IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **No. M154 of 2017**

BETWEEN:

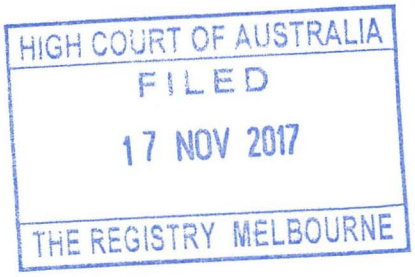
THE REPUBLIC OF NAURU

Appellant

WET 040

Respondent

APPELLANT'S SUBMISSIONS



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I. INTERNET PUBLICATION

1. The Appellant (the **Republic**) certifies that this submission is in a form suitable for publication on the Internet.

II. STATEMENT OF THE ISSUES

2. This appeal presents the following issues:

   2.1. What is the content of the obligation of the Refugee Status Review Tribunal (the **Tribunal**) to give a written statement under section 34(4) of the *Refugees Convention Act 2012* (the **Act**)?

   2.2. Can an inference be drawn from the Tribunal's written statement in this matter that the Tribunal had no evidentiary or rational basis for its conclusions that certain factual allegations made by the respondent were implausible?

   2.3. Was it open to the Supreme Court of Nauru (the **Supreme Court**), in deciding the respondent's appeal against the decision of the Tribunal, to consider and assess for itself that certain factual allegations made by the respondent were 'possible' or 'not inherently improbable', and thereby conclude that the Tribunal made an error of law by concluding that the allegations were implausible?

III. SECTION 78B NOTICES

3. The Republic has considered whether any notices should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth), and has concluded that no such notices need be given.

IV. CITATION

4. The Internet citation of the decision under appeal is *WET 040 v Republic* [2017] NRSC 79, which is available on the website of the Pacific Islands Legal Information Institute.[1]

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[1] http://www.paclii.org/nr/cases/NRSC/2017/91.html

V. RELEVANT FACTS

Chronology of key events

5. On 13 April 2014, the respondent applied to the Secretary of the Department of Justice and Border Control (the **Secretary**) under section 5(1) of the *Refugees Convention Act 2012* (the **Act**) to be recognised as a refugee.

6. On 30 November 2015, the Secretary determined that the respondent is not recognised as a refugee, and is not owed complementary protection.

7. On 4 December 2015, the respondent applied to the Tribunal under section 31(1)(a) of the Act for merits review of the Secretary's determination.

10 8. On 17 October 2016, the respondent appeared at a hearing before the Tribunal.

9. On 5 December 2016, the Tribunal exercised its power under section 34(2)(a) of the Act to affirm the Secretary's determination, and gave the respondent and the Secretary a written statement under section 34(4) of the Act.

10. On 2 February 2017, the respondent appealed to the Supreme Court under section 43(1) of the Act against the Tribunal's decision.

11. On 28 September 2017, the Supreme Court, acting under section 44(1)(b) and (2)(b) of the Act, quashed the decision of the Tribunal and remitted the matter to the Tribunal for redetermination according to law.

Tribunal's decision

20 12. The respondent is a national of Iran. He made various claims to invoke Nauru's protection obligations. Relevantly, he claimed to have a well-founded fear of harm in Iran from (or through the actions of) the family of his wife (Shamim).

13. The Tribunal was not satisfied as to the credibility of the respondent's evidence as to the enmity of his wife's family towards him ([70], [95]). The Tribunal considered that the respondent had provided a "shifting set of explanations for these alleged attitudes" ([70]), which it set out and discussed in considerable detail in its written statement ([71]-[93]).

14. The Tribunal accepted that the respondent's marriage had broken down in 2013, after he discovered that Shamim had been married previously. The Tribunal
30 accepted that, subsequently, his relationship with his wife's family had become acrimonious. There had been "allegations of deception and theft of property on his

side and of domestic violence and failure to pay maintenance on hers", and both parties had resorted to litigation ([94]).

15. However, the Tribunal did not accept that the respondent's "father-in-law or other members of the family have been motivated to harm him by religious fanaticism, a desire to prevent a divorce, a desire to keep secret his wife's first marriage or a fear that he would divulge information about his father-in-law's wrongdoing". The Tribunal did not accept that there was "any credible evidence that the wife's family ever took action to physically harm him or that they sought to go outside the sphere of the courts to seek restitution from him" ([95]).

