IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S142/2017

B E T W E E N:

YAU027

Appellant

and

THE REPUBLIC OF NAURU

Respondent

ANNOTATED SUBMISSIONS OF THE APPELLANT

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I. CERTIFICATION

1. These submissions are suitable for publication on the internet.

II. ISSUES PRESENTED

2. The appeal presents the following issues:

   (a) Did the primary judge err in failing to hold that the Tribunal failed to deal with the appellant's claim to fear harm by reason of his attendance at meetings, rallies, and other public events arranged by the Bangladesh National Party (**BNP**)?

   (b) Did the primary judge err in failing to hold that the Tribunal misdirected itself in relation to the commencement and operation of the *Refugees Convention (Amendment) Act 2014* (Nr)?

   (c) Were the reasons given by the primary judge so inadequate or unreasonable as to require intervention by this Court?

   (d) Did the primary judge err in failing to hold that the Tribunal's decision was unreasonable, irrational, not based on findings or inferences of fact supported by logical grounds, or otherwise involved an error of law?

   (e) Should the appellant be granted leave to raise points of law that were not argued before the primary judge, being issues (a) and (b) above?

   (f) Should the appellant be granted leave to adduce evidence of two transcripts of the respondent's interview audio recordings on the basis that the evidence is uncontroversial, important, was before the Tribunal, and was not put before the court below in circumstances where it was known to be essential to his case and no forensic advantage could have been obtained from its omission?

III. SECTION 78B NOTICES

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

IV. CITATION BELOW

4. The judgment appealed from is *YAU027 v Republic of Nauru* [2017] NRSC 29.

V. MATERIAL FACTS

5. The appellant is a national of Bangladesh (**AB19** [16]) whose education is limited to five years of primary school. (**AB15** [8])

6. On 6 December 2013, the appellant arrived on Christmas Island, Australia. On 11 December 2013, pursuant to a memorandum of understanding signed 3 August 2013 between the Commonwealth of Australia and the Republic of Nauru (**MOU**),[1] the appellant was transferred to the Nauru Regional Processing Centre. (**AB149-151**)

7. On 23 December 2013, an officer of Nauru interviewed the appellant apparently for the purpose of gathering information about the appellant and his circumstances for the Government of Nauru. (**Transfer Interview**) (**AB114**, **AB293**)

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[1] Certain aspects of the MOU were described in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [3] (French CJ, Kiefel and Nettle JJ), [68]-[70], [101] (Bell J), [105], [178] (Gageler J), [201]-[206] (Keane J), [282]-[292] (Gordon J).

8. On 28 February 2014, pursuant to s 5(1) of the Refugees Convention Act, the appellant applied to the Secretary for Justice and Border Control (**Secretary**) to be recognised as a refugee under the *Refugees Convention Act 2012* (Nr) (**Refugees Convention Act**) (**AB129**), and provided a non-exhaustive written statement. (**AB153**) On 13 May 2014, the appellant wrote to the Secretary with further evidence in support of his application. (**AB158**) On 14 May 2014, a refugee status determination officer interviewed the appellant. (**RSD Interview**) (**AB303**)

9. On 21 May 2014, the Refugees Convention Act was amended to provide for complementary protection for people who are not refugees but who also cannot be refouled because of Nauru's international obligations. (**CP Amendment Act**)

10. On 2 November 2014, the Secretary determined that the appellant was not a refugee and was not owed complementary protection. (**AB12**)

11. On 10 November 2014, pursuant to s 31(1) of the Refugees Convention Act, the appellant applied to the Refugee Status Review Tribunal (**Tribunal**) for merits review of the Secretary's determination (**AB171**), providing written submissions (**AB173**), country information (**AB182**), and a supplementary statement (**AB196**). On 26 March 2015, the appellant attended a hearing before the Tribunal. (**AB206**)

12. On 22 May 2015, the Tribunal affirmed the decision of the Secretary. (**AB155**)

13. On 30 October 2015, pursuant to s 43(1) of the Refugees Convention Act, the appellant appealed to the Supreme Court of Nauru on points of law (**AB28**), and on 12 July 2016, the appellant filed an amended notice of appeal. (**AB34**) On 26 July 2016, the primary judge heard the appeal (**AB75**) and, on 5 May 2017, affirmed the decision. (**AB270**)

14. On 19 May 2017, the appellant filed a notice of appeal in this Court (**AB272**), and on 6 July 2017, the appellant sought leave to file an amended notice of appeal. (**AB285**)

VI. ARGUMENT

15. These submissions address the jurisdiction of this Court and the applicable law in Nauru before turning to the grounds in the proposed amended notice of appeal.

A JURISDICTION OF THIS COURT

16. The proceeding is within the original jurisdiction of this Court conferred by s 5 of the *Nauru (High Court Appeals) Act 1976* (Cth) (**Nauru Appeals Act**) pursuant to s 76(ii) of the Constitution.[2]

Jurisdiction exercised by the Supreme Court of Nauru

17. The appeal is brought as of right. Article 1(A)(b)(i) of the Agreement in the Schedule to the Nauru Appeals Act provides that, in respect of the exercise by the Supreme Court of Nauru "of its original jurisdiction", appeals lie to this Court in civil cases "as of right, against any final judgment, decree or order". In this case, the jurisdiction exercised by the Supreme Court of Nauru under s 43 of the Refugees Convention Act to hear and determine an "appeal" from a decision of the Tribunal was original jurisdiction. It was the first occasion on which the jurisdiction of a Nauruan court was invoked, and on which the judicial power of Nauru was engaged, in respect of the Tribunal's decision.[3]

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2 *Diehm v Director of Public Prosecutions (Nauru)* (2013) 88 ALJR 34 at [56] (French CJ, Kiefel and Bell JJ); *Ruhani v Director of Police* (2005) 222 CLR 489 at [7] (Gleeson CJ), [52] (McHugh J), [118] (Gummow and Hayne JJ).

3 *Ruhani v Director of Police* (2005) 222 CLR 489 at [9]-[10] (Gleeson CJ), [50]-[52] (McHugh J), [110] (Gummow and Hayne JJ). See also *Watson v Federal Commissioner of Taxation* (1953) 87

18. Although s 43 of the Refugees Convention Act, when enacted, was accompanied by a note that, on one view, suggested appellate jurisdiction, the note was repealed on 23 December 2016.[4] In the explanatory memorandum to the Bill, the reasons given for repealing the note included: "It is implicit in the Note that in hearing and determining an appeal commenced pursuant to section 43 the Supreme Court of Nauru exercises appellate jurisdiction. The Republic has received advice from senior counsel that the Court is in fact exercising original, rather than appellate jurisdiction."[5] The order made by the Supreme Court of Nauru in this case was made on 5 May 2017.

19. The better view is that, even with the note, the Supreme Court of Nauru was always exercising original jurisdiction in hearing and determining an "appeal" under s 43 of the Refugees Convention Act. In any event, on 23 May 2017 and 1 June 2017, the respondent filed notices of appearance submitting to the jurisdiction of this Court.

Powers of this Court

20. The proceeding is not an "appeal" in the strict sense and is not governed by the limits applicable to the exercise of appellate jurisdiction under s 73 of the Constitution.[6]

21. In exercising jurisdiction under the Nauru Appeals Act, this Court has power to "affirm, reverse or modify" the judgment appealed from and "may give such judgment, make such order ... as ought to have been given, made ... in the first instance or remit the case for re-determination by the court of first instance, by way of a new trial or rehearing, in accordance with the directions of the High Court" (s 8). The power to remit a case for re-determination in accordance with directions is wider than that given by s 37 of the *Judiciary Act 1903* (Cth).[7] The powers conferred by s 8 "are analogous to those of a court exercising original jurisdiction in first instance review of an administrative decision",[8] and "where any question arises as to the proper inference to be drawn from the facts, it is the duty of this Court to form an independent judgment on that question".[9]

22. Pursuant to s 32 of the *Judiciary Act 1903* (Cth), this Court in the exercise of its original jurisdiction in any matter pending before it, "whether originated in the High Court or removed into it from another Court", "shall have power to grant ... on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled ... so that as far as possible all matters in controversy between the parties regarding the cause of action ... may be completely and finally determined".

