IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
B E T W E E N:

No M146 of 2017

HFM043
Appellant

and

THE REPUBLIC OF NAURU
Respondent

APPELLANT'S SUBMISSIONS IN REPLY AND ON THE NOTICE OF CONTENTION

Part I: These submissions are in a form suitable for publication on the internet.

Part II: REPLY TO THE RESPONDENT'S SUBMISSIONS

1 These submissions are in response to the Respondent's submissions dated 20 December 2017 (**RS**) only in respect of issues not already addressed in the Appellant's submissions dated 17 November 2017 (**AS**).

2 The Respondent's submissions as to the construction of s 31(5) of the Convention Act centre not on the text of the Act itself, but on the embellishment to that text which appears in the annexed Explanatory Memorandum; see **RS 6.c, 9, 14, 16, 19** and **22**. In particular, the Respondent relies heavily on the statements in the Explanatory Memorandum that the Refugee Determination Record is a 'common document' which 'is taken to conclude the determination of all protection claims made by that person'. However, recourse to the Explanatory Memorandum cannot avail the Respondent for two reasons.

3 First, nothing in the Explanatory Memorandum is inconsistent with the construction of s 31(5) proffered by the Appellant. Specifically, nothing in the Explanatory Memorandum contradicts the Appellant's central proposition that a Refugee Determination Record only operates with respect to the particular s 5 application in respect of which it is made, and the 'Refugee Determination Record' referred to in

Date of document: 9 February 2018
Filed on behalf of: the Appellant
Allens
Lawyers
Deutsche Bank Place
Corner Hunter and Phillip Streets
Sydney NSW 2000
syom A0140988153 120719810
Telephone: (02) 9230 4000
Fax: (02) 9230 5333
Email: Malcolm.Stephens@allens.com.au
Ref: YMSS:120719810
Contact Name: Malcolm Stephens

s 31(5) is one issued in respect of the 'application' first mentioned in the section, being an application to the Tribunal for review of a determination of that s 5 application.

4 An 'application' under s 5 may be 'to be recognised as a refugee',[1] or alternatively 'to be given derivative status'.[2] In the former application, the Secretary 'must determine' whether that applicant is a refugee[3] or whether that person is owed complementary protection.[4] In the latter application, the Secretary 'must determine' whether that applicant is to be given derivative status[5] or whether that person is owed complementary protection.[6] By drawing these clear distinctions, the Parliament has made it plain that a determination on one s 5 application that a person is entitled to derivative status as the dependent of another refugee cannot and does not preclude a separate s 5 application by the same person for refugee status in their own right (as occurred in the present case). The effect of s 31(5) is, as the Explanatory Memorandum reflects, that the issue of a Refugee Determination Record in respect of such an application determines all such claims. However, the Explanatory Memorandum does not address a situation where, as here, *different applications* are on foot.[7]

5 Likewise, to point out that the Refugee Determination Record is 'the common document' issued regardless of the basis upon which a person is found to be entitled to protection does not undermine the proposition that such a document is a record of the determination of the particular application in respect of which it is issued, not any and all applications which might be on foot at the time.[8] The document being in a common form does not alter this, nor does it change the meaning of the Convention Act's terms.

---

[1] Convention Act s 5(1)
[2] Convention Act s 5(1AA)
[3] Convention Act s 6(1)(a)
[4] Convention Act s 6(1)(c)
[5] Convention Act s 6(1)(b)
[6] Convention Act s 6(1)(c)
[7] The limited nature of the Appellant's application, which was before the Supreme Court, was noted in the judgment of Khan J at *HFM043 v Republic of Nauru* [2017] NRSC 43 at [25]
[8] Cf RS 14.a, 19

6 Second, extrinsic material cannot be used to contradict the meaning of the language of an Act.[9] 'The function of the Court is to give effect to the will of Parliament as expressed in the law.'[10]

7 The Respondent appears to rely upon s 51(1)(b) of the *Interpretation Act* 2011 (Nr) to the effect that 'material not forming part of the written law may be considered in order to... displace the apparent meaning of the law'. Manifestly, this provision does not mean that extrinsic material may be deployed to *change* the meaning of a statutory provision. Such a construction of s 51 would be an affront to the rule of law[11] and the principle of legality in Nauru.[12] It would also make compliance with the law all but impossible absent refined legal research skills into all of those sources listed in s 52 of the same Act. Rather, the provision is directed to situations where a provision, capable of more than one meaning, bears a meaning more readily apparent than the others, and permits recourse to extrinsic materials in order to resolve whether that meaning is the correct one. This is confirmed by the Explanatory Memorandum to the Bill for the *Interpretation Act* itself, which states, in respect of s 51:

> There may be circumstances where the words of a law have no clear meaning, or a meaning that is clearly absurd. This provision outlines the circumstances in which extrinsic material may be used by a court to *interpret the law*.[13] (Emphasis added).

