IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M145 of 2017**

BETWEEN:

DWN 027
Appellant

and

REPUBLIC OF NAURU
Respondent

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 Republic accepts the appellant's statement of issues.

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.

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Part V: RELEVANT PROVISIONS

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

   i. *Refugees Convention Act 2012* (**the RC Act**) in force on 28 December 2014.

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

   iii. *Convention on the Rights of the Child* (**the CRC**).[2]

Part VI: ARGUMENT

Ground 1

"Complementary protection" under the RC Act

6. 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;

   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;

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

7. 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

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1 opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
2 opened for signature on 20 November 1989, 1577 UNTS 3 (entered into force on 2 September 1990).

as it relates to the *Republic*, and applies only at the point where return of a person to another country is proposed. It does not influence or affect the Tribunal's function to conduct a review.

The reasons of the Tribunal

8. In paragraph 45 of its reasons, the Tribunal states that the appellant was not owed complementary protection "for the same reasons as are set out above with respect to relocation". By this statement, the "relocation analysis" that was done for the purpose of assessing whether the appellant was a refugee (Reasons [26]-[41]) 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

9. The appellant's argument centres on the submission that the "complementary protection obligations that arise by reason of Nauru's international obligations are not limited in scope in any relevant way" (AS [35]). This is said to create an "absolute prohibition on return" (AS [36]) which is "unlimited" in nature (AS [37]), and that the Supreme Court erred in failing to conclude that the appellant was entitled to complementary protection (AS [46]).

10. Before turning to the substance of the argument, it should be noted that the appellant urges the Court to find, and declare that he is owed complementary protection (AS [46], [78]). That misunderstands the scope of an appeal to the Supreme Court, which is necessarily limited to a point of law (RC Act s 43(1)).

11. International jurisprudence has identified, and the Republic accepts, that the obligation in Art 2 of the ICCPR includes an obligation not to return or expel a person to a country where there are substantial grounds for believing that, as a necessary and foreseeable consequence of such return, there is a real risk of irreparable harm, such as that contemplated by arts 6 and 7 of the ICCPR.[3]

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[3] 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]; Human Rights Committee, *Views:*

12. The reference to necessary and foreseeable consequence imports a "high standard",[4] and reflects the fact that the implied obligation is engaged only when it can be seen that a person's fundamental rights will not be protected in the country to which he or she may be returned. That test will not be met where there are places within that country where the person's rights can be expected to be protected, at least if it is reasonable, in the sense of practicable, for the person to relocate to one of those places (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.

13. This analysis is the settled position in international jurisprudence regarding the ICCPR, and comparable obligations.

14. Thus, in *BL v Australia*,[5] 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 were unable to conclude that removing the man to Senegal would violate Australia's obligations under arts 6 or 7 of the ICCPR (at [7.4]). Three other members gave separate concurring reasons and one expressed a contrary view.

15. Similarly, in a submission to the Australian Senate Legal and Constitutional Affairs Legislation Committee which was considering proposed legislation that was to specify 'that a person has a real risk of significant harm,' for the purposes of a statutory complementary protection assessment, 'only if the real risk relates to all areas of a receiving country', the UNHCR recommended:

Communication No 470/1991, 48th sess, UN Doc CCPR/C/48/D/470/1991 (30 July 1993), 9-10 [6.2] ('***Kindler v Canada***').

4 *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497, [62].

5 Human Rights Committee, *Views: Communication No 2053/2011*, 112th sess, UN Doc CCPR/C/112/D/2053/2011 (7 January 2015).

> ...the revision of this proposed amendment to ensure that the complementary protection framework, as codified in the Migration Act, requires consideration of the reasonableness of the proposed area of internal relocation consistent with existing State practice and a correct legal interpretation of Australia's obligations under international law.[6] (emphasis added)

16. Implied in this submission is acceptance that the non-refoulement obligation under the ICCPR does not arise in a case where internal relocation would be effective and reasonable.

