IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M131 of 2017

BETWEEN:

CRI 026
Appellant

and

REPUBLIC OF NAURU
Respondent

REDACTED

# RESPONDENT'S SUBMISSIONS

## Part I: PUBLICATION ON THE INTERNET

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

## Part II: ISSUES

2. The issues in this appeal from the Supreme Court of Nauru are:

   i. whether the appellant should have leave to rely on new grounds, raised for the first time on appeal to this Court;

   ii. whether there is any error of law affecting the finding of the Refugee Status Review Tribunal (**the Tribunal**) that the Republic of Nauru would not act in breach of its international obligations if the appellant was returned to Pakistan, by reason of the appellant having protection available to him in Pakistan if he were to relocate away from the place where he feared harm in Pakistan;

   iii. whether a passage included in the Tribunal's reasons in error justifies an inference that the Tribunal took into account irrelevant considerations or asked itself the wrong question;

Filed on behalf of the Respondent by:
Rogan O'Shannessy
Level 30, 35 Collins Street
Melbourne, Victoria
3000



Date of this document: 8 November 2017
File ref: HCA 17-M131
Telephone: 0457 000 678
Facsimile: *none available*
E-mail: roganoshannessy@naurursd.com

iv. whether the Tribunal failed to respond to any substantial, clearly articulated argument made by the appellant, in objecting to relocation;

v. whether the Tribunal made a finding for which there was no evidence, in finding that there was an absence of MQM power and influence in Punjab?

## Part III: 78B NOTICE NOT REQUIRED

3. The Republic has considered whether any notice is required under s 78B of the *Judiciary Act 1903* (Cth) and considers that such notice is not required.

## Part IV: FACTUAL BACKGROUND

4. The Republic does not dispute the appellant's summary under the heading "Factual Background".

## Part V: RELEVANT PROVISIONS

5. The Republic submits that the legal instruments relevant to this case are:

   i. *Refugees Convention Act 2012* (**the RC Act**) as in force on 29 November 2015.

   ii. *International Covenant on Civil and Political Rights* (**the ICCPR**).[1]

## Part VI: ARGUMENT

### Preliminary

6. The appellant's notice of appeal to the Supreme Court of Nauru did not identify any "point of law". The four grounds that the appellant seeks to rely upon now are all new grounds, raised for the first time on appeal, which would involve a departure from the way in which the case was conducted before the Supreme Court. A party is bound by the manner in which a case was conducted before

[1] opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

the primary court, subject to the discretion of the appellate court to allow a departure from that course where it is expedient to do so in the interests of the administration of justice.[2] This depends on all relevant circumstances, including why the grounds were not advanced below, any prejudice suffered by affected parties, the nature of the argument that would be advanced if leave were granted, and the merits of new grounds.

7. The Republic opposes the grant of leave because each of the grounds lack sufficient merit in the relevant sense, and therefore, it is not expedient in the interests of the administration of justice to grant leave.

10 8. Further, in relation to proposed grounds 2 and 4, the Republic opposes the grant of leave because, had these grounds been raised in the Supreme Court, it might have led evidence in answer to them. This is detailed below.

**Ground 1**

*"Complementary protection" under the RC Act*

9. Nauru has signed the ICCPR and accepts that this creates "international obligations" within the meaning of the definition of 'complementary protection' in s 3 of the RC Act. Accordingly, the Tribunal is obliged to determine claims made in relation to the ICCPR, arising through the combination of:

   i. the definition of 'complementary protection' in s 3 of the RC Act;

20 ii. the obligation on the Secretary under s 6(1) of the RC Act;

   iii. the implied requirement to resolve an application for merits review of the decision of the Secretary under s 31 of the RC Act; and

   iv. the functions, powers and duties of the Tribunal under ss 33 and 34 of the RC Act;

   and not by dint of s 4(2) of the RC Act.

---

[2] See *Martinaj v Minister for Immigration* [2016] FCA 868, [13] and the cases cited there.

10. Section 4(2) of the RC Act does not impose any obligation upon the *Tribunal*. Rather, s 4(2) of the RC Act is an expression of the principle of non-refoulement as it relates to the *Republic*, and a statement that the Republic must not expel or return any person in breach of Nauru's international obligations arising in this case under the ICCPR.

