IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M145 of 2017

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN

DWN027
Appellant

and

The Republic of Nauru
Respondent

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.

   a. Whether the Supreme Court of Nauru erred by failing to conclude that the Refugee Status Review Tribunal (**Tribunal**) had erred by 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**), where no such test exists at law.

   b. Whether the Supreme Court erred by failing to conclude that the Tribunal erred by failing to consider Nauru's international obligations under the *Convention on the Rights of the Child* when it determined whether the Appellant could only reasonably relocate within Pakistan if his child relocated with him, that child being a few weeks old when the Appellant left Pakistan.

   c. Whether the Supreme Court erred by failing to conclude that the Tribunal erred by failing to consider all integers of the Appellant's objections to relocation, separately and cumulatively.

III SECTION 78B NOTICE

3. 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.

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IV JUDGMENT BELOW

4. The citation for the decision of the Supreme Court of Nauru is *DWN027 v Republic of Nauru* [2017] NRSC 77.

V FACTUAL BACKGROUND

The Appellant's claim

5. The Appellant was born in in Hastnagrie in the Peshawar district of Pakistan.[1] He is a Sunni Muslim of Pashtun ethnicity.[2]

6. The Appellant fled Pakistan because of his and his family's history with attacks by the Taliban.

10 7. In 2005, the Appellant's brother, Abdul, was beaten by the Taliban and told that he must either give them money or join them. The Taliban men said to that brother that if he refused he would be killed.[3] In fear for his life, the Appellant's brother fled and has not returned to Pakistan.[4]

8. In 1999, the Appellant began working in his father's grocery store in Minar Bazaar, Peshawar.[5] On 28 October 2009, there was a bomb blast close to that grocery store. The Appellant sustained significant injuries to his arm from which he still bears scarring.[6] 150 people were killed and the grocery store was destroyed. The Taliban claimed responsibility for this attack.[7]

9. In January 2010, the Appellant took over the site of the store from his father.[8] This store
20 remains the Appellant's family's source of income.[9]

10. Also in 2010, another of the Appellant's brothers, Mohammed, was approached by Taliban supporters who demanded that that brother also join them. That brother feared that he would be killed if he refused. He fled to join the other brother and has also not returned to Pakistan since.[10]

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1 Court book page (**CB**) 4, 22, 41.
2 CB 7, 26, 41.
3 CB 42.
4 CB 42.
5 CB 6, 40.
6 CB 6, 13, 42.
7 CB 42 [11]
8 CB 6, 40, 42.
9 Refugee Status Review Tribunal Decision (28 December 2014) (**Tribunal decision**) at [39]
10 CB 42.

11. In October 2012, the Appellant was attacked by three Taliban militants on his way home from the store. The Taliban men took his money and his mobile phone. They beat him and left him with injuries to his head.[11]

12. In May and June 2013, events involving the Taliban occurred that led the Appellant to depart Pakistan to seek protection.

13. On 20 May 2013, four Taliban militants came into the Appellant's store and demanded 5 million rupees (about AUD$60,000), saying that he had to pay them or join the Taliban. The Appellant responded that he would not do either.[12]

14. On 24 May 2013, Taliban militants shot and killed a friend of the Appellant who owned a shop near the Appellant's.[13] That friend had previously told the Taliban that he would not give them money or join them.

15. On the evening of 30 May 2013, the Appellant closed his store and walked home.[14] The same four Taliban militants who had entered his shop ten days earlier ran up behind him carrying guns. They shouted at the Appellant to stop or they would shoot him. The Appellant managed to escape them. The next day, the Appellant closed his store and went into hiding.[15]

16. On 3 June 2013, the Appellant left his house to buy medication for his wife and newborn son. While he was walking through Minar Bazaar, two or three shots were fired at him from a passing car. The Appellant ran away. He suspected that the shots were from the Taliban because he had refused to join them or give them money.[16]

17. Almost two weeks later, the Appellant again left his house to get groceries for his wife, son and mother, all of whom are dependant on him. While he was walking down the main road next to Minar Bazaar he was hit by a car. The people in the car were the same Taliban militants who had approached him in his store.[17]

18. The Appellant went to the police station to report what had happened. The police told him that they were unable to protect him and that the best thing for him to do was to leave.[18]

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11 CB 42.
12 CB 13, 42.
13 CB 13, 42, 107.
14 CB 13, 42, 56-61, 106-7, 109.
15 CB 43, 107.
16 CB 43, 107-8.
17 CB 43, 109.
18 CB 43.

19. On 2 July 2013, the Appellant left Pakistan.[19] He arrived in Australia a month later and was then transferred against his will to Nauru a further month later.[20]

20. The Appellant lodged an application for protection under the Convention Act on 19 December 2013.[21] The Appellant's claim to protection was based on his fear of persecution due to his actual or imputed political opinions as a result of his refusal to join or give money to the Taliban.[22]

21. The Appellant's claim for protection was refused by the Secretary of the Department of Justice and Border Control on 17 July 2014.[23] He lodged an application for review by the Tribunal on 1 August 2014.