Limits of power to receive evidence

23. This Court held in *Clodumar* that it had power to receive evidence in the exercise of original jurisdiction under s 5 of the Nauru Appeals Act, and expressly declined to

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CLR 353 at 370-371; *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652 at 657; *Hembury v Chief of General Staff* (1998) 193 CLR 641 at 653-654.

4 *Refugees Convention (Derivative Status & Other Measures) (Amendment) Act 2016* (Nr), s 27.

5 Explanatory memorandum, Refugees Convention (Derivative Status) (Amendment) Bill 2016, 5.

6 *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561 at [28] (French CJ, Gummow, Hayne and Bell JJ).

7 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [39]-[42] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); cf. *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561 at [30] (French CJ, Gummow, Hayne and Bell JJ).

8 *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561 at [31] (French CJ, Gummow, Hayne and Bell JJ).

9 *Amoe v Director of Public Prosecutions (Nauru)* (1991) 66 ALJR 29 at 31 (Deane, Gaudron and McHugh JJ).

decide the limits of the power.[10] In *Clodumar*, satisfaction of the principles stated in *Orr v Holmes*[11] was held to be sufficient, and was not held to be necessary, for the admission of the evidence. But those principles do not apply to cases of malpractice,[12] and this Court has held that the common law cases "have nothing authoritative to say about the admissibility of further evidence in respect of a statutory power to admit evidence on appeal".[13] The purpose of the power "is to ensure that the proceedings do not miscarry", and a provision conferring judicial power on a court should be construed liberally and without the making of implications or the imposition of limitations not found in the words used by the legislature.[14] The decision in *Orr v Holmes* does not control the exercise of jurisdiction under the Nauru Appeals Act either generally or in this case.

24. Referring to cognate principles stated in *Ladd v Marshall*,[15] the English Court of Appeal observed: "The fact is however that these principles never did apply strictly in public law and judicial review."[16] The emphasis was on the word "strictly", indicating the availability of a discretion in exceptional cases. At least in a public law matter involving judicial review, the touchstone must be the interests of the administration of justice, which include not only the interest in the finality of litigation but also the rule of law requirement that "the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise".[17]

25. In asylum cases, there is also a critical human dimension, embraced by the Supreme Court of Nauru,[18] that "[t]he most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."[19] That principle is itself reflected in the absolute prohibition of non-refoulement in s 4 of the Refugees Convention Act, which operates independently of a determination of refugee status by administrative decision-makers. As with the position at international law, determination of refugee status is declaratory, not constitutive, and a person is a refugee under Nauruan law whenever the person satisfies the definition in the Refugees Convention. An incorrect determination of refugee status followed by removal may entail the international responsibility of the Republic of Nauru.

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10 *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561 at [33]-[34] (French CJ, Gummow, Hayne and Bell JJ).

11 *Orr v Holmes* (1948) 76 CLR 632.

12 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 140 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

13 *CDJ v VAJ* (1998) 197 CLR 172 at [97] (McHugh, Gummow and Callinan JJ).

14 *CDJ v VAJ* (1998) 197 CLR 172 at [104] (McHugh, Gummow and Callinan JJ), citing *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 (Brennan, Gaudron and McHugh JJ), 316 (Toohey and Gummow JJ).

15 *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 (Denning LJ).

16 *R v Immigration Appeal Tribunal; Ex parte Haile* [2001] EWCA Civ 663 at [25] (Simon Brown LJ with whom Mummery and Longmore LJJ agreed at [29] and [30]).

17 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 (Gaudron J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [55] (Gaudron and Gummow JJ with whom Gleeson CJ and Hayne J agreed at [5] and [172]).

18 *CRI020 v Republic of Nauru* [2017] NRSC 41 at [37] (Crulci J); *DWN113 v Republic of Nauru* [2016] NRSC 28 at [33] (Crulci J).

19 *Bugdaycay v Secretary of State for the Home Department* [1987] 1 AC 514 at 531 (Lord Bridge of Harwich).

26. The circumstances in which this Court admitted evidence in *Clodumar* were described by Dixon J as pursuant to an exception that existed "to fulfil an imperative demand of justice".[20] The demands of justice are not closed. A contemporary approach under the Nauru Appeals Act must accommodate the role of public law and the circumstances of Nauru, including in relation to matters arising under the Refugees Convention Act.

Exercise of power to receive evidence in this case

27. The evidence sought to be adduced comprises two transcripts of the respondent's audio recordings of the Transfer Interview and RSD Interview (**AB293-AB315**), such recordings having been listened to and relied upon by the Tribunal in its review. The evidence is uncontroversial, important, and clearly should have been put before the primary judge if the appellant's 'no evidence' and procedural fairness grounds were to be argued. No forensic advantage could have been obtained from its omission.

28. The amended notice of appeal in the court below raised several grounds by which the appellant sought to contradict or impugn statements in the Tribunal's reasons about what the appellant had claimed during the two interviews. (**AB285**) The transcripts were provided to the appellant's counsel below (**AB326**.32) but were not adduced. The only direct evidence before the primary judge of the Transfer Interview was the Nauruan officer's summary of that interview. (**AB114**) There was no direct evidence of the RSD Interview. The respondent, in its response to the notice of appeal, pleaded that "there is no direct evidence before the Court of the evidence given by the appellant at the [RSD] interview". (**AB32** [4(b)]) In its written submissions, the respondent submitted that "there is no transcript before the Court that would provide some basis for the appellant's contention" that the appellant did not give certain evidence during that interview. (**AB62** [31]) During the hearing, the appellant's counsel said: "there is no direct evidence before us of what was said at the [RSD] interview". (**AB93**.18-19) The transcripts were not tendered. It would seem that for so long as the respondent maintained its submissions, the 'no evidence' grounds were doomed to fail without them. The oral argument shows that those grounds were pressed and were not abandoned. (**AB92-93**, **AB109**)

29. The omission to tender the transcripts in support of those grounds could not have been "a rational tactical decision, made in order to avoid a forensic risk", or "for the purpose of obtaining a forensic advantage".[21] There could not have been any "reasonable explanation for not calling the evidence".[22] The appellant had also not been made aware of any decision to that effect. (**AB283**.15) The significance of the omission was such that the appellant could not have had a fair hearing in relation to those grounds.

30. In the particular circumstances of this case, the special factors that the content of the evidence is of Nauru's own audio recordings, and is important, and was omitted in the circumstances described above, are enough to justify the exercise of the power.

31. All references to those transcripts in these submissions are clearly marked as such.

B THE APPLICABLE LAW IN NAURU

Refugees Convention Act

32. Nauru acceded to the Refugees Convention and Refugees Protocol on 28 June 2011. Determination of refugee status in Nauru is governed by the Refugees Convention Act.

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20 *Orr v Holmes* (1948) 76 CLR 632 at 640 (Dixon J).

21 *TKWJ v The Queen* (2002) 212 CLR 124 at [17] (Gleeson CJ), [27] (Gaudron J with whom Gummow J agreed).

22 *TKWJ v The Queen* (2002) 212 CLR 124 at [112] (Hayne J with whom Gummow J agreed).

