IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M37 of 2011

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN:

KINZA CLODUMAR
Appellant

and

NAURU LANDS COMMITTEE
First Respondent

and

JANELLA ATSIME, ARAMWIT DEDUNA, BRODINE DEDUNA, JASON DEDUNA, JENA DEDUNA, DENEIY DEDEUNA, DORA DEPAUNE, DOREEN ADUMUR (EST), RABWIDO DEDUNA, RUBBER DEDUNA, BRIDELIA EDWARD, PAULINA HARRIS, JAYLEEN MENKE, JURAN SCOTTY, GEORGE TAGAMAOUN, DORIS CALEB, BELINDA TAGAMOUN, ANGELLA TAGAMOUN, JOHN TAGAMOUN, WAYNE TAGAMOUN, JAMIESON TAGAMOUN, VICTOR TAGAMOUN

Second Respondents

REPLY SUBMISSIONS OF THE APPELLANT

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PART I: Publication of Submission

The appellant certifies that this submission is in a form suitable for publication on the internet.

PARTS II , III, IV and V: Issues presented; Judiciary Act certification; Citation of primary decision; Relevant findings of fact

These matters are addressed in the appellant's submissions filed 13 September 2011 ("**the Appellant's First Submissions**"), and do not require supplementation.

Notwithstanding that the first respondent has issued a notice pursuant to s.78B of the *Judiciary Act 1903* (Cth), the appellant contends that no question of the interpretation of the Constitution arises in this proceeding.

10 **PART VI: Argument**

1. These submissions respond to the Further Submissions of the First Respondent, filed on 27 February 2012 ("**the Further Submissions of the First Respondent**").

Vienna Convention on the Law of Treaties

2. In paragraph 4 of the Further Submissions of the First Respondent, reference is made to the Vienna Convention on the Law of Treaties to support interpretation "in an objective sense" of the Agreement implemented by the *Nauru (High Court Appeals) Act 1976* (Cth) ("**the Appeals Act**"). This approach to interpretation is asserted to be one to be distinguished from that adopted in the appellant's previous submissions, which the first respondent characterises as seeking to ascertain "what the intention of
20 the States parties was."

3. It is accepted that the Agreement falls to be interpreted in accordance with the Vienna Convention. However it is too simplistic to say that the Convention provides for interpretation of treaties "in an objective sense", or that it does not permit regard to the "intention of the States parties". In particular, paragraph 1 of Art. 31 directs attention to the interpretation of the terms of a treaty, inter alia, "in light of their object and purpose". This requires that consideration be given to the purpose of the States parties in entering into the Agreement. The appellant's previous submissions addressed those matters. Such analysis is appropriate.

Second reading speech on the Nauru Appeals Act

4. In paragraph 5 of the Further Submissions of the First Respondent, reference is made to the second reading speech of the Attorney-General at the time that the Appeals Act was enacted. No relevant assistance can be drawn from that speech. That is because, once it is accepted (as it must be) that the sole purpose of enacting the Appeals Act was simply to implement the Agreement, the interpretation question is governed by the Vienna Convention. What was said by the Attorney-General of one of the States parties, after the Agreement was entered into, cannot rationally affect the determination of that question.

10 5. In any event:

(a) the Attorney-General said nothing which was directed to the question now under consideration; and

(b) a passing reference by the Attorney-General to the situation which is asserted by the first respondent to have pertained under the *Nauru Act 1965* (Cth) ("**the Nauru Act**") is not indicative that the nature of the appeal process provided for in the Appeals Act was intended to be identical to that which prevailed under the Nauru Act. There clearly was not (despite what the first respondent asserts in its paragraph 6) an intention to "continue the arrangement previously in place concerning appeals from Nauru". There was no continuation, not least because
20 the Nauru Act was repealed, with effect from the date of Nauru's independence (31 January 1968), by s.4(1) of the *Nauru Independence Act 1967* (Cth). No appeal from Nauru to the High Court of Australia was then available at all from 31 January 1968 until the commencement of the Nauru Appeals Act in 1976. Further, as the first respondent itself points out, the former process was available only by leave. By contrast the present process is available as of right. For these reasons, in no sense can the present process be fairly described as a "continuation" of the former process. There is accordingly no reason to suppose that the nature of the "appeal" provided for was intended to be identical.

