IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S267 of 2017

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN:

WET 052
Appellant

and

THE REPUBLIC OF NAURU
Respondent

APPELLANT'S SUBMISSIONS

Part I: Internet Publication

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

Part II: Issues

2. The amended Notice of Appeal raises the following issues:

   a. Whether the Tribunal's adverse and determinative credibility finding, that certain claims for protection concerning drug trafficking were untrue because they had not been mentioned at the transfer interview, was without logical and probative foundation or was legally unreasonable.

   b. Whether the Tribunal erred by failing to consider an integer of the Appellant's claims to protection and/or to consider his claims cumulatively, namely,

      i. that he had a political profile which would lead him to be at particular risk as a failed asylum seeker from the West; and

      ii. that he was at risk as a failed asylum seeker per se.

Part III: Section 78B of the *Judiciary Act* 1903 (Cth)

3. The Appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act* 1903 (Cth) and concluded that no notice is required.

Part IV: Citations

4. The citation for the decision of the Supreme Court of Nauru is *WET052 v Republic* [2017] NRSC 96. The decision of the Refugee Status Review Tribunal was made on 1 February

Date of document: 5 February 2018

Filed on behalf of the Appellant by:
BANKI HADDOCK FIORA
Level 10
179 Elizabeth Street
Sydney NSW 2000

Contact: Julie Robb
Tel: (02) 9266 3400
Fax: (02) 9266 3455

2016 (**Tribunal decision**).

Part V: Factual background

5. The Appellant was born on 9 October 1990 in Tehran, Iran, and is an Iranian citizen.[1] He was a Shia Muslim.[2] The Appellant's mother and six siblings were born in Tabriz and Tehran.[3] The Appellant's father was also born in Tabriz, Iran in 1954.[4] He fought in the Iran-Iraq war, during which he sustained leg injuries and experienced shellshock. He subsequently developed drug and alcohol addictions.[5]

6. The Appellant's father has connections with Iranian officials, including Iranian police officials and officials from the Basij, Sepah and Etalaat (the Ministry of Intelligence and Security), some of whom drank or consumed drugs with him.[6]

7. The Appellant's father began to physically abuse him around 2002, when he was 12 to 13 years old.[7] The Appellant claimed that his father forced him to consume and supply drugs. The Appellant was also forced to deliver drugs for his father, up to multiple times in a day.[8] He also used the Appellant's money from work to purchase drugs.[9]

8. On three occasions, the Appellant escaped from his father in Tehran to other Iranian cities. He fled to Zanjan for two months in 2009; Tabriz for three months in 2010; and Mashad for one month in 2011.[10] On each occasion the Appellant stayed with relatives, but his father found him and brought him back to Tehran.[11]

9. In 2009, the Appellant participated in political demonstrations about the Iranian election.[12]

10. In May 2013, the Appellant's father attacked him with a kitchen knife, threatened to kill him and threw an ashtray at his head when he tried to flee again.[13] Shortly after the attack and after obtaining medical treatment for the resulting injuries, the Appellant fled Iran for Australia on 28 June 2013.[14] He arrived on Christmas Island in September 2013, and was

---

[1] Appellant's passport, Court Book before the Supreme Court of Nauru at page ("**CB**") 45.
[2] Transfer Interview, CB 7.
[3] Transfer Interview, CB 8-10.
[4] Transfer Interview, CB 8.
[5] Nauru Refugee Status Review Tribunal ("**Tribunal**") transcript, CB 155[40]-[45]; 156[1]-[4].
[6] Appellant's statement, CB 40.
[7] Appellant's statement, CB 40-41.
[8] Appellant's supplementary statement, CB 114-115.
[9] Appellant's statement, CB 40-41[7]-[8], [11], [16]-[17], [19]-[20].
[10] Appellant's statement, CB 40[9].
[11] Appellant's statement, CB 40[9].
[12] Transfer Interview, CB 13.
[13] Appellant's statement, CB 40-41[13]; 54[5]; 216[10].
[14] Transfer Interview, CB 4.

transferred to Nauru in February 2014.[15] On 26 May 2014, the Appellant applied for recognition as a refugee, or a person owed complementary protection under the *Refugees Convention Act 2012* (Nr) (**Convention Act**).[16]

11. The Appellant fears that if he returned to Iran, he would be persecuted due to:

    a. His father's drug trafficking and his own involvement in drug trafficking, including because of his father's relationships with Iranian officials;[17]

    b. His imputed political opinion because of his association with his father, who is engaged in contraventions of Sharia law or because of his own contraventions of Sharia law from when his father forced him to consume, supply and purchase drugs;[18]

    c. His imputed religion from seeking asylum in a 'non-Muslim' country;[19] and

    d. His membership in a group of failed asylum seekers from 'the West',[20] in light of his personal history including attending political protests.

