

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S142 OF 2017

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN:

YAU027
Appellant

AND:

REPUBLIC OF NAURU
Respondent

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ANNOTATED SUBMISSIONS OF THE RESPONDENT

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Filed on behalf of the Respondent by:

Rogan O'Shannessy
Level 30, 35 Collins Street
Melbourne, Victoria
3000

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File ref: HCA 17-S142
Telephone: 0457 000 678
Facsimile: *none available*
E-mail: roganoshannessy@naurursd.com

PART I PUBLICATION

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

PART II ISSUES

2. The issues are as identified by the appellant, but the respondent submits that the question of leave to raise new grounds (see paragraph (e) of the appellant's statement of the issues) should be dealt with first. The question of leave to adduce additional evidence (paragraph (f) of the appellant's statement of the issues) is best addressed in the context of the ground in respect of which it is sought to be deployed, namely Ground 5 (paragraph (d) of the appellant's statement of the issues).
- 10 3. The Court's jurisdiction to hear and determine the appeal is not in issue: See ss 44 and 45 of the *Appeals Act 1972* (Nr); ss 5 and 8, and the Schedule, of the *Nauru (High Court Appeals) Act 1976* (Cth); *Ruhani v Director of Police* (2005) 222 CLR 489 at [10], [14] (Gleeson CJ), [49]-[51], [49]-[51] (McHugh J), [89], [108] (Gummow and Hayne JJ).

PART III SECTION 78B NOTICE

4. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV FACTS

5. The appellant's summary of facts in paragraphs 5 to 14 of the written submissions filed on his behalf (**AWS**) is accurate. However, in order to evaluate the grounds further elaboration is required.
- 20 6. In the transfer interview on 23 December 2013 (**AWS** [7]), the appellant was asked why he left Bangladesh (**AB 121**). According to the record of that interview, the appellant described his father as being presently involved in politics, as the local member of a village committee; the appellant said that he was also involved in that party, which he subsequently identified as the Bangladesh National Party (**BNP**). The appellant claimed to have been assaulted in 2006 and 2012 by the other political party (being the Awami League (**AL**)). He was recorded as having given a negative

response when asked whether there were any other reasons that made him leave Bangladesh (AB 121).

7. The appellant applied to the Secretary for Justice and Border Patrol (**Secretary**) to be recognised as a refugee under the *Refugees Convention Act 2012* (Nr) (**Refugees Convention Act**) with the assistance of a Claims Assistant Provider (AB 144, 158). The contents of both the application form and his statement were translated to the appellant by an interpreter in the English and Bengali languages (AB 147, 156).

8. In his statement in support of his application, the appellant claimed that he was a member of the student wing of the BNP from about 2005. In that capacity, he was involved in publicising the party, encouraging new people to join, and organising the program of events (AB 153-4 [6]-[7]). The appellant claimed that from approximately September 2007, he came to the adverse attention of the AL as a result of his membership and involvement in the BNP (AB 154 [8]). He identified a number of occasions between September 2007 and February 2013 when he was attacked by members of the AL and/or the police (AB 154-55 [9], [12], [16], [18]). Members of the AL also attended his parents' home (where he lived) from time to time during this period, asking where he was (AB 155 [14]-[15], [17]). The appellant claimed that he decided to leave Bangladesh after he was seriously injured in the context of a BNP rally in February 2013 (at [19]).

9. In answer to a question on the form about who he thought may harm or mistreat him in Bangladesh (AB 140), the appellant stated that he feared serious harm and/or murder at the hands of the AL and those acting at their behest (AB 156 [21]). As to why he would be harmed, the appellant stated that his fears were on account of:

- (a) My political opinion in support of the BNP; and
- (b) My imputed and/or actual political opinion against the Awami League.

Read in context, the basis of the appellant's claim to have had an imputed political opinion against the Awami League was his actual political opinion in support of the BNP, as the opposition party.

10. Following the Secretary's adverse determination of his application (ss 6 and 9 of the Refugees Convention Act), the appellant applied to the Tribunal for merits review of the Secretary's decision (s 31 of the Refugees Convention Act) (AB 171). He was

legally represented (AB 173). In a statement he provided to the Tribunal, the appellant took issue with the Secretary's finding (AB 10-11) that he did not have a sufficiently high profile as a BNP member to attract the adverse interest of Bangladeshi authorities or AL supporters (AB 199 [29]-[31]). At the same time, he contended that his mere membership of the BNP was sufficient for the AL to have an adverse interest in him (AB 200 [36]-[38]). The appellant also sought to explain why notwithstanding the claimed attacks by AL members and their repeated inquiries at his home as to his whereabouts, the only precautions he took to avoid harm between 2007 and 2013 was sleeping in a storeroom some 10 minutes from his home between 2007 and 2012; and moving between various locations (although remaining in his village) between 2012 and 2013 (AB 200-201).

11. The appellant advanced additional information in support of his claim to fear harm on his return to Bangladesh (AB 198 [21]). He now claimed that in 2010, he commenced a two-year, sexually intimate relationship with a girl whose family were active members of the AL. When he approached the girl's parents in 2012 for permission to marry her, they were very angry and refused his request on account of his membership of the BNP. The appellant claimed that in August 2012, her uncles and cousins tried to attack him in a local bazaar; and in late February or early March 2013, she told him that her parents had said they were going to kill him or have him killed (AB 197 [11]-[20]). The appellant contended that the girl's family would harm him if he returned to Bangladesh because of his political opinion, because their daughter was in love with him, and because the two of them had been sexually intimate when they were not married (AB 198 [21]).

12. In a submission supporting his review application, the appellant's representatives put his claims to fear harm on the following three bases (AB 175):

- (a) actual political opinion, arising from his being an active supporter of the student wing of the BNP and Organising Secretary of a local ward from 2007;
- (b) imputed political opinion, albeit as a result of his active involvement with the student wing of the BNP (in opposition to the AL); and

(c) membership of a particular social group, arising from the relationship that he disclosed, for the first time, in his statement accompanying the Tribunal application. The representative described the social group as “men who are perceived to have committed sexually immoral acts in Bangladesh”.

13. The appellant’s representatives addressed Nauru’s international obligations apart from the Refugees Convention, but did not separately identify any basis on which the appellant claimed to be owed complementary protection and relied instead upon the account provided in support of his refugee status (AB 179 [33]-[34]).

10 14. On 26 March 2015, the Tribunal conducted a hearing with the appellant. The appellant’s legal representative attended the hearing (AB 207). At the commencement of the hearing, the appellant confirmed that the reasons he feared harm if he returned to Bangladesh were his political involvement with the BNP and his relationship with the daughter of AL supporters (AB 208-209).

15. The Tribunal rejected the appellant’s claimed political involvement as it was unable to be satisfied that his claims were credible, including for the following reasons:

(a) The appellant’s evidence about the circumstances in which he became politically active in Bangladesh were ‘inconsistent and implausible at a number of points’ (AB 20 [18]-[20]).

20 (b) The appellant did not provide any plausible explanation as to why he would choose to involve himself with the student wing of the BNP when he left school eight years before his claimed appointment to the position of Organising Secretary (AB 21 [21]).

(c) The appellant’s responses to questions about the role of Organising Secretary were ‘notably generalised and lacking in circumstantial detail’ (AB 21 [23]).

16. The Tribunal was not satisfied that the appellant joined the BNP’s student wing, either formally or by supporting it through activities such as attending meetings and rallies; and it did not accept that he was appointed to the position of Organising Secretary. The Tribunal also rejected the appellant’s claims to have suffered harm in

Bangladesh because of his political activism, again because it was unable to be satisfied that those claims were credible. In particular, the Tribunal found that:

- (a) based on its findings with respect to the appellant's claimed political involvement, it was not satisfied that the appellant ever did anything to earn for himself a profile as a political activist so as to cause him to be harmed by the AL or the authorities (AB 22 [28]);
- (b) there was a notable inconsistency between the appellant's account of harm in his transfer interview, and his subsequent statements and oral evidence (AB 22-23 [29]);
- 10 (c) the appellant provided significantly differing versions of a particular incident in February 2013, when he claimed to have been injured in an attack by police and the AL on a BNP demonstration (AB 23 [30]); and
- (d) the appellant's evidence that he was usually able to avoid the attention of AL by spending nights in a storage shed on or near the family farm was implausible in the setting of a semi-rural village (AB 23 [31]).

