**IN THE HIGH COURT OF AUSTRALIA**
**MELBOURNE REGISTRY**

**No. M 66 of 2017**
**ON APPEAL FROM THE SUPREME COURT OF NAURU**

**BETWEEN:**



**CRI028**
Appellant

and

**THE REPUBLIC OF NAURU**
Respondent

## APPELLANT'S SUBMISSIONS

### PART I: CERTIFICATION FOR PUBLICATION

1. It is certified that these Submissions are in a form suitable for publication on the internet.

### PART II: ISSUES ON THE APPEAL

2. The appeal presents the following issues:

**A. The nature of this appeal**

Is this appeal brought by right? Is it an appeal from an exercise of the original jurisdiction of the Supreme Court of Nauru?

**B. The law of Nauru – issues relating to the recognition of a refugee**

***The law relating to "internal protection"***

What is the law of Nauru about when "internal protection" is to be considered available in a person's country of nationality[1], such the person is not to be recognized as a refugee under the Refugees Convention Act 2012 (Nauru)?

***Is the concept of an applicant's home area relevant to "internal protection"?***

[1] Or country of habitual residence, if the person is stateless. See Article 1A of the Refugees Convention.

Clothier Anderson Immigration Lawyers
Level 3, 62 Lygon Street
CARLTON VIC 3053

Telephone: (03) 9347 4022
Fax: (03) 9347 5066
Email: info@clothieranderson.com.au
Contact: Sanmati Verma

Is the concept of an applicant's home "home area" part of the reasoning to be applied under the law of Nauru in determining whether "internal protection" is available to an applicant for recognition as a refugee?

***Is the concept of the "reasonableness" of relocation relevant to "internal protection"?***

In determining whether "internal protection" is available to an applicant for recognition as a refugee, is it the law of Nauru that any prospective relocation of an applicant within the country of nationality is to be reasonable in all the circumstances?

***Is the concept of "family unity" as a relevant consideration for reasonableness of relocation for "internal protection"?***

Is family unity a relevant consideration in assessing any prospective relocation of an applicant within the country of nationality?

***Were there errors by the Court below?***

Did the Supreme Court of Nauru err in determining and applying the law of Nauru relating to "internal protection"?

## PART III: WHETHER A NOTICE SHOULD BE GIVEN UNDER SECTION 78B OF THE JUDICIARY ACT 1903

3. The appellant considers that the appeal does not raise any constitutional question, and no notice should be given under section 78B of the *Judiciary Act 1903 (C'th)*.

## PART IV: CITATION OF JUDGEMENT BELOW

4. The judgement from which this appeal is brought is cited as *CRI028 v Republic* [2017] NRSC 32; Appeal Case 104 of 2015 (11 May 2017).[2]

## PART V: NARRATIVE OF RELEVANT FACTS

5. The Supreme Court of Nauru found as follows:[3]

### A. The application for protection, and the decisions of the Secretary and of the Tribunal

*BACKGROUND*

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[2] This was a judgement of the Supreme Court of Nauru (constituted by Crulci J.), given at Yaren on 11 May 2017.
[3] Judgement below, [5]-[23].

5. *The appellant is a ... married man with one child. He was born in the [K] District. He is a Sunni Muslim, a Punjabi by ethnicity and a citizen of Pakistan. The appellant's wife is Shiaa.*

6. *The appellant's father is deceased and his mother and siblings live in his home village. He attended school until grade nine and then worked .... He went to Karachi to look for work in 2004 and remained for a couple of years. He went back to his home village for one year working ..., and then returned to Karachi for work. On the second occasion in Karachi he met and married his wife. She is a Shiaa Muslim and it was not an arranged marriage, rather a 'love match' which did not have the approval of his family.*

7. *On many occasions whilst living in Karachi he was forced to attend demonstrations, meetings, various events and contribute money to the Muttahida Quami Movement (the "MQM") cause. .... If he refused to attend he was assaulted and told that it would go badly for him and that he would be in trouble. He was unable to go to the police for protection because many members of the police force were also MQM supporters.*

8. *In May2013 some MQM supporters came to his house demanding that he attend a demonstration and threatened him with harm if he did not attend. As a result the appellant decided to flee Pakistan as he feared that if he remained he would be detained, harmed or killed in the on-going civil and political violence. In August 2013 he travelled to Malaysia, then on to Indonesia where after a period of a couple of months he boarded a boat for Australia. This was intercepted and he was taken to Christmas Island arriving in December 2013; a few days later he was transferred to Nauru.*

*INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION*

9. *The appellant states that MQM is very active in Karachi and frequently hold events and demonstrations which people are forced to attend. Attendance is ensured by the MQM supporters seizing national ID cards, which are returned at the end of the meeting. Members supporting the MQM terrorise people and he was on occasions slapped around.*

