IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M20 of 2017

BETWEEN:

DWN 042
Appellant

and

THE REPUBLIC OF NAURU
Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication

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

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Part II: Statement of Issues

2. How does the High Court gain jurisdiction to determine this appeal brought as of right from the Supreme Court of Nauru?

3. Was it lawful for the Supreme Court of Nauru to ignore the Appellant's notice of motion to reopen two grounds of appeal which notice was based upon an assurance given to this Court by the Respondent that the reasons to strike out those same grounds were plainly wrong?

4. Was the Supreme Court of Nauru in error not to deal with and determine the two grounds of appeal, which concerned the lawfulness of a process of the executive government of Nauru arising from evidence gathered during unlawful conduct by the same executive government?

5. Did the Supreme Court of Nauru err by failing to conclude that the Refugee Status Review Tribunal of Nauru (the **Tribunal**) did not consider an integer of the Appellant's claims to complementary protection in Nauru – namely, that there was a reasonable possibility that he would arbitrarily deprived of his life if he returned to Pakistan?

6. Did the Supreme Court of Nauru err when it failed to conclude that the Tribunal had denied the Appellant procedural fairness by relying on a form that was unsigned and unsworn, was not made available to the Appellant's representative when the representative prepared the Appellant's statement of claims and was expressly disowned as a record of the Appellant's claims?

Part III: Section 78B of the *Judiciary Act* 1903 (Cth)

7. The Appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and concluded that no notice is required.

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Part IV: Citations

8. The citation for the decision of the Supreme Court of Nauru is *DWN042 v Republic of Nauru* [2017] NRSC 4, which relies on the judgment for striking out grounds 1 and 2 as reported at *DWN 042 v Republic of Nauru* [2016] NRSC 6.

Part V: Factual background

9. The Appellant is an asylum seeker from Pakistan, who sought asylum in Australia and was transferred to Nauru on 7 September 2013 against his will.[1] There he made a claim to protection under the *Refugees Convention* Act *2012* (Nr) (the **Refugees Act**).[2]

10. Almost three months later, the Appellant was subject to a "transfer interview".[3]

11. The Appellant subsequently filed two sworn statements.[4] Those statements disowned the purported record of the "transfer interview" and made claims to be at risk of arbitrary deprivation of his life because of the place in Pakistan to which he would return.

12. On 17 July 2014, the Secretary of the Department of Justice and Border Control of the Republic of Nauru determined[5] that Nauru did not owe the Appellant any obligations under the Refugees Act.

13. The Appellant applied for merits review of that determination[6] by the Tribunal, which was established and functioned pursuant to Part 3 of the Refugees Act.

14. The Appellant was detained at a Regional Processing Centre on Nauru, from the time of his arrival there up to and including the hearing by the Tribunal of his claim for protection.

15. On 25 September 2014, the Appellant attended a hearing by the Tribunal of his claim to protection at a Regional Processing Centre on Nauru.[7]

16. On 29 December 2014, the Tribunal found that Nauru did not owe the Appellant obligations under the Refugees Act.[8] The Tribunal found that the Appellant's claims under the Refugees Convention were not credible.[9] That assessment was made, in part, based on differences between information recorded in the transfer interview record and the Appellant's subsequent statements. The Tribunal then rejected the Appellant's claims for complementary protection based on the same reasons as the claims to protection under the Refugees Convention, but made no mention of his claims to be at real risk of being arbitrarily deprived of his life for non-Refugees Convention reasons.[10]

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1 Affidavit of Tamsin Webster dated 21 February 2017 annexing, as TW-1.1, the affidavit of Ijaz Ahmed dated 13 July 2016 (the **Ahmed affidavit**), paragraph 2.

2 Pursuant to the Refugees Act, s 5.

3 Book of documents before the Refugee Status Review Tribunal page (**BoD**), 3 and 41.

4 BoD, 41-44 and BoD, 140-145.

5 Pursuant to the Refugees Act, s 6.

6 Pursuant to the Refugees Act, s 31.

7 Ahmed affidavit, paragraph 3; see also BoD, 41, 105 and 140.

8 Ahmed affidavit, paragraph 6.

9 BoD, 207 [40] and 209 [50].

10 BoD, 210 [56].

17. The Appellant unsuccessfully sought legal assistance from the only two available legal services on Nauru to challenge the Tribunal's finding.[11]

18. On 24 April 2015, the Appellant filed, in the Supreme Court of Nauru, a 'notice of appeal' (prepared by the Appellant) from the Tribunal's decision.

19. On 4 May 2016, the Appellant first engaged counsel to assist with his 'appeal', which was due to be heard the next day.[12]

20. By a proposed amended 'notice of appeal' in the Supreme Court, the Appellant raised four new grounds in his 'appeal'.[13] The grounds of 'appeal' were:

> 1. The Tribunal acted in a way that was in breach of the principles of natural justice, contrary to s 22(b) of the Act, by conducting its hearing when and at the place where the Appellant was unlawfully detained in breach of s 5 of the Constitution of Nauru.
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> 2. The Tribunal's hearing in respect of the Appellant was unconstitutional because he was unlawfully detained at that time.
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> 3. The Tribunal erred in law in determining that the appellant is not owed complementary protection in that the Tribunal failed to respond to the appellant's claim that returning him to Pakistan would breach Nauru's international obligations due to the risk of arbitrary deprivation of life.
>
> 4. The Tribunal erred by relying on the transfer interview form contrary to s 22(b) [of the Refugees Act] in circumstances where it was unsigned and unsworn, was not made available to his representative when he prepared his statement of claims and was expressly disowned as a record of his claims.

21. Written submissions in support of those grounds were filed with the Court.[14] The only relief sought by the Appellant was an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Supreme Court, pursuant to s 44(1)(b) of the Refugees Act.

22. On the morning of the 'appeal' hearing, the Republic of Nauru filed a motion to strike out those grounds 1 and 2 on the basis that they did not disclose any cause of action, and were an abuse of process, frivolous and vexatious. Written submissions in support of the motion were filed by the Republic.[15]

23. By its written submissions, the Republic submitted that "the Court lacks jurisdiction to hear and determine those grounds in this proceeding". At the hearing, the Republic invited the Court to assume the Appellant's detention was unconstitutional.[16] The Republic submitted that the Court had a "narrow jurisdiction" to "hear appeals on a point of law" but not "general applications for declarations, writs of habeas, claims for damages for false imprisonment or any other kind of relief

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11 Ahmed affidavit, paragraphs 7, 9.