Complementary protection

33. With the commencement of the CP Amendment Act on 21 May 2014, complementary protection was defined as "protection for people who are not refugees ... but who also cannot be refouled ... where this would breach Nauru's international obligations" (s 3).

Nauru's international obligations

34. Nauru is also a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**). Nauru has signed, but not ratified, the International Covenant on Civil and Political Rights (**ICCPR**). In 1978, Nauru acceded to the Vienna Convention on the Law of Treaties (**VCLT**), article 18(a) of which obliges Nauru as a signatory to the ICCPR "to refrain from acts which would defeat the object and purpose" of that covenant. Nauru also signed the MOU with Australia on 3 August 2013, the terms of which are broader than the Refugees Convention (art 19(a)); impose obligations in the same terms as articles 6 and 7 of the ICCPR (cl 19(c)); and require that transferees be treated "in accordance with relevant human rights standards" (cl 17).

35. Customary international law recognises non-refoulement obligations corresponding at least to those implied in articles 6 and 7 of the ICCPR and article 3 of the CAT.[23] For the purposes of this appeal, it is sufficient to limit consideration to those obligations.

Common law

36. The *Customs and Adopted Laws Act 1971* (Nr) provides that, with some exceptions, "the common law and the statutes of general application" (s 4(1)) and "the principles and rules of equity" (s 4(2)) in force in England on 31 January 1968 are adopted as laws of Nauru. That adoption of English common law and statutes has force and effect "only so far as the circumstances of Nauru and the limits of its jurisdiction permit" and "only so far as they are not repugnant to or inconsistent with" the laws of Nauru (s 5(1)).

37. The "principles and rules of the common law and equity" so adopted "may from time to time in their application to Nauru be altered and adapted by the Courts to take account of the circumstances of Nauru" and of any changes to those principles and rules which occurred in England after 31 January 1968 (s 4(4)), provided that "the Court which makes the alteration or adaptation is satisfied that the principle or rule so altered or adapted will suit better the circumstances of Nauru than does the principle or rule without that alteration or adaptation" (s 4(4)(b)). The circumstances of Nauru include the right of appeal to this Court from judicial decisions under the Refugees Convention Act.

38. By reason of ss 4(1), 6, and the First Schedule, the common law in force in England on 31 January 1968 relating to "the interpretation and effect of statutes" applies and has force and effect in Nauru.

C GROUNDS OF APPEAL TO THIS COURT

39. The points of law advanced in the court below were that the Tribunal "erred in law and/or fell into jurisdictional error in that it acted unreasonably and/or irrationally and/or unfairly and/or in that it failed to accord the appellant procedural fairness" in one or more of the ways particularised in the amended notice of appeal (**AB34**) and in other ways explained in written (**AB40**, **AB69**) and oral argument (**AB75**) before the primary judge.

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[23] See, for example, Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 87 at 149-164.

40. By a proposed amended notice of appeal (**AB285**), the appellant appeals on the following grounds:

(a) **Proposed ground 2:** The primary judge erred in failing to hold that the Tribunal failed to deal with the appellant's claim to fear harm by reason of his attendance at meetings, rallies, and other public events arranged by the BNP.

(b) **Proposed ground 3:** The primary judge erred in failing to hold that the Tribunal misdirected itself in relation to the commencement of the CP Amendment Act.

(c) **Ground 4:** The primary judge erred in failing to give adequate reasons and in arriving at conclusions that lack an evident and intelligible justification.

(d) **Ground 5:** The primary judge erred in failing to hold that the Tribunal's decision was unreasonable, irrational, not based on findings or inferences of fact supported by logical grounds, or otherwise involved an error of law.

41. If the appellant succeeds only on ground 4 in relation to the inadequacy of the reasons given by the primary judge, the matter should be remitted to the Supreme Court. If the appellant succeeds on any other ground, the matter should be remitted to the Tribunal.

PROPOSED GROUND 2: THE PRIMARY JUDGE ERRED IN FAILING TO HOLD THAT THE TRIBUNAL FAILED TO DEAL WITH THE APPELLANT'S CLAIM TO FEAR HARM AT MEETINGS, RALLIES, AND OTHER PUBLIC EVENTS ARRANGED BY THE BNP

42. For the reasons given below, leave should be granted to raise this ground. The essence of the ground is that the Tribunal misunderstood an important part of the appellant's case and, having misunderstood it, failed to consider and deal with it. The relevant part of the appellant's case was his claim to fear harm, irrespective of his profile, by reason of his attendance at protests, rallies, and other public events arranged by the BNP or Chatra Dal (which was a student wing of the BNP).

43. Although not necessary for this ground to be established, for completeness, and subject to the grant of leave to adduce it, the transcript of the RSD Interview confirms that the claim was made by the appellant's representative at an early stage: (**AB314**.28-31)

> *"[The appellant] has the mindset to be active, even though other people that support BNP might prefer to be silent supporters. That is what puts him at risk of harm – he wants to participate, he wants to get involved and he wants to attend rallies. ... the country information does support the fact that people who are active can be at risk of harm and in terms of some of the force used against protesters, the country information has also pointed out that it has been a disproportionate use of force."*

44. The Secretary found that the appellant "was a supporter of [Chatra Dal] from 2005" and "held the position of Organising Secretary of a local Ward from 2007". (**AB8**) Accepting there was "ongoing political violence in Bangladesh", the Secretary said the appellant "does not have a profile, nor is he involved in any activities, that would bring him to the adverse attention or interest of Bangladeshi authorities or AL supporters". (**AB11**)

45. In response to the Secretary's concerns, the appellant said in his statement before the Tribunal that, irrespective of his profile, he faces a real risk of harm by virtue of his attendance at protests, rallies, and other public events arranged by the BNP:

> *"I do not agree with the Secretary's implication that only high-profile BNP members are targeted by the state authorities of Bangladesh. Anytime the members or supporters of the BNP hold a protest or a rally, they are violently attacked by the police. This has been widely reported in the media. The people who participate in these rallies are not high-profile political leaders. They are the masses, the workers*

for the party like me, who turn out to support the party that we believe in." (**AB200** [36])

46. Having given one account of such an attack at a BNP rally in February 2013, he said:

> *"Neither the police nor the AL supporters who attacked the rally stopped to ask anyone participating in the rally what their rank within the BNP was, or whether they were a high-profile political figure. It did not matter to them. All that mattered to them was that we were supporters of the BNP, and that was sufficient for them to seriously harm many of the participants in the rally, including me. Therefore, I believe the Secretary was incorrect in concluding that I would only be at a risk of harm from the authorities of Bangladesh, and from AL members and supporters, if I had a nationwide profile as a leader in the BNP."* (**AB200** [38])

47. In addition to his own accounts, the appellant relied on evidence of ongoing political violence in Bangladesh, including reports of "excessive force against anti-government protesters" citing instances where "police, the Border Guards of Bangladesh (BGB) and the Rapid Action Battalion (RAB) have shot live ammunition ... into unarmed crowds". (**AB185**) Another report described BNP rallies "that turned violent" and said that "protesters are frequently injured and occasionally killed during clashes in which police use excessive force". (**AB187**) Still other reports estimated that "at least 40 people, including bystanders, have been killed during protests" and "more than 4,000 people were injured during protests in November [2013] alone". (**AB189**) That evidence was logically probative of a risk of harm to people who attend protests, rallies, and other public events irrespective of their profile.

