IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M131 of 2017

BETWEEN

CRI026
Appellant

AND

Republic of Nauru
Respondent

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APPELLANT'S SUBMISSIONS IN REPLY

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I THESE SUBMISSIONS ARE SUITABLE FOR INTERNET PUBLICATION.

II REPLY

1. Contrary to Respondent's submissions dated 8 November 2017 (**RS**) **[4]** and as noted at Appellant's submissions dated 17 October 2017 at [27], two of the grounds of appeal were advanced below, or the issues were before the Supreme Court of Nauru. To the extent that leave is required in relation to any of the grounds that the appellant seeks to advance, it should be granted for the reasons set out in the appellant's primary submissions.

Ground 1

2. At **RS [15]**, the Respondent criticises the Appellant's use of the term 'complementary protection' as an 'omnibus expression… of imprecise analytical foundation'.

3. Section 4(2) of the Act states that Nauru must not 'expel or return any person to the frontiers of territories in breach of its international obligations'.[1] RS at [9] accepts that Nauru's international obligations include those arising under the ICCPR and in light of the recent observations of this Court in *HFM045 v Nauru*,[2] it is also the case (and there does not appear to be any dispute about this) that they include those arising under clause 19(c) of the 2013 MoU between Australia and Nauru. Those instruments, as well as other international treaties to which Nauru is party[3] contain non-refoulement obligations known collectively as 'complementary protection' – so called because they complement the protection obligations under the Refugees Convention.[4] Article 7 of the ICCPR and cl 19(c) of the MoU are those most relevant to this case.

4. At **RS [16]**, the Respondent adopts the test for a finding of complementary protection set out in the relevant UN Committee's General Comment. The Appellant agrees that that is the test. However, at **RS [17]**, the Respondent adopts an alternative test from an individual complaint determined more than a decade before the General Comment, namely in the matter of *Kindler*. That formulation adds the 'necessary and foreseeable' gloss.

5. Those additional words make no difference given the facts of this case, but it is submitted that there is no textual support for their addition and they do not alter the meaning of the test for making out a complementary protection claim. Other decision-makers support this conclusion:

   a. The same Committee that decided the *Kindler* complaint has, in a more recent recommendation concerning non-refoulement under the ICCPR, expressly equated 'real risk' with something that is 'necessary and foreseeable';[5]

   b. This is also supported by the treatment given to the same terms by Australian courts interpreting a codification of the 'necessary and foreseeable' formulation. Section 36(2)(aa) of the Australian *Migration Act* 1958 (Cth) provides that:

      > A criterion for a protection visa is that the applicant for the visa is:… (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has

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[1] See also the definition of 'complementary protection' in s 3, read together with ss 6(1), 31, 33 and 34.

[2] [2017] HCA 50 (**HFM045**) at [30].

[3] Office of the High Commissioner for Human Rights, *Reporting Status for Nauru* (11 November 2017) <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=NRU&Lang=EN>.

[4] See generally, McAdam, J., *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford, 2007) especially p 23; cf the observation of this Court in HFM045 at [3].

[5] *ARJ v Australia*, Communication No 692/1996, UN Doc CCPR/C/60/D/692/1996 [6.8], [6.10], [6.14]

substantial grounds for believing that, as a *necessary and foreseeable consequence* of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm [emphasis added].

Of that provision, a five member Full Court of the Federal Court concluded[6] that even with the addition of the words 'necessary and foreseeable', the threshold for making out a protection claim was the same as the threshold for making out a claim under the Refugees Convention, namely that there is a 'real chance'.

In both examples above it was found that the words 'necessary and foreseeable' corroborated 'real risk' and added nothing additional of substance.

6. In any event, the relevant passage from *Kindler* is better read as supporting the Appellant's position. The relevant passage states, at [6.2]:

> [I]f a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.

That passage supports the proposition that a State will infringe its international obligations by returning a person to another jurisdiction where he or she will be exposed to relevant harm in part of the other jurisdiction. The relevant inquiry is as to the existence of a real risk.[7] *Kindler* does not support the proposition that international obligations will not be infringed if a person is returned to the frontiers of a State where he or she will not be exposed to a real risk of relevant harm provided that he or she remains in a confined geographical area.

7. This is not surprising when one considers that the ICCPR's implied non-refoulement obligation arises within an instrument containing an express right to freedom of movement. Article 12 of the ICCPR provides that:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country.

