



IN THE SUPREME COURT OF NAURU  
AT YAREN

APPEAL NO. 7/2015

Being an appeal against a decision of the Nauru Refugee  
Status Review Tribunal brought pursuant to s43 of the  
*Refugees Convention Act 2012*

BETWEEN

COA026

APPELLANT

AND

The Republic of Nauru

RESPONDENT

Before: Khan J  
Date of Hearing: 6 May 2016  
Date of Judgment: 27 September 2017

Case may be cited as: COA026 v The Republic

CATCHWORDS:

Whether the Tribunal failed to make an enquiry about a critical fact and acted contrary to natural justice – whether the Tribunal denied the appellant procedural fairness in rejecting the evidence of Christian conversion – whether the Tribunal erred by determining the appellant’s claim together with his wife’s.

HELD: the Tribunal erred by determining the appellant’s claim together with his wife’s – the Tribunal failed to give the appellant an opportunity to provide further information or material – the appellant was denied natural justice – appeal allowed.

APPEARANCES:

Counsel for the Appellant: M Albert  
Counsel for the Respondent: A Aleksov

JUDGMENT

INTRODUCTION

1. The appellant filed an appeal against the decision of the Refugee Status Review Tribunal (“the Tribunal”) pursuant to s43(1) of the *Refugees Convention Act 2012* (“the Act”) which states:

A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.

2. The Tribunal delivered its decision on 7 January 2015 affirming the decision of the Secretary for the Department of Justice and Border Control (“the Secretary”) that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.
3. The appellant filed an appeal in this Court on 27 August 2015 and the grounds were subsequently amended.

#### EXTENSION OF TIME

4. At the time of the Tribunal’s decision, s 43(3) of the Act provided that a Notice of Appeal against a decision of the Tribunal had to be filed within 28 days after the appellant received a written statement of the Tribunal’s decision. At that time, there was no provision in the Act (or otherwise) for an extension of the 28 day period.
5. On 14 August 2015, the Act was amended by the *Refugees Convention (Amendment) Act 2015* which provides for a period of 42 days in s 43 of the Act for filing of the appeal. The amendment also provided that the Court may extend the period in s 43(3) of the Act if, inter alia, it is satisfied it is necessary in the interests of the administration of justice to make that order.<sup>1</sup>
6. On 4 February, 27 April and 30 June 2015, orders were made by the Registrar to extend the time for appeal to be filed against the decision delivered on 7 January 2015 to 31 August 2015.
7. The Notice of Appeal was filed on 27 August 2015.
8. The Republic for the efficient disposal of the case had agreed that the appellant be allowed to present his case on merits on the proposed grounds of appeal and at the same time present his argument on substantive issues. If the Court was satisfied that there was merit in the appeal, then the extension of time could be granted.
9. After the hearing the Republic and the lawyers for the appellant have come to an agreement that the extension of time will no longer be an issue and consent orders were filed on 14 November 2016.

#### BACKGROUND

10. The applicant is a 33 year old man from Ahwaz, Khuzestan province in Iran.

---

<sup>1</sup>*Refugees Convention (Amendment) Act 2015*, s 43(5).

