IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S46 of 2018

BETWEEN:

TTY 167
Appellant

and

REPUBLIC OF NAURU
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Internet Publication

1. We certify that this submission is in a form suitable for publication on the internet.

Part II: Issues

2. The procedural issues before the Court in this appeal are:
   a. Whether an order should be made under rule 4.02 of the *High Court Rules* 2004 (Cth)(the "*Rules*") enlarging the period of time for the filing of a notice of appeal under rule 42.03; and
   b. Whether the Appellant should be permitted to raise grounds of appeal not raised in the Court below.

3. The legal issues raised by the proposed grounds of appeal are clouded to some degree by unresolved factual questions. In broad terms they are:
   a. Whether the Refugee Status Review Tribunal (the "Tribunal") erred in making a decision on the review after the Appellant failed to attend a scheduled hearing, in circumstances where an invitation to the hearing under s 40(1) of the *Refugees Convention Act* 2012 (Nr) (the "*Convention Act*") was directed through another person; and
   b. Whether the Tribunal's decision under s 41 of the *Convention Act* to make a decision on the review without taking further action to allow or enable the Appellant to appear before it was legally unreasonable in circumstances where the Appellant failed to attend a scheduled hearing.

Filed on behalf of the Respondent by:

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Part III: Section 78B of the *Judiciary Act* 1903 (Cth)

4. The respondent has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act* 1903 (Cth) and has concluded that no such notice is required.

Part IV: Material facts that are contested

5. The factual background recounted in the Appellant's submissions ("AS") at [6]-[12] describe the claims for refugee status made by the Appellant before the Secretary of the Department of Justice and Border Control (the "Secretary") and the Tribunal. Not all of those claims were accepted by the Tribunal (or by the Secretary).[1] Those facts are not, however, material to the determination of the appeal.

6. The Respondent does not contest any of the other material facts set out in the Appellant's submissions at [13]-[20] or the Appellant's chronology.

7. However, the proposed grounds of appeal depend on facts which have not been the subject of any findings and which are to some extent controversial. This is explained below.

Part V: Respondent's argument on the appeal

(a) The grant of an enlargement of time

8. The notice of appeal was filed on 12 March 2018.[2] It was filed 6 days outside the 14-day period imposed by Rule 42.03 of the *Rules*. The Respondent does not oppose an order enlarging the time for the filing of the notice of appeal.

9. The Respondent notes that this Court has no jurisdiction in relation to appeals from the Supreme Court of Nauru in respect of appeals filed *after* 12 March 2018. The Respondent accepts that the Court has jurisdiction in respect of this appeal[3], including the jurisdiction (and power) to grant an order enlarging the time in which to file a notice of appeal.[4]

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1 See, e.g., Core Appeal Book ("CAB") 26-27 at [37] (Reasons of the Tribunal); *cf.* AS at [10]-[11].
2 CAB 46 (Notice of Appeal).
3 *BRF 038 v The Republic of Nauru* [2017] HCA 44; (2017) 91 ALJR 1197 at 1204 [40]-[41].
4 *Clodumar v Nauru Lands Committee* [2012] HCA 22; (2012) 245 CLR 561 at 575 [39].

(b) Leave to rely on grounds not advanced in the Court below

10. The Appellant accepts that the grounds now pressed in the notice of appeal, grounds one and three, were "*not raised in the same terms*" in the Court below.[5] In fact, ground 1 was not raised at all.[6] No issue about the construction of s 40 of the *Convention Act* was in issue below. Although framed quite differently, the Respondent accepts that the matters now sought to be raised by ground 3 in this Court overlap with the issues raised by ground 1, and perhaps ground 2(b), in the Court below.[7]

11. Contrary to the Appellant's submissions[8], the decision in *WET 044 v The Republic of Nauru* [2018] HCA 14 does not stand for the proposition that "*the only relevant consideration* [in deciding whether to permit new grounds to be raised on appeal] *is whether the grounds of appeal are meritorious*". *WET 044* is simply an example of a case where the fact that the proposed new grounds lacked merit proved to be a basis for refusing leave. Nothing in *WET 044* suggests that the ordinary principles applicable to the grant of leave to raise new grounds on appeal do not apply in appeals from the Supreme Court of Nauru.