17. The Tribunal also rejected the appellant's claim regarding his relationship with the daughter of AL supporters (AB 24 [40]). The appellant had not made any reference to this relationship until his supplementary statement and the Tribunal submissions (AB 24 [36]), and the Tribunal considered that his explanation for this was not
20 plausible (AB 24 [38]). Further, it appeared 'implausibly foolhardy' to the Tribunal for a committed BNP supporter, as the appellant claimed to be, to place himself in obvious danger by beginning a relationship with the daughter of a family strongly committed to the AL (AB 24 [39]).

18. Finally, the Tribunal rejected the contentions advanced on the appellant's behalf with respect to complementary protection, on the basis of its findings that the appellant would not face any real possibility of harm of any kind in Bangladesh (AB 25 [45]-[46]).

19. Pursuant to Part 5 of the Refugees Convention Act, the appellant appealed to the Supreme Court of Nauru against the Tribunal's decision. The Amended Notice of
30 Appeal contained one ground, alleging that the Tribunal "acted unreasonably and/or

irrationally and/or unfairly and/or that it failed to accord the Appellant procedural fairness” (AB 34). The ground was supported by 17 particulars which took issue with various findings of the Tribunal, inter alia on the basis that the Tribunal had made findings without evidence or on a mis-description of the evidence, or which were otherwise illogical or unreasonable, and concluded that the Tribunal could not permissibly have relied on those findings in reaching its conclusion. On 5 May 2017, the Supreme Court (Khan J) dismissed the appeal and affirmed the Tribunal’s decision pursuant to s 44(1)(a) of the Refugees Convention Act.

PART V APPLICABLE PROVISIONS

- 10 20. The respondent agrees with the appellant’s identification of the applicable provisions, which are contained in the annexure to the appellant’s submissions. However, the respondent notes that a more recent consolidation of the Refugees Convention Act has been prepared with effect from 5 May 2017, and annexes that consolidation to these submissions for convenience.

PART VI ARGUMENT

Application for leave to raise new grounds

21. On an appeal pursuant to s 5 of the *Nauru (High Court Appeals) Act*, the Court has jurisdiction to consider new grounds of appeal not raised before the Supreme Court of Nauru, if it exercises its discretion to do so.
- 20 22. The requirement for leave to raise new grounds for the first time on appeal reflects the orthodox principle that a party should be bound by the conduct of his or her case at first instance save in exceptional circumstances: *Metwally v University of Wollongong* (1985) 60 ALR 68 at 71; *Coulton v Holcombe* (1986) 162 CLR 1 at 7. Although strictly this Court is exercising original rather than appellate jurisdiction, the proceedings have the character of an appeal. The principle and the established rules directed at the question of whether leave should be granted to raise new grounds are applicable to an appeal from the Supreme Court of Nauru (compare

Clodumar v Nauru Lands Committee (2012) 245 CLR 561, applying conventional principles as to the reception of fresh evidence in an appeal).¹

23. The appellant must demonstrate that it is expedient and in the interests of justice to raise two grounds which he did not advance in the Supreme Court. The considerations include whether the grounds have a reasonable prospect of success, whether the appellant has given an acceptable explanation for failing to raise them in the court below, the prejudice to the respondent in allowing the appellant to raise the new grounds, and the integrity of the appellate process: *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 at [48];
10 *VAAC v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 168 at [26]. In so far as the grounds now sought to be raised reflect a difference of opinion between legal representatives, any such explanation would be inadequate and unsatisfactory: *AYJ15 v Minister for Immigration v Border Protection* [2016] FCA 863 [17].
24. As to prejudice to the respondent, it can always be said that no actual prejudice apart from costs is suffered compared with the position of the appellant, but there is nonetheless a significant public interest in the timely and effective disposal of litigation. This aspect has particular force in this area of public law: *Iyer v Minister for Immigration and Multicultural Affairs* (2001) 192 ALR 71 at [62].
- 20 25. The appellant has not satisfactorily explained why the grounds he now seeks to advance were not raised below. Further, for the reasons set out below the grounds do not have sufficient merit to warrant a grant of leave.

Proposed Ground 2

26. As noted above, in his further submission to the Tribunal the appellant took issue with the Secretary's finding that he did not have a profile that would bring him to the attention of the AL or Bangladeshi authorities. His explanation as to why that finding was, in his view, erroneous, rested on two bases:

¹ As to the nature of an appeal by way of rehearing, where such a proceeding is instituted under Nauruan statute, see *Akibwib v Kepae* [2013] NRSC 6 at [21] (von Doussa J).

(a) First, when assessed from the perspective of the rural locality in which the appellant was operating, his role was sufficient to give him a profile that would draw the attention of the opposition (AB 198-199 [27]-[35]).

(b) Secondly, notwithstanding that he did not have a “nationwide profile”, he was still at risk, referring to media reports of violent attacks at protests or rallies and stating that the people who participated in those rallies were “not high profile leaders” but “the workers for the party like me, who turn out to support the party that we believe in” and giving as an example what he claimed happened to him at a rally in February 2013 (AB 200 [36]-[48]).

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27. At the hearing before the Tribunal, the appellant’s representative summarised his claims in the same way, namely, as involving “grassroots” support (which could nonetheless be high profile in a rural area) which led to the harm he claimed to have suffered (AB 249). The appellant’s claim to fear harm, and his evidence in support thereof, derived from his claim to have actively supported, and held a position within, the student wing of the BNP (cf AWS [48]). As he confirmed for the Tribunal at the hearing, apart from his relationship with the daughter of AL supporters (which was also problematic for political reasons) that was the only basis on which he feared harm in Bangladesh (AB 106).

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28. Contrary to the appellant’s submissions on this appeal (AWS [45], [49]), neither he nor his legal representative separately advanced a claim to the Tribunal that was based on his mere attendance at protests, rallies or other public events arranged by the BNP. The pages of country information which accompanied the submission of his representative – devoid of commentary linking the information to the appellant’s circumstances save for a generalised introduction and conclusion – cannot be said to have added claims beyond what the representative advanced on her client’s behalf (cf AWS [47]).

29. After considering the evidence that the appellant advanced in support of his claims, the Tribunal was not satisfied that the appellant was a member of the student wing of the BNP holding a position of Organising Secretary in his local ward, or that he was

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subject to any of the harm that he claimed to have suffered. Its acceptance in passing, in that context, that the appellant may have been present at public events staged in his area by the BNP or its student wing, as a member of the public (at [41] (AB 25)), did not require the Tribunal to consider whether he had a well-founded fear of persecution on that account. Nor did it require the Tribunal to make any findings in relation to the country information the appellant presented (cf AWS [50]). Contrary to the appellant's submissions, he did not advance any other Convention reasons and nothing on the face of the information before the Tribunal raised any other Convention claim (see the Tribunal's reasons at [42] (AB 25)).

- 10 30. In any event, the issue now sought to be identified was dealt with by the findings that the Tribunal made. The Tribunal concluded (at [28] (AB 22)) that, as a consequence of its earlier finding, it was not satisfied that the appellant had done anything to earn himself a political profile "so as to cause him to be harmed by members or supporters of the AL or the Bangladesh authorities". Necessarily implicit in that conclusion was a finding that such involvement as he might have had (presence at public events) would not bring him to the attention of the AL or the authorities.

Proposed Ground 3

- 20 31. This proposed ground of appeal is premised on the appellant re-characterising a claim that he squarely advanced in support of his refugee status as one of complementary protection. That contention cannot be sustained in circumstances where neither the appellant nor, significantly, his legal representative ever sought to characterise it on that basis.
32. The appellant places much reliance on part of his explanation as to why he did not raise this claim at an earlier stage, namely that he was not sure that it was relevant to his claims (AB [10], AB 197; see AWS [53], [55], [57]). It is apparent, however, from the context of this statement – including his immediately following comment that he was not asked about it in the RSD process – that the appellant was not intending to advance this material on any basis other than in support of his refugee status. That is supported by the explanation that the appellant gave at the hearing as
30 to why he had not mentioned it earlier, namely, that he was afraid that if the girl's parents found out he had spoken of it they would torture his parents; and that while

he had wanted to keep it a secret he had to disclose it now that he was in the danger he was (AB 245 L46 – 246 L5).

