IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M145 of 2017

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN

DWN027
Appellant

and

The Republic of Nauru
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

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I THESE SUBMISSIONS ARE SUITABLE FOR INTERNET PUBLICATION

II REPLY

Ground 1

1. The Appellant's primary submissions on ground 1 focus on the text[1] and the context[2] of the provisions which give content to 'complementary protection' under the Nauruan Convention Act. This is consistent with fundamental principles of statutory interpretation. The Respondent's submissions avoid engaging with the text or its context. They do not, for example, address the text of cl 19(c) of the Memorandum of Understanding[3] or Article 12 of the ICCPR.[4] The Respondent has instead primarily focused on the texts of other instruments in other contexts.

2. The Respondent has attempted to superimpose a "*necessary and foreseeable*" qualification on the implied non-refoulement obligation in Articles 6 and 7 ICCPR, relying upon a Human Rights Committee ("**HRC**") General Comment.[5] However, this phrase does not appear in the General Comment. The phrase does appear in the HRC's Views in *Kindler*, however as subsequent decisions of the HRC make clear, this term is being used to ascertain whether there is a "*real risk*" that the non-refoulement obligation is engaged, not to constitute an additional requirement.[6] In this respect, the Appellant adopts the submission in reply of the Appellant in CRI026, being proceeding M131 of 2017, dated 22 November 2017 at [5]-[6].

3. At RS [12], the Respondent relies on the decision of Perram J in *Anochie*. His Honour's reference to a "*high standard*" in that case was not directed to questions of relocation, but to explaining that the relevant inquiry is "whether a necessary and foreseeable consequence of deportation would be a real risk of irreparable harm", as is made clear at [63]-[67].

4. The inquiry as to the consequences of return to the frontier of a state does not of itself involve any "internal relocation" inquiry. The inquiry is simply whether there is a real risk, if the person is to be returned to the country at all. Adopting the Respondent's analysis would be inconsistent with the manner in which the non-refoulement obligation has been given effect by s 4(2) of the Convention Act, which expressly refers to "the frontiers of territories", and also with cl 19(c) of the MoU which refers to not sending transferees to "another country". Adopting the construction for which the Appellant contends would enable the ICCPR, the MoU and the Convention Act to be read harmoniously.

5. At RS [14] and [18], the Respondent relies on a statement of two members of the Human Rights Committee in *BL*. That statement should be approached with caution, given the perfunctory manner in which the issue was addressed, and the terms of the concurring individual opinion:

> The Committee has never based its decisions on the "internal flight alternative" or "internal relocation alternative" doctrines. It is my understanding that it has not done so in this case either and that the above-mentioned assertions figured no more than marginally in the line of reasoning that led to the Committee's decision. ...
>
> I hope that in the future, the Committee will abstain from superfluous analyses that could cloud its practices in cases such as this. If a person would genuinely be at risk of becoming the victim of violations of article 6 or article 7 of the Covenant if that person were to be expelled or extradited from a State party to another State (whether or not it is a party to

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1 Submissions of the Appellant dated 24 November 2017 ("**AS**") [33], [35], [36], [40], [41], [43], [44].
2 AS [37]-[38], [44].
3 AS [44], *HFM045 v The Republic of Nauru* [2017] HCA 50 at [8], [30].
4 AS [37]-[38].
5 Submissions of the Respondent dated 15 December 2017 ("**RS**") [11].
6 See, e.g., *ARJ v Australia*, Communication No 692/1996, UN Doc CCPR/C/60/D/692/1996 [6.8], [6.10], [6.14], equating "real risk" with one that is "necessary and foreseeable".

the Covenant), the Committee should find a violation regardless of whether or not there are any safer areas within the country to which the victim would be sent.[7]

6. The Respondent also relies on a single submission to an Australian inquiry from the Australian office of UNHCR.[8] The extract is taken out of context. In the same passage the UNHCR office expresses the view that the proposed amendment gives rise to "serious concerns" for UNHCR[9] which does not support a view that the proposed law complied with international law. The central office of UNHCR has on another occasion expressed a view supportive of the Appellant's position in this case. In that analysis,[10] the UNHCR describes the role of the UN Committee on Torture when determining a complementary protection claim:

> 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.

