IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M27 of 2017

BETWEEN:

HFM045
Appellant

and

THE REPUBLIC OF NAURU
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the Internet.

Part II: Statement of issues

2. Does the High Court have jurisdiction to hear this appeal brought as of right from the Supreme Court of Nauru?

3. Section 37 of the *Refugees Convention Act 2012* (Nr) (the **Refugees Act**) obliged the Refugee Status Review Tribunal (the **Tribunal**) to give to the Appellant "clear particulars of information that the Tribunal [considered] would be the reason, or a part of the reason, for affirming the determination … that is under review".

   3.1 In affirming the decision not to recognise the Appellant as a refugee, the Tribunal relied on certain independent information and country information, which it did not provide to the Appellant.

   3.2 The Supreme Court of Nauru (the **Supreme Court**) did not consider whether the Tribunal had breached s 37 of the Refugees Act, but held that the Tribunal had not breached the requirements of procedural fairness.

   3.3 Did the Supreme Court err?

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4. The Refugees Act recognises complementary protection for people who are not recognised as refugees under that Act.

4.1 In determining whether the Appellant was owed complementary protection, the Tribunal considered whether the Appellant had been, or would be, harmed for a Convention reason.

4.2 Did the Supreme Court err in holding that the Tribunal did not misinterpret the test for complementary protection?

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

5. The Appellant does not consider that any notice under s 78B of the *Judiciary Act 1903* (Cth) is necessary in this appeal.

Part IV: Citation of judgment below

6. The judgment in the Supreme Court of Nauru is published as: *HFM045 v The Republic* [2017] NRSC 12.

Part V: The facts

7. The Appellant is a Hindu, a member of the Chhetri tribe and a national of Nepal.[1]

8. In September 2013, the Appellant arrived at Christmas Island, having fled Nepal in May 2013.[2] In November 2013, the Appellant was transferred to Nauru under the regional processing arrangement between Australia and Nauru.[3]

9. On 29 January 2014, the Appellant made a claim for protection under the Refugees Act.[4] The Appellant claimed that he would be harmed if he were returned to Nepal: he claimed that the Maoists would target him because of his political activities and the Mongols would target him because of his membership of the Chhetri tribe.[5]

10. In applying for protection, the Appellant claimed that:[6]

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1 Book of Documents before the Supreme Court of Nauru (**BOD**), p 58.

2 BOD, p 58.

3 BOD, p 58.

4 BOD, p 28.

5 BOD, pp 35-36.

6 BOD, pp 63-64.

10.1 in 1993 or 1994, he became a member of the Rastriya Prajatantra Party (Nepal) (the **RPP**), a pro-royalist party wanting to return Nepal to a Hindu state over the opposition of the Maoists;

10.2 the Maoists would actively try to recruit him to join their party, and between 2001 and 2005 he was harassed and intimidated by their members to join the Maoists or to give them donations;

10.3 in 2008, he became the President of a local RPP committee and he was an active member speaking about the King and religion, each of which was considered to be a crime in Nepal;

10.4 he stepped down from his position as President of the local RPP committee because of pressure by the Mongols (who are affiliated with the Maoists) to leave the district in which he lived;

10.5 he had been assaulted by the Mongols in 2012, and the Mongols had previously stolen his property (including cattle, buffalo and goats, which were his source of income); and

10.6 the police did not protect him against those circumstances because the police force is comprised mostly of Maoists.

11. On 12 September 2014, a delegate of the Secretary of the Department of Justice and Border Control refused to recognise the Appellant as a refugee requiring protection under the Refugees Act.[7]

12. On 16 January 2015, the Tribunal affirmed the Secretary's decision.[8]

13. The Appellant appealed against the Tribunal's decision to the Supreme Court under s 43 of the Refugees Act.

14. On 22 February 2017, the Supreme Court dismissed the Appellant's appeal and affirmed the Tribunal's decision under s 44(1)(a) of the Refugees Act.[9]

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7 BOD, p 78.

8 BOD, p 171.

9 *HFM045 v Republic* [2017] NRSC 12.

Part VI: Argument

A Jurisdiction

15. The appeal is brought as of right under the *Nauru (High Court Appeals) Act 1976* (Cth).

16. Section 5(1) of that Act gives the High Court jurisdiction to hear appeals from the Supreme Court of Nauru as provided in the Agreement between Australia and Nauru, included as Schedule 3 to that Act (the **Agreement**). Article 1(A)(b) of the Agreement provides that an appeal lies as of right from a final judgment, decree or order of the Supreme Court of Nauru exercising original jurisdiction in a civil case. This appeal meets that definition for the following reasons:

10 16.1 Section 43 of the Refugees Act confers jurisdiction on the Supreme Court to hear an "appeal" from the Tribunal.

16.2 Despite being styled as an "appeal", a Supreme Court proceeding under s 43 constituted the first exercise of judicial power on the Appellant's claim. As with s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) and s 148 of the *Victorian Civil and Administrative Appeals Tribunal Act 1998* (Vic),[10] the "appeal" to the Supreme Court was a first instance application for judicial review.

16.3 The previous decisions – the determination of the Secretary's delegate on the Appellant's asylum claims and the decision of the Tribunal in reviewing that
20 determination – were exercises of executive power.

