IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M167 of 2017

BETWEEN:

ETA067
Appellant

and

THE REPUBLIC OF NAURU
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

PART I: PUBLICATION

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

PART II: SUBMISSIONS

Introduction

2. These submissions are in reply to those of the Respondent dated 19 February 2018 ("RS").

Ground 1

3. In addressing the Respondent's submissions on Ground 1, it is important to start by noting the submissions that the Respondent does not make.

   3.1 The Respondent does not deny that the Tribunal had a duty to consider cogent and material evidence that was before it: see Appellant's Submissions at [48] ("AS").

   3.2 The Respondent does not deny that the Appellant advanced a clearly articulated argument to the Tribunal to the effect that a person, R, had been "physically beaten" and "assaulted": see AS [49]; BD 35 [11], 46.8.

Date of document:
Filed on behalf of: The appellant

Allens
Lawyers
Deutsche Bank Place
Corner Hunter and Phillip Streets
Sydney NSW 2000

Telephone: (02) 9230 4000
Fax: (02) 9230 5333
Email: Malcolm Stephens@allens.com.au
Ref: YMSS:120724568
Contact Name: Malcolm Stephens

3.3 The Respondent does not deny that the Appellant advanced a clearly articulated argument to the Tribunal to the effect that "several people" named by the Respondent had been assaulted: see AS [49], BD 48.6.

3.4 The Respondent also does not contend that the Tribunal gave discrete consideration to the arguments referred to in paragraphs 3.2 and 3.3.

4. The Respondent's contention appears to be that the Tribunal did not need to give discrete consideration to the arguments at paragraphs 3.2 and 3.3 because those arguments were, by implication, rejected by findings of greater generality in paragraph [31] of the Tribunal's reasons (BD 146).

5. That contention cannot stand with the facts.

6. In paragraph [31] of its reasons, the Tribunal said only that "groups may engage in antagonistic behaviour towards their political opposites" and that there had been "harassment and pushing and shoving" between BNP supporters and Awami League supporters.

7. In paragraph [31], the Tribunal:

7.1 did not refer in terms to the Appellant's argument that R had been violently assaulted and physically beaten;

7.2 did not refer in terms to the Appellant's argument that other named persons had been assaulted;

7.3 did not refer in terms to assault or beating;

7.4 did not make any finding that the other named persons were political opposites of the Awami League.

8. The references to "antagonistic behaviour" and "harassment and pushing and shoving" in paragraph [31] cannot on any fair reading be read as encompassing violent assault and beating.

9. Further, the Tribunal's reference to "antagonistic behaviour" only concerned persons who were the Awami League's "political opposites". There is nothing

capable of indicating that the other persons named by the Appellant met that description.

10. The Respondent's second response to the first ground is to the effect that the Tribunal's erroneous failure to consider the Appellant's claims was immaterial and so does not justify remittal: see RS [21]-[24].

11. This Court would only accept this response if this Court were satisfied a procedurally fair hearing before the Tribunal "could not possibly have produced a different result": *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147.

12. This Court would not lightly reach that satisfaction. The merits were for the Tribunal. It follows that that what weight the Tribunal would have given to the arguments had it in fact considered them is not a matter for this Court.

13. The Respondent does not contend that it was not open to the Tribunal to form a view favourable to the Appellant on the basis of the arguments the Tribunal did not consider. Rather, the Respondent seeks to have this Court form its own view as to whether the arguments were strong ones.

14. The arguments that the Tribunal did not consider could have led to a different result. They were examples of past persecution by the Awami League. They were evidence of what the Awami League intended and what might happen to the Appellant on his return.

Ground 2

15. The Appellant's submissions in chief involved an express contention that the Tribunal had a duty to advise the Appellant of the risk of an adverse conclusion that was not reasonably open on the known material: see AS [72] and cf RS [27].

16. The Respondent's response to ground 2 is that it must have been obvious to the Appellant that his membership of the BNP was in issue because of a statement in the Tribunal's reasons at [24]: see RS [34]. The respondent calls this the "fatally contradictory country information". That paragraph reads:

> The Tribunal notes from the BNP official website that membership of the BNP normally requires the new member, who must be over the age of 18, to fill in a prescribed membership form available at the party office and to pay a membership fee of five *taka* on joining and annually thereafter.

17. The contents and effect of the website referred to in paragraph [34] were not put to the Appellant at any point. This gives rise to a further ground of error which the Appellant will seek leave to rely on in this Court. Procedural fairness required the Tribunal to put the Appellant on notice of "the nature and content of information that the repository of power undertaking the inquiry might take into account as a reason for coming to a conclusion adverse to the person": *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [83]; see also *BRF038 v Republic of Nauru* (2017) 91 ALJR 1197 at [58]-[64]. The information from the website was, on any view, information that the Tribunal might take into account in coming to an adverse conclusion – the Tribunal *in fact* took it into account in coming to an adverse conclusion and the Respondent now asserts that the information was "fatally contradictory".

18. The Respondent's contention appears to be that, because of something which first appeared in the written reasons for the Tribunal's decision, it must have been obvious to the Appellant *before* that decision that his membership of the BNP was in issue. That contention is plainly wrong.

19. Nothing in the transcript at BD 105-106 can be characterised as putting the Appellant on notice that his membership was in issue. Further, it can be noted that nowhere in that part of the transcript did the Tribunal identify that any of the matters referred to on the "BNP official website" were in issue or cast doubt on the Appellant's credit.

Dated: 6 March 2018

.....
G. O'L. Reynolds
Ph: (02) 9232 5016
Fax: (02) 9233 3902
Email:
guyreynolds@sixthfloor.com.au

.....
Julian Gormly
Ph: (02) 9221 6744
Fax: (02) 9223 1262
Email:
juliangormly@windeyerchambers.com.au

.....

David Hume
Ph: (02) 8915 2694
Fax: (02) 9233 3990
Email: dhume@sixthfloor.com.au

Counsel for the Appellant