IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S46 of 2018

BETWEEN:

TTY167
Appellant

and

THE REPUBLIC OF NAURU
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

Part I: These submissions are in a form suitable for publication on the internet.

Part II: REPLY TO THE RESPONDENT'S SUBMISSIONS

1. These submissions are in reply to the Respondent's submissions dated 15 May 2018 (**RS**), only in respect of issues not already addressed in the Appellant's submissions dated 17 April 2018 (**AS**).[1]

Ground 1: error of law in respect of the hearing invitation

2. The construction of s 40 does not authorise the Tribunal to discharge its obligations by service on an authorised representative or lawyer or "through someone else" (contra RS [22]). This is plain from the terms of the Act – 'an invitation to appear before the Tribunal must be given to the applicant'. It is beside the point that the section does not 'prescribe the form', method or method of service of the invitation (contra RS [21] and [23]).
3. Section 101 of the *Interpretation Act* 2011 (Nr) does not help the Respondent (contra RS [23]). It only applies to 'a person' and the Tribunal does not fulfil that definition.[2] Further or alternatively, the Convention Act refers only to the Tribunal 'giving' the invitation, not serving it. The Convention Act uses the term 'serve' in other contexts; see ss 28(1) and 29(3). The legislature's careful choice of language other than 'serve' in s 40 should be reflected in any interpretation of that section.

---

[1] The Applicant withdraws reliance on footnote 35 of those submissions.

[2] *Interpretation Act* 2011 (Nr), s 70(1).

Date of document: 5 June 2018
Filed on behalf of: the Appellant
Clothier Anderson Immigration Lawyers
Level 3, 62 Lygon St
Carlton VIC 3053
Telephone: (03) 9347 4022
Fax: (03) 9347 5066
Email: catherine@clothieranderson.com.au
Ref: 180091
Contact Name: Catherine Farrell

4. Similarly, the doctrine of agency does not help the Respondent (contra RS [23]). There is nothing to indicate that Ms Alexander was the Appellant's agent for any purpose.

5. The fact that the Appellant expressly eschewed the opportunity to nominate someone else who was involved in his application or someone else to receive information from the Tribunal in respect of his merits review application to the Tribunal underlines this point.[3] Under Part F of his Tribunal application form, the Appellant indicated that he received assistance in completing the application from Hoda Shafizadeh, not Blaise Alexander. Further, Part F does not contain any statement or authorisation for the Tribunal to give documents to a representative. This stands in contrast to the immediately following Part G, as prescribed by the Regulations but absent from the Appellant's form. The Convention Act contains no equivalent "authorised recipient" provision found in Division 7A of Part 7 of the *Migration Act 1958* (Cth).

6. No new evidence is needed by this Court to determine whether there was an error of law. The express requirement on the Tribunal under the Convention Act is to give an invitation 'to the applicant'. The invitation issued by the Tribunal and before the Court below was not addressed 'to the applicant'. The Tribunal was the author of the letter of invitation and was present for the hearing. There can be no doubt that, on the material before the Tribunal, these facts were known to it when it exercised its power under s 41 of the Convention Act to make its decision without convening a further hearing. These facts are the 'basis for drawing the inference necessary to make out the' Tribunal's non-compliance with s 40(1) and to justify relief for this reason.[4] That evidence alone establishes the error of law.

7. The evidence foreshadowed at RS [13] and [24] would not assist this Court to determine the question of whether there was an error of law.[5] However, the Appellant accepts that it might be necessary for evidence to be received from both parties to determine the question of whether relief should be granted as a result of this error of law. If that be necessary, this Court should 'remit the case for re-determination by the court of first instance, by way of... rehearing' pursuant to s 8 of the *Nauru (High Court Appeals) Act* 1976 (Cth).[6] That Court could then receive the evidence and determine

---

[3] AFM 44-45.

[4] *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; (2011) 241 CLR 594 at 616 [67].

[5] *SZTOX v Minister for Immigration and Border Protection* [2015] FCAFC 77 at [27(f)].

[6] See also *Appeals Act* 1972 (Nr) s 46. This Court has remitted a matter to the Supreme Court of Nauru in analogous circumstances, namely where additional evidence may have altered the outcome in that Court; see *Clodumar v Nauru Lands Committee* [2012] HCA 22; 245 CLR 561at [35] – [37] per French CJ, Gummow J,

whether relief should be granted in light of the error of law.

Ground 3: unreasonableness

8. The Respondent concedes at RS [10] that ground 3 was raised in substance below. It follows that it was open to the Respondent to have led whatever evidence was responsive to that ground in the Court below.

9. The Respondent's reliance at RS [32] and footnote 56 on s 33(1) of the Convention Act - which requires the Tribunal to complete its review within 90 days of receiving from the Secretary the documents relevant to the review[7] - is misplaced in this case on a legal and a factual level. Legally, the emphasis the Respondent places on s 33(1) does not have regard to s 33(2), which makes non-compliance with s 33(1) inconsequential at law.[8] Factually, 142 days elapsed between the Appellant's application to the Tribunal[9] and the Tribunal hearing date, and a further 59 days then elapsed between the hearing and the Tribunal's decision.[10]

10. The power conferred on the Tribunal in s 41(1) is to be exercised consistently with the purposes of review and common law principles of procedural fairness.[11] Such purposes include facultative provisions such as s 22(b) and s 41(2), which provides the Tribunal an express power to reschedule the hearing in order to enable the applicant's appearance before it. In addition, there is a clear overlap between s 40 and s 41.[12] These provisions underpin the exercise of the power in s 41(1).

