# HIGH COURT OF AUSTRALIA

GAGELER, NETTLE AND EDELMAN JJ

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TTY167 APPELLANT

AND

REPUBLIC OF NAURU RESPONDENT

*TTY167 v Republic of Nauru*
[2018] HCA 61
*5 December 2018*
S46/2018

**ORDER**

1. *The time fixed for the filing of the notice of appeal is enlarged to 12 March 2018.*

2. *Appeal allowed.*

3. *Set aside the orders made by the Supreme Court of Nauru on 20 February 2018 and, in their place, order that:*

   (a) *the decision of the Refugee Status Review Tribunal dated 3 July 2016 be quashed; and*

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

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

On appeal from the Supreme Court of Nauru

**Representation**

W G Gilbert SC with M L L Albert and J A Barrington for the appellant (instructed by Clothier Anderson Immigration Lawyers)

G R Kennett SC with P M Knowles for the respondent (instructed by Republic of Nauru)

## CATCHWORDS

**TTY167 v Republic of Nauru**

Immigration – Refugees – Nauru – Appeal as of right from Supreme Court of Nauru – Where Secretary of Department of Justice and Border Control determined appellant not refugee and not owed complementary protection – Where appellant applied to Refugee Status Review Tribunal for merits review of Secretary's determination – Where Tribunal sent letter to "Team Leader" of claims assistance provider inviting appellant to attend hearing – Where appellant and his representatives failed to attend Tribunal hearing – Where Tribunal affirmed Secretary's determination in appellant's absence – Where Supreme Court affirmed Tribunal's decision – Whether invitation to attend Tribunal hearing given to appellant – Whether legally unreasonable for Tribunal to decide matter without taking further action to allow or enable appellant to appear.

Words and phrases – "authorised representative", "given", "invitation to appear", "jurisdictional requirement", "legally unreasonable".

*Interpretation Act 2011* (Nr), ss 100, 101.
*Refugees Convention Act 2012* (Nr), ss 40(3), 41(1).

GAGELER, NETTLE AND EDELMAN JJ.

## Introduction

1 This appeal is from a decision of the Supreme Court of Nauru. The appeal was brought six days out of time but the notice of appeal was filed prior to the termination of 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. An extension of time in which to file the notice of appeal was not opposed. The extension should be granted. For the reasons given in *The Republic of Nauru v WET040*[1], this Court has jurisdiction to hear the appeal.

2 The Supreme Court of Nauru upheld a decision of the Refugee Status Review Tribunal ("the Tribunal"), which had concluded that the appellant was neither a refugee nor owed complementary protection. There are two grounds of appeal in this Court. The first concerns whether an invitation to appear before the Tribunal was given to the appellant and, if not, whether that failure meant that the Tribunal had no jurisdiction. The second concerns whether it was legally unreasonable for the Tribunal not to adjourn the hearing when neither the appellant nor his lawyers attended.

3 For the reasons below, the first ground of appeal should be dismissed. In summary, the Tribunal's jurisdiction required that an invitation be given to the appellant to attend the hearing. That invitation could have been given to the appellant or to his authorised representative. Since this ground of appeal was not raised in the Supreme Court, it is not possible to know whether the person to whom the Tribunal gave the invitation was the authorised representative of the appellant. It is too late to raise this point on appeal to this Court.

4 However, the appeal should be allowed on the second ground. The failure by the Tribunal to adjourn the hearing was legally unreasonable in the exceptional circumstances of this case, where: (i) the appellant and his lawyers had informed the Tribunal that the appellant had mental health issues, which should have raised a reasonable apprehension that the appellant did not attend for health reasons; (ii) the absence of the appellant and his lawyers from the hearing was surprising because the appellant had been strongly engaged with his application, he had informed the Tribunal that he would attend and his lawyers had informed the Tribunal only two days before the hearing of their expectation that he would attend; (iii) the personal attendance of the appellant was a matter of

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**1** [2018] HCA 56.

considerable importance to the appellant and was important for matters about which the Tribunal was concerned; and (iv) it would have been easy for the Tribunal to contact the appellant's lawyers.