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The nature of the "appeal" right is substantive, not procedural

6. In paragraphs 9 to 13 of the Further Submissions of the First Respondent, an argument is developed to the effect that the law of Nauru concerning appeals is not picked up and applied as federal law because it is procedural rather than substantive.

7. It is accepted that the Justices of the High Court are empowered to make rules concerning procedural matters governing Nauru appeals, and that they have done so.[1] But the first respondent's essential point in this controversy goes to the nature of the appeal provided for, not merely to the procedure by which the appeal is heard. The first respondent contends that the Nauru Appeals Act provides only for an "appeal" in the "strict sense". That is a substantive question as to what rights of "appeal" have been conferred by the Act. It is not a procedural matter; the regulation of procedure can neither widen nor confine substantive appeal rights conferred by statute.

Unfair prejudice flowing from the new evidence?

8. The appellant welcomes the concession in paragraphs 14 and 15 of the Further Submissions of the First Respondent concerning the cogency of the evidence now available.

9. The first respondent still contends however that admission of the new evidence would cause it unfair prejudice. It says that "the evidence remains unresolved in important respects," and that it is unfairly prejudiced by the unavailability of former President Harris as a witness.

10. The prejudice asserted by the first respondent is at best speculative. It is significant that:

    (a) the authenticity of the approval document (including former President Harris's signature on it, next to the stamped word "APPROVED") is no longer in dispute on this appeal;

    (b) Mr Namaduk's evidence provides the first respondent with as much forensic ammunition as it is reasonably conceivable that it could ever have had, even if former President Harris was still alive and available as a witness. Indeed, it is only

[1] High Court Rules, Part 43

because the appellant has put forward Mr Namaduk's affidavit, including its "warts and all" explanation of the then political situation and the Cabinet's concerns about the conduct of the appellant (amongst others) in relation to land transfers, that the first respondent is even able to mount its present argument. It is difficult to imagine how any evidence which former President Harris could have given could have improved the first respondent's case;

(c) the case, however, does not turn on oral evidence. On its face the (now admitted) approval document satisfies the legislative requirement for President's "consent in writing". The first respondent has advanced no argument as to why, under Nauruan law or otherwise, it would be permissible for a Court to seek to go behind that document. It is apparently undisputed that there is no legislative or other requirement for the consent to be published or otherwise communicated in order to be effective. There is accordingly no reason to suppose that the approval document was not immediately effective to validate the land transfer at the moment of being signed by the President;

(d) if President Harris had not wanted to consent to the transfer, he would simply not have signed the document. His conduct is consistent only with intending to consent, but to keep the consent a secret for a time. It is not consistent with an intention to withhold consent.

11. Nor has the first respondent advanced an argument as to why, even if there is potentially some prejudice to it in former President Harris no longer being available, that is "unfair" prejudice.

Reasonable diligence

12. There is an air of artificiality about the first respondent's continuing submissions[2] that the appellant failed to exercise reasonable diligence in seeking to secure, for use at the original trial, the evidence which has now come to light. These submissions overlook the central fact that at the time of trial not only the appellant, but also the first respondent itself, actively believed that no "consent in writing" had been given. The first respondent's submissions also ignore the fact that the first respondent itself was and is a statutory body charged with the due administration of certain aspects of land

[2] See paragraphs 20-24 of the Further Submissions of the First Respondent

transfers. Its participation in the litigation was not as an interested party, but rather amounted to the performance of a public duty. If it had believed that there was a real likelihood that a document constituting "consent in writing" might have existed, or that secondary evidence of same might be available, the first respondent itself would have been duty bound to search for it. Indeed, the evidence indicates that it did search for it, but to no avail. It was just as open to the first respondent as to the appellant (perhaps more so) to enquire of former President Harris as to whether written consent had been given. But the first respondent's own inability to find any such document, coupled with the absence of the customary (but legally inessential) gazettal of such consents, evidently meant that it did not see any reason to make such an enquiry. The asserted lack of diligence on the part of the appellant must be viewed in this context.

Dated: 9 March 2012

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