IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M146 of 2017

B E T W E E N

HFM043
Appellant

and

THE REPUBLIC OF NAURU
Respondent

10 **APPELLANT'S ORAL OUTLINE**

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Part I: Certification

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

Part II: Outline of the propositions the appellant intends to advance

2. The object of the *Refugees Convention Act 2012* (Nr) (**the Act**), identified in the long title, is to "give effect to the Refugees Convention; and for other purposes". The cornerstone provision directed to the first mentioned purpose is s 4(1), which reflects the *non-refoulement* obligation in article 33(1) of the Refugees Convention. The "other purposes" referred to in the long title include that of providing for "complementary protection", which means protection for people who "are not refugees as defined in [the Act]", but who "also cannot be returned or expelled to the frontiers of territories where this would breach Nauru's international obligations": section 3. Section 4(2) is addressed to the position of those people. Sections 4(1) and (2) of the Act constrain the power of removal conferred by s 11 of the *Immigration Act 2014* (Nr) (and any common law executive power of expulsion that has not been abrogated). They do so irrespective of whether the relevant person does or does not hold a visa under the *Immigration Regulations 2014*.

3. A determination that a person is a refugee (s 6(1)(a)) or is owed complementary protection (s 6(1)(c)) will also affect that person's visa entitlements: clauses 9 and 9A(1) *Immigration Regulations 2014*. But the protection from *refoulement* afforded by those entitlements is less secure than that conferred by ss 4(1) and (2) of the Act.

- *Immigration Act 2014* (Nr) – ss 11(1)(a), (b) and (c);
- *Immigration (Amendment) Regulations 2014* – clauses inserting 9A(2) and (4).

4. Consistent with the position under the Refugees Convention, the Act creates a different structure in respect of a determination that a person is to be given "derivative status" (s 6(1)(b) – formerly s 6(2)). The Act itself imposes no relevant substantive obligations upon the Republic in respect of the holders of "derivative status" equivalent to those in s 4. Those persons must rather look to the (less secure) entitlements associated with a visa conferred pursuant to cl 9A of the *Immigration Regulations 2014*.

- *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at 455-457 [19]-[25].
- **AS [46]; AR [10].**

5. The appellant's primary submission is that the issue of a Refugee Determination Record in respect of the determination of her application for derivative status did not engage the

deeming provision in s 31(5) in respect of the review of her extant claims to be recognised as a refugee, such that she was placed in that comparatively less secure position in terms of potential *refoulement*. Rather, the mischief to which the *Refugees Convention (Derivative Status and Other Measures) (Amendment) Act 2016* was relevantly addressed was the position of people determined to be "owed international protection by Nauru": see the definition of "Refugee Determination Record" in s 3 of the Act. In *those* cases certification of *that* determination is to be taken to "conclude" the determination of other applications under s 5. A person who is given "derivative status" under s 6(1)(b) (or former s 6(2)), but no other status, is not a person who has been determined to be "owed international protection by Nauru". That status does not, of itself, give rise to a need for protection from *refoulement*.

- Current version of the Act, ss 3, 6(2A), 6(2B), 31(5).
- *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 181-182 [63], 224-225 [213]-[216].
- Explanatory Memorandum to the *Refugees Convention (Derivative Status and Other Measures) (Amendment) Act 2016*, page 3.
- Historical version of the Act (in force from 21 May 2014 to 5 May 2017), ss 3, 6(1) and (2), 8 and 9.
- **AS [20], [29]; AR [4], [9]-[10].**

6. The appellant has not yet been determined to be owed protection obligations by Nauru. The certificate with which she was provided was not one which engages the deeming effect of s 31(5).

    - **AS [20]**

7. The appellant's alternative submission proceeds on the basis that the respondent is correct in its submissions on the appellant's primary argument. On that assumption, the Nauruan Parliament has provided that the determination of the statutory questions posed by ss 6(1)(a) and 6(1)(c) (or on review by the provisions of Part 4) may be forestalled where there is an anterior determination that a person is to be "given" derivative status under s 6(1)(b) (or, formerly, s 6(2)).

8. Consistent with the statutory objects and the international obligations to which those objects are directed, the Act nevertheless provides further opportunities for those persons to advance their claims for refugee status and complementary protection and have them determined by the Republic. It does so, in part, by conferring upon the Secretary the discretion in s 8(2) of the Act to relax the prohibition in s 8(1). Section 8(2)(a) conditions

that "dispensing power" on a state of satisfaction that the "grounds of application" "have not been substantially determined by the Secretary, nor by the Tribunal". The operation of the power conferred by s 8(2)(a) in such a case is straightforward if ss 6(2B) or 31(5) intercede *prior* to the making of a decision by the Tribunal under s 34. More difficult questions potentially arise in a case such as the present – the state of satisfaction required by s 8(2)(a) of the Act may require the Secretary to embark upon an inquiry as to whether the determination of the tribunal was a "nullity" or invalid for jurisdictional error. The legislature has, by design, avoided burdening the Secretary with those potentially difficult questions by treating such matters as a special case. That is the point of the distinction drawn in the text of s 31(5) between applications that have or have not "been determined" (the enlivening condition for the application of that provision) and the deeming effect of that provision (such applications are taken to have been "validly determined"). That textual distinction requires attention to the difference between a "thing in fact" and the legal force that that thing purports to have. The condition for the enlivening of s 31(5) is the (absence) of a thing in fact: the determination. The statute attaches to that factual circumstance a particular (deemed) legal consequence. In a case such as the present one, the condition is not met (at least as a matter of fact there is a determination by the Tribunal) and the deemed legal consequences prescribed by s 31(5) are not attached.

- Current version of the Act, ss 8(1) and (2) and 31(5).
- *Interpretation Act* 2011 (Nr) s 49
- *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 190-191 [94], 192 [98], 225 [216].
- *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16; 353 ALR 600 at 611 [39], [40].
- *New South Wales v Kable* (2013) 252 CLR 118 at 138-139 [52].
- **AS [31]-[37]**

9. The appellant does not press the submission made at **AS [38]-[42]**.

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