IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M20 of 2017

BETWEEN:

DWN 042
Appellant

and

REPUBLIC OF NAURU
Respondent

RESPONDENT'S SUBMISSIONS

Part I: PUBLICATION

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

Part II: STATEMENT OF ISSUES

2. The Republic disagrees with the appellant's statement of issues as set out in paragraphs 2-4 of his written submissions, with respect to grounds 1-3, and submits that the issues in this respect are:

   a. Does the High Court have jurisdiction to hear any of grounds 1, 2 and 3 of the appeal?

   b. If so, does the appellant have any entitlement to relief?

3. The Republic agrees with the appellant's statement of issues as set out in paragraphs 5-6 of his written submissions, with respect to grounds 4 and 5.

Part III: CERTIFICATION

4. It is certified that the Republic has considered whether notice should be given pursuant to s 78B of the *Judiciary Act 1903* (Cth), and concluded that no notice is required.

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Part IV: BACKGROUND

5. On 17 July 2014, the Secretary of the Department of Justice and Border Control determined not to recognise the appellant as a refugee. The appellant sought review of the Secretary's determination by the Refugee Status Review Tribunal (the **Tribunal**) under s 31 of the *Refugees Convention Act 2012* (Nr) (the **RC Act**).

6. The Tribunal is constituted under Pt 3 of the RC Act, and was required by s 40(1) of that Act to invite the appellant to appear before it to give evidence and present arguments relating to the issues arising in relation to the determination or decision under review. With the assistance of a legal representative, the appellant furnished written evidence and submissions to the Tribunal in advance of the hearing. On 25 September 2014, the Tribunal conducted an oral hearing at which the appellant appeared, with the assistance of a legal representative, to give evidence and present arguments to the Tribunal.

7. During the review process, including at the hearing on 25 September 2014, the appellant was detained pursuant to the *Immigration Act 2014* (Nr), the *Immigration Regulations 2014* (Nr) and the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr).

8. On 29 December 2014, the Tribunal affirmed the determination of the Secretary not to recognise the appellant as a refugee.

9. On 17 April 2015, the appellant initiated an 'appeal on a point of law' against the decision of the Tribunal pursuant to s 43(1) of the RC Act.

10. Such an 'appeal' under s 43 is a proceeding in the original jurisdiction of the Supreme Court, in the nature of judicial review, and is analogous to an appeal from the Australian Administrative Appeals Tribunal to the Federal Court of Australia under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth).[1] The appellant has a 'right of appeal' to this Court from a final judgment of the Supreme Court in an appeal under the RC Act, pursuant to Art 1(A)(b)(i) of the Agreement appearing as Schedule 3 to the *Nauru (High Court Appeals) Act 1976* (Cth) (the **Appeals Act**). The nature of the 'appeal' to this Court was set out in *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561.

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[1] See generally, *TNT Skypak International v FCT* (1988) 82 ALR 175, 178 (per Gummow J).

11. The appellant commenced in the Supreme Court by a 'Notice of Appeal'.[2] The matter was set down for hearing on 5 May 2016, and on that day the appellant obtained leave to rely on an Amended Notice of Appeal (which was served on the Republic the same day).

12. Judge Khan struck out grounds 1 and 2 of the Amended Notice of Appeal: *DWN042 v Republic of Nauru* [2016] NRSC 6. Argument then proceeded on grounds 3 and 4 of the Amended Notice of Appeal, and judgment was reserved.

13. Prior to final judgment on the Amended Notice of Appeal, the appellant sought leave to appeal to the High Court from the interlocutory ruling striking out grounds 1 and 2. Leave was refused: *DWN042 v Republic of Nauru* [2016] HCATrans 310.