16.4 It follows that the orders subject to appeal in this matter arise from the first invocation of judicial supervision of executive power and, therefore, an exercise of original jurisdiction by the Supreme Court of Nauru.[11]

17. Accordingly, the Court is called on to exercise its original jurisdiction under s 76(ii) of the Commonwealth Constitution to determine the appeal.[12]

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10 *Osland v Secretary to the Department of Justice* (2010) 241 CLR 320 at 331-332 [18]-[19] (French CJ, Gummow and Bell JJ).

11 See *Ruhani v Director of Police* (2005) 222 CLR 489 (***Ruhani***) at 511-512 [49]-[51] (McHugh J), 528 [108] (Gummow and Hayne J), 543 [165] (Kirby J), 569 [274] (Callinan and Heydon JJ). See also *Minister for Navy v Rae* (1945) 70 CLR 339 at 249 (Dixon J).

12 *Ruhani* at 500 [10] (Gleeson CJ), 500-501 [14] (McHugh J), 522 [89] (Gummow and Hayne JJ).

B Ground 1: The Supreme Court erred in failing to find that the Appellant was denied procedural fairness or natural justice

18. The Court should allow this ground of appeal for three reasons.

19. **First**, the Supreme Court failed to consider the application of s 37 of the Refugees Act, which was a ground of appeal raised squarely before it.

20. **Second**, the Tribunal did not give to the Appellant "clear particulars" of the changing circumstances in Nepal and Chhetri representation in the army, each of which was relied on by the Tribunal to reject an aspect of the Appellant's claim for protection.

    20.1 The Tribunal raised the first issue with the Appellant but did not explain its relevance to him and did not invite him in writing to respond to it.

    20.2 The Tribunal did not raise the second issue with the Appellant, did not explain its relevance and did not invite him in writing to respond to it.

    20.3 In each case, the Tribunal did not meet the requirements of s 37 of the Refugees Act.

21. **Third**, the Tribunal "sought independent information", on which it relied without identifying that information, either to the Appellant or in its reasons. As a result, the Tribunal necessarily breached the requirements of s 37 of the Refugees Act – because the Appellant could not respond to information that was independently obtained by the Tribunal and was never given to the Appellant.

The statutory framework

<u>The requirements of s 37 of the Refugees Act</u>

22. At the time of the hearing before the Tribunal, s 37 of the Refugees Act provided:

> The Tribunal must:
>
> (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of information that the Tribunal considers would be the reason, or a part of the reason, for affirming the determination or decision that is under review; and
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> (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the determination or decision that is under review; and

(c) invite the applicant in writing to comment on or respond to it.

23. Section 37 is similar to s 424A(1) of the *Migration Act 1958* (Cth) (the **Migration Act**). However, unlike its Australian analogue, s 37 of the Refugees Act contains no limitation on the type of information that must be disclosed to an applicant. Section 37 does not exclude information that is not specifically about the applicant and is only about a class of persons, of which the applicant is a member.[13] On its face, therefore, s 37 applies to country information if that information is the reason, or part of the reason, for affirming the decision under review.

The content to be given to the obligation in s 37 of the Refugees Act

24. Analogical reasoning with the principles developed in relation to s 424A and similar provisions may assist the Court in determining the content to be given to s 37 of the Refugees Act.

25. Those principles include the following:

25.1 Section 424A does not require notice to be given of every matter the Tribunal might think relevant to the decision under review.[14]

25.2 The Tribunal's obligation is limited to the provision of particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review.[15]

25.3 The material in question should on its terms contain a "rejection, denial or undermining" of the applicant's claim for refugee status.[16]

25.4 The obligation may extend to country information.[17]

25.5 The requirement, that the Tribunal ensure, as far as reasonably practicable, that an applicant understand why certain information is relevant, requires that the

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13 See *Migration Act 1958* (Cth), s 424A(3)(a).

14 *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 at 615 [15] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) (***SZBYR***); *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507 at 513 [21] (French CJ, Heydon, Crennan, Kiefel and Bell JJ) (***SZLFX***).

15 *SZBYR* at 615 [15] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *SZLFX* at 513 [21] (French CJ, Heydon, Crennan, Kiefel and Bell JJ).

16 *SZBYR* at 615 [17] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *SZLFX* at 513 [22] (French CJ, Heydon, Crennan, Kiefel and Bell).

17 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 357 [91] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

importance of the information and its potential impact on the applicant's case be identified and the information be communicated in a way which promotes that understanding as far as is possible.[18]

25.6 A provision like s 424A is mandatory and its breach constitutes jurisdictional error sufficient to invalidate the Tribunal's decision.[19]

26. The Refugees Act discloses no reason why those principles should not be applied in determining whether the Tribunal has breached the requirements of s 37 of that Act.

27. A provision like s 424A is intended to reflect an aspect of procedural fairness. Procedural fairness in this context requires that a decision-maker put before an applicant the substance of the matters that the decision-maker knew of and considered might bear on whether to accept the applicant's claims.[20] In that way, s 424A is a statutory expression of the common law rules of procedural fairness,[21] including the fair hearing rule.[22] As Brennan J said in *Kioa v West*:[23]

> A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise ... in the ordinary case where 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. It is not sufficient for the repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it. Information of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information. He will be neither consoled nor assured to be told that the prejudicial information was left out of account.

