IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M37 of 2011

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN:

KINZA CLODUMAR
Appellant

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and

NAURU LANDS COMMITTEE
First Respondent

and

JANELLA ATSIME, ARAMWIT DEDUNA, BRODINE DEDUNA, JASON DEDUNA, JENA DEDUNA, DENEIY DEDEUNA, DORA DEPAUNE, DOREEN ADUMUR (EST), RABWIDO DEDUNA, RUBBER DEDUNA, BRIDELIA EDWARD, PAULINA HARRIS, JAYLEEN MENKE, JURAN SCOTTY, GEORGE TAGAMAOUN, DORIS CALEB, BELINDA TAGAMOUN, ANGELLA TAGAMOUN, JOHN TAGAMOUN, WAYNE TAGAMOUN, JAMIESON TAGAMOUN, VICTOR TAGAMOUN

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Second Respondents

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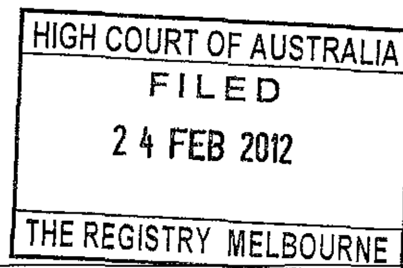
FURTHER SUBMISSIONS OF THE FIRST RESPONDENT



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Ms Lisa Maree Lo Piccolo
Solicitor-General
Department of Justice and Border Control
Government offices
Yaren district
Republic of Nauru
Telephone: (+674) 557 3075
Email: lisa.lopiccolo@naurugov.nr

PART I: Publication of Submissions

The First Respondent certifies that these submissions are suitable for publication on the internet.

PARTS II , III, IV and V: Issues presented; Judiciary Act certification; Citation of primary decision; Relevant findings of fact

These matters are addressed in the First Respondent's Submissions dated 11 October 2011 ("**the First Respondent's Submissions**").

PART VI: Argument

1. These further submissions are intended to supplement the First Respondent's Submissions, having regard to the Appellant's Further Submissions filed on 10 February 2012. The First Respondent otherwise relies upon the First Respondent's Submissions.

Nature of the appeal

2. It is convenient to deal with the nature of the appeal first, because if the First Respondent is correct in its construction any extension of time to bring the appeal would be futile. The First Respondent maintains its submission that the appeal provided for by s 5 of the *Nauru (High Court Appeals) Act 1976* (Cth) ("**the Appeals Act**") is an appeal in the strict sense.

3. In so far as the Appellant seeks to rely on what he contends is the legislative intention in enacting the Appeals Act, it is far from clear that the circumstances identified by the Appellant concerning the enactment of the Appeals Act are either relevant or demonstrate an intention to confer a broad power of appeal on this Court.

4. While it may be accepted that the Appeals Act implements the Agreement Between the Government of Australia and the Government of the Republic of Nauru Relating to Appeals to the High Court of Australia from the Supreme Court of Nauru (the **Agreement**), so that that Agreement will be relevant to

the construction of the Appeals Act, the Agreement is to be interpreted in an objective sense in accordance with the principles set out in the Vienna Convention on the Law of Treaties and not by reference to hypotheses about what the intention of the States parties was. The terms of the Agreement shed no light on the question of whether fresh evidence is to be permitted on an appeal under the Appeals Act.

5. Extrinsic materials may shed some light on the intentions of the legislators in enacting the Appeals Act. In the second reading speech, Mr Ellicott, ~~Bowen~~ the then Attorney-General for Australia, explained the reason for enacting the Appeals Act as follows:[1]

> *I draw the attention of honourable members to the Schedule to the Bill that sets out the text of the Agreement to which I have referred. The Preamble notes the previous arrangements that formerly applied in regard to appeals to the High Court and the Nauruans' desire to maintain those arrangements.*

6. The reference to Nauru in the past being able to appeal to the High Court is a reference to the period when Nauru was a dependent territory of Australia and appeals to the High Court were available pursuant to the *Nauru Act 1965* (Cth), enacted under either s 122 or s 51(xxix) of the Constitution. Such appeals would, under Australian law, have been appeals in the strict sense; and so, in the absence of statutory authority, fresh evidence would not have been permitted. Thus if the Appeals Act is understood as intended to continue the arrangement previously in place concerning appeals from Nauru to Australia, that intention supports the Respondent's construction of the Appeals Act.