As with domestic statutory interpretation, international treaties should be read and interpreted as a whole.[8] It would be inconsistent with Article 12 to read Articles 6 and 7 as permitting return to a country conditional on that person being denied freedom of movement and requiring that that person be effectively restricted to a specific safe area, as the Respondent

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[6] *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 at 551 [246] per Gordon and Lander JJ (Besanko and Jagot JJ agreeing at 557-8 [297], Flick J agreeing at 565 [342]) (**SZQRB**); see also *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211 at [31] per Lander, Jessup and Gordon JJ (**MZYYL**)

[7] *HFM045* at [30]

[8] *Vienna Convention on the Law of Treaties* Article 31(1); see also *FTZK v Minister for Immigration and Border Protection* (2014) 88 ALJR 754 at [13] per French CJ and Gageler J and *Competence of the International Labour Org. in regard to International Regulation of Conditions of Labour of Persons Employed in Agriculture*, Advisory Opinion, 1922 P.C.I.J. (ser. B) No. 2 (Aug. 12) [24]; *Thiel v FCT* (1990) 171 CLR 338 at 356-7 per McHugh J (with whom Mason CJ, Brennan and Gaudron JJ agreed at 344), *FCT v Lamesa Holdings BV* (1997) 77 FCR 567 at 603-605 and *McDermott Industries (Aust) Pty Ltd v FCT* (2005) 142 FCR 134 at 143-145.

would have it. Thus, the text of the ICCPR itself is inconsistent with the existence of the "relocation qualification" upon which the Respondent relies.

8. At **RS [18]**, the Respondent relies on the decision of Perram J in *Anochie*. His Honour's reference to a "high standard" was not directed to questions of relocation. His Honour's remarks were directed, as is made clear by the qualifying discussion at [63]-[67], to explaining that the relevant inquiry is "whether a necessary and foreseeable consequence of deportation would be a real risk of irreparable harm".

9. The inquiry as to the consequence of removal looks at the circumstances prevailing in the country of origin: it would be erroneous to conclude that there is no necessary and foreseeable risk of irreparable harm in the event of removal to the frontier of a particular State, where there is such a risk in part of the State in question. In the Appellant's submission, if there is a real risk of irreparable harm in part of the State in question (and the Respondent does not dispute that there is in this case), it follows that a necessary and foreseeable consequence of removal to the State in question is a real risk of irreparable harm. It does not follow that there is no real risk if the person is returned to a country where there is a real risk of harm, because the risk might not be prevalent in all of the country in question.

10. Thus, the inquiry does not permit of an "internal relocation" qualification. The inquiry is simply whether there is a real risk, if the person is to be returned to the country at all. Adopting the Respondent's analysis would be inconsistent with the manner in which the non-refoulement obligation has been given effect by s 4(2) of the Convention Act, which expressly refers to "the frontiers of territories" and also with cl 19(c) of the MoU.

11. As a matter of text, cl 19(c) is engaged where there is a real risk in the country in question; there is no exclusion in circumstances where the risk does not exist in part of the country. The text does not accommodate any "internal flight" option as a qualification to the inquiry as to whether or not there is a real risk in the country. It would have been easy for the parties to agree wording providing expressly for such a qualification if one had been intended. This is especially so given that one of those parties, Australia, expressed such a carve-out in its own domestic legislation concerning the same international obligation.[9]

12. Adopting the construction for which the Appellant contends would enable the ICCPR, the MoU and the Convention Act to be read harmoniously, would enable Articles 6 and 7 of the ICCPR to be read harmoniously with Article 12 and would give sensible operation to the prohibition on returning persons to "the frontiers of territories" in s 4(2) of the *Convention Act* and to "another country" in cl 19(c) of the MOU.

13. In any event, the decision in *Anochie* should be approached with caution. It was heard before the decision of the Full Court of the Federal Court in *MZYYL*, but was decided shortly after it. *MZYYL* is not referenced and *Anochie* articulates a standard which arguably conflicts with the approach taken the Full Federal Court, the five member Full Court in *SZQRB* and this Court in *HFM045*.[10]

14. At **RS [20]-[22]**, the Respondent relies on the ECHR decision in *Sufi and Elmi* concerning 'subsidiary protection', not 'complementary protection'. 'Subsidiary protection' is a unique

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[9] *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 at [1] per Kiefel CJ, Nettle and Gordon JJ, at [33] per Gageler J and at [79] per Edelman J approving the reasons in *SZQRB* at [99-100] per Gordon and Lander JJ (Besanko and Jagot JJ agreeing at [297], Flick J agreeing at [342])

[10] For example, contrast a central conclusion in the reasoning at *Minister for Immigration and Citizenship v Anochie* [2012] FCA 1440; 209 FCR 497 [79-80] on the one hand with, on the other, *HFM045* at [30]-[32]; *SZQRB* at [246] per Gordon and Lander JJ (Besanko and Jagot JJ agreeing at [297], Flick J agreeing at [342]) and *MZYYL* (2012) 207 FCR 211 at [31] per Lander, Jessup and Gordon JJ

term defined by a legal instrument by and for European states.[11] Among the differences between international complementary protection law and European subsidiary protection law are that **(a)**, complementary protection prohibits return to 'cruel … treatment or punishment' (ICCPR Art 7) where subsidiary protection does not (Directive Art 15(b)), **(b)** subsidiary protection prohibits return to a place where there is a 'serious and individual threat to a civilian's… person by reason of indiscriminate violence in situations of international or internal armed conflict' (Directive Art 15(c)) where complementary protection does not use this qualification at all;[12] and **(c)** subsidiary protection is of a prescribed one year duration (Directive Art 24(2)), where complementary protection has no fixed time limit. *Sufi and Elmi* should be read in light of this because it was a decision under that Directive.

