IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M154 of 2017**
BETWEEN:

THE REPUBLIC OF NAURU
Appellant

WET 040
Respondent

APPELLANT'S REPLY TO THE AMICUS CURIAE

I. INTRODUCTION

1. The Refugee and Immigration Legal Centre (**Refugee Legal**), which seeks to be heard as an *amicus curiae*, has filed submissions addressing only what it identifies as "preliminary questions", being questions relating to jurisdiction and service. Refugee Legal has not advanced any submissions on the substantive grounds.

2. In reply, the Republic:

   2.1. submits that it has instituted an appeal by filing a notice of appeal;

   2.2. submits that service of the notice of appeal was effected.

II. JURISDICTION

Relevant provisions

3. The jurisdiction of the High Court to determine appeals from the Supreme Court is conferred by the *Nauru (High Court Appeals) Act 1976* (Cth) (the **Nauru Act**). Section 5 of the Nauru Act relevantly provides:

Filed on behalf of the Appellant by:

Rogan O'Shannessy
Level 30, 35 Collins Street
Melbourne, Victoria
3000

Date of this document: 6 September 2018

Telephone: 0457 000 678
Facsimile: *none available*
E-mail: roganoshannessy@naururs d.com

(1) Appeals lie to the High Court of Australia from the Supreme Court of Nauru in cases where the Agreement provides that such appeals are to lie.

(2) The High Court has jurisdiction to hear and determine appeals mentioned in subsection (1).

4. Article 1A(b)(i) of the Agreement provided that appeals are to lie to the High Court from the Supreme Court in respect of the exercise by the Supreme Court of its original jurisdiction, in civil cases, as of right against any final judgment.

5. Article 3(1) provides that, generally speaking, "procedural matters relating to appeals are to be governed by the Rules of the High Court". Part 43 of the *High Court Rules 2004* (the **Rules**), made under section 11 of the Nauru Act, makes provision with respect to appeals. Rule 43.02 relevantly provides that, where an appeal lies to the High Court as of right, the provisions of Part 42 apply to that appeal "with such variations as are necessary".

6. Rule 42.01 provides that an appeal "shall be instituted by filing a notice of appeal". Rule 42.03(c) relevantly provides that a notice of appeal "must be filed within 14 days after the date of the judgment below". Rule 4.02 provides that any period fixed by or under the Rules may be enlarged or abridged by order of the Court or a Justice whether made before or after the expiration of the time fixed.

Submissions

7. The Republic accepts that the Agreement came to an end on or about 12 March 2018 and that this Court has jurisdiction to hear and determine an appeal from the Supreme Court only if it was "instituted" (within the meaning of Article 6 of the Agreement) before that date (cf Refugee Legal submissions at [17]). It is submitted that that condition is satisfied in the present case by the filing of the Republic's notice of appeal, together with the application to extend time, on 13 October 2017.

8. Article 3(1) of the Agreement provides for "procedural matters" to be dealt with by the High Court Rules. Relevantly, rule 42.03 (applied by Part 43) makes provision for the time by which a notice of appeal must be filed. Similarly, rule 4.02 (also applied by Part 43) makes provision for the ability of the Court to extend time.

9. In *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, the High Court considered a similar provision in section 486A of the *Migration Act*

1958 (Cth). That section provided that an application for a remedy in exercise of the High Court's original jurisdiction in relation to a migration decision "must be made to the court within 35 days of the date of the migration decision", but that the High Court may extend that period as it considers appropriate. The plaintiff made an application for prohibition and certiorari in relation to a migration decision outside the 35-day time period, and also sought an order extending the time period under section 486A.

10. The Court (Gageler and Keane JJ, Nettle J agreeing) described section 486A as "a procedural provision which regulates the exercise of the original jurisdiction conferred by s 75(v) of the *Constitution*". "Section 486A does not, and could not, impose a condition precedent to the invocation of that jurisdiction". The majority continued (at [42]):

> Section 486A does not prevent the making of an application under s 75(v) of the Constitution. The application is made by filing an application for an order to show cause in accordance with the High Court Rules. Section 486A operates rather to regulate the procedure applicable to the exercise of the jurisdiction that has been invoked by the making of such an application where the application has not been made within thirty-five days of the date of the decision which the plaintiff seeks to challenge. It does so by making the grant of the relief sought in the application conditional on an order extending the period for the making of the application. The period of the extension need only be to the date on which the application for an order to show cause has in fact been filed. In parlance which derives from the historical practice of the Court of Chancery, the order is one which can and should be made nunc pro tunc.

