IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M131 of 2017

BETWEEN

CRI026
Appellant

AND

Republic of Nauru
Respondent

REDACTED

APPELLANT'S SUBMISSIONS

I INTERNET PUBLICATION

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

II ISSUES

2. There are three principal issues for determination, and four if the Appellant is permitted to raise a fourth ground of appeal. It may not be necessary to determine all of them.

3. The first is whether the Supreme Court of Nauru erred by failing to conclude that the Refugee Status Review Tribunal (**Tribunal**) had erred in applying a relocation test to the Appellant's claim for complementary protection under s 4(2) of the *Refugees Convention Act* 2012 (Nr) (**Convention Act**) (see Ground of Appeal 1).

4. The second is whether the Supreme Court erred by failing to find that the Tribunal erred by determining the claim by relying on findings in respect of Sri Lanka and Tamils, when the Appellant is from Pakistan and is not a Tamil (see Ground of Appeal 2).

5. The third is whether the Tribunal failed to take into account an integer of the appellant's objection to internal relocation (see Ground of Appeal 4).

6. The proposed fourth ground is whether the evidence before the Tribunal supported its conclusion that the MQM group in Pakistan, had little or no influence outside the Sindh province. A proposed amended notice of appeal identifying this ground will be provided to the respondent when these submissions are served.

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III SECTION 78B NOTICE

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

IV JUDGMENT BELOW

8. The citation for the decision of the Supreme Court of Nauru is *CRI026 v Republic of Nauru* [2017] NRSC 67.

V FACTUAL BACKGROUND

The Appellant's claim

9. The following paragraphs summarise the claims of the Appellant.

10. He was born on [redacted] in [redacted], in the Punjab Province of Pakistan.[1] The Appellant is from the Mohajir ethnic group.[2] He is the father of two young children, born in 2009 and 2010.[3]

11. In 2003, the Appellant had an altercation with [redacted] at a [redacted] in Karachi.[4] The Appellant subsequently became aware that [redacted] was an influential member of the Muttahida Qaumi Movement (**MQM**).[5]

12. Ten days after the incident, the Appellant was beaten up and threatened by a group of MQM members.[6] This was the first of several encounters during which the Appellant was harassed and intimidated by the group.

13. Six months later, MQM militants burnt down the Appellant's [redacted] shop in Karachi.[7] The Appellant reported this to the local police. However, the authorities did not investigate.[8]

14. The Appellant decided it was unsafe to remain in Karachi due to the ongoing threat of violence.[9] In 2003, the Appellant moved to [redacted] and went into hiding.[10]

15. While the Appellant was in hiding, MQM members targeted his family in Karachi. In 2004, one of the Appellant's brothers was beaten by MQM militants who were looking for the Appellant.[11]

16. In 2005, despite attempts to evade MQM, the Appellant was threatened, beaten and pursued by members from the group again.[12]

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[1] Court book page (**CB**) 4, 22, 26, 44 [7], 51, 52, 56, 58, 114 [36], 191 [9].
[2] CB 44, 51, 55, 56, 58, 115 [7].
[3] CB 8, 40, 55, 58
[4] CB 13, 45 [11], 56, 122 [42], 124 [16], 191 [12], 193 [16].
[5] CB 45 [12], 58, 125 [24], 191 [11].
[6] CB 45 [14], 56, 79 [38], 126 [17], 192 [12], 194 [18].
[7] CB 45 [16], 56, 79 [38], 132 [17], 192 [12], 194 [20].
[8] CB 45 [17], 56, 134 [30], 192 [12].
[9] CB 45 [15], 46 [18], 56, 79 [38], 192 [12].
[10] CB 46 [19], 56, 136 [24], 139, [43], 191 [10].
[11] CB 46 [20], 56, 79 [38], 144 [33], 192 [12], 194 [24].

17. In November 2006, the Appellant married in [redacted].[13] The Appellant spent two to three months in [redacted] before moving to [redacted], near Karachi.[14] MQM militants continued to pursue the Appellant, threatening him on numerous occasions.[15]

18. Members from MQM also harassed one of the Appellant's siblings at their family home, demanding to know the Appellant's phone number and location.[16] As a result, the Appellant regularly changed his sim card to prevent MQM from finding him.[17]

19. In 2009, there was a further incident in [redacted] where MQM members chased the Appellant and fired shots at him in a local market.[18]

20. Due to the fear of being killed by MQM, the Appellant fled to Lahore in 2010.[19] MQM militants obtained his address in Lahore, went to his house, abused his wife and threw a letter at her.[20] The letter stated, amongst other things, 'We will not spare his life. We will kill him.'[21]

21. After this incident, the Appellant's wife and two children moved back to a village outside [redacted].[22]

22. The Appellant fled Pakistan in 2011[23] and arrived on Christmas Island. On 15 December 2013, the Appellant was taken to Nauru.[24] He applied for asylum there on 8 March 2014.

