IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M132 of 2017

BETWEEN

WET044
Appellant

AND

Republic of Nauru
Respondent

APPELLANT'S SUBMISSIONS

I INTERNET PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

II ISSUES

2. There are three principal issues for determination.

   a. Whether the Appellant should be able to raise grounds of appeal that were not raised in the Supreme Court of Nauru, in circumstances, among others, where he was not represented before that Court.

   b. Whether the Refugee Status Review Tribunal (**Tribunal**) erred by failing to deal with submissions and country information provided by the Appellant to the Tribunal with respect to the risk of returning to Iran as a failed asylum seeker and/or a person with an imputed political opinion because of his asylum claim in breach of s 22 or s 34(4)(d) of the *Refugees Convention Act 2012* (Nr) (**Convention Act**).[1] This is in circumstances where:

      i. that country information was directly contrary to findings of fact adverse to the Appellant's claims for protection;

      ii. the country information had not been before the Secretary; and

      iii. the Tribunal nevertheless adopted the Secretary's reasoning and findings of fact to reject (at paragraphs 95 and 97) the Appellant's claims in respect of those risks.

   c. Whether the Tribunal acted in a way that was procedurally unfair, contrary to s 22 of the Convention Act, by failing to put to the Appellant the nature and content of the country information it relied upon at paragraph 90 of its reasons concerning the risk of harm to Kurds who are Shia Muslim.[2]

Part III: Section 78B of the *Judiciary Act* 1903 (Cth)

3. The Appellant has considered whether any notice should be given in compliance

[1] Ground 1 of the proposed Amended Notice of Appeal.
[2] Ground 2 of the proposed Amended Notice of Appeal.

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with s 78B of the *Judiciary Act* 1903 (Cth) and concluded that no notice is required.

Part IV: Citations

4. The citation for the decision of the Supreme Court of Nauru is *WET044 v Republic of Nauru* [2017] NRSC 66. The decision of the Tribunal was made on 1 February 2016 (**Tribunal decision**).

Part V: Factual background

5. The Appellant was born on 1 August 1982 in Ilam Province, Iran.[3] He is of Faili Kurdish ethnicity.[4]
6. He worked as a farmer with his father from the age of 10, before starting work as a construction labourer.[5] The next year he undertook compulsory military service.[6]
7. The Appellant claimed that he was detained on several occasions, for one to two days, because he wore Kurdish clothing[7] and that he was unable to get a job because of his ethnicity.[8]
8. In 2010, the Appellant demonstrated against the government.[9]
9. In 2012, the Appellant was stopped in the street by the Basij, part of the Iranian Revolutionary Guards, called a 'Kurdish clown' and threatened with arrest.[10]
10. In April 2013, the Appellant had an altercation with a member of the police when asked for his identity documents.[11]
11. In May 2013 he fled Iran for Australia.[12] He was subsequently transferred to Nauru in February 2014.[13]
12. On 29 May 2014, the Appellant made an application to be recognised as a refugee

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[3] Transfer Interview dated 19 February 2014 (**Transfer Interview**) Court Book in the Supreme Court of Nauru (**CB**) 4; Application for Refugee Status Determination dated 24 May 2014, (**RSD Application**) CB 23, 28; Statement dated 23 May 2014 (**Statement in RSD Application**) CB 45 [7]; Negative Refugee Determination Decision Record and Complementary Protection Assessment Decision Record dated 30 August 2015 (**Secretary's determination**) CB 53 – 54; Tribunal decision CB 200 [7].

[4] Transfer Interview CB 7; Secretary's determination CB 54; Submissions from Craddock Murray Neumann dated 29 November 2015 (**Appellant's submissions to Tribunal**) CB 76 [22]; Statement of Appellant dated 25 November 2015 (**Statement in Appellant's submissions**) CB 111 [28]; Tribunal decision, CB 200 [7], 214 [8].

[5] RSD Application, CB 42.

[6] Transfer Interview CB 6; Secretary's determination CB 54, 57; Tribunal decision CB 201 [15], 213 [81]-[82].

[7] Transfer Interview CB 13; Statement in RSD Application CB 45 [17]; Secretary's determination, CB 60; Tribunal decision CB 202[19].

[8] Transfer Interview CB 13; Statement in RSD Application CB 45[12]; Secretary's determination CB 60; Tribunal decision CB 202 [24].

