IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M21 of 2017

BETWEEN:

MEG027 and MEG026
Appellants

and

REPUBLIC OF NAURU
Respondent

APPELLANTS' SUBMISSIONS IN REPLY

Part I:

1. This submission is in a form suitable for publication on the internet.

Part II:

2. These submissions respond to the submissions of the Respondent dated 20 April 2017 only in respect of issues not already addressed in the submissions filed by the Appellants dated 28 March 2017 (**Appellants' Submissions**).

Leave to raise new grounds should be granted

3. Paragraph 17 of the Respondent's submissions note only one possible form of prejudice to it by reason of the new grounds of appeal,[1] being that it 'may' (not 'would') have been able to put on evidence about the receipt of and attention given to the post-hearing submissions relevant to ground 3 had that ground been raised earlier. This submission should not be accepted for two reasons:

   a. The Book of Documents that was provided to the Supreme Court of Nauru was prepared by the Respondent as a record of the materials before the Tribunal in this case. As such, there can be no dispute that it was received by the Tribunal, nor can there be any dispute that the Respondent knew of that receipt.

   b. Evidence of the "attention" given to the submission by the Tribunal is revealed by its reasons,[2] not by evidence from the decision-maker as to what they say they considered after a decision has been handed down.

4. At paragraph 18, the Respondent highlights that the Appellants have not provided an explanation for the current grounds not being run below. This is but one of the factors that Courts have identified as being relevant to the exercise of discretion to allow a new ground to be raised on appeal.

5. However that may be, this is not a case where it could be suggested that grounds were not raised below deliberately for some strategic advantage.[3] Submissions were filed on behalf of the Appellants to the Supreme Court of

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[1] *Salama v Minister for Immigration and Border Protection* [2017] FCA 2 [11], *Lobban v Minister for Justice* (2016) 244 FCR 76 [72] and [74] and *Parker v Minister for Immigration and Border Protection* [2016] FCAFC 185 [31].

[2] See paragraphs 53 – 55 of the Appellants' Submissions and see also *Minister for Immigration and Border Protection v CZBP* [2014] FCAFC 105 [65].

[3] *Linkhill Pty Ltd v Director, Officer of the Fair Work Building Industry Inspectorate* (2015) 240 FCR 578 [70].

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Nauru on 15 February 2016.[4] The first final judgment under the Convention Act was handed down six months later.[5] In the circumstances where there is no relevant precedent at all to draw from and where previous counsel had no prior experience of Nauruan administrative law,[6] implicit criticism of previous counsel's assessment as to available grounds is unwarranted. The Appellants should not be denied an opportunity to have this Court determine those grounds, especially as it is 'centrally relevant'[7] and a matter of 'particular sensitivity... in refugee cases'[8] that 'serious consequences... may attend a wrongful refusal'[9] to allow a new grounds to be heard and determined.

6. More broadly, 'there is a discernible public interest in this Court determining' the new grounds of appeal which raise issues of 'general application' and 'importance'[10] including for the reasons identified at paragraph 22(b) of the Appellants' Submissions.

7. The Respondent's submission, at paragraph 19, that 'delays in dealing with applications for protection visas are obviously to be avoided if possible' can be broadly accepted. However, the time for that concern to have had any real currency in this case has passed. The Appellants arrived in Nauru on 14 November 2013. It took over 38 months for their matters to reach judgment on 'appeal' in the Supreme Court, during which the Appellants were detained for about 22 months.[11] For the Respondent to then raise a concern about a further delay of a few months for the matter to be heard and determined by this Court is disingenuous, especially in the context where the Appellants are no longer detained and where justice is served not by speed but by proper consideration of the grounds of appeal before this Court.

Ground 1

8. The Respondent at paragraph 22 and 33 relies on the statement of the Tribunal to the effect that returning the Appellants to Iran would not breach Nauru's international obligations under CEDAW. However that statement must be read in its context and especially in light of the Tribunal's reasons in the immediately preceding paragraph. Those reasons made it plain that the Tribunal did not regard 'Nauru's international obligations under CEDAW' to have any extraterritorial operation such that there was no non-refoulement obligation on Nauru under that Convention. Even on the Respondent's case (as set out at paragraph 29 of its submissions), this was an error of law by the Tribunal.