33. As noted above, the appellant's representative contended that by reason of his claimed relationship, the appellant was a member of a particular social group (AB 175). She maintained this characterisation of his claim at the hearing before the Tribunal (AB 249), by which time the complementary protection provisions of the Act were in force (AWS [33]). At the conclusion of her submissions, the Tribunal specifically questioned the appellant and his representative about whether there was a social group of the nature claimed, and whether, if it accepted his claims, he would be put at risk of harm by reason of his membership (AB 250). After clarifying the Tribunal's concerns, the representative sought, and was granted, an opportunity to make submissions on that issue in writing (AB 251). Consistently with the position taken at the hearing, the representative's written submission maintained the claim on the basis of its Convention nexus (AB 254).
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34. When considered against all of the material that was before the Tribunal, the appellant's contention that this claim was in truth one of complementary protection which could not have been raised earlier is not available. In light of the circumstances in which the claim was advanced and how it was characterised by the appellant and his agent, it was well open to the Tribunal to reject it, inter alia, on the basis of the late stage at which the appellant raised it.
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35. In so far as the appellant relies on the Tribunal allegedly proceeding on an erroneous basis as to the application of complementary protection at the time (AWS [52], [56]), the first paragraph of the Tribunal's reasons, on which he relies, does not support that conclusion. In that paragraph, the Tribunal is merely summarising the findings of the Secretary, who, after determining that the appellant was not a refugee (AB 11-12):
- (a) accepted that a person may nonetheless be found to be owed complementary protection; but
 - (b) was not satisfied that the appellant had a reasonable possibility of being subjected to torture or cruel, inhuman or degrading treatment or punishment if he were to return to Bangladesh, or that there was any
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reason not articulated but raised on the evidence that warranted him being granted complementary protection.

Grounds 4 and 5

36. The respondent does not dispute the necessity of the Supreme Court giving reasons. However, the adequacy of the reasons in any particular case can depend upon the nature of the proceeding and the issues raised. In an appropriate case, the reasons may be adequate by a combination of what is expressly stated, in conjunction with the inferences that necessarily arise from what is expressly stated.² Contrary to AWS [60]-[61], the statutory obligations of the Tribunal do not provide the standard of adequacy applicable to the Court's reasons.
37. As noted above, the appellant raised 17 particulars in support of a generalised ground that alleged unreasonableness, irrationally, unfairness and denial of procedural fairness. The Supreme Court concluded that none of the particulars supported those various allegations. That conclusion followed the Court setting out and implicitly considering the submissions of the appellant and the respondent. Evaluating the competing submissions, and reaching a decision, did not involve resolving complex matters of disputed of fact; so that the brevity of his Honour's reasoning does not compromise this Court's ability to deal with the issues presented by the appeal. As will be addressed below, in light of the nature of what the Court was evaluating, the respondent contends that the statement of its conclusions was adequate in the circumstances.
38. The appellant has combined his submissions on ground 4 with those on ground 5, the latter of which re-agitates the particulars before the Supreme Court albeit with additional arguments and additional evidence sought to be relied upon. If this Court is able to hear and determine ground 5 (as clearly it is) it must follow that, whatever criticism might be made of his Honour's reasons, ground 4 does not provide a distinct basis upon which the matter should be remitted.
39. As to the proposed additional evidence, it will be apparent from the submissions set out below that it does not advance the appellant's position significantly. There being

² *Transport Accident Commission v Kamel* [2011] VSCA 110 at [86].

no suggestion that it was not available to be tendered in the Supreme Court (where the appellant was represented), the evidence should not be received.

Particulars (a) to (d): circumstances in which the appellant joined the BNP

40. In reaching the conclusion that the appellant's claims to have been a supporter of the student wing of the BNP and to have held the position of Organising Secretary in his local area were not credible (AB 20 [17]), the Tribunal relied on a number of reasons. The first of those reasons was that his evidence about the circumstances in which he became politically active in Bangladesh was inconsistent and implausible at a number of points. On the issue of what led him to join the BNP, the Tribunal noted that in his evidence before it, the appellant spoke of the ethos of the party, and his admiration for the BNP leader in his area, but offered no other reason. It continued:

As put to him, however, this evidence is at odds with his responses in his TI and RSD interview, to the effect that he was invited to join the BNP by his father who was a member and who would go to party meetings with him. Asked why he would not have mentioned his father's role in bringing him to the party he said only that he could not remember.

41. The Tribunal's statement that it put the material in the first sentence to the appellant, and that it asked the question identified in the second sentence, is correct. The relevant passage from the hearing transcript, which is extracted in his Honour's reasons at [20] (AB 263; AB 217 L 5), indicates that the Tribunal broke down the material that was of concern by reference to what he said at the two interviews. First, there was the appellant's reference, in the transfer interview, to his father being a member of the BNP and a member of a local committee, and that he accompanied his father to meetings. Next, there was what the Tribunal understood to be his reference in the RSD interview (having listened to the recording) to his father having invited him to join the BNP. The transcript of that interview, if received, would not show this to be an untenable understanding (AB 305).

42. The hearing transcript indicates that the appellant did not take issue with the Tribunal's summary of what he had earlier said, responding only that he could not remember and could not recollect. This led the Tribunal to confirm with the appellant, as a matter of substance, the correctness of his previous account, stating (AB 217 L 17-22):

T: 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?

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

43. Contrary to the appellant's contention (AWS [75]), that was not an unfair question. Far from being "based on [a] false assertion", it asked the appellant to confirm whether the Tribunal's understanding of his case was correct. It was not a question with which the appellant's representative took issue, in circumstances where there was no legislative constraint on the representative raising a concern if she considered the Tribunal's questioning to be unfair. Nor did the appellant's representative return to the issue at the conclusion of the hearing in response to the Tribunal's specific concerns, which included the credibility of the appellant's claim to have been involved with the BNP or the student wing in the way he claimed (AB 247 L 4-9).
44. Ultimately, the Tribunal referred in its reasons to the evidence it considered the appellant to have given in the transfer interview and the RSD interview by way of a compound description, prefaced with the qualifying "in effect". The appellant's construction of this first sentence, in particulars (a) and (c) of the ground in the amended application to the Supreme Court (AB 34-35) and now, requires the invitation point to have been made at both the transfer interview and the RSD interview (AB 34-35; AWS [70]-[73], [79]-[80]). That approach involves reading the Tribunal's decision with an eye too keenly attuned to error, particularly in light of its approach to the subject in the hearing.
45. His Honour's summary of the appellant's written submissions in relation to particulars (a) to (d) was accurate, those submissions comprising four sentences in total (AB 49). The appellant's oral submissions did not substantially add to the written submissions (AB 92-93); and transcripts of the interviews were not tendered notwithstanding that they were apparently available. Considered against that background, and in light of the passage from the hearing transcript which his Honour extracted (AB 263), the short form manner in which his Honour dealt with the arguments, and his conclusion that there was no basis for a "no evidence" ground, is not indicative of error.

46. The appellant now seeks to argue, with the benefit of the transcripts that were available but not put before the Supreme Court, that the Tribunal had no basis for the description it gave of his earlier evidence. It is apparent, however, from the record of the transfer interview, even without the transcript, that the appellant described the “political problem” that prompted him to leave the country was his father’s involvement in the BNP, and his similar involvement (AB 121). And in relation to the appellant having been invited to join the BNP by his father, the passage of the transcript of the RSD interview on which the appellant seeks to rely (set out at AWS [78]) is at least ambiguous as to whether it was the appellant’s father or
10 another person who invited him to join the BNP.

47. Further, and more importantly, even if the Tribunal had misunderstood the appellant’s evidence at the RSD interview, the appellant confirmed its understanding in the hearing before it. It cannot be said, as is alleged, that the Tribunal relied on a proposition for which it had no evidence and which was not reasonably open: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356. Even more clearly, the Tribunal’s view of the appellant’s evidence as inconsistent with his earlier claims cannot be said to be irrational or lacking any foundation.