**Background**

5 The appellant is a citizen of Bangladesh. On 20 September 2014, he applied to the Secretary of the Department of Justice and Border Control ("the Secretary") to be recognised as a refugee, or a person owed complementary protection, under s 6 of the *Refugees Convention Act 2012* (Nr). The appellant was assisted in preparing his application by a representative of a Nauru claims assistance provider called CAPS. In the statement attached to his application he explained that the standard of education in Bangladesh was poor, and that he was illiterate and struggled even to write his own name.

6 On the day of the appellant's scheduled refugee status determination ("RSD") interview, a representative of CAPS sent an email to the RSD officer explaining that the appellant was unwell but was "eager to attend" an interview. The interview was rescheduled to and took place on 20 October 2014.

7 The appellant claimed that he had been a member of the student wing of the Jamaat-e-Islami ("JeI") political party, and that his father was a local JeI leader. He said that after the Awami League formed government in 2009 they had begun oppressing the supporters of JeI. He claimed that his home had been raided and vandalised by members of the Awami League, and that his mother and siblings had been beaten. He said that he had amended his religious practices to avoid identification as a JeI supporter, but that he had attended a protest in 2013 at which he and his father were beaten, and his brother went missing and is feared to have been killed.

8 On 9 October 2015, the Secretary refused the application. The Secretary did not accept that the appellant was anything more than a low-level supporter of JeI, or that the appellant had any profile that would have been of interest to the Awami League. He did not accept that the appellant's father was in a leadership position or a position of influence in JeI. He did not accept the appellant's evidence about the alleged raid on his home. Nor did the Secretary accept that the appellant had taken part in the protest.

9 On 17 December 2015, two days after being notified of the Secretary's determination, the appellant applied to the Tribunal under s 31 of the *Refugees Convention Act* for merits review of the Secretary's determination.

10 On 15 April 2016, the Tribunal invited the appellant to appear before it. The invitation letter was not addressed to the appellant. It was addressed to a

woman described as a "Team Leader" at CAPS. The letter informed the Team Leader of the appellant's application to the Tribunal as well as the date and time of the hearing. She was asked to inform the Tribunal in writing of any person from whom the appellant would like the Tribunal to take oral evidence. The letter concluded by informing her that, if the appellant did not appear before the Tribunal on the date and at the time specified, "the Tribunal may make a decision on the review without taking further action to allow the [appellant] to appear".

11 On 20 April 2016, the appellant provided a statement to the Tribunal. He explained that the information was only a summary of his response to the Secretary's determination. He said that he would "provide further information in relation to my protection claims during my hearing". He also explained that his mental health had been affected by his fear of returning to Bangladesh and his detention for nearly three years. He described symptoms of deteriorating memory, anxiety and depression, weakness, confusion, and dizziness.

12 On 4 May 2016, the appellant's lawyers sent the Tribunal a 39-page submission in support of the appellant's application. The lawyers referred to the matters upon which the Secretary had disbelieved the appellant but pointed out the absence of any discussion or conclusions concerning seven other material matters that supported the appellant's application. In response to the adverse credibility findings against the appellant, his lawyers said that it was "reasonable for our client to take his next available opportunity, before the Tribunal, to provide all the information he has in support of his claims for protection". The lawyers also reiterated the deteriorating state of the appellant's physical and mental health, including his depression and anxiety.

13 On 6 May 2016, the appellant failed to attend the scheduled hearing. The Tribunal's reasons contain no mention of any attendance by any lawyer representing the appellant, or any representative of CAPS, who had assisted the appellant with preparing his application and to whom the appellant's invitation to attend had been directed. The natural inference from the Tribunal's reasons is that there was no attendance by any representative of the appellant at the hearing, nor any communication from either the appellant or any representative of him before the Tribunal gave its reasons on 3 July 2016.

