IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M132 of 2017

BETWEEN **WET044**
Appellant

AND **Republic of Nauru**
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

I INTERNET PUBLICATION

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

II REPLY

Ground 1

2. By its submissions dated 24 November 2017, the Respondent seeks to supplement the reasons of the Tribunal:

   a. with comments made by one of the panel of three members at the Tribunal hearing,[1]

   b. with material 'referred to' by a different decision maker at a different time, being the Secretary;[2] or

   c. by elevating passing references to a document to an evaluation of the content of that document.[3]

   None has nor can have a determinative role in the context of the ground raised.

3. Ground 1 is based on s 34(4) of the Convention Act.[4] That section requires that the Tribunal's 'written statement' itself set out the decision, the reasons for the decision and the findings on any material questions of fact as well as the evidence or other material on which the findings were based.[5]

4. One cannot, as the Respondent seeks to have this Court do, look to a transcript or another decision-maker's recitation to plug the gaps required of the Tribunal by law but left unevaluated by it in its 'written statement'. If anything, the reference to the relevant covering submissions in the Tribunal hearing transcript and the country information in the Secretary's decision, but not in the 'written statement' of the Tribunal suggest that those materials were not 'material' to any of the Tribunal's findings for the purposes of s 34 of the Convention Act, as recorded in its 'written statement'. As the Full Court of the Federal Court recently stated of the

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[1] Submissions of the Respondent dated 24 November 2017 paragraphs (**RS**) [29]-[33].
[2] RS [34]-[38].
[3] RS [29].
[4] Submissions of the Appellant dated 1 November 2017 paragraph (**AS**) [2(b)], [29(b)] and [34].
[5] RS [25].

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equivalent provision in Australian law (s 430(1)(a)-(d) of the *Migration Act*):[6]

> 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* (2001) 206 CLR 323 (*Yusuf*) at [10], [34], [68]. Representing as it does what the Tribunal itself considered important and material, what is present — and what is absent — from the reasons may in a given case enable a Court on review to find jurisdictional error: see *Yusuf* 206 CLR 323 at [10], [44], [69].

5. The Respondent seeks to excuse the Tribunal's failure at RS [29] by pointing out that the covering submissions to the relevant country information were 'referred to' by the Tribunal. It identifies only two such references,[7] at [69] and [100] of the Tribunal reasons, but neither reveal that the Tribunal *evaluated* the submissions before it on this issue.

   a. The reference at [69] comes in the context of a summary of the matters which arose at the hearing before the Tribunal. In that context, the Tribunal's written statement notes that:

      > The representative referred the Tribunal to the written submissions provided as well as the applicant's own written statements from May and November 2015.

      The fact that the representative referred – remotely from the Tribunal's consideration of the Appellant's claims of fear of harm as a failed asylum seeker – to the submissions says nothing about the Tribunal evaluating them, let alone considering the particular country information now in issue.

   b. The reference at [100] is under the heading 'complementary protection assessment' and comes after the conclusions dealing with the claims which are the basis for this ground. At that point, the Tribunal stated:

      > Written submissions were advanced on the applicant's behalf that if he is returned to Iran there is a real possibility he will face treatment in breach of Nauru's international human rights treaty obligations, such as arbitrary deprivation of life, torture, or cruel[,] inhuman or degrading treatment.

      While this generic statement may acknowledge the existence of written submissions, it could not be said to amount to the evaluation of submissions which is required by law.[8] The Tribunal did no more than to 'note',[9] in its written statement, that the submissions existed. It failed to engage in the 'evaluative task' required of it.[10] An absence of evaluation is what leads to

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[6] *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 (***MZYTS***) at [49] per Kenny, Griffiths and Mortimer JJ.

[7] RS footnote 13.

[8] *MZYTS* at [38] per Kenny, Griffiths and Mortimer JJ; *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157 at [47] per Dowsett, Flick and Griffiths JJ.