9. The Respondent's submissions at paragraph 23 and 30 adopt a distinction which is illusory and which had no part in the reasoning of the Tribunal itself. Section 4(2) of the Convention Act mandates that Nauru 'must not expel or

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[4] Appeal book, Document 14.
[5] *DWN008 v Republic* [2016] NRSC 13; Appeal Case 8 of 2015.
[6] A wholly different legal team represents the Appellants in this Court to that which appeared on their behalf in the Supreme Court of Nauru. As at the date of filing these submissions, it has not been possible to obtain affidavit evidence from the Appellants' former counsel. Nevertheless, it is not unusual that different grounds might commend themselves to those currently representing the Appellants than those which were seen to have merit by their Nauruan advisers.
[7] *SZKCQ v Minister for Immigration and Citizenship* [2009] FCA 578 [9].
[8] *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 [22].
[9] *SZEPN v Minister for Immigration and Multicultural Affairs* [2006] FCA 886 [16].
[10] *Lobban v Minister for Justice* (2016) 244 FCR 76 [73]-[74], and see also *Parker v Minister for Immigration and Border Protection* [2016] FCAFC 185 [31].
[11] See December 2013 Application, (Court Book 41), and letter from the Nauru Refugee Status Review Tribunal Registrar to Craddock Murray Newmann Lawyers (Court book 95) and *Plaintiff M68/2015 v Minister for Immigration and Border Protection* 257 CLR 42 [218].

return any person to the frontiers of territories in breach of its international obligations'. The Appellants submitted to the Tribunal that CEDAW embodied such international obligations, including an implied non-refoulement obligation,[12] as the Respondent's submission acknowledges at paragraphs 23(a), 23(c)[13] and 29.

10. At paragraph 24, the Respondent seems to then rely on that obligation not being labeled by the Appellants as 'an international non-refoulement obligation' to have some significance and represent a concession by the Appellants that 'CEDAW did not contain a non-refoulement obligation'. This misconceives the Appellants' Tribunal Submissions and should be rejected. The effect of the Tribunal Submissions was clear: the Appellants' submission was that s 4(2) of the Convention Act was engaged by the prospect of a breach of CEDAW if they were returned to Iran, with the result that Nauru's 'international obligation' was not to refoule them.[14]

11. The Respondent's analysis at paragraphs 24 and 25 ignores the first part of the sentence of the reasons of the Tribunal and focuses only on the second part. The first part of the relevant sentence at paragraph 89 of the Tribunal's reasons states 'CEDAW does not create any obligations on states to take measure that extend beyond their borders'. This is consistent with the previous sentence: 'all the obligations created by CEDAW are for states to take action within their national borders.' This is the source of the complaint contained in ground 1. Focusing on the second part of the latter sentence without its context misses the gravamen of the ground.

12. At paragraphs 31 and 34, the Respondent attempts to restrict the scope of the implied non-refoulement obligation to serious gender-based violence, persecution or degrading treatment. That submission should be rejected for three reasons:

    a. It is contrary to the clear words of General Recommendation 32 as set out in paragraph 28 of the Appellants' Submissions which state that serious forms of discrimination *include* serious forms of gender-based persecution and violence.

    b. The line which the Respondent recites at paragraph 34 from the Committee on the Elimination of Discrimination Against Women's decision in *MNN* is concerned with the non-refoulement obligations under treaties other than CEDAW.[15] This explains why the terms of the quote identifies the harms of express concern under the Convention Against Torture and the International Covenant on Civil and Political Rights.

    c. *MNN* pre-dates all other decisions on which the Appellants rely at paragraph 30 as identified in footnote 34 of the Appellants' Submissions. For example, in the later decision of *SO v Canada*, the Committee relevantly stated that:

> The Committee also stresses that, according to its established jurisprudence, article 2 (d) encompasses the obligation of States

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[12] See Appellants' submissions to the Tribunal dated 20 July 2014 (**Tribunal Submissions**) [40]-[44].
[13] Contrary to the Respondent's submissions, the Tribunal Submissions at [44] did not use the word 'any' (Court book 108).
[14] A submission is not a pleading and Tribunals of this kind do not work by reference to anything akin to a pleading: *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 [1]. Further, for the purposes of s 4(2), there is no significance in whether the obligation is one that is regarded as a breach of an implied non-refoulement obligation or an express treaty provision.
[15] *MNN v Denmark,* communication no 33/2011, 15 July 2013 [8.8] cf [8.10].

> parties to protect women from being exposed to a real, personal and foreseeable risk of serious forms of gender-based violence, irrespective of whether such consequences would take place outside the territorial boundaries of the sending State party. The Committee further recalls that gender-based violence is a form of discrimination against women and *includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.*[16]

13. Paragraph 26(b) of the Respondent's submissions seek to side-step the issue for this Court. The Tribunal's reasons for rejecting the Appellants claims under CEDAW were limited to finding that there was no extraterritorial obligation under CEDAW. The Tribunal did not – as the Respondent seeks by its submissions to do – conclude that her personal circumstances did not rise to the level of harm protected under CEDAW's non-refoulement obligation, namely whether there was 'a real, personal and foreseeable risk of serious forms of discrimination against women'.[17] It simply did not engage with this enquiry. And, contrary to the Respondent's submissions at paragraph 26(c), 32, 34 and 35, it is no answer that the Tribunal rejected overlapping aspects of the Appellants' claims under *different* international conventions which are in distinct terms. There is a substantive difference between protection under the Refugees Convention and protection under CEDAW based on the type of harm and reason for the harm. For example, a woman might be at risk of threats of sexual suffering or mental harm in the form of workplace sexual harassment (as the Tribunal found in this case at 56 and 73 of its reasons) that does not meet the definition of 'persecution' under the Refugees Convention, but does meet the definition of 'gender-based violence' under CEDAW, as set out above at 12.c above. That woman would be entitled to protection in Nauru by operation of s 4(2) of the Convention Act which picks up the implied non-refoulement obligation under CEDAW.

