

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER AND NETTLE JJ

EMP144

APPELLANT

AND

THE REPUBLIC OF NAURU

RESPONDENT

EMP144 v The Republic of Nauru
[2018] HCA 21
16 May 2018
M151/2017

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Nauru

Representation

J W K Burnside QC with M L L Albert for the appellant (instructed by Allens)

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.



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CATCHWORDS

EMP144 v The Republic of Nauru

Migration – Refugees – Appeal as of right from Supreme Court of Nauru – Where Secretary of Department of Justice and Border Control of Nauru ("Secretary") determined appellant not refugee under *Refugees Convention Act* 2012 (Nr) – Where Secretary determined Nauru did not owe appellant complementary protection under *Refugees Convention Act* – Where Refugee Status Review Tribunal ("Tribunal") affirmed Secretary's determinations on basis appellant could reasonably relocate within country of origin – Where Supreme Court of Nauru affirmed Tribunal's decision – Whether appellant's ability reasonably to relocate within country of origin relevant to claim for complementary protection – Whether Tribunal failed to raise issue of whether appellant could reasonably relocate – Whether Tribunal failed to take into account factors relevant to appellant's ability reasonably to relocate – Whether Tribunal misunderstood country information.

Words and phrases – "complementary protection", "country information", "internal relocation", "reasonable internal relocation", "refugee", "well-founded fear of persecution".

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Art 3.

International Covenant on Civil and Political Rights (1966), Arts 6, 7.

Nauru (High Court Appeals) Act 1976 (Cth), s 5.

Refugees Convention Act 2012 (Nr), ss 4, 22(b), 34(4), 40(1), 43.



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1 KIEFEL CJ, GAGELER AND NETTLE JJ. This is an appeal as of right, pursuant to s 5 of the *Nauru (High Court Appeals) Act 1976* (Cth), from a judgment of the Supreme Court of Nauru (Khan J). The Supreme Court dismissed the appellant's appeal brought under s 43 of the *Refugees Convention Act 2012* (Nr) ("the *Refugees Act*") against a decision of the Refugee Status Review Tribunal ("the Tribunal"). The Tribunal had affirmed a decision of the Secretary of the Department of Justice and Border Control, made pursuant to s 6 of the *Refugees Act*, to reject the appellant's application to be recognised as a refugee in accordance with the Act or as a person to whom the Republic of Nauru ("Nauru") owes complementary protection under the Act.

The facts

2 Before the Tribunal, the appellant presented as a 34 year old man from the village of Pakhu in the Myagdi district of Nepal. He said that Pakhu was isolated and not serviced by a road on which cars could be driven, and that his family owned a small farm there. He had attended boarding school in the town of Beni¹, which was a day's walk from Pakhu, and about once a month he would walk back to his home in Pakhu.

3 The appellant's father, uncle and older brother were all members of the pro-Royalist political group called the Rastriya Prajatantra Party of Nepal, otherwise known as the National Democratic Party of Nepal ("the RPP(N)"²). In 2003, however, the Myagdi district was taken over by members of the Nepal Communist Party-Maoist ("the NCP-M"). The following year the appellant's older brother disappeared and had not been seen since. The appellant's family believed the Maoists were responsible for his disappearance or, perhaps, death. Further, the appellant's father was attacked and assaulted for refusing to co-operate with the Maoists, and so departed for India where he had since remained. The appellant had visited him there.

4 In 2006, the appellant married a woman from the next village, and in December 2006 they had a son. In 2008, a road was put through the area where the appellant and his family resided (although it did not reach Pakhu, which remained about an hour's walk from the road). A local person bought a jeep for use, in effect, as a taxi. The appellant learned to drive and became the taxi driver, although he never drove for more than about five hours from Beni. His wife and mother tended the crops on the family farm in Pakhu while the appellant worked as a taxi driver.

1 The Tribunal referred to Beni as "Benni" in their reasons.

2 The Tribunal sometimes referred to the RPP(N) as "the RRP(N)" in their reasons.

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5 In 2008, the appellant joined the RPP(N), at which time his Uncle Rudra was still active at the local level. In 2010, the appellant stopped working as the taxi driver in order to tend to his farm and devote himself more actively to politics by increasing his level of activity within the RPP(N). He worked in the RPP(N) office in Beni when he could, and he became the vice-president of the local branch.

The appellant's case before the Tribunal

6 The appellant's case before the Tribunal was that he was a refugee under the *Refugees Act* or, alternatively, that he was a person to whom Nauru owed complementary protection under the Act because his circumstances engaged Nauru's international obligations under, inter alia, the International Covenant on Civil and Political Rights (1966) ("the ICCPR") and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) ("the CAT").