10 22. A further statement from the Appellant was submitted to the Tribunal on 30 September 2014, and the Appellant attended a hearing before the Tribunal on 2 October 2014.[24]

The Tribunal's decision

23. On 28 December 2014, the Tribunal affirmed the Secretary's decision.[25]

24. The Tribunal accepted the Appellant's claims of being approached, threatened and attacked by the Taliban.[26] The Tribunal accepted that the threat of harm facing the Appellant is real, and that if he returns to Peshawar there is a real possibility that he will encounter those Taliban members again.[27] The Tribunal therefore accepted that the Appellant had a well-founded fear of persecution for Convention reasons if he were to return to his home area in Pakistan.[28]

20 25. However, the Tribunal concluded that the Taliban militants who targeted him were 'highly unlikely to pursue him, or to be able to locate him in the unlikely event that they did pursue him... to another part of Pakistan such as Punjab'.[29] The Tribunal concluded that the Appellant would be able to avoid persecution[30] if he were to relocate within Pakistan. On that basis alone the Tribunal concluded that he was not owed protection.

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19 CB 15, 30, 39, 43.
20 CB 39.
21 CB 19-45.
22 Tribunal decision, [13].
23 CB 61-82.
24 CB 89-114, 117-146.
25 CB 157-167.
26 Tribunal decision, [23].
27 Tribunal decision, [23].
28 Tribunal decision, [25].
29 Tribunal decision, [29]; [33].
30 Tribunal decision, [42].

26. The same reasons were said by the Tribunal to lead it to conclude that the Appellant was not owed complementary protection obligations.[31] 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**)[32] and any obligations under the 2013 *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia* (**the 2013 MOU**), and in particular article 19(c) thereof which obliges Nauru to refrain from transferring any asylum seeker to another country where such removal would breach those obligations on Nauru.

10 **The decision of the Supreme Court**

27. The Appellant appealed to the Supreme Court of Nauru. The Supreme Court heard the appeal on 2 May 2016. On 22 September 2017, it dismissed the appeal and affirmed the decision of the Tribunal, pursuant to s 44 of the Convention Act. It found that the Tribunal had correctly applied the relevant principles on complementary protection,[33] and was correct in determining that relocation to the Punjab Province would be reasonable.

28. This is an appeal from that decision of the Supreme Court of Nauru. The appeal lies as of right to this Court.[34]

VI ARGUMENT

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

29. The determinative issue of the Appellant's claim to refugee protection was the Tribunal's conclusion that he could relocate elsewhere in Pakistan.[35]

30. In the alternative to his claims to be a refugee under the Act, the Appellant submitted that he was owed complementary protection, on the basis that there was a real risk that

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31 Tribunal decision, [45]

32 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Articles 6 and 7. 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].

33 *DWN027 v Republic of Nauru* [2017] NRSC 77 (**Supreme Court decision**) at [41]

34 *BRF038 v The Republic of Nauru* [2017] HCA 44 [40]-[41] per Keane, Nettle and Edelman JJ; *HFM045 v The Republic of Nauru* [2017] HCA 50 [5] per Bell, Keane and Nettle JJ.

35 Tribunal decision [42].

he would face, *inter alia*, arbitrary deprivation of life, or cruel, inhuman or degrading treatment.[36]

31. Under the heading 'complementary protection assessment', the Tribunal responded to these claims and held that:

> ... for the same reasons as are set out above with respect to relocation, the Tribunal is not satisfied that the applicant faces a real possibility of degrading treatment or other treatment such as to enliven Nauru's international obligations.[37]

The Tribunal thus rejected the complementary protection claims of the Appellant for the same reason as it ultimately rejected the Appellant's refugee claims, namely by finding that he could relocate within Pakistan to avoid relevant mistreatment. For the reasons set out below, this was an error of law.

32. The content of those complementary protection obligations is relevantly different from those applicable where persons are claiming refugee status under the *Convention Relating to the Status of Refugees*[38] (**Refugees Convention**). In claims based on the Refugees Convention the claimant must establish that there is not only a reasonable possibility of persecution in one place, but that it would not be reasonable for that person to relocate from the country of asylum to elsewhere in the country of origin away from the risk of persecution.[39]

33. 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'.[40] Nauru's international *non-refoulement* obligations include those implied under article 6 of the ICCPR which prohibits 'arbitrary deprivation of life' and article 7 of the ICCPR which provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. These international obligations on Nauru are confirmed by clause 19(c) of the 2013 MOU 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, inhuman or degrading treatment or punishment...'. Other international treaties to which Nauru is party[41] contain further express or implied non-

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36 Applicant's submissions to the Tribunal [40-45], CB 99.

37 Tribunal decision [45].

38 Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954)

39 *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, per Bingham LJ; *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 27 [24] per Gummow, Hayne and Crennan JJ. See also *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 442 per Black CJ.

