SHORT PARTICULARS OF CASES

FEBRUARY 2018

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IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING MS JACQUI LAMBIE (C27/2017)

Date referred to Full Court: 13 December 2017

Section 44 of the Constitution provides that any person who has any of certain attributes shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Among those attributes are (in s 44(i)), being a subject or a citizen of a foreign power, and (in s 44(iv)), holding any office of profit under the Crown.

On 2 June 2016 Ms Jacqui Lambie was nominated as the first of three Tasmanian candidates endorsed by the Jacqui Lambie Network (JLN) for the Senate for the general election held on 2 July 2016. Steven Leigh Martin was nominated as the second of the three candidates. Ms Lambie was returned as a Senator for Tasmania after the election; Mr Martin was not.

Ms Lambie was born in Australia in 1971 of a mother born in Tasmania and a father born in Scotland in 1951 who had emigrated to Australia as a young child in the 1950's and become an Australian citizen. Ms Lambie's father never renounced his British citizenship. Unbeknown to Ms Lambie, at the time of her birth she had automatically become a citizen of the United Kingdom & Colonies by descent as a consequence of the citizenship of her father. Not having renounced that citizenship she remained a British citizen by descent at the time of her nomination and her subsequent election. On 14 November 2017, after becoming aware that she held United Kingdom citizenship, Ms Lambie submitted her resignation as a Senator in writing to the President of the Senate. (She later renounced her United Kingdom citizenship, that renunciation taking effect on 17 November 2017.)

At all times since 2009 Mr Martin has been a Councillor of the City of Devonport, Tasmania, and at all times since 2011 he has in addition been the Mayor of the City of Devonport. He held both of these positions on the day the election writs were issued for the 2016 election, on the day he nominated as a candidate, on polling day and on the day the election writ was returned. He still holds these positions today. Under s 30A of the *Local Government Act* 1993 (Tas), Mr Martin is paid allowances for holding the positions of Councillor and Mayor.

The following questions were transmitted to the High Court by the Senate on 15 November 2017 pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth):

(a) whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of Tasmania in the Senate for the place for which Jacqui Lambie was returned;

(b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;

(c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and

(d) what, if any, orders should be made as to the costs of these proceedings.

On 17 November 2017 the High Court published a notice advising that it would sit as the Court of Disputed Returns on 8 December 2017 for the purpose of giving directions as to the hearing and determination of the questions referred by the Senate. The notice invited any person who desired to place any evidence before, or make any submission to, the Court to apply setting out their reasons by 30 November 2017. Submissions were received from five applicants.

On 8 December 2017 Justice Nettle, sitting as the Court of Disputed Returns, considered those submissions and made orders that three of the five applicants be entitled to be heard and be deemed to be parties to the reference under s 378 of the *Commonwealth Electoral Act* 1918 (Cth), namely the Attorney-General of the Commonwealth ("the Attorney-General"), Mr Steven Leigh Martin and Ms Katrina Melissa McCulloch. Mr Martin was found to be a person interested in the determination of the questions referred to the Court as he was the candidate second to Ms Lambie for the Jacqui Lambie Network on the ballot paper. Ms McCulloch was also found to be a person interested on the basis that she was placed thirteenth in the election of the twelve Senators for Tasmania.

Justice Nettle then answered the questions referred as follows:

(a) there is a vacancy by reason of s 44(i) of the Constitution in the representation of Tasmania in the Senate for the place for which Jacqui Lambie was returned;

(b) the vacancy in the representation of Tasmania in the Senate should be filled by a single special count of the ballot papers cast for candidates for the election of twelve senators for the State of Tasmania;

(c) the special count shall take place in accordance with specified orders and directions;

(d) the Commonwealth shall pay the costs of Mr Martin and Ms McCulloch of the proceedings.

On 12 December 2017 the Australian Electoral Office (AEO) conducted the special count of the ballot papers. The AEO reported to the Court that as result of the special count, the twelve candidates who would be elected upon application of the Rules set out in s 273 of the *Electoral Act* included Mr Martin in the ninth position.

On 13 December 2017, Justice Nettle reserved the following question for the consideration of the Full Court pursuant to s 18 of the *Judiciary Act*:

1. Is Mr Steven Martin incapable of being chosen or of sitting as a senator by reason of s 44(iv) of the Constitution?

A Notice of a Constitutional Matter has been filed by the Attorney-General.

The Attorney-General submits that neither office of the Councillor of the Devonport City Council or Mayor of Devonport is an "office of profit under the Crown" within the meaning of s 44(iv) of the Constitution. "Crown" means the Executive government. "Under" means "under the control of", in the sense of "in the gift of the Executive government". As both the offices of Councillor and Mayor are elected offices, appointment to them is not 'in the gift of the Executive". Further, the "confined powers" of the Executive to dismiss occupants of those offices or to affect their remuneration "fall far short" of establishing that ongoing occupancy of those offices is "in the gift of the Executive."

