HIGH COURT OF AUSTRALIA

KEANE, NETTLE AND EDELMAN JJ

BRF038 APPELLANT

AND

THE REPUBLIC OF NAURU RESPONDENT

BRF038 v The Republic of Nauru
[2017] HCA 44
18 October 2017
M28/2017

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order made by the Supreme Court of Nauru on 22 February 2017, and in its place order that:*

   (a) *the decision of the Refugee Status Review Tribunal made on 15 March 2015 be quashed;*

   (b) *the matter be remitted to the Refugee Status Review Tribunal for reconsideration according to law; and*

   (c) *the respondent pay the appellant's costs of the appeal.*

On appeal from the Supreme Court of Nauru

Representation

G A Costello and A N P McBeth for the appellant (instructed by Allens)

C J Horan QC with N M Wood for the respondent (instructed by Republic of Nauru)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

BRF038 v The Republic of Nauru

Appeal – Supreme Court of Nauru – Where *Refugees Convention Act* 2012 (Nr), s 43(1) confers right to "appeal" to Supreme Court against a decision by Refugee Status Review Tribunal not to recognise person as a refugee – Whether Supreme Court was exercising original jurisdiction when determining "appeal" from Tribunal – Whether appeal from Supreme Court to High Court lay as of right.

Migration – Refugees – Where *Refugees Convention Act* 2012 (Nr), s 3 adopts definition of "refugee" under Refugees Convention as modified by Refugees Protocol – Where Refugees Convention requires "well-founded fear of being persecuted" – Where Tribunal found harm appellant and family faced constituted discrimination, but not persecution – Whether Supreme Court erred in failing to hold that Tribunal applied wrong test in determining whether appellant suffered persecution – Whether Tribunal required total deprivation of appellant's human rights to find persecution.

Migration – Refugees – Where *Refugees Convention Act* 2012 (Nr), s 22(b) provides that Tribunal "must act according to the principles of natural justice and the substantial merits of the case" – Where appellant stated that Somalian authorities were unwilling to assist him and his family due to ethnicity – Where Tribunal relied on country information indicating that there are police from every tribe in Somaliland to conclude appellant would have "some redress from the acts of others" – Whether failure by Tribunal to put substance of information to appellant constituted breach of requirements of procedural fairness.

Words and phrases – "appeal", "country information", "credible, relevant and significant", "original jurisdiction", "persecution", "procedural fairness", "well-founded fear of persecution".

Appeals Act 1972 (Nr), s 44.
Nauru (High Court Appeals) Act 1976 (Cth), ss 5, 8.
Refugees Convention Act 2012 (Nr), ss 3, 5(1), 6(1), 22(b), 31(1), 37, 43(1), 44.
Refugees Convention (Derivative Status & Other Measures) (Amendment) Act 2016 (Nr), ss 5, 6, 24.
Refugees Convention (Amendment) Act 2017 (Nr), ss 4, 5, 6, 7.
Agreement between the Government of Australia and the Government of the Republic of Nauru Relating to Appeals to the High Court of Australia from the Supreme Court of Nauru (1976), Art 1.
Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967), Art 1A(2).

1 KEANE, NETTLE AND EDELMAN JJ. The appellant is from the Awdal Province in Somaliland, an autonomous region in Somalia. He is a Sunni Muslim and a member of the Gabooye tribe[1]. His mother and four brothers live in Somaliland; another brother lives in Ethiopia. His father died in 1999[2].

2 In September 2013, the appellant arrived by boat at Christmas Island. He was subsequently transferred to the Republic of Nauru[3]. There he applied to the Secretary of the Department of Justice and Border Control of Nauru ("the Secretary") for refugee status.

3 The appellant told the authorities at the Nauru Regional Processing Centre that he left Somalia in 2006 and travelled to Yemen after his father passed away, because of "war, trouble and [the fact that] we didn't have anybody to provide for us", and due to hunger and starvation. He said that he left Yemen due to racism and a lack of security. He travelled from Yemen to Indonesia, via Malaysia, in August 2013. The following month, he boarded a boat to Christmas Island[4].

