

BETWEEN:

EMP 144
Appellant

and

10

Republic of Nauru
Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

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

Ground 1 generally

2. Further to the respondent's written submissions (**RWS**), [6]-[12], it is settled that the Tribunal is not required to make out an applicant's case (*Abebe* (1999) 197 CLR 510, [187]), and in relation to objections to relocation, "the extent of the decision-maker's task will be largely determined by the case sought to be made out by an applicant" (*Randhawa* (1994) 52 FCR 437, 442-443, esp 443C-D). Also, "It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons" (*Applicant WAEE* (2003) 236 FCR 593, [46]), nor is it necessary for the Tribunal to give a line by line refutation of material put to it (*Durairajasingham* (2000) 168 ALR 407, [65]-[67]).

Ground 1(a)

3. The relevant item of evidence appears at AB 35 [21]. It was not directed to objecting to relocation. The appellant's objection to relocation was based on his claim that he would not be safe anywhere in Nepal, rather than any supposed unreasonableness of relocation (see AB 35 [27], AB 98 [46], AB 112-113 [68]-[72], AB 175.13-175.26).
4. In any event, the "prejudice" complained of at AB 35 [21] arose from the appellant's political affiliation and the Tribunal comprehensively dealt with that issue. The point was not developed in the otherwise extensive written submissions (AB 89-103, especially AB 98 [45]-[46]), and was not supported by reference to country information. It follows that the Tribunal was not required to do more than it has done.
5. To the extent that the appellant might now seek to identify support for the proposition at AB 35 [21] from materials that were before the Tribunal, that approach would seek to recast the appellant's case and is inconsistent with authority: *Appellant S395/2002* (2003) 216 CLR 473, [1]; *MZAJC* [2016] FCA 208, [12].

Ground 1(b)

6. It cannot be said that the Tribunal overlooked the material in relation to the appellant being in hiding: Reasons [17], [22] AB 181-183.¹ See also AB 156.6-156.8.
7. Further, the Tribunal found that:
 - a. the current situation in Nepal in areas other than the appellant's home region was safe, having regard to the limited risks that he faced, by reference to appropriate country information (Reasons [26]-[32], [34], [37]-[38], AB 184-187); and
 - b. the appellant could "live a normal life without undue hardship" if he were to relocate (Reasons [39], AB 187).
- 10 8. The appellant does not suggest that the Tribunal at any stage contemplated that the appellant may need to live in hiding in order for relocation to be safe and reasonable (and see AB 156.7).
9. Having regard to the matters in [6]-[8] above, the better inference is that the Tribunal considered the evidence in relation to the applicant being in hiding by did not think it was something that was material to mention in its reasons (*Yusuf* (2001) 206 CLR 323, [4]-[5], [9], [30]-[35], [66]-[69], *SZSRS* (2014) 309 ALR 67, [34]).²
10. Even if the Court were to infer that this material was not considered by the Tribunal, that does not give rise to any legal error. The evidence of a subjective fear held by the appellant which led him to hide was not sufficiently important to the decisive question in
20 this review – whether it was safe and reasonable for him to relocate away from the place of the localised risk of harm – to justify the conclusion that a failure to consider that evidence amounts to legal error: *SZSRS* (2014) 309 ALR 67, [58]-[59] (read with [15] and [19]); *SZRKT* (2013) 212 FCR 99, 127 [97], 128-129 [102].
11. Insofar as ground 1(b) relates to a complaint that the Tribunal did not consider the appellant's evidence at AB 35 [20] – that "In Nepal, there is no freedom to express ones political views", this point was not developed in any way as an objection to relocation and was a piece of evidence that did not require express mention.

Ground 1(c)

12. The Tribunal was plainly aware of this evidence: Reasons [8], [10], [33], [39]-[40].
- 30 *Appellant's submissions [35(d)]*
13. This point is not comprehended by the Notice of Appeal (see AB 342).

¹ Note that Reasons [17] refers to discussion at the hearing recorded at AB 155.43-156 and Reasons [22] refers to discussion at the hearing recorded at AB 175.23-175.26

² It is not suggested that any error of law arises from the Tribunal finding that it was not material to the decision under review that the appellant claimed to have been in hiding.

14. The Tribunal did not make any finding about whether or not the appellant's wife may join the applicant if he were to relocate, nor was there any evidence on the point.
15. The appellant's fears for her safety arose entirely from his own political activities. If she were to relocate with him, the Tribunal's findings that the appellant will be able to "live a normal life without undue hardship" (Reasons [39], AB 187) subsume the point made in AS [35(d)].
16. If she were not to relocate with him, then any fears he held for her safety could not have rationally engaged with the reasonableness of him relocating because his relocation would leave her situation unaffected, and also, would leave unaffected any
10 fears that he held for her safety.
17. It follows that either: (i) specific mention of this evidence was unnecessary as it was subsumed within findings of greater generality; or (ii) it was not evidence which the Tribunal had to resolve specifically (being directed to a misconceived argument).
18. In any event, this point was not developed in any subsequent submissions as an objection to relocation, and did not require specific response.

Ground 2

19. The appellant gave evidence (AB 112 [68]-[72]), and his representatives made submissions, on relocation (AB 98 [46]-[47]; 175.13-175.35). He must have been aware of this issue. In any event, this was an "obvious issue".

20 *Ground 3*

20. The totality of paragraph 43 of the Tribunal's reasons (AB 187) makes plain that the Tribunal understood that the appellant's complementary protection claims arose from the same circumstances as his claims under the Refugees Convention. No error of law is shown in the Tribunal adopting earlier findings in its subsequent analysis.

Ground 5

21. The country information referred to by the Tribunal supports what is said in Reasons [20] (AB 182; see AB 210).
22. The passages cited by the appellant in the transcript of the hearing do not indicate that Tribunal had closed its mind. Rather, the Tribunal attentively engaged with what the
30 appellant was saying in relation to his child, and responded by referring to country information on the point (AB 161). The use of the word irrefutable in Reasons [20] AB 182 does not in any way indicate that the appellant was denied an opportunity to address the Tribunal or that the Tribunal had closed its mind on this issue.

8 February 2018

ANGEL ALEKSOV