48. It was apparent that the appellant claimed that, if returned to Bangladesh, he would continue to attend BNP protests, rallies, and other public events. His evidence was that it is impossible to be apolitical in Bangladesh: "Everyone must take a side." (**AB202** [55]) "I would always pick the BNP". (**AB203** [56]) His representative had also said, in the transcript of the RSD Interview subject to leave, "he wants to attend rallies". (**AB314**.31)

49. The Tribunal expressly found that the appellant "may have been present at meetings, rallies or other public events arranged by the BNP or Chatra Dal ... as a member of the general public". (**AB22** [25], **AB25** [41]) But the Tribunal failed to consider and make any findings about the appellant's claim that, if returned, he would face a risk of harm by reason of his attendance at such events. The failure to deal with the claim involved a denial of procedural fairness and a constructive failure to exercise jurisdiction.[24]

50. The Tribunal also did not refer to or make any findings about the questions of fact raised by the appellant's claim, including the reports of harm to attendees of protests, rallies, and other public events. By reason of s 34(4)(c)-(d) of the Refugees Convention Act, the Tribunal's omission to set out any findings in relation to those matters requires the conclusion that the Tribunal erroneously considered them not to be material.[25]

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[24] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [24] (Gummow and Callinan JJ with whom Hayne J agreed at [95]), applied in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [90] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [35] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at [45]-[47] (French, Sackville and Hely JJ).

[25] *Minister for Immigration and Border Protection v SZSRS* [2014] FCAFC 16 at [33]-[34] (Katzmann, Griffiths and Wigney JJ); *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [5] (Gleeson CJ), [35] (Gaudron J), [69] (McHugh, Gummow and Hayne JJ).

PROPOSED GROUND 3: THE PRIMARY JUDGE ERRED IN FAILING TO HOLD THAT THE TRIBUNAL MISDIRECTED ITSELF IN RELATION TO THE CP AMENDMENT ACT

51. For the reasons given below, leave should be granted to raise this ground. This ground is confined to paragraph 3(b) of the proposed notice of appeal, paragraph 3(a) not being pressed. The Tribunal erred in rejecting the appellant's complementary protection claim in relation to his girlfriend's family partly on the basis that the claim should have been raised at a time when it could not lawfully have been considered.

52. The Tribunal erroneously proceeded on the basis that the CP Amendment Act had commenced as early as 28 February 2014, shown by the Tribunal's description of the appellant's application as having been made pursuant to those amendments. (**AB15** [1]) Had the Tribunal proceeded upon a correct understanding of the law, namely, that the CP Amendment Act had only commenced on 21 May 2014, the Tribunal would have been bound to hold that the application made by the appellant on 28 February 2014 to be recognised as a refugee could not have been an application for complementary protection. On that correct view of the law, it would not have been open to the Tribunal to conclude that the appellant should have advanced, at that or any earlier time, a complementary protection claim that could not lawfully have been considered.

53. The appellant's complementary protection claim relating to his girlfriend was first made in the appellant's supplementary statement dated 9 November 2014, signed at the same time he applied to the Tribunal for merits review. That was his first opportunity to make a complementary protection claim following the commencement of the CP Amendment Act. In his statement, the appellant said: "I did not previously provide this information because I was not sure if it was relevant to my claims, and I was never questioned about it at any stage of my refugee status application process." (**AB197** [10])

54. Importantly, the Tribunal's view was that the claim was probably not a valid claim under the Refugees Convention. First, the Tribunal said that it had "some reservations" as to the existence of a particular social group of "men who are perceived to have committed sexually immoral acts in Bangladesh" (**AB24** [35]), although it made no finding either way. Secondly, the Tribunal said there was "at least some room for doubt" as to whether the appellant would be harmed "because of his membership" of that group, or because of rage "directly and personally" targeted at him. (**AB24** [35]) The thrust of the Tribunal's comments was that the claim was not a valid claim under the Refugees Convention because of its direct and personal nature. That is the very kind of claim that was intended to be considered under the amendments made by the CP Amendment Act.

55. If the Tribunal was right that the claim could not have been admitted under the Refugees Convention, that circumstance provided a complete explanation, as a matter of law, for the claim not having been made before the commencement of the CP Amendment Act. The Tribunal cannot discharge its review function by rejecting a claim on the basis that it was not made at a time when it could not lawfully have been considered. In this case, the Tribunal relieved itself of the burden of finally determining whether the claim could or could not have been admitted under the Refugees Convention by proceeding on the erroneous basis that the amendments made by the CP Amendment Act were in force at the time the appellant made his application. (**AB15** [1]) It was only upon that basis that the Tribunal was able to conclude that the claim should have been made at that earlier time irrespective of whether it was a valid claim under the Refugees Convention.

56. It is no answer to the foregoing to say that the Tribunal rejected the factual basis for the claim. A critical part of the Tribunal's reasons for rejecting the factual basis for the claim was its perception that the claim had been raised too late in the process, which it said "casts strong doubt over the credibility of the claim". (**AB24** [38]) But a conclusion that the appellant's claim could not lawfully have been considered at any earlier point in

time, because the CP Amendment Act had not yet commenced, would have precluded that perception. The Tribunal's error about the commencement of the CP Amendment Act was therefore material to its decision. The other reasons for rejecting the factual basis of the claim were also affected by legal error in the manner explained at [106].

57. The attempt by the appellant's claims assistance provider to shoehorn the claim into a ground under the Refugees Convention before the Tribunal does not detract from the appellant's explanation that his claim was not raised earlier because he "was not sure if it was relevant" (**AB197** [10]), and the appellant is not to be penalised on that account.

GROUNDS 4 AND 5: THE PRIMARY JUDGE ERRED IN FAILING TO GIVE ADEQUATE REASONS AND IN FAILING TO HOLD THAT THE TRIBUNAL'S DECISION INVOLVED AN ERROR OF LAW

58. In respect of each ground of appeal raised below that is maintained on this appeal, the appellant submits that the reasons of the primary judge were inadequate in a manner requiring intervention by this Court, and for other reasons in relation to each ground, the primary judge should have held that the Tribunal's decision involved legal error. These submissions explain the applicable law before proceeding to the grounds.

Inadequate reasons

59. The Supreme Court of Nauru must give reasons that are at least sufficient to enable the parties to understand the basis of its decision and to enable this Court to perform its task of appellate review.[26] Reasons are central to the judicial function and an incident of the judicial process, both of which should result in an outcome that can be assessed according to its own terms.[27] The failure to give adequate reasons is an error of law.

60. It is sufficient in this case to observe that reasons given by the Supreme Court of Nauru must be held to a standard that is at least as strict as the standard to which that Court holds the administrative decision-makers of Nauru on judicial review of their decisions. For example, in decisions under the Refugees Convention Act, the Tribunal must give a written statement that "sets out the decision of the Tribunal", "sets out the reasons for the decision", "sets out the findings on any material questions of fact", and "refers to the evidence or other material on which the findings of fact were based" (s 34(4)).

61. Further, the Supreme Court of Nauru has adopted this Court's judgment in *Li* holding that a decision is unreasonable where it "lacks an evident and intelligible justification".[28] As shown in the next section, almost every conclusion expressed by the primary judge in this case answers that description. His Honour's decision was unreasonable.

62. This Court has also remarked upon "the danger of recording a bare acceptance" of the submissions of counsel in terms that "the reader of the judgment may lack confidence about whether the mind of the responsible judge actually did assimilate and evaluate the competing points of view".[29] A reader of the judgment here lacks that confidence.

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26 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666-667 (Gibbs CJ); *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 277-281 (McHugh JA); *Jacobs v London County Council* [1950] AC 361 at 369 (Lord Simonds).

27 *Wainohu v New South Wales* (2011) 243 CLR 181 at [54]-[58] (French CJ and Kiefel J), [92], [94] (Gummow, Hayne, Crennan and Bell JJ).

