunal failed to consider integers of the objection to relocation – whether the Tribunal failed to identify the practicability of relocation – whether the Tribunal failed to identify the practicability of relocation – whether the Tribunal erred by importing a relocation test into the complementary protection assessment – whether the Tribunal failed to deal with the evidence or other material or to conduct the hearing in accordance with the Act.

HELD: the four arguments raised by the appellant regarding relocation do not amount to objections and the Tribunal dealt with those issues – the issue of relocation was obvious in this matter and was addressed by the appellant – appeal dismissed.

APPEARANCES:

Counsel for the Appellant: M Albert
Counsel for the Respondent: A Aleksov

JUDGMENT

INTRODUCTION

1. The appellant filed an appeal against the decision of the Refugee Status Review Tribunal ("the Tribunal") pursuant to s 43(1) of the *Refugees Convention Act 2012* ("the Act") which states:

> A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.

2. The Tribunal delivered its decision on 17 January 2015 affirming the decision of the Secretary for the Department of Justice and Border Control ("the Secretary") that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.

3. The appellant filed an appeal in this Court on 20 July 2015 and the grounds were amended on 29 April 2016.

EXTENSION OF TIME

4. At the time of the Tribunal's decision, s 43(3) of the Act provided that a Notice of Appeal against a decision of the Tribunal had to be filed within 28 days after the appellant received a written statement of the Tribunal's decision. At that time, there was no provision in the Act (or otherwise) for an extension of the 28 day period.

5. On 14 August 2015, the Act was amended by the *Refugees Convention (Amendment) Act 2015* which provides for a period of 42 days in s 43 of the Act for filing of the appeal. The amendment also provided that the Court may extend the period in s 43(3) of the Act if, inter alia, it is satisfied it is necessary in the interests of the administration of justice to make that order.[1]

6. On 4 February, 27 April and 30 June 2015, orders were made by the Registrar to extend the time for appeal to be filed against the decision delivered on 17 January 2015 to 31 August 2015.

7. The Notice of Appeal was filed on 20 July 2015.

8. The Republic for the efficient disposal of the case had agreed that the appellant be allowed to present his case on the merits of the proposed grounds of appeal and at the same time present his argument on substantive issues. If the Court was satisfied that there was merit in the appeal, then the extension of time could be granted.

9. After the hearing the Republic and the lawyers for the appellant have come to an agreement that the extension of time will no longer be an issue and consent orders

[1] *Refugees Convention (Amendment) Act 2015*, s 43(5).

were filed on 3 May and 14 November 2016 vacating the orders of the Registrar and extending the time for filing of the appeal.

BACKGROUND

10. The appellant is a 37 year old man from the village of Pakhu, Myagdi District in western Nepal.

11. The appellant's village was very isolated. He attended boarding school in Benni, which was about a day's walk away and he only returned home about once per month.

12. The appellant is married to a woman from the next village and has a son born in December 2006.

13. In 2008, a road was built in the area and the appellant worked as a driver for two years while his mother and wife worked on the family's farm. The road was still a long walk from the village and the appellant only drove within five hours of Benni, which was not a large distance given the road condition.

14. The appellant's father, paternal uncle and older brother were members of Rastriya Prajatantra Party ("RPP"). His uncle was an office bearer in their area.

15. In 2003, the Nepal Communist Party-Maoist ("NPC-M") came to power in the Myagdi District. Within 12 months, the appellant's brother disappeared and has not been seen since. The appellant suspects that NPC-M is responsible for the disappearance. The appellant's father was assaulted by members of NPC-M and departed for India where he has lived for 10 years without returning, though the appellant has visited him in India.

16. In 2008, the appellant joined RPP, with which his uncle was still involved. When the appellant ceased working as a driver in 2010, he was able to become more involved and became vice president of the local branch. He occasionally worked in the office in Benni.

17. On 7 August 2011, members of NPC-M intruded on a RPP meeting and forcefully paraded the appellant's uncle around the marketplace with his face blackened and his shoes tied around his neck in order to show him disrespect and humiliate him. After this incident, his uncle stayed in Benni and did not return to Pakhu.

18. On 10 August 2011, members of NPC-M attended the appellant's farm. He saw a group of about 15 people armed with sticks approach, calling his name. He fled before they arrived and spent three months in Benni, only making occasional return trips to his home at night. He then returned to his home but tried to avoid being outside during the daytime.

19. In May 2012, the appellant received a letter demanding that he leave the RPP and support Maoist ideology. The letter threatened that he would suffer "consequences" if he did not acquiesce to the demands. The appellant fled to Baglang District where he

stayed with his parents in law for a month. He then moved further away to stay with a maternal aunt for a month. He then gradually returned to living at home in Pakhu.

