IN THE SUPREME COURT OF NAURU
AT YAREN

APPEAL NO. 6/2015
Being an appeal against a decision of the Nauru Refugee Status Review Tribunal brought pursuant to s43 of the *Refugees Convention Act 2012*

BETWEEN

COA025 APPELLANT

AND

The Republic of Nauru RESPONDENT

Before: Khan J
Date of Hearing: 3 and 4 May 2016
Date of Judgment: 22 September 2017

Case may be cited as: COA025 v The Republic

CATCHWORDS:

Whether the Tribunal failed to consider the claim that the appellant would suffer harm as a woman in Iran – whether the Tribunal denied the appellant procedural fairness – whether the Tribunal erred in finding that it was not subject to obligations arising from the Convention on the Elimination of Discrimination Against Women – whether the Tribunal erred in determining the appellant's claim jointly with her husband – whether the Tribunal should have reconvened or used other means of obtaining information about the additional claim about conversion to Christianity after the hearing – whether the Tribunal was functus officio – whether the Tribunal denied the appellant procedural fairness in rejecting the evidence of Christian conversion.

HELD: the Tribunal erred by determining the appellant's claim together with her husband's – the Tribunal failed to consider the claim of risk of persecution as a woman in Iran – the Tribunal denied the appellant natural justice in failing to reconvene to hear the additional claim – appeal allowed.

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 7 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 of appeal were amended on 23 June 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 provides 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 7 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 her case on merits on the proposed grounds of appeal and at the same time present her argument on substantive issues. If the Court was satisfied that there was merit in the appeal, then the extension of time could be granted.

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

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 were filed on 3 May 2016 and 14 November 2016.

BACKGROUND

10. The applicant is a 27 year old woman from Ahwaz, Khuzestan province in Iran.

11. She is married to her 33 year old husband who was the joint owner of a computer business. The applicant and her husband sought asylum together and their claims were considered together by the Secretary. They have no children. The appellant worked in accounting prior to marriage.

12. The appellant is a moderate Iranian woman which has caused her difficulties with the authorities. She received a warning from the authorities for not adhering to the dress code. She was refused entry to classes at university and was therefore unable to complete her course.

13. The appellant's mother and sister live in Iran. Her husband's family, comprising his mother and two brothers, also live in Iran. Her husband also has a brother in Turkey and another brother who is deceased.

14. The appellant's husband's brother married an Arab Ahwazi woman, Maryam Zergani, in 2008 despite his family's reluctance. The brother died in December 2012 in a car accident. Maryam was left a widow with an infant daughter.

15. Within a week of the death, the Zergani family demanded that the appellant's husband would eventually marry Maryam. His refusal angered the Zergani family, who made threats against him.

16. The appellant had very limited contact with Maryam. However, her husband regularly dropped off shopping at her house at about 11pm on his way home from work. He felt a responsibility to look after his brother's widow.

17. In late January 2013, the appellant's husband visited Maryam. An argument with her father and other relatives broke out and the police arrived on account of the noise. Maryam's father accused the appellant's husband of sleeping with his daughter and that he did not know the appellant's husband.

18. The appellant's husband was charged with adultery and released on bail. He did not have an opportunity to explain the circumstances to police. The appellant's husband was not certain why Maryam was not also arrested for engaging in sexual intercourse prior to the end of Iddah, a period of mourning for widows. The appellant's husband has later claimed that he was charged with rape, which explains why Maryam was not arrested.

19. The appellant and her husband fled to Tehran, in contravention of the bail conditions. Her husband did not stay to defend the charge because he believed that the authorities

would not want to interfere with Arab ethnic customs which dictate that he ought to marry his brother's widow.

20. The appellant and her husband departed Iran on 10 June 2013. They flew to Malaysia and then Indonesia, before boarding a boat to Australia. The boat was intercepted by Australian authorities and taken to Christmas Island in July 2013. The appellant and her husband were then transferred to Nauru.

21. In September 2014, the appellant and her husband began attending church classes in Nauru three times a week. They have now converted to Christianity and fear persecution in Iran on this basis.