14. At the hearing of the application for leave, before Kiefel, Gageler and Nettle JJ, the following exchange took place:

> GAGELER J: Mr Kennett, in the respondent's summary of argument at page 139 of the application book in paragraph 27, it is said that if leave to appeal were granted "the Republic would not seek to defend the reasoning of Judge Kahn". Now, I have a question that is in three parts. ... Does that mean that the Republic of Nauru (1) accepts that the reasoning of Judge Khan is plainly wrong; (2) would not rely on that reasoning as a precedent in other proceedings; and (3) would not rely on that reasoning in opposition to an application by the present applicant to reopen the present case to further amend the grounds of appeal?
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> MR KENNETT: ... The answer to the first question is, yes. The answer to the second question is also, yes. In a future proceeding we would consider it necessary to alert the Court to the existence of Justice Khan's decision but we would not seek to submit that it should be followed for its reasoning. The answer to the third question is also, yes, in that if there were an application in this proceeding to reopen and to reintroduce the grounds which were struck out, the Republic would likely wish to submit that they should remain struck out but would not say that for the reasons given by Justice Khan.

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[2] A notice of appeal is the originating process contemplated by ss 43(3) and 43(4) of the RC Act. There is no express provision, regulation or Rule of Court dealing with notices of appeal. However, ss 43(3) and 43(4) of the RC Act constitute an express provision in another written law for the purpose of Order 4 Rules 2(c) of the Rules, displacing the otherwise applicable rule that civil proceedings be commenced by way of a Writ of Summons.

15. The answers given by Senior Counsel for the Republic were later described by Kiefel J (as her Honour then was) as 'assurances'. Those assurances were no more expansive than as set out above.

16. The appellant subsequently sought the Republic's consent to orders that he have leave to 're-open his appeal in respect of grounds 1 and 2 of the amended notice of appeal' and leave to 'file any further amended notice of appeal'.[3] The Republic refused to consent to such orders in the light of its position that grounds 1 and 2 should not be reinstated and the absence of any draft of proposed further amendments.

17. No draft or proposed further amendment has been provided to the Republic, nor has one ever been furnished to the Supreme Court, or to this Court.

18. The appellant's solicitor then sent an email to the Registrar of the Supreme Court, attaching several documents. One of those documents was a draft Notice of Motion, seeking to 'reinstate' the same grounds that the Supreme Court had already struck out, and an order to 're-open the appeal' to further amend the grounds of appeal.[4]

19. It is unclear whether the notice of motion and supporting documents were ever 'filed' in the Court, but the Republic accepts that the appellant emailed these documents to the Registrar of the Supreme Court 'for filing'.[5] The Registrar replied indicating that the matter was referred to the Judge for his decision.[6]

20. Final judgment was delivered on 7 February 2017: *DWN042 v Republic of Nauru* [2017] NRSC 7. The Republic accepts that this judgment does not deal with the notice of motion.

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3 Affidavit of Tamsin Webster filed on 21 February 2017 (and sworn on 20 February 2017) (the **Webster Affidavit**), page 8.

4 Webster Affidavit, page 24.

5 Webster Affidavit, page 22.

6 Webster Affidavit, page 36.

Part V: ARGUMENT

Ground 1

21. It is not conceded that the delivery of judgment on 7 February 2017 was affected by any denial of procedural fairness. It was open to the Appellant at any time after 5 May 2016 to move the Supreme Court to re-instate the grounds of review that had been struck out; and the assurances given to this Court on 16 December 2016 gave notice that, while such an application might well be opposed, Khan J would not be invited to apply his earlier reasoning. The Appellant's motion was sent to the Supreme Court for filing on 6 February 2017, after the Court had given notice that judgment was to be given the next day. With judgment having been reserved for nine months, the Court was not obliged to delay its delivery in order to hear argument on an application which could have been made earlier.

22. Even if the delivery of judgment on 7 February did involve a denial of procedural fairness, it does not lead to any entitlement to relief in the present appeal. The proceeding is not an appeal in the strict sense,[7] and this Court may (and at least *prima facie* should) give such judgment as ought to have been given in the Court below.[8] This Court can address any issue or submission not considered by the Supreme Court and determine whether the judgment given below was correct.