12. The Appellant also fears that he might be detained and tortured by the Iranian authorities,[21] executed by the Iranian authorities,[22] or killed by his father.[23]

13. In May 2015, the Appellant spoke with one of his brothers in Iran, who informed him that their father had arranged to have their cousin gaoled, following a family dispute.[24] Their cousin was gaoled for dealing drugs and is on death row.[25] The Appellant feared his father might arrange for officials to gaol him also should he return to Iran.[26]

14. On 28 September 2015, the Secretary of the Nauruan Department of Justice and Border Control (**Secretary**) determined that the Appellant was neither a refugee, nor owed complementary protection under the Convention Act.[27] On 2 October 2015, the Appellant applied to the Refugee Status Review Tribunal (**Tribunal**) for review of the Secretary's determination.[28]

15. Around May 2015, the Appellant met a representative of the Christian church on Nauru

---

[15] Attachment to Application for Refugee Status Determination ("**RSD**"), CB 35.
[16] Application for RSD, CB 19-42.
[17] Appellant's statement, CB 40-42.
[18] Appellant's statement, CB 41[20].
[19] Pre-hearing submissions by the appellant's agent ("**Pre-hearing Submissions**"), CB 91[76].
[20] Appellant's statement, CB 41[20].
[21] Appellant's statement, CB 42[23].
[22] Appellant's statement, CB 41[14], [17].
[23] Appellant's statement, CB 40-41[13]-[14], [18].
[24] Appellant's supplementary statement, CB 115[15].
[25] Appellant's supplementary statement, CB 115[19].
[26] Appellant's supplementary statement, CB 116[20].
[27] 3(1); Negative refugee determination decision record and complementary protection assessment decision record of the Secretary ("**Secretary's Decision**"), CB 51-63.
[28] 2(1); Tribunal review application form, CB 67.

through an Iranian Christian friend.[29] The Appellant later converted from Islam to Christianity[30] and was baptised in Nauru on or around 11 October 2015.[31] He received social media messages in Farsi on Facebook, from Iranian friends in Australia, Papua New Guinea and Nauru, congratulating him on his baptism and conversion to Christianity.[32] The Appellant also fears the Iranian authorities would discover his conversion to Christianity through his social media activity if he was returned to Iran.[33] On 19 December 2015, the Appellant filed post-hearing submissions to the Tribunal,[34] including a copy of images of his baptism.[35]

16. On 1 February 2016, the Tribunal affirmed the decision of the Secretary.[36]

10 17. On 6 May 2016, the Appellant filed a Notice of Appeal in the Supreme Court of Nauru. The Appellant later amended the Notice of Appeal and filed submissions in the Supreme Court of Nauru.

18. On 30 October 2017, Khan J dismissed the appeal and affirmed the Tribunal's decision.

Part VI: Argument

19. This is an appeal from that decision of the Supreme Court of Nauru. The appeal lies as of right to this Court.[37]

The Court's approach to the Tribunal's statement of reasons generally

20. A Tribunal's decision should be 'in no way flawed' and be the subject of 'the most anxious scrutiny' because of 'the gravity of the issue which the decision determines'.[38] The
20 statement of reasons of this Tribunal – what appears in them and what does not – should also be read in light of the expertise of those involved in their drafting. The latitude suggested by the beneficial construction approach set out in *Wu Shan Liang*[39] is ill suited to the Nauruan process. In that case, the decision-maker whose reasons were being scrutinized,