20. In December 2012, a group of seven or eight members of NPC-M broke into his house at night. The appellant was beaten with fists and sticks to the extent that he lost consciousness. He was taken to hospital in Benni by neighbours who carried him to the road. He told the neighbours that his wife should meet him in Baglang. While in Benni he heard that his house had been burned down when the group of NPC-M members returned four days later.

21. The appellant lived with his mother, wife and child at his wife's parents' house in Baglang District for three months. He did not feel safe there because of its proximity to Pakhu.

22. The appellant travelled to Kathmandu where he met up with his uncle, who was no longer involved with RPP. While in Kathmandu he saw some members of NPC-M that he recognised from his home which caused him fear.

23. He departed Nepal in 25 May 2013. After spending time in Indonesia, he arrived in Nauru in November 2013 without his passport. His wife has since moved to Kathmandu.

24. On 9 November 2014, the appellant's wife was assaulted by NPC-M members in Benni while attempting to establish her child's citizenship, which is necessary for him to attend school. She was asked for the appellant's whereabouts and when she told them that he was in Nauru she was hit. The appellant suspects that the difficulty with his son's citizenship has arisen because of his political involvement.

APPLICATION TO THE SECRETARY

25. On 23 November 2013, the appellant attended a Transfer Interview.

26. On 29 January 2014, the appellant made an application to the Secretary for recognition as a refugee and for complementary protection under the Act.

27. On 12 September 2014, the Secretary made a determination that the appellant is not a refugee and is not owed complementary protection.

APPLICATION TO THE TRIBUNAL

28. The appellant made an application for review of the Secretary's decision pursuant to s 31(1) of the Act which provides:

> A person may apply to the Tribunal for merits review of any of the following:
>
> a) a determination that the person is not recognised as a refugee;

b) a decision to decline to make a determination on the person's application for recognition as a refugee;

c) a decision to cancel a person's recognition as a refugee (unless the cancellation was at the request of the person).

d) a determination that the person is not owed complementary protection.

29. On 27 October 2014, the appellant made a statement and on 24 November 2014 his lawyers, Craddock Murray Neumann, made written submissions to the Tribunal.

30. On 24 November 2014, the appellant's lawyers also contacted the Tribunal via email to request an adjournment on the grounds that the appellant was distressed by news that his wife had been threatened with death and his child is not safe to attend school. The email also stated that an appointment had been made with a psychiatrist and attached a further statement of the appellant dated 24 November 2014. The request for an adjournment was made two days before the scheduled date of the hearing.

31. On 26 November 2014, the appellant appeared before the Tribunal and explained that he did not feel fit to give evidence. The hearing was adjourned.

32. On 2 December 2014, the appellant appeared before the Tribunal to give evidence and present his arguments with his representative and an interpreter in Nepali and English languages.

33. The Tribunal handed down its decision on 17 January 2015 affirming the decision of the Secretary that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.

THIS APPEAL

34. The appellant filed five grounds of appeal which are:

1) The Tribunal erred by failing to consider integers of the objection to relocation raised by the Appellant and thereby erred by denying the Appellant natural justice in breach of the Act.

2) The Tribunal acted in breach of s 22(b) and/or s 40(1) of the Act by failing to identify the practicability of relocation with the Appellant and seeking his response to that issue.

3) The Tribunal erred by failing to consider integers of the Appellant's claims to complementary protection including that there was a reasonable possibility that he would be subject to arbitrary deprivation of life and/or torture and/or degrading treatment.

4) The Tribunal erred by importing a relocation test in its analysis of the Appellant's 'complementary protection assessment' in breach of s 4(2) of the Act.

5) The Tribunal erred by failing to:

   a) deal with evidence or other material provided by the Appellant in breach of s 34(4)(d) of the Act;

   b) alternatively, acted in breach of s 22(b) and/or s 40(1) of the Act in the conduct of the hearing about Nepali citizenship law relevant to the denial of the Appellant's son's Nepali citizenship application.

SUBMISSIONS

35. In addition to the submissions filed by the appellant and the respondent, they also made oral submissions which were of great assistance to me and I am indeed very grateful to both counsel.