12 Ahmed affidavit, paragraph 10.

13 As filed with the application for leave to appeal to this Court dated 17 June 2016.

14 The reasons of the Supreme Court record (inaccurately) that no written submissions were filed with the Court. Written submissions were filed and read by Khan J: see Ahmed affidavit, annexure IA-5, *DWN042 v Republic of Nauru* (Appeal No 12/2015) Supreme Court of Nauru, paragraph 8; Ahmed affidavit, annexure IA-3; and Ahmed affidavit, annexure IA-4, p 3 lines 1-15, p 5 line 17, p 33, lines 39-41.

15 Ahmed affidavit, annexure IA-3.

16 Ahmed affidavit, annexure IA-4, T24:23-27, T25:2, 29-30, T28:28-30, T33:26-27.

in connection with unlawful detention".[17] It further submitted that the Court "doesn't have the jurisdiction ... to decide ... the lawfulness of detention".[18]

24. At the conclusion of the strike out application hearing, the Court announced:

> Having heard both parties in relation to the application to strike out grounds 1 and 2 I order that grounds 1 and 2 of the appeal is struck out pursuant to order 15 rule 9 of the Civil Procedure Rules. I will give my reasons – ruling later – on a later date.[19]

25. The Appellant then sought, unsuccessfully, to adjourn the balance of the 'appeal'. The hearing continued on the remaining two grounds.[20]

26. On 20 May 2016, the Court gave its "ruling" on grounds 1 and 2, broadly accepting the submissions of the Republic quoted in paragraph 23 above.[21] The Supreme Court ruled that:

    26.1 the appeal right conferred by s 43(1) of the Refugees Act was only available where the point of law arises from matters contained in the Tribunal's decision itself;[22]

    26.2 the orders sought by the Appellant were not available under the Refugees Act;[23] and

    26.3 the limits on the right to appeal from the Supreme Court to the High Court of Australia told against the Supreme Court entertaining grounds that involved the interpretation or effect of the Nauru Constitution.[24]

27. The reasons for judgment concluded with the following:

> The appellant cannot ventilate his arguments on grounds 1 and 2 in this court. It is his constitutional right to do so in a properly constituted court should he decide to do so.
>
> Grounds 1 and 2 were filed without any basis, they do not disclose any course [sic] of action, they are frivolous and vexatious and both grounds are struck out.[25]

28. On 7 February 2017, the Supreme Court of Nauru gave final judgment in this matter, dismissing all four grounds of appeal. It relied on the earlier reasons for striking out grounds 1 and 2 of the appeal before it.

Part VI: Argument

29. This is an appeal from the Supreme Court of Nauru in respect of claims by the Appellant for protection under the Refugees Act. The Appellant seeks leave to file and rely on an amended notice of appeal in the High Court.

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17 Ahmed affidavit, annexure IA-4 p 10 lines 11-35.

18 Ahmed affidavit, annexure IA-4 p 10 lines 35-43.

19 Ahmed affidavit, annexure IA-4 p 26 lines 15-18; see also Ahmed affidavit, annexure IA-5, *DWN042 v Republic of Nauru* (Appeal No 12/2015) Supreme Court of Nauru, at [7].

20 Ahmed affidavit, paragraph 15.

21 *DWN042 v Republic of Nauru* (Appeal No 12/2015) Supreme Court of Nauru, at [9].

22 *DWN042 v Republic of Nauru* (Appeal No 12/2015) Supreme Court of Nauru, at [20].

23 *DWN042 v Republic of Nauru* (Appeal No 12/2015) Supreme Court of Nauru, at [22].

24 *DWN042 v Republic of Nauru* (Appeal No 12/2015) Supreme Court of Nauru, at [24].

25 *DWN042 v Republic of Nauru* (Appeal No 12/2015) Supreme Court of Nauru, at [25]-[26].

A. Jurisdiction on appeal[26]

30. In this case, the High Court is called on to exercise its original jurisdiction under s 76(ii) of the Constitution to determine the appeal.[27]

31. The appeal from the Supreme Court of Nauru is brought as of right. Section 5(1) of the *Nauru (High Court Appeals) Act 1976* (Cth) (the **Nauru Appeals Act**) confers jurisdiction on the Court to hear appeals from the Supreme Court of Nauru as provided in the Agreement between Australia and Nauru, which is schedule 3 to that Act (the **Agreement**). Article 1(A)(b) of the Agreement provides that an appeal lies as of right from a final judgment, decree or order of the Supreme Court of Nauru exercising original jurisdiction in a civil case.

32. This appeal is such a case.

32.1 Section 43 of the Convention Act confers jurisdiction on the Supreme Court of Nauru to hear an "appeal" on a point of law from the Refugee Status Review Tribunal (the **Tribunal**).

32.2 Despite being styled as an "appeal", the Supreme Court proceeding constituted the first exercise of judicial power in respect of the Appellant's claim. Analogously to s 44 of the *Administrative Appeals Tribunal* Act *1975* (Cth), which provides for an "appeal" on a question of law from the AAT to the Federal Court, such "appeal" being heard in the original jurisdiction of that court,[28] the "appeal" to the Supreme Court of Nauru was a first instance application for judicial review.[29]

32.3 All previous decisions – being the determination as to the Appellant's asylum claims by the Secretary's delegate under Part 2 of the Convention Act, and the decision of the Tribunal in reviewing that determination, under Part 4 – were exercises of executive power.

32.4 As such, the orders subject to appeal in this case arise from the first invocation of judicial supervision of executive power and, therefore, an exercise of original jurisdiction by the Supreme Court of Nauru.[30]

B. Jurisdiction in respect of the constitution of Nauru

33. Article 2(a) of the Agreement relevantly provides that:

> An appeal is not to lie to the High Court of Australia from the Supreme Court of Nauru ... where the appeal involves the interpretation or effect of the Constitution of Nauru.

34. The Constitution of Nauru is mentioned in both grounds 2 and 3 of the notice of appeal in this case. However, neither grounds 2 or 3 fall within the exception of Article 2 of the Agreement. That is so for three reasons:

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26 See, generally, Dale, G, "Appealing to Whom? Australia's 'Appellate Jurisdiction' over Nauru" (2007) 56 *International and Comparative Law Quarterly* 641 at 649-658.

27 *Ruhani v Director of Police* (2005) 222 CLR 489 (***Ruhani***) at 500 [10] (Gleeson CJ), 500-501 [14] (McHugh J), 522 [89] (Gummow and Hayne JJ); *Diehm v Director of Public Prosecutions (Nauru)* (2013) 88 ALJR 34 at 45 [56] (French CJ, Kiefel and Bell JJ); *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561 (***Clodumar***) at 571 [26] (French CJ, Gummow, Hayne and Bell JJ).

28 See, for example, *Haritos v FCT* (2015) 233 FCR 315 at 346 [78], 347-348 [80]-[83] and the authorities there cited (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ).

