IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M151 of 2017**

BETWEEN:

EMP 144
Appellant

and

REPUBLIC OF NAURU
Respondent

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RESPONDENT'S SUBMISSIONS

Part I: PUBLICATION ON THE INTERNET

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

Part II: ISSUES

2. The Republic accepts the appellant's statement of issues.

Part III: 78B NOTICE NOT REQUIRED

3. The Republic has considered whether any notice is required under s 78B of the *Judiciary Act 1903* (Cth) and considers that such notice is not required.

20 ### Part IV: FACTUAL BACKGROUND

4. The Republic does not dispute the appellant's summary.

Part V: RELEVANT PROVISIONS

5. The Republic submits that the relevant legal instruments are:

   i. *Refugees Convention Act 2012* (**the RC Act**) in force on 17 January 2015.

   ii. *International Covenant on Civil and Political Rights* (**the ICCPR**).[1]

[1] opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

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Part VI: ARGUMENT

Ground 1

Relevant principles

6. The Republic accepts that where an asylum seeker objects to the possibility of "internal relocation", the Refugee Status Review Tribunal (**the Tribunal**) may come under a duty to consider that objection. This principle is derived by analogy with the obligation to consider clearly articulated arguments, or "claims", as to why that asylum seeker should be recognised as a refugee or owed complementary protection.[2]

7. Whether any such duty arises in any given case is to be assessed in the context of the principles relating to internal relocation in international law, that internal relocation will be available where it is reasonable, in the sense of practical, for a person to avail himself or herself of the protection of his or her country in some place other than the place where they fear harm.[3]

8. Although the personal circumstance of an asylum seeker will be relevant, that does not mean that every point identified by an asylum seeker as an objection to relocation gives rise to a duty on the Tribunal to consider and resolve that objection. It may be that the objection is misconceived, irrelevant, or has no rational connection with the relevant test, noting that objections to relocation are often made on grounds that amount to no more than a complaint about living standards or lifestyle. Complaints of this kind could not amount to objections to relocation that must be considered by the Tribunal.

Inferences from a statement of reasons

9. An appellant before the Supreme Court of Nauru, and before this Court, bears by the "burden of persuasion" to satisfy the Court that there has been some legal error by the Tribunal.[4] Where an appellant alleges that some matter was

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2 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088.
3 Approved by this Court in *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 and *Minister for Immigration and Border Protection v SZSCA* (2014) 254 CLR 317.
4 *SZSSC v Minister for Immigration and Border Protection* (2014) 317 ALR 365, [81(g)].

not considered by the Tribunal by pointing to the omission to mention that matter in the statement of reasons, the starting point for resolving that argument is to observe the limited nature of the obligation to produce a statement of reasons under s 34(4) of the RC Act.

10. This obligation is identical in form to that considered in *Minister for Immigration v Yusuf* (2001) 206 CLR 323 (see especially at 330-331 [4]-[5], [9] (Gleeson CJ), 337-338 [30]-[35] (Gaudron J), 345-346 [66]-[69] (McHugh, Gummow and Hayne JJ)), and the Republic submits that the same principles are applicable: the mere fact that a matter is not referred to in a statement of reasons does not mean the matter was not considered by the Tribunal. Some matters may have been considered but found not to be material, or not deserving of any weight, and thus not mentioned. The issue is whether, having regard to the limited obligation under s 34(4) of the RC Act, an inference can be sustained that if the matter had been considered at all, it would have been referred to expressly in the reasons (even if it were then rejected or given no weight).[5]

11. In this context, it may also be that specific mention of a matter was otiose because the Tribunal had dealt with the overarching issue at a level of generality or rejected a premise which made further specific mention of subsidiary or derivative matters otiose.[6]

12. Deciding whether an appellant has met their burden of persuasion will be significantly influenced by the objective "importance" of the matter alleged not to have been considered, understood in the context of the case advanced on review and the manner in which the Tribunal determined the review.[7]

Legal error in not considering material

13. Even where a Court is satisfied that a Tribunal has failed to consider some matter, that does not immediately justify a finding of "legal error": merely to ignore relevant material, without more, is not legal error. A failure to consider

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5 *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67, 75 [34].
6 *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593, 604-605 [46]-[47].
7 *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99, 130 [111].