The Tribunal's decision

23. The Tribunal accepted that the Appellant had a fight at a [redacted] with [redacted], that he was threatened after the fight and had his shop burnt by associates of [redacted].[25] The Tribunal found that there was a real possibility that the Appellant would be harmed by [redacted] and his associates in Karachi, and that state protection from the police or other authorities in Karachi may be withheld because of [redacted]'s political connection and involvement with the MQM.[26] The Tribunal accepted that the MQM was powerful in Karachi, where it was dominant at the local and provincial level, and observed that it was 'link[ed] to the State in Karachi'[27] and reported to be allied to the Pakistani military.[28]

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[12] CB 46 [21], 57, 79 [38], 192 [12].
[13] CB 8, 58, 138 [40], 139 [25], 191 [9], 193 [22].
[14] CB 195 [30].
[15] CB 46 [23], 57, 79 [38], 192 [12].
[16] CB 46 [23], 57, 79 [38], 159 [7], 160 [24], 161 [4], 163 [43], 167 [31], 192 [12], 196 [32].
[17] CB 46 [23], 162 [22], 196 [32].
[18] CB 169 [22].
[19] CB 4, 42, 45, 55, 57, 103 [6], 105 [16], 105 [19], 168 [9], 191 [10].
[20] CB 103 [7], 172 [36-37], 197 [37].
[21] CB 172 [46].
[22] CB 174 [13], 175 [46], 179 [31], 183 [25].
[23] CB 31.
[24] CB 41.
[25] Tribunal's reasons at [53]. See also [40]-[44].
[26] Tribunal's reasons at [55].
[27] Tribunal's reasons at [57].
[28] Tribunal's reasons at [54].

The Tribunal also accepted that "the MQM has campaigned in Punjab and may have an office or a presence in Lahore and in [redacted]".[29]

24. The Tribunal then considered whether it was reasonable for the Appellant to relocate to another part Pakistan, including Lahore or [redacted] in the Punjab Province, and concluded that in [redacted], Lahore or elsewhere in Punjab there was no real possibility of harm from [redacted] or his associates.[30] It also concluded that the Appellant could safely and reasonably relocate to the Punjab Province.

25. In that part of its reasons where the Tribunal set out its conclusion that the Appellant was not a refugee it described him as a Tamil from Sri Lanka. It stated (at [68]):

> Having regard to all of the evidence and the findings above, the Tribunal finds that the Appellant does not face a real possibility of persecution now or in the reasonably foreseeable future in Sri Lanka because of an imputed political opinion, his race or his membership of particular social groups comprising his family, young Tamils from the north, failed Tamil asylum seekers, Tamil returnees, persons who left Sri Lanka illegally or young Tamils Separately and cumulatively. The Tribunal finds the Appellant is not a refugee.

The same reasons were said by the Tribunal to lead it to conclude that the Appellant was not owed complementary protection obligations: at [69]. Significantly the Tribunal considered whether returning the Appellant to Pakistan would breach Nauru's international obligations arising under, relevantly for present purposes, the *International Covenant on Civil and Political Rights* (**the ICCPR**) and any obligations under the *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia* (**the MOU**), and in particular article 19(c) thereof which, as the Tribunal held, "obliges Nauru to refrain from transferring any asylum seekers originally transferred from Australia to another country where there is a real risk that they will be subjected to torture, cruel, inhumane or degrading treatment or punishment...".

26. Some six months after it published its reasons, and after the appeal to the Supreme Court had been commenced, the Tribunal purported to correct errors in paragraphs 2 and 68 by issuing a corrigendum.

The decision of the Supreme Court

27. The Appellant appealed, as a self-represented litigant, to the Supreme Court. Insofar as is presently relevant, the reasons below record that the appeal raised:

    a. the issue of the principles to be applied in determining whether it would be reasonable for a person to relocate to a safe area within his or her own country;[31] and

    b. whether the Tribunal committed an error of law, in describing the Appellant as a Tamil from Sri Lanka.[32]

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[29] Tribunal's reasons at [57], see also CB 105 [20].
[30] Tribunal's reasons at [59].
[31] *CRI 026 v Republic* [2017] NRSC 67 [40]
[32] *CRI 026 v Republic* [2017] NRSC 67 [43]

28. The Supreme Court dismissed the appeal. It found that the Tribunal had acted correctly in its application of the relevant principles, in determining that the Appellant could safely and reasonably relocate to the Punjab Province.

29. The Supreme Court also found that the decision "taken as a whole" indicated that the "Tribunal was alert to the particular circumstances of [the Appellant]". Therefore, it concluded that the decision was not vitiated by any error of law, notwithstanding that the Tribunal had described the Appellant as a Tamil from Sri Lanka.

VI ARGUMENT

A. Jurisdiction – this appeal is brought as of right

30. This is an appeal from the decision of the Supreme Court of Nauru, in which the High Court exercises original jurisdiction under s 76(ii) of the Constitution.[33] The appeal is brought as of right. Sub-section 5(1) of the *Nauru (High Court Appeals) Act* 1976 (Cth) confers jurisdiction on this 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. 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.