29 See, for example, *Ruhani* at 508 [43] (McHugh J).

30 See *Ruhani* at 511-512 [49]-[51] (McHugh J) and the authorities there cited; 528 [108] (Gummow and Hayne J), 543 [165] (Kirby J), 569 [274] (Callinan and Heydon JJ). See also *Minister for Navy v Rae* (1945) 70 CLR 339 at 249 (Dixon J).

34.1 The Republic ran its successful strike out application before the Supreme Court of Nauru in respect of grounds 2 and 3 expressly on the basis that the Court should assume the detention was unlawful in the way the Appellant alleged.[31] This Court is therefore not called on, by the Republic's own case reflected in a final judgment of the Supreme Court, to proceed otherwise. It is the Republic's position that those grounds can be determined without considering any constitutional issue.

34.2 Neither grounds 2 or 3 require this Court to engage with "the interpretation or effect of the Constitution of Nauru". The grounds only require an assessment of what the Supreme Court did and did not do in respect of the Appellant's resort to the Constitution, not the Constitution itself. So much is reflected in both the way the grounds are framed and the relief sought in respect of the grounds.

34.3 Section 8 of the Nauru Appeals Act empowers this Court to "remit the case for re determination by the court of first instance, by way of a new trial or rehearing, in accordance with the directions of the High Court". This Court can remit the matter, if grounds 2 and 3 succeed, for re-determination by the Supreme Court with a direction that the Supreme Court consider the Constitution's effect and interpretation on the basis that, if it is satisfied the detention was unconstitutional, the grounds are otherwise made out.

35. None of the grounds crosses the line defined by Article 2(a) either because the Respondent adopted the position that its strike out application, now crystalised in a final judgment, should succeed with the Court assuming the detention was unlawful, or because the ground calls on this Court merely to consider the legal consequence of the Supreme Court not lawfully determining those grounds. That is made clear by the nature of those grounds, as discussed below and as framed before this Court in the application for leave to appeal from the interlocutory judgment on those grounds.

C. Ground 1: The Supreme Court erred in failing to deal with and determine the notice of motion filed by the Appellant on 6 February 2017 prior to giving final judgment on the whole of the Appellant's appeal, by which notice of motion the Appellant sought to re-open grounds 1 and 2 of the appeal before the Court in light of the assurances given by the Republic of Nauru to the High Court of Australia on 16 December 2016.

36. On 17 June 2016, the Appellant applied to the High Court for leave to appeal from the interlocutory judgment of the Supreme Court striking out grounds 1 and 2, pursuant to s 5(3) of the Nauru Appeals Act. By its submissions in reply, the Respondent submitted to the High Court that, "if leave was granted, the Republic would not seek to defend the reasoning of Judge Khan".[32]

37. On 16 December 2016, the application for leave was heard by this Court.[33] At that hearing, the Respondent provided several assurances in response to questions posed by the Court. Relevantly, the Respondent assured this Court that it would not rely on the reasoning of Judge Khan in opposition to an application by the Appellant to reopen the present case on grounds 1 and 2. At the conclusion of the leave hearing, Kiefel J said, on behalf of the Court:

> In light of the assurances which have been given by the Republic of Nauru to this Court and, taking into account the interlocutory nature of the decision, this Court

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31 Ahmed Affidavit, annexure IA-4, T24:23-27, T25:2, 29-30, T28:28-30, T33:26-27.

32 Respondent's summary of argument on the application for leave, paragraph 27 and see *DWN042 v Republic of Nauru* [2016] HCATrans 310.

33 *DWN042 v Republic of Nauru* [2016] HCATrans 310.

does not consider that there should be a grant of special leave to appeal in this matter.[34]

38. Two written attempts by the Appellant to enter into orders by consent to give effect to the Respondent's assurances to this Court were rejected by the Respondent.[35]

39. On 6 February 2017, the Appellant filed a notice of motion to re-open grounds 1 and 2 in the Supreme Court of Nauru.[36] The Registry of that Court confirmed receipt of that notice by reply email,[37] as did the representative of the Republic.

40. On 7 February 2017, the Supreme Court of Nauru gave final judgment in this matter dismissing all four grounds of appeal, relying on the earlier reasons for striking out grounds 1 and 2.

41. Despite his attempt,[38] the Appellant was neither present nor represented at the Supreme Court hearing on 7 February 2017. The Republic was represented. That representative did not alert the Court to the assurances the Republic gave to this Court on 16 December 2016, nor mention the Appellant's notice of motion.[39]

42. The Supreme Court gave final judgment without any regard to the notice of motion. It did so in the Appellant's absence. By its actions, the Court constructively dismissed the notice without any hearing or reason. By so doing, the Supreme Court of Nauru failed to provide the Appellant with even the most rudimentary form of procedural fairness.

D. Ground 2: The Supreme Court erred in failing to deal with and determine ground 1 in the amended notice of appeal, that the Refugee Status Review Tribunal (the Tribunal) acted in a way that was in breach of the principles of natural justice, contrary to s 22(b) of the *Refugees Convention Act 2012* (Nr) (the Act), by conducting its hearing at the time and place of the Appellant's detention when he was unlawfully detained in breach of s 5 of the Constitution of Nauru.

43. By reason of the matters set out above in respect of ground 1, coupled with the reasons of the Court striking out grounds 1 and 2[40] being conceded to be "plainly wrong",[41] the Supreme Court has yet to deal with and determine grounds 1 and 2 in the amended notice of appeal before that Court. By this appeal and pursuant to s 8 of the Nauru Appeals Act, the Appellant seeks from this Court an order that the Supreme Court exercise power in respect of the matters raised in those grounds. There is merit in doing so for the following reasons.

44. Grounds 1 and 2 before the Supreme Court involved, indirectly and directly, an analysis of the Nauru Constitution in the context of judicial review of the Tribunal's process. The Tribunal decision was based on evidence taken by it from the Appellant pursuant to s 24 of the Refugees Act at a hearing when and where the Appellant was detained. At that time, the Appellant had entered Nauru with a visa (that is, lawfully) and he was not the subject of a process for his removal from

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34 *DWN042 v Republic of Nauru* [2016] HCATrans 310.

35 Affidavit of Tamsin Webster dated 21 February 2017 annexures TW-1, TW-2, TW-3 and TW-6.

36 Affidavit of Tamsin Webster dated 21 February 2017 annexure TW-7.

37 Affidavit of Tamsin Webster dated 21 February 2017 annexure TW-8.

38 Affidavit of Tamsin Webster dated 21 February 2017 annexure TW-7.

39 Affidavit of Tamsin Webster dated 21 February 2017 [16].

40 *DWN 042 v Republic of Nauru* [2016] NRSC 6.

41 *DWN042 v Republic of Nauru* [2016] HCATrans 310.