16. The focus of the respondent's first ground of appeal in the Supreme Court was a part of the Tribunal's written statement where it discussed two aspects of the respondent's claims regarding his wife's family, and his "shifting explanations" for their alleged enmity to him:

16.1. claims regarding his wife's family's involvement in an acid attack on his car ([71]-[74]); and

16.2. claims regarding his wife's plot to have her brother (Ozhan) marry the respondent's sister (Fereshte) as a guarantee against the respondent divorcing her ([75]-[76]).

17. With respect to the first aspect, the Tribunal's written statement relevantly includes as follows (emphasis added):

> [71] The applicant originally claimed, in his RSD application and his RSD interview, that his wife's family were motivated by a desire to prevent him divorcing Shamim, a development which would bring shame and disgrace on her and them and would greatly reduce the chance that she could ever marry again. He claimed this was the reason behind [an] acid attack on his car, said to have been accompanied by a warning from his brother-in-law that he would have acid thrown in his face the next time.
>
> [72] The Tribunal finds this explanation inconsistent with the applicant's other claims about his experiences in Iran. At the time of the alleged acid attack, he and Shamim are said to have been living together in the matrimonial home, albeit under strained circumstances following the revelation of her previous marriage. **The Tribunal is not satisfied that an attack on their joint property such as this could plausibly have been intended to prevent them divorcing.** Nor, as put to the applicant at the hearing, is the Tribunal satisfied that Ozhan or his family could genuinely have expected it would be possible for him to remain in a marriage to Shamim if he had suffered acid thrown in his face or had been otherwise harmed by people following him. The Tribunal notes the applicant's explanation that these threats were only intended to frighten him and would

have been made good only if he had actually divorced but it is not satisfied that their marriage could have continued in the face of such violent menaces from one side of the family.

[73] The Tribunal is reinforced in this by the applicant's evidence at the hearing when he was asked whether he had reported to the police that his brother-in-law had claimed responsibility for the acid attack on his car in an SMS message to his sister Fereshte. He said at first that he did not report it because, like many people, Ozhan had used a cheap SIM card and thrown it away after the call. He then went on to say, inconsistently, that the police had told him than an SMS message would not be regarded by the Courts as proof and if he had pursued the matter he risked Ozhan instigating defamation proceedings against him. There was no indication that the police had even considered investigating the case when presented with this information.

[74] The Tribunal considers that the applicant changed his evidence on this issue when it appeared to him unlikely that the Tribunal would accept he would complain to the police over the attack and then fail to follow up by providing them with evidence pointing to the perpetrator. **The Tribunal also finds it generally implausible that if the police had gone to the trouble of visiting the applicant's house to make a report of an incident involving an unknown perpetrator, they would then ignore the evidence he supplied of the perpetrator's identify and confession, on the grounds that the means by which he had discovered it did not constitute legal proof.** The Tribunal finds this casts doubt over the credibility of his claims about the incident. The Tribunal notes that he has produced a document said to be a police report indicating an unknown person damaged his car with acid, and it is prepared to accept that such an incident did occur. It does not accept that there is any credible evidence to link it with his brother-in-law Ozhan or a threat designed to prevent him divorcing his wife.

18. With respect to the second aspect, the Tribunal's written statement relevantly includes as follows (emphasis added):

> [75] The Tribunal is also not satisfied that the various court cases brought by Shamim's family against the applicant, for domestic violence, return of the dowry and payment of maintenance are at all consistent with the continuation of the marriage and the avoidance of divorce ... The Tribunal is not satisfied that her family would have begun these actions had they been at all concerned to preserve her marriage and prevent the applicant divorcing her.
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> [76] In this context, the Tribunal has also considered the claim that Shamim plotted to have her brother Ozhan marry the applicant's sister Fereshte as a guarantee against the applicant divorcing her. The scheme is said to have been partly successful in that Ozhan established some form or relationship [sic] with the applicant's sister, giving her a mobile phone so they could communicate and, apparently meeting her at various times. He intended to advance things by luring her to his place of work and to rape her, thereby forcing her into a marriage but she was able to escape these