12. The Appellant's submissions[9], citing authorities of the Full Court of the Federal Court of Australia[10], contend that "*new questions of law*" may be raised "*if it is 'expedient and in the interests of justice' to do so*". The true position, however is that it will only be "*expedient and in the interests of justice*" to permit a new ground to be raised where the ground depends upon "*facts either admitted or beyond controversy*".[11] Where the grounds now sought to be raised could have been met by evidence in the Court below, the point cannot be raised on appeal.[12]

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5 AS at [22].
6 CAB 31-32 (Amended Notice of Appeal in the Court below).
7 CAB 31-32 (Amended Notice of Appeal in the Court below); AB 40-42 at [25]-[37] (Judgment of the Court below).
8 AS [25].
9 AS [23].
10 *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73 at [19]-[20]; *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92; (2015) 233 FCR 315 at 347 [79]-[80]; *VAUX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158; (2004) 238 FCR 588 at 598 [46].
11 *O'Brien v. Komesaroff* [1982] HCA 33; (1982) 150 CLR 310 at 319; *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1 at 8.
12 *Suttor v Gundowda Pty Ltd* [1950] HCA 35; (1950) 81 CLR 418 at 438; *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1 at 7-8.

13. In the circumstance of this case there is evidence which could have been led in the Court below which would bear upon ground 1. Specifically, the following factual matters would very likely have been the subject of evidence:

    a. The functions and responsibilities of Ms Blaise Alexander, the person to whom the invitation to appear was addressed, and the organisation of which she was a member ("CAPS").

    b. Whether the Appellant in fact received the invitation, either from Ms Alexander or someone else (and in what form), or was otherwise aware of the proposed time, date and venue of the hearing, and when he became so aware.

14. Further, it is inconsistent for the Applicant to submit that ground 1 involves only questions of law,[13] while also suggesting that the Appellant did not know the time and place of the hearing.[14] The latter proposition is not supported by any finding, evidence or agreement.

15. Proposed ground 3 faces the same difficulties, to the extent that the argument in support of it depends on a factual proposition that the Appellant could have been quickly and easily contacted by the Tribunal.[15] Many of the unsupported assertions of fact made at AS [38(c)] are contested.

16. It is no answer to the Respondent's complaint that, for the purposes of Australian domestic law, the Court in this case is exercising the original jurisdiction conferred by s 76(ii) of the *Constitution*.[16] In a substantive sense the proceedings in this Court are in the nature of an appeal (even if not an appeal in the strict sense). Nor is it an answer to say it would be open for the Court to receive fresh evidence in the appeal.[17] The procedures of this Court in an appeal are not adapted to determine questions of factual contest which may require the issue of subpoenas[18] and interrogatories, and the conduct of cross-examination. Nor would it be possible in

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[13] AS [26(b)].
[14] AS [33].
[15] AS [38(c)].
[16] *Clodumar v Nauru Lands Committee* [2012] HCA 22; (2012) 245 CLR 561 at 571 [26].
[17] *Clodumar v Nauru Lands Committee* [2012] HCA 22; (2012) 245 CLR 561 at 574 [34].
[18] Noting that Rule 24.02 of the *Rules* does provide for the issue of subpoenas "*upon a note from a Justice*".

this case, unlike other cases in the Court's original jurisdiction, to refer any disputed factual questions for determination by a single justice.[19]

17. Further, it is not to the point that the appeal to this Court is made as of right and without any intermediate appellate procedure. The principle that an appellant not be permitted to bring any new ground of appeal that could turn on contested factual matters not litigated at first instance applies equally to the first and second layers of the appellate hierarchy.[20]

18. In any event, for the reasons outlined below, the proposed grounds of appeal lack sufficient merit to warrant the grant of leave.

10 ***(c) Proposed ground 1: the giving of an invitation***

19. Proposed ground 1 contains (at least) two essential premises. *First*, that the Appellant had not been invited to a hearing, in breach of s 40 of the *Convention Act*. *Secondly*, that the postulated breach of s 40 of the *Convention Act* caused the Tribunal to fall into error when it determined under s 41 of the *Convention Act* to make a decision on the review without taking further action to enable the Appellant to appear.

20. In respect of the first premise, s 40 of the Convention Act relevantly provides:

> *(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to*
> 20 *the determination or decision under review.*
>
> *(2) ...*
>
> *(3) An invitation to appear before the Tribunal must be given to the applicant with reasonable notice and must:*
>
> *(a) specify the time, date and place at which the applicant is scheduled to appear; and*
>
> *(b) invite the applicant to specify, by written notice to the Tribunal given within 7 days, persons from whom the applicant would like the Tribunal to obtain oral evidence.*

21. Two points will be noticed about s 40. The first is that it does not prescribe either
30 the form of an invitation or the method by which it is to be given: the Tribunal is required by s 40(1) simply to "invite" the applicant to appear; while the timing and

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[19] *Nauru (High Court Appeals) Act* 1976, S 7, which requires that the jurisdiction be exercised by a "*Full Court consisting of not less than 2 justices*".