7 The appellant's claim for protection was put on the basis that he had a well-founded fear of being persecuted in Nepal by reason of, inter alia, his political views. He stated that in Nepal there was a strong Maoist presence in the district which occasionally caused problems. For example, the appellant said that, on 7 August 2011, his Uncle Rudra was chairing an RPP(N) meeting, which the appellant did not attend, when a Maoist group came into the meeting hall, grabbed Uncle Rudra and forcibly paraded him around the Beni marketplace with his face blackened and shoes tied around his neck. Such gestures were said to show great disrespect and to cause Uncle Rudra to be humiliated. The appellant said that after the incident of public humiliation, his Uncle Rudra had not gone home to Pakhu but continued to live in Beni for some time until leaving the district.

8 The appellant claimed that, shortly afterwards, on the evening of 10 August 2011, a group of about 15 of the local Maoists came to his farm, armed with sticks and calling out his name. He escaped through a back window and made his way in the dark to Beni, where he stayed with friends and in local hotels. He did not return to his farm in the daytime, but returned sometimes at night, cautiously. He spent his days in Beni, sometimes at the RPP(N) office, where he would on occasion see his Uncle Rudra. Uncle Rudra was aware of the appellant's situation, as were other party members. After about three months, when he had run out of money for hotels and was satisfied that there had been no further incursions on his farm, he returned to the farm but tried to avoid being outside during the daytime.

9 The appellant further claimed that, in May 2012, he received a letter from the local Maoists threatening that there would be "consequences" if he did not

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leave the RPP(N) and support the Maoist ideology. He said that he was very frightened, particularly bearing in mind the disappearance of his older brother and the events that caused his father to flee to India. The appellant therefore caught a bus to the home of his parents-in-law in the neighbouring district of Baglung³, where he stayed for a month, and thereafter stayed with one of his uncles a further four hours' walk away. After a further month with no reports of further visits to his farm, the appellant returned to Beni and, as before, he gradually started returning to his farm at night, and then staying for two or three days at a time.

10 Over time, the appellant resumed more or less permanent residence at the farm and, for a time, there were no reports of any more incursions or sightings of potential problems. But then in December 2012, when he was asleep at his farm, seven or eight Maoists came to the farm holding torches, pushed open the door, dragged the appellant outside and beat him with their fists and sticks into unconsciousness. When he regained consciousness, the Maoists had departed the farm and the appellant's neighbours had come to help. They took him to a clinic in Beni and undertook to tell his wife that he would go to Baglung and she should meet him there (apparently, on the basis that she would know that he would meet her at the home of his parents-in-law in Baglung). Meanwhile, he had discharged himself from the clinic and stayed at a friend's house for a couple of days and, while there, he heard that his home had been burned down. After that, he went to Baglung, where he was joined by his wife, son and mother. They told him that the Maoists had come back four nights later, dragged the family out of the house and then set fire to it.

11 The appellant and his wife and son stayed with his parents-in-law for three months. But the appellant said that he remained uneasy as Baglung was only a couple of hours by vehicle from Beni and he thought the Maoists might still be looking for him. In the result, he left for Kathmandu, where he found his Uncle Rudra. And ultimately, it was from there that he departed Nepal lawfully on 25 May 2013 and eventually arrived in Nauru, without a passport, in November 2013. He claimed that he had never thought about returning to Nepal but that, if he did, he would still care about the RPP(N).

The Tribunal's decision

12 The Tribunal accepted that the appellant had suffered serious harm amounting to persecution at the hands of particular local Maoist groups (namely, the NCP-M and its youth group, the Youth Communist League ("the YCL"))

3 The Tribunal sometimes referred to Baglung as "Baglang" in their reasons.

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because of his political opinion, and that such harm might re-occur in the future if he were to return to the area where he had suffered the harm (namely, Pakhu and Beni). But the Tribunal concluded that, because it was localised harm which was the work of a particular branch of the NCP-M and the YCL situated in Beni, the appellant could reasonably be expected to establish himself elsewhere in Nepal and live a normal life without undue hardship. Consequently, he did not qualify as a refugee or for complementary protection.

The Supreme Court's decision

13 In dismissing the appellant's appeal to the Supreme Court, Khan J held that the Tribunal had not erred in applying a reasonable internal relocation test to the appellant's claim for complementary protection⁴; that the Tribunal had not failed to take into account all matters relevant to the appellant's claim for complementary protection, including whether it was reasonably practicable for him to relocate within Nepal⁵; and that the Tribunal had not failed to afford the appellant procedural fairness in their decision making process⁶.

Grounds of appeal

14 The appellant's grounds of appeal to this Court are as follows:

"1. The Supreme Court of Nauru erred by failing to conclude that the Refugee Status Review Tribunal ('the Tribunal') erred by failing to consider integers of the objection to relocation raised by the Appellant, namely that:

- a. his family and he would 'face substantial prejudice in accessing education, employment and essential services' and would be unsafe;
- b. he lived in hiding when he lived elsewhere to ensure he did not publically express his political views; and
- c. he does 'not have any tertiary or professional education' and no professional skills; *and*

4 See *EMP144 v The Republic* [2017] NRSC 73 at [61]-[62].

5 See *EMP144 v The Republic* [2017] NRSC 73 at [46], [59].

6 See *EMP144 v The Republic* [2017] NRSC 73 at [54], [75].

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d. he holds ongoing fears for the safety of his wife and young son;

and thereby erred by denying the Appellant natural justice in breach of s 22 and/or was in breach of s 34(4) of the *Refugees Convention Act 2012* (Nauru) ('the Act').

