ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M154 of 2017

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN: **THE REPUBLIC OF NAURU**
Appellant

and

WET 040
Respondent

SUBMISSIONS OF AMICUS CURIAE

Part I: Internet Publication

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

Part II: Basis of intervention

2. Refugee and Immigration Legal Centre (**Refugee Legal**) seeks leave to make submissions and be heard in this matter in the capacity of *amicus curiae* (**Amicus**). At this stage, leave is only sought on the preliminary questions set out in [3]-[7] below, which the Amicus contends should be heard and determined as preliminary questions. If the Court is of the view that notwithstanding that contention submissions should also be made by the Amicus on the merits of the appeal Refugee Legal will do so.

Part III: Issues

3. Whether it is in the interests of justice that Refugee Legal be granted leave to appear as *amicus curiae* in this matter?

4. Whether the Court does not have jurisdiction to grant the relief sought by the Appellant (**Nauru**) on its Summons dated 13 October 2017, or to hear and determine the appeal sought to be brought by Nauru, because the appeal had not been "instituted" within the meaning of Art 6(2) of the agreement between the Government of Australia and the Government of Nauru (the **Agreement**) set out in the Schedule to the *Nauru (High Court Appeals) Act 1976* (Cth) (**the Act**) before the date of termination of the Agreement?

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5. Whether the notice of appeal, Summons and other documents relied upon by Nauru in this matter have been served on the Respondent in accordance with the *High Court Rules 2004* (Cth) (**High Court Rules**) and, if not, whether the Court has jurisdiction to make the orders sought by Nauru in the absence of the Respondent or his legal representative?

6. If the Court has jurisdiction to make the orders sought by Nauru, whether the Court should make orders enlarging the time to appeal and require personal service of the notice of appeal on the Respondent before proceeding further in this matter?

7. In the event that all of the preceding questions are answered in Nauru's favour, whether the Court should hear and determine the appeal under s 10(3) of the Act in the absence of the Respondent or his legal representative?

Factual background

8. The Respondent was born in Tehran, Iran on 28 March 1983.[1] He is an Azeri Turk by ethnicity. [2] His claims to protection arose predominantly out of the following circumstances.

9. On or around 12 March 2010, the Respondent entered into a marriage arranged by his mother.[3] Almost three years into the marriage, the Respondent first learned that his wife had been previously married. This revelation contributed to tensions and conflict within his marriage.[4] His new father-in-law was a well-connected member of the Iranian security forces. On or around 20 April 2013, the Respondent's car was attacked with acid, which he reported to police.[5] The next day, the Respondent's brother-in-law sent him a text message threatening that if the Respondent tried to divorce his sister, he would throw acid on his face.[6] As a result of this threat, the Respondent informed his wife that he wanted to separate.[7]

10. Shortly after, the Respondent was visited by police who alleged that he had been violent to his wife. The police then took him to court on these allegations.[8] The Court ultimately accepted the allegations and ordered that he pay his wife a substantial fine and return the

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[1] Court book before the Supreme Court of Nauru at pages (**CB**) 4, 20, 24-25, 36, 71-72, 93
[2] CB 7, 25, 71, 93 [5], 115 [8], 127 [105]-[106]
[3] CB 8, 24, 40 [8], 49, 50, 74, 94 [10], 116 [18]
[4] CB 40 [12]-[14], 74, 94 [13], 116 [18(b)]
[5] CB 12, 28, 41 [16], 49 [para (c)], 51-52, 74, 79, 117 [18(c)]
[6] CB 12, 41 [19], 43 [35], 74, 76
[7] CB 12, 41 [22], 74, 76
[8] CB 12, 41 [23], 74, 77, 117 [21]

dowry from their marriage.[9]

11. Shortly after this, the Respondent was followed by men on motorbikes around Tehran.[10]

12. Fearing further violence, threats or (mis)use of the Iranian security apparatus against him by his wife's family, the Respondent decided to flee Iran. He arrived in Australia on 6 August 2013.[11] As a result of arriving without a visa, he was and remains, at law, an 'unauthorised maritime arrival' for the purposes of the *Migration Act 1958* (Cth).[12] He was transferred to Nauru on 25 January 2014.[13]

13. The Amicus otherwise agrees with the summary of facts provided by Nauru at [5]-[11] of its submissions dated 17 November 2017.

