IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M28 of 2017

BETWEEN:

BRF 038
Appellant

and

THE REPUBLIC OF NAURU
Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication

1. This submission is in a form suitable for publication on the internet.

Part II: Statement of Issues

2. What is the source and nature of the High Court's jurisdiction to determine this appeal brought as of right from the Supreme Court of Nauru?

3. Did the Supreme Court of Nauru err in its application of the principles of procedural fairness required by ss 22, 37 and 40 of the *Refugees Convention Act 2012* (Nr) ('the RC Act') in finding that procedural fairness did not require the Refugee Status Review Tribunal (the 'Tribunal') to put to the appellant material relating to the tribal composition of the Somali police force before making an adverse finding based on that information?

4. Did the Supreme Court of Nauru err in applying the incorrect test for persecution under international law for the purposes of an assessment under s 6 of the RC Act?

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Filed on behalf of: the appellant

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

5. The Appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and concluded that no notice is required.

Part IV: Citations

6. The citation for the decision of the Supreme Court of Nauru is *BRF 038 v The Republic of Nauru* [2017] NRSC 14. The decision of the Tribunal was made on 15 March 2015.

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Part V: Factual background

7. The appellant is an asylum seeker from Somalia, who sought asylum in Australia and was transferred to Nauru in September 2013. The appellant made a claim in Nauru for protection as a refugee, or alternatively, as a person owed complementary protection, under the RC Act.

8. The appellant was accepted by both the Tribunal and the Supreme Court of Nauru to be a member of the Gabooye (also spelt Gaboye) tribe or clan.[1] The Supreme Court treated the appellant's Gabooye tribal status as his ethnic identity, therefore falling within the race ground of the *Convention and Protocol Relating to the Status*
20 *of Refugees 1951* ('the Refugees Convention').[2] The Tribunal did not specify whether it considered the appellant's tribal status to be an aspect of his race or ethnicity, or membership of a particular social group.[3] Either way, there was no dispute before the Tribunal or before the Supreme Court that the discrimination and mistreatment suffered by the appellant was for the reason of one of the grounds specified in the Refugees Convention.

9. The appellant sought protection as a refugee on the basis of his well-founded fear of persecution for reasons of his membership of the Gabooye tribe, particularly in the form of serious discrimination and violation of his human rights at the hands of larger

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[1] Supreme Court judgment, [3]; Tribunal decision record, [26], Book of Documents p162.
[2] Supreme Court judgment, [3].
[3] These claims were recited as alternatives at [19] of the Tribunal decision record, Book of Documents p160, without any formal finding by the Tribunal as to which applied.

and stronger clans.[4] He also sought protection based on his actual or imputed political opinion as an opponent of Al-Shabaab, and feared abduction by Al-Shabaab or other militant groups upon his return to Somalia.[5] He further feared persecution as a member of the particular social group of "Somalis who have spent a significant amount of time overseas", on the basis that his return after a prolonged absence put him at greater risk of harm at the hands of Al-Shabaab.[6]

10. The harm suffered by the appellant by reason of his membership of the Gabooye tribe is set out under ground 2, below.

11. Under s6 of the RC Act, the Secretary of the Department of Justice or his/her delegate is required to assess whether an asylum seeker applicant is a refugee.[7] The term 'refugee' is defined by reference to whether a person is a refugee under the Refugees Convention, as amended by its Protocols.[8] The Secretary or delegate is also required to assess whether the applicant is entitled to complementary protection.[9]

12. The appellant's application for refugee status was unsuccessful. He subsequently applied to the Tribunal for merits review of the decision. After the Tribunal affirmed the decision of the Secretary's delegate, the appellant sought judicial review (described in the RC Act as an appeal[10]) of the Tribunal's decision in the Supreme Court of Nauru. The Supreme Court dismissed the appellant's application and affirmed the Tribunal's decision.

Part VI: Argument

A. Appeal lies to the High Court of Australia as of right

13. The *Nauru (High Court Appeals) Act 1976* (Cth) confers jurisdiction on the High Court to hear appeals from the Supreme Court of Nauru as provided in the agreement between Australia and Nauru appended as schedule 3 to that Act

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[4] Letter from appellant's representatives to Tribunal, 23 January 2015, p2, Book of Documents p84.
[5] Letter from appellant's representatives to Tribunal, 23 January 2015, p3, Book of Documents p85.
[6] Letter from appellant's representatives to Tribunal, 23 January 2015, p3, Book of Documents p85; Tribunal decision record, [57], Book of Documents p168.
[7] *Refugees Convention Act 2012 (Nr)*, s6.
[8] *Refugees Convention Act 2012 (Nr)*, s3.
[9] *Refugees Convention Act 2012 (Nr)*, s6.
[10] *Refugees Convention Act 2012 (Nr)*, s43.