> unwelcome attentions. **As put to the applicant at the hearing, this claims appears to the Tribunal inherently implausible. It also seems implausible that Fereshte could have had any interest in such a person, who is described by the applicant as a violent long-term abuser of methamphetamines and alcohol and who had been jailed many times. Moreover, if the purpose was to prevent a divorce, the secret of Shamim's first marriage must already have been known and the Tribunal finds it additionally implausible that Fereshte would associate herself with a family which had deceived her brother and her family in this way. Further, the Tribunal finds it implausible that such a relationship could have commenced while Fereshte, a girl of only eighteen or nineteen, was still living with her parents.** The Tribunal notes the applicant's explanation that Shamim threatened, or possibly was able, to make Fereshte to emotionally dependent on Ozhan that she would commit suicide if she could not marry him but is not satisfied this could have occurred in the circumstances he describes.

Supreme Court's decision

19. By an amended notice of appeal filed in the Supreme Court on 24 May 2017, the respondent contended (in ground 1) that the Tribunal 'constructively failed to exercise its jurisdiction' or 'failed to carry out and/or complete its statutory task' by making certain findings that did not disclose a 'rational basis or evidentiary foundation'. Those alleged 'findings' were set out in paragraphs 72, 74 and 76 of the Tribunal's written statement, and are bolded in the excerpts of the Tribunal's reasons set out above.

20. The Supreme Court (Crulci J) purported to identify a number of principles relating to the making of findings as to the credibility or plausibility of allegations, and then purported to apply those principles to the impugned parts of the Tribunal's written statement in this case.

21. Crulci J purported to identify the following principles. "[W]hen making a credibility finding, a bare assertion that a claimed event is 'implausible' will only stand if the event is 'inherently unlikely' or 'inherently improbable' or 'so far out of accord with what was likely to occur'" ([34]). Otherwise, in order for the Tribunal to conclude that an allegation is implausible, the Tribunal "must point to 'basic inconsistencies' in the evidence, or 'probative material' or 'independent country information'" ([35]). "The Tribunal must not make findings that are 'largely speculative', a 'matter of conjecture' or 'somewhat inconclusive'" ([37]). Her Honour purported to discern these principles from reasons for decision of the Federal Court of Australia in *W148/00A v Minister for Immigration and Multicultural Affairs* (2001) 185 ALR 703

(Full Court of the Federal Court) and *W64/01A v Minister for Immigration and Multicultural Affairs* [2002] FCA 970 (Lee J).

22. In applying those principles, Crulci J appeared to accept the respondent's contention that that the Tribunal had erred by making various findings in its written statement (bolded above) without any rational or evidentiary basis. In particular, her Honour held as follows:

22.1. With respect to the impugned finding in [72] of the Tribunal's written statement, that "[i]t is possible (as opposed to 'implausible' or 'inherently improbable') that acid could have been thrown over the car to deter the Appellant from obtaining a divorce, especially if the car was owned solely by the Appellant" ([40]).

22.2. With respect to the impugned finding in [74] of the Tribunal's written statement, "[i]t is not 'inherently improbable' that the police would ignore the evidence of the identity of the perpetrator and the confession, because the means through which this had been conveyed did not constitute legal proof"; the Tribunal's finding "was nothing more than a bare assertion" for which "there was no supporting evidence ... including any 'basic inconsistencies' in the Appellant's evidence" ([43]); and

22.3. With respect to the impugned findings in [76] of the Tribunal's written statement, "[t]hese findings ... are not supported by inconsistencies in the Appellant's evidence, or probative material or independent country information"; "[t]he findings are 'speculative' and 'matters of conjecture'" ([45]).

VI. ARGUMENT

(A) LEGISLATIVE FRAMEWORK

23. The Act permits a person to apply to the Secretary to be recognised as a refugee: s 5(1). Upon making such an application, the person is referred to as an "asylum seeker": see the definition in s 3. As soon as practicable after a person becomes an asylum seeker, the Secretary must determine whether he or she is recognised as a refugee or is owned complementary protection: s 6(1), (3). A "refugee" is a person who is a refugee under the Convention Relating to the Status of Refugees done at Geneva on 28 July 151: s 3. "Complementary protection" is defined to mean "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": s 3.

