IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M27 of 2017

BETWEEN:

HFM045
Appellant

and

THE REPUBLIC OF NAURU
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

Filed on behalf of the Appellant by
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Part I: Certification

1. These submissions are in a form suitable for publication on the Internet.

Part II: Reply

The repeal of s 37 of the Refugees Act

2. The Respondent contends that s 37 of the Refugees Act did not apply to the Tribunal's review of the Appellant's claim and, therefore, the Supreme Court did not err in failing to consider that section: **RS [28]-[29]**.

   2.1 The predicate for the Respondent's contention is that the recent enactment of the *Refugees Convention (Amendment) Act 2017* (Nr) (the **Second Amendment Act**) has now made the repeal of s 37 retrospective with effect from 10 October 2012: **RS [27]-[28]**.

   2.2 However, observing that s 37 has now been repealed with retrospective effect does not resolve the question whether the Supreme Court erred in failing to consider that section. The Respondent gives the concept of retrospectivity, insofar as it applies to s 37, an extended meaning and operation that cannot be justified by the words of the Second Amendment Act.

   2.3 On its proper construction, the Second Amendment Act could not absolve the Supreme Court of its error in failing to consider s 37, nor does it extinguish the Appellant's right to obtain relief for that error.

3. The Respondent's assertion that the Second Amendment Act is "unequivocal" that s 37 has been repealed with retrospective effect is a fair one: **RS at [28]**. In that way, the Second Amendment Act is sufficient to displace both the general common law rule[1] against retrospectivity and the statutory expression of that rule in s 28 of the *Interpretation Act 2011* (Nr). However, a further rule is engaged: that the retrospective effect of a statute should be given no greater operation than the legislature plainly intended.[2]

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1 *Maxwell v Murphy* (1957) 96 CLR 261 at 267 (Dixon CJ), 285 (Fullagar J); *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 134 [27] (French CJ, Crennan and Kiefel JJ).

2 *RS Howard & Sons Ltd v Brunton* (1916) 21 CLR 366 at 371 (Griffith CJ), 373 (Barton J), 375 (Isaacs J); *Attorney-General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 570 [48] (Spigelman CJ); *Lodhi v R* (2006) 199 FLR 303 at 310-311 [23]-[28] (Spigelman CJ).

4. As Spigelman CJ observed in *Lodhi v R*:[3]

> There is a line of authority that the common law presumption against retrospectivity is not spent when it is clear that Parliament intended a statute to operate retrospectively. The extent of retrospective operation is itself a matter requiring interpretation of the statute. A statute will only be given retrospective operation to the extent intended by the Parliament and to no greater extent. This is to be determined by the words of the statute, construed in their full context, and in accordance with the scope and purpose of the legislation.

5. The further rule recognises that the mere fact that a statute is retrospective may not always reveal the extent to which that statute is intended to affect pre-existing rights.

6. It remains for this Court to construe the Second Amendment Act, having regard to its text, context and purpose, to ascertain whether that Act has the effect for which the Respondent contends.[4]

   6.1 That task may be influenced by the line of cases, in which the application of retrospectivity to pending proceedings has been treated as a distinct category because of its potential for unfairness. It is not necessary, for the purposes of this proceeding, to determine the validity of that line of cases and, in particular, the relevance of notions of fairness and justice to this Court's constructional task.

   6.2 As this Court has observed, it is "sufficient to focus upon the constructional choices which are open on the statute according to established rules of interpretation and to identify those which will mitigate or minimise the effects of the statute, from a date prior to its enactment, upon pre-existing rights and obligations".[5]

7. Apart from clarifying that the repeal of s 37 is taken to have commenced on 10 October 2012, the Second Amendment Act also relevantly provides that:

   7.1 the rights of all persons are declared to be the same, and to always have been the same, as if s 37 had not been enacted;[6] and

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3 *Lodhi v R* (2006) 199 FLR 303 at 310 [25] (Spigelman CJ).

4 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 134 [27] (French CJ, Crennan and Kiefel JJ).

5 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 136 [32] (French CJ, Crennan and Kiefel JJ).

6 Second Amendment Act, s 5.

7.2 all proceedings taken, made or done, or purporting to have been taken, made or done, in relation to an application to the Tribunal under s 31 of the Refugees Act are declared to have the same force and effect before and after the commencement of the Second Amendment Act, as if s 37 had not been enacted.[7]

8. Contrary to Respondent's assertions, the Second Amendment Act does not absolve the Supreme Court of its failure to consider s 37. The Second Amendment Act is not directed to any proceeding in, or any exercise of judicial power by, the Supreme Court. The Respondent's argument is that the effect of the Second Amendment Act is to clarify that s 37 never applied to a review by the Tribunal and, as a result, the Supreme Court could not have committed the error of which the Appellant now complains. That argument is untenable.