7. Finally, assuming for the sake of argument that it is permissible to have regard to the subjective intentions of the States parties to the Agreement, the intentions identified by the Appellant are speculative. Given:

    a. the significance of the move to Nauruan independence from Australia;

    b. the distance of the High Court from Nauru;

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[1] Hansard, House of Representatives, ~~2 November 1976~~ 7 October 1976. See also Gregory Dale, "Appealing to Whom? Australia's 'Appellate' Jurisdiction Over Nauru" (2007) 56 *Int'l & Comp L Q* 641, 650-1.

c. the related expense and difficulty of bringing appellate proceedings in the High Court; and

d. the complexity that could arise in proceedings where factual disputes are involved (including the need, potentially, for witnesses to be required for cross-examination in Australia),

this Court should conclude that the legislative intention underpinning the Agreement and the Appeals Act was to confine the ability of the High Court, being a foreign court distant from Nauru, to hear appeals only in the strict sense, consistently with the history of appeals from Nauru.

10 8. The Appellant relies on a submission[2] that in practice the only appeals mechanism from Nauru will be that provided for in this Court. That argument should be rejected:

a. it rests on a factual premise that is not established;

b. it is inconsistent with the express limitations on appeals, including on matters involving the interpretation and effect of the Constitution of Nauru and appeals from the Nauru Lands Committee;[3] and

c. to the extent there is a gap in the appeal structure it is one that Nauru itself can address by the appointment of Judges to hear appeals.

There is no reason to think that the provision in the 1968 Constitution for
20 domestic appeals was a dead letter by 1976.

9. The Appellant relies on Nauruan law and, in the absence of any relevant Nauruan statute, on the law and practice in the United Kingdom, in aid of his construction of the Appeals Act. This reliance is said to be based on this Court's judgment in *Ruhani v Director of Police (No 1)*,[4] which held that what is in issue on appeal is the correctness of the decision below, determined

[2] Further Submission of the Appellant para [15]-[16].

[3] Agreement, article 2; and see Appeals Act, 2 5(1).

[4] (2005) 222 CLR 489. See also *Amoe v Director of Public Prosecutions (Nauru)* (1991) 103 ALR 595; 66 ALJR 29 at [6]-[7].

by reference to Nauruan law, which is picked up and applied as federal law.[5] But there are two difficulties with the Appellant's reliance approach.

10. First, the Appellant's reliance on Nauruan law (and, indirectly, UK law) is to put the cart before the horse. First the Appeals Act (an Act of the Commonwealth Parliament) must be construed, to ascertain the nature of the jurisdiction conferred on this Court. Once that construction exercise has been undertaken, then this Court is to apply the law of Nauru (picked up and applied as federal law) in its determination of the appeal. But the law of Nauru does not govern the interpretation of the Appeals Act, a federal statute.

10 11. Second, it is not the case that the procedural rules relating to appeals are determined by reference to Nauruan law. Section 6 of the Appeals Act provides as follows:

> *The power of the Justices of the High Court or of a majority of them to make Rules of Court under section 86 of the* Judiciary Act 1903 *extends to making Rules of Court in relation to matters referred to in paragraph 1 of Article 3 of the Agreement.*

12. Article 3 of the Agreement provides as follows:

> *1. Subject to paragraph 2 of this Article and to Article 4 of this Agreement, procedural matters relating to appeals from the Supreme Court of Nauru to*
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> *the High Court of Australia are to be governed by Rules of the High Court.*
>
> *2. Applications for the leave of the trial judge to appeal to the High Court of Australia in civil matters are to be made in accordance with the law of Nauru.*

(Article 4 of the Agreement, relating to the staying of orders of the Supreme Court or Nauru and the giving of effect to orders of the High Court in Nauru, is not presently relevant.)

