

Nauruan refugee appeals in the High Court of Australia: *CRI026*, *DWN027* and *EMP144*

Last updated: May 2020

This casenote provides an overview of the key facts and findings of the High Court of Australia in three refugee status determination cases on appeal from the Supreme Court of Nauru: *CRI026 v The Republic of Nauru* [2018] HCA 19; *DWN027 v The Republic of Nauru* [2018] HCA 20; and *EMP144 v The Republic of Nauru* [2018] HCA 21.

Introduction

The High Court of Australia heard the appeals of *CRI026 v The Republic of Nauru* ('*CRI026*'), *DWN027 v The Republic of Nauru* ('*DWN027*'), and *EMP144 v The Republic of Nauru* ('*EMP144*') in Canberra on 16 May 2018.¹ Under section 44 of the now repealed *Appeals Act 1972* (Nr), a party to a proceeding in the Supreme Court of Nauru had the right to appeal any judgment, decree or order to the High Court of Australia. Of the 23 appeals commenced in the High Court on asylum seeker matters, seven were resolved prior to hearing and 16 were resolved by judgment, with seven appeals allowed and nine dismissed (including one application for special leave to appeal).

In January 2018, the Government of Nauru indicated its intention to abolish the right of appeal to the High Court, raising concerns about the justice system in Nauru, particularly in relation to asylum seeker appeals.² However, on 15 May 2018, the *Nauru Court of Appeal Act 2018* (Nr) came into effect, providing that the Nauru Court of Appeal has exclusive power and jurisdiction to hear and determine appeals from the Supreme Court under the *Refugees Convention Act 2012* (Nr) ('*Refugees Convention Act*').³ Henceforth, future appeals from the Supreme Court will be directed to the Court of Appeal, as opposed to the High Court. The Court of Appeal has yet to commence the hearing of appeals.

Facts

The appeals of *CRI026*, *DWN027* and *EMP144* raised multiple grounds, although each had in common a ground relating to the relevance (or irrelevance) of internal relocation to the

assessment of Nauru's complementary protection obligations. The High Court addressed this ground in detail in *CRI026*, and referred back to this judgment in *DWN027* and *EMP144*.

Each appellant claimed a well-founded fear of persecution on the basis of his actual or imputed political opinion. *CRI026*, a Pakistani national, claimed he had injured a member of the Muttahida Qaumi Movement ('MQM') in a cricket match, and that the MQM were seeking revenge against him for inflicting this injury. *DWN027*, a Sunni Muslim from Peshawar, Pakistan, alleged that the Pakistani Taliban were targeting him and his family, and had assaulted him four times during 2013. *EMP144* was a Nepali national with connections to the Rastriya Prajatantra Party, the pro-Royalist party. The opposing party, the Communist Party-Maoist, took over the appellant's village, allegedly beating and humiliating the appellant and his uncle.

In respect of each of the claims of *CRI026*, *DWN027* and *EMP144* to refugee status or complementary protection, the Nauru Refugee Status Review Tribunal (the 'Tribunal'), concluded that relocation within each appellant's country of origin was both relevant and reasonable to avoid the risk of harm.⁴ Upon appeal to the Supreme Court of Nauru pursuant to section 43 of the *Refugees Convention Act*, the Court held that the Tribunal had not erred in applying a test of reasonable relocation to the appellants' claims for complementary protection.⁵

Key issue

The key issue that fell to be determined by the High Court in each case was whether, in assessing Nauru's complementary protection obligations, the Tribunal had erred in taking into account the appellants' capacity to internally relocate to avoid the risk of harm.

Relevant law

The refugee status determination process in Nauru is governed by the *Refugees Convention Act*. Section 4 of that Act provides that Nauru must not expel or return a refugee to the frontiers of territories where he or she would be persecuted, or where such expulsion or return would constitute a breach of Nauru's international obligations.

Section 3 of the Act adopts the definition of 'refugee' set out in Art 1A(2) of the 1951 Convention Relating to the Status of Refugees (the 'Convention'),⁶ of any person outside his or her country of nationality who is unable or unwilling for reasons of race, religion, membership of a particular social group or political opinion, to avail himself or herself of that country's protection. Section 3 further defines 'complementary protection' as protection for those who do not fall within the definition of 'refugee', but nonetheless cannot be returned to his or her country of nationality as this would result in Nauru breaching its obligations under international law. Internationally, the concept is also referred to variously as 'subsidiary protection' or 'humanitarian protection'.

The concept of an ‘internal relocation alternative’ is not one that is defined in the Act or the Convention, although it is widely accepted that it refers to the existence of an area in an applicant’s country of origin to which the applicant may relocate to avoid the risk of persecution or serious harm. Hathaway and Foster identify a number of matters relevant to the question of whether relocation would be relevant and reasonable, including:⁷

- Can the applicant safely, legally and practically access an internal site of protection?
- Will the applicant enjoy protection from the original risk of being persecuted?
- Will the site provide protection against any new risks of being persecuted or of any indirect *refoulement*?
- Will the applicant have access to basic civil, political and socio-economic rights provided by the home country or State?

