IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M66 OF 2017**

BETWEEN: **CRI 028**
Appellant

AND: **THE REPUBLIC OF NAURU**
Respondent

RESPONDENT'S SUBMISSIONS

Part I PUBLICATION

1. This document is in a form suitable for publication on the Internet.

Part II ISSUES

2. The Respondent (the **Republic**) accepts that the Appellant can appeal to this Court as of right.

(1) The proceeding before the Supreme Court of Nauru (the **Supreme Court**) was an "appeal" on a point of law from a decision of the Refugee Status Review Tribunal (the **Tribunal**) under s 43(1) of the *Refugees Convention Act 2012* (Nr) (**Refugees Act**). The Republic agrees that s 43(1) of the Refugees Act invests the Supreme Court of Nauru with original jurisdiction in the nature of judicial review.[1]

(2) Under Article 1A(b)(i) of the Agreement between Australia and the Republic, as given effect by s 5 of the *Nauru (High Court Appeals) Act 1976* (Cth) (the **Nauru Appeals Act**), an appeal lies to this Court from the Supreme Court as of right against any final judgment, decree or order of the Supreme Court in the exercise of its original jurisdiction.

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1 Compare *Tasty Chicks Pty Limited v Chief Commissioner of State Revenue* (2011) 245 CLR 446 at [5]; *Osland v Secretary to the Department of Justice* (2010) 241 CLR 320 at 331-332 [18]; *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72 at 79 [15]; *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mouratidis* (2012) 200 FCR 464 at [69].

Republic of Nauru
Level 30, 35 Collins Street
Melbourne, Victoria
3000

Date of this document: 14 August 2017
Telephone: 0457 000 678
Fax: none available
Email: roganoshannessy@naurursd.com
Ref: Rogan O'Shannessy

(3) The High Court, in the exercise of its jurisdiction under the Nauru Appeals Act, may affirm, reverse or modify the judgment given or order made by the Supreme Court, and may give such judgment or make such order as ought to have given or made by the Supreme Court: s 8 of the Nauru Act. By doing so, the High Court is exercising its original rather than appellate jurisdiction.[2]

3. The principal issue in this appeal is whether the Supreme Court erred in failing to hold that Tribunal did not properly apply the principles in relation to "internal relocation" to the circumstances of the present case. Each ground of appeal is ultimately directed to a contention that, when assessing the Appellant's claims to be owed protection as a refugee, including whether he could return to and live in his home area in Pakistan (referred to in the Appellant's Submissions as [K]) where there was no appreciable risk of the feared persecution, the Tribunal did not properly consider the position of the Appellant as a "family unit" together with his wife and child.

4. The subsidiary issues are whether the Tribunal:

(1) properly considered whether it was reasonable to expect the Appellant to return to and live in his home area of [K];

(2) failed to consider the position of the Appellant's wife when determining that [K] was a home area of the Appellant; and

(3) properly considered the position of the Appellant's wife or family unit in the application of the relocation principles.

5. On a fair reading of its reasons for decision, the Tribunal conducted an assessment of whether it was reasonable to expect the Appellant to "relocate" to [K] in order to avoid the localised risk of persecution that he faced in Karachi. The Tribunal concluded that the Appellant could "practically, safely and legally relocate to an area within Pakistan where he would not face any real risk of persecution or other serious or significant harm (at [101]), and that relocation would be reasonable in the sense that the Appellant could lead a relatively

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2 *Ruhani v Director of Police (No 1)* (2005) 222 CLR 489 at 499-500 [9]-[10], 507-508 [39]-[41], 510-511 [49]), 527-528 [107]-[110].

normal life without undue hardship in all the circumstances" (at [102]-[103]). In order to obtain any relief in this Court, the Appellant must successfully impugn these findings on grounds of legal error – in other words, he must succeed on ground 3 of his notice of appeal, together with either ground 1 or ground 2.

