HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER AND NETTLE JJ

CRI026 APPELLANT

AND

THE REPUBLIC OF NAURU RESPONDENT

CRI026 v The Republic of Nauru
[2018] HCA 19
16 May 2018
M131/2017

ORDER

1. *Leave to amend the notice of appeal refused with costs.*

2. *Leave to be heard on Ground 3 refused with costs.*

3. *Appeal dismissed with costs.*

On appeal from the Supreme Court of Nauru

Representation

A T Broadfoot QC with M L L Albert and S Gory for the appellant (instructed by Fitzroy Legal Service)

G R Kennett SC with A Aleksov for the respondent (instructed by Republic of Nauru)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

CRI026 v The Republic of Nauru

Migration – Refugees – Appeal as of right from Supreme Court of Nauru – Where Secretary of Department of Justice and Border Control of Nauru ("Secretary") determined appellant not refugee under *Refugees Convention Act* 2012 (Nr) – Where Secretary determined Nauru did not owe appellant complementary protection under *Refugees Convention Act* – Where Refugee Status Review Tribunal ("Tribunal") affirmed Secretary's determinations on basis appellant could reasonably relocate within country of origin to place where persecutors had little or no influence or power – Where Tribunal's reasons contained typographical error – Where Tribunal issued corrigendum correcting error – Where Supreme Court of Nauru affirmed Tribunal's decision – Whether appellant's ability reasonably to relocate within country of origin relevant to claim for complementary protection – Whether typographical error in Tribunal's reasons disclosed error – Whether ability of appellant's family reasonably to relocate relevant to assessing appellant's ability reasonably to relocate – Whether Tribunal erred in failing to consider whether appellant's family able reasonably to relocate in assessing appellant's ability reasonably to relocate – Whether Tribunal's finding that persecutors had little or no influence or power in place of relocation supported by evidence.

Words and phrases – "complementary protection", "corrigendum", "freedom of movement", "internal flight alternative", "internal relocation", "non-refoulement", "reasonable internal relocation", "reasonable relocation", "refugee", "subsidiary protection", "typographical error", "well-founded fear of persecution".

Convention Relating to the Status of Refugees (1951) as modified by the Protocol Relating to the Status of Refugees (1967), Art 1A(2).
Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Art 3.
International Covenant on Civil and Political Rights (1966), Arts 2, 6, 7, 12.
Nauru (High Court Appeals) Act 1976 (Cth), s 5.
Refugees Convention Act 2012 (Nr), ss 3, 4, 43.

1 KIEFEL CJ, GAGELER AND NETTLE JJ. This is an appeal as of right, pursuant to s 5 of the *Nauru (High Court Appeals) Act* 1976 (Cth), from a judgment of the Supreme Court of Nauru (Crulci J). The Supreme Court dismissed the appellant's appeal brought under s 43 of the *Refugees Convention Act* 2012 (Nr) ("the *Refugees Act*") against a decision of the Refugee Status Review Tribunal ("the Tribunal"). The Tribunal had affirmed a decision of the Secretary of the Department of Justice and Border Control, made pursuant to s 6 of the *Refugees Act*, to reject the appellant's application to be recognised as a refugee in accordance with the Act or as a person to whom the Republic of Nauru ("Nauru") owes complementary protection under the Act.

The facts

2 As appears from the Tribunal's reasons, the appellant was born on 13 July 1975 in Sialkot in Punjab Province, Pakistan, but had lived most of his life in Karachi. Between 2003 and 2005, however, he lived in Sialkot, and, between 2010 and 2011, he lived in Lahore. He had completed nine years of schooling and held an electrical certificate. Between 2003 and 2011, he was self-employed in Pakistan as an electrician and air conditioning mechanic.

3 The appellant married in Pakistan on 5 November 2006 and had two children, one born after he left Pakistan in 2011. His wife and children were living in Sialkot with her family. His parents, who emigrated from India many years ago, were resident in Karachi. His father worked in Dubai for some 15 to 20 years and retired four or five years before the Tribunal hearing. Two of the appellant's brothers, Faisal and Nasier, were in Dubai and Libya, respectively, and his other brother, Asif, had been in Libya but at the time of the hearing was living with the appellant's wife and children in Sialkot. The appellant had relatives living in Roras and Sambrial in the Sialkot district.

4 The appellant departed Pakistan in 2011 and went to Malaysia. He arrived in Nauru in December 2013.

The appellant's case before the Tribunal

5 The appellant's case before the Tribunal was that he was a refugee under the *Refugees Act* or, alternatively, that he was a person to whom Nauru owed complementary protection under the Act because his circumstances engaged Nauru's international obligations under, inter alia, the International Covenant on Civil and Political Rights (1966) ("the ICCPR"). He claimed that he could not or did not want to return to Pakistan because he feared that upon his return he would be harmed by members of the Muttahida Qaumi Movement ("the MQM"). He said that he feared that the MQM would seek to hurt him to get revenge for an injury which he had inflicted on one of their senior members, Munir Tunda, in a

fight at a cricket game some years before, and also because they viewed him as a political dissident. He claimed that he feared that the MQM would be able to find him anywhere in Pakistan and that the State would not be willing to protect him because the MQM are supported by and allied with the Pakistani authorities. He said that he also feared harm from generalised violence and insecurity in Pakistan.

The Tribunal's decision

6 The Tribunal accepted that the appellant might be regarded adversely by Munir Tunda as a result of the injury inflicted on Munir Tunda at the cricket game. The Tribunal did not accept that Munir Tunda held a senior position in the MQM but allowed that he might be a powerful person in Karachi associated with the MQM. The Tribunal accepted that the appellant was threatened in Karachi in 2003 and 2009 and that his shop was burnt down in 2003 by persons associated with Munir Tunda, and that those persons may have done so in retaliation for the assault. The Tribunal found that the MQM remained powerful in Karachi, albeit their power had diminished in recent times due to a high level of ethno-political violence between the MQM and the Awami National Party in 2012 and targeting by militant groups. It appeared to the Tribunal that the MQM were still dominant at the local and provincial level, having won 15 of the 20 National Assembly seats in 2013, and were allied to the Pakistani military. As against that, however, the Tribunal noted that the appellant's father had not reported any further threats or contact with Munir Tunda's associates since the appellant left Pakistan, and that the last threat was in 2009. The Tribunal further observed that it had been 12 years since the fight at the cricket game and six years since the last contact or threat. Consequently, it did not appear to the Tribunal that Munir Tunda or his associates had been searching for the appellant or waging a systematic vendetta against him. But it was possible that they might opportunistically harm him if they were to encounter him in Karachi.