[20] *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1 at 7-8.

contents of the invitation are dealt with concisely by s 40(3). Nor do the Regulations under the *Convention Act* deal with this issue. The second is that (unlike its Australian analogues) s 40 does not provide for circumstances in which an invitation is deemed to be received by the applicant.

22. Section 40 will therefore have been complied with *at least* if the invitation to appear, including the information in subsection (3)(a) and (b), was in fact conveyed (whether directly or through someone else) to the Appellant at a time that gave him "reasonable notice". The material before the Court does not establish that this was not done (noting that the Appellant bears the onus in this respect[21]). It strongly suggests the contrary.

a. Something prompted the Appellant to sign on 20 April 2016 (four months after his review application and five days after the letter to Ms Alexander), and cause to be lodged with the Tribunal, a detailed further statement.[22] It is apparent that the Appellant (who needed an interpreter and who claimed to have been illiterate in his own language before coming to Nauru)[23] had some assistance in preparing that document – suggesting that he was in close contact with his advisers at that time;

b. Something prompted the Appellant's former solicitors to lodge a written submission of 39 pages with the Tribunal on 4 May 2016;[24]

c. The Appellant did not allege in the Supreme Court that he had been unaware of details of the Tribunal hearing. On the contrary, he said that he told his legal representative before the hearing that he was unwell and could not go ahead with it; and that he asked his representative to have the date adjourned.[25] While there was no evidence of either of those things,[26] the fact that he took that position (rather than claiming not to have been informed of the hearing) is telling.

23. The Republic would also submit in the alternative that the obligation in s 40 is satisfied by transmission of an invitation, containing the requisite information, to

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21 *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; (2011) 241 CLR 594 at 616 [67].
22 Applicant's Book of Further Materials ("AFM") 49.
23 CAB 20 [13], 23 [24].
24 AFM 54.
25 CAB 31.
26 CAB 41 [35].

the applicant's legal representative or some other person acting on his or her behalf. That construction accords with the lack of any stipulations as to form or service of a document (let alone personal service) in s 40. Further, if s 40 were construed as requiring service of a document, it would be read in the light of s 101 of the *Interpretation Act* 2011 (Nr). That provision applies in relation to "*a document that is authorised or required under a written law to be served*".[27] Section 101 expressly provides that the document may be given to "*the individual*" or "*a person authorised by the individual to receive the document*". The provisions of the *Convention Act* must also be construed in light of the basic common law principles, including the doctrine of agency.[28] Nothing in s 40 should be taken to exclude the possibility of the Tribunal giving the invitation to an agent or other authorised person.

24. In this regard it is relevant that the organisation referred to as CAPS had assisted the Appellant in the RSD process and communicated with the Secretary on his behalf.[29] However the Court does not have any direct evidence about the role of CAPS or the particular responsibilities of Ms Alexander. The lacuna can be addressed by observing again that the Appellant bears the onus. If that is not a sufficient response, it serves as an illustration of why ground 1 should not be permitted to be raised. The Republic would have been in a position to (a) seek to obtain; and (b) lead; evidence about these matters, had the present ground been raised below.

25. As to the second premise upon which ground 1 depends, even assuming (contrary to the submissions above) that s 40 required that the invitation be given by the Tribunal to the Appellant personally, it does not follow that the Tribunal erred in the exercise of its powers to determine the review under s 41 of the *Convention Act*.

26. The requirements of s 40(3) regulate "*the manner of providing timely and effective* notice".[30] It not the case that any departure from those requirements would result in the invalidity of a subsequent step taken by s 41 of the *Convention Act.* Rather, "*a*

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[27] *Interpretation Act* 2011 (Nr), s 100.

[28] *cf Minister for Immigration and Citizenship v Kumar* [2009] HCA 10; (2009) 238 CLR 448 at 455 [19]-[21].

[29] AFM 29, 38, 40.

[30] *Minister for Immigration and Citizenship v SZIZO* [2009] HCA 37; (2009) 238 CLR 627 at 639-640 [34].

failure to comply with [s 40(3)] *will require consideration of whether in the events that occurred the* [Appellant] *was denied natural justice*".[31]

27. In *Minister for Immigration and Citizenship v SZIZO*[32] the fact that the Australian Refugee Review Tribunal (the "RRT") addressed an invitation to a hearing to the respondents rather than an authorised representative as required by the relevant statute did not cause the RRT's decision to be invalid in circumstances where the invitation was in fact received and the respondents attended the hearing. In this case, it may be accepted that the Appellant did not attend the hearing. Nevertheless, the purpose of s 40 of the *Convention Act* will have been served if the Appellant was in fact notified of the time, date and location of the hearing.

