IN THE SUPREME COURT OF NAURU

AT YAREN
[APPELLATE DIVISION]

Case No. 28 of 2016

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T15/00215, brought pursuant to s43 of the *Refugees Convention Act* 1972

BETWEEN

ULA007 Appellant

AND

THE REPUBLIC Respondent

Before: Crulci J

Appellant: T. Baw
Respondent: G. R. Kennett SC

Date of Hearing: 28 September 2016
Date of Judgment: 22 June 2017

CATCHWORDS
APPEAL - *Refugees – Refugee Status Review Tribunal – Complementary Protection – Internal Relocation Principles – Application – Appeal DISMISSED*

JUDGMENT

1. This matter comes to the Court pursuant to section 43 of the *Refugee Convention Act* 2012 ("the Act")) which provides:

   43 Jurisdiction of the Supreme Court

   (1) 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.

   (2) The parties to the appeal are the appellant and the Republic.

   ...

2. The determinations open to this Court are defined in section 44 of the Act:

   44 Decision by Supreme Court on appeal
   (1) In deciding an appeal, the Supreme Court may make either of the following orders:
   (a) an order affirming the decision of the Tribunal;
   (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

3. The Appellant filed an Application for Extension of Time to Lodge Notice of Appeal on the 8 August 2016 pursuant to section 43(5) of the Act to extend the time for filing a notice of appeal up to and including 14 October 2016; this application was not opposed by the Respondent for the Republic.

BACKGROUND

4. The Refugee Status Review Tribunal delivered its decision on 29 May 2016, affirming the decision of the Secretary of the Department of Justice and Border Control ("Secretary") of 10 October 2015, that the appellant is not recognised as a refugee under the 1951 Refugee Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees ("the Convention"), and is not owed complementary protection under the Act.

5. The Appellant is a single man from Afghanistan. He was born in Rahbat Village, Nili, Daikundi Province. The Appellant is a Shia Muslim and a Hazara. His birthdate is put as 31 December 1984.

6. The Appellant's parents are deceased. He has a brother who lives in Iran. He has an older brother and three older married sisters who live in Daikundi. The Appellant did not attend school.

7. The Appellant enlisted with a military group in 2003 and there was an incident following which the Appellant and the Commander had an altercation, a visiting General became involved. Fearing that the Commander has alerted the local Taliban to the Appellant as a person of interest, and they would harm or kill him, the Appellant fled and made his way to Iran.

8. From 2003 to 2013 he lived in Iran illegally and worked as a labourer on construction sites and as a security guard. He was given notice to depart several times and was deported on some of these occasions.

9. In July 2013 he travelled to Malaysia, then on to Indonesia. In August 2013 the Appellant travelled by boat to Australia. He was first taken to Christmas Island and was transferred to Nauru in July 2014.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

10. The Appellant's claims before the Secretary were:
    - he would be harmed because of his involvement with the Afghanistan National Army ("ANA") fighting the Taliban
    - if he were returned to Afghanistan, he would be found by the Taliban and killed
    - he feared harm because of his race and religion
    - he had heard that the Taliban were killing Hazara and Shia
    - he would not be able to associate with other young Hazara Shias because he would be afraid of being targeted, tortured or murdered by the Taliban
    - he would not be accepted in Afghanistan because his manner, dress and general cultural outlook would make him stand out due to living abroad for a prolonged period
    - he would be harmed because of being a failed asylum seeker

11. The Appellant's evidence to the Secretary was that he enlisted with the ANA in 2003 and was given work at a military base as a watch guard. The Appellant noticed that some of the trees at the military base had been stolen and found and detained the culprit. He told his commanding officer what he had done, and the Commander ordered him to release the man. The Appellant disobeyed the order and was imprisoned by the Commander for a few hours.

12. A few days later, the Appellant reported the incident to a visiting General. The General punished the Commander and the Commander was angry. A month later the Commander told the Appellant that he had given the Appellant's photo to the Taliban. The Commander told the Appellant that the Taliban would kill him. The Appellant fled and made his way to Iran.