Nauru.[42] For the purposes of its strike out motion, the Republic invited the Court to assume that the Appellant's detention was relevantly unconstitutional.[43]

45. The constitutional provision enlivened by those facts was s 5(1):

> No person shall be deprived of his personal liberty, except as authorised by law in any of the following cases:
>
> ...
>
> (h) for the purpose of preventing his unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru.

46. Express protection of that right with the same qualification can be found in the constitutions of other Commonwealth island nations, including Papua New Guinea,[44] Dominica,[45] Belize[46] and St Lucia,[47] as well as the European Convention on Human Rights.[48]

47. Ground 2 raised the question whether the Appellant had been denied procedural fairness because the hearing was held where and when he was being unconstitutionally detained.

48. The decision in this case concerned judicial review of a decision-maker's process in a statutory context where there is express protection of human rights in the constitution itself:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[49]

49. In this case, the protected interest of the individual was personal liberty, "the most basic human right or freedom".[50] "People whose fundamental rights are at stake ... are ordinarily entitled to expect fairness".[51]

50. A procedure that is "fair" or "a procedure that is reasonable in the circumstances" is not one conducted in breach of the most basic human right, nor one where that procedure continues an ongoing breach of the Constitution. The legal characterisation of the Appellant's detention is central to the lawfulness of the exercise of the power and the fairness of the procedure adopted by the Tribunal.

51. In this case, the executive of Nauru conducted its process and exercised power in the same place and at the same time as the executive was detaining the Appellant in breach of the Constitution. A condition on the exercise of decision-making power, being compliance with the Constitution, was not met. The decision was, as a result, procedurally unfair.

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42 Affidavit of Ijaz Ahmed, 13 July 2016 (**Ahmed affidavit**), paragraphs 2 and 3; Applicant's summary of argument, paragraphs 5 and 6.

43 Ahmed Affidavit, annexure IA-4, T24:23-27, T25:2, 29-30, T28:28-30, T33:26-27.

44 (1975) Article 42(1)(g), relevantly and recently considered in *Namah v Pato* [2016] PGSC 13; SC1497 (26 April 2016), at [31]-[37].

45 (1978) Article 3(1)(i).

46 (1981) Article 5(1)(i).

47 (1978) Article 3(1)(i).

48 (1950) Article 5(f), relevantly considered in *Chahal v United Kingdom* (22414/93) Grand Chamber Judgment [1996] ECHR 54 (15 November 1996), see especially at [112]-[113].

49 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [31].

50 *South Australia v Totani* (2010) 242 CLR 1 at [423].

51 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [37].

E. Ground 3: The Supreme Court erred in failing to deal with and determine ground 2 in the amended notice of appeal, that the Tribunal's hearing of the Appellant's application for review was unconstitutional because the Appellant was unlawfully detained at the time of that hearing.

52. The Appellant's allegation under ground 3 was that the Tribunal's process was unconstitutional because he was unlawfully detained during that process. It was that allegation that the Supreme Court again failed to consider and determine.

53. The only authoritative text book on the Nauru Constitution, on which the Supreme Court itself relied in its decision,[52] opines that the condition under which Mr Ahmed was detained "was, no doubt, a clear breach of" Article 5 of the Constitution,[53] which supported the focus of the grounds struck out, as did a decision of the Supreme Court of Papua New Guinea in respect of an analogous constitutional provision and similar facts.[54]

54. That ground can be made out on remittal by analogy with long-standing jurisprudence from many jurisdictions[55] with constitutionally enshrined human rights protection of the kind protected by Nauru's constitution. That jurisprudence is to the effect that material collected in breach of a constitutional protection prevents a Court regarding that material as lawful, it being the "fruit of a poisonous tree".[56] Put another way, if a constitutional right is breached, the result of that breach cannot lawfully be considered by a court "even if the same result might have been achieved in a lawful way".[57] Courts so act to avoid "legitimis[ing] morally reprehensible conduct [by] afford[ing that conduct] the cloak of law".[58]

55. Even in jurisdictions without constitutional protection of human rights, a similar rule exists,[59] "grounded in the public policy that" weighs the "serious illegality or other serious impropriety on the part of officials" against the efficacy of using the material so gained. This "has less if anything to do with fairness to the [affected person] than with protecting societal norms".[60]

56. Nauru's societal norms are protected by obliging the executive branch of government to conduct its processes in strict compliance with the requirements of the constitution.[61] Here, those executive processes included the collection of evidence from the Appellant by the Tribunal while he was unconstitutionally detained. Albeit in a different context, the judgment of this Court in *Bunning v Cross* rings true:

> The liberty of the subject is in increasing need of protection as governments ... enact a continuing flood of measures affecting day-to-day conduct, much of it

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52 *DWN042 v Republic of Nauru* (Appeal No 12/2015) Supreme Court of Nauru at [15].

53 MacSporran, P, *Nauru: The Constitution* (Seaview Press 2007), p 24; see also Dastyari, A, "Detention of Australia's asylum seekers in Nauru: Is deprivation of liberty by any other name just as unlawful" (2015) 38 *University of New South Wales Law Journal* 669 at 677-685.

54 *Namah v Pato* [2016] PGSC 13; SC1497 (26 April 2016), at [1]-[4], [34], [74], [78]-[81].

55 See JJ Spigelman, "Truth and the Law" (2011 Winter) Bar News: Journal of the NSW Bar Association 99, at p 105, see especially footnote 32.

56 *Gafgen v Germany* [2010] ECHR 759 (1 June 2010) p 7; see also Stephen C Thaman, "'Fruits of the Poisonous Tree' in Comparative Law" (2010) 16 *Southwestern Journal of International Law* 333.

57 *Silverthorne Lumber Co v United States* 251 US 385 (1920) at 392. See also Article 15 of the *Convention Against Torture*, to which Nauru is a party, which prohibits the use of statements obtained "as a result of torture" from being "invoked as evidence in any proceeding".

58 *Gafgen v Germany* [2010] ECHR 759 (1 June 2010) at 48.

59 *Bunning v Cross* (1978) 141 CLR 54 at 74-75.

60 *Police v Dunstall* [2015] HCA 26; (2015) 256 CLR 403 at [63].

61 Ahmed Affidavit, annexure IA-4, T21:35 - T22.11.

> hedged about with safeguards for the individual. These safeguards the executive ... should not be free to disregard. Were there to occur wholesale and deliberate disregard of these safeguards its toleration by the courts would result in the effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm. This would not be excusable however desirable might be the immediate end in view ...[62]

57. Were it remitted by this Court, the Appellant's case could be lawfully determined by the Supreme Court for the first time, there being no dispute that its first refusal to engage with that case was plainly wrong. For the reasons set out above, that Court would have good reason to allow the appeal on these grounds.