23. The judgment delivered on 7 February was correct, in so far as it relied on the earlier striking out of grounds of review 1 and 2, because those grounds had no merit.

    a. In support of ground 1 of the Amended Notice of Appeal before the Supreme Court, the appellant did not allege any failure by the Tribunal to afford him a hearing, let alone one that resulted in any 'practical injustice'. The legal characterisation of his detention is irrelevant to whether the circumstances of that detention resulted in a review process in the Tribunal that was unfair.

    b. To the extent that ground 2 of the Amended Notice of Appeal before the Supreme Court raised any separate point, much like ground 1, it did not allege any basis on which to connect the legal characterisation of the appellant's detention and the

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7 *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561.

8 Appeals Act s 8.

constitutionality or lawfulness of the review conducted by the Tribunal under the RC Act.

24. The appellant's reliance on the theory of 'fruit of a poisoned tree' is misplaced. The authority upon which the appellant relies – *Gafgen v Germany* [2010] ECHR 759 – does no more than identify, in a 'human rights' context, the basis for the long-known rule that evidence obtained in certain circumstances may not be admitted into evidence. This rule is now embodied in s 138 of the *Evidence Act 1995* (Cth).

25. That principle has no application to the present circumstances.

    a. The appellant was not the subject of any coercive process in connection with the Tribunal review; rather, he applied for review by the Tribunal. The appellant was not required to participate in the hearing, or any other part of the review.

    b. The Tribunal did not at any stage detain the appellant. Nor did the Tribunal exercise any coercive power in respect of the appellant (eg, under s 24(2) of the RC Act). Further, although the Tribunal exercises administrative power, it is not part of the 'executive of Nauru' (see Part III of the Constitution of Nauru). It is inaccurate to assert that the 'Tribunal decision was based on evidence taken by it from the appellant…', that the 'executive processes included the collection of evidence from the appellant' and 'the executive of Nauru conducted its process and exercised its power in the same place and at the same time as the executive was detaining the Appellant' (cf, appellant's submissions [44], [51], [56]). Rather, the appellant voluntarily participated in the review before the Tribunal, and voluntarily gave evidence to the Tribunal, hoping to persuade the Tribunal to interfere with the adverse determination of the Secretary.

    c. The Tribunal's review functions had been invoked by the appellant. It was required, under s 33(1) of the RC Act, to complete its review within 90 days after receiving from the Secretary the documents relevant to the review. It had no power to affect the appellant's detention. Acceptance of the appellant's argument may mean that the Tribunal could not lawfully complete the review which the appellant had himself initiated.

26. While the submissions above focus on grounds 1 and 2 of the Amended Notice of Appeal before the Supreme Court, which were dealt with on a strike-out application, no refinement of the grounds has been suggested – let alone advanced in the Supreme Court – which would overcome these arguments.[9]

27. If the consideration of these arguments involves the interpretation or effect of the Constitution of Nauru, the consequence is that the appeal is incompetent in so far as it involves ground 1.[10] This must be so because the determination of whether ground 1 forms a basis on which the judgment below should be set aside necessarily involves consideration of these arguments.

10 28. These considerations point to a further problem with the competence of the appeal. In support of its contention that the grounds sought to be reinstated had no merit, the Republic would wish to submit that the detention of the appellant was lawful, following *AG v Secretary for Justice* [2013] NRSC 10. (Judge Khan was invited to assume the contrary for the purposes of the strike-out application, but this did not amount to a concession for any broader purpose.) The appellant would presumably seek to distinguish *A-G v Secretary for Justice* (or, perhaps, argue that it was wrongly decided). That debate is, on any view, outside the jurisdiction of this Court. But it is a necessary aspect of determining whether ground 1 forms a basis for setting aside the judgment under appeal.

20 29. The problems cannot be avoided by limiting the relief sought to an order remitting the matter to the Supreme Court. To obtain that order, the appellant still needs to show that there is an error that justifies the judgment under appeal being set aside. That cannot be done without overcoming any arguments as to why that judgment is correct.

