IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M27 of 2018**

BETWEEN:

QLN147
Appellant

THE REPUBLIC OF NAURU
Respondent

APPELLANT'S SUBMISSIONS

I. INTERNET PUBLICATION

1. These Appellant certifies by his lawyers that these submissions are in a form suitable for publication on the Internet.

II. ISSUES

2. The appellant is a national of Sri Lanka, who made claims to invoke the protection obligations of the respondent (the **Republic**). Relevantly, he claimed that, if he were to be returned or expelled to Sri Lanka, he may be detained in a Sri Lankan prison for some days. He gave and referred to certain information and submissions as to the conditions in Sri Lankan prisons. He claimed that his exposure to such conditions would infringe Article 7 of the International Covenant on Civil and Political Rights (**ICCPR**). The Refugee Status Review Tribunal (the **Tribunal**) rejected his claim but, in its written statement under section 34(4) of the *Refugees Convention Act 2012* (Nr) (the **Act**), did not refer to the particular information or submissions which the appellant had given and referred to.

3. This appeal presents the following issues:

Robinson Gill Lawyers
Level 3, 990 Whitehorse Road
Box Hill Victoria 3128

Telephone: (03) 9890 3321
Fax: (03) 9898 4266
Email: y.al-azzawi@robinsongill.com.au
Ref: Yusur Al-Azzaw – YA 34579

3.1. Does the failure of the Tribunal to refer to the relevant information or submissions in its written statement rise to an inference that that information was not considered? If so, did that involve an error of law?

3.2. Alternatively, if the Tribunal considered the relevant information and submissions, does its failure give rise to an inference that it did not consider that information or submissions to be material to its decision? If so, did the Tribunal's conclusion in that respect involve an error of law?

3.3. Alternatively, if the Tribunal considered the relevant information and submissions, and considered that it was material to its decision, did the Tribunal fail to comply with its obligation under section 34(4) to give the appellant a statement that sets out the reasons for its decision, sets out its findings on any material questions of fact, and refers to the evidence or other material on which its findings were based?

III. SECTION 78B NOTICES

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

IV. REASONS OF SUPREME COURT

5. The reasons for judgment of the Supreme Court are available on the Internet at *QLN 147 v Republic* [2018] NRSC 2.[1] There is no authorised report of the reasons for judgment.

V. RELEVANT FACTS

6. On 28 September 2014, the appellant applied to the Secretary under section 5(1) of the Act to be recognised as a refugee. On 11 October 2015, the Secretary determined under section 6(1) that the appellant is not recognised as a refugee, and is not owed complementary protection.

7. On 22 October 2015, the appellant applied to the Tribunal under section 31(1)(a) of the Act for review of the Secretary's determination. On 26 November 2016, the Tribunal purported to exercise its power under section 34(2)(a) of the Act to affirm the Secretary's determination. On the same date, the Tribunal gave the appellant and the Secretary a written statement in purported compliance with its obligation under section 34(4).[2] Section 34(4) required the Tribunal to prepare a written statement that "sets out the reasons for the

---

1 www.paclii.org/nr/cases/NRSC/2018/2.html

2 Core Appeal Book of the High Court of Australia (**Core Appeal Book**), 4.

decision"; "sets out the findings on any material questions of fact"; and "refers to the evidence or other material on which findings of fact were made".

The appellant's complementary protection claim and evidence

8. The appellant advanced various claims to invoke Nauru's protection obligations. One claim was to the effect that he was owed "complementary protection" within the meaning of the Act[3] because his return or expulsion to Sri Lanka would expose him to "cruel, inhuman or degrading treatment" within the meaning of Article 7 of the ICCPR.

9. The basic factual premises to the appellant's claim were that: (a) he had departed Sri Lanka illegally; (b) if he were to be returned to Sri Lanka, he would be charged with this offence; and (c) if he was charged with this offence, he may be remanded for some days pending a hearing before a magistrate in connection with the criminal charge.