14 The Tribunal affirmed the determination of the Secretary. The Tribunal observed that the appellant's failure to attend the hearing prevented it from exploring many aspects of his claims that were described by the Tribunal as "lacking in details and ... unsupported by other evidence". The Tribunal also referred to particular information that it would "have liked to clarify with the [appellant]" such as when he joined a political party and what his father's role and his role were with the party after they moved to a different district.

*Gageler J*
*Nettle J*
*Edelman J*



15 The appellant appealed from the decision of the Tribunal to the Supreme Court. He was unrepresented. He had two grounds of appeal. In essence, his first ground was that he had been denied procedural fairness by the Tribunal's failure to adjourn the hearing. He claimed that he had instructed his lawyers to seek an adjournment. His second ground of appeal alleged that the decision of the Tribunal was unreasonable and that the Tribunal was biased against him.

16 The Supreme Court dismissed the appeal on both grounds. In relation to the first ground, which is the only ground relevant to the appeal to this Court, the Court held that it was open to the Tribunal to make a decision without taking further action to enable the appellant to appear. The Court referred to the absence of any request for an adjournment from the appellant at any time before the Tribunal's decision, and the absence of any expert medical evidence before the Tribunal explaining why it was not possible for the appellant to attend the hearing[2].

**Whether the invitation was given to the appellant**

17 The first ground of appeal to this Court alleges that the Supreme Court should have quashed the Tribunal's decision because the appellant was not given an invitation to appear before the Tribunal. This issue was not raised before the Supreme Court.

18 Sections 40 and 41 of the *Refugees Convention Act* provide relevantly as follows:

> **"40 Tribunal must invite applicant to appear**
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> ...
>
> (3) An invitation to appear before the Tribunal must be given to the applicant with reasonable notice and must:
>
> (a) specify the time, date and place at which the applicant is scheduled to appear; and
>
> (b) invite the applicant to specify, by written notice to the Tribunal given within 7 days, persons from whom the applicant would like the Tribunal to obtain oral evidence.
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> ...

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**2** *TTY 167 v The Republic* [2018] NRSC 4 at [31], [33].

**41 Failure of applicant to appear before Tribunal**

(1) If the applicant:

(a) is invited to appear before the Tribunal; and

(b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear;

the Tribunal may make a decision on the review without taking further action to allow or enable the applicant to appear before it."

19 The two conditions in s 41(1) are jurisdictional requirements for the exercise of the power by the Tribunal to make a decision on the review without taking further action to allow or enable an applicant to appear before it. The first, an invitation to appear, is plainly a reference to the requirements of s 40, including the requirements in s 40(3).

20 Section 101 in Pt 9, Div 4 of the *Interpretation Act 2011* (Nr) provides for service of a document on an individual in a number of ways. These include "giving it to: (i) the individual; or (ii) a person authorised by the individual to receive the document". Section 100 of the *Interpretation Act* provides that Div 4 applies to "a document that is authorised or required under a written law to be served, whether the word 'serve', 'give', 'notify', 'send', 'tell' or any other word is used".

21 The effect of ss 100 and 101 of the *Interpretation Act* is that the jurisdictional requirement in s 40(3) of the *Refugees Convention Act*, that an invitation to appear before the Tribunal be "given" to the applicant, can be satisfied by giving the document to a person authorised by the applicant to receive it. However, since this issue was not raised before the Supreme Court, there is no evidence before this Court concerning whether the Team Leader at CAPS, to whom the letter inviting the appellant to appear before the Tribunal was addressed, had been authorised by the appellant to receive the invitation. That evidence could have been an answer to this ground of appeal. Its absence below means that the issue cannot be raised on appeal to this Court[3].