14. Paragraph 31 of the Respondent's submissions attempts to do a similar thing, but frames the flaw as a failure by the Appellant to articulate the claim. The First Appellant clearly raised a prima facie case that she faced a risk of serious form of gender-based discrimination, including gender-based violence upon return to Iran.[18] This risk was exacerbated by the prospect that the First Appellant would be detained and face criminal prosecution upon her return as a failed asylum seeker, as indicated by the country information the subject of the post-hearing submission.[19] The Tribunal's error was in failing to address this claim at all because it mistakenly concluded that no 'international obligation' existed.

15. The question whether the First Appellant *in fact* faced a risk of 'serious gender-based discrimination', contrary to CEDAW, was not determined by the Tribunal, and does not fall for determination in this Court. Should the Appellants succeed on ground 1, this is a question which would be addressed by the Tribunal upon remittal.[20] The Appellants will contend that the risk of sexual harassment as a

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[16] *SO v Canada*, communication no 49/2013, 27 October 2014, [9.5] (emphasis added).

[17] Recommendation 32, [22]-[23].

[18] See the Appellants' Submissions at paragraphs 23 – 25 and 56. See also Appendix B of the Appellants' Tribunal Submissions of the increased risk of harm that the First Appellant may face as a woman in detention including 'rape, sexual humiliation', and abuse (Court Book 129).

[19] See further the Appellants' Submissions at paragraph 56.

[20] The appellants would rely, for example, on the analysis at W. Kalin and J Kunzli,*The Law of International Human Rights Protection*, Oxford: Oxford University Press, 2009, 103-111 and 190.

divorced woman, the risk of gendered abuse in detention and systemic discrimination in the legal system and workplace falls within the scope of serious forms of discrimination,[21] however this is a matter for the Tribunal on merits review, not for this Court on judicial review.

Ground 2

16. The Respondent rightly notes at paragraph 38 that the Appellants did not identify all of the provisions of the Children's Convention now identified in this Court on appeal. However, this is immaterial for the reasons addressed in the Appellants' Submissions at paragraph 45.

17. At paragraphs 38 and 39, the Respondent submits that the Second Appellant did not make any claims that he may be subject to arrest, detention or imprisonment. This is contrary to the materials before the Tribunal.[22]

18. At paragraph 39, the Respondent submits that the Second Appellant's claim must fail because 'there was no suggestion that' his detention for questioning on return 'would not be in accordance with law or that [he] would be separated from his mother or [be] unaccompanied'. Even if this Court accepted those submissions, it is no answer to the alleged breach of Article 37(b) of the Children's Convention. The critical question for the Tribunal, had it considered the integer, would have been: would the Second Appellant's anticipated detention be 'only as a measure of last resort and for the shortest appropriate period of time'? If not, this would breach Article 37(b) and give rise to a basis to find that Nauru would be in breach of s 4(2) of the Convention Act if it returned him to Iran.

19. At paragraph 41 and 42, the Respondent submits that the findings of the Tribunal sufficiently deal with the claims as made. This submission should be rejected. The limited findings made by the Tribunal[23] by reference to Article 9 of the Children's Convention did not address the abduction claims[24] or the prospect that he would be detained and separated from his custodial parent upon return to Iran.

Ground 3

20. The Appellants dispute the submissions of the Respondent, and refer to and repeat their initial submissions[25] and paragraph 3 above.

Dated: 4 May 2017

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[21] See Tribunal decision at [31], [56], [71] - [73] and Appellants' submissions at paragraph 56.
[22] See paragraph 38 of the Appellants' Submissions as well as Appendix B of the Appellants' Tribunal Submissions (Court Book 122-130).
[23] Tribunal decision at [56] and [57].
[24] As the Tribunal decision acknowledges at [36], [38] and [41], The Second Appellant expressly put his claim on the basis of a risk of abduction. This claim was not dealt with by reference to the Children's Convention. See also December 2013 Application Statement at [33] and [36] (Court Book 44).
[25] By way of analogy, they further rely on the reasons in *Kelso v Tatiara Meat Co Pty Ltd* (2007) 17 VR 592 [189-190] per Dodds-Streeton JA; Buchannan, Nettle, Ashley and Kellam JJA agreeing.