IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M 132 of 2017

BETWEEN:

WET 044
Appellant

and

Republic of Nauru
Respondent

RESPONDENT'S SUBMISSIONS

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PART I PUBLICATION

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

PART II ISSUES

2. The issues raised by the appeal are:

   (a) whether the appellant should be granted leave to advance grounds of appeal that were not argued before the Supreme Court of Nauru; and

   (b) if so:

      (i) whether, in respect of the appellant's claims to fear persecution in Iran as a failed asylum seeker, the Refugee Status Review Tribunal:

         A. failed to consider written submissions made by the appellant, including country information to which those submissions referred; and

         B. therefore did not comply with s 22 or 34 of the *Refugee Convention Act 2012* (Nr) (the **Act**); and

      (ii) whether, in respect of the appellant's claims to fear persecution in Iran as a Faili Kurd, the Tribunal:

         A. failed to put adverse country information to the appellant; and

         B. therefore did not comply with s 22 of the Act.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The respondent, the Republic of Nauru, has considered whether or not notices should be given pursuant to s 78B of the *Judiciary Act 1903* (Cth). It considers that no such notices are necessary.

PART IV FACTS

Introduction

4. The appellant was born in Iran in 1982 and lived there until 2013. He arrived at Christmas Island in July 2013 and was transferred to Nauru in February 2014.

The appellant's protection claims

5. On 24 May 2014, the appellant applied to the Secretary of the Department of Justice and Border Control to be recognised as a refugee or as a person owed complementary protection.

6. The appellant relevantly claimed that, upon any return to Iran, he would face serious harm as a failed asylum seeker and due to his asserted status as a stateless and undocumented Faili Kurd.

The Secretary's determination

7. In a determination dated 30 August 2015, the Secretary found that the appellant was not a refugee. The Secretary was not otherwise satisfied that the appellant was owed complementary protection.

8. The Secretary accepted that the appellant was Kurdish. However, having regard to information given by the appellant soon after his arrival in Nauru, the Secretary found that:

   (a) the appellant was an Iranian citizen and was not stateless;

   (b) the appellant had completed military service in Iran; and

   (c) the appellant had left Iran using his genuine Iranian passport.

9. The Secretary accepted that, if the appellant returned to Iran, he could be recognised as Kurdish and might face some discrimination. However, having regard to country information about the treatment of Kurds in Iran, the Secretary was not satisfied that the appellant had a profile that would, in the reasonably foreseeable future, give rise to a real possibility of persecution from the authorities or others on the basis of his ethnicity.

10. The Secretary also considered country information about the treatment of failed asylum seekers in Iran. The Secretary did not accept that, in the absence of any political or other profile, the appellant would face a risk of serious harm in Iran as a failed asylum seeker.

The Tribunal's review

11. On 10 September 2015, the appellant applied to the Tribunal for review of the Secretary's determination.

12. The appellant made written submissions dated 29 November 2015.[1] The written submissions referred to, among other things, country information about the treatment of Faili Kurds and returned asylum seekers in Iran.

13. The appellant attended a hearing before the Tribunal on 7 December 2015, at which time he gave evidence and made oral submissions.

The Tribunal's decision

14. On 1 January 2016, the Tribunal affirmed the Secretary's determination. The Tribunal was not satisfied that the appellant was a refugee or was owed complementary protection.

15. The Tribunal accepted that the appellant was a Faili Kurd. Like the Secretary, however, the Tribunal did not accept that the appellant was stateless. The Tribunal was satisfied that the appellant was an Iranian citizen who had completed military service and lawfully departed Iran on his own genuine Iranian passport.

16. The Tribunal did not accept that there was a real possibility that the appellant would face persecution in Iran in the reasonably foreseeable future simply because of his Kurdish ethnicity. In making that finding, the Tribunal referred to country information about treatment of Kurds and other minorities in Iran.[2]

17. The Tribunal otherwise did not accept that the appellant had a well-founded fear of persecution in Iran by reason of his status as a failed

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1 At all times before the Tribunal, the appellant was represented.
2 See paragraphs 90 to 93 of the Tribunal's decision.

asylum seeker in Nauru.[3] The Tribunal stated that it 'agrees with and adopts the reasoning and findings of the Secretary on this point'. The Tribunal also referred to the appellant's lawful departure from Iran on his genuine Iranian passport.

18. The Tribunal therefore rejected the appellant's claims to be a refugee.[4] The Tribunal also rejected the appellant's complementary protection claims.[5]

The proceeding before the Supreme Court

19. The appellant then appealed to the Supreme Court from the Tribunal's decision. Among other things, he claimed that the Tribunal had made adverse factual findings, including adverse credibility findings, which were unreasonable or without proper basis.[6]

The Supreme Court's reasons for judgment

20. On 29 August 2017, the Supreme Court delivered its judgment. The Supreme Court dismissed the appellant's appeal. The Supreme Court considered that the Tribunal's factual findings were open to it on the materials before it and did not disclose legal error.[7]

The appeal to the High Court

21. On 12 September 2017, the appellant appealed to the High Court.

PART V LEGISLATION

22. The Republic does not intend to refer to legislative provisions other than or in addition to the legislative provisions set out in the appellant's submissions dated 1 November 2017.