relevant material will only amount to an error of law where the material was central and important to the review, with the correlative consequence that the error was sufficiently serious to justify a conclusion that the Tribunal has failed to exercise jurisdiction or denied procedural fairness to an appellant.[8]

The purported objections in this case

14. The appellant alleges that he made four objections to relocation during the course of the review, which were such that obliged the Tribunal to consider them, and further alleges that the Tribunal did not consider these objections (AS [35]). These are said to be that:

a. His family would face substantial prejudice in accessing education.

b. He was in hiding because there was no freedom to express one's political views throughout Nepal.

c. He did not have any tertiary or professional education.

d. He held ongoing fears for the safety of his wife and son.

15. The first supposed objection appears at paragraph 21 of the appellant's statement dated 29 January 2014, which provides: "As an active member of the NNDP my family and I face substantial prejudice in accessing education, employment and essential services." This was not an "objection to relocation". Rather, it was part of the appellant's evidence as to why he said he was a refugee or owed complementary protection. The Tribunal responded to the issue to which this statement related – the appellant's fears arising from his political opinion – in finding that the appellant was not at risk of politically motivated harm in Kathmandu by reason of the stabilised situation in Nepal (Reasons [26], [28], [35], [37]). Accordingly, there is no basis to infer that the Tribunal did not consider this matter. Further, the Republic submits that this assertion about the situation in Nepal, made by the appellant himself and

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[8] *Minister for Immigration and Border Protection v SZSRS* [58]-[59]; *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99, 127 [97], 128-129 [102].

without reference to supporting country information, could not be regarded as "central or important" evidence in the review.

16. The second supposed objection appears at paragraph 69 of the appellant's statement dated 27 October 2014, which relevantly provides: "The whole time that I was in Kathmandu in 2013, I was in hiding." The Republic submits that read in its proper context, the appellant's statement that he was "hiding in Kathmandu" is a reference to the fact that his mere presence in Kathmandu, in his opinion, was "hiding" from those persons in his village who sought to cause him harm. There is no suggestion, however, that he thought it was necessary that he had to take protective measures whilst in Kathmandu to avoid harm there. The Tribunal found by reference to country information that the appellant would not be exposed to a real chance of harm if returned to Kathmandu (Reasons [33]-[38]). In that circumstance, it was otiose to make specific mention of this piece of evidence. Further, the Republic submits that this piece of evidence could not on any view be regarded as "central or important" evidence in the review (however it is construed), given that its relevance was completely overtaken by the Tribunal's findings about the present security situation in Kathmandu.

17. In relation to the second supposed objection to relocation, the appellant suggests that he made a complaint that there is no freedom to express one's political views throughout Nepal. However, the reference in footnote 50 of the appellant's submissions does not support the supposed objection. In any event, the Tribunal found that the appellant was not at risk of politically motivated violence in Kathmandu by reason of the stabilised situation in Nepal (Reasons [26], [28], [35], [37]), which demonstrates consideration of any supposed objection on these grounds.

18. The third supposed objection to relocation appears at paragraph 66 of the appellant's statement dated 27 October 2014, which provides under the heading "Why I did not flee to India" that "I do not have any tertiary or professional education, and I have no professional skills" (BD 118). This statement by the appellant is made under a heading not concerned with objecting to relocation – the heading "Relocation" appears later in this

statement. Having regard to the structure of the appellant's own statement, but also having regard to the content of what is said in paragraphs 62-67 of that statement, it is apparent that this evidence was not advanced as an objection to relocation. It follows that insofar as the appellant's argument is premised on the notion that it was an objection to relocation, it must fail. In any event, the Tribunal specifically addressed the appellant's education and skills (Reasons [39]-[40]), demonstrating an awareness that the appellant's highest level of education is year 10 of high school and that he is not tertiary educated, that his employment was limited to driving and political activity and that he was not professionally skilled.