4 The appellant's application for refugee status was refused by the Secretary. His application to the Refugee Status Review Tribunal ("the Tribunal") for review of the Secretary's determination failed, as did his subsequent appeal to the Supreme Court of Nauru.

5 The appellant now appeals to this Court, contending that the Supreme Court erred in applying the wrong test to determine whether the appellant was a refugee within the *Refugees Convention Act* 2012 (Nr) ("the Refugees Act"), and in failing to hold that the Tribunal did not accord him procedural fairness in making that determination.

6 The appeal to this Court should be allowed, the decision of the Tribunal quashed and the appellant's application for review of the Secretary's determination remitted to the Tribunal, on the basis that the Tribunal failed to accord the appellant procedural fairness in its review of the determination of the Secretary.

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1 *BRF038 v The Republic* [2017] NRSC 14 at [3].

2 *BRF038 v The Republic* [2017] NRSC 14 at [4].

3 *BRF038 v The Republic* [2017] NRSC 14 at [9].

4 *BRF038 v The Republic* [2017] NRSC 14 at [9].

Keane J
Nettle J
Edelman J

The application to the Secretary

The legislation

7 The long title of the Refugees Act is "An Act to give effect to the Refugees Convention; and for other purposes". Section 3 defines "refugee" as "a person who is a refugee under the Refugees Convention as modified by the Refugees Protocol". Read together, those treaties[5] establish that a refugee is someone who:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it".

8 Section 5(1) entitles a person to apply to the Secretary to be recognised as a refugee.

9 At the time of the appellant's application to the Secretary, s 6(1) relevantly stated that "[s]ubject to this Part, the Secretary must determine whether an asylum seeker is recognised as a refugee".

The appellant's case for refugee status

10 The appellant's application to the Secretary was made on 26 February 2014. It alleged a fear of persecution arising from membership of the Gabooye tribe. The application referred, among other things, to an incident that took place in 2004 during which the appellant, while playing soccer, got into a fight with a boy from another tribe. The boy threatened the appellant with a gun, stating that the appellant should not have fought him as he (the appellant) was from a lower caste tribe. The appellant went into hiding in order to avoid being confronted by the other boy[6]. This incident was said to exemplify the manner in which the members of the appellant's tribe were treated. The treatment was said by the appellant to have caused him "significant mental stress".

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5 Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

6 *BRF038 v The Republic* [2017] NRSC 14 at [5].

11 As mentioned, the appellant said that he left Somalia for Yemen in 2006. While in Yemen, the appellant worked washing dishes and in other menial jobs[7]. He also registered with the United Nations High Commissioner for Refugees, but he was not interviewed by the High Commissioner. In Yemen, he had no right to work or to access education[8].

12 The appellant stated that, in 2007, his family's farm was taken by members of another tribe. When the appellant's mother confronted the men who took the farm from her, they refused to leave, saying that they had a right to the farm as they were from a higher caste tribe. The appellant said that they told his mother to leave the farm or she would die.

13 The appellant said that, in 2009, the appellant's mother's shop was robbed by men from another tribe. She was threatened at gunpoint. She confronted a family member of one of the thieves the next day, but was told that she had no rights as a member of a minority tribe. She complained to government authorities, but was told that they could not assist[9].

14 The appellant stated that the Somalian authorities were unwilling to assist him and his family due to their ethnicity. He said that there was nowhere in Somalia where he would be safe, as racism, discrimination and militant groups existed across the country. He had only ever lived in Awdal Province and had no networks outside that province that could support or protect him. He feared that he would be unable to relocate without exposing himself to an increased risk of harm.

15 In addition, the appellant alleged that he was an opponent of the group Al-Shabaab, which terrorised members of his tribe, perpetrated violence throughout Somalia and forcefully recruited members from tribes that it considered weaker than them, including the Gabooye tribe. He asserted that he feared abduction by Al-Shabaab should he return to Somalia and persecution on the basis of his prolonged absence from Somalia – a circumstance that, he said, would lead groups such as Al-Shabaab to think that he was no longer religiously observant – and because he would be regarded as opposed to groups such as Al-Shabaab due to the violence that such groups had perpetrated against the Gabooye tribe.

