IN THE SUPREME COURT OF NAURU

AT YAREN

Cases No. 45 and 46 of 2016

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T15/00228 and T15/00179, brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

HFM 005 Appellants

HFM 007

AND

THE REPUBLIC Respondent

Before: Justice Freckelton

Appellant: Ms T. Baw
Respondent: Mr A. Aleksov

Date of Hearing: 6 December 2017
Date of Judgment: 19 April 2018

CATCHWORDS

APPEAL – Convention on the Rights of the Child – complementary protection – best interests of the child – derivative status – failure to order a medical report – mental health of child – APPEAL DISMISSED.

JUDGMENT

1. This matter is before the Court pursuant to s 43 of the *Refugees Convention Act* 2012 ("the Act") which provides that:

   > *(1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.*
   >
   > *(2) The parties to the appeal are the Appellant and the Republic.*
   >
   > ...

2. A "refugee" is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951 ("the Refugees Convention")*, as modified by the *Protocol Relating to the Status of Refugees 1967* ("the Protocol"), as any person who:

   > "*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 to, 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, is unable to or, owing to such fear, is unwilling to return to it ...*"

3. Under s 3 of the Act, complementary protection means "protection for people who are not refugees but who also cannot be returned or expelled to the frontiers or territories where this would breach Nauru's international obligations."

4. The determinations open to this Court are defined in s 44(1) of the Act:

   > *(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.*

5. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on 28 August 2016 affirming the decisions of the Secretary of the Department of Justice and Border Control ("the Secretary") of 11 October 2015 that the Appellants are not recognised as refugees under the Refugees Convention as amended by the 1967 Protocol and are not owed complementary protection under the Act.

6. The Appellants filed a Notice of Appeal on 8 December 2016 and an Amended Notice of Appeal on 9 June 2017. The Appellants filed a Further Amended Notice of Appeal on 6 December 2017.

BACKGROUND

7. The First Appellant, HFM 007, is the husband of the Second Appellant, HFM 005. The First Appellant was born in a small village in Nuwakot, in the hills of Nepal. The second Appellant was born in Kavra, also in Nepal. The Appellants have two children.

8. The First Appellant claims a fear of harm on account of his political opinion and the connection between his family and family name to the Nepali Congress Party ("NCP"). The Second Appellant claims a fear of being killed by the Communist Party of Nepal, which opposed the NCP, because they had killed the First Appellant's brother and uncle, and tortured his cousin.

9. The First and Second Appellants have two children, AB (born 28 August 2003) and AAB (born 8 June 2012), whose details they provided at their transfer interview and in their applications for refugee status determination.[1] Minor identity cards for both children were provided by their parents.[2]

10. The Appellants fled Nepal for Australia via Bangladesh, Malaysia, and Indonesia in July 2013. They arrived on Christmas Island on 15 September 2013, and were transferred to Nauru on 12 April 2014.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

11. The First Appellant attended a Refugee Status Determination ("RSD") interview on 10 September 2014. He said that he was not interested in politics and served his country through the military. The First Appellant claimed that around 1998 Maoists would visit his village and try to recruit young Nepalese, and if the youth refused they would be threatened, harmed or killed. He said that in early 2002 the Maoists visited his village and tried to recruit him. In May 2002, the Maoists visited the village again and took his cousin, who was found the next morning in a river, having been tortured and left to die. In August 2002, the Maoists tied up the First Appellant's uncle and brother, and told his father that they would kill them if he did not withdraw from the army. The following day, his uncle's body was discovered in the jungle near the village.[3]

12. About three days after the First Appellant returned to his village subsequent to the murder of his uncle, the Maoists approached him and insisted that he join them. The First Appellant agreed, but asked for one week to organise his affairs. During this period, he fled to Lalitpur with his wife, parents, sister-in-law and niece. He claimed that, since fleeing the village, the Maoists have been using their property as an office, and have told everyone in the village that the First Appellant would be killed for refusing to join them.[4]

13. In 2003, the First Appellant found work in Macau working as security for a casino. In 2006, the Maoists came to his family's home in Lalitpur and threatened his father. Due to this incident, the family moved to Charbel, a suburb of Kathmandu. In 2009, the Maoists visited the First Appellant's wife (the Second Appellant) and made threats against the First Appellant. Due to this, the family moved again, this time to Kapan, another suburb of Kathmandu. The First Appellant returned to live in Nepal in 2011, but was identified by Maoists who came to the Appellants'

[1] Book of Documents ("BD") 46.
[2] BD 89, 90.
[3] BD 107.
[4] BD 107-108.