Leave should be granted to Refugee Legal to appear as amicus curiae

14. The Respondent has not filed an appearance, is not represented and is currently unable to lawfully enter Australia. Thus, the Respondent is presently a party who is 'unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case.'[14]

15. It is in the interests of justice that leave be granted to the Amicus to allow the Court to have assistance from an effective contradictor in respect of the relief sought by Nauru.[15] That is particularly so as this matter gives rise to questions concerning this Court's jurisdiction to grant the relief sought and whether the hearing and determination of any appeal should be in the absence of the Respondent (whose rights are directly affected by the orders sought) and without him having a legal representative.

Pt IV Argument

(a) This Court lacks jurisdiction

16. Appeals only lie to the High Court in cases where the Agreement provides that such appeals are to lie under s 5(1) of the Act. Article 1(A)(b)(i) of the Agreement provides that in civil cases appeals lie, as of right, against a final judgment in the exercise by the

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[9] CB 12, 42 [27]-[31], 75-76, 78, 117 [18(f)]

[10] CB 43 [36], 75-76

[11] CB 14, 36-37

[12] s 5AA

[13] CB 36 - 37

[14] *Levy v Victoria* [1997] HCA 31; 189 CLR 579 at 604 per Brennan CJ.

[15] *Priest v West (in his capacity as Deputy State Coroner)* (2011) 35 VR 225, 234 at [35] per Maxwell P, Harper JA and Kyrou AJA. Refugee Legal relies on the affidavit of David Manne of 8 August 2018 .

Supreme Court of Nauru of its original jurisdiction.[16] The appeal sought to be instituted by Nauru is in the original jurisdiction of the High Court and not its appellate jurisdiction.[17]

17. Article 6 of the Agreement, which provides for the termination of the Agreement, states that the termination is not to affect the hearing and determination of an appeal 'instituted' in the High Court before the date of termination, being the ninetieth day after the day on which either Government gives notice in writing of its desire to terminate. As the Government of Nauru advised the Government of Australia on 12 December 2017 that it desired to terminate the Agreement, the Agreement terminated on 13 March 2018, or at the latest as from 15 May 2018 (**the termination date**).[18] By reason of s 5 of the Act the High Court's jurisdiction to hear and determine appeals ended at the termination date, save as is provided, relevantly, in Art 6(2)(a) in respect of appeals 'instituted' before the termination date. For the following reasons the Amicus contends that Nauru had not 'instituted' an appeal for the purposes of Art 6(2)(a) in the High Court before the termination date.

18. Section 77T of the *Judiciary Act 1903* (Cth) (the **Judiciary Act**) requires that 'appeals to the High Court shall be instituted within such time and in such manner as is prescribed by Rules of Court'. The predecessor to s 77T[19] was considered by this Court in *Singh v Karbowsky* in which the Court concluded, '[w]e think that compliance with the rules as to the time of instituting an appeal is a condition precedent to the coming into existence of a cause in the appellate jurisdiction.'[20] In *Whitehouse Hotels Pty Ltd v Lido Savoy Pty Ltd* this Court considered whether an appeal had been 'instituted' where the notice of appeal had been filed in time but not served in time. Justices Menzies, Gibbs and Stephen held that '[u]pon the proper construction of the rules, once a notice of appeal is filed within time and in the proper manner, an appeal is instituted'.[21] While those authorities apply to cases brought within the Court's appellate jurisdiction, the same construction should

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[16] *BRF038 v The Republic of Nauru* [2017] HCA 44; 91 ALJR 1197 at [40].