11. He is married to his 27 year old wife who worked in accounting prior to marriage. The applicant and his wife sought asylum together and their claims were considered together by the Secretary. They have no children. The appellant was the joint owner of a computer business.
12. The appellant's mother and two brothers live in Iran. He also has a brother in Turkey and another brother who is deceased. His wife's family, comprising her mother and sister, also live in Iran.
13. The appellant's brother married an Arab Ahwazi woman, Maryam Zergani, in 2008 despite his family's reluctance. The brother died in December 2012 in a car accident. Maryam was left a widow with an infant daughter.
14. Within a week of the death, the Zergani family demanded that the appellant marry Maryam. His refusal angered the Zergani family, who made threats against him.
15. The appellant regularly dropped off shopping at Maryam's house at about 11pm on his way home from work. He felt a responsibility to look after his brother's widow.
16. In late January 2013, the appellant visited Maryam. An argument with her father and other relatives broke out and the police arrived on account of the noise. Maryam's father accused the appellant of sleeping with his daughter and claimed that he did not know the appellant.
17. The appellant was charged with adultery and released on bail. He did not have an opportunity to explain the circumstances to police. The appellant was not certain why Maryam was not also arrested for engaging in sexual intercourse prior to the end of Iddah, a period of mourning for widows. The appellant has later claimed that he was charged with rape, which explains why Maryam was not arrested.
18. The appellant and his wife fled to Tehran, in contravention of the bail conditions. He did not stay to defend the charge because he believed that the authorities would not want to interfere with Arab ethnic customs which dictate that he ought to marry his brother's widow.
19. The appellant and his wife departed Iran on 10 June 2013. They flew to Malaysia and then Indonesia, before boarding a boat to Australia. The boat was intercepted by Australian authorities and taken to Christmas Island in July 2013. The appellant and his wife were then transferred to Nauru.
20. In September 2014, the appellant and his wife began attending church classes in Nauru three times a week. They have now converted to Christianity and fear persecution in Iran on this basis.
21. The appellant and his wife also fear persecution in Iran as failed asylum seekers.

## APPLICATION TO THE SECRETARY

22. On 7 November 2013, the appellant attended a Transfer Interview.
23. On 11 December 2013, the appellant made an application to the Secretary for recognition as a refugee and for complementary protection under the Act.
24. On 16 July 2014, the Secretary made a determination that the appellant is not a refugee and is not owed complementary protection.

## APPLICATION TO THE TRIBUNAL

25. The appellant made an application for review of the Secretary's decision pursuant to s 31(1) of the Act which provides:

A person may apply to the Tribunal for merits review of any of the following:

- a) a determination that the person is not recognised as a refugee;
  - b) a decision to decline to make a determination on the person's application for recognition as a refugee;
  - c) a decision to cancel a person's recognition as a refugee (unless the cancellation was at the request of the person).
  - d) a determination that the person is not owed complementary protection.
26. On 14 September 2014, the appellant made a statement and on 25 September 2014 his lawyers, Craddock Murray Neumann, made written submissions to the Tribunal.
  27. On 26 September 2014, the appellant appeared before the Tribunal to give evidence and present his arguments with his representative and an interpreter in Farsi and English languages.
  28. The appellant's lawyers made further written submissions on 29 December 2014 attaching a further statement of the appellant's wife.
  29. The Tribunal handed down its decision on 7 January 2015 affirming the decision of the Secretary that the appellant is not recognised as a refugee and is not owed complementary protection under the Act.

## THIS APPEAL

30. The appellant filed three grounds of appeal which are:
  - 1) The Tribunal erred in law by:

- a) failing to make an obvious inquiry about a critical fact, the existence of which is easily ascertained; and/or
- b) acting contrary to natural justice by failing to exercise its powers under any or all of ss 24(1)(d), 24(2)(a) or (b), 26 or 36(b) of the Act

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

- 2) The Tribunal committed an error of law by acting in breach of ss 22(b) and/or 37 of the Act in respect of its reasons for rejecting the Christian conversion claim of the Appellant.
  - 3) The Tribunal erred by determining the Appellant's claims to protection together with his wife's.
31. This appeal and appeal number 6/2015 *COA025 v The Republic*<sup>2</sup> ("*COA025*") are related. The appellant in this case is the husband and the appellant in *COA025* is the wife.

#### APPLICATION FOR REFUGEE STATUS DETERMINATION ("RSD")

32. Both the appellants made separate applications for RSD.
33. The Secretary dealt with the two applications separately and the wife was described as the accompanying dependant for the purposes of derivative status and likewise the husband was described as an accompanying dependant in the wife's application.
34. On 16 July 2014, the Secretary made separate findings in respect of the appellant and his wife and determined neither of them could be accorded derivative status to the other.
35. After the Secretary's determination, the appellant and his wife made separate applications for review of the determination to the Tribunal under s 31 of the Act.