home and threatened him in early 2013. As a result of these threats, in July 2013, the Appellants departed Nepal with their two children.[5]

14. The Second Appellant also attended an RSD interview on 10 September 2014. Her evidence in that interview was largely consistent with that of her husband. She claimed to have married her husband in 2001, and that he was a supporter of the NCP, but not politically active. However, the Second Appellant claimed that the Maoists interrogated her, as opposed to the First Appellant's father, during the Maoists' visit in 2006, and that the Maoists also made threats against the Appellant's daughter during the visit in 2006.[6]

15. The Secretary accepted the credibility of the following claims:

- The First Appellant's village was in the vicinity of armed confrontations between armed Maoists and the Nepalese armed forces during the civil war;
- The First Appellant's uncle was killed, his cousin beaten and his brother was taken in 2002 by Maoists;
- The family left the village in 2002;
- The First Appellant worked in Macau from January 2003 to February 2011, returning to visit Nepal on five known occasions;
- The First Appellant returned to Nepal in February 2011 and lived in Kathmandu until July 2013; and
- The Appellants and their family departed Nepal in July 2013.[7]

16. However, the Secretary did not accept the credibility of the following claims:

- The First Appellant was threatened by Maoists in 2013; and
- The First Appellant was of interest to Maoists when she departed Nepal in 2013.[8]

17. In making these adverse findings, the Secretary took into account the following matters:

- If the Appellants were genuinely persons of interest to the Maoists, it was unlikely that the Maoists would wait three years to visit the Second Appellant's family in 2006, and then not for another three years in 2009;[9]
- The First Appellant was apparently able to return to Nepal on five occasions between 2005 and 2011 without any harassment by the Maoists;[10]
- Given that the Appellants were not high-profile persons, or active members of any political party, it was unlikely that they would have been targeted by the Maoists in 2013, seven years after the Nepali civil war finished;[11]

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[5] BD 95.
[6] BD 108.
[7] BD 98.
[8] Ibid.
[9] BD 96.
[10] BD 97.
[11] Ibid.

- The two month period between the First Appellant being threatened by the Maoists, and the family fleeing Nepal, is not consistent with the First Appellant's life being under threat in 2013;[12]
- The First Appellant's account of being threatened by Maoists in 2013 in Kathmandu was not supported by country information.[13]

18. In light of the fact that the First Appellant had not been threatened since his departure in 2002,[14] and the Second Appellant had never been personally threatened because of her name or political affiliations,[15] the Secretary was also not satisfied that their surnames would increase their profiles if returned to Nepal in the future.

19. The Secretary also considered country information suggesting that the security situation in Nepal has significantly improved from the time when the Appellants left Nepal in 2003, and that Maoist party organisations no longer engage in terrorist activity, and are committed to peace and reconciliation.[16] Given the fact that the Appellants do not have a political profile or any affiliations that would make them persons of interest, the Secretary did not accept that the Appellants face a reasonable possibility of being harmed by Maoists upon return to Nepal.[17]

20. The Appellants' fear of harm was therefore not well-founded and the Appellants were not granted refugee status.[18] As there was no reasonable possibility of being harmed upon return to Nepal, the Secretary concluded that returning the Appellants to their country of origin would not breach Nauru's international obligations, and so the Appellants were not granted complementary protection.[19]

REFUGEE STATUS REVIEW TRIBUNAL

21. The Appellants attended a joint hearing before the Tribunal on 7 April 2016. The First Appellant gave further evidence about his uncle's involvement in the NCP,[20] incidents throughout 2002 in which the Maoists threatened him and his family and killed his uncle,[21] the Maoists' attempts to recruit the First Appellant for his military and nursing skills,[22] the Appellants' escape to Lalitpur,[23] the Maoists' taking over of the family property in Likhu, and telling people they would kill the First Appellant for not joining them.[24] The Second Appellant gave evidence that supported that of her husband.[25]

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[12] BD 97.
[13] BD 110.
[14] BD 111.
[15] BD 99.
[16] Ibid.
[17] BD 100.
[18] Ibid.
[19] BD 101.
[20] BD 377 at [15].
[21] BD 378 at [17]-[19].
[22] Ibid at [20].
[23] Ibid.
[24] Ibid at [21].
[25] Ibid at [22].