[9] Transfer Interview CB 13 cf Tribunal decision CB 210 [66].

[10] Statement in RSD Application CB 45 [19]; Secretary's determination CB 60; Transcript of Tribunal hearing dated 7 February 2015 (**Tribunal hearing transcript**) CB 161; Tribunal decision CB 203 [25], CB 207 [52].

[11] Statement in RSD Application CB 45 [21]–[22]; Secretary's determination CB 60; Tribunal hearing transcript CB 156 [21]; Tribunal decision CB 203 [25], 207 [53].

[12] Transfer interview CB 15, 16; RSD Application, CB 32; Tribunal decision CB 200 [8].

[13] Tribunal decision, CB 200 [8].

or a person owed complementary protection under the Convention Act.[14] The Appellant claimed protection on the basis of being:

a. stateless;[15]
b. of Faili Kurdish ethnicity;[16]
c. of Kurdish ethnicity;[17]
d. a failed asylum seeker (and consequently, a person who would have an imputed adverse political opinion).[18]

13. On 30 August 2015, the Secretary determined that the Appellant was neither a refugee nor owed complementary protection.[19]
14. On 10 September 2015, the Appellant applied to the Tribunal for review of the Secretary's determination pursuant to s 31 of the Convention Act.[20]
15. On 29 November 2015, the Appellant's solicitors made submissions on the Appellant's behalf in support of his claims to refugee status and complementary protection,[21] including providing detailed country information in relation to the persecution of Faili Kurds in Iran[22] and the persecution of failed asylum seekers in Iran.[23]
16. The Tribunal hearing took place on 7 December 2015.[24]
17. On 1 February 2016, the Tribunal affirmed the decision of the Secretary and found that he was neither a refugee nor owed complementary protection. In particular, the Tribunal:

a. concluded that the Appellant was not stateless, but a citizen of Iran of Faili Kurdish ethnicity;[25]
b. concluded further that, while 'Kurds and other minorities may face discrimination in Iran', it was not satisfied on the material before it that the Appellant had 'suffered serious harm in the past for reason of his Kurdish ethnicity' nor that there was 'a real possibility that such harm w[ould] befall him in the reasonably foreseeable future';[26]
c. agreed with and adopted the (adverse) reasoning and findings of the Secretary with respect to the Appellant's claims that he feared persecution

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[14] See s 5 of the Convention Act; RSD Application, CB 19 -47.
[15] RSD Application CB 45 – 46; Appellant's submissions to Tribunal CB 78; Statement in Appellant's submissions to Tribunal CB 109 [5], 112 [29], 113 [39]; Tribunal hearing transcript, CB 159.
[16] Transfer Interview CB 7; Appellant's Submissions to Tribunal CB 74 [8], 76 [22], 79 [41], 85, 86, 92-93; Statement in Appellant's submissions to Tribunal CB 109 [5], 111 [28], 113 [39]; Tribunal hearing transcript CB 180 [25]; Tribunal decision, CB 200 [7], 206[44], 214 [88].
[17] Transfer interview CB 13, 14; Statement in RSD Application CB 45, Secretary's determination CB 60, Tribunal decision CB 202-203.
[18] Statement in RSD Application CB 46; Secretary's determination CB 60; Appellant's submissions to Tribunal CB 76, 78-79, 99-101, 132-135.
[19] See s 6 of the Convention Act; Secretary's determination CB 53-68.
[20] Refugee Status Review Tribunal Application Form dated 10 September 2015, CB 71.
[21] Appellant's submissions to the Tribunal CB 73-140.
[22] See, in particular, Appellant's submissions to the Tribunal at CB 78 [36], 82-83 [58]-[61], 84 [69], Appendix 1 CB 85-98.
[23] See, in particular, Appellant's submissions to the Tribunal at CB 79 [41]-[42], 82-83 [58]-[61], 84 [69], Appendix 2 (99-108).
[24] Tribunal hearing transcript, CB 141; Tribunal decision CB 200 [2].
[25] Tribunal decision CB 214-215 [88] – [89].
[26] Tribunal decision CB 215-216 [90] – [94], in particular at [91], [93].

