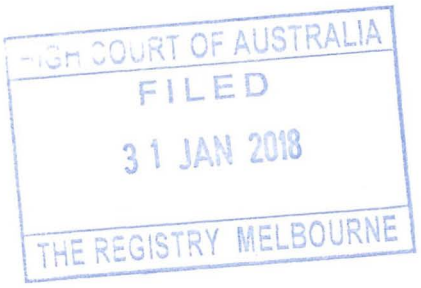
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M151 of 2017

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN



EMP144
Appellant
and

The Republic of Nauru
Respondent

APPELLANT'S AMENDED SUBMISSIONS IN REPLY

I THESE SUBMISSIONS ARE IN A FORM SUITABLE FOR INTERNET PUBLICATION

II REPLY

Ground 1

1. The submissions of the Respondent dated 12 December 2017 ("**RS**") at paragraph **[8]** seek to have this Court draw a distinction between objections to relocation that the Tribunal must consider and objections to relocation that are 'misconceived [or] irrelevant'. None of the objections identified at Appellant's Submissions ("**AS**") [**35**] fall into the latter category described by the Respondent.

2. Even if they did, adopting the Respondent's approach would lead the Court into impermissible merits review. Either a matter is an objection, or it is not. If it is an objection, it needed to be evaluated because it is a submission of substance[1] or evidence of significance[2] in that it is a matter to weigh in determining the reasonableness of relocation. It does not need to be 'central and important' to an aspect of the case the Tribunal must consider, contrary to **RS [13]**, see also **RS** at **[14]** and **[16].** That is not a threshold identified in any of the cases the Respondent cites at footnotes 5-8. If it were otherwise, protection claimants would have to restate related issues multiple times under all possible Refugee Convention headings on every occasion they made a statement or submission.

3. If a fact was raised as an objection by an Appellant but was, to use the Respondent's examples, regarded by the Tribunal as 'misconceived, irrelevant' or 'lacking in rational connection', the Tribunal ought to have said so.

4. A Tribunal's decision should be 'in no way flawed' and should be the subject of 'the most anxious scrutiny' because of 'the gravity of the issue which the decision

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[1] *SZSSC v Minister for Immigration and Border Protection* (2014) 317 ALR 365 at [75]-[76], [78]-[81] per Griffiths J, citing *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [24] per Gummow and Callinan JJ, *SZRBA v Minister for Immigration and Border Protection* (2014) 314 ALR 146 at 149 [11] per Siopsis, Perram and Davies JJ and *MZYTS* at [38].

[2] *Minister for Immigration & Multicultural Affairs v SBAA* [2002] FCAFC 195 at [44] per Wilcox and Marshall JJ; see also *W280 v Minister for Immigration and Multicultural Affairs* [2001] FCA 1606 at [26] per French J; see also *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157 at [47] per Dowsett, Flick and Griffiths JJ

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determines'.[3] The Tribunal's reasons - what appears in them and what does not - should also be read in light of the expertise of those involved in their drafting. The latitude the Respondent calls for in this Court at **RS [10]-[11]** – a laissez-faire approach – is ill-suited to the Nauruan process, as is the beneficial construction approach set out in *Wu Shan Liang*[4] where the decision-maker was a delegate of the Minister.[5] In this case, the decision-makers are a panel of three[6] highly qualified and experienced[7] specialist refugee law decision makers[8] who were aided by experienced lawyers also with specialist legal expertise.[9] The presiding Member was, at the relevant time, required by law to be a person qualified to be appointed a judge of the Supreme Court of Nauru.[10] Less latitude should be given in these circumstances: 'Eyes should not be so blinkered as to avoid discerning an absence of reasons or reasons devoid of any consideration of a submission central to a party's case',[11] especially because 'more may be expected of experienced and legally qualified members of [a specialist administrative tribunal] who have had the benefit of written submissions filed by experienced legal practitioners'.[12]

5. The Respondent's approach at **RS [15]** and **[18]** appears to elevate the raising of an objection to something like a pleadings exercise. This is contrary to authority.[13] Relocation is not always a live question in refugee protection claim assessments.[14] Once relocation is raised as an issue, a reappraisal of all material put forward by the applicant must be undertaken in light of the reasonable relocation test. See the relevant UNHCR Guidelines.[15]

6. In any event, the second objection was made under a heading 'relocation'.[16] Reading the relevant paragraph makes it plain that the Respondent's attempt at **RS [16]** to have this Court, on appeal, re-interpret a fact which was not in dispute before the Supreme Court, is misplaced. The sentence quoted by the Respondent arises in the following context:

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[3] *W375/01A v Minister for Immigration & Multicultural Affairs* (2002) 67 ALD 757 at [16] per Lee, Carr and Finkelstein JJ

[4] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at [30]-[31]

[5] Ibid. [10]

[6] Convention Act s 19

[7] According to public reports of the Australian government's Refugee and Migration Review Tribunals, each of the Tribunal members in this case had been on an equivalent Australian Tribunal for at least 10 years.