('the Agreement').[11] Article 1(A)(b) of the Agreement provides that an appeal lies as of right from a final judgment of the Supreme Court of Nauru exercising original jurisdiction in a civil case. Article 1(B) of the Agreement provides that an appeal lies from a final judgment of the Supreme Court exercising appellate jurisdiction only with the leave of the High Court.

14. Section 44 of the *Appeals Act 1972 (Nr)* reflects the agreement between Australia and Nauru in the same way as the *Nauru (High Court Appeals) Act*. Under s44(a), an appeal to the High Court lies as of right from a final judgment of the Supreme Court of Nauru that is not an appeal from another court or tribunal. Under s44(c) of the *Appeals Act*, an appeal lies to the High Court of Australia from a judgment or order of the Supreme Court of Nauru in the exercise of its appellate jurisdiction with the leave of the High Court.

15. Although s43 of the RC Act uses the language of an appeal in relation to an appeal from the Tribunal to the Supreme Court, the Supreme Court is in fact exercising its original jurisdiction of judicial review of an administrative tribunal. The Supreme Court proceeding is the first time that judicial power is exercised in respect of the case, with all previous decisions, including the determination of the Secretary's delegate and the decision of the Tribunal, being the exercise of administrative power. It is not properly characterised as an appeal from a lower court.

16. This process is analogous to the provision in s44 of the *Administrative Appeals Tribunal Act 1975* (Cth), which provides for an appeal on a point of law from the Administrative Appeals Tribunal to the Federal Court. However, despite being described as an appeal and to some extent following appellate procedures, the Federal Court treats such an application as an exercise of its original jurisdiction in a "special class of proceeding".[12]

17. It follows that an appeal lies to the High Court as of right from the exercise of the original jurisdiction of the Supreme Court of Nauru in this case, pursuant to s5(1) of the *Nauru (High Court Appeals) Act*, read together with article 1(A)(b) of the Agreement and s44(a) of the *Appeals Act 1972* (Nr).

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[11] *Nauru (High Court Appeals) Act 1976* (Cth), s 5(1), sch 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*'.

[12] See division 33.2 of the *Federal Court Rules 2011* (Cth), particularly its placement in chapter 3 (original jurisdiction – special classes of proceedings) rather than chapter 4 (appellate jurisdiction).

B. Ground 1: The appellant was denied procedural fairness before the Tribunal

18. The Tribunal erred in failing to put to the appellant country information regarding the tribal composition of the police force in Somaliland and to give him an opportunity to comment on that information. That failure amounted to a breach of the specific procedure in s37 of the RC Act, or alternatively, procedural fairness as required by ss22 and 40 of the RC Act. The Supreme Court erred in failing to find that the Tribunal contravened any of those provisions in relation to that information.

The s37 procedure was not complied with

19. The definition of a refugee under the Refugees Convention requires that a person have a well-founded fear of persecution for one of the specified Convention purposes, be outside the country of his or her nationality, and be "unable or, owing to such fear, unwilling to avail himself of the protection of that country."[13] The availability of protection by state organs from feared persecution is thus a critical element of the definition of a refugee and a question that the Tribunal must consider in determining whether or not an applicant is a refugee.

20. The information before the Tribunal that the Somaliland police included some members from the appellant's tribe, the Gabooye, was relied on by the Tribunal to conclude that "he would have some redress from the acts of others."[14]

21. It follows that the country information suggesting the availability of state protection was part of the Tribunal's reason for affirming the decision under review. The context of the statement in the Tribunal's decision also demonstrates that it formed part of the Tribunal's reasoning in determining the threshold of persecution and the risk of future harm.