if returned as a failed asylum seeker;[27]

d. rejected, for the same reason as set out in subparagraph (c) above, the claim that the Appellant would be imputed with an adverse political opinion by the Iranian authorities for having sought asylum;[28]

e. again for the same reasons, did not accept that the Appellant faced any reasonable possibility of adverse treatment that would engage Nauru's international obligations.[29]

18. On 6 May 2016, the Appellant filed a Notice of Appeal (which was subsequently amended on 17 May 2016) in the Supreme Court of Nauru pursuant to s 43 of the Convention Act.[30]

19. The Appellant was self-represented for the entire Supreme Court appeal process. In summary, his grounds of appeal were that:

a. the Tribunal failed to consider his mental health condition and the impact this had on his memory, stress and mental capacity;

b. the Tribunal was unreasonable in its treatment of inconsistencies in the Appellant's evidence;

c. the Tribunal rejected the Appellant's claim that he was stateless without any proper basis; and

d. the Tribunal made adverse credibility findings without any proper basis.[31]

20. The Supreme Court heard the appeal on 25 May 2017.[32] On 29 August 2017, Crulci J dismissed the appeal and affirmed the decision of the Tribunal, pursuant to s 44 of the Convention Act.

Part VI: Argument

21. This is an appeal from that decision of the Supreme Court of Nauru. The appeal lies as of right to this Court.[33] The grounds of appeal raised in this Court were not raised before the Supreme Court of Nauru in their current form.

A. Raising new grounds on appeal

22. The first issue for determination in this case is: in what circumstances can this Court consider new grounds of appeal not raised in the same terms before the Supreme Court of Nauru?

23. In respect of the Convention Act, this Court sits as the first court to hear a matter other than by way of first instance judicial review. This Court is, therefore, in a similar position to the Full Court of the Federal Court of Australia in appeals in proceedings initiated under s 44 of the Administrative Appeals Tribunal Act, and in appeals from first instance review decisions under s 476 or 476A of the *Migration Act* 1958 (Cth) (the **Migration Act**). In appeals of this kind, new questions of law may be raised on appeal before the Full Court of the Federal

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[27] Tribunal decision CB 216 [95]-[96].
[28] Tribunal decision CB 216 [97].
[29] Tribunal decision CB 216-217 [99]-[101].
[30] *WET044 v Republic of Nauru* [2017] NRSC 66 [4], [24]
[31] *WET044 v Republic of Nauru* [2017] NRSC 66 [7].
[32] *WET044 v Republic of Nauru* [2017] NRSC 66 cover sheet.
[33] *BRF038 v The Republic of Nauru* [2017] HCA 44 [40]-[41] (***BRF038***).

Court if it is 'expedient and in the interests of justice' to do so.[34] The same test has been applied in this Court where a new point is sought to be raised on appeal.[35]

24. Unlike the Full Court of the Federal Court, the High Court exercises original jurisdiction in the present case.[36] As such, it has the enlarged powers under s 32 of the *Judiciary Act* 1903 (Cth) to:

> grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter; so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined ...[37]

25. It follows that the test for the introduction of new grounds where the High Court exercises original jurisdiction must be at least as liberal as that which applies on an appeal proper. In the present case, it is expedient and in the interests of justice to allow the Appellant to raise new grounds on appeal in this Court for the following reasons:

    a. Each of the grounds has merit, for the reasons set out below.

    b. As to the reasons why the grounds were not run below, the Appellant was not represented before the Supreme Court of Nauru. He made his submissions to the Supreme Court through an interpreter,[38] and has no legal training in any jurisdiction.[39] He has limited education.[40] In this context, it is inherently unlikely that the Appellant, for some strategic advantage, did not raise grounds below deliberately.[41]

    c. While the grounds were not raised in terms in the Supreme Court of Nauru, they concern matters which *were* raised before the Tribunal. No new facts or evidence are relied upon to substantiate the grounds, which each concern only

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[34] *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73 [19]-[20] per Griffiths and Perry JJ; *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 at 347 [79]-[80] per Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ; *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 at 598 [46] per Kiefel, Weinberg and Stone JJ.

[35] See, eg, *Water Board v Moustakas* (1988) 180 CLR 491 at 497 per Mason CJ, Wilson, Brennan and Dawson JJ, 506 per Gaudron J.

