HIGH COURT OF AUSTRALIA

KEANE, NETTLE AND EDELMAN JJ

DWN042 APPELLANT

AND

THE REPUBLIC OF NAURU RESPONDENT

DWN042 v The Republic of Nauru
[2017] HCA 56
13 December 2017
M20/2017

ORDER

1. *Appeal allowed.*

2. *Set aside the order made by the Supreme Court of Nauru on 7 February 2017.*

3. *Remit the matter to the Supreme Court of Nauru, to a judge other than Judge Khan, for reconsideration according to law.*

4. *The respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of Nauru

Representation

P R D Gray QC with M L L Albert for the appellant (instructed by Maddocks)

G R Kennett SC with A Aleksov 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

DWN042 v The Republic of Nauru

Migration – Refugees – Appeal as of right from Supreme Court of Nauru – Where Supreme Court of Nauru failed to consider notice of motion – Whether failure to consider notice of motion involved denial of procedural fairness – Whether primary judge entitled to treat notice of motion as abandoned – Whether appeal could be dismissed because proper hearing could not have produced different result – Whether appeal incompetent because it would require consideration of interpretation and effect of Constitution of Nauru – Whether failure to consider complementary protection claim – Whether reliance on unsigned and unsworn transfer interview form constituted breach of requirements of procedural fairness.

Words and phrases – "appeal", "arbitrary deprivation of life", "assurances to the court", "complementary protection", "denial of procedural fairness", "extortion by the Taliban", "interpretation or effect of the Constitution of Nauru", "notice of motion", "original jurisdiction", "transfer interview form", "unconstitutional nature of detention".

Appeals Act 1972 (Nr), ss 44(a), 44(b), 45(a).
Nauru (High Court Appeals) Act 1976 (Cth), ss 5, 8.
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(A)(b)(i), Art 1(A)(b)(ii), Art 2(a).
Refugees Convention Act 2012 (Nr), ss 4(2), 5, 43(1).
International Covenant on Civil and Political Rights (1966), Art 6.

1 KEANE, NETTLE AND EDELMAN JJ. This is an appeal as of right from the Supreme Court of Nauru. The appellant is a Sunni Muslim of Pashtun ethnicity from a village in Pakistan. In August 2013, he arrived by boat at Christmas Island and in September 2013 was transferred to the Republic of Nauru ("the Republic") under a Memorandum of Understanding reached between Australia and the Republic. He applied for refugee status under s 5 of the *Refugees Convention Act* 2012 (Nr) ("the Refugees Act"). The Secretary of the Department of Justice and Border Control ("the Secretary") and the Refugee Status Review Tribunal ("the Tribunal") dismissed the appellant's application. The Supreme Court of Nauru, on an appeal in the nature of judicial review, struck out two of the appellant's grounds of appeal for reasons that, the respondent accepts, were incorrect. Very shortly before final judgment on the remaining grounds was delivered the appellant filed a notice of motion to reinstate those grounds. Final judgment was delivered without hearing that motion. The primary issue on this appeal is whether, in all the circumstances of the case, this involved a denial of procedural fairness to the appellant. For the reasons below, it did involve such a denial and the matter should be remitted to the Supreme Court of Nauru for determination according to law.

Background

The appellant's application for refugee status

2 On 31 July 2014, after the Secretary determined that the appellant was not a refugee and was not owed complementary protection under the Refugees Act, the appellant applied to the Tribunal for a review of the Secretary's determination. The Tribunal invited the appellant to appear before it at a hearing on 25 September 2014. Prior to the Tribunal hearing, the appellant's solicitors provided the Tribunal with materials, including lengthy written submissions and a statement from the appellant. The appellant attended the Tribunal hearing on 25 September 2014.

3 On 29 December 2014, the Tribunal affirmed the decision of the Secretary that the appellant was not a refugee and was not owed complementary protection under the Refugees Act. The Tribunal concluded that there were many flaws and inconsistencies in the appellant's narrative which, taken together, led the Tribunal to reject the appellant's evidence that he had been targeted for extortion by the Taliban. The Tribunal did not accept that there was any reasonable possibility that the appellant would be targeted in the future by the Taliban or opportunistic criminals who targeted wealthy businessmen.