28. As noted above, an inference is available from the existing material that the Appellant was on notice of the hearing.[33] At least, it has not been shown that the Appellant was not made aware of the relevant details a reasonable time before the hearing. In these circumstances, the Tribunal did not err in law by proceeding on the basis that it was authorised to make its decision without further attempting to hear from the Appellant. Section 41, which provides that power, refers to the applicant having been "invited" to appear but does not in its terms require compliance with s 40.

29. Alternatively, the Appellant suffered no prejudice or disadvantage by reason of the fact that invitation was addressed to Ms Alexander. If this is the case, this Court should exercise the discretion conferred by s 44 of the *Convention Act* to refuse relief. The exercise of such discretion is appropriate in circumstances where any error of law did not materially affect the conduct of the review and did not cause the Appellant any prejudice.[34]

(d) Proposed ground 3: Unreasonableness

30. The Appellant contends that the exercise of the Tribunal's discretion under s 41(1) of the *Convention Act* to take a decision on the review without taking further steps to enable the Appellant to appear at a hearing was unreasonable. Apart from the

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[31] *Minister for Immigration and Citizenship v SZIZO* [2009] HCA 37; (2009) 238 CLR 627 at 640 [36].
[32] [2009] HCA 37; (2009) 238 CLR 627.
[33] See [12(b)] above. In the event that this inference is not available on the evidence, it only serves to highlight the prejudice that arises if this issue is permitted to be raised for the first time on appeal.
[34] *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; (2005) 228 CLR 294 at 322 [80].

challenge made in proposed ground 1, there is no dispute that the discretion was enlivened by the Appellant's failure to attend the hearing. The Appellant does not point to any specific underlying error in the Tribunal's reasoning.[35] The only question is whether an "*inference of unreasonableness can be objectively drawn*" from the conclusion of the Tribunal itself.[36]

31. This requires an analysis of the "scope and purpose" of the power conferred by s 41(1) in light of the particular facts of this case.[37] This analysis, of course, proceeds on the basis that the discretion conferred upon the Tribunal creates an "*area of decisional freedom*" within which the Tribunal may reasonably reach a particular conclusion, even if it were not the conclusion that the Court on review might itself arrive at if it were to consider the question on the merits.[38]

32. In this case, s 41(1) of the *Convention Act* operates in the wider statutory context of the review performed by the Tribunal. In particular, the power is closely connected to the duty of the Tribunal under s 40(1) to invite an applicant to a hearing before it.[39] It may be accepted that a hearing serves an important function in the conduct of the Tribunal's review, including by providing an applicant with procedural fairness. It must be also recognised, however, that what s 40 requires is, subject to certain express exceptions, that an applicant be provided with a reasonable opportunity to attend the hearing. If an applicant does not take advantage of that opportunity, certain consequences follow, including the possibility that the review will be determined without a hearing being conducted. The statutory context also includes the Tribunal's statutory obligation to complete its review within 90 days of receiving from the Secretary the documents relevant to the review.[40]

33. Turning to the specific facts of this case, the Appellant's submissions contend that the exercise of the Tribunal's discretion in this case was unreasonable because:

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35 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at 365-366 [71]-[72].
36 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at 364 [68]; *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1 at 5 [8].
37 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at 363-364 [67], 366 [72], see also at 350 [26] and at 370-371 [90].
38 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at 351 [28] and 363 [66]; *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1 at 4-5 [7]-[8].
39 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at 361-362 [60]-[61] and 366 [74].
40 *Convention Act*, s 33(1).

(i) the Appellant's previous conduct had demonstrated a desire on his part to participate in the review;[41] (ii) the Appellant had informed the Tribunal of his poor mental health and the fact that this could cause him to become anxious, confused and to "lose the sense of time";[42] and (iii) it would have been reasonably open for the Tribunal to make inquires as to the Appellant's whereabouts and the reason for his non-attendance at the appointed time. [43]

34. As to the first matter, it is true that the Appellant had participated in the review, for example by providing a further written statement and detailed written submissions. There is no evidence that that distinguished him from other review applicants. The Appellant was represented in the course of the review, so that the lodgement of documents on his behalf was hardly surprising. The invitation to the hearing specifically informed the Appellant that a consequence of non-attendance could be that the review would be determined without the Tribunal taking further steps to enable him to appear.[44] Neither the Appellant nor his representatives contacted the Tribunal prior to the hearing, or afterwards, to request that the hearing be adjourned or rescheduled as provided for in s 41(2) of the *Convention Act*. As the primary judge correctly held, the Appellant could have contacted the Tribunal to explain his non-attendance anytime up until the Tribunal made its decision.[45] It is one thing to hold that a Tribunal has acted unreasonably when it refuses to grant an adjournment application supported by cogent reasons;[46] it is a considerable step further to conclude that the Tribunal acted unreasonably in circumstances where no such application was made and no explanation was given by the Appellant.

