IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M28 of 2017

BETWEEN:

BRF 038
Appellant

and

THE REPUBLIC OF NAURU
Respondent

APPELLANT'S REPLY

Part I: Publication

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

Part II: Submissions in reply

2. This reply responds to the retrospective repeal of s 37 of the *Refugees Convention Act 2012* (Nr) ('**RC Act**') by the *Refugees Convention (Amendment) Act 2017* (Nr) ('**2017 Amendment Act**') on 27 April 2017, referred to in the respondent's submissions. The amendment came into effect after the appellant's submissions in this appeal were filed and necessitates an amendment to the Notice of Appeal. This reply also responds to the respondent's submissions on the test of persecution applied by the Tribunal.

The 2017 Amendment Act does not diminish the scope of procedural fairness

3. When commencing this appeal and at the time of filing the appellant's submissions, s 37 of the RC Act had been repealed by the *Refugees Convention (Derivative Status and Other Measures) (Amendment) Act 2016* (Nr) ('**2016 Amendment Act**') with effect from 23 December 2016, which would not have affected the conduct of this appeal.[1] The 2017 Amendment Act makes the repeal of s 37 retrospective, with effect from 10 October 2012. The Tribunal was therefore not required to comply with the specific requirements of s 37, but was required to comply with the obligation under s 22 and s 40 and under the common law of Nauru to afford natural justice and procedural fairness to the appellant in the conduct of the hearing.

[1] See [22] and footnote 15 of the appellant's outline of submissions.

Date of document: 24 May 2017
Filed on behalf of: The appellant

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4. The 2016 and 2017 Amendment Acts did not abrogate or diminish the procedural fairness obligations of the Tribunal.[2] Rather, as the Explanatory Memorandum to the 2016 Amendment Act makes clear,[3] the amendments were intended to remove confusion between Australian migration law - in which s 422B of the *Migration Act 1958* (Cth) displaces common law procedural fairness in favour of the codified procedure of ss 424AA and 424A - and Nauruan law, which does not restrict the scope of common law procedural fairness.

5. The retrospective repeal of s 37 does not alter the obligation of the Tribunal to put to the appellant the substance of significant issues or information which, if accepted by the Tribunal, may contribute to a decision adverse to the appellant.

6. The appellant seeks the Court's leave to delete reference to s 37 of the RC Act in the first ground in the Notice of Appeal and substitute reference to s 40. The retrospective repeal of s 37 of the RC Act necessitates the amendment. The denial of procedural fairness of which the appellant complains under the first ground of appeal is now grounded in both s 22 and s 40, and no longer in s 37. The substance of this procedural fairness ground remains the same.

7. In the circumstances of the retrospective appeal, the respondent's criticism[4] that the appellant relied in the Supreme Court of Nauru on a breach of the now repealed s 37 rather than a breach of s 40 to describe the same underlying denial of procedural fairness is unwarranted.

8. The obligation to afford procedural fairness under s 22 of the RC Act and the common law of Nauru included but was not limited to an obligation to put material to an applicant for review, which was augmented by s 37 of the RC Act, as well as the obligation to provide an applicant with an opportunity to give evidence and present arguments relating to the issues arising in the review pursuant to s 40(1).

9. In *DWN066 v Republic of Nauru*,[5] the Supreme Court of Nauru canvassed the scope of procedural fairness under Nauruan common law. Justice Khan cited the seminal case of *Ridge v Baldwin*,[6] which as a House of Lords decision shortly before the date of Nauruan independence is binding on Nauru save to the extent it has been modified by subsequent Nauruan law.

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[2] 2016 Amendment Act, s 6; 2017 Amendment Act, s 7; Respondent's submissions, [12].
[3] Explanatory Memorandum to 2016 Amendment Act, 3, reproduced in supplementary annexure to respondent's submissions, 18-19.
[4] Respondent's submissions, [41].
[5] [2017] NRSC 23 (Khan J).
[6] [1964] AC 40.

10. Lord Reid held in *Ridge v Baldwin*: "Before attempting to reach any decision they were bound to inform him of the grounds on which they proposed to act and give him a fair opportunity of being heard in his own defence."[7] Applied to the present context, the proposition that the treatment of the appellant did not amount to persecution, because he could avail himself of the protection of the Somaliland police given its ethnic composition, was an important and dispositive matter which should have been put to the appellant for a response.