22. The appellant and her husband also fear persecution in Iran as failed asylum seekers.

APPLICATION TO THE SECRETARY

23. On 7 November 2013, the appellant attended a Transfer Interview.

24. On 11 December 2013, the appellant made an application to the Secretary for recognition as a refugee and for complementary protection under the Act.

25. On 16 July 2014, the Secretary made a determination that the appellant is not a refugee and is not owed complementary protection.

APPLICATION TO THE TRIBUNAL

26. 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:
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> a) a determination that the person is not recognised as a refugee;
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> 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.

27. On 12 September 2014, the appellant made a statement and on 25 September 2014 her lawyers, Craddock Murray Neumann, made written submissions to the Tribunal.

28. On 26 September 2014, the appellant appeared before the Tribunal to give evidence and present her arguments with her representative and an interpreter in Farsi and English languages.

29. The appellant's solicitors made further written submissions on 29 December 2014. The appellant and her husband made further statements on the same date.

THIS APPEAL

30. The appellant initially filed three grounds of appeal and on 7 April 2016 filed an amended Notice of Appeal with six grounds which are:

1) Ground 1 – the Tribunal erred in law by failing to consider a claim made by the Applicant that there was a real possibility of harm to her by being a woman in Iran and thereby erred by failing to perform its statutory task of reviewing the decision as required by Part 4 of the *Refugees Convention Act 2012*.

Particulars

1.1 In the Submission to the Tribunal dated 25 September 2014, the Applicant claimed to have a well-founded fear of persecution on account of her membership of a particular social group – "*women in Iran*" (see Submission, paragraph 17(b)(ii)).

1.2 At paragraph 24, the Submission provided:

> *Women face severe discrimination and disadvantage in contemporary Iran. They are denied equal access to employment, and face severe restrictions on their civil liberties (including their privacy and freedom of movement). Furthermore, women face severe risk of violence. Feminist activities face severe persecution on account of their imputed anti-regime sentiments.*

1.3 The Submission set out, in considerable detail, a range of country information that describes the discrimination and disadvantage suffered by women in Iran (see paragraphs Submission [25]-[36]) and concludes at paragraph 37 as follows:

> *Viewed in context, the cumulative impact of limited opportunities for women to access education, employment and participate in public life means that the severe discrimination faced by women in Iran can clearly be seen to affect their ability to subsist in Iran, particularly in circumstances where male protection is not forthcoming.*

1.4 Thus, the applicant made a clear and distinctly articulated claim that she had a well-founded fear of persecution owing to her membership of a particular social group – women in Iran, a group that has been recognised as constituting a "particular social group for the purposes of the Convention": see *SBBK v Minister for Immigration and Multicultural Affairs* [2002] FCA 565 at [43]; and see also the decision

of the High Court of Australia in *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 CLR 1; [2002] HCA 14 per Gleeson CJ at [32] (recognising "women in Pakistan" as a particular social group).

1.5 While the Tribunal dealt with the claim to fear persecution as a result of non-adherence to the dress code, the Applicant's claim to fear persecution as a member of the particular social group "Women in Iran" was separate from and independent of her other claims (being those that were identified in paragraphs 17(a) and 17(c) of the Applicant's Submission, and which are expanded on in paragraphs 38-50 of the Submission).

1.6 By s 34(4) of the *Refugees Act*, the Tribunal is obliged to set out its findings on the questions of fact it considers to be material, together with evidence or other material on which those findings were based.

1.7 The Tribunal's reasons, provided by reference to its statutory obligation under s 34(4) of the Act, do not expressly deal with this claim. At no time does the Tribunal record that [the appellant] claimed to fear persecution on account of her membership of a particular social group – women in Iran. Rather, the only claim of [the appellant] that is expressly identified (aside from those that are derivative of or identical to those of her husband) is that "*she was persecuted because she did not adhere to the Islamic dress code*". This claim is dealt with by the Tribunal at [41]-[43] of its reasons. But there is no express recognition, much less, consideration, of [the appellant's] claim to fear persecution on account of her membership of the social group women in Iran, and thus the Tribunal has fallen into legal error.

2) Ground 2 – In failing to respond to a clearly articulated claim made by the Applicant, the Tribunal erred in law by denying the applicant procedural fairness, thereby erring in the manner identified by the High Court in Australia in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 at [23]-[24].