Keane J
Nettle J
Edelman J

The circumstances of the appeal to the Supreme Court of Nauru

4 On 24 April 2015, the appellant, then unrepresented, appealed from the decision of the Tribunal to the Supreme Court of Nauru. The appeal was listed for hearing on 5 May 2016. The appellant was unsuccessful in obtaining legal representation until the day before his hearing when a barrister in Nauru agreed to assist him pro bono publico. On the morning of the hearing, the appellant filed an amended notice of appeal raising four grounds as follows:

> "1. The Tribunal acted in a way that was in breach of the principles of natural justice, contrary to s 22(b) of the [Refugees] Act, by conducting its hearing when and at the place where the [a]ppellant was unlawfully detained in breach of s 5 of the Constitution of Nauru.
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> 2. The Tribunal's hearing in respect of the [a]ppellant was unconstitutional because he was unlawfully detained at that time.
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> …
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> 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.
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> 4. The Tribunal erred by relying on the transfer interview form contrary to s 22(b) [of the Refugees Act] 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."

5 At the appeal hearing, counsel for the respondent submitted that he did not have instructions to make submissions in relation to grounds 1 and 2 of the appellant's amended notice of appeal but he sought to be heard on a motion to strike out those grounds. The primary judge, Judge Khan, struck out grounds 1 and 2 of the amended notice of appeal with reasons to be given later. His Honour then refused the appellant's application for an adjournment. Arguments proceeded on the remaining grounds of the amended notice of appeal. Judgment was reserved on those grounds.

6 On 20 May 2016, the primary judge gave his reasons for striking out grounds 1 and 2. His Honour held that the grounds should be struck out because the Supreme Court of Nauru had no jurisdiction to consider them, apparently because (i) the two grounds involved the interpretation and effect of the

Constitution of Nauru so that under s 45(a) of the *Appeals Act* 1972 (Nr) there could be no appeal to the High Court of Australia from his decision on these grounds, and (ii) the Refugees Act was "crafted in a way to provide speedy resolution of ... refugee status"[1].

7 As the strike out decision was interlocutory, the appellant had no automatic right of appeal to this Court[2]. He sought leave to appeal to this Court from the strike out decision of the primary judge. At the leave hearing, on 16 December 2016, the respondent accepted that the primary judge's reasoning was "plainly wrong"[3]. Senior counsel for the respondent said that the respondent would not rely on Judge Khan's reasoning in opposition to any application by the appellant to reopen the present case on grounds 1 and 2. However, senior counsel for the respondent also said that any application to reopen in order to reintroduce the grounds that had been struck out would likely be resisted by the respondent, although for different reasons from those given by the primary judge. In light of the assurance given, and given the interlocutory nature of the application, this Court refused leave to appeal.

8 While the primary judge's decision concerning grounds 3 and 4 remained reserved, correspondence was exchanged between the solicitors for the appellant and the solicitor for the respondent. On 22 December 2016, the solicitors for the appellant referred to the assurances given by the respondent at the leave hearing and sought consent from the respondent to orders permitting the appellant to reopen his appeal in respect of grounds 1 and 2 and to have leave to file any further amended notice of appeal. The appellant's solicitors did not provide the respondent with a proposed amended notice of appeal or a minute of the unspecified amendments to the notice of appeal. On 3 January 2017, the solicitor for the respondent replied, refusing to consent to the proposed orders, and setting out the assurances that had been given, including the comments that the respondent would likely resist any application to reopen. On 1 February 2017, the appellant's solicitors replied, persisting with the suggestion that the respondent should consent to orders to reopen grounds 1 and 2 of the appeal. On 6 February 2017, the respondent's solicitor replied, reiterating that the respondent's assurances at the leave hearing did not extend to consenting to an application to reopen grounds 1 and 2.