10. *The appellant was approached at home by supporters of the MQM and was told to attend a forthcoming demonstration and that if he did not do so he would be harmed. The appellant fearing harm if he were to remain in Pakistan left the country in August 2013. He is opposed to the MQM ideals and has frequently objected to attending their demonstrations.*

*SECRETARY'S DECISION*

11. *The Secretary accepted that the MQM are active in Karachi but did not accept that the appellant ever attended their demonstrations rallies or meetings, nor that he had ever been threatened or assaulted by them.*

12. *The Secretary noted the appellant response to why he remained in Karachi was that his wife is from there and does not want to move, furthermore that his family did not get along with his wife and he struggled to find employment in his home area.*

13. *The Secretary found that the appellant is not political, is not a member of a religious minority, and he does not have a profile that would lead him to be targeted in Karachi. Therefore the appellant in the Secretary's view does not face a reasonable possibility of harm in Karachi. In relation to his home region the Secretary stated as follows "I have not considered whether he faces a reasonable possibility of harm in his alternative home region ... in [K] District of Punjab Province of Pakistan."*[4]

14. *The Secretary did not make a finding on the availability of state protection, as he found there was no real possibility that the appellant would face harm, similarly he did not make a finding on the reasonableness of relocation. Having found that there was no reasonable possibility that the appellant would be harmed, the Secretary determined that the appellant's fear was not well-founded. The appellant is not found to be a refugee under the Act. The Secretary furthermore determined that for similar reasons Nauru does not have complementary protection obligations to the appellant.*

*REFUGEE STATUS REVIEW TRIBUNAL*

15. *The Tribunal having questioned the appellant in the hearing accepted that for a period of four years to May 2013 that the appellant was coerced into attending meetings and paying money to the MQM thugs as they demanded.*

16. *The Tribunal considered the issues of the appellant's mixed marriage, he being Sunni and his wife Shiaa. The Tribunal noted that although the appellant's wife did not want to go to his home area, the appellant held no fear of returning to [K] accompanied by his wife. The Tribunal formed the view that the reluctance to return to [K] was based on the wife's wish not to leave her own family in Karachi.*

[4] Book of Documents, page 60 para 8

17. *In looking at the appellant's 'home area' the Tribunal was guided by the Federal Court of Australia decision in the SZQEN[5], summarising the English cases and jurisprudence as follows: 'where a person has more than one home area, the decision-maker is not required to assess whether it or not it is reasonable to relocate from one area to the other, merely whether that person has a well-founded fear of persecution in each of the home areas.'[6]*

18. *The Tribunal considered that the appellant was born and raised in [K], and prior to departing Pakistan aged 30 years, had spent 22 years living in his home area of [K]. He lived in Karachi for the previous six years, where he had married, had a child and was working. The Tribunal accepted that Karachi is the home area for the appellant and family; also that [K] is a home area for the appellant alone, noting that "it might not to be a home area for his wife, who has never lived there".[7]*

19. *Whilst the Tribunal accepted that the appellant made well be subject to threats or harm from the MQM, which amounts to persecution for a Convention reason of his actual or imputed political opinion, they view this threat to be restricted to the Karachi area. As the appellant is found not to have a reasonable possibility of persecution in his home in area of [K] he does not have a well-founded fear of persecution, including fears arising from his mixed Shia-Sunni marriage.*

20. *The applicant was found by the Tribunal to have two home areas, and applying the principles of SZQEN they find 'the ordinary principles of relocation to not apply in the situation' of having two home areas[8].*

21. *Notwithstanding the Tribunal's determination noted above, they went on to consider whether relocation was appropriate in the appellant's case. The Tribunal found that the appellant's profile was not such as to attract the attention of the MQM throughout Pakistan. They concluded therefore that if he did not return to Karachi and went to some other part of Pakistan (such as [K]) that he could safely, practically, and legally relocate within Pakistan.*

*TRIBUNAL'S DECISION*

22. *Having determined that he could return and lead a normal life within Pakistan the Tribunal found that the appellant is not a refugee. When considering complementary protection the Tribunal found that as the appellant did not face a real possibility of degrading or*

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[5] *SZQEN v Minister for Immigration and Citizenship* (2012) 202 FCR 514
[6] Book of Documents in the Supreme Court of Nauru, p 176, para 77
[7] Ibid., p 176 para 81
[8] Ibid., p179, para 94

*other treatment violating his human rights he was not owed complementary protection.*

23. *The Tribunal affirmed the Secretary's decision that the appellant is not a refugee, nor is he owed complimentary protection under the Act."*

**B: The Supreme Court's summary of the Grounds of the appeal in the Supreme Court of Nauru**

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6. The learned Judge below set out the Grounds of the appeal in the Supreme Court:[9]

*GROUNDS OF THIS APPEAL*

*24. The appellant's amended application raises three grounds of appeal, the first two in the alternative, in relation to the Tribunal finding that the appellant is not recognised as a refugee :*