2. The Supreme Court of Nauru erred by failing to conclude that the Tribunal acted in breach of s 22(b) and/or s 40(1) of the Act by failing to provide the Appellant with an opportunity to respond to the issue of whether it was reasonably practicable for him to relocate.
3. The Supreme Court of Nauru erred by failing to conclude that the Tribunal erred by failing to consider integers of the Appellant's claims to complementary protection including that there was a reasonable possibility that he would be subject to arbitrary deprivation of life and/or torture and/or degrading treatment.
4. The Supreme Court of Nauru erred by failing to conclude that the Tribunal erred by importing a relocation test in its analysis of the Appellant's 'complementary protection assessment' in breach of s 4(2) of the Act.
5. The Supreme Court of Nauru erred by failing to conclude that the Tribunal erred by failing to:
 - a. deal with evidence or other material provided by the Appellant in breach of s 34(4)(d) of the Act;
 - b. alternatively, act in accordance with s 22(b) and/or s 40(1) of the Act in the conduct of the hearing

about Nepali citizenship law relevant to the denial of the Appellant's son's Nepali citizenship application." (emphasis added)

15 At the hearing of the appeal, the appellant sought leave to add the emphasised words to Ground 1. Leave was granted.

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Relevant statutory and treaty provisions

16 The relevant statutory and treaty provisions are set out in *CRI026 v The Republic of Nauru*⁷ and need not be repeated.

Ground 1: Failure to take into account objections to internal relocation

17 Under Ground 1, the appellant contended that the Tribunal erred in law, and thereby denied the appellant natural justice in breach of s 22(b) of the *Refugees Act*, and failed to provide a statement of reasons in accordance with s 34(4) of the Act, by failing to respond to a "substantial, clearly articulated argument" that the appellant could not reasonably relocate within Nepal for "expressly articulated reasons" relying upon "established facts".

18 The "expressly articulated reasons" were identified as follows:

- (1) The appellant's family and he would "face substantial prejudice in accessing education, employment and essential services".
- (2) The appellant lived away from his home area, in part because he wished to ensure that he did not publically express his political views, because "there is no freedom to express one's political views" throughout Nepal.
- (3) The appellant did not have any tertiary or professional education or professional skills. He had only ever worked as a self-employed farmer and driver.
- (4) The appellant held ongoing fears for the safety of his wife and young son.

19 The "established facts" were said to be that the appellant had previously attempted to relocate within Nepal, which attempt had been unsuccessful and had caused him to flee Nepal.

20 The appellant's first "expressly articulated reason" faces the difficulty that, although he contended before the Tribunal that the problems he was experiencing in having his child enrolled in school in Nepal were due to his political beliefs and adherence, ultimately the effect of the evidence before the Tribunal was that the problems associated with enrolling the appellant's child at school in Nepal

7 [2018] HCA 19 at [12]-[15].

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were due to the fact that neither the appellant nor his father were present in Nepal to vouch that the child was a Nepali citizen. As the Tribunal observed:

"The [appellant] seemed to be of the view that it was his political opinion, or some action of the Maoists, that was denying his son citizenship. However, the Tribunal put it to him quite clearly that citizenship in Nepal can be established only with the active participation of the father. That is, the [appellant's] wife alone, even armed with her child's birth certificate, cannot prove that the boy has a Nepali citizen father. The case could be made out by the paternal grandfather, but like the [appellant] he too is outside Nepal (the [appellant's] father having lived in India for a decade). The Tribunal emphasised that country information on this point is irrefutable: a child needs evidence that his father is Nepali in order for him to have Nepali citizenship, and therefore to be able to attend school. It is nothing to do with the [appellant's] politics but rather, the position of women in Nepalese society. 'Securing citizenship papers for the child of Nepali parents, even when the mother possesses Nepali citizenship documents, was extremely difficult unless the father of the child supported the application. This persisted despite a 2011 Supreme Court decision to grant a child Nepali citizenship through the mother if the father was unknown or absent'."

21 Nor can there be any doubt that that was the effect of the evidence. In a statement in support of his application to be recognised as a refugee, the appellant gave as one of his reasons for leaving Nepal that:

"[a]s an active member of the [RPP(N)] my family and I face substantial prejudice in accessing education, employment and essential services. Furthermore, the facilities available to communities which are supporting the [RPP(N)] are poor compared to the pockets which are predominantly [NCP-M] members."