Particular (h): the appellant’s path to political activism

48. In his amended notice of appeal to the Supreme Court, the appellant contended that
20 the Tribunal’s characterisation of the appellant joining the BNP as following “a pathway to political activism through his politically committed father” was unreasonable, irrational and not founded on probative evidence. The Tribunal characterised the appellant’s case in this way, in the context of considering the appellant’s explanation as to why his involvement in the BNP did not commence until he was 18 years old (at AB 20-21 [20]). The Tribunal noted that the appellant had said, first, that he was too young and then, when it put to him that many persons are politically active in Bangladesh at a young age, that he was working on the farm. The Tribunal had regard to both responses and was not satisfied that they provided a convincing explanation, relying on the characterisation above.

30 49. The characterisation in issue was the product of what the appellant had said in earlier interviews as to how he had come to be involved in the BNP, which is the subject of

particulars (a) to (d). All that the Tribunal was otherwise doing in this paragraph of its reasons was evaluating the explanations that the appellant advanced for his delayed involvement in light of what he had also said about his father. The Tribunal's statement that the appellant claimed to have "followed a pathway to political activism through his politically committed father" was a fair and accurate summary both of the appellant's evidence at the transfer interview and what the Tribunal understood of the RSD interview, all of which was confirmed by the appellant.

10 50. As his Honour effectively concluded (at [33], AB 266), the Tribunal's approach was reasonable in the circumstances. The Tribunal's observation about the extent to which persons under the age of 18 were involved in political activism in Bangladesh was hardly a radical or surprising proposition (cf AWS [89]), or one for which it needed to refer to specific evidence (AWS [92]). The appellant had claimed, after all, to have joined the student wing of the BNP, which the Tribunal described in [21] of its reasons (in a manner with which the appellant does not take issue) as an organisation aimed at "mobilising support among students mainly at secondary and tertiary levels to advance the BNP's aims on campus and more widely in the community" (AB 21). It was open to the Tribunal to consider that the alternative explanation that the appellant then advanced in response to its observation was
20 unconvincing in the circumstances.

Particular (hb): appellant's account of incidents of harm in Bangladesh

30 51. One of the bases on which the Tribunal was not satisfied that the appellant's claims to have suffered harm in Bangladesh were credible was the inconsistency between the account he gave of such incidents in his transfer interview and the account he gave in his subsequent statements (at [29], AB 22). The inconsistencies did not just relate to the number of attacks. Importantly, the appellant had not indicated in the transfer interview that he had been harmed as a result of any attack; and he had not identified that anyone apart from the AL had attacked him. There were, therefore, significant quantitative and qualitative differences between the appellant's early account and his later accounts.

52. When the Tribunal put the differences to the appellant at the hearing, he did not resist the suggestion that his case had changed but gave an explanation: that he had been reluctant to disclose all of the details of the harm he had suffered because he feared that if he did so he would be seen as a criminal (AB 232-233). The Tribunal did not find that to be a convincing explanation.

53. Before the Supreme Court, the appellant contended that the Tribunal had unreasonably perceived this inconsistency in circumstances where the transfer interview involved the appellant responding to what was asked of him (AB 52 [55]). In circumstances where the appellant (who was represented), accepted the premise of the Tribunal's question at the hearing, and sought to explain it, his Honour concluded that this aspect of the Tribunal's decision could not be impugned in that way (at [39]-[40], AB 267-268).

54. The appellant submitted at the hearing before the Supreme Court that the Tribunal attached too much weight to the limited evidence given at the transfer interview (AB 96). His submissions to this Court pick up on and develop this argument. However, it cannot be said that the Tribunal's fundamental conclusion of inconsistency between his accounts was not open to it in circumstances where at the outset of the transfer interview it was explained to the appellant (AB 114):

20 While the main purpose of today's interview is to collect background information on you and your circumstances, the information that you give will also be read and used by the people who will be assessing your claim for refugee status. It may be compared against the information you give in your refugee application.

55. Contrary to the appellant's submissions, the Tribunal did not give this matter "excessive weight". Although it described the inconsistency as "notable", it was but one of a number of considerations on the basis of which it was unable to be satisfied that the appellant's claims to have suffered harm in the past at the hands of the AL or the police were credible (AB 22-23 [28]-[32]).

Particulars (he) and (hf): the appellant's relationship

30 56. In these particulars, the appellant contended that the Tribunal was unreasonable in rejecting this claim (particular (hf)), including on the basis of delay in circumstances

where the appellant was reluctant to discuss an intimate relationship (particular (he)). In oral submissions to the Supreme Court, the appellant contended that the Tribunal's dismissal of his claim on the basis of delay unreasonably failed to account for the distress he would have felt in this situation. In so far as the Tribunal described the claimed relationship as "implausibly foolhardy", the appellant contended that the Tribunal effectively dismissed the claim out of hand when it should have considered the claim (AB 98-99).

10 57. In dismissing particular (he), the Supreme Court agreed with the respondent's contention that it was not unreasonable for the Tribunal to reject the claim on the basis that he did not disclose it earlier, in circumstances where (at [50]-[51], AB 269):

(a) the Tribunal accepted that a person may feel some initial reluctance to discuss an intimate relationship; but

(b) that did not sufficiently explain, in the Tribunal's view, why the appellant would not have raised it until he was before the Tribunal.

20 58. It is apparent that, in dismissing particular (hf) (at [54], AB 270), his Honour accepted the respondent's submission that it was reasonably open for the Tribunal to consider that if a person in Bangladesh was as committed to a party as the appellant claimed to be, it was foolhardy to take up a relationship with the daughter of supporters of the opposition party.

59. The first basis on which the appellant now seeks to impugn the Tribunal's findings rests on the contention that the delay was attributable to the fact that the appellant was making a complementary protection claim (AWS [110]). For the reasons outlined above, that characterisation is against the weight of the evidence and should not be accepted. It was well open to the Tribunal to consider the lateness of the claim as bearing on its credibility.

30 60. In so far as the applicant emphasises the term "implausibly" (AWS [111]), two points should be made. First, if it matters, the respondent's submission below (at AB [108]) was, in terms, that the Tribunal's reasoning (including the expression "implausibly foolhardy") was open to it. Secondly, the Tribunal's description of the

foolhardiness as “implausible” was a conclusion as to what it thought of the appellant’s claim in the circumstances. It does not relevantly add to the basis of the Tribunal’s dismissal of the claim as one that simply did not make sense if the appellant was as committed a supporter of the BNP as he claimed to be.

PART VII NOTICE OF CONTENTION OR CROSS-APPEAL

61. The respondent does not intend to file a notice of contention or a notice of cross-appeal.

PART VIII ESTIMATE OF TIME

10 62. The respondent estimates that it will require 1.5 hours for the presentation of oral argument.

Dated: 6 September 2017

Geoffrey Kennett

T: 02 9221 3933

F: 9221 3724

E: kennett@tenthfloor.org

Anna Mitchelmore

T: 02 9223 7654

F: 02 9232 1069

E: amitchelmore@sixthfloor.com.au



Rogan O'Shannessy

Solicitor for the respondent

T: 0457 000 678

20 **E:** roganoshannessy@naurursd.com

**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

NO S142 OF 2017

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN:

YAU027

Appellant

AND:

REPUBLIC OF NAURU

Respondent

10

ANNEXURE TO THE

ANNOTATED SUBMISSIONS OF THE RESPONDENT

20

Filed on behalf of the Respondent by:

Rogan O'Shannessy
Level 30, 35 Collins Street
Melbourne, Victoria
3000

Date of this document: 6 September 2017

File ref: HCA 17-S142
Telephone: 0457 000 678
Facsimile: *none available*
E-mail: roganoshannessy@naurursd.com



REPUBLIC OF NAURU

Refugees Convention Act 2012

As in force from 5 May 2017

This consolidation comprises Act No. 12 of 2012 as amended and in force from 5 May 2017 (being, at the time the consolidation was prepared on 9 June 2017, the date of commencement of the most recent amendment).

The notes section at the end of the consolidation includes a reference to the law by which each amendment was made. The Table of Amendments in the notes section sets out the legislative history of individual provisions.

The operation of amendments that have been incorporated in the text of the consolidation may be affected by application provisions that are set out in the notes section at the end of the consolidation.