20 *1) Whether a person can have more than one 'home area' and thus negate the principles of the relocation alternative, and whether it is correct in law to say that the decision-maker is not required to assess the reasonableness of relocation from one home area to another; and/ or*

*2) If the existence of a second home area negates the requirement of a reasonableness of relocation question, does this second area need to be considered for the appellant on his own or as appropriate for him and his family together; and*

30 *3) If there is not a second home area exception, was the Tribunal required to and did it take into consideration the appellant's claim that the family as a unit could not relocate to [K] from Karachi.*

*<u>Relocation principles – 'two home areas'?</u>*

*25. The appellant submits to the Court that the Tribunal was incorrect in asserting that SZQEN,[10] and the United Kingdom cases referred to, were authority for the proposition that the asylum seeker could have*

40 *two home areas, and that relocation from one to the other was not a matter to be considered under the relocation principles.*

*26. ...*

*27. The appellant submits that the case mentioned above does not talk in terms of multiple home areas rather, that the determination of what is the 'home area', is a matter to be considered taking into account the circumstances of the person. By the Tribunal determining that there was in existence two home areas and that this then negated*

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[9] Judgement below, [24]-[47].
[10] (2012) 202 FCR 514

*their need to consider relocation principles, the Tribunal fell into error.*

*.....*

*'What is a home area?' – Did the Tribunal ask the right questions?*

37. *The appellant argues that in considering whether [K] is a 'home area' for the appellant they considered him in the singular and not as a unit with his immediate family. The appellant highlight's the section in the Tribunal's determination which reads as follows:*

> *"The Tribunal...also finds [K] to be a home area for the purposes of this assessment. While it may not be a home area for his wife, who has never lived there, it is the applicant's claim the Tribunal is assessing."*[11]

38. *It is argued that this is a misconception on behalf of the Tribunal as it disregards the facts that he is married and has a child, and that his wife and child have always lived in Karachi. The appellant cites UNHCR Refugees Convention Article 12(2) and the International Covenant on Civil and Political Rights which state that the rights of the marriage be respected, and that the family is a fundamental group or unit of society and entitled to protection.*

39. *The appellant had told the Tribunal at the hearing that his wife and child had always lived in Karachi and that his wife was determined not to leave Karachi to move to another part of Pakistan which included the appellant's home area of [K].*

*.....*

*Move to [K] a threat to family unity?*

44. *This ground is based on the appellant's contention that claim that his wife refused to move from Karachi to [K]; that the Tribunal did not consider the reasonableness of relocation in the light of maintaining family unity.*

45. *The appellant has been consistent in his claim in relation to his wife and any move to [K]:*

    a) *In his transfer interview he said as follows: "I married for love in Karachi (not an arranged marriage). When I married my wife she didn't want to move to any other address when I lived there there is targeted killing and he didn't want to move anywhere else"*[12]*;*

    b) *In his statement to Tribunal members: "Our client instructs that although he originates from [K], Punjab, his wife's family are in*

[11] Book of Documents before the Supreme Court, page 176, para [81]
[12] Ibid., page 11, Q1

*Karachi. Our client instructs that he is not welcome in his home area of [K] with his family, as our client entered into a love marriage against the wishes of his family. Our client is Sunni, and his wife is Shia. Therefore, without the support of his family in [K], the only place where our client has tribal and familial support networks are in Karachi, where his wife's family live."*[13]

c) *In his second statement to the Tribunal he said as follows: "I married a woman from Karachi in a love marriage and it was against the wishes of my family. My wife is Shia and I am Sunni. As a result, I have very little contact with my family. My wife has never visited my family in Punjab, we could not move there because we do not have the support of my family. My wife was reluctant to move because she does not have any family outside of Karachi…. We would be vulnerable to harm as an interfaith couple isolated from the support networks."*[14]

d) *In the interview the appellant explained that his relationship with his family is not good because he went against their wishes and did not have an arranged marriage, but rather a love marriage*[15]*, that his wife had grown up in Karachi and studied there.*[16]*That his wife does not want to go because her whole family is in Karachi and that his wife feels safe with her family in Karachi.* [17]

46. *The appellant draws the Courts attention to the lack of reference by the Tribunal to the appellant's threat of family unity in relation to their moving to [K], stating this is contrary to the requirements of the Act section 34 (4) which requires the Tribunal to give written reasons and findings on material questions of fact.*

47. *This failure of the Tribunal to consider the threat of family unity is a jurisdictional error because the wife's refusal to move is a material claim for the Tribunal to review, but it did not do so, and by failing to do so fell into error.*

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[13]Ibid., page 86, 87 at (vi)
[14] Ibid., page 106, para [17]
[15] Ibid., page 113 lines 33-47
[16]Ibid., page 118, lines 1-3
[17] Ibid., 129, lines 26 on and page 132 lines 16 on

## C. The findings of the Supreme Court

7. The Supreme Court found:

1. **There can be more than one home area of an applicant.** The Court said:

> *30. In the case of SZQEN, and in particular the section cited at paragraph 27 above, the Court is of the view that what is being put forward is that when assessing the situation* ***it may be that there is more than one place to which the claimant can have a substantial tie or links.*** *The Court in SZQEN noted that whether these links exist or not is a matter of fact determined by the reviewer.*
>
> *31. In order to be recognised as a refugee the appellant must be outside his home country because of a well-founded fear of persecution for a Convention reason. It is up to the Tribunal to determine whether the appellant has a well-founded fear in a particular area.*
>
> ***32. If an appellant has ties or links to more than one area, as in this case, then the Tribunal can rightly assess whether the appellant has a well-founded fear of persecution in each area where he has been residing or is able to take up residence because of those ties. The question of relocation only arises if the appellant is living outside of his country and cannot return to an area in which he was living, or an area in which he has ties, due to a well-founded fear of persecution for a Convention reason.***
>
> ***33. This Court is of the view that if proper consideration is given to each area in which an appellant has ties and can safely live without a well-founded fear of persecution, then a determination that there is such an area to which he can return is not 'operating to defeat the relocation alternative principles'. These principles only arise when there is a well-founded fear of persecution for a Convention reason.***
>
> ***34. The Tribunal in the matter before the Court found that [K] was an area in which the appellant had lived for 22 of his 30 years; that his family lived there; and that he had suffered no well-founded fear of persecution whilst living there, nor was likely to in the future. Furthermore the Tribunal found that relations between Sunni and Shiaa in that area were good and that there appeared to be no reason to believe that the appellant could not return there with his family. As such questions pertaining to the 'relocation principles' do not arise.*** (Emphasis added)

2. **The Tribunal considered the appellant's wife's situation, at least whether she would be safe if she went to [K]**. The Court said:

> *41. The respondent highlights the Tribunal's determination under the heading "Marriage, wife's situation, and threat to Shias" and notes that the Tribunal discussed at some length with the appellant about his wife and the relationship with his family in [K].*
>
> *42. The Tribunal found that the appellant has no fear of returning to [K] whether with his wife or not. They accepted that his marriage is mixed Sunni-Shia, and noted country information that "Sunnis and Shias coexist so harmoniously in [K] that it is considered an exemplary model of Shia-Sunni brotherhood". The Tribunal rejected the appellant's claim that this had led to any particular problems with his family in [K]. Rather the Tribunal found that it was that his wife who did not want to leave her family in Karachi.*
>
> **43. *The Court finds that the Tribunal did consider the appellant's family situation and in particular whether his wife would be safe in [K]. There is nothing in the Tribunal's determination (on the material before it and relevant country information referred to) to suggest that the appellant's wife and family were disregarded when considering [K] as a home area for the appellant; no legal error is evident. Ground two of the appeal fails.*** (Emphasis added.)

3. **The Court considered the Tribunal had considered the question of family unity**. It said:

> *49. As the Tribunal's determination is silent on the question of family unity in relation to a return to live in [K], the appellant says the inference can be drawn that the Tribunal did not consider this to be a material claim. Further the appellant points to the statement by the Tribunal as evidence that they did not consider family unity to be a material claim, when the Tribunal held in relation to [K]: "While it may not be a home area for his wife, who has never lived there, it is the appellant's claim the Tribunal is assessing."*
>
> *50. The appellant points to the importance of the family and family unit under various International Instruments and says that considerations in accordance with section 34 of the Act in relation to its review obligations are central to the role of the Tribunal.*
>
> *51. **These claims of the appellant were aired before the Tribunal and the Tribunal made a determination that there was not a risk of harm to the appellant and his wife should they go to [K].***

*52. It is the view of this Court that this was a determination open to the Tribunal on the evidence before it. This ground of appeal has no merits.* (Emphasis added.)

## PART VI: ARGUMENT

### A. Errors in the Supreme Court

8. The appellant submits that the Supreme Court erred:

1. In finding that:

> The question of relocation only arises if the appellant is living outside of his country and cannot return to an area in which he was living, or an area in which he has ties, due to a well-founded fear of persecution for a Convention reason.

2. In not finding that the Tribunal should have considered the *reasonableness* of the relocation of the appellant's wife as well as her safety.

3. In not finding that the Tribunal had failed to consider as a relevant consideration the issue of the unity of the appellant's family.

### B. Applicable legislation, principle or rule of law, with references to authority or legislation and relevance, and

### C. Analysis of rationale of legislation, principle or rule

#### (i) The right to appeal to this Court

9. There is an agreement between Australia and the Republic relating to appeals to the High Court from the Supreme Court of Nauru ("**the Agreement**"). Section 5 of the *Nauru (High Court Appeals) Act 1976 (Cth)* was enacted pursuant to the Agreement and provides:

> (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).
>
> (3) Where the Agreement provides that an appeal is to lie to the High Court of Australia from the Supreme Court of Nauru with the leave of the High Court, the High Court has jurisdiction to hear and determine an application for such leave.