The Supreme Court of Nauru has referred to this list of matters with approval.⁸ However, international jurisprudence varies in regard to the requisite level of protection of socio-economic rights for an international relocation alternative to be considered available.⁹

Judgment

The High Court comprising Kiefel CJ, Gageler and Nettle JJ unanimously upheld the decisions of the Supreme Court of Nauru.¹⁰

Their Honours commenced their examination of the relevance of the ability to reasonably relocate to any entitlement to complementary protection by dealing with the appellant’s reliance upon the authority of the Full Court of the Federal Court of Australia in *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211. In that case, the Full Court said:

“... the International Human Rights Treaties do not require the non-citizen to establish that the non-citizen could not avail himself or herself of the protection of the receiving country or that the non-citizen could not avail himself or herself of the protection of the receiving country or that the non-citizen could not relocate within that country.”¹¹

The High Court said that this statement must be viewed in context. The Full Court was merely highlighting how international jurisprudence is of limited utility in interpreting the codified complementary protection regime in the Australian *Migration Act 1958* (Cth). Provisions of the *Migration Act* expressly provide that an applicant for complementary protection must demonstrate the absence of an internal relocation alternative, while, according to the High Court in the above quoted statement, the international treaties are silent on the issue.

The Court then proceeded to embark on a comprehensive survey of relevant international jurisprudence. First, the Court turned to jurisprudence of the European Court of Human Rights (the ‘ECtHR’) on Art 3 of the European Convention on Human Rights (the ‘ECHR’),¹² which contains the prohibition on torture, inhuman or degrading treatment or punishment. A distinct line of authority has emerged from the ECtHR, beginning with *Hilal v United Kingdom*,¹³ recognising that reasonable internal relocation may, in some circumstances,

provide a reliable guarantee against the risk of serious harm and disentitle the applicant to subsidiary protection. This reasoning was followed subsequently in *Salah Sheekh v The Netherlands*,¹⁴ *Omeredo v Austria*,¹⁵ and *Sufi and Elmi v United Kingdom*.¹⁶

Second, the Court noted similar jurisprudence on Art 7 of the International Covenant on Civil and Political Rights (the 'ICCPR'), the equivalent provision to Art 3 of the ECHR.¹⁷ For example, in *SYL v Australia*,¹⁸ the United Nations Human Rights Committee found that a Timor-Leste national was not eligible for complementary protection due to a health condition that would purportedly be exacerbated if returned because it was not unreasonable for the applicant to relocate internally to a location where adequate healthcare was available.¹⁹

The Court then dealt comprehensively with other arguments advanced by the appellants. First, the Court dismissed the submission that, if reasonable internal relocation was relevant to the assessment of complementary protection, it would be incumbent upon an applicant to undertake the 'practically impossible task' of proving there was no place in his or her home country to which he or she could reasonably relocate. The Court recognised that the burden of proof does not lie on the applicant; rather, it is for the decision-maker to satisfy his or herself that a reasonable internal relocation alternative is available by reverting to relevant and reliable information.²⁰

Second, the Court dealt with the submission that, given the relevance of internal relocation to a State's *non-refoulement* obligations vis-à-vis an applicant facing a real risk of persecution stems from the Convention definition of 'refugee', and such terminology is not used in the ICCPR, the same logic does not apply to import a test of reasonable internal relocation to the assessment of complementary protection against a reasonable likelihood of the serious harm prohibited by the ICCPR. The Court considered that this did not follow. *Non-refoulement* obligations are accepted as being implicit in the ICCPR. If an applicant for complementary protection is able to avoid a reasonable likelihood of serious harm in his or her country by reasonable internal relocation, a risk of such harm is not a necessary or foreseeable consequence of the applicant's refoulement, and the host country's complementary protection obligations are not activated.²¹

Third, counsel for the appellants submitted that expecting an applicant for complementary protection to relocate internally to avoid the risk of harm impinges upon the applicant's freedom of movement. The Court rejected this submission on four grounds: first, the decision whether to relocate always remains with the applicant;²² second, the host state is only obliged to protect freedom of movement within its territory and not in the country of nationality;²³ third, there is no international jurisprudence that lends support to this proposition that a state's *non-refoulement* obligations are informed by an applicant's right to freedom of movement;²⁴ and fourth, allowing an applicant to remain unlawfully within the territory of host state would do nothing to remedy any violation of freedom of movement in the country of nationality.²⁵

Orders

Having determined the key issue in favour of the respondent, the High Court proceeded to dispose of the remaining grounds. In each case, the High Court made orders dismissing the appeals with costs.²⁶

Implications

Given the appellants exercised their statutory rights of appeal to the High Court, they exhausted their appellate rights and became liable to be removed to their countries of nationality, with the potential to file additional claims being the only option to further pursue a favourable refugee status determination.