7. The European Court of Human Rights decision in *Sufi and Elmi*[11] on which the Respondent relies concerns 'subsidiary protection',[12] not 'complementary protection'. 'Subsidiary protection' is a unique term defined by a legal instrument by and for European states.[13] Among the differences between international complementary protection law and European subsidiary protection law are that:

   a. complementary protection prohibits return to 'cruel … treatment or punishment' (ICCPR Art 7) where subsidiary protection does not (Directive Art 15(b)),

   b. subsidiary protection prohibits return to a place where there is a 'serious and individual threat to a civilian's … person by reason of indiscriminate violence in situations of international or internal armed conflict' (Directive Art 15(c)) where complementary protection does not use this qualification);[14] and

   c. subsidiary protection is of a prescribed one year duration (Directive Art 24(2)), where complementary protection has no fixed time limit.

   Sufi and Elmi did not consider the ICCPR or CAT.

8. Further the Directive has an express relocation provision. Article 8 provides:

> As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she:
>
> (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or
>
> (b) has access to protection against persecution or serious harm as defined in Article 7;

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7 Individual opinion of Committee member Fabián Omar Salvioli (concurring) at [7].

8 At RS [15]-[16].

9 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].

10 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].

11 *Sufi and Elmi v United Kingdom* (2012) 54 EHRR 9, 219 [30] immediately under the heading 'Relevant European Union Law'.

12 At RS [17]-[18].

13 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).

14 This might factually overlap in extreme cases with the prohibition on return to 'arbitrary deprivation of life' (ICCPR Art 6(1)).

and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.

Thus the European Court's observations in *Sufi and Elmi* say nothing about complementary protection under general international law, or pursuant to Nauru's international obligations.

9. As regards the Refugees Convention, it is not the case that the "internal flight" principle arises by implication because "the Refugees Convention is framed around the geopolitical unit of 'States'" (RS [19]-[20]). The Respondent's submission disregards the critical textual difference between the ICCPR and the Refugees Convention. As this Court has explained, the issue of internal relocation arises under the Refugees Convention due to the causative condition found within the text of art 1A(2) of that instrument.[17] The causative condition that was critical to the analysis in *SZATV* and *SZSCA* is absent from the instruments which give rise to complementary protection. Neither the text of the ICCPR nor the MoU imports the requirement seen in art 1A(2) of the Refugees Convention.

10. At RS [10], the Respondent submits that this Court cannot grant relief that would bring the process of determining the Appellant's protection claims to a close. The relief sought does not require that this Court make any determination of merits (contra RS [56]). It merely invites this Court to avoid the imposition on the parties of the unnecessary step of remitting a matter when the decision of the Tribunal, on its own terms, makes it plain that only one outcome is possible if the Appellant succeeds on this ground.

11. This Court is empowered to do so by Australian and Nauruan law. The *Nauru (High Court Appeals) Act* 1976 (Cth), s 8 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 that first instance, the Supreme Court of Nauru was empowered by s 44 of the Convention Act to, on remittal, 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 should ground 1 be allowed. Such an approach would also be consistent with this Court exercising its power under s 32 of the Judiciary Act, given that it is exercising original jurisdiction in this case.[19]

Ground 2

12. There are two principal areas of dispute between the parties. First, a dispute as to whether the jurisdiction of Nauru, pursuant to international human rights law, is engaged where executive action produces an effect in the territory of another state (see AS [56]-[57] and RS [25]). Secondly, a dispute as to whether the Tribunal's decision 'concerns' the Appellant's 4 year old child (see AS [62]-[63] and RS [37]).