13. The Secretary did not accept that all the claims made by the Appellant were credible. The Secretary accepted that the Appellant had been a member of the ANA but found it implausible that he would disobey an

order from the Commander, and would approach a General about the matter, who would over-rule the Commander; causing the Commander to provide information about the Appellant to the Taliban.

14. The Secretary accepted that the Appellant feared being harmed because of his race and ethnicity, but, based on country information on the situation of Shia and Hazara in Afghanistan, was not satisfied that he would be harmed because of his race and ethnicity upon return. He therefore concluded that the Appellant's fear was not well-founded.

15. Having found that the Appellant's fears were not well-founded he was determined not to be a refugee under the Act. Furthermore having considered that he would not be subject to torture, cruel or inhuman or degrading treatment or punishment or other treatment in breach of Nauru's international obligations, the Secretary determined that Nauru did not have complementary protection obligations towards the Appellant.

REFUGEE STATUS REVIEW TRIBUNAL

Incident with Commanding Officer

16. The Tribunal questioned the Appellant about his membership with the ANA. Upon this questioning, the Appellant clarified that he was a member of a militia group and not the ANA. The Tribunal accepted that this error in the Appellant's initial application was likely due to errors of interpretation. The Tribunal enquired whether the claims relating to the Appellant's membership of the ANA were withdrawn and the Appellant agreed with this approach.

17. The Tribunal accepted that the Appellant and Commander became involved in a dispute over some trees and this resulted in a senior militia officer disciplining the Commander because of his actions towards the Appellant.

18. The Tribunal found however, that the claim that the Taliban would harm the Appellant upon his return to Afghanistan because of information provided by the Commander, to be speculative as no one had been to his family home in search for him in the many years since this incident.

19. The appellant told the Tribunal that he did not know whether the Commander had given the Taliban a photograph of him. The Tribunal noted that the incident with the Commander occurred 14 years ago and the Appellant was not harmed during the periods he was in Afghanistan after being deported from Iran. The Tribunal concluded that the Appellant's fear that he would be harmed by the Commander or Taliban was not well-founded.

Race and Ethnicity

20. The Tribunal considered Country Information about the threat the Taliban poses on the roads leading to the Appellant's home region of Daikundi, and found that there was a reasonable chance of the Appellant experiencing persecution because of being Shia Hazara if he attempted to return to Daikundi[1].

Membership of a Particular Social Group

21. The Tribunal accepted that the Appellant lived in Iran for 10 years and may have begun using some Farsi words and dressing differently. However, the Tribunal did not accept that because of this, the Appellant would experience social discrimination amounting to persecution for a Convention reason.

22. The Tribunal also noted Country Information about failed asylum seekers who had been returned to Afghanistan, and did not accept that all failed asylum seekers were targeted for seeking protection abroad. The Tribunal noting that the Appellant did not experience any harm as a returnee from Iran. The Tribunal found that there was no reasonable possibility that the Appellant would be harmed because of being a failed asylum seeker[2].

Relocation

23. The Tribunal considered Country Information that most attacks in Kabul are directed at prominent targets and the risk to civilians is relatively low. The Tribunal found that the Appellant could practically, safely and legally relocate to Kabul where he would not face a reasonable possibility of being persecuted by the Taliban or anyone else for a Convention reason.

24. The Tribunal looked at the Appellant's availability of support in Kabul, his access to shelter, availability of infrastructure and essential services, livelihood opportunities and the scale of internal displacement, and found that it was reasonable for the Appellant to relocate to Kabul or Herat[3].

Complementary Protection

25. The Tribunal was not satisfied that the Appellant would face any reasonable possibility of significant harm for the same reasons identified in relation to whether there was any reasonable likelihood that the Appellant would suffer persecution for Convention reasons.