7 In the result, the Tribunal accepted that there was a real possibility that if the appellant were returned to Karachi he would be harmed by Munir Tunda or his associates, but only for reasons of personal revenge and not because of the appellant's political inclinations. The Tribunal further accepted that state protection from the police or other authorities in Karachi may be inadequate or withheld from the appellant because of Munir Tunda's political connections and involvement with the MQM. But the Tribunal also found that, due to the MQM's absence of power and influence in Punjab, the size of the population of Punjab, the existence of large urban centres such as Lahore and Sialkot and the fact that the appellant had previously lived in Lahore and Sialkot without coming to any harm, the appellant could live safely in Sialkot or Lahore or elsewhere in Punjab without a real possibility of harm from Munir Tunda or his associates. For reasons which the Tribunal specified, the Tribunal found, too, that relocation to

Punjab would be reasonably available to the appellant. Further, due to the low level of attacks and casualties in Punjab, including Lahore and Sialkot, relative to the size of the population, and the fact that the appellant was not politically active and was a member of the religious majority, the Tribunal was satisfied that the risk of the appellant being harmed in generalised insecurity was remote and not a real possibility.

8 The Tribunal decided, therefore, that the appellant was not a refugee and that, because there was not a real risk that he would be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty if he were returned to Pakistan, he was not owed complementary protection.

The Supreme Court's decision

9 In dismissing the appellant's appeal to the Supreme Court, Crulci J held that the Tribunal had not erred in applying a reasonable internal relocation test to the appellant's claim for complementary protection[1]; that the Tribunal had taken into account all matters relevant to whether the appellant could reasonably relocate to Punjab; and that the Tribunal's reasons did not otherwise disclose an error of law[2].

Grounds of appeal

10 The appellant's grounds of appeal to this Court are as follows:

"1. The Supreme Court erred by failing to conclude:

(a) that the Refugee Status Review Tribunal (**Tribunal**) had misapplied the Nauruan law of complementary protection (as embodied in s 4(2) of the *Refugees Convention Act* 2012 (Nr) (**Refugees Act**)), namely by identifying ... and applying ... a 'reasonable relocation' test in relation to complementary protection, where there is no such test as a matter of law; and

(b) that it followed, on the basis of the Tribunal's finding ... that there was a real possibility of harm if the [appellant] were to

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1 See *CRI026 v The Republic* [2017] NRSC 67 at [40]-[41].

2 See *CRI026 v The Republic* [2017] NRSC 67 at [43].

> return *to Karachi*, that the [a]ppellant was entitled to complementary protection.
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> 2. The Supreme Court erred in law by failing to find that the Tribunal's decision was vitiated by errors of law in that it took irrelevant considerations into account *or asked itself the wrong question*, in that it determined the [a]ppellant's claim to refugee status ... and his claim to complementary protection ... by reference to his circumstances in the event that he were to return to Sri Lanka.
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> 3. Further or alternatively, the Tribunal erred by failing to take into account an integer of the [a]ppellant's objection to internal relocation, namely that it would not have been reasonable for him to relocate to Punjab because of his children, then aged 6 and 4, who lived in Karachi." (emphasis added)

11 The appellant sought leave to add the emphasised words to Ground 1 and Ground 2 and also to include a further ground of appeal:

> "4. Further or alternatively, the Tribunal erred by making a finding ... without any probative evidence, namely that the militant body that had been used to harm the [a]ppellant previously had 'no power or influence' in the place to which the Tribunal concluded he could reasonably relocate."

Relevant statutory and treaty provisions

12 In brief substance, s 4 of the *Refugees Act* provides that Nauru must not expel or return a refugee to the frontiers of territories where he or she would be persecuted, and that it must not expel or return any person to the frontiers of territories in breach of its international obligations.

13 Section 3 of the *Refugees Act* defines "refugee" as a person who is a refugee under the Convention Relating to the Status of Refugees (1951) as modified by the Protocol Relating to the Status of Refugees (1967) ("the Refugee Convention").

14 To the extent that is relevant, Art 1A(2) of the Refugee Convention defines "refugee" as any person outside his or her country of nationality who is unable or unwilling for Convention reasons (for example, race, religion, membership of a particular social group or political opinion) to avail him or herself of that country's protection.

15 Section 3 of the *Refugees Act* defines "complementary protection" as protection for people who are not refugees as defined in the Act but who also cannot be returned or expelled to the frontiers of territories where this would breach Nauru's international obligations.

Ground 1: Relevance of ability reasonably to relocate to entitlement to complementary protection

16 As was earlier noticed, having found that the appellant could live safely in another part of Pakistan, namely, Punjab (including Lahore and Sialkot), and that it was reasonable for him to relocate there, the Tribunal concluded that the appellant was not a refugee within the meaning of the *Refugees Act* because in effect he was not unable or unwilling for Convention reasons to avail himself of the protection of Pakistan. The Tribunal added that, for the same reasons, they found that returning the appellant to Pakistan would not breach Nauru's international obligations arising under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the ICCPR or cl 19(c) of the Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues (2013), and hence that the appellant was not entitled to complementary protection.

17 Under Ground 1, the appellant contended that the Tribunal erred in their determination of his claim for complementary protection by taking into account his capacity to avoid harm by relocating within Pakistan. Counsel for the appellant submitted that whether or not the appellant would be able reasonably to relocate to a place of safety in Pakistan is irrelevant to the question of whether Nauru is obligated to provide him with complementary protection. In counsel's submission, so much was made plain by the Full Court of the Federal Court of Australia in *Minister for Immigration and Citizenship v MZYYL*[3].

18 The submission that *MZYYL* is determinative should be rejected. The passage of the judgment in *MZYYL* was part of the Full Court's explanation of why authority as to the interpretation of international treaties was unhelpful in interpreting the codified regime of complementary protection provided for in the *Migration Act* 1958 (Cth). Their Honours were making the point that, in contrast to s 36(2)(aa) and (2B) of that Act, which in substance stipulate that an applicant for complementary protection must demonstrate that he or she cannot avail him or herself of the protection of the receiving country by relocating within that country, the international treaties say nothing expressly about the matter. So to

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3 (2012) 207 FCR 211 at 215 [18]-[20].

observe – and thus emphasise that, consequently, each regime calls for a different technique of interpretation – portends nothing as to the international jurisprudence which informs the scope of the complementary protection obligations arising from international treaties. To the contrary, as was emphasised in *MZYYL*, the implications of international treaties did not need to be considered in that case because they did not materially bear on the task of statutory interpretation with which the Full Court was concerned.

19 Counsel for the appellant argued in the alternative that the only question relevant to the assessment of a claim for complementary protection is whether there is a "real risk of exposure to inhuman or degrading treatment or punishment", among other harms, in any place in the country of nationality, and, if there is, an applicant for protection should not be returned to the frontiers of that country. That was said to be apparent from the statement of the United Nations Human Rights Committee in *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*[4] that:

> "[t]he text of article 7 [of the ICCPR] allows of no limitation ...
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> States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."

20 Counsel also invoked the observations of the European Court of Human Rights in *Soering v United Kingdom*[5] regarding Art 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ("the European Convention on Human Rights"), which, like Art 7 of the ICCPR, provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment".

21 For reasons which will be explained, counsel's submissions cannot be accepted in the broad terms in which they were stated. In particular, it is not the case that, just because there may be a real risk of exposure to inhuman or degrading treatment or punishment in one place, or even some places, in a country of nationality, an applicant cannot be returned to some other place in that country in which there is not such a risk and to which it would be reasonable for him or her to relocate.