Those alleged difficulties were said to show that he and his family were at risk of being discriminated against because of his political beliefs and associations and thus that his application for refugee status should be granted. But the evidence before the Tribunal told against that. After some discussion as to whether a Nepali woman is legally capable of passing on Nepali citizenship to her child, and having regard to country information which indicated that the position on the ground in Nepal was different to what it was at law, the appellant acknowledged that the problem with getting his child enrolled in school was that it was necessary for the appellant or his father to be present in Nepal to demonstrate their Nepali citizenship and that the appellant's wife was in truth his wife or his father's daughter-in-law. The appellant said that he was not prepared to go back

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to do that because he was scared that he would be persecuted, and that his father was not about to return from India. The evidence proceeded thus:

[THE APPELLANT (THROUGH INTERPRETER)]: There must be someone to witness [my wife and] also that she is my wife or my daughter-in-law. Sorry, yes, daughter-in-law or something like that, but there is no one to give this. There must be someone, relatives.

[MEMBER 1]: Well, I don't think that's the real problem.

...

I think that the discussion between you and your wife has – you know, the trying to talk over a long distance and so on. The problem is school enrolment and the child needs his father or his grandfather to show Nepali citizenship.

[THE APPELLANT (THROUGH INTERPRETER)]: Yes, that's correct.

...

[MEMBER 1]: Have you still got your passport?

[THE APPELLANT (THROUGH INTERPRETER)]: No, it was thrown in the sea.

[MEMBER 2]: Have you got a birth certificate?

[MEMBER 1]: Because you could have sent that back to your wife. That ought to do. That would be proof.

[THE APPELLANT (THROUGH INTERPRETER)]: The one who got my citizenship, he has thrown that in the sea.

[MEMBER 1]: Okay. Well, that's the problem that your wife is facing, so you will have to – you know, either you can return or your father could travel back from India back to Nepal to help.

[THE APPELLANT (THROUGH INTERPRETER)]: For me, I cannot go back because I'm scared that they will kill and about my father, I don't know. He's already in India, fled, and I don't know where is he."

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Given the evidence before the Tribunal and the findings which have been referred to, the contention that the Tribunal failed to consider the argument that

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the appellant and his family would "face substantial prejudice in accessing education, employment and essential services" must be rejected.

23 It is also not correct to say that the Tribunal failed to consider the appellant's evidence that he had lived away from his home area, in part because he wished to ensure that he did not express his political views publically, because "there is no freedom to express one's political views" throughout Nepal.

24 The appellant's evidence before the Tribunal was to the effect that, even when he had lived away from his home in Nepal, he had considered that he had to remain in hiding because he was not free to express his political views anywhere in Nepal. Likewise, in her closing address to the Tribunal, the appellant's legal representative stated:

"We rely on our written submission and regarding the information we have provided to you that the Maoist group throughout the country act with impunity and there's no geographic limits for their actions. So with that recent changes [sic], there's no effect on the fact that [the appellant's] life still is in danger and Maoist party are still the opposition group. They're still powerful. They might not have the strongest seats in the parliament, but they have seats in the parliament. They are acting with impunity still throughout Nepal. Regarding [the appellant's] temporary residence in a couple of – in other cities, we submit that [the appellant] said himself today he was in hiding, he did not have a job, he wouldn't go out publicly.

So that should not be assessed as a normal living condition."

25 In effect, therefore, the thrust of the appellant's evidence and submissions before the Tribunal was that the appellant lived in fear of persecution at the hands of the Maoists and that relocation within Nepal would not be a practicable option for overcoming that problem because the Maoists were powerful throughout Nepal with the consequence that there was a real risk that the appellant could be harmed by the Maoists anywhere he went in Nepal. And the Tribunal acknowledged that was so:

"The Tribunal accepts that two serious incidents befell the [appellant] within days of each other: that the [appellant] was assaulted in his house, resulting in his hospitalisation, and that within two or three days, his house was burned down (although his family had first been removed by the attackers) ...

In short, the Tribunal accepts that the [appellant] has suffered serious harm – harm amounting to persecution – in the past at the hands of

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particular local Maoist groups (the NCP-M and its youth group, the YCL) for reason of his political opinion and that this harm may re-occur in the future if he were to return to that area. However, the Tribunal is satisfied that this is *localised* harm. It is the work of a particular branch of the NCP-M and its YCL: the branch which is situated in Benni and which includes members from the [appellant's] home village of Pakhu in the district of Myagdi." (emphasis in original)

26 But having so acknowledged the thrust of the appellant's case, the Tribunal then turned to consider whether, despite the appellant's expressed fears that he would be at risk anywhere in Nepal, the threat of harm was localised:

"The Tribunal notes that no harm has befallen the [appellant] when he has been staying in the neighbouring district of Baglung, nor in the capital Kathmandu. Therefore the Tribunal will consider the question of relocation."