19. The fourth supposed objection to relocation appears at paragraph 71 of the appellant's statement dated 27 October 2014, and concerns the situation with respect to his wife and son. The appellant's concerns regarding his wife and child involved two elements:

    a. The first concerned the same matters from which he asserted to be in fear of harm in Nepal – the dispute with the Maoists in his home region. This was dealt with by the Tribunal in the context of its findings that the appellant would not be exposed to a real chance of harm in Kathmandu (which subsumed the issue insofar as it overlapped with the circumstances of his wife and child) (Reasons [18], [21], [33]-[38]).

    b. The second concerned the appellant's child's inability to enrol in school. The Tribunal dealt with this issue by observing that the reason why the child could not enrol in school was due to the appellant's absence from Nepal (Reasons [20]).

    c. Accordingly, there is simply no basis for suggesting that the Tribunal failed to consider the material set out in paragraph 71 of the appellant's statement dated 14 October 2014.

20. The reference to *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307 does not assist the appellant. That case turned on its own

unique factual circumstances, and Mortimer J did not purport to apply any different principles than those discussed above.

21. Further, insofar as the appellant mounts an argument by reference to the arguably more difficult standard discussed in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088, the appellant is on ever weaker ground. On no view could it be said that the various disparate references to selected extracts from the appellant's evidence amounted to a "clearly articulated argument".

Ground 2

22. In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 162 [32], this Court endorsed the statement in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591-592, that procedural fairness obligations extend to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made.

23. The Republic accepts that under the RC Act, there may arise a case where procedural fairness requires the Tribunal to identify for a review applicant an issue in the review. However, that obligation does not extend to specifically identifying issues that are "obvious", and further, no procedural unfairness – in the sense of practical injustice – could arise where a review applicant was actually on notice of an issue.

24. To the extent that the appellant identifies the source of this obligation as being s 40(1) of the RC Act, that is not correct. Section 40(1) of the Act is a formal, mechanistic provision which does no more than oblige the Tribunal to invite a review applicant to attend for an oral hearing. Whatever the quality of any hearing that takes place, or even if no hearing takes place, the only relevant legal question is whether the Tribunal afforded procedural fairness to a review applicant.

25. In this case, the appellant himself gave evidence directed to the question of relocation, and filed written submissions through his legal representatives in relation to relocation (statement dated 29 January 2014, [27]; statement dated 27 October 2014, [38]-[46]; submissions dated 24 November 2014, [68]-[72]). His legal representative also made oral submissions on relocation at the hearing before the Tribunal (Transcript, P51.16, P51.37).

26. It follows that the Tribunal did not fail to afford the appellant procedural fairness for the reasons asserted in ground 2.

27. Indeed, there is an irreconcilable tension between the appellant's grounds 1 and 2, and it is unclear why the appellant has not advanced these grounds in the alternative.

Ground 3

28. The appellant's suggestion that there is some lack of clarity about the Tribunal's findings with respect to complementary protection is unfounded. In paragraphs 43-44 of the Reasons, the Tribunal records its findings that the appellant's claims to complementary protection were based on the same factual matters (ie, the same "narrative") as his claims made under the Refugees Convention.

29. An administrative decision maker is entitled to approach a case by assessing an applicant's factual claims in relation to one particular legal context or issue, and then to cross-refer or adopt such factual findings for the purpose of another legal issue.[9] That will often be an efficient course for the Tribunal to adopt. Where there is a detailed and comprehensive evaluation of the applicant's narrative with respect to the Refugees Convention, and there are no additional factual claims or evidence said to warrant complementary protection, the Tribunal is entitled to give only brief reasons for rejecting the complementary protection claims, including where the reasoning is essentially to the effect that

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[9] *SZSGA v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 774, [56].

"the complementary protection claims are rejected for the same reasons as the Refugees Convention claims" (Reasons [43]-[45]).

30. To the extent that the appellant's complaint focusses upon the Tribunal's use of the phrase "There are no *arguments* advanced...." (AS [51], Reasons [43]), the appellant misconstrues that expression.

31. This is an attack on a straw man – the Tribunal's expression cannot be read in the manner suggested by the appellant. The Tribunal stated, correctly, that the appellant made one set of factual claims, which ground his claims under the Refugees Convention and to complementary protection.

Ground 4

"Complementary protection" under the RC Act

32. Nauru has signed the ICCPR and accepts that this creates "international obligations" within the meaning of the definition of 'complementary protection' in s 3 of the RC Act. Accordingly, the Tribunal is obliged to determine claims made in relation to the ICCPR, arising through the combination of:

    i. the definition of 'complementary protection' in s 3 of the RC Act;

    ii. the obligation on the Secretary under s 6(1) of the RC Act;

    iii. the implied requirement to resolve an application for merits review of the decision of the Secretary under s 31 of the RC Act; and

    iv. the functions, powers and duties of the Tribunal under ss 33 and 34 of the RC Act;

    but, not by dint of s 4(2) of the RC Act.