CONSIDERATION

Ground One – The Tribunal erred by failing to consider integers of the objection to relocation raised by the appellant and thereby erred by denying the appellant natural justice in breach of the Act

36. The appellant submits that under the Refugees Convention the Tribunal is required to deal with two issues. Firstly, whether the appellant could be removed from the risk of persecution in another part of the country; and secondly to determine whether such relocation would be reasonable. The appellant concedes that the Tribunal dealt with the issue of relocation under the sub-headings 'Removal of Risk' [2] and 'Reasonableness'[3].

37. The appellant submits that the Tribunal's analysis was an error of law in that it failed to deal with specific integers that the appellant told the Tribunal that made relocation unreasonable in his personal circumstances. The reasons are set out which are:[4]

   a) His family and he would "face substantial prejudice in accessing education, employment and essential services";

   b) That he lived in hiding when he lived elsewhere from his home area and he did so, in part, because he wished to ensure that he did not publicly express his political views, which he continues to hold, because "there is no freedom to express one's political views" throughout Nepal. It is worth noting in this

[2] Refugee Status Review Tribunal Decision, [33]-[38].
[3] Ibid, [39]-[41].
[4] Appellant's written submissions, [25].

respect that it is well established that hiding an inherent attribute to avoid harm is not a reason for a Tribunal to conclude that there is no risk of that harm.[5]

c) He does "not have any tertiary or professional education, and I have no professional skills. I have only ever worked as a self-employed farmer and driver"; and

d) He holds ongoing fears for the safety of his wife and young son.

38. The appellant submits that the Tribunal did not deal with the objections raised above when it considered the reasonableness of the appellant's relocation in its reasons. In support of this submission the appellant relies on *MZZQV v Minister for Immigration and Border Protection and Refugee Review Tribunal*[6] and relies on [68] where it is stated:

> All the authorities cited to this point, including the passages from Kirby J's judgment, are to the effect that the range of issues may become relevant to the question of whether internal relocation is reasonable, depending on the circumstances and the issues raised by an applicant for refugee status, and, when they do, must be carefully regarded by the decision-maker.

39. The appellant also submits that the Tribunal was required to act in accordance with s 22 of the Act and "act according to the principles of natural justice" and the Tribunal's failure to "respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord [the appellant] natural justice"[7].

40. The appellant submits that in this matter the Tribunal failed to respond to a clearly articulated argument that he had relocated within Nepal but unsuccessfully which eventually caused him to flee Nepal.

41. The respondent in its response accepts that when complaints are made about relocation the Tribunal comes under a duty to consider the claim. The respondent submits that the principles are set out *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*[8] ("*Randhawa*") which was approved by the High Court of Australia in *SZATV v Minister for Immigration and Citizenship*[9] where it was stated:

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[5] *RT (Zimbabwe) and others (Respondents) v Secretary of State for the Home Department (Appellant)* [2012] UKSC 38 [25-26]; *Minister for Immigration and Border Protection v SZSCA* [2014] HCA 45; (2014) 254 CLR 317, [17].

[6] [2015] FCA 533.

[7] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088, 1092 [24]; see also [32], approved and applied by a unanimous High Court in *Plaintiff M16/2010E v Commonwealth of Australia* [2010] HCA 41 [90].

[8] (1994) 52 FCR 437, 441.

[9] (2007) 233 CLR 18, 22-23 [10] (Gummow, Hayne and Crennan JJ).

> Although it is true that the Convention definition of a refugee does not refer to parts or regions of a country, that provides no warrant for construing the definition so that it would give refugee status to those who, although having a well-founded fear of persecution in their home region, *could nevertheless avail themselves of the real protection of their country of nationality elsewhere within that country.* The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of the protection by that country. If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders.
>
> (emphasis added)

42. The respondent submits that the emphasised passage from Randhawa reveals that the relocation question is to be assessed by reference to whether it is reasonable in the sense of practical for a person to avail himself of the protection of that country.

43. The respondent accepts that the personal circumstances of an asylum seeker would always be relevant – but the mere fact some complaint is made does not necessarily mean that relocation is unreasonable; if the complaint does not rationally connect with the question whether access to protection is reasonable; there is no error of law if the Tribunal does not address the complaint in its statement of reasons.