*Appellant's complementary protection claims and reasons of the Tribunal*

11. The appellant's primary case before the Tribunal was that he was a refugee under the RC Act, through the operation of the Refugees Convention (BD 73 [2], BD 77-87 [29]-[49]). A secondary claim was that his circumstances engaged Nauru's international obligations pursuant to arts 3 and 7 of the ICCPR (BD 87-88 [50]-[59]). No submissions were made to the Tribunal to the effect that there was no "relocation" qualification applied to Nauru's international obligations under the ICCPR.

12. In paragraph 69 of its reasons, the Tribunal states that the appellant was not owed complementary protection "For the reasons set out above". This is a reference to the extensive reasoning set out in paragraphs 9-66 of the Tribunal's reasons, dealing with the factual issues in the appellant's case, and the analysis of whether the appellant was a refugee under the RC Act (Reasons [56]-[65]).[3]

13. With the words "For the reasons above" in paragraph 69 of the Tribunal's reasons, the "relocation analysis" for the purpose of assessing whether the appellant was a refugee is imported as the dispositive analysis for the purpose of the appellant's complementary protection claims.

*No error of law is shown in the Tribunal's approach*

14. The appellant's argument on ground 1 centres around the submission that the "complementary protection obligation that arises by reason of Nauru's international obligations is not limited in any relevant way" (AS [35]). This is said to create an "absolute prohibition on return" (AS [36]), which means that "the

---

[3] No difficulty arises with such cross referencing: *SZSGA v Minister for Immigration* [2013] FCA 774, [57]; *SZSHK v Minister for Immigration* [2013] FCAFC 125, [35].

Tribunal erred in applying a relocation test to the appellant's claim for complementary protection" (AS [42]).

15. Putting aside the difficulties with the appellant's use of the omnibus expression, "complementary protection" (there is no "Complementary Protection Treaty"), and the imprecise analytical foundation for the appellant's submissions, the Republic submits that the appellant's argument in AS [32]-[33] is misconceived.

16. International jurisprudence has identified, and the Republic accepts, that art 2 of the ICCPR gives rise to an obligation not to return or expel a person to a country where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by arts 6 and 7 of the ICCPR.[4] Those provisions are as follows:

> *Article 2*
>
> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. ...
>
> *Article 6*
>
> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. ...
>
> *Article 7*
>
> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

---

[4] See 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/Add.13 (26 May 2004), [12].

17. The obligation in article 2 has been understood to prohibit refoulement of a person to a country where, as a necessary and foreseeable consequence of return to that country, there is a real risk that the person may suffer the kind of harm addressed in Articles 6 and 7 of the ICCPR.[5]

18. The Republic submits that this is a "high standard",[6] which will not be met where it is reasonable, in the sense of practicable, for a person to relocate to another part of their own country and obtain protection in that place of relocation (ie, sometimes referred to as an internal flight option). That is because, if the relevant harm can reasonably be avoided by internal relocation, the risk of such harm cannot be said to be a necessary consequence of return to the country in question.

19. This analysis is supported by acceptance in international jurisprudence of the existence of a "relocation qualification" to international protection obligations under the ICCPR, and comparable obligations.

20. In *Sufi and Elmi v United Kingdom*,[7] after referring to earlier authorities on the proposition, the European Court of Human Rights affirmed that the availability of internal relocation (or internal flight) was a qualification to the relevant obligations owed by the United Kingdom under the Convention for the Protection of Human Rights and Fundamental Freedoms (**the European Convention**)[8] (at [266]).[9] The Court said:[10]

> It is a well-established principle that persons will generally not be in need of asylum or subsidiary protection if they could obtain protection by moving elsewhere in their own country.[11] [emphasis added]

---

5 Human Rights Committee, *Views: Communication No 470/1991*, 48th sess, UN Doc CCPR/C/48/D/470/1991 (30 July 1993), 9-10 [6.2].
6 *Minister for Immigration v Anochie* (2012) 209 FCR 497, [62].
7 (2012) 54 EHRR 9, 266 [266].
8 opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).
9 See also *Salah Sheekh v The Netherlands* (2007) 45 EHRR 50, 1198-1199 [141].
10 *Sufi and Elmi v United Kingdom* (2012) 54 EHRR 9, 220 [35].
11 See also Hathaway and Foster, 'Internal protection/relocation/flight alternative as an aspect of refugee status determination' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003: CUP), 357.