22. The Tribunal accepted that the First Appellant's family included members or supporters of the NCP, and that the First Appellant's uncle may have been killed, his brother was probably killed, and his cousin was tortured by the Maoists.[26] Noting relevant country information, the Tribunal accepted that this conduct by the Maoists may have been motivated by the family's support for the NCP. The Tribunal also accepted that the Maoists sought to recruit the First Appellant in 2002, and that his family left the village in 2002 to escape.[27]

23. The Tribunal did not accept that Maoists threatened the Appellants' family in Lalitpur four years after they attempted to recruit the First Appellant, or threatened the First Appellant's family in Charbel in 2009, seven years after the family left Likhu. The Tribunal observed that by that time the peace agreement had been signed and Maoists disarmed.[28] Even if the Maoists continued to be active at the grass-roots level, the Tribunal did not accept they still wanted to recruit the First Appellant in 2006 or 2009, 300 or 400 kilometres from the village.[29] In addition, the fact the First Appellant returned home four or five times for visits between 2003 and 2011, and did not return to Nepal until 18 months or two years after the claimed threat to his wife and daughter, led the Tribunal to consider that the threats in 2006 and 2009 did not occur.[30]

24. The Tribunal also did not accept the First Appellant's account of being threatened by Maoists in Kathmandu in 2013. The First Appellant told the Tribunal that the Maoists threatened to kill him if he did not go with them, but they ran away after a friend walked past and called his name. The Tribunal did not accept that the Maoists would pursue the First Appellant for 11 years and threaten to kill him, and then run away when someone called out his name.[31] The Tribunal also took into account that the Maoists had never attacked the family, despite the alleged threats in 2006 and 2009, and during the two-month period between the threats in 2013 and the family fleeing Nepal.[32]

25. The Tribunal accepted that the Maoists may have occupied the property in Likhu owned by the father of the First Appellant in 2002 and that the government may have instituted some form of transfer in 2016. However, given the findings that the Maoists were not pursuing the Appellants, the Tribunal found that any transfer of the land was unrelated.[33] The Tribunal further found that the Appellants were not at risk of harm because of any family affiliation with the NCP, as the NCP had become part of the government with the Maoists, and that the Appellants' surname does not put them at further risk, given there are many people across different classes and political backgrounds with the same surname.[34]

26. Noting country information that Maoist groups are no longer active in the Nuwakot district, in which the Appellants' home village of Likhu is situated, and in

[26] BD 379 at [27].
[27] Ibid.
[28] BD 380 at [32].
[29] Ibid.
[30] BD 381 at [39].
[31] BD 382 at [43].
[32] Ibid.
[33] BD 383 at [46].
[34] Ibid at [50].

light of the above findings, the Tribunal was not satisfied that the Appellants face a real possibility of harm amounting to persecution in the reasonably foreseeable future if returned to Nepal on account of any imputed political opinion as supporters of the NCP.[35] The Appellants were not found to be refugees. The Tribunal also did not accept that the Appellants face a real possibility of harm amounting to torture or cruel or inhumane treatment or punishment if returned to Nepal, meaning that the Appellants were not owed complementary protection.[36]

27. The Appellants also submitted before the Tribunal that their daughter's poor mental health gives rise to a protection claim, as returning the daughter to Nepal would breach Nauru's obligations under the *Convention on the Rights of the Child* ("*CRC*").

28. The Tribunal noted the medical records indicated that the Appellants' daughter became depressed in early 2016 and had engaged in self-harm.[37] An article provided by the Appellants to the Tribunal asserted that there are limited mental health resources in Nepal.[38] However, the Tribunal found that the daughter's depression was related to her current circumstances in Nauru, including her loss of friends and concerns about her schooling, and that there was no indication she would continue to require high level mental health care if returned to Nepal. In those particular circumstances returning the daughter to Nepal would not breach Nauru's obligations under the *CRC*.[39]

THIS APPEAL

29. The First Appellant's Further Amended Notice, incorporating handwritten amendments made by counsel for the Appellants during the hearing, asserts:

> 1. *The Tribunal erred on a point of law in assessing whether or not Nauru would be in breach of its obligations under the Convention on the Rights of the Child, in respect of the daughter of the Appellant (the child), by failing to take into account a relevant consideration and/or made a finding without any evidence.*
>
> *Particulars*
>
> a. *The Tribunal accepted at D[67] that the child "has developed depression, has expressed suicidal thoughts, has self-harmed and has been prescribed medication."*
> b. *But, the Tribunal found at D[67]: "[t]he material before the Tribunal does not indicate that [the child] will continue to suffer from depression or self-harm if she returns to Nepal and resumes her education there or that she will continue to require high level mental health care".*
> c. *However, the Tribunal failed to consider:*
>
> i. *the submission that they did not have a specialist psychologist report to provide an opinion on whether the child's mental health issues are ongoing and would continue if she were returned to Nepal; and*