[36] *Ruhani v Director of Police* (2005) 222 CLR 489 and *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561 at [26] per French CJ, Gummow, Hayne and Bell JJ.

[37] This power extends, for example, to the reception of new evidence not placed before the court or tribunal below see *Clodumar* at 574 [34]-[35] per French CJ, Gummow, Hayne and Bell JJ; *Federal Commissioner of Taxation v Lewis Berger and Sons (Australia) Ltd* (1927) 39 CLR 468 at 469-470 per Starke J.

[38] Transcript before the Supreme Court of Nauru p 5 – 7.

[39] This can be inferred from his education and work history contained in his Transfer Interview, CB 6 and his RSD Application, CB 42.

[40] RSD Application, CB 42

[41] *Linkhill Pty Ltd v Director, Officer of the Fair Work Building Industry Inspectorate* (2015) 240 FCR 578 [70].

a question of law.[42]

d. There would be no relevant prejudice to the Respondent (other than potentially, with respect to costs).[43]

The nature of the case also makes it in the interests of justice to allow the new grounds to be raised. It is 'centrally relevant'[44] and a matter of 'particular sensitivity... in refugee cases'[45] that 'serious consequences... may attend a wrongful refusal'.[46] In addition, there is a discernible public interest in this Court determining the new grounds of appeal which raise issues of 'general application' and 'importance'.[47] These factors should also lead to new grounds being heard and determined on appeal in this Court.

B. Grounds of appeal

Ground 1: the Tribunal failed to deal with any of the country information submitted on behalf of the Appellant on his claims as a returnee failed asylum seeker and/or person with an imputed political opinion

26. At paragraph 95 of its reasons, the Tribunal 'agree[d] with and adopt[ed] the reasoning and findings of the Secretary' on the question of whether the Appellant faced a well-founded fear of persecution due to his membership of the particular social group of 'failed asylum seekers'. At paragraph 97, the Tribunal rejected his claim that he would be imputed with an adverse political opinion for having sought asylum 'for the same reasons'. At paragraph 101, the Tribunal relied on the same reasons for rejecting the Appellant's claim for complementary protection.

27. In his determination, the Secretary found that the relevant country information *before him*[48] indicated that 'seeking asylum overseas per se [would] not lead to harsh action by the authorities on return to Iran', rather that it depended on a 'person's actions while overseas and the authorities' view of that person's potential to engage in protest action on return'.[49] As the Secretary was satisfied that the Applicant did not have 'any adverse political profile', he did not accept that there was 'a reasonable possibility that the Applicant would experience persecutory harm for reasons of being a failed asylum seeker if he were to return to Iran.'[50] The Secretary further concluded, with regard to the Appellant's claim to

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[42] Further, the fact that the Appellant feared harm upon return to Iran by reason that he was a failed asylum seeker and a Kurd was recognised by the Supreme Court and recorded in its judgment (*WET044 v Republic of Nauru* [2017] NRSC 66 at [6]), albeit that these matters were not the subject of the grounds of appeal raised by the Appellant.

[43] *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 [62].

[44] *SZKCQ v Minister for Immigration and Citizenship* [2009] FCA 578 [9].

[45] *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 [22].

[46] *SZEPN v Minister for Immigration and Multicultural Affairs* [2006] FCA 886 [16]; see also *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73 [56-58] per Mortimer J.

[47] *Lobban v Minister for Justice* (2016) 244 FCR 76 [73]-[74], and see also *Parker v Minister for Immigration and Border Protection* [2016] FCAFC 185 [31].

[48] That material is recorded in the Secretary's Determination at CB 58-59, and discussed, with relevance to the claim that the Appellant would be persecuted or harmed as a failed asylum seeker, at CB 63-64.

[49] Secretary's Determination, CB 64.

[50] Secretary's Determination, CB 65.

complementary protection, that he had 'no evidence before [him] to find that there is a reasonable possibility that the Applicant would face harm if returned to Iran which would constitute a breach of Nauru's international obligations'.[51]

28. The Secretary made his decision on 30 August 2015.[52] The Tribunal made its decision on 1 February 2016.[53] Between those dates,[54] the Appellant filed extensive submissions which included country information directly on the question of whether the Appellant had a well founded fear of persecution based on being part of particular social group (of failed asylum seekers) and/or his imputed political opinion because he had unsuccessfully claimed asylum.[55] Most of that country information was not considered by the Secretary because it was not before him.[56] By adopting the reasoning and findings of the Secretary without also dealing with the substantial additional country information submitted by the Appellant after those reasons and findings were made, the Tribunal was in error of a kind that amounts to an error of law.