[8] *Refugee Convention Regulations* 2013 (Nr) r 4, which required that each member have at least 2 years' experience in refugee merits review at a tribunal or equivalent level; and proven capacity to conduct administrative review; and thorough knowledge of UNHCR refugee status guidelines and standards.

[9] Namely, Craddock Murray Neumann Lawyers Pty Ltd, who are contracted by the Commonwealth of Australia to provide legal services on Nauru (*Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [209]), including to the Appellant see CB 72-112

[10] Convention Act s 13(2) as at 17 January 2015

[11] *Soliman v University of Technology, Sydney* [2012] FCAFC 146; 207 FCR 277 at [57]

[12] *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157; 240 IR 178 at [47]

[13] *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at [1] per Gleeson CJ; *Minister for Immigration and Citizenship v SZQPA* (2012) 133 ALD 292 at [42] per Gilmour J see also the reference to a 'clearly articulated argument', not a pleading, at *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [24]; see also *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307 at [58] per Mortimer J

[14] *Minister for Immigration and Border Protection v CRY16* [2017] FCAFC 210 at [86] per Robertson, Murphy and Kerr JJ

[15] UNHCR Guidelines on International Protection, "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees at [8]. For the significance of such guidelines to Nauruan refugee law see ~~the sources at footnote Error! Bookmark not defined.~~ *Refugee Convention Regulations 2013* (Nr) reg 4(c) and ~~the Supreme Court's decision in this case at~~ *YAU011 v Republic* [~~40~~2017] NRSC 102 at [45]; see also *CRI029 v Republic* [2017] NRSC 75 [49]-[51] and *EMP144 v Republic* [2017] NRSC 73 [62].

[16] CB 118

> In Kathmandu, I am still at risk of harm. The whole time that I was in Kathmandu in 2013, I was in hiding. I hid in a hotel. I cannot hide in Kathmandu forever – how can I work and have a life?

Read in context, the Appellant was not saying that 'his mere presence in Kathmandu, in his opinion, was "hiding"'. Contrary to the Respondent's submissions, there was a 'protective measure' the Appellant took and that was that he 'hid in a hotel' in Kathmandu.

7. The Tribunal found that there was no risk of harm to the Appellant there because 'no harm befell the applicant... in Kathmandu' in the past.[17] This is hardly surprising, given that the Appellant was in hiding in a hotel when he was there. The finding that no harm 'befell' him does not show that he could reasonably relocate there. The Tribunal failed to consider whether he could reasonably relocate when his previous relocation was safe for him because he was in hiding. This consideration is absent from [39]-[41] of the Tribunal's reasons. This was the second objection which the Tribunal did not consider.

8. The Respondent at **RS [17]**[18] seeks to elide findings on the absence of persecution on the one hand, with a denial of freedom of expression as part of a reasonableness assessment on the other. The Tribunal dealt with the former at [**37**]-[**38**] and ignored the latter at [**39**]-[**41**]. The distinction between these two assessments is highlighted by authority:[19] a finding of an absence of persecution is not enough to imply a finding that relocation is reasonable. A denial of basic rights – including freedom of expression as protected in Article 19(2) of the ICCPR – in a place can make it unreasonable for that individual under the relocation test of the Refugees Convention.[20]

9. The wife's safety was expressly raised as a reason relocation would not be reasonable for the Appellant. The Tribunal needed to consider the nature of that risk to her safety and, consistent with its obligation to establish that relocation was not reasonable,[21] determine whether this made relocation unreasonable for him. The Appellant gave evidence that, three weeks before the Tribunal hearing, his wife was directly threatened with death by a YCL member.[22] The fact that no harm came to the Appellant when he was in hiding in Kathmandu says nothing of the risk to his wife, which risk was a factor to consider on the question of the reasonableness of his relocation.

10. In response to **RS [19b],** the relevant objection to relocation relates to the Appellant's child's safety, not his ability to enrol in school. The Tribunal failed to consider the safety issues for the child that were expressly raised by the Appellant.

Ground 2

11. Contrary to **RS [27],** this ground is concerned with the Tribunal hearing and its reasons on this question, and the lack of opportunity the Appellant had to address the Tribunal on what turned out to be the determinative adverse issue in his case.