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1 *DWN042 v The Republic* [2016] NRSC 6 at [25].

2 *Appeals Act* 1972 (Nr), s 44(b); *Nauru (High Court Appeals) Act* 1976 (Cth), Schedule, Art 1(A)(b)(ii).

3 *DWN042 v The Republic of Nauru* [2016] HCATrans 310.

9 On Friday, 3 February 2017, while this correspondence was ongoing, the solicitor for the respondent was advised that the primary judge would hand down his judgment on 7 February 2017. Late that afternoon, the solicitor for the respondent emailed the appellant's counsel advising him of this. Perhaps realising that counsel for the appellant was based in Melbourne and may not be able to travel to the Republic at short notice, the solicitor for the respondent helpfully suggested that counsel may wish to ask Ms Keane, a solicitor working in the Republic as a Claims Assistance Provider for asylum seekers, who was copied in to the email, "to mention an appearance on behalf of the appellant". On Monday, 6 February 2017, the solicitor for the respondent then informed the solicitors for the appellant that the primary judge would be handing down his judgment at 11am the next day. The solicitor for the respondent reiterated that the respondent would be represented at the hearing and that the respondent would not object if the appellant's solicitors contacted Ms Keane "with respect to an appearance on behalf of the appellant".

10 On 6 February 2017, the same day that the appellant's solicitors were notified that judgment would be handed down the next day, they wrote to the Supreme Court of Nauru in two respects: (i) seeking leave to appear the next day by telephone, and (ii) filing a notice of motion to reinstate grounds 1 and 2, and to reopen the appeal to further amend those grounds. The appellant sought a substantive hearing of the notice of motion at a date to be fixed. The email and attachments were copied to the respondent's solicitor and the Associate to the primary judge.

11 At 4.22pm on 6 February 2017, the Registrar replied as follows:

> "I have referred the matter to the Judge for his decision. It is rather late not only in time but also on the day to be making such a request but I had suggested that the matter be adjourned to another date."

12 At 10.05am on 7 February 2017, less than an hour before the judgment was delivered, the Registrar emailed the parties, saying "I have discussed with the Judge and we are not in favour of phone-ins at all". Although the appellant's solicitors were precluded from appearing at the handing down of the primary judge's judgment, they would have expected, based upon the practical and reasonable approach of the Registrar, that the notice of motion would be adjourned to be heard on another date.

13 The appellant was unable to attend the handing down of the judgment due to ill health. Nor was the appellant represented, except by the solicitor, Ms Keane, who had been instructed by the appellant's Melbourne solicitors to appear for the sole purpose of physically taking judgment. Judgment was handed

down. Ms Keane made no mention of the motion to reopen grounds 1 and 2 or of the possibility of any adjournment.

The judgment of the primary judge

14 In his Honour's reasons for decision, after observing that he had struck out grounds 1 and 2, the primary judge considered the remaining two grounds. The third ground was dismissed by the primary judge because he concluded that the appellant had not made any claim before the Tribunal that returning him to Pakistan would breach Nauru's international obligations due to the risk of arbitrary deprivation of life. Hence, his Honour concluded that the Tribunal was not required to consider this issue[4]. The fourth ground was dismissed essentially because the Tribunal was not bound by the rules of evidence and was not precluded from relying upon an unsigned written statement[5]. At no stage in his reasons did the primary judge address the appellant's notice of motion to reinstate grounds 1 and 2, and to reopen the appeal to further amend those grounds.

The appeal to this Court

15 For the reasons explained in *BRF038 v The Republic of Nauru*[6], the Supreme Court of Nauru was exercising original jurisdiction on "appeal" to it under s 43(1) of the Refugees Act, and an appeal to this Court under s 44(a) of the *Appeals Act* lies as of right in accordance with s 5 of the *Nauru (High Court Appeals) Act* 1976 (Cth), read with Art 1(A)(b)(i) of the Agreement forming the Schedule to that Act. However, Art 1(A)(b)(i) of the Agreement is subject to Art 2(a), which provides[7]:

> "An appeal is not to lie to the High Court of Australia from the Supreme Court of Nauru … where the appeal involves the interpretation or effect of the Constitution of Nauru".