27 Having so identified that possibility, the Tribunal went on to analyse country information which they found established that there had been a remarkable transformation in the political landscape in Nepal, and a dramatic improvement in security, since the general election of 2013. On that basis, the Tribunal concluded that, since, in the altered political landscape, any threat of harm would be localised to a particular area, there would be no real chance of harm befalling the appellant if he were to move away from that area:

"The major political parties of Nepal are working on issues relating to a new constitution. There has been a marked decline in the political volatility of the pre-election period, with the *South Asia Terrorism Portal* reporting only three violent political incidents at the beginning of 2014, followed by a whole year of non-violent political activity. The country, collectively, seems to be seeking an ongoing peaceful political landscape. There is nothing before the Tribunal which indicates that the [appellant] will be in any danger of persecution for reason of his support of the RRP(N), or the support of his uncle, father and (possibly) late brother for the RPP or RPP(N).

The Tribunal acknowledges that a small group of Maoist cadres and political activists in a very specific location in Nepal have a history of antagonism against the [appellant] (for reason of his political opinion) and may seek to harm him in the future. The Tribunal accepts the [appellant's] testimony that there is no police presence in Pakhu and therefore any effective State protection for the [appellant] at home is absent. The Tribunal is satisfied that this threat of harm is localised and that the [sic] there is no real chance of harm amounting to persecution befalling the

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[appellant] if he moved away from his home district, whether he engages further in political activities or not."

28 Contrary to the appellant's submissions, therefore, the Tribunal's reasons leave no doubt as to why the Tribunal were not persuaded that the appellant's evidence of remaining in hiding while he lived away from his home area rendered the option of internal relocation unreasonable. Axiomatically, whatever significance the appellant's evidence of remaining in hiding may have had in the period before the general election of 2013, on the Tribunal's findings the appellant's perception of the need to remain in hiding while living outside his home district ceased to be of significance in the post-election period as a result of the curtailment of the influence of the Maoists and the confinement of their reach to the localised areas of Pakhu and Beni.

29 The Tribunal also dealt comprehensively with the appellant's contention that it would be unreasonable to expect him to relocate within Nepal because he did not have any tertiary or professional education and had only ever worked as a self-employed farmer and driver:

"... The Tribunal notes that the [appellant] has said that his only employment history is as a farmer and a driver, and that he does not believe he would find work in India. However, the same argument can be made out in reference to his relocation to Nauru – and the latter location does not have a 10-12 million-strong community of Nepalese expatriates [who the Tribunal had earlier found were making a successful life in India under the rights accorded to them by the *Treaty of Peace and Friendship*].

However, the Tribunal is not directing the [appellant] to India. It simply finds that, in Nepal, only the immediate area around Benni in the Myagdi district is dangerous for the [appellant] or his family. No harm befell the [appellant] in his parents-in-law's house in the neighbouring district of Baglang, nor in Kathmandu. There are no claims, nor does the evidence suggest, that any harm has befallen his mother who now lives at her brother's house away from Pakhu and Benni.

...

The Tribunal is satisfied that the [appellant] could reasonably be expected to establish himself elsewhere in Nepal and live a normal life without undue hardship. It notes that he lived for about three months in both neighbouring Baglang district (with his parents-in-law) and in Kathmandu before leaving Nepal. It notes that he is reasonably young (34 years) and able-bodied. He has completed year 10 of high school (leaving at

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18 years) and is literate. He speaks the major language of Nepal and observes the religion of the large majority of his countrymen.

The Tribunal notes that the [appellant] has shown resourcefulness in the past. When the road came to his district, he quickly learned to drive and was soon accomplished enough to be employed as a driver, taking passengers on journeys to destinations up to five hours away. He must have shown some political and/or leadership skills in order to be made the vice-president of his local RRP(N) branch, and may also have acquired other organising/administrative skills through his frequent work in the RRP(N) office in Benni from 2010.

In short, the Tribunal notes that in Nepal, 'The law provides for freedom of internal movement, foreign travel, emigration and repatriation' and is satisfied that the [appellant] can freely move to, and settle in, any place outside the Pakhu/Benni area of Myagdi District." (footnote omitted)

30 Finally on this aspect of the matter, the Tribunal dealt directly with the appellant's contention that he held ongoing fears for the safety of his wife and child. The Tribunal expressly found that the Maoists were targeting only the appellant:

"The most recent incident (November 2014) when the YCL questioned the [appellant's] wife on her return to Benni also indicates that they were looking for the [appellant] – those were the questions they asked her. The [appellant] asserts that they hit his wife, and this could well be so, but it may indicate frustration with her answer that her husband was far away, rather than a deliberate attack on her. Fortunately, she was not seriously harmed and able to return to complete her mission at the government office."