22. At the time of the decision,[15] s37 of the RC Act required the Tribunal to give to the appellant "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

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[13] Refugees Convention, art 1(A)(2).
[14] Tribunal decision record, [48], Book of Documents p 166.
[15] Section 37 of the RC Act was subsequently repealed by s24 of the *Refugees Convention (Derivative Status and Other Measures) (Amendment) Act 2016* (Nr), with effect from 23 December 2016. The amending Act in s6 provides: "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."

under review," and to give the appellant an opportunity to comment on or respond to that information. Section 37 is thus equivalent to ss424A and 424AA of the Australian *Migration Act*, except that it does not contain the exclusion of country information that appears in the Australian counterpart[16] and does not purport to form part of a procedural code that otherwise excludes the natural justice hearing rule.[17]

23. The Supreme Court of Nauru found that the Tribunal "made a factual finding in relation to the composition of the police forces in Somaliland" and accepted that the information on which that finding was based had not been put to the appellant.[18] Not having been put to the appellant, it is self-evident that he was not invited to comment on or respond to the information as required by s37(c). However, the Supreme Court found that the information "is not seen to be critical to the decision that the appellant did not suffer discrimination so as to amount to persecution for a Convention reason. There was therefore no breach of procedural fairness or of natural justice on behalf of the Tribunal."[19]

24. In finding that the information was "not critical to the decision", the Supreme Court of Nauru applied the wrong test to the Tribunal's obligation under s37 of the RC Act. The obligation in s37 to give particulars of information applies to "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", not information that is "critical to the decision".

25. In *SZBYR v Minister for Immigration and Citizenship*, the High Court plurality interpreted the identical language in s424A of the *Migration Act*, finding that the question of what constitutes information that would be part of the reason for affirming the decision must be determined by the statutory criteria for the decision, "independently of the Tribunal's particular reasoning on the facts of the case."[20] In the RC Act, the statutory criteria are the elements of the Refugee Convention definition. An essential element of that definition is the ability of a person to avail himself or herself of the protection of state authorities.

26. The Supreme Court therefore made an error of law in the threshold it applied to s37.

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[16] Cf s424A(3) *Migration Act 1958* (Cth).
[17] Cf s422B *Migration Act 1958* (Cth).
[18] Supreme Court judgment, [39] and [42].
[19] Supreme Court judgment, [42].
[20] *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190, [17] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

Alternatively, procedural fairness required by ss22 and 40 was not afforded to the appellant

27. In the alternative, even if s37 of the RC Act did not require the information regarding the tribal composition of the Somaliland police to be put to the appellant, because the information was not part of the reason for affirming the decision, the ordinary principles of procedural fairness did so require.

28. Section 22(b) of the RC Act provides that the Tribunal "must act according to the principles of natural justice and the substantial merits of the case." As there is no equivalent in the RC Act to s422B of the *Migration Act 1958* (Cth), which purports to exclude procedural fairness beyond the matters dealt with in the relevant division in the *Migration Act*, the obligation in s37 of the RC Act applies to augment, rather than replace, the principles of procedural fairness that would otherwise apply.

Scope of procedural fairness in the law of Nauru

29. The common law of Nauru incorporates the common law of England as at Nauruan independence on 31 January 1968, with such adaptation as considered by the Nauruan Courts to be necessary to the circumstances of Nauru.[21]

30. The edition of *Halsbury's Laws of England* current at the date of Nauruan independence said of natural justice:

> An order of prohibition may restrain, and an order or certiorari may be granted to bring up and quash the decision of, a person or body exercising judicial or quasi-judicial functions if he or it fails in its duty to act in good faith, and to listen fairly to both sides, and to give fair opportunity to the parties in the controversy adequately to present their case and to correct or contradict any relevant statement prejudicial to their view. ... **If a tribunal receives from a third party a document relevant to the subject matter of the proceedings, it should give both parties an opportunity of commenting on it.**[22]

31. The starting point of the content of procedural fairness in the law in Nauru is therefore that, under the applicable English common law, a document that is

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[21] *Custom and Adopted Laws Act 1971* (Nr), s4.

[22] *Halsbury's Laws of England* (3rd ed, 1955), vol 11, pp 64-66 (footnotes omitted, emphasis added). The authority relied on for the proposition in bold text is *B Johnson & Co (Builders) Ltd v Minister of Health* [1947] 2 All ER 395 (CA), 405 (Cohen LJ).

relevant to the subject matter of the proceeding should have been provided to the appellant and he should have been given an opportunity to comment on it. The threshold for such an opportunity is one of relevance to the proceeding, not that the document be "critical" to the decision.[23]

32. Given the congruence between the language of the RC Act and the corresponding provisions of Australia's *Migration Act* – albeit with the attempts to limit procedural fairness in the Australian Act being absent from the Nauruan Act – the interpretation of principles of procedural fairness by the High Court in the *Migration Act* context are pertinent to the interpretation of the scope of procedural fairness in s22(b) of the RC Act.