In his submissions Mr Martin submits that the offices are not "under the Crown" because of the high degree of independence of those offices from the Executive government. He sets out the relevant statutory provisions which govern those offices in considerable detail.

The Attorney-General for the State of Victoria has filed submissions in support of Mr Martin.

Ms McCulloch submits that Mr Martin is ineligible for election as the 'character' of the offices he holds is as an extension of the Executive. She asserts that the Council's funding and therefore his remuneration is controlled by the Crown, that there is a threat of dismissal from the offices by the Crown, and that the demands of both offices raise an obvious conflict of duties and interest for Mr Martin. Even though each of Mr Martin's offices did not "come from" the Crown (because he was elected) each is still "under" the Crown. And further "that the relationship of control between the Executive Government and the Mayor constitutes a real risk of Crown influence on the decision-making of the office-holder".

CRI026 v REPUBLIC OF NAURU (M131/2017)

Court appealed from: Supreme Court of Nauru [2017] NRSC 67

Date of judgment: 29 August 2017

The appellant was born in Punjab Province, Pakistan. He is a Mohajir and a Sunni Muslim. He claims a fear of harm arising out of a dispute at a cricket game with a man who was a senior member of the Muttahida Quami Movement ("MQM"). The appellant claims that the MQM will find him anywhere in Pakistan and seek revenge. He also claims a fear of harm from ongoing civil and political violence in Pakistan. After moving around within Pakistan for several years, including living in Karachi, the appellant left for Malaysia in 2011, and then travelled to Indonesia in 2012. In December 2013, the appellant left Indonesia for Australia and arrived on Christmas Island on 15 December 2013. On 19 December 2013, the Appellant was transferred to Nauru where he made an application for refugee status determination under the *Refugees Convention Act* 2012 (NR).

The Secretary of the Nauru Department of Justice and Border Control concluded that the appellant's claimed fear of harm on the basis of the feud with the member of MQM, and the ongoing civil and political violence in Pakistan was not well-founded, and the appellant did not attract refugee status. For the same reasons, the appellant would not face harm if returned to Pakistan in a manner that would breach Nauru's international obligations. Consequently, the appellant was not owed complementary protection. The appellant made an application for merits review of that decision to the Refugee Status Review Tribunal. The Tribunal affirmed the decision of the Secretary.

The appellant then appealed to the Supreme Court of Nauru (Crulci J). He did not file written submissions and did not attend the hearing, where he was not represented. The issues raised by the appellant in his Notice of Appeal included:

1. In finding that the appellant could safely and reasonably relocate elsewhere in Punjab, did the Tribunal misapply legal principles relating to internal relocation?

2. Does an erroneous reference by the Tribunal in its decision to the appellant as a Tamil from Sri Lanka, which error was subsequently corrected, give rise to any error of law?

Crulci J noted the questions laid out by Hathaway and Foster in *The Law of Refugee Status* should be taken into account when considering the reasonableness of relocation. These questions include:

1. Can the appellant safely, legally and practically access an internal site of protection?

2. Will the appellant enjoy protection from the original risk of being persecuted?

3. Will the site provide protection against any new risks of being persecuted or of any indirect *refoulement*?

4. Will the appellant have access to basic civil, political and socio-economic rights provided by the home country or State?

Her Honour considered that the Tribunal decision record indicated that the Tribunal took into account matters relevant to those questions in determining whether it would be reasonable for the appellant to relocate elsewhere in Punjab Province. Those matters included: the fact that the appellant lived in other areas in Punjab between 2003 and 2011 without experiencing any harm; Punjab is the most prosperous province in Pakistan and is a large industrial and manufacturing base; the appellant speaks and reads Urdu, which is spoken widely throughout Punjab, and also speaks some Punjabi; the appellant has a portable skill and training and would likely be able to obtain employment; and Punjab is relatively secure. Crulci J concluded that the Tribunal therefore applied the correct principles in determining that the appellant could safely and reasonably relocate to Punjab Province.

With respect to the error in the decision record that the appellant was a Tamil from Sri Lanka, her Honour considered that taken as a whole, the decision record indicated that the Tribunal was alert to the particular circumstances of the Appellant. The error in the decision record therefore did not give rise to any error of law.

The grounds of the appeal include:

- The Supreme Court of Nauru erred by failing to conclude:

  (a) that the Refugee Status Review Tribunal had misapplied the Nauruan law of complementary protection (as embodied in s 4(2) of the *Refugees Convention Act* 2012 (NR)), namely by identifying and applying a "reasonable relocation" test in relation to complementary protection, where there is no such test as a matter of law;

  (b) that it followed, on the basis of the Tribunal's finding that there was a real possibility of harm if the appellant were to return, that the appellant was entitled to complementary protection.

The issue raised by ground of appeal (a) is also raised in two other appeals, namely *DWN027 v Republic of Nauru* (M145/2017) and *EMP144 v Republic of Nauru* (M151/2017) which are all listed for hearing together.

