IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
ON APPEAL FROM THE SUPREME COURT OF NAURU No. M20 of 2017

BETWEEN:

DWN 042
Appellant

and

REPUBLIC OF NAURU
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply to Respondent's Argument

2. These submissions are in response to the Respondent's submissions dated 18 April 2017 – only in respect of issues not already addressed in the Appellant's submissions dated 28 March 2017.

Ground 1

3. At paragraph 17 and footnote 9, the Respondent makes a point of the Appellant not yet having identified the proposed additional ground of appeal before the Supreme Court of Nauru.

   3.1 By his notice of motion dated 6 February 2017, the Appellant sought "an order to reopen the appeal to further amend the grounds of appeal". Because the notice of motion was ignored by Judge Khan before his Honour delivered final judgment, the Appellant has not been provided with an opportunity to identify the further ground.

   3.2 To the extent that it would assist this Court to know of the proposed ground, the Appellant would, if given the opportunity, seek to add the following ground of appeal before the Supreme Court of Nauru:

> The Refugee Status Review Tribunal acted in a way that was in breach of the principles of natural justice, contrary to s 22(b) and / or s 40 of the *Refugees Convention Act 2012* (Nr), by conducting its hearing when and at the place where the Appellant was detained in light of the impact of his continuing detention on him and his capacity to participate at the hearing at the relevant time.

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The Appellant would rely upon the matters deposed to by him in his affidavit before this Court and dated 13 July 2016, as well as the summary of the legal principles relevant to ss 22(b) and 40 in paragraphs 10-13 of his submissions to the Supreme Court of Nauru dated 6 May 2016.

4. At paragraph 21, the Respondent submits that "the [Supreme] Court was not obliged to delay its delivery [of final judgment] in order to hear argument on an application". No authority is cited in support of that proposition: all authority is to the contrary. The Supreme Court was not *functus officio* "while there remains any function that may be performed by it in relation to the proceeding".[1] In this case, at the time that the notice of motion was filed, the Court had not given final judgment. The notice of motion should have been dealt with.

5. At paragraph 22, the Respondent submits that "[t]his Court can address any issue or submission not considered by the Supreme Court and determine whether the judgment below was correct". If that proposition is accepted by this Court, the Appellant seeks leave to rely in this Court on the ground set out above at paragraph 3.

6. Further, the terms of paragraph 22 of the Respondent's submissions appear to undermine the Respondent's summons dated 14 March 2017 relying on Article 2(a) of the Agreement. The Supreme Court has not considered the substance of either of the grounds that invoke the Constitution. According to the Republic, this Court can "determine whether the judgment below was correct" in that respect. The Appellant endorses the Respondent's submission that "this Court may (and at least *prima facie* should) give such judgment as ought to have been given in the Court below".

7. In response to paragraph 23 of the Respondent's submission (also relied on at paragraph 35) to the effect that the legal characterisation of the Appellant's detention is irrelevant to the fairness of the process, the Appellant relies on paragraphs 54-56 of his primary submissions – to the effect that the unlawfulness flows from the need for Courts to "protect societal norms", including the constitutionally-enshrined right not to be unlawfully detained.

8. As to paragraph 25 of the Respondent's submissions, the Appellant notes that, while the Tribunal hearing was not conducted coercively, the Appellant's detention, which continued during that hearing, was coercive. He did not request that the hearing be conducted at the time and place where he was detained. Nor was the Tribunal obliged to conduct the hearing then or there. Nothing in the Act required it to do so: see s 21(1) of the *Refugees Convention Act 2012* (Nr).

9. While the Appellant's attendance at the Tribunal hearing was voluntary – in the sense that he could, contrary to his own best interests, have not attended the hearing – the Tribunal chose the time and place of the hearing. It should have only conducted the hearing away from any continuing illegal detention of the Appellant.

10. The proposition put by the Respondents at paragraph 27, on the operation and effect of Article 2(a) of the Agreement, ought be rejected. If an appeal to this Court is incompetent where there is a need for mere consideration of an argument involving the interpretation or effect of the Constitution of Nauru, every respondent to an appeal can raise the Constitution in their submissions in response to the appeal and, by so doing, exclude this Court's jurisdiction to entertain the appeal. Since neither ground 1 on its

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1 *Fletcher Construction Australia Ltd v Lines MacFarlane Marshall Pty Ltd* [2001] VSCA 167; 4 VR 28 [43] citing relevant decisions of this Court.

terms nor the Appellant's argument refers to the Constitution, ground 1 cannot be said to offend Article 2(a) of the Agreement, such that this Court is deprived of jurisdiction.

11. At paragraph 28, the Respondent seeks to resile from its concession before the Supreme Court that the Court could determine the two relevant grounds on the assumption the Appellant's detention was unconstitutional. Those submissions were the basis for the Supreme Court of Nauru's final judgment in this matter. If the Respondent had wanted to take a different position in respect of any final judgment, it should and ought to have done so before that judgment was pronounced. Unlike the Appellant the Respondent was represented when the matter was called on for judgment.[2] Parties are bound by the way in which their cases are conducted by their counsel, who make forensic decisions about what issues to contest.[3] Further, that concession fortifies the Appellant's submission that this Court does not need to determine the effect of the Constitution, but can proceed on the assumption that the Respondent urged on the Court below.

Grounds 2 and 3

12. Paragraph 32 of the Respondent's submissions misstate the effect of grounds 2 and 3. The two grounds respond to the situation where a judge has accepted an application to strike out two grounds of appeal, for reasons that are agreed by both parties to be plainly wrong. The Appellant comes to this Court to complain that the judge has not dealt with the substance of those grounds.