33. In *Minister for Immigration and Border Protection v SZSSJ*, a unanimous High Court held that the content of procedural fairness in a particular case requires a decision maker to adopt a procedure that is reasonable in the circumstances, affords an opportunity for the affected person to propound his or her case for a favourable exercise of the power, so as to avoid practical injustice to the affected person.[24] The High Court, elaborating on what was meant by "practical injustice", held that a reasonable opportunity to be heard will ordinarily include being put on notice of "the nature and content of information that the repository of power undertaking the inquiry **might take into account** as a reason for coming to a conclusion adverse to the person."[25]

34. The Tribunal in the present case clearly took into account the country information regarding the composition of the Somaliland police force and made explicit reference to it as part of the reason for its decision. The threshold for disclosure of that material and an opportunity for the appellant to comment on it as a matter of procedural fairness was passed. The respondent conceded before the Supreme Court that the issue had not been brought to the appellant's attention[26] and the Supreme Court accepted that was so.[27] The Supreme Court therefore erred in finding that there was no breach of procedural fairness because the issue was not critical to the Tribunal's decision.

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[23] Cf Supreme Court judgment, [42].
[24] *Minister for Immigration and Border Protection v SZSSJ* (2016) 90 ALJR 901, [82].
[25] *Minister for Immigration and Border Protection v SZSSJ* (2016) 90 ALJR 901, [83] (emphasis added).
[26] Supreme Court judgment, [39].
[27] Supreme Court judgment, [40].

35. Furthermore, s40(1) of the RC Act provides that 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."

36. The identical wording of s425(1) of the *Migration Act 1958* (Cth), according to the High Court in *SZBEL*, requires the Tribunal to identify the issues that arise in relation to the decision and to provide the appellant with a meaningful opportunity to respond. The Tribunal must provide the appellant with "the opportunity to satisfy the Tribunal's specific reservations about the applicant's case."[28]

10 37. The issue of the impunity of persons from other tribes who posed a threat to the appellant, and the capacity of the appellant to avail himself of the protection of state authorities from such threats, was a significant issue in this case. That is particularly so where the appellant had claimed – and the Tribunal had accepted – that he had previously been unable to claim protection from state authorities when he had been threatened with a Kalashnikov rifle by a member of another tribe,[29] when his mother had been robbed by a member of another tribe[30] and when his family had been forced off their land by members of another tribe.[31]

38. In the present case, the appellant was denied procedural fairness in circumstances where:

20 38.1 The hearing was conducted without any mention of the capacity of the appellant to avail himself of protection from the police, or of the tribal composition of the police force;

38.2 As a consequence the appellant was not provided with an opportunity to comment on the tribal composition of the police force or the underlying issue regarding his capacity to avail himself of police protection; and

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[28] *SZHKA v Minister for Immigration and Citizenship* (2008) 172 FCR 1, [7] (Gray J), summarising the principles from *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152.*

[29] Tribunal decision record, [27], Book of Documents p 162; transcript of Tribunal hearing 27 January 2015, p8, line 27 – p11, line 37, Book of Documents pp130-133.

[30] Tribunal decision record, [29], Book of Documents p 162; transcript of Tribunal hearing 27 January 2015, p18, line 13 – p19, line 9, Book of Documents pp140-141.

[31] Tribunal decision record, [16] and [28], Book of Documents pp 160 and 162.

38.3 Notwithstanding these matters, reliance was placed on the country information on tribal composition of the police to support a finding that the appellant could in fact seek redress from the police.[32]

C. Ground 2: The Supreme Court of Nauru applied the incorrect test to persecution

39. The Tribunal accepted that the appellant suffered significant discrimination on the basis of his Gabooye ethnicity or status, but found that the discrimination did not amount to persecution under the Refugees Convention and therefore under the RC Act. The appellant submits that the Tribunal applied an incorrect test to the question of persecution, in that it effectively required the deprivation of his human rights to be absolute, rather than a systematic and serious violation of his rights. In finding that the Tribunal applied the correct test, the Supreme Court made an error of law.

