IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M151 of 2017

BETWEEN:

EMP144
Appellant

and

THE REPUBLIC OF NAURU
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I:

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

Part II:

2. **Ground 1**: The reasonable relocation test under the Refugees Convention requires that the individual circumstances of the protection claimant be carefully considered. The Tribunal failed to consider the identified, express reasons identified by the Appellant as to why he could not reasonably relocate, given his specific and limited skills,[1] his family situation and his history of avoiding harm by going into hiding.

3. The Tribunal accepted the Appellant as a credible witness.[2] Even so, the Tribunal failed to mention that when he fled to Baglang and then Kathmandu after his house was burned down, he remained in hiding in both places.[3] The Tribunal said he faced only "localised harm"[4] and noted that "no harm had befallen him" when he stayed in Baglang and Kathmandu.[5]

4. **Ground 2**: In the course of evidence, the Tribunal appears to have side-stepped the question of whether relocation was reasonable in all of the Appellant's circumstances: they did not give the Appellant an opportunity to address the reasonableness of relocation. The issue arose at Appeal Book pp.165-166. It appears that the Tribunal did not even know whether it was addressing the question of relocation, and did not draw the Appellant's attention to the question whether relocation to any particular place would be reasonable (in the sense of practicable[6]) and gave him no opportunity at all to deal with that question.

5. As the Appellant's statement of 27 October 2014 (Appeal Book pp. 104-113) makes clear at [48], the Appellant was "eager to provide a full and detailed account of each of the incidents of harm" he had experienced. He was not given that opportunity: in fact the Tribunal completely overlooked the significance of that evidence, despite having found him to be a credible witness.[7] He was given no opportunity to deal with the relevant question: whether relocation to a particular, identified place was reasonable and practicable for him.

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[1] See SZATV (2007) 233 CLR 18 at 27 [24]
[2] Appeal Book p183, [24]
[3] Appeal Book p112, [69]; Appeal Book p151, lines 4-7
[4] Appeal Book p184, [29] & [31]
[5] Appeal Book p184, [32]
[6] *SZATV* at [23], *Plaintiff M13/2011* (2011) 85 ALJR 740 at [21] per Hayne J
[7] Refugee Status Review Tribunal reasons: Appeal Book 178-188 at [24]

6. **Ground 3**: The Tribunal failed to deal with the integers of the Appellant's claim for complementary protection. It dealt with the claim at [43-45].[8] The Tribunal's reasoning is hard to understand: it appears to have treated the claim for complementary protection as if it was a watered-down claim for refugee status (see their reasons at [43]). But the Appellant had identified a number of specific forms of harm, including arbitrary deprivation of life (ICCPR Art. 6); torture (ICCPR Art. 6; CAT Art 3); and degrading treatment (ICCPR Art. 6). His evidence on these points is at Appeal book pp. 34-35; Appeal Book pp. 104-113, especially at [17-19], [40-43], [69-72]; and Appeal Book p. 117.

7. **Ground 4** (the Common Ground): We adopt the common submissions of the Appellants. We emphasise just this: to apply an internal relocation test in order to protect rights under the ICCPR would involve sacrificing the rights given by Article 12 of ICCPR: "the right to liberty of movement and freedom to choose his residence."

8. **Ground 5**: The Tribunal mis-stated the relevant country information about Nepali citizenship law. The Appellant identified a concern that his son was being denied citizenship because of the Appellant's political opinion (Appeal Book 117). If his son was denied citizenship, he could not attend school.

9. The Tribunal found that the difficulty associated with his son gaining citizenship was unrelated to his political position, but was because of the fact that "...citizenship in Nepal can be established only with the active participation of the father." It said this was "irrefutable" (Appeal Book p.182 at [20]). The Tribunal was equally emphatic in the course of the hearing: see Appeal Book p.161.

10. But the Tribunal was entirely wrong on the point. Section 3 of the Nepali Citizenship Act provides: "(1) A person born at the time when his/her father or mother is a citizen of Nepal, shall be a citizen of Nepal by descent." This is irreconcilable with the Tribunal's view in argument (Appeal Book p.161) and its reasons (Appeal book p.182 at [20]).

11. The Tribunal, having formed a view which it considered "irrefutable", gave the Appellant no opportunity to deal with the reason why the son was denied citizenship (and as a consequence, schooling) and closed its mind to the Appellant's argument. It failed to evaluate the country information properly and thus failed to exercise jurisdiction.[9]

Dated: 7 February 2018

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J.W.K. Burnside
and M.L.L Albert
Counsel for the Appellant

[8] Appeal Book p 187-188
[9] *MZYTS* (2013) 136 ALD 547 [48]-[50]