29. It is not open to the Respondent to suggest that it might be inferred that the Tribunal did in fact consider the country information provided by the Appellant. That is so for two reasons:

    a. In reaching its conclusion, the Tribunal confined itself to 'the reasoning and findings of the Secretary'. Manifestly, that reasoning and those findings could not have taken into account material which was not before the Secretary.

    b. Consistently with the obligation under s 22 of the Convention Act to 'act according to the principles of natural justice and the substantial merits of the case', the Tribunal is obliged under s 34(4)(d) to 'give... a written statement that... refers to the evidence and other material on which the findings of fact were based.' Section 34(4)(a)-(d) adopts the wording of s 430(1)(a)-(d) of the Migration Act, of which this Court has observed that it may be inferred that any matter not mentioned in a s 430 statement was not considered by the Tribunal to be material.[57] Further, a failure to refer to and make findings with respect to particular matters may 'reveal failure to exercise jurisdiction, whether actual or constructive, and, also, failure to conduct a review as required by the Act'.[58]

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[51] Secretary's Determination, CB 66.
[52] Secretary's Determination, CB 66.
[53] Tribunal Decision, CB 199
[54] Appellant's Submissions to the Tribunal, CB 73
[55] Appellant's Submissions to the Tribunal, CB, 78-79, 99 - 105
[56] As a comparison of the country information before the Secretary (CB 58-59) and considered by him (at CB 63-64), with that provided to the Tribunal in the Appellant's submission (CB 99-108) readily demonstrates.
[57] See *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (***Yusuf***) at 331-332 [10] per Gleeson CJ, 338 [34] per Gaudron J, 346 [69] per McHugh, Gummow and Hayne JJ; see further *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 (***MZYTS***) at 447 [50] ('[t]he absence from the recitation of country information of the material referred to in the post-hearing submissions is indicative of omission and ignoring, not weighing and preference'), 449 [61] (citing *Yusuf* at [69]) per Kenny, Griffiths and Mortimer JJ.
[58] *Yusuf* at [44] per Gaudron J, referred to in *MZYTS* at 449 [60]. See further *Yusuf* at 331-332 [10] per Gleeson CJ, 338 [34], 340 [44] per Gaudron J, 346 [68]-[69] per McHugh, Gummow and Hayne JJ; *MZYTS* at 447 [49], 449 [59].

30. It follows that a failure by the Tribunal to advert in its reasons to independent country information and submissions presented to it may lead to the conclusion that it failed to consider those matters or that it considered them but found them not to be material. Either may reveal that the Tribunal fell into jurisdictional error by failing in its statutory task, by failing to take into account a relevant consideration or taking into account an irrelevant consideration, or asking itself the wrong question.[59] Jurisdictional error arises when 'a submission of substance'[60] or evidence of 'significance'[61] is not evaluated,[62] as happened in this case.

10 31. In this case, the Tribunal was presented with, but did not consider or take account of, country information which was mostly not before the Secretary but which contradicted the analysis and conclusion of the Secretary. That country information included:

a. that 'failed asylum seekers could be prosecuted for making up accounts of alleged persecution';[63]

b. that Iranian authorities have recently signaled that Iranians who have sought asylum abroad should be charged for 'dissemination of false propaganda against the Islamic Republic of Iran';[64]

c. that '[t]orture and other ill-treatment, particularly during pre-trial detention
20 remained common' in Iran in 2014, 'facilitated by routine denial of access to lawyers and the virtual impunity of perpetrators';[65]

d. observations by an Iranian judge that 'Asylum seekers are interrogated on return, whether or not they have been political activists in Iran or abroad....Returnees will therefore be held for a few days until it is clear to the police, that they have not been involved in political activity';[66]

e. that the Iranian authorities dealt with returned asylum seekers in an 'arbitrary' and 'unpredictable' manner. For example, an Iranian was arrested

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[59] *Craig v South Australia* (1995) 184 CLR 163 at 179; *Yusuf* at 351 [82] per McHugh, Gummow and Hayne JJ.