[35] BD 384 at [55].
[36] BD 385 at [59].
[37] BD 386 at [63].
[38] Ibid at [64].
[39] Ibid at [68].

ii. *the evidence of the Appellant and his wife that they are concerned that given the child's current mental state, if she were returned to Nepal, she might be motivated to commit suicide.*

d. *The Tribunal erred in failing to find that Nauru breached its international obligations by its failure to give consideration to the best interests of the child as a "primary consideration".*

2. *The Tribunal erred on a point of law by failing to exercise its power to determine if the child would require ongoing medical treatment for her severe mental health issues, which include depression and episodes of self-harm, by requiring a psychiatric or psychological investigation or examination into the mental health of the child, pursuant to its powers in sections 24(1)(d); 7(1)(b); 34(1), and 36 of the Act. Further and in the alternative, in failing to exercise the aforementioned power of the Tribunal, the Tribunal breached its international obligations by failing to act in the best interests of the child as a "primary consideration".*

Particulars

a. *See Particulars in Ground 1.*

3. *The Tribunal erred on a point of law by failing to give proper, genuine and realistic consideration to the Appellant's claim that the Maoist party in Nepal had split into two groups, and it was the group which refused to put down their weapons and join with the government which is still targeting the Appellant and from whom he fears persecution.*

30. The Second Appellant's Further Amended Notice of Appeal is in mirrored terms.

31. Counsel for the Appellants indicated that the Appellants did not press ground 3 of their Further Amended Notices of Appeal.

CONSIDERATION

Grounds One and Two

32. Grounds One and Two relate to the circumstances of AB, the daughter of HFM 005 and HFM 007. Because the matters traversed in them overlap substantially, for the most part they are dealt with together.

33. AB was born on 25 August 2003. She has been seen extensively by primary care nurses, a GP, mental health nurses, a psychologist and a psychiatrist working in Nauru at the offices of International Health and Medical Services ("IHMS)".

34. To quote a file note of 31 March 2016 by an unnamed psychiatrist:

> "*The prolonged stay [by this point 2.5 years] in detention has led to a deterioration in her mood. She has been experiencing thoughts to hurt herself and to take her own life for the last 4-5 weeks. Initially [AB] looked to be improving but then self-harmed with a razor blade 3 days ago*".[40]

[40] BD 156.

35. It is apparent that she suffers from hopelessness and anhedonia. A note by the mental health nurse on 30 March 2016 recorded:

> *"[AB] has no ability currently to envisage a future that is different from her present situation. She also stated she doesn't feel like doing anything. Her motivation to study and work towards becoming a Cardiologist is no longer there. She also stated that she feels that what she has done up till now has been lost."*[41]

36. As of 2016, AB was being prescribed escalating amounts of Quetiapine and Escitalopram, an antidepressant. She has had nightmares where she attempted to hang herself, suffered a variety of symptoms of anxiety and depression, and self-harmed by cutting herself on her forearms.

37. AB reported to clinicians hearing voices telling her to end her life but was unsure whether these were her thoughts. At times she has been unable to guarantee her safety.

38. In short therefore it is quite apparent that as of 2016 AB was a very vulnerable young person in need of ongoing expert psychiatric care for her various symptoms of mental illness.

39. Nauru has ratified the *Convention on the Rights of the Child* ("*CRC*"). Article 3 of the CRC compels States Parties to consider the best interests of the child as a primary consideration when undertaking all actions "concerning children".

40. The parties had polarised positions on the relevance of the *CRC* and on whether the applications of the Appellants for refugee status and complementary protection were actions "concerning children".

41. The Appellant argued before the Tribunal that AB was owed complementary protection. In written submissions, it was contended that:

> *"We further submit that the ... family is owed complementary protection based on the health status of [AB], who has experienced serious mental health difficulties since being transferred to Nauru. As evidenced by IMHS medical records attached, [AB] has become progressively more depressed since being detained in Nauru, and is now suicidal and has attempted self-harm on a number of occasions. She has had sleeping difficulties, has been prescribed anti-depressants, and is classed as at a 'high risk' to herself. ...*
>
> *Article 3 of the CRC requires state parties to maintain the best interests of the child as a primary consideration when undertaking all actions concerning children. Article 6 mandates that state parties ensure 'to the maximum extent possible the survival and development of the child.' Thus it is submitted that as part of its complementary protection obligation, Nauru cannot return [AB] to Nepal when she was experiencing such detrimental and deteriorating mental health problems. This would clearly not be in [AB]'s best interests, and it would in fact hinder her right to proper development.*
>
> *If [AB] is found to be owed complementary protection on the basis of the serious mental health problems she has experienced, it is stressed that this protection should*