28 *CRI020 v Republic of Nauru* [2017] NRSC 41 at [34] (Crulci J) and *CRI052 v Republic of Nauru* [2017] NRSC 33 at [41], [51], [58] (Crulci J), applying *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76] (Hayne, Kiefel and Bell JJ).

29 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [107] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

63. Whichever standard is adopted, the primary judge's reasons did not meet that standard. Unless this Court is prepared to hear and determine each of the appellant's grounds of appeal de novo, the consequence is that the matter must be remitted to the court below for re-determination by way of rehearing.

Grounds of appeal considered by the primary judge

64. Essential to these grounds of appeal is an understanding that the Tribunal's reasons were built around a series of credibility findings, the cumulative effect of which led to the rejection of the appellant's claims. It cannot be said that any one of those findings was not critical to the decision, or provided an independent basis for the decision. Those matters were at the heart of the case advanced before the primary judge.

Paras 1(a)-(d): No evidence that the appellant's father invited him to join the BNP

65. The grounds were that the Tribunal erred in law in finding that the appellant's evidence in the Transfer Interview and the RSD Interview was to the effect that he was invited to join the BNP by his father, who played a role in bringing him to the party. (**AB34-35**) The perception that the appellant had said he "was invited to join the BNP by his father" was important to the Tribunal's review because the Tribunal perceived it as inconsistent with the appellant's evidence at the hearing to the effect that the reasons he joined the BNP included his support of democracy and admiration for the BNP leader in his area who was a teacher who tried to help people by solving their problems. (**AB20** [18])

Paras 1(a)-(d): The reasons of the primary judge

66. In relation to the Transfer Interview, the primary judge summarised aspects of the parties' written submissions in chief and held that "[t]his ground of appeal has no basis". (**AB263** [21]) In relation to the RSD Interview, the primary judge relied on his Honour's disposition of the ground concerning the Transfer Interview. (**AB264** [22])

67. It is to be inferred from the dismissal of the ground that the primary judge rejected the appellant's submissions, but his Honour did not state whether he accepted or rejected any other submissions, and did not otherwise express any conclusions. His Honour did not refer to the appellant's written submissions in reply (**AB71** [21], [26]-[27]), or the oral argument of either party. Substantially the whole of the appellant's case in relation to this ground was advanced in oral argument. (**AB92-93**, **AB109**; cf. **AB49** [39]-[42]) The respondent's oral argument involved a close analysis of the transcript and the decision and how those documents were to be understood. (**AB99-101**) No reasons were given for his Honour's conclusion that "[t]his ground of appeal has no basis".

68. Although the primary judge summarised the respondent's submissions as involving the proposition that the Tribunal "put to the appellant that he was invited to join BNP by his father" (**AB263** [20]), that did not accurately capture the respondent's submission, which was that the Tribunal "put to the appellant *that he said at that interview* that he was invited to join the BNP by his father" (**AB62** [31]). The difference was critical to a proper understanding of the appellant's case, which was not that the Tribunal found that his father had invited him to the party, but that the Tribunal found that was what he said. Further, the respondent made the above submission in relation to the RSD Interview, not the Transfer Interview. (**AB62** [31])

69. The submissions referred to in relation to the Transfer Interview could not support the dismissal of the ground concerning the RSD Interview. The first of the respondent's submissions, as misstated by his Honour, did not address either ground. (**AB263** [20]) The second submission concerned only the Transfer Interview. (**AB263** [21]) The primary judge failed to give adequate reasons for dismissing grounds 1(a)-(d).

Paras 1(a)-(d): Error of law

70. **First**, to the extent that the primary judge adopted the respondent's submission in relation to the Transfer Interview, the primary judge erred. The submission was that the transcript of the Tribunal hearing revealed that "the Tribunal considered that the extent of the appellant's evidence at the Transfer Interview was that his interest in Chatra Daal or BNP arose because his father was a member of the BNP". (**AB62** [32])

71. Acceptance of that proposition did not require the ground to be dismissed. What the Tribunal considered at the hearing was different to the reasons it gave for its decision. Significantly, the respondent did not submit there was any evidence for the Tribunal's finding, in its reasons, that the appellant said words "in his TI ... interview, to the effect that he was invited to join the BNP by his father" evidencing "his father's role in bringing him to the party". (**AB20** [18]) Rather, the respondent's case was that the Tribunal's reasons should be read as finding that "the extent of the appellant's evidence at the Transfer Interview was that his interest in Chatra Daal or BNP arose because his father was a member of the BNP". (**AB62** [32]) That is not a fair reading of the reasons.

72. There was, in fact, no material capable of supporting the conclusion that the appellant said words "in his TI ... interview, to the effect that he was invited to join the BNP by his father" evidencing "his father's role in bringing him to the party". (**AB20** [18]) The Nauruan officer's record of the Transfer Interview provided no support. (**AB121**)

73. There was "not a skerrick of evidence"[30] in the Transfer Interview to the effect that the appellant "was invited to join the BNP by his father" or otherwise describing "his father's role in bringing him to the party". That inference was not "reasonably open".[31] The transcript of the Transfer Interview, subject to a grant of leave, confirms the same. (**AB297**.35-55, **AB298**.37-38) The Tribunal erred in finding that the appellant gave evidence to that effect "in his TI ... interview". (**AB161** [18]) It was also never put to the appellant that he had given that evidence during the Transfer Interview. (**AB217**.5-10) The finding should not have been relied on to reject the credibility of his claims.

74. **Secondly**, to the extent that the primary judge adopted the respondent's submission in relation to the RSD Interview, the primary judge also erred. The submission involved the following propositions: (1) the Tribunal had listened to the audio recording of the RSD Interview; (2) the transcript of the Tribunal hearing showed that the Tribunal put to the appellant that he said at the RSD interview that he was invited to join the BNP by his father; and (3) the appellant accepted that proposition. (**AB62** [31])

75. The third proposition is incorrect, as the Tribunal's questions were unfair, and the appellant's responses to those questions could not fairly be understood as acceptance of what was put to him. The exchange was as follows: (**AB217**.10-22)

> *MR MULLIN: Why I'm asking this ... is because in your original interview when you first arrived in Nauru, you gave a very definite reason for your interest in the Chatra Dal or the BNP. I mean, that was a very definite reason. It was because your father was a member of the BNP, and I will just go on – I'm sorry ..... And you said, well, he was – not only that, he was on a committee of 10 people in 10 the village, and you said you and your father would go along to BNP meetings. And, then, following that, at your second interview, you said, in fact, your father invited you to join the BNP. So, I mean, I just find it a little hard to understand why you wouldn't have mentioned that when I was asking you what led you to the BNP. Could you comment on it?*

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30 *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [575] (Weinberg J).

31 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 (Mason CJ).

THE INTERPRETER: I didn't remember. I couldn't recollect.

MR MULLIN: Right. But that's right is it, that your father was a member of the BNP and he used to go along to BNP meetings and he invited you to join the party?

THE INTERPRETER: I just followed my father. Whatever he wanted to do, I just tried to follow those things.

