

BETWEEN:

DWN027
Appellant

and

THE REPUBLIC OF NAURU
Respondent

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS ON GROUNDS 2 AND 3

Part I:

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

Part II:

2. The Tribunal determined the Appellant's protection claims on the basis that although the appellant would be subject to persecution if he was returned, he could relocate within Pakistan: (Reasons at [41] and [45] **AB 156-157**). The Tribunal also expressly found that the Appellant's infant child and family would be required to relocate with the appellant if he was returned ([39] **AB 156**).
3. The Convention on the Rights of the Child (**CRC**) imposes "international obligations" on Nauru which are encompassed by ss 3 and 4(2) of the *Convention Act*. Nauru must not expel or return any person to the frontiers of territories in breach of CRC obligations, including the art 3(1) requirement that "in all actions concerning children, the best interests of the child shall be a primary consideration".
4. The Tribunal was required by art 3(1) to give primary consideration to the interests of the Appellant's child, but failed to do so. The Supreme Court erred in accepting that art 3(1) did not apply to the Tribunal's consideration of the Appellant's application (Judgment [53]-[55] and [60] **AB 198-199**) and in disposing of the ground by concluding that the Tribunal "took the interests of the child into consideration when making the finding of relocation" (Judgment at [60] **AB 199**).
5. The Supreme Court accepted the Respondent's contention that the Tribunal was not obliged to comply with art 3(1) because art 2(1) limits Convention protections to children within the jurisdiction of Nauru, on the basis that that is limited to the territory or Nauru's "physical power and control" ([53]-[54] **AB 198-199**). This was in error for three reasons.
6. First, art 2(1) confers a right, and is not a provision of limitation expressed to curtail each other freestanding provision in the Convention. A harmonious and purposive reading of the Convention as a whole (see art 31(1) of the Vienna Convention on the Law of Treaties; see also *Teoh* at 289), including particular Convention rights and obligations which may of their nature extend to subject children beyond a State Parties' traditional jurisdiction (arts 10, 11, 35 and 38(4)) suggests that article 2(1) does not operate to impose limits on every substantive article of the Convention. Any limits may be found in the terms or subject matter of individual articles.
7. Second, art 2(1), even if it limits other Convention rights, does not restrict the procedural *obligation* to consider the best interests of children in article 3.

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8. Third, if the art 2(1) reference to “child within ... jurisdiction” does impose some limitation on art 3(1), “jurisdiction” as applied to the art 3(1) obligation is *not* limited to children in the territory of or subject to the physical control or power of the State.
9. Jurisdiction at international law is not limited to territory or physical control, and while not fully settled, has as a touchstone a “substantial and bona fide connection” (see I. Brownlie; V. Lowe; *XYZ v Commonwealth* at [6]).
10. Human rights instruments existing before the CRC which adopted express territorial limitations show that art 2(1) jurisdiction is not territorially limited: ICCPR art 2(1); Convention Against Torture art 2(1).
- 10 11. International law precedents recognise that States may be obliged to consider extraterritorial consequences of actions within the State or by State actors. Various human rights law precedents in other contexts also recognise that the State may have responsibility for rights contraventions by reason of the effect or foreseeable consequences of State actions:
 - (a) The extradition and expulsion cases in the European Convention system, where a State may contravene the art 3 prohibition on torture by reason of the foreseeable consequences when the person is returned to the requesting country: eg *Soering*.
 - (b) The State may have responsibility for or jurisdiction over actions of its authorities which produce extraterritorial effects: eg *Drozdz*; *Loizidou*.
 - 20 (c) Family reunification cases recognise the obligation to consider the interests of a child outside the decision making State; and is not the subject of physical power or control by that State (eg *El Ghatet*), because of the effect on the child.
12. “Jurisdiction” applies for the purpose of the art 3(1) obligation to consider wherever the state’s actor is taking action which may have a direct effect on a child. The connection between Nauru and the Appellant’s child is the direct practical effect of the Tribunal’s decision that it could return the Appellant based on relocation, which required his child to relocate with him.
13. Art 3(1) of the CRC applies to all actions concerning children, including those of “administrative authorities”. Action “concerning” children is to be interpreted broadly and practically as action “regarding”, “touching”, or “in relation to” children even when not the formal legal subject of action (*Teob* at 289; 303; *Guo* at [55]).
- 30 14. The action concerned the Appellant’s child because (1) the Appellant raised the child’s circumstances in his evidence and submissions as to the unreasonableness of relocation (Statement 19 December 2013 **AB 42**, par [31] to [32]; interview **AB 130**) and (2) the Tribunal accepted as a premise of the decision that the Appellant could relocate, that his child would relocate also (Reasons at [39], [40], [45] **AB 156-157**).
15. The Tribunal did not consider the child’s best interests as a primary consideration or otherwise. The Supreme Court’s conclusion that the Tribunal “took the interests of the child into consideration when making the finding of relocation” (**AB 199** at [60]) was based only on the finding that it would take the appellant time to re-establish himself and that “it would take some time before his family including the child could re-join him.” This involved no consideration of whether the relocation from his home to a new and unfamiliar location would be in the child’s best interests.
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GROUND 3: failure to consider objections to relocation