31. This is such a case. Section 43 of the Convention Act confers jurisdiction on the Supreme Court to hear an 'appeal' on a point of law from the Tribunal. The original decision of the Secretary's delegate and the subsequent proceeding before the Tribunal involved the exercise of power that was of an administrative or executive nature, rather than involving any exercise of judicial power. Accordingly, although styled as an 'appeal', the Supreme Court proceeding constituted the first time that judicial power was exercised in respect of the Appellant's claims and the Supreme Court was exercising original jurisdiction. The proceeding before the Supreme Court was analogous to proceedings brought under 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, but it is well established that such an 'appeal' is an exercise of original jurisdiction by the Federal Court.[34]

B. Grounds

Ground 1: Relocation test is not applicable to a complementary protection claim

32. The Tribunal found that the relocation principle from refugee law applied to the Appellant's complementary protection claim, and thus the Appellant could be returned to Pakistan, on the basis (in essence) that he would be safe in Punjab, notwithstanding that there was a real possibility of the Appellant being harmed in Karachi and that he may not there have been protected by the police or other authorities. This was an error of law, because s 4(2) of the Convention Act

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

[34] See, eg, at *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 at 346 [78], 347-348 [80]-[83] (and the authorities there cited) per Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ; and *Lewski v Commissioner of Taxation* [2017] FCAFC 145 at [3].

provides that Nauru must not 'expel or return any person to the frontiers of territories in breach of its international obligations'. As the Tribunal recognised, Nauru's international obligations include those arising under the ICCPR.[35] The content of those obligations is different from those applicable where persons are claiming refugee status under the Refugee Convention, in which context (as discussed further below) a person will not be entitled to protection if he or she can reasonably relocate to another part of the relevant country.

33. In contrast to the situation applicable under the Refugee Convention, Article 7 of the ICCPR provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' This international obligation on Nauru in respect of such mistreatment is confirmed by clause 19(c) of the Memorandum by which the Republic 'assured' Australia that it would not 'send a Transferee to another country where there is a real risk that the Transferees will be subject to torture, cruel, inhumane or degrading treatment or punishment...'.

34. In this case, it follows from the findings of the Tribunal referred to at [23] above, that that there is a real risk that the Appellant will be in danger of being subjected to 'cruel, inhuman or degrading treatment or punishment' as contemplated by Article 7 and the MOU, if he were to be returned to Pakistan. Specifically in Karachi, the Tribunal found that there was a real possibility of harm and that the Appellant may not be afforded protection by the police or other authorities. Accordingly the Supreme Court erred in failing to conclude that the Appellant was entitled to complementary protection given the findings of fact summarised at 23 above that are submitted to have engaged Nauru's complementary protection obligations.

35. The complementary protection obligation that arises by reason of Nauru's international obligations, is not limited in any relevant way. The United Nations Human Rights Committee has explained that:

> *[t]he text of article 7 allows of no limitation...* States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement.*[36]

36. Article 7 has been described as providing an "absolute prohibition on return".[37]

37. The text of the ICCPR provision is almost identical to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that '[n]o one shall be subjected to torture or to inhuman or

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[35] Nauru has signed but not yet ratified the ICCPR. However, it has 'expressed an intention to be bound by' that treaty; United Nations Human Rights Council Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1,* 10th sess, UN Doc A/HRC/WG.6/10/NRU/1 (5 November 2010) at [32]

[36] UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment),* 44th sess, UN Doc A/44/40 (10 March 1992) [3], [9]; see also UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* 80th sess, UN Doc CCPR/C/21/Rev.1/Add13 (21 April 2004) [12].

[37] McAdam, "Australian Complementary Protection: A Step-By-Step Approach" (2011) 33(4) *Sydney Law Review* 687 at 708.

degrading treatment or punishment.' Of that provision, the European Court of Human Rights said in *Soering v United Kingdom*:[38]

> Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights ... and is generally recognised as an internationally accepted standard.
>
> The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture". The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.

38. Hence, under the international law of complementary protection, and through application by analogy of the reasoning in the passage set out above to claims for complementary protection under the ICCPR, the only question is whether there is a "real risk of exposure to inhuman or degrading treatment or punishment", among other harms, in any place in the country of return. If there is, the applicant for protection should not be returned to the frontiers of that country.

39. It is for this reason, at least in part, that Australia and other jurisdictions, including the European Union, the United Kingdom, Canada-and New Zealand[39],

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[38] (1989) 161 Eur Court HR (ser A) at [88]. The case concerned extradition to a jurisdiction imposing the death penalty.

have added an express relocation provision to the domestic determination of complementary protection claims, whereas they have not done so in respect of claims under the Refugees Convention (which itself contemplates internal relocation as discussed further below).

40. In *Minister for Immigration and Citizenship v MZYYL*[40], the Full Court of the Federal Court accepted that the position under Australian refugee legislation and the position under the ICCPR in respect of relocation differ, accepting by implication that the ICCPR precludes an applicant for protection from being returned to his or her country of origin where he or she will be exposed to a risk of relevant harm in any part of that country, and regardless of whether the Appellant for protection could relocate within that country to avoid the risk. The Full Court stated (at [18]):

> The express and implied *non-refoulement* obligations under the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CROC)... do not require the non-citizen to establish that the non-citizen could not avail himself or herself of the protection of the receiving country or that the non-citizen could not relocate within that country. Sections 36(2B)(a) and (b) [of the Australian *Migration Act*] have adopted a different and contrary position.