31 Ground 1 should be rejected.

Ground 2: Failure to provide opportunity to respond to determinative issue of reasonableness of relocation

32 Under the heading of Ground 2, counsel for the appellant contended that the Tribunal erred in a manner that denied the appellant natural justice, contrary to s 22(b) of the *Refugees Act*, and constituted a breach of the Tribunal's obligation to invite the appellant to appear before them, as provided for in s 40(1) of the Act, by failing to draw the appellant's attention to the importance of the issue of whether it would be reasonable for the appellant to relocate within Nepal.

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33 Those contentions are untenable. It is clear that the appellant and his legal representative were aware from the outset of the significance of the issue, and that they were specifically reminded of it in the course of the hearing before the Tribunal.

34 In his statement to the Tribunal, the appellant expressly adverted to the possibility of internal relocation and sought to demonstrate that it was not a reasonable option for him because he would be at risk from the Maoists throughout Nepal:

"Relocation

The Secretary also suggested that I would be able to safely relocate to Kathmandu. I completely disagree with this statement.

In Kathmandu, I am still at risk of harm. The whole time that I was in Kathmandu in 2013, I was in hiding. I hid in a hotel. I cannot hide in Kathmandu forever – how can I work or have a life?

I have no idea where my [U]ncle Rudra is at the moment, because we have lost contact since he went into hiding. Last I heard he was in Kathmandu. If he is in Kathmandu at the moment, then he is in hiding, as he would have to be to avoid harm.

My wife is currently in hiding in Nepal, but this will not be a sustainable solution to her problems for very much longer. I know she is still in danger, but I do not know how to help her all the way from Nauru. I am very worried about her, and the safety of our child. He is currently unable to attend school because of the dangers they are facing.

I am at risk of harm throughout Nepal. As a member and supporter of the [RPP(N)], I will be persecuted by the Maoists throughout Nepal, including Kathmandu."

35 Then, in the course of the appellant's oral evidence before the Tribunal, the Tribunal specifically alerted the appellant's legal representative to the fact that it appeared to the Tribunal that the risk of harm was localised, and thus that the appellant would not be at risk of harm in Nepal if he were to move away from the Maoists' area of influence. Having done so, they gave the appellant and his legal representative a "natural justice break" to enable the appellant's legal representative to consult with the appellant as to how the appellant wished to respond to that possibility:

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[MEMBER 1]: Okay. I think we're just about getting up to a natural justice [break]. Can you see our points that we're looking at? We're looking at a very localised harm.

[THE APPELLANT'S LEGAL REPRESENTATIVE]: Is that on location?

[MEMBER 1]: So the harm is very localised that he has suffered – that he recognises the Maoists, they recognise him. It's a tiny place. And so, it seems reasonable to be anywhere else other than in that particular village, especially given the changes of circumstances.

[MEMBER 2]: be relocation? Wouldn't [it] be a relocation issue because he has said he's not going back to the village.

[PRESIDING MEMBER]:

[MEMBER 2]: That's different. Yes. It may not be a question of relocation.

[PRESIDING MEMBER]: No. Well, when - - -

[MEMBER 1]: That may be a semantic problem because it's – if he - - -

[MEMBER 2]: It's a – yes. the test might not be - - -

[MEMBER 1]: - - - [The appellant] says I am not going back to that particular village because my house has been burned down and chooses another location, then we're just racking our brains to see if that is the same test as relocation. But you may as well look at it under that, but it does seem [sic] to be a localised fight with the participants knowing each other and so on. And, but we also look to the fact that even those localised fighters may very well have stopped. There's no evidence of them continuing in – over the last year.

[THE APPELLANT'S LEGAL REPRESENTATIVE]: So if he can replace or if there is a still ongoing persecution, is it just the case that you will advance the

[MEMBER 1]: Yes, is there ongoing – yes, that's - - -

[THE APPELLANT'S LEGAL REPRESENTATIVE]: Thank you.

[MEMBER 1]: All right. Well, you can go to him and we will - - -

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[PRESIDING MEMBER]: So, the hearing is adjourned at 4.54 pm."

36 Thereafter, when the hearing resumed at 5.01 pm, one of the Tribunal members, Member 1, asked the appellant whether he had thought about any of the issues that had been raised and whether he had something to say about them. The appellant replied that he had and then gave evidence to the effect that the Maoists retained power and influence throughout Nepal and thus that he remained in fear for himself and his wife and child, and as to the difficulties involved in enrolling his child in school in Nepal.

37 Then at the end of the hearing, in her closing address to the Tribunal, the appellant's legal representative dealt directly with the point on the basis of the evidence which the appellant had given:

"We rely on our written submission and regarding the information we have provided to you that the Maoist group throughout the country act with impunity and there's no geographic limits for their actions. So with that recent changes [sic], there's no effect on the fact that [the appellant's] life still is in danger and Maoist party are still the opposition group. They're still powerful. They might not have the strongest seats in the parliament, but they have seats in the parliament. They are acting with impunity still throughout Nepal. Regarding [the appellant's] temporary residence in a couple of – in other cities, we submit that [the appellant] said himself today he was in hiding, he did not have a job, he wouldn't go out publicly.