33. Section 4(2) of the RC Act does not impose any obligation upon the *Tribunal*. Rather, s 4(2) of the RC Act is an expression of the principle of non-refoulement as it relates to the *Republic*, and a statement that the Republic must not expel or return any person in breach of Nauru's international

obligations arising in this case under the ICCPR. This does not influence or affect the Tribunal's function to conduct a review.

The reasons of the Tribunal

34. In paragraphs 43-45 of its reasons, the Tribunal essentially states that the appellant was not owed complementary protection for the same reasons as why he was found not to be a refugee. By this analysis, the "relocation analysis" that was done for the purpose of assessing whether the appellant was a refugee (Reasons [33]-[41]) is imported as the dispositive analysis for the purpose of the appellant's complementary protection claims.

10 *No error of law is shown in the Tribunal's approach*

35. The appellant's argument centres on the submission that the "complementary protection obligation that arises by reason of Nauru's international obligations is not limited in any relevant way" (AS [58]). This is said to create an "absolute prohibition on return" (AS [36]), which means that "the Tribunal erred in applying a relocation test to the appellant's claim for complementary protection" (AS [58]).

36. This argument is misconceived.

37. International jurisprudence has identified, and the Republic accepts, that art 2 of the ICCPR contains an obligation not to return or expel a person to a country
20 where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by arts 6 and 7 of the ICCPR.[10] Those provisions are as follows:

> *Article 2*
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> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour,

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[10] See Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), [12].

> sex, language, religion, political or other opinion, national or social origin, property, birth or other status. ...
>
> *Article 6*
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> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. ...
>
> *Article 7*
>
> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

38. The obligation in article 2 has been understood to prohibit return of a person to a country where, as a necessary and foreseeable consequence of return to that country, there is a real risk that the person may suffer the kind of harm addressed in Articles 6 and 7 of the ICCPR.[11]

39. The Republic submits that this is a "high standard",[12] which will not be met where it is reasonable, in the sense of practicable, for a person to relocate to another part of their own country and obtain protection in that place of relocation (an internal flight option). That is because, if the relevant harm can reasonably be avoided by internal relocation, the risk of such harm cannot be said to be a necessary consequence of return to the country in question.

40. This analysis is the settled position in international jurisprudence regarding the ICCPR, and comparable obligations.

41. In *Sufi and Elmi v United Kingdom*,[13] after referring to earlier authorities on the proposition, the European Court of Human Rights affirmed that the availability of internal relocation (or internal flight) was a qualification to the relevant obligations owed by the United Kingdom under the Convention for the

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[11] Human Rights Committee, *Views: Communication No 470/1991*, 48th sess, UN Doc CCPR/C/48/D/470/1991 (30 July 1993), 9-10 [6.2].
[12] *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497, 512 [62].
[13] (2012) 54 EHRR 9, 266 [266].

Protection of Human Rights and Fundamental Freedoms (**the European Convention**[14]).[15] The Court said:[16]

> It is a well-established principle that persons will generally not be in need of asylum or subsidiary protection if they could obtain protection by moving elsewhere in their own country.[17] [emphasis added]

42. This proposition is stated under the heading "Relevant Principles of International Protection" and is a principle which is said to find reflection in the Qualification Directive and the Immigration Rules. Inherent in this passage is the acceptance by the Court of the internal relocation qualification as a general principle of international law and applicable to non-refoulement obligations other than those arising under the Refugees Convention. To the extent that the appellant may suggest that this passage is merely a statement of the position adopted in the Qualification Directive or the Immigration Rules, that would be a serious misreading of the reasons of the Court.