Particulars

2.1 The applicant repeats the particulars to Ground One.

3) Ground 3 – the Tribunal erred in law by concluding that s 4(2) of the Act did not include 'any obligation on states to take measures that extend beyond their borders' arising from the Convention on the Elimination of Discrimination Against Women.

4) Ground 4 – the Tribunal erred in law by:

a) failing to make an obvious inquiry about a critical fact, the existence of which is easily ascertained; and/or

b) acting contrary to natural justice by failing to exercise its powers under any or all of ss 24(1)(d), 24(2)(a) or (b) or 36(b) of the Act

in respect of the baptism certificate from the Protestant Reverend 'in the camp'.

5) Ground 5 – the Tribunal committed an error of law by acting in breach of ss 22(b) and/or 37 of the Act in respect of its reasons for rejecting the Christian conversion claim of the Appellant.

6) Ground 6 – the Tribunal erred by determining the Appellant's claims to protection together with her husband's.

SUBMISSIONS

31. 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.

APPLICATION FOR REFUGEE STATUS DETERMINATION ("RSD")

32. Both the appellants made separate applications for RSD.

33. The Secretary dealt with the two applications separately and the wife was described as the accompanying dependant for the purposes of derivative status and likewise the husband was described as an accompanying dependant in the wife's application.

34. On 16 July 2014, the Secretary made separate findings in respect of the appellant and her husband and determined neither of them could be accorded derivative status to the other.

35. After the Secretary's determination, the appellant and her husband made separate applications for review of the determination to the Tribunal under s 31 of the Act.

TRIBUNAL PROCEEDINGS

36. Neither the appellant or her husband or their legal representatives made any applications for their review applications to be heard together; however, the Tribunal combined the review applications. At [3] of the decision, the Tribunal stated:

> As the Tribunal accepts that the applicants are a married couple, it has combined their review applications into one decision having regard to the relevant law.

The applicants will be referred to applicant husband and applicant wife in this review.

37. The Tribunal having combined the applications delivered one ruling on 7 January 2015.

38. The appellant's claim was that she failed to comply with dress code; she claimed to be a moderate woman in Iran; she received warnings from Basij about not covering her hair and she complied with this warning.

39. The husband's claim was based on his refusal to marry his widowed sister-in-law following the death of his elder brother. He claimed to have been falsely accused of having a sexual relationship with his sister-in-law. He initially claimed that he was accused of adultery and later claimed that he had raped his sister-in-law and was charged for rape and later bailed to attend Court.

ADDITIONAL CLAIM

40. The Tribunal hearing was completed on 29 September 2014 and on 29 December 2014 both the appellant and her husband made an additional claim that they had converted to Christianity and were baptised.

41. In the appellant's statement to the Tribunal dated 29 December 2014, she stated that both she and her husband had converted to Christianity and she also stated that she was hoping to receive her copy of the Baptism Certificate soon. In the husband's statement to the Tribunal, also dated 29 December 2014, he stated that both he and his wife were baptised by a Reverend Richard, a Protestant reverend in Nauru in October 2014, and that they were yet to receive their Baptism Certificates. Once they received it they would like to submit copies of that to the Tribunal in support of their case.

42. Both claimed that the conversion to Christianity is forbidden by Iranian law and is punishable by death.

43. The Tribunal did not conduct a further review of the claim for conversion to Christianity. It considered this claim together with other claims by the appellant and her husband.

TRIBUNAL FINDINGS

The Husband's Claim

44. The Tribunal did not find the appellant's husband to be a credible witness and it did not accept that he was accused of adultery or rape of his widowed sister-in-law as he had given inconsistent or implausible accounts of accusations against him. The appellant's response to the Tribunal was that she was not present and relied on her husband's evidence.[2]

[2] Refugee Status Review Tribunal Decision, [38].

The Wife's Claim

45. The Tribunal's finding was that the appellant only received a warning that if she did not comply with her dress code to cover her hair; that she received a warning from Basij to cover her head which she did. The Tribunal accepted that she had to dress according to the Islamic code and found that Islamic dress code applied to all the citizens of Iran and did not amount to persecution.