17. The established understanding of the ICCPR reflects a consistent approach to international non-refoulement obligations more generally. 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)

18. This proposition is stated under the heading "Relevant Principles of International Protection" and is a principle which is said to find reflection in the Qualification Directive and the Immigration Rules. Inherent in this passage is the acceptance by the Court of the internal relocation qualification as a general principle of international law applicable to non-refoulement obligations other than those arising under the Refugees Convention. In *BL v Australia*, two members of the

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6 UNHCR Regional Representation in Canberra, Submission No 15 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Complementary Protection and Other Measures) Bill 2015*, 3 December 2015, 8 [32].

7 (2012) 54 EHRR 9, [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, [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.

Human Rights Committee 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 *Sufi and Elmi, SYL v Australia*,[12] and *Omeredo v Austria*[13] as authority for the proposition.

19. The appellant's attempt to distinguish the position under the Refugees Convention is unsound. The relocation principle is not provided for expressly in that Convention but necessarily arises from the nature of the obligations undertaken. It arises in part from the fact that the Refugees Convention is framed around the geopolitical unit of 'States'. This observation directs attention to 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 where protection is provided domestically. Flowing from this observation is the requirement for an 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, before international protection can be said to be required.[14]

20. The ICCPR also operates at the level of relations between States. This observation fortifies the correctness of the settled position in international law that the non-refoulement obligation arising under the ICCPR does not arise where internal relocation is available. If it were not correct, refoulement would be precluded if there were *any* place in the receiving State where the person

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[12] Human Rights Committee, *Views: Communication No 1897/2009*, 108th sess, UN Doc CCPR/C/108/D/1897/2009 (11 September 2013).

[13] (European Court of Human Rights, Chamber, Application No 8969/10, 20 September 2011).

[14] 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.

would face a real risk of relevant harm (even a place where he or she had never been and was unlikely to go).

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

    a. The suggestion that the obligation under art 7 of the ICCPR provides for an "absolute prohibition on return" does not assist the appellant. The argument is as to whether that obligation is engaged.

    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 [41]). 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 *MZYYL v Minister for Immigration and Citizenship*[15] does not assist the appellant. The extracted statement from *MZYYL* (AS [42]), with respect to relocation, was made in the course of explaining why authority on the interpretation of the treaties did not assist in construing the regime in the Migration Act. The Court did not need to, and did not, decide whether there is any internal relocation qualification to relevant obligations under the ICCPR.

22. It follows that the appellant has not demonstrated any error of law affecting the decision of the Tribunal by reason of it applying a relocation qualification when assessing Nauru's international obligations arising under the ICCPR in respect of the appellant.

Ground 2

23. The appellant submits that Art 3(1) of the CRC together with the RC Act imposed a duty upon the Tribunal to give primary consideration to the best interests of the appellant's son, and that it failed to comply with that duty.

24. This argument is misconceived. There are two basic reasons why it must fail.

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[15] (2012) 207 FCR 211 ('***MZYYL***').

Appellant's child not within Nauru's jurisdiction

25. Article 2(1) of the CRC limits the protections 'set forth in' the CRC to protections with respect to 'each child within [Nauru's] jurisdiction'. 'Jurisdiction', with respect to the application of treaties, is presumed to be limited to the territorial boundaries of a State,[16] but may in certain limited circumstances extend to territory over which a State exercises effective control,[17] or circumstances where a State exercises 'physical power and control' over an individual.[18]

26. There was not before the Tribunal, and there is not on this appeal, any evidence to indicate that:

10 a. the appellant's child was upon Nauruan territory or territory over which Nauru exercised effective control; or

b. Nauru exercised 'physical power and control' over the appellant's child.

27. It follows that there were no "international obligations" owed by Nauru under the CRC arising from the fact that the appellant has a child in Pakistan.

28. The appellant's argument to the contrary in AS [52]-[60] should be rejected. The Court should also reject the proposition that Nauru might exercises *any* form of jurisdiction over the appellant's child, who is both a citizen of Pakistan and physically located in Pakistan.

29. The appellant's submissions with respect to the so-called "adjudicatory
20 jurisdiction" are misconceived. The authority cited in support of the appellant's argument suggests that "adjudicatory jurisdiction" is an emanation of the two principal forms of jurisdiction in international law, being the jurisdiction to prescribe and the jurisdiction to enforce. It is said to refer "to the power of its courts to settle legal disputes, though this type of jurisdiction may safely be

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[16] 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.' *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 29.