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18 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 261 [20] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (***Saeed***) (in the context of s 57(2)(b) of the Migration Act, which is similar to s 424A of that Act).

19 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 321-322 [77] (McHugh J); 345-346 [173] (Kirby J); 354-355 [208] (Hayne J) (***SAAP***); *SZBYR* at 614 [13] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

20 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 356 [91] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

21 *SAAP* at 317 [66] (McHugh J).

22 *Saeed* at 260 [18] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

23 (1985) 159 CLR 550 at 628-629.

28. That underlying principle has been referred to in the context of s 424A, or similar provisions.[24] It is an aspect of the broader rule that an applicant should be given a reasonable opportunity to present his or her case.[25] It should guide this Court's approach to the content to be given to s 37 of the Refugees Act.

The effect of the purported repeal of s 37 of the Refugees Act

29. Section 37 has now been repealed by s 24 of the *Refugees Convention (Derivative Status & Other Measures) (Amendment) Act 2016* (Nr) (the **Amendment Act**). The repeal of s 37 does not affect the issues in this appeal.

30. Section 2 of the Amendment Act specifies when the provisions of the Amendment Act are to come into force. It provides:

> (1) Sections 10, 16 and 22 of this Act are deemed to have commenced on 21 May 2014.
>
> (2) Section 23 of this Act is deemed to have commenced on 10 October 2012.
>
> (3) All other provisions in this Act commence upon certification by the Speaker.

31. Section 24 falls within s 2(3) of the Amendment Act – because it is one of the class: "[a]ll other provisions". Therefore, the repeal of s 37 commences on the certification date of the Amendment Act (stated in the Amendment Act to be 23 December 2016). In those circumstances, the repeal of s 37 has only a prospective effect.[26] It does not affect the Tribunal's previous obligation to comply with s 37 in reviewing the Appellant's claim.

32. The Explanatory Memorandum to the Bill for the Amendment Act stated that the repeal of s 37 was intended to apply retrospectively to the date when the Refugees Act first commenced (that is, 10 October 2012).[27] That intention is not reflected in the text of the Amendment Act, which (as noted in paragraph 31 above) specifies that the repeal of s 37 is to commence from 23 December 2016. The apparent dissonance between the Explanatory Memorandum and the text of the Amendment Act does not diminish the

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24 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 161-162 [29]-[32] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ); *Saeed* at 260-261 [18]-[19] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ)

25 *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at 617 [61] (Gaudron J).

26 *Interpretation Act 2011* (Nr), ss 19, 21, 22 and 28.

27 Republic of Nauru, Refugees Convention (Derivative Status) (Amendment) Bill 2016 – Explanatory Memorandum, pp 1 and 4.

Court's duty to give effect to the will of the Nauruan Parliament as expressed in the Amendment Act.[28] The words of the Explanatory Memorandum cannot be used in substitution for the words of the Amendment Act.[29] The repeal of s 37 commenced prospectively from 23 December 2016.

The Tribunal failed to give the Appellant clear particulars of the information on which it relied to affirm the Secretary's decision

The Supreme Court's failure to consider s 37 of the Refugees Act

33. Although it was raised squarely in the Appellant's grounds of appeal, the Supreme Court did not consider whether the Tribunal had failed to comply with s 37.

34. The relevant ground of appeal alleged that the "Tribunal erred in law by failing to comply with section 37 or 40 of [the Refugees Act]".[30] The Appellant's reliance on s 37 was expressly referred to in his written submissions.[31] It was the subject of oral argument: counsel for the Appellant referred to s 37 on no less than 12 occasions during oral argument.[32] Counsel for the Respondent referred to that section a further 13 times during oral argument.[33]

35. Even though s 37 was clearly raised, the Supreme Court did not refer to or apply s 37 in dismissing the relevant ground of appeal. Indeed, the Supreme Court does not refer to s 37 at all in its reasons. Instead, the Supreme Court referred only to s 40 of the Refugees Act, in concluding that the Tribunal had not breached the requirements of procedural fairness or natural justice.[34] The Supreme Court appears to have forgotten the Appellant's reliance on s 37.

36. The Supreme Court's failure to deal with s 37, in circumstances where the section was squarely raised and plainly arguable, gives rise to an appealable error of law, or a

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28 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 (Mason CJ, Wilson and Dawson JJ).

29 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 517-518 (Mason CJ, Wilson and Dawson JJ); *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at 80 [102] (Kirby J); *Saeed* at 264-265 [31]-[32] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

30 Amended Notice of Appeal filed 7 April 2016 (emphasis added).

31 Appellant's Outline of Submissions before the Supreme Court of Nauru, paragraph 51.

32 Ts 29, line 29; Ts 30, line 17; Ts 32, line 20; Ts 8 (19 April 2016), line 42; Ts 9 (19 April 2016), lines 1, 24, 28, 40, 45; Ts 11 (19 April 2016), line 13; Ts 12 (19 April 2016), line 43; Ts 18 (19 April 2016), line 43.

33 Ts 71, line 47; Ts 72, lines 3, 9, 14, 16, 17, 21; Ts 73, lines 24, 38, 43, 45; Ts 74, line 2; Ts 79, line 5.

34 Tribunal's reasons at [35] and [44].

miscarriage of justice requiring this Court's intervention.[35] The Appellant submits that the Supreme Court's failure alone is sufficient for the Court to allow his appeal.