44. In relation to the four complaints made by the appellant the respondent submits:

    a) The appellant's first statement provides "As an active member of NNDP my family and I face substantial prejudice in accessing education, employment and essential services". The respondent submits that this was not an objection "to relocation". It was part of the appellant's claim as to why he was a refugee or owed complementary protection; and the Tribunal responded to the issue of the appellant's fear from his political opinion in finding that he was not at risk of politically motivated violence in Kathmandu by reason of a stabilised situation in Nepal.

    b) The second argument is that "the whole time that I was in Kathmandu in 2013, I was in hiding". The respondent submits that this "hiding in Kathmandu" means his way of avoiding the Maoists in his home region. The Tribunal found that he would not be exposed to a real risk of harm if he returned to Kathmandu; and further, this was not an objection to relocation and there was no error on the part of the Tribunal for failing to specifically mention it in its reasons.

    c) The third argument related to the lack of tertiary education or professional skills. Again the respondent submits that this was not an objection to relocation and the Tribunal could not have erred in not considering it as it was

never raised. In any event the Tribunal addressed the level of the appellant's education which is Year 10 of High School at [39] – [40][10] which means that he did not have tertiary education and his employment was therefore confined to driving and political activity.

d) In relation to the issue of his wife and young son the respondent submits that it involved two aspects:

i) The first concerns his fear of Maoists in his home region and the Tribunal dealt with this in its finding that the appellant and his wife and child would not be exposed to a real chance of harm in Kathmandu; [11] and therefore it cannot be suggested that the Tribunal did not deal with it.

ii) With respect to the child's inability to enrol in school, the respondent submits that the child was unable to enrol because of the appellant's absence and with his return his child would be able to obtain citizenship and enrol in school.[12]

45. The respondent further submits that the first, third and fourth arguments have no connection with any objections to reasonableness of the appellant seeking State protection in Nepal, further the third argument regarding tertiary education again has no connection with his ability to seek State protection; and that it may affect his quality or standard of living but this is not the issue which the Tribunal is required to determine.[13]

46. The four arguments raised by the appellant do not amount to objections and in any event the Tribunal dealt with those issues.

47. In the circumstances this ground of appeal has no merit or basis and is dismissed.

Ground Two – The Tribunal acted in breach of s 22(b) and/or s 40(1) of the Act by failing to identify the practicability of relocation with the appellant and seeking his response to that issue

48. The appellant submits that the rejection of the appellant's refugee claim was based on the Tribunal's opinion that he could reasonably relocate within Nepal [14] and the Tribunal failed to draw the appellant's and his legal representative's attention to the issue of relocation as to whether it would be practical to relocate within Nepal. The appellant submits that the Tribunal raised but very briefly the risk of persecution to

[10] Refugee Status Review Tribunal Decision.
[11] Ibid, [8], [21], [33], [38].
[12] Ibid, [20].
[13] Hathaway and Foster, *The Law of Refugee Status* (2014, 2nd ed), 350-361.
[14] Appellant's written submissions, [29].

the appellant elsewhere in Nepal which was one half of the criteria that the Tribunal had to consider in order to determine the question and his claim to protection.[15]

49. The appellant refers to the relevant passages of the transcript where it is stated: [16]

Ms Zelinka:	Okay. I think we're just about getting up to natural justice brief. Can you see our points that we're looking at? We're looking at a very localised harm.
Ms Palmer:	Is that on location?
Ms Zelinka:	So the harm is very localised that he has suffered – that he recognises the Maoists, they recognised him. It's a tiny place. And so, it seems reasonable to be anywhere else other than in that particular village, especially given the changes of circumstances.
Ms McIntosh:	... be relocation? Wouldn't be a relocation issue because he said he's not going back to the village.
Mr Fisher:	...
Ms McIntosh:	That's different. Yes. It may not be a question of relocation.
Mr Fisher:	No. Well, when ...
Ms Zelinka:	That may be a semantic problem because it's – if he ...
Ms McIntosh:	It's a – yes ... the test might not be ...
Ms Zelinka:	... EM144 says I am not going back to the particular village because my house has been burned down and chooses another location, then we're just racking our brains to see if that is the same test as relocation. But you may as well look at it under that..., but it does seem to be a localised fight with the participants knowing each other and so on. And, but we also look to the fact that even those localised fighters may very well have stopped. There's no evidence of them continuing in – over the last year.
Ms Palmer:	So if he can replace or... if there is a still ongoing persecution, is it just the case that you will advance the...?
Ms Zelinka:	Yes, is there ongoing – yes that's...

[15] Appellant's written submissions, [30].
[16] Transcript of Proceedings, 41-42.

Ms Palmer: Thank you.

Ms Zelinka: Alright. Well you can go to him and we will...

Mr Fisher: So, the hearing is adjourned at 4.54 pm.

50. The appellant submits that it can be seen from the above transcript that the appellant did not speak at all during this exchange; that the error arises from the failure of the Tribunal to alert the appellant to the issue that was ultimately dispositive of his claim, "namely, the reasonableness of his relocation".[17] The appellant submits that the failure to raise the issue of relocation with him or with his legal representatives was in breach of s 22(b) and s 40 of the Act.

