



IN THE SUPREME COURT OF NAURU

Appeal No.12/2015

**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

(DWN 042)

} APPELLANT

AND

The Republic of Nauru

} RESPONDENT

Before: Khan, J
Date of Hearing: 5 May, 2016
Date of Ruling: 20 May, 2016

CATCHWORDS: Refugee Convention Act 2012 – Grounds of appeal limited to points of law against decision of Tribunal-Limited jurisdiction and powers- Supreme Court can only make orders affirming the Tribunal's decision or remitting matters for reconsideration with directions.-No jurisdictions to deal with Constitutional issues.

APPEARANCES

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

RULING

BACKGROUND

1. The appellant is an asylum seeker from Pakistan. He is married with 2 children. His wife and children are presently in Pakistan.
2. The appellant arrived in Nauru in 2013 under the Memorandum of Understanding reached between Nauru and Commonwealth of Australia.
3. The Secretary for Justice and Border Control (Secretary) made a decision on 17th July 2014, in which he made a finding that the appellant was not a refugee under the Refugee Convention Act 2012(the Act), nor was he a person to whom Nauru owed a complementary protection under the Refugee Convention.
4. On 29th of December 2014, the Refugee Status Review Tribunal (The Tribunal) affirmed the decision of the Secretary that the appellant was not recognized as a refugee, nor was he owed a complementary protection under the Act.
5. The appellant appealed against the decision of the Tribunal on 24th April 2015 in person and this matter was set down for hearing on the 5th May 2016. Mr. Albert appeared on behalf of the appellant on a pro bono basis and filed amended grounds of appeal, which are follows:

“ The appellant hereby appeals pursuant to section 43 of the Refugees Convention Act 2012 against the decision of the Refugee Status Review Tribunal made on 29th day of December 2014 on the following grounds:

1. *The Tribunal acted in a way that was in breach of the principles of natural justice, contrary to s 22(b) of the Act, by conducting its hearing when and at the place where the appellant was unlawfully detained in breach of s 5 of the Constitution of Nauru.*
2. *The tribunal's hearing in respect of the appellant was unconstitutional because he was unlawfully detained at that time.*

PARTICULARS

- a. *The appellant gave evidence at a Tribunal hearing at the Regional Processing Centre 1 held on 25 September 2014 ('the hearing')*
- b. *Section 5 of the Constitution of Nauru provides for an absolute prohibition on deprivation of personal liberty, except, inter alia, 'for the purpose of preventing his unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru'.*
- c. *The appellant entered Nauru lawfully on a regional processing centre visa issued by the Principal Immigration Officer of Nauru under Regulation 9 of the Immigration Regulations 2013 (Nauru). It follows that at the hearing, the appellant was not deprived of his liberty 'for the purpose of preventing his unlawful entry into Nauru'.*
- d. *The appellant was, at 25 September 2014, and continues to be, the subject of a process the purpose of which is to determine whether Nauru owes him obligations under s 4 of the Act.
Nauru cannot lawfully remove him unless and until it is finally determined that Nauru has no such obligations to the appellant. It follows that he was not, on 25 September 2014, deprived of his liberty*

'for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru.'

e. The Constitution generally, and s 5 specifically, conditions all of the powers, and exercise of those powers, including the power to conduct a hearing, of the Tribunal.

f. It follows from the above that the appellant was unlawfully detained contrary to the constitution at the time of the hearing.

3. *The Tribunal erred in law in determining that the appellant is not owed complementary protection in that the Tribunal failed to respond to the appellant's claim that returning him to Pakistan would breach Nauru's international obligations due to the risk of arbitrary deprivation of life.*

4. *The Tribunal erred by relying on the transfer interview form contrary to s22(b) in circumstances where it was unsigned and unsworn, was not made available to his representative when he prepared his statement of claims and was expressly disowned as a record of his claims."*

APPLICATION TO STRIKE OUT

6. On 5 May 2016, the respondent filed a motion to strike out (the application) grounds 1 and 2 of the Notice of Appeal pursuant to Order 15 Rule 19 of the Civil Procedure Rules 1972. The hearing of the application to strike out was heard first with the consent of the parties. The parties also agreed that if the respondent was successful in the strike out application, then the remaining grounds can be heard on that day, otherwise the matter was to be adjourned to enable the respondent to seek further instructions.

7. It was also agreed that I will hear the application and make orders and give my reasons later. Having heard the application on 5 May 2016 I ordered that grounds 1 and 2 shall be struck out. I now give my reasons for making those orders.

8. In view of the time constraint counsels were unable to file written submissions but both made substantial oral submissions which greatly assisted me.

RESPONDENT'S SUBMISSIONS

9. The respondent's submission essentially was that this court's jurisdiction and powers emanates from the Act and it is to operate within the confines thereof. It was further submitted that grounds 1 and 2 deal with the interpretation of the Constitution and this court sitting in its appellate capacity under the Act does not jurisdiction or the powers to deal with Constitutional matters as its powers are limited.

APPELLANT'S SUBMISSIONS

10. The appellant's submissions are that grounds 1 and 2 are related but yet different. Mr. Albert submitted that grounds 2 deals with the Constitutional validity of the hearing, whilst ground 1 is statutory challenge and he maintained that the grounds are related.

11. Mr. Albert disagreed with the respondent's submission that this Court does not have jurisdiction to deal with Constitutional issues. He submitted that this Court has unlimited jurisdiction to deal with the Constitutional issues and relied on the provisions of Articles 14, 48 and 54.

12. Mr. Albert further submitted that the Constitutional issues rose in grounds 1 and 2 come within the ambit of "points of law" as the defined in Section 43(1) of the Act. He emphasized that the only issue he wants this Court to determine is whether the appellant's detention was constitutionally valid on the day he appeared before the Tribunal.