DWN027 v REPUBLIC OF NAURU (M145/2017)

Court appealed from: Supreme Court of Nauru [2017] NRSC 77

Date of judgment: 22 September 2017

The appellant was born in Khyber Pakhtunkhwa Province, Pakistan. He owned a grocery store. On 20 May 2013, four members of the Taliban entered his store and demanded that he join them or pay money. He refused. On 24 May 2013, a proprietor in the vicinity of the appellant's store was killed after ignoring a similar demand. On 30 May 2013, the appellant was chased from his store by the four men who had made the earlier demand, now wielding guns. The appellant was able to escape and lock up his shop and did not return. On 3 June 2013, the appellant went out to purchase medication for his wife and was shot at from a car in a market. On 16 June 2013, he was run down by a car driven and occupied by the same men. Following this incident, the appellant decided to flee Pakistan, and he departed on 2 July 2013. He arrived in Australia a month later and was then transferred to Nauru. On 19 December 2013 he made an application for refugee status determination under the *Refugees Convention Act* 2012 (NR).

The Secretary of the Nauru Department of Justice and Border Control refused the application on 17 July 2014. The appellant made an application for merits review of that decision to the Refugee Status Review Tribunal. The Tribunal affirmed the decision of the Secretary that the appellant was not recognised as a refugee and was not owed complementary protection under the Act. While the Tribunal was satisfied that the appellant had a well-founded fear of persecution in his home area, it found that this could be avoided by relocating within Pakistan.

The appellant then appealed to the Supreme Court of Nauru (Khan J). His grounds of appeal were:

1. The Tribunal erred by importing a relocation test in its analysis of the appellant's 'complementary protection assessment' in breach of s 4(2) of the Act;

2. The Tribunal erred by failing to consider all of Nauru's international obligations when it determined whether the appellant could relocate within Pakistan, namely its obligation to give 'primary consideration' to the best interests of the appellant's child;

3. The Tribunal erred by failing to consider an integer of the appellant's relocation objections, namely that if he returned to Pakistan other than to his home town he would 'be compelled to go back to the original area of persecution'.

With respect to the issue of relocation, the Court found that the Tribunal's decision was correct. Khan J noted that the purpose of international obligations and complementary protection is to protect those who are not refugees from harm (a harm which is not one of the five convention reasons). If there is an internal relocation alternative open to the appellant then this is as relevant to the complementary protection consideration as it was to the refugee status determination.

His Honour endorsed the considerations laid out by Hathaway and Foster in *The Law of Refugee Status* when determining if there is an internal relocation alternative for an applicant:

1. Can the applicant safely, legally and practically access an internal site of protection?

2. Will the applicant enjoy protection from the original risk of being persecuted?

3. Will the site provide protection against any new risks of being persecuted or of any indirect *refoulement*?

4. Will the applicant have access to basic civil, political and socio-economic rights provided by the home country or State?

With respect to the second ground, the respondent submitted that Article 2(1) of the *Convention on the Rights of the Child* ('CRC') limits the protections set out in the CRC to protections with respect to "each child within [Nauru's] jurisdiction". The respondent further submitted that it was accepted that the appellant's child was not within Nauru's territory or that Nauru exercised 'physical power and control' over the child. It therefore followed that there was no international obligation owed by Nauru under the CRC to the appellant's child in Pakistan. Khan J found that there was merit in those submissions, and he further found, in any event, that the Tribunal took the interests of the child into consideration when making the finding of relocation.

In dismissing the third ground of appeal, Khan J noted that the tribunal did not fail to consider the practical realities faced by the appellant. The Tribunal noted that he had the assistance of two brothers in his home area, and that there was no reason why his property could not be sold through an agent. Further, it was noted that the appellant had experience as a small trader, and had written and spoken language skills in Urdu and English. It therefore concluded that it would be reasonable for the appellant to relocate.

The grounds of the appeal are similar to the grounds in the Supreme Court appeal, and include:

- The Supreme Court of Nauru erred by failing to conclude that the Refugee Status Review Tribunal had erred by applying a relocation test to the appellant's claim for complementary protection assessment under s 4(2) of the *Refugees Convention Act* 2012 (NR), where no such test exists at law?

The issue raised by this ground of appeal is also raised in two other appeals, namely *CRI026 v Republic of Nauru* (M131/2017) and *EMP144 v Republic of Nauru* (M151/2017) which are all listed for hearing together.

EMP144 v REPUBLIC OF NAURU (M151/2017)

Court appealed from: Supreme Court of Nauru [2017] NRSC 73

Date of judgment: 27 September 2017

The appellant was born in western Nepal. He is married and has a son born in December 2006. The appellant's father, paternal uncle and older brother were members of Rastriya Prajatantra Party ("RPP"). In 2003, the Nepal Communist Party-Maoist ("NPC-M") came to power in the appellant's area. Within 12 months, the appellant's brother disappeared and has not been seen since. The appellant suspects that NPC-M is responsible for the disappearance. The appellant's father was assaulted by members of NPC-M and departed for India where he has lived for 10 years. In 2008, the appellant joined RPP, and became vice president of a local branch. He experienced several incidents of harassment and violence by the NCP-M, including an incident in December 2012, when a group of seven or eight members of NPC-M broke into his house at night. The appellant was beaten with fists and sticks to the extent that he lost consciousness. He was taken to hospital by neighbours. While there he heard that his house had been burned down when the group of NPC-M members returned four days later. The appellant departed Nepal in 25 May 2013. After spending time in Indonesia, he arrived in Nauru in November 2013. On 29 January 2014 he made an application for refugee status determination under the *Refugees Convention Act* 2012 (NR) ('the Act').