10. On 14 December 2014, the appellant's lawyer gave the Secretary a submission which relevantly stated that "imprisonment in Sri Lanka, even for brief periods, exposes detainees to real risks of ... cruel, inhuman and degrading treatment".[4] The appellant's lawyer noted: (emphasis added):

> *Conditions in Sri Lankan prisons have been harshly condemned by international observers. In its* 2012 Country Report on Human Rights Practices – Sri Lanka *(19 April 2013), the United States Department of State has noted that Sri Lanka's* ***'prison conditions [are] poor and [do] not meet international standards due to gross overcrowding and the lack of sanitary facilities*** *...*

11. Subsequently, on 11 October 2015, the Secretary determined that the appellant is not owed complementary protection. In his notice of that determination under section 9 of the Act, the Secretary gave his reasons.[5] Relevantly, the Secretary found that, if the appellant were to be returned to Sri Lanka, he would be returned to the airport of Negombo, and he may then be "held in remand until the next sitting of the court in Negombo".[6]

12. On 28 June 2016, the appellant's lawyer gave a submission to the Tribunal (the **Document**) which contained more detailed and more recent information as to the conditions in Sri

---

3 "Complementary protection" is defined in section 3 as meaning "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".

4 Book of Further Materials before the High Court of Australia (**Appellant's Book of Further Materials**), 59.

5 Appellant's Book of Further Materials, 65.

6 Appellant's Book of Further Materials, 72, 76.

Lankan prisons than that previously provided to the Department.[7] That Document included, or referred to, information and argument to the following effect (emphasis added):

12.1. On 10 May 2016, the UN Special Rapporteur on Torture, Mr Juan E Mendez, expressed "deep concern" about "the conditions of life in all prisons" in Sri Lanka. "All are characterized by a very deficient infrastructure and pronounced overcrowding. As a result, there is an acute lack of adequate sleeping accommodation, extreme heat and insufficient ventilation. Overpopulation also results in limited access to medical treatment, recreational activities or educational opportunities. These combined conditions constitute in themselves a form of cruel, inhuman and degrading treatment".[8]

12.2. "Prison conditions in Sri Lanka have been recognised as likely to breach article 3 of the European Convention on Human Rights (phrased in equivalent terms to article 7 of the ICCPR) and hence amount to inhuman or degrading treatment or punishment". In that respect, the submission referred to the United Kingdom Home Office *Sri Lanka Operational Guidance Note* (April 2012), which relevantly stated that: "Conditions in prisons and police custody are very poor and taking into account the levels of overcrowding, unsanitary conditions, lack of food and the incidence of torture, are likely to reach the Article 3 threshold and a grant of Humanitarian Protection may be appropriate".

12.3. "In particular, Sri Lanka's prisons have been found to suffer from severe overcrowding, antiquated infrastructure and limited access to food and basic assistance".[9] In that respect, the submission referred a "useful summary" of conditions in Sri Lankan prisons is provided in *SZTAL v Minister for Immigration* [2015] FCCA 64 at [32]. It was there recorded that the Refugee Review Tribunal had found that "the combination of severe overcrowding and antiquated infrastructure of certain prison facilities places unbearable strains and services and resources, which for detainees in certain prisons, such as the Colombo Remand Prison, amounts to degrading treatment".[10]

12.4. "The Tribunal may ... have regard to numerous decisions of the UN Human Rights Committee, which have found that article 7 of the ICCPR is breached by inhumane prison conditions – including extreme overcrowding, lack of adequate food or water,

---

7 Appellant's Book of Further Materials, 91.
8 Appellant's Book of Further Materials, 109.
9 Appellant's Book of Further Materials, 117.
10 Appellant's Book of Further Materials, 117.