This consolidation is prepared and published in a legislation database by the Department of Justice and Border Control under the *Legislation Publication Act 2011*.

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REPUBLIC OF NAURU

Refugees Convention Act 2012

An Act to give effect to the Refugees Convention; and for other purposes

PART 1- PRELIMINARY

1 Short title

This Act may be cited as the *Refugees Convention Act 2012*.

2 Commencement

- (1) Subject to subsection (2), this Act commences on the day it receives the certificate of the Speaker under Article 47.
- (2) Parts 3, 4 and 5 of this Act commence on the date to be fixed by the Minister by Gazette notice.

3 Interpretation

In this Act, unless the contrary intention appears:

'asylum seeker' means:

- (a) a person who applies to be recognised as a refugee under section 5; or
- (b) a person, or persons of a class, prescribed by the Regulations;

'complementary protection' means protection for people who are not refugees as defined in this Act, but who also cannot be returned or expelled to the frontiers of territories where this would breach Nauru's international obligations;

'corresponding law' means a law of another jurisdiction that provides for a person to apply for recognition as a refugee under the Refugees Convention as modified by the Refugees Protocol;

'dependent' of a person means:

- (a) the person's spouse other than a spouse from whom he or she is formally separated; or

- (b) the person's child under the age of 18 years; or
- (c) someone dependent on the person for financial, emotional, psychological or physical support;

'Deputy Principal Member' means a Deputy Principal Member of the Tribunal;

'derivative status' means the status given to a person, who is a dependent of a person who has been recognised as a refugee, given derivative status, or found to be owed complementary protection;

'member' means the Principal Member, a Deputy Principal Member or any other member of the Tribunal;

'personal identifier' means any of the following (including any of the following in digital form):

- (a) fingerprints or handprints of a person, including those taken using paper and ink or digital technologies;
- (b) a measurement of a person's height and weight;
- (c) a photograph or other image of a person or of the face and shoulders or other part of a person;
- (d) an audio or video recording of a person;
- (e) an iris scan;
- (f) a person's signature;
- (g) any other identifier prescribed by the Regulations;

'Principal Member' means the Principal Member of the Tribunal;

'refugee' means a person who is a refugee under the Refugees Convention as modified by the Refugees Protocol;

'Refugee Determination Record' means the certificate issued to a person who is owed international protection by Nauru under section 6(2A);

'Refugees Convention' means the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951;

'Refugees Protocol' means the Protocol Relating to the Status of Refugees done at New York on 31 January 1967;

'Secretary' means the Head of Department;

'Tribunal' means the Refugee Status Review Tribunal established under section 11.

4 Principle of non-refoulement

- (1) The Republic must not expel or return a person determined to be recognised as a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion except in accordance with the Refugees Convention as modified by the Refugees Protocol.
- (2) The Republic must not expel or return any person to the frontiers of territories in breach of its international obligations.

PART 2 – DETERMINATION OF REFUGEE STATUS

5 Application for refugee status

- (1) A person may apply to the Secretary to be recognised as a refugee.
 - (1A) A person may include one or more dependents in an application made under section 5(1).
 - (1AA) A person may apply to the Secretary to be given derivative status.
 - (1B) A person included in an application for refugee status under section 5(1A) is taken to have applied to be given derivative status.
- (2) An application to the Secretary to be recognised as a refugee made under section 5(1), or to be given derivative status under section 5(1AA), must:
 - (a) be in the form prescribed by the Regulations; and
 - (b) be accompanied by the information prescribed by the Regulations.
- (3) No fee may be charged for the making or processing of an application made under this section.

6 Determination of refugee status

- (1) Subject to this part, the Secretary must determine:
 - (a) an application to be recognised as a refugee made under section 5;
 - (b) an application to be given derivative status made under section 5; or

- (c) whether a person who has made an application under section 5 is owed complementary protection.

(2) *[Repealed]*

(2A) A Refugee Determination Record must be issued to a person who is:

- (a) determined to be a refugee;
- (b) given derivative status; or
- (c) determined to be owed complementary protection.

(2B) Any application made by a person under section 5(1), section 5(1AA) or section 5(1A), that has not been determined at the time the person is given a Refugee Determination Record, is taken to have been validly determined at that time.

(3) The determination under section 6(1) must be made as soon as practicable after the application is received.

7 Powers of Secretary in determining refugee status

(1) For the purposes of making a determination under section 6(1), the Secretary:

- (a) may require the asylum seeker:
 - (i) to provide one or more personal identifiers to assist in the identification of, and to authenticate the identity of, the asylum seeker; and
 - (ii) to attend one or more interviews; and
 - (iii) to provide information required by the Secretary, within the period specified, for the purposes of the determination; and
 - (iv) to consent to the release by any other person of relevant documents or information relating to the asylum seeker; and
 - (v) if the Secretary believes on reasonable grounds that the asylum seeker has in his or her possession or control a document relating to the asylum seeker (including a passport or a travel document) – to produce the document; and
 - (vi) to verify, by statutory declaration or on oath or affirmation, information provided to the Secretary; and

- (b) may seek information from any other source and for that purpose may, if the Secretary believes on reasonable grounds that a person has in his or her possession or control a document relating to the asylum seeker (including a passport or travel document) – require the person to produce the document; and
 - (c) may rely, without further enquiry, on a determination made under the Refugees Convention or a corresponding law.
- (3) However, the Secretary:
- (a) is not obliged to seek information, evidence or submissions further to that provided by the asylum seeker; and
 - (b) may make the determination as to whether the asylum seeker is recognised as a refugee on the basis of the information, evidence and submissions provided by the asylum seeker; and
 - (c) may decline to make a determination if the asylum seeker has declined to provide a personal identifier reasonably required by the Secretary.
- (4) If an asylum seeker which is required to attend an interview fails to attend the interview, the Secretary may determine whether the asylum seeker is recognised as a refugee without conducting the interview.

8 Subsequent asylum claim

- (1) A person may not make an application under section 5 if a determination has previously been made under section 6(1) with respect to that person.
- (2) Despite section 8(1), the Secretary may permit a person to make an application under section 5 if the Secretary is satisfied that the grounds of the application either:
 - (a) have not been substantially determined by the Secretary, nor by the Tribunal; or
 - (b) are based on a change in the person's circumstances since the previous application was finally determined, including the circumstances in a territory to which the applicant may be expelled or returned.
- (3) The Secretary is not under a duty to consider whether to exercise the power under section 8(2) in any circumstances.
- (4) Neither the Tribunal, nor the Supreme Court, has any jurisdiction in respect of a decision of the Secretary not to exercise, or not to consider the exercise of, the Secretary's power under section 8(2).

- (5) A request that the Secretary exercise, or consider the exercise of the Secretary's power under section 8(2) is not, for the purposes of section 11 of the Immigration Act 2014, an application to the Secretary to be recognised as a refugee or to be given derivative status.

9 Notice of determination

As soon as practicable after making a determination as to whether an asylum seeker is recognised a refugee or is owed complementary protection, or a decision to decline to make a determination, the Secretary must give the asylum seeker a notice specifying:

- (a) the relevant determination or decision; and
- (b) *[Repealed]*
- (c) if the asylum seeker has not been recognised as a refugee or is found to be owed complementary protection, or the Secretary declined to make a determination, the reasons for the determination or decision and details of the claimant's right to merits review.

10 Cancellation of refugee status

- (1) The Secretary must cancel a person's recognition as a refugee if the Secretary is satisfied that:
- (a) the Refugees Convention as modified by the Refugees Protocol ceases to apply to the person; or
 - (b) the recognition given by the Secretary was procured by fraud, forgery, false or misleading representation, or concealment of relevant information.
- (2) As soon as practicable after cancelling a person's recognition as a refugee, the Secretary must give the person a notice specifying:
- (a) the decision; and
 - (b) the reasons for the decision; and
 - (c) details of the person's right to merits review.
- (3) The Secretary may cancel a person's recognition as a refugee if requested by the person while in Nauru.

PART 3 – REFUGEE STATUS REVIEW TRIBUNAL

Division 1 – Establishment and membership of Tribunal

11 Establishment

The Refugee Status Review Tribunal is established.