---

[29] Appellant's supplementary statement, CB 117[31]-[32].
[30] Appellant's supplementary statement, CB 117-119[31]-[40].
[31] Tribunal transcript, CB 134.25-28, 134.36-47.
[32] Screenshots of Facebook posts, CB 170-174; 185-186. The Facebook posts are translated at CB140[1], 140[5]-[7], 140[39]-[41] and 141[3]-[4].
[33] Tribunal transcript, CB 146[9]-[27].
[34] Post-hearing submissions by appellant's agent ("**Post-hearing Submissions**"), CB 181-211.
[35] Screenshots from video of appellant's baptism, CB 175-179.
[36] Tribunal decision, CB 213-230.
[37] *BRF038 v The Republic of Nauru* [2017] HCA 44 [40]-[41] (*BRF038*).
[38] *W375/01A v Minister for Immigration & Multicultural Affairs* (2002) 67 ALD 757 at [16] per Lee, Carr and Finkelstein JJ; *R v Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] AC 514 at 531 per Lord Bridge.
[39] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at [30]-[31]

was a delegate of the Minister.[40] In this case, the decision-makers are a panel of three,[41] highly qualified, highly experienced specialist refugee law decision makers[42] who were aided by experienced lawyers also with specialist legal expertise.[43] The presiding Member was, at the time of the hearing, also required by law to be a person qualified to be appointed a judge of the Supreme Court of Nauru.[44] As the Full Court of the Federal Court of Australia has stated many times, less latitude should be given to loose phrasing or reasons, or absent but expected findings or reasoning in the decisions of administrative decision makers with such expertise. 'Eyes should not be so blinkered as to avoid discerning an absence of reasons or reasons devoid of any consideration of a submission central to a party's case',[45] especially because 'more may be expected of experienced and legally qualified members of who have had the benefit of written submissions filed by experienced legal practitioners'.[46]

Ground 1: The Tribunal's adverse and determinative credibility finding, that certain claims for protection concerning drug trafficking were untrue because they had not been mentioned at the transfer interview, was without logical and probative foundation or was legally unreasonable.

21. Shortly after his arrival in Nauru,[47] on 21 February 2014, the Appellant was subject to an interview through an interpreter (**Transfer Interview**). The Transfer Interview lasted 75 minutes[48] and contained 55 questions.[49] The form used for the Transfer Interview contains the following preface,

> The purpose of this interview is to gather information about you and your circumstances for the Government of Nauru. ... While the main purpose of today's interview is to collect background information on you and your circumstances, the information that you will 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.[50]

22. The first question in Part C of the Transfer Interview form is 'Why did you leave your

---

[40] Ibid [10].
[41] Convention Act s19.
[42] *Refugee Convention Regulations* 2013 (Nr) r 4, which required that each member have at least 2 years' experience in refugee merits review at a tribunal or equivalent level; and proven capacity to conduct administrative review; and thorough knowledge of UNHCR refugee status guidelines and standards.
[43] Namely, Craddock Murray Neumann Lawyers Pty Ltd, who are contracted by the Commonwealth of Australia to provide legal services on Nauru (*Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [209]), including to the Appellant see Pre-hearing Submissions, CB 72-112.
[44] Convention Act s 13(2) as at 4 December 2015.
[45] *Soliman v University of Technology, Sydney* [2012] FCAFC 146; 207 FCR 277 at [57].
[46] *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157; 240 IR 178 at [47].
[47] Transfer Interview, CB 3.
[48] Transfer Interview, CB 3.
[49] Part B has 18 questions and Part C has 18 questions which includes why the applicant has left his or her country of nationality or residence.
[50] Transfer Interview, CB 3.

country of nationality (country of residence)?' The form then includes further questions (Questions 2 – 9), which may be relevant to refugee status, as to political involvement; membership of social and religious groups; service with, interaction and impact of police, security and intelligence organisations; local group activity; and participation or training in armed conflict.[51] No further questions are posed, on the form, as to what fears the applicant might have if returned to his or her country.

23. The Appellant attended that interview without any legal representation. He is not a lawyer and had not previously interacted with refugee law.[52] While the interview was recorded[53] it was not sought by nor was it before the Tribunal.

10 24. In reply to the first question in Part C, the Appellant was recorded to have said, through an interpreter, that 'my dad is a [sic] alcoholic and he does [sic] child abuse and was abusing me physically … .'[54] Further details were then given by the Appellant of physical abuse he suffered at the hands of his father.[55] At the Tribunal hearing, the Appellant said he had also mentioned that his father was a drug addict during the Transfer interview and that there may have been a misinterpretation of what he had said. The Tribunal did not seek a copy of the recording or a statement from those persons present.[56]