#### TRIBUNAL PROCEEDINGS

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

As the Tribunal accepts that the applicants are a married couple, it has combined their review applications into one decision having regard to the relevant law. The applicants will be referred to applicant husband and applicant wife in this review.

---

<sup>2</sup> Decision published in the Supreme Court of Nauru on 22 September 2017.

37. The Tribunal having combined the applications delivered one ruling on 7 January 2015.
38. The appellant's claim was based on his refusal to marry his widowed sister-in-law following the death of his elder brother. He claimed to have been falsely accused of having a sexual relationship with his sister-in-law. He initially claimed that he was accused of adultery and later claimed that he had raped his sister-in-law and was charged for rape and later bailed to attend Court.
39. The wife's claim was that she failed to comply with dress code; she claimed to be a moderate woman in Iran; she received warnings from Basij about not covering her hair and she complied with this warning.

#### ADDITIONAL CLAIM

40. The Tribunal hearing was completed on 29 September 2014 and on 29 December 2014 both the appellant and his wife made an additional claim that they had converted to Christianity and were baptised.
41. In the wife's statement to the Tribunal dated 29 December 2014, she stated that both she and the appellant had converted to Christianity and she also stated that she was hoping to receive her copy of the Baptism Certificate soon. In the appellant's statement to the Tribunal, also dated 29 December 2014, he stated that both he and his wife were baptised by a Reverend Richard, a Protestant reverend in Nauru in October 2014, and that they were yet to receive their Baptism Certificates. Once they received it they would like to submit copies of that to the Tribunal in support of their case.
42. Both claimed that the conversion to Christianity is forbidden by Iranian law and is punishable by death.
43. The Tribunal did not conduct a further review of the claim for conversion to Christianity. It considered this claim together with other claims by the appellant and her husband.

#### TRIBUNAL FINDINGS

##### The Husband's Claim

44. The Tribunal did not find the appellant to be a credible witness and it did not accept that he was accused of adultery or rape of his widowed sister-in-law as he had given inconsistent or implausible accounts of accusations against him. The appellant's wife's response to the Tribunal was that she was not present and relied on her husband's evidence.<sup>3</sup>

---

<sup>3</sup> Refugee Status Review Tribunal Decision, [38].

## The Wife's Claim

45. The Tribunal's finding was that the appellant's wife only received a warning that if she did not comply with her dress code to cover her hair; that she received a warning from Basij to cover her head which she did. The Tribunal accepted that she had to dress according to the Islamic code and found that Islamic dress code applied to all the citizens of Iran and did not amount to persecution.
46. The Tribunal rejected the claim for conversion to Christianity for the following reasons:<sup>4</sup>
- a) that the appellant and his wife's credibility were in issue and it had indicated this to them at the hearing;
  - b) that the appellant and his wife did not mention the claim about conversion to Christianity despite having ample opportunity to do so;
  - c) that it did not accept the conversion to be genuine;
  - d) that the conversion was done with 'unseemly haste'; and
  - e) that no supporting evidence like a certificate by a minister was produced.

## CONSIDERATION

### Ground 3

47. The appellant's ground 3 is in identical terms to the wife's ground 6.
48. I upheld the wife's appeal on this ground on the basis that the appellant's credibility findings had caused her 'unfairness' and her position was 'disadvantaged'.<sup>5</sup> I further held that the Tribunal did not comply with the requirements of s 23(1) and committed an error of law in combining the two hearings.
49. I adopt my reasons in the wife's matter where applicable. Insofar as the appellant is concerned, I find that no application was made by the appellant or his wife or their legal representatives for the hearing of the review application to be combined into one application and the Tribunal took it upon itself to combine the two review applications. Therefore, the Tribunal failed to comply with the requirements of s 23(1) of the Act and committed an error of law.
50. In the circumstances, the appellant succeeds on this ground of appeal.

### Grounds 1 and 2

---

<sup>4</sup> Refugee Status Review Tribunal Decision, [48].