9. The Respondent requires the Court to accept that the Second Amendment Act, passed on 5 May 2017, clears an error made by the Supreme Court even though the Second Amendment Act makes no reference to proceedings in, or the exercise of judicial power by, the Supreme Court. Rather, the Respondent relies on a process of extrapolation. The necessity of extrapolation proves that the proposition for which the Respondent contends does not arise "plainly" or "clearly" or with "reasonably certainty" from the words of the Second Amendment Act. To accept the Respondent's submission, therefore, would be to disregard the long-standing principle that a statute should not be construed as applying to past events unless that intention is expressed with reasonable certainty.[8]

10. It is not sufficient for the Nauru Parliament now to declare that s 37 is taken to have been repealed from 10 October 2012. That declaration may have immunised the Tribunal's review of the Appellant's claim if the Supreme Court were considering that review after the Second Amendment Act. It cannot do that when, at the time the Supreme Court handed down its judgment, the Second Amendment Act had not been enacted. If that was the intended effect of the Second Amendment Act, it should have expressed that plainly and clearly. The Nauru Parliament has failed to do that.

11. In particular, while it is evident that the Second Amendment Act borrows the drafting technique validated by this Court in *R v Humby; Ex parte Rooney* (1973) 129 CLR 231, no provision of the Act is directed to proceedings in, or the exercise of judicial power by, the Supreme Court. Although the Nauru Parliament could have attached a new legal

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7 Second Amendment Act, s 6.

8 *Maxwell v Murphy* (1957) 96 CLR 261 at 267 (Dixon CJ); *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 at 21-22 [51]-[52] (Gageler J).

consequence to any failure by the Supreme Court to consider or apply s 37, it did not legislate in those terms.

12. Accordingly, this Court should reject the Respondent's submission. The retrospectivity introduced by the Second Amendment Act has no bearing on the Supreme Court's failure to consider s 37 in the circumstances of this case. That result is consistent with a "constructional choice" that minimises the retrospective effect of the Second Amendment Act on the Appellant's pre-existing rights.

13. Moreover, as the Respondent observes, even if the Second Amendment Act has the effect for which it contends, the Supreme Court remains bound by the requirements of procedural fairness: **RS at [31]**. As the Appellant has previously submitted, s 37 reflects an aspect of procedural fairness and, in the absence of s 37, the Appellant's arguments under the first ground of his appeal fall to be resolved by considering whether the Tribunal failed to accord procedural fairness to the Appellant: **AS at [27]-[28]**. The arguments that the Appellant has deployed in support of his claim under s 37 apply with equal force to the common law principles of procedural fairness.

The Respondent's submissions on procedural fairness

14. The Respondent contends that the Tribunal was not required to put the changed circumstances in Nepal to the Appellant because the Appellant was "on notice of [its] existence, contents and potential relevance": **RS at [34]**. That contention does not deal with the gravamen of the Appellant's complaint, which is that the relevance of that information was never explained to the Appellant and the Appellant was never given an opportunity to respond to that information. Even if the Appellant was on notice as to its "potential relevance" (which is not admitted), it is evident that the Tribunal was required, as a matter of procedural fairness, to explain its actual relevance to the Appellant and to give him an opportunity to respond. It failed to do so.

15. The Respondent also contends that the Tribunal did not err in failing to put to the Appellant the information concerning Chhetri representation in the army because, among other reasons, it went solely to "state protection": **RS at [38]-[40]**.

    15.1 The Respondent seeks to impute retrospectively a clarity of reasoning that is not evident on the face of either the Tribunal's or the Supreme Court's reasons. In neither decision is there any reference to the concept of "state protection".

    15.2 Moreover, the Respondent does not deal with the fact that at least part of the Appellant's case in this Court is that the Supreme Court simply did not resolve his complaint that the Tribunal had failed to put the information concerning Chhetri representation in the army to him.

15.3 In any event, the Respondent's submissions do not grapple with the Tribunal's obligation to explain the relevance of the information to the Appellant and to permit him an opportunity to respond, either as a matter arising under s 37 or in accordance with procedural fairness.

16. The Respondent argues that this Court should not permit the Appellant to advance his argument concerning the failure by the Tribunal to inform him of the "independent information" on which the Tribunal relied: **RS at [41]-[43]**.

16.1 The only prejudice identified by the Respondent is that "evidence might have been adduced by the republic": **RS at [42]**. There is no identification of the evidence, if any, that the Respondent may have led if this ground had been ventilated before the Supreme Court.

16.2 In any event, the range of factors that empower the Court to permit the raising of a new ground of appeal, including its enlarged powers under s 32 if the *Judiciary Act 1903* (Cth), are wide. The Appellant contends that the reasons identified in his written submissions in chief are sufficient to warrant the exercise of that discretion: **AS at [56]**.

Complementary protection

17. Contrary to the Respondent's submission, it is evident that the Appellant's failure to establish that he would suffer harm for "a Convention reason" formed the principal basis of the Tribunal's decision that the Appellant was not entitled to complementary protection. Further, the Respondent's submissions do not address the panoply of errors committed by the Supreme Court in affirming the Tribunal's decision, including reliance by that Court on a test that did not reflect the test applied by the Tribunal nor the test required by the Refugees Act: **AS at [62]**.

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