41. In contrast, Nauru has not modified its complementary protection obligations. The parliament of Nauru chose to leave the obligations at international law in this regard unaltered, when they were incorporated into domestic law under s 4(2) of the Refugees Act. Unlike in respect of many other aspects of the Convention Act, the Nauruan parliament did not adopt the approach or terms of the Australian *Migration Act.*

42. It follows that the Tribunal erred in applying a relocation test to the Appellant's claim for complementary protection. It was incorrect of the Tribunal to apply (at paragraphs 55, 56 and 69) a relocation test in respect of the claim to complementary protection.

43. Having regard to the findings of fact made by the Tribunal, as identified at [23] above, the Appellant was entitled to complementary protection based on the existing findings of the Tribunal.

44. As to the difference between the principles applicable under the Refugee Convention in relation to internal relocation and those applicable under other international obligations (known as complementary protection and including the ICCPR), it is well-established that an internal relocation test, also referred to as an internal flight or internal protection test, applies to persons claiming refugee

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[39] **European Union**: *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* (2011); **UK**: *Immigration Rules* (UK) paras 339C and 339O; **Canada**: *Immigration and Refugee Protection Act* 2001 (Can) s 97(1); **NZ**: *Immigration Act* 2009 (NZ) s 130(2).

[40] (2012) 207 FCR 111.

status under the Refugee Convention.[41] Thus a person is entitled to protection under the Refugees Convention only if:

> a. The person has a well founded fear of persecution for a Convention reason in one place in the country of return; and
>
> b. The person cannot reasonably relocate to another part of that country.

45. The test is grounded in the text of the Refugee Convention definition itself.[42] A person cannot be said to be "unable or, owing to such fear, unwilling, to avail himself of the protection of the [home] country" if he or she has access to protection elsewhere in that country.[43] As observed by the US Court of Appeal for the Eleventh Circuit:[44]

> The [refugee definition] speak[s] consistently in terms of the geopolitical unit "country". ... [A] government may expect that asylum seekers be unable to obtain protection anywhere in his own country before he seeks the protection of another country.

A person cannot be said to have a well-founded fear of persecution "where the protection of his country would be available to him and where he could reasonably be expected to relocate".[45]

46. As submitted above, this contrasts with the complementary protection obligation prevailing under Article 7 of the ICCPR, under the MOU, and under s 4(2) of the Convention Act.

Ground 2: Error in taking irrelevant considerations into account and / or asking the wrong questions

47. The Appellant is a native of Pakistan and made no asylum claims in respect of Sri Lanka or being Tamil. At paragraphs [68] and [69], which are submitted to contain the ratio for the decision, the Tribunal held that:

> **Refugee assessment**
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> 68. Having regard to all of the evidence and findings above, the Tribunal finds that the Appellant does not face a real possibility of persecution now or in the reasonably foreseeable future in Sri Lanka because of an imputed political opinion, his race or his membership of a particular social groups comprising his family, young Tamils from the north, failed Tamil asylum seekers, Tamil returnees, persons who left

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[41] James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) p 334.

[42] *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at [19].

[43] James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) p 332.

[44] *Mazariegos v Immigration and Naturalization Service* 241 F 3d 1320, 1327 (11th Cir, 2001).. See also *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 442.

[45] *Januzi v Secretary of State for Home Department* [2006] 2 AC 426 at 440. There is some debate as to whether the relocation test is located in the "well-founded fear" or "protection of the home country" aspects of the Convention definition: James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) p 335 - 336; *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at [19]-[22] per Gummow, Hayne and Crennan JJ, cf [54]-[60] per Kirby J. It is not necessary to resolve this debate for present purposes.

Sri Lanka illegally or young Tamils separately and cumulatively. The Tribunal finds that the Appellant is not a refugee.

Complementary protection assessment

69. For the reasons set out above, the Tribunal finds that returning the Appellant to Pakistan would not breach Nauru's international obligations...

It is apparent from the opening words of [69] that in reaching its conclusion as to complementary protection, the Tribunal was relying on what it had said in [68].

48. To adopt the words of Perram J of the Federal Court in a similar context, these passages leave '[t]he impression that there has been carried out a mechanical process of cutting and pasting devoid of cognitive activity'.[46] These misplaced references to country and personal characteristics relevant to the ultimate issue for determination, and which purport to constitute the ratio of the Tribunal's decision, are submitted to go well beyond the acceptable threshold of being 'defect[s] due to "inadvertence, mistake, accident or clerical error"'.[47]

49. In addition to the grave errors in [68], the Tribunal's reasons contain numerous other errors:

a. The Appellant addressed the Tribunal through an Urdu interpreter.[48] At paragraph [2] the Tribunal noted that he used an 'Arabic interpreter'. Arabic is not an official language of Pakistan, Sri Lanka, Iran or the Czech Republic (see below).