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7 *BRF038 v The Republic* [2017] NRSC 14 at [8].

8 *BRF038 v The Republic* [2017] NRSC 14 at [6].

9 *BRF038 v The Republic* [2017] NRSC 14 at [7].

The decision

16 On 21 September 2014, the Secretary refused the appellant's application for refugee status. The decision record stated that the Secretary was sceptical as to aspects of the appellant's account. The Secretary found that there was a reasonable possibility that the appellant would suffer low levels of discrimination based on his membership of the Gabooye tribe, but that all other aspects of his claimed fear of persecution were not well-founded. That the discrimination that the appellant might face did not rise to the level of persecution was said to be demonstrated by the appellant's brothers' ability to receive an education and his mother's ability to earn an income despite any discrimination and stigma that they suffered by reason of their membership of the Gabooye tribe.

Review by the Tribunal

The legislation

17 Section 11 of the Refugees Act establishes the Tribunal. Section 31(1) provides that a person may apply to the Tribunal for merits review of a determination that they not be recognised as a refugee.

18 Section 22(b) provides that the Tribunal "must act according to the principles of natural justice and the substantial merits of the case".

19 Section 36 entitles the Tribunal, in conducting a review, to invite a person to provide information, orally or in writing, and to obtain information that it considers relevant by any other means.

20 At the time of the review by the Tribunal, s 37 imposed further obligations on the Tribunal in conducting a review. It provided as follows:

"The Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of information that the Tribunal considers would be the reason, or a part of the reason, for affirming the determination or decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the determination or decision that is under review; and

(c) invite the applicant to comment on or respond to the information."

21 Section 40(1) of the Refugees Act requires the Tribunal to invite an applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the determination or decision under review.

The decision

22 The Tribunal's decision was delivered on 15 March 2015. The Tribunal found that the harm that the appellant and his family faced constituted discrimination, but did not rise to the level of persecution.

23 The Tribunal accepted that the appellant was a member of the Gabooye tribe[10], and that the Gabooye were a minority group who faced discrimination, which included relegation to undesirable and low-paying professions, difficulty in accessing education, prevention of inter-marriage with other tribes and difficulty in accessing justice[11].

24 The Tribunal accepted that the appellant's family were forced off their land due to their perceived low caste status. However, it noted that the land did not belong to the appellant's family, but rather was vacant land that his family were farming. The Tribunal went on to accept that the land probably did not belong to those who forced the appellant's family off it. The Tribunal found that "[a]fter this occurred the [appellant's] mother then earned a living – or rather, a subsistance [sic] – by selling items."[12]

25 The Tribunal found that the appellant had received up to 10 years of education[13]. It noted that two of his brothers were working and his mother was able to earn a "bare living" and that, based on his family's experience, members of the Gabooye tribe were able to obtain employment and earn an income, albeit at a subsistence level[14]. It found that the appellant left Somalia in search of a better life and better employment prospects[15].

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10 *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [26].

11 *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [36].

12 *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [28].

13 *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [30].

14 *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [31].

15 *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [32].

26 The Tribunal also referred to country information that it said established that Somaliland was "the safest region within Somalia with a functioning government, judiciary and security forces"[16].

27 The Tribunal found that the appellant and his family had not suffered any "serious violation of their human rights" and had not been persecuted by reason of their membership of the Gabooye tribe[17]. In the course of directly addressing the question whether the appellant had a well-founded fear of persecution as a result of his membership of the Gabooye tribe[18], in a passage that is sufficiently important to be set out at length, the Tribunal concluded that the harm faced by the appellant and his family in the past involved discrimination, but that it[19]:

> "was not of sufficient seriousness to amount to persecution and [the appellant's family's] living conditions were not intolerable. It did not amount to a breach of [the appellant's] non derogable human rights. He was able to obtain an education and the family was able to earn a bare living. The Tribunal does not accept, based on his and his family's past experiences and the country information, that there is a reasonable possibility that the [appellant] would be subjected to a threat to his life or physical freedom as a member of the Gabooye tribe in Somaliland.
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> Although the [appellant] has been subjected to discrimination in the past, the Tribunal does not accept that he would suffer torture or cruel, inhuman or degrading treatment or punishment in Somaliland. The country information indicates that there are police from every tribe in Somaliland so he would have some redress from the acts of others. The [appellant] may be only able to work in lowly paid employment but would be able to subsist as he did in the past and as his family members currently do. He was able to obtain a limited education in the past and although the Tribunal accepts that he would not be able to study agriculture, the Tribunal does not find that this can be called a serious breach of his human rights and it is therefore not persecution. The [appellant's] family has somewhere to live, albeit a basic dwelling. The Tribunal find[s] that the discriminatory conduct that the [appellant] may be subjected to on return to Somalia, even when considered cumulatively, does not amount to

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16 *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [33].

17 *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [38].

18 *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [20].

19 *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [47]-[48].

persecution within the meaning of the Convention. Consequently the Tribunal finds that the [appellant] does not have a well-founded fear of persecution for reason of his membership of the Gabooye tribe and that he is not a refugee on this basis." (footnote omitted)

28 The Tribunal went on to reject the appellant's claims of feared persecution arising from his perceived opposition to Al-Shabaab and other militant groups[20] and his having lived overseas for a significant period[21].

The appeal to the Supreme Court

29 The appellant appealed to the Supreme Court on the grounds, relevantly, that the Tribunal erred in finding that the discrimination faced by the appellant did not amount to persecution and that the Tribunal had denied the appellant procedural fairness[22].

The legislation

30 Section 43(1) of the Refugees Act provides that a person may "appeal" to the Supreme Court of Nauru against a decision by the Tribunal that they not be recognised as a refugee. The Supreme Court may either make an order affirming the decision of the Tribunal or make an order remitting the matter to the Tribunal[23]. It is to be noted that, if an order is made remitting the matter, the Supreme Court is also empowered to "quash" the decision of the Tribunal[24].

The decision

31 The Supreme Court (Crulci J) rejected the grounds advanced by the appellant, and made an order affirming the decision of the Tribunal.

32 Her Honour held that the Tribunal's finding that the discrimination that the appellant's family experienced did not rise to the level of persecution was open to the Tribunal on the evidence. The judge pointed particularly to the circumstance

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20 *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [49]-[56].

21 *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [57]-[60].

22 *BRF038 v The Republic* [2017] NRSC 14 at [23].

23 Refugees Act, s 44(1).

24 Refugees Act, s 44(2)(b).

that the appellant's family had been able to sustain themselves and earn a living in Somaliland[25].

33 The appellant's contention that he was not accorded procedural fairness by the Tribunal was based on the Tribunal's reliance upon country information that the Somaliland police comprised members of every tribe[26]. This was said to be information that the Tribunal ought to have put to him so that he would have been allowed to respond. The Supreme Court accepted that the country information regarding the tribal composition of the Somaliland police, upon which the Tribunal acted, had not been put to the appellant, but held that the information was not "critical to the decision", and therefore that this failure was not a breach of the rules of procedural fairness[27].

34 Before proceeding to a discussion of the grounds of appeal against the Supreme Court's decision, it is necessary to deal with a point of procedure which is not now in contention between the parties.

An appeal as of right

35 Initially, an issue was raised in the appeal to this Court as to whether leave to appeal is required from this Court on the basis that the order of the Supreme Court of Nauru was made in the exercise of its appellate, rather than original, jurisdiction. It is now common ground between the parties that the appellant's appeal to this Court lies as of right because the Supreme Court of Nauru was exercising its original jurisdiction when it determined the "appeal" from the Tribunal. That view is correct. It is desirable to explain why that is so.

36 Appeals to this Court from the Supreme Court of Nauru are governed by the *Appeals Act* 1972 (Nr) and the *Nauru (High Court Appeals) Act* 1976 (Cth). Section 44 of the *Appeals Act* relevantly provides:

> "Subject to the provisions of section 45, an appeal shall lie to the High Court:
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> (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;

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25 *BRF038 v The Republic* [2017] NRSC 14 at [30]-[31].

26 See *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [48].

27 *BRF038 v The Republic* [2017] NRSC 14 at [42].