21. As the appellant accepts (AS [37]), this reasoning applies with equal force to the ICCPR.

22. In *BL v Australia*,[12] the UN Human Rights Committee (**UNHRC**) considered a communication authored by a Senegalese national who was found by the Australian legal system not to have a well-founded fear of persecution for the purposes of the Refugees Convention, because he could access State protection in Senegal by relocating to a place within Senegal where he would not be exposed to the claimed fear of harm. Given those findings, ten of fourteen members of the UNHRC adopted the view that removing the man to Senegal would not violate Australia's obligations under arts 6 or 7 of the ICCPR (at [7.4]). Two other members, concurring in the decision but giving separate additional reasons, described the "internal flight alternative" as a "basic rule of international refugee law as well as international human rights law". They also stated that "Individuals are not in need of international protection if they can avail themselves of the protection of their own State; if resettling within the State would enable them to avoid a localized risk, and resettling would not be unreasonable under the circumstances, then returning them to a place where they can live in safety does not violate the principle of non-refoulement", citing *SYL v Australia*,[13] *Sufi and Elmi v United Kingdom*,[14] and *Omeredo v Austria*[15] as authority for the proposition. (One member expressed a contrary view.)

23. Of course, internal flight is not mentioned in the Refugees Convention as an exception to the express non-refoulement obligation there set out. Rather, it arises by implication because the Refugees Convention is framed around the geopolitical unit of 'States'. International and national jurisprudence has accepted that for any *obligation* to arise upon a State to afford protection to an asylum seeker, the person seeking protection must be unable to obtain that protection from their own State (or country of nationality).[16] This implication

---

[12] Human Rights Committee, *Views: Communication No 2053/2011*, 112th sess, UN Doc CCPR/C/112/D/2053/2011 (7 January 2015).
[13] Human Rights Committee, *Views: Communication No 1897/2009*, 108th sess, UN Doc CCPR/C/108/D/1897/2009 (11 September 2013).
[14] (2012) 54 EHRR 9.
[15] (European Court of Human Rights, Chamber, Application No 8969/10, 20 September 2011).
[16] The application of Refugees Convention protections to the circumstances of stateless persons may be set aside for present purposes.

derives from the fact that under international law, principal responsibility for protection lies with an individual's own State, and a foreign State does not owe protection obligations that could be provided domestically. Flowing from this observation is the examination of whether a person might reasonably be able to 'relocate' to an area within his or her country of nationality where that protection can be accessed.[17] The ICCPR also operates at the level of relations between States.

24. A specific response is required to some the appellant's submissions.

a. The suggestion that the obligation under art 7 of the ICCPR is "absolute" and makes no provision for exception or derogation (AS [35]-[38]) does not assist the appellant. In the context of return or expulsion, the obligation is only engaged if relocation is not available; if relocation is available, then the obligation is simply not engaged (absolute though it may be). *Soering v United Kingdom* does not suggest otherwise, and the passage quoted at AS [37] says no more than that the comparable obligation under the European Convention may not be suspended. That is immaterial if the obligation is not engaged in the first place.

b. The appellant has failed to identify any authority or support for the postulated "reason" for the inclusion of express relocation provisions in the domestic arrangements of Australia, the European Union, the United Kingdom, Canada and New Zealand (AS [39]). This is a bald assertion, which does not assist his argument.

c. In Australia, the Migration Act includes a codified regime of complementary protection, rather than picking up the test under international law. Hence, the reference to *Minister for Immigration v MZYYL*[18] does not assist the appellant. The extracted statement (AS [40]), with respect to relocation, was made in the course of explaining why it was not helpful to refer to authority on the interpretation of the treaties in construing the regime in the Migration

---

[17] Hathaway and Foster, *The Law of Refugee Status* (2014, 2nd ed), 332. The Republic accepts that an alternative analysis to the same conclusion is available, and has been preferred in Australia: *Minister for Immigration v SZSCA* (2014) 254 CLR 317. However, this analysis remains valid.