[41] BD 165.

be extended to the rest of the … family. As per Nauru's obligations under article 9 of the CRC, a child must not be separated from his or her parents against their will unless this is necessary for their best interests. As it is clearly not in the best interests for [AB] to be separated from her parents, especially where they are providing much needed support for her, it is submitted that the entire…. family is owed complementary protection due to the harm [AB] would suffer from if they were returned to Nepal."[42]

42. The Tribunal noted that:

> "*… [AB] made no claims at the primary stage and that the Secretary has not made a refugee or complementary protection determination in relation to [AB] and that [AB] has not applied to the Tribunal for review although it could be implied that she has applied through her parents as she was named on their RSD application.*"[43]

43. The Tribunal made a finding on the facts on the issue:

> "*In the event that the Tribunal has jurisdiction to consider [AB]'s claim, the Tribunal has made the following assessment. The Tribunal accepts that [AB] has developed depression, has expressed suicidal thoughts, has self-harmed and has been prescribed medication. The Tribunal accepts that this must be very distressing and concerning for the applicants. Their evidence and the medical notes indicate however that [AB]'s current health is related to her current circumstances in Nauru including her loss of friends and her concerns about her schooling. The material before the Tribunal does not indicate that [AB] will continue to suffer from depression or self-harm if she returns to Nepal and resumes her education there or that she will continue to require high level mental health care.*"[44]

44. The Appellants submitted before this Court that, given the broad definition of "complementary protection" in s 3 of the Act, as protection for persons who are not refugees, but "who also cannot be returned or expelled to the frontiers of territories where this would breach Nauru's international obligations", the Tribunal was obliged to consider whether it would be contrary to the provisions of the *CRC* to return the family to Nepal, noting the children's applications for derivative status meant the children would also be refouled if their parents' applications were rejected.[45]

45. The Appellant took the Court to several Australian and Canadian authorities, as a basis of advancing the argument that the language of Article 3 compels a decision-maker to take into account the best interests of the child as a primary consideration, not only where a decision directly affects the child, but also where the child is indirectly affected, such as where their application for derivative status as a refugee, or for complementary protection, hinges on the outcome of a family member's application.[46]

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[42] BD 153 at [39]-[40]..
[43] BD 386 at [66].
[44] Ibid at [67].
[45] Supreme Court Transcript 30 ln 42 – 31 ln 7.
[46] Ibid 23 at ln 21 – 24.

46. In *Minister for Immigration and Multicultural Affairs v Teoh* ("*Teoh*"),[47] the Australian High Court considered the decision of a delegate of the Minister to refuse the Applicant's application for resident status under s 501 of the *Migration Act 1958* (Cth) on the basis that he was not of "good character". On appeal to the Full Court of the Australian Federal Court, the Appellant argued that the delegate did not consider, as a primary consideration, whether it was in the best interests of his children that he be deported. The Full Court found in favour of the Appellant and the Minister appealed to the High Court. Mason CJ and Deane J considered the meaning of the phrase "action concerning children", as it appears in Article 3 of the *CRC*, and concluded that:

> *"The crucial question is whether the decision was an "action concerning children". It is clear enough that the decision was an "action" in the relevant sense of that term, but was the decision an action "concerning children"? The ordinary meaning of "concerning" is "regarding, touching, in reference or relation to; about". The appellant argues that the decision, though it affects the children, does not touch or relate to them. That, in our view, is an unduly narrow reading of the provision, particularly when regard is had to the grounds advanced in support of the application and the reasons given for its rejection, namely that the respondent's bad character outweighed the compassionate considerations arising from the effect that separation would have on the family unit, notably the young children. A broad reading and application of the provisions in Art.3, one which gives the word "concerning" a wide-ranging application, is more likely to achieve the objections of the Convention."*[48]

47. Their Honours continued: "[a] decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it";[49] therefore, where a decision is made on the visa applications of a child's parent(s), that "concerns" the child in a broad sense, the decision-maker is compelled to consider the best interests of the child as a primary consideration.