…

(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."

37 Section 5 of the *Nauru (High Court Appeals) Act* provides:

"(1) Appeals lie to the High Court of Australia from the Supreme Court of Nauru in cases where the Agreement provides that such appeals are to lie.

(2) The High Court has jurisdiction to hear and determine appeals mentioned in subsection (1).

(3) Where the Agreement provides that an appeal is to lie to the High Court of Australia from the Supreme Court of Nauru with the leave of the High Court, the High Court has jurisdiction to hear and determine an application for such leave."

38 The "Agreement" to which s 5 refers is the Agreement between the Government of Australia and the Government of the Republic of Nauru Relating to Appeals to the High Court of Australia from the Supreme Court of Nauru ("the Agreement"). Article 1 of the Agreement provides:

"Subject to Article 2 of this Agreement, appeals are to lie to the High Court of Australia from the Supreme Court of Nauru in the following cases:

A. In respect of the exercise by the Supreme Court of Nauru of its original jurisdiction –

(a) In criminal cases – as of right, by a convicted person, against conviction or sentence.

(b) In civil cases –

(i) as of right, against any final judgment, decree or order; and

(ii) with the leave of the trial judge or the High Court of Australia, against any other judgment, decree or order.

B. In respect of the exercise by the Supreme Court of Nauru of its appellate jurisdiction –

In both criminal and civil cases, with the leave of the High Court."

39 Under s 8 of the *Nauru (High Court Appeals) Act*, this Court may affirm, reverse or modify the judgment of the Supreme Court of Nauru, and make such order as ought to have been made by that Court.

40 The appeal to this Court comes pursuant to s 44(a) of the *Appeals Act*, rather than s 44(c). Notwithstanding the use of the word "appeal" in s 43(1) of the Refugees Act, it is apparent that the Supreme Court was exercising its original jurisdiction in conducting judicial review of the decision of the Tribunal. In this regard, the Tribunal did not exercise judicial power, much less the jurisdiction of the Supreme Court, in conducting its review of the decision of the Secretary[28]. Rather, the Tribunal conducted an administrative review of the merits of the case. The decision of the Supreme Court, on "appeal" from the Tribunal, was therefore an exercise by the Court of its original jurisdiction.

41 Accordingly, the appeal to this Court lies under s 44(a) of the *Appeals Act*; and in accordance with s 5 of the *Nauru (High Court Appeals) Act* and Art 1(A)(b)(i) of the Agreement, the appeal to this Court lies as of right.

The test for persecution

42 In this Court, the appellant argued that the Supreme Court erred in failing to hold that the Tribunal applied the wrong test in determining whether the appellant suffered "persecution" within the meaning of the Refugees Convention by requiring the total deprivation of the appellant's human rights in order to find that he faced persecution. It was said that, when regard is had to the factual findings of the Tribunal, it is apparent that its conclusions necessarily bespeak an erroneous understanding of what is involved in "persecution" within the meaning of the Refugees Convention.

43 The appellant's argument cannot be accepted. It overstates the stringency of the approach adopted by the Tribunal. The Tribunal did not purport to

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28 Cf *Ruhani v Director of Police* (2005) 222 CLR 489 at 510-511 [49]-[50] per McHugh J; [2005] HCA 42.

articulate, or apply, any exhaustive "test" for persecution which could be satisfied only by the total deprivation of a person's human rights. On the contrary, the Tribunal observed, correctly, that attempts to formulate a definition of "persecution" have "met with little success"[29]. In *Minister for Immigration and Border Protection v WZAPN*[30], the plurality accepted that, as suggested by Professor Goodwin-Gill[31], "persecution is … very much a question of degree and proportion". Whether a person has a well-founded fear of persecution is a fact-dependent question on which reasonable minds may differ[32].

44 In *WZAPN*[33], the plurality referred, with evident approval, to the observation of Lord Millett in *Islam v Secretary of State for the Home Department*[34] that "[t]he denial of human rights … is not the same as persecution, which involves the infliction of serious harm." The findings of the Tribunal were not such as to compel the conclusion that the appellant faced such serious, sustained and systematic harm that he has a well-founded fear of persecution in Somalia by reason of his membership of the Gabooye tribe[35]. On the contrary, it was open to the Tribunal to conclude that the appellant was not faced with a well-founded fear of "persecution" within the meaning of the Refugees Convention.