24. A person may apply to the Refugee Status Review Tribunal (the **Tribunal**) for merits review of a determination by the Secretary that he or she is not recognised as a refugee, or that he or she is not owed complementary protection: s 31(1) of the Refugees Act. On review, the Tribunal stands in the shoes of the Secretary and may, *inter alia*, affirm the Secretary's determination or set it aside and substitute a new determination: s 34(1)-(3).

25. Section 34(4) of the Act is important. It provides as follows:

> The Tribunal must give the applicant for review and the Secretary a written statement that:
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> (a) sets out the decision of the Tribunal on the review;
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> (b) sets out the reasons for the decision; and
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> (c) sets out the findings on any material questions of fact; and
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> (d) refers to the evidence or other material on which findings of fact were based.

26. This provision reflects and was clearly modelled on the terms of section 430(1)(a) to (d) of the *Migration Act 1958* (Cth) (**Migration Act**), which imposes on the Administrative Appeals Tribunal (formerly the Refugee Review Tribunal) an obligation to make a written statement with respect to its decision on a review of a decision of the Minister (or his or her delegate) to refuse to grant a protection visa to an applicant under section 65(1)(b) of that Act.

(B) APPLICABLE PRINCIPLES

27. The content of the Tribunal's obligation to give a written statement under section 34(4) of the Act is important to the resolution of this appeal, as it affects the inferences that are properly open when particular matters are not discussed in the Tribunal's written statement. Since section 34(4) reflects the terms of section 430(1)(a) to (d) of the Australian Migration Act, a useful starting point for ascertaining the content of the Tribunal's obligation under section 34(4) is the decision of this Court in *Re the Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 regarding section 430(1) of the Australian Migration Act.

28. That case concerned a Sri Lankan citizen of Tamil ethnicity. He claimed, inter alia, to be a refugee in circumstances where he gave evidence that, in Sri Lanka in late 1993, he had been approached by members of PLOTE and asked to return to his home town of Jaffna and act as a spy for PLOTE. Specifically and relevantly, he gave evidence to the effect that he was "approached at a market by a young man who recognised him because of his fame as a cricketer in Jaffna when he was at college in the early 1970s"; "[t]he man asked [the claimant] if his brother was a lecturer at Jaffna University and [the claimant] agreed that he was" ([24]). The Tribunal did not believe that members of PLOTE had tried to recruit the claimant. The Tribunal stated that the evidence was "utterly implausible" ([26]).

29. The applicant contended that that the Tribunal had failed to set out reasons for its finding that his claim that members of the PLOTE had tried to recruit him was implausible. However, the Court rejected that argument, stating (at [67], emphasis added):

> [T]his was essentially a finding as to whether the [applicant] should be believed in his claim – a finding on credibility which is the function of the primary decision maker *par excellence*. **If the primary decision maker has stated that he or she does not believe a particular witness, no detailed reasons need to be given as to why that particular witness was not believed. The Tribunal must give the reasons for its decision, not the sub-set of reasons why it accepted or rejected individual pieces of evidence.** In any event, the reason for the disbelief is apparent in this case from the use of the word "implausible". The disbelief arose from the Tribunal's view that it was inherently unlikely that the events had occurred as alleged.

30. The correctness of these conclusions in *Durairajasingham* as to the (limited) scope of the Tribunal's obligation to give a written statement under section 430(1) of the Migration Act has never been doubted. This passage is frequently cited, and has been recently described as "entire[ly] orthodox" by the Full Court of the Federal Court of Australia.[2]

31. Because the Tribunal was not under an obligation to give detailed reasons for disbelieving the respondent on any particular aspect of his claims, the fact that it did not set out such reasons does not provide any basis for inferring that its conclusion was not based on a rational analysis of the material before it. The

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[2] *CQG15 v Minister for Immigration and Border Protection* (2016) 70 AAR 413 (***CQG15***) at [37] (Full Court).

description of an aspect of those claims as "implausible", even without elaboration, does not indicate error.