The Tribunal's failure to give the Appellant clear particulars of the information concerning the changed political circumstances in Nepal

37. The Tribunal appears to have rejected the Appellant's claim that he feared harm because of his previous political involvement by relying on country information concerning changed political circumstances in Nepal.[36]

38. The country information on which the Tribunal relied was in the following terms:[37]

> In a remarkable achievement after decades of turmoil, the Himalayan Nation remained completely free of insurgency-related violence through 2013. Militant violence has registered a constant decline since the signing of the Comprehensive Peace Agreement (CPA) in 2006 but it is for the first time since 2000, when the South Asian Terrorism Portal (SATP) database commenced compiling data on insurgency-related fatalities in Nepal, that the country did not record a single insurgency-related incident during the course of the year. In a worrying development, however, political violence did increase considerably during 2013. Activists of political parties clashed with each other on at least 22 occasions resulting in four death and 167 injuries. There were four such incidents resulting in seven injuries and no fatalities in 2012. Further, activists of political parties clashed with law enforcement personnel on at least four occasions in 2013, with 14 persons injured. Moreover, till the fag-end of 2013, the political environment remained extremely volatile, with a looming threat of violent escalation. Indeed, the clouds of political uncertainty that had enveloped Nepal in 2012, after the dramatic gains of 2011, had deepened, exasperating the political class. **Political developments thereafter have, however, made freedom from insurgency-related violence sustainable, even as they have resulted in a diminution in political violence itself. The successful holding of elections for the second Constituent Assembly on 19 November 2013 was the critical development that transformed the political environment of the country ...**

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35 *QBE Insurance Ltd v Switzerland Insurance Workers Compensation (NSW) Ltd* (1996) 134 ALR 433 at 436-437 (Gaudron, McHugh and Gummow JJ); *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd* (2002) 6 VR 1 at 44 [166] (Charles, Buchanan and Chernov JJA); *SZIVK v Minister for Immigration and Citizenship* [2008] FCA 334 at [26] (Finkelstein J); *260 Oxford Street Pty Ltd v Premetis* [2006] NSWCA 96 at [121]-[123] (Basten JA).

36 Tribunal's reasons at [23]-[24], [43]-[44].

37 Tribunal's reasons at [43], citing South Asia Terrorism Portal, *Nepal Assessment 2014,* at www.satp.org (Tribunal's emphasis).

Eventually, a voter turn-out of 78.34% conferred tremendous legitimacy on the process ...

39. The Supreme Court found that the Appellant was made aware that the Tribunal was considering the changing circumstances in Nepal. The basis of the Supreme Court's finding was an exchange between the Tribunal and the Appellant during the Tribunal hearing. The exchange was in the following terms:[38]

> MS ZELINKA: When you were in Kathmandu, the Communist prime minister was no longer there. I mean, it was now, by this stage, a government of National Unity waiting for the elections. I mean, things were already changing at the time that you left.
>
> THE INTERPRETER: There is no any changes in their action. Still they have got conflict and – if they change – I don't think that they will change their ideology. If they change themself, then also I cannot change because if they find me they will not leave – that is what I am thinking and I am worried about.
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> MS ZELINKA: Well, I know you've been away from Nepal now for some time, but it seems to us, when we were reading information about Nepal, that there have been some very substantial changes which might – you know, which you may not have considered. You know, the elections went off quite well, the government has been formed, it seems that all the country is sick of the fighting and the political instability, and even the main Communist Party is now working in government – not in government – as the opposition, but working with the - - -
>
> THE INTERPRETER: It seems Maoist are – they are working in different way. We can find in the news that they have got – Maoist, they are not cooperating with other parties. We can find in the news also.

40. The Supreme Court was in error to hold that the exchange was sufficient for the Tribunal to discharge its obligations under s 37 for three reasons.

41. **First**, the Tribunal did not give clear particulars of the country information, set out in paragraph 38 above, to the Appellant.

41.1 The Supreme Court found that the short exchange during the Tribunal hearing meant that the Appellant was aware that the Tribunal was considering the changed political circumstances in Nepal.[39] That much may be true, and it is

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38 *HFM045 v The Republic* [2017] NRSC 12 at [40], [42].

39 *HFM045 v Republic* [2017] NRSC 12 at [42].

apparent that the changing circumstances in Nepal was raised by the Tribunal during the hearing.

41.2 However, that could not answer the question whether the Tribunal complied with the requirements of s 37.

41.3 The Supreme Court conflated the question whether the Appellant was aware of a matter with the question whether the Tribunal had complied with s 37. In so doing, the Supreme Court did not proceed on the correct premise.[40]

42. **Second**, the Tribunal did not meet the requirements of s 37(b).

42.1 The Tribunal did not explain to the Appellant why the changing political circumstances in Nepal would be relevant to its determination of the proceeding before it. The link may have arisen by implication, but that does not satisfy the requirements of s 37(b).

42.2 In failing to explain the relevance of the changed political circumstances in Nepal, the Tribunal failed to meet the statutory requirement in s 37(b) of the Refugees Act.

43. **Third**, the Tribunal never invited the Appellant in writing to comment on the country information, on which the Tribunal relied.

