IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 044/2015
Being an appeal against the decision of the Nauru Refugees Status Review Tribunal both pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

HFM043 APPELLANT

AND

THE REPUBLIC OF NAURU RESPONDENT

Before: Khan J
Date of Submissions: 5 July 2017
Date of Judgment: 22 September 2017

Case may be cited as: HFM043 v The Republic (No. 2)

CATCHWORDS:

Whether the matter should be remitted to the Tribunal when the appellant has been separately granted derivative status.

HELD: the Tribunal is now unable to reconsider the matter - an order remitting the matter to the Tribunal would be futile - appeal dismissed.

APPEARANCES:

Counsel for the appellant: K Keane
Counsel for respondent: R O'Shannessy

JUDGMENT

INTRODUCTION

1. On 9 June 2017, I delivered my reasons on the appeal dismissing grounds one and three and allowing ground two and had adjourned this matter for further submissions on the orders that I should make for the disposal of the appeal.

2. On 21 September 2014, the Secretary made a decision that the appellant was not recognised as a refugee nor was owed complementary protection under the *Refugee Convention Act 2012* ("the Act").

3. On 17 March 2015, the Refugee Review Status Tribunal ("the Tribunal") affirmed the decision of the Secretary that the appellant was not recognised as a refugee and nor was she owed complementary protection under the Act.

4. The appellant filed an appeal pursuant to s 43 of the Act that she was not recognised as a refugee.

5. On 4 August 2016, the appellant was granted derivative status pursuant to s 6(2) of the Act as she is now married to a refugee. On 5 August 2016, she was issued a Refugee Determination Record ("RDR") in recognition of her status as a refugee.

AMENDING ACT 2016

6. On 23 December 2016, the *Refugee Derivative Status & Other Measures (Amendment) Act 2016* ("Amending Act") came into effect.

7. The Amending Act inter alia made changes to s 6 and s 31 of the Act. For the sake of completeness, I shall set out the provisions of the Act and the Amending Act.

8. Section 6 of the Act provided:

   1) Subject to this Part, the Secretary must recognise whether an asylum seeker is recognised as a refugee or is owed complementary protection.

   2) Dependents of an asylum seeker recognised as a refugee or owed complementary protection must be given derivative status.

   3) The determination must be made as soon as practicable after a person becomes an asylum seeker under this Act.

9. Section 13 of the Amendment Act substitutes a new s 6(1), which states as follows:

   Subject to this Part, the Secretary must determine:

   a) an application to be recognised as a refugee made under section 5;

b) an application to be given derivative status made under section 5; or

c) whether a person who has made an application under section 5 is owed complementary protection.

10. Section 14 of the Amendment Act repeals s 6(2) of the Act. Section 15 of the Amendment Act inserts a new s 6(2A), which states:

> A Refugee Determination Record must be issued to a person who is:
>
> a) determined to be a refugee;
>
> b) given derivative status; or
>
> c) determined to be owed complementary protection.

11. Section 16 of the Amending Act inserts a new s 6(2B), which states:

> Any application made by a person under section 5(1), section 5(1AA) or section 5(1A), that has not been determined at the time the person is given a Refugee Determination Record, is taken to have been validly determined at that time.

12. Section 17 of the Amending Act substitutes a new s 6(3), which states:

> The determination made under s 6(1) must be made as soon as practicable after the application is received.

13. Section 31(1) of the Act provided:

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

14. Section 21 of the Amending Act substitutes a new s 31(1), which states:

> A person may apply to the Tribunal for merits review of any of the following:
>
> a) a determination made under section 6(1);

b) a decision to cancel a person's recognition as a refugee made under section 10(1).

15. Section 22 of the Amending Act inserts a new s 31(5), which states:

> An application made by a person under section 31(1)(a), that has not been determined at the time the person is given a Refugee Determination Record, is deemed to have been validly determined at that time.

COMMENCEMENT DATE

16. Sections 10, 16 and 22 of the Amendment Act, which insert the new ss 6(2B) and 31(5) into the Act, are deemed to have commenced on 21 May 2014.[1] All other relevant sections commenced on the date of certification, 23 December 2016.

SUBMISSIONS

17. The respondent filed written submissions on 5 July 2017 and the appellant relies on her submissions filed on her behalf on 13 April 2017.

18. The respondent submits that this matter should not be remitted to the Tribunal despite this Court's finding allowing the appeal on ground two as the Tribunal would not have the powers or authority to reconsider the matter in view of the new s 31(1) and s 31(5); and under s 6(2A) the appellant was given a RDR on 5 August 2016.