11. The respondent's submission that procedural fairness under the common law of Nauru only requires country information to be put to an applicant if the information in its terms is adverse should not be accepted. So much is clear from the principal Australian authority on which the respondent relies, namely *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* ('***Alphaone***').[8]

12. In *Alphaone*, immediately after stating that procedural fairness requires adverse material to be put to a party for comment, the Full Court stated:

> *"It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material."*[9]

13. If the Tribunal has before it information which, if accepted without comment, contradiction or clarification by the applicant, would lead the Tribunal to make a finding adverse to the applicant, procedural fairness requires the substance of that information to be put to the applicant for a response before the adverse finding is made. It is not necessary that the information itself be adverse on its terms. Australian authority interpreting s 424A of the *Migration Act* has no application to the proper scope of common law procedural fairness in this context.[10]

14. Contrary to the respondent's submissions, the finding of the Tribunal at [48] that the appellant "would have some redress from the acts of others" was a critical component of the Tribunal's reasoning that the treatment of the appellant did not amount to persecution. It was one of several components mentioned in [48] as reasons that the Tribunal considered the appellant did not have a well-founded fear of persecution; it

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[7] Ibid, 64.
[8] (1994) 49 FCR 576, [1994] FCA 1074.
[9] (1994) 49 FCR 576, 592A, [1994] FCA 1074, [30] (Northrop, Miles and French JJ) (emphasis added).
[10] See *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 356-357 [91]; cf Respondent's submissions, [32.1] and the cases there cited.

was not a finding made subsequent to and separate from the finding regarding persecution, contrary to the respondent's submissions.[11]

15. It follows that the country information relied on by the Tribunal as its sole basis for finding that the appellant could avail himself of protection of the authorities was credible, relevant and significant to the decision, such that procedural fairness required that its substance be put to him for a response.[12]

The Tribunal breached s 40 of the RC Act

16. Neither the issue of the availability of protection from state authorities, nor the reference to the tribal composition of the Somaliland police in the country information relied on by the Tribunal for that finding, were raised with the appellant for comment.

17. Impunity of the perpetrators of persecution from state authorities was a clear and important part of the appellant's claim for protection. In his statutory declaration, the appellant emphasised the impunity of the perpetrators in relation to multiple incidents as a key factor in his well-founded fear of persecution.[13]

18. The Secretary did not reject the appellant's claim because of the issue of impunity and came no closer to the issue than the phrase quoted in the respondent's submissions, that "the institutions of the Somaliland authority promote equality before the law."[14] Contrary to the respondent's submissions, the appellant was not on notice that the Tribunal might decide that he would enjoy "some redress from the acts of others" on the basis of country information asserting that "there are police from every tribe in Somaliland." That finding therefore could be expected to take the appellant by surprise, such that procedural fairness required that the substance of the country information be put to him and that he be given an opportunity to respond.[15]

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[11] Cf Respondent's submissions, [36].
[12] *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 96 [17] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).
[13] Statement of appellant, 26 February 2014, [9], [11], [13], [15]-[17], Book of Documents p 40-41.
[14] Decision of the Secretary of the Department of Justice and Border Control, Republic of Nauru, 21 September 2014, 18, Book of Documents p 74; quoted in Respondent's submissions, [42].
[15] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 161-162 [29], 163 [35] and 165 [43] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

The Tribunal incorrectly applied the persecution test

19. The respondent submitted regarding the second ground of appeal that the Tribunal did not err in assessing the criterion of persecution because it recited the correct test from the UNHCR Handbook.[16] That submission is flawed in that it elides finding error where the Tribunal has asked itself the wrong question in its application of the legal test which forms the basis for the satisfaction or non-satisfaction of the criteria for the grant of the visa.[17]

20. The Supreme Court of Nauru erred by approving the approach that any capacity to subsist negated the possibility of persecution under the Convention. That "the appellant's mother and brothers have been able to maintain themselves despite their membership with the Gabooye tribe" was held to be sufficient to find that the violation of the appellant's rights could not rise to the level of persecution.[18]

21. The respondent's contention that "[t]he Tribunal did not articulate any 'test' for persecution" is incorrect.[19] At [47], the Tribunal found that the "living conditions were not intolerable". At [48], the Tribunal found that although the appellant would be precluded from all but lowly paid work due to his ethnicity, he "would be able to subsist". Although he would be precluded from higher education because of his ethnicity, he "was able to obtain a limited education in the past". Although his family had been forced from their land due to their ethnicity, they still had somewhere to live. All of these findings reveal a test applied by the Tribunal that complete deprivation of human rights on a Convention ground was necessary to establish persecution. The Supreme Court made an error of law in failing to find that the Tribunal had applied the incorrect test for persecution.

Dated: 24 May 2017

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[16] Respondent's submissions, [48]-[49].
[17] *Craig v South Australia* (1995) 184 CLR 163, [14] (Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 195 (Lord Pearce).
[18] Judgment of Supreme Court of Nauru, [30]-[31].
[19] Respondent's submissions, [45].