51. The respondent accepts that there may arise a case where procedural fairness requires the Tribunal to specifically identify with the appellant an issue in review which is not obvious to the appellant;[18] what the respondent notes is an element of the common law requirement of procedural fairness (s 22 of the Act). Section 40(1) obliges the Tribunal to invite the applicant to the hearing but does no more.[19] The respondent submits that there is no unfairness if the Tribunal does not specifically mention an obvious issue to an appellant.[20]

52. The respondent further submits that the issue of relocation is an inherent aspect of evaluation of whether an appellant is a refugee or owed complementary protection; and so, will be an obvious issue, at least where the appellant is legally represented[21].

53. The appellant in this matter addressed the issue of relocation in his written submissions to the Tribunal[22] and his representative also made submissions at the oral hearing.[23] Therefore no procedural unfairness arises in the Tribunal not expressly mentioning to the appellant that the relocation was an issue in review. He was clearly aware of the issue and took up the opportunity to address the same.

54. I accept that the issue of relocation was obvious in this matter and both the appellant and his representatives addressed the Tribunal on that issue and therefore no procedural unfairness arises in the Tribunal's failure to expressly mention that issue to the appellant.

55. In the circumstances, this ground of appeal has no merit and is dismissed.

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[17] Appellant's written submissions, [31].
[18] Respondent's written submissions, [18].
[19] Ibid, [19].
[20] *Commissioner for ACT Revenue v Alphaone* (1994) 49 FCR 576, 591-593.
[21] Respondent's written submissions [21]
[22] Book of Documents, 36 [27], 118-119 [68]-[72].
[23] Transcript of Proceedings, 183.

Ground Three – The Tribunal erred by failing to consider integers of the appellant's claim to complementary protection including that there was a reasonable possibility that he would be subject to arbitrary deprivation of life and/or torture and/or degrading treatment

56. The appellant submits that it is very hard to decipher the Tribunal's reasons in respect of the appellant's claim to complementary protection. Mr Albert submits that there appears to be two reasons for the Tribunal to reject the appellant's claim for complementary protection. If the claim was rejected on the basis that the appellant could reasonably relocate then the appellant relies on grounds one, two or four and if the claim was rejected on the basis that no argument was advanced as to why he would suffer relevant harm then the appellant relies on this ground of appeal.

57. The respondent in response submits that:[24]

> Under Australian law, it is settled that where the Refugee Review Tribunal evaluates an applicant's claims to protection under the Refugees Convention, and finds that the appellant's narrative – the factual matters underlying the claim – do not give rise to a risk of harm, then the Tribunal is entitled to rely on those same findings (essentially rejecting the claim) to determine related complementary protection claims. This is an efficient course for the Tribunal to adopt, having regard to the workload required of it. Where there is a detailed and comprehensive evaluation of the applicant's narrative with respect to the Refugees Convention, it is lawful for the RRT to state that it has determined the complementary protection claims 'for the same reasons as the Refugees Convention claim'.[25]

58. The respondent further submits that this is what the Tribunal has done in this case and there is no error of law.

59. I find that the Tribunal has done precisely as submitted by the respondent and that there is no error of law.

60. In the circumstances, this ground of appeal has no merit and is dismissed.

Ground Four – The Tribunal erred by importing a relocation test in its analysis of the Appellant's 'complementary protection assessment' in breach of s 4(2) of the Act

61. Both counsel have agreed to adopt all the submissions made in respect of appeal number 11/2015 *DWN027 v The Republic*[26] ("*DWN072*") as being equally applicable to this case in respect of this ground.

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[24] Respondent's written submissions, [24].

[25] *SZSHK v Minister for Immigration* [2013] FCAFC 125; *SZSGA v Minister for Immigration* [2013] FCA 774.

[26] Decision published in the Supreme Court of Nauru on 22 September 2017.