13. The Justices of the High Court have exercised the power conferred on them by s 6 of the Appeals Act and have made rules concerning the procedural matters relating to appeals from Nauru, as contemplated by Article 3(1) of the

30 Agreement.[6] The terms of the Agreement make clear the intention that

[5] Appellant's Further Submissions at [18]-[22].

[6] High Court Rules, Part 43.

procedure in the High Court is to be governed not by the law of Nauru but by the law of Australia. In *Ruhani* this Court concluded that the substantive laws of Nauru were picked up and applied as federal law in the determination of the appeal. In those circumstances, Nauruan laws concerning procedural matters are not picked up and applied in appellate proceedings in the High Court. In particular, s 46 of the *Courts Act 1972 (Nauru)* is not picked up and applied as federal law.

Cogency and authenticity of the fresh evidence — Namaduk affidavit

14. The First Respondent accepts that the filing of the affidavit sworn by Remy Namaduk on 7 December 2011 (the **Namaduk Affidavit**) responds to some of the doubts expressed in the First Respondent's First Submissions about the authenticity and cogency of the new evidence sought to be adduced on appeal.

15. The First Respondent does not seek to cross-examine Mr Namaduk in the appellate proceedings before this Court, and accepts for the purposes of the applications before this Court that there is cogent evidence that the then President signed the document now relied on by the Appellant.

Unfair prejudice in receiving the fresh evidence

16. The Appellant's Further Submissions suggest that the First Respondent will suffer no unfair prejudice as a consequence of the death of former President Harris because of the "cogent evidence" of Mr Namaduk.[7] This proposition ought not be accepted. The nature of the evidence highlights the prejudice that would be attended by a trial. That prejudice stands in the way of an extension of time.

17. In particular, the First Respondent notes that the evidence remains unresolved in important respects.

    a. The evidence of Mr Namaduk is that President Harris gave a file to Mr Namaduk on 21 May 1999 (the date the document was apparently

[7] Appellant's Further Submissions at [9].

signed), and that the file remained first in his office and then later in a box, until located by him in November 2011.[8]

b. The evidence reveals that the President did not intend that the document be given to the Appellant, nor actioned pending further consideration about the appropriateness of giving consent in this case and in others.

c. The evidence also shows that a photocopy of the document (being the basis on which this appeal was originally filed) was apparently in existence prior to November 2011, and in the possession of Mr
10 Ekwona.[9]

d. Mr Ekwona has deposed that he obtained the photocopy from the relatives of one Mrs Akubor. But the circumstances in which the photocopy came into existence, or into the possession of Mrs Akubor's relatives, are not the subject of evidence.

e. Finally, the evidence of Mr Namaduk suggests that Mr Clodumar obtained some transfers of land in inequitable circumstances, and that this was regarded as a significant regulatory issue by Cabinet.[10]

18. Even if accepted at face value, the Namaduk Affidavit casts real doubt on whether any consent to the transfer of land by Mr Burenbeiya to Mr
20 Clodumar in fact occurred. Mr Namaduk says that then-President Harris signed a document evidencing consent to the transfer, but instructed Mr Namaduk not to show anyone and not to give it to Mr Clodumar. The reason for this was that debates in Cabinet were ongoing in relation to regulation of such transfers, and Mr Clodumar's conduct was of particular concern. In those circumstances the Court should infer that consent to the transfer from

[8] Namaduk Affidavit at [7]-[8], [10]. The date on which the file was packed into the box (being the date when Mr Namaduk left office) is not specified in his affidavit, though it appears to be April 2000, when the change of government occurred (to which Mr Namaduk refers in paragraph 9 of his Affidavit).