46. The Tribunal rejected the claim for conversion to Christianity for the following reasons: [3]

a) that the appellant and her husband's credibility were in issue and it had indicated this to them at the hearing;

b) that the appellant and her husband did not mention the claim about conversion to Christianity despite having ample opportunity to do so;

c) that it did not accept the conversion to be genuine;

d) that the conversion was done with 'unseemly haste'; and

e) that no supporting evidence like a certificate by a minister was produced.

47. Having discussed the application, the determination by the Secretary and the proceedings before the Tribunal, I think I should consider ground 6 of the appeal first.

GROUND 6 - THE TRIBUNAL ERRED BY DETERMINING THE APPELLANT'S CLAIM TO PROTECTION TOGETHER WITH HER HUSBAND'S

48. The appellant submits that under s 40(1) of the Act the Tribunal must invite "the applicant" which she submits is in the singular. Section 40(1) reads as follows:

> The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the determination of the decision under review.

49. The appellant further submits that the review hearing by the Tribunal should have been "in private" as provided for in s 23(1) of the Act which states:

a) The hearing of an application for review by the Tribunal must be in private.

50. The appellant further submits that whilst the claims to protection were "inter-related", they were not derivative from one another[4]; that the Tribunal made a credibility finding against the appellant's husband; that no such findings were made against her; and her claims were accepted; that the Tribunal rejected her claim for conversion to Christianity because of its credibility finding against the husband.

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[3] Refugee Status Review Tribunal Decision [48].
[4] Appellant's written submissions, [45].

JOINT HEARING

51. The appellant further submits that neither she nor her husband or her legal representative made an application for the joint hearing of the review application; and in conducting the joint review the Tribunal failed to conduct her review in accordance with the Act.

52. The respondent submits[5] "...a hearing does not cease to be in 'private' where the persons other than an applicant are present if the applicant desires, or consents to, their presence." The respondent relies on the case of *SZAYW v Minister for Immigration* ("*SZAYW*")[6].

53. The respondent further submits that the appellant sought to have the Tribunal consider her application with her husband's[7]. The appellant took no objection to the hearing being conducted jointly and it should therefore be inferred that she consented to her husband's presence.

54. The appellant further submits that s 23(1) is mandatory and the appellant has no powers to consent to the Tribunal conducting the review in breach of the Act.

SECTION 429 OF THE MIGRATION ACT 1958 AND S 23 OF THE ACT

55. Section 429 of the *Migration Act 1958* (Cth) and s 23 are identical. Section 429 states:

> The hearing of an application for review by the Tribunal must be in private.

SZAYW

56. Section 429 was discussed in *SZAYW* by the High Court of Australia at [9], [10], [11], [12] and [24]:

> [9] The appellant, and three of his friends who were described as applicants 226, 228 and 229, were stateless Palestinians who had been living in Lebanon. They all left Lebanon and travelled to Australia. They all claimed to fear that, if they returned to Lebanon, they would be persecuted by Hezbollah or Islamic Jihad. The basis of that fear was said to be that together they had become involved with Hezbollah, and had received military training for the purpose of attacking Israel or Israeli interests in South Lebanon. They had lost their enthusiasm for the conflict, and left Lebanon. They feared that, if they returned, they would suffer reprisals for desertion. The Tribunal rejected their claims that they had a well-founded fear of persecution. The Tribunal's reasons for that conclusion are not presently material. A substantial part of their evidence was disbelieved.

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[5] Respondent's written submissions, [55].
[6] [2006] HCA 49.
[7] Book of Documents, p 105.

[10] After the four original applications for protection visas were refused by a delegate of the first respondent, Refugee Advice and Casework Service (Australia) Inc ("RACS") wrote to the Tribunal on behalf of each man. The letter concerning the appellant said:

> "We confirm that we act for [the appellant] in his application for review of the decision refusing to grant a Protection Visa.
> Please find attached an application for review signed by him.
>
> We note that the four young men ... were together for the events which form *their claim*. We ask therefore that consideration be given to the same member being allocated to the four persons." (emphasis added)

[11] The reference, in the singular, to the claim of the four men was consistent with the manner in which the matter was presented to the Tribunal. At no stage was there any suggestion that their interests, or their cases, conflicted. Evidently, RACS felt no embarrassment in representing them all. As the Tribunal member recorded in her reasons relating to the appellant's application for review, "the group's claims were based on experiences all four claimed to have shared in common". In argument to the Tribunal, RACS relied upon the consistency of the claims made by the four men and submitted that "their claims are furthermore strengthened by each other's testimony". The four applicants for review were making common cause, and argued that their individual claims should be regarded as more credible because of the consistency of their accounts of their shared experiences in Lebanon.