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[17] Reasons of the Tribunal at [34], see also [32]

[18] The Respondent there correctly identifies an error in the citation in AS footnote 50. That footnote should cite CB 36 [20], where the quoted text appears as a standalone paragraph.

[19] See AS footnote 55

[20] *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* [1994] FCA 1253; 52 FCR 437 at 442 per Black CJ, at 450-451 per Beaumont J and at 453 per Whitlam J; see also all the cases cited at James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) p 333-334 footnote 280 and UNHCR Guidelines on International Protection, "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees at [28]

[21] UNHCR Guidelines on International Protection, "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees at [33]-[35]

[22] CB 123, see also the reasons of the Tribunal at [30], which does not deal with this aspect of the claims concerning the Appellant's wife.

12. Relocation is not an 'obvious' issue as the Respondent suggests at **RS [23]**, because it is not always a live question in refugee assessments.[23] Its scope is also not obvious unless and until the Tribunal identifies with precision the relocation places to which it would have regard and the reasons those places were safe and were reasonable as places for that individual to relocate.

13. The submissions made by the Appellant on this question (including all of those identified at **RS [25])** were submissions made at large and in anticipation of the general issue of relocation. Those submissions could not have guessed at the places to which the Tribunal might regard it as being reasonable for the Appellant to relocate. The Appellant was not put on notice of either: see the extract from the transcript at **AS [42]**. The failure to give the Appellant an opportunity to respond to those matters was a breach of procedural fairness.

Ground 3[24]

14. The Tribunal did not make its complementary protection assessment 'having regard to my findings of fact above', as occurred in the only case on which the Respondent relies.[25] Instead, it said that 'no arguments as to why the applicant would suffer those various types of harm' were made.

Ground 4

15. There is a significant overlap of issues in this case and the cases of CRI026 and DWN027. We adopt the reply submissions made in those cases to the extent that they deal with issues raised by Nauru which are common to this case and either of those cases.

16. At **RS [38]**, the Respondent draws from an individual complaint, in the matter of *Kindler,* decided more than a decade before the same Human Rights Committee's more authoritative General Comment. That earlier formulation adds the 'necessary and foreseeable' gloss. Those additional words, on which the Respondent relies at **RS [39]**, make no difference given the facts of this case, but in any event there is no textual support for their addition.

17. Little, if any, weight should be given to any of the views expressed in *BL*. The views do not reveal a process of reasoning on the critical issue of concern to this Court.

18. In any event, some of the other 'views' of the Human Rights Committee concluded that the ICCPR provisions were not engaged "[p]rovided that the author would only be returned to such a location where the State party determines that adequate and effective protection is available".

19. At **RS [44]-[45]**, the Respondent seeks to attribute to UNHCR a view supportive of its contentions from a single submission to an Australian inquiry from the Australian office of UNHCR. The extract on which the Respondent relies is taken out of a context where the UNHCR office also expresses the view that the same proposed amendment gives rise to 'serious concerns' for UNHCR[26] - no such concerns could exist if the proposed law complied with international law. And the quote is ambiguous. The reference to 'existing State practice' could be read as a reference to 'existing State practice' on

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[23] *Minister for Immigration and Border Protection v CRY16* [2017] FCAFC 210 at [86] per Robertson, Murphy and Kerr JJ

[24] See **RS [28] – [29]**

[25] Contrast *SZSGA v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 774 at [15] with the reasons of the Tribunal in this case at [43]-[45]

[26] UNHCR Regional Representation in Canberra, Submission No 15 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Complementary Protection and Other Measures) Bill* 2015, 3 December 2015, 5 [21]

reasonable relocation under the Refugees Convention, or it could be read as a reference to the kinds of provisions at footnote 87 of the Appellant's primary submissions. Importantly, that 'State practice' is not one Nauru adopted.

20. Little weight should be given to the view of a regional office of UNHCR, especially as there is no established, public opinion of the UN High Commissioner's office on the present question. The central office of UNHCR has expressed a view supportive of the Appellant's position in this case. UNHCR notes that, when determining a complementary protection claim, the UN Committee on Torture:

> In considering the facts of an individual's case, his personal profile, (e.g. ethnic/political background) will be taken into account as well as the general human rights conditions in the country of origin, but not any internal flight argument.[27]

21. At **RS [41]-[42]**, the Respondent relies on the ECHR decision in *Sufi and Elmi* concerning 'subsidiary protection', not 'complementary protection'. 'Subsidiary protection' is a unique term defined by a legal instrument by and for European states.[28] The differences are substantial – some of them were identified at **AS** footnote 83. The differences are not dealt with at all in the Respondent's submissions.