19. In her submissions, the appellant concedes that under the new s 31(5) the appellant's position would be that her application to the Tribunal would be taken to have been validly determined on 5 August 2016, when she was issued with a RDR; [2] and that the RDR is issued unconditionally and she would still continue to hold her RDR regardless of the outcome of the appeal.[3]

20. Despite the concession that the appellant has been issued with a RDR, she still maintains:[4]

> Obtaining an RDR on the basis of derivative status should not be construed to render the Court proceedings as futile, and nor should it be construed as restrictive to the Appellant potentially being determined to be a refugee and also holding her RDR pursuant to s.6(2A)(a) of the Act.

21. The respondent disputes the appellant's contention and submits at [21] as:

> Third, it is patently incorrect to state that 'there is nothing in the legislation that prevents a person from being given derivative status and also be

[1] Amendment Act, s 2(1).
[2] Appellant's written submissions, [18].
[3] Ibid, [19].
[4] Ibid, [48].

determined to be a refugee' (sic) [DS Submissions, [23.a]). That is precisely the intention of ss 6(2B) and 31(5) of [the Act], as is made clear in the Explanatory Memorandum; it is also the plain effect of those provisions.

CONSIDERATION

22. In the normal course of events once an applicant is recognised as a refugee, granted derivative status or owed complementary protection by the Secretary under s 6(1) of the Act, the appellant is precluded from applying for a review under s 31(1) of the Act.

23. In this case the appellant was granted a RDR on 5 August 2016 and from that time she is precluded from seeking the Tribunal to review the determination under s 31(1).

24. In the reasons given for allowing the appeal on ground two, I held that the Tribunal's decision was affected by an error of law in that it failed to adjourn the hearing to ask the appellant to obtain a full medical report with respect to her mental health status at [65] of the decision. Having made that finding, the matter should ordinarily be remitted to the Tribunal for reconsideration.

Whether the matter should be remitted to the Tribunal

25. The respondent submits at [5] of the written submissions that this Court should not make an order remitting the matter to the Tribunal for reconsideration; and its reason for making the submission is that the Tribunal would be *legally incapable* of reviewing the matter because of the provisions of s 31(5) of the Act. It further submits that any remittal would not serve any practical purposes for the parties.

26. The respondent submits that if its submissions are accepted then the only order this Court can make under s 44(1) to dispose of the matter is to dismiss the appeal.

Moot and futile

27. On the issue of the matter being moot or futile or 'otiose', the respondent made submissions as follows:

> [7] It is well-established that a court exercising judicial power has the discretion to refuse to grant relief not withstanding that a ground of appeal (or a ground of judicial review) may succeed, on the basis that the grant of relief would be 'futile' or 'otiose', or that the proceeding was 'moot'. This principle was recognised by Lord Wilberforce in *Mallach v Aberdeen Corporation* [1971] WLR 1578, where his Lordship noted that 'the Court does not act in vain'.[5] It has been given effect in many common law jurisdictions, including Australia,[6] New Zealand,[7] and Canada.[8]

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[5] *Mallach v Aberdeen Corporation* [1971] WLR 1578, 1595.
[6] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
[7] *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29.
[8] *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board* [1994] 1 SCR 202.

[8] This court has consistently applied the principle in refusing relief in circumstances where it is established that the relevant proceeding is moot,[9] or that the relief sought by an appellant would be futile.[10] As is evident in the jurisprudence of this Court, the nomenclature of 'mootness' or 'futility' is not significant; what is important is the Court's recognition that relief will not issue where it would have no useful or practical consequence for the parties...

28. Although the appellant was issued with a RDR on 5 August 2016 under s 5(2) of the Act, the new s 31(5) provides that an application that has not been determined at the time the person is given a RDR, is taken to have been validly determined *at that time*.

29. If the decision of the Tribunal is quashed, the Tribunal is now unable to reconsider the matter due to the operation of s 31(5). Therefore an order remitting the matter to the Tribunal would be futile.

CONCLUSION

30. I accept the respondent's submissions and in exercise of my discretion, I refuse to remit the matter to the Tribunal for reconsideration as it will be a purely 'futile' exercise; and in the circumstances I decline to make any orders under s 44 of the Act and the appeal is dismissed.

DATED this 22nd day of September 2017

Mohammed Shafiullah Khan
Judge

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[9] See, for recent examples, *Kingrae v Nauru Lands Committee* [2017] NRSC 7; *Gideon v Electoral Commission* [2017] NRSC 21.
[10] In *Amwano v Nauru Phosphate Royalties Trust* [2007] NRSC 2.