32. Further, it needs to be borne in mind that a conclusion that an allegation is "implausible" does not purport to exclude any possibility of that allegation being true.[3] To assess an allegation as "implausible" is simply to assess it as "not having the appearance of truth, probability or acceptability".[4] However, a conclusion that an allegation is implausible may readily lead to a finding that the allegation is not to be believed (eg if it is not corroborated, or if other evidence points against it).

33. Of course, the making of an adverse assessment of credibility does not immunise a decision from judicial review, and *Durairajasingham* did not so hold.[5] Ordinary bases for establishing legal error may be invoked. However, having regard to the (limited) scope of the Tribunal's obligation to give a written statement, "[t]he difficulties confronting any party who seeks to upset findings founded upon an assessment of the credibility of witnesses cannot ... be underestimated".[6]

34. The Tribunal does not require "specific evidence of falsity" in order to consider that an allegation is implausible. Put another way, the Tribunal does not need "rebutting evidence" to find a particular allegation to be plausible.[7] Furthermore, at least generally speaking, a decision-maker is entitled, in assessing the plausibility of an allegation, to rely "on his common sense and his ability, as a practical and informed person, to identify what is or is not possible".[8] Indeed, any suggestion that the Tribunal requires specific evidence of falsity in order to characterise a particular allegation as implausible would be inimical to section 22 of the Act, which provides that the Tribunal "is not bound by technicalities, legal forms or rules of evidence" and "must act according to ... the substantial merits of the case".

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3 See, e.g., *Gheisari v Secretary of State for the Home Department* [2004] EWCA Civ 1854 (***Gheisari***) at [16] (Thomas LJ). Further, as Sedley LJ observed at [10], "[w]e all know that in real life the improbable, even the incredible, sometimes happens". In an Australian context see, e.g., *Applicant M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 16, [111] (Tamberlin J).

4 *W64/001A v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 12 at [42] (French J).

5 *CQG15*. See also, e.g.: *SZSHV v Minister for Immigration and Border Protection* [2014] FCA 253, [31] (Flick J); *SZVAP v Minister for Immigration and Border Protection* (2015) 233 FCR 451, [20] (***SZVAP***).

6 *SZVAP* at [17] (Flick J), citing *Minister for Immigration and Citizenship v SZNPG* (2010) 115 ALD 303.

7 See, e.g., *Selvadurai v Minister for Immigration and Ethnic Affairs* (1993) 34 ALD 347, 348 (Heerey J).

8 See, e.g., *Awala v Secretary of State* [2005] CSOH 73 at [24] (Lord Brodie); *Gheisari* at [20]-[21] (Pill LJ); *HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037 at [30] (Neuberger LJ, with whom Jacob LJ agreed).

35. As the majority (Tamberlin and RD Nicholson JJ) held in *W148/00A* (at [64]), a "reviewing body must not set aside a finding of credibility simply because it thinks that the probabilities of the case are against, or even strongly against, the finding".[9] And, as the Full Court of the Federal Court recently accepted in *CQG15 v Minister for Immigration and Border Protection* (2016) 70 AAR 413 at [56]:[10]

> Considerable caution must, however, be exercised before too readily acceding to a proposition that adverse findings as to credit expose jurisdictional error: *SZVAP v Minister for Immigration and Border Protection* (2015) 233 FCR 451 at 455-456 [14]-[15]. That is because assertions of illogicality and irrationality can all too readily be used to conceal what is in truth simply an attack on the merits of the Tribunal's findings and decision. In *SZMDS* [(2010) 240 CLR 611] Crennan and Bell JJ (at 636 [96]) made it plain that the deployment of irrationality or irrationality to achieve merits review should not be sanctioned.

36. In *W148/00A*, the Full Court did not conclude that a Tribunal's decision was affected by jurisdictional error in circumstances where the Tribunal's adverse assessment was influenced by its characterisation of various factual allegations as "implausible". The majority noted (at [67]) that the Tribunal "should" disclose the basis on which it expresses such views. Insofar as this observation is inconsistent with the decision of this Court in *Durairajasingham* set out above as to the limited scope of the obligation under section 430(1) – especially that that section does not require the Tribunal to provide "subset of reasons" why it rejected individual pieces of evidence[11] – the decision of this Court is to be preferred. In any event, in *W148/00A*, the majority accepted that it was open to the Tribunal to reach its conclusion as to the applicant's credibility on the basis of the cumulative weight of the matters which it referred to (including the implausibility of various factual allegations).

