IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M131, M145 and M151 of 2017

BETWEEN:

CRI026, DWN027 and EMP144
Appellants

and

THE REPUBLIC OF NAURU
Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS ON THE COMMON 'COMPLEMENTARY PROTECTION' GROUND

Part I:

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

Part II:

2. There is no dispute that Nauru's international obligations include those arising under the *International Covenant on Civil and Political Rights* (**ICCPR**) and the *Memorandum of Understanding between Nauru and Australia* (2013) (**MOU**).[1]

3. It is well established that the internal relocation test in refugee law arises from the text of the Refugees Convention, as this Court identified in *SZATV*. However the text of the ICCPR and the MOU is materially different.

4. The ICCPR (Articles 2, 6 and 7) and the MOU (cl 19(c)) prohibit Nauru from returning a person to a country where there is a real risk to that person of torture, cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life.

5. The ICCPR (Article 12(1)) also gives the right to all persons to liberty of movement and the right of freedom to choose their places of residence. This right protects 'against all forms of forced internal displacement' (UN Human Rights Committee General Comment 27 [7]).[2]

6. None of the *Refugees Convention Act 2012* (Nauru), the ICCPR or the MOU restricts the prohibition on return to circumstances where the return would be to another part of the person's country of origin where there would be no risk of harm. The language of cl 19(c) of the MOU refers to the obligation not to 'send a Transferee to another country where there is a real risk that the Transferees will

[1] Cf *HFM045 v Republic of Nauru* [2017] HCA 50 at [8]; and *DWN042 v Republic of Nauru* [2017] HCA 56 at [24] in which this Court proceeded on the basis that those instruments impose international obligations.
[2] See the appellant's submissions in chief in *DWN027* at [38], footnote 49.

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be subjected to' the relevant harm. This inquiry is directed to the country, not to a geographically restricted part of the country.

7. A text based approach, that enables Articles 2, 6, 7 and 12 to be read harmoniously, and consistently with the MOU, leads to the conclusion that the only question for determination of a claim to complementary protection under Nauruan law is whether there is a real risk of exposure to relevant harm in any place in the country of return. As a matter of text, this should be preferred to the Respondent's approach, which would stultify the rights under Article 12 and would provide that *non-refoulement* obligations are not engaged provided for example that a person can avoid inhuman or degrading treatment if he or she goes into hiding in or is restricted to a small part of the relevant country. The Appellants' approach is also consistent with s 4(2) of the *Refugees Convention Act* which speaks of the 'frontiers of countries'.

8. The position at international and Nauruan law on this issue is materially different from the domestic statutory provisions (that are submitted to be alterations of the otherwise applicable international obligations) in at least Australia (*MZYYL* [18]), Europe, UK, Canada and NZ. The context in which the MOU was signed on 3 August 2013, includes the fact that in 2011 one of the parties (Australia) had enacted the deeming provision now found in s 36(2B) of the *Migration Act*. Given the text of the ICCPR, it should not be concluded that s 36(2B) otherwise had no work to do. Noting the enactment of s 36(2B) before the parties entered into the MOU, it is significant that they chose not to include an equivalent provision, and that Nauru elected not to include a similar provision in the *Refugees Convention Act* 2012 or in any of the 2014 amendments to that Act.

9. Notwithstanding the above, the Tribunal refused each Appellant's claim to complementary protection under the Convention Act for the reason that it found that each Appellant could reasonably relocate to places within their respective countries of origin.

10. The Tribunal relied on its reasoning in respect of the Refugees Convention in this regard. Case law, including from this Court (*SZATV* [15], [19]), makes clear that the reasonable relocation test arises under the Refugees Convention by reason of the causative condition in Article 1A. There is no equivalent condition in the text of the Convention Act, ICCPR or the MOU and none arises by necessary implication, particularly having regard to the qualitative differences in approach that underlie the Refugees Convention and the ICCPR.

11. The Respondent's reliance on European case law concerning subsidiary, not complementary, protection is misplaced because the European texts are materially different from the position at general international law. Also, none of that case law deals with the ICCPR or the MOU.

12. The Respondent's asserted gloss on the text of the ICCPR, namely the addition of the requirement that it is a 'necessary and foreseeable' consequence of return that there is a real risk, does not provide a basis for imposing a reasonable relocation requirement. The UN Human Rights Committee documents as well as the Special Full Federal Court's decision in *SZQRB* do not support the view that the phrase alters the substance of the tests for finding complementary protection.

13. The Human Rights Committee's views in *BL* address reasonable relocation under the ICCPR but in a perfunctory way and without clear foundation, as observed in member Salvioli's concurring individual opinion, which supports the Appellants'

position. For these reasons and because the relevant reasoning is inconsistent with the relevant text and context applying in Nauru, this Court should not follow the approach taken by the joint reasons in that decision. The approach endorsed by Lander, Jessup and Gordon JJ in *MZYYL* should be preferred as evidencing an orthodox text-based construction.

14. If the Appellants succeed on this ground, it is submitted that this Court should make an order declaring each Appellant's right to be recognised as a person owed protection under the Convention Act (*Nauru (High Court Appeals) Act* s 8, *Convention Act* s 44, *Judiciary Act* s 32) because the existing findings of the Tribunal in each case make out the complementary protection claim absent a relocation analysis, which makes remittal an unnecessary step.

15. To the extent that leave is required to advance this ground of appeal in CRI026, the respondent does not point to any relevant prejudice but contends that the ground lacks merit. The issue is primarily one of construction of the ICCPR and the MOU and application of them to facts that are not in dispute. The construction issue is important and arises in relation to each of the appeals listed today. In those circumstances it is expedient in the interests of justice to consider the merits of the grounds.

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