[17] See eg. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 179 [109].

[18] *Al-Skeini v United Kingdom* [2011] IV Eur Court HR 99, 168 [136].

subsumed under the state's prescriptive and enforcement jurisdiction."[19] It follows that the appellant's argument is not supported by the authority to which he refers (cf AS [55(c)]).

30. The extracted quote in AS [56] refers to the preliminary objections decision in *Loizidou v Turkey*, a case in which it was alleged that the Republic of Turkey bore responsibility for various acts done in northern Cyprus. In the relevant passages, the Court was addressing the question "whether the matters complained of by the applicant are capable of falling within the 'jurisdiction' of Turkey even though they occur outside her national territory" (at [60]). The Court noted that Contracting Parties to the European Convention may in certain circumstances be responsible for the acts of their authorities, notwithstanding that those acts may have been performed outside national boundaries (at [62]). The ECtHR did not suggest that the concept of jurisdiction should be understood in any different way than that set out in paragraph 25 above.

31. The reference in AS [57] to *Alejandre v Cuba* (at fn 73) is to a passage of the Inter-American Commission where it is stated:

> Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad.

32. This statement was made with the principles of *de facto* jurisdiction in mind, indicated by reference to that concept in footnote 14 of this Report. The concept of *de facto* jurisdiction is not relevant to the present appeal.

33. The reference to the Advisory Opinion of the ICJ in relation to the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* does not assist the appellant. Although the ICJ stated that the obligations of the ICCPR (cf CRC) extended to "acts done by a State in the

exercise of its jurisdiction outside its own territory", the ICJ did not suggest that the concept of jurisdiction should be understood in any different way than that set out in paragraph 25 above.

34. Nor is the appellant assisted by reference to *El Ghatet v Switzerland*. The extracted quote in AS [58] is not relevant to the present appeal. The decision there (as to the *admission* of a child to Switzerland for the purpose of family reunification with a parent already in Switzerland) was one which would directly affect the legal rights of the child.

35. As to the submissions in AS [59]-[60]:

10 a. Whatever consequence may follow upon any acceptance of the appellant's construction of the concept of "jurisdiction" in Art 2(1) of the CRC, those matters do not arise for consideration in circumstances where the appellant's postulated construction is not open.

b. The suggestion that the obligation in Ar 3(1) of the CRC has a customary law status, or even rises to the level of *jus cogens*, is distracting. The ground of appeal focusses upon the CRC itself, and not any customary international law rights.

Tribunal decision is not an action concerning children

36. In order for the CRC to be engaged, the appellant must identify an "action
20 concerning children" within the meaning of art 3(1). The appellant at AS [48] frames the relevant issue as whether the Tribunal was required to consider the best interests of his child – suggesting that the relevant "action" is the *decision of the Tribunal* (see also AS [64]).

37. That characterisation has at least two fundamental difficulties. One is that the nature of the power exercised by the Tribunal has no bearing on whether the subsequent act of returning the appellant to Pakistan would constitute a breach of Nauru's international obligations (which is the determinant of whether he is owed "complementary protection"). His criticism of the Tribunal is irrelevant

unless he establishes a separate requirement under the law of Nauru for bodies such as the Tribunal to conduct themselves in accordance with Article 3(1).

38. The second difficulty is that the decision to be made by the Tribunal involved no discretion, and was therefore not one in which the best interests of the child were capable of being brought to bear as a "primary consideration". The Tribunal's role was only to apply criteria to facts that it found. The fact that those criteria involved assessment of whether relocation would be "reasonable" did not mean that the Tribunal was engaged in an exercise of weighing the interests of the child against other factors to identify the preferable outcome.

39. For these reasons, the arguments at AS [63]-[64] are misdirected. It is not necessary to determine whether the Tribunal proceeded on any particular assumption as to whether the appellant's child would live with him. It is not submitted that the Tribunal had regard to the child's interests as a "primary consideration". It would have been erroneous for it to do so, to the extent that such consideration distracted attention from whether it was reasonable (in the sense of practicable) for the appellant to relocate within Pakistan.