[18] (2012) 207 FCR 211.

Act. The Court was not purporting to decide whether there is any internal relocation qualification to relevant obligations under the ICCPR.

25. It follows that the appellant's submissions should be rejected, and that there is no error of law affecting the decision of the Tribunal by reason of applying a relocation qualification in assessing Nauru's international obligations arising under the ICCPR for the purposes of complementary protection.

**Ground 2**

26. The appellant alleges that there are four instances in the reasons of the Tribunal where it has made errors, justifying an inference that the Tribunal took into account prohibited irrelevant considerations, or asked itself the wrong question.

27. The Republic submits that no such inference should be made.

28. The first error is in paragraph 68 of the Tribunal's reasons, where the Tribunal refers to Sri Lanka as the country of nationality and to the appellant as being Tamil (AS 47]). The Republic accepts that this was wrong.

29. The second error is in paragraph 2 of the Tribunal's reasons, where the Tribunal mentions that the appellant appeared at the hearing before the Tribunal with the assistance of an Arabic interpreter (AS [49(a)]). The Republic accepts that this was wrong, in that the appellant appeared with the assistance of an Urdu interpreter.

30. The third alleged error relates to paragraph 13 of the Tribunal's reasons (AS [49](b)). First, the paragraph is criticised for misstating the chronology of events. Aside from asking this Court to delve into the primary facts, this criticism is misplaced because the Tribunal was summarising the contents of the appellant's Refugee Status Determination, or RSD, interview and there is no evidence that that recitation was wrong. To the extent that what was said in that interview is in issue, the point should not be allowed to be raised for the first time on appeal to this Court because, if raised below, it could have been met by tendering a recording or transcript of the RSD interview (which was a separate hearing from the Tribunal hearing).

31. To the extent that the appellant complains about the reference to "Mianabad", this is plainly a reference to "Moeenabad" which was mentioned at dot point five of paragraph 12 of the Tribunal's reasons (BD 192) and in paragraph 18 of his statement dated 8 March 2014.

32. The fourth error is in paragraph 45 of the Tribunal's reasons, where the Tribunal refers to "Marianbad". When read fairly and in the context that the Tribunal is there referring to the appellant being in hiding in 2003 (which according to his statement was in "Moeenabad"), this is plainly no more than a typographical error.[19]

33. Whether taken individually or together, these errors do not point to any failure by the Tribunal to perform its statutory task (however such an error might be described for the purpose of formulating a ground of appeal).

    a. Reading the reasons of the Tribunal fairly as a whole, it is apparent that the Tribunal undertook an extensive intellectual engagement with the appellant's factual claims, relevant country information, and the appropriate domestic and international legal instruments.

    b. The Tribunal identified that the appellant was a Pakistani national (Reasons [8]), and accurately summarised his background (Reasons [9]-[10]).

    c. The Tribunal set out a fair summary of the appellant's factual claims (Reasons [11]-[39]). These paragraphs reveal an active intellectual engagement with the appellant's case. The Tribunal evaluated the merits of the appellant's claims, accepting some but not all of the factual bases to his claimed fear of harm, and found that there was a real chance that the appellant may be harmed in his home region in Pakistan (Reasons [40]-[55]).

    d. The Tribunal evaluated whether the appellant was able to safely and reasonably relocate within his home country – correctly identifying that to

---

[19] *Minister for Immigration v Wu Shan Liang* (1996) 185 CLR 259.

be Pakistan – and found that he could relocate to the Punjab area of Pakistan (Reasons [56]-[65]).

e. The Tribunal also considered the general security situation in Pakistan by reference to relevant country information, and found that it did not render relocation unreasonable (Reasons [66]-[67]).

34. It is thus apparent that the Tribunal gave a comprehensive statement as to how it determined the appellant's claims, cogently explained why it found that the appellant was not a refugee, and cogently explained why it found that returning the appellant to Pakistan would not involve any breach of Nauru's international obligations. In that context, the errors complained of go no higher than inadequate proof reading.