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

41 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>.

refoulement obligations including article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**CAT**),[42] the *Convention on the Rights of the Child* (**CRC**)[43] and the *Convention on the Elimination of All Forms of Discrimination Against Women.*[44]

34. This series of non-refoulement obligations is known collectively as 'complementary protection' – so called because they complement the obligations of State signatories to the Refugees Convention by providing additional means to avoid return to harm prohibited by international human rights law.[45]

35. The complementary protection obligations that arise by reason of Nauru's international obligations are not limited in scope in any relevant way. The Parliament of Nauru chose to leave them just as they are at international law.

36. The United Nations Human Rights Committee has explained of the ICCPR 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.*[46]

Article 7 provides an "absolute prohibition on return".[47] Hence, under the international law of complementary protection, 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 that country.

37. This interpretation of articles 6 and 7 of the ICCPR, and the unlimited nature of the implied non-refoulement obligation, is reinforced when read in the context of the whole of the ICCPR. The ICCPR's implied non-refoulement obligation arises within an instrument containing an express right to freedom of movement.

38. Article 12 of the ICCPR provides [emphasis added]:

> 1. *Everyone lawfully within the territory of a State shall, within that territory, have the*

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42 Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) Art 3(1).

43 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990

44 Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) Art 2(d).

45 See, regarding the international law basis in the CAT and ICCPR obligations of Australia for the Australian complementary protection regime, *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 at [1] per Kiefel CJ, Nettle and Gordon JJ; at [33] per Gageler J; at [73] per Edelman J. See also generally, McAdam, J., *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford, 2007), especially at p 23.

46 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] (emphasis added).

47 McAdam, J., 'Australian Complementary Protection: A Step-By-Step Approach' (2011) 33(4) *Sydney Law Review* 687 at 708.

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 must be read and interpreted as a whole.[48] 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. Of Article 12 of the ICCPR, the United Nations Human Rights Committee has stated that 'the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement.'[49] This obligation requires that 'States must not only refrain from interfering with a person's freedom of movement; they must also ensure that one's freedom of movement is not unduly restricted by other persons.'[50]

39. The absence of a limitation based on a relocation requirement in the ICCPR, CAT and other international non-refoulement obligations contrasts with the principles applicable under the Refugees Convention, which itself contemplates internal relocation. A relocation test or internal protection test applies to persons claiming refugee status under the Refugees Convention.[51] 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 from the country of asylum to another part of the country of origin.[52]

40. The test is grounded in the text of the Refugees Convention definition itself[53] by reason of the causative condition in article 1A(2) of that Convention. A person cannot be said

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48 *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.

49 Human Rights Committee, *General Comment No 27: Freedom of Movement (Art.12)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) at [7]

50 Joseph, S and Castan, M, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3rd ed., 2013) at p 394

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

52 See, generally as to the relocation principle, *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at [9]-[24]. See *SZQPY v Minister for Immigration and Border Protection* [2013] FCA 1133 (*SZQPY*) at [69], [73]-[74] per Kenny J

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.[54] 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".[55]

41. The absence of any similar textual basis in non-refoulement obligations in the ICCPR and other international instruments is, at least in part, why Australia and other jurisdictions, including the European Union, the United Kingdom, Canada and New Zealand have added to the domestic determination of complementary protection claims express provisions dealing with relocation[56] whereas this has not been done in respect of claims under the Refugees Convention.

42. In *Minister for Immigration and Citizenship v MZYYL,*[57] the Full Court of the Federal Court of Australia accepted that the position under the Australian complementary protection provisions and the position under the ICCPR in respect of relocation differ, accepting by implication that the ICCPR precludes return to the country of origin where the applicant for protection 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:[58]

> 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.

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53 *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 (***SZATV***) at 25-26, [15] and [19] per Gummow, Hayne and Crennan JJ.

54 James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) p 332 and 336.

55 *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* at 25-26 [19]-[22] per Gummow, Hayne and Crennan JJ, cf 36 [54]-[60] per Kirby J. It is not necessary to resolve this debate for present purposes.

56 **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) note 27 and Art 8; **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).

57 (2012) 207 FCR 211.

58 Ibid. at 215 [18] per Lander, Jessup and Gordon JJ.

> Sections 36(2B)(a) and (b) [of the Australian *Migration Act*] have adopted a different and contrary position.[59]

43. 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 Nauru's domestic law in s 4(2) of the Act.

44. Similarly, the text of cl 19(c) of the MOU between Australia and Nauru does not incorporate any internal relocation consideration as a qualification to the inquiry as to whether or not there is a real risk of relevant harm. It would have been easy for the parties to agree wording providing expressly for such a qualification, in terms reflecting s 36 of the Australian *Migration Act* if one had been intended.

45. It follows that the Tribunal erred in applying a relocation test to the Appellant's claim for complementary protection. It was contrary to law for the Tribunal to apply (at [45]) a relocation test in respect of the claim to complementary protection.