15. The decision in *Sufi and Elmi* should also be viewed in light of the fact that the European instrument which created 'subsidiary protection' has an express relocation provision. Article 8 of the Directive[13] with which *Sufi and Elmi* was concerned[14] provides:

> As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she:
>
> (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or
>
> (b) has access to protection against persecution or serious harm as defined in Article 7;
>
> and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.

Thus it is unsurprising that the European Court noted that 'it is a well-established principle that persons will generally not be in need of … subsidiary protection if they could obtain protection by moving elsewhere in their own country'. This says nothing about complementary protection under Nauru's international obligations.

16. At **RS [22]**, the Respondent relies on the 'views' of the Committee in *BL*. On one reading, that recommendation emphatically supports the proposition being put by the Appellant. The final sentence of the last, individual, *concurring* opinion states:

> If a person would genuinely be at risk of becoming the victim of violations of article 6 or article 7 of the Covenant if that person were to be expelled or extradited from a State party to another State (whether or not it is a party to the Covenant), the Committee should find a violation regardless of whether or not there are any safer areas within the country to which the victim would be sent.[15]

17. The views expressed by the other members of the committee are inconsistent with what was said by Lander, Jessup and Gordon JJ in *MZYYL* [18] that the ICCPR provisions "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

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[11] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (**Directive**) Art 2(e)

[12] This might factually overlap in extreme cases with the prohibition on return to 'arbitrary deprivation of life' (ICCPR Art 6(1)).

[13] Directive

[14] *Sufi and Elmi v United Kingdom* (2012) 54 EHRR 9, 219 [30] immediately under the heading 'Relevant European Union Law'

[15] Individual opinion of Committee member Fabián Omar Salvioli (concurring) at [7]

country." To the extent that some of the opinions in *BL v Australia* suggest a different outcome, they should not be adopted. Among the reasons for this is that while some of the conclusions seem clear, the reasoning to them is opaque or absent.

18. In relation to the Refugees Convention it is not the case, contrary to **RS [23]**, that the "internal flight" principle arises by implication "because the Refugees Convention is framed around the geopolitical unit of 'States'." The Respondent relies on this proposition to suggest that because the ICCPR operates at the level of relations between States also, an examination of relocation is also appropriate. However, the proposition is incorrect: as this Court has explained, the issue of whether relocation is reasonable arises under the Refugee Convention due to the causative condition found within the text of cl 1A(2) of that instrument.[16] Adopting that reasoning, the "relocation principle" is read into the text of the Refugee Convention by reason of the causative condition in the text of cl 1A(2) of the Refugee Convention, namely that a person "owing to well-founded fear ... is outside the country of his nationality". The causative condition that was critical to the analysis in *SZATV* and *SZSCA* is absent from the instruments which give rise to complementary protection. Neither the text of the ICCPR nor the MoU imports the causative requirement seen in cl 1A(2) of the Refugee Convention.

Ground 2

19. The Appellant relies on his primary submissions. It is not the point that the Tribunal got his details right some of the time (see **RS [33-34]**). The obvious and serious errors in other parts of the decision demonstrate the underlying error. In context, the errors in this case point less to 'inadequate proof reading' and more to no reading at all.

Ground 3

20. The Respondent is incorrect to claim that there is 'no obligation upon the Tribunal to identify the place of relocation' (**RS[46]**). In *Plaintiff M13*, Hayne J (sitting alone) found jurisdictional error for this reason.[17] In any event, this is not the gravamen of the complaint in ground 3 – it is focused instead on the lack of consideration of an important objection this Appellant had to relocating in Pakistan, namely his family situation.

Ground 4

21. The Appellant seeks leave to put before this Court only those materials to which both he and the Respondent refer in submissions (**RS [52]-[54]**). Those documents are easily identifiable and speak for themselves. Any prejudice to the Respondent that arises from those documents needing to be considered by this Court is outweighed by the importance of the issue being determined.

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[16] *SZATV v Minister for Immigration* (2007) 233 CLR 18 at 24 [15] per Gummow, Hayne and Crennan JJ; at and 25-6 [19] adopting the reasoning of Lord Bingham in *Januzi v Secretary of State for Home Department* [2006] 2 AC 426 at 440. That reasoning was approved by French CJ, Hayne, Kiefel and Keane JJ in *Minister for Immigration v SZSCA* (2014) 254 CLR 317 at 326 [21] to 327 [24].

[17] *Plaintiff M13/2011 v Minister for Immigration and Citizenship* (2011) 277 ALR 667 at 671 [19], 672 [22].