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9 In his application for leave to appeal the appellant affirmed an affidavit deposing to problems which had been caused for him by the conditions of his detention (Webster Affidavit, pp 42-43). Such evidence might conceivably support a procedural fairness argument but is irrelevant to any ground based on the asserted unlawfulness of his detention. In any event it was not placed before the Supreme Court. The application sought to be filed on 6 February 2017 sought to reinstate the original grounds, together with leave to make further unspecified amendments (Webster Affidavit, p 24).

10 See Article 2(a) of the Agreement forming the Schedule to the Appeals Act.

Grounds 2 and 3

30. The proposed Amended Notice of Appeal filed in this Court on 28 March 2017 articulates grounds 2 and 3 as follows:

> (2) The Supreme Court erred in failing to deal with and determine ground 1 in the amended notice of appeal, that the Tribunal acted in a way that was in breach of the principles of natural justice, contrary to s 22(b) of the RC Act, by conducting its hearing at the time and place of the Appellant's detention when he was unlawfully detained in breach of s 5 of the Constitution of Nauru.
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> (3) The Supreme Court erred in failing to deal with and determine ground 2 in the amended notice of appeal, that the Tribunal's hearing of the Appellant's application for review was unconstitutional because the appellant was unlawfully detained at the time of that hearing.

31. It is plainly not the case that Judge Khan failed to 'deal with and determine' grounds 1 and 2 as they were advanced before the Supreme Court. His Honour did so in the strike out ruling, which has now merged into the final judgment.

32. The fact that his Honour's reasons for disposing of these grounds were 'plainly wrong' is not relevant to the question whether Judge Khan 'dealt with and determined' them.

33. The appellant appears to suggest that, by reason of the error in reasoning by the Supreme Court of Nauru, there is some kind of 'constructive failure to exercise jurisdiction' (or some similar notion), such that grounds 1 and 2 of the Amended Notice of Appeal before the Supreme Court remain (constructively) undetermined (appellant's submissions, [34.2]-[34.3], [43], [57]). If that is the argument being made, it is misconceived; Judge Khan made orders striking out these grounds in the exercise of judicial power, which was a 'judicial order' by the superior court of Nauru. There can be no doubt that Judge Khan's order has legal effect for all purposes unless and until it is set aside, irrespective of the correctness or incorrectness of his reasoning.[11] There is no room for a principle such as 'constructive failure to exercise jurisdiction' in relation to the Supreme Court.

34. Grounds 2 and 3 therefore cannot succeed in their present form.

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[11] *New South Wales v Kable* (2013) 252 CLR 118.

35. To the extent that the appellant submits that grounds 1 and 2 of the Amended Notice of Appeal before the Supreme Court were wrongly struck out, the Republic would again make the submissions outlined at 23 above to the effect that these grounds had no merit. It follows that the decision to strike these grounds out was correct (although Judge Khan's reasons for doing so are not sought to be defended) and did not give rise to any error affecting the final judgment. It also follows that, if consideration of these arguments involves the interpretation or effect of the Constitution of Nauru, the appeal is incompetent in so far as it involves a submission that grounds 1 and 2 of the Amended Notice of Appeal before the Supreme Court should not have been struck out.

Ground 4

36. The appellant alleges that the Tribunal failed to consider aspects of his claims to be owed 'complementary protection', being that he feared that he might be arbitrarily deprived of his life.

37. The Republic accepts the appellant's analysis in paragraphs 58-59 of his written submissions, and accepts that the Tribunal must consider[12] claims made to it that the return of the appellant to his country of nationality would be in breach of Nauru's international obligations, including because he may be arbitrarily deprived of his life.

38. The appellant's principal claims to protection were said to arise from an incident where the Taliban sought to extort money from him, he refused, and they targeted him for harm for refusing to comply with their demand.