So that should not be assessed as a normal living condition. The recent assault and threats shows that the threats and the persecution is ongoing. [The appellant] was desperate for the fact that he has no appearance and as a result of that, his child might not be able to go to a school. And education was so important to him to the point that he would travel two days on foot to go to school and now, the fact that the child can't go to a school because of his absence is devastating for [the appellant]. In light of our secondary supplementary statement, filed note of statement, our submission and what [the appellant] said today and my submission, we submit that this tribunal should accept that [the appellant] has a well-founded fear of persecution throughout Nepal and cannot access the State protection."

38 Ground 2 should be rejected.

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Ground 3: Failure to deal with integers of claim for complementary protection

39 In support of Ground 3, the appellant contended that the Tribunal erred in failing to deal with the following "integers" of the appellant's claim for complementary protection:

- (1) The appellant was at real risk of being subjected to arbitrary deprivation of his life, contrary to Art 6 of the ICCPR, by those who were his political opponents, as occurred to 25 of his political colleagues in his area and as was probably experienced by his brother, who had disappeared.
- (2) The appellant was at real risk of being subjected to torture, contrary to Art 7 of the ICCPR and Art 3 of the CAT, on the basis that his father was tortured because he held the same political opinions as the appellant.
- (3) The appellant was at real risk of being subjected to degrading treatment, contrary to Art 7 of the ICCPR, in the form of being painted black and paraded publically with shoes hanging around his neck because his Uncle Rudra had held the same political opinions as the appellant when he had been subjected to such humiliation.

40 It was contended that the Tribunal's failure to consider those "integers" of the appellant's claim was evident in their conclusion that:

"[t]here are no arguments advanced as to why the [appellant] would suffer these various types of harm, other than to state that removal to Nepal constitutes circumstances where the [appellant] has 'a well-founded fear'."

41 That contention misstates the Tribunal's conclusion. As is apparent from the Tribunal's reasons, the Tribunal did take into account all of the "integers" of the appellant's claim and largely accepted his evidence as to the facts from which the integers were said to derive:

"The Tribunal accepts that the [appellant] was an active member of the RRP(N), not only from his own testimony but also from photographs he showed of himself carrying RRP(N) banners at local demonstrations in Benni. The Tribunal also accepts that the [appellant's] Uncle Rudra was also an active member of the RRP(N), noting photographs of the incident in which Uncle Rudra was paraded around the Benni marketplace in a humiliating way by political opponents. The Tribunal notes reliable country information about the Maoist insurgency which began in 1995 and was only brought to an end by the Comprehensive Peace Agreement (CPA) signed in November 2006. Against this background, the Tribunal

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accepts that the [appellant's] elder brother disappeared in 2004, followed by his father's departure to India where he has remained since – both incidents attributable to adverse conditions brought about by Maoist guerrillas, but to be assessed differently from instances of recent harm.

The Tribunal accepts the [appellant's] testimony that he became an office-bearer in the Benni branch of the RPP(N) in 2010. The Tribunal notes from the RPP(N)'s own website that it has a special category for 'active members', expecting them to give 30 hours service to the party per month. This supports the [appellant's] testimony that he 'worked' for the party at its Benni office and that he participated in party activities such as recruitment and public meetings.

The Tribunal notes that the RRP(N) was a legal political party and had four elected members of parliament following the 2008 elections, although these appear to have lost their places in the most recent (November 2013) elections. This is consistent with the independent advice that the RRP(N) has only 'meagre popular support'. The RRP(N) maintains a website and there is no information that any of its leaders or members are targeted by other political groups, nor by the authorities. There is no evidence before the Tribunal, including the country information submitted by the [appellant], which indicates that the RPP(N) members are currently targeted by Maoists or indeed any other group in Nepal, or that the [appellant] would be persecuted if he were to return to Nepal and resume an active membership in the party.

...

The Tribunal accepts that the [appellant] is known locally – that is, in his village and in Benni – as an office-bearer and active member of the RRP(N), just like his Uncle Rudra. The Tribunal accepts that Uncle Rudra was publicly humiliated by the Maoists in 2011 and from then on, did not return to his village but stayed in Benni, apparently doing less work for the RRP(N) before finally leaving the district at some unspecified time and going to Kathmandu. The Tribunal accepts that the [appellant] received a letter from the NCP-M demanding that he change his political support to their cause. However, the Tribunal notes that there are pro forma letters sent out by the Maoists, generally for purposes of extortion, and that in any case, no consequences ensued from the letter which was delivered in May 2012. The next adverse encounter was in December 2012 and it is difficult to see that one was a direct consequence of the other. The Tribunal is satisfied that these are two isolated incidents, although perpetrated by the same individuals.