[60] *SZSSC v Minister for Immigration and Border Protection* (2014) 317 ALR 365 at [75]-[76], [78]-[81] per Griffiths J, citing *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [24] per Gummow and Callinan JJ, *SZRBA v Minister for Immigration and Border Protection* (2014) 314 ALR 146 at 149 [11] per Siopsis, Perram and Davies JJ and *MZYTS* at [38].

[61] *Minister for Immigration and Multicultural Affairs v SBAA* [2002] FCAFC 195 at [44] per Wilcox and Marshall JJ; see also *W280 v Minister for Immigration and Multicultural Affairs* [2001] FCA 1606 at [26] per French J

[62] See also *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157 [47].

[63] Amnesty International article dated 28 February 2012 as cited in Appellant's submissions to the Tribunal, CB 102.

[64] Iran Human Rights article dated 23 March 2011 as cited in Appellant's Submissions to the Tribunal, CB 103.

[65] United States Department of State report dated 25 June 2015 as cited in the Appellant's Submissions to the Tribunal, CB 107.

[66] Amnesty International report dated 28 February 2012 as cited in Appellant's Submissions to the Tribunal, CB 101.

after her deportation to Iran although she had no political profile;[67] and

f. direct criticism and contradiction of comments made by Hassan Qashqavi, the Deputy Foreign Minister for Consular, Parliamentary, and Iranian Expatriate Affairs, which were relied on by the Secretary in his decision.[68]

32. The country information therefore indicated that returned failed asylum seekers, including those without a pre-existing political profile, were subject to mistreatment that could give rise to:

a. a well-founded fear of persecution on the basis of being a failed asylum seeker and/or being imputed with an adverse political opinion for claiming asylum from Iran; and/or

b. a real risk of torture, cruel or inhuman treatment or punishment, which would engage Nauru's *non-refoulement* obligations under s 4(2) of the Convention Act.[69]

33. The additional country information provided to the Tribunal 'cast a different light on the position'[70] to that which obtained before the Secretary. Yet, not only did the Tribunal fail to mention that information in its reasons, but in reaching its

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[67] Swiss Refugee Council report dated 18 August 2011 as cited in Appellant's Submissions to the Tribunal, CB 103.

[68] Article 19 article dated 15 May 2014 as as cited in Appellant's Submissions to the Tribunal, CB 103-104.

[69] Section 4(2) provides that Nauru 'must not expel or return any person to the frontiers of territories in breach of its international obligations'. The following international obligations are of relevance:

1. Article 33 of the Convention relating to the Status of Refugee (**Refugee Convention**), which Nauru signed and ratified, prohibits the expulsion or return of a refugee to frontiers of territories where their life or freedom would be threatened, including on account of membership of a particular social group or their political opinion, imputed or actual;
2. Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment,* which Nauru has signed and ratified, prohibits Nauru from expelling, returning or extraditing a person to a country where there are substantial grounds for believing that they would be in danger of torture;
3. Human Rights Committee, General Comment No 31 (2004) [12] states that Article 2 of the *International Covenant on Civil and Political Rights,* which Nauru has signed and indicated its intention to be bound but not ratified, confers an obligation not to return a person from their territory to a country '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 [ICCPR]';
4. Article 19(a) of the *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia* (**MOU**) in which Nauru assured Australia that it would not expel or return a person to another country where his or her life or freedom would be threatened, including on account of his or her membership of a particular social group or political opinion;
5. Article 19(c) of the MOU in which Nauru assured Australia that it will not send a person to another country where there is a real risk that that person will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty.
6. The prohibition of refoulement of non-citizens to a country where they are at risk of torture or cruel, inhuman or degrading treatment or punishment is considered to be a principle of customary international law to which Nauru would be bound: Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Feller, Turk and Nicholson (eds), Refugee Protection in International Law, available at http://www.unhcr.org/419c75ce4.pdf, p 149 -163.

[70] *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174 at [67].

conclusion it relied *solely* on the reasoning and findings of the Secretary based on the *different, smaller* suite of information before him. In doing so, the Tribunal fell into jurisdictional error.