35. As to the second matter, the Appellant's statement asserted that he had mental health problems and that this affected, among other things, his "sense of time".[47] This assertion was not supported by any medical evidence, either before the Tribunal or in the Court below.[48] Further, as the Tribunal itself recognised[49] it was

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41 AS at [38(a)].
42 AS at [38(b)] and [38(d)].
43 AS at [38(c)].
44 AFM 47.
45 CAB 41 at [33].
46 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at 363-364 [67], 366 [72], see also at 347 [21] and 352 [31].
47 AFM 49 at [5].
48 CAB 41-42 at [35]-[46].
49 CAB 25 at [31].

not clear that the Appellant put forward his mental illness as an explanation for the answers he had given in a previous interview, or to indicate that his ability to participate in the forthcoming hearing before the Tribunal might be impaired, or both. Regardless, nothing in the statement (or any of the other material before the Tribunal) suggested that the Appellant would be unable for reasons of his mental health to attend a hearing on the scheduled date. A review applicant who was legally represented, and who sought to have a hearing adjourned, might be expected to articulate that request.

36. As to the third matter, the evidence does not establish, as the Appellant asserts[50] (and if it is relevant), that the Appellant's representative did not attend the hearing at the scheduled time and place.[51] Further, it is not the case that, on the day of the scheduled hearing (6 May 2016) the Appellant was lawfully confined to the Regional Processing Centre.[52] Section 18C of the *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nr) cited by the Appellant was repealed and replaced by operation of s 8 of the *Asylum Seekers (Regional Processing Centre) (Amendment) Act* 2015 (Nr).

37. The Appellant's submissions[53] also make a number of assertions regarding the ease at which the Appellant could have been located in Nauru on the date of the hearing that go well beyond the limits of judicial notice. To the extent the Appellant now puts this grounds on the basis that the Tribunal failed to make an obvious inquiry, this is a matter in respect of which evidence could have been adduced in the Court below and, accordingly, leave to argue this ground on appeal ought not be granted. (If the proposition is simply that the Tribunal could have got a message to the Appellant after the hearing date, seeking an explanation for his non-attendance or offering a further hearing date, that can be accepted but does not take matters very far.)

38. Even if leave is granted, however, it has not been demonstrated that the Tribunal exercised its discretion unreasonably. The Tribunal hears and determines reviews in respect of a large number of applicants. Unfortunately, the nature of its jurisdiction

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[50] AS [38(d)].
[51] CAB 19 [8].
[52] AS at [38(c)].
[53] AS at [38(c)].

is that many of those applicants suffer from some form of mental illness.[54] There is no evidence that the Appellant in this case faced any particular impediment which prevented his attendance at the scheduled hearing, let alone that the Tribunal was on notice of that impediment. There is no basis, therefore, to assert that the Tribunal was obliged to take extra steps in the Appellant's particular case to facilitate his attendance at the hearing, or that it was legally unreasonable not to do so.

39. The primary judge held:

> *There is no evidence before the Court to support the Appellant's assertion that he told his legal representative he was sick and could not go ahead with the hearing. There is also no evidence to support his claim that he asked his legal representative to have the hearing adjourned. There is no material to show that any attempt was made to communicate with the Tribunal about a rescheduled hearing. There was no obligation on the Tribunal to attempt to contact the Appellant before making a decision on the review. Even if the Appellant's legal advisors acted improperly in not seeking an adjournment such action would not affect the entitlement of the Tribunal to proceed to make a decision.*

40. That reasoning was, with respect, correct. The Tribunal was required to give the Appellant the opportunity to be heard; it was not obliged to make his case for him, or to prompt and stimulate his participation.[55] Once the opportunity was given, and in the absence of any request that it be renewed or extended, it was the Tribunal's task to proceed to determine the review with due expedition.[56]

Part VI: Respondent's argument on any notice of contention or cross appeal

41. Not applicable.

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[54] *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 995 [19].

[55] *cf Re Ruddock; Ex parte Applicant S154/2002* [2003] HCA 60; (2003) 77 ALJR 1909 at 1919 [58].

[56] Section 33(1) of the *Convention Act* imposes a 90-day timeframe for the determination of review applications by the Tribunal, from the time documents are received from the Secretary.

Part VII: Time estimate

42. The Respondent estimates that it will require 1½ hours to present oral argument.

Dated: 15 May 2018

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