16 The appellant appealed to the High Court on five grounds. The first ground alleged error by the primary judge by failing to consider the appellant's notice of motion prior to giving judgment on the whole of the appeal. The second and third grounds reiterated the grounds that had been struck out. They

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4 *DWN042 v The Republic* [2017] NRSC 4 at [26].

5 *DWN042 v The Republic* [2017] NRSC 4 at [32].

6 [2017] HCA 44 at [35]-[41].

7 See also *Appeals Act* 1972 (Nr), s 45(a).

concerned the alleged unconstitutional nature of the appellant's detention at the time of the Tribunal hearing. The fourth ground alleged error by the primary judge in failing to conclude that the Tribunal erred in failing to consider part of the appellant's claim to complementary protection. The fifth ground alleged that the primary judge erred in failing to conclude that the Tribunal erred by relying upon the appellant's unsigned and unsworn transfer interview form.

The failure to consider the notice of motion

17 This appeal proceeded on the assumed basis that the notice of motion was no longer extant. The failure by the primary judge to consider the appellant's notice of motion involved a failure to deal with an important part of the appellant's case. The appellant only put his case on the basis of a failure to afford procedural fairness and did not submit that the failure to deal with the notice of motion involved a failure to exercise jurisdiction[8]. As the appellant submitted, the failure by the primary judge involved, at least, a failure to accord procedural fairness[9].

18 The respondent sought to resist this conclusion on two grounds. First, it was submitted that the primary judge was entitled to treat the notice of motion as having been abandoned. That submission should not be accepted. The notice of motion had only been filed the previous day. The Registrar, who had joined with the primary judge in advising that they were not in favour of telephone attendances, had notified the appellant's solicitors that it would be recommended to the judge that the hearing of the notice of motion be adjourned. And, as the appellant's solicitors were aware, the primary judge had been notified that the appellant's solicitors and counsel were unavailable to appear. Ms Keane was present only to take judgment.

19 Secondly, the respondent submitted that the first ground of appeal was incompetent because (i) the respondent would seek to meet any allegation of procedural unfairness by failing to consider the notice of motion by submitting that this Court should, in giving "such judgment ... as ought to have been given" in the Supreme Court[10], dismiss the notice of motion, and (ii) the submissions

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8 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 612 [44], 649 [163]; [2002] HCA 11; *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1093 [32]; 197 ALR 389 at 395; [2003] HCA 26.

9 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24]; 197 ALR 389 at 394.

10 *Nauru (High Court Appeals) Act* 1976 (Cth), s 8.

that the respondent would make to this effect would involve matters concerning "the interpretation or effect of the Constitution of Nauru", which this Court is precluded from hearing under Art 2(a) of the Agreement forming the Schedule to the *Nauru (High Court Appeals) Act* and s 45(a) of the *Appeals Act*.

20 This submission should not be accepted. The respondent accepted that the "stringency" of the test in *Stead v State Government Insurance Commission*[11] did not apply to the circumstances of this appeal. That case involved a denial of procedural fairness at trial where a party was deprived of the chance to make submissions on an issue of fact. This Court held that[12]:

> "All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility, it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result."

21 The respondent was correct not to submit that this appeal could be dismissed on the basis that a properly conducted hearing could not possibly have produced a different result. That principle does not apply where, as was the case with the appellant's notice of motion, a party receives no hearing at all. The appellant was, and is, entitled to a hearing in the Supreme Court. It is not for this Court to attempt to provide the hearing that the appellant has not had, or to attempt to give any judgment such as might be thought to have been appropriate in the Supreme Court. There is, therefore, no basis upon which this ground of appeal requires consideration of the interpretation or effect of the Constitution of Nauru.