[9] To adopt the language of the Full Court of the Federal Court in a similar context at *Minister for Immigration and Border Protection v CZBP* [2014] FCAFC 105 at [49], [88] per Gordon, Robertson and Griffiths JJ.

[10] Ibid. at [48]-[50], [63], [65].

jurisdictional error.[11]

6. The Respondent at RS [30]-[31] identifies two passages of the transcript of the hearing before the Tribunal at which the existence of the critical submissions are mentioned. The Respondent relies on the same passage twice[12] and all three citations are comments made by the same Member, Paul Fischer.

7. It is generally the case that statements in a hearing have less importance in determination of jurisdictional error than the reasons themselves and that 'even greater caution [than that which attends the review of administrative decisions generally] should be expressed in seeking to give too great a prominence to statements made during the course of an interview.'[13] Courts have also repeatedly expressed 'considerable reservation' about the use of transcripts as a means of construing a written statement of an administrative decision maker.[14] This is even more the case where it is only one Member on a panel of three[15] which makes a comment which might indicate that that Member has read some submissions. The comment of that one member cannot be imputed to all three members when, as a Tribunal, they have committed their concluded view to writing in a way which indicates that the relevant submissions were overlooked.

8. At RS [37]-[38], the Respondent seeks to demonstrate that the Secretary's decision took into account some, but not all, of the information which the Appellant submitted to the Tribunal. Several points can be made in response.

   a. Examination of the references in RS footnote 26 demonstrates that the Respondent relies simply on the inclusion of various reports in the Secretary's statement of the material before him.[16] This recitation does not establish that the relevant parts of that material were taken into account.

   b. At [95] of the Tribunal's own reasons, the three Members state that the 'Tribunal agrees with and adopts the *reasoning and findings* of the Secretary *on this point*' and relied only on 'the *country information set out* in the Secretary's decision'.[17] The country information extracts and the analysis of the Secretary 'on this point' appear only on pages 11-13 of his reasons.[18] That passage does not include nor cross-refer to the 'additional information' amongst the 'material before the' Secretary which is mentioned earlier.[19] The Respondent seeks to have this Court impute to the Tribunal an evaluation of information which the Secretary merely listed.[20] That adventurous submission ought to be rejected because it seeks to add to one set of reasons an evaluation missing from another set of reasons on which the first set of reasons relied.

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[11] Ibid [65].
[12] RS footnotes 13 and 14.
[13] *SZRCI v Minister for Immigration and Citizenship* (2012) 214 FCR 584 at [51] per Flick J.
[14] See, most recently, *Minister for Immigration and Border Protection v MZAIV* [2016] FCA 251 at [33]-[34] per Mortimer J, by which her Honour agreed with *Kelly v Australian Postal Corporation* (2015) 67 AAR 359 [51]-[53] per Griffith J who adopted the 'considerable reservation' of Flick J in *WZAQU v Minister for Immigration and Citizenship* [2013] FCA 327 at [30].
[15] CB 199; see also s 19, 21(2) of the Convention Act.
[16] At CB 58-59.
[17] Emphasis added. See CB 216, relevantly quoted at RS [27].
[18] CB 63-65.
[19] CB 58.
[20] RS footnote 26 referring to CB 58-59.

c. Even if only one 'credible, relevant and significant'[21] piece of information was added between the Secretary's decision and the Tribunal's decision, and that information was not 'dealt with' by the Tribunal, that would be enough to find jurisdictional error. 'Whenever rejection of evidence is one of the reasons for the decision, the Tribunal must set that out as one of its reasons.'[22] That is so because, as this Court recently acknowledged, in the context where the ultimate question is one of 'degree and proportion',[23] any relevant information has a role to play in reaching the ultimate conclusion.