35. Neither *SZNZK v Minister for Immigration and Citizenship*[20] nor *SZIFI v Minister for Immigration and Multicultural and Indigenous Affairs*[21] assist the appellant.

a. In *SZNZK*, Perram J accepted that errors in a statement of reasons would not justify an inference that they were material to the reasoning process if the balance of the reasons disclosed the actual (lawful) process of reasoning (at [38]). Accepting that principle, in this case, the Tribunal's careful and cogent analysis of the appellant's individual circumstances reveals the actual path of reasoning, rebutting any suggested inference of legal error.

b. Although the factual errors made by the Tribunal in *SZIFI* were sufficient to justify an inference of jurisdictional error, Greenwood J accepted that matters of degree are relevant in assessing whether factual errors by an administrative decision maker are indicative of jurisdictional error (at [36], [45]). It is apparent that the conclusion in *SZIFI* was influenced by the presence of serious errors in the dispositive paragraphs of a very brief statement of reasons (apparently containing less than three pages of analysis, see *SZIFI* [12]-[16]). In those circumstances, an inference was

---

20 [2010] FCA 651 ('***SZNZK***').
21 [2007] FCA 63 ('***SZIFI***').

made that the Tribunal was influenced by irrelevant considerations, and asked itself a wrong question. In the present case, however, the Tribunal's reasons reveal that it was not distracted by extraneous considerations and did not ask itself any wrong question.

36. It is therefore unnecessary to refer to the corrigendum to paragraph 68 which the Tribunal issued on 6 June 2016. However, the doctrine of *functus officio* is irrelevant to the status of that document. In issuing its corrigendum the Tribunal was not purporting to re-open or vary the decision it had made under s 34(2) of the RC Act. Although the RC Act deems that a decision is taken to have been made when a statement of reasons is furnished, nothing in the RC Act prevents the Tribunal from supplementing or correcting a statement of reasons that it has provided – even after making its decision – pursuant to s 34(4). The decision on the review is legally and conceptually distinct from the reasons for that decision.[22]

37. The only question that may arise is whether a statement prepared after the commencement of an appeal to the Supreme Court, and not in the form of an affidavit, is admissible as evidence of the Tribunal's reasoning.[23] In this case, the corrigendum was admitted into evidence in the Supreme Court without objection or qualification[24] (the appellant having declined to attend). This Court can properly rely on the corrigendum to the extent that it confirms that the Tribunal did not proceed on the understanding that the appellant was from Sri Lanka.

**Ground 3**

38. The appellant submits that "Objections to relocation are materially the same ... 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" (AS [62]).

---

[22] *Re Minister for Immigration; Ex parte Palme* (2003) 216 CLR 212, 225-226 [44]-[48].
[23] Cf *Minister for Immigration v Taveli* (1990) 23 FCR 162, 167-168, 177-184, 186-189.
[24] Transcript p 2.40, 4.7-.10.

39. The appellant refers as support for that proposition to *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, [90] and *Dranichnikov v Minister for Immigration* (2003) 77 ALJR 1088, [24], [95]. The formulation of the test in *Dranichnikov* is set out at [24], being that "To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice."[25]

40. An exhaustive list of references to the appellant's nuclear family before the Secretary and during the course of the review by the Tribunal, is as follows:

    a. In paragraph 9 of his statement dated 8 March 2014, the appellant identified that he was married with two young children, and that his wife and children were dependent on him (BD 45). This was accepted by the Secretary (BD 56.2).

    b. In paragraph 35 of his statement dated 8 March 2014, the appellant said "I have a number of dependents as detailed above. I fear if I were forced to relocate within Pakistan I would be forced to take my family with me and that as a result they and I would be exposed to an increased risk of harm. Further, I am unfamiliar with many parts of Pakistan and there are limited employment opportunities, I fear if were to attempt to relocate anywhere in Pakistan I would be unable to secure employment which would threaten mine and my family's abilities to subsist and make us more vulnerable to harm from the MQM."