76. The second question asked by the Tribunal in the exchange above was a compound question that would have been improper in cross-examination.[32] When asked of an asylum seeker with a low level of education through an interpreter, it was at least unfair to arrive at an adverse conclusion based on his response.[33] Insofar as the question was based on the false assertion that the appellant's father "invited [him] to join the party" (as shown below), the question was also "misleading and confusing" because it "may by implication put into the mouth of an unwilling witness, a statement which he never intended to make, and thus incorrectly attribute to him testimony which is not his".[34] This is a case where the Tribunal "confront[ed] him unfairly with that assertion and then [proceeded] to reject [his] evidence partly on the basis of the wrong assertion".[35] The Tribunal's error "meant that the Tribunal's assessment of the appellant's credibility at the Tribunal hearing was informed by, among other things, the appellant's answer to a question based unfairly on a misstatement of what he said at the [RSD] interview".[36]

77. The answer given by the appellant, that he "[j]ust followed his father", was consistent with his evidence that he had attended BNP meetings with his father, which was closely related to the first and second assertions in the compound question. The fact that the appellant did not "mention[] his father's role in bringing him to the party" (**AB20** [18]) was immaterial in circumstances where his father had not brought him to the party. The Tribunal erred in misunderstanding the appellant's reasons for why he joined the BNP.[37]

78. **Thirdly**, to the extent that the primary judge implicitly found that the appellant had said words to the effect that "he was invited to join the BNP by his father" evidencing "his father's role in bringing him to the party", the primary judge erred. No such evidence was given in his application (**AB153** [6]), the Transfer Interview (see above at [72]-[73]), or was recorded in the Secretary's decision following the RSD Interview. (**AB5**) If leave is granted to adduce the RSD Interview transcript, the following shows what was said:

"How did you become a member?

Someone... My father also used to support BNP and work also for BNP and one of the person, he invited me to join the Chatra Dal – the student wing – and I joined. (**AB305**.45-47)

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32 *Libke v The Queen* (2007) 230 CLR 559 at [127] (Heydon J).

33 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592 (Northrop, Miles and French JJ); *SZBEL v Minister for Immigration & Citizenship* (2006) 228 CLR 152 at [29]-[32] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

34 *Libke v The Queen* (2007) 230 CLR 559 at [130] (Heydon J).

35 *Minister for Immigration and Border Protection v SZSNW* (2014) 229 FCR 197 at [19] (Mansfield J), [84] (Buchanan J), [108] (Perram J).

36 *SZSMR v Minister for Immigration and Border Protection* [2015] FCA 655 at [54] (Gleeson J).

37 *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [111] (Robertson J: "[t]he fundamental question must be the importance of the material to the exercise of the Tribunal's function and thus the seriousness of the error"); *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at [70] (Kenny, Griffiths and Mortimer JJ); *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67 at [47]-[54] (Katzmann, Griffiths and Wigney JJ). Special leave to appeal was refused: *Minister for Immigration and Citizenship v SZRKT* [2013] HCATrans 251 (Bell and Keane JJ).

Why did you join the BNP?

I know I worked for the local BNP. He is a BNP local member. So if any local people will be in a problem, if anything happen to people, always he will come out and rise his hand to help and everybody will go to him – day or night – he will help. (**AB306**.7-10)

Why did you join the BNP and not a party such as Jamaat Islami?

Our local leader and parliament member, he is from BNP and he is doing very good and everybody respect him and he is devoted to his local people, always helpful. That is, I see the local leader who is BNP doing good for the people. That is why I joined the BNP. (**AB306**.18-22)"

79. The appellant did not say he was invited to join by his father: he said he was invited to join by "one of the person", who may well have been the "BNP local member" for whom the appellant said he worked. On the evidence from the RSD Interview, a finding or inference to the effect that the appellant said he was "invited to join the BNP by his father", was not "reasonably open".[38] Further, in circumstances where that inference was perceived to be so "at odds" with the appellant's other evidence as to materially and adversely affect the credibility of his claims, it could not have been an inference of fact "supported by logical grounds".[39] The Tribunal erred in proceeding on the basis that the appellant gave evidence to that effect "in his ... RSD interview". (**AB161** [18])

80. **Fourthly**, the errors were errors of law because there was no evidence that the appellant said words to the effect that "he was invited to join the BNP by his father" evidencing "his father's role in bringing him to the party" either in the Transfer Interview or in the RSD Interview; it was never put to the appellant that he gave evidence to that effect during the Transfer Interview; the critical question asked by the Tribunal, being a compound question based partly on a false premise, was unfair; and it was unfair for the Tribunal to arrive at adverse conclusions based on the appellant's response.

81. The errors were material to the Tribunal's review. The perceived role played by the appellant's father in bringing him to the BNP also affected the second and third matters that the Tribunal said adversely affected the credibility of his claims. (**AB161** [19]-[20]) For those reasons, the primary judge erred in dismissing grounds 1(a)-(d).

Para 1(h): The appellant's explanation for not being active in politics

82. The ground was that the Tribunal erred in law in rejecting what it perceived to be the appellant's claim that "he had genuinely followed a pathway to political activism through his politically committed father" on the basis that, if that were true, he would have been politically active as a minor. (**AB36**) The importance of that error to the review is that the appellant never claimed to have followed any such pathway, and that, in any event, the Tribunal's assumptions about the form of political expression engaged in by minors in Bangladesh lacked an evidentiary, rational, and logical foundation. (**AB20-21** [20])

Para 1(h): The reasons of the primary judge

83. The primary judge quoted the appellant's written submissions, summarised part of the respondent's written submissions, and said: "I find that the Tribunal's finding to be reasonable and this ground of appeal is dismissed." (**AB266** [33])

84. It is to be inferred from the dismissal of the ground that the primary judge rejected the appellant's submissions, but his Honour did not state whether he accepted or rejected

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38 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 (Mason CJ).

39 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at [38] (Gummow and Hayne JJ with whom Gleeson CJ agreed at [1]).

any other submissions, and did not express any conclusions other than that the Tribunal's finding was reasonable. His Honour did not refer to the appellant's oral argument in chief or in reply (**AB95**, **AB109-110**), which went beyond the appellant's written submissions (**AB50-51**, **AB63**), but his Honour's summary of the respondent's submissions was taken from part of the respondent's oral argument. (**AB104**)

85. No reasons were given for his Honour's conclusion that the finding was reasonable. Although his Honour recorded the appellant's argument that the finding was "irrational and not founded on probative evidence", his Honour did not respond to it. (**AB266** [31]) No evidence or rational grounds were identified by his Honour as supporting the finding. His Honour did not refer to the respondent's oral submissions in relation to those issues. The primary judge failed to give adequate reasons for dismissing ground 1(h).

Para 1(h): Error of law

86. To the extent that the primary judge adopted the respondent's submissions, the primary judge erred. In oral argument, the respondent developed its submission as follows:

(a) First, the Tribunal considered that "the appellant's father got him involved, invited him into politics, was involved in politics, had an important position locally, and attended meetings on a regular basis", and it was open to the Tribunal to infer that, in those circumstances, the appellant would have become politically active at an earlier point in time (that is, as a minor).

(b) Secondly, the Tribunal found that the appellant's explanation that he did not become politically active at an earlier point in time (that is, as a minor) because he was "too young" was not convincing.

(c) Thirdly, the Tribunal did not need any evidence "to draw a conclusion as to what the tribunal might've expected from the appellant, in circumstances where it has put to him an observation in the course of the hearing, that many people are active within political parties in Bangladesh at a much earlier age".

(d) Fourthly, there was a "shift in explanation" on the part of the appellant that justified the Tribunal finding that the explanation was not convincing (or perhaps that neither explanation was convincing). (**AB104**.9-38).

87. The first proposition was affected by the errors in relation to grounds 1(a)-(d). The appellant never claimed to be a person who "had genuinely followed a pathway to political activism through his politically committed father" (**AB21** [20]). That was a case theory developed by the Tribunal that travelled far beyond the appellant's evidence. When asked about his father's political commitment, the appellant expressly denied that his father was "a strong member of the BNP". (**AB219**.9-13) There was no evidence to the contrary. The Tribunal responded with speculation: "let's say" he is a strong "supporter". (**AB219**.19) Hypothesising in that way could not provide any proper basis for the Tribunal's case theory about a paternal pathway to political activism. In that respect, the Tribunal misunderstood a significant component of the appellant's case.