37. As for the decision of Lee J in *W64/01A* on which Crulci J relied, that decision was overturned on appeal by the Full Federal Court in *Minister for Immigration and Multicultural Affairs v W64/01A* [2003] FCAFC 12. It is not persuasive. Notably, on the appeal:

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[9] See also, e.g., *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at 558 (Full Court).

[10] See also, e.g., *Avesta v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 121 at [19] (Full Court).

[11] See also, e.g., *NAOL v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 243 at [8] (Spender J, with whom Hely and Bennett JJ agreed); *WACK v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 122 at [8]-[9] (Spender J, with whom O'Loughlin and Gyles JJ agreed).

37.1. French J observed that "where a number of claims are made which are found to be implausible, that accumulation may warrant the global finding that they are not true" ([41]). Importantly, his Honour also deprecated Lee J's approach that "isolates various elements of the Tribunal's reasons from each other in a way that fails to do them justice"; "[w]hen read together the conjugation of difficulty in accepting various elements of the evidence, the implausibility of the claims and their non-acceptance coalesce in an unsurprising finding of fabrication" ([45]).

37.2. Carr J (with whom Finkelstein J agreed) shared Lee J's concern about the sufficiency of the Tribunal's explanation for its conclusion. Nevertheless, his Honour considered that the following observation of Kenny J in *Minister for Immigration and Multicultural Affairs v Rajalingham* (1999) 93 FCR 220 at 257 was an apposite criticism of Lee J's approach: "[T]he effect of his Honour's judgment was to turn what his Honour saw as doubtful fact-finding into an error or law [sic]. What his Honour did, I think, was erroneously attribute to the RRT the doubts his Honour had about the facts the RRT had found." ([68])

38. More generally, it has been said that assessment of credibility involvements matters of fact and degree.[12] "Often a conclusion as to the credibility of a witness will depend not only on the body language and general impression conveyed by a witness in the way in which questions are answered but also on a careful consideration of the factual background or available information, coupled with ordinary experience as to likely patterns of response."[13] "Decisions as to credibility are often based upon matters of impression, and an unfavourable view taken upon an otherwise minor issue may be decisive."[14]

(B) ERROR BY THE SUPREME COURT

39. Crulci J erred in the identification of applicable principles relating to the making of findings as to the credibility or plausibility of allegations. Her Honour identified wrong principles, and her Honour's summary of applicable principles was also materially incomplete (having regard to the outline of applicable principles above).

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[12] *W148/00A* at [66] (Tamberlin and RD Nicholson JJ).
[13] *W148/00A* at [65] (Tamberlin and RD Nicholson JJ).
[14] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [4] (Gleeson CJ). See also *VAAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 117 at [79] (Full Court).

40. In particular, Crulci J was fundamentally wrong to conclude (at [34]) that a finding by the Tribunal that an allegation was implausible is affected by an error of law if the Court (itself) forms the view that that allegation is not "inherently unlikely", "inherently improbable" or "so far out of accord with what was likely to occur". These propositions are not supported by the decisions of the Full Court in *W148/00A* or *W64/01A* (the latter which her Honour did not cite, instead relying on the overturned judgment of Lee J at first instance) or by other authority. Furthermore, these propositions are incorrect in principle and should not be accepted. Their acceptance would be apt to encourage the Court to slide into merits review, which is what it did in this case.

41. Crulci J was also wrong to conclude (at [35]) that the Tribunal cannot find that a particular allegation was implausible without identifying in its written statement "basic inconsistencies" in the evidence, or "probative material" or "independent country information" to support its conclusion of implausibility. In particular, a decision-maker is entitled, in assessing the plausibility of an allegation (i.e., in assessing whether the allegation has the appearance of truth or probability), to rely "on his common sense and his ability, as a practical and informed person".[15] Furthermore, as noted above, the Tribunal is not required to give detailed reasons for concluding that an allegation is implausible: that is because the Tribunal was required by section 34(4) to give the reasons for its decision, not the sub-set of reasons why it accepted or rejected individual pieces of evidence.