46. It also follows from the findings of the Tribunal referred to at [24] above, that there is a real risk that the Appellant will be in danger of being subjected to arbitrary deprivation of life or 'cruel [or] inhuman… treatment' as contemplated by the ICCPR and the MOU, if he were to be returned to Pakistan. Specifically in Peshawar, 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.[60] Accordingly the Supreme Court erred in failing to conclude that the Appellant was entitled to complementary protection given the findings of fact summarised at [24] above that are submitted to have engaged Nauru's complementary protection obligations.

Ground 2: Failure to conclude that the Tribunal failed to take into account Nauru's international obligations under the Convention on the Rights of the Child to give primary consideration to the best interests of the Appellant's child when considering relocation

47. The Appellant is the father of a son who is currently aged 4 years and was only 18 weeks old when the Appellant fled Pakistan. The Tribunal in this case rejected the Appellant's claim to protection because it found that he could 'lead a relatively normal life without facing undue hardship in all the circumstances'[61] in a place away from where his son currently lives.[62] In the process of reaching this conclusion 'the Tribunal acknowledge[d]

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59 This view is confirmed by Professor Jane McAdam quoting Professor Michelle Foster, two eminent scholars in asylum law, in McAdam, J., 'Australian Complementary Protection: A Step-By-Step Approach' (2011) 33(4) *Sydney Law Review* 687 at 706-707.

60 Tribunal decision [25]; see also CB 43.

61 Tribunal decision [41].

62 Tribunal decision [29].

that... his own family [would] join him' in the place of relocation.[63] The Tribunal's conclusion as to the absence of 'undue hardship' is therefore premised on the Appellant's 4-year old son moving across the country to join the Appellant.

48. The issue arising for consideration under this ground is: was the Tribunal required by s 4(2) of the Act to consider the best interests of the Appellant's young child in making its decision on relocation of the Appellant with his family within Pakistan?

49. Section 4(2) of the Act requires that the Republic 'not expel or return any person to the frontiers of territories in breach of its international obligations'. The focus of s 4(2) is on the international obligations of Nauru, not on the person claiming protection as such. This is important because Nauru's international obligations include obligations to act conformably with the CRC. By being party to the CRC, in the words of this Court, Nauru:

> ... has given a solemn undertaking to the world at large that it will: "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies" make "the best interests of the child a primary consideration".[64]

This is so because Article 3(1) of the CRC relevantly contains the following obligation:

> In all actions concerning children, whether undertaken by... courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

50. The importance of taking the best interests of children into account when considering relocation under the Refugees Convention is spelt out in the UNHCR's Guidelines on International Protection. Those relevantly state that:

> As assessment of the issue of internal flight alternative contains two parts: the relevance of such an inquiry, and the reasonableness of any proposed area of internal relocation. The child's best interests inform both the relevance and reasonableness assessments... Age and the best interests of the child are among the factors to be considered in assessing the viability of a proposed place of internal relocation.[65]

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63 Tribunal decision [39]

64 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (**Teoh**) at [29] per Toohey J.

65 UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, available at: http://www.refworld.org/docid/4b2f4f6d2.html at [53] and [55]. See, by way of illustration, *RA (AP) v Secretary of State for the Home Department* [2011] CSOH 68 at [10]: "The decision maker accordingly had to look at the circumstances which the children would face in Pakistan when deciding whether it was unduly harsh or unreasonable to require internal relocation. In considering the welfare of the children, the decision maker should not compare their circumstances in the United Kingdom and those which they would face in Pakistan. But he had to take account of their welfare as a weighty consideration when assessing internal relocation. He had not done so and so failed to take account of a material consideration".

51. The Supreme Court in the decision below concluded that article 2(1) of the CRC provided a relevant limitation on the Convention obligations, in that it limits the Convention's protections to those with respect to "each child within [Nauru's jurisdiction]".[66] The relevant provision in this respect, Article 2(1), provides:

> States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national or ethnic or social origin, property, disability, birth or other status.

10 52. The Supreme Court appears to have accepted that Nauru owed no international obligation to the Appellant's child because "there is no evidence and it is accepted that the child is not within Nauru's territory or that Nauru exercises 'physical power and control' over the appellant's child."[67]

53. However, this is not the question posed by article 2(1); on its terms it does not require that Nauru exercise physical power and control over the child for the rights in the CRC to apply, or refer to the concept of "personal" jurisdiction, which may import such a limitation. Nor does article 2(1) refer to the child being within Nauru's territory. This can be contrasted with other similar "jurisdictional" clauses in the ICCPR and the *Convention against Torture,*[68] which expressly limit the obligation to individuals that are within the
20 States Party's territory.

54. The language of article 2(1) of the CRC requires States Parties to ensure the rights of each child "within their jurisdiction". Determining the scope of this requires a consideration of what is meant by that phrase in the context of an international instrument.

55. A State has jurisdiction at international law wherever there is 'a substantial and bona fide connection'[69] or a connecting factor[70] between the subject matter and the source of jurisdiction. Three concepts are bound up in the term 'jurisdiction' in international law:[71]

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66 Supreme Court decision at [53], [60] per Khan J.