88. The second and third propositions, concerning the Tribunal's rejection of the appellant's explanation that he was too young to be politically active at an earlier age than 18, and the Tribunal's "observation" about the age at which minors are politically active in Bangladesh, are addressed in conjunction with the fourth proposition below.

89. The fourth proposition, describing a "shift in explanation", could not justify the approach taken by the Tribunal. When read in the context of the Tribunal's reasons (**AB20** [20]), the reason for the "shift in explanation" is readily apparent from the bizarre position adopted by the Tribunal during the hearing: (**AB219**.23-47, **AB220**.1-2)

MR MULLIN: So why does [your father] not influence you to join the BNP before to – or to involve yourself with the BNP before 2005?

THE INTERPRETER: At that time, I was very [young] that's why probably he didn't ...

MR MULLIN: Yeah. Well, I think you were 18 in 2005; is that correct? ...

THE INTERPRETER: ..... September. Yeah, could be 17, 18 years old.

MR MULLIN: Yes. Well, I mean, many people in Bangladesh involve themselves in politics with the BNP or the Awami League or any of the parties well before that, and if they've got a father who is a strong supporter of a party, it's hard to understand why they're not influenced to do something about it before they get to the age of 18.

THE INTERPRETER: Okay. Because he ..... a lot ofm pressure for my studies but I didn't pursue my studies, but how ..... involved with the farm work and everything ..... the farm and other things, so, since I had – I was ..... doing that so all my time and everything was spent in there and I was doing that work for probably that reason.

90. When the appellant was asked why he had not been politically active before 2005, that is, before he was 18 years old, he said he was "too young". (**AB20** [20]) By the last question shown above, the Tribunal indicated to the appellant that it did not accept that there could be minors in Bangladesh whose fathers are strong supporters of a party and who are not politically active because they are too young. If the Tribunal had been prepared to countenance that possibility, the question would have been irrelevant.

91. Faced with the apparently irrefutable proposition that all minors in Bangladesh whose fathers are strong supporters of a party are politically active absent a convincing reason to the contrary, the appellant attempted to provide such a reason from his own life. That was not a matter that was capable of adversely affecting the credibility of his claims. The true position is that the whole process of reasoning underlying the question asked by the Tribunal, and ultimately expressed in its decision, was unfair and unreasonable.

92. There was no evidentiary, rational, or logical basis for the finding that all, most, or many minors in Bangladesh are politically active "at a much earlier age" than 18. (**AB20** [20]) Had there been any evidence, the Tribunal was bound to refer to it (s 34(4)(d)).

93. The unreasonableness was exacerbated by the fact that, in the very next paragraph of its reasons, the Tribunal said it was unlikely that the appellant had been politically active in any way at school "given that he was only twelve years old when he left". (**AB21** [21])

94. For those reasons, the primary judge erred in dismissing ground 1(h).

Para 1(hb): Inconsistency between Transfer Interview and subsequent statements

95. The ground was that the Tribunal erred in law in finding that the evidence given by the appellant during the Transfer Interview, by omission, was inconsistent with his evidence in subsequent statements and oral evidence. (**AB36**) The perceived inconsistency was only important to the review because the Tribunal considered that it reflected adversely on the appellant's credibility. (**AB20** [18])

Para 1(hb): The reasons of the primary judge

96. The primary judge referred to the parties' written submissions in chief and accepted the respondent's submission in these terms: "I accept that the new explanation cannot raise a point of law and therefore this ground of appeal is dismissed." (**AB268** [40]) The primary judge did not refer to the appellant's written submissions in reply (**AB72** [31]) or to the parties' oral arguments (**AB96-97**, AB106, **AB110-111**).

97. His Honour did not otherwise state whether he accepted or rejected any submissions, and did not express any other conclusions. No reasons were given for his Honour's

conclusion that "the new explanation cannot raise a point of law", or why that led to his Honour dismissing the ground in circumstances where the appellant had complained that, amongst other things, "it's not reasonable to regard it as an inconsistency if somebody at a brief transfer interview, in those circumstances, gives part of what later turns out to be a greater picture". (**AB110-111**) The primary judge failed to give adequate reasons for dismissing ground 1(hb).

Para 1(hb): Error of law

98. **First**, the primary judge erred in dismissing the ground on the basis that "the new explanation cannot raise a point of law", which failed to engage with the appellant's case. His case was that the Tribunal erred in law in finding inconsistency. That issue was necessarily antecedent to any "explanation" for the perceived inconsistency.

99. **Secondly**, the "notable inconsistency" was said to arise from the appellant's account of past incidents of harm during the Transfer Interview ("where he speaks of only two incidents where he was threatened by the AL, receiving injuries in only one"), and the account in subsequent statements and oral evidence ("in which he speaks of a number of serious physical attacks together with repeated threats and harassment, at the hands of the AL and police"). (**AB22** [29]) The difference is that, on later occasions, the appellant gave evidence of more incidents and referred not only to the AL but to police.

100. The Tribunal erred in reasoning about those accounts in the following way:

(a) There is a significant difference between finding that a person made a prior inconsistent statement, and finding that a person *omitted* to make a prior statement in such a way that the prior omission is inconsistent with subsequent statements. Whilst the former may bear upon credibility, the latter cannot without a further finding or inference that, if the statements were true, it would have been reasonable to expect the person to make the statements on the prior occasion.

(b) No such further finding or inference was made by the Tribunal in this case, which is demonstrated by the omission from its reasons of any reference to the material circumstances that bore upon whether the appellant could reasonably have been expected to make a comprehensive and exhaustive statement of his claims during the Transfer Interview.

101. **Thirdly**, by reason of the following circumstances, the appellant could not reasonably have been expected to make such a statement during the Transfer Interview. The interview was held on 23 December 2013 in circumstances where the appellant had not yet made an application under the Refugees Convention Act; he had no legal or other representation; he had been told the "main purpose" of the interview was to "collect background information about you and your circumstances for the Government of Nauru" (**AB114**.19, **AB293**.14-15); the Nauruan officer led the interview by asking standard questions principally about his biographical details and people smuggling arrangements and did not seek to elicit a comprehensive or exhaustive statement of his claims (**AB293-302**); his education was limited to five years of primary school (**AB116** [16]), being such a low level that the interpreter said (in a transcript subject to a grant of leave) "it is very hard to let him understood because his education level is too low ... He's not getting the question. I am saying, but his language skill is so poor he cannot understand" (**AB298**.47-50); and where the appellant said at the end of the interview that an accident 18 days earlier in which he was shipwrecked without food for three days had left him "traumatized" and "had an impression on my mind" "still now" (**AB125** [18]) and in relation to which (in a transcript subject to a grant of leave) he also said he "lost everything except my underwear which was on me" (**AB302**.41-46).

102. The foregoing circumstances of the Transfer Interview stand in stark contrast to the circumstances of the appellant's "subsequent statements and oral evidence", which were all made and given in 2014 and 2015 in support of the formal application the appellant had since lodged under the Refugees Convention Act; at times when he had legal and other representatives assisting him; and in circumstances where those representatives and others had a fair opportunity to elicit a comprehensive and exhaustive statement of his claims from him.