The Secretary of the Nauru Department of Justice and Border Control refused the application on 12 September 2014. The appellant applied for merits review of that decision to the Refugee Status Review Tribunal. The Tribunal affirmed the decision of the Secretary that the appellant was not recognised as a refugee and was not owed complementary protection under the Act.

The appellant then appealed to the Supreme Court of Nauru (Khan J). His grounds of appeal included:

1. The Tribunal erred by failing to consider integers of the objection to relocation raised by the appellant and thereby erred by denying the appellant natural justice in breach of the Act;

2. The Tribunal acted in breach of s 22(b) and/or s 40(1) of the Act by failing to identify the practicability of relocation with the appellant and seeking his response to that issue;

3 The Tribunal erred by importing a relocation test in its analysis of the appellant's 'complementary protection assessment' in breach of s 4(2) of the Act.

With respect to the first ground of appeal, the appellant submitted that the Tribunal failed to deal with specific integers that he told the Tribunal made relocation unreasonable in his personal circumstances. Those integers were: (1) he and his family would face substantial prejudice in accessing education, employment and essential services in Nepal; (2) he lived in hiding when he lived elsewhere from his home area and he did so, in part, because he wished to ensure that he did not publicly express his political views, which he continues to

hold, because there was no freedom to express one's political views throughout Nepal; (3) he does not have any tertiary or professional education, or professional skills; and (4) he holds ongoing fears for the safety of his wife and young son. Khan J found that the four arguments raised by the appellant did not amount to objections and in any event the Tribunal dealt with those issues.

With respect to the second ground, the appellant submitted that the Tribunal erred in that it failed to alert him to the issue that was ultimately dispositive of his claim, namely, the reasonableness of his relocation. Khan J noted that the appellant had addressed the issue of relocation in his written submissions to the Tribunal and his representative also made submissions at the oral hearing. Therefore no procedural unfairness arose as a result of the Tribunal not expressly mentioning to the appellant that the relocation was an issue in review.

Khan J noted that the third ground of appeal was also raised by the appellant in the matter of *DWN027 v The Republic of Nauru* and he repeated the findings he made in that matter, in dismissing this ground.

The grounds of the appeal are similar to the grounds in the Supreme Court appeal, and include:

- The Supreme Court of Nauru erred by failing to conclude that the Tribunal erred by importing a relocation test in its analysis of the appellant's 'complementary protection assessment' in breach of s 4(2) of the Act.

The issue raised by this ground of appeal is also raised in two other appeals, *DWN027 v Republic of Nauru* (M145/2017) and *CRI026 v Republic of Nauru* (M131/2017) and which are all listed for hearing together.

ROZENBLIT v VAINER & ANOR (M114/2017)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2017] VSCA 52

Date of judgment: 17 March 2017

This case concerns the power of the Supreme Court of Victoria to stay proceedings pending the payment of an interlocutory costs order under Rule 63.03(3) of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) ('the Rules'). Rule 63.03 relevantly provides:

(3) Where the Court makes an interlocutory order for costs, the Court may then or thereafter order that if the party liable to pay the costs fails to do so—
(a) if that party is the plaintiff, the proceeding shall be stayed or dismissed;

The appellant filed and served a writ and statement of claim in the Supreme Court of Victoria on 23 December 2013. By summons dated 29 August 2014, the appellant sought leave to file and serve an amended statement of claim. On 20 October 2014, Lansdowne AsJ refused the application for leave to amend and ordered that the appellant pay the respondents' costs of that day's hearing, and the costs of a directions hearing of 25 August, to be taxed immediately. By summons dated 10 November 2014, the appellant again sought leave to file and serve an amended statement of claim. On 15 December 2014, a costs registrar ordered by consent that the appellant pay the respondents $22,000, pursuant to the order of Lansdowne AsJ of 20 October 2014, by 19 December 2014. That sum remains unpaid. In an affidavit affirmed on 19 June 2015, the appellant stated that he had no assets other than his personal possessions and his only income was from the aged pension. He said that he had not paid the costs because he had no way of doing so. He had consented to the order to avoid a 'pointless court fight' which he was likely to lose.