67 Supreme Court decision at [54], [60].

68 ICCPR 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." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 2(1): "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction"

69 Brownlie, I., *Principles of Public International Law*, 6th ed (2003) at 309 as quoted in *XYZ v The Commonwealth* (2006) 227 CLR 532 at [6] per Gleeson CJ.

70 Lowe, V., 'Jurisdiction', in M. Evans (ed.), *International Law*, 2nd ed (Oxford: Oxford University Press, 2006), at 342.

a. jurisdiction to prescribe – that is, to make laws;

b. jurisdiction to enforce – that is, to apply and enforce law; and

c. adjudicatory jurisdiction – that is, to make decisions about a subject matter.

56. It is the last form of jurisdiction which is engaged in this case. As the European Court of Human Rights has held, a State's jurisdiction is engaged under international law:

> ...because of acts of their authorities, whether performed within or outside national boundaries, which *produce effects* outside their own territory.[72]

57. The adjudicatory jurisdiction has potential to apply even where the person is outside the territory but is impacted by the other nation's decisions or action.[73] This approach is consistent with the International Court of Justice's conclusion that both the ICCPR and CRC are 'applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.'[74]

58. A practical illustration of this is that article 3(1) is regularly invoked in cases involving family reunification, where a State is required to consider the best interests of a child residing in another State in determining whether family unity principles mandate the admission of the child. For example in *El Ghatet v Switzerland,* the European Court of Human Rights stated:

> [I]n cases regarding family reunification the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in their country of origin and the extent to which they are dependent on their parents ... While the best interests of the child cannot be a "trump card" which requires the admission of all children who would be better off living in a Contracting State ..., the domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to it...[75]

59. An understanding of "jurisdiction" which acknowledges that there is jurisdiction to consider the best interests of the child notwithstanding that the child is not within the territory or the power or control of the State is consistent with the humanitarian object and purpose of the CRC, which emphasises the universal nature of the rights it

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71 Milanovic, M., *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties.* Human Rights Law Review, Vol. 8, 2008. Available at SSRN: https://ssrn.com/abstract=1139174 at p 10

72 *Loizidou v Turkey*, ECHR App. no. 15318/89, Judgment (preliminary objections) of 23 February 1995 at [62] (emphasis added). This statement was made in the context of a discussion about 'effective control' which is not in issue in this case. See also *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745 at [91].

73 *Alejandre v Cuba* (Inter-American Commission) Case 11.589, Report No 86/99, 29 September 1999 at [23]

74 See discussion, albeit in a different context, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep 136 at [107]-[113].

75 Application No 56971/10, 8 November 2016, at [46].

contains.[76] It allows for the capability or power of the state to ensure or respect the particular right,[77] particularly where that capability or power will not impair the jurisdiction of another state. The obligation in article 2(1) to "respect and ensure the [Convention] rights" of children within the State's jurisdiction must be understood by reference to the individual rights. The State may respect and ensure the right of children, including children outside territorial limits of that State, to have their best interests *considered* in actions concerning them without any requirement of physical power or control over them.

60. The interpretation of articles 2(1) and 3(1) of the CRC outlined above is also consistent with the customary law status of the article 3(1) obligation to give primary consideration to the best interests of the child, and the arguably *jus cogens* nature of that norm.[78] The CRC has been signed and ratified by all States save for the United States. As the European Court of Human Rights observed in *Neulinger v Switzerland*, 'there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount'.[79]

61. The Supreme Court also found that the decision of the Tribunal was not an "action concerning children" within the meaning of article 3(1) "because it could not, on any view, involve an alteration of the circumstances of children".[80] This took an erroneously narrow view of what may be an action "concerning children". That phrase is not to be interpreted in a narrow or pedantic sense.[81] 'The term "concerning" is "a word of wide import'.[82] As this Court stated previously of the same phrase:

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76 See the preamble to the Convention which refers to the basis in the *Universal Declaration of Human Rights*, and other instruments, of the right of children to special care and assistance.

77 See, for example, the discussion in *Al-Skeini v United Kingdom*, European Court of Human Rights, Appl No 55721/07, Judgment of 7 July 2011, Concurring Opinion of Judge Bonello at [16].
"In my view, the one honest test, in all circumstances (including extra-territoriality), is the following: did it depend on the agents of the State whether the alleged violation would be committed or would not be committed? Was it within the power of the State to punish the perpetrators and to compensate the victims? If the answer is yes, self-evidently the facts fall squarely within the jurisdiction of the State. All the rest seems to me clumsy, self-serving alibi hunting, unworthy of any State that has grandiosely undertaken to secure the "universal" observance of human rights whenever and wherever it is within its power to secure them, and, may I add, of courts whose only *raison d'etre* should be to ensure that those obligations are not avoided or evaded." See also Gerd Oberleitner *Human Rights in Armed Conflict: Law, Practice,* Policy (Cambridge University Press, 2015)

78 See, for example, Geraldine van Bueren "Committee on the Rights of the Child" in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed Malcolm Langford, at 577, citing G Van Bueren *The Separation of Powers and the International Legal Status of the Best Interests of the Child in Assisting Domestic Courts Protect Children's Economic and Social Rights,* Proceedings of the International Conference on the Rights of the Child (Montreal, Canada: Wilson Lafleur 2007).