9. In any event, the Respondent accepts that there are two pieces of information which were not before the Secretary and not in any way considered, let alone, evaluated by the Tribunal.

a. The first (AS [31(c)][24] and RS [38]) relates to serious mistreatment of persons detained in Iran, particularly during 'pre-trial detention'. That country information needs to be read alongside the statement of an Iranian judge that those who return as failed asylum seekers 'will therefore be held for a few days' and 'interrogated' and that a returned asylum seeker can be arrested even without a political profile.[25] The relevant country information should not be read in isolation, as the Respondent seeks to have the Court do.

b. The second (AS [31(f)] and RS [38]) directly contradicted the country information on which the Secretary (and, in turn, the Tribunal) relied. It noted the Iranian government's 'inconsistent and ambiguous position with regard to the return of émigrés to Iran, including the possibility that perceived political dissenters will continue to face persecution upon their return.' It was relevant because the Appellant's claim of protection was based on being a failed asylum seeker and consequently a person who would be perceived to have an adverse political opinion against the government.[26] It highlighted that the country information relied upon by the Secretary and the Tribunal was not reliable and should therefore not be taken as the only, nor the final, word on the topic.

For these reasons, the Court can be satisfied that the information at AS [31] was relevant to the Tribunal because it contradicted the analysis and conclusions of the Secretary, on which the Tribunal relied. Accordingly, it ought to have been dealt with by the Tribunal.

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[21] *BRF038 v The Republic of Nauru* [2017] HCA 44 at [60] per Keane, Nettle and Edelman JJ.
[22] *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at [65] per McHugh J; *Minister for Immigration and Border Protection v CZBP* [2014] FCAFC 105 at [102] per Gordon, Robertson and Griffiths JJ.
[23] *BRF038 v The Republic of Nauru* [2017] HCA 44 at [43], [63] per Keane, Nettle and Edelman JJ.
[24] The correct citation for this information is contained footnote 161 of the Appellant's submissions to the Tribunal at CB 107, namely the Amnesty International Report 2014/2015 – Iran dated 25 February 2015.
[25] AS 31(d) and AS 31(e).
[26] AS footnote 18.

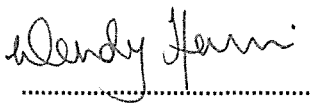
Ground 2

10. At RS [40] and [47], the Respondent submits, in effect, that the Appellant knew or ought to have known the information on which the Tribunal relied because 'it was contained in a report cited in the appellant's written submissions'. This submission should be rejected at a factual and a legal level.

11. At a factual level, it cannot be said that the entirety of a report from which a five-line quote is taken in submissions prepared by the Appellant's representatives[27] gives rise to an imputation that the Appellant himself was on notice of the content of the whole report, *or* the way its contents would be relied upon to reject his claim. This is especially so when the Appellant could not read either the submissions or the report himself, because he does not have adequate English.[28]

12. At a legal level, the Respondent's submissions appear to proceed from the assumption that imputed knowledge of the information that the Tribunal will rely upon is enough. This is inconsistent with the 'warning rule' within the 'fair hearing doctrine'. The rule requires that the decision maker warn the affected 'person of the risk of [the relevant] finding being made'.[29] No such warning about the adverse significance the Tribunal would place on his faith was given to the Appellant in this case. Nor was this issue previously raised by the Secretary. Even if the Appellant had actual knowledge that a page of a report existed, it would not be enough to put the Appellant on notice as to *the finding* that was going to be made adverse to him by the Tribunal on the basis of that page. The obligation to afford procedural fairness extends to notice of the 'nature and content' of the information taken into account as a reason for the adverse finding.[30] Such notice was denied to the Appellant in this case.[31]

Dated: 7 December 2017



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[27] CB 107.

[28] See, for example, CB 7, 28, 40, 47, 113 and transcript before the Supreme Court of Nauru p 5 – 7.

[29] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [101] per McHugh J.

[30] *BRF038 v The Republic of Nauru* [2017] HCA 44 at [58] per Keane, Nettle and Edelman JJ.

[31] The Appellant notes that the Respondent has not sought to put the report to which it refers at RS [47] into evidence in this Court; see RS [23]. The Appellant would not object to the information at the link identified in the Appellant's submissions to the Tribunal at footnote 159 (as identified at RS footnote 37) being put before this Court for the purposes of dealing with the second ground.