62. I therefore reproduce my findings in respect of ground one in DWN027 which relates to this ground and which appears at paragraphs [26] to [43] of the decision:

> [26] At the hearing of the appeal the appellant's counsel amended ground one. The reference to s 4(2) was deleted and was replaced by "in breach of the Act".
>
> [27] The appellant submits that as an alternative to the claim to be a refugee, he also submitted that he was owed complementary protection on the basis that there was a real risk that he would face, inter alia, arbitrary deprivation of life or cruel, inhumane or degrading treatment.
>
> [28] It is submitted by the appellant that the Tribunal dealt with complementary protection at [45][27] and the Tribunal rejected his claim and stated:
>
>> ...However, for the same reasons as are set out above with respect to relocation, the Tribunal is not satisfied that the applicant faces a real possibility of degrading or other treatment such as to enliven Nauru's international obligations.
>
> [29] Having rejected the complementary protection claim, the Tribunal found that the appellant could relocate within Pakistan to avoid mistreatment.
>
> [30] The appellant further submits in its written submissions[28] that it is well established that the 'internal flight alternative' or 'internal relocation principle' is part of the determination of a claim to protection under the Refugees Convention; and that in international law a person is entitled to the protection if:
>
> a) The person has a well-founded fear of persecution for a Convention reason in one place in the country of return; and
>
> b) The person cannot reasonably relocate to another part of that country.
>
> [31] The appellant further submits[29] that under s4(2) of the Act, Nauru "must not expel or return any person to the frontiers of territories in breach of its international obligations"; those obligations include Article 7 of the International Covenant on Civil and Political Rights ("ICCPR") which provides that no one "shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment"; and that the UN Human Rights Committee on the implied non-refoulement obligation stated that:
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>> The text of Article 7 allows of no limitation... States parties must not expose individuals to the danger of torture or cruel, inhumane or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.

[27] Refugee Status Review Tribunal Decision.
[28] Appellant's written submissions, [24].
[29] Ibid, [26].

[32] The appellant further submits[30] that the international obligations on Nauru are confirmed by Article 19(c) of the Memorandum of Understanding between Nauru and Australia on 3 August 2013 where Nauru "assured" Australia that it would not "send a Transferee to another country where there is a real risk that the Transferees will be subject to torture, cruel, inhumane or degrading treatment or punishment...".

[33] The appellant further submits [31] that there is no relocation test under international law if a decision-maker is satisfied that the person is at risk of being subject to relevant mistreatment at the place of country of return.[32] The appellant relies on *Minister for Immigration and Citizenship v MZYYL*[33]where the Full Federal Court of Australia stated:

> ...express and implied non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CROC)... do not require the non-citizen to establish that the non-citizen could not avail himself or herself of the protection of the receiving country or that the non-citizen could not relocate within that country. Sections 36(2B)(a) and (b) [of the Australian *Migration Act*] have adopted a different and contrary position.

[34] The appellant also submits that Australia, New Zealand, the European Union, the United Kingdom and Canada have an express relocation provision in respect of complementary protection in their legislation.

[35] In oral submissions, the appellant's counsel submitted as follows:

> The very short point that the appellant makes by this ground is that there is no relocation test as a matter of international law and therefore under the Act in respect of complementary protection.[34]

[36] The appellant in conclusion submits that "...the Tribunal was in error to import into Nauruan law a relocation test in respect of a complementary protection claim."[35]

[37] The respondent submits[36] that the appellant's argument cannot be accepted where it stated:

[30] Appellant's written submissions, [26].
[31] Ibid, [27].
[32] See commentary on this question by leading refugee and complementary protection scholars, Professors Jane McAdam and Michelle Foster as recorded in J. McAdam "Australian Complementary Protection; A Step-By-Step Approach" [2011] SydLawRw 29; (2011) 33(4) Sydney Law Review 687 at 707.
[33] [2012] FCAFC 147, [18].
[34] Transcript of Proceedings, page 25, lines 38-40.
[35] Appellant's written submissions, [29].
[36] Respondent's written submissions, [23].

Indeed, the logical extension of the appellant's argument is that it would not permit the Tribunal to have regard to internal relocation or protection under a treaty that expressly provided for internal relocation or protection. This absurdity emphasises that the appellant's argument cannot be accepted.

[38] The respondent submits that any international obligations on Nauru in regard to 'complementary protection' ought to be examined according to the terms and context of the source treaty or customary law and the context of each treaty or custom will include the general body of international law regarding international protection obligations. The respondent discussed relocation and non-refoulement under international law in its written submissions[37] where it stated:

25) Having regard to the manner in which the review before the Tribunal was conducted, it appears that the appellant's argument on this appeal must focus on the [*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*("CAT")] and the ICCPR.

26) The respondent submits that it is helpful to consider these treaties by reference to the jurisprudence regarding the Refugees Convention.