34. In failing to consider the country information the Tribunal revealed that it had failed to undertake its statutory task[71] to determine whether the Appellant is to be recognised as a refugee or is entitled to complementary protection: ss 4, 6(1)(a) and 34(1) of the Convention Act. While there was no requirement on the Tribunal to accept that country information, it was bound to 'deal with it' in carrying out its statutory function.[72] The error was one of law because the determination of a real possibility of the relevant harm is a central and important part of the determination of whether the Appellant was owed protection under the Convention Act.[73] Insofar as there was a failure to give some explanation of its preference for one conclusion over another, the Tribunal failed to comply with its statutory obligation under s 34 and thereby fell into jurisdictional error.

Ground 2: denial of procedural fairness in respect of country information relied upon

35. The Tribunal accepted that the Appellant was a Faili Kurd by ethnicity who had 'experienced some discrimination because of his ethnicity.'[74] However, it concluded that 'there is nothing before it which indicates that there is a real possibility that harm amounting to persecution will befall the applicant because of his ethnicity'.[75]

36. The Tribunal then proceeded expressly to 'note' – apparently by way of (at least) fortification for that conclusion – two specific items of country information sourced from documents dated August 2015 and 25 June 2015 respectively.[76] The country information included the following two passages, on which the Tribunal apparently relied:

> 'It was considered that generally, no matter what ethnic or religious background, an individual has, if he or she plainly accepts and lives by the Islamic regime, he or she will be left alone. However, there is institutional discrimination in Iran and it would for example be harder for a Kurd to get a job compared to a Persian Iranian ... it was considered that Kurds would be subject to harsher treatment from the authorities than ethnic Persians.'[77]
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> 'While the constitution grants equal rights to all ethnic minorities and allows for minority languages to be used in the media and in schools, minorities did not enjoy equal rights, and the government consistently denied their right to use their languages in school. In addition, the

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[71] See *MZYTS* at 449 [57]; *Yusuf* at 351 [82]; *Craig v South Australia* (1995) 184 CLR 163 at 179.
[72] *MZYTS* at 445 [42]; *Minister for Immigration and Border Protection v CZBP* [2014] FCAFC 105 at [65] per Gordon, Robertson and Griffiths JJ.
[73] *Minister for Immigration v Citizenship v SZRKT* [2013] FCA 317 at [111]; followed in *MZYTS* at [70].
[74] Tribunal Decision, CB 214 [88].
[75] Tribunal Decision, CB 215 [90].
[76] Ibid.
[77] *Viz,* the August 2015 UK Home Office report cited at footnote 6 of the Tribunal decision (**August 2015 document**), CB 215 [90].

> Gozinesh (selection) law prohibits non-Shia ethnic minorities from fully participating in civic life. The law and its associated provisions make full access to employment, education, and other areas conditional on devotion to the Islamic republic and the tenets of Shia Islam.'[78]

37. The Tribunal then concluded, apparently on the basis of this information, that 'certain discriminatory provisions apply only to those who are not Shia Muslim. The applicant is part of the majority religion... There is nothing to show that he does not "accept and live by the Islamic regime".'[79] It then determined that '[o]n all the material before it, the Tribunal is not satisfied that the applicant has suffered serious harm in the past for reason of his Kurdish ethnicity' or 'that there is a real possibility that such harm will befall him in the reasonably foreseeable future'.[80]

38. A different document to the August 2015 document, containing the first passage cited above, was referenced in the Secretary's determination.[81] However, in citing the passage in support of his conclusion that 'there is not a reasonable possibility the Applicant would be targeted by the Iranian authorities for reason of his Kurdish ethnicity upon return to Iran', the Secretary made no reference to, and did not suggest that his conclusion somehow rested upon, the Appellant's religious identification.[82] Similarly, while the June 2015 document, which contained the second passage, was referenced in the written submissions filed by the Appellant in the Tribunal,[83] his submissions on that document extracted only country information relating to the treatment of prisoners in Iran.

