IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M167 of 2017

BETWEEN: **ETA067**
Appellant

and

THE REPUBLIC OF NAURU
Respondent

APPELLANT'S SUBMISSIONS

PART I: PUBLICATION

1. This submission is in a form suitable for publication on the internet.

PART II: ISSUES

2. Did the Refugee Status Review Tribunal ("the Tribunal") act unlawfully by failing to consider evidence relevant to the well-foundedness of the appellant's fear of persecution for an imputed political opinion?

3. Did the Tribunal breach its duty to afford natural justice by failing to disclose to the appellant an issue relevant to the Tribunal's finding that the appellant could reasonably relocate within Dhaka?

PART III: SECTION 78B NOTICES

4. There is no need for notices to be given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: CITATION

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Filed on behalf of: the appellant

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5. The citation for the judgment appealed from is *ETA067 v The Republic of Nauru* [2017] NRSC 99.

PART V: FACTS

6. The appellant is a citizen of Bangladesh. He is 31 years old. He is not married. His ethnicity is Bengali and his religion is Islam. He was born and has always lived in the same suburb in Dhaka.[1]

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7. On 19 December 2013 the appellant arrived in Australia as an unauthorised maritime arrival. On 24 December 2013 he was transferred to the Republic of Nauru (Nauru)[2] pursuant to s 198AD of the *Migration Act 1958* (Cth) and a Memorandum of Understanding between Nauru and Australia of 3 August 2013.

8. On 20 March 2014 the appellant, under s 5 of the *Refugees Convention Act 2012* (Nr) ("the Refugees Act"),[3] applied to the Secretary of Justice and Border Control of Nauru ("the Secretary") for recognition as a refugee.[4] Section 6 of the Refugees Act provided that, if the appellant was not found to be a refugee, the Secretary was also
20 to determine whether the appellant's return or expulsion would breach Nauru's international *non-refoulement* obligations (complementary protection) as adopted in ss 3 and 4(2) of the Refugees Act.

9. The basis of the application to the Secretary was that the appellant had a well-founded fear of persecution upon return to Bangladesh for reason of an imputed political opinion.

10. On 16 June 2014 the appellant was interviewed by an RSD officer about his application.

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[1] Book of Documents – Evidence before the Supreme Court of Nauru in No. 113/2015 (***BD***) page 33
[2] BD 33
[3] References in these submissions to the Refugees Act are to the consolidation of the *Refugees Convention Act 2012* (Nr) as amended and in force from 21 May 2014. Specific reference is made to subsequent amending legislation where relevant.
[4] BD 17- 40

11. On 13 March 2015 the Secretary determined the appellant was not recognised as a refugee and was not a person to whom Nauru owed complementary protection ("the Secretary's decision").[5]

12. On 31 March 2015 the appellant applied to the Refugee Status Review Tribunal for merits review of the Secretary's decision pursuant to s 31(1) of the Refugees Act.[6]

13. On 13 August 2015 the Tribunal conducted an oral hearing of the appellant's application for review[7], having received written submissions on the appellant's claims for protection from the appellant's advisors dated 26 July 2015.[8]

14. On 30 September 2015 the Tribunal affirmed the Secretary's decision.[9]

15. On 29 April 2016 the appellant commenced proceedings in the Supreme Court of Nauru ("the Supreme Court") under the right of appeal allowed by s 43(1) of the Refugees Act.[10] Although described as an "appeal", the Supreme Court's jurisdiction was original in character: *BRF038 v Republic of Nauru* (2017) 91 ALJR 1197 at [40] ("BFR038"). On 13 November 2017 the Supreme Court dismissed the appeal.

16. On 27 November 2017, the appellant commenced this appeal by Notice of Appeal. The appeal is as of right: *BRF038* at [41]. The source of this Court's jurisdiction is s 5 of the *Nauru (High Court Appeals) Act 1976* (Cth) read with Art 1A(b)(i) of the Agreement between the Government of Australia and the Government of the Republic of Nauru Relating to Appeals to the High Court of Australia from the Supreme Court of Nauru.