b. At paragraph [13] the Tribunal recited that before 2009 the Appellant 'had been living for three years in Mianabad without incident'. After 2003, there was no place where the Appellant lived for one three year period. He lived in [redacted] from 2003 until 2005 (as the Tribunal correctly noted at [10]), but that was not for a full three years.[49] In the three years before 2009, he lived in Karachi[50] and [redacted].[51] In addition, there is no mention of a place called 'Mianabad' in any of the material before the Tribunal. As far as the Appellant's lawyers have been able to ascertain there is no such place in Pakistan with this name, although there is a place with this name in Iran.

c. At paragraph [45] the Tribunal addressed a claim that the Appellant 'was hiding in Marianbad in 2003'. There was also no mention of a place called 'Marianbad' in any of the material before the Tribunal, and (again, as far as the Appellant's lawyers have been able to ascertain) there is no such place in Pakistan or anywhere else, although there is a place called Marienbad in the Czech Republic.

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[46] *SZNZK v Minister for Immigration & Citizenship* (2010) 115 ALD 332 at [38]
[47] See *Handa v Minister for Immigration* (2000) 106 FCR 95 at 101 [17] (in the context of construing legislation) and cf *Bhangu v Minister for Immigration and Border Protection* [2017] FCA 108 at [28] – [32].
[48] CB 112 line 36 sic
[49] CB 46 [19, 21]
[50] CB 42, 104 [10], 146 [line 21], 153 [line 12-14]
[51] CB 57, 151 [13], 192 [12], 195 [25]

50. These errors, together and separately, give the impression that there was a mechanical process of cutting and pasting carried out such that that the analysis was affected by irrelevant considerations or by asking the wrong questions. It is difficult to see, given all of the errors, how the Supreme Court could have concluded that the Tribunal was alert to the particular circumstances of the Appellant.

51. The approach of Perram J in *SZNSK* has been also accepted by Greenwood J in the Federal Court as giving rise to vitiating error. *SZIFI v MIMIA*[52] involved references to material unrelated to the person before the Tribunal in its reasons. This led his Honour to conclude that that Tribunal had asked itself the wrong question, had taken into account irrelevant considerations and had failed to "undertake an undistracted, focused and deliberative assessment of only those facts and circumstances referable to the case of the Appellant".[53] His Honour found that notwithstanding (as in this case) the fact that parts of the decision referred correctly to the Appellant's actual country of origin, and otherwise addressed the Appellant's claims in some detail, the Tribunal erred. Accordingly, the Tribunal's decision was a nullity. His Honour explained:

> Errors which misdescribe an Appellant as an Indonesian and reach conclusionary observations that the tribunal cannot be satisfied that the Appellant holds a well-founded fear of persecution should he return to a country which is identified as other than the country of nationality, suggest that the deliberative process going to the merits of the appellant's case was infused with notions which are erroneous and thus irrelevant to the appellant's case, and suggest that the tribunal member may have had in mind facts, circumstances and considerations referable to other cases.[54]

Those observations are submitted to be apposite to the present case.

52. As to the 'corrigendum', which was not referred to or relied on by the Supreme Court, the Tribunal made[55] its decision on 29 November 2015.[56] On 14 March 2016, the Appellant filed a notice of appeal of that decision in the Supreme Court of Nauru. That notice of appeal identified the fact that 'the Tribunal [sic] decision states that I am a Tamil from Sri Lanka. This is a mistake. I am from Pakistan.' On 6 June 2016[57] – 84 days after the notice of appeal was filed – the Tribunal issued a 'corrigendum' purporting to correct and replace text in its decision more than six months earlier.

53. The Tribunal has no express power to amend or correct a decision once 'made' under the Convention Act.[58] 'Absent specific statutory authority, the power of courts to re-open their proceedings and to vary their orders is constrained by the principle of finality.'[59] This is submitted to apply equally to Tribunals. '[T]he

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[52] [2007] FCA 63.
[53] *SZIFI v Minster for Immigration and Multicultural and Indigenous Affairs* [2007] FCA 63 at [44].
[54] [2007] FCA 63 at [33]
[55] Convention Act s 34(5)
[56] CB 189
[57] CB 205
[58] Convention Act s 34(5)
[59] *Achurch v The Queen* (2014) 253 CLR 141 [14]

principle of finality serves as the sharpest spur to all participants... to get it right the first time.'[60]

54. It follows that the Tribunal's corrigendum was done when it was *functus officio*. It was not open to the Tribunal to purport to publish a corrigendum, especially some six months after the event and after an appeal had been instituted, purporting to substitute additional reasoning for that contained in what was a critical paragraph of its decision.[61] The corrigendum was of no effect at law.[62]

Ground 3: Failure to take into account an integer of the Appellant's objection to internal relocation: the Appellant's children

New grounds should be permitted in this case

55. This ground of appeal, and proposed ground 4, was not advanced in the notice of appeal below. However for the following reasons it is submitted that the Appellant should be permitted to raise them now notwithstanding that they were not in terms raised in the Supreme Court.