42. These errors by Crulci J infected her Honour's analysis of the particular impugned findings of the Tribunal in paragraphs 72, 74 and 76 of its written statement as bolded above. These specific findings are further addressed below.

Finding at paragraph 72

43. As noted above, at [72], the Tribunal found that it was not satisfied that an attack on a car, being the "joint property" of the respondent and his wife, "could plausibly have been intended to prevent them divorcing". Crulci J sought to impeach that finding (at [40]), on the basis that it was "possible (as opposed to 'implausible' or 'inherently improbable') that acid could have been thrown over the car to deter the

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[15] See, e.g., *Awala v Secretary of State* [2005] CSOH 73 at [24] (Lord Brodie); *Gheisari* at [20]-[21] (Pill LJ); *HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037 at [30] (Neuberger LJ, with whom Jacob LJ agreed).

Appellant from obtaining a divorce, especially if the care was owned solely by the Appellant".

44. That approach involved error for any one or more of the following reasons.

45. *First*, Crulci J erred in proceeding from her own assessment that it was "possible" that the alleged event had occurred as alleged to the conclusion that the Tribunal had made an error of law by concluding that the respondent's allegation was implausible.

46. *Secondly*, Crulci J was wrong to conclude that, merely because it was possible that the alleged event had occurred as alleged, the Tribunal's finding as to implausibility was affected by an error of law. The Tribunal's statement at [72] that it was not satisfied that an attack on the car "could plausibly have been intended" to prevent the respondent and his wife from divorcing did not in itself deny the possibility of the allegation as being true, it was simply to assess it as "not having the appearance of truth, probability or acceptability".

47. In this context, it is important to note that the Tribunal did not solely rely on its observation that this allegation was implausible in order to reject the respondent's claim. The Tribunal's finding at [72] was one of many concerns identified by the Tribunal that, collectively, led to its conclusion at [95] that it did not accept that "his father-in-law or other members of the family have been motivated to harm him". Indeed, in the immediate context, the Tribunal's concern as to the plausibility of the respondent's claims about his wife's family's involvement in an acid attack on his car was "reinforced" by Tribunal's perception of inconsistent evidence about his interactions with the police about the matter, and the Tribunal's impression (which may have been influenced by demeanour) that "the applicant changed his evidence on this issue when it appeared to him unlikely that the Tribunal would accept he would complain to the police over the attack and then fail to follow up by providing then with evidence pointing to the perpetrator" ([73]-[74]).

48. Thus the Tribunal's finding was based on the cumulative effect of the matters to which it had referred.[16] Crulci J's approach in respect of the impugned finding at

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[16] Cf. *W148/00A* at [69] (Tamberlin and RD Nicholson JJ). See also *Chen v Minister for Immigration and Citizenship* [2011] FCAFC 56 at [40] (Full Court).

[72] (as with the impugned findings at [74] and [76]) "isolates various elements of the Tribunal's reasons from each other in a way that fails to do them justice".[17]

49. *Thirdly*, insofar as Crulci J justified her conclusion that the Tribunal erred on the basis that the evidence suggested that the car belonged to the respondent alone (rather than being "joint matrimonial property"), her Honour's reasons betrays an overzealous approach to scrutinising the Tribunal's reasons contrary to this Court's admonition in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259. Her Honour correctly observed (at [39]) that the Tribunal appeared to accept that the car was the respondent's. The immediate context for the Tribunal's characterisation (at [72]) of the car as "joint property" was its observation that, at the relevant time, the couple were "living together in the matrimonial home". In this context, the Tribunal's reasons are not to be understood as expressing definite conclusions about strict legal ownership of chattels, and therefore as contradicting itself as to the ownership of the car (only owned by the respondent vs. owned jointly by the couple). Rather, the Tribunal's concern was about the plausibility of the allegation that his wife's family would destroy the car in circumstances where the couple were still sharing property (leaving aside which spouse or spouses owned the particular property).

Finding at paragraph 74

50. *First*, again, was erroneous for Crulci J to proceed from her own assessment that it was "not 'inherently improbable' that the police would ignore the evidence of the identity of the perpetrator and the confession, because the means through which this had been conveyed did not constitute legal proof", to the conclusion that the Tribunal had made an error of law by concluding otherwise.