The appellant's claims before the Tribunal for refugee and complementary protection

17. By the time the Tribunal came to determine the appellant's application for review of the Secretary's decision, the appellant had made specific claims for refugee and complementary protection for an imputed political opinion:

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[5] BD 43 - 56
[6] BD 61
[7] BD 93 - 139
[8] BD 64 - 89
[9] BD 141 - 149
[10] As amended by s 25 *Refugees Convention (Derivative Status & Other Measures)(Amendment) Act 2016* (Nr) with retrospective effect from 9 September 2013

- in his original statement dated 20 March 2014[11] which accompanied his application to the Secretary;
- in his interview with the RSD officer on 16 June 2014[12];
- in his further statement to the Tribunal dated 15 July 2015[13];
- in his advisors' submissions to the Tribunal of 26 July 2015[14]; and
- at the Tribunal hearing on 13 August 2015[15].

18. The appellant's claims before the Tribunal were that he joined the Bangladesh Nationalist Party ("BNP") in 2004 when he was around 18 years old. He became a local Publications Secretary, which involved assisting in the organisation of meetings, informing and assisting members to attend meetings, and hanging posters.[16]

19. The appellant claimed he was physically harmed in the many violent clashes which occurred between the BNP and the opposing Awami League when those political parties had organised public meetings on the same day and place.[17]

20. The appellant said that in 2008 he ended his involvement with the BNP and stopped attending rallies and meetings. After this, members of the Awami League began pressuring him to join them. This happened frequently over a period of many years[18] until he left Bangladesh. The appellant claimed the Awami League believed he was an influential member of the BNP who would be able to assist them and would bring in more votes.[19]

21. The appellant was afraid he would be harmed if he continued to refuse to join the Awami League. In 2010 he saw the Awami League beat a local man, his friend, who is referred to in these submissions as R[20], whom (like the appellant) they had been

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[11] BD 34 - 37
[12] BD 46 - 47
[13] BD 86 - 89
[14] BD 64 - 89
[15] BD 93 - 139
[16] BD 46
[17] BD 35, [8]
[18] BD 35, [9]-[10]
[19] BD 46
[20] R's full name appears on page 1 of the Appellant's submissions to the Supreme Court of Nauru dated 8 March 2017.

trying to recruit for a long time but who continually refused to join them.[21] The appellant saw the Awami League members beat R on the street, before a crowd of people.[22]

22. In 2013, in the lead up to the 2014 elections the Awami League started to pressure him more heavily to join them.[23] Giving as an example the experience of his friend R, the appellant claimed that the actions of Awami League members against those they were attempting to recruit gradually escalated over time. The appellant claimed the conduct of the Awami League members towards him escalated from 2008 to 2013, their words becoming harsher and more threatening. He claimed he fled the country before this escalation reached the stage he knew would be violent physical assault and possible death.[24]

23. The appellant also claimed his home was ransacked after the 2014 elections by associates of the Awami League who came asking for him and his brothers, and that his brothers left the home because of this.[25]

24. The appellant claimed to fear persecution by reason of his political opinion (due to his support for and involvement with the BNP) and by reason of his imputed political opinion (as a person opposed to the ruling Awami League).[26]

The Secretary's decision

25. The Secretary accepted as plausible that the appellant was approached by the Awami League to join their party and, significantly for ground one, that the appellant witnessed a person being assaulted for not joining the party around 2010.[27]

26. Significantly for ground two, the Secretary also accepted that the appellant 'may have been a member of the BNP'[28], and was involved with the BNP between 2004 and 2008.

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[21] BD 35, [11]
[22] BD 87, [13]
[23] BD 35, [12]
[24] BD 87, [12] – [14]
[25] BD 46, 49-50
[26] BD 41-44
[27] BD 49
[28] BD 49

27. The Secretary otherwise did not accept that the appellant was an 'important, influential' member of the BNP or that his life was threatened or that he would be abused for not joining the Awami League.[29]

The Tribunal's decision

28. The Tribunal affirmed the Secretary's decision, finding that the appellant's fear of persecution for his political opinion and imputed political opinion was not well founded.[30]

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29. The Tribunal found the appellant had not suffered harm in the past amounting to persecution for reason of his imputed political opinion.[31] The Tribunal did not accept there was a real possibility the appellant would face harm in the reasonably foreseeable future.[32] Significantly for ground one, the Tribunal appeared to base its finding as to the risk of future harm solely on its finding that there had been no past harm.

