IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **No. M66 of 2017**

BETWEEN: **CRI 028**

Appellant

and

THE REPUBLIC OF NAURU

Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I:

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

Part II:

Ground 1 Two home areas/reasonableness

2. The Tribunal found that the appellant had two home areas, Karachi, and the place where he was born, referred to here as [K]; decision [81], [93], [AB 176-177]. The Tribunal erred in engaging in a two home area analysis, and then concluding that because the appellant had a second home area, it was not necessary to consider the reasonableness of relocation: [77]-[81], [93]-[94] AB 176-179. The Tribunal's reliance on the Federal Court decision of *SZQEN*[1] was misplaced.

3. The analysis is flawed, if it stands for the proposition that reasonableness is excluded at the second home area found. Whilst this type of inquiry has made its way into Australian jurisprudence, it is not found in the text of the *Refugees Convention*. The correct test is that set out in *SZTAV*[2], where at [11] the plurality endorsed the UK decision of *Januzi*.[3] This refers to "Place A" and "Place B". Having found that an applicant has a well-founded fear of persecution in "Place A", it is then necessary to consider whether that fear would be present in another location, where the applicant might be expected to return to, such as "Place B". If the fear does not extend to the new place, the practical realities must nevertheless be considered, because the effect of the finding is that the relevant applicant must remain in "Place B" (to avoid persecution in "Place A").

---

1 *SZQEN v. Minister for Immigration and Citizenship* (2012) 292 FCR 514
2 *SZTAV v. Minister for Immigration and Citizenship* (2007) 233 CLR 18
3 *Januzi v. Secretary of State for the Home Department* [2006] 2 AC 426

4. It is a distraction to attach significance to the second place identified, beyond the purpose of the exercise, which is simply to identify a place, if it exists, where the applicant does not have a well-founded fear of persecution. At best, the identification of a home area is a logical starting point in the factual inquiry. It has no greater significance than that.

5. In the alternative, *SZQEN* is distinguishable. First, in that case, there was no finding that the applicant had two home areas. Secondly, the facts were very different to the present. The applicant there had spent his first 40 years in his home area, then only 18 months in the second place of residence, where his refugee claim arose, and from where he departed the country. It was found that there was no impediment to him returning to the place where he had spent the great majority of his life. Tellingly also, the applicant raised little by way of objection to returning to his former home.

6. The recent Full Federal Court decision of *CSO15*[4] is consistent with the appellant's analysis: see in particular [42] and [48].

Ground 2 Failure to consider the appellant's wife and child when determining the second home area

7. After going to Karachi in 2007, the appellant had married and had a young child, born in 2010. He owned a house in Karachi. Before leaving for Australia, he had lived and worked in the Karachi for the last 6-7 years. Importantly, he, and his wife and child, had not been to his birthplace since he had come to Karachi in 2007.

8. In circumstances where his wife and child were dependent on him, it was artificial to consider the question of a home area through the prism of the appellant alone. His family circumstances had changed entirely in the intervening period. He was no longer a single man, to be measured against his birthplace, in isolation from his family.

Ground 3: Failure to consider family unity principle vis a vis the location [K]

9. Whilst the Tribunal dealt with and rejected an aspect of the appellant's objection to returning to [K] with his wife (that there was a fear that they would face harm as a mixed Shia/Sunni marriage) and another (that he was estranged from his family because of his "love" marriage), it did not deal with his objection that his wife did not want to go to [K]. The appellant made a clearly articulated claim or objection to this effect. It was squarely

---

4 *CSO15 v. Minister for Immigration and Border Protection* [2017] FCAFC 14

raised: see his statement dated 14 May 2015 [17], AB 106, and the decision at [11] AB 124, [25] AB 126, [40] AB 128, [46] AB 129, [63] AB 132, [73] AB 134, [76] AB 135.

10. The decision of the Tribunal is completely silent with regard to this objection. Nothing appears in [102] and [103], where one would expect to find discussion. Further, nothing appears under the heading *Complementary Protection Assessment*, which is where a threat to family unity might particularly be expected to be discussed (this section simply refers back to [99]-[100], which only dealt with an objection based on generalised violence).

11. The threat to family unity was a material question of fact going to the issue of reasonableness. It is analogous to the situation arising in *MZANX*[5] where it was found that the decision-maker had not taken into account the circumstances facing the applicant and his wife and young child, rather, had considered the question of relocation only from the perspective of a single man: see [62]-[63].

12. Another analogy is with the decision of *SZSCA*[6]. There the Tribunal was found to be in error in not considering the impact upon the applicant, where his return to Kabul would necessitate him giving up his previous occupation as a truck driver, which had involved him travelling to the countryside: see [31]-[32]. Rather, the Tribunal had simply found that he could resume an earlier occupation that he had had, as a jeweller.

13. The Tribunal here failed to engage in any analysis of the kind in *MZANX* or *SZSCA*. The question of the appellant's wife's reluctance to go to a place where she had never been, to leave all of her family behind, and to go as part of a mixed marriage, which was not endorsed by the appellant's family, raised a serious issue to be determined, as it had a direct impact on the appellant. There is an insufficient basis to infer from the silence in the decision that the Tribunal took this important matter into account. The oft quoted passage from *Yusuf*[7] is apposite, applying as it should to s. 34(4) of the *Refugees Convention Act 2012 (Nr)*, the equivalent of s. 430 of the *Migration Act 1958*.

Guy Gilbert
Castan Chambers
14 February 2018

Anthony Krohn
Owen Dixon Chambers East

5 *MZANX v. Minister for Immigration and Border Protection* [2017] FCA 307
6 *SZSCA v. Minister for Immigration and Border Protection* 254 CLR 357
7 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323