<sup>5</sup> COA025, [59].

51. Grounds 1 and 2 have certain amounts of overlap. Both allege that the appellant was denied natural justice and the Tribunal rejected the claim for conversion to Christianity without giving the appellant an opportunity to provide further information or material.
52. In *COA025* I discussed that s 37 of the Act was repealed by s 24 of the *Refugees Convention (Derivative Status and Other Measures Act) (Amendment) Act 2016* (“the Amending Act”). Section 6 of the Amending Act provides that:

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

53. I discussed the effect of repealing of s 37 of the Act in *COA025* at [81] to [86] where I stated:

[81] After the enactment of the Amending Act on 23 December 2016, I waited for further submissions from the parties and I was informed by both parties that they did not wish to make further submissions so in the circumstances I will have to deal with this ground under the principles of natural justice under the common law of Nauru. I dealt with the issue of common law in the matter of *DWN066 v The Republic*<sup>6</sup> (“*DWN066*”) and at [34] it was stated:

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

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

- i) Impartiality; and
- ii) Fair hearing

And I discussed the Nauruan and Australian cases on natural justice. In *Kioa v West*<sup>7</sup> Brennan J of the High Court of Australia held that:

A person whose interests are likely to be affected by exercise of power must be given an opportunity to deal with the relevant matters adverse to his interest which the repository of the power proposes to take into account in deciding its exercise [citing *Ridge v Baldwin*]. The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information,

---

<sup>6</sup> [2017] NRSC 23.

<sup>7</sup> (1985) 159 CLR 550, 628-9.



irrespective of its credibility, relevance or significance ... Nevertheless in the ordinary case when no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made.

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

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

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

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

(b) must act according to the principles of natural justice and the substantial merits of the case.

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

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

- a) telephone; or
- b) closed-circuit television; or
- c) any other means of communication.

[88] In the circumstances, the Tribunal failed to afford natural justice to the appellant. It should have either reconvened to hear the additional claim of conversion to Christianity or should have used other means of clarifying the

issue available to it but it failed to do so and thereby denied the appellant her right of natural justice.

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

54. The only difference between the appellant in this matter and the appellant in *COA025* was that the Tribunal made a finding of credibility against the appellant in this matter and it was justified in making that finding as the appellant gave conflicting versions of his incident with Zergani family. Apart from that the Tribunal made the same findings against both the husband and the wife and in particular at [48]<sup>8</sup> made the finding that:

Finally, no supporting evidence relating to the claimed conversion, such as certification by a minister of religion, has been provided.

47. The appellant stated at [12] of his statement dated 29 December 2014 as:

... my wife and I were baptised on the same day. We are yet to receive our Baptism Certificate, but once we do we would like to submit copies in support of our case.

48. It is quite obvious that the failure to produce the Baptism Certificate was one of the main reasons for rejecting the claim of conversion as the Tribunal used the word 'finally'.


49. I held in *COA025* that the Tribunal failed to afford natural justice to the appellant and it failed to do the same in this case.

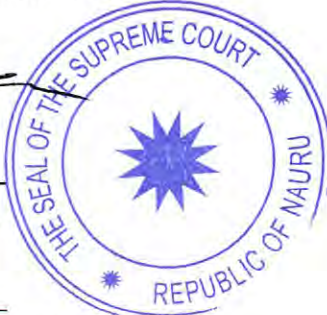
50. In the circumstances, the appellant succeeds on grounds 1 and 2 of the appeal.

## CONCLUSION

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

DATED this 27<sup>th</sup> day of September 2017

  
-----  
Mohammed Shafiullah Khan  
Judge

The seal of the Supreme Court of the Republic of Nauru is circular. It features a central eight-pointed star. The outer ring of the seal contains the text "THE SEAL OF THE SUPREME COURT" at the top and "REPUBLIC OF NAURU" at the bottom, separated by two small stars.

<sup>8</sup> Refugee Status Review Tribunal Decision.