[12] The Tribunal agreed to the request that one member be assigned to deal with all four applications for review. The same date (7 April 1999) was fixed as the date for hearing all four hearings. One applicant was a little late in arriving. All four were represented by RACS. The girlfriend of one of the applicants (not the appellant) was present. All applicants had previously received written notices, in standard form, from the Tribunal, inviting them to state whether they wanted to bring someone to the hearing, and indicating that such persons could be an adviser, a friend or relative.

[24] It was noted earlier that Driver FM described the other three applicants as "unrelated" to the appellant. What exactly he meant by that is not clear. If all he meant was that they were not blood relatives, that is correct, but beside the point. The claims of the four men were certainly related, in the manner earlier explained. They were close associates. Their claims were based on shared experiences. Each was a witness in support of the others. They had same migration agents. They had applied to have their cases heard by the same member. Each was entitled, as a matter of fairness, to know what evidence the others had given. There was no suggestion that any one of them wanted to say something that the others should not hear. If the learned Magistrate was intending to convey that, vis-à-vis the appellant, the other three applicants were no more than members of the public, then such suggestion would be unwarranted. The hearing of the appellant's claim was not "in public" although, for the reasons already given, that does not of itself mean that it was "in private".

57. A joint hearing is appropriate when there is 'common cause' but not so where the presence would cause unfairness or disadvantage – see [28] of *SZAYW* where it is stated:

> [28] The other applicants who were present when the appellant was giving his evidence to the Tribunal were people with whom the appellant was making common cause. His migration agent had told the Tribunal that all four men knew what the other's claims would be. As a matter of fairness it appeared that the other applicants would have been entitled to be told what the appellant said in his evidence. The Tribunal thought it appropriate that they be present when the appellant gave his evidence. The appellant and his migration agents raised no objection to their presence. That presence caused no unfairness. It was to the appellant's advantage.

58. In this matter neither the appellant, her husband nor her legal representative made a request for the review to be heard together and it appears that the Tribunal took it upon itself to combine the review applications as is evident from the Tribunal's decision at [3].

59. The Tribunal's main reason for rejecting the applicant's claim for conversion to Christianity was that: at the hearing the applicant's 'credibility' was already in issue. When the Tribunal put to the appellant's husband that he had provided an 'inconsistent and implausible' account of accusations by the Zergani family – the appellant conceded that 'she was not present and relied on her husband's evidence'. So, the appellant's husband's presence caused her 'unfairness' and further it disadvantaged her position.

60. In the circumstances, I find that the Tribunal did not comply with the requirements of s 23(1) of the Act and committed an error of law by taking it upon itself to combine the hearings and the appellant therefore succeeds on this ground of appeal.

GROUNDS 1 AND 2

61. The appellant submits that she made a series of claims for protection under the Act;[8] that there was a real possibility of harm to her being a woman in Iran; and that the Tribunal failed to perform its statutory task and/or denied the appellant procedural fairness.

62. The appellant in her submissions on 24 September 2014 at [18] stated she feared harm for reasons of membership of a particular social group:

> [The appellant] fears harm due to her gender as a woman in Iran. [The appellant] was persecuted due to her gender as a woman in Iran and harsh and repressive laws against women in her country.

[8] Appellant's written submissions, [17].

63. The appellant submits that the Tribunal at [43] dealt with the "requirement to adhere to the Islamic dress code is a general rule applying to all citizens of Iran and does not amount to persecution"; but 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".[9] Women in Iran are at risk of persecution for that reason and the appellant was a woman from Iran[10].

64. The appellant at [23] of her submissions submits that the Tribunal committed an error of law by failing to consider the substantial clearly articulated claim that the appellant faced a 'real possibility' that she would be subject to persecution.