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The Tribunal accepts that two serious incidents befell the [appellant] within days of each other: that the [appellant] was assaulted in his house, resulting in his hospitalisation, and that within two or three days, his house was burned down (although his family had first been removed by the attackers). The fact that the family was removed from harm's way indicates that the attackers were targeting only the [appellant]. The most recent incident (November 2014) when the YCL questioned the [appellant's] wife on her return to Benni also indicates that they were looking for the [appellant] – those were the questions they asked her. The [appellant] asserts that they hit his wife, and this could well be so, but it may indicate frustration with her answer that her husband was far away, rather than a deliberate attack on her. Fortunately, she was not seriously harmed and able to return to complete her mission at the government office." (footnotes omitted)

42 It did not follow from the Tribunal's acceptance of the appellant's evidence of events that had occurred in Nepal that the Tribunal were bound to come to the same conclusion as the appellant as to the risk the appellant would face if he returned to Nepal. Due to the absence of evidence of continued attacks on persons of the appellant's political persuasion, and country information as to political changes that had occurred in Nepal since the events to which the appellant deposed (with consequent confinement of Maoist influence to a particular relatively isolated area in Nepal), the Tribunal were entitled to come to the different conclusion they did: that, although the appellant had suffered serious harm amounting to persecution at the hands of particular local Maoist groups (namely, the NCP-M and the YCL) "for reason of his political opinion", and although such harm might re-occur if the appellant were to return to that area, it was *localised* harm inflicted by Maoist groups in Beni which included members from the appellant's home village of Pakhu in the district of Myagdi, and the appellant could avoid the risk of that harm by reasonably and safely relocating elsewhere in Nepal. On that basis, the Tribunal were not in error in deciding that the appellant was not a refugee.

43 The Tribunal turned finally to the assessment of the appellant's claim for complementary protection, which had been put on the same basis as his claim for refugee protection under the Refugee Convention: a well-founded fear of persecution for a Convention reason. The Tribunal rejected the complementary protection claim, accordingly, for the same reasons as they had rejected the claim for Convention protection: the appellant's ability to reasonably and safely relocate elsewhere in Nepal:

"Having found that the [appellant] is not a refugee, the Tribunal now turns to consider whether he is owed complementary protection. In addressing this question, his representative asserted that if the [appellant] were

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returned to Nepal, he would face 'physical violence, discrimination and deprivation of economic and social rights'. There are no arguments advanced as to why the [appellant] would suffer these various types of harm, other than to state that removal to Nepal constitutes circumstances where the [appellant] has 'a well-founded fear'. However, the Tribunal has already found this not to be the case."

44 There is no error in that. Ground 3 should be rejected.

Ground 4: Relevance of ability reasonably to relocate to entitlement to complementary protection

45 The arguments advanced by the appellant in support of Ground 4 were substantially the same as those advanced in *CRI026 v The Republic of Nauru*⁸. For the reasons given in that matter, they are rejected.

Ground 5: Misunderstanding of country information about Nepali citizenship

46 Finally, in support of Ground 5 the appellant contended that the Tribunal erred in their perception of country information as to a change in Nepali citizenship law that occurred in 2006 which allowed a Nepali woman to pass on her Nepali citizenship to her child, and thereby wrongly concluded that the difficulties faced in getting the appellant's child enrolled in school in Nepal were attributable to the inability of Nepali women to pass on Nepali citizenship to their children.

47 As will be apparent from what has been said in relation to Ground 1, that contention is incorrect. It is plain that the Tribunal did not misunderstand that the appellant's wife was, at law, able to pass on her Nepali citizenship to the appellant's child as the mother of that child and thus qualify the child for enrolment in school in Nepal without invoking the assistance of the appellant as the father of the child. But as the country information to which the Tribunal referred also made clear, it remained the position, in fact, that:

"a child needs evidence that his father is Nepali in order for him to have Nepali citizenship, and therefore to be able to attend school. It is nothing to do with the [appellant's] politics but rather, the position of women in Nepalese society. 'Securing citizenship papers for the child of Nepali parents, even when the mother possesses Nepali citizenship documents, was extremely difficult unless the father of the child supported the application. This persisted despite a 2011 Supreme Court decision to

8 [2018] HCA 19 at [16]-[49].

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grant a child Nepali citizenship through the mother if the father was unknown or absent'."

48 Furthermore, as has been seen, the appellant confirmed in the course of the hearing before the Tribunal that, based on his telephone calls to his wife in Nepal, his understanding was that, in practice, the child could not be enrolled in Nepal unless either the appellant were present in Nepal to prove his citizenship and that the appellant's wife was in truth his wife, or the appellant's father were present in Nepal to prove his citizenship and that the appellant's wife was in truth his daughter-in-law. And since the father was absent and the appellant maintained that he was not prepared to return for Convention reasons, the child could not be enrolled. That had nothing to do with the appellant's political persuasion.

49 Ground 5 should be rejected.

Conclusion

50 For the reasons which have been given, the appeal should be dismissed with costs.