13. At the heart of the Appellant's case is the fact that the practical effect of the Tribunal's decision is that he will be liable to be returned to Pakistan, and that a necessary pre-condition of this was that his son would be required to move across the country to join him. The Tribunal appropriately recognised that the only way that internal relocation would not cause "undue hardship" for the Appellant was if he would be joined by his family in his place of relocation. The Tribunal therefore premised its decision on a finding that the Appellant's son would move across the country to join him. This was not an "assumption" (contra RS [39]), it was an express premise of the Tribunal's ultimate conclusion: without it, the Tribunal would not have lawfully been able to conclude that there was no "undue hardship" on the Appellant. The Appellant accepts that his child is not in Nauru and that Nauru does not have any direct

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17 *SZATV v Minister for Immigration* (2007) 233 CLR 18 at 24 [15] per Gummow, Hayne and Crennan JJ; and at [19] adopting the reasoning of Lord Bingham in *Januzi v Secretary of State for Home Department* [2006] 2 AC 426 at 440. That reasoning was approved by French CJ, Hayne, Kiefel and Keane JJ in *Minister for Immigration v SZSCA* (2014) 254 CLR 317 at 326 [21] - 327 [24], as acknowledged at RS footnote 14.

19 *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.

control over any part of Pakistan (RS [26] and [28]). However, the practical effect of the Tribunal's decision is that the Appellant's return would only be lawful if the Appellant's child relocated to be with him.

14. As regards the dispute as to jurisdiction, the Respondent does not engage with the critical feature of this case: that the Respondent has taken a decision within its territory, that has a direct effect on a child outside its territory. It is the fact that the Tribunal's decision, performed within the national boundaries of Nauru, may produce an effect outside those national boundaries, that brings the Appellant's child within jurisdiction in respect of the obligation to consider the child's best interests. In the same way that a decision regarding family reunification produces effect on a child seeking to join his or her family members (AS [58]), a decision which is premised on a young child moving across the country to join his father, has an effect on the child. Article 3 of the Convention on the Rights of the Child ("**CRC**") is engaged in both cases. This does not mean that the Respondent exercises jurisdiction over the Appellant's child for all purposes: but insofar as the Tribunal's decision concerns the child in a very real and practical way, it exercises jurisdiction in respect of that child for the limited purpose of the art 3(1) obligation to make the child's best interests a primary consideration. Any alternative conclusion would give rise to a significant protection gap, which would be contrary to the humanitarian object and purpose of the CRC.

15. As regards the interpretation of 'concerning children', the Respondent does not acknowledge the domestic and international legal framework. As regards the domestic framework, the Respondent's attempts at RS [37] to distinguish between the executive of Nauru in the form of the Tribunal, and the executive in the form of the officer or entity that would remove the Appellant from Nauru, are irrelevant. The executive of Nauru *in any form* is bound by the terms of s 4(2) of the Convention Act, as the Respondent effectively acknowledges at RS [7]. As regards the international framework, art 3 of the CRC expressly provides that the obligation shall apply "in all actions concerning children", including actions taken by "courts of law, administrative authorities or legislative bodies". The fact that the body or institution may be exercising discretion is irrelevant (contra RS [38]).

Ground 3

16. The Respondent appears to submit at RS [40]-[41] that this ground is a substantial departure from the case before the Supreme Court. The Appellant sought to have the Court review whether the Tribunal dealt with the question of whether it was reasonable for him to relocate within Pakistan based only on the issues raised by him as to why it was not. The Court below at [62] correctly framed the issue as follows:

> The appellant submits that the Tribunal in making the finding of relocation did not address the issue that given the appellant's circumstances he would be compelled to return to the place where he was persecuted, that is, his home area. The Tribunal therefore failed to consider an integer of his objection to relocation.

This is the same complaint that the Appellant raises before this Court.