or denial of medical treatment".[11] The submission referred to the authorities cited in *SZTAL* at [28]. There, the Federal Circuit Court relevantly stated (citations omitted): "The body established by the ICCPR to ensure compliance with that instrument by the States parties is the Human Rights Committee (HRC). The International Court of Justice ascribes 'great weight' to the HRC's interpretation of the ICCPR. Relevantly for the purposes of this case, decisions of the HRC recognise that article 7 of the ICCPR is violated by the following kinds of conditions in prisons and other places of detention: (a) extremely cramped or unsanitary conditions, exposure to cold or inadequate ventilation or lighting; (b) lack of adequately nutritious food or water, lack of adequate clothing or a separate bed, threats of torture of death, lack of opportunity for adequate exercise; and (c) denial of medical treatment".

12.5. "It is our submission that such characteristics are displayed by Sri Lankan prisons. Given such, if [the appellant] is detained upon removal to Sri Lanka (for any reason), the conditions in which he may be detained may cause him to suffer cruel, in human or degrading treatment sufficient to enliven Nauru's non-refoulement obligations under article 7 of the ICCPR".[12]

13. On 8 July 2016, the Tribunal conducted a hearing with the appellant. The Tribunal put the following information to him (emphasis added):[13]

> *... There's another aspect of this which you mentioned a little earlier, and that is you say, "Well, I left Sri Lanka illegally and so I'll be in trouble when I get back." So the Tribunal does have information about what happens to people who go back after having left the country illegally. What happens though when they arrive at Katunayake in most cases it will be quite clear that they did leave illegally because in many cases they won't have a passport or, if they do have a passport, it won't show an exit stamp at the airport or at a seaport.*
>
> *So what happens is that in that situation those people will be arrested on a charge of leaving the country illegally and they will be taken from Katunayake, across the road to Negombo and taken before a Magistrates Court in Negombo for a bail hearing. Bail is granted and then the person has to come back at some later time, probably months later, to face the charge of having left unlawfully. If that person is convicted of charge of leaving illegally then they're fined. The fine will usually go up to 50,000 rupees.*
>
> *There's no record of people who have returned and being charged with having left illegally, having been sent to gaol. If the person arrives at Kaunayake on a weekend or maybe a holiday, it won't be possible to go to the Magistrates Court immediately and so they may be held on remand in Negombo Gaol for one, two, three days, something like that.* ***It's not a very nice place. It's old and it's dirty and it's crowded***

---

11 Appellant's Book of Further Materials, 117.
12 Appellant's Book of Further Materials, 117.
13 Appellant's Book of Further Materials, 237-238.

> ***but there is no information to indicate that people who are held on remand there for this charge are held on remand there for just this fairly brief period of time have been harmed ...***

The Tribunal's decision and reasons

14. In its written statement under section 34(4) of the Act, the Tribunal:

    14.1. accepted that the appellant had departed Sri Lanka illegally ([57]);

    14.2. found that he would be arrested on return to Sri Lanka ([58]); and

    14.3. found that he may be "placed in the remand section of Negombo prison, possibly for some days, until the next opportunity for magistrates court appearance arises" ([58]).

15. The Tribunal's written statement only twice specifically referred to the appellant's claims relating to the conditions that he would experience in detention.

16. Under the headings "Assessment of Refugees Convention claims" and "Failed asylum seeker", referring to the matters set out to in paragraph 14 above, the Tribunal stated as follows (emphasis added):

> [59] *When the applicant was invited to comment on this information he said he remembered a New Zealand government report from 2015 which found that many of those who return to Sri Lanka go missing. One woman had been raped by the authorities while in custody. Asked about the more specific issue of the treatment of those who leave the country illegally he reiterated his claim about this incident, adding that the authorities are trying to hide the information. In his situation his life would be at risk because the authorities would question him and discover his background.*
>
> [60] *On the information before it the Tribunal finds that Sri Lanka's* Immigrants and Emigrants Act *is a law of general application, adopted for the legitimate and unexceptional purpose of regulating the movement of people across the country's borders. There is no credible evidence to indicate that the law would be imposed on the applicant in a discriminatory way, such as with a harsher penalty or treatment, because of his Tamil ethnicity or for any other reason.* ***Nor is there any credible evidence that the fine which would be imposed on him or any brief period spent in remand awaiting a hearing in the magistrates court would rise to the level of persecution of other harm such that returning him to Sri Lanka would amount to a breach of Nauru's international obligations, or that they would be imposed on him for one of the Convention reasons.***