40. The Tribunal found that:

> the Gabooye are a minority clan or caste group within Somalia, who face a cultural stigma and discrimination within Somali society. They are viewed by many Somalis as dirty, relegated to work in undesirable and low-paying professions. Other harms by way of discrimination suffered by the Gabooye include difficulties accessing education due to bullying of students by majority clan members, societal taboos against inter-marriage between clans and a difficulties [sic] accessing justice due to the dominance of the government and courts by majority clans.[33]

41. In relation to the specific experience of the appellant, the Tribunal found, among other harm:

41.1 Shortly after the appellant left Somalia, his family was forced off their land by members of a higher tribe "as a result of their lowly status";[34]

41.2 The appellant was prevented from accessing higher education "as a result of his tribal membership";[35]

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[32] *ABV16 v Minister for Immigration and Border Protection* [2017] FCA 184, [29]-[31] (Bromberg J).
[33] Tribunal decision record, [36], Book of Documents p 163.
[34] Tribunal decision record, [16] and [28], Book of Documents pp 160 and 162.
[35] Tribunal decision record, [30] and [48], Book of Documents pp 163 and 166.

41.3 The appellant may be restricted to working in lowly paid employment, but would be able to subsist;[36]

41.4 The appellant had been threatened by a member of a majority tribe with a Kalashnikov rifle during a football match, and was able to seek informal help from neighbours (but not police);[37] and

41.5 The appellant's mother had been robbed and the police did not help her.[38]

42. The taking of his family's land on the basis of their tribal status was said by the Tribunal not to constitute persecution because it had previously been vacant land to which they had no title, even though the same applied to the people who forced them from it. The Tribunal emphasised that the appellant had had *some* education and would be able to access *some* forms of employment to justify a conclusion that the discrimination he faced in those aspects of his life did not constitute persecution.

43. In focusing on whether the appellant faced total deprivation of his rights to property, education and work (all of which are rights guaranteed under the Universal Declaration of Human Rights[39]), rather than whether he faced a sustained and systematic breach of those rights, the Tribunal applied the wrong test of persecution within the meaning of the Refugees Convention and thus the RC Act.

44. The Supreme Court fell into the same error, accepting the respondent's submission that because the appellant's family had managed to subsist in Somalia despite their Gabooye tribal status, the discrimination faced by the appellant as a member of the Gabooye tribe did not amount to persecution.[40]

45. The United Nations High Commission on Refugees (UNHCR) Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status provides the following analysis for when discrimination will amount to persecution within the meaning of the definition of refugee under the Refugees Convention:

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[36] Tribunal decision record, [48], Book of Documents p 166.
[37] Tribunal decision record, [27], Book of Documents p 162; transcript of Tribunal hearing 27 January 2015, p8, line 27 – p11, line 37, Book of Documents pp130-133.
[38] Tribunal decision record, [29], Book of Documents p 162; transcript of Tribunal hearing 27 January 2015, p18, line 13 – p19, line 9, Book of Documents pp140-141.
[39] *Universal Declaration of Human Rights*, GA Res 217A (III), adopted 10 December 1948, UN Doc A/810, articles 17, 23 and 26.
[40] Supreme Court judgment, [30]-[31].

> It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.[41]

46. In *Applicant A v Minister for Immigration and Multicultural Affairs*,[42] decided when Australia's *Migration Act* defined 'refugee' by reference to the Refugees Convention (as the RC Act does), before the more restrictive statutory definition was enacted, McHugh J observed:

> Persecution for a Convention reason may take an infinite variety of forms from death or torture **to the deprivation of opportunities to compete on equal terms with other members of the relevant society.** Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group.[43]

47. The Supreme Court of Canada in the seminal case of *Canada (Attorney-General) v Ward*[44] adopted the definition of "sustained or systematic violation of basic human rights demonstrative of a failure of state protection" as informing the definition of 'persecution' under the Refugee Convention.[45] La Forest J noted that the preamble to the Refugees Convention invoked the United Nations Charter and the Universal Declaration of Human Rights, observing: "Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination."[46] Discrimination that amounts to systematic violation of

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[41] United Nations High Commission on Refugees (UNHCR) Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, Geneva, December 2011, [54]. That passage is repeated verbatim in the Republic of Nauru's *Refugee Status Determination Handbook*, August 2013, 32.

[42] (1997) 190 CLR 225.

[43] *Applicant A v Minister for Immigration and Multicultural Affairs* (1997) 190 CLR 225, [89] (McHugh J) (emphasis added); adopted by the majority in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, [20] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[44] [1993] 2 SCR 689.

[45] *Canada (Attorney-General) v Ward* [1993] 2 S.C.R. 689, 734 (La Forest J). This definition draws from the academic writing of Hathaway and Goodwin-Gill, who have also been influential in the development of the law in the United Kingdom, New Zealand and Australia.

