IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

Nos M145 and M131 of 2017

DWN 027 v Republic of Nauru

CRI 026 v Republic of Nauru

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

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

Common issue: application of internal flight principle to complementary protection (Ground 1 in each case)

2. International jurisprudence has accepted that a state may breach its obligations under the ICCPR by returning a person to another state if, *as a necessary and foreseeable consequence* of that return, he or she would face a real risk of conduct contrary to article 6 or 7. (DWN 027 RWS [11])

    - *Kindler v Canada* at [6.2]

3. That condition is not met if there is a place in the country of return where the person could live without encountering a real risk of such conduct, and it is reasonable for him or her to relocate to that place. (DWN 027 RWS [12])

4. The proposition in [3] is accepted by the UN Human Rights Committee. (DWN 027 RWS [13]-[14])

    - *BL v Australia* at [7.4], [8], Appendices 1 and 2

5. The proposition in [3] reflects a broader understanding that non-refoulement obligations operate at the level of states and are not engaged if a person's human rights would be protected in the receiving state. This understanding informs the construction of other treaties as well. (DWN 027 RWS [17]-[18])

    - *Sufi and Elmi v UK* at [35]

    - *BL v Australia* Appendix 1

6. The Tribunal therefore did not err, in either case, by proceeding on the basis that Nauru would not have non-refoulement obligations under the ICCPR if the Appellant could reasonably be expected to relocate within Pakistan to an area where he would not be subject to the harm that he claimed to fear.

DWN 027 Ground 2: the Convention on the Rights of the Child (CRC)

7. The decision of the Tribunal was not itself an "action concerning children" within Art 3 (RWS [36]-[38]). In any event, the CRC not being part of Nauruan domestic law, there was no obligation on the Tribunal to make the interests of the appellant's child a primary consideration in its decision-making.

8. If any question arose for the Tribunal, it was whether returning the appellant to Pakistan would constitute a breach of any obligation of Nauru under the CRC.

    - *Refugees Convention Act* (2017 reprint) s 6(1)(c) and definition of "complementary protection in s 3)

9. No claim of this kind was made to the Tribunal.

10. No non-refoulement obligation could arise under the CRC, at least because the appellant's child was not within Nauru's jurisdiction within the meaning of Art 2 of the CRC. (RWS [25]-[35])

DWN 027 Ground 3

11. On a sensible reading of the Tribunal's reasons, each of the matters mentioned in AWS [70] was considered in assessing whether it was reasonable for the appellant to relocate. (RWS [49]-[54])

    - AB 156

CRI 026 Ground 2

12. As to AS [49(b)], it is not established that there was any error. The relevant paragraph of the Tribunal's reasons (AB 183 [13]) purports only to summarise the appellant's RSD interview. No transcript of that interview is in evidence. (RWS [30)

13. The other matters pointed out in AS [49], viewed in context, are no more than proof reading errors. They do not provide any basis to infer that the Tribunal had regard to extraneous material or failed to grapple with the appellant's case. (RWS [33]-[35])

14. As to the mistake at AB 192 [68] the Court may, if necessary, have regard to the Tribunal's corrigendum (AB 194) as evidence of the Tribunal's reasoning. (RWS [36]-[37])

CRI 026 Ground 3

15. The Tribunal accepted that there was a real possibility of the appellant being harmed in Karachi (AB 190 [55]). It then turned to consider whether he could avoid harm by living in Punjab. It noted that he had been born in Punjab (AB 191 [61]) and his wife's family lived in S_, which is in Punjab (AB 191 [63]). His wife and children were living with them (AB 181 [9]).

16. The appellant raised his family responsibilities as a general concern about relocating but did not relate that concern specifically to Punjab. (RWS [40]-[41], [43])

17. In these circumstances it is unreal to suggest that there was a "substantial, clearly articulated argument" that it would be unreasonable for the appellant to relocate to Punjab because he could not safely have his family there. On the Tribunal's findings, his family was already there; and for him to relocate there could not cause any detriment to them. This is probably what the Tribunal had in mind when it referred to the appellant being able to "establish a normal life there with his family" (AB 191 [65]).

CRI 026 Proposed Ground 4

18. The impugned statement at AB 190 [59] refers back to findings that the Tribunal made at [57]. Those findings were made citing two documents. (RWS [52])

19. For Ground 4 to succeed the appellant would need to show that neither those documents nor any other evidence provided a rational basis for the findings. (RWS [53])

20. The argument was not raised before the Supreme Court and the relevant documents were not in evidence. They are reproduced at AB 260-262 and 300-302 and it is understood that the appellant wishes to tender them.

21. The ground should not be permitted to be raised because, if raised below, it could have been met by evidence (not only the two documents referred to, but conceivably other material). If it is raised, the ground must fail in the absence of evidence that there was no material before the Tribunal to support its findings. (RWS [54])

22. Alternatively, if reference is made to the two documents, they clearly supported the propositions for which the Tribunal cited them: AB 260.6, 301-302. There was thus some evidence, at least, for the findings at [57], and for the premise stated at [59].

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7 February 2018