[17] *Ruhani v Director of Police* (2005) 222 CLR 489 per Gleeson CJ at [9] – [10], McHugh J at [65] – [67], Gummow and Hayne JJ at [109], [113] and [115].

[18] There is an argument, which does not result in a different outcome in this case, that the termination of the High Court's jurisdiction did not occur until the passing of the *Nauru Court of Appeal Act 2018* (Nr), which confirmed the termination of appeals to the High Court as from 15 May 2018: the argument in summary is that under Art 5 of the Agreement both the coming into force, and by implication the termination, of the jurisdiction of the High Court, occurs when the "constitutional and other requirements" of both Nauru and Australia have been complied with.

[19] Section 37 of the *High Court Procedure Act 1903* (Cth).

[20] (1914) 18 CLR 197 at 201 per Griffith CJ, Barton and Gavan Duffy JJ.

[21] (1974) 131 CLR 333 at 336.

apply, and the same conclusion should be reached, with respect to the application of rules 43 and 42.03 of the High Court Rules in the context of an appeal sought to be brought under s 5 of the Act, which is claimed by Nauru to fall within the transitional provisions in Art 6(2) of the Agreement.

19. Rule 43.02 of the High Court Rules provides that Part 42 is to apply to appeals brought under the Act. Rule 42.03 provides that a notice of appeal must be filed within 14 days of the date of the judgment below, which was given on 28 September 2017. On 13 October 2017, one day after the 14-day period expired, Nauru purported to file its notice of appeal and caused a summons to be issued seeking an order enlarging time for the filing of the notice of appeal (**Summons**).[22] The application was not heard prior to the termination date and no order has yet been made to enlarge time as is sought in Nauru's Summons.

20. Order 70 of the High Court Rules, which was considered in *Whitehouse Hotels,* included a provision to extend the time for filing the notice of appeal. That provision is now provided for in rule 4.02 which permits the Court or a Justice to enlarge or abridge time before or after the lapse of the relevant time. But the result here is that, as time had not been enlarged or abridged by the Court prior to the termination date, the notice of appeal has not been filed in accordance with rule 42.03 and no appeal has been instituted. If that is correct, then s 5(1) of the Act and Art 6(2)(a) of the Agreement applies and the High Court's jurisdiction to hear and determine any appeal that had not been instituted prior to the termination date ended on 13 March 2018, or the latest as from 15 May 2018. It follows that the present application, which is to enlarge the time within which the appeal may be instituted, falls outside of the transitional provisions in Art 6 of the Agreement and no appeal lies to the High Court in this matter under s 5 of the Act.

21. The filing of the notice of appeal out of time cannot be "saved" after the termination date by rule 2.03.1 or s 77K of the Judiciary Act. Rule 2.03.1 states that a failure to comply with the High Court Rules is an irregularity and does not render any step taken in a proceeding a nullity. However, the present question is not whether the notice of appeal is a nullity but rather, whether an appeal has been instituted in time. If the appeal has not been instituted in time it falls outside the transitional provisions and s 5 of the Act has no application as an appeal in this matter to the Court no longer lies. The proper application of rule 2.03.1 is that that question necessarily awaits an enlargement or abridgement of time before the filing of the notice of appeal can result in an appeal that falls within the

[22] The Notice of Appeal was recorded as being "filed" in the Melbourne Registry on 13 October 2017 but that does not have the consequence of the appeal having been instituted on 13 October 2017.

terms of Art 6(2)(a) of the Agreement. That follows from the reasoning in *Singh v Karbowsky* and *Whitehouse Hotels*. The same reasoning applies to s 77K(1) of the Judiciary Act as validity of the purported notice of appeal is not determinative of whether an appeal had been instituted before the termination date.