[46] *Canada (Attorney-General) v Ward* [1993] 2 S.C.R. 689, 733 (La Forest J)

human rights under international law has thus been taken by the Canadian courts to be persecution under the Refugees Convention.

48. The Canadian definition, drawn from Hathaway, is also followed in New Zealand.[47]

49. The systematic deprivation of the human rights of a person based on a Convention ground (in this case, the appellant's ethnicity and/or membership of a particular social group as a member of the Gabooye clan), is an affront to that person's human dignity so as to constitute persecution.[48] The prospect of having one's land taken by members of another clan with impunity, exclusion from higher education that is open to members of other clans, and restriction to all but the most unpleasant and menial forms of work, with the likelihood that such exclusion and deprivation will continue into the future, are each sufficient to constitute persecution within the meaning of the Convention. Even if these incidents were not enough on their own to constitute persecution, the test of persecution must have regard to the cumulative effect of multiple discriminatory measures,[49] with the result that the combination of these forms of discrimination amounts to persecution.

50. In any case, it is not necessary for this Court to determine whether or not the discrimination complained of by the appellant, which the Tribunal and the Supreme Court accepted, in fact constituted persecution. It is enough for this Court to determine that the Supreme Court erred in the test it applied in judicially reviewing the Tribunal's assessment of persecution.

51. It follows that the Supreme Court of Nauru erred in applying the test for persecution under s6 of the RC Act, by reference to the Refugees Convention definition, in that it:

    51.1 Applied the incorrect threshold of requiring complete deprivation of the appellant's human rights, rather than a serious restriction on those rights; and/or

    51.2 Failed to assess multiple forms of discrimination cumulatively.

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[47] See for example *Refugee Appeal No 71687* [1999] NZRSAA 250 (28 September 1999).
[48] *Canada (Attorney-General) v Ward* [1993] 2 S.C.R. 689.
[49] United Nations High Commission on Refugees (UNHCR) Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, Geneva, December 2011, [55]; Republic of Nauru, *Refugee Status Determination Handbook*, August 2013, 32.

D. Ground 3: No longer pressed

52. Ground 3 in the notice of appeal filed on 8 March 2017– that the Supreme Court of Nauru failed to consider one or more of the grounds of appeal raised by the appellant, namely grounds 1(d) and/or 1(f) of the appellant's notice of appeal – is no longer pressed.

Part VII: Legislative provisions

53. The particular legislative provisions and international treaties applicable to the questions the subject of the appeal are attached as an annexure.

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Part VIII: Orders sought

54. The orders sought by the Appellant are:

54.1 The appeal be allowed.

54.2 Set aside the order of the Supreme Court of Nauru and in lieu thereof order that the matter be remitted to the Refugee Status Review Tribunal.

54.3 The respondent pay the costs of the appellant.

54.4 Such further or other orders as the Court deems appropriate.

Part IX: Oral argument

20 55. The Appellant estimates that he will require three hours to present oral argument.

Dated: 12 April 2017

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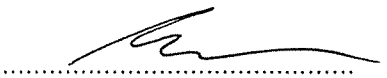

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REPUBLIC OF NAURU

Refugees Convention Act 2012

As in force from 21 May 2014

This consolidation comprises Act No. 12 of 2012 as amended and in force from 21 May 2014 (being, at the time the consolidation was prepared on 26 September 2014, the date of commencement of the most recent amendment).

The notes section at the end of the consolidation includes a reference to the law by which each amendment was made. The Table of Amendments in the notes section sets out the legislative history of individual provisions.

The operation of amendments that have been incorporated in the text of the consolidation may be affected by application provisions that are set out in the notes section at the end of the consolidation

This consolidation is prepared and published in a legislation database by the Department of Justice and Border Control under the *Legislation Publication Act 2011*.

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;

'complementary protection' means 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;

'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;

'dependent' of a person means:

(a) the person's spouse other than a spouse from whom he or she is formally separated; or

(b) the person's child under the age of 18 years; or

(c) someone dependent on the person for financial, emotional, psychological or physical support;

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

'*derivative status*' means the status granted to a family member of or dependant of a person who has been determined to be a refugee.

'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 Principle of Non-Refoulement

(1) 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.

(2) The Republic must not expel or return any person to the frontiers of territories in breach of its international obligations.

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.

(1A) A person may include family members and dependents in an application for refugee status.