30. In findings on relocation which the Tribunal expressed to be 'separate and independent', the Tribunal found that even if some harm might befall the appellant
20 (which the Tribunal did not admit), any risk of that harm was confined to the locality of the appellant's own suburb of Dhaka, and the appellant could safely and reasonably relocate to another part of Dhaka.[33]

31. Significantly for ground two, the Tribunal's reasoning on relocation included that the appellant had no profile within the BNP, including because he was not even a member of the BNP, 'merely' a supporter.[34]

32. Although the Tribunal found the appellant was not a formal member of the BNP (see ground two), it accepted that between 2003 and 2008 the appellant was involved in
30 BNP activities and did jobs for the party at the request of his brother and local

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[29] BD 49
[30] BD 148, at [40].
[31] BD 148 at [40].
[32] BD 148 at [40].
[33] BD 149 at [41].
[34] BD 149 at [41].

officials, and because of this he would have been identified as a BNP supporter by members of his local community.[35]

33. The Tribunal accepted at [31]-[32], BD146-147 that the appellant was physically beaten in altercations between BNP supporters and Awami League supporters in the lead up to the 2008 elections. The Tribunal also accepted that groups of BNP and Awami League supporters in the appellant's suburb 'may engage in antagonistic behaviour toward their political opposites' consisting of 'harassing and mocking' one another, and in the case of the appellant, some pushing and shoving.

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34. Significantly for ground one, the Tribunal did not refer to or assess the appellant's claims that the Awami League assaulted his friend R for not joining them and assaulted others for not attending Awami League meetings.

35. The Tribunal found that on the appellant's own testimony, his experience from 2009 to 2013 of 'harassment and pushing and shoving' indicated that he had not suffered persecutory harm at the hands of the Awami League.[36]

36. The Tribunal accepted that local Awami League supporters may have broken into
20 homes of BNP supporters, including the appellant's, and caused damage,[37] however it did not accept that the intruders were asking for the appellant or his brother,[38] or that this was indicative of any future harm to him on account of his political opinion.[39]

37. For the same reasons it found the appellant was not a refugee, the Tribunal also found the appellant was not owed complementary protection.[40]

PART VI: ARGUMENT

Ground One

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38. The Supreme Court erred in failing to find the Tribunal acted unlawfully in failing to consider evidence presented to it by the appellant relevant to the well foundedness

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[35] BD 145 at [25].
[36] BD 146 at [31].
[37] BD 147 at [36],
[38] BD 148 at [37],
[39] BD 148 at [39].
[40] BD 149 at [44].

of his fear that Awami League supporters had intended to harm him and would harm him in the future. The Tribunal's duty to consider that evidence arose as an incident of its duty to "review" the Secretary's decision and its overriding duty to afford procedural fairness.

Legal Basis of Ground

39. The fundamental task of the Tribunal was to "review" the Secretary's decision. That that is the Tribunal's task pervades the legislative scheme and can be seen in (amongst others) the following provisions of the Refugees Act:

a. under s 31(1),[41] a person was entitled to apply to the Tribunal "for merits review";

b. under s 33(1), the Tribunal is obliged to "complete a review";

c. section 34(1) gives the Tribunal its power to sit in the shows of the original decision-maker, that power being given "for the purposes of a merits review";

d. section 34(2) gives the Tribunal power to affirm, vary, set aside or remit "[o]n a merits review";

e. section 42 confirms that a person has a "right" to "a review".

40. The nature of that "review" is, ultimately, determined by reference to the Refugees Act: *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [57].

41. Nothing in the text and context of the Refugees Act suggests that the fundamental character of the "review" which the Tribunal is obliged to conduct is materially different from the "review" which is to be conducted by refugee merits review tribunals under Australian laws with which this Court will be familiar. The fundamental character of that "review" has been described in a number of decisions,

[41] This section was, subsequently, amended in an inconsequential way: see the *Refugees Convention (Derivative Status & Other Measures)(Amendment) Act 2016* (Nr) which commenced on 29 January 2016, after the Tribunal's decision.

including *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [55]-[68]; *SZRBA v Minister for Immigration and Border Protection* (2014) 314 ALR 146 at [23]-[24]. See also *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALJR 1088 at [24]; *DWN072 v Republic of Nauru* [2016] NRSC 18 at [30].