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3 See paragraphs 95 to 97 of the Tribunal's decision.
4 See paragraph 98 of the Tribunal's decision.
5 See paragraphs 99 to 101 of the Tribunal's decision.
6 See, for instance, *WET 044 v Republic of Nauru* [2017] NRSC 66, [7] and [30].
7 See *WET 044 v Republic of Nauru* [2017] NRSC 66, [36]-[54].

PART VI ARGUMENT

Introduction

23. The appellant seeks leave to advance two new arguments for the first time on appeal to the High Court. It would not, however, be expedient in the interests of justice to permit him to do so.[8] First, the new arguments would require consideration of evidence, which was not before the Supreme Court, relating to the contents of items of country information about Iran.[9] Second, the new arguments do not, for the following reasons, have sufficient prospects of success to warrant the grant of leave.

First proposed ground of appeal – failed asylum seeker claim

24. Section 22 of the Act relevantly provides that the Tribunal must act according to the principles of natural justice. Those principles generally entitle a person likely to be affected by a decision to put information and submissions to the decision-maker in support of an outcome that supports the person's interests.[10]

25. Subsection 34(4) relevantly provides that the Tribunal must give an applicant a written statement that:

    (a) sets out the decision of the Tribunal on the review;

    (b) sets out the reasons for the decision;

    (c) sets out the findings on any material questions of fact; and

    (d) refers to the evidence or other material on which the findings of fact were based.

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8 *O'Brien v Komesaroff* [1982] HCA 33; (1982) 150 CLR 310, 319 and 329-330; *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1, 7-8.

9 See, for example, footnote 26 below. A person claiming a denial of procedural fairness bears the onus of making out the factual foundation for the claim.

10 *BRF038 v Republic of Nauru* [2017] HCA 44, [59].

26. The appellant seeks to argue that, in respect of his claims to fear persecution in Iran as a failed asylum seeker, the Tribunal:

    (a) failed to consider his written submissions, including the country information to which those submissions referred; and

    (b) therefore did not comply with s 22 or 34 of the Act.

27. In considering the claims to fear persecution as a failed asylum seeker, the Tribunal referred in some detail to the Secretary's determination.[11] The Tribunal stated that:

> ... The Tribunal agrees with and adopts the reasoning and findings of the Secretary on this point, and also notes that while it may be prepared in light of the country information set out in the Secretary's decision to accept that failed asylum seekers can constitute a particular social group in Iran, it does not accept that mere membership of this group gives rise to well-founded fear of being persecuted.[12]

28. The appellant's first new argument rests on an assumption that, having agreed with the Secretary's reasoning and findings, the Tribunal must have 'confined itself' to consideration of the country information before the Secretary and therefore ignored the written submissions lodged with the Tribunal. That assumption is unfounded. It should not be assumed that the Tribunal confined itself to consideration of the country information before the Secretary or ignored the written submissions lodged with the Tribunal.

29. The Tribunal referred to the written submissions at the hearing before it and in its decision.[13] Those references do not support an inference that the Tribunal failed to have regard to the submissions.

30. Among other things, the Tribunal mentioned at the hearing that it had considered country information about the treatment of failed asylum seekers in Iran, including country information set out in the Secretary's

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[11] See paragraph 32 of the Tribunal's decision.

[12] Paragraph 95 of the Tribunal's decision. See also paragraphs 96, 97 and 101 of the Tribunal's decision.

[13] See pages 50 (lines 34-43) and 51 (lines 10-19) of the transcript of the hearing before the Tribunal. See paragraphs 69 and 100 of the Tribunal's decision. See also page 53 (lines 3 and 11) of the Tribunal hearing transcript.

decision. The Tribunal then stated to the appellant and his representative that:

> The country information suggests it's only those ones who have some sort of political profile, who have been activists or been speaking out against the government or bringing – sorry – or drawing attention – publicly drawing attention to human rights abuses in Iran. It's those sort of people who get problems if they're sent – if they've failed – if they go back as failed asylum seekers. Now, the submissions I understand have identified and raised some arguments to suggest that it's broader than that, and I appreciate that. But nevertheless, we have concerns that simply being a failed asylum seeker will give rise to a well-founded fear of being persecuted for a Convention reason or lead to – or involve a breach of Nauru's international obligations.[14]

31. As such, the Tribunal informed the appellant and his representative that:

    (a) in considering country information about the treatment of failed asylum seekers in Iran, it had had regard to the written submissions; and

    (b) it nonetheless remained concerned that a person's status as a failed asylum seeker did not, of itself, give rise to a well-founded fear of persecution or complementary protection obligations.