17. Under the heading "Assessment of complementary protection claims", the Tribunal stated as follows (emphasis added):

> [65] *The representative submits that the applicant faces a real risk of torture, cruel, inhuman or degrading treatment, and/or arbitrary deprivation of life in Sri Lanka and that removing him there would be in breach of Nauru's international obligations under [inter alia] the International Covenant on Civil and Political Rights ... It is submitted that the prohibited treatment would arise in the context of physical*

> *mistreatment, imprisonment in unacceptable conditions and discrimination on the basis of the applicant's race.*
>
> ...
>
> [67] *As noted, the Tribunal accepts that on return to Sri Lanka the applicant could be arrested and charged with a breach of the* Immigrants and Emigrants Act *over his illegal departure for India in 2013. The Tribunal accepts that he would be fined if convicted of such an offence but does not accept there is a reasonable possibility of him being sentenced to a term of imprisonment because of it.* ***While it is possible that he could be held on remand for a small number of days while awaiting a hearing in the magistrates court, in cramped and unsanitary conditions, the Tribunal does not accept that this in itself would constitute torture or cruel, inhuman or degrading treatment or punishment of a kind prohibited by Nauru's international human rights commitments*** ...

18. Otherwise, generically, the Tribunal noted that the appellant's lawyer had provided "a covering submission [that] canvasses legal issues, outlines the applicant's claims and cites a range of country information relative to human rights conditions in Sri Lanka, the treatment of the Tamil minority and the forms of harm the applicant claims to fear on return" ([16]). And the Tribunal stated that, in assessing the appellant's claims under the Refugees Convention, it had "had regard to ... the submission of 28 June 2016" ([31]).

VI. ARGUMENT

Relevant legal principles

Article 7 of the ICCPR

19. Article 7 of the ICCPR relevantly provides that "[n]o one shall be subjected to cruel, inhuman or degrading treatment or punishment." As Gageler J indicated in *SZTAL v Minister for Immigration and Border Protection*, Article 3 of the European Convention on Human Rights has an equivalent proscription, and therefore interpretations of one are apt to guide the other.[14]

20. The ICCPR does not define the expression "cruel, inhuman or degrading treatment or punishment". However, as this Court recently observed held in *SZTAL v Minister for Immigration and Border Protection*, Article 7 of the ICCPR does "not expressly require that pain or suffering of the requisite degree be intentionally inflicted; nor has it subsequently been interpreted as importing such a requirement".[15] (As the Court explained in *SZTAL*,

---

14 (2017) 91 ALJR 936 at [52]-[53.

15 (2017) 91 ALJR 936 at [4].

under the Australian *Migration Act 1958*, which codifies the criteria for complementary protection, the relevant criterion requires an actual subjective intention on the part of the relevant State to inflict suffering. But no such requirement is overlaid in the Nauruan Act.)

21. It was the common position of both parties in *SZTAL*, and it is correct, that the fact that a person may be exposed to poor prison conditions for only a short period (e.g., a few days) does not mean that the conditions are incapable of constituting a breach of Article 7 of the ICCPR. Whether exposure to poor prison conditions amounts to a breach of Article 7 of the ICCPR involves an evaluation of *all* of the relevant conditions, considered cumulatively.[16]

22. By way of illustration, in *Portorreal v Dominican Republic*, the Human Rights Committee concluded that the complainant had been subjected to inhuman and degrading treatment in circumstances where had had been detained for only 50 hours in an overcrowded, hot and dirty cell, and where he received no food or water on the first day of his detention.[17]