42. In addition to its duty to "review" the decision under appeal, the Tribunal is subject to a duty to afford procedural fairness. The existence of such a duty was a necessary basis of this Court's decision in *BRF038*: see at [57]-[66]. The source of that duty is both general principle and the specific provisions of the Refugees Act. As for general principle: the exercise of the Tribunal's powers was apt to affect adversely his interests (see *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [66]; *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [30]).

43. As for the specific provisions of the Refugees Act: s 22(b) expressly provides that the Tribunal "must act according to the principles of natural justice". Section 6 of the *Refugees Convention (Derivative Status & Other Measures)(Amendment) Act 2016* (Nr) and s 7 *Refugees Convention (Amendment) Act 2017* (Nr) each provide in identical terms, respectively, that nothing in that Act displaces the obligation imposed on the Tribunal 'under the common law of Nauru' to act according to the principles of natural justice.[42] Neither of these Acts diminish the Tribunal's procedural fairness obligations under s 22 of the Refugees Act.[43]

44. The content of the Tribunal's twin duties – to carry out a review and to afford procedural fairness – is determined by the statutory framework and the circumstances of the particular case: *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [10], [23], [25].

45. Here, a number of features of the Refugees Act indicate the content of those duties:

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[42] *HFM045 v Republic of Nauru* [2017] HCA 50 at [39]
[43] *BRF038 v The Republic of Nauru* [2017] HCA 44 at [55]

a. under s 22(b), the Tribunal "must act according to ... the substantial merits of the case";

b. under s 40(1), the Tribunal "must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the determination or decision under review";

c. under s 34(4), the Tribunal is obliged to give the parties a written statement that "sets out the reasons for the decision ... the findings on any material questions of fact [and] refers to the evidence on which the findings of fact were based".

46. The "invitation" referred to in s 40(1) must, of course, "be meaningful, in the sense that it must provide the applicant for review with a real chance to present his or her case": *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [61]. The invitation to give submissions is not meaningful if the Tribunal fails to adequately engage with those submissions: *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 85 at [62]; *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 28 CLR 470 at [104]; see also at [37], [171].

47. In these circumstances, the Tribunal's duties to conduct a review and afford procedural fairness carried with them a duty to consider and respond to the appellant's "substantial, clearly articulated argument[s]": *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [23]-[24]; *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [58], [68].

48. The Tribunal's duties also carried with them a duty to consider the evidence before the Tribunal if that evidence was cogent and material to the assessment of the applicant's claims: *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [111]; *VAAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 117 at [77]; *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67 at [46]-[58]. See also *Minister for Immigration and Citizenship* (2010) 243 CLR 164 at [27] (stating that "jurisdictional error may include ignoring relevant material in a way that affects the exercise of a power").

Argument

49. In this case, the Tribunal failed to consider and make findings in respect of claims and evidence put before it of assaults by Awami League supporters against a young man 'R' who, like the appellant, had refused to join the Awami League; and also against 'others' named by the appellant in the RSD interview who had refused to attend Awami League meetings. The appellant claimed that while he had not suffered physical harm in the past[44], he knew he faced such harm in the future because of what happened to R and the 'others' in similar circumstances to him.[45]

50. The particular circumstances of the assaults against R and the others were relevant to the Tribunal's findings at [40], BD148, in particular to the conclusion the Tribunal drew that the appellant would not face persecutory harm from the Awami League in the future because the appellant had not suffered such harm in the past.

51. The Secretary had accepted that the appellant had "witnessed a person being assaulted for not joining the party around 2010".[46]

52. Although these claims and evidence were highly relevant to the appellant's contention that the Awami League had intended to harm him and would harm him in the future, the Tribunal made no mention of the evidence of the assaults on R and the others, or of the reasons for those assaults in its decision or during the hearing.

53. The premise that the Awami League had not actually intended to harm the appellant is implicit in the Tribunal's reasoning that 'no harm in the past means no harm in the future'. The Tribunal's decision at [29], BD146 incorrectly states that it put this proposition to the appellant: 'that the Awami League clearly did not intend to harm the applicant or it would have done so already', and that the appellant said that he had a 'deep rooted' fear.