43. In *BL v Australia*,[18] the UN Human Rights Committee (**UNHRC**) considered a communication authored by a Senegalese national who was found by the Australian legal system not to have a well-founded fear of persecution for the purposes of the Refugees Convention, because he could access State protection in Senegal by relocating to a place within Senegal where he would not be exposed to the claimed fear of harm. Given those findings, ten of fourteen members of the UNHRC were unable to conclude that removing the man to Senegal would violate Australia's obligations under arts 6 or 7 of the ICCPR (at [7.4]). Two other members, concurring in the decision but giving separate additional reasons, described the "internal flight alternative" as a "basic rule of international refugee law as well as international human rights

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[14] opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).
[15] See also *Salah Sheekh v The Netherlands* (2007) 45 EHRR 50, 1198-1199 [141].
[16] *Sufi and Elmi v United Kingdom* (2012) 54 EHRR 9, [35].
[17] See also Hathaway and Foster, 'Internal protection/relocation/flight alternative as an aspect of refugee status determination' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003: CUP), 357.
[18] Human Rights Committee, *Views: Communication No 2053/2011*, 112th sess, UN Doc CCPR/C/112/D/2053/2011 (7 January 2015).

law". They also stated that "Individuals are not in need of international protection if they can avail themselves of the protection of their own State; if resettling within the State would enable them to avoid a localized risk, and resettling would not be unreasonable under the circumstances, then returning them to a place where they can live in safety does not violate the principle of non-refoulement", citing *SYL v Australia*,[19] *Sufi and Elmi v United Kingdom*,[20] and *Omeredo v Austria*[21] as authority for the proposition. (One member expressed a contrary view.)

44. In a submission to the Australian Senate Legal and Constitutional Affairs Legislation Committee which was considering proposed legislation that was to specify 'that a person has a real risk of significant harm,' for the purposes of a statutory complementary protection assessment, 'only if the real risk relates to all areas of a receiving country', the UNHCR recommended:

> ...the revision of this proposed amendment to ensure that the complementary protection framework, as codified in the Migration Act, requires consideration of the reasonableness of the proposed area of internal relocation consistent with existing State practice and a correct legal interpretation of Australia's obligations under international law. [emphasis added]

45. Implied in this submission is acceptance of the existence of an internal relocation aspect to complementary protection.

46. Internal flight is not mentioned in the Refugees Convention as an exception to the express non-refoulement obligation in that treaty. The exception arises by implication, through the recognition of the fact that the Refugees Convention is framed around the geopolitical unit of 'States'. This implication derives from the fact that under international law, principal responsibility for protection lies with an individual's own State, and a foreign State does not owe protection obligations that could be provided domestically. Flowing from this observation is the examination of whether a person might reasonably be able to 'relocate'

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[19] Human Rights Committee, *Views: Communication No 1897/2009*, 108th sess, UN Doc CCPR/C/108/D/1897/2009 (11 September 2013).
[20] (2012) 54 EHRR 9.
[21] (European Court of Human Rights, Chamber, Application No 8969/10, 20 September 2011).

to an area within his or her country of nationality where that protection can be accessed.[22]

47. The ICCPR also operates at the level of relations between States. This observation fortifies the correctness of the settled position in international law that there exists a internal flight exception, or relocation qualification, to the non-refoulement obligation arising under the ICCPR.

48. A specific response is required to some the appellant's submissions.

a. The suggestion that the obligation under art 7 of the ICCPR is "absolute" and makes no provision for exception or derogation does not assist the appellant. That observation presumes that an obligation is engaged; however, if relocation is reasonably available, then no obligation is engaged.

b. The appellant has failed to identify any authority or support for the postulated "reason" for the inclusion of express relocation provisions in the domestic arrangements of Australia, the European Union, the United Kingdom, Canada and New Zealand (AS [60]). The appellant cannot know why Australia and other jurisdictions adopted their respective domestic schemes; it is a bald assertion which does not assist his argument.

c. In Australia, the Migration Act includes a codified regime of complementary protection, rather than picking up the test under international law. Hence, the reference to *MZYYL v Minister for Immigration and Citizenship*[23] does not assist the appellant. The extracted statement (AS [61]), with respect to relocation, was made in the course of explaining why it was not helpful to refer to authority on the interpretation of the treaties in construing the regime in the Migration Act. The Court was not purporting to decide whether there is any internal relocation qualification to relevant obligations under the ICCPR.

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[22] Hathaway and Foster, *The Law of Refugee Status* (2014, 2nd ed), 332. The Republic accepts that an alternative analysis to the same conclusion is available, and has been preferred in Australia: *Minister for Immigration v SZSCA* (2014) 254 CLR 317. However, this analysis remains valid.