22 This ground of appeal should be upheld.

The alleged unconstitutional nature of the appellant's detention

23 The second and third grounds of appeal to this Court can be disposed of shortly. Both grounds of appeal are incompetent. Both grounds plainly fall within the terms of Art 2(a) of the Agreement forming the Schedule to the *Nauru (High Court Appeals) Act* and s 45(a) of the *Appeals Act* as they involve "the interpretation or effect of the Constitution of Nauru". The appellant submitted that Art 2(a) could effectively be bypassed due to the concession by the respondent that the reasons of the primary judge on this point, relating to the

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11 (1986) 161 CLR 141; [1986] HCA 54.

12 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147.

Constitution of Nauru, were plainly wrong. But in order to accept the concession of law this Court would be required to consider it. The appeal on these grounds would necessarily involve the interpretation or effect of the Constitution of Nauru.

The alleged failure to consider an aspect of the appellant's case

24 Section 4(2) of the Refugees Act requires that the Republic not return a person where doing so would be in breach of its international obligations. Article 6 of the International Covenant on Civil and Political Rights (1966), which the Republic ratified in 2001, requires that "[n]o one shall be arbitrarily deprived of his life". The Tribunal considered, in detail, the appellant's claim that he feared that he would be arbitrarily deprived of his life at the hands of the Taliban in connection with threats and extortion by the Taliban. The Tribunal accepted that the Taliban had been involved in human rights abuses and that opportunistic criminals had targeted businessmen. But the Tribunal rejected the appellant's evidence that he had been targeted by the Taliban or by opportunistic criminals in the past, including rejecting the appellant's evidence concerning an incident when the appellant said he had refused to pay extortion money demanded by the Taliban. The Tribunal concluded that there was a less than reasonable possibility of this happening in the reasonably foreseeable future. In the appellant's fourth ground of appeal he reiterated before this Court his submission before the primary judge that the Tribunal failed to consider that there was a reasonable possibility that he would be subject to an arbitrary deprivation of life on return to Pakistan as a result of "generalised violence" rather than being targeted for violence by the Taliban.

25 It has been said in this Court that a decision maker's reasons should not be "scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed"[13]. For the same reasons, the record of a hearing should not be scrutinised in an attempt to elucidate grounds which were not, on a fair and reasonable construction of the record, raised for decision.

26 On a fair and reasonable construction of the record, the submission concerning generalised violence that the appellant made in the Supreme Court of Nauru, and now makes in this Court, was not made before the Tribunal. The appellant's signed statement before the Tribunal contained headings "Who I think may harm/mistreat me in Pakistan" and "Why I will be harmed in Pakistan". The

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13 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272; [1996] HCA 6.

appellant's evidence under these headings was that the Taliban will kill him if he returns because he refused to pay money to the Taliban that they had demanded. At no point in the appellant's submissions, which were prepared by his lawyers, was it suggested that the appellant feared arbitrary deprivation of his life as a consequence of generalised violence, independent of his claims concerning the Taliban. Indeed, at one point in the appellant's written submissions to the Tribunal he said of the situation of violence that "[i]t is not local people and mere criminals who do these things. It is only the Taliban who are responsible."

27 Nor at any stage during the oral hearing did the appellant make this allegation concerning generalised violence independent of the Taliban. This was despite being asked by the Tribunal on several occasions whether there was any other claim that he was making other than that he had been targeted by the Taliban.

28 The appellant submitted in this Court that the submission about generalised violence was most clearly put to the Tribunal in a paragraph of his submissions where, under the heading "Extent of Nauru's International *Non-Refoulement* Obligations" and the sub-heading "Physical Violence", the appellant said:

> "It is our submission that Nauru's *non-refoulement* obligations prohibit the removal of [the appellant] to circumstances where he would face a reasonable possibility of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment. It is our submission that [the appellant] would face harm of this kind if he were removed to Pakistan."