Implications from absence of reference to information etc in written statement

23. The imposition of a statutory duty to give a statement of reasons provides an effective means by which a court can "detect the kind of error which entitles the court to intervene".[18] Relevantly, in the present context, the imposition by section 34(4) of a duty on the Tribunal to give a written statement entitles this Court to make certain inferences as to the Tribunal's decision-making process when information given made by an applicant is not referred to.[19] That is because, as the Full Court of the Federal Court explained in *Minister for Immigration and Border Protection v MZYTS*, by reference to an equivalent duty in section 430 of the *Migration Act 1958* (Cth) (emphasis added, citations omitted):[20]

> *The Court is entitled to take the reasons of the Tribunal as setting out the findings of fact the Tribunal itself considered material to its decision, and as reciting the evidence and other material which the Tribunal itself considered relevant to the findings it made:* Minister for Immigration and Multicultural Affairs v Yusuf ... at *[10], [34], [68]. Representing as it does what the Tribunal itself considered*

---

16 This submission of the Minister is recorded in the judgment of the Full Court of the Federal Court of Australia at *SZTAL v Minister for Immigration and Border Protection* (2016) 243 FCR 556 at [32].

17 *Views: Communication No 188/1984*, 31st sess, UN Doc CCPR/C/31/D/188/1984.

18 *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605 at [308]; *R v Home Department State Secretary; Ex parte Doody* [1994] 1 AC 531 at 565.

19 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [31] (French CJ and Kiefel J. Heydon and Crennan JJ agreeing) and [69]-[72] (Gummow J). Cf. *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at [25], where no statutory duty was imposed.

20 (2013) 230 FCR 431 at [49]. The Full Court's decision in *MZYTS* has been approved on numerous occasions. See, for example, *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67 at [34].

> *important and material, what is present – and what is absent – from the reasons may in a given case enable the Court on review to find jurisdictional error.*

24. In these circumstances, one of two alternative inferences may be made, assuming the Tribunal to have complied with its duty in section 34(4) of the Act.

24.1. The Tribunal did not consider the information.

24.2. Alternatively, the Tribunal considered the information, but did not regard it as material to its decision.

25. Which of the two inferences should be made depends on the nature of the information, and its apparent importance to the applicant's claims. As the Full Court of the Federal Court explained in *Minister for Immigration and Border Protection v SZSRS*,[21] approving and applying the analysis in *MZYTS* (emphasis added):

> *[W]here a particular matter, or particular evidence, is not referred to in the Tribunal's reasons, the findings and evidence that the Tribunal has set out in its reasons may be used as a basis for inferring that the matter or evidence in question was not considered at all. The issue is whether the particular matter or evidence that has been omitted from the reasons can be sensibly understood as a matter considered, but not mentioned because it was not material.* ***In some cases, having regard to the nature of the applicant's claims and the findings and evidence set out in the reasons, it may be readily inferred that if the matter or evidence had been considered at all, it would have been referred to in the reasons, even if it were then rejected or given little or no weight.***

26. Of course, there is always a third possibility. That is that the Tribunal failed to comply with its duty in section 34(4) of the Act. It is trite that a breach of the duty imposed by section 430 of the *Migration Act 1958* (Cth) is not a *jurisdictional* error.[22] However, as the Republic appears to accept, an appeal to the Supreme Court on a "point of law" is not confined to *jurisdictional* error. It extends to an appeal on any error of law.[23] And a failure to comply with an obligation to give reasons is an error of law.[24]

---

21 (2014) 309 ALR 67 at [34].

22 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212.