Part III SECTION 78B NOTICES

6. The Respondent has considered whether notices should be given under s 78B of the *Judiciary Act* 1903 (Cth), and concluded that no such notices are necessary.

Part IV FACTUAL BACKGROUND

10 7. The Appellant is a citizen of Pakistan and a Sunni Muslim. He was born in the district of [K] in the Punjab province, where he lived for about 21 years before moving to Karachi for work. His mother and brothers still reside in [K]. While he was living in Karachi, the Appellant married and had a child. His wife is a Shia Muslim. The Appellant left Pakistan in August 2013, and arrived in Australia on Christmas Island in December 2013 (when he was 30 years old), before being transferred to Nauru.

8. On 8 March 2014, the Appellant applied to the Secretary of Justice and Border Control (the **Secretary**) in Nauru for a Refugee Status Determination (**RSD**) under the *Refugees Act*. On 19 May 2014, the Appellant was interviewed by an
20 RSD officer about his application. On 14 March 2015, the Secretary determined that the Appellant was not recognised as a refugee and was not a person to whom Nauru owed protection obligations either under the Refugees Convention or any other international instrument (AB 49-62).

9. On 31 March 2015, the Appellant applied to the Tribunal for review of the Secretary's decision. On 11 June 2015, the Tribunal conducted an oral hearing of the Appellant's application for review, having received written submissions from the Appellant's lawyer dated 3 June 2015 (AB 29-) and 14 June 2015 (AB 99). On 13 August 2015, the Tribunal affirmed the Secretary's determination (AB 122-140).

(1) In summary, the Appellant claimed to fear harm from the Muttahida Qaumi Movement (**MQM**) in Karachi, who had threatened him and forced him to attend numerous meetings and to contribute money to their cause: Tribunal reasons at AB 124 [9]-[13], 127-128 [32]-[39], 134 [72].

(2) The Tribunal accepted that the Appellant had a well-founded fear of persecution in Karachi, in that there was a more than remote chance that he will encounter further threats or actual harm from the MQM in the reasonably foreseeable future: AB 136 [82]. However, the Tribunal found that this risk was localised to Karachi, and was not satisfied that the Appellant faced a reasonable possibility of persecution from the MQM outside of Karachi, including in his "home area" of [K]: AB 136 [83]-[84].

(3) The Tribunal found that [K] was a "home area" for the purposes of its assessment, given the Appellant's close, longstanding and ongoing connection with the area, where the rest of his family resides: AB 135 [81].

(4) The Tribunal found that the Appellant did not have a subjective fear of returning to [K], including with his wife: AB 134 [73]. While the Appellant had claimed that his family did not like his wife, he conceded that they could go to the Punjab region "but his wife didn't want to": AB 134 [73]. The Tribunal did not accept that the Appellant's family had any "significant issues with his wife": AB 135 [76], [80]. Rather, the Appellant and his wife could move to [K], but his wife did not want to move as she did not want to leave her own family in Karachi: AB 135 [76].

(5) The Tribunal found that there was no real chance that the Appellant would experience persecution in [K] for reasons of his mixed Shia-Sunni marriage: AB 137 [88]-[89].

(6) Accordingly, given the relative safety of [K], the Appellant was not a refugee for the purpose of the Act: AB 178 [93].

(7) The Tribunal also separately concluded that it was reasonable to expect the Appellant to relocate to [K] (or some other part of the Punjab province) from Karachi: AB138-139 [95]-[103]. The Tribunal found that there was no more than a remote possibility that the Appellant would experience

harm if he relocated to such an area: AB 138-139 [100]-[101]. The Tribunal did not accept that the Appellant was estranged from his family or that he would lack a support network in [K]: AB 139 [102]. In particular, the Appellant would not have difficulty finding employment in [K]: AB 139 [102]. Accordingly, if the Appellant were to relocate to [K], he could "lead a relatively normal life without facing undue hardship in all the circumstances": AB 139 [103]. The Tribunal therefore concluded that relocation would be reasonable for the Appellant.