The wider implications of the decisions were also substantial. The decisions narrowed the scope of complementary protection and effectively disposed of outstanding cases in Nauru in which asylum seekers' claims to protection rested upon a threat of regionalised (as opposed to whole-of-country) harm.

The application of a reasonable relocation test to complementary protection is in keeping with the 'surrogate' nature of the Convention, under which claimants are granted protection only where their country of nationality is unwilling or unable to provide protection from the anticipated persecution.²⁷ Complementary protection is, by definition, intended to 'complement' the Convention.

Furthermore, any contrary finding would open the doors for a very expansive range of claimants to be granted protection, further straining already over-burdened resettlement agencies and host countries. This is a challenge currently being contended in South Africa, which has introduced a definition of 'refugee' into its domestic legislation that is inclusive of persons who face a threat of persecution 'in part... of his country of origin'.²⁸ A narrower interpretation of the nature of complementary protection, as found by the High Court, is therefore necessary to ensure protection is granted to those who need it most.

Author: Esther Pearson

Refugee Status Determination Officer at the Government of Nauru and former Associate at the Supreme Court of Nauru

Endnotes

¹ Pleadings, hearing transcripts and judgments in these appeals are available at:

<https://www.hcourt.gov.au/cases/case_m131-2017> for *CRI026*;

<https://www.hcourt.gov.au/cases/case_m145-2017> for *DWN027*; and

<https://www.hcourt.gov.au/cases/case_m151-2017> for *EMP144*.

² See, eg, Melissa Clarke, 'Justice in Nauru curtailed as Government abolishes appeal system' (*ABC News*, 2 April 2018) <<http://www.abc.net.au/news/2018-04-02/nauru-now-without-court-of-appeal/9609524>>; Michaela Whitbourn, 'Asylum seekers in limbo as Nauru scraps appeals to High Court of Australia' (*Sydney Morning Herald*, 2 April 2018) <<https://www.smh.com.au/national/asylum-seekers-in-limbo-as-nauru-scraps-appeals-to-high-court-of-australia-20180402-p4z7e2.html>>.

³ *Nauru Court of Appeal Act 2018* (Nr) s 57.

⁴ *CRI026 v The Republic of Nauru* [2018] HCA 19 (16 May 2018) [16]; *DWN027 v The Republic of Nauru* [2018] HCA 20 (16 May 2018) [7]; *EMP144 v The Republic of Nauru* [2018] HCA 21 (16 May 2018) [12].

⁵ *CRI026* [9]; *DWN027* [8]; *EMP144* [13].

⁶ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

⁷ James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 361.

⁸ *ULA007 v The Republic of Nauru* [2017] NRSC 40 (22 June 2017) [62] (per Crulci J).

⁹ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 124.

¹⁰ *CRI026* [10]; *DWN027* [11]; *EMP144* [45].

¹¹ *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211 [18] (per Lander, Jessup and Gordon JJ).

¹² *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1950).

¹³ *Hilal v United Kingdom* (European Court of Human Rights, Third Section, Application No 45276/99, 6 March 2001) [67]-[68].

¹⁴ *Salah Sheekh v The Netherlands* (European Court of Human Rights, Third Section, Application No 1948/04, 11 January 2007) [141].

¹⁵ *Omeredo v Austria* (European Court of Human Rights, First Section, Application No 8969/10, 20 September 2011) 5.

¹⁶ *Sufi and Elmi v United Kingdom* (European Court of Human Rights, Fourth Section, Application Nos 8319/07 and 1149/07, 28 June 2011) [35].

¹⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS (entered into force 3 January 1976).

¹⁸ Human Rights Committee, *Views: Communication No 1897/2009*, 108th sess, UN Doc CCPR/C/108/D/1897/2009, 11 September 2013 ('*SYL v Australia*').

¹⁹ See also Human Rights Committee, *Views: Communication No 2053/2011*, 112th sess, UN Doc CCPR/C/112/D/2053/2011, 16 October 2014 ('*BL v Australia*').

²⁰ *CRI026* [39].

²¹ Ibid [43].

²² Ibid [45].

²³ Ibid [46].

²⁴ Ibid [47].

²⁵ Ibid [48].

²⁶ *CRI026* [81]; *DWN027* [33]; *EMP144* [50].

²⁷ See Hathaway and Foster, above n 7, 133–134; *Canada (Attorney General) v Ward* [1993] 2 SCR 688 (25 March 1993) 709; *AC (Russia) v Immigration and Protection Tribunal New Zealand* [2012] NZIPT 800151 (25 June 2015).

²⁸ *Refugee Act 1998* (SA) s 2, implementing Art 1(2) the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974).