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4 44th sess, UN Doc A/44/40, (1992) at [3], [9].

5 (1989) 11 EHRR 439 at 467-468 [88].

22 The content of a treaty obligation depends upon the construction which the international community would attribute to the treaty and on the operation which the international community would accord to it in particular circumstances[6]. The interpretative principles to be applied include the rules of customary international law codified in Arts 31 and 32 of the Vienna Convention on the Law of Treaties (1969). Considerable weight should be given to the interpretations adopted by an independent body established to supervise the application of the treaty[7]. Taken as a whole, international law and practice leave no doubt that, unless the feared persecution emanates from or is condoned or tolerated by state actors (which is not an issue in this case)[8], an applicant's ability reasonably to relocate within a receiving country, including the ability safely and legally to travel to the place of relocation, is relevant to whether the applicant is in need of complementary protection.

23 To the extent that it is germane, Arts 2, 6, 7 and 12 of the ICCPR provide as follows:

> "*Article 2*. 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
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> ...
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> *Article 6*. 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
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> ...

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6 *Queensland v The Commonwealth* (1989) 167 CLR 232 at 240 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; [1989] HCA 36.

7 See *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639 at 664 [66].

8 See United Nations High Commissioner for Refugees, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/03/04, (2003) at [13]; *Sufi and Elmi v United Kingdom* (2012) 54 EHRR 9 at 220 [36].

> *Article 7*. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
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> ...
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> *Article 12*. 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
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> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
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> 4. No one shall be arbitrarily deprived of the right to enter his own country."

24 As can be seen, those provisions of the ICCPR do not expressly impose a non-refoulement obligation on States Parties. Rather, it is accepted as a matter of international law that Art 2 impliedly obligates States Parties not to remove a person from their territory where there are "substantial grounds" for believing that there is a real risk of irreparable harm of the kind contemplated by Arts 6 and 7 in the country to which such removal is to be effected[9]. "Substantial grounds" means, however, that it must be a necessary and foreseeable consequence of refoulement that the person would suffer the kind of harm identified in Arts 6 and 7[10]. As Perram J observed in *Minister for Immigration*

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9 See, for example, United Nations Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13, (2004) at [12].

10 See United Nations Human Rights Committee, *Communication No 470/1991 (Kindler v Canada)*, 48th sess, UN Doc CCPR/C/48/D/470/1991, (1993) at [6.2]; United Nations Human Rights Committee, *Communication No 692/1996 (ARJ v Australia)*, 60th sess, UN Doc CCPR/C/60/D/692/1996, (1997) at [6.8]-[6.9], [6.14].

and Citizenship v Anochie[11], that is a high hurdle for the applicant to meet. The risk of harm must be both necessary and foreseeable and, according to the weight of relevant international jurisprudence, it is neither if it can be avoided by reasonable relocation within the applicant's country of nationality.

25 The cornerstone of the international regime for the protection of refugees, and in turn for complementary protection, is the Refugee Convention. Until superseded in 2011, Art 8 of the Council of the European Union's *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* ("the 2004 Directive")[12] relevantly provided:

> "As part of the assessment of the application for international protection [which was defined in Art 2 as including an application seeking refugee status or subsidiary protection status], Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country."

26 More recently, the European Parliament and the Council of the European Union recast the 2004 Directive as *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* ("the 2011 Directive")[13]. Relevantly, Art 8 of the 2011 Directive reiterates the position of Member States in relation to their non-refoulement obligations as follows:

> "As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she:
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> (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or

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11 (2012) 209 FCR 497 at 512 [62].

12 [2004] OJ L 304/12.

13 [2011] OJ L 337/9.

(b) has access to protection against persecution or serious harm as defined in Article 7;

and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there."

27 There are also several individual communications concerning Art 3 of the European Convention on Human Rights to similar effect.

28 In the decision of *Omeredo v Austria*[14], the European Court of Human Rights held that, notwithstanding the applicant would face the prospect of female genital mutilation if returned to the village in Nigeria from which she came seeking asylum in Austria, her claim for subsidiary protection pursuant to Art 3 of the Convention was "manifestly ill-founded ... and must therefore be rejected" because the applicant "could for instance live in another province or in one of the big cities" and not be exposed to that risk. The Court concluded that, owing to the applicant's education and work experience as a seamstress, "there is reason to believe that the applicant will be able to build up her life in Nigeria without having to rely on support of family members"[15].

29 In *Salah Sheekh v The Netherlands*[16], the applicant belonged to a minority group living in Mogadishu, Somalia. He sought asylum in Amsterdam on the basis that his repatriation to Somalia would constitute a breach of Art 3 of the European Convention on Human Rights. The Netherlands refused asylum on the basis, inter alia, that protection would be available to the applicant in relatively safe parts of Somalia to which it would be reasonable for him to relocate[17]. On appeal, the European Court of Human Rights expressly recognised the relevance of reasonable internal relocation to such claims, albeit rejecting its application to the facts of the applicant's claim[18]:

"Moreover, Art 3 does not, as such, preclude contracting states from placing reliance on the existence of an internal flight alternative in their

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14 European Court of Human Rights, Chamber, Application No 8969/10, (2011) at 2, 5.

15 European Court of Human Rights, Chamber, Application No 8969/10, (2011) at 5.

16 (2007) 45 EHRR 50.

17 *Salah Sheekh v The Netherlands* (2007) 45 EHRR 50 at 1164 [31].

18 *Salah Sheekh v The Netherlands* (2007) 45 EHRR 50 at 1199 [141].

> assessment of an individual's claim that a return to his or her country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision ... [But the] Court considers that as a precondition for relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, to gain admittance and be able to settle there, failing which an issue under Art 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subject to ill-treatment."

30 In *Hilal v United Kingdom*[19], the applicant originated from Zanzibar, being part of the United Republic of Tanzania, and sought asylum in the United Kingdom. He applied for protection on the basis, relevantly, that his deportation to Tanzania would expose him to a real risk of ill-treatment contrary to Art 3 of the European Convention on Human Rights. Once again, the European Court of Human Rights expressly recognised the possibility of reasonable internal relocation providing a reliable guarantee against the risk of ill-treatment, albeit finding on the facts that the applicant would be at risk in both Zanzibar and mainland Tanzania and, therefore, that his expulsion from the United Kingdom would violate Art 3 of the Convention[20]:

> "The Government relies on the 'internal flight' option, arguing that even assuming that the applicant was at risk in Zanzibar, the situation in mainland Tanzania was more secure ... Conditions in the prisons on the mainland are described as inhuman and degrading, with inadequate food and medical treatment leading to life-threatening conditions. The police in mainland Tanzania may be regarded as linked institutionally to the police in Zanzibar as part of the Union and cannot be relied on as a safeguard against arbitrary action. There is also the possibility of extradition between Tanzania and Zanzibar.
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> The Court is not persuaded therefore that the internal flight option offers a reliable guarantee against the risk of ill-treatment." (footnotes omitted)

31 To the same effect, in *Sufi and Elmi v United Kingdom*[21], the European Court of Human Rights, although finding on the facts of the case that the

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19 (2001) 33 EHRR 2.