43.1 The Tribunal simply raised the issue in the course of the hearing. The fact that the Appellant may have been made aware that the Tribunal was considering the changing circumstances in Nepal was not sufficient.[41]

43.2 He was entitled to be invited in writing to respond to, or comment on, that matter.

43.3 The Tribunal failed to do that and, as a result, failed to meet the statutory requirement in s 37(c) of the Refugees Act.

44. In the premises, the Supreme Court erred in finding that the Tribunal had not breached the requirements of s 37. Procedural fairness required the Tribunal to give the

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40 *Craig v South Australia* (1995) 184 CLR 163 at 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

41 *SAAP* at 316 [63] (McHugh J), 319 [71] (McHugh J), 347-348 [183] (Hayne J).

Appellant an opportunity to put a case in response to the changing circumstances in Nepal.[42]

The Tribunal's failure to give the Appellant clear particulars of the information concerning Chhetri representation in the army

45. It was an aspect of the Appellant's claim that he would not be protected on his return to Nepal because Maoists had been absorbed into the army and the police force.[43] The Tribunal dismissed the Appellant's claim that he would not be protected on his return to Nepal as a "mere assertion" and observed that "Chhetris are heavily represented in the army, accounting for 43.64 per cent of personnel as of 2009".[44]

46. The transcript of the hearing before the Tribunal shows that the Tribunal did not put the information about Chhetri representation in the army to the Appellant. The Tribunal should have:

46.1 given clear particulars of that information to the Appellant;

46.2 explained why it was relevant to the Tribunal's scrutiny of his claim that he would not be protected on his return to Nepal; and

46.3 invited the Appellant in writing to comment on this information.

The Tribunal did not take any of these steps and, in failing to do so, the Tribunal failed to comply with the requirements of s 37.

47. The Supreme Court does not appear to have considered why the Tribunal's failure to give to the Appellant clear particulars of information concerning the Chhetri representation in the army did not constitute a breach of procedural fairness.

47.1 The Supreme Court commenced by observing that the Appellant alleged that the Tribunal's failure to provide this information resulted in a failure to accord to him procedural fairness.[45]

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42 See, for example, *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 86 [99] (Gaudron J), 98 [143] (McHugh J), 118 [196] (Kirby J).

43 BOD, p 68.

44 Tribunal's reasons at [39].

45 *HFM045 v Republic* [2017] NRSC 12 at [37].

47.2 However, the Supreme Court does not appear to have analysed or resolved the Appellant's complaint. The Supreme Court simply concluded by stating that there had been no breach of procedural fairness.

47.3 By limiting its consideration in that way, however, the Supreme Court fell into the error identified in paragraph 36 above.

The Tribunal's failure to give the Appellant clear particulars of the independent information, which the Tribunal had sought

48. In determining the Appellant's claims concerning his political activities and race, the Tribunal stated that it had "sought independent information".[46] The Tribunal did not identify the nature and source of that "independent information". The Tribunal did state that it had relied on that information in accepting "the following scenario".[47] which comprised a series of paragraphs concerning the Appellant's faith and ethnicity. It is not clear if the "independent information" related to some or all of those paragraphs.

49. By conducting its own independent research, without identifying that information or giving it to the Appellant, the Tribunal necessarily breached the requirements of s 37.

49.1 A decision-maker is required to make his or her decision on the basis of the evidence and arguments in the proceeding and not "on the basis of information or knowledge which is independently acquired".[48]

49.2 Although that obligation has been described as an aspect of the rule against apprehended bias,[49] the obligation also reflects the rule that a party is entitled to know the case made against that party and to be given an opportunity to respond to that case.[50]

49.3 The Appellant had no chance of responding to information that was independently obtained by the Tribunal and that was never given to the Appellant.

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46 Tribunal's reasons at [34].

47 Tribunal's reasons at [34].

48 *Re Media Entertainment & Arts Alliance; Ex parte Hoyts Corporation Pty Ltd* (1994) 119 ALR 206 at 210.

49 Ibid.

50 *SD v R* (2013) 39 VR 487 at 496 [38] (Ashley, Redlich and Priest JJA), citing *Kioa v West* (1985) 159 CLR 550 at 628 (Brennan J).

50. The failure of the Tribunal to identify the "independent information" makes it difficult to determine if the information was of a kind that was required to be disclosed under s 37(a) of the Refugees Act. Rather than absolving the Tribunal from the disclosure obligation, that circumstance compounded the denial of procedural fairness to the Appellant.

51. The Appellant concedes that this ground was not raised before the Supreme Court. It is thus necessary to consider the circumstances, in which the Court can consider a new grounds of appeal not raised below.

52. Under the Refugees Act, the High Court functions as the first court to deal with the current matter other than by way of first instance judicial review. The High Court is, therefore, in a similar position to the Full Court of the Federal Court of Australia in hearing an appeal from a primary judgment on an appeal initiated under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth), and in an appeal from a first instance judgment under ss 476 or 476A of the Migration Act.

53. In appeals of that kind, new questions of law may be raised on appeal from a primary judgment before the Full Court of the Federal Court if it is "expedient and in the interests of justice" to do so.[51] The same test has been applied by the High Court where a new point is sought to be raised on appeal.[52]

54. Of course, unlike the Full Court of the Federal Court, the High Court exercises original jurisdiction in the present case. As such, it has the enlarged powers under s 32 of the *Judiciary Act 1903* (Cth) to:

> ... grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter; so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined ...