103. **Fourthly**, had the Tribunal considered any of those circumstances, it would have been obliged to refer to them in its reasons. The importance of those circumstances to the Tribunal's actual decision-making process was such that the Tribunal could not have lawfully ignored them in finding or inferring that the appellant could reasonably have been expected to make a comprehensive and exhaustive statement of his claims at the Transfer Interview.[40] Their absence from the reasons requires the conclusion that the Tribunal either considered those circumstances not to be material, or did not make such a finding or inference. In either case, the Tribunal erred, with the result that the Tribunal could not lawfully conclude that the appellant's omission at the Transfer Interview was inconsistent with the appellant's subsequent statements and oral evidence.

104. **Fifthly**, the Tribunal acted unreasonably in giving excessive weight, in the sense of "more than was reasonably necessary",[41] to the appellant's omission from the Transfer Interview of the accounts of past harm about which he gave evidence in subsequent statements and oral evidence. Having regard to the circumstances in which the Transfer Interview was held, that omission was a factor "of no great importance".[42] It did not involve a "notable inconsistency" justifying rejection of all of the appellant's accounts of past harm including those that were in fact given in the Transfer Interview. (**AB22** [29])

105. The foregoing raised points of law and the primary judge erred in dismissing the ground on the basis that "the new explanation cannot raise a point of law". (**AB268** [40])

Paras 1(he)-(hf): Error in rejecting appellant's claim about relationship with girlfriend

106. The grounds were that the Tribunal erred in law in rejecting the appellant's claim to have had a sexual relationship with his girlfriend on the basis that he should have raised the claim sooner and that it was "implausibly foolhardy" for a young man who supported one party to enter into a relationship with a daughter of supporters of the opposing party. (**AB38**) Those matters became significant because the Tribunal relied upon them to conclude that the appellant's claim was not credible. (**AB24** [36]-[40])

Paras 1(he)-(hf): The reasons of the primary judge

107. In relation to the timing of the appellant's claim about his girlfriend, the primary judge cited submissions from the parties' oral arguments and concluded: "I do not find that the Tribunal was unreasonable in rejecting the applicant's claim that he did not disclose this intimate relationship either." (**AB269** [51]) No reasons were given for the conclusion.

108. In relation to the finding that the appellant's claim was "implausibly foolhardy", the primary judge referred briefly to the parties' oral arguments and concluded: "So, this ground is dismissed." (**AB270** [54]) His Honour is presumably to be taken to have

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40 See above, n 37.

41 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [74] (Hayne, Kiefel and Bell JJ).

42 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 (Gibbs CJ with whom Dawson J agreed at 30, 71).

accepted the respondent's submissions. But there was no response to the appellant's arguments. The primary judge failed to give adequate reasons for the dismissal.

Paras 1(he)-(hf): Error of law

109. **First**, the primary judge erred in concluding that "I do not find that the Tribunal was unreasonable in rejecting the applicant's claim that he did not disclose this intimate relationship earlier" (**AB269** [51]), because that conclusion obviously misstates both the claim made by the appellant and what was rejected by the Tribunal. The appellant had claimed to have been in a sexual relationship with his girlfriend, and the Tribunal rejected his explanation about why he had not raised that claim sooner.

110. The Tribunal erred insofar as it accepted that, if the appellant's claim were true, "he might well have felt some reluctance, at least initially, to talk about it", but then proceeded to find that the fact that he did not raise the claim "until the time of his supplementary statement casts strong doubt over the credibility of the claim". (**AB24** [38]) The "supplementary statement" was a statement signed by the appellant at the time he applied to the Tribunal (**AB204**), and as previously submitted that was his first chance to make complementary protection claims after the CP Amendment Act.

111. **Secondly**, the primary judge erred in adopting the respondent's submission. The submission was that "if someone is committed to an opposition party it does seem foolhardy to take up a relationship with somebody who is the daughter of supporters of the opposing party" (**AB108**.27-29). The respondent submitted that it was reasonable for the Tribunal to find that the appellant's claim was "foolhardy", but did not engage at all with the Tribunal's actual finding that the claim was "implausibly foolhardy". Whether the appellant's claim was "foolhardy" was wholly different to whether it was "implausibly foolhardy": only in the latter case could the Tribunal reject the claim. No submission was put to the primary judge that it was open to the Tribunal to find that the appellant's and his girlfriend's romance was "implausibly" foolhardy. As the appellant submitted in the court below, that finding was not reasonably open to the Tribunal.

112. **Thirdly**, it was "all these considerations together" (**AB24** [40]) that led the Tribunal to conclude that the appellant had in fact never had a love affair with his girlfriend at all. Accordingly, the errors were material to the Tribunal's decision. The primary judge erred in dismissing grounds 1(he)-(hf).

Unreasonableness

113. It is well-established that an inference of unreasonableness may be objectively drawn even where a particular error cannot be discerned.[43] The inference must be drawn here.

114. Claims having such serious and grave potential consequences for the appellant should not have been rejected by "inexact proofs, indefinite testimony, or indirect inferences".[44] The UNHCR's Note on Burden and Standard of Proof in Refugee Claims, "accepted as authoritative" in Nauru (**AB9**), provides that "minor inconsistencies, insubstantial vagueness or incorrect statements which are not material may be taken into account in the final assessment on credibility, but should not be used as decisive factors"; "[where] the applicant's story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant's claim"; and "[the Tribunal] must apply the criteria in a spirit of justice and understanding".[45] The quality of the material relied on by the

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43 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [68] (Hayne, Kiefel and Bell JJ), citing *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 (Dixon J).

44 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 (Dixon J).

45 UNHCR, Note on Burden and Standard of Proof in Refugee Claims (1998) at [9], [12], [22].

Tribunal in this case to reject the substance of the appellant's claims was so slender as to require the conclusions that the Tribunal was not acting with due appreciation of its responsibilities and that the Tribunal failed to conduct the review required by the Act.

D LEAVE TO RAISE NEW GROUNDS

115. An appellate court has a discretion to permit an appellant to argue an issue on appeal that was not argued below where it is expedient and in the interests of justice to entertain the issue.[46] Special considerations apply in the context of refugee cases where an adverse decision may have very serious consequences for an appellant.[47] If the point clearly has merit and there is no prejudice to the respondent, leave should be granted.[48]

116. The merit of the points sought to be raised is demonstrated in these submissions and, together with the possibility of very serious consequences for the appellant, outweighs such minimal prejudice as there may be to the respondent. All the facts have been established beyond controversy. Further, the inadequacy of the reasons given by the primary judge in this case requires that there be a de novo hearing in any event. In those circumstances, leave should more readily be granted.

VII. LEGISLATION

117. The annexure sets out verbatim the applicable statutory and transitional provisions.

VIII. ORDERS SOUGHT

118. If the appellant succeeds only on ground 4, he seeks orders 2 and 3 in the proposed amended notice of appeal. (**AB288**) If the appellant succeeds on grounds 2, 3, or 5, he seeks orders 1 and 3 in the proposed amended notice of appeal. (**AB288**)

IX. ESTIMATE OF ORAL ARGUMENT

119. The appellant estimates that about two hours will be required for oral argument.

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46 *Water Board v Moustakas* (1988) 180 CLR 491 at 497 (Mason CJ, Wilson, Brennan and Dawson JJ); *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8 (Gibbs CJ, Wilson, Brennan and Dawson JJ); *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319 (Mason J with whom Murphy, Aickin, Wilson and Brennan JJ agreed at 329).

47 *Iyer v Minister for Immigration and Multicultural and Indigenous Affairs* [2000] FCAFC 1788 at [22]-[24] (Heerey, Moore and Goldberg JJ); *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51 at [165], [174] (Madgwick J), [229] (Conti J).

48 *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158 at [46]-[48] (Kiefel, Weinberg and Stone JJ).