12 Membership

(1) The Tribunal consists of:

- (a) a Principal Member; and
- (b) 2 Deputy Principal Members; and
- (c) such number of other members as are appointed in accordance with this Act.

(2) The total number of persons appointed under paragraph (1)(c) must not exceed the prescribed number.

13 Appointment of members

(1) The members of the Tribunal must be appointed by Cabinet in consultation with the Chief Justice.

(2) A person is eligible for appointment as the Principal Member or as a Deputy Principal Member if the person meets one or more of the following requirements:

- (a) the person is qualified to be appointed a judge of the Supreme Court.
- (b) the person is or has been a member of the Tribunal.
- (c) the person has been admitted as:
 - (i) a barrister or solicitor in England, Northern Ireland or the Republic of Ireland, as an advocate, law agent or writer to the Signet in Scotland, as a barrister or solicitor, or as a barrister and solicitor, in Australia or New Zealand; or
 - (ii) a legal practitioner (whether described as a barrister, a solicitor or in any other way) in any other country duly notified by the Minister for the purposes of section 5(a) of the *Legal Practitioners Act 1973*;

and the person has:

- (iii) has been so admitted for not less than five years; and
 - (iv) not been struck off the roll of practitioners, or equivalent list, maintained by any Court in which the person was so admitted.
- (3) The Regulations may prescribe other eligibility requirements for appointment as a member.
 - (4) Subject to this Part, a member holds office for the period, not exceeding 5 years, specified in the instrument of appointment, and is eligible for reappointment.
 - (5) A member holds office on such other terms and conditions as are determined by the Minister in writing.

14 Principal Member

- (1) The Principal Member is the executive officer of the Tribunal and is responsible for the overall operation and administration of the Tribunal.
- (2) The Principal Member is responsible for allocating the work of the Tribunal among the members (including himself or herself).
- (3) The Principal Member may give directions in writing, not inconsistent with this Act, as to:
 - (a) the operations of the Tribunal; and
 - (b) the conduct of reviews by the Tribunal.
- (4) The Tribunal should, as far as practicable, comply with the directions.
- (5) However, non-compliance by the Tribunal with a direction does not affect the validity of a decision of the Tribunal.

15 Resignation

A member may resign by writing signed by him or her and sent to the President as Chairman of the Cabinet.

16 Disclosure of interests

- (1) A member who has a conflict of interest in relation to a review by the Tribunal:
 - (a) must disclose the matters giving rise to that conflict to the applicant and:
 - (i) if the member is the Principal Member – to the Minister; and

- (ii) in any other case – to the Principal Member; and
- (b) must not take part in the review or exercise powers in relation to the review unless:
 - (i) if the member is the Principal Member – the applicant and the Minister consent; or
 - (ii) in any other case – the applicant and the Principal Member consent.
- (2) For this section, a member has a conflict of interest in relation to the review by the Tribunal if the member has an interest, pecuniary or otherwise, that could conflict with the proper performance of the member's functions in relation to that review.

17 Removal from office

- (1) The President, with the consent of Cabinet, may remove a member from office on the ground of misconduct or physical or mental incapacity.
- (2) The President may remove a member from office if:
 - (a) the member ceases to be eligible to be appointed a member (and the ground on which the person ceases to be eligible was prescribed before the appointment of the member); or
 - (b) the member fails, without reasonable excuse, to comply with his or her obligations as a member.

18 Registrar and officers

- (1) The Minister:
 - (a) must appoint a Registrar of the Tribunal; and
 - (b) may appoint such other officers of the Tribunal as are required.
- (2) The officers of the Tribunal have:
 - (a) the functions and powers prescribed by the Regulations; and
 - (b) any other functions as directed by the Principal Member.

Division 2 – Constitution, sittings and powers

19 Constitution for merits review

- (1) For the purpose of a particular review, the Tribunal is to be constituted by:
 - (a) the Principal Member or a Deputy Principal Member, who will preside; and
 - (b) 2 other members.
- (2) The Principal Member must determine who is to constitute the Tribunal for the purpose of a particular review.

20 Reconstitution if necessary

- (1) The Principal Member may reconstitute the Tribunal if:
 - (a) one or more of the 3 members who constitute the Tribunal for the purposes of a particular review:
 - (i) stops being a member; or
 - (ii) for any reason, is not available for the purpose of the review at the place where the review is being conducted; or
 - (b) the Principal Member thinks the reconstitution is in the interests of achieving the efficient conduct of the review.
- (2) The Tribunal as reconstituted is to continue to finish the review and may have regard to any record of the proceedings of the review made by the Tribunal as previously constituted.

21 Sittings

- (1) Sittings of the Tribunal are to be held from time to time as required, in such places as are convenient.
- (2) The Tribunal constituted by 3 members may sit and exercise the powers of the Tribunal even though the Tribunal constituted by another 3 members is at the same time sitting and exercising those powers.

22 Way of operating

The Tribunal:

- (a) is not bound by technicalities, legal forms or rules of evidence; and

- (b) must act according to the principles of natural justice and the substantial merits of the case.

23 Review to be in private and recording made

- (1) The hearing of an application for review by the Tribunal must be in private.
- (2) An audio or audio visual recording must be made of a hearing.

24 Evidence and procedure

- (1) For the purpose of the review, the Tribunal may:
 - (a) take evidence on oath or affirmation; or
 - (b) adjourn the review from time to time; or
 - (c) subject to Part 6, give information to the applicant and to the Secretary; or
 - (d) require the Secretary to arrange for the making of an investigation, or a medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.
- (2) The Tribunal in relation to a review may:
 - (a) summon a person to appear before the Tribunal to give evidence; and
 - (b) summon a person to produce to the Tribunal such documents as are referred to in the summons; and
 - (c) require a person appearing before the Tribunal to give evidence on oath or affirmation.
- (3) A member of the Tribunal or the Registrar may administer an oath or affirmation to a person appearing before the Tribunal.
- (4) A person appearing before the Tribunal to give evidence is not entitled to examine or cross-examine any other person appearing before the Tribunal to give evidence.
- (5) If a person appearing before the Tribunal to give evidence is not proficient in English, the Tribunal may direct that communication with that person during his or her appearance proceed through an interpreter.

25 Authorisation of person to take evidence

- (1) The power of the Tribunal to take evidence on oath or affirmation for the purpose of a review may be exercised on behalf of the Tribunal by a person authorised in writing by the Tribunal who is:
 - (a) a public officer; or
 - (b) another person approved in writing by the Minister for the purposes of this section.
- (2) The power to take evidence on oath or affirmation may be exercised on behalf of the Tribunal:
 - (a) inside or outside Nauru; and
 - (b) subject to such limitations (if any) as are specified by the Tribunal.
- (3) If a person other than a Tribunal is authorised to take evidence for the purpose of a review:
 - (a) the person has, for the purpose of taking that evidence:
 - (i) all the powers of the Tribunal under section 24; and
 - (ii) the power to administer an oath or affirmation to a person appearing before the first-mentioned person to give evidence; and
 - (b) for the purpose of the exercise of those powers by that person, this Part has effect (except where the context otherwise requires) as if a reference to the Tribunal included a reference to that person.
- (4) If a person exercises the power of the Tribunal to take evidence on oath or affirmation for the purpose of a review, the person must cause a written record of the evidence taken to be made and sent to the Tribunal.
- (5) If the Tribunal receives the record of evidence given by the applicant, the Tribunal is taken to have given the applicant an opportunity to appear before it to give evidence.

26 Oral evidence by telephone etc.

For the purposes of a review, the Tribunal may allow the appearance by the applicant before the Tribunal, or the giving of evidence by the applicant or any other person, to be by:

- (a) telephone; or

- (b) closed-circuit television; or
- (c) any other means of communication.

27 Certain Tribunal decisions to be published

- (1) A decision of the Tribunal that the Principal Member thinks is of general interest may be published.
- (2) The published decision must not identify an applicant or a relative or other dependent of an applicant.

Division 3 – Offences

28 Failure of witness to attend

- (1) A person who has been served with a summons to appear before the Tribunal to give evidence must not:
 - (a) fail to attend as required by the summons; or
 - (b) fail to appear and report from day to day unless excused, or released from further attendance, by the Tribunal.

Maximum penalty: Imprisonment for 6 months.