23 See, for example, *OPK 023 v Republic* [2018] NSRC 9 at [31].

24 *DWN088 v Republic* [2016] NRSC 13 at [16]-[25]. In the analogous context of appeals on a question of law from the Administrative Appeals Tribunal to the Federal Court see: *Dornan v Riordan* (1990) 24 FCR 564, 573-574; *CASA v Central Aviation Pty Ltd* (2009) 179 FCR 554, 562-563; *Comcare v Singh* (2012) 126 ALD 119 at [26]; *Ekinci v Civil Aviation Safety Authority* (2014) 227 FCR 459 at [107]-[114].

Failure to consider substantial information or submissions is a legal error

27. A failure by the Tribunal to consider substantial and consequential evidence amounts to an error of law.[25] So too does a failure to consider a submission worthy of serious consideration.[26]

28. For example, recently, in *OPK 023 v Republic*, the Supreme Court explained that the Tribunal's decision-making process "can miscarry if important information is 'ignored' in the course of the Tribunal's decision-making in the sense that it may have been conscious of the information but it ignored it in its decision-making – in which case it did not 'deal with' the information".[27] Similarly, the Republic accepted in this matter that the Tribunal is "required to consider relevant and serious submissions put to it" (Supreme Court at [35]).

29. As to whether the Tribunal has in fact failed to consider information or submissions, a mere conclusionary and general statement by the Tribunal to the effect that it has considered a particular document does not demonstrate that it has done so, or has done so lawfully. For example, as the Federal Court explained in *SZOVB v Minister for Immigration and Citizenship*:[28] "Saying that it considered the information before it on the issues indicates the tribunal purported to conduct the review required of it, the question, however, is whether it actually did so. As Kirby J said in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 595, it is the reality and not the appearance that matters".[29]

Application of principles in this matter

30. The appellant's primary position, before the Supreme Court and this Court, was and is that the Tribunal failed to consider the information and submissions as to the conditions in Sri Lankan prisons which the appellant's lawyer had given or referred to in the Document. The information and submissions were not referred to in the Tribunal's written statement. Applying the principles outlined above, the key question is whether the Tribunal failed to consider that information or submissions, or whether it considered that material but did not

---

25 See, for example, *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [111]; *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67 at [47]-[54].

26 *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 19 ATR 1122 at 1129-1130; *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 73 ALD 321 at [24]-[25].

27 [2018] NSRC 9 at [33], [40].

28 [2011] FCA 1462 at [43].

29 See also, for example, *Hindi v Minister for Immigration and Ethnic Affairs* (1998) 91 ALR 586 at 597-598; *SZSSY v Minister for Immigration and Border Protection* [2014] FCA 1144 at [46]-[72].

refer to it on the basis that it was not *material* (credible, relevant and significant) to the decision that it was required to make.

31. The appellant submitted to the Supreme Court that the more probable explanation in this case is the former. The Supreme Court wrongly rejected that submission.

32. There appear to be two strands of reasoning in the Supreme Court's judgment.

33. ***First***, the Supreme Court appeared to accept the Republic's contention that the information and submissions in the 28 June 2016 document were not "relevant and serious" ([35]-[36]), and that is why they were not referred to. Specifically, the Court held that that information and those submissions "were very general", and they "did not relate to the specific matter required to be considered by the Tribunal", being "whether detention for up to three days on remand in Negombo prison would amount to cruel and inhumane treatment" ([36]).

34. The Supreme Court's analysis is flawed for the following reasons.

35. First, the Document was given to the Tribunal in a particular context, being a "review" of a particular decision by the Secretary, for which the Secretary gave reasons.[30] The Secretary had found that the appellant may be detained, in Negombo, for a short period pending a magistrates court hearing. Thus, in that context, the information and submissions in the Document given to the Tribunal ought to have been taken by the Tribunal as being directed at that particular circumstance which the Secretary had identified, including a *location* (Negombo prison) and *duration* of detention (until the next sitting of the magistrates court). For this reason alone, it is inaccurate to conclude that the information and submissions in the Document were not directed at "whether detention for up to three days on remand in Negombo prison would amount to cruel and inhuman punishment".