54. The transcript of the hearing shows that that Tribunal did not put this proposition about intention to the appellant. While the Tribunal identified the appellant had not

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[44] BD 35, [12] & BD 87, [16]
[45] BD 35 [11] & BD 87, [12]-[14] (R claims) and BD 48.5 (others named in RSD interview)
[46] BD 47, 49

claimed to have been physically harmed, it did not put to the appellant that this meant therefore the Awami League did not intend to harm him[47]:

> MS ZELINKA: I don't – if you – this – being harassed by people on the street, by men on the street, why don't you join the Awami League, you must join the Awami League, this does not seem to be serious enough to make somebody leave their family and leave their country. The things that have happened to you, being approached often by Awami League boys saying "you have to join us; we will beat you up if you don't join us" – even if it happens often, this does not seem to me to be a serious enough reason to leave all your family and to leave your country.
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> THE INTERPRETER: Once somebody has got fear from something, and if it is deeply rooted inside, then it's very difficult to overcome this situation.

55. From what it said during the hearing the Tribunal seemed minded at that stage to doubt whether the claimed harassment since 2008 had occurred at all because the appellant had never been physically harmed.[48] Eventually in its decision however the Tribunal accepted the appellant's testimony of harassment and 'pushing and shoving', but found this did not amount to persecutory harm.[49]

56. The assaults on R and the others were not dealt with or subsumed in the Tribunal's findings at [31], BD146 on the 'antagonistic behaviour' between BNP and Awami League supporters in the appellant's suburb. The evidence did not identify R as a BNP supporter or as one perceived to be a BNP supporter. The evidence was that R was a poor man who had been approached by the Awami League to join them, but who had refused; and that the appellant had witnessed the resulting public beating.[50] The others named by the appellant to the RSD officer as people who were beaten for refusing attend Awami League meetings were also not identified as BNP supporters, and therefore not the subject of the Tribunal's findings at [31].

57. Further, the behaviour treated by the Tribunal at [31], BD146 did not rise above harassment and mocking, or 'harassment and pushing and shoving' in the case of

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[47] BD 116-117, Transcript p 24 line 46 – p 25 line 8
[48] BD 121, TR 29/43; BD 125, TR 33/33; BD136, TR 44/1
[49] BD 146 at [31].
[50] BD 48, 49

the appellant. The difference between this behaviour and claimed assaults on R and the others is another reason why it cannot be inferred that the findings at [31] took in or subsumed those claimed assaults.

58. The Tribunal's reasons fail to refer to the claims and evidence before it concerning assaults on R and others. Those were matters of importance to the Tribunal's decision. It should be inferred that the Tribunal failed to consider the claims and evidence in circumstances where it was under a statutory duty to provide reasons,[51] where those reasons are otherwise apparently comprehensive and where the matters were significant and touched on the core duty to be discharged.[52]

59. There is a similarity with the conclusion reached by the Full Court of the Federal Court in *Minister for Immigration and Border Protection v MZYTS* in respect of country information put before it:

> The Tribunal's reasons disclose no process of weighing evidence and preferring some over the other. In the context of two or more pieces of apparently pertinent, but contradictory, evidence an expression of a preference for some evidence over other evidence generally requires an articulation of the different effects of the evidence concerned, and then some indication as to why preference is given. All these are matters for the trier of fact. The 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.[53]

60. In ignoring the relevant evidence of the assaults on R and the others in its consideration of the claimed intent of the Awami League to harm the appellant, the Tribunal breached its duties to carry out a "review" and to afford procedural fairness.

The Court's error

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[51] See *Minister for Immigration and Multicultural Affairs v Yusuf* (2002) 206 CLR 323 at [5], [37], [69], [89], [133]; *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675 at 682, 685; *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1 at [16].
[52] *Fox v Australian Industrial Relations Commission* [2007] FCAFC 150 at [39].
[53] *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114; (2013) 230 FCR 431 at [50]

61. The Court's error in not coming to this conclusion resulted from its finding that the evidence of the assaults on R was not sufficiently important to the review, because it was "neither 'corroborative' nor 'central'" to the appellant's claims, and was only 'peripheral to the Tribunal's conclusion or was subsumed in the finding of greater generality'.[54]

62. The Court's account of the 'conclusion' of the Tribunal was that, as the appellant had not been assaulted 'over a period of 5 years with a total of 500 interactions', 'nothing would happen to him in the future'.[55]