51. *Secondly*, it plainly was open to the Tribunal to consider it implausible that "if the police had gone to the trouble of visiting the applicant's house to make a report of an incident involving an unknown perpetrator, they would then ignore the evidence he supplied of the perpetrator's identity and confession, on the grounds that the means by which he had discovered it did not constitute legal proof". That that particular information might not "constitute legal proof" in a court does not entail that that information would not be of potential use, and therefore interest, to an investigator. The Tribunal was sceptical that the police, despite some information

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[17] *Ibid* at [45] (French J).

as to the identity of the perpetrator (even if that information did not constitute "proof"), would not investigate further (see also [73]). It was plainly open to the Tribunal to be sceptical. In the Tribunal's words: the respondent's (shifting) story "casts doubt on his credibility of his claims".

52. *Thirdly*, insofar as Crulci J based her conclusion on the proposition that it was not open to the Tribunal to conclude that the respondent had shifted his story about his interactions with the police, her Honour erred. The Tribunal observed that the respondent's initial evidence was that he had not reported to the police that Ozhan had claimed responsibility for the attack in an SMS message to Fereshte, because "Ozhan had used a cheap SIM card and thrown it away after the call". The Tribunal observed that the respondent then went on to say, "inconsistently", that he had reported it to the police. Crulci J's conclusions are equivocal: her Honour states (at [42]) that "the transcript suggests that the Appellant may have intended to convey that he reported the message to the police, but did not provide the message as evidence". Whether or not that be so, it was plainly not irrational for the Tribunal to conclude that the respondent's story had shifted. In response to the question "Did you take this information back to the police?", the respondent initially answered "no".

Findings at paragraph 76

53. Finally, it was plainly open to the Tribunal to find that the allegations of an elaborate scheme devised by Shamim and Ozhan to force the respondent not to divorce her (by Ozhan establishing a relationship with Fereshte with the intention of luring her to his place of work and raping her and thereby forcing her into marriage with him), and the allegation that Fereshte had fallen for Ozhan (despite the fact that he was a violent long-term drug and alcohol abuser who had been jailed many times, that Fereshte was a young woman still living with her parents, and that Ozhan's family had deceived her family) were implausible. That is to say, it was open to the Tribunal to assess those allegations, taken together, as "not having the appearance of truth, probability or acceptability".

54. It fell comfortably with the Tribunal's capacity, in reliance on its collective "common sense" and understanding as "practical and informed persons", to form those views. The Tribunal did not regard the allegations as *impossible*; nor was it required to do so. Certainly, it did not need to identify "inconsistencies", "rebutting

evidence" or "independent country information" in its written statement to support its findings in this respect.

55. Again, it is important to note that the Tribunal did not solely rely on its finding that these allegations were implausible in order to reject the respondent's claim. Again, the Tribunal's impugned findings at [76] were among many concerns identified by the Tribunal that, collectively, led to its conclusion at [95] that it did not accept that "his father-in-law or other members of the family have been motivated to harm him".

VII. APPLICABLE PROVISIONS

10 56. Section 34(4) of the Act, as it existed at the relevant time, provided as follows:

> The Tribunal must give the applicant for review and the Secretary a written statement that:
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> (a) sets out the decision of the Tribunal on the review;
>
> (b) sets out the reasons for the decision; and
>
> (c) sets out the findings on any material questions of fact; and
>
> (d) refers to the evidence or other material on which findings of fact were based.

57. That provision is still in force, in that form, at the date of making these submissions.

20 **VIII. ORDERS SOUGHT**

58. The Republic seeks orders under section 8 of the *Nauru (High Court Appeals) Act 1976* (Cth) reversing or modifying the orders made by the Supreme Court made on 28 September 2017 and, in particular:

58.1. dismissing the respondent's appeal to the Supreme Court of Nauru; and

58.2. affirming the decision of the Tribunal.

IX. ESTIMATE OF TIME FOR ORAL ARGUMENT

59. The Republic estimates that presentation of its oral argument will take 1.5 hours.

Dated: 17 November 2017

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