20 *Hilal v United Kingdom* (2001) 33 EHRR 2 at 49 [67]-[68].

21 (2012) 54 EHRR 9 at 220 [35].

applicants' refoulement to Somalia would breach Art 3 of the European Convention on Human Rights, expressly stated:

> "It is a well-established principle that persons will generally not be in need of asylum or subsidiary protection [under the European Convention on Human Rights] if they could obtain protection by moving elsewhere in their own country."

32 A similar approach has been adopted in relation to the non-refoulement obligation arising out of the ICCPR. In *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*[22], the United Nations Human Rights Committee stated:

> "[T]he article 2 [of the ICCPR] obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant".

33 Although there was no mention in *General Comment No 31* of whether the opportunity for reasonable internal relocation should be regarded as relevant, the United Nations Human Rights Committee later clarified the position in *Communication No 1897/2009 (SYL v Australia)*[23]. In that instance, the applicant's claim for complementary protection was put on the basis that he would face cruel, inhuman and degrading treatment if returned to Timor-Leste due to a lack of access to adequate medical treatment in the Aileu province of Timor-Leste. After noting the applicant's claim that his return to Timor-Leste would exacerbate his health condition to an extent amounting to inhuman treatment, and his reference to a medical report according to which his health status would be likely rapidly to decline in Timor-Leste, the Committee stated[24]:

> "The Committee further notes that the [applicant] has not presented any reasons as to why it would be unreasonable for him to live in a location in Timor-Leste where adequate health care would be more available than in

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22 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13, (2004) at [12].

23 108th sess, UN Doc CCPR/C/108/D/1897/2009, (2013).

24 United Nations Human Rights Committee, *Communication No 1897/2009 (SYL v Australia)*, 108th sess, UN Doc CCPR/C/108/D/1897/2009, (2013) at [8.4].

> the Aileu province, nor has the Committee received information indicating an acute condition that would make the [applicant's] return to Timor-Leste an immediate threat to his health. In light of the information before it, the Committee considers that the [applicant] has not sufficiently substantiated that the possible aggravation of his state of health as a result of his deportation would reach the threshold of inhuman treatment within the meaning of article 7 of the Covenant."

34 The same point was made again, but with added emphasis, in *Communication No 2053/2011 (BL v Australia)*[25], in which the Human Rights Committee concluded that Australia was not obligated to provide the applicant, originating from Touba, Senegal, with complementary protection against harm of the kind identified in Arts 6, 7 and 18 of the ICCPR because of the availability of reasonable internal relocation. The Committee concluded that[26]:

> "it was not shown that the authorities in Senegal would not generally be willing and able to provide impartial, adequate and effective protection to the [applicant] against threats to his physical safety, and that it would not be unreasonable to expect him to settle in a location, especially one more distant from Touba, where such protection would be available to him. Provided that the [applicant] would only be returned to such a location where [Australia] determines that adequate and effective protection is available, the Committee cannot conclude that removing him to Senegal would violate [Australia's] obligations under article 6 or 7 of the Covenant."

35 In a concurring opinion, two further members of the Committee added[27]:

> "We concur fully with the Committee's Views. We write separately merely to point out that the Committee's discussion in paragraph 7.4 reflects the well-established principle of the 'internal flight

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25 112th sess, UN Doc CCPR/C/112/D/2053/2011, (2014).

26 United Nations Human Rights Committee, *Communication No 2053/2011 (BL v Australia)*, 112th sess, UN Doc CCPR/C/112/D/2053/2011, (2014) at [7.4] per Yadh Ben Achour, Christine Chanet, Ahmad Amin Fathalla, Cornelis Flinterman, Victor Manuel Rodríguez-Rescia, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashivili, Margo Waterval and Andrei Paul Zlătescu.

27 United Nations Human Rights Committee, *Communication No 2053/2011 (BL v Australia)*, 112th sess, UN Doc CCPR/C/112/D/2053/2011, (2014) at Appendix I per Gerald L Neuman and Yuji Iwasawa.

alternative', a basic rule of international refugee law as well as international human rights law. Individuals are not in need of international protection if they can avail themselves of the protection of their own State; if resettling within the State would enable them to avoid a localized risk, and resettling would not be unreasonable under the circumstances, then returning them to a place where they can live in safety does not violate the principle of non-refoulement. See, for example, communication No 1897/2009, *SYL v Australia*, inadmissibility decision of 24 July 2013, para 8.4; *Sufi and Elmi v the United Kingdom*, Applications Nos 8319/07 and 11449/07 (European Court of Human Rights, 2011), para 266; and *Omeredo v Austria*, Application No 8969/10 (European Court of Human Rights 2011) (inadmissibility decision)."

36 Similarly, in a second concurring opinion, another member of the Committee stated[28]:

"In the light of the Committee's own finding that the [applicant] has not put forward any reason why he could not relocate within Senegal, the burden falls upon him to avail himself of the protection of his own State as established by the doctrine of internal flight. The duty of ascertaining the location where adequate and effective protection is available in Senegal does not rest upon the authorities of [Australia]. Their duty is limited to obtaining reliable information that Senegal is a secular State where there is religious tolerance."

37 Only the one remaining member of the Committee stated that he did not agree as to the significance of internal relocation[29]:

"The Committee should not have stated that 'the [applicant] has not put forward any other reason why he could not relocate within Senegal' (para 7.4). It is also regrettable that the Committee concluded that 'it would not be unreasonable to expect him to settle in a location, especially one more distant from Touba, where such protection would be available to him' (para 7.4)."

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28 United Nations Human Rights Committee, *Communication No 2053/2011 (BL v Australia)*, 112th sess, UN Doc CCPR/C/112/D/2053/2011, (2014) at Appendix II per Dheerujlall B Seetulsingh.

29 United Nations Human Rights Committee, *Communication No 2053/2011 (BL v Australia)*, 112th sess, UN Doc CCPR/C/112/D/2053/2011, (2014) at Appendix III [4] per Fabián Omar Salvioli.

38 Counsel for the appellant further contended, in substance, that it logically could not be that the availability of reasonable internal relocation is relevant to the assessment of complementary protection, for, if it were, it would be incumbent upon an applicant for complementary protection to undertake the practically impossible task of establishing that there is no place in his or her country of nationality to which he or she could reasonably relocate.

39 That contention should also be rejected. Implicitly, it proceeds from the false premise that a claim for complementary protection is in the nature of an adversarial proceeding in which the burden of proof is on the applicant and, therefore, that, in the event of the applicant failing to discharge the burden of proof, the claim for complementary protection must fail. To the contrary, however, as appears from *BL v Australia*, before a decision maker may properly reject a claim for complementary protection on the basis of the availability of reasonable internal relocation, the decision maker needs reliable information as to the safety and suitability of the place of relocation[30]. Moreover, as Gummow, Hayne and Crennan JJ observed in *SZATV v Minister for Immigration and Citizenship*[31] in relation to a claim for refugee protection:

> "What is 'reasonable', in the sense of 'practicable', must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality."