13. Now I shall discuss the relevant provisions of the Constitution and the relevant legislations.

CONSTITUTION

14. Article 14- Enforcement of fundamental rights and freedoms

14. (1.) *A right or freedom conferred by this Part is enforceable by the Supreme Court at the suit of a person having an interest in the enforcement of that right or freedom.*

(2). *The Supreme Court may make all such orders and declarations as are necessary and appropriate for the purposes of clause (1.) of this Article.*

15. Article 48- Supreme Court of Nauru

48.(1.) *There shall be a Supreme Court of Nauru, which shall be a superior court of record.*

(2). *The Supreme Court has, in addition to the jurisdiction conferred on it by this Constitution, such jurisdiction as is prescribed by law.*

In his book titled “*Nauru The Constitution*” Peter H. MacSporran states as follows; “*The jurisdiction of the Supreme Court at present is extensive and numerous Acts of Parliament confer or acknowledge jurisdiction. The most important of these the Court’s Act 1972.....*”

16. Article 54- Matters concerning the Constitution

54. (1.). *The Supreme Court shall, to the exclusion of any other court, have original jurisdiction to determine any question arising under or involving the interpretation of effect of any provision of this Constitution.*

(2). *Without prejudice to any appellate jurisdiction of the Supreme Court, where in any proceedings before another court a question arises involving the interpretation of effect of any provision of this Constitution, the cause shall be removed into the Supreme Court, which shall determine that question and either dispose of the case or remit it to that other court to be disposed of in accordance with the determination.*

17. Courts Act 1972

Powers of Judges

Section 5(1)- All the judges of the Supreme Court shall have in all respects, save as is expressly otherwise provided by this Act, equal power, authority and jurisdiction under this Act.

(2)- Save as may be otherwise expressly provided by any written law, any judge of the Supreme Court may exercise all or any part of the jurisdiction vested in the Supreme Court by or under the provisions of this Act or any other law, and for such purpose shall be and form a Court.

18. Jurisdiction of Supreme Court

S.17(1) The Supreme Court shall have and exercise within Nauru all such powers and jurisdictions as are or may arise from time to time be vested in it under or by virtue of the Constitution, this Act and other written law for the time being in force.

(2) The Supreme Court shall, subject to any limitation expressly imposed by any written law, have and exercise within Nauru all the jurisdiction, powers and authorities which were vested in, or capable of being exercised by, the High Court of Justice in England on the thirty-first of January, 1968.

19. Refugee Conventions Act 2012

Section 43(1)-Jurisdiction of Supreme Court

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

20. A plain reading of S43 (1) suggests that a person who is dissatisfied by the decision of the Tribunal may appeal against **that decision** (*emphasis added*) on a point of law which must arise from the matters contained in the decision itself.

21. Section 44(1) of the Act provides that in deciding an appeal the Supreme Court may make either of the following orders:

(a) *An order affirming the decision of the Tribunal;*

(b) *An order remitting the matter to the Tribunal for reconsideration (emphasis added) in accordance with any directions of the Court.*

(2) *If the court makes an order remitting the matter to the Tribunal, the Court may also make either or both of the following:*

(a) *an order declaring the rights of a party or the parties;*

(b) *An order quashing or staying the decision of the Tribunal.*

22. It can be seen that the powers under s 44(1) and (2) are very limited. The Court can only make orders prescribed therein. It cannot make any other orders. Grounds 1 and 2 of the appeal are seeking orders that go beyond the scope of section 44 of the Act.

23. APPEALS ACT 1972

Section 44-Appeals from the Supreme Court

Subject to the provisions of section 45, an appeal shall lie to the High Court:

(a) *Against any final judgment, decree or order of the Supreme Court in any cause or matter, not being a criminal proceeding or an appeal from any other Court or tribunal;*

(b) *With the leave of the trial judge or the High Court, against any judgment, decree or order, not being a final judgment, decree or order, of the Supreme Court in any cause or matter, not being a criminal proceeding or an appeal from any other Court or tribunal; and*

(c) With the leave of the High Court, against any judgment, decree or order of the Supreme Court in the exercise of its appellate jurisdiction under Part III of this Act or under any other written law, except Part II of this Act;

And the High Court has jurisdiction to hear and determine the appeal.

Section 45-No Appeal in certain cases

No appeal shall lie under this Part:

(a) Where the appeal involves the interpretation or effect of the Constitution;

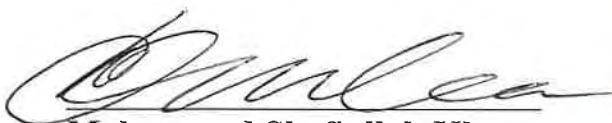
24. Grounds 1 and 2 involve with interpretation an effect of the Constitution and section 45(a) is very clear that no appeal shall lie to the High Court where the appeal involves the interpretation or effect of the Constitution. So if I were to make a determination on grounds 1 and 2 its effect would be both parties would be deprived of their rights to appeal against the substantive decision.

Conclusions

25. What has to be borne in mind is that the Act was crafted in a way to provide speedy resolution of the refugee status and accordingly this court was vested with very limited powers to achieve those objectives. The appellant cannot ventilate his arguments on grounds 1 and 2 in this court. It is his constitutional right to do so in a properly constituted court should he decide to do so.

26. Grounds 1 and 2 were filed without any basis, they do not disclose any course of action, they are frivolous and vexatious and both grounds are struck out.

Dated this day of 20 May 2016.



Mohammed Shafiullah Khan
Judge