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29 *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [43], quoting United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, (2011) at 13 [51].

30 (2015) 254 CLR 610 at 633 [65]; [2015] HCA 22.

31 Goodwin-Gill, "Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees", (1982) 3 *Michigan Yearbook of International Legal Studies* 291 at 298.

32 See *SZTEQ v Minister for Immigration and Border Protection* (2015) 229 FCR 497 at 524 [105], 535 [153].

33 (2015) 254 CLR 610 at 632 [62].

34 [1999] 2 AC 629 at 660.

35 Cf *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at 734. See also *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 8-9 [24], 41 [124], 78-79 [220]-[223]; [2000] HCA 55.

45 For the sake of completeness, it may also be said that it is not the case that an unreasonable view of the facts of a case would necessarily bespeak an incorrect construction of the statutory provisions in question. It is possible that a decision-maker may reach an unreasonable decision on the facts of a particular case while applying the correct construction of the legislation. In this regard, it is to be noted that the appellant did not seek to argue in the Supreme Court that the decision of the Tribunal was unreasonable in the sense that it was so lacking an evident and intelligible justification that it amounted to a failure on the part of the Tribunal to exercise its jurisdiction to review the decision of the Secretary[36]. To the extent that the appellant sought to advance such an argument in oral argument in this Court, it was not open to him to do so having regard to his grounds of appeal. In any event, however, for the reasons already given, that argument could not be accepted.

Section 37 of the Refugees Act

46 Initially in his appeal to this Court, the appellant sought to argue that the Tribunal, by failing to put to him the country information regarding the tribal composition of the Somaliland police force, failed to comply with s 37 of the Refugees Act. As noted above, s 37 required the Tribunal to give the appellant "clear particulars of information" that might form part of the reason for affirming the decision under review. The appellant argued that whether he is able to avail himself of the protection of the state to counteract discriminatory mistreatment is material to whether he is a refugee; and the information regarding the composition of the Somaliland police force was said to bear directly on that issue. It was said that, by failing to put that information to him, the Tribunal breached s 37. By reason of events subsequent to the decision of the Supreme Court, this argument is no longer available to the appellant.

47 On 23 December 2016, the *Refugees Convention (Derivative Status & Other Measures) (Amendment) Act* 2016 (Nr) ("the 2016 Act") commenced in operation[37]. Section 24 of the 2016 Act repealed s 37 of the Refugees Act.

48 Section 5 of the 2016 Act addresses the potential invalidity of a decision of the Tribunal arising from a failure to comply with s 37. It provides:

> "For the avoidance of doubt, any decision or purported decision of the Tribunal made with respect to an application to the Tribunal under

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36 Cf *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351-352 [30]-[31], 369 [84]-[86], 379-380 [120]-[124]; [2013] HCA 18.

37 2016 Act, s 2(3).

section 31 of the [Refugees Act] for merits review of a decision or determination of the Secretary, between 10 October 2012 and the commencement day, which would have been validly made if at the time of the application, section 37 of the [Refugees Act] had not been enacted, is taken to have been validly made on the day it was in fact made."

49 Section 6 of the 2016 Act confirms the requirement that the Tribunal observe the requirements of procedural fairness. It provides:

"For the avoidance of doubt, nothing in this Act displaces any obligation imposed on the Tribunal under the common law of Nauru to act according to the principles of natural justice and to afford procedural fairness with respect to an application to the Tribunal under section 31 of the [Refugees Act] for merits review of a decision or determination of the Secretary."

50 On 5 May 2017, the *Refugees Convention (Amendment) Act* 2017 (Nr) ("the 2017 Act") was certified. Section 4 provides:

"The repeal of section 37 of the [Refugees Act], effected by section 24 of the [2016 Act], is taken to have commenced on 10 October 2012."