Accordingly, depending on the issues and circumstances identified by the applicant, the decision maker not only will need reliable information as to the safety and suitability of the place of relocation but also will need to pay careful regard to the applicant's personal and family circumstances. It is only when and if the decision maker concludes on that basis that internal relocation would be reasonable that the claim for complementary protection may be rejected on that basis.

40 Of course, that does not mean that it will be necessary in every case for a decision maker to identify with precision the proposed place of relocation and undertake the analysis of reasonableness in relation to that precise place. In some

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30 See, in particular, United Nations Human Rights Committee, *Communication No 2053/2011 (BL v Australia)*, 112th sess, UN Doc CCPR/C/112/D/2053/2011, (2014) at [7.4], Appendices I-II.

31 (2007) 233 CLR 18 at 27 [24]; [2007] HCA 40. See also *MZZQV v Minister for Immigration and Border Protection* [2015] FCA 533 at [68]; Hathaway and Foster, *The Law of Refugee Status*, 2nd ed (2014) at 330-331.

cases it may be that the reliable information available to the decision maker demonstrates that the risk of harm of the kind described in Arts 6 and 7 of the ICCPR exists only in one place or area, or a couple or few places or areas, within the applicant's country of nationality, and that elsewhere the country is relevantly risk free. In such cases, it is accurate to say that the burden would be upon the applicant for complementary protection, once sufficiently alerted to the significance of the information available to the decision maker, to present reasons why it would nonetheless be unreasonable to expect the applicant to relocate to any place beyond the affected places or areas[32]. Each case is fact specific and must be dealt with accordingly. The point for present purposes, however, is that treating reasonable internal relocation as a relevant consideration in the determination of a claim for complementary protection is not in any sense impracticable or unfair.

41 Counsel for the appellant contended that, be all that as it may, it was apparent that judicial recognition of the relevance of reasonable internal relocation to a claim for protection under the Refugee Convention is based on the definition of "refugee" in the Convention and, since there is no such applicable definition of "refugee" in or in relation to the ICCPR, and since the ICCPR is of such a different nature from the Convention, the logic of regarding reasonable internal relocation as relevant to complementary protection does not apply.

42 Logically, that does not follow. Admittedly, judicial recognition of the relevance of reasonable internal relocation to a claim for protection under the Refugee Convention has been said to be based on the Convention definition of "refugee". As will be recalled, the Convention defines a "refugee" in substance as any person outside his or her country of nationality who is unable or unwilling for Convention reasons to avail him or herself of that country's protection[33]. And as Lord Bingham of Cornhill observed in *Januzi v Secretary of State for the Home Department*[34], a person is not unable to obtain the protection of his or her

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32 See, in particular, United Nations Human Rights Committee, *Communication No 1897/2009 (SYL v Australia)*, 108th sess, UN Doc CCPR/C/108/D/1897/2009, (2013) at [8.1]-[8.4].

33 See Convention Relating to the Status of Refugees (1951) as modified by the Protocol Relating to the Status of Refugees (1967), Art 1A(2).

34 [2006] 2 AC 426 at 440 [7]-[8]. See *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 25-26 [19]-[22] per Gummow, Hayne and Crennan JJ; *Minister for Immigration and Border Protection v SZSCA* (2014) 254 CLR 317 at 326-327 [22]-[23] per French CJ, Hayne, Kiefel and Keane JJ, 330-332 [35], [39]-[40] per Gageler J; [2014] HCA 45.

country of nationality if he or she is able to obtain it in a part of that country to which he or she could reasonably relocate:

> "The Refugee 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 would 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 ...
>
> The ground of refusal would be that the person is not, within the Convention definition, a refugee."

43 But so to conclude in no way gainsays the relevance of reasonable internal relocation to the extent of non-refoulement obligations which, as a matter of international jurisprudence, are accepted as being implicit in Art 2 of the ICCPR and comparable treaty provisions. Rather to the contrary, given that a person who is outside his or her country of nationality is considered to be not unable to obtain the protection of that country if able to obtain protection at a place within that country to which he or she can reasonably relocate, parity of logic dictates that, if by reasonable relocation to that place the person can avoid risk of harm of the kind identified in Arts 6 and 7 of the ICCPR, it should not be seen as a necessary and foreseeable consequence of the person's refoulement to that place that he or she will be at risk of that kind of harm.

44 Counsel for the appellant further contended that Nauru's non-refoulement obligation arising by implication from the ICCPR, properly construed in its context, is not so limited in scope because to deny a person complementary protection on the basis that he or she could avoid risk of harm by relocating to a place in that country to which he or she could reasonably be expected to relocate would be to deny him or her freedom of movement in that country and thus constitute a breach of Nauru's international obligations under Art 12.

45 That contention also faces difficulties at several levels. In the first place, and most fundamentally, the fact that a person may be at risk of harm at a place in his or her country of nationality and thus chooses to relocate within that

country does not, without more, mean that the person is not free to go to or remain at that place or to choose to reside there. In such a case, a rational choice to relocate from that place to another place to avoid the risk of harm in the former is not a denial of freedom of movement but a manifestation of its exercise.

46 In the second place, while it may be that Nauru is under an international obligation arising out of Arts 2 and 12 of the ICCPR to respect the right of a person who is lawfully within Nauruan territory to freedom of movement within Nauruan territory, and to choose his or her place of residence in Nauruan territory, nothing in the text of Arts 2 and 12, or any other article of the ICCPR to which this Court was referred, suggests that Nauru is under an international obligation to procure for a person who, ex hypothesi, is unlawfully within Nauruan territory a right to freedom of movement within that person's country of nationality[35].

47 In the third place, counsel was unable to identify any international jurisprudence in which it has been held or suggested that a State's international non-refoulement obligations arising out of the ICCPR or comparable international treaties are to any extent informed by an applicant's right to freedom of movement within his or her country of nationality. To the contrary, the decision of *Omeredo v Austria* suggests[36] that they are not. Further, as Nauru submitted, it is not otherwise apparent why Art 12 of the ICCPR would assist in defining the scope of the non-refoulement obligation arising by implication from the ICCPR, given the obligation is not enlivened by potential breaches of Art 12.

48 In the fourth place, even if Nauru owed some kind of international obligation to procure for a person who, ex hypothesi, is unlawfully within Nauruan territory a right to freedom of movement within that person's country of nationality (and there is no reason to suppose that it does), for Nauru to permit a person who is unlawfully within Nauruan territory to remain in Nauru, rather than returning to that person's country of nationality, would do nothing to procure that person's freedom of movement in his or her country of nationality. Consequently, such if any right as that person may have to move freely in his or her country of nationality cannot logically be the basis of the kind of non-refoulement obligation for which the appellant contended.

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35 See generally Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed (2013) at 392-394.

36 See European Court of Human Rights, Chamber, Application No 8969/10, (2011) at 5.

49 Given the weight of international jurisprudence in favour of the relevance of reasonable internal relocation to the assessment of complementary protection, the apparent absence of any international jurisprudence to the contrary, and the evident logic and common sense of regarding reasonable internal relocation as relevant to complementary protection just as it is relevant to refugee protection, leave to add the words "to Karachi" to Ground 1 should be refused and Ground 1 should be rejected.