22. *Sufi and Elmi* should be read in light of those differences. It did not refer to, let alone consider, the ICCPR or CAT at all. And the European instrument which created 'subsidiary protection' has an express relocation provision. The European Court noted that 'it is a well-established principle that persons will generally not be in need of ... subsidiary protection if they could obtain protection by moving elsewhere in their own country'. This says nothing about complementary protection under Nauru's international obligations.

23. The reference in *Sufi and Elmi* to 'international law' on which the Respondent relies at **RS [42]** must be read as a reference to the relations between European nations only, not relations between all nations. That is, the Respondent's attempt to extrapolate from the European decision a principle of universal application is at odds with the context in which the relevant comment was made, which context concerned the inter-national law of Europe.

24. At **RS [41]**, the Respondent also cites the European decision in *Salah Sheekh*. The relevant paragraph is not concerned with the MOU, ICCPR or CAT, but is concerned with a European variant[29] of Article 7 of the ICCPR. Properly understood, the decision in *Sheekh* supports the Appellant's submission to the effect that Article 7 of the ICCPR does not contain nor imply a relocation test.

25. Contrary to **RS [48(b)]** the Full Federal Court noted in *MZYYL*, that the complementary protection regime enacted in the Australian legislation "uses definitions and tests different from those referred to in the International Human Rights Treaties". One such difference adopted by the legislature in seeking to codify the ICCPR obligations is the inclusion of an express relocation qualification. There would be no reason for the statutory imposition of an express relocation qualification, not seen in the text of the ICCPR, if one already existed.

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[27] Mandal, R., *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, Legal and Protection Policy Research Services, Department of International Protection, United Nations High Commissioner for Refugees, PPLA/2005/02 (June 2005) at [55]

[28] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (**Directive**) Art 2(e)

[29] That European variant differs from the ICCPR in that it does not protect against 'cruel' treatment of punishment; see *Salah Sheekh v The Nehterlands* (2007) 45 EHRR 50 at [114]

26. Contrary to **RS [57]**, the relief sought by the Applicant does not require this Court to make any determination of merits. It merely invites this Court to avoid a remittal where only one outcome is possible if the Appellant succeeds on this ground: section 8 of the *Nauru (High Court Appeals) Act 1976* (Cth) empowers this Court to 'give such judgment, make such order or decree... as ought to have been given, made or imposed in the first instance'. In the first instance, the Supreme Court of Nauru was empowered by s 44 of the *Refugees Convention Act 2012* (Nr) to make 'an order declaring the rights of a party or of the parties'. It is this power which the Appellant seeks that this Court exercise in his favour if ground 4 is allowed. This approach is also consistent with the power under s 32 of the *Judiciary Act 1903* (Cth), given that the Court is exercising original jurisdiction in this case.[30]

Ground 5

27. At **RS [55]**, the Respondent asserts that there 'is no suggestion that [the Tribunal] 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)'. That is precisely what is alleged. It was to demonstrate this point that the extended extract from the reasons and transcript were recited at **AS [71]-[72]**. The Tribunal's repeated use of the term 'irrefutable' at the hearing *and* in its reasons demonstrates that it approached its task with a fixed view and that it was not prepared to listen to the Appellant or the country information which refuted the 'irrefutable'. The Tribunal closed its mind. We refer to *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at [172] per Callinan and Heydon JJ.

28. The fact that there may have been some equivocal country information which supported the Tribunal's finding (see **RS [52]**, such as that recited at **RS [51]**, which refers to the relevant action being 'extremely difficult', but not irrefutably impossible as the Tribunal suggested) does not make it irrefutable and nor does it justify ignoring other aspects of the same country information, nor denying the Appellant a meaningful chance to respond to that issue.

29. Procedural fairness ordinarily requires that a decision-maker actually consider relevant submissions which a party has an opportunity to make.'[31] No such opportunity was provided to the Appellant on this issue because the Tribunal fixed its view on a fact it regarded as 'irrefutable', albeit contrary to part of the very source on which it relied.

Date: 31 January 2018

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[30] *Ruhani v Director of Police* (2005) 222 CLR 489 at 500 [10] per Gleeson CJ, 500-501 [14] per McHugh J, 522 [89] per Gummow and Hayne JJ; *Diehm v Director of Public Prosecutions (Nauru)* (2013) 88 ALJR 34 at 45 [56] per French CJ, Kiefel and Bell JJ.

[31] *Forrest and Forrest Pty Ltd v Minister for Mines and Petroleum* [2017] WASCA 153 at [103] per Murphy, Mitchell and Beech JJA