    c. In paragraph 48(a)(ix) of their written submissions to the Tribunal, under the heading "Internal Flight or Relocation Alternative" (BD 81) and sub-heading "the reasonableness of relocation" (BD 84, [48]), and after discussing his concerns in relation to employment, the appellant's advisers stated: "We submit that it would be very difficult for our client to obtain employment should he relocate within Pakistan. This would make it extremely difficult for him to subsist, especially with his wife and children

---

[25] The Republic notes that there has been development in the Australian Federal Court on the manner in which this species of jurisdictional error should be articulated: see *SZSSC v Minister for Immigration* (2014) 317 ALR 365, [75]-[81].

as dependents, and thus we submit our client would be subjected to undue hardship should he attempt to relocate within Pakistan" (BD 86).

d. During the course of the hearing before the Tribunal, the appellant stated (BD 183, ln 17-28):

> In future, you know, I can see that I can't survive over there. I have to educate my children. I have to them a good education, look after them and establish myself and, given the situation and this – all the things I've told you, I cannot see surviving and settling down in future at all. Like MQM are still growing up in – like, before maybe not that much, but ... getting stronger in Punjab as well. They are opening up their offices in Punjab as well ...
>
> And unfortunately, any of those men, if they are there or come there, and I don't want to risk my life and my children's life because of that in future. And I tried my best that I don't get out of Pakistan, that I settle down with my family and my children and run my business in Pakistan.

41. The appellant also refers to paragraph 20 of his statement dated 18 May 2015 (AS [59], fn 77), where he stated: "I had to travel back and forth between Lahore and [redacted] because the MQM had established a base in [redacted], so I did not feel safe there, and the MQM knew my address in Lahore, so I did not feel safe there either. I did not have any family anywhere else in Pakistan, so there was nowhere else I could go because it is too dangerous in Pakistan to attempt to relocate without a familial support network" (BD 105). The Republic submits that the reference to "familial networks" in these passages is not concerned with the appellant's nuclear family, but is a broader reference to the importance of familial networks in Pakistan. The Tribunal found that he would not lack such networks if he were to relocate to Punjab (Reasons [63]).

42. In assessing the appellant's arguments, adapting what was said by Gleeson CJ in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473, 478 [1], it is important to bear in mind that the system of appeals on a point of law is the third level of decision-making (and on appeal to this Court, the fourth level) and it may not be surprising that, at the third level, an appellant will look for a new

way of putting a case that has already failed on two occasions. The case put to the Court may bear little relationship to what was previously advanced, considered, and rejected. There is a risk that criticism of the reasoning of the Tribunal might overlook the context in which such reasoning was expressed; a context that may have changed almost beyond recognition upon appeal. A decision of the Tribunal must be considered in the light of the basis upon which the application was made, not upon an entirely different basis which occurs to an appellant at some later stage.

43. The appellant's concern about relocating his family was never articulated as relating specifically to Punjab; rather, it was a general concern about Pakistan. Even at the Tribunal hearing ([39.4] above), the concern that he raised was about MQM growing in strength in Punjab rather than any specific concern about providing for or educating his children there. Thus, the "clearly articulated arguments" postulated in AS [59] are not to be found in the material before the Tribunal. Meanwhile, the Tribunal was aware that the appellant's wife and children were currently living with her family in [redacted] (which is in Punjab) (Reasons [9]; see also BD 174 lines 5-30).

44. Having had regard to the information before it, the Tribunal found that the appellant would be able to "find employment and accommodation in Punjab and live securely and establish a normal life there with his family" (Reasons [65]). That finding dealt with the contention that relocation to Punjab was unreasonable because it was disadvantageous for the appellant's family, to the extent that any such contention was raised.

45. For these reasons, the ground of appeal must fail.

46. To the extent that the appellant criticises the Tribunal for not identifying where in Punjab he might relocate to (AS [65]), that does not suggest any error of law. There is no obligation upon the Tribunal to identify the place of relocation with the level of specificity suggested by the appellant.[26] Further, the appellant is

---

[26] *Plaintiff M196/2015 v Minister for Immigration* [2015] HCATrans 240, lns 391-418 (Gordon J), referring to *Randhawa v Minister for Immigration* (1994) 52 FCR 437, 440E-G and 443A-D.

wrong to try to deduce from the Tribunal's reasons, or to ascribe to the Tribunal, any more precise location than "Punjab".