On 24 June 2015 Lansdowne AsJ made orders formally dismissing the summons of 10 November 2014 and ordering that the appellant pay the respondents' costs of the summons, to be taxed immediately. On 12 August 2015, a costs registrar ordered that the appellant pay the respondents $28,000, pursuant to that order. On 17 July 2015, the respondents filed a summons seeking that the proceeding be stayed pursuant to Rule 63.03(3) of the Rules until the appellant paid the costs. On 16 December 2015, Lansdowne AsJ granted the appellant leave to file and serve an amended statement of claim but also granted the relief sought in the respondents' summons, ordering that the proceeding be stayed until the appellant paid the amounts owing to the respondents pursuant to the costs orders of 15 December 2014 and 12 August 2015. An appeal to a single judge (Cameron J) was dismissed on 4 August 2016.

The appellant's appeal to the Court of Appeal (Whelan, Kyrou & McLeish JJA) was dismissed. The Court held that the power to order a stay under Rule 63.03(3) is to be exercised according to the following principles:

(a) a stay may only be ordered if it is the only fair and practical way of facilitating the just, efficient, timely and cost-effective resolution of the proceeding;

(b) justice between the parties requires regard to be had to the interests of the party in whose favour the costs were ordered to be paid;

(c) the parties' conduct of the proceeding to date, and in particular the reasons for which costs were ordered to be taxed immediately, are relevant to the exercise of the power;

(d) a stay should not be ordered unless the conduct of the party in default warrants the condemnation inherent in such an order;

(e) the power is not to be used simply as a means of enforcing payment of the costs in question unless there are grounds for concluding that the party in default is recalcitrant and is capable of remedying the default.

The Court considered that the fact that the orders had not been complied with was highly relevant, and the associate judge clearly addressed the central question whether there was any other practical way of doing justice between the parties. In doing so, she was not looking solely at compliance with the costs orders, but at the just disposition of the whole proceeding. She was conscious that a stay should only be ordered where the defaulting party's conduct called for condemnation. On a fair reading, the associate judge proceeded in accordance with the principles articulated above, and Cameron J was right to dismiss the appeal in that respect.

The ground of the appeal is:

- In circumstances where it is not alleged or found that the plaintiff has conducted a proceeding in a manner amounting to harassment or for a collateral purpose, and where it is not contested that the plaintiff lacks means sufficient to meet interlocutory costs orders made against him or her in favour of the defendant, it is not open, as a matter of law, to conclude that the only fair and practical way of ensuring justice between the parties is to make an order pursuant to Rule 63.03(3) of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) or in exercise of the inherent jurisdiction, staying the proceeding.

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING MS SKYE KAKOSCHKE-MOORE (C30/2017)

Date referred to Full Court: 24 January 2018

Section 44 of the Constitution provides that any person who has any of certain attributes shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Among those attributes is (in s 44(i)) being a subject or a citizen of a foreign power.

On 6 June 2016 Ms Skye Kakoschke-Moore was nominated as the third of four candidates endorsed by the Nick Xenophon Team for the Senate for the general election held on 2 July 2016. Mr Timothy Raphael Storer was nominated as the fourth of the four candidates endorsed by the NXT. Ms Kakoschke-Moore was returned as a Senator for the State of South Australia after the election; Mr Storer was not. Mr Storer remained a member of the NXT until 3 November 2017, when he was purportedly expelled as a member. He then formally resigned as a member on 6 November 2017.

Ms Kakoschke-Moore was born in Australia in 1985 of a father born in Australia in 1959 and a mother born in Singapore in 1957 who emigrated to Australia in 1970. Ms Kakoschke-Moore's mother was a British citizen otherwise than descent by as her father was serving in the Royal Air Force in Singapore at the time of her [the mother's] birth. Unbeknown to Ms Kakoschke-Moore, at the time of her birth she had automatically become a British citizen by descent as a consequence of the citizenship of her mother. Not having renounced that citizenship she remained a British citizen by descent at the time of her nomination and her subsequent election. On 22 November 2017, after becoming aware that she held United Kingdom citizenship, Ms Kakoschke-Moore submitted her resignation as a Senator in writing to the President of the Senate. (On 30 November 2017 she renounced her United Kingdom citizenship, that renunciation taking effect on 6 December 2017.)

The following questions were transmitted to the High Court by the Senate on 28 November 2017 pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth):

(e) whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of South Australia in the Senate for the place for which Skye Kakoschke-Moore was returned;

(f) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;

(g) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and

(h) what, if any, orders should be made as to the costs of these proceedings.

On 29 November 2017 the High Court published a notice advising that it would sit as the Court of Disputed Returns on 8 December 2017 for the purpose of giving

directions as to the hearing and determination of the questions referred by the Senate. The notice invited any person who desired to place any evidence before, or make any submission to, the Court to apply setting out their reasons by 6 December 2017. Submissions were received from five applicants.

On 8 December 2017 Justice Nettle, sitting as the Court of Disputed Returns, considered those submissions and made orders that three of the five applicants be entitled to be heard and be deemed to be parties to the reference under s 378 of the *Commonwealth Electoral Act* 1918 (Cth), namely the Attorney-General of the Commonwealth ("the Attorney-General"), Ms Kakoschke-Moore and Mr Timothy Raphael Storer. Mr Storer was found to be a person interested on the basis that he had polled the highest number of votes after Senator Xenophon (as he then was) on the NXT 'ticket' but was not elected and may be found entitled to be elected in Ms Kakoschke-Moore's place on a special count. Justice Nettle also made an order that the Commonwealth pay the costs of Ms Kakoschke-Moore and Mr Storer of the proceedings.