- (2) Subsection (1) does not apply if the person has a reasonable excuse.
- (3) An offence against subsection (1) is an offence of strict liability.
- (4) An invitation to appear before the Tribunal is not a summons to appear before the Tribunal to give evidence.

29 Refusal to be sworn or to answer questions etc.

- (1) A person appearing before the Tribunal to give evidence must not:
 - (a) when required to take an oath or to make an affirmation – refuse or fail to comply with the requirement; or
 - (b) refuse or fail to answer a question that the person is required to answer by the Tribunal.

Maximum penalty: Imprisonment for 6 months.

- (2) Subsection (1) does not apply if the person has a reasonable excuse.
- (3) A person must not refuse or fail to produce a document that a person is required to produce by a summons served on the person.

Maximum penalty: Imprisonment for 6 months.

- (4) Subsection (3) does not apply if the person has a reasonable excuse.
- (5) An offence against subsection (1) or (3) is an offence of strict liability.
- (6) A person appearing before the Tribunal to give evidence must not intentionally give evidence that is false or misleading in a material particular.

Maximum penalty: Imprisonment for 12 months.

30 Contempt

A person must not:

- (a) obstruct or hinder the Tribunal or a member in the performance of the functions of the Tribunal; or
- (b) disrupt the taking of evidence by the Tribunal.

Maximum penalty: Imprisonment for 12 months.

PART 4 – MERITS REVIEW BY TRIBUNAL

Division 1 – Application

31 Application for merits review by Tribunal

- (1) A person may apply to the Tribunal for merits review of any of the following:
 - (a) a determination made under section 6(1);
 - (b) a decision to cancel a person's recognition as a refugee made under section 10(1).
- (2) The application must be made:
 - (a) within 28 days after the person receives notice of the determination or decision; and
 - (b) in the form prescribed by the Regulations.
- (3) The Principal Member may extend the time in which an application for review can be lodged if the Principal Member is satisfied that there are compelling circumstances.
- (4) No fee may be charged for the making or hearing of the application.

- (5) An application made by a person under section 31(1)(a), that has not been determined at the time the person is given a Refugee Determination Record, is taken to have been validly determined at that time.

32 Secretary to be notified of application and to provide information

- (1) If an application for review is made to the Tribunal, the Registrar must, as soon as practicable, give the Secretary written notice of the making of the application.
- (2) The Secretary must, within 10 working days after being notified of the application (or such longer period as the Presiding Member may allow), give to the Registrar the prescribed number of copies of a statement about the determination or decision under review that:
 - (a) sets out the findings of fact made by the person who made the determination or decision; and
 - (b) refers to the evidence on which those findings were based; and
 - (c) gives the reasons for the determination or decision.
- (3) The Secretary must, as soon as is practicable after being notified of the application, give to the Registrar each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the determination or decision.

33 Period within which Tribunal must conduct merits review

- (1) The Tribunal must complete a review of a determination or decision within 90 days after the day on which the Secretary gives the Registrar the documents relevant to the review.
- (2) Failure to comply with this section does not affect the validity of a decision on an application for merits review.

34 Decision of Tribunal on application for merits review

- (1) The Tribunal may, for the purposes of a merits review of a determination or decision, exercise all the powers and discretions of the person who made the determination or decision.
- (2) On a merits review of a determination or decision, the Tribunal may:
 - (a) affirm the determination or decision; or
 - (b) vary the determination or decision; or

- (c) remit the matter to the Secretary for reconsideration in accordance with directions or recommendations of the Tribunal;
 - (d) set the determination or decision aside and substitute a new determination or decision.
 - (e) determine that a dependent, of a person in respect of whom the determination or decision was made, is recognised as a refugee or is owed complementary protection.
- (3) If the Tribunal:
- (a) varies the determination or decision; or
 - (b) sets aside the determination or decision and substitutes a new determination or decision;
- the determination or decision as varied or substituted is taken (except for the purpose of appeals from the decisions of the Tribunal) to be a determination or decision of the Secretary.
- (4) The Tribunal must give the applicant for review and the Secretary a written statement that:
- (a) sets out the decision of the Tribunal on the review; and
 - (b) sets out the reasons for the decision; and
 - (c) sets out the findings on any material questions of fact; and
 - (d) refers to the evidence or other material on which findings of fact were based.
- (5) A decision on a review is taken to have been made on the date of the written statement.

Division 2 – Review procedures

35 Parties may give information or written arguments to Tribunal

- (1) An applicant for review by the Tribunal may give the Registrar:
- (a) a statutory declaration in relation to a matter of fact that the applicant wishes the Tribunal to consider; and
 - (b) written arguments relating to the issues arising in relation to the determination or decision under review.
- (2) The Secretary may give the Registrar written argument relating to the issues arising in relation to the determination or decision under review.

36 Tribunal may seek information

In conducting a review, the Tribunal may:

- (a) invite, either orally (including by telephone) or in writing, a person to provide information; and
- (b) obtain, by any other means, information that it considers relevant.

37 *[Repealed]*

38 *[Repealed]*

39 Failure of applicant to respond

If a person is invited by the Tribunal to give information or to comment or respond to information but does not do so as required, the Tribunal may make a decision on the review without taking further action to obtain the information, comment or response.

40 Tribunal must invite applicant to appear

- (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.
- (2) Subsection (1) does not apply if:
 - (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
 - (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it.
- (3) An invitation to appear before the Tribunal must be given to the applicant with reasonable notice and must:
 - (a) specify the time, date and place at which the applicant is scheduled to appear; and
 - (b) invite the applicant to specify, by written notice to the Tribunal given within 7 days, persons from whom the applicant would like the Tribunal to obtain oral evidence.
- (4) If the Tribunal is notified by an applicant under subsection (3)(b), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice.

41 Failure of applicant to appear before Tribunal

- (1) If the applicant:
- (a) is invited to appear before the Tribunal; and
 - (b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear;

the Tribunal may make a decision on the review without taking further action to allow or enable the applicant to appear before it.

- (2) This section does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review, in order to enable the applicant's appearance before it as rescheduled.

Division 3 – Miscellaneous

42 Rights conferred by this Part additional to other rights

The rights of a person provided under this Part for a review of a determination or decision are in addition to, and not in derogation of, any other right that the person may have for review of the determination or decision.

PART 5 – APPEAL

43 Jurisdiction of the Supreme Court

- (1) A person may appeal to the Supreme Court against a decision of the Tribunal on a point of law.

(1A) Despite section 43(1), the Supreme Court has no jurisdiction in respect of a determination by the Tribunal that a person is not to be given derivative status.

- (2) The parties to the appeal are the appellant and the Republic.
- (3) The notice of appeal must be filed within 42 days after the person receives the written statement of the decision of the Tribunal.
- (4) The notice of appeal must:
- (a) state the grounds on which the appeal is made; and
 - (b) be accompanied by the supporting materials on which the appellant relies.

- (5) The Supreme Court may by Order, through the Registrar or a Judge, extend the period in subsection (3) as may be considered appropriate if:
- (a) an application for the Order has been made in writing to the Supreme Court specifying that the appellant considers it necessary in the interest of the administration of justice to make that Order; and
 - (b) the Supreme Court is satisfied that it is necessary in the interests of the administration of justice to make that Order.

44 Decision by Supreme Court on appeal

- (1) In deciding an appeal, the Supreme Court may make either of the following orders:
- (a) an order affirming the decision of the Tribunal;
 - (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.
- (2) If the Court makes an order remitting the matter to the Tribunal, the Court may also make either or both of the following orders:
- (a) an order declaring the rights of a party or of the parties;
 - (b) an order quashing or staying the decision of the Tribunal.

45 Costs

The Supreme Court may not make an order for costs against the appellant except in extraordinary circumstances.

46 Period within which Tribunal must reconsider matter remitted

- (1) If a matter is remitted to the Tribunal for reconsideration, the Tribunal must complete its reconsideration within 90 days.
- (2) Failure to comply with this section does not affect the validity of a decision on an application for merits review.

47 Rights conferred by this Part additional to other rights

The rights of a person provided under this Part for an appeal against a decision are in addition to, and not in derogation of, any other right that person may have for review of the decision.