27) Article 33(1) of the Refugees Convention provides:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

28) There are at least two analyses by which a relocation test is implied into the Refugees Convention[38]:

28.1) One analysis flows from the observation that the Refugees Convention adopts as subject matter the geopolitical unit of a 'country' (or State). This has been said to imply that for any *obligation* to arise upon a country to afford protection to an asylum seeker, the person seeking protection must be unable to obtain that protection from their country of nationality. This implication derives from the fact that in the Refugees Convention, principal responsibility for protection lies with an individual's country of nationality. It follows that a foreign country does not owe protection obligations under the Refugees Convention to a person who can obtain the protection of his or her country of nationality. Inherent in this task is an examination of whether a person might reasonably be able to

[37] Respondent's written submissions, [25] – [28].
[38] Hathaway and Foster, *The Law of Refugee Status* (2014, 2nd ed) 332ff.

'relocate' to an area within his or her country of nationality where he or she can access protection.

28.2) A second analysis flows from the definition of refugee, in that a person who can reasonably relocate to an area within his or her country of nationality is not outside his or her country of nationality 'owing to' a well-founded fear of persecution. Such a person is not regarded to be a refugee.

[39] The respondent discussed the relocation test under Article 3(1) of the CAT and Articles 2, 6, 7 of the ICCPR and submits that unlike the Refugees Convention both the CAT and the ICCPR do not have an express non-refoulement obligation but non-refoulement obligations are implied in the same manner as in Article 33 of the Refugees Convention.

[40] The respondent further submits[39] that the Tribunal applied the UNHCR Guidelines on International Protection (No. 4), dated 23 July 2013; and that the appellant does not challenge the correctness of that test set in the Guidelines and the appeal should be dismissed.

[41] I am satisfied that both the CAT and the ICCPR contain an implied non-refoulement obligation and that the Tribunal was correct in arriving at its decision at [45].

[42] In coming to this conclusion, I am assisted by the decision of Crulci J in *ULA007 v The Republic*[40]where the entire appeal was based on complementary protection and Nauru's international obligations. In that caseCrulci J stated as follows at [59] to [62] as follows:

> [59] In Nauru, the Act is the primary instrument of protection for an asylum seeker, and consideration of internal relocation is part of the determination of refugee status. The determination of complementary protection is secondary and 'complements' the first enquiry. If there is not a well-founded fear of harm for a Convention reason so as to determine that the applicant is a refugee, the question then moves to whether he/she nonetheless faces a real risk of harm if returned to the home country (or any country to which they may be moved).
>
> [60] Having considered that an asylum seeker has an internal relocation alternative and is therefore not a refugee, and then moving on to consider complementary protection on the same facts but without the relocation alternative, would potentially render theprimary legislation redundant.
>
> [61] The purpose of international obligations and complementary protection is to protect those who are not refugees from harm (a harm which is not one of the five convention reasons). If there is an internal relocation

[39] Respondent's written submissions, [40] – [41].
[40] [2017] NRSC 40.

alternative open to the appellant then this is as relevant to the complementary protection consideration as it was to the refugee status determination.

[62] The Court endorses the considerations laid out by Hathaway and Foster in *The Law of Refugee Status*[41]when determining if there is an internal relocation alternative for an applicant:

1) Can the applicant safely, legally and practically access an internal site of protection?

2) Will the applicant enjoy protection from the original risk of being persecuted?

3) Will the site provide protection against any new risks of being persecuted or of any indirect *refoulement*?[42]

4) Will the applicant have access to basic civil, political and socio-economic rights provided by the home country or State?

[43] In the circumstances, this ground of appeal is dismissed.

<u>Ground Five – the Tribunal failed to deal with evidence or acted in breach of s 22(b) and/or s 40(1) of the Act in the conduct of the hearing</u>

63. In relation to the appellant's claim that his son was denied citizenship on the basis of his political opinion, the Tribunal told the appellant at the hearing that Nepali citizenship by descent requires proof of the father's or paternal grandfather's Nepali citizenship. The mother's status is not sufficient to establish the child's Nepali citizenship. In response to this information, the appellant stated through his interpreter, "I don't know".[43]

64. In its reasons for decision, the Tribunal stated:[44]

> The applicant seemed to be of the view that it was his political opinion, or some action of the Maoists, that was denying his son citizenship. However, the Tribunal put it to him quite clearly that citizenship can be established only with the active participation of the father… The Tribunal emphasised that country information on this point is irrefutable: a child needs evidence that his father is Nepali in order for him to have Nepali citizenship, and therefore to be able to attend school. It is nothing to do with the applicant's politics but rather, the position of women in Nepali society.

65. The Tribunal cited a US State Department country report on Nepal[45] in support of its reasons.

[41] Hathaway and Foster, *The Law of Refugee Status* (2014, 2nd ed).
[42] Ibid, 361 lines 14-17.
[43] Transcript of proceedings, 37.
[44] Refugee Status Review Tribunal, [20].