79 (2010) ECHR 1053 at [135].

80 Supreme Court decision at [50]; see also [55] and [60].

81 *Guo v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1585 at [55] per Wilcox J.

82 *Tien v Minister for Immigration and Multicultural Affairs* (1998) 159 ALR 405 at 429 per Goldberg J.

> A broad reading and application of the provisions in Art 3, one which gives to the word "concerning" a wide-ranging application, is more likely to achieve the objects of the Convention.[83]

62. The impact which decisions or actions may have on children may range across a broad spectrum.[84] The language makes clear that the best interests principle is engaged not only where a decision directly affects a child, for example where a child independently claims international protection, but also where a child is indirectly affected by a decision, for example where a child's parent is at risk of being removed, or, as in this case, a decision on internal relocation is made which is premised on the child also relocating.[85] Contrary to the finding of the Supreme Court, it is not the case that the decision must have a direct legal effect on the child to be properly regarded as one "concerning children".[86]

63. The Tribunal premised its decision on internal relocation on the basis that the Appellant's family, including the Appellant's then 18 week old child, would also relocate to join the Appellant.[87] The direct practical effect of that decision-making on the Appellant's child involves an action concerning the child, where the Tribunal had jurisdiction to consider the child's best interests.

64. In light of this, the error of law arises from the fact that the Tribunal did not consider Nauru's international obligations under the CRC, namely the Appellant's child's best interests – as 'a primary' or any other form of consideration – when it determined that the Appellant could reasonably relocate within Pakistan if that child also relocated. The Supreme Court erred in accepting the Respondent's submissions that the article 3(1) protections do not apply because the child was not within Nauru's territory or under its "physical power and control", which submissions were wrong in law. It could not and did not then properly assess whether the Tribunal had identified and considered the best interests of the Appellant's child as it was required to do,[88] and was not in a position to proceed to the factual aspect of the inquiry, as it purported to do.[89]

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83 *Teoh* at [30] per Mason CJ and Deane J

84 *Suleyman v Minister for Immigration & Multicultural Affairs* [2000] FCA 610 at [37]-[38] per Mathews J.

85 See, in particular, UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14 at [19]-[20]

86 *Guo v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1585 at [55] per Wilcox J.

87 Tribunal decision [39]. The Tribunal made this factual finding in order to justify its conclusion.

88 See *Teoh* at 292; *ZH (Tanzania) v Secretary of State for the Home Department* at 180 [26] per Baroness Hale; 185 [44] per Lord Hope; 185 [46] per Lord Kerr. See also *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133 at [32] per Branson, North and Stone JJ.

89 Supreme Court decision at [60], where the Court both accepted the Respondent's submissions as to the Convention, and agreed "that the Tribunal took the interests of the child into consideration when making the finding of relocation".

Whether the Supreme Court erred by failing to conclude that the Tribunal erred by failing to consider all integers of the Appellant's objections to relocation.

65. 'There are two aspects to the internal relocation principle that need to be considered. The first is whether there is a place (or places) in the country of nationality where the applicant for refugee status would not have a well-founded fear of persecution on a Convention ground. The second is whether it would be reasonable in the circumstances for the person to relocate to that place (or one of those places).'[90] The enquiry on the reasonableness of relocation:

a. requires a consideration of a broader range of matters specific to the relevant person than the enquiry as to whether there is a real chance of persecution;[91]

b. is forward-looking – it has regard to the prospective reasonableness of the person moving to reside at the proposed place of relocation;[92] and

c. is made by reference to a proposed, identified[93] place of return in the country of origin.[94]

66. 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".[95] 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.[96]

> ...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.[97]

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90 *CID15 v Minister for Immigration and Border Protection* [2017] FCA 780 at [32] per Moshinsky J.

91 *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307 (***MZANX***) at [49], [55], [61] per Mortimer J; *SZQPY* at [69],[73][74] per Kenny J.

92 *MZANX* at [12] per Mortimer J quoting James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014).

93 *Plaintiff M13/2011 v Minister for Immigration and Citizenship* (2011) 85 ALJR 740 at 743 [19], [22] per Hayne J.

94 *Minister for Immigration and Border Protection v SZSCA* (2014) 254 CLR 317 at 331 [39] per Gageler J. *MZANX* at [12] per Mortimer J. Noting the use of the term 'return' in Refugees Convention Article 1A and 33 and contra terminology of 'home area'. See, for example, *SZQEN v Minister for Immigration and Citizenship* (2012) 202 FCR 514 at 522 [36] per Yates J.

95 *SZATV* at 27 [24] per Gummow, Hayne and Crennan JJ. See also *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 442 per Black CJ.