56. In respect of the Convention Act, this Court sits as the first court to hear a matter other than by way of first instance judicial review. This Court is, therefore, in a similar position to the Full Court of the Federal Court of Australia in appeals in proceedings initiated under s 44 of the AAT Act, and in appeals from first instance review decisions under s 476 or 476A of the *Migration* Act 1958 (Cth) (the **Migration Act**). In appeals of this kind, new questions of law may be raised on appeal before the Full Court of the Federal Court if it is "expedient and in the interests of justice" to do so.[63] The same test has been applied in this Court where a new point is sought to be raised on appeal.[64]

57. Unlike the Full Court of the Federal Court, the High Court exercises original jurisdiction in the present case. As such, it has the enlarged powers under s 32 of the *Judiciary Act* 1903 (Cth) to:

> grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter; so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined ...[65]

58. It follows that the test for the introduction of new grounds where the High Court exercises original jurisdiction must be at least as liberal as that which applies in

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[60] *Burrell v The Queen* (2008) 238 CLR 218 [16]

[61] Cf *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597 at 603 ([7]-[8]) per Gleeson CJ

[62] Cf *SZMKN v Minister for Immigration & Anor* [2009] FMCA 954 [82-83]

[63] *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73 [19-20] per Griffiths and Perry JJ; *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 at 347 [79]-[80] per Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ; *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 at 598 [46] per Kiefel, Weinberg and Stone JJ.

[64] See, eg, *Water Board v Moustakas* (1988) 180 CLR 491 at 497 per Mason CJ, Wilson, Brennan and Dawson JJ, 506 per Gaudron J.

[65] This power extends, for example, to the reception of new evidence not placed before the court or tribunal below see *Clodumar* at 574 [34]-[35] per French CJ, Gummow, Hayne and Bell JJ; *Federal Commissioner of Taxation v Lewis Berger & Sons (Australia) Ltd* (1927) 39 CLR 468 at 469-470 per Starke J.

an appeal proper. In the present case, it is expedient and in the interests of justice to allow the Appellant to raise new grounds on appeal in this Court for the following reasons:

i. Each of the grounds has merit, for the reasons set out below.

ii. The third ground is strongly linked with matters raised below. In particular, the Appellant raised the issue of the Tribunal's reasons referring to his claim being in respect of Sri Lanka, not Pakistan.[66] This was discussed by the Court below.[67]

iii. The grounds were not run below in the present terms because the Appellant was not represented. In a case such as this it could not be suggested that the Appellant for some strategic advantage did not raise grounds below deliberately.[68]

iv. While the grounds were not raised in terms in the Supreme Court of Nauru, they concern matters which *were* raised before the Tribunal. In particular and as to the third ground, the Appellant (as set out below) did raise as an objection to relocation, the needs of his children. In relation to the proposed fourth ground, he did contend that the MQM has influence throughout Pakistan. No new facts or evidence are relied upon to substantiate the grounds, which each concern questions of law.

v. There would be no relevant prejudice to the Respondent if the Appellant is now permitted to raise the grounds identified below.[69]

The nature of the case also makes it in the interests of justice to allow the new grounds to be raised. It is 'centrally relevant'[70] and a matter of 'particular sensitivity... in refugee cases'[71] that 'serious consequences... may attend a wrongful refusal'.[72] In addition, there is a discernible public interest in this Court determining' the new grounds of appeal which, especially in respect of ground 3, are submitted to raise issues of 'general application' and 'importance'.[73] These factors should also lead to the new grounds being heard and determined on appeal.

Failure to take into account an integer of the Appellant's objection to internal relocation: the Appellant's children

59. The third ground of appeal is that the Tribunal erred in failing to take into account an integer of the Appellant's objection as to why it was not reasonably practicable for him to relocate within Pakistan. That objection to relocation was

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[66] Notice of appeal dated 14 March 2016 at the fifth dot point

[67] CRI 026 v Republic [2017] NRSC 67 [27, 34, 36, 43]

[68] *Linkhill Pty Ltd v Director, Officer of the Fair Work Building Industry Inspectorate* (2015) 240 FCR 578 [70].

[69] *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 [62].

[70] *SZKCQ v Minister for Immigration and Citizenship* [2009] FCA 578 [9].

[71] *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 [22].

[72] *SZEPN v Minister for Immigration and Multicultural Affairs* [2006] FCA 886 [16]; see also *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73 [56-58] per Mortimer J.