Ground 3

Leave is required to raise this ground

40. The appellant's case in the Supreme Court on this ground focussed upon the supposed objection to relocation that if the appellant were to be returned to his home country, despite findings that he could safely and reasonably relocate to another part of the country, he would feel compelled by familial obligation to return to his home region despite the risk of harm in that region.

41. A party is bound by the manner in which a case was conducted before 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.[20] This depends on all relevant circumstances, including why the grounds were not advanced below, any prejudice suffered by

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

affected parties, the nature of the argument that would be advanced if leave were granted, and the merits of new grounds.

42. The Republic opposes the grant of leave because the proposed ground lacks sufficient merit in the relevant sense, and therefore, it is not expedient in the interests of the administration of justice to grant leave.

Introduction

43. The authorities referred to at AS [65]-[67] indicate that the reasonableness of relocation depends on the practical realities of the particular case and may be fact-intensive. They do not establish that the "integers" of the visa applicant's objections to relocation have a particular status such that each one must be addressed and determined. Some objections may be irrelevant or misconceived. It is a matter for the decision-maker (within the bounds of legal reasonableness) to determine which objections are entitled to be given weight, and how much weight. Absence of reference to particular matters raised by the appellant as to why he could not relocate does not, without more, point to any error of law.

Inferences from a statement of reasons

44. There is an initial factual question as to whether the Tribunal turned its mind to the matters identified at AS [70]. An appellant before the Supreme Court of Nauru, and before this Court, bears the "burden of persuasion" to satisfy the Court that there has been some legal error by the Tribunal.[21] Where an appellant seeks to show that some matter was not considered by the Tribunal by pointing to the omission to mention that matter in the statement of reasons, the starting point for resolving that argument is to observe the limited nature of the obligation to produce a statement of reasons under s 34(4) of the RC Act.

45. This obligation is identical in form to that considered in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (see especially at 330-331 [4]-[5], [9] (per Gleeson CJ), 337-338 [30]-[35] (per Gaudron J), 345-346 [66]-

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[21] *SZSSC v Minister for Immigration and Border Protection* (2014) 317 ALR 365, [81(g)].

[69] (per McHugh, Gummow and Hayne JJ)), and the Republic submits that the same principles are applicable: the mere fact that a matter is not referred to in a statement of reasons does not mean the matter was not considered by the Tribunal. Some matters may have been considered but found not to be material, or not deserving of any weight, and thus not mentioned. The issue is whether, having regard to the limited obligation under s 34(4) of the RC Act, an inference can be sustained that if the matter had been considered at all, it would have been referred to expressly in the reasons (even if it were then rejected or given no weight).[22]

10 46. In this context, it may also be that specific mention of a matter was otiose because the Tribunal had dealt with the overarching issue at a higher level of generality or rejected a premise which made further specific mention of subsidiary or derivative matters otiose.[23]

47. Deciding whether an appellant has met their burden of persuasion will be significantly influenced by the objective "importance" of the matter alleged not to have been considered, understood in the context of the case advanced on review and the manner in which the Tribunal determined the review.[24]

Legal error in not considering material

48. Even where a Court is satisfied that a Tribunal has failed to consider some
20 matter, that does not immediately justify a finding of "legal error". In so far as specific *arguments or issues* are not grappled with, that does not constitute legal error in the absence of a requirement to consider those issues.[25] A failure to consider relevant *material* does not of itself constitute an error of law. It will only do so where the material was centrally important to the review, with the correlative consequence that the error was sufficiently serious to justify a

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[22] *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67, 75 [34].
[23] *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593, 604-605 [46]-[47].
[24] *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99, 130 [111].
[25] *Foster v Minister for Customs and Justice* (2000) 200 CLR 442, 452 [23], 456-457 [38]; *Drake-Brockman v Minister of Planning* (2007) 158 LGERA 349, 385 [126].

conclusion that the Tribunal has failed to exercise jurisdiction or denied procedural fairness to an appellant.[26]

The purported objections in this case

49. The appellant mentions three topics addressed in his evidence and submissions which are said not to have been considered by the Tribunal (AS [70]-[71]).