Ground 2: Error in taking irrelevant considerations into account or asking wrong question

50 As was earlier noticed, counsel for the appellant sought leave to add the words "or asked itself the wrong question" to Ground 2. Leave should be refused.

51 Under the heading of "General insecurity", the Tribunal recorded that the appellant had stated that there were ongoing targeted killings, violence and attacks in Pakistan, and the Tribunal accepted that there had been a level of insecurity in Pakistan, particularly in the tribal areas of Khyber Pakhtunkhwa and the Federally Administered Tribal Lands. But the Tribunal found that, in general, urban centres tended to be more secure, the situation in Lahore was relatively secure and better than many other areas of Pakistan and the evidence before the Tribunal did not indicate that Sialkot was insecure. It followed, as the Tribunal found, that, although there was a level of insecurity in Pakistan, by contrast Punjab (including Lahore and Sialkot) was relatively secure. Accordingly, given that the appellant was not politically active or associated with a government or military institution which might be targeted, and was of the majority Sunni faith, he was not a person at risk of being targeted and the risk of him being harmed in generalised insecurity was remote and not a real possibility.

52 Having so concluded, the Tribunal then added to its reasons the following, evidently incongruous, further observation:

> "**Refugee assessment**
>
> 68. Having regard to all of the evidence and findings above, the Tribunal finds that the [appellant] does not face a real possibility of persecution now or in the reasonably foreseeable future in Sri Lanka [sic] because of an imputed political opinion, his race or his membership of particular social groups comprising his family, young Tamils from the north, failed Tamil asylum seekers, Tamil returnees, persons who left Sri Lanka illegally or young Tamils separately and cumulatively [sic]. The Tribunal finds that the [appellant] is not a refugee."

53 The appellant contended that it is apparent from that further observation that the Tribunal took into account irrelevant considerations concerning Sri Lanka and Tamils which had nothing to do with the case in point, or alternatively asked themselves the wrong question, and therefore the Tribunal's reasoning process was affected by error.

54 At first sight, that might appear to be so. By any standard, it is remarkable that, in a matter concerning a Pakistani applicant claiming refugee protection on the basis of an alleged fear of being harmed by the MQM waging a vendetta against him for the injury he inflicted on Munir Tunda, the Tribunal should express its "Refugee assessment" in terms of the applicant not facing a real possibility of persecution in Sri Lanka because of an imputed political opinion, his race or his membership of particular Tamil social groups. Axiomatically, the latter has nothing at all to do with the former and thus, other things being equal, the Tribunal's reference to the latter would tend to imply that the Tribunal's reasoning process had gone seriously awry[37].

55 Closer examination of the Tribunal's reasons shows, however, that the Tribunal in fact reached their conclusion – that the appellant was not a refugee – on the basis of the evidence and findings essayed at paragraphs 11 to 67 of the reasons: the evidence and the Tribunal's findings regarding the appellant's dealings and experiences with the MQM in Pakistan, his expressed fears of being harmed by the MQM in the event of returning to Karachi, the level of general insecurity in Pakistan, and the unlikelihood of him being harmed by the MQM or others in places in Pakistan elsewhere than in Karachi. That included the Tribunal's conclusion in the paragraph which immediately precedes the incongruous observation in paragraph 68 that:

> "67. ... [The Tribunal] is satisfied that [the appellant] is not a person at risk of being targeted in an attack ... and is satisfied that the risk of the [appellant] being harmed in generalised insecurity is remote and not a real possibility."

56 Viewed in that context, it will be seen that the incongruous observation in paragraph 68 was truly intended to be a formal restatement of the conclusion immediately before expressed, in paragraph 67, on the basis of all of the relevant considerations essayed in paragraphs 11 to 66, and that somehow a typographical error – possibly an error in editing a form of words cut and pasted from a

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37 See and compare *SZIFI v Minister for Immigration and Multicultural and Indigenous Affairs* [2007] FCA 63 at [36]; *SZNZK v Minister for Immigration and Citizenship* (2010) 115 ALD 332 at 341 [38].

previous decision in another matter – resulted in references to Sri Lanka and Tamils rather than Karachi and the MQM.

57 It is unfortunate that such an error should have been permitted to occur. It suggests a lack of care in final proof reading of reasons for which all three members of the Tribunal were responsible – but the principal burden of which falls on the presiding member – that should not have occurred and should not be repeated. Such errors are likely to create doubts about the validity of decisions which should not arise. Nevertheless, reading the Tribunal's reasons as a whole, it is plain beyond peradventure that in this case it was not an error in the reasoning process of the kind for which the appellant contended and should be disregarded: *falsa demonstratio non nocet*[38].

58 It remains to mention two other matters pertaining to Ground 2. The first is that, some 84 days after the appellant filed his notice of appeal in the Supreme Court (in which he complained of error in the Tribunal's reasoning process by reference to the mistaken statement in paragraph 68 of their reasons), the Tribunal published a corrigendum stating that the original paragraph 68 of their reasons should be deleted and that a new paragraph 68 should be inserted in its place as follows:

> "68. Having regard to all of the evidence and findings above, the Tribunal finds that the [appellant] does not face a real possibility of persecution now or in the reasonably foreseeable future in Pakistan because of an actual or imputed political opinion, his race or his religion or his membership of a particular social group comprising persons subject to a vendetta or any other Convention reason separately and cumulatively. The Tribunal finds that the [appellant] is not a refugee."

59 When the matter was before the Supreme Court, Nauru relied on the corrigendum as evidence of what the Tribunal had truly intended, and the appellant, who was then unrepresented, did not object. When the matter came before this Court, it was contended on behalf of the appellant that the Tribunal did not have power to issue the corrigendum and that it should be ignored.

60 Whether the Tribunal had power to issue the corrigendum, as Nauru contended, or whether they published the corrigendum when they were *functus*

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38 See and compare *Diocesan Trustees of the Church of England in Western Australia v Solicitor-General* (1909) 9 CLR 757 at 761-762, 765-766 per Griffith CJ (Barton J agreeing at 767-768), 771 per O'Connor J; [1909] HCA 66.

officio, as the appellant contended, is debatable. As Gummow J observed in *Minister for Immigration and Ethnic Affairs v Kurtovic*[39], where a discretionary power reposed by statute in a decision maker is, upon proper construction, of such a character that it is not exercisable from time to time but rather is spent upon publishing a decision, the decision maker is prevented from later resiling from the decision because the power to do so is spent and the proposed second decision would be ultra vires. In *Minister for Immigration and Multicultural Affairs v Bhardwaj*[40], Gaudron and Gummow JJ embraced the conclusion of the Supreme Court of Canada in *Chandler v Alberta Association of Architects*[41] that, as a general rule, once an administrative tribunal have reached a final decision in respect of a matter before them in accordance with their enabling statute, the decision cannot be revisited because the tribunal have made an error within jurisdiction. Their Honours also endorsed[42] the Supreme Court's conclusion that, in such a case, the principle of *functus officio* applies on policy grounds favouring the finality of proceedings as opposed to the rules of procedure which apply to formal judgments of courts whose decisions are subject to a full appeal[43]. But it is apparent that those observations were directed to the possibility of a statutory tribunal making substantive changes to a decision as the result of a change of mind, substantive error within jurisdiction or subsequent change of circumstances. They did not relate directly, if at all, to whether, in circumstances in which a tribunal have made a mere textual error in recording their reasons for decision, it is open to the tribunal later to correct the text to make it accord to what the tribunal always intended. The latter case is more akin to the kind of error to which procedural slip rules may apply[44].