51 Sections 5 and 6 of the 2017 Act make elaborate provision to confirm the validity of decisions made in disregard of the repealed s 37. Section 5 provides:

"(1) For the avoidance of doubt, the rights, liabilities, obligations and status of all persons are, by force of this Act, declared to be the same as if section 37 of the [Refugees Act] had not been enacted.

(2) For the avoidance of doubt, the rights, liabilities, obligations and status of all persons are, by force of this Act, declared always to have been the same as if section 37 of the [Refugees Act] had not been enacted."

52 Section 6 of the 2017 Act provides:

"(1) For the avoidance of doubt, all proceedings, matters, decrees, acts and things taken, made or done, or purporting to have been taken, made or done, under the [Refugees Act] in relation to an application to the Tribunal under section 31 of the [Refugees Act] for merits review of a decision or determination of the Secretary are, by force of this Act, declared to have the same force and effect after the commencement of this Act, as they would have if section 37 of the [Refugees Act] had not been enacted.

(2) For the avoidance of doubt, all proceedings, matters, decrees, acts and things taken, made or done, or purporting to have been taken, made or done, under the [Refugees Act] in relation to an application to the Tribunal under section 31 of the [Refugees Act] for merits review of a decision or determination by the Secretary are, by force of this Act, declared to have had the same force and effect before the commencement of this Act, as they would have had if section 37 of the [Refugees Act] had not been enacted."

53 Section 7 of the 2017 Act reaffirms the ongoing requirements of procedural fairness. It provides:

"For the avoidance of doubt, nothing in this Act displaces any obligation imposed on the Tribunal under the common law of Nauru to act according to the principles of natural justice and to afford procedural fairness with respect to an application to the Tribunal under section 31 of the [Refugees Act] for merits review of a decision or determination of the Secretary."

54 The combined effect of the 2016 Act and the 2017 Act is that the Tribunal could not have "breached" s 37, as that provision must be taken to have been repealed prior to the Tribunal making its decision in this case. In addition, any "breach" of s 37 was deprived of legal consequences by the 2017 Act.

55 While the appellant did not dispute the effect of the 2016 Act and the 2017 Act, he argued that those Acts did not diminish the Tribunal's procedural fairness obligations under s 22 of the Refugees Act. In that respect, the appellant was plainly correct.

56 As has been seen, s 6 of the 2016 Act and s 7 of the 2017 Act expressly preserved the application of the common law of procedural fairness to the Tribunal. Accordingly, the question remains whether the Tribunal denied the appellant procedural fairness by failing to put to him for his response the country information relating to the tribal composition of the Somaliland police before making an adverse finding based on that information, and whether the Supreme Court therefore erred in not so holding. To that question one may now turn.

A denial of procedural fairness

57 The appellant argued that the hearing before the Tribunal was conducted without reference to the appellant's capacity to avail himself of effective police protection against mistreatment by reason of the fact that the Somaliland police force included members of his tribe. The appellant argued that the country information relating to the tribal composition of the Somaliland police was

credible, relevant and significant to the decision the Tribunal would make. It followed that fairness required that the Tribunal ought to have put the substance of that information to him. Its failure to do so, the appellant argued, constituted a breach of the requirements of procedural fairness contemplated by s 22 of the Refugees Act.

58 In *Minister for Immigration and Border Protection v SZSSJ*, this Court held that procedural fairness requires that a person whose interest is apt to be affected by a decision be put on notice of "the nature and content of information that the repository of power undertaking the inquiry might take into account as a reason for coming to a conclusion adverse to the person"[38].

59 In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*[39], Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ referred with evident approval to the following statement by the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*[40]:

> "Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker."

60 The respondent accepted, correctly, that procedural fairness requires a person to be given the opportunity to deal with all information that was "credible, relevant and significant" to the decision[41]. The respondent sought to argue that disclosure of such information was required only in relation to "the critical issue or factor on which the administrative decision is likely to turn"[42], and that the

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38 (2016) 90 ALJR 901 at 915 [83]; 333 ALR 653 at 670; [2016] HCA 29.

39 (2006) 228 CLR 152 at 161-162 [29]; [2006] HCA 63.

40 (1994) 49 FCR 576 at 591-592.