PART 6 – CONFIDENTIALITY

48 Confidentiality

- (1) The Secretary and the Supreme Court must maintain confidentiality at all times as to:
 - (a) the identity of an asylum seeker whose application as a refugee is being considered under this Act; and
 - (b) the particulars of the determination of the application or any other matter relevant to the determination.
- (2) Subsection (1) does not prevent disclosure of particulars:
 - (a) to a person necessarily involved in determining the relevant determination, including any appeal; or
 - (b) to a public officer whose functions in relation to the asylum seeker require knowledge of those particulars; or
 - (c) to the United Nations High Commissioner for Refugees or a representative of the High Commissioner; or
 - (d) in dealing with government officials of other countries, not being the country of feared persecution.
- (3) Subsection (1) does not apply if an asylum seeker has waived his or her rights under that subsection.

49 Disclosure of certain information

- (1) This section applies to information that:
 - (a) is given to the secretary or the Tribunal in confidence; or
 - (b) is of a kind prescribed by the Regulations.
- (2) If the Secretary or the Tribunal receives information to which this section applies, the Secretary or the Tribunal (as the case requires):
 - (a) may, for the purpose of the exercise of powers under this Act, have regard to the information; and
 - (b) must, if intending to rely on the information for the purpose of the exercise of powers contrary to the interests of an applicant, disclose the information to the applicant.
- (3) If the Secretary or the Tribunal discloses information to the applicant under subsection (2)(b), the Secretary or the Tribunal (as

the case requires) may give a direction to the applicant that the information must not be disclosed except in a specified manner and to specified persons, or to persons of a specified class.

- (4) A person commits an offence if the person discloses information contrary to a direction of the Secretary or the Tribunal under subsection (3).

Maximum penalty: Imprisonment for 2 years.

50 Disclosure of confidential information

- (1) This section applies to a person who is or has been:
- (a) the Secretary; or
 - (b) a member of the Tribunal; or
 - (c) an officer of the Tribunal; or
 - (d) a Judge of the Supreme Court; or
 - (e) an officer of the Supreme Court; or
 - (f) a person providing interpreting services in connection with:
 - (i) a review by the Tribunal; or
 - (ii) an appeal in the Supreme Court.
- (2) This section applies to information or a document if the information or document:
- (a) concerns a person; and
 - (b) is obtained by a person to whom this section applies in the course of performing functions or exercising powers under this Act.
- (3) A person to whom this section applies must not:
- (a) make a record of information to which this section applies; or
 - (b) directly or indirectly divulge or communicate to a person information to which this section applies;

unless the record is made or the information is divulged or communicated;
 - (c) for the purposes of this Act; or

- (d) for the purposes of, or in connection with, the performance of a function or the exercise of a power under this Act.

Maximum penalty: Imprisonment for 2 years.

- (4) A person to whom this section applies must not be required to produce, or permit access to, a document, or to divulge or communicate information, to which this section applies to or in:
 - (a) a court; or
 - (b) a tribunal; or
 - (c) Parliament; or
 - (d) a Parliamentary Committee; or
 - (e) any other authority or person having power to require the production of documents or the answering of questions,
 - except if it is necessary to do so for the purposes of carrying into effect the provisions of this Act.
- (5) For this section, a person who is providing interpreting services in connection with a review by the Tribunal or an appeal in the Supreme Court is taken to be performing a function under this Act.

PART 7 – MISCELLANEOUS

51 Principal Member's obligation to report to Minister

- (1) The Principal Member must give a report to the Minister, within 45 days after the end of each reporting period, about each occasion on which the Tribunal has not been able to complete a review or reconsideration of matters remitted to the Tribunal within the required period (see section 33 and section 46).
- (2) A report must include:
 - (a) the date of each application for review or the date on which the matter was remitted to the Tribunal; and
 - (b) the reasons why the decisions were not reviewed or the matters reconsidered within the required period.
- (3) A report must not include:
 - (a) the name of any current or former applicant for review; or
 - (b) information that may identify such an applicant; or
 - (c) the name of any other person connected in any way with an application for review; or
 - (d) information that may identify that other person.

- (4) A report may include other information that the Principal Member thinks appropriate.
- (5) The Minister must cause a copy of a report under this section to be tabled in Parliament within 4 sitting days after the day on which the Minister receives the report from the Principal Member.
- (6) For the purposes of this section, each of the following is a reporting period:
 - (a) the period that starts on the day that the Tribunal is first constituted and ends 4 months after that day;
 - (b) each subsequent period of 4 months.

52 Regulations

- (1) The Cabinet may make regulations under this Act.
- (2) The regulations may:
 - (a) be of general application or vary in their application according to prescribed factors; and
 - (b) give a person discretion to decide a matter.

53 Delegation of Secretary's powers

The Secretary may, by writing signed by him or her, delegate to a person, any of the Secretary's powers under this Act.

Notes for Refugees Convention Act 2012

Table of Constituent Legislation

Short title	Number	Certification	Commencement
<i>Refugees Convention Act 2012</i>	2012/12	10.10.2012	10.10.2012
<i>Refugees Convention (Amendment) Act 2014</i>	2014/04	21.05.2014	21.05.2014
<i>Refugees Convention (Amendment) Act 2015</i>	2015/18	14.08.2015	14.08.2015
<i>Refugees Convention (Validation and Amendment) Act 2016</i>	2016/02	29.01.2016	29.01.2016
<i>Refugees Convention (Derivative Status & Other Measures) (Amendment) Act 2016</i>	2016/56	23.12.2016	23.12.2016
<i>Refugees Convention (Amendment) Act 2017</i>	2017/05	05.05.2017	05.05.2017

Table of Amendments

ad.= added or inserted	am. = amended	rep.= repealed	rs.= repealed and substituted
om.= omitted	os. = omitted and substituted	cert.= certified	com.= commence

Provision Affected	How Affected
Section 3	ad. by Act 2014/04 ad. by Act 2014/04 om. by Act 2014/04 am. by Act 2014/04 om. by Act 2016/56 ad. by Act 2016/56
Section 4	os. by Act 2014/04
Section 5	Subs. (1A) ad. by Act 2014/04 Subs. (1A) os. by Act 2016/56 Subs. (1AA) ad. by Act 2016/56 Subs. (1B) cert. by Act 2016/56 Subs. (1B) com. by 21 May 2014 Subs. (2) os. by Act 2016/56 Subs. (3) os. by Act 2016/56
Section 6	Subs. (1) am. by Act 2014/04 Subs. (1) os. by Act 2016/56

	Subs. (2) rep. by Act 2016/56 Subs. (2A) ad. by Act 2016/56 Subs. (2B) ad. by Act 2016/56 Subs. (2B) com. by Act 2014/04 Subs. (3) os. by Act 2016/56
Section 7	Subs. (1) am. by Act 2016/56
Section 8	Subs. (1) os. by Act 2016/56 Subs. (2) os. by Act 2016/56
Section 9	am. of heading by Act 2014/04 ad. by Act 2014/04 Subs. (b) rep. by Act 2014/04 Subs. (c) am. by 2014/04
Section 13	Subs. (2) os. by Act 2016/02 Subs. (2) com. on 9 Sep 2013
Section 21	Subs. (1) am. by Act 2016/56
Section 31	Subs. (1)(d) am. by Act 2014/04 Subs. (1) os. by Act 2016/56 Subs. (3) os. by Act 2014/04 Subs. (4) os. by Act 2014/04 Subs. (5) ad. by Act 2016/56 Subs. (5) com. by 21 May 2014
Section 34	Subs. (2)(e) ad. by Act 2017/05 Subs. (5) com. by 23rd Dec 2016 Subs. (4)(e) ad. by Act 2016/56 Subs. (4)(e) com. by 10 Oct 2012 Subs. (4)(e) rep. by Act 2017/05
Section 37	Rep. retrospectively to 10 Oct 2012 by Act 2017/05
Section 38	Rep. by Act 2014/04
Section 43	Subs. (1) os. by Act 2016/02 Subs. (1) com. by 9 Sep 2013 Subs. (1) os. by Act 2016/ 56 Subs. (1A) ad. by Act 2016/56 Subs. (3) am. by Act 2015/18 Subs. (5) ad. by Act 2015/18 Note: rep. by Act 2016/56
Section 53	ad. by Act 2014/04