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39 (1990) 21 FCR 193 at 211. See and compare *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 1)* (1991) 32 FCR 219 at 225 per Beaumont J.

40 (2002) 209 CLR 597 at 615-616 [52]-[53]; [2002] HCA 11.

41 [1989] 2 SCR 848 at 861-862 per Dickson CJ, Wilson and Sopinka JJ.

42 See *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 615 [52]-[53].

43 See also, for example, *Bailey v Marinoff* (1971) 125 CLR 529 at 530 per Barwick CJ; [1971] HCA 49; *Achurch v The Queen* (2014) 253 CLR 141 at 153-154 [17]-[18] per French CJ, Crennan, Kiefel and Bell JJ; [2014] HCA 10.

44 See *Burrell v The Queen* (2008) 238 CLR 218 at 224-225 [21] per Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ; [2008] HCA 34. See, in particular, *Interpretation Act* 2011 (Nr), s 89.

61 That said, as Hill J observed in *Minister for Immigration and Ethnic Affairs v Taveli*[45], in relation to the admissibility of a statement of reasons provided by an administrative decision maker under s 13 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), where a statement of reasons is made after the event it will as a matter of general principle not be received as evidence in favour of the person making the statement, because it is both self-serving and a narrative of the past event which purports to be the equivalent of or a substitute for direct testimony of the event it narrates. In terms of general principle, parity of reasoning suggests that the same is true of an ex post facto amendment to reasons for decision. If so, except where it is admitted into evidence by consent, it should not be received.

62 In this matter, the position is further complicated by the fact that, on one view of the proceedings before the Supreme Court, the corrigendum was received into evidence without objection. Other things being equal, that would pose a question as to whether the appellant waived objection to the admissibility of the corrigendum and whether he is now estopped from resiling from the waiver[46]. But in turn, the resolution of that question might well turn on the fact that the appellant was unrepresented before the Supreme Court and that the judge did not alert him to the chance to object.

63 Ultimately, however, it is unnecessary to reach a concluded view about the issue. As has been stated, the fact that the errors in paragraph 68 were unintended textual errors is apparent from the face of the Tribunal's reasons without reference to the corrigendum. For the reasons earlier stated, it is clear from the remainder of the reasons, particularly paragraphs 11 to 67, that the references in paragraph 68 to Sri Lanka and Tamils were something which the Tribunal could not possibly have intended. The matter therefore falls to be decided on the basis previously stated, by reference to the contents of the original reasons alone, and, as all parties ultimately accepted would be appropriate in those circumstances, the corrigendum can be disregarded.

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45 (1990) 23 FCR 162 at 168 per Davies J, 187 per Hill J. See also *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 190 at 205-207 [48]-[55].

46 See, for example, Harrison, "Hearsay Admitted Without Objection", (1955-1957) 7 *Res Judicatae* 58 at 67-68; Weinberg, "The Consequences of Failure to Object to Inadmissible Evidence in Criminal Cases", (1978) 11 *Melbourne University Law Review* 408 at 424-426; "Note: The Status of Hearsay and Other Evidence Admitted Without Objection", (1985) 1 *Australian Bar Review* 155 at 158. See also *Radford* (1993) 66 A Crim R 210 at 232-233 per Phillips CJ and Eames J.

64 The other remaining point in relation to Ground 2 is that, in his written submissions, the appellant identified three other alleged errors in the Tribunal's reasons which, either alone or standing together with the alleged error evident in paragraph 68, were said to be productive of error in the Tribunal's reasoning process which vitiated their decision. The first was a reference to the appellant having appeared before the Tribunal with the assistance of an Arabic interpreter when in fact the appellant had appeared with the assistance of an Urdu interpreter. The second and third were references to the appellant having previously lived in "Mianabad" and "Marianbad" which, as was accepted, should have appeared as "Moeenabad". Unsurprisingly, counsel for the appellant did not pursue any of those complaints in oral argument. He was right not to do so. None of them could seriously be conceived of as productive of error or as evidence of error in the Tribunal's reasoning process.

65 In the circumstances, there would be no point in granting the leave that was sought. Ground 2 should be rejected.

Ground 3: Failure to take into account integer said to be relevant to assessment of capacity reasonably to relocate

66 Under cover of Ground 3, which was not advanced before the Supreme Court, counsel for the appellant sought leave to contend that the Tribunal erred in failing to respond to the appellant's "substantial, clearly articulated argument" that he would and could not relocate to a place where his young family would not be safe, educated and provided for. That contention is untenable. There was no substantial, clearly articulated argument of the kind suggested and the Tribunal were not required to consider claims that were not clearly articulated or which did not clearly arise on the materials before them[47]. Leave should thus be refused.

67 Relevantly, the furthest the appellant's evidence before the Tribunal went was as follows:

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47 See and compare *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24] per Gummow and Callinan JJ (Hayne J agreeing at 1102 [95]); 197 ALR 389 at 394, 408; [2003] HCA 26. See generally *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at 18-20 [58], [60]-[61]; *NAVK v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 124 at [31]; *SZTQP v Minister for Immigration and Border Protection* (2015) 232 FCR 452 at 463-464 [50].

> "I had to travel back and forth between Lahore and Sialkut [sic] because the MQM had established a base in Sialkut [sic], so I did not feel safe there, and the MQM knew my address in Lahore, so I did not feel safe there either. I did not have any family anywhere else in Pakistan, so there was nowhere else I could go because it is too dangerous in Pakistan to attempt to relocate without a familial support network",

and as follows:

> "In future, you know, I can see that I can't survive over there [in Punjab]. I have to educate my children. I have to [give] them a good education, look after them and establish myself and, given the situation and this – all the things I've told you, I cannot see [us] surviving and settling down in future at all. Like [the] MQM are still growing up in – like, before maybe not that much, but [they are] getting stronger in Punjab as well. They are opening up their offices in Punjab as well ...
>
> And unfortunately, any of those men, if they are there or come there, and I don't want to risk my life and my children's life because of that in future. And I tried my best that I don't get out of Pakistan, that I settle down with my family and my children and run my business in Pakistan. But I couldn't. That's why I had to leave."

68 The furthest the appellant's submission on the point went before the Tribunal was as follows:

> "We submit that it would be very difficult for our client to obtain employment should he relocate within Pakistan. This would make it extremely difficult for him to subsist, especially with his wife and children as dependents, and thus we submit our client would be subjected to undue hardship should he attempt to relocate within Pakistan."