10. Article 1 of the Agreement relevantly provides in part:

> .... subject to Article 2,[18] appeals are to lie to the High Court from the Supreme Court in the following cases:
>
> A. In respect of the exercise by the Supreme Court of its original jurisdiction-
> ...
>
> (b) In civil cases-
> (i) as of right, against any final judgment, decree or order; and
> (ii) with the leave of the trial judge or the High Court of Australia, against any other judgment, decree or order.
>
> B. In respect of the exercise by the Supreme Court of Nauru of its appellate jurisdiction
>
> In both criminal and civil cases, with the leave of the High Court.

11. The exercise of jurisdiction by the Supreme Court of Nauru in the Court below was pursuant to section 43 of the *Refugees Convention Act 2012 (Nauru)*. At all relevant times that provision[19] was that:

> (1) A person may appeal to the Supreme Court on a point of law against that decision of the Tribunal where the Tribunal has decided that the person:
> (a) is not recognized as a refugee; or
> (b) is not owed complementary protection

12. Although the legislation provided that a person "may appeal ....on a point of law", such the use of the word "appeal" does not determine that the exercise by the Supreme Court of Nauru of power under section 43 of the Refugees Convention Act was an exercise of appellate rather than original jurisdiction.

13. As McHugh J. said in *Ruhani v Director of Police,*[20] a case in which the nature of an "appeal" from the Supreme Court of Nauru to the High Court of Australia was determined by the High Court to be an exercise of this Court's original jurisdiction:

> *The description of the proceeding as an "appeal" is not decisive. A classic description of an appeal is "the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below"*[21]*. Appellate jurisdiction, therefore, implies that the subject*

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[18] The exceptions in Article 2 cover matters not here relevant, for example matters involving the interpretation of the Constitution of Nauru.

[19] As amended with retrospective effect by section 10 of the *Refugees Convention (Validation and Amendment) Act 2016 (Nauru)*

[20] 222 CLR 489, [2005] HCA 42, [38] per McHugh J.

[21] *Eastman v The Queen* (2000) 203 CLR 1 at 33 [104] per McHugh J, citing *Attorney-General v Sillem* (1864) 10 HLC 704 at 724 [11 ER 1200 at 1209].

*matter has already been instituted in and acted upon by some other court whose judgment or proceedings are to be revised*[22]

14. The exercise of jurisdiction by the Supreme Court of Nauru in this matter was therefore an exercise of original jurisdiction by way of judicial review of an administrative decision, analogous to an "appeal on a question of law" to the Federal Court of Australia under section 44 of the *Administrative Tribunals Act (C'th),* or to the exercise of power by this Court under section 75(v) of the Australian *Constitution*, save that it is to be enlivened by an error "on a point of law", rather than by jurisdictional error or error of law on the face of the record.

15. As the judgement of the Supreme Court of Nauru was an exercise of original jurisdiction in a civil matter, the present appeal to the High Court of Australia is brought as of right, and, pursuant to s 5 of the *Nauru (High Court Appeals) Act 1976 (Cth)* and Art 1A(b)(i) of the Agreement, leave is not required.

**(ii) Assessment of claim to protection – relocation**

16. Article 1A(2) of the *Refugees Convention* provides relevantly that a refugee is a person who:

> "(2) ....owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ... is unable or, owing to such fear, is unwilling to return to it."

17. The *Refugees Convention Act (Nauru) 2012* ("**the Act**") provides for the recognition by Nauru of refugees, and the extension of complementary protection to those who are not recognised as refugees but whose return to their countries of nationality may violate Nauru's international obligations.[23]

18. If the Refugee Status Review Tribunal reviews an applicant's claims on the merits, and concludes that the applicant has a well-founded fear of persecution in one place in his or her country of nationality, does this mean that the person has a well-founded fear of persecution in relation to the country such as to bring the person within the ambit of the definition of a refugee? The answer must be yes, unless relocation to a safe place in the country is possible and reasonable in all the circumstances.

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[22] See Story, *Commentaries on the Constitution*, 5th ed (1891), vol 2 at [1761]; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 174.

[23] *Refugees Convention Act (Nauru) 2012,* sections 6, 31, 34.