The italicised words confirm that the effect of s 51 is to assist the Court to *construe* the words Parliament has used in a statutory provision, not to *alter its meaning*.

---

[9] *Barry R. Liggins Pty Ltd v Comptroller-General of Customs & Ors* [1991] FCA 650; 103 ALR 565 at [28] per Beaumont J (with Lochkart and Gummow JJ agreeing)

[10] *Re Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ; see also per Deane J at 552, *Catlow v Accident Compensation Commission* [1989] HCA 43; (1989) 167 CLR 543 at 550 per Brennan and Gaudron JJ and *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 179 ALR 238 at [132] per McHugh J. Contrary to the Respondent's submissions, 'determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted': *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378 at [25] per French CJ and Hayne J

[11] In the way described at Bingham, T., "The Rule of Law" (2007) 66 Cambridge Law Journal 67 as subrule 1; see also *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at 271 [49] both extracted and discussed at *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 at [39]-[42] per Spender J; *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland)* [2016] UKSC 51 at [79]

[12] *AS (Somalia) (FC) and another (Appellants) v Secretary of State for the Home Department (Respondent)* [2009] UKHL 32 at [17] per Lord Hope (with Hoffman LJ at [11], and Brown LJ at [31] agreeing)

[13] Available at http://www.paclii.org/nr/legis/bill_em/ib2011201/

8 In addition, the relevant Explanatory Memorandum is not extrinsic material that Parliament has condoned to be taken into account by an interpreting Court. Section 51(2) of the *Interpretation Act* states that any Court considering whether to take extrinsic material into account must weigh, among other things 'the accessibility of the material to the public'. This precondition is not met in this instance because the Explanatory Memorandum annexed to the Respondent's submissions is hidden from public view.[14]

9 As appears from **RS 21** and **22**, central to the Respondent's contentions on the construction of s 31(5) is that the grant of a Refugee Determination Record in respect
10 of one s 5 application makes Tribunal review of an adverse determination on another s 5 application 'otiose'. The facts of this case, as addressed at AS 46, demonstrate clearly why that is not necessarily so.

10 The Respondent asserts that a person with a Refugee Determination Record for derivative status and refugee status receives the 'same rights and protections under Nauruan law'. No authority or evidence is cited to support this statement. Nor is any material put forward by the Respondent to contradict the matters set out at AS 46. The grant of derivative, as opposed to full, refugee status renders the Appellant vulnerable to changes in Nauruan domestic policy and personal circumstances, which render it important that the Appellant obtain individual recognition, via a remittal to
20 the Tribunal, if she is entitled to it. The Appellant's construction of s 31(5) is accordingly consistent with the apparent purpose of the written law which is to ensure that applications for refugee status are determined lawfully in compliance with Nauru's international obligations and the principles of natural justice.[15]

11 At **RS 27(a)** and **(c)**, the Respondent contends that s 31(5) applies to the Appellant because the finding by the Supreme Court that there was an error of law in the Tribunal decision of 17 March 2015 and any remitter would have meant that there was no determination 'according to law'. However, if the Respondent's construction of s 31(5) is accepted, the Supreme Court of Nauru would not have had any jurisdiction to review the Tribunal's decision after 5 August 2016, meaning that such
30 contentions are not applicable.

---

[14] Affidavit of Zainab Mahmood dated 9 February 2018
[15] See ss 4, 22, 43 and 46 of the Convention Act and s 49(1) of the *Interpretation Act* 2011 (Nr); cf **RS 27(b)**.