69 The Tribunal then responded comprehensively to that evidence and submission as follows:

> "The Tribunal therefore accepts that there is a real possibility that the [appellant] will be harmed by Monir Tunda [sic] or his associates in Karachi. The Tribunal finds that the harm will arise for reasons of personal revenge, not for a Convention reason. However, the Tribunal accepts that state protection from the police or other authorities in Karachi may be inadequate or withheld from the [appellant] because of Monir Tunda's [sic] political connection and involvement with the MQM.
>
> ...

... The MQM's support base is largely confined to Urdu speakers in the main cities of Sindh, particularly Karachi and Hyderabad. The Tribunal accepts that the MQM has campaigned in Punjab and may have an office or a presence in Lahore and in Sialkot. However, the MQM was not successful in securing seats at the national or provincial level in Punjab in 2013 and has little or no influence or power outside Sindh.

The Tribunal notes that Punjab has an estimated population of 91 million people and a number of large urban centres including Lahore which has an estimated population of over 6 million. Sialkot city, also in Punjab, has a population of about 500,000. The Tribunal notes that the [appellant] lived in Sialkot between 2003 and 2005 and during 2011 without experiencing any harm and that he lived in Lahore between 2010 and 2011 without experiencing any harm.

In view of the absence of MQM power and influence in Punjab, the size of the population of Punjab, the existence of large urban centres such as Lahore and Sialkot and the fact that the [appellant] has previously lived in Lahore and Sialkot district without coming to any harm, the Tribunal is satisfied that he could live safely in Lahore or Sialkot or elsewhere in Punjab without a real possibility of harm from Munir Tunda or his associates of Munir Tunda [sic].

In relation to whether relocation is reasonable, the Tribunal notes Punjab is Pakistan's most prosperous province. It is ethnically diverse and has a large industrial and manufacturing base.

The Tribunal notes that the [appellant] speaks and reads Urdu which is spoken widely throughout Punjab; that he was born in Punjab and that he speaks some Punjabi.

The [appellant] claims that he was unable to find work in Sialkot. The Tribunal notes that the [appellant] confined his job search to the small village in Sialkot district he was residing in at the time and notes that large urban centres such as Lahore offer greater employment opportunities and access to services. The [appellant] has a portable skill and training [he held an electrical certificate and was a self-employed electrician and air conditioning mechanic between 2003 and 2011] and the Tribunal is satisfied that he could obtain employment in Lahore or Sialkot city.

The Tribunal notes that the [appellant] has relatives living in Sialkot, a relatively short distance from Sialkot city; and that his wife's family also lives in Sialkot. The Tribunal also notes that Lahore is relatively close to

> Sialkot. The Tribunal is satisfied that the [appellant] has access to family support networks in Punjab.
>
> The Tribunal also notes that Punjab, including Lahore and Sialkot, is relatively secure ... and safer than Karachi which has been subject to ethno-political violence and targeted insurgency.
>
> Having regard to the information above, the Tribunal is satisfied that the [appellant] has family support in Punjab and will be able to find employment and accommodation in Punjab and live securely and establish a normal life there with his family and that, accordingly, relocation to Punjab is reasonably available to the [appellant]." (footnotes omitted)

70 Counsel for the appellant contended that the Tribunal's findings on relocation were "vague and ambiguous" because the Tribunal did not identify where it was in Punjab – an area the size of Victoria, Australia, with a population of approximately 91 million people – that the appellant could reasonably relocate.

71 That contention should also be rejected, for two reasons. First, the Tribunal were not required to identify the place of reasonable internal relocation with the degree of precision for which the appellant contended[48]. Secondly, the Tribunal did specifically identify both Sialkot and nearby Lahore as cities to which the appellant could reasonably relocate on the basis, inter alia, that he had lived in those cities in the past without harm befalling him, they were relatively secure, and the appellant could obtain employment and have access to family support networks in them.

72 Counsel for the appellant argued that the Tribunal's reasoning was deficient because, in concluding that the appellant would have access to family support networks in Sialkot and nearby Lahore, the Tribunal evidently failed to take into account the appellant's evidence that when he had last lived in Sialkot he was only safe because he was in hiding.

73 That argument must also be rejected. The appellant did not say that he was in hiding in Sialkot because he feared being harmed in Sialkot. He said that he was in hiding in Sialkot because he had been beaten in Karachi. And, as the Tribunal found, not only was Punjab, including Lahore and Sialkot, relatively

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48 See *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 440, 443 per Black CJ (Whitlam J agreeing at 453); *Plaintiff M196 of 2015 v Minister for Immigration and Border Protection* [2015] HCATrans 240 at 10-11 per Gordon J.

more secure and safer than Karachi, which had been subject to ethno-political violence and targeted insurgency, but Sialkot was where the appellant's wife and children were living with her family.

74 Finally on this aspect of the matter, counsel for the appellant submitted that the Tribunal's "passing, generalised reference to the [a]ppellant's 'family' or the ability to live a 'normal life'" was insufficient to demonstrate that the Tribunal had considered the appellant's objection that he would not be able reasonably to relocate his young children with their needs as a family.

75 That submission is equally unpersuasive. As will be recalled, the only bases which the appellant advanced before the Tribunal for concluding that it was not reasonable to expect that he relocate were that he feared that the MQM would come after him and, perhaps implicitly, his family; he had no family elsewhere in Pakistan; and it was too dangerous to relocate without family support. The Tribunal effectively disposed of each of those arguments by their findings that the MQM would not pose a significant threat to the appellant's security, and thus implicitly his family's security, in Punjab; the appellant had family support networks in Punjab; and, because of the appellant's skills and the economic and social diversity of the area, he would be able to obtain employment there.

76 In the circumstances, there is no point in granting the leave that was sought.

Proposed Ground 4: No evidence to support critical finding

77 As was also earlier noticed, counsel for the appellant sought leave to advance a further ground of appeal, proposed Ground 4, to the effect that there was no evidence to support what counsel described as the Tribunal's critical finding that "the MQM ... has little or no influence or power outside Sindh". Leave should be refused.

78 As has been seen, the Tribunal's statement that the MQM had little or no influence or power outside Sindh formed part of their larger finding that:

> "[t]he MQM's support base is largely confined to Urdu speakers in the main cities of Sindh, particularly Karachi and Hyderabad. The Tribunal accepts that the MQM has campaigned in Punjab and may have an office or a presence in Lahore and in Sialkot. However, the MQM was not successful in securing seats at the national or provincial level in Punjab in 2013 and has little or no influence or power outside Sindh." (footnote omitted)

79 In turn, as appears from the Tribunal's reasons, that finding was based on footnoted references to country of nationality information from the Immigration

and Refugee Board of Canada and *The Nation* newspaper. Those sources were not adduced in evidence before the Supreme Court, and, just as they were not in evidence before the Supreme Court, they were not in evidence before this Court. Nor did counsel for the appellant suggest that the appellant should be permitted to tender those sources into evidence for the first time on appeal to this Court. He was right not to do so.

80 In the circumstances, there is nothing to say that there was insufficient evidence to sustain the Tribunal's finding, and, accordingly, the argument in support of proposed Ground 4 must fail. Leave to advance Ground 4 should be refused.

Conclusion

81 The appeal should be dismissed with costs.