26. The Tribunal did accept that there was a real risk that the Appellant would encounter the Taliban and suffer cruel, inhumane or degrading treatment or punishment or arbitrary deprivation of life if he attempted to return to Daikundi.

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[1] Book of Documents p 269 at [134].
[2] Ibid., p 270 at [139].
[3] Ibid., p 271 at [146]-[150].

27. The Tribunal then proceeded to consider the internal relocation principle in the context of Nauru's complementary protection obligations. The Appellant asserted that there was no established principle of international law to suggest that the internal relocation principle applies when considering a claim for complementary protection. The Appellant relied on the decision of the Federal Court of Australia in *Minister for Immigration and Citizenship v MZYYL*[4] [2012] FCAFC 147 ("*MZYYL*") to support this assertion. The Tribunal considered the relevant passages to be *obiter dicta* and not persuasive.

28. However, the Tribunal found the comments of Black CJ in *Randhawa v Minister of Immigration, Local Government and Ethnic Affairs*[5] to be highly persuasive on the point that it would be anomalous to require the international community to provide protection to a claimant under complementary protection where real protection could be found within the claimant's country of origin.

29. The Tribunal therefore did not accept the contention that the internal relocation principle has no application to assessment of Nauru's complementary protection obligations. As to the Convention claims, the Tribunal found that it would be relevant and reasonable for the Appellant to relocate to Kabul or Herat. This being the case, Nauru did not owe the Appellant complementary protection[6].

THIS APPEAL

30. The Appellant raises one ground of appeal as follows:

    The Tribunal erred in law by erroneously construing s.4(2) of the Act as incorporating a relocation test in determining the Appellant's complementary protection claim, however there is no such requirement.

31. Section 3 of the Act defines "complementary protection" as:

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

32. The term "international obligations" is not defined in the Act. However, the parties are in general concurrence as to the sources of Nauru's international obligations. These include the treaties that Nauru has ratified (the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment,[7] the Convention on the Elimination of All Forms of Discrimination Against Women,[8] the Convention on the Rights of the

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[4] *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147.

[5] *Randhawa v Minister of Immigration, Local Government and Ethnic Affairs* (1994) 124 ALR 265.

[6] Book of Documents p 275 at [169].

[7] *Convention against Torture* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[8] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 1 March1980, entered into force 3 September 1981) 1249 UNTS 13.

Child[9]), treaties Nauru has signed (the International Covenant of Civil and Political Rights[10]), and the Memorandum of Understanding ("the MOU) between Australia and Nauru.

33. In the MOU Nauru agreed in clause 19(c) "not to send a transferee to another country where there is a real risk that the transferee will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty".

34. The Appellant accepts that the internal relocation principle is part of the determination of a claim to protection under the Refugee Convention. However, the Appellant submits that a claim for complementary protection is different to a claim under the Refugee Convention in respect of internal relocation. There is no relocation test if the decision-maker is satisfied that the person is at real risk of being subjected to the mistreatment referred to in the international treaties.

35. The Appellant again made reference to the decision of *MZYYL*[11] and quoted the following passage of Lander, Jessup and Gordon JJ (at [18)]:

> *The Complementary Protection Regime provides criteria for the grant of a protection visa in circumstances where the Minister is not satisfied that Australia has protection obligations to that non-citizen under the Refugee Convention. The regimes establishes criteria "that engage" Australia's express and implied non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CRC) (collectively the International Human Rights Treaties)... The Complementary Protection Regime is a code in the sense that the relevant criteria and obligations are defined in it and it contains its own definitions: see, by way of example, the definitions in s 5 of the Act of "torture" and "cruel or inhuman treatment or punishment". Unlike s 36(2)(a), the criteria and obligations are not defined by reference to a relevant international law. Moreover, the Complementary Protection Regime uses definitions and tests different from those referred to in the International Human Rights Treaties and the commentaries on those International Human Rights Treaties. For example, the definition of "torture" in the Complementary Protection Regime is different from that in the CAT... Further, the International Human Rights Treaties do not require the non-citizen to establish that the non-citizen could not avail himself or herself of the protection of the receiving country or that the non-citizen could not relocate within that country. Section 36(2B)(a) and (b) have adopted a different and*

[9] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

[10] *International Covenant on Civil and Political Rights* (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[11] See supra note 3.

contrary position. Section 36(2B)(a) and (b) relieve Australia from its protection obligations in s 36(2)(aa) if those two particular circumstances are satisfied.