On 24 January 2018 Justice Nettle answered the first question transmitted by the Senate as follows:

> There is a vacancy, by reason of s 44(i) of the Constitution, in the representation of South Australia in the Senate for the place for which Ms Skye Kakoschke-Moore was returned.

The following questions were then reserved for the consideration of the Full Court pursuant to s 18 of the *Judiciary Act*:

i. Should the vacancy… be filled by a special count of the votes cast at the poll on 2 July 2016 or by some other, and if so what, method?

ii. Notwithstanding that until 6 December 2017 Ms Kakoschke-Moore was a British citizen…does the fact that she renounced that citizenship …render her capable of being chosen to fill the vacancy by means of such a special count?

iii. If the vacancy is to be filled by such a special count… should Mr Storer be excluded by reason that… he ceased to be a member of the NXT on 6 November 2017?

A Notice of a Constitutional Matter has been filed by the Attorney-General.

Ms Kakoschke-Moore submits that there is nothing in the Constitution that expressly renders a person, who is an Australian citizen, ineligible to fill a vacancy created in the Senate even if the vacancy was caused by that person's earlier disability to be chosen. She says that the question is whether now that she is only an Australian citizen, she is, at this time, still necessarily precluded from filling the vacancy resulting from her earlier disqualification (or indeed, from her resignation). Therefore the vacancy should be filled by a special count conducted on the basis that Ms Kakoschke-Moore is not incapable of being chosen, or given that such a special count was already conducted after *Re Day (No 2)* and the result of it is known, a further count could be dispensed with and a simple declaration made that Ms Kakoschke-Moore is elected.

The Commonwealth Attorney-General submits that the outcome should be a special count conducted on the basis that a vote for Ms Kakoschke-Moore would be counted to the candidate next in the order of the voter's preference; in effect the votes would be counted in favour of Mr Storer rather than Ms Kakoschke-Moore. It is submitted that Ms Kakoschke-Moore's position is untenable: the words "incapable of being chosen" in s 44 refer to the "process of choice" required by ss 7 and 24 of the Constitution and provided for in the *Electoral Act*. Such "process of choice" commences on the date of nomination… until the completion of the electoral process. A special count… is conducted [in such circumstances of a disqualification] for the purposes of ascertaining the "true legal intent of the voters"… that was expressed by polling. It is not a 'new choice and therefore any indication of a voter's preference for the disqualified candidate is a nullity, and the true legal intent of the voter is to select the next qualified candidate. As to Mr Storer, there is no rule - constitutional, statutory or otherwise – that requires Senators to remain in the party by whom they were nominated. Voters cast their vote in a context where party-political loyalties may change.

Mr Storer also submits that Ms Kakoschke-Moore's arguments should be rejected. Her disqualification on citizenship grounds "endures for all purposes related to the 2016 election." The fact that she chose to resign her place before a reference was made to the High Court does not alter the manner in which that vacancy is to be filled. As to his membership of the NXT, Mr Storer submits that for the purposes of the *Electoral Act*, he had the necessary NXT Party endorsement at the time of the 2016 election. Whether or not he was still a member of a political party, or whether the circumstances of his being expelled from that party were in accordance with that party's rules, are irrelevant for the purposes of that *Act.*

WET044 v REPUBLIC OF NAURU (M132/2017)

Court appealed from: Supreme Court of Nauru [2017] NRSC 66

Date of judgment: 29 August 2017

The appellant was born in Illam Province, Iran in August 1982. He is of Faili Kurdish ethnicity. He worked as a farmer with his father from the age of 10, before starting work as a construction labourer and then undertaking compulsory military service a year later. He claimed that he was detained on several occasions, for one to two days, because he wore Kurdish clothing and that he was unable to get a job because of his ethnicity. In 2012 he was stopped in the street by the Iranian Revolutionary Guards, called a "Kurdish clown" and threatened with arrest. In April 2013 he had an altercation with a member of the police when asked for his identity documents.

In May 2013 the appellant fled Iran for Australia, arriving in Christmas Island in July 2013. He was transferred to Nauru in February 2014. A transfer interview was conducted with him on 19 February 2014. On 29 May 2014 he made an application for refugee status determination under the *Refugees Convention Act* 2012 (NR). The appellant claimed a fear of persecution on the basis of his (lack of) nationality, ethnicity, membership of the particular social group of stateless Kurds and being a failed asylum seeker

The Secretary of the Nauru Department of Justice and Border Control refused the application on 30 August 2015. The appellant made an application for merits review of that decision to the Refugee Status Review Tribunal. On 29 November 2015 the appellant's then solicitors made submissions ('the written submissions") to the Tribunal in support of his claims for refugee status and complementary protection, including providing detailed country information in relation to the persecution of both Faili Kurds and failed asylum seekers in Iran. The Tribunal affirmed the decision of the Secretary that the appellant was not recognised as a refugee and was not owed complementary protection under the Act.