(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 or is owed complementary protection.

(2) Dependents of an asylum seeker recognised as a refugee or owed complementary protection must be given derivative status.

(3) 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 or is owed complementary protection, 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

(iii) to provide information required by the Secretary, within the period specified, for the purposes of the determination; and

(iv) to consent to the release by any other person of relevant documents or information relating to the asylum seeker; and

(v) if the Secretary believes on reasonable grounds that the asylum seeker has in his or her possession or control a document relating to the asylum seeker (including a passport or travel document)—to produce the document; and

(vi) to verify, by statutory declaration or on oath or affirmation, information provided to the Secretary; and

(b) may seek information from any other source and for that purpose may, if the Secretary believes on reasonable grounds that a person has in his or her possession or control a document relating to the asylum seeker (including a passport or travel document)—require the person to produce the document; and

21 Sittings

(1) Sittings of the Tribunal are to be held from time to time as required, in such places in Nauru as are convenient.

(2) The Tribunal constituted by 3 members may sit and exercise the powers of the Tribunal even though the Tribunal constituted by another 3 members is at the same time sitting and exercising those powers.

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) written arguments relating to the issues arising in relation to the determination or decision under review.

(2) The Secretary may give the Registrar written argument relating to the issues arising in relation to the determination or decision under review.

36 Tribunal may seek information

In conducting a review, the Tribunal may:

(a) invite, either orally (including by telephone) or in writing, a person to provide information; and

(b) obtain, by any other means, information that it considers relevant.

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 to comment on or respond to the information.

38 *[Repealed]*

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.

(2) This section does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review, in order to enable the applicant's appearance before it as rescheduled.

Division 3 – Miscellaneous

42 Rights conferred by this Part additional to other rights

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

PART 5 – APPEAL

43 Jurisdiction of Supreme Court

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

(2) The parties to the appeal are the appellant and the Republic.

(3) The notice of appeal must be filed within 28 days after the person receives the written statement of the decision of the Tribunal.

(4) The notice of appeal must:

(a) state the grounds on which the appeal is made; and

(b) be accompanied by the supporting materials on which the appellant relies.

Note for section 43

Under section 44(c) of the Appeals Act 1972, an appeal lies to the High Court of Australia, with the leave of the High Court, against any judgment, decree or order of the Supreme Court in the exercise of its appellate jurisdiction under Part III of the Appeals Act or under any other written law.

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;

REPUBLIC OF NAURU

REFUGEES CONVENTION (DERIVATIVE STATUS & OTHER MEASURES) (AMENDMENT) ACT 2016

No. 56 of 2016

An Act to amend the Refugees Convention Act 2012

Certified: 23rd December 2016

Table of Contents

24 Repeal section 37

25 Amendment of section 43(1)

Omit

Section 43(1)

Substitute

(1) A person may appeal to the Supreme Court against a decision of the Tribunal on a point of law.

26 Insert new section 43(1A)

(1A) Despite section 43(1), the Supreme Court has no jurisdiction in respect of a determination by the Tribunal that a person is not to be given derivative status.

27 Repeal Note for section 43

REPUBLIC OF NAURU

Appeals Act 1972

As in force from 15 April 2011

This compilation comprises Act No. 1 of 1972 as amended and in force from 15 April 2011 (being, at the time the compilation was prepared on 17 May 2011, the date of commencement of the most recent amendment).

The notes section at the end of the compilation includes a reference to the law by which each amendment was made. The Table of Amendments in the notes section sets out the legislative history of individual provisions.

The operation of amendments that have been incorporated in the text of the compilation may be affected by application provisions that are set out in the notes section at the end of the compilation.

This compilation is prepared and published in a legislation database by the Nauru Parliamentary Counsel under the *Legislation Publication Act 2011*.

43 Costs of appeal

On the hearing and determination of an appeal, or of an application for leave to appeal, under this Part, the High Court may order the payment of such costs as it thinks just.

PART VI – APPEALS FROM THE SUPREME COURT IN OTHER CAUSES AND MATTERS

44 Appeals from the Supreme Court

Subject to the provisions of section 45, an appeal shall lie to the High Court:

(a) against any final judgment, decree or order of the Supreme Court in any cause or matter, not being a criminal proceeding or an appeal from any other Court or tribunal;

(b) with the leave of the trial judge or the High Court, against any judgment, decree or order, not being a final judgment, decree or order, of the Supreme Court in any cause or matter, not being a criminal proceeding or an appeal from any other Court or tribunal; and

(c) with the leave of the High Court, against any judgment, decree or order of the Supreme Court in the exercise of its appellate jurisdiction under Part III of this Act or under any other written law, except Part II of this Act;

and the High Court has jurisdiction to hear and determine the appeal.