[9] Clodumar Affidavit at [8]-[9].

[10] Namaduk Affidavit at [7].

Mr Burenbeiya to Mr Clodumar was intended by President Harris not to be given until Cabinet resolved these outstanding issues. It appears that these issues were not resolved before President Harris left office and later died. The evidence thus suggests that there was no "*consent* in writing" to the transfer; there may be a written document, but the evidence discloses a lack of consent.

19. These are matters that the Respondents would, in the ordinary course, be entitled to test at trial in the Supreme Court of Nauru. The passage of time and the death of witnesses means that the ability of parties to adduce relevant
10 evidence before that Court is heavily compromised, to the point where no extension should be given.

Availability of evidence at trial with reasonable diligence

20. The First Respondent contends that the Namaduk Affidavit and the affidavit sworn by Mr MacSporran on 8 December 2011 (the **MacSporran Affidavit**) do not demonstrate that there were no steps reasonably open to have been taken by the appellant which would have enabled him to place the Presidential Approval before the Court at trial.

21. The First Respondent's Submissions suggested that the appellant could have issued a subpoena:

20 (a) to the President and/or the relevant Department to produce documents; and

(b) to the President to give evidence at the trial.

22. The Appellant contends that the first of these suggested courses would have "been to no avail, even if taken", because neither "the President nor any Department had relevant documents".[11] But the evidence does not support a conclusion that, in 2002, neither the President nor any Department of Government held any relevant documents. Given the matters set out in paragraph 17, above, the existence in 2002 of other photocopies of the

[11] Appellant's Further Submissions at [4], [6].

Presidential Approval, in the possession of government Departments or the President, cannot be ruled out.

23. Thus while it is possible that, had subpoenas to produce documents been issued in the 2002 proceedings in the Nauru Supreme Court, no documents would have been produced, this is simply unknown and the evidence does not demonstrate that this would have been the case. Evidence of an attempt to issue a subpoena for production of documents, which subpoena produced no documents, would demonstrate that reasonable diligence had been exercised.

24. The second of the suggested courses, namely subpoena to "the President", also cannot be ruled out as a reasonable course for the appellant to have taken.

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a. The fact there were two former Presidents who could conceivably have approved the transfer[12] is no answer to the ability to issue a subpoena — clearly two subpoenas could have been issued.

b. The now expressed view of the appellant's then lawyer that the Nauru Supreme Court would not have countenanced the issue of a subpoena[13] is also no answer. Evidence of an attempt to issue a subpoena that was denied by the Supreme Court would demonstrate that reasonable diligence had been exercised.

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c. Nor should it be accepted that there was no reasonable basis to issue a subpoena to the former President(s). Presidential consent to a transfer is a legal requirement; in the absence of the document the Appellant could have called the President to give evidence about whether such approval was given would be that of the relevant President. The Appellant did not do that, but chose to cast his case differently and on the basis that no consent had been given. Mr MacSporran relies upon the fact that the "question of land transfers was a matter of unfettered

[12] Appellant's Further Submissions at [7].

[13] Appellant's Further Submissions at [7]

Presidential discretion".[14] Accepting for the sake of argument the correctness of that characterization, any subpoena to the President would simply have been to determine whether consent was given, not to impugn any consent in fact given. Thus the nature of the discretion provides no basis for concluding that no subpoena would have been issued.

Dated: 24 February 2012

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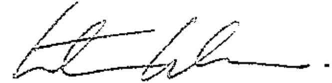
RICHARD NIALL SC
Melbourne Chambers
Telephone (03) 9225 7225
Facsimile (03) 9640 3108



KRISTEN WALKER
Melbourne Chambers
Telephone (03) 9640 3281
Facsimile (03) 9640 3108

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[14] MacSporran Affidavit at [11].