48. In *Wan v Minister for Immigration and Multicultural Affairs*,[50] the Full Federal Court considered a similar factual situation to that in *Teoh*. Branson, North and Stone JJ considered that the Australian Administrative Appeals Tribunal failed to identify what the best interests of the children indicated it should decide with respect to their father's application for resident status, and said:

> *"An identification by the Tribunal of what the best interests of Mr Wan's children required, and a recognition by the Tribunal of the need to treat such interests as a primary consideration, would not have led inexorably to a decision by the Tribunal to adopt a course in conformity with those interests. That is, even had the Tribunal concluded that the best interests of the children indicated that Mr Wan should be granted a visa, it was legally open to it to refuse to grant Mr Wan a visa. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of Mr Wan's children, it was entitled to conclude, after a proper consideration of the evidence and other material before it, that the strength of other considerations outweighed the best interests of the children. <u>However, it was required to identify what the best interests of Mr Wan's children required with respect</u>*

[47] (1995) 183 CLR 273.
[48] Ibid at [30].
[49] Ibid at [39].
[50] [2001] FCA 568.

to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration."[51] [emphasis added]

49. In *Baker v Canada* ("*Baker*"),[52] a mother of Canadian-born children was ordered to be deported. She applied for exemption on humanitarian and compassionate grounds, under s. 114(2) of the *Immigration Act 1985*, from the requirement that an application for resident status be made from outside Canada. Letters accompanying her application pointed to the effect of her possible departure on her children. An immigration officer said there were insufficient humanitarian and compassionate grounds to justify processing in Canada. L'Heureux-Dube J found, in relation to the relevant statutory provision, that the "*failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section*".[53] In coming to this conclusion, her Honour was guided by the provisions of the *CRC*,[54] the Universal Declaration of Human Rights, and the United Nations Declaration of the Rights of the Child.[55]

50. The Appellants further submitted that the authority of *Kanthasamy v Minister for Citizenship and Immigration* ("*Kanthasamy*")[56] is also of persuasive authority. This Canadian decision was delivered under the *Immigration and Refugee Protection Act 2001* s 25, which was enacted after *Baker*, and included a requirement that the Minister consider the best interests of a child in considering an application for resident status, or whether to exempt an applicant from needing to meet certain statutory requirements on humanitarian and compassionate grounds. In *Kanthasamy*, a 17-year-old applicant sought exemption. The majority of the Supreme Court considered that the immigration officer "failed to give sufficiently serious consideration to [the applicant's] youth, his mental health and the evidence that he would suffer discrimination if he were returned to Sri Lanka",[57] and "the very fact that [the Applicant's] mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighed..."[58]

51. However, in answer, the Respondent submitted that the authorities relied on by the Appellants should be distinguished as the legislative provisions under consideration in each of the decisions were discretionary – for instance, they reposed in the decision-maker a *discretion* to refuse an application for resident status, or to exempt an applicant from needing to meet certain statutory requirements.

52. The Respondent submitted that both the first and second grounds of appeal fail to overcome a threshold difficulty, in that the Tribunal was reviewing the

[51] [2001] FCA 568 at [32].
[52] [1999] 2 SCR 817.
[53] Ibid at [65].
[54] Ibid at [69].
[55] Ibid at [71].
[56] [2015] 3 SCR 909.
[57] Ibid at [45].
[58] Ibid at [48].

Secretary's determinations with respect to AB's parents, HFM 005 and HFM 007 who needed to meet specified statutory criteria in order to succeed in their applications. This made the statutory context, the Respondent said, materially different from that applying, for instance, in *Teoh*.

53. Although I accept that the concerns expressed by AB's parents are genuinely held and that they are very worried about the mental state of their daughter, which is most troubling, the Respondent's submission is legally correct and disposes of the appeal.

54. The fact that AB, and the Appellants' other child, applied for derivative status under s 5(1B) of the Act is not relevant for the purposes of this case.[59] What is significant is that no application for refugee status or for complementary protection was before the Secretary or the Tribunal in her name. Thus, for instance, the Secretary determined that each of the two Applicants "is not a refugee within the meaning of the Nauruan *Refugees Convention Act 2012*. As I have determined that [the First Appellant] is not a refugee, I also determine that [AB and AAB], who are family members included in this application are not to be accorded derivative status."[60]

55. The decision of the Tribunal undertaking merits review of the decision of the Secretary under s 31 of the Act was to affirm the determination of the Secretary that each of the Appellants was not recognised as a refugee and was not owed complementary protection. Derivative status is defined by s 3 of the Act to mean "the status given to a person, who is a dependent of a person who has been recognised as refugee, given derivative status, or found to be owed complementary protection."

56. The children of the Appellants, including AB, were not parties to the applications for refugee status; they were refused derivative status on the basis of the decisions in respect of their parents refusing to give them refugee status or complementary protection.