65. The respondent accepts that it if the Tribunal fails to consider a clearly articulated claim that 'a point of law' arises as to whether the Tribunal failed to afford procedural fairness to the appellant; that the Tribunal is not required to deal with each and every argument or piece of evidence put for review; and a written statement indicates that a particular claim had been considered, although the Tribunal does not mention it specifically.

66. The respondent further submits that her claim as a 'woman in Iran' was considered by the Tribunal.

67. The respondent further submitted that the Tribunal's decision should be read as a whole and not by 'line by line' and should not be investigated with an eye attuned to perception of error and relies on *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[11] and *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs*[12].

68. The respondent further submits that the Tribunal articulated a 'hierarchy of claim' when drafting [52] and [53] of the decision and the Tribunal found that the appellant never suffered anything worse than 'being stopped' by the authorities for not adhering to Islamic 'dress code'.

69. The claim of 'women in Iran' at risk of persecution was clearly articulated and the Tribunal was required to consider this claim of whether the appellant because of her gender there was a 'real possibility' that she would be subject to persecution; and it failed to do so and the Tribunal therefore fell into an error of law.

70. In the circumstances the appellant succeeds on grounds 1 and 2 of the appeal.

GROUND 3

71. The appellant submits that under s 4(2) Nauru must not expel or return any persons to frontiers of territory in breach of its international obligations and Nauru ratified the

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[9] *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] 77 ALJR 1088 at [24] approved and applied by unanimous High Court in *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41 at [90].
[10] Appellant's written submissions, [10].
[11] (1996) 185 CLR 259.
[12] (2003) 75 ALD 630.

Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW") in 2011.

72. The appellant amended ground 3 by deleting reference to s 4(2) and the amended ground reads as follows:

> The Tribunal erred in law by concluding that the Act did not include any obligation on states.

73. The appellant submits that the Tribunal erred in rejecting the appellant's claim at [54] where it stated that:

> ...There is no obligation created that is breached, either by return of a woman to a country that has not ratified CEDAW or to a country that is in breach of obligations created under CEDAW. Although the Tribunal acknowledges that Iran has not complied with some of the articles of CEDAW the Tribunal finds that returning the applicant wife to Iran would not breach Nauru's international obligations under CEDAW.

74. The appellant submits at [25] and [26] of its submissions as follows:

> [25] Non- refoulement under CEDAW
>
> The Republic submits that it is implied in CEDAW a limited non-refoulement obligation.
>
> [26] In Communication 39/2012, *N v The Netherlands*, the Committee on Elimination of Discrimination against Women (The Committee) recalled that Article 2(d) of CEDAW implies that parties to CEDAW are required to protect women from being exposed to a 'real, personal and for civil risk of serious forms of gender based violence', irrespective of whether such consequences take place outside their territory of the state party (at [6.4]).

75. The appellant submits that the question for determination is whether the Tribunal fell short when it came to the conclusion that there is no obligation on Nauru to return a woman to a country that has not ratified CEDAW or to a country which is in breach of its obligation created by CEDAW.

76. The respondent's response is contained in [31][13] where it is stated:

> [31] The Republic accepts that the Tribunal's statement that "There is no obligation created that is breached, ... by return of a woman to a country ... that is in breach of obligations created under CEDAW" is too narrow. Nauru may have international obligations not to return a woman to a country that is in breach of obligations under the CEDAW if that breach gave rise to a real, personal and foreseeable risk of serious forms of gender based violence. However, this does not give rise to a point of law which warrants remittal because the Tribunal's findings, read fairly and as a whole, indicate that it found that the

[13] Respondent's written submissions.

appellant was not exposed to a situation where any breach of the CEDAW by Iran gave rise to a real, personal and foreseeable risk of serious forms of gender based violence. This is evident from the Tribunal's finding – in the context of its hierarchical logic discussed in paragraphs 14-19 above – that discrimination that the appellant may experience upon return to Iran did not amount to "degrading treatment" or worse, and so, did not amount to any kind of harm that engages the non-refoulement obligation under the CEDAW (Reasons [52-53]).