F. Ground 4: The Tribunal erred in law in failing to conclude that the Tribunal erred in failing to consider an integer of the Appellant's claim to complementary protection, namely, that there was a reasonable possibility that the Appellant would be subject to arbitrary deprivation of life on return to Pakistan.

58. Section 4(2) of the Refugees Act requires that Nauru not return a person where doing so would be in breach of its international obligations. Section 3 establishes the scope of complementary protection under the Act also by reference to Nauru's international obligations.

59. Those obligations include those owed under the *International Covenant on Civil and Political Rights* (**ICCPR**), which Nauru ratified in 2001. Article 6 of that instrument requires that "[n]o one shall be arbitrarily deprived of his life". Nauru's obligation to protect people from "arbitrary deprivation of life" requires that Nauru must itself refrain from killing people, and also that Nauru must exercise due diligence in preventing people from being killed by other actors.[63]

60. Critical to this case is the difference between a claim to asylum based on arbitrary deprivation of life under the ICCPR and a claim to asylum based on a well-founded fear of death for a Refugees Convention reason. A claim under the ICCPR is made out if a person is at real risk of arbitrary death by reason of, for example, the location of the person's return rather than any personal feature of that person. By contrast, a claim under the Refugees Convention is only made out if a person is at real risk of death because of the person's race, religion, nationality, membership of a particular social group or political opinion.

61. The Appellant claimed repeatedly in material before the Tribunal that he was at real risk of arbitrary deprivation of life due to widespread violence and bomb blasts, and not only because of his race, religion, nationality, membership of a particular social group or political opinion. The Appellant's submissions and evidence raised the claim that the Appellant was at real risk of arbitrary deprivation of life by targeted and / or non-targeted violence at his place of return.

62. In his first sworn statement, the Appellant said:

> I was working at a checkpoint called Prangsum ... some of the security staff were killed and other were kidnapped and as a result of this incident I was concerned for my life.[64]
>
> I decided to leave Pakistan because my life was in danger ...
>
> If I return to Pakistan I will be seriously harmed or killed ... For the reasons outlined above I fear that if I am returned to Pakistan I would be arbitrarily deprived of my life ... [65]

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62 *Bunning v Cross* (1978) 141 CLR 54 at 77-78.

63 "Extrajudicial, Summary or Arbitrary Executions: Note by the Secretary-General", UN Doc A/61/311 (5 September 2006), [37].

64 BoD, 41.

63. In a later sworn statement dated 21 September 2014, the Appellant said:

> The Taliban wanted the people of my home area to help them in their jihad however our tribal elders refused to help them. The elders knew that the Pakistani military would come to the area to try to drive the Taliban away and then there would be fighting. Instead, the Talban started attacking our area. The Pakistani military then sent their forces anyway and now the whole area is de-stablised.[66]
>
> I fear that my home area will soon face the same Military operations as in places like Waziristan. The Taliban will use local people as a shield from the military response. The Pakistani government will also use the area and the people as the front line so that Taliban will kill us. The only way to escape would be to flee into Afghanistan which is also very unsafe.[67]
>
> I would not have left Pakistan if I did not fear for my life.[68]

64. In written submissions dated 13 March 2014, the Appellant's representative wrote:

> In recent years, Pakistan has become increasingly unstable ... As noted by the United States Department of State "violence, abuse and social and religious intolerance by militant organizations, and other nongovernmental actors" have "contributed to a culture of lawlessness and in some parts of the country" including ... Khyber Pakhunkhwa, the Federally Administered Tribal Areas [where the Appellant lived and worked respectively][69]
>
> This expanded Taliban presence has brought with it a wave of savage attacks against civilians in Peshawar, particularly members of secretarian minorities. As of July 2013, it was reported that "[m]ilitants have attacked inside Peshawar ... once a day, on average, for the past five months. In particular, late September 2013 witnessed multiple vicious attacks [including] a car bombing on 29 September (killing at least 38 people). In November 2012, a superintendant of police along with five other people, was killed in an attack for which the Tehrik-e-Taliban Pakistan [sic]".[70]
>
> [There is] a risk to our client from fundamentalist violence.[71]

By his representative's submissions on 24 September 2014, he submitted again that:

> [The Appellant] fears being killed by the Taliban.[72]
>
> It is our submission that Nauru's non-refoulement obligations prohibit the removal of the Appellant to circumstances where he would face a reasonable possibility of arbitrary deprivation of life ... It is our submission that Mr Ahmed would face harm of this kind if he were removed to Pakistan.[73]

65. Even after the Tribunal hearing, his representative made further submissions on this topic. They included:

> [The Appellant's] family has told him that the security situation in his home area continues to deteriorate. They have informed him that during Eid in early October 2014, one man from a neighbouring village was abducted on his way home. He was slaughtered and his body dumped in a creek. Although there is no specific evidence that this attack was carried out by the Taliban, the villagers suspect the Taliban were responsible as there are no other reason for the attack on the man

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65 BoD, 43.

66 BoD, 143.

67 BoD, 144.

68 BoD, 145.

69 BoD, 62.

70 BoD, 70.

71 BoD, 64.

72 BoD, 111.

73 BoD, 114.

> and the Taliban are the only group in the area capable of carrying out and getting away with such actions.[74]

66. The Secretary in his decision recorded that he had regard to country information which further supported the Appellant's claim that arbitrary deprivation of life was reasonably possible:

> KPK has experienced a range of socio-economic and security problems primarily emanating from the presence of militabt and criminal activity. SATP has reported that thus far in 2014 there have been 157 fatalities in the province including 103 civilians. In the previous year, almost 1,000 fatalities were recorded with over 600 of those being civilians. SATP considers that the majority of civilian casualities were caused by sectarian attacks which have been enabled by the ineffectiveness of state protection and an unwillingness of the government to "antagonize Islamist extremists'.[75]

In light of that country information the Secretary concluded: "I am satisfied there is a reasonable possibility the Applicant will face harm in his home area";[76] and went on to consider whether there was any place to which the Appellant could reasonably relocate.[77]

67. Notwithstanding those claims and that country information, the Tribunal's assessment of the Appellant's claims under complementary protection was as follows:

> For the same reasons as are set out above with respect to Convention persecution, the Tribunal is not satisfied that returning or expelling the applicant to the frontiers of Pakistan would give rise to any breach of Nauru's international obligations.[78]

The reasons for the Tribunal's rejection of the Convention persecution claims made by the Appellant did not assess, nor include findings on, the Appellant's claims to be at risk of arbitrary deprivation of life.

68. To fail to deal with a claim of that kind involves a constructive failure to exercise jurisdiction and a denial of procedural fairness.[79] Section 22 of the Act required that the Tribunal "act according to the principles of natural justice". In *Dranichnikov*, this Court held that:

> To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord [the Appellant] natural justice.[80]

That analysis reflects the second of the two aspects of the hearing rule, which requires that the affected person have an opportunity to provide information[81] and a reflex entitlement to be heard by the decision-maker when the information is given.[82]

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74 BoD, 185.