39. The Republic accepts that the appellant, a citizen of Pakistan, claimed that he feared being arbitrarily deprived of his life if returned to Pakistan. However, relevantly, this claim was limited to the possibility of an arbitrary deprivation of life at the hands of the Taliban. The Tribunal expressly responded to the risk that the appellant faced at the hands of the Taliban, and found that returning or expelling the appellant to the frontiers of Pakistan would not lead to any breach of Nauru's international obligations (BD 210 [56]). It follows that there was no aspect of his claim to fearing arbitrary deprivation of life that was not

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[12] *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, 357 [90]; *Dranichnikov v Minister for Immigration* (2003) 77 ALJR 1088.

considered and determined by the Tribunal. Judge Khan was correct in so finding: *DWN042 v Republic of Nauru* [2017] NRSC 4, [26].

40. In assessing the appellant's arguments, adapting what was said by Gleeson CJ in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473, 478 [1], it is important to bear in mind that the system of appeals on a point of law is the third level of decision-making (and on appeal to this Court, the fourth level) and it may not be surprising that, at the third level, an appellant will look for a new way of putting a case that has already failed on two occasions. The case put to the Court may bear little relationship to what was previously advanced, considered, and rejected. There is a risk that criticism of the reasoning of the Tribunal might overlook the context in which such reasoning was expressed; a context that may have changed almost beyond recognition upon appeal. A decision of the Tribunal must be considered in the light of the basis upon which the application was made, not upon an entirely different basis which occurs to an appellant at some later stage.

41. As identified by Mortimer J in *MZAJC v Minister for Immigration* [2016] FCA 208:

    a. The Tribunal is not required to divine a claim out of country information or apply its own analytical skills to articulate claims that might have conceivably been made.

    b. It is not appropriate to engage, after the fact of the Tribunal's decision, in a process of constructing a 'possible process of reasoning' which might flow from one of the Tribunal's findings in favour of an applicant.

    c. The assessment of what a Tribunal might reasonably be expected to appreciate should be undertaken by a reviewing court as best it can without the advantage of hindsight, and the court should be astute not to scrutinise the Tribunal decision too assiduously with that perspective of hindsight.

42. The appellant refers to 12 passages in the materials before the Tribunal that are said to have amounted to a claim that the appellant was owed complementary protection due to the possibility of 'arbitrary deprivation of life from bomb blasts, attacks on mosques and/or widespread violence'.

43. The first two passages mentioned by the appellant (appellant's submissions, [62] fn 84 and 85; BD 41 [6], 43 [37]) derive from the appellant's statement accompanying his application for refugee status to the Secretary. This statement made it abundantly clear that the appellant feared harm at the hands of the Taliban, and not any other organisation, authority or entity. The concluding statement in paragraph 37 of his statement indicates that the appellant feared arbitrary deprivation of his life 'For the reasons outlined above', which were reasons based on his fears of the Taliban.

44. The written submissions of his representative dated 13 March 2014, which were made to the delegate of the Secretary (appellant's submissions, [64]; BD 55-70), advanced country information in support of the claim that the appellant faced a 'well-founded fear of persecution' as a 'perceived opponent of the Taliban' (BD 55).

45. The Secretary found that the appellant was not a refugee and, notably, rejected the appellant's claim that he had been targeted for harm by the Taliban.

46. In support of his application for review by the Tribunal, the appellant filed a further statement addressing the Secretary's concerns, emphasising that it was indeed the Taliban who had sought to harm him (BD 140 [1]-[6]). For example, he said 'The security situation at the moment in my home area is very bad. I hear news of people being beheaded and cut into pieces by the Taliban. Houses are being bombed. It is not local people and mere criminals who do these things. It is only the Taliban who are responsible.' (emphasis added) (BD 142 [18]; see also BD 142-144 [19]-[28]).

47. The written submissions made by the appellant's representative to the Tribunal said in the opening paragraph '[The appellant] is outside the country of his nationality because of his well-founded fear of being persecuted for reasons of his actual or imputed political opinion of opposition to the Taliban and his membership of particular social groups.' (BD 107). The particular social groups were identified at BD 110. Significantly, the first postulated particular social group, 'members of the Kokikhel tribe' (paragraph (b)(i) on BD 110) were said to face a reasonable possibility of persecution from the Taliban and not any other organisation, authority or entity. The second postulated particular social group is presently immaterial.