22 This ground of appeal must be dismissed.

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**3** *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; [1950] HCA 35; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8; [1986] HCA 33.

*Gageler J*
*Nettle J*
*Edelman J*



**Unreasonableness**

23 The second ground of appeal to this Court alleges that the Tribunal acted unreasonably in exercising its powers under s 41(1) of the *Refugees Convention Act* to decide the matter without taking further action to allow or enable the appellant to appear before it.

24 It was not in dispute that the standard of legal unreasonableness implied as a condition of exercise of the power in the *Refugees Convention Act* is a demanding standard, particularly in light of the concerns of informality and the need for efficiency that underlie Tribunal hearings[4] and the wide latitude that the Tribunal has in making a decision under s 41(1) to decide the matter in an applicant's absence[5]. Nevertheless, there are six reasons, in combination, why the circumstances of this case were so exceptional that the decision of the Tribunal to proceed to decide the matter without making any enquiry about the appellant's absence on the date of the hearing was legally unreasonable.

25 First, unlike the circumstances described in *Minister for Immigration and Border Protection v SZVFW*[6], to which the parties referred, the appellant had been highly engaged with pursuing his application for protection. With assistance, he had prepared a substantial written statement in support of his application prior to the RSD interview. Although he was unwell at the time of the first scheduled RSD interview, he had attended the rescheduled RSD interview. He had provided the Tribunal with a further written statement and had instructed his lawyers to prepare substantial submissions, which they did.

26 Secondly, the appellant's statement to the Tribunal, just over two weeks before the hearing, had indicated that he intended to attend the hearing and to provide further evidence. Further, the submissions of the appellant's lawyers, only two days before the hearing, also indicated their expectation that the appellant would take the opportunity to appear before the Tribunal.

27 Thirdly, the appellant's oral evidence was a matter of considerable importance for the Tribunal because the appellant's claims were considered by the Tribunal to be lacking in details and unsupported by other evidence.

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**4** See, eg, *Refugees Convention Act 2012* (Nr), ss 22, 33.

**5** See *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713 at 731 [68]-[69], 734-735 [88]-[96], 741 [140]; 357 ALR 408 at 426, 429-431, 439; [2018] HCA 30.

**6** (2018) 92 ALJR 713; 357 ALR 408.

28 Fourthly, the Tribunal was aware that the appellant claimed to be suffering from mental health problems. The Tribunal observed that it was unclear whether the appellant had raised his mental health issues as a reason why he may not have been able to answer questions in his RSD interview or whether he was "indicating that he would have difficulty participating in a hearing before the Tribunal". In either case, the Tribunal was aware of health issues raised by the appellant. Those health issues could reasonably have been expected to affect the ability of the appellant to attend the hearing on the scheduled date.

29 Fifthly, although the invitation from the Tribunal warned that "the Tribunal may make a decision on the review without taking further action to allow the [appellant] to appear", and although the Tribunal could reasonably have assumed that the contents of the invitation had been communicated to the appellant, the Tribunal, which knew of the appellant's illiteracy and limited understanding of English, could not reasonably have inferred that the appellant had made an informed decision not to attend the hearing.

30 Sixthly, it would have been a simple matter for the Tribunal to have contacted either the appellant's lawyers or persons at CAPS who the Tribunal would reasonably have been aware were assisting the appellant. Senior counsel for the respondent properly accepted that this Court could take judicial notice of the fact that Nauru is a small island. He also accepted that it would usually be easy to contact the appellant's lawyers at reasonably short notice. The Tribunal did not do so.

**Conclusion**

31 The appeal should be allowed. Orders should be made as follows:

1. The time fixed for the filing of the notice of appeal is enlarged to 12 March 2018.

2. Appeal allowed.

3. Set aside the orders made by the Supreme Court of Nauru on 20 February 2018 and, in their place, order that:

   (a) the decision of the Refugee Status Review Tribunal dated 3 July 2016 be quashed; and

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

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