47. In any event, it is unclear how this supposed criticism is said to assist in establishing any error of law.

**Ground 4**

48. In proposed ground 4, the appellant argues that the Tribunal made a finding that was not based on any evidence.

49. The Republic accepts that it is an error of law for the Tribunal to make a finding based on no evidence. However, the Republic submits that "evidence" for this purpose can be either direct or found in material which permitted the decision-maker reasonably to infer that the condition existed;[27] and further, that there is no error of law when even a skerrick of evidence appears.[28]

50. The impugned statement is said to be that "[there is an] absence of power and influence in Punjab" by the MQM (AS [69]). The full statement by the Tribunal appears in paragraph 59 of its reasons, and provides: "In view of the absence of MQM power and influence in Punjab..."

51. That statement plainly referred back to the findings in paragraph 57 of the Tribunal's reasons, that "The MQM's support base is largely confined to Urdu speakers in the main cities of Sindh, particularly Karachi and Hyderabad. ... MQM was not successful in securing seats at the national or provincial level in Punjab in 2013 and has little or no influence or power outside Sindh." (Cf. AS [71], referring to paragraph 54 of the Tribunal's reasons).

52. The findings in paragraph 57 of the Tribunal's reasons are ostensibly supported by footnoted references to country information from the Immigration and Refugee Board of Canada regarding the MQM (fn 10), and from "The Nation" newspaper, also regarding the MQM (fn 11) (BD 200).

---

[27] *Minister for Immigration v SGLB* (2004) 207 ALR 12, 21 [39]–[41] (per Gummow and Hayne JJ).
[28] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227, 235 [31].

53. It is for the appellant to satisfy the Court that there was not any evidence before the Tribunal which could support the statement made in paragraph 59 of the Tribunal's reasons, including to rebut any reasonable inference from the material that was before the Tribunal. That cannot be done without demonstrating (at least) that the sources expressly cited in support of the finding at [57] did not provide any such support. The appellant's argument therefore fails at this level.

54. If the Republic were required to demonstrate the evidentiary basis for the Tribunal's findings, ground 4 should not be permitted to be raised for the first time in this Appeal because, had it been raised below, it could have been met by tendering the material on which the Tribunal relied for its findings.

**Relief claimed by the appellant**

55. The appellant claims that success on ground one entitles him to a declaration from this Court that he is owed complementary protection by Nauru. That submission invites this Court to determine the merits of his claims, and cannot be acceded to.

56. To the extent that the appellant's submissions involve any analogy with the situation where a discretion has merged into a duty capable of enforcement by mandamus,[29] the present case bears no analogy with such cases. Even if the appellant is successful on ground 1, the relevant legal question remains, upon an evaluative judgment, what are the necessary and foreseeable consequences of Nauru returning the appellant to Pakistan? If the Tribunal erred in law in attempting to answer that question, this Court can do no more than enforce the law, and cannot substitute its own opinion of what the Tribunal's legal conclusions should have been, as flowing from some or all of the factual findings it made.

---

[29] *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 188 (per Kitto J), 201 (per Menzies J) and 203 (per Windeyer J); *Commissioner of State Revenue (Vic) v Royal Insurance Aust Ltd* (1994) 182 CLR 51, 88 (per Brennan J), 103 (per Toohey J) and 103 (per McHugh J). Nor is there any analogy with cases where peremptory mandamus has been granted (see *Plaintiff S297-2013 v Minister for Immigration* (2015) 255 CLR 231).

## Part VIII: ESTIMATE OF ORAL ADDRESS

57. The Republic estimates that it will require 2 hours in oral submissions.

58. The Republic agrees with the appellant's submission (see AS [76]) that there will be an efficiency in listing this appeal for oral argument at the same time as the following appeals:

    - Proceeding M146 of 2017: *DWN 027 v Republic of Nauru*
    - Proceeding M151 of 2017: *EMP 144 v Republic of Nauru*

Dated: 8 November 2017

10

**GEOFFREY KENNETT SC**

**ANGEL ALEKSOV**

Counsel for the Republic