50. The first bundle of references (Transfer interview at 6, RSD application – Response to question 10, RSD Statement at 2 [15], Tribunal hearing transcript at P-22 lns 10-12) merely record the existence of the appellant's son, and do not involve the making of any objection to relocation.

51. The second reference (Tribunal hearing transcript at P-29 lns 40-41) is to a passage in the transcript of the hearing before the Tribunal where the appellant's representative referred to the appellant's evidence that he does not speak Punjabi. The Tribunal dealt with the issue of the appellant's language abilities – in the specific context of relocation – in the final three lines of paragraph 39 of its reasons, and it does not suggest that the appellant speaks Punjabi. Implicit in this statement of the reasons is awareness of the fact that the appellant does not speak Punjabi. It follows that there is no basis for inferring that the Tribunal failed to consider this evidence.

52. The third reference (Tribunal hearing transcript at P-23 lns 38-46 and P-29 lns 43-46) is to a passage in the transcript of the hearing before the Tribunal where the appellant's representative made a submission about "how people from other ethnicities perceive Sunni Pashtuns and how usually they be (*sic*) perceived as (*sic*) to be assisting the Taliban", by reference to the appellant's evidence to this effect. The suggested need for a "guarantor" in order to rent a house was the subject of evidence given in the context of this topic. The Tribunal dealt with the issue of discrimination against Pashtuns in paragraphs 34-35, 38 and 40 of its reasons and there is no basis on which it can be inferred that it failed to consider this evidence and argument.

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[26] *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67, 80 [58]-[59]; *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99, 127 [97], 128-129 [102].

53. To the extent that the appellant complains about the failure to mention specifically the evidence in relation to needing a "guarantor" to rent a house, there is no obligation upon the Tribunal to refer to every piece of evidence or respond thereto line by line, and specific mention of it was otiose because it was subsumed within the broader findings about discrimination against Pashtuns.

54. The suggestion of an inconsistency in the Tribunal's findings in AS [71] is illusory. It is obvious that if the appellant sold his assets, he would obtain money in return which could be made available to support his family. In any event, the appellant does not articulate how this allegation demonstrates an error of law affecting the decision of the Tribunal.

Relief claimed by the appellant

55. The appellant appears to claim that success on ground 1 entitles him to a declaration from this Court that he is owed complementary protection by Nauru (AS [78(3)]). That submission impermissibly invites this Court to determine the merits of his claims.

56. While the Supreme Court has power to make declarations of right when remitting a matter to the Tribunal (RC Act s 44(2)), that power must be exercised consistently with the nature of an appeal to that court, which (as noted above) is limited to points of law.[27] It does not provide a basis for the Supreme Court (or this Court on appeal) to decide the merits of an application to the Tribunal. To the extent that the appellant's submissions involve an analogy with the situation where a discretion has merged into a duty capable of enforcement by mandamus,[28] 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

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[27] Cf *Minister for Immigration and Ethnic Affairs v Gungor* (1982) 42 ALR 209, 220.

[28] *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 and Border Protection* (2015) 255 CLR 231).

law and cannot substitute its own opinion of what the Tribunal's conclusions should have been, as flowing from some or all of the factual findings it made.

Part VIII: ESTIMATE OF ORAL ADDRESS

57. The Republic estimates that it will need 1 hour to present oral submissions in relation to ground 1, and a further 45 minutes to present oral submissions in relation to the issues raised by Grounds 2 and 3.

58. It is noted that the issue raised by Ground 1 is also raised in the appeals by CRI 026 and EMP 144. Some saving of time may therefore be able to be achieved by listing these matters together.

Dated: 15 December 2017

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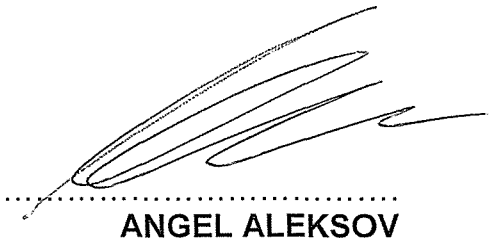

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