22. The construction contended for above is supported by the manifest intention that Art 6 is to cover the field of the matters that may be heard and determined by the High Court after the termination date. Those matters are confined to appeals instituted before the termination date (Art 6(2)(a)) and appeals instituted, heard and determined in pursuance of leave given before the termination date (Art 6(2)(b)). The contrary construction would require the following sub-clause to impermissibly be added to Art 6(2):

> *"(c) the hearing and determination of an application made before the date of the termination to enlarge or abridge the time for instituting an appeal and, if the application is granted, the hearing and determination of the appeal."*[23]

23. It also follows that there is no room for the making of a procedural order enlarging or abridging time *nunc pro tunc* in the inherent jurisdiction of the Court. Such an order cannot be employed to overcome the substantive limitation on the Court's jurisdiction to hear an appeal outlined in the Act and the Agreement.[24]

24. One final procedural aspect of the Summons needs to be addressed by Nauru. It appears that Nauru has failed to comply with the High Court Rules in three respects (assuming, contrary to our submissions, rule 42 applies to this appeal by reason of rule 43.02 'with such variations as are necessary'):

    a. The notice of appeal was lodged one day late on 13 October 2017 (contrary to rule 42.03);

    b. The notice of appeal was served (if at all) two days late on Saturday, 14 October 2017 (contrary to rule 42.05.1); and

    c. The affidavit of service was filed four days late, on 23 October 2017 (contrary to rule 42.05.5).

    The Appellant only seeks enlargement of time to excuse the first act of non-compliance of this Court's Rules but should seek leave in respect of the other two instances of non-compliance.

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[23] Cf *HFM043 v The Republic of Nauru* [2018] HCA 37 at [21]-[24].

[24] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 543-544 [99]-[100] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

(b) No Service on the Respondent

25. This Court's jurisdiction is founded on service of the initiating process on a Respondent.[25] Nauru relies on the Affidavit of Service of Rogan O'Shannessy affirmed on 23 October 2017 to found the Court's jurisdiction in this matter.

26. The deponent claims to have effected the service said to be required by rule 42.05 of the *High Court Rules* by service of the relevant documents at the address of Craddock Murray Neumann Lawyers in Sydney and by sending those documents by email to the email address of Craddock Murray Neumann Lawyers.[26] Rule 42.05.4 permits service of a notice of appeal 'by leaving a copy at the address for service, if any, of the parties to be served in the proceedings from which the appeal is brought'. Rule 43 provides that the Rule applies to applications (being applications for leave to appeal under s 5(3) of the Act) and appeals under ss 5(1) and (2) of the Act. Relevantly, r 43.02 provides that where an appeal lies to the Court as of right the provisions of Pt 42 apply with such variations as are necessary. The Appellant did not choose the option of personal service on the Respondent under r 9.

27. The first problem with Nauru's reliance upon r 42.05.4 is that it applies to service of a notice of appeal and not to a service of the Summons to enlarge time under rule 4.02.

28. The second problem is that under O 10 r 2 of the *Civil Procedure Rules 1972* (Nauru) the "Memorandum of Appearance", being Exhibit RO-1 to the affidavit of Rogan O'Shannessy of 23 October 2017, only applies to a defendant to a proceeding in the Nauru Supreme Court and not to the appellant who in this case filed the notice of appeal personally giving as his address in the notice as "Of Nauru Regional Processing Centre". Thus, while it is correct that Craddock Murray Neumann Lawyers did subsequently act as solicitors on behalf of the Respondent in the Supreme Court and in briefing counsel to appear, the address set out in the Memorandum of Appearance has no legal effect or consequence.[27]

29. The third problem is that, although Craddock Murray Neumann Lawyers acted for asylum seekers in their appeals in the Supreme Court of Nauru, they had never acted for asylum seekers in any of their appeals to the High Court.[28] Nauru's solicitor must have been

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[25] *Laurie v Carroll* (1958) 98 CLR 310 at 322-324.

[26] Affidavit of Rogan O'Shannessy dated 23 October 2017 at [7], [8].

[27] See *Civil Procedure Rules 1972* (Nr) O 10 r 2(3)(b) and the form set out in the Rules. In any event, the rules and form require an 'address in Nauru for service'.