96 See for example *SZQPY* at [69],[73]-[74] per Kenny J.

97 *MZZQV v Minister for Immigration and Border Protection* [2015] FCA 533 at [68] per Barker J endorsed by the Full Court of the Federal Court at *MZAEU v Minister for Immigration and Border Protection* [2016] FCAFC 100 at [33] per North, Rangiah and Moshinsky JJ.

67. This inquiry is "fact intensive". "Generalities will not suffice".[98] As recently explained by Mortimer J in *MZANX v Minister for Immigration and Border Protection*:

> ... 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.[99]

68. The Tribunal here concluded that "relocation would be reasonable for the applicant reasonable in the sense that he could, if he relocated, lead a relatively normal life without facing undue hardship in all the circumstances".[100] The Tribunal had acknowledged generally that the Appellant had contended that "his ethnicity, family commitments, and lack of resources would prevent him from relocating even if it were safe to do so."[101] The Tribunal then

a. acknowledged that "it might take the applicant some time to re-establish himself in a different part of Pakistan before he would be able to have his own family join him";[102]

b. referred to the evidence the Appellant's "family own their home and the shop underneath, from which they draw rental income, and that his brothers are also assisting them";[103]

c. referred to the Tribunal's suggestion that the Appellant could sell assets such as his shop and rejected his objection that he would be targeted if it was known he had money, noting that it did not explain why such a transaction could not be carried out by an agent;[104] and

d. noted that the Appellant had considerable experience as a small trader, that he could read and write Urdu and also speaks and writes some English "suggesting little practical impediment to the applicant's relocation".[105]

69. The Tribunal then made the following incomplete statement:

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98 *MZANX* at [51] per Mortimer J.
99 *MZANX* at [55] per Mortimer J.
100 Tribunal decision at [41].
101 Tribunal decision at [38].
102 Tribunal decision at [39]
103 Tribunal decision at [39].
104 Tribunal decision at [39].
105 Tribunal decision at [39].

"With respect to the suggestion that a newly arrived Pashtun would face difficulty integrating the Tribunal notes that".[106]

The Tribunal did not complete this point but proceeded to a different point in referring to a 2012 study of Pathans (Pashtuns) who had moved to Lahore. The Tribunal's apparent acceptance of this study as accurately stating the situation was not consistent with the apparent acceptance of Member Fisher in the hearing that there was discrimination against Pashtuns.[107]

70. Most importantly, the Tribunal's reasons did not refer to any of the Appellant's evidence as to why he specifically would face difficulty integrating in another area within Pakistan. The evidence and submissions of the Appellant were:

a. His son, who was only 18 weeks old when he fled,[108] his wife and his dependent mother, remain in Peshawar.

b. He did not speak Punjabi, the predominant language in Punjab;[109] and

c. He would need a guarantor in order to rent a house.[110]

71. These objections to relocation were not considered by the Tribunal. Nor did the Tribunal address the inconsistency between the finding that the Appellant's family (who continued to depend on the house, and rented shops in Peshawar) [111] may need to remain in Peshawar "for some time" before they could join him in another area of Pakistan, and the suggestion that he could support his move by selling his assets of the house with shops underneath it.[112]

72. Any of these factors or all in combination affected whether relocation was practical and reasonable for the Appellant. It is not for this Court to determine on appeal whether this is correct. However, the Court can be satisfied that the relocation test was misapplied because this consideration was not part of the Tribunal's application of the Refugees Convention relocation test.

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106 Tribunal decision at [40].

107 Transcript of Tribunal hearing T26.46-T27.6

108 CB 8, 38, 42; transcript of Tribunal hearing p 22 line 10 – 12.

109 Transcript of Tribunal hearing p 29.40—41.

110 Transcript of Tribunal hearing at p 23 lines 42-46; page 29 at 42-43.

111 Tribunal decision [39] See also transcript of Tribunal hearing at p 5 lines 33-34.

112 See Transcript of Tribunal hearing at p 24, lines 1-3; see also Tribunal decision at [39]. Note that the "suggestion that he might sell assets such as his shop" which is referred to in the Tribunal decision at [39] was not actually in those terms; the suggestion that was actually put to the Applicant for comment (in response to his concern that renting a house would not be possible because of the need for a guarantor) was that "you've got a house with two shops underneath it and a shop in the market. Why couldn't you sell those assets and buy a house if renting would be difficult?" (at page 24 lines 1-3.) There was no suggestion that simply selling the "shop" would be enough to enable him to resettle.

73. The Tribunal did not engage with the specific factual matters put forward by the Appellant as to why it would not be reasonable for him to relocate elsewhere in Pakistan; that is, why it would not be reasonable or practical in his circumstances. Instead, the Tribunal referred to some matters only and failed to complete its consideration of the Appellant's reasons as to why it was unreasonable for him.

74. 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.[113] 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.[114]

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[115] and a corresponding entitlement to be heard by the decision-maker when the information is given.[116] 'Proceedings before the Tribunal are not adversarial; and issues are not defined by pleadings, or any analogous process.'[117]

75. The Tribunal's failure to deal with the identified reasons why it was not practical or reasonable for the Appellant to relocate meant that it did not apply the relocation test to the particular facts of this case, as the test itself requires.