75 BoD, 85-86.

76 BoD, 87.

77 BoD, 88-89.

78 BoD, 210 [56].

79 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [90]; *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [24], [95].

80 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24] see also [32], approved and applied by a unanimous High Court in *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319 at [90].

81 *Minister for Immigration and Border Protection v SZSSJ, Minister for Immigration and Border Protection v SZTZI* (2016) 90 ALJR 901 at 915 [83]; see also the authorities summarised at *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [159-166] per Bromberg J.

69. In this instance, the claim to protection from arbitrary deprivation of life was put expressly. It was also the subject of clear and specific submissions and country information before the Tribunal by the Appellant.[83] The Tribunal thereby failed to respond to a substantial, clearly articulated argument (namely, that the Appellant was at risk of arbitrary deprivation of his life) that relied on established facts (namely, that the Appellant worked as a driver and moved around the area where country information indicated that people were being arbitrarily killed by bombings and violence).

70. The Tribunal erred by failing to evaluate whether the Appellant was owed complementary protection due to the possibility of arbitrary deprivation of life from bomb blasts, attacks on mosques and / or widespread violence at the place to which he would return. That amounts to an error of law justifying remittal for reconsideration according to law.

G. Ground 5: Supreme Court erred in failing to conclude that the Tribunal erred by relying on the transfer interview form, contrary to s 22(b) of the Act, in circumstances where that form was unsigned and unsworn, was not made available to the Appellant's representative when the representative prepared the Appellant's statement of claims and was expressly disowned as a record of the Appellant's claims.

71. The Appellant was interviewed on 28 November 2011.[84] Among other things, the purported record of that interview included that the Appellant was attacked in his home on 20 February 2013.[85] That date was a focus of the Tribunal's rejection of the Appellant's credibility and the credibility of his claims.[86]

72. The Appellant did not sign or swear to the truth of the information in the transfer interview record.[87] Even the interviewer did not attest to the accuracy of the information recorded.[88] Indeed, there was no evidence before the Tribunal that the Appellant had an opportunity to check and/or verify what was recorded at any point. There was evidence before the Tribunal that the Appellant does not read English and that, even if he had been given access, he could not understand or check it without the assistance of an interpreter.[89]

73. As at 8 December 2013, the Appellant's allocated representative had not been provided with the transfer interview.[90] It follows that he could not advise or assist the Appellant to respond to its content, nor obtain instructions as to its accuracy as a record.

74. The Appellant's first signed and sworn statement dated 8 December 2013 expressly disowned whatever was recorded in the transfer interview record. At paragraph 2, the Appellant stated:

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82 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 45 [140] per Callinan J and *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 at 578 [389] per Flick J.

83 See paragraphs 62 and 63 above.

84 BoD, 41.

85 BoD, 13.

86 BoD, 207-9 [41], [42], [50].

87 BoD, 16.

88 BoD, 17.

89 BoD, 37, 44, 103, 145, 148.

90 BoD, 33.

> "I was not made aware before or during the transferee interview that the information I provided during the transferee interview would be used for the purposes of assessing my claims for protection."[91]

75. Section 22 of the Refugees Act required the Tribunal to act according to the principles of natural justice. Natural justice or procedural fairness usually involves two requirements: the fair hearing rule and the rule against bias.[92] The hearing rule requires a decision-maker to inform a person of the case against them, provide the person with an opportunity to be heard, and prior notice of information that might adversely affects the person's interests.[93] Procedural fairness requires "a procedure that is reasonable in the circumstances to afford an opportunity to be heard",[94] a "full opportunity".[95]

> Procedural fairness must be upheld for its own sake, as well as for its consequences because "the experience of the common law [is] that, out of fair and lawful procedures, fair and lawful outcomes will more commonly emerge".[96] The concern is with the fairness of the procedure adopted rather than the fairness of the outcome; with the decision-making process not the decision.[97]

76. A "denial of ... procedural fairness will ordinarily involve failure to comply with a condition of the exercise of decision-making power [which will be modified by] the statutory context".[98] In *Commissioner of Police v Tanos,* Dixon CJ and Webb J stated that:

> ... it is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by a judicial or quasi-judicial proceeding he must be afforded an adequate opportunity to be heard.[99]

77. The transfer interview was used repeatedly by the Tribunal in this case as the basis for a number of findings adverse to the Appellant. In the circumstances set out above, doing so was contrary to the principles of natural justice because it was not adopted by the Appellant as a record of his claims, nor was it known to or adopted by the Appellant and his adviser as at the date of his next statement; and yet the contrasts in evidence were a basis for many of the Tribunal's adverse credibility findings. By so doing, the Tribunal was in breach of s 22 of the Refugees Act.

H. Conclusion

78. For the reasons outlined above, the High Court should, pursuant to s 8 of the Nauru Appeals Act, make the orders set out in paragraph 81 below.

79. Should error be found in respect of grounds 4 and 5, to do other than refer the whole of the Appellant's case back for reconsideration would be an 'abuse of power' in circumstances where the Appellant has a substantive legitimate expectation of this

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91 BoD, 41.

92 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 489 (Gleeson CJ).

93 *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29; 90 ALJR 901 at [75].

94 *MIBP v SZSSJ* [2016] HCA 29 at [82].

95 *MIBP v WZARH* [2015] HCA 40; (2015) 90 ALJR 25, at [36] (Kiefel, Bell and Keane JJ).

96 *NAFF of 2002 v MIMIA* (2004) 221 CLR 1, at [83].

97 *Re MIMA; Ex parte Lam* (2003) 214 CLR 1, at [105]. The quote appears in *S D v The Queen* [2013] VSCA 133; 39 VR 487 at [49].

98 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [25].

99 *Commissioner of Police v Tanos* (1985) 98 CLR 383 at 395. "The fundamental rule is that a statutory authority having power to effect the rights of a person is bound to hear him before exercising the power": *Kioa v West* (1985) 159 CLR 550 at 563 (Gibbs CJ) quoting Mason J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 360.

as the only potential outcome.[100] That expectation arose because of the Tribunal's own stated assurance to this effect by its letter to the Appellant titled 'Fact Sheet for Applicants'.

Part VII: Legislative provisions

80. The particular constitutional provisions, statutes and regulations applicable to the questions the subject of the appeal are attached as an annexure.

Part VIII: Orders sought

81. The orders sought by the Appellant are:

81.1 The appeal be allowed.

81.2 In respect of grounds 1, 2 and/or 3, the matter be remitted to the Supreme Court of Nauru, differently constituted, for reconsideration according to law; or

81.3 In respect of all grounds, the matter be remitted to the Refugee Status Review Tribunal for reconsideration according to law.