The appellant then appealed to the Supreme Court of Nauru (Crulci J).

His grounds of appeal were:

1. The Tribunal failed to consider the appellant's mental health condition and the impacts that had on his presentation;

2. The Tribunal erred in rejecting the appellant's claim that he was stateless; and

3. The Tribunal was unreasonable in its treatment of inconsistencies in the appellant's evidence and erred in making adverse credibility findings without proper basis against him.

Her Honour held that the Tribunal did take into account the appellant's mental health problems and therefore dismissed ground 1. It was open to the Tribunal to not accept the appellant's evidence that at the transfer interview he was still suffering from ice withdrawal and mental health problems and therefore confused, given that he asserted that he had last used ice in Indonesia on his way to

Australia, some 7 months before his transfer interview. In relation to Ground 2, her Honour did not find any error of law in the Tribunal's finding that the appellant was not stateless, but a citizen of Iran of Faili Kurdish ethnicity. Nor did the Tribunal err in failing to be satisfied that the appellant had suffered serious harm in the past because of his ethnicity and that there was a reasonable possibility that such harm would befall him in the reasonably foreseeable future. As to Ground 3, her Honour held that it was open to the Tribunal to accept the Secretary's findings that there were considerable inconsistencies in the appellant's evidence as to his citizenship and other relevant matters between the transfer interview and a later RSD interview and that various other aspects of the appellant's evidence were not credible.

The appellant appealed to the High Court on 12 September 2017. He relies on a proposed Amended Notice of Appeal which seeks to raise two new grounds of appeal which were not raised by him when he represented himself in the Supreme Court. The first issue for determination at the appeal is whether the appellant should be able to raise the two new grounds of appeal which are:

- The Refugee Status Review Tribunal erred in failing to consider the written submissions and country information with respect to the risks of returning to Iran as a failed asylum seeker in circumstances where that country information had not been before the Secretary, was directly contrary to findings of fact adverse to the appellant's claim for protection and the Tribunal nevertheless adopted the Secretary's reasoning and findings of fact to reject those claims;

- The Refugee Status Review Tribunal acted in a way that was procedurally unfair, by failing to put to the appellant the country information it relied upon concerning the risk of harm to Kurds who are Shia Muslim.

CRI028 v REPUBLIC OF NAURU (M66/2017)

Court appealed from: Supreme Court of Nauru [2017] NRSC 32

Date of judgment: 11 May 2017

The appellant was born in the "K" District of Pakistan in October 1983. He is a Sunni Muslim, a Punjabi by ethnicity and a citizen of Pakistan. He is a married man and his wife is a Shiaa Muslim. He attended school until grade 9 and then worked in various trades. He went to Karachi to look for work in 2004. He later met and married his wife in Karachi. It was a 'love match' which did not have the approval of his family. On many occasions whilst living in Karachi he was forced to attend demonstrations and other gatherings and contribute money to the Muttahida Quami Movement (the "MQM") under threat of being assaulted and after having his identity cards confiscated. He could not go to the police for help because many members of the police were also MQM supporters.

In May 2013 some MQM supporters came to his house demanding that he attend a demonstration and threatened him with harm if he did not do so. As a result the appellant decided to flee Pakistan as he feared that if he remained he would be detained, harmed or killed in the on-going civil and political violence. In August 2013 the appellant travelled to Malaysia, then onto Indonesia where after a couple of months he boarded a boat for Australia. This was intercepted and he was taken to Christmas Island in December 2013; a few days later he was transferred to Nauru where he remains. On 8 March 2014 he made an application for refugee status determination under the *Refugees Convention Act* 2012 (NR).

The Secretary of the Nauru Department of Justice and Border Control refused the application on 17 July 2014. The appellant made an application for merits review of that decision to the Refugee Status Review Tribunal. The Tribunal affirmed the decision of the Secretary that the appellant was not recognised as a refugee and was not owed complementary protection under the Act. The Tribunal found that the appellant had two 'home areas': the first in the "K" District where he had lived for 22 years, and the second in Karachi where he had lived, worked, married and had a child in the 6 years before leaving Pakistan. While the Tribunal was satisfied that the appellant may well have had a well-founded fear of persecution from the MQM, it viewed this threat to be restricted to the Karachi area. The appellant was found to not have a reasonable possibility of persecution in his home area of the "K" District either based on the MQM threats or his mixed-faith marriage. Having determined that he could return and lead a normal life in Pakistan the Tribunal found that the appellant was not a refugee. The Tribunal found 'the ordinary principles of relocation to not apply in the situation' of having two home areas.