57. The criteria for refugee status have been referred to at the commencement of this decision. The Secretary and then the Tribunal only had jurisdiction in respect of the Appellants as persons who claimed to meet the criteria for refugee status and as persons who asserted that they fulfilled the criteria for complementary protection. The decision-making in respect of each status is not discretionary: it is made on the basis of whether the criteria for refugee status and complementary protection are established.

58. The Tribunal therefore lacked the power to engage in the kind of reasoning employed by the courts in respect of minors in the cases cited by the Appellants which dealt with materially different statutory schemes.[61] Thus, while in lay parlance the children of the Appellant are of course affected by the decisions of first the Secretary, and then of the Tribunal undertaking merits review, the

[59] Supreme Court Transcript 43 ln 1 – 3.

[60] BD 101, 113.

[61] See also *AZAEH v Minister for Immigration and Border Protection* [2015] FCA 414 at [31], [40] per Kenny J.

decisions of the Secretary and of Tribunal are not as a matter of law "actions concerning children." A consequence of this is that strictly (and correctly) speaking Article 3 of the *CRC* does not apply to the decision-making of the Tribunal in respect of its decisions in relation to HFM005 and HFM007. It was not an error of law for the Tribunal to fail to regard the best interest of AB as a primary consideration in making its decision about whether her parents met the criteria for complementary protection.

59. Thus, as the Respondent has correctly submitted, this Court has no jurisdiction to grant relief to AB, because she is not an applicant for refugee status or complementary protection, save by way of her derivative status if one or her both of her parents are successful in their claims, and, it follows that the errors of law alleged in the first and second grounds cannot be used to found relief for the Appellants.[62] These grounds fail.

Further Observations

60. I note too for the sake of completeness that there is another fundamental error in the submissions by the Appellants. No error of law is demonstrated by them – the facts are against them.

61. The Appellants submitted that the Tribunal acknowledged the need for a medical/psychological opinion on the mental health of AB, indicating that the mental health of ST was a "critical fact" to the overall claim. This being the case, ordering a medical report on the mental health of AB was an "obvious inquiry" that ought to have been undertaken.

62. By analogy to the circumstances in *HFM043*, the First Appellant submitted that:

- the extent of AB's mental health issues was vital to the issue of whether Nauru owes AB complementary protection under the *CRC*;
- in the absence of a proper medical report, the Tribunal was unable to determine the extent of AB's mental health issues, including the risk she may commit suicide in Nepal without the appropriate medical care;
- the issue of the rights of the child was raised by the Appellants, and the Tribunal asked if there was a medical report available.[63]

63. The failure of the Tribunal to order a medical report, the Appellant submitted, resulted in the Tribunal speculating as to the mental health of AB, and meant the Tribunal failed to perform its statutory function. Further, by failing to order a medical report, the Tribunal failed in its task of identifying the best interests of the child, and assessing whether any other consideration outweighed those interests, such that the Tribunal also acted contrary to Article 3 of the *CRC*.[64]

[62] Respondent's Submissions at [5]-[8].
[63] Appellant's Submissions at [23].
[64] Supreme Court Transcript 34 – 35. See *Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568.

64. By reference to the High Court authority of *Minister for Immigration and Citizenship v Li,*[65] the Appellants further submitted that a decision may be legally unreasonable or plainly unjust if it "lacks an evident and intelligible justification", and the failure of the Tribunal to order a medical report in circumstances where AB's mental health was a live issue before the Tribunal lacked any intelligible justification.[66] The Appellants further asserted that the Tribunal's failure to refer explicitly to the evidence of AB's parents as to her mental health, in circumstances where her mental health was a critical fact, also led the Tribunal into error.[67]

65. The Respondent submitted that even if the Appellants were able to overcome the threshold difficulty, upon which I have determined their appeal to this Court, the Appellants' arguments did not demonstrate any error of law.

66. The Appellants identified that the following submissions were put before the Tribunal, in relation to the mental health of the child, AB:

- AB's mental state would worsen if she were returned to Nepal;
- She would not be able to receive the medical attention she needs for her depressive disorder;
- It is clearly not in her best interests to be separated from her parents;
- The First Appellant said he cannot guarantee his family's safety if they are returned to Nepal, and in the event that he were to be harmed his family would struggle to survive;
- The Second Appellant, the mother, said that if her family were returned to Nepal they would go into hiding and her children would not be able to go to school or to be able to survive.[68]

67. In relation to the mental health of AB, and the existence of any medical report, though, the Tribunal stated (at [65]):

> "... *When asked if there is any medical opinion which indicates that [AB] will continue to need high level mental health care if she is removed from her current environment, the representative stated that such a report is probably not available however the impact of her current circumstances may be ongoing and her current condition may be exacerbated by returning to Nepal where there is a lack of appropriate medical care and that she may commit suicide if forced to return*".