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63. This account of the Tribunal's 'conclusion' erroneously included the recital by the Tribunal at [29], BD146 of matters it had put to the appellant in the course of the hearing that the appellant had not been assaulted 'over a period of 5 years with a total of 500 interactions'.[56]

64. The Court found that this 'conclusion' about a lack of harm was a 'factual premise upon which a contention rests but has been rejected', citing the decision of a Full Court of the Federal Court of Australia in *WAEE v Minister for Immigration and Multicultural Affairs*[57]. However, the appellant never claimed to have been assaulted
20 as R had been. The appellant gave evidence of what happened to R in anticipation of the obvious objection to his claims, namely: that if he had not been harmed in the past this might be taken to mean that there was never any intention to harm him and that he would not face harm in the future.

65. Nor is the 'conclusion' a finding of 'greater generality' which subsumed the appellant's contentions that what had happened to R would happen to him. An example of such subsuming findings would be that there was no Awami League presence in his neighbourhood.

30 66. Neither the Court's account at [47], *ETA067 v The Republic of Nauru* [2017] NRSC 99 of the Tribunal's 'conclusion' nor the Tribunal's actual findings at [31] & [32], BD146-147 and at [40], BD148 address the similarity between the appellant and R, both being persons who refused to join the Awami League.

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[54] *ETA067 v The Republic of Nauru* [2017] NRSC 99 at [48].
[55] *ETA067 v The Republic of Nauru* [2017] NRSC 99 at [47].
[56] *ETA067 v The Republic of Nauru* [2017] NRSC 99 at [47].
[57] [2003] FCAFC 184; (2003) 236 FCR 593 at [47].

67. The evidence of what happened to R and the others was "substantial and consequential"[58] because it anticipated and answered the conclusion that "no harm in the past means no harm in the future". The appellant never claimed he was harmed as R and the 'others' were, but that what had happened to them proved that the Awami League used violence for the same reasons that the appellant feared, and therefore the appellant's fears that the Awami League intended to harm him were well founded.

Ground Two

68. The Tribunal also acted unlawfully in failing to give the appellant an opportunity to be heard on a critical issue, namely, the Tribunal's doubt that the appellant was ever a formal member of the BNP in the context of its consideration of safe relocation within Dhaka having regard to the appellant's profile within the BNP.[59]

69. The Tribunal did not give the appellant an opportunity to be heard because it did not bring to his attention or allow him to ascertain that his formal membership of the BNP was in issue so that he could comment or provide further evidence.

Legal Basis of Ground

70. For the reasons set out in paragraphs 39 to 45, the Tribunal was subject to overriding duties to "review" the Secretary's decision and to afford procedural fairness in the course of doing so.

71. Those duties carried with them a duty on the Tribunal to ensure that the appellant was "given the opportunity of ascertaining the relevant issues": *Tahiri v Minister for Immigration and Citizenship* (2012) 87 ALJR 225 at [22]. If the appellant was not given that opportunity, it could not be said that he was given the meaningful opportunity to make submissions as required by s 40(1) of the Refugees Act. That duty encompassed a duty to put the appellant "on notice of: the nature and purpose of the inquiry [and] the issues to be considered in conducting the inquiry": *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [83]. See also *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*

[58] *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; (2013) 212 FCR 99 at [111].
[59] BD 148 at [41].

(2006) 228 CLR 152 at [32] and *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591.

72. These duties are not inconsistent with the aphorism that, ordinarily, a decision-maker is not "required to expose his or her thought processes or provisional views for comment before making [a] decision": *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [9]. That aphorism cannot detract from the basal duty to afford procedural fairness, which encompasses a duty to "advise of any advice of any adverse conclusion which would not obviously be open on the known material": *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [9], [91], [92].

Argument

73. On the basis that it had dismissed the first ground of the Amended Notice of Appeal before it, the Supreme Court chose not to determine the second ground concerning relocation.[60]

74. The Tribunal found the appellant could safely and reasonably relocate to another suburb in Dhaka to avoid any harm in his own suburb in that city partly on the basis that the appellant had no profile within the BNP, including because he was not even a member of the BNP, 'merely' a supporter.[61]

75. In the context of this consideration of the independent question of safe relocation within the city of Dhaka, natural justice required the Tribunal to put the appellant on notice of its doubts that the appellant was ever a formal member of the BNP by at least asking him why his account of his formal membership should be accepted.[62]