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51 *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 at 347 [79]-[80] (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ); *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 at 598 [46] (Kiefel, Weinberg and Stone JJ).

52 See, for example, *Water Board v Moustakas* (1988) 180 CLR 491 at 497 (Mason CJ, Wilson, Brennan and Dawson JJ), 506 (Gaudron J).

55. That power extends, for example, to the reception of new evidence not placed before the court or tribunal below.[53]

56. It follows that the test for the introduction of new grounds where the Court exercises original jurisdiction must be at least as liberal as that which applies on an appeal proper. In the present case, it is expedient and in the interests of justice to allow the Appellant to raise this new ground for the following reasons:

56.1 The ground has obvious merit.

56.2 Although the ground was not raised in the Supreme Court, it concerns the Tribunal's compliance with s 37 of the Refugees Act. That issue was clearly articulated as a ground of appeal and ventilated before (although not decided by) the Supreme Court. No new facts or evidence are needed to substantiate the ground, which concerns a question of law.

56.3 There would be no relevant prejudice to the respondent (other than the need to answer the ground).

C Ground 2: The Supreme Court erred in failing to find that the Tribunal had applied the wrong test for complementary protection

57. The Supreme Court erred in finding that the Tribunal had not misinterpreted the law because the Tribunal required the Appellant to demonstrate that he had been, or would be, harmed for a Convention reason. That "test" in effect required the Appellant to demonstrate why he was entitled to refugee protection. Accordingly, the Tribunal ignored entirely the distinction drawn under the Refugees Act between refugee protection and complementary protection.

The Tribunal's approach to complementary protection

58. The Tribunal found that the Appellant was not owed complementary protection because the Tribunal was not satisfied that the Appellant "has suffered serious harm in the past, nor is likely to in the future, for a Convention reason or any other particular reason or that he has put forward any circumstances or reasons that would engage further protection consideration".[54] The effect of that "test" was to require the Appellant to

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53 *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561 at 574 [34]-[35] (French CJ, Gummow, Hayne and Bell JJ); *Federal Commissioner of Taxation v Lewis Berger & Sons (Australia) Ltd* (1927) 39 CLR 468 at 469-470 (Starke J).

54 Tribunal's reasons at [49] (emphasis added).

establish that he was entitled to refugee protection under the Refugees Act before he could be entitled to complementary protection.

The Supreme Court's approach to complementary protection

59. The Supreme Court found that the Tribunal had not misinterpreted the law in relation to Nauru's complementary protection obligations.[55]

59.1 The Supreme Court found that, looking at the Tribunal's decision "taken as a whole", it was satisfied that the Tribunal considered whether the Appellant's "life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion".[56]

59.2 Those findings were said to be "continuing from the determinations in relation to whether he was recognised as a refugee for a Convention reason as to whether he would suffer such prohibited treatment if returned to Nepal".[57]

59.3 The Court found that the Tribunal had not misinterpreted the law because the Tribunal had found, among other things, that "the appellant had not been harmed previously (or 'persecuted')".[58]

The errors in the Supreme Court's approach to complementary protection

60. As the Supreme Court observed, the test for complementary protection has not been determined in Nauru.[59] However, the test cannot be the test applied by either the Tribunal or the Supreme Court.

61. Section 3 of the Refugees Act defines "complementary protection" to mean "protection for people who are not refugees as defined in this Act, but who also cannot be returned or expelled to the frontiers of territories where this would breach Nauru's international obligations". The definition clarifies that complementary protection is different to refugee protection. In that way it reflects the common understanding that

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55 *HFM045 v Republic* [2017] NRSC 12 at [58].

56 *HFM045 v Republic* [2017] NRSC 12 at [57].

57 *HFM045 v Republic* [2017] NRSC 12 at [57].

58 *HFM045 v Republic* [2017] NRSC 12 at [58].

59 *HFM045 v Republic* [2017] NRSC 12 at [46].

complementary protection provides protection to those who may not be entitled to protection as a refugees.[60]

62. Neither the Tribunal nor the Supreme Court appeared to appreciate the difference between refugee protection and complementary protection. Three aspects of the Supreme Court's reasons cause particular concern:

62.1 **First**, the Supreme Court found that the Tribunal had not applied the wrong test and that it had considered whether the Appellant's life or freedom would be threatened "on account of" a list of personal characteristics: see paragraph 59.1 above. That was not the test applied by the Tribunal, which was whether the Appellant had been, or would be, harmed for a Convention reason.

62.2 **Second**, if that had been the test applied by the Tribunal, it could not be the correct test. The test stated by the Supreme Court was derived from s 4 of the Refugees Act, which deals with the principle of non-refoulement. That test is the test to be applied in determining a claim for refugee protection. It cannot be the test for complementary protection.

62.3 **Third**, the Supreme Court suggested that the Tribunal could rely on its findings on the Appellant's refugee protection claim to dismiss the Appellant's complementary protection claim. That was an error. The two tests are not the same. It was inappropriate for the Supreme Court to proceed on the basis that satisfaction of one test necessarily meant satisfaction of the other.