10. The Appellant appealed from the Tribunal's decision on a point of law under s 43 of the Refugees Act. The Supreme Court dismissed the appeal, and relevant held that:

(1) The Tribunal's finding that [K] was a "home area" of the Appellant was a finding of fact that was open to the Tribunal (AB 203 [36]); and

(2) In determining whether [K] was the Appellant's home area and whether it was reasonable to expect the Appellant to move there to avoid persecution, the Tribunal had considered the Appellant's family situation and his wife's circumstances (AB 204 [43], 206 [51]-[52]).

PART V LEGISLATION

11. This appeal turns on the definition of "refugee" under the Act. Accordingly, the only statutory provisions necessary for the appeal are ss 3-6 of that Act, together with the Refugees Convention.

Part VI ARGUMENT

The relocation principle

12. It is well established that an applicant will not be a refugee within the meaning of the Refugees Convention if, notwithstanding the existence of a well-founded fear of persecution in one part or region of his or her country of nationality, there is another part of the country in which he or she does not have a well-

founded fear of persecution and to which he or she can reasonably be expected to relocate.[3]

13. The principles in relation to "internal relocation" are distilled from the text of the Refugees Convention.[4] The High Court has accepted the approach of Lord Bingham in *Januzi* that, if a person could reasonably be expected to relocate to a place within his own country where he could have no well-founded fear of persecution, he or she is not outside his country "owing to" a well-founded fear of persecution for a Convention reason – in such circumstances, the "causative condition" in the definition of "refugee" under Article 1A would not be satisfied.[5] As the majority stated in *SZSCA*:[6]

> If a person could have relocated to a place within his own country where he could have no well-founded fear of persecution, and where he could reasonably be expected to relocate, then the person is outside the country of his nationality because he has chosen to leave it and seek asylum in another country. He is not outside his country owing to a well-founded fear of persecution for a Convention reason. The person is not, within the Convention definition, a refugee.

14. In each case, the question of whether it is reasonable for a refugee applicant to relocate to a safe place within their country of origin is a factual inquiry that turns on whether it is reasonable, in the sense of practicable, for him or her to relocate to an area where objectively there is no appreciable risk of the feared persecution, having regard to the particular circumstances of the applicant and the impact on him or her of relocation.[7]

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3 *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18; *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* [1994] FCA 1253; 52 FCR 437; *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 at 440 [7] (Lord Bingham).

4 *SZATV* (2007) 233 CLR 18 at 24 [15].

5 See *SZATV* (2007) 233 CLR 18 at 25-26 [19]; *Minister for Immigration and Border Protection v SZSCA* (2014) 254 CLR 317 at 326-327 [22]-[23] (French CJ, Hayne, Kiefel and Keane JJ), 331 [39] (Gageler J).

6 (2014) 254 CLR 317 at 326-327 [23] (French CJ, Hayne, Kiefel and Keane JJ).

7 *Minister for Immigration and Border Protection v SZSCA* (2014) 254 CLR 317 at 327 [23]-[26]; *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 26-27 [23]-[24] (Gummow, Hayne and Crennan JJ).

15. A decision maker's task in assessing the availability of relocation is framed by reference to the particular arguments against relocation that are raised by an applicant seeking refugee status determination.[8]

16. The internal relocation principle, or the underlying principle from which it is derived, is not necessarily confined to cases in which an applicant faces a real chance of persecution in an area where he or she previously resided, but can safely relocate to a different part of the country in which there is no such risk of persecution. Thus, in *SZSCA*, the refugee applicant did not have a well-founded fear of persecution in Kabul (where he had previously lived), but would face a risk of persecution for a Convention reason if he were to travel on the roads outside Kabul (which he had previously done in the course of his employment as a truck driver). The High Court concluded that, by analogy with the internal relocation principle, it was necessary to address whether the applicant could reasonably be expected to remain in Kabul and not drive trucks outside Kabul.[9] Such circumstances attracted the same underlying principle arising from the "causative condition" under the Convention definition of "refugee", namely whether the applicant was outside his or her country of nationality "owing to" a well-founded fear of persecution, if it could reasonably be expected that he could avoid persecution by remaining in Kabul.

