

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN:



YAU026
Appellant

And

REPUBLIC OF NAURU
Respondent

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APPELLANT'S SUBMISSIONS IN REPLY

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Part I:

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

Part II:

Ground 1

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2 The Appellant accepts that the Respondent drew the Second Amending Act to the Primary Judge's attention: RWS [25]. That compounds, rather than cures, the Primary Judge's error. The Respondent does not submit with any real force that the Amending Act was effective at retrospectively repealing s 37 of the Act, relying instead on the terms of the Second Amending Act to justify the Primary Judge's conclusion. The Primary Judge made no reference to the Second Amending Act and therefore erred for the reasons advanced at AS [25]. The Respondent makes no submissions on the scope of the Second Amending Act to retrospectively cure the exercise of judicial power by the Court below. If the Appellant's submissions on that issue are accepted, the appeal is not futile: contrary to RWS [24].

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3 There are five remaining issues that divide the parties on ground 1. First, the nature of the 'information' relied on by the Tribunal. Second, the use the Tribunal made of the information. Third, whether common law obligations of procedural fairness mandated the disclosure of the information. Fourth, whether inadequacies in the standard of interpretation can inform those

procedural fairness obligations. Fifth, whether the information constituted a rejection, denial or undermining of the Appellant's claims so as to enliven the statutory obligations in s 37 of the Act.

4 First, the 'information' was specific and directly adverse to the Appellant's Convention claims. The nature of the information is best discerned from the text of the decision record, which records that *'the information before the Tribunal indicates that formal membership of the BNP or Chatra Dal and the holding of positions on executive bodies within them are separate matters.'* On its face, the information was highly specific material about the internal structure of the relevant political organisations. It was either information about the general structure of the BNP and Chatra Dal, or specific information about the structure of the Appellant's Ward. If the information was general, then the Appellant ought to have been given the opportunity to comment about the circumstances in his Ward. If the information was specific to his Ward then it directly contradicted the Appellant's claim, which was *'that he was a supporter of the Chatra Dal and held the position of General Secretary of the Chatra Dal in his local area'*: Reasons at [19]. Either way, the information was fundamental to refuting the Appellant's Convention claim of persecution on the basis of his political opinions.

20 5 Second, at RWS [31] the Respondent disputes the contention that the Tribunal 'used' the information referred to at [24] of its Reasons to support the finding at [22] and [23]. However the Tribunal's finding at [23] that the Appellant's responses were "*confused and conflicting*" cannot be separated from its access to the 'information'. The Reasons at [22] clearly indicate that the supposed conflation of membership and a position on the executive was interconnected with the question of whether the Appellant had joined the BNP or the Chatra Dal.

30 6 Third, the failure to disclose the information resulted in a denial of procedural fairness. Contrary to RWS [30], there is a fundamental difference between the opportunity to comment on a general observation about the hypothetical actions of third parties (being *'many people join a political party...'*) and the opportunity to respond to specific information about the internal structure of the Chatra Dal and the BNP. For the reasons developed below at paragraph 11, this Court's reasons in *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 confirm that procedural fairness mandated the disclosure of the information.

7 Fourth, at RWS [32] the Respondent takes issue with the Appellant raising concerns about the standard of interpretation. However, the Appellant does not raise these concerns as a separate ground. The Respondent accepts

that the obligations of procedural fairness look to matters of fairness (RWS [27]) and depend on the circumstances of the case (RWS [26]). The Court cannot ignore the fact that the Appellant's evidence on a critical issue was rejected as '*confused and conflicting*' and contradicted by undisclosed information in circumstances where the transcript clearly indicates that the standard of interpretation was a contributing factor. This is particularly so where the Respondent relies on the hypothetical postulation by the Tribunal as having a curative effect on the procedural fairness failing.

10 8 Fifth, contrary to RWS [33], the information constituted a rejection, denial or undermining of the Appellant's claims. The information undermined the Appellant's claims of having a well-founded fear of being persecuted by virtue of his membership to the BNP or Chatra Dal. This membership was an essential element of the Convention basis advanced by the Appellant.

Ground 2

9 The Respondent contests that the information needed to be supported by evidence, proposing that the Tribunal relied on its own body of knowledge to support its finding (RWS [38]). These contentions should be rejected as inconsistent with the plain text of the decision record (*'the information before the Tribunal'*) which do not suggest that the Tribunal was drawing from any general experience. In any event, this Court's reasons in *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 do not support the Respondent's contention.

10 There were two categories of "information" in *Muin*. The first was general background information described as the "Part B documents". It was this information that Gleeson CJ and Hayne J were referring to in the dicta extracted at RWS [38]. *Muin* does not stand for the proposition that a Tribunal can make findings of fact without evidence, but instead that procedural fairness does not require this neutral background information to be disclosed.

30 11 The second category of information was adverse to Mr Muin's claim. The Court held that procedural fairness mandated the disclosure of this information. A majority of the Court provided separate, but generally consistent, reasons for reaching this conclusion. Gleeson CJ held that the failure to bring the substance of adverse documentary material to the Appellant's attention is a denial of procedural fairness: [30]. Gaudron J held that there is requirement that an applicant for review be given a '*reasonable opportunity to answer any material in the possession of the Tribunal which suggests that he or she is not a refugee as defined in the Convention*': at

[64]. McHugh J held that the Tribunal is required to disclose particular adverse matters at [137]. Kirby J observed at [228] that: '*[t]he right to respond to significantly adverse evidence is one of the most important aspects of natural justice. It is deeply embedded in our legal system. It is grounded in basic notions of fair procedure. As has been famously said, even God gave Adam the opportunity to be heard before expelling him from Paradise*'.

Ground 3

10 12 At RWS [41], the Respondent contends that the claim raised by ground 3 was not advanced by the Appellant before the Tribunal. Even if that submission was accepted, it would not be an answer to the Appellant's challenge: *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [68]. Although a Court will not 'lightly' finding that a Tribunal failed to consider a claim that was not advanced, it will so find if the claim '*emerge[s] clearly from the materials before the Tribunal*'. As the Tribunal made findings of fact about the very issue that the Appellant says gave rise to his claim, it was incumbent on the Tribunal to assess the claim that flowed from those findings of fact.

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