[23] (2012) 207 FCR 211.

49. It follows that the appellant has not demonstrated any error of law affecting the decision of the Tribunal by reason of it applying a relocation qualification when assessing Nauru's international obligations arising under the ICCPR in respect of the appellant.

Ground 5

50. The appellant alleges that the Tribunal misunderstood country information regarding the ability of the appellant's child to obtain citizenship and attend school in his absence.

51. AS [73] extracts highly selective passages from the relevant source document, which actually provides (on page 16 of that document):

> Citizenship laws that discriminate by gender contributed to statelessness. The 2006 Citizenship Act, which allowed more than 2.6 million persons to receive certificates, states that anyone born to a Nepali mother or father has the right to Nepali citizenship. The same law states, contradictorily, that a child born to a Nepali woman who is married to a foreign citizen is able to obtain citizenship only through naturalization. ***Securing citizenship papers for the child of Nepali parents, even when the mother possesses Nepali citizenship documents, was extremely difficult unless the father of the child supported the application***. This persisted despite a 2011 Supreme Court decision to grant a child Nepali citizenship through the mother if the father was unknown or absent. [emphasis added]

52. This country information states that despite the appearances of the Nepali Citizenship Act, the practical reality in Nepal was that the appellant's child could not obtain Nepali citizenship in his absence. The emphasised portion of the country information above clearly supports the factual findings made by the Tribunal in paragraph 20 of its Reasons.

53. It follows that there is simply no foundation for the appellant's argument.

54. The Republic accepts that the principles discussed in relation to Ground 1 can apply in relation to country information (cf AS [75]-[77]). However, there is no general obligation upon a Tribunal to mention in its reasons every possibly

relevant detail in the country information before it to avoid making an error of law (cf AS [77]). Having regard to the obvious intellectual engagement demonstrated in paragraph 20 of its reasons, there is no basis on which it can be inferred that the Tribunal somehow misunderstood the existence of a tension within that country information.

55. The exchange which took place at the Tribunal hearing extracts in AS [72] does not reveal any procedural unfairness. Rather, it reveals that the Tribunal informed the appellant of what it understood to be the position in Nepal; a common occurrence in proceedings under the RC Act. There is no suggestion that it was not prepared to listen to evidence to the contrary or that it approached its task with some fixed view on the issue (nothing of that kind is alleged). Indeed, the appellant is more likely to have criticised the Tribunal if it had not mentioned that country information to him.

Relief claimed by the appellant

56. The appellant claims that success on ground one entitles him to a declaration from this Court that he is owed complementary protection by Nauru (AS [83(3)]).

57. That submission invites this Court to determine the merits of his claims, and cannot be acceded to. To the extent that the appellant's submissions involve any analogy with the situation where a discretion has merged into a duty capable of enforcement by mandamus,[24] the present case bears no analogy with such cases. Even if the appellant is successful on ground 1, the relevant legal question remains, upon an evaluative judgment, what are the necessary and foreseeable consequences of Nauru returning the appellant to Pakistan? If the Tribunal erred in law in attempting to answer that question, this Court can do no more than enforce the law, and cannot substitute its own opinion of what the Tribunal's legal conclusions should have been, as flowing from some or all of the factual findings it made.

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[24] *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 188 (per Kitto J), 201 (per Menzies J) and 203 (per Windeyer J); *Commissioner of State Revenue (Vic) v Royal Insurance Aust Ltd* (1994) 182 CLR 51, 88 (per Brennan J), 103 (per Toohey J) and 103 (per McHugh J). Nor is there any analogy with cases where peremptory mandamus has been granted (see *Plaintiff S297-2013 v Minister for Immigration* (2015) 255 CLR 231).

Part VIII: ESTIMATE OF ORAL ADDRESS

58. The issue raised by Ground 4 in this appeal is also raised in the appeals by CRI 026 and DWN 027.

59. If this appeal is heard together with one or both of those matters, the Republic estimates that it will need 1 hour to present oral submissions in relation to the common issue, and a further 1 hour to present oral submissions in relation to the issues raised by Ground 1-3 and 5 in this appeal.

60. If this appeal is heard on its own, the Republic estimates that it will need 2 hours to present oral argument.

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Dated: 12 December 2017

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