17. It is correct that s 34 of the Convention Act mirrors s 430 of the Migration Act 1958 (Cth); see RS [45]. However, the case law emanating from that Australian provision is inconsistent with the Respondent's submissions (RS [43] and [45]). A failure to analyse material directly bearing on a determinative issue for the Tribunal is inconsistent with the obligation on it to give proper, genuine and realistic[21] consideration to matters of that kind. Jurisdictional error arises when evidence of 'significance'[25] is not evaluated. As this Court has stated 'the failure of the Tribunal to make findings with respect to a particular matter may... reveal failure to

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21 *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51 at 92-3 in particular [212]; see also *Islam v Cash* [2015] FCA 815; 148 ALD 132 [14].

25 *Minister for Immigration and 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.

exercise jurisdiction, whether actual or constructive, and, also, failure to conduct a review as required by the Act.'[27] In *MZYTS*, the Full Federal Court held that:

> ...the absence of any... evaluation [of submitted material] in the context of the Tribunal's statutory task, can only signify a constructive failure to exercise jurisdiction ... The absence from the recitation of country information of the material referred to ... is indicative of omission and ignoring, not weighing and preference.[28]

18. The Full Court in that case found jurisdictional error on that basis. Similarly, a differently constituted Full Federal Court endorsed and applied this reasoning in circumstances where material expressly raised with the decision-maker before the hearing was not evaluated,[29] as in this case. The Respondent's approach at RS [50] and [52] to two of the Appellant's objections to relocation elevates the raising of an objection to something akin to a pleadings exercise. This is contrary to authority.[30] It is also inconsistent with the context in which relocation issues arise. Relocation is not always a live question in refugee protection claim assessments.[31] Relocation commonly arises first for submissions at the hearing before the Tribunal, as it did in this case. At that opportunity, the Appellant responded to the issue of relocation. The following comments by the Appellant in the Tribunal hearing evidence two of the objections neglected by the Tribunal in its reasons:

    a. Being away from his son: when asked whether he considered leaving his home area as his brothers had done, the Appellant stated to the Tribunal through an interpreter "who wouldn't want to be with his young baby and who would want to leave the baby behind. Would you leave your own baby behind in that condition?"[32]

    b. Needing a guarantor: the Appellant stated to the Tribunal through an interpreter that "[s]ince I don't know anybody there it's hard to live in those cities.... If I go and rent a house I need a guarantor."[33]

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Date: 5 January 2017

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27 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [44] per Gaudron J; see also McHugh, Gummow and Hayne JJ at [78] and [82]; see also *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at [37] per McHugh J.

28 *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 [44, 50, and see also 49]. In *SZRBA v Minister for Immigration and Border Protection* [2014] FCAFC 81, 142 ALD 211 at [24], the Full Court of this Court queried, without resolving the question, 'whether MZYTS reveals any different principle to the ground of review that permits the setting aside of a decision which has not involved 'proper, genuine and realistic consideration' of an application'; see also *SZSZW v Minister for Immigration and Border Protection* (2015) 150 ALD 465 at [17] per Perry J.

29 *Minister for Immigration and Border Protection v CZBP* [2014] FCAFC 105 at [65].

30 *Minister for Immigration and Citizenship v SZQPA* (2012) 133 ALD 292 at [42] per Gilmour J; see also *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307 at [58] per Mortimer J.

31 *Minister for Immigration and Border Protection v CRY16* [2017] FCAFC 210 at [86] per Robertson, Murphy and Kerr JJ. See also UNHCR, Guidelines on International Protection, "Internal Flight or Relocation Alternative", [34]-[35]. As to the import of this document, see *Refugee Convention Regulations* 2013 (Nr) reg 4(c) and *YAU011 v Republic* [2017] NRSC 102 at [45] per Khan ACJ and *CRI029 v Republic* [2017] NRSC 75 [49]-[51].

32 Transcript p 22 lines 10 – 12 (CB 138).

33 Transcript p 23 lines 38 – 43.