32. Shortly after the Tribunal made this statement to the appellant and his representative, the Tribunal briefly adjourned the hearing to give the appellant and his representative an opportunity to consider any response. The hearing later resumed and the appellant made a short statement and his representative made submissions on his behalf.

33. Further, and in any event, the Tribunal was not obliged to give, in its decision, a line-by-line refutation of information contrary to its findings of material fact.[15] Section 34 of the Act did not impose an obligation on the Tribunal to deal with, in its decision, information in the written submissions which was contrary to the Tribunal's findings of fact. Rather,

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[14] Page 51 (lines 10-19) of the transcript of the hearing before the Tribunal.

[15] *Re Minister for Immigration and Multicultural Affairs; ex parte Durairajasingham* [2000] HCA 1; (2000) 168 ALR 407, [65]; *Minister for Immigration and Border Protection v CZBP* [2014] FCAFC 105, [102]; *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10, [14]. See also *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; (2010) 243 CLR 164, [35].

s 34 directed the Tribunal to record in its decision the evidence on which its findings were based.[16]

34. Further, and in any event, the appellant has not shown how any express rejection of information in the written submissions might have constituted a necessary reason for the Tribunal's decision.[17] Accordingly, the absence of any express rejection of that information by the Tribunal in its decision does not give rise to an inference that the information was ignored or overlooked. That is, having regard to the Tribunal's agreement with the reasoning and findings of the Secretary and the terms of that reasoning and those findings, there was no requirement for the Tribunal to address explicitly in its reasons the information in the written submissions.

35. In this regard, the appellant appears to claim that six pieces of information in the written submissions lodged with the Tribunal were 'not before the Secretary' and 'contradicted the analysis and conclusion of the Secretary'.[18] That claim is not made out.

36. The reasoning and findings of the Secretary were relevantly as follows:

    (a) the Secretary accepted that the Iranian authorities might consider the appellant to be a person who had sought asylum overseas;[19]

    (b) the Secretary found that instances of detention and mistreatment of failed asylum seekers on return to Iran involved returnees who had some profile of interest other than being a failed asylum seeker;[20]

    (c) the Secretary further found that the appellant did not have an adverse political or other profile;[21]

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16 *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323, [67]-[69]; *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; (2011) 241 CLR 594, [31].

17 *Re Minister for Immigration and Multicultural Affairs; ex parte Durairajasingham* [2000] HCA 1; (2000) 168 ALR 407, [65]; *Minister for Immigration and Border Protection v CZBP* [2014] FCAFC 105, [102].

18 Paragraph 31 of the appellant's submissions to the High Court.

19 Pages 9.2 and 13.1-2 of the Secretary's decision.

20 Page 12.8-9 of the Secretary's decision.

21 Pages 10.6-8 and 13.3 of the Secretary's decision.

(d) the Secretary found that the appellant had departed Iran lawfully on his own genuine Iranian passport;[22]

(e) although the Secretary accepted that the appellant would need to acquire and use a new travel document for any return to Iran, the Secretary did not accept that the authorities would target him for that reason;[23] and

(f) the Secretary did not accept that there was a reasonable possibility that, on any return to Iran, the appellant would experience persecutory harm due to his status as a failed asylum seeker.[24]

37. In his decision, the Secretary referred to country information about treatment of failed asylum seekers in Iran.[25] Importantly, that country information included four of the six pieces of information which the appellant claims were 'not before the Secretary'.[26] Contrary to what is suggested by the appellant, only two of those pieces of information were 'not before the Secretary'. It was therefore only those two pieces of information that, on the appellant's new argument, the Tribunal might have had cause to mention expressly in its decision.[27]

38. However, those two pieces of information were not relevant to the Tribunal's reasoning. As such, a failure by the Tribunal to mention expressly those pieces of information in its decision does not suggest that they were ignored or overlooked. The two pieces of information did not, contrary to what is asserted by the appellant, indicate 'that returned failed asylum seekers, including those without a pre-existing political profile,

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22 Pages 10.6-8 and 13.3 of the Secretary's decision.
23 Pages 11.9 to 12.1 and 13.1-4 of the Secretary's decision.
24 Page 13.4-5 of the Secretary's decision.
25 Pages 6.4 to 7.5 and 11.3 to 12.7 of the Secretary's decision.
26 See pages 6.4 to 7.5 of the Secretary's decision. The report containing the information described in subparagraphs 31(a) and (d) of the appellant's submissions to the High Court was before the Secretary. The information described in subparagraph 31(b) of the appellant's submissions was quoted in a report before the Secretary, namely the report of the Immigration Refugee Board of Canada dated 10 March 2015. The information described in subparagraph 31(e) of the appellant's submissions was also quoted in a report before the Secretary, namely the report of the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) dated July 2015.
27 See paragraph 33 of the appellant's submissions to the High Court.

were subject to mistreatment'.[28] One piece of information related generally to '[t]orture and other ill-treatment' in detention in Iran[29] and the other piece of information concerned the return to Iran of failed asylum seekers with a pre-existing political profile.[30] Neither of those pieces of information 'contradicted the analysis and conclusion of the Secretary' as adopted by the Tribunal in its reasons.