39. At no point in the hearing before the Tribunal or otherwise was the Appellant put on notice of the distinction drawn by the Tribunal in reliance upon these passages; ie to the effect that the country information demonstrated that Kurds who 'accept and live by the Islamic regime' or are 'devot[ed] to the Islamic republic and the tenets of Shia Muslim' are not liable to face discriminatory treatment, or discrimination of the same order as those who are not. He did not have an opportunity to make submissions on the propositions which the Tribunal drew from those documents, to reach the conclusions adverse to his claim at paragraphs 90 to 93. Further, he did not have the opportunity to make submissions on the particular country information sourced from the June 2015 document at all, either in writing or orally at the hearing. That document was also not before the Secretary.[84]

40. Nor was the Appellant asked about whether he was in fact *and identifiably* devoted to 'the Islamic republic and the tenets of Shia Islam'; this was apparently

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[78] *Viz*, the 25 June 2015 United States Department of State report cited at footnote 7 of the Tribunal decision (**June 2015 document**), CB 215 [90].
[79] Tribunal decision, CB 215 [91].
[80] Ibid, CB 216 [93].
[81] *Viz*, the 2013 report from the Danish Refugee Council cited at footnote 8, CB 62 in the Secretary's Determination, which appears to cite the same passage as the August 2015 document referred to in footnote 6, CB 215.
[82] Secretary's determination, CB 62.
[83] *Viz*, the June 2015 document referred to in footnote 7, CB 215, which was referenced in the Appellant's submissions to the Tribunal at footnote 159, CB 107.
[84] Secretary's determination, CB 58 – 59.

an assumption made by the Tribunal on the basis that he self-identified as Shia Muslim in his Transfer interview and RSD Application.[85] The only time he was asked about his religion by the Tribunal was when he was asked whether he would like to take an oath or affirmation when giving evidence to the Tribunal. He asked for the 'non-religion' option.[86] While there was evidence and findings of the Tribunal to the effect that his Kurdish ethnicity was apparent to the outside observer by his clothing or through his accent,[87] there was no evidence with respect to whether such an observer would or could have concluded that he was 'part of the majority religion'.[88]

41. As this Court recently stated in *BRF038*, the common law principles of procedural fairness apply to the Nauruan Tribunal[89] and those principles require that an affected person be 'put on notice of "the nature and content of information [that] might be taken into account as a reason for coming to a conclusion adverse to the person"'.[90] That is, there is a 'right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker.'[91]

42. As it was in *BRF038*, so too in this case did the Tribunal 'expressly refer[...] to this information in the course of reaching its conclusion [and] while not necessarily determinative, [this] goes some way to demonstrating that the information was integral to the Tribunal's conclusion.'[92] In the context where the ultimate question is one of 'degree and proportion',[93] any such adverse information is bound to have a role to play in reaching the ultimate conclusion in an inquiry of this kind.

43. The opportunity to respond to the country information on which the Tribunal relied at paragraph 90 to reject the Appellant's claims regarding his future risk of harm as a Faili Kurd was denied to the Appellant. It follows that he was denied procedural fairness by the Tribunal and its decision was infected by an error of law as a result.

Conclusion

44. For the reasons outlined above, it is respectfully submitted that the High Court ought, pursuant to s 8 of the *Nauru (High Court Appeals) Act* 1976 (Cth), make the orders set out in Part VIII below.

Part VII: Legislative provisions

45. The applicable statutes and regulations are attached as Annexure A.

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[85] Transfer interview, CB 7; RSD Application, CB 28.
[86] Tribunal hearing transcript, CB 143 line 36 – 40; see also CB 13, albeit that he did identify as a Shia Muslim when asked; see CB 7, 28.
[87] Transfer interview, CB 13-14; Statement in RSD Application, CB 45 [17], [19], Tribunal decision, CB 215 [90].
[88] Tribunal decision CB 215 [91].
[89] *BRF038* at [56].
[90] *BRF038* at [58]
[91] *BRF038* at [59]
[92] *BRF038* at [62]
[93] *BRF038* at [43], [63]

Part VIII: Orders sought

46. The orders sought by the Appellant are:

a. The appeal be allowed.

b. The orders made by the Supreme Court of Nauru on 29 August 2017 be quashed.

c. The matter be remitted to the Refugee Status Review Tribunal for reconsideration according to law.

d. The Respondent pay the Appellant's costs of the appeal to this Court.

e. Such further or other orders as the Court deems appropriate.

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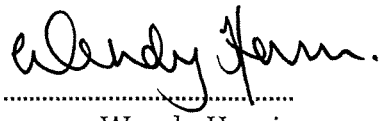
Part IX: Oral argument

47. The Appellant estimates that he will require 1½ hours to present oral argument.

Dated: 1 November 2017



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