76. The appellant's claimed formal membership of the BNP was not an issue arising in relation to the Secretary's decision. The Secretary accepted that the appellant 'may have been a member of the BNP' although it did not consider his claims to be an

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[60] *ETA067 v The Republic of Nauru* [2017] NRSC 99 at [50].
[61] BD 149 at [41].
[62] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 at 162 [47].

influential member of the BNP to be plausible.[63] In this circumstance, the appellant was entitled to assume that his membership (or otherwise) of the BNP was not an issue arising on the review before the Tribunal: see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [35] ("if the Tribunal takes no step to identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what that other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are 'the issues arising in relation to the decision under review'").

10 77. It was not obvious, and the appellant could not fairly have been expected to tell, that the fact of his formal membership was in issue from the Tribunal's questions about how he became a BNP member. When the Tribunal asked how he was made a member and whether this required any particular thing, the appellant responded that a meeting was organised, the new member's name was listed in the book and then it was announced by the area leader. In response to the Tribunal's questions, the appellant said he did not remember the year or how old he was when he became a member, or whether his brother came along or if the area leader had said 'anything nice' about the appellant at the meeting.[64]

20 78. The Tribunal inaccurately summarised this evidence at [12], BD143:

> *12. When asked about the process by which a person becomes a member of the BNP, he stated that local officials list the new members' names in a book and this is announced by a leader at the thana level. The Tribunal asked if the applicant was thus listed and announced, but he could not remember any details of this occasion, nor when it occurred. When asked if his brother ..... – a BNP member - was present, the applicant said he could not remember.*

79. The Tribunal's consideration at [24] & [25], BD145 that the appellant was not a
30 formal member of the BNP relies on this inaccurate summary of the appellant's evidence:

> *24. The Tribunal notes from the BNP official website that membership of the BNP normally requires the new member, who must be over the age of 18, to fill in a*

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[63] BD 49.
[64] BD 105-106, TR 13/14 – TR14/33.

prescribed membership form available at the party office and to pay a membership fee of five taka on joining and annually thereafter.

25. *The Tribunal notes that the process the applicant described for membership (see paragraph 12 above) does not conform to this official version. Moreover, the applicant could not recall how or when he himself became a member. The Tribunal is not satisfied that the applicant was ever formally a member of the BNP.*

80. In particular it was not correct for the Tribunal to say 'the appellant could not recall how he became a member', simply because he could not recall the details of when he became a member, or whether his brother was present, or what the area leader said.

81. Further, the Tribunal seems not to have noticed that when the Secretary asked the appellant how he became a BNP member the appellant gave the information that 5 Bangladeshi *taka* had to be paid[65]. This was despite the Tribunal's reliance at [24], BD145 on information from "the BNP official website" that membership requires a new member to fill in a form and pay a fee of 5 *taka* on joining.

82. The Tribunal went on to reason that as the appellant had no profile within the BNP, he being 'merely' a supporter and not ever a formal member of the BNP, the appellant could safely relocate to another part of Dhaka.[66]

83. In addition to the effect the Tribunal's doubts had on its consideration of relocation, practical unfairness also resulted from the effective denial of an opportunity for the appellant to produce documentary or other evidence of his membership, or to bring to the Tribunal's attention aspects of the appellant's evidence to the RSD about how he became a member of the BNP, such as the payment of 5 taka.

PART VII: LEGISLATION

84. The applicable legislative provisions are annexed.

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[65] BD 47.
[66] BD 148 at [41].

Part VIII: ORDERS SOUGHT

85. The orders sought by the appellant are:

85.1 Appeal allowed with costs.

85.2 Set aside the order made by the Supreme Court of Nauru on 13 November 2017, and in its place order that:

a. the decision of the Refugee Status Tribunal made on 30 September 2015 be quashed;

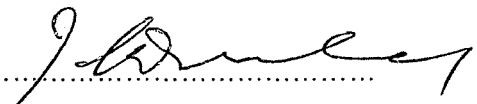
b. the matter be remitted to the Refugee Status Review Tribunal for reconsideration according to law; and

c. the respondent pay the appellant's costs of the appeal.

PART IX: ESTIMATE OF ORAL ARGUMENT

86. The appellant estimates he will require one hour to present oral argument

Dated: 29 January 2018



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