63. By applying the wrong legal test and not applying the test required by the Refugees Act, the Supreme Court fell into error. This ground of appeal should also be allowed.

Part VII: Legislative provisions

64. The relevant legislative provisions are attached.

Part VIII: Orders sought

65. The Appellant seeks the orders sought in its Notice of Appeal filed on 8 March 2017.

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60 *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211 at 215 [18] (Lander, Jessup and Gordon JJ); *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 at 522 [70] (Lander and Gordon JJ). See also Jane McAdam, "Australian Complementary Protection: A Step-by-Step Approach" (2011) 33 *Sydney Law Review* 687 at 694.

Part IX: Time for oral argument

66. The oral argument for the Appellant will take approximately 1.5 hours.

Date: 11 April 2017

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An Act relating to Appeals to the High Court from the Supreme Court of Nauru

1 Short title [*see* Note 1]

This Act may be cited as the *Nauru (High Court Appeals) Act 1976*.

2 Commencement [*see* Note 1]

This Act shall come into operation on a date to be fixed by Proclamation, being a date not earlier than the date on which the Agreement comes into force.

3 Interpretation

In this Act, ***Agreement*** means 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 that was signed on 6 September 1976, being the agreement a copy of the text of which is set out in the Schedule.

4 Approval of Agreement

The Agreement is approved.

5 Appeals to High Court

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

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

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

Schedule

Section 3

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF NAURU RELATING TO APPEALS TO THE HIGH COURT OF AUSTRALIA FROM THE SUPREME COURT OF NAURU

The Government of Australia and the Government of the Republic of Nauru,

Recalling that, immediately before Nauru became independent, the High Court of Australia was empowered, after leave of the High Court had first been obtained, to hear and determine appeals from all judgments, decrees, orders and sentences of the Court of Appeal of the Island of Nauru, other than judgments, decrees or orders given or made by consent,

Taking into account the desire of the Government of the Republic of Nauru that suitable provision now be made for appeals to the High Court of Australia from certain judgments, decrees, orders and sentences of the Supreme Court of Nauru, and

Conscious of the close and friendly relations between the two countries,

Have agreed as follows:

ARTICLE 1

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

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

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

(b) In civil cases—

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

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

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

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

ARTICLE 2

An appeal is not to lie to the High Court of Australia from the Supreme Court of Nauru—

(a) where the appeal involves the interpretation or effect of the Constitution of Nauru;

(b) in respect of a determination of the Supreme Court of Nauru of a question concerning the right of a person to be, or to remain, a member of the Parliament of Nauru;

(c) in respect of a judgment, decree or order given or made by consent;

(d) in respect of appeals from the Nauru Lands Committee or any successor to that Committee that performs the functions presently performed by the Committee; or

(e) in a matter of a kind in respect of which a law in force in Nauru at the relevant time provides that an appeal is not to lie to the High Court.

ARTICLE 3

1. Subject to paragraph 2 of this Article and to Article 4 of this Agreement, procedural matters relating to appeals from the Supreme Court of Nauru to the High Court of Australia are to be governed by Rules of the High Court.

2. Applications for the leave of the trial judge to appeal to the High Court of Australia in civil matters are to be made in accordance with the law of Nauru.

ARTICLE 4

1. Pending the determination of an appeal from the Supreme Court of Nauru to the High Court of Australia, the judgment, decree, order or sentence to which the appeal relates is to be stayed, unless the Supreme Court of Nauru otherwise orders.

2. Orders of the High Court of Australia on appeals from the Supreme Court of Nauru (including interlocutory orders of the High Court) are to be made binding and effective in Nauru.

ARTICLE 5

This Agreement shall come into force on the date on which the two Governments exchange Notes notifying each other that their respective constitutional and other requirements necessary to give effect to this Agreement have been complied with.

ARTICLE 6

1. Subject to paragraph 2 of this Article, this Agreement shall continue in force until the expiration of the ninetieth day after the day on which either Government has given to the other Government notice in writing of its desire to terminate this Agreement.

2. Termination of this Agreement is not to affect—

(a) the hearing and determination of an appeal from the Supreme Court of Nauru instituted in the High Court before the date of the termination; or

(b) the institution, hearing and determination of an appeal from the Supreme Court of Nauru in pursuance of leave of the trial judge or of the High Court of Australia given before the date of the termination.

IN WITNESS WHEREOF the undersigned being duly authorized by their respective governments have signed the present Agreement.

DONE at Nauru this Sixth day of September One thousand nine hundred and seventy-six in two originals in the English language.

A. L. FOGG
For the Government of Australia

A. BERNICKE
For the Government of the Republic of Nauru

REPUBLIC OF NAURU

Refugees Convention Act 2012

Act No. 12 of 2012

An Act to give effect to the Refugees Convention; and for other purposes

Certified on 10 October 2012

Enacted by the Parliament of Nauru as follows:

PART 1 – PRELIMINARY

1 Short title

This Act may be cited as the *Refugees Convention Act 2012*.

2 Commencement

(1) Subject to subsection (2), this Act commences on the day it receives the certificate of the Speaker under Article 47.

(2) Parts 3, 4 and 5 of this Act commence on a date to be fixed by the Minister by Gazette notice.