48. In that same submission, the representative made a bare submission (without reference to any of the facts of the appellant's case) that the appellant faced a reasonable possibility of harm of the kind referred to in the ICCPR (BD 114 [35]). That can only be understood as seeking to place a further characterisation on the factual claims already made.

49. The appellant does not point to any aspect of the oral hearing before the Tribunal where the appellant claimed to fear arbitrary deprivation of his life by any actor other than the Taliban. Rather, at that hearing, the appellant emphasised that it was the Taliban from whom he feared harm (BD 152.22ff; 154.18ff; 160.37ff; 180.17).

50. In post-hearing submissions, the appellant's representative again emphasised the risk posed to the appellant by reason of the activities of the Taliban (BD 185).

51. Under the heading 'Refugee and Complementary Protection Claims', the Tribunal reviewed and summarised the evidence and submissions as they were presented to the Tribunal (BD 201-205). The Tribunal found that appellant's principal claim was not credible because 'the claimed timeline of events is at odds with the documents which the applicant has submitted' (BD 207, [41]), and telephone records said to corroborate claims of threatening phone calls were inconsistent with other aspects of the evidence (BD 207, [42]-[44]). The Tribunal also found that the appellant's claims about aspects of his behaviour, and the behaviour of the Taliban, were unlikely (BD 207-208 [45]-[47]). The Tribunal concluded that his claims 'were not true' (BD 209 [50]).

52. In this way, the Tribunal responded to the substantive basis of all of the claims advanced by the appellant for why he might be arbitrarily deprived of his life. There was no need for the Tribunal to restate all these matters in expressing its conclusions with respect to complementary protection in that section of its reasons.[13]

Ground 5

53. The appellant alleges that the decision of the Tribunal is affected by procedural unfairness because the Tribunal relied on the appellant's unsigned entry interview.

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[13] See eg, *SZSGA v Minister for Immigration* [2013] FCA 774, [56]; *SZSHK v Minister for Immigration* [2013] FCAFC 125, [35].

54. Although the appellant's entry interview record was not signed, he later affirmed to the Secretary (after having a chance to review the contents of the entry interview): 'The information I provided during my transferee interview was only a summary of my claims for protection' (BD 41 [2]).

55. Contrary to the submission that the appellant 'expressly disowned' the contents of the entry interview record, he embraced those contents as a 'summary of his claims' and sought not to be confined to the matters there stated, no doubt conscious of the possibility that the Secretary or the Tribunal may be concerned about the possibility of any 'recent invention' of additional claims not made in the entry interview (cf, appellant's submissions [74]).

56. It is unclear why the appellant suggests that the Tribunal was not entitled to rely on the appellant's unsworn statement, as containing prior inconsistent statements to the statements he made before the Tribunal. There is no prohibition upon the Tribunal taking into account unsworn evidence, consistent with its not being bound by the rules of evidence or by technicalities (s 22(a) of the RC Act). It is also unclear why there was any unfairness in doing so, given that the Tribunal squarely raised this issue with the appellant at the hearing.

57. The appellant made arguments to the Tribunal as to why it should not rely on the entry interview record (BD 204, [26]), but the Tribunal did not accept those arguments for sound reasons (BD 207, [41]). The weight to be given to the interview record was a matter for the Tribunal. In these circumstances, the Republic submits that this ground fails.

Part VI: COSTS

58. The Republic submits that there is no basis for any special costs order.

Part VII: LEGISLATION

59. The Republic accepts the appellant's statement of applicable constitutional provisions, statutes and regulations, save that the Republic states that the entirety of the *Refugees Convention Act 2012* (Cth) is applicable to the questions the subject of the appeal.

Part VIII: ORAL ARGUMENT

60. The Republic estimates that it will require two hours to present oral argument.

18 April 2017

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