17. Where the internal relocation principle (or an analogous principle) applies, there are two key issues for a decision-maker: (i) is there a place within the country of origin in which the applicant does not have a well-founded fear of persecution (*i.e.* the postulated safe place); and (ii) is it reasonable (in the sense of practicable) in all the circumstances to expect the applicant to return or move to that place?[10]

The present appeal

18. The Tribunal took the view that the relocation principle did not apply if there was an area in Pakistan which could be considered a "home area" of the

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8 *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* [1994] FCA 1253; 52 FCR 437 at 442–443, especially at 443C–D (Black CJ), at 453 (Whitlam J agreeing).

9 SZSCA (2014) 254 CLR 317 at 327 [25], 328 [29] (French CJ, Hayne, Kiefel and Keane JJ); compare at 331 [39], 332 [40]-[41], 334 [46] (Gageler J).

10 See, for example, *SZSCA* (2014) 254 CLR 317 at 332 [41] (Gageler J).

Appellant and in which he did not have a well-founded fear of persecution: AB 135 [77]. However, as established by *SZSCA*, if only one part of the country (including a "home area") is safe for a refugee applicant, the decision-maker may also be required to consider whether it is reasonable in all the circumstances to expect the applicant to remain in that place.

19. In this case, having concluded that the Appellant did not face a real chance of persecutory harm in [K], the Tribunal needed to consider whether it was reasonable to expect the Appellant to return to [K] and not to go to Karachi where there was a risk of such harm. Nevertheless, when the reasons for decision are read as a whole, the Tribunal did properly consider whether it was reasonable to expect the Appellant to locate himself in [K] so as to avoid the persecution that he feared in Karachi.

    (1) The Tribunal was aware that the Appellant claimed that he could not go to [K] because his wife didn't want to leave Karachi. This claim was put on two principal bases: first, that the Appellant and his wife would be at risk of harm if they were to go to [K]; and, second, that his wife was reluctant to leave her family in Karachi (at [11], [25], [46]-[50], [62]-[63]).[11]

    (2) Having appraised the evidence, the Tribunal concluded that the Appellant in fact held no fear of returning to [K], including with his wife (at [73]-[75]). The Tribunal did not accept the Appellant's claims that his marriage to a Shia Muslim would cause problems with his family or more generally in [K].

    (3) The Tribunal concluded that there was nothing preventing the Appellant's wife from going to [K] other than that she did not want to leave her own family in Karachi (at [76]).

    (4) Having regard to the location of the Appellant's family and his connections in [K], the Appellant would be able to "lead a relatively normal life without facing undue hardship" if he were to go there to avoid the harm that he feared in Karachi (at [102]-[103]).

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[11] See also AB 16.7, 32-33, 65 [17], 77.1, 83-85, 88.6, 91.5, 92.9, 101-102.

20. When considering whether [K] was a "home area" for the Appellant, the Tribunal did not in terms address the reasonableness of moving to [K] as a location in which the Appellant could avoid persecutory harm. However, when the Tribunal's reasons are read as a whole, it can be inferred that the Tribunal had regard both to the Appellant's "close, longstanding and ongoing connection with [K] and to his wife's circumstances in making a finding that [K] was the Appellant's "home area". Further, it is implicit in this finding that the Tribunal reached a view that it was reasonable to expect the Appellant to move to such an area in order to avoid the risk of persecutory harm.