---

30 Cf. *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [34]. "The issues arising in relation to a decision under review are to be identified having regard not only to the fact that the Tribunal may exercise ... all the powers and discretions conferred by the Act on the original decision-maker ... but also to the fact that the Tribunal is to require that *particular* decision, for which the decision-maker will have given reasons". The Nauruan Act includes substantially provisions to the Australian Act. Thus: the Secretary is required to give reasons for his or her decision (section 9); the Tribunal is required to "review" the Secretary's decision (section 31); the Tribunal exercises all of the powers and discretions of the Secretary (section 34); and the Tribuinal must invite the applicant to appear to give evidence and present arguments "relating to the issues arising in relation to the determination or decision nunder review".

36. Secondly, and in any event, the information and submissions in the Document encompassed, in the generality, information and submissions as to the conditions in Negombo Prison.[31] For example, the appellant relied on recent information from the UN Special Rapporteur on Torture – about "the conditions of life in *all prisons*", and that "*[a]ll* are characterized by" certain conditions. Similarly, for example, the appellant relied on information from the United Kingdom Home Office to the effect that conditions in Sri Lankan prisons generally are "very poor" and involve (inter alia) "lack of food". It was unnecessary, particularly in light of issues arising on the review from the Secretary's decision, to specifically add (as though for the avoidance of doubt) "all prisons *including Negombo Prison*".

37. Thirdly, the Court was wrong to conclude that "[t]here was no requirement to deal with each item of [the information identified or referred to in the Document] that touched on prison conditions in Sri Lanka in the absence of material *directly relevant* to short term prisoners held at Negombo" ([42], emphasis). Those qualifying words gloss the applicable case law. The Tribunal was required to consider information that was material (credible, relevant and significant) to the question of what conditions the appellant might experience in Negombo. Information did not need to be "directly" (i.e., specifically or explicitly) about Negombo (and only Negombo) to meet that description. Information about all Sri Lankan prisons (including Negombo) met that description. Such information needed to be considered. Whether it was accepted by the Tribunal is, of course, a different matter.

38. Fourthly, the (limited and less recent) information which the *Tribunal* relied on was also, apparently, "very general". The Tribunal's finding in paragraph [67] that the appellant might be detained "in cramped and unsanitary conditions" reflected the (limited and less recent) information which the appellant's lawyer had previously provided to the Secretary, by reference to the 2012 US Department of State report on Human Rights Practices. At that stage, the appellant's lawyer had asserted that the US Department of State "has noted that *Sri Lanka's prison conditions* [are] poor and [do] not meet international standards due to gross overcrowding and the lack of sanitary facilities" (emphasis added). Certainly, it does not appear that the information on which the *Tribunal* relied was specific to Negombo: the written statement does not reveal any source of such specific evidence.[32] And if the (limited and less recent) information which the Tribunal relied on was also "general" (i.e., not specific to Negombo), then it is perverse for the Supreme Court to conclude that the Tribunal

---

31 Cf. *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184 at [47].

32 Cf. section 34(4)(d) of the Act.

was not required to consider more detailed and more recent information simply on the basis that it was "general" (i.e., applied to all prisons).

39. The ***second*** strand to the Supreme Court's reasoning was to the effect that the Tribunal's conclusion that the appellant may be detained in "cramped and unsanitary conditions", in their generality, encompassed the conditions that the appellant had complained of. Thus, the Court held that the Tribunal's "reference to 'cramped and unsanitary condition', although brief, captures the flavour of that material" ([40], see also [37]). That analysis is also flawed.

40. The conditions identified or referred to in the Document are <u>not</u> all adequately described by the expression "cramped and uncomfortable". Take, for example, the information about the "lack of food" or "lack of adequately nutritious food or water" in Sri Lankan prisons. Lack of adequate food or water is obviously a qualitatively different condition or circumstance to "cramped and uncomfortable". Nor is it necessarily the product of "deficient infrastructure".