[28] Affidavit of Georgia Dobbyn dated 22 August 2018.

aware of this as he is employed for refugee appeals in the Supreme Court of Nauru[29] and in appeals to the High Court for Australia.

30. Rules 9.01.5 and 9.04 of the High Court Rules might permit "ordinary service" of Nauru's Summons and affidavit at an address for service as defined in r 9.05.2 but that does not apply as the address is that stated on the party's "notice of appearance" filed under rule 23.That rule is of no avail to the appellant in the present case as no appearance has been filed.

31. The short answer to the above problems is that this is a case where the procedure for service of Nauru's Summons and its supporting affidavit is not provided for in the High Court Rules with the consequence that appropriate directions needed to be sought by Nauru from the Court under r 6.01, which has not occurred.

32. For the above reasons, there has been no valid service of the Summons and the Affidavit and, accordingly, the jurisdiction of the High Court sought to be invoked by Nauru is not able to be validly invoked.

(c) Hearing and determining the appeal in the absence of the Respondent or his legal representative

33. If the Court does have jurisdiction to grant the relief sought it should not proceed to hear and determine the substantive appeal until the Respondent has been afforded the opportunity to be served with the notice of appeal and the documents in the appeal book and also the opportunity to seek his own legal advice in respect of the appeal, including whether he may wish to file a notice of contention.

34. In that regard, the Amicus relies on the duty of the Court to afford procedural fairness to the Respondent and also s 10(3) of the Act, which provides that:

> The High Court may hear and determine appeals and applications for leave to appeal notwithstanding that a party to the appeal or the applicant for leave to appeal, as the case may be, is not present in person and is not represented at the hearing of the appeal or application.

The subsection confers on the Court a discretion to hear and determine, or not to hear and determine, the appeal in the absence of the Respondent or his legal representative.

35. Before deciding to proceed in the Respondent's absence in the present matter it is contended that the Court should consider the following matters:

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[29] Affidavit of Rogan O'Shannessy dated 23 October 2017 at [1].

a. whether the appeal and the grounds for it have been brought to the attention of the Respondent;

b. whether the Respondent understands the appeal and his rights in relation to it, noting that at all times during the refugee determination process he was assisted by an interpreter and a legal representative;[30]

c. whether the Respondent has been provided with interpreting services by the Operational Manager of the Regional Processing Centre on Nauru with respect to the notice of appeal (if received), noting the statutory obligation to do so;[31]

d. whether Nauru has taken the necessary steps to afford the Respondent with the opportunity to receive independent legal advice and representation in relation to the appeal, including whether Nauru has offered or is offering to meet the Respondent's costs of obtaining legal advice in respect of the appeal and being represented at the hearing; and

e. whether the Respondent wishes to appear on the appeal in person or by his legal representative.

36. The Appellant has not addressed the exercise of the Court's power in s 10(3) of the Act in its submissions filed to date, nor has it put on evidence concerning its position on the above issues, save for two affidavits concerning late filing of the notice of appeal and purported service.

37. In the event the Court decides the issues in [3]-[6] above in Nauru's favour, in light of the above matters the Amicus submits that the High Court should exercise its discretion not to proceed to hear and determine this appeal in the Respondent's absence, or in the absence of his legal representative, at this stage as it cannot be satisfied that to do so involves no actual or potential injustice or unfairness to the Respondent.

Orders sought

38. The Amicus seeks the following orders:

1. Refugee Legal be granted leave to appear as *amicus curiae* in this appeal to address the Court in respect of the issues set out in [3]-[7] above.

2. The Court make such orders and directions as may be appropriate.

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[30] See, for example, CB 45, Transcript of Tribunal Hearing, 17 October 2016, p 2.

[31] *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) s 6(1)(h).

Part IX: Oral argument

39. The Amicus estimates that it will require 1½ hours to present oral argument.

Dated: 22 August 2018

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