The appellant then appealed to the Supreme Court of Nauru (Crulci J). His grounds of appeal were:

1. Whether a person can have more than one 'home area' and thus negate the principles of the relocation alternative, and whether it is correct that a decision-maker is not required to assess the reasonableness of relocation from one home area to another;

2. If the existence of a second home area negates the requirement of a reasonableness of relocation question, does this second area need to be considered for the appellant alone or as appropriate for he and his family together;

3. If there is not a second home area exception, was the Tribunal required to take into consideration the appellant's claim that the family unit could not relocate to the "K" District.

With respect to the issue of there being two home areas, the Court found that the Tribunal's finding on this issue was a finding of fact and could therefore not be the subject of an appeal. With respect to Ground 2, the Court noted that the Tribunal had made a finding that the appellant did not have a subjective fear of returning to Karachi, including with his wife. The Court found that the Tribunal did consider the appellant's family situation and in particular whether his wife could be safe in the "K" District.

As to Ground 3, her Honour noted the Tribunal had made a determination that at no time had the appellant's wife said that she would not leave Karachi; rather for various reasons that she did not wish to do so. In those circumstances the Court held that this was a determination open to the Tribunal on the evidence before it and this ground of appeal had no merit. The appeal was dismissed.

The appellant appealed to the High Court on 25 May 2017.

The grounds of appeal include:

- The Supreme Court of Nauru erred by failing to find that the Refugee Status Review Tribunal made an error of law in misconceiving and misapplying the 'internal protection' or 'relocation' principles as if relocation from one home area to a second was not subject to the relocation principle of reasonableness;

- The Supreme Court erred in failing to find the Tribunal made an error of law by failing to ask the correct question in relation to its consideration of the "K" District as another home area, namely whether it was another home area to the appellant and his family.

DL v THE QUEEN (A38/2017)

Court appealed from: Court of Criminal Appeal of the Supreme Court of South Australia [2015] SASCFC 24

Date of judgment: 10 March 2015

Date special leave granted: 24 October 2017

After a trial by judge alone (Judge Rice) in the District Court of South Australia, the appellant was convicted of one count of persistent sexual exploitation of a child, between 1984 and 1994, in contravention of s 50(1) of the *Criminal Law Consolidation Act* 1935 (SA). The complainant, who is a nephew of the appellant, gave evidence of various acts, comprising indecent assault or unlawful sexual intercourse, by the appellant while the complainant was between 5 and 15 years old. While the prosecution called various other witnesses, including members of the complainant's family, the prosecution case was largely reliant upon acceptance by the Judge of the credibility and reliability of the complainant's evidence. The appellant gave evidence denying any sexual activities with the complainant. The defence case was that the allegations were motivated by ill-will on the part of the complainant and his family over certain events and the defendant's conduct regarding those events.

In his appeal to the Court of Criminal Appeal (Kourakis CJ, Blue & Bampton JJ), the appellant submitted, inter alia, that the verdict was unreasonable or could not be supported having regard to the evidence. He contended that there were inconsistencies and implausibilities in and in relation to the complainant's evidence, which must have led to a reasonable doubt about acceptance of his evidence; and there was no reason to reject beyond reasonable doubt the appellant's evidence.

The Court of Appeal held that, after considering the entirety of the evidence given by the complainant in conjunction with the evidence given by the other prosecution witnesses and by the appellant, it could not be said that the complainant's evidence was glaringly improbable, contrary to compelling inferences or otherwise such that it was not open to the Judge to accept it. Nor could it be said that it was not open to the Judge to reject the appellant's evidence. The case essentially turned on the direct conflict between the evidence given by the complainant and the appellant. It was open to the Judge on the evidence to be satisfied beyond reasonable doubt that the complainant was telling the truth about the sexual abuse alleged and that the appellant was not. The Judge had explicitly acknowledged that, even if he rejected the evidence of the appellant beyond reasonable doubt, that did not suffice to convict the appellant because before doing so he would need to be independently satisfied beyond reasonable doubt about the allegations made by the complainant and vice versa. The appellant had therefore not established that the verdict was unreasonable or that it could not be supported by the evidence.

The appellant further contended that the Judge erred as a matter of law in failing to give adequate reasons for his decision as he did not deal with incontrovertible, or arguably incontrovertible, inconsistencies affecting the credibility of the complainant. Those inconsistencies related to the complainant's account as to

how and when the acts of sexual abuse occurred and the complainant's evidence concerning disclosure of abuse to others.

The Court noted that a trial judge's findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose.

After examining all the inconsistencies alleged by the appellant, the Court concluded that in the circumstances, there was no need for the Judge to address specifically the questions identified by the appellant. It was open to the Judge to accept the complainant's evidence and reject the appellant's evidence. The verdict was not unreasonable or incapable of being supported, having regard to the evidence. The Judge's reasons were not inadequate as a matter of law.

The grounds of appeal are:

- The Court of Criminal Appeal erred in failing to hold that, by not identifying the particular sexual offences, separated by at least three days, which were found proved:

  (1) the learned trial judge erred in law by failing to give adequate reasons;

  (2) the verdict of guilty was uncertain, unreasonable and unsafe; and/or

  (3) there was a miscarriage of justice.