

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

No. M 66 of 2017

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN:

CRI028
Appellant

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and
THE REPUBLIC OF NAURU
Respondent

APPELLANT'S OUTLINE OF SUBMISSIONS IN REPLY

PART I: CERTIFICATION FOR PUBLICATION

- 20 1. It is certified that these Submissions are in a form suitable for publication on the internet.

PART II: OUTLINE OF ARGUMENTS IN REPLY

2. In reply to the Respondent's Submissions¹, the Appellant refers to and relies on his Submissions already filed in this matter. He also makes the following submissions.

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THE LAW RELATING TO RELOCATION WITHIN THE COUNTRY OF NATIONALITY

3. The Appellant notes the Respondent's submission (at [15]) that

"A decision maker's task in assessing the availability of relocation is framed by reference to the particular arguments against relocation that are raised by an applicant seeking refugee status determination."

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4. This may be accepted, but the task of assessing relocation is also framed more generally by the material before the Tribunal, and is not necessarily limited to propositions articulated by the applicant. Questions raised squarely on the material before the Tribunal must be considered.²

¹ Dated 14 August 2017

² *DWN072 v. Republic of Nauru* [2016] NRSC 18, (19 August 2016), [28]-[30] per Khan J. accepting and applying *Paramanathan v. Minister for Immigration and Multicultural Affairs* [1998] FCA 1693; (1998) 160 ALR 24; (1998) 94 FCR 28

5. In reply to the Respondent's submissions at [17], the question is whether relocation is reasonable in all the circumstances; it is not limited to whether "practicable" in the sense of physically possible, but *reasonably practicable* in the sense of not imposing or undertaking an unreasonable burden. As Gageler J. noted in SZSCA,³ – for relocation to be relevant, "Conditions in the area must be such that a relatively normal life can be led in the context of the country concerned."

10 **REASONABLENESS OF RELOCATION TO [K] – GROUND 1**

6. Further, in reply to paragraph 19 of the Respondent's Submissions, the appellant submits that, as the Respondent concedes, "the Tribunal needed to consider whether it was reasonable to expect the Appellant to return to [K] and not to go to Karachi". The Appellant submits, however, contrary to the Respondent, that the Tribunal did not "properly consider whether it was reasonable to expect the Appellant to locate himself in [K]".

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7. Further, in reply to paragraph 20 of the Respondent's Submissions, the appellant submits that the Tribunal did not need to determine whether [K] was a "home area" of the Appellant, although it did so. The Tribunal wrongly regarded this determination as eliminating the need for it to determine whether relocation to [K] was reasonable in all the circumstances.

8. Contrary to the Respondent's submissions at paragraph [20], the Appellant submits that the Tribunal did not determine the reasonableness, in *all* the circumstances, *including the Appellant's marriage*, of the Appellant relocating to [K]. Such a finding about the reasonableness of relocation to [K] was not implicit in the Tribunal's "finding that [K] was the Appellant's 'home area' ".⁴

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9. Nor was the Tribunal's "application of the ordinary relocation principles"⁵ complete as required by the law, for it omitted consideration of the reasonableness of the relocation of the Appellant when his wife, of a different religious affiliation than his family, did not want to leave Karachi where her own family were. Nor did it consider and determine whether the Appellant's wife would go with her husband to [K], or whether she may refuse to go.⁶ Contrary to the Respondent's Submissions at [21], this was a question necessarily before the Tribunal for its determination.

³ SZSCA (2014) 254 CLR 317 at 332 [44] (Gageler J), quoting *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 at 448 [20]

⁴ Respondent's submissions, [20].

⁵ Tribunal's Decision Record, [95].

⁶ Tribunal's Decision Record, [95]-[103].

10. Because of these defects in the Tribunal's consideration of the question of the potential relocation of the Appellant to [K], the Tribunal's determination "that relocation would be reasonable for the applicant"⁷ was not "a separate and independent basis for its decision", contrary to the Respondent's Submissions at paragraph [22].

11. The Tribunal did not therefore determine whether relocation to [K] was reasonable in all the circumstances.

10 **CONSIDERATION OF [K] AS A HOME AREA – GROUND 2**

12. The Tribunal considered "*The applicant's mixed Sunni-Shia marriage and problems this caused with his own family*".⁸

13. Under this heading of its reasons, the Tribunal said that it did not accept the Appellant's claim that his family were antipathetic to his wife, but found that the Appellant's wife did not want to leave Karachi.⁹

20 14. However, when it determined the home area(s) of the Appellant, the Tribunal did not have regard to this (or perhaps any) aspect of the marriage.¹⁰ Indeed, it excluded it, shown by its observation that: "While it [K] might not be a home area for his wife, who has never lived there, it is the applicant's claims the Tribunal is assessing."

REASONABLENESS OF WIFE'S RELOCATION – GROUND 3

30 15. In reply to paragraph [24] of the Respondent's submissions, the Tribunal was required to assess the "reasonableness" of relocation of the Appellant's wife, as this was a factor in the Tribunal's determination of the reasonableness of the relocation of the Appellant. If relocation of the Appellant's wife was not reasonable this may have affected the reasonableness of the Appellant's relocation, for example, if his wife may have refused to go with him to [K], or if she may have been wretched in [K].

16. In the separate part of its reasons addressing relocation,¹¹ the Tribunal noted the Appellant's mixed marriage, but did so only in passing and in the context of the safety of the Appellant himself.¹² It did not consider the mixed marriage in its brief determination that "relocation would be reasonable for

⁷ Tribunal's Decision Record, [103].

⁸ Tribunal's Decision Record, [73]-[76].

⁹ Tribunal's Decision Record, [76]

¹⁰ Tribunal's Decision Record, [81]

¹¹ Tribunal's Decision Record, [94]-[103]

¹² Tribunal's Decision Record, [96]

the applicant in the sense that he could, if he relocated, lead a relatively normal life without facing undue hardship in all the circumstances.”¹³

17. The question of whether the Appellant’s wife would move to [K] with him, or might not, was raised on the material before the Tribunal but was not dealt with, neither explicitly nor implicitly.

CONCLUSION

10 18. For the reasons given above, and in the Appellant’s Submissions already filed, the learned judge below therefore erred in not finding that the decision of the Tribunal was affected by error of law.

19. The appeal therefore should be allowed, the judgement below and the determination of the Tribunal should be set aside, and the matter remitted to the Tribunal for determination according to law.



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¹³ Tribunal's Decision Record, [103]