11. A failure to seek an adjournment (assuming that was what happened in this case) is not fatal in this regard.[13] Rather, whether the power under s 41(1) has been exercised reasonably will be affected by the subject matter of the review, the course of the particular review, the affected person's situation and conduct throughout the review,

---

Hayne and Bell JJ. This remittal power was exercised most recently in *DWN042 v The Republic of Nauru* [2017] HCA 56; 92 ALJR 146 at [36] per Keane, Nettle and Edelman JJ.

[7] RS [32], s 33(1).

[8] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, at [55] per McHugh J.

[9] AFM 45, CAB 19 [7]

[10] The same delay between the hearing and the decision is material in respect of the Respondent's acceptance at RS [37] that the 'Tribunal could have got a message to the Appellant after the hearing date, seeking an explanation for his non-attendance or offering a further hearing date'.

[11] *HFM045 v The Republic of Nauru* [2017] HCA 50 at [39]; *Kaur v Minister for Immigration and Citizenship* (2014) 236 FCR 393 at [80].

[12] *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, at [51].

[13] See, for example, *Kaur v Minister for Immigration and Citizenship* (2014) 236 FCR 393.

and the other surrounding circumstances.[14]

12. The Respondent at RS [38] ignores the evidence as to the Appellant's mental state (which was before the Tribunal) when it submits that there was 'no evidence' of any impediment to the Appellant. This assertion also ignores the material on which it relies at RS [22(c)], namely the notice of appeal in which the Appellant re-stated to the Supreme Court the impact of his ill-health around the time of the Tribunal hearing.

13. The Respondent's assertion at RS [35] that the Appellant 'was legally represented' at the time of the hearing is without foundation. In fact, the material on which the Respondent itself relies at RS [22(c)] suggests otherwise. While it cannot be doubted that the Appellant was represented for the filing of submissions to the Tribunal on 4 May 2016, the fact that the Appellant told the Supreme Court that he had asked his previous representatives to seek an adjournment,[15] and the Tribunal's reasons record no such request, strongly suggests that his legal representative did not convey that adjournment request (or, if that legal representative did, the Tribunal ignored it entirely which would itself be legally unreasonable). An explanation for this is that the lawyer ceased to be the Appellant's representative between the date of the submission and the date of the hearing.

14. The Appellant accepts that s 18C of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) was repealed by the time of the review. That repeal did not alter the condition on the visa given to the Appellant that he was required reside at a Regional Processing Centre at the relevant time.[16] That condition made it plain that the Appellant was a resident at only one of three designated places on Nauru, which included the very place at which the Tribunal conducted its hearing.

15. The Respondent asserts at RS [37] that the Appellant relies on facts which are 'beyond the limits of judicial notice'. The size of a country (in this case, 21km^2) cannot be beyond the scope of judicial notice for a court of that country, including this Court.

16. The distance between notable buildings and facilities – such as that between the three Regional Processing Centres – also is well within the scope of judicial notice.[17] Decisions of the Supreme Court of Nauru itself make this clear. In *DPP v Deaido*, the Supreme Court of Nauru took on judicial notice the actual distance when a person

---

[14] *Kaur v Minister for Immigration and Citizenship* (2014) 236 FCR 393 at [83], [123].

[15] CAB 31.

[16] Regulation 9(6)(a) of the *Immigration Regulations* 2013 (Nr).

[17] *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9; 208 CLR 460 at [64]-[68] per McHugh J.

before that Court referred to the distance solely by reference to the two buildings at either end of the distance.[18] The average number of ships arriving in the country each year, the number of containers that each carry, and the number of staff in the customs department has also been accepted on judicial notice by the Supreme Court of Nauru.[19]

17. In that context, this Court, as the final court of appeal for Nauru, should accept on judicial notice, the size of the Republic and the close proximity between the Regional Processing Centres, Regional Processing Centre 1 being to the Supreme Court of Nauru almost the same distance by foot as the High Court of Australia is from Parliament House. Put another way, it cannot be the case that that which could plainly be taken on judicial notice in one court in the judicial hierarchy of a country (namely, the Supreme Court of Nauru) cannot be taken in another (namely, this Court). If that is wrong, evidence in the form of a recent scale map of Nauru should be allowed in this Court to establish that which the Supreme Court of Nauru would, on precedent, accept on judicial notice.

Dated: 5 June 2018

.....

W. Guy Gilbert
Castan Chambers
(03) 9225 7379
gilbert@vicbar.com.au

Matthew Albert
Castan Chambers
(03) 9225 8265
matthew.albert@vicbar.com.au

Jonathan Barrington
Castan Chambers
(03) 9225 7438
j.barrington@vicbar.com.au

---

[18] *Director of Public Prosecutions v Deaido* [1978] NRSC 9; [1969-1982] NLR (D) 69.

[19] *Republic v Chen Jian Ping* [2016] NRSC 17; Criminal Case 42 of 2016 [33].