68. In relation to the third particular, the Appellants placed before the Tribunal extensive evidence of their daughter's mental health in the form of the IHMS clinical file. There was no pressing need for an expert opinion. The data from multiple treating clinicians were available to the Tribunal.

69. The Tribunal considered this evidence, and concluded that "[t]he material before the Tribunal does not indicate that [AB] will continue to suffer from depression or

[65] (2013) 249 CLR 332.
[66] Appellant's Submissions at [27]-[28].
[67] Ibid at [29]-[30].
[68] Ibid at [7].

self-harm if she returns to Nepal".[69] This finding was not challenged by the Appellants.

70. It is apparent that the Appellants, who were assisted by a legal representative before the Tribunal, had the opportunity, and took up that opportunity, to put AB's extensive medical notes relating to her mental health before the Tribunal. The Tribunal considered those notes, referred to them, and arrived at the conclusion that the daughter's mental health issues were related to her current circumstances in Nauru, and that if she was returned to Nepal, her condition would be likely to improve.[70]

71. The Appellants relied upon authorities that a tribunal may fall into error if it fails to make an inquiry, including by exercising its discretion to order an investigation or medical examination as to the claimant's mental health, in certain circumstances. In *Minister for Immigration and Citizenship v SZIAI*, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ left open the possibility that a tribunal's decision may be vitiated by jurisdictional error if the tribunal failed to "make an obvious inquiry about a critical fact, the existence of which is easily ascertained", but only if there was evidence that the inquiry could have made a difference to the outcome of the review.[71]

72. The Appellants' written submissions also relied upon the decision of Khan J in *HFM043 v The Republic of Nauru* ("*HFM043*") (at [63]-[65]):

> *"The appellant's ability to earn money was completely dependent on her good health...*
>
> *The extent of the appellant's mental health issue was vital for the Tribunal to assess whether she could still engage in her employment to be able to earn a living in Thailand and Malaysia. In the absence of a proper medical report, the Tribunal could not have determined as to whether her mental health issues would affect her ability to continue employment without which she would not have been able to maintain herself let alone have access to medical treatment.*
>
> *In the circumstances, when this matter was raised by the appellant in her statutory declaration and when the Tribunal made its own observation of the appellant it should have adjourned the hearing and asked the appellant to obtain a full medical report, so that it could adequately deal with the review process. The Tribunal failed to do so and therefore it fell into an error of law."* [72]

73. In this instance, further inquiry was not required and certainly the failure to make it did not constitute an error of law. The evidence before the Tribunal was ample for the Tribunal to conclude both that further mental health expert opinions were not necessary and that the psychiatric condition of AB may well improve upon her family returning to Nepal. Thus, the *SZIAI* preconditions were not met.

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[69] BD 386 at [67].
[70] Ibid at [67].
[71] (2009) 259 ALR 429 at [25].
[72] [2017] NRSC 43.

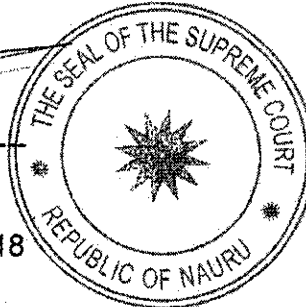
74. In relation to the fourth particular, the Respondent submitted that complementary protection extends protection to an applicant where the act of returning or expelling the applicant to their home country would breach an international obligation owed by Nauru.

75. The Tribunal does not breach any international obligation that relates specifically to the act of returning or expelling the Appellants by failing to consider whether it would be in the best interests of their daughter to be returned to their home country.[73] Therefore, by failing to order a medical report, or conduct some other further investigation into her mental state, the Tribunal has not breached any international obligation concerned with the return or expulsion of AB.[74]

76. While there is the potential arising from the *CRC* for Nauru to be obliged not to return a child applicant to a place where there is a real risk, for instance, that Article 9 of the *CRC* will be breached, I reiterate that that is not the scenario with which the Tribunal was faced in this case.

CONCLUSION

77. Under s 44(1) of the Act, I make an order affirming the decision of the Tribunal and make no order as to costs.



Justice Ian Freckelton
Dated this 19th day of April 2018

[73] Supreme Court Transcript 45 at ln 20 – 45.
[74] Ibid 52 at ln 23 – 29.