[73] *Lobban v Minister for Justice* (2016) 244 FCR 76 [73]-[74], and see also *Parker v Minister for Immigration and Border Protection* (2016) 247 FCR 500 at [31].

on the basis that he has two young children who are 'dependent upon' him,[74] need access to a safe education[75] and who he would be 'forced to take' if he relocated.[76] His submission to the Tribunal was that 'it was too dangerous in Pakistan to attempt to relocate without a familial support network.'[77]

60. In applying the relocation test, the decision-maker must be satisfied that it is reasonable, in the sense of being practicable, for the applicant to relocate to another part of their country of origin. This inquiry "must depend on the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality".[78] The question of whether relocation to an identified place is reasonable is a separate question to whether the applicant faces a real chance of harm in the proposed place of relocation.[79]

> ...a range of issues may become relevant to the question of whether internal relocation is reasonable, depending on the circumstances and the issues raised by an applicant for refugee status, and, when they do, must be carefully regarded by the decision-maker.[80]

61. This inquiry is "fact intensive". "Generalities will not suffice".[81] As explained by Mortimer J:[82]

> ... detailed consideration of the circumstances "on the ground" in the area proposed for relocation will be required. General statements will be insufficient, because what is in issue is the practical and realistic ability of an individual to re-start her or his life in a new place, without undue hardship... . Likewise, the circumstances of that individual – her or his personal strengths and weaknesses, skills, material and family support, will need to be considered in some detail. A broad brush approach will not satisfy the requirements of the task to be performed. In order to determine whether, as a conclusion, relocation is "practicable" and "reasonable" for a particular individual, a level of comfortable satisfaction based on probative material must be reached by the decision-maker about what will face that particular individual and how she or he will cope.

62. The error in this case is a denial of natural justice, contrary to s 22 of the Convention Act. A decision-maker considering the reasonableness of relocation must expressly consider each and every objection raised by the applicant as to

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[74] CB 45, 56, 86
[75] CB 183 line 17 - 28
[76] CB 48
[77] CB105[20]
[78] *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at [24]. See also *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 442.
[79] The relevant authorities on this point are collated at *MZZZA v Minister for Immigration and Border Protection* [2015] FCA 594 [34]; and see also *MZZYC v Minister for Immigration and Border Protection* [2015] FCA 1426 [18]
[80] *MZZQV v Minister for Immigration and Border Protection* [2015] FCA 533 [68] endorsed by the Full Court of the Federal Court at *MZAEU v Minister for Immigration and Border Protection* [2016] FCAFC 100 [33]
[81] *MZANX v Minister for Immigration and Border Protection* [2016] FCA 307 at [51].
[82] *MZANX v Minister for Immigration and Border Protection* [2016] FCA 307 at [55].

why relocation is not reasonably practicable for him or her. Objections to relocation are materially the same in this respect as integers of a protection claim itself. To fail to deal with a claim of that kind involves a constructive failure to exercise jurisdiction and a denial of procedural fairness.[83]

63. Section 22 of the Convention 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.[84]

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[85] and a corresponding entitlement to be heard by the decision-maker when the information is given.[86] 'Proceedings before the Tribunal are not adversarial; and issues are not defined by pleadings, or any analogous process.'[87]

64. In this case, the Tribunal failed to respond to a substantial, clearly articulated argument (namely, that the Appellant would and could not relocate to a place where his young family would not be safe, educated and provided for[88]) relying upon facts established by the material before the Tribunal (namely, that the Appellant and his wife had two children, aged 4 and 6 at the relevant time).[89] The Tribunal did not consider these matters.

65. The Tribunal's findings on relocation are vague and ambiguous. The Tribunal did not identify where it was in Punjab – an area roughly the size of Victoria, but with 91 million people[90] - that the Appellant could reasonably relocate. It notes that he would have 'access to family support networks in Punjab'. If [redacted] was where the Tribunal intended for the Appellant to relocate for reason of family support, it is notable that:

a. It does not say so in terms, albeit that the [redacted] is one postulated place in Punjab that the Tribunal mentions;

b. It did not reject nor raise any credibility concerns about the Appellant's claim that when he last lived in or near [redacted] he was only safe because

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[83] *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].
[84] *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].
[85] *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.
[86] *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.
[87] *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at [1]
[88] CB 183 (P-73.18-20).
[89] CB 8.
[90] CB 200 [58]

he was in hiding,[91] albeit that it did note that he did not 'experience[e] any harm' when he lived there.[92]

Given the evidence before the Tribunal, [redacted] was not a place where the Appellant had previously been safe except when he was in hiding. For these reasons, the Tribunal should be taken to have meant that somewhere else, including Lahore, is where he could relocate in Punjab. That being so such relocation necessarily required his young family to also relocate.

66. The only possible reference to the Appellant's children is at [65] of its Reasons, where the Tribunal concluded that the Appellant "will be able to ... live securely and establish a normal life there [ie in Punjab] with his family". This passing, generalised reference to the Appellant's "family" or the ability to live a "normal life" is submitted to be insufficient to demonstrate that the Tribunal considered the Appellant's objection that he would not be able to reasonably relocate his young children with their needs as a family.

67. The Tribunal breached s 22(1) of the Convention Act and thereby committed an error of law by failing to consider a substantial, clearly articulated claim of the Appellant arising as an objection to relocation. That failure led the Tribunal into the consequential error of not considering whether Nauru would be in breach of its international obligations in returning the Appellant to Punjab, Pakistan, an action precluded by s 4(2) of the Convention Act.