45 No appeal in certain cases

No appeal shall lie under this Part:

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

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

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

Nauru (High Court Appeals) Act 1976

Act No. 151 of 1976 as amended

This compilation was prepared on 10 July 2008
taking into account amendments up to Act No. 73 of 2008

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

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.

Migration Act 1958

No. 62, 1958

Compilation No. 134

Compilation date:	23 February 2017
Includes amendments up to:	Act No. 10, 2017
Registered:	6 March 2017

This compilation is in 2 volumes

Volume 1:	sections 1–261K
Volume 2:	**sections 262–507**
	Schedule
	Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

Division 4—Part 7-reviewable decisions: conduct of review

422B Exhaustive statement of natural justice hearing rule

(1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.

(2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

(3) In applying this Division, the Tribunal must act in a way that is fair and just.

423 Documents to be given to the Tribunal

(1) An applicant for review by the Tribunal may give the Registrar:
  (a) a statutory declaration in relation to any matter of fact that the applicant wishes the Tribunal to consider; and
  (b) written arguments relating to the issues arising in relation to the decision under review.

(2) The Secretary may give the Registrar written argument relating to the issues arising in relation to the decision under review.

423A How Tribunal is to deal with new claims or evidence

(1) This section applies if, in relation to an application for review of an RRT-reviewable decision (the ***primary decision***) in relation to a protection visa, the applicant:
  (a) raises a claim that was not raised in the application before the primary decision was made; or
  (b) presents evidence in the application that was not presented in the application before the primary decision was made.

being relied on in affirming the decision that is under review; and

(ii) orally invite the applicant to comment on or respond to the information; and

(iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and

(iv) if the applicant seeks additional time to comment on or respond to the information—adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

(2) A reference in this section to affirming a decision that is under review does not include a reference to the affirmation of a decision that is taken to be affirmed under subsection 426A(1F).

424A Information and invitation given in writing by Tribunal

(1) Subject to subsections (2A) and (3), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear 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; 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 decision that is under review; and

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

(2) The information and invitation must be given to the applicant:

(a) except where paragraph (b) applies—by one of the methods specified in section 441A; or

(b) if the applicant is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.

(2A) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 424AA.

(3) This section does not apply to information:

(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

(b) that the applicant gave for the purpose of the application for review; or

(ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or

(c) that is non-disclosable information.

(4) A reference in this section to affirming a decision that is under review does not include a reference to the affirmation of a decision that is taken to be affirmed under subsection 426A(1F).

424B Requirements for written invitation etc.

(1) If a person is:

(a) invited in writing under section 424 to give information; or

(b) invited under section 424A to comment on or respond to information;

the invitation is to specify the way in which the information, or the comments or the response, may be given, being the way the Tribunal considers is appropriate in the circumstances.

(2) If the invitation is to give information, or comments or a response, otherwise than at an interview, the information, or the comments or the response, are to be given within a period specified in the invitation, being a prescribed period or, if no period is prescribed, a reasonable period.

425 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 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; or
  (c) subsection 424C(1) or (2) applies to the applicant.

(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

425A Notice of invitation to appear

(1) If the applicant is invited to appear before the Tribunal, the Tribunal must give the applicant notice of the day on which, and the time and place at which, the applicant is scheduled to appear.

(2) The notice must be given to the applicant:
  (a) except where paragraph (b) applies—by one of the methods specified in section 441A; or
  (b) if the applicant is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.

(3) The period of notice given must be at least the prescribed period or, if no period is prescribed, a reasonable period.

(4) The notice must contain a statement of the effect of section 426A.

426 Applicant may request Tribunal to call witnesses

(1) In the notice under section 425A, the Tribunal must notify the applicant:

CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES

Text of the 1951 Convention
Relating to the Status of Refugees

Text of the 1967 Protocol
Relating to the Status of Refugees

Resolution 2198 (XXI) adopted by the
United Nations General Assembly

---

with an
Introductory Note
by the Office of the
United Nations High Commissioner for Refugees

CHAPTER I: General Provisions

Article 1

DEFINITION OF THE TERM "REFUGEE"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B.(1) For the purposes of this Convention, the words "events occurring