19. This has been considered in various jurisdictions, as reviewed by this Court in *SZTAV v. Minister for immigration and Citizenship*.[24] In that case, the majority (Gummow, Hayne and Crennan JJ said:

> *19 .... the matter of "relocation" finds its place in the Convention definition by the process of reasoning adopted by Lord Bingham of Cornhill in Januzi v Secretary of State for the Home Department[25]. His Lordship said[26]:*
>
> *"The [Convention] does not expressly address* ***the situation at issue in these appeals where, within the country of his nationality, a person has a well-founded fear of persecution at place A, where he lived, but not at place B, where (it is said) he could reasonably be expected to relocate****. But the situation may fairly be said to be covered by the causative condition to which reference has been made: for if a person is outside the country of his nationality because he has chosen to leave that country and seek asylum in a foreign country, rather than move to a place of relocation within his own country where he could have no well-founded fear of persecution, where the protection of his country would be available to him and where he could reasonably be expected to relocate, it can properly be said that he is not outside the country of his nationality owing to a well-founded fear of being persecuted for a Convention reason."*
>
> *20 The reference in the passage to the unavailability of the protection of the country of nationality of the refugee is best understood as referring not to the phrase "the protection of that country" in the second limb of the definition, but to the broader sense of the term identified in Respondents S152/2003[27]. This was the international responsibility of the country of nationality to safeguard the fundamental rights and freedom of its nationals.*
>
> *21 Lord Bingham went on in Januzi[28] to refer to the statement in the UNHCR Handbook[29], at [91]:*
>
> *"The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality.*

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[24] *SZTAV v Minister for Immigration and Citizenship* [2007] HCA 40; (2007) 233 CLR 18 [2007] HCA 40 (30 August 2007), [19]-[22] per Gummow, Hayne and Crennan JJ.

[25] [2006] 2 AC 426.

[26] [2006] 2 AC 426 at 440.

[27] (2004) 222 CLR 1 at 8-9 [20].

[28] [2006] 2 AC 426 at 440.

[29] UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979).

> *Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations,* ***a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."***

10 22 *His Lordship, significantly both for Januzi and the present appeal to this Court, added*[30]*:*

> *"The corollary of this proposition, as is accepted, is that* ***a person will be excluded from refugee status if under all the circumstances it would be reasonable to expect him to seek refuge in another part of the same country."***

20. It is respectfully submitted that this is a correct statement of the law in Nauru.
20 It is therefore clear that there is no need to interpolate the construct of an applicant's "home area" as done by the Supreme Court in the judgement below. The simple question is whether, if an applicant is in danger of persecution in place A, there is a safe place B where he or she can, in all the circumstances, reasonably relocate?

21. It is not necessary for the resolution of this appeal to determine what, in the law of Nauru, is the link to the text of the *Refugees Convention* of the question of internal protection by means of relocation within the country of nationality, although, for the reasons given by Kirby J in *SZTAV*, it is respectfully
30 submitted that, for Nauru if not for Australia, the link is in the words "the protection of that country", ie the country of nationality. [31]

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[30] [2006] 2 AC 426 at 440.

[31] In the same case of *SZTAV v. Minister for immigration and Citizenship* (at [53]-[63), Kirby J. considered in detail and with care the question of the manner in which the question of relocation is to be connected with or derived from the text of the Refugees Convention. His Honour said (at [54]) '.... a reliance on "owing to" would introduce barren arguments about causation.' He went on (at [55]-[57]):

> Much more attractive is the suggested attention to the inability or unwillingness of the refugee applicant "to avail himself of the protection of that country", ie the country of nationality. On the face of things, this explanation of the relocation principle appears to present the most convincing textual foundation for the propounded "exception".
>
> ...
>
> Thus, if the country concerned were able to afford protection, albeit in a different town, district or region, the basis for the necessary unwillingness or inability would be knocked away. This is the preferred explanation adopted for the relocation test by Professor Hathaway and Dr Foster. (The footnote, n. 59, reference to Hathaway and Foster, the Law of Refugee Status, 3rd ed., 358-359.)

His Honour then said (at [58]-[60]) of the third possible link to the text of the Convention:

> 58. So far as Australian law is concerned, a real difficulty is presented for this second textual support for relocation. It appears in two decisions of this Court, mentioned in the joint reasons[31]. In those decisions, this Court appears to have decided that the term

## D. How the legislation, principle or rule applies

22. If the question is whether, if an applicant is in danger of persecution in place A, there is a safe place B where he or she can, in all the circumstances, reasonably relocate, it must follow that the unity of the family unit was a relevant consideration in assessing any prospective relocation of the appellant in the present matter. This is both because the unity of spouses and children is a basically important human value, and also because it is recognized as a value protected under Nauru's international obligations, for example under the *International Covenant on Civil and Political Rights,* and under the *Refugees Convention Act 2012 (Nauru)* the appellant was entitled to complementary protection if his return to his country would violate this obligation. Given the Tribunal's finding that the appellant would be at risk of harm in Karachi, and his wife's unwillingness to go to his home town, the question of the unity of the appellant's family was relevant to the assessment of any proposed relocation by the appellant to a place in Pakistan other than Karachi.

23. It follows that cases which have resolved this question of potential relocation to a safe place for "internal protection" by reference to the construct of moving from the applicant's "home area" to another place, and only then considering whether this relocation is possible and reasonable, have erred by importing an unnecessary and distracting concept.[32]

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"protection", in the Refugees Convention definition, is a reference to "diplomatic or consular protection" extended abroad by a country to its nationals[31]. In *Minister for Immigration and Multicultural Affairs v Khawar*[31] it is said specifically that "protection" is not "the provision of 'internal' protection provided inside the country of nationality from which the refugee has departed".