39. In all the circumstances, it cannot be said that the Tribunal failed to have regard to the written submissions and the information in those submissions. The appellant has not shown any denial of procedural fairness. Nor has he established any failure to comply with s 22 or 34 of the Act.

Second proposed ground of appeal – Faili Kurd claim

40. In requiring the Tribunal to act according to the principles of natural justice, s 22 of the Act requires the Tribunal to give procedural fairness to an applicant. Ordinarily, that requires the Tribunal to give an applicant a reasonable opportunity to comment on adverse information that is credible, relevant and significant.[31] Procedural fairness does not, however, require the Tribunal to reveal to an applicant that the Tribunal intends to rely on information of which the applicant is or should be aware.[32]

41. The appellant seeks to argue that, in respect of his claims to fear persecution in Iran as a Faili Kurd, the Tribunal:

    (a) failed to put adverse country information to him; and

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28 Paragraph 32 of the appellant's submissions to the High Court.

29 See subparagraph 31(c) of the appellant's submissions to the High Court. In footnote 65 of the appellant's submissions, the source of this information is described inaccurately. Cf. page 35 of the appellant's submissions to the Tribunal.

30 See subparagraph 31(f) of the appellant's submissions to the High Court. See also pages 31 to 32 of the appellant's submissions to the Tribunal.

31 *BRF038 v Republic of Nauru* [2017] HCA 44, [60].

32 *Re Minister for Immigration and Multicultural Affairs; ex parte Cassim* [2000] HCA 50; (2000) 175 ALR 209, [22]; *Milne v Minister for Immigration and Citizenship* [2011] FCAFC 41; (2011) 120 ALD 405, [53]; *Pilbara Land Council v Minister for Aboriginal and Torres Strait Islander Affairs* [2000] FCA 1113; (2000) 103 FCR 539, [71]. See also *Commissioner for ACT Revenue v Alphaone Pty Ltd* [1994] FCA 1074; (1994) 49 FCR 576, 591-592.

(b) therefore did not comply with s 22 of the Act.

42. The appellant's new argument relates to the Tribunal's reference in its decision to two pieces of country information about the treatment of Kurds in Iran.[33] The argument is unsustainable because the two pieces of information were known to the appellant and the Tribunal's findings based on that information were obviously open.

43. The first piece of information was as follows:

> 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.[34]

44. That information was, or should have been, known to the appellant because it was quoted by the Secretary in his decision.[35]

45. The Tribunal's findings based on the information were obviously open to it. Relying on that information, the Secretary had stated that '[c]ountry information does not support a finding that a Kurdish person would be imputed with an adverse political opinion in Iran purely on the basis of his or her ethnicity, without further political or cultural activism on [the] part of the individual'. The Secretary had also found that the appellant did not have such a profile, had completed military service in Iran, and had departed Iran lawfully on his genuine Iranian passport.

46. The second piece of information was as follows:

> 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 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,

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[33] Paragraph 90 of the Tribunal's decision.
[34] Ibid.
[35] Page 10.4-7 of the Secretary's decision.

> and other areas conditional on devotion to the Islamic republic and the tenets of Shia Islam.[36]

47. That information was known to the appellant because it was contained in a report cited in the appellant's written submissions.[37] Those submissions also contained a general statement that 'Faili Kurds are Shi'a Muslim Kurds".[38] That general statement was in no way qualified in relation to the appellant.

48. Having regard to the known information before the Tribunal, it was obviously open to the Tribunal to find that the appellant was 'part of the majority religion' in Iran and, while he might face some discrimination in Iran as a Faili Kurd, 'certain discriminatory provisions' (that is, the Gozinesh or selection law) would not apply to him.

49. In the circumstances, the Tribunal did not deny the appellant procedural fairness or contravene s 22 of the Act.

Conclusion

50. The appeal should therefore be dismissed.

PART VII TIME ESTIMATE FOR THE RESPONDENT'S ORAL ARGUMENT

51. The estimated duration of the presentation of the respondent's oral argument is one hour.

Dated: 24 November 2017

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[36] Paragraph 90 of the Tribunal's decision.
[37] See, for example, page 35 of the appellant's submission to the Tribunal. Cf. footnote 7 to the Tribunal's decision.
[38] See page 13 of the appellant's submission to the Tribunal.