66. The appellant states that this source in fact states that anyone born to a Nepali mother or father has the right to Nepali citizenship under the 2006 Citizenship Act.

67. The appellant submits that under s 34 of the Act the Tribunal is required to give a written statement that refers to the evidence and other material on which the findings of fact were based. The appellant refers to the judgment of the Full Court of the Federal Court in *Minister for Immigration and Border Protection v MZYTS*:[46]

> The Tribunal's reasons disclose no process of weighing and preferring some over the other. In the context of two or more pieces of apparently pertinent, but contradictory, evidence an expression of a preference for some evidence over other evidence generally requires an articulation of the different effects of the evidence concerned, and then some indication as to why preference is given. All these matters are for the trier of fact. The absence from the recitation of country information of the material referred to in the post-hearing submissions is indicative of omission and ignoring, not weighing and preference.

68. The appellant submits that the failure of the Tribunal to refer to the further and contradictory parts of the country information indicate "omission and ignoring". This amounts to a failure to meet the requirements of s 34 and so also an error of law.[47]

69. Further, the appellant submits that under ss 22(b) and 40(1), the Tribunal is required to act according to the principles of natural justice and invite the applicant to appear before it. By denying the appellant an opportunity to speak and failing to listen to what he had to say on this issue, the appellant was denied a meaningful hearing.

70. The appellant refers to the judgment of Flick J in the Federal Court of Australia in *Minister for Immigration and Citizenship v SZQRB*:[48]

> The requirements of procedural fairness… extend beyond affording a claimant an opportunity to be heard. The opportunity extends to requiring a decision-maker to hear and genuinely take into account what he has been told. An opportunity to speak to a decision-maker who does not listen is no opportunity at all. Never has it been suggested that an opportunity to be heard is satisfied by an opportunity to speak to an unhearing and disinterested decision-maker. On one view, the opportunity is no opportunity at all; on another view, a decision-maker who is unwilling to listen is a decision-maker who displays actual bias, prejudice and prejudgment.

71. The appellant submits that the Tribunal did not listen to the appellant and dismissed his attempt to put forward a contrary argument. The Tribunal described its own understanding as "irrefutable" and acted in breach of either or both ss 22(b) and 40(1).[49]

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[45] US State Department, *Country Report of Human Rights Practices for 2013: Nepal*, s.2c.
[46] [2013] FCAFC 114, [50].
[47] Appellant's written submissions, [58].
[48] [2013] FCAFC 33 [389].
[49] Appellant's written submissions, [61].

72. The respondent submits that the US State Department report indicates that despite the provisions of the 2006 Citizenship Act, "the practical reality in Nepal was that the appellant's child could not obtain Nepali citizenship in his absence".[50] There is therefore no foundation for the appellant's submissions on either alleged error of law.

73. The respondent further states that the appellant's submissions that the Tribunal failed to consider part of the country information or failed to conduct a meaningful hearing are without merit. The most that the submissions could amount to is an error of fact which does not give rise to a point of law.[51]

74. The relevant passage in the US State Department Report is as follows:

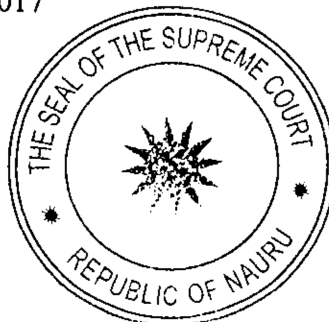
> Citizenship laws that discriminate by gender contributed to statelessness. The 2006 Citizenship Act, which allowed more than 2.6 million persons to receive certificates, states that anyone born to a Nepali mother or father has the right to Nepali citizenship. The same law states, contradictorily, that a child born to a Nepali woman who is married to a foreign citizen is able to obtain citizenship only through naturalization. Securing citizenship papers for the child of Nepali parents, even when the mother possesses Nepali citizenship documents, was extremely difficult unless the father of the child supported the application. This persisted despite a 2011 Supreme Court decision to grant a child Nepali citizenship through the mother if the father was unknown or absent.

75. I accept the respondent's submissions. The country information supported the Tribunal's view that the father's involvement was required for a child to obtain Nepali citizenship. This issue was discussed with the appellant at the hearing. This ground of appeal has no merit and is dismissed.

CONCLUSION

76. Under s 44(1) of the Act, I make an order affirming the decision of the Tribunal.

DATED this 27th day of September 2017



Mohammed Shafiullah Khan
Judge

[50] Respondent's written submissions, [46].
[51] Ibid, [48].