16. Leave to amend the grounds of appeal should be granted as the amendment does not involve a substantive difference from the way the matter was raised in the Supreme Court, raising essentially the same issues and findings as were there in issue, and it is in the interests of justice to permit the amendment as it has merit.
17. The Tribunal accepted the risk of persecution in the Appellant's home area (**AB 157** [45]) based on the real threat of harm (**AB 152** [24]) of assault or death (**AB 151-2** [23]).
18. The sole basis on which the Tribunal then determined that the Appellant was not owed obligations under the Refugees Convention or complementary protection was that it was reasonable for him to relocate: at **AB 156**, [41]; and **AB 157** [45].
19. What is reasonable, in the sense of practicable, depends on the particular circumstances of the applicant and the impact upon that person of relocation in the place of return within the country of nationality (*SZATV* at [24]). Where relocation will also involve family members, it is necessary to consider their circumstances: *MZANX* at [54], [55], [60].
20. The Appellant's objections to relocation that were not considered as required were:
- (a) His difficulty integrating as a Pashtun and as a Sunni Muslim who may be mistaken for Taliban (Submissions at **AB 90-91** [35] [36]; Statement **AB 105** at [40]-[43]; interview at **AB130** lines 16-2; **AB131** lines 38-43. The Tribunal rejected this but did not complete any reason as to why: **AB 156** at [40])
- (b) His dependent son and family who would have to relocate with him (**AB 42**). The Tribunal accepted this (**AB 156** at [39]) but engaged in no consideration at all of whether the relocation would also be reasonable in respect of family members by reference to their personal circumstances including language abilities, health and education needs (cf *MZANX* at [62]).
- (c) His lack of housing; the need for a guarantor to obtain a rental property; he could not buy a house without selling the family home and shops which would make him a target for extortion. (Statement **AB 105** at [44]; interview at **AB 131** line 42 to **AB 132** line 8; submissions at **AB137** lines 43-44). The Tribunal assumed the family would live in the home on income derived from the shops while the Appellant re-established himself, but did not address how he could then arrange housing (**AB 156** at [39]).
- (d) He could not speak Punjabi, the predominant language in Punjab (Submissions **AB 137**, 40-41). The Tribunal found only that he could speak some Urdu (**AB156** [39])
21. Both the Tribunal's reasons and its cursory and inconclusive questioning on the issues compel the conclusion that the Tribunal failed to consider these objections to relocation.
22. The Tribunal's failure to consider and respond to all of the Appellant's objections to relocation constituted a failure to address the relocation question involved in the task imposed on the Tribunal by ss 6 and 34 of the Convention Act. (*SZATV* at [29], *MZANX* at [70])
23. The error was also a denial of procedural fairness (*Dranichnikov* at [24]; *M61* at [90]) which was a breach of s 22 of the Convention Act.


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