13. The same complaint can be expressed as a failure to expose a path of reasoning.[4] The Appellant does not, and could not, know why the Court below rejected the relevant grounds – where all parties agree that the reasons presented by the Court below were plainly wrong. Without any intelligible reasons, the Appellant can only complain that the Court below has neither dealt with nor determined, by any discernable judicial method, the grounds he put. To adopt the words of McHugh JA:

> A decision which is made arbitrarily cannot be a judicial decision; for the hallmark of a judicial decision is the quality of rationality.

However one might frame it, the Appellant's fundamental complaint, raised by grounds 2 and 3, is that the judgment in this case lacked that quality – because it was based on reasoning that was plainly wrong.

Ground 4

14. The Respondent's submissions at paragraph 38, 39, 46-51 are to the effect that the Appellant made his claims under the Act by reference to the risk of harm to him by the Taliban. That is not in dispute. He did so and the Tribunal lawfully dealt with the specific claim of past harm by the Taliban to the Appellant.

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2 Affidavit of Tamsin Webster dated 21 February 2017, paragraphs 16-17.

3 *Metwally v University of Wollongong* (1985) 59 ALJR 481; [1984] HCA 28; *Van Gervan v Fenton* (1992) 175 CLR 327 at [16]; *Nudd v R* (2006) 80 ALJR 614; [2006] HCA 9 at [9].

4 *Hunter v Transport Accident Commission* [2005] VSCA 1; 43 MVR 130 at [21] (Nettle JA); *Wodonga City Council v Braunack* [2012] VSCA 320 at [14] (Nettle and Redlich JJA). See also *Pettit v Dunkley* [1971] 1 NSWLR 376; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 278-279 (McHugh JA); *Mifsud v Campbell* (1991) 21 NSWLR 725; *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430.

15. The Appellant's complaint under ground 4 is that he also made a claim of harm in the form of arbitrary deprivation of life, not based on past harm by the Taliban, but based on future risk of harm because of the activities (at the place of his return) of the Taliban and other armed groups, including the Pakistan government and Islamist extremists, as well as general sectarian attacks. Those claims were made expressly and are set out at paragraphs 63, 64 and 66 of the Appellant's principal submissions to this Court.

16. Paragraph 44 of the Respondent's submissions seeks, in effect, to have this Court read submissions to a Tribunal as if they were pleadings. As this Court has previously held, that is an inappropriate way to approach materials put before a specialist refugee merits review tribunal.[5]

17. The question a Court on judicial review must ask itself is: was the claim made sufficiently clearly by the Appellant and if so, what materials provided by the Appellant support it?[6] The Respondent conceded, at paragraph 39, that the relevant claim was made by the Appellant. The only question for this Court then is: was there material to support it? The material placed before the Tribunal is identified in the Appellant's earlier submissions to this Court.

18. The submissions and information identified in paragraphs 46-51 of the Respondent's submissions were not advanced, or were not only advanced, in support of the ground of protection relevant to the Appellant's claim to be at risk of arbitrary deprivation of life by reason of his place of return in Pakistan and the presence of armed or violent people there. Those materials supported other, presently irrelevant claims or integers of protection by the Appellant. They therefore do not bear on the determination of ground 4 on appeal to this Court.

Ground 5

19. In paragraph 54, the Respondent relies on the Appellant's statement that he provided information during his transferee interview. That misunderstands the Appellant's complaint. The Appellant does not dispute that he had a transfer interview, at which he mentioned part of his "claims for protection". The dispute is whether the transfer interview record placed before the Tribunal contained the claims as the Appellant made them at that interview. The Appellant disowned the record and the interviewer made no claim to its accuracy, in that the interviewer did not sign the record.[7]

20. In paragraph 56, the Respondent queries whether there was any unfairness to the Appellant by reason of the Tribunal relying upon a copy of the purported record of the transfer interview. The unfairness is detailed in paragraphs 71 and 77 of the Appellant's principal submissions to this Court.

21. In paragraph 56, the Respondent also submits that the Tribunal is not prohibited from taking into account unsworn evidence by operation of s 22(a). Section 22 reads:

> The Tribunal:
>
> (a) is not bound by technicalities, legal forms or rules of evidence; and
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> (b) must act according to the principles of natural justice and the substantial merits of the case.

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5 *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at [1].

6 *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1.

7 Appeal Book, page 20.

The conjunction between paragraphs (a) and (b) of s 22 is important. Read as a whole, s 22 requires that the Tribunal accord natural justice; and, only if it is consistent with that obligation may the Tribunal dispense with "rules of evidence".

22.1 In this case, the Tribunal took into account a document that was disowned by the Appellant and not claimed to be accurate by anyone else. The document's only claim to relevance to the Tribunal's task was that it was on the Tribunal's file.

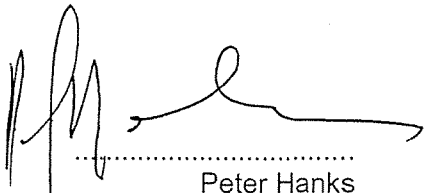
22.2 The Appellant submits that, in those circumstances, it was contrary to the rules of natural justice for the Tribunal to have regard to the document, let alone to give it the weight the Tribunal gave it in this case.

22. The Respondent submits (at paragraph 58) that there is no basis for any special costs order. Assuming that means costs should follow the event, the Appellant takes issue. The Appellant should have its costs of the leave application.

22.3 The assurances given to this Court by the Respondent were a reason for the refusal of the Appellant's leave application. The Respondent then refused several requests to convert those assurances to orders by consent.

22.4 When the Supreme Court convened to give final judgment, the Republic was represented but said nothing when the opportunity arose to convey its assurances to the Court. That inaction should be reflected in a costs order: the leave application hearing, although it removed any value as a precedent that the Supreme Court's strike-out reasons might have had, conferred no benefit or advantage on the Appellant.

Dated: 2 May 2017



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