

BETWEEN:

HFM 043
Appellant



and

THE REPUBLIC OF NAURU
Respondent

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RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I: Certification

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

Part II: Outline of the propositions that the Respondent intends to advance

The Appellant's primary argument

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2. The Appellant contends that there is a distinction between a Refugee Determination Record issued to a person who is given derivative status, and a Refugee Determination Record issued to a person who is determined to be a refugee or to be owed complementary protection. Her primary argument is that the former does not engage s 31(5) of the *Refugees Convention Act 2012* (Nr) (the **RC Act**) in respect of her application to the Tribunal for merits review.
3. There is no textual support in the RC Act for such a distinction as to the operation and effect of a Refugee Determination Record issued under s 6(2A), whether for the purposes of s 31(5) or more generally.

- **Respondent's Submissions (RS) at [7]-[13] and [15]**
- *Refugees Convention Act 2012* (Nr), ss 3, 5, 6(2A), 8, 31.

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4. Section 31(5) of the Act operates where an application for merits review is made under s 31(1), relevantly, in relation to a determination made by the Secretary under s 6(1). The Tribunal's jurisdiction is not limited to the review of a determination under only one of the grounds for protection in 6(1)(a), (b) or (c). It would be anomalous, therefore, to limit the operation of s 31(5) by reference to the "basis" on which the Refugee Determination Record was issued.

- **RS at [21]-[22]**

5. The Respondent's construction is harmonious with the analogous provision in s 6(2B) of the Act, which is expressed to operate in respect of any extant application for refugee status, derivative status or complementary protection. Subsection 31(5) should be given an equivalent operation.

- **RS at [20]**

10 6. The Appellant's primary argument – that s 31(5) can only operate where the Refugee Determination Record is issued on the same basis as the application made under s 5 (**AS** at [29]) – would deprive s 31(5) of any meaningful operation. Section 31(5) operates by reference to the issue of a Refugee Determination Record – not by reference to the nature of an application made under s 5 of the RC Act, or the basis on which protection is sought.

- **RS at [23]**

7. The Appellant's focus on differential rights attaching to a finding of derivative status operates on a false assumption. Specifically:

a. The language of the Act reflects the position that the Respondent owes international obligations to persons holding derivative status – see the definition of Refugee Determination Record which describes all persons issued with a certificate under s 6(2A), including persons recognised as having derivative status, as persons "owed international protection".

20 b. The protections against refoulement recognised in s 4 of the RC Act are afforded equally to persons recognised as refugees, given derivative status, and owed complementary protection. That is consistent with the principle of family unity, recognised by a majority of parties to the *Refugees Convention* who have adopted the recommended protections respecting that principle:

- *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at 454-455 at [20]-[22] and the instruments quoted therein.

30 c. Provisions regulating the grant of visas, including temporary settlement visas granted pursuant to reg 9A of the *Immigration Regulations 2014* (Nr), do not discriminate between persons recognised as refugees, persons given derivative status, and persons in need of complementary protection. In any event, those Regulations do not assist in the construction of s 31(5) of the RC Act.

d. So understood, the Nauruan statutory regime gives no differential legal treatment to persons with derivative status when compared with persons recognised as refugees or persons owed complementary protection.

8. The Respondent's preferred construction is supported by the extrinsic material, which is to be given weight under Nauruan law.

- **RS at [14] and [19]**
- *Interpretation Act 2011 (Nr), ss 49-52*
- *Explanatory Memorandum to the Refugees Convention (Derivative Status and Other Measures) (Amendment) Bill 2016 (Nr)*

10 9. The Appellant's focus upon the differential rights attaching to a finding of derivative status (as opposed to refugee status, or protection by reason of complementary protection obligations) is misplaced. Section 31(5) speaks to the jurisdiction of the Tribunal to conduct its review, not the rights and obligations of a person granted a Refugee Determination Record:

- **RS at [29]**

The Appellant's secondary argument

10. The Appellant's alternative submission is that s 31(5) does not operate in this case because the Tribunal's review had been "determined" at the time the Appellant was granted a refugee determination. The submission ought be
20 rejected for the following reasons:

- a. It would give s 31(5) an anomalous temporal operation. Without any rational justification, the section would operate according to happenstance.
- b. The words "at the time the person is given a Refugee Determination Record" in s 31(5) should be construed as having an ongoing operation. Upon remittal, the Refugee Determination Record would operate immediately to deem the review application to have been "validly determined", so that there is nothing left before the Tribunal.

- **RS at [27]**

Dated: 14 June 2018

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.....(signed).....

Chris Horan
Patrick Knowles