59. Although that view enjoys some support in academic writing[31], it has been strongly criticised, including by Professor Hathaway and Dr Foster. They describe it as an attempt "to force a narrow, decontextualised reading of 'protection' onto the 1951 Convention"[31]. They assert that understanding "protection" within the Refugees Convention definition as limited to "diplomatic protection" outside the country of nationality or habitual residence is "out of step with most contemporary pronouncements of UNHCR as manifested in its official documents ... materials and interventions in domestic adjudication."[31]

60. Professor Hathaway and Dr Foster also cite a great deal of judicial and other writing, including the reasons of Black CJ in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*[31], which has hitherto been followed routinely in such cases by Australian judges and refugee claim adjudicators. The hypothesis on which those reasons were written was that the applicable consideration for deciding "refugee" status was the availability of domestic "protection" in the country of nationality rather than the availability of diplomatic protection abroad. Overseas courts have not followed this Court's view of the meaning of "protection" in this context[31]

(Notes omitted.)

[32] See e.g. *SZQEN v. Minister for Immigration and Citizenship* (2012) 202 FCR 514, cited in the judgement below, [25]-[30]. *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs,* (1994) 52 FCR 437, 440-441 per Black C.J.

24. It is respectfully submitted that the Court below erred in this way, and as a result made the errors set out above.[33]

## PART VII: APPLICABLE STATUTES AND REGULATIONS

25. The relevant legislation appears as an annexure to these submissions.

## PART VIII: ORDERS SOUGHT

10

26. The appellant seeks orders that:

    1. The appeal be allowed and the orders of the Supreme Court of Nauru and the decision of the Refugee Status Review Tribunal be set aside.

    2. The matter be remitted to the Refugee Status Review Tribunal for redetermination according to law.

    3. The Respondent pay the appellant's costs of this appeal.

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    4. Such other orders as this Honorable Court thinks just.

## PART IX: ESTIMATE OF TIME FOR ORAL ARGUMENT

27. The appellant estimates that between two and three hours are needed to present the appellant's oral argument.

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Anthony Krohn,
Owen Dixon Chambers,
Melbourne.
24 July 2017.

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Telephone: (03) 9225 7444
Mobile telephone: 0411 483 494
Facsimile: to the Offices of my instructing solicitor (03) 9347 5066
Email: akrohn@vicbar.com.au

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[33] In paragraph 8 of these submissions.

## ANNEXURE – PART VII – RLEVANT LEGISLATION

28. As at the relevant time, the following legislation relevantly provided in part as follows, and is still in same form **save where shown by later amending or repealing provision and relevant transitional provision.**

### *NAURU (HIGH COURT APPEALS) ACT 1976 (CTH)*

29. The *Nauru (High Court Appeals) Act 1976 (Cth)* relevantly provided in part:

**3 Interpretation**

In this Act, Agreement means 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 that was signed on 6 September 1976, being the agreement a copy of the text of which is set out in the Schedule.

...

**5 Appeals to High Court**

(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).

(3) Where the Agreement provides that an appeal is to lie to the High Court of Australia from the Supreme Court of Nauru with the leave of the High Court, the High Court has jurisdiction to hear and determine an application for such leave.

...

**Schedule**

Section 3 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 Government of Australia and the Government of the Republic of Nauru,

Recalling that, immediately before Nauru became independent, the High Court of Australia was empowered, after leave of the High Court had first been obtained, to hear and determine appeals from all judgments, decrees, orders and sentences of the Court of Appeal of the Island of Nauru, other than judgments, decrees or orders given or made by consent,

Taking into account the desire of the Government of the Republic of Nauru that suitable provision now be made for appeals to the High Court of Australia from certain judgments, decrees, orders and sentences of the Supreme Court of Nauru, and

Conscious of the close and friendly relations between the two countries,

Have agreed as follows:

ARTICLE 1 Subject to Article 2 of this Agreement,[34] appeals are to lie to the High Court of Australia from the Supreme Court of Nauru in the following cases:
A. In respect of the exercise by the Supreme Court of Nauru of its original jurisdiction—
(a) In criminal cases—as of right, by a convicted person, against conviction or sentence.
(b) In civil cases—
(i) as of right, against any final judgment, decree or order; and
(ii) with the leave of the trial judge or the High Court of Australia, against any other judgment, decree or order.
B. In respect of the exercise by the Supreme Court of Nauru of its appellate jurisdiction— In both criminal and civil cases, with the leave of the High Court.

***REFUGEES CONVENTION ACT 2012 (NAURU)***

30. The *Refugees Convention Act 2012 (Nauru)*, relevantly provided in part (at the time of the appellant's application for recognition as a refugee until the amendment of the Act on 21 May 2014, after the Secretary's decision not to recognise the appellant as a refugee):

....