21. In any event, the Tribunal went on to give specific consideration to "the application of the ordinary relocation principles" in relation to whether it was reasonable in all the circumstances to expect the Appellant to "relocate" to [K] or to some other part of the Punjab in which he did not face a risk of persecution or serious harm from the MQM (at [95]-[103]). The Tribunal addressed the arguments and objections that had been raised by the Appellant against his relocation to [K], including employment prospects and the existence of support networks. Having found that the Appellant's wife could move to [K] despite her reluctance to do so (*i.e.* there was no claim nor any finding by the Tribunal that the Appellant's wife and child would remain in Karachi and would refuse to move to [K]), the issue of "family unity" did not directly arise.

22. In response to Ground 1 of the notice of appeal, the Republic submits that on a fair reading of the Tribunal's reasons as a whole, it did address and consider whether it was reasonable to expect the Appellant to return to his "home area" in [K]. The Tribunal's finding that relocation would be reasonable for the Appellant (at [103]) provides a separate and independent basis for its decision to affirm the Secretary's determination that he is not a refugee and is not owed complementary protection under the Refugees Act. The question whether or not the relocation principle applies to circumstances involving the relocation from one "home area" to another "home area" (including the correctness of the decision in *SZQEN v Minister for Immigration and Citizenship*[12]) therefore does not arise, or was not critical to the Tribunal's ultimate decision. The Tribunal

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12 (2012) 202 FCR 514.

did in fact make a finding that relocation to [K] was both possible and reasonable in the circumstances.

23. In response to Ground 2 of the notice of appeal, the Republic submits that, in finding that [K] was a "home area" of the Appellant, the Tribunal did not fail to have regard to the position of the Appellant's wife and his family situation. The primary judge was correct so to find: AB 204 [43]. The Tribunal's finding that [K] was a "home area" of the Appellant was a finding of fact that was open to the Tribunal: AB 203 [36]. In any event, the finding regarding the Appellant's "home area" (which is the subject of the challenge raised by Ground 2) is largely academic given that the Tribunal considered the reasonableness of relocation to [K] in any event.

24. In response to Ground 3 of the notice of appeal, the Republic submits that the "reasonableness" of relocation arose in relation to the Appellant, as the person who feared persecution in Karachi, and the Tribunal was not required to address separately whether or not it was reasonable to expect the Appellant's wife to move to [K]. Rather, the wife's situation and her reluctance to move to [K] was relevant in assessing whether it was reasonable in all the circumstances to expect the Appellant to return or relocate to [K] in order to avoid the feared persecution. On the evidence before the Tribunal, the Appellant did not claim that his wife could or would not move to [K]. The Tribunal specifically found that she could move to [K], and that neither the Appellant nor his wife would have any problems in [K] arising from their mixed marriage. In finding that the Appellant could "lead a relatively normal life without facing undue hardship" if he were to relocate to [K], the Tribunal had regard to the circumstances of the Appellant's wife and implicitly found that she would move with him to [K] despite her reluctance to do so. The primary judge was correct to find that the Tribunal took into account and dealt with the Appellant's arguments about his wife's circumstances in concluding that the Appellant could avoid the risk of harm by locating (or relocating) in [K]: AB 206 [51]-[52].

25. Accordingly, the appeal should be dismissed as the primary judge did not err in failing to identify the errors alleged by the Appellant.

Part VI COSTS

26. There is no basis for any special costs order.

Part VIII ORAL ARGUMENT

27. The Republic estimates that it will require two hours to present oral argument.

DATED: 14 August 2017

CHRIS HORAN
Telephone: (03) 9225 8430
Facsimile: (03) 9225 8668
E-mail: chris.horan@vicbar.com.au

LIAM BROWN
Telephone: (03) 9225 7503
Facsimile: (03) 9225 8668
E-mail: liam.brown@vicbar.com.au

Counsel for the Respondent

.....
Rogan O'Shannessy
Solicitor for the Respondent

Phone: 0457 000 678
E-mail: rogan.oshannessy.nrst@gmail.com