Conclusion

76. For the reasons outlined above, it is respectfully submitted that the High Court ought, pursuant to s 8 of the *Nauru (High Court Appeals) Act* 1976 (Cth), make the orders set out in Part VIII below.

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113 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [90] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 (**Dranichnikov**) at [24] per Gummow and Callinan JJ see also [95] per Hayne J.

114 *Dranichnikov* at 1092 [24] per Gummow and Callinan JJ 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] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

115 *Minister for Immigration and Border Protection v SZSSJ* (2016) 90 ALJR 901 at 915 [83] per French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ; see also the authorities summarised at *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [159-166] per Bromberg J.

116 *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.

117 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at [1] per Gleeson CJ.

VII STATUTORY PROVISIONS

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

VIII ORDERS SOUGHT

78. The orders sought by the Appellant are:

(1) The appeal be allowed.

(2) The orders of the Supreme Court of Nauru made on 22 September 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* 2012 (Nr).

10 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.

(5) The Respondent pay the costs of the Appellant.

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

IX ESTIMATE OF TIME

79. The Appellant estimates he will require 1½ hours to present oral argument. If this matter was listed with CRI026 or EMP144, this estimate might be revised down, on account of ground 1 in this appeal being substantively common to all three appeals.

20 Date: 24 November 2017

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Annexure A – Part VII Statutory Provisions

Refugees Convention Act 2012 (Nr) (as at 5 May 2017)

3 Interpretation

...

'complementary protection' means protection for people who are not refugees as defined in this Act, but who also cannot be returned or expelled to the frontiers of territories where this would breach Nauru's international obligations;

...

4 Principle of non-refoulment

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

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

6 Determination of refugee status

(1) Subject to this part, the Secretary must determine:

(a) an application to be recognised as a refugee made under section 5;

(b) an application to be given derivative status made under section 5; or

(c) whether a person who has made an application under section 5 is owed complementary protection.

...

22 Way of operating

The Tribunal:

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

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

31 Application for merits review by Tribunal

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

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

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

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

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

(2) The application must be made:

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

(b) in the form prescribed by the Regulations.

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

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

33 Period within which Tribunal must conduct merits review

(1) The Tribunal must complete a review of a determination or decision within 90 days after the day on which the Secretary gives the Registrar the documents relevant to the review.
(2) Failure to comply with this section does not affect the validity of a decision on an application for merits review.

34 Decision of Tribunal on application for merits review

(1) The Tribunal may, for the purposes of a merits review of a determination or decision, exercise all the powers and discretions of the person who made the determination or decision.
(2) On a merits review of a determination or decision, the Tribunal may:
(a) affirm the determination or decision; or
(b) vary the determination or decision; or
(c) remit the matter to the Secretary for reconsideration in accordance with directions or recommendations of the Tribunal;
(d) set the determination or decision aside and substitute a new determination or decision.
(e) determine that a dependent, of a person in respect of whom the determination or decision was made, is recognised as a refugee or is owed complementary protection.
(3) If the Tribunal:
(a) varies the determination or decision; or
(b) sets aside the determination or decision and substitutes a new determination or decision;
the determination or decision as varied or substituted is taken (except for the purpose of appeals from the decisions of the Tribunal) to be a determination or decision of the Secretary.
(4) The Tribunal must give the applicant for review and the Secretary a written statement that:
(a) sets out the decision of the Tribunal on the review; and
(b) sets out the reasons for the decision; and
(c) sets out the findings on any material questions of fact; and
(d) refers to the evidence or other material on which findings of fact were based.
(5) A decision on a review is taken to have been made on the date of the written statement.

44 Decision by Supreme Court on appeal

(1) In deciding an appeal, the Supreme Court may make either of the following orders:
(a) an order affirming the decision of the Tribunal;
(b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.
(2) If the Court makes an order remitting the matter to the Tribunal, the Court may also make either or both of the following orders:
(a) an order declaring the rights of a party or of the parties;
(b) an order quashing or staying the decision of the Tribunal.

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

8 Form of judgment on appeal

The High Court in the exercise of its appellate jurisdiction under section 5 may affirm, reverse or modify the judgment, decree, order or sentence appealed from and may give such judgment, make such order or decree or impose such sentence as ought to have been given, made or

imposed in the first instance or remit the case for re-determination by the court of first instance, by way of a new trial or rehearing, in accordance with the directions of the High Court.

Migration Act 1958 (Cth) (as at 3 May 2012)

36 Protection visas--criteria provided for by this Act

...

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

Judiciary Act 1903 (Cth)

32 Complete relief to be granted

The High Court in the exercise of its original jurisdiction in any cause or matter pending before it, whether originated in the High Court or removed into it from another Court, shall have power to grant, and shall 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, and all multiplicity of legal proceedings concerning any of such matters may be avoided.