81.4 The Respondent pay the costs of the Appellant of:

(a) this appeal to the High Court; and

(b) the Appellant's application for leave to appeal dismissed by the High Court on 16 December 2016.

81.5 Such further or other orders as the Court deems appropriate.

Part IX: Oral argument

82. The Appellant estimates that he will require three hours to present oral argument.

Dated: 28 March 2017

Peter Hanks QC and Matthew Albert
Counsel for the Appellant

per Lindy Richardson, Partner, Maddocks
Solicitors for the Appellant

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100 *Regina v. Secretary of State for the Home Department (Appellant) ex parte Mullen (Respondent)* [2004] UKHL 18 at [60].

Annexure (Part VII – Legislative provisions)

The Constitution of Nauru

5 Protection of personal liberty

(1) No person shall be deprived of his personal liberty, except as authorised by law in any of the following cases:

a) in execution of the sentence or order of a court in respect of an offence of which he has been convicted;

b) for the purpose of bringing him before a court in execution of the order of a court;

c) upon reasonable suspicion of his having committed, or being about to commit, an offence;

d) under the order of a court, for his education during any period ending not later than the thirty-first day of December after he attains the age of eighteen years;

e) under the order of a court, for his welfare during any period ending not later than the date on which he attains the age of twenty years;

f) for the purpose of preventing the spread of disease;

g) in the case of a person who is, or is reasonably suspected to be, of unsound mind or addicted to drugs or alcohol, for the purpose of his care or treatment or the protection of the community; and

h) for the purpose of preventing his unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru.

(2) A person who is arrested or detained shall be informed promptly of the reasons for the arrest or detention and shall be permitted to consult in the place in which he is detained a legal representative of his own choice.

(3) A person who has been arrested or detained in the circumstances referred to in paragraph (c) of clause (1.) of this Article and has not been released shall be brought before a judge or some other person holding judicial office within a period of twenty-four hours after the arrest or detention and shall not be further held in custody in connexion with that offence except by order of a judge or some other person holding judicial office.

(4) Where a complaint is made to the Supreme Court that a person is unlawfully detained, the Supreme Court shall enquire into the complaint and, unless satisfied that the detention is lawful, shall order that person to be brought before it and shall release him

14. Enforcement of fundamental rights and freedoms

(1) A right or freedom conferred by this Part is enforceable by the Supreme Court at the suit of a person having an interest in the enforcement of that right or freedom.

(2) The Supreme Court may make all such orders and declarations as are necessary and appropriate for the purposes of clause (1.) of this Article.

48. Supreme Court of Nauru

(1) There shall be a Supreme Court of Nauru, which shall be a superior court of record.

(2) The Supreme Court has, in addition to the jurisdiction conferred on it by this Constitution, such jurisdiction as is prescribed by law.

54. Matters concerning the Constitution

(1) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction to determine any question arising under or involving the interpretation or effect of any provision of this Constitution.

(2) Without prejudice to any appellate jurisdiction of the Supreme Court, where in any proceedings before another court a question arises involving the interpretation or effect of any provision of this Constitution, the cause shall be removed into the Supreme Court, which shall determine that question and either dispose of the case or remit it to that other court to be disposed of in accordance with the determination.

***Refugees Convention Act 2012* (Nr)**

4. Principle of Non-Refoulement

(1) The Republic must not expel or return a person determined to be recognised as a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion except in accordance with the Refugees Convention as modified by the Refugees Protocol.

(2) The Republic must not expel or return any person to the frontiers of territories in breach of its international obligations.

5. Application for refugee status

(1) A person may apply to the Secretary to be recognised as a refugee.

(1A) A person may include family members and dependents in an application for refugee status.

(2) The application must:

(a) be in the form prescribed by the Regulations; and

(b) be accompanied by the information prescribed by the Regulations.

(3) No fee may be charged for the making or processing of the application.

6. **Determination of refugee status**

(1) Subject to this Part, the Secretary must determine whether an asylum seeker is recognised as a refugee or is owed complementary protection.

(2) Dependents of an asylum seeker recognised as a refugee or owed complementary protection must be given derivative status.

(3) The determination must be made as soon as practicable after a person becomes an asylum seeker under this Act.

22. **Way of operating**

The Tribunal:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to the principles of natural justice and the substantial merits of the case.

31. **Application for merits review by Tribunal**

(1) A person may apply to the Tribunal for merits review of any of the following:

(a) a determination that the person is not recognised as a refugee;

(b) a decision to decline to make a determination on the person's application for recognition as a refugee;

(c) a decision to cancel a person's recognition as a refugee (unless the cancellation was at the request of the person).

(d) a determination that the person is now owed complementary protection.

(2) The application must be made:

(a) within 28 days after the person receives notice of the determination or decision; and

(b) in the form prescribed by the Regulations.

(3) The Principal Member may extend the time in which an application for review can be lodged if the Principal Member is satisfied that there are compelling circumstances.

(4) No fee may be charged for the making or hearing of the application.

43. Jurisdiction of Supreme Court

(1) A person who, by a decision of the Tribunal, is not recognized as a refugee may appeal to the Supreme Court against that decision on a point of law.

(2) The parties to the appeal are the appellant and the Republic.

(3) The notice of appeal must be filed within 28 days after the person receives the written statement of the decision of the Tribunal.

(4) The notice of appeal must:

(a) state the grounds on which the appeal is made; and

(b) be accompanied by the supporting materials on which the appellant relies.

Note for section 43

Under section 44(c) of the Appeals Act 1972, an appeal lies to the High Court of Australia, with the leave of the High Court, against any judgment, decree or order of the Supreme Court in the exercise of its appellate jurisdiction under Part III of the Appeals Act or under any other written law.

44. Decision by Supreme Court on appeal

(1) In deciding an appeal, the Supreme Court may make either of the following orders:

(a) an order affirming the decision of the Tribunal;

(b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

(2) If the Court makes an order remitting the matter to the Tribunal, the Court may also make either or both of the following orders:

(a) an order declaring the rights of a party or of the parties;

(b) an order quashing or staying the decision of the Tribunal.

45. Costs

The Supreme Court may not make an order for costs against the appellant except in extraordinary circumstances.

***Nauru (High Court Appeals) Act 1976* (Cth)**

5. Appeals to High Court

(1) Appeals lie to the High Court of Australia from the Supreme Court of Nauru in cases where the Agreement provides that such appeals are to lie.

10

(2) The High Court has jurisdiction to hear and determine appeals mentioned in subsection (1).

(3) Where the Agreement provides that an appeal is to lie to the High Court of Australia from the Supreme Court of Nauru with the leave of the High Court, the High Court has jurisdiction to hear and determine an application for such leave.