**6 Determination of refugee status**

(1) Subject to this Part, the Secretary must determine whether an asylum seeker is recognised as a refugee.
...

**PART 4 – MERITS REVIEW BY TRIBUNAL**

**Division 1 – Application**

**31 Application for merits review by Tribunal**

(1) A person may apply to the Tribunal for merits review of any of the following:

(a) a determination that the person is not recognised as a refugee;

(b) a decision to decline to make a determination on the person's application for recognition as a refugee;

[34] The appellant notes that the exceptions in Article 2 cover matters not here relevant, for example matters involving the interpretation of the Constitution of Nauru.

(c) a decision to cancel a person's recognition as a refugee (unless the cancellation was at the request of the person).

.....

**34 Decision of Tribunal on application for merits review**

(1) The Tribunal may, for the purposes of a merits review of a determination or decision, exercise all the powers and discretions of the person who made the determination or decision.

(2) On a merits review of a determination or decision, the Tribunal may:

(a) affirm the determination or decision; or

(b) vary the determination or decision; or

(c) remit the matter to the Secretary for reconsideration in accordance with directions or recommendations of the Tribunal; or

(d) set the determination or decision aside and substitute a new determination or decision.

(3) If the Tribunal:

(a) varies the determination or decision; or

(b) sets aside the determination or decision and substitutes a new determination or decision;

the determination or decision as varied or substituted is taken (except for the purpose of appeals from decisions of the Tribunal) to be a determination or decision of the Secretary.

31. From 21 May 2014, the *Refugees Convention Act* 2012 was amended by the *Refugees Convention (Amendment) Act* 2014, which allowed for complementary protection as well as for recognition of refugees, and relevantly provided in part:

Certified on 21 May 2014

...

**2 Commencement**

This Act commences upon certification by the Speaker.

**3 Act Amended**

The Schedule amends the *Refugees Convention Act 2012*.

**SCHEDULE - AMENDMENT OF REFUGEES CONVENTION ACT 2012**

**[2] Amendment of section 4**

**Omit**

Section 4

**Substitute**

**4 Principle of Non-Refoulement**

(1) The Republic must not expel or return a person determined to be recognised as a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion except in accordance with the Refugees Convention as modified by the Refugees Protocol.

(2) The Republic must not expel or return any person to the frontiers of territories in breach of its international obligations.

....

**[4] Amendment of section 6 (1)**

**Insert** after the words **'as a refugee'** the words **'or is owed complementary protection'.**

**New section 6 (1) will now read-**

(1) Subject to this Part, the Secretary must determine whether an asylum seeker is recognised as a refugee or is owed complementary protection.

32. At the time of the filing of the Notice of Appeal in the Supreme Court of Nauru, on 27 November 2015, Subsection 43(1) of the *Refugees Convention Act 2012 (Nauru)* relevantly provided:

> "A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law."

33. This provision, however, was retrospectively amended by the *Refugees Convention (Validation and Amendment) Act 2016 (Nauru),* which relevantly provided in part:

**Refugees Convention (Validation and Amendment) Act 2016**
**No. 2 of 2016**
An Act to amend the *Refugees Convention Act 2012*
*Certified: 29th January 2016*

...

Enacted by the Parliament of Nauru as follows:

**1 Short title**

This Act may be cited as the *Refugees Convention (Validation and Amendment) Act 2016*.

**2 Commencement**

(1) Sections 9 and 10 of this Act shall commence on 9 September 2013.

(2) All other provisions in this Act shall commence upon certification by the Speaker.

**3 Indication of retrospective commencement**

Sections 9 and 10 of this Act are taken to have commenced on 9 September 2013.

**4 Refugees Convention Act 2012 amended**

The *Refugees Convention Act 2012* is amended by the provisions of this Act.

**5 Definitions**

In this Act:

***'principal act'*** means the *Refugees Convention Act 2012*.

***'commencement day'*** means the day on which the provisions of this Act, other than sections 9 and 10, commences.

**....**

**8 Validation of notices of appeal filed pursuant to s 43 of the Act**

For the avoidance of doubt, any notice of appeal filed pursuant to s 43(1) of the principal act between 9 September 2013 and commencement day, which would have been competent if, at the time of filing, s 43(1) of the principal act had been in the terms substituted by section 10 of this Act, is taken to have been, and always to have been, competent.

...

**10 Amendment of section 43**

**Omit subsection (1)**

(1) A person who, by a decision of the Tribunal, is not recognized as a refugee may appeal to the Supreme Court against that decision on a point of law.

**Substitute**

(1) A person may appeal to the Supreme Court on a point of law against that decision of the Tribunal where the Tribunal has decided that the person:

- (a) is not recognized as a refugee; or
- (b) is not owed complementary protection