12 At **RS 28** to **29**, the Respondent asserts that the relief which may be granted by the Supreme Court upon determination of an appeal is discretionary. In truth, s 44(1) simply sets out two alternative courses which are necessarily self-selecting, depending upon the outcome of the appeal. However that may be, the Respondent's submissions on the issue of discretion depend upon acceptance of the proposition that there would be no 'potential practical benefit to the Appellant' in a remittal to the Tribunal because s 31(5) forecloses the jurisdiction of the Tribunal to deal with the matter. For the reasons set out in the Appellant's earlier submissions and above, that proposition is incorrect.

10 **Notice of contention response**

13 The Respondent's submissions on the notice of contention largely miss the point of the ground that was allowed by the Supreme Court in this case and instead focus on the Court's criticism in [65] that the Tribunal had failed to adjourn. That ground was framed as a 'failure to consider the Appellant's current mental health problems'[16] in that the Appellant 'would be unable to access adequate medical treatment for her severe depression'[17] and / or her mental state would 'undermine her ability to even earn a living to survive'.[18] This was identified as a distinct integer of her claims for protection which was 'raised squarely on the material'[19] before the Tribunal. The ground was consistent with the Tribunal's acknowledgement that 'her effect at the
20 hearing was very depressed' and its acceptance that she 'has mental health issues'.[20]

14 Consistently with the authorities identified and quoted at length in the judgment, the Court accepted that the ground was made out at [64]:

> The extent of the appellant's mental health issue was vital for the Tribunal to assess whether she could still engage in her employment to be able to earn a living in Thailand and Malaysia. In the absence of a proper medical report, the Tribunal could not have determined as to whether her mental health issues would affect her ability to continue employment without which she would not have been able to maintain herself let alone have access to medical treatment.

---

[16] Notice of Appeal dated 10 April 2015, ground 2
[17] Submissions of the Appellant dated 29 February 2016 at [23]
[18] Submissions of the Appellant dated 29 February 2016 at [24]
[19] Submissions of the Appellant dated 29 February 2016 at [22] quoting from *NABE v Minister for Immigration & Multicultural & Indigenous Affairs* (No 2) (2004) 144 FCR 1 at [58]; see also Submissions of the Appellant dated 20 March 2016 at [10]
[20] Reasons of the Tribunal at [9]-[11], reproduced in full at *HFM043 v Republic of Nauru* [2017] NRSC 43 at [50]

15 It then went on to elaborate its holding on this ground by pointing out that what the Tribunal ought to have done was to obtain a medical report, a course which obviously necessitated an adjournment. Obtaining such a report was consistent with the Tribunal's shared duty of fact finding[21] and akin to a duty to inquire[22] about the extent of the Appellant's mental state.[23]

16 Strictly, the further conclusion of the Court at [65] was not needed to dispose of the ground favourably to the Appellant; rather, it indicates the course the Tribunal should have taken. The Respondent's focus on the comment in [65] obscures the key fact that the substantive ground was allowed, and properly so.

10 17 If leave is granted to the Respondent to rely on its proposed notice of contention, the Appellant will, in turn, seek leave to amend her notice of appeal and supplement her submissions on appeal with additional grounds.

Dated: 9 February 2018

Wendy Harris
Aickin Chambers
Telephone: (03) 9225 7719
Email: harriswa@vicbar.com.au

20 Matthew Albert
Castan Chambers
Telephone: (03) 9225 8265
Email: matthew.albert@vicbar.com.au

Evelyn Tadros
Owen Dixon Chambers
Telephone: (03) 9225 6612
Email: etadros@vicbar.com.au

---

[21] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Geneva, UNHCR (re-edited 1992) at [196] where it is said that 'the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.' As to the importance of this document for the purposes of Nauruan refugee law, see *Refugee Convention Regulations* 2013 (Nr) reg 4(c) and *YAU011 v Republic* [2017] NRSC 102 at [45] per Khan ACJ: 'the Handbook is the most significant document in this area of law.'

[22] *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at [25] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; see also *Sun Zhan Qui v Minister for Immigration & Ethnic Affairs* (1997) 151 ALR 505

[23] This approach echoes the direction of the UNHCR's Handbook to the effect that, where a refugee applicant has evident 'mental or emotional disturbances', the decision-maker 'should, in such cases, wherever possible, obtain expert medical advice. The medical report should provide information on the nature and degree of mental illness'; quoted at *CRI029 v Republic* [2017] NRSC 75 at [49]