36. The Appellant submits the fact that States in the European Union, the United Kingdom, Canada and New Zealand have codified a relocation test with respect to complementary protection supports the absence of such a test in international law.

37. The Appellant takes issue with the Tribunal's reliance on a submission of the UNHCR to the Senate Standing Committee on the basis that it does not form part of international law, and the reference to *Randhawa*[12], as that decision pre-dated the decision in *MZYYL*[13].

38. In the oral submissions on 28 September 2016, counsel for the Appellant took the Court to a determination of the Human Rights Committee in *BL v Australia*[14], in which the internal relocation principle was considered in the context of a claim that Australia would breach the author's rights under articles 6, 7 and 18 of the ICCPR if he was deported to his home region of Touba in Senegal. In particular, counsel emphasised the view of member Fabian Omar Salvioli, in which the member said (at [5]-[6]):

> *The Committee has never based its decisions on the "internal flight alternative" or "internal relocation alternative" doctrines. It is my understanding that it has not done so in this case either and that the above-mentioned assertions figured no more than marginally in the line of reasoning that led to the Committee's decision.*
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> *The adoption of these doctrines in the course of the Committee's deliberations would represent a setback for the consideration of future cases and would undermine the standards of protection already established by the Committee in its settled jurisprudence.*

39. The Respondent filed written submissions on the appeal on 27 September 2016. The Respondent contends that the Tribunal's determination that the Appellant is not owed complementary protection because real protection is available within Afghanistan is not vitiated by error.

40. The Respondent refers the Court to the decision of Perram J in *Anochie*[15], and the submissions of the UNHCR in *Dawood Khan v Canada*[16], and contends that a "high standard" must be satisfied for the Court to accept that a real risk of serious harm was a necessary and foreseeable consequence of being returned to Afghanistan. Therefore, the test would

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[12] See supra note 3.

[13] See supra note 4.

[14] United Nations Human Rights Committee, *BL v Australia* (7 January 2015) UN Doc CCPR/C/112/D/2053/2011.

[15] *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497.

[16] United Nations Human Rights Committee, *Dawood Khan v. Canada* (10 August 2006) CCPR/C/87/D/1302/2004.

not be satisfied if there were a reasonably available means of avoiding the harm.

41. In addition, the Respondent submits that the quoted passage from *MZYYL*[17] is not authoritative because it was made in the context of interpreting a section of the Australian Migration Act, and not determining the availability of complementary protection when there is a viable internal relocation alternative. The point made in the quote was that international agreements are of limited use in interpreting the Migration Act because the language of the Act differed in several ways from the agreements.

42. In oral submissions, the Respondent highlighted that the majority understood the internal relocation principle to be part of both refugee law and human rights law more generally. In response to the Appellant's submissions on *BL v Australia*[18] the Respondent took the Court to the Committee's conclusions that:

> *... 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 author 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 author would only be returned to such a location where the State party determine that adequate and effective protection is available, the Committee cannot conclude that removing him to Senegal would violate the State party's obligations under article 6 or 7 of the Covenant.*

CONSIDERATIONS

43. European Council Directive 2004/83/EC provides that in assessing whether a person should be granted refugee or "subsidiary protection" Member States should consider internal protection (Article 8).