41 *Kioa v West* (1985) 159 CLR 550 at 629; [1985] HCA 81. See also *SZBEL* (2006) 228 CLR 152 at 162 [32]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 256 [2], 261 [19]; [2010] HCA 23.

42 *Kioa v West* (1985) 159 CLR 550 at 587. See also *Alphaone* (1994) 49 FCR 576 at 591.

information as to the tribal composition of the Somaliland police was not a factor on which the Tribunal's decision was likely to turn. It was said to be apparent from the Tribunal's reasons that the Tribunal had already made findings sufficient to dispose of the appellant's claim, namely, that he had no well-founded fear of persecution[43], before its reference to the tribal composition of the Somaliland police.

61 The respondent's reading of the Tribunal's reasons in this respect is unsustainable. It cannot be said that the Tribunal's observation as to the composition of the Somaliland police force did not significantly affect its assessment of whether the appellant was likely to face persecution in Somaliland. On the contrary, that consideration was integral to the Tribunal's reasons for its conclusion[44].

62 The circumstance that the Tribunal expressly referred to this information in the course of reaching its conclusion, while not necessarily determinative, goes some way to demonstrating that the information was integral to the Tribunal's conclusion. It is evident from the lengthy passage excerpted above that the conclusions there stated were directly dispositive of the issue whether the appellant has a well-founded fear of persecution as a result of his membership of the Gabooye tribe. It is also apparent from the excerpt that the country information to which the Tribunal referred in the first paragraph of that excerpt (which was a basis for its conclusion adverse to the appellant) included the information as to the tribal composition of the Somaliland police force.

63 In addition, as noted above, whether a person suffers a well-founded fear of persecution is a question of degree and proportion. That the country information concerning the composition of the Somaliland police was indeed integral to the Tribunal's conclusion is supported by the consideration that the presence of Gabooye tribal members in the Somaliland police force might be apt to counter, or limit, the harsh effects of discriminatory treatment of the Gabooye by higher caste groups. When that consideration is not available, it is easier to conclude that the harm from the discriminatory mistreatment faced by the appellant is likely to be so sustained and systematic that it can properly be characterised as persecution[45].

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43 *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [47]-[48].

44 Cf *WZAPN* (2015) 254 CLR 610 at 637-638 [78].

45 Cf *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 233; [1997] HCA 4; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 54 [154], 78-79 [220]-[223].

64 Finally, it is to be noted that the respondent did not suggest, either in the Supreme Court or in this Court, that compliance by the Tribunal with this aspect of the requirements of procedural fairness could not possibly have made any difference to the outcome of the review by the Tribunal[46]. That is understandable: it cannot be said that the appellant could not have rebutted such a suggestion had it been made, in that the appellant might well have pointed to evidence that the appellant's family had been unable to access effective police protection in relation to the incidents when his mother was robbed and when his family were forced off their land[47]. Further, because the Tribunal had not raised the suggestion, the appellant did not seek to make any submission about other, contrary, general country information that might exist.

Conclusion

65 The failure on the part of the Tribunal to put the appellant on notice that the country information as to the tribal composition of the police in Somaliland might be taken into account as a reason for coming to a conclusion adverse to him was a failure to accord him procedural fairness. The Supreme Court of Nauru should have concluded that this breach of s 22 of the Refugees Act vitiated the decision of the Tribunal.

66 Under s 44 of the Refugees Act, the Supreme Court of Nauru was empowered to quash the decision of the Tribunal and remit the matter to the Tribunal for decision according to law. These were the orders that should have been made by the Supreme Court, and which, by virtue of s 8 of the *Nauru (High Court Appeals) Act*, may be made by this Court.

Orders

67 The appeal to this Court should be allowed.

68 The order of the Supreme Court of Nauru should be set aside; and in its place it should be ordered that the decision of the Tribunal be quashed and the matter be remitted to the Tribunal for reconsideration according to law.

69 The respondent should pay the costs of the appellant in this Court and in the Supreme Court of Nauru.

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46 Cf *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-146; [1986] HCA 54.

47 See *BRF038* unreported, Refugee Status Review Tribunal, 15 March 2015 at [28]-[29].