Schedule

20 Section 3

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF NAURU RELATING TO APPEALS TO THE HIGH COURT OF AUSTRALIA FROM THE SUPREME COURT OF NAURU

The Government of Australia and the Government of the Republic of Nauru,

Recalling that, immediately before Nauru became independent, the High Court of Australia was empowered, after leave of the High Court had first been obtained, to hear and determine appeals from all judgments, decrees, orders and sentences of the Court of Appeal of the Island of Nauru, other than judgments, decrees or orders given or made by consent,

30 Taking into account the desire of the Government of the Republic of Nauru that suitable provision now be made for appeals to the High Court of Australia from certain judgments, decrees, orders and sentences of the Supreme Court of Nauru, and

Conscious of the close and friendly relations between the two countries,

Have agreed as follows:

ARTICLE 1

Subject to Article 2 of this Agreement, appeals are to lie to the High Court of Australia from the Supreme Court of Nauru in the following cases:

40 (A). In respect of the exercise by the Supreme Court of Nauru of its original jurisdiction –

(a) In criminal cases—as of right, by a convicted person, against conviction or sentence.

(b) In civil cases –

(i) as of right, against any final judgment, decree or order; and

(ii) with the leave of the trial judge or the High Court of Australia, against any other judgment, decree or order.

(B). In respect of the exercise by the Supreme Court of Nauru of its appellate jurisdiction—

In both criminal and civil cases, with the leave of the High Court.

ARTICLE 2

An appeal is not to lie to the High Court of Australia from the Supreme Court of Nauru—

(a) where the appeal involves the interpretation or effect of the Constitution of Nauru;

(b) in respect of a determination of the Supreme Court of Nauru of a question concerning the right of a person to be, or to remain, a member of the Parliament of Nauru;

(c) in respect of a judgment, decree or order given or made by consent;

(d) in respect of appeals from the Nauru Lands Committee or any successor to that Committee that performs the functions presently performed by the Committee; or

(e) in a matter of a kind in respect of which a law in force in Nauru at the relevant time provides that an appeal is not to lie to the High Court.

ARTICLE 3

(1) Subject to paragraph 2 of this Article and to Article 4 of this Agreement, procedural matters relating to appeals from the Supreme Court of Nauru to the High Court of Australia are to be governed by Rules of the High Court.

(2) Applications for the leave of the trial judge to appeal to the High Court of Australia in civil matters are to be made in accordance with the law of Nauru.

ARTICLE 4

(1) Pending the determination of an appeal from the Supreme Court of Nauru to the High Court of Australia, the judgment, decree, order or sentence to which the appeal relates is to be stayed, unless the Supreme Court of Nauru otherwise orders.

(2) Orders of the High Court of Australia on appeals from the Supreme Court of Nauru (including interlocutory orders of the High Court) are to be made binding and effective in Nauru.

ARTICLE 5

This Agreement shall come into force on the date on which the two Governments exchange Notes notifying each other that their respective constitutional and other requirements necessary to give effect to this Agreement have been complied with.

ARTICLE 6

(1) Subject to paragraph 2 of this Article, this Agreement shall continue in force until the expiration of the ninetieth day after the day on which either Government has given to the other Government notice in writing of its desire to terminate this Agreement.

(2) Termination of this Agreement is not to affect-

(a) the hearing and determination of an appeal from the Supreme Court of Nauru instituted in the High Court before the date of the termination; or

(b) the institution, hearing and determination of an appeal from the Supreme Court of Nauru in pursuance of leave of the trial judge or of the High Court of Australia given before the date of the termination.

IN WITNESS WHEREOF the undersigned being duly authorized by their respective governments have signed the present Agreement.

DONE at Nauru this Sixth day of September One thousand nine hundred and seventy-six in two originals in the English language.

A. L. FOGG
For the Government of
Australia

A. BERNICKE
For the Government of the
Republic of Nauru

***Courts Act 1972* (Nr)**

5. Powers of judges

(1) All the judges of the Supreme Court shall have in all respects, save as is expressly otherwise provided by this Act, equal power, authority and jurisdiction under this Act.

(2) Save as may be otherwise expressly provided by any written law, any judge of the Supreme Court may exercise all or any part of the jurisdiction vested in the Supreme Court by or under the provisions of this Act or any other law, and for such purpose shall be and form a court.

(3) The jurisdiction of the Supreme Court may be exercised in any cause or matter by a judge notwithstanding that it is being exercised at the same time in another cause or matter by another judge.

17. Jurisdiction of Supreme Court

(1) The Supreme Court shall have and exercise within Nauru all such powers and jurisdictions as are or may from time to time be vested in it under or by virtue of the Constitution, this Act and any other written law for the time being in force.

(2) The Supreme Court shall, subject to any limitation expressly imposed by any written law, have and exercise within Nauru all the jurisdiction, powers and authorities which were vested in, or capable of being exercised by, the High Court of Justice in England on the thirty-first day of January, 1968.

(3) The Supreme Court shall have within Nauru all and singular the powers and authorities vested in, or capable of being exercised by, the Lord High Chancellor of England on the thirty-first day of January, 1968, to appoint guardians of the persons and estates of infants.

(4) Save as provided by this Act, the *Civil Procedure Act 1972*, or any other written law or by rules of court, the jurisdiction of the Supreme Court shall be exercised by a single judge.

***Appeals Act 1972* (Nr)**

45. No appeal in certain cases

No appeal shall lie under this Part:

(a) where the appeal involves the interpretation or effect of the Constitution;

(b) in respect of the determination by the Supreme Court of a question concerning the right of a person to be, or to remain, a member of the Parliament;

(c) in respect of a judgment, decree or order given or made by consent;

(d) in respect of a judgment, decree or order given or made by the Supreme Court upon an appeal from the Nauru Lands Committee

or any successor to that Committee that performs the functions performed by the Committee immediately prior to the date on which this Part of this Act came into force;

(e) from an order allowing an extension of time for appealing from a decision;

(f) from an order of a judge giving unconditional leave to defend an action;

(g) from the decision of the Supreme Court or of any judge thereof where it is provided by any written law that such decision is to be final; or

(h) from an order absolute for the dissolution or nullity of marriage in respect of any party who, having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree.

46. Powers of High Court on hearing of appeal

Upon the hearing of any appeal under this Part of this Act the High Court may affirm, reverse or modify the judgment or order appealed from and may give such judgment or make such order as ought to have been given in the first instance, or remit the case, together with its judgment or order thereon, to the Court of first instance for determination by way of trial de novo or rehearing, with such directions as the High Court may think necessary.

47. Quorum of judges

The jurisdiction of the High Court to hear and determine appeals and applications for leave to appeal under Parts V and VI of this Act shall be exercised by a Full Court consisting of any two or more Justices of the High Court sitting together.