44. Council Directive 2004/83/EC recasts the wording of Article 8 such that it aligns with the case law of the European Court of Human Rights ("the ECHR"), without affecting the assessment for subsidiary protection:

European Council Directive 2011/95/EU

Article 8
Internal Protection

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not

[17] See supra note 3.
[18] United Nations Human Rights Committee, *BL v Australia* (7 January 2015) UN Doc CCPR/C/112/D/2053/2011., at [7.4]

in need of international protection if in a part of the country of origin, he or she:

a. has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or
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.

2. In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances in that part of the country and to the personal circumstances of the applicant in accordance with Article 4. To that end, Member States shall ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office."

45. There is a strong line of authority from the ECHR[19] providing that Contracting States to the European Convention of Human Rights are not precluded from relying on an "internal flight alternative" in assessing whether a person is owed protection under Article 3,[20] following on from the Court's decision in *Salah Sheekh v The Netherlands*.[21]

46. This case laid down guidelines in relation to guarantees that should be in place for consideration of internal flight or relocation:

"Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their 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. However, the Court has previously held that the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to

[19] *AAM v Sweden,* Application no 68519/10, 3 April 2015 at [68]; *AGAM v Sweden*, Application no. 71680/10, 27 June 2013 at [39]; *MKN v Sweden*, Application no. 72413/10, 27 June 2013 at [35]; *Sufi and Elmi v the UK*, Application nos 8319/07 and 11449/07, 28 November 2011 at [266].

[20] "Prohibition of Torture: No one shall be subjected to torture or inhuman or degrading treatment or punishment."

[21] *Salah Sheekh v The Netherlands*, Application No. 1948/04 (11 January 2007).

Article 3 of the Convention. It sees no reason to hold differently where the expulsion is, as in the present case, to take place not to an intermediary country but to a particular region of the country of origin. 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 Article 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 subjected to ill-treatment."[22]
(emphasis mine)

47. In the United Kingdom and Ireland, the Immigration Rules Part 11, and the Eligibility for Protection Regulations respectively, implement the Directive. Notwithstanding the retrospectivity, case law prior to the implementation of the Rules in the UK suggests that when considering whether a person should be granted exceptional leave to remain, it is relevant to consider whether it would have been "unduly harsh" to send the person back to a "safe haven" in their country of origin.

48. In *AE and FE v Secretary for the Home Department*[23] their Honours considered an appeal from a decision of the Immigration Appeal Tribunal in respect of Sri Lankan Tamils in which case the Tribunal found that it would not be "unduly harsh" to expect the appellants to relocate to a location where they would not be subject to risk of persecution:

> *"If the question is asked simply to determine whether he falls within the definition of a refugee under Article 1(A)(2), the answer should depend upon the same comparison between conditions in the place where persecution is feared and conditions in the safe haven. Once an asylum seeker is in this country, however, there may be a number of reasons why it would be unreasonable or harsh to send him back to his home country which have nothing at all to do with the question of whether he has a well-founded fear of persecution for a Convention reason. Asylum seekers who have not established refugee status have frequently been granted exceptional leave to remain because to remove them would infringe their rights under the Human Rights Convention or for other humanitarian reasons.*
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> ...
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> *The United Kingdom is not the only country which will refrain from sending home an asylum seeker who cannot establish refugee status if, for other reasons it will be unduly harsh to do so. ... The 'unduly harsh' test has, however, been extended in practice to have regard to factors which are not relevant to refugee status, but which are very relevant to whether exceptional*

[22] Ibid., at [141].
[23] *AE and FE v Secretary for the Home Department* [2003] EWCA Civ 1032, at [27] and [64].

leave to remain should be granted having regard to human rights or other humanitarian considerations."
(emphasis mine)

49. Case law in Ireland affirms that the internal relocation principle applies when the decision-maker is deciding a "subsidiary protection" claim. Case law in Ireland similarly affirms that the internal relocation principle applies when the decision-maker is deciding a "subsidiary protection" claim. The application of internal relocation considerations was clarified by MacEochaidh J in *M.A. v the Minister for Justice, Equality and Law Reform*[24], where his Honour said:

> *"A decision on an application for subsidiary protection which is determined on the basis that the applicant may internally relocate in the relevant country of origin must comply with the provisions of Article 8 of the Council Directive 2004/83/EC and Regulation 7 of SI 518/2006. The matters to be considered in this context have been addressed in numerous decisions of this Court and have been summarised by Clark J in K.D. v Minister for Justice, Equality and Reform and E.I. v Minister for Justice Equality and Law Reform."*

50. A similar regime is contained in the Canadian Immigration and Refugee Protection Act 2001. While the Act and guidelines used by the Immigration and Refugee Board to assess whether a person is owed complementary protection do not mention the internal flight alternative in relation to claims for complementary protection, the courts in Canada appear to assess whether the internal flight alternative applies to "Convention refugees" and those owed complementary protection simultaneously.

51. The legislative summary of Bill C-11[25], the *Immigration and Refugee Protection Act*, prepared by the Law and Government Division of Canadian Parliament indicates that it was the practice of the Board to consider whether protection is owed to Applicants based on both Convention and non-Convention risks:

> *"Adding those "in need of protection" to the Convention refugee definition would be necessary in order to consolidate most of the decisions relating to risk at the Immigration and Refugee Board. This approach has been supported by many commentators on the system, including the Standing Committee on Citizenship and Immigration in its two reports preceding its study of Bill C-11. Thus, although it might appear that the definition of "refugee" would be expanded; in fact the existing mechanisms that have been available to refugee claimants for some time would be consolidated."*
> (emphasis mine)

[24] *M.A. v the Minister for Justice, Equality and Law Reform* [2015] IEHC 287 at [19].
[25] Parliament of Canada, "Bill C-11: The Immigration and Refugee Protection Act" (26 March 2001) <https://lop.parl.ca/about/parliament/legistlativesummaries/bills_ls.asp?ls=c11&parl=37&ses=1>.

52. In considering alternative flight alternatives the Canadian Courts have found that "*The internal flight alternative is also a component of the notion of "person in need of protection" provided under subparagraph 97(1)(b)(ii)".*[26]

53. In the matter of *Flores Argote v Canada (Citizenship and Immigration)*[27] the Applicant applied for review of the Board's decision to reject her application for protection on the basis that, among other things, the Board erred in finding that there was an internal flight alternative available. The Court noted that the Board found that the threats and violence to the Applicant by her ex-husband did not entitle the Applicant to protection under the Refugee Convention.

54. The Board then continued to analyse the merits of the claim[28] (presumably as a claim for complementary protection), and determined that there were several cities in Mexico that the Applicants might have used as an internal flight alternative. The Court found that the Board's consideration of the reasonableness of relocation was sufficient and dismissed the application for review.

55. In New Zealand claims for recognition as a refugee or 'protected person' are considered under Part 5 of the New Zealand *Immigration Act* 2009. The question of whether an applicant may be able to safely relocate to another part of the home country is called the Internal Protection Alternative ("the IPA").

56. It has been found that relocation considerations (or IPA) applied equally to the complementary protection regime. In the case of AC (Russia),[29] the Appellant, a businessman in Russia, was threatened by the leader of a crime syndicate, DD, and his associates, that he must transfer to DD the Appellant's business, or the Appellant would be killed. The Appellant fled to New Zealand. The Appellant was found not to be a refugee under the meaning of the *Immigration Act* 2009, nor to be a protected person within the meaning of the Convention Against Torture, but was found to be a protected person within the meaning of the International Covenant on Civil and Political Rights.[30]

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[26] *Vasquez Luna v Canada (Citizenship and Immigration)* 2008 FC 1132.
[27] *Flores Argote v Canada (Citizenship and Immigration)* 2009 FC 128.
[28] Ibid., at [5].
[29] *AC (Russia)* [2012] NZIPT 800151.
[30] *International Covenant on Civil and Political Rights* (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

57. The Court found that the Appellant's problems were localised to a particular region, and therefore turned to consider s 131 of the *Immigration Act 2009*. That section provides as follows:

    (1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

    (2) Despite subsection (1), a person must not be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if he or she is able to access meaningful domestic protection in his or her country or countries of nationality or former habitual residence.