77. I accept the respondent's submissions that the Tribunal's finding does not indicate that the appellant would be exposed to a situation where a breach of CEDAW by Iran would expose her to a real, personal and foreseeable risk of gender-based violence.

78. In the circumstances, ground 3 of the appeal is dismissed.

GROUNDS 4 AND 5

79. Grounds 4 and 5 have a certain amount of overlap in that both grounds allege breaches of s 22 of the Act.

80. Section 37 of the Act was repealed on 23 December 2016 by s 24 of the *Refugees Convention (Derivative and Other Measures) (Amendment Act) 2012* ("the Amending Act") and parties were invited to make submissions in relation to s 37. On 8 March 2017, the Court was informed by the appellant's solicitor that they were considering whether they would be seeking leave to make further submissions in relation to s 37. Section 37 was repealed with effect from 10 October 2012 and I cannot deal with this ground under s 37 of the Act and must deal with it under the principles of natural justice as provided for by the common law of Nauru.

81. After the enactment of the Amending Act on 23 December 2016, I waited for further submissions from the parties and I was informed by both parties that they did not wish to make further submissions so in the circumstances I will have to deal with this ground under the principles of natural justice under the common law of Nauru. I dealt with the issue of common law in the matter of *DWN066 v The Republic* [14] ("*DWN066*") and at [34] it was stated:

> [34] The Customs Adopted Law Act 1971 which came into effect on 5 January 1972 adopted the principles of common law in force in England on 31 January 1968.

82. Under the principles of natural justice, I discussed in *DWN066* that the following principles are to be considered:

i) Impartiality; and

ii) Fair hearing

[14] [2017] NRSC 23.

And I discussed the Nauruan and Australian cases on natural justice. In *Kioa v West*[15] Brennan J of the High Court of Australia held that:

> A person whose interests are likely to be affected by exercise of power must be given an opportunity to deal with the relevant matters adverse to his interest which the repository of the power proposes to take into account in deciding upon its exercise [citing *Ridge v Baldwin*]. The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance ... Nevertheless in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made.

83. On 29 December 2014, the appellant informed the Tribunal that she and her husband had converted to Christianity and according to the husband's statement they were baptised by Reverend Richard and had not received their Baptism Certificate.

84. The hearing was concluded on 29 December 2014 and the decision was delivered on 7 January 2015 and it is common ground that the Tribunal was not functus officio and only became functus officio after it delivered its decision in accordance with the provisions of s 31(5) on 7 January 2015.

85. At [48] the Tribunal made adverse findings against the appellant of her credibility (when it was never in issue) about not mentioning this claim on 26 September 2014. The Tribunal did not accept that the conversion was genuine, but found that it was done with undue haste and no supporting documents were tendered in support.

86. The respondent submits that the Tribunal having completed the hearing on 26 September 2014 had returned to Australia and it also had a busy schedule. This submission in my view is not acceptable as the Tribunal must comply with the requirements of the Act. In this regard, s 22(b) is relevant where it is stated that the Tribunal:

> must act according to the principles of natural justice and the substantial merits of the case.

87. Furthermore, if the Tribunal felt that distance was an issue (having returned to Australia) it could have written to the appellant and sought an explanation as to why her Baptism Certificate was not sent; when it knew that it was going to make a determination and that the certificate had not been provided. The Tribunal also had at its disposal other means of obtaining evidence as provided for in s 26 of the Act which states:

> For the purposes of review, the Tribunal may allow the appearance by the applicant before the Tribunal, or the giving of evidence by the applicant or any other person, to be by:

[15] (1985) 159 CLR 550, 628-9.

a) telephone; or

b) closed-circuit television; or

c) any other means of communication.

88. In the circumstances, the Tribunal failed to afford natural justice to the appellant. It should have either reconvened to hear the additional claim of conversion to Christianity or should have used other means of clarifying the issue available to it but it failed to do so and thereby denied the appellant her right of natural justice.

89. In the circumstances, the appellant succeeds on both grounds 4 and 5.

CONCLUSION

90. Under s 44(2)(b) of the Act the Tribunal's decision dated 7 January 2015 is quashed and the matter is remitted to the Tribunal for it to review the appellant's application separately from her husband.

DATED this 22nd day of September 2017

Mohammed Shafiullah Khan
Judge