Proposed new ground 4 – no evidence to support critical finding

68. The Appellant seeks leave to rely on an additional ground of appeal. This ground raises as a question of law, whether there was any evidence that was before the Tribunal or referred to in its reasons capable of supporting a critical finding of the Tribunal about the reach of the group (MQM) that harmed the Appellant elsewhere in Pakistan, to the place where it concluded he could reasonably relocate. Whether there is evidence that supports a finding of fact is a question of law.[93]

69. At [59] of its reasons, the Tribunal identified that a reason the Appellant could reasonably relocate in Punjab was that there is an 'absence of power and influence in Punjab' by MQM, through which [redacted] had previously harmed the Appellant. This conclusion was apparently based on a finding two paragraphs earlier that MQM 'has little or no influence or power outside Sindh.'

70. No citation or source is identified for this conclusion. No material identified by the Tribunal or put to it by the Appellant supports it either.

71. In fact, the material identified by the Tribunal is submitted to be to the contrary. As the Tribunal noted at [54], the MQM was reportedly 'allied to the Pakistani military'. The information relied on in respect of that conclusion is a 2011 report from the International Crisis Group which itself notes that the PPP, the party with the largest popular vote in hung parliament following elections in 2008, had

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[91] CB 46 [19], 56, 136 line 43-44, 139 line 43-44

[92] CB 200 [58, 59]

[93] See e.g. *FCT v Trail Brothers Steel & Plastic Pty Ltd* (2010) 186 FCR 410 at 415 [13] per Dowsett and Gordon JJ citing *Minister for Immigration and Multicultural Affairs v Al-Miahi* (2001) 65 ALD 141 at [34]; Edmonds J generally agreed at 426 [62].

formed 'unstable coalitions at the centre and in the provinces with parties allied with the military, most notably the Muttahida Quami Movement (MQM).' The MQM was described as 'a coalition partner in both the centre and the Sindh government.'[94] The information relied on by the Tribunal does not support the finding of fact made by it, that there was an absence of power and influence held by the MQM in Punjab.

72. Further the evidence of the Appellant on this topic, which was not rejected, nor the subject of any adverse credibility assessment, was consistent with the independent country information.[95] When the issue of MQM's lack of power or influence outside Sindh was raised, in terms, with the Appellant at the Tribunal hearing he reiterated, through an interpreter, that MQM are 'still attached to the military and the government and they can do anything anywhere'.[96]

73. It is well established that an absence of evidence which is relevant and logically probative of a finding by a Tribunal can provide a basis for setting aside an administrative decision.[97] There was no evidence to support the Tribunal's conclusion that MQM had no power or influence in the places to which it found the Appellant could reasonably relocate. It follows that the Tribunal's decision was infected by an error of law in this respect also.

VII STATUTORY PROVISIONS

74. The applicable statutory provisions are set out in Annexure A.

VIII ORDERS SOUGHT

75. The orders sought by the Appellant are:

(1) The appeal be allowed.

(2) The orders of the Supreme Court of Nauru made on 29 August 2017 be set aside and in lieu thereof it be ordered that the appeal to the Supreme Court be allowed.

(3) A declaration that the Appellant is entitled to complementary protection pursuant to s 4(2) of the *Refugees Convention Act.*

This declaration is sought if ground 1 is upheld; it is intended to avoid the need for a remittal.

(4) The matter be remitted to the Refugee Status Review Tribunal for reconsideration according to law.

Remittal to the Tribunal rather than to the Supreme Court (if only ground 2 is upheld) is submitted to be preferable. It would be undesirable for the

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[94] Ibid p 2

[95] CB 46-47 [25, 34], 183 [20]

[96] CB 177 [36-37]

[97] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at p 358 per Mason CJ and p 367 per Deane J; *GTE (Aust) Pty Ltd v Brown* (1986) 14 FCR 309 at 336-337 per Burchett J; *Sagar v O'Sullivan* (2011) 193 FCR 311 at 322 per Tracey J; *Minister for Immigration and Multicultural and Indigenous Affairs v VOAO* [2005] FCAFC 50 at [5] and [13] per Wilcox, French and Finkelstein JJ; *SZMWQ v Minister for Immigration and Citizenship* (2010) 187 FCR 109 at [121]-[123] per Flick J (Besanko J agreeing); *Minister for Immigration and Citizenship v SZOCT* (2010) 189 FCR 577 at [22]-[26] per Jacobson J and [80]-[82] per Nicholas J; see also *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1047 per Lord Wilberforce

matter to be remitted to the Supreme Court, which might itself remit the matter to the Tribunal. In any event if the matter is to be remitted to the Supreme Court it is submitted that it should not be remitted to either Crulci J or Khan J. That is because Crulci J (as appears at pages 4-5 of the transcript below) indicated that she would "have a discussion with my brother judge" and "have a chat to Judge Khan and see what his thoughts are" before delivering reasons, which gives rise to concerns about whether her Honour failed to discharge her judicial function by reference only to the material that was properly before her.

(5) The Respondent pay the costs of the Appellant of this appeal to the High Court of Australia.

(6) Such further or other orders as the Court deems appropriate.

IX ESTIMATE OF TIME

76. The Appellant estimates he will require 2.5 hours to present oral argument. If this matter was listed with DWN027 or EMP144, this estimate might be revised down, on account of ground 1 in this appeal being substantively common to all three appeals.

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