29 This asserted conclusion about physical violence summarised the appellant's earlier written submissions in the same document where he said that he feared harm because of his imputed and actual political opinions. In each case the submission was concerned with directed violence by the Taliban rather than generalised violence. His submissions explained that:

> "i. The Taliban believe that [the appellant] opposes their political views because he has refused to pay them the money they demanded;
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> ii. [The appellant] opposes the Taliban's ideals and objectives. As he states at paragraph [16] of his statement of claims dated 8 December 2014 'I did not want to give them money because they would only use it for bad things';
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> iii. [The appellant] will be further perceived to oppose the Taliban because he is a member of the Kokikhel tribe, whose elders in

April 2014 refused the Taliban passage through their lands and refused to join or support the Taliban".

30 This ground of appeal must be dismissed.

The unsigned and unsworn transfer interview form

31 On 28 November 2013, prior to his application for refugee status, the appellant attended a transfer interview. As part of the transfer interview, a form was completed. The appellant's fifth ground of appeal was that the Supreme Court should have found that the Tribunal erred by relying upon the transfer interview. The appellant submitted that it was not open to the Tribunal to rely upon the transfer interview form because it was unsigned and unsworn, was not made available to the appellant's representative when the representative prepared the appellant's statement of claims, and was expressly disowned as a record of the appellant's claims.

32 Contrary to the appellant's submissions, there are three independent reasons why there was no procedural unfairness occasioned by the Tribunal's reliance upon the transfer interview form. First, the transfer interview form was not, and could not be, "disowned" by the appellant. The passage in a statement from the appellant upon which he relied asserted only that his information was "only a summary" and that he had not been told that the information that he provided would be used for the purposes of assessing his claims for protection. This statement by the appellant does not repudiate the transfer interview form. It is also inconsistent with the statement on the transfer interview form that the appellant understood the preliminary matters that were explained to him, including a statement that the information the appellant gave "will also be read and used by the people who will be assessing your claim for refugee status". The appellant consented to the interview and he consented to it being recorded.

33 Secondly, although the appellant did not have a copy of the transfer interview form in December 2013, he or his representative had a copy of it at the time of the Tribunal hearing when reference was made to it by the appellant's representative. Neither the appellant nor his representative raised any objections with the Tribunal about it relying upon the content of the transfer interview form. Rather, the appellant's representative submitted that the Tribunal should "exercise caution" before relying upon the transfer interview "because of the pressurised situation that those interviews are conducted in".

34 Thirdly, the matters in the transfer interview form upon which the Tribunal relied were consistent with evidence that the appellant gave before the Tribunal. The Tribunal relied upon statements by the appellant during his transfer interview concerning the first threat by the Taliban, which he said

occurred in his home on 20 February 2013. This date was inconsistent with the earlier date when the appellant was issued with a passport as a consequence, he had said, of threats from the Taliban. Although the inconsistency was one of the reasons why the Tribunal formed adverse conclusions about the appellant's credibility, the appellant's oral evidence before the Tribunal was to the same inconsistent effect. In his oral evidence he variously gave dates of 25 February and late February.

35 This ground of appeal must be dismissed.

Conclusion

36 The appeal should be allowed on the first ground. As the only order made by the primary judge was to affirm the decision of the Tribunal, the parties agreed that the appropriate orders in this Court if the appeal were allowed on the first ground would include quashing the orders made by the primary judge and remitting the matter to the Supreme Court of Nauru pursuant to s 8 of the *Nauru (High Court Appeals) Act*. The appellant submitted that the order for remitter should exclude the primary judge and Registrar who had been involved with this matter by concurring in the course of not permitting the appellant's solicitors to appear by telephone. However, as the respondent submitted, the Registrar, who is now Chief Justice, had not been involved with the matter in any substantive respect and need not be excluded from the remitter. The orders to be made should be:

(1) Appeal allowed.

(2) Set aside the order made by the Supreme Court of Nauru on 7 February 2017.

(3) Remit the matter to the Supreme Court of Nauru, to a judge other than Judge Khan, for reconsideration according to law.

(4) The respondent pay the appellant's costs of the appeal to this Court.