    (3) For the purposes of determining whether there are substantial grounds for belief under subsection (1), the refugee and protection officer concerned must take into account all relevant considerations, including, if applicable, the existence in the country concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.

58. The Court said that the phrase "able to access meaningful domestic protection"[31] reflects the jurisprudence of the Refugee Status Appeals Authority ("the Authority") in relation to the IPA. The IPA principle was well established in jurisprudence of the Authority relating to determination of refugee status.[32] The Court said that "Section 131(2) puts the Authority's approach in the refugee jurisdiction on a statutory footing in the protected person jurisdiction."[33]

59. In Nauru, the Act is the primary instrument of protection for an asylum seeker, and consideration of internal relocation is part of the determination of refugee status. The determination of complementary protection is secondary and "complements" the first enquiry. If there is not a well-founded fear of harm for a Convention reason so as to determine that the applicant is a refugee, the question then moves to whether he/she nonetheless faces a real risk of harm if returned to the home country (or any country to which they may be moved).

[31] *AC (Russia)* [2012] NZIPT 800151, at [90]
[32] Ibid., at [91]
[33] Ibid., at [93]

60. Having considered that an asylum seeker has an internal relocation alternative and is therefore not a refugee, and then moving on to consider complementary protection on the same facts but without the relocation alternative, would potentially render the primary legislation redundant.

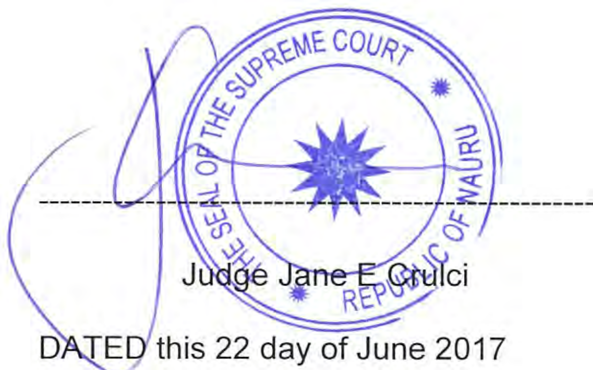
61. The purpose of international obligations and complementary protection is to protect those who are not refugees from harm (a harm which is not one of the five convention reasons). If there is an internal relocation alternative open to the appellant then this is as relevant to the complementary protection consideration as it was to the refugee status determination.

62. The Court endorses the considerations laid out by Hathaway and Foster in *The Law of refugee Status*[34] when determining if there is an internal relocation alternative for an applicant:
    (1) Can the applicant safely, legally and practically access an internal site of protection?
    (2) Will the applicant enjoy protection from the original risk of being persecuted?
    (3) Will the site provide protection against any new risks of being persecuted or of any indirect *refoulement*?[35]
    (4) Will the applicant have access to basic civil, political and socio-economic rights provided by the home country or State?[36]

63. Having taken into consideration submissions by counsel, the legislation, case law and matters outlined above, I find that the Tribunal was correct in applying internal relocation principles to the Appellant's assessment of complementary protection according to Nauru's international obligations.

ORDER

64. The appeal is dismissed. The decision of the Tribunal T15/00215, of the 29 May 2016, is affirmed under section 44(1) of the Act.



Judge Jane E Crulci

DATED this 22 day of June 2017

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[34] Hathaway, J.C. and Foster, M *The Law of Refugee Status,* Cambridge University Press, 2nd Ed.
[35] Ibid p 361 lines 14 – 17.
[36] *AC (Russia)* [2012] NZIPT 800151 [110(d)]