11. Here, the rules described above have a similar operation. It would not be possible for the Court to make rules that negated, confined or qualified the conferral of jurisdiction on it by section 5 of the Nauru Act. Rule 42.03 (applied by Part 43) thus does not condition the Court's jurisdiction; rather, it "regulates the procedure" applicable to the exercise of that jurisdiction. The jurisdiction is invoked by filing a notice of appeal in accordance with rule 42.01. If, as in this case, a notice of appeal "has in fact already been filed" after the expiry of that period, then the High Court may make an order under rule 4.02 (applied by Part 43) *nunc pro tunc* enlarging that period of time.

12. The cases relied on by the *amicus curiae* are distinguishable. Both *Delph Singh v Karbowsky* (1914) 18 CLR 197 and *Whitehouse Hotels Pty Ltd v Lido Savoy Pty Ltd* (1974) 131 CLR 333 dealt with provisions to the effect that an appeal shall be instituted in a certain manner, including by filing a notice of appeal within a certain

period. But there is no equivalent provision in the Nauru Act, which simply provides that an appeal lies where the Agreement so provides. Consistently with Article 3(1) of the Agreement, Part 43 (made under section 11 of the Nauru Act), in so far as it applies provisions of Part 42, deals with "procedural matters only". And, to that end, the Rules provide that an appeal is instituted *simply* "by filing a notice of appeal", which has occurred here.

13. Furthermore, any suggestion that the proposition, drawn from *Delph Singh*, that "when the time for appealing has expired the Court has no power to extend the time in the case of appeal",[1] applies equally to the High Court's jurisdiction and power under the Nauru Act and Part 43 of the Rules cannot be accepted. It is incompatible with the Court's decision in *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561, where an extension of time was granted *nunc pro tunc*.

III. SERVICE

14. The Republic has filed an affidavit of its solicitor, Rogan O'Shannessy, in relation to service of the notice of appeal, and documents relating to its application for an extension of time, on the respondent.

15. The affidavit evidences that, on 16 October 2017, the Republic left a copy of these documents at the respondent's address for service in the Supreme Court proceeding, namely, the address of the solicitors who represented him in the Supreme Court proceeding (Craddock Murray Neumann), which was identified in a "memorandum of appearance" filed on his behalf in the Supreme Court proceeding.[2]

16. Service of the notice of appeal in that manner is effective for the purposes of Part 43 of the Rules, according to the express terms of rule 42.05.4. Details of Craddock Murray Neumann's retainer are irrelevant for this purpose (cf Refugee Law's submissions at [28]-[29]).

17. No provision of the Rules expressly governs the service of an application to extend the time in which to commence an appeal. Rule 9.01 requires personal service of particular kinds of document and permits "ordinary service" in others; but ordinary service under rule 9.4 requires an "address for service", which is defined by reference to a party's notice of appearance (rule 9.5). No such notice

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1 See *Owens v Farrington* (1933) 49 CLR 20.
2 Cf. rule 42.05.4 of the Rules.

will have been filed at the point where an extension of time to commence proceedings is being sought.

18. The Rules should be construed sensibly, so as to apply the rules for service of initiating documents apply also to an application to file and serve such documents out of time.

19. Nonetheless, the Republic intends to attempt to effect personal service on the respondent of all documents filed in this proceeding – including those recently filed on behalf of Refugee Legal – in October 2018. The Republic intends to seek leave to:

10 19.1. file a further affidavit with respect to that attempt; and

19.2. file further submissions addressing the issue of service, including in response to the submissions of Refugee Legal as relevant, and the future conduct of the matter,

after it has made this attempt.

Dated: 4 September 2018

GEOFFREY KENNETT

20 10th Floor Chambers
T: (02) 9221 3933
F: (02) 9221 3724
kennett@tenthfloor.org

NICK WOOD

Owen Dixon Chambers West
30 T: (03) 9225 6392
F: (03) 9225 8395
nick.wood@vicbar.com.au

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