41. Notably, in the *Portorreal* case, it was the *combination* of the detention of the complainant for a period of 50 hours in what perhaps be described (albeit reductively) as "cramped and uncomfortable" conditions – i.e., in an overcrowded, hot and dirty cell – *together* with the fact that the complainant was not fed for the first day that led to the Committee's conclusion that he had been subjected to inhuman and degrading treatment in violation of Article 7 of the ICCPR.

42. In ***conclusion***, the Tribunal's task was to consider the appellant's factual claims as to the conditions that he would experience in detention in Sri Lanka. The Tribunal might, conceivably, have concluded that the conditions in Negombo Prison were not as claimed (although it is not apparent that it had information before it that was peculiar to Negombo, and which contradicted or qualified the information before it as to the conditions in *all* Sri Lankan prisons). Then, having made findings in light of all of the relevant evidence about what conditions the appellant would experience, its task was to evaluate whether those conditions, considered cumulatively, would amount to inhuman and degrading treatment.

43. The Tribunal did not do that. The better view is that it simply did not consider the relevant, credible and significant information and submissions identified and referred to in the Document as to the conditions in Sri Lankan prisons. The Tribunal therefore disabled itself from conducting the evaluative exercise that it was required to conduct. It considered *only* whether or not detention in "cramped and uncomfortable" conditions for a few days would

involve inhuman or degrading treatment. It did not consider whether *all* of the cumulative conditions identified or referred to in the Document obtained in relation to Negombo Prison, and to the extent that they did, whether exposure to those conditions even only for a few days would involve inhuman or degrading treatment. The Tribunal thereby erred.

44. The two alternative ways of explaining the Tribunal's error are as follows.

44.1. By failing to make findings with respect to the actual conditions in Negombo prison (beyond a mere reference to the conditions being "cramped and unsanitary"), the Tribunal implicitly regarded the information as to conditions falling outside the description "cramped and unsanitary" as not being material.[33] Yet the nature of the "combined conditions" (including the various specific conditions referred to by the appellant and yet not discussed by the Tribunal) is critical to conducting a lawful assessment of whether the conditions would amount to "cruel, inhuman or degrading treatment or punishment", as *SZTAL* and *Portorreal* illustrate.

44.2. Alternatively, the Tribunal failed to explain why exposure to the other conditions in prison in Sri Lanka falling outside the description "cramped and unsanitary" would not "in itself" amount to "cruel, inhuman or degrading treatment or punishment". The Tribunal's reasons do not "reveal the path of reasoning" for its decision" in a manner "adequate to enable a court to see whether the opinion does or does not involve any error of law".[34] The appellant can only speculate as to why the Tribunal considered that, "in itself", the (limited) conditions in Sri Lankan prisons that it identified did not constitute cruel, inhuman or degrading treatment in contravention of Article 7 of the ICCPR, especially in light of the evidence he advanced.

VII. ORDERS SOUGHT

45. The Court should make the following orders:

45.1. The appeal be allowed.

45.2. The order made by the Supreme Court of Nauru on 20 February 2018 be set aside, and in its place the following orders be made:

(a) The decision made by the Refugee Status Review Tribunal on 26 November 2016 be quashed under section 44(2) of the Act.

---

33 Cf. *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [37] (Gaudron J).
34 Cf. *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at [55].

(b) The matter be remitted to the Refugee Status Review Tribunal for reconsideration under section 44(1)(b) of the Act.

(c) The respondent pay the appellant's costs of the appeal to the Supreme Court.

45.3. The respondent pay the appellant's costs of the appeal to the High Court.

VIII. ESTIMATE OF TIME FOR ORAL ARGUMENT

46. The appellant estimates that he will require 45 minutes for presentation of oral argument.

Dated: 10 April 2018

10

NICK WOOD

Owen Dixon Chambers West
T: (03) 9225 6392
F: (03) 9225 8395
nick.wood@vicbar.com.au