3 Interpretation

In this Act, unless the contrary intention appears:

'asylum seeker' means:

(a) a person who applies to be recognised as a refugee under section 5; or

(b) a person, or persons of a class, prescribed by the Regulations;

'corresponding law' means a law of another jurisdiction that provides for a person to apply for recognition as a refugee under the Refugees Convention as modified by the Refugees Protocol;

'Deputy Principal Member' means a Deputy Principal Member of the Tribunal;

'member' means the Principal Member, a Deputy Principal Member or any other member of the Tribunal;

'personal identifier' means any of the following (including any of the following in digital form):

(a) fingerprints or handprints of a person, including those taken using paper and ink or digital technologies;

(b) a measurement of a person's height and weight;

(c) a photograph or other image of a person or of the face and shoulders or other part of a person;

(d) an audio or video recording of a person;

(e) an iris scan;

(f) a person's signature;

(g) any other identifier prescribed by the Regulations;

'Principal Member' means the Principal Member of the Tribunal;

'refugee' means a person who is a refugee under the Refugees Convention as modified by the Refugees Protocol;

'Refugees Convention' means the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951;

'Refugees Protocol' means the Protocol Relating to the Status of Refugees done at New York on 31 January 1967;

'Secretary' means the Head of Department;

'Tribunal' means the Refugee Status Review Tribunal established under section 11.

4 Protection of refugees—principle of non-refoulment

The Republic must not expel or return a person determined to be recognised as a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion except in accordance with the Refugees Convention as modified by the Refugees Protocol.

PART 2 – DETERMINATION OF REFUGEE STATUS

5 Application for refugee status

(1) A person may apply to the Secretary to be recognised as a refugee.

(2) The application must:

(a) be in the form prescribed by the Regulations; and

(b) be accompanied by the information prescribed by the Regulations.

(3) No fee may be charged for the making or processing of the application.

6 Determination of refugee status

(1) Subject to this Part, the Secretary must determine whether an asylum seeker is recognised as a refugee.

(2) The determination must be made as soon as practicable after a person becomes an asylum seeker under this Act.

7 Powers of Secretary in determining refugee status

(1) For the purposes of determining whether an asylum seeker is recognised as a refugee, the Secretary:

(a) may require the asylum seeker:

(i) to provide one or more personal identifiers to assist in the identification of, and to authenticate the identity of, the asylum seeker; and

(ii) to attend one or more interviews; and

22 Way of operating

The Tribunal:

(a) is not bound by technicalities, legal forms or rules of evidence; and

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

23 Review to be in private and recording made

(1) The hearing of an application for review by the Tribunal must be in private.

(2) An audio or audio visual recording must be made of a hearing.

24 Evidence and procedure

(1) For the purpose of a review, the Tribunal may:

(a) take evidence on oath or affirmation; or

(b) adjourn the review from time to time; or

(c) subject to Part 6, give information to the applicant and to the Secretary; or

(d) require the Secretary to arrange for the making of an investigation, or a medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.

(2) The Tribunal in relation to a review may:

(a) summon a person to appear before the Tribunal to give evidence; and

(b) summon a person to produce to the Tribunal such documents as are referred to in the summons; and

(c) require a person appearing before the Tribunal to give evidence on oath or affirmation.

(3) A member of the Tribunal or the Registrar may administer an oath or affirmation to a person appearing before the Tribunal.

37 Invitation to applicant to comment or respond

The Tribunal must:

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

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

(c) invite the applicant in writing to comment on or respond to it.

38 Requirements for invitation

(1) An invitation by the Tribunal to provide information or to comment or respond to information must specify:

(a) the way in which the information, comment or response is to be given; and

(b) the time, date and place on which, or the period within which, the information, comment or response is to be given.

(2) The Tribunal may alter the time, date or place specified in an invitation or extend the period within which the information, comment or response is to be given.

39 Failure of applicant to respond

If a person is invited by the Tribunal to give information or to comment or respond to information but does not do so as required, the Tribunal may make a decision on the review without taking further action to obtain the information, comment or response.

40 Tribunal must invite applicant to appear

(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the determination or decision under review.

(2) Subsection (1) does not apply if:

(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or

(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it.

(3) An invitation to appear before the Tribunal must be given to the applicant with reasonable notice and must:

(a) specifiy 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.

(4) If the Tribunal is notified by an applicant under subsection (3)(b), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice.

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.

44 Decision by Supreme Court on appeal

(1) In deciding an appeal, the Supreme Court may make either of the following orders:

(a) an order affirming the decision of the Tribunal;

(b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

(2) If the Court makes an order remitting the matter to the Tribunal, the Court may also make either or both of the following orders:

(a) an order declaring the rights of a party or of the parties;

(b) an order quashing or staying the decision of the Tribunal.

45 Costs

The Supreme Court may not make an order for costs against the appellant except in extraordinary circumstances.

46 Period within which Tribunal must reconsider matter remitted

(1) If a matter is remitted to the Tribunal for reconsideration, the Tribunal must complete its reconsideration within 90 days.

(2) Failure to comply with this section does not affect the validity of a decision on an application for merits review.

47 Rights conferred by this Part additional to other rights

The rights of a person provided under this Part for an appeal against a decision are in addition to, and not in derogation of, any other right that the person may have for review of the decision.