25. As is anticipated by the Transfer Interview form, the Appellant subsequently lodged a refugee status determination (**RSD**) application on 26 May 2014. Questions 37 - 44 in the RSD application form are aimed at eliciting whether the applicant falls within the definition
20 of refugee in Article 1A(2) of the Refugee Convention: [37] 'State your reasons for claiming to be a refugee'; [39] 'Why did you leave your home country?'; [40] 'What do you fear may happen to you … if you go back to your home country?'; [41] 'What harm, if any, have you experienced in your home country?'; [42] 'Who do you think may harm/mistreat you if you go back to your home country?'; [43] 'Why do you think this will happen to you if you go back to your home country?'; and [44] 'Do you think the authorities in your home country can and will protect you if you go back? If not, why not?'[57]

26. The Appellant completed the form with the assistance of a lawyer ('claims assistance provider')[58] who also took his statement in answer to questions 37-44.[59] At paragraph [20]

---

[51] Transfer Interview, CB 13-14.
[52] Transfer Interview, CB 16 q18.
[53] Transfer Interview, CB 3.
[54] Transfer Interview, CB 13.
[55] Transfer Interview, CB 13.
[56] Tribunal transcript, CB 153.10-13, 22-23.
[57] Application for RSD, CB 26-27.
[58] Application for RSD, CB 31.
[59] Appellant's statement, CB 39-42.

of that statement the Appellant set out his claim that he will be harmed because of: imputed political opinion arising from his father's drug supplying; actual or perceived contravention of Sharia law due to assisting his father to supply drugs and association with him as a drug dealer; membership of a social group comprising his family where the father was involved in anti-Islamic activities and being a failed asylum seeker.[60]

27. On every subsequent occasion the Appellant gave detailed and consistent evidence and submissions concerning his father's drug habits, addiction and dealing: to the Secretary,[61] in submissions[62] and a second statement[63] and at the Tribunal hearing.[64]

28. The Appellant's answer to Question 1 of Part C of the Transfer Interview was responsive to the simple question that was asked. Similarly the Appellant's statement annexed to his RSD application was responsive to Questions 37-44 of that application form. There was no conflict or inconsistency between the answers given by the Appellant, but there was an expansion and elucidation of why the father had physically abused the Appellant. Such an expansion and elucidation is to be expected because the RSD application concerns refugee status specifically, the questions are directed to eliciting the basis for the claim to refugee status and the applicant is assisted by a lawyer to complete the form.

29. The Tribunal, however, made adverse findings concerning the credibility of the Appellant's claims without consideration of the limited nature of the Transfer Interview. The Tribunal found that the Appellant was not credible in respect of the bulk of his protection claims because:

> 18. … in his transfer interview the applicant made no reference to drugs when he was explaining why it was that he left Iran. ... [65]
>
> 19. In his RSD and supplementary statements as well as in the Tribunal hearing, however, the applicant introduces a new and significant reason for having left Iran. This is that his father is not simply an alcoholic but is also [a] drug addict.[66] …
>
> 23. The Tribunal finds that the applicant's failure to make any reference to these centrally important aspects of his account at the first opportunity he had to do so casts strong doubt on the truth of his subsequent claims as to his father's, and his, involvement

---

[60] Appellant's statement, CB 41[20].
[61] Secretary's Decision, CB 54, 56-60.
[62] Pre-hearing Submission, CB 72-73, 77-80, 81-84.
[63] Appellant's supplementary statement, CB 114-117.
[64] Tribunal transcript, CB 124.41-45, 125.1-8, 125.21-22, 149.8-12, 152.14-47, 153.1-47, 154.1-15, 151.29-46, 155.1-45; 157.33-45, 158.1-7, 160.38-47; 161.1-20, 165.39-45, 166.1-16. That hearing was almost four times as long as the transfer interview: It lasted from 2:54pm until 6:29pm.
[65] Tribunal decision, CB 220[18].
[66] Tribunal decision, CB 220[19].

in drug taking and drug dealing.[67]

30. The finding was devastating to his protection claims on the grounds of imputed political opinion and membership of a particular social group:

> 31. On the information before it, the Tribunal is not satisfied as to the credibility of the applicant's claim that his father is a drug addict or drug dealer, or that he forced the applicant to use drugs and transport drugs to his friends and others.... The Tribunal finds that these claims have been fabricated by the applicant to strengthen his case for protection.[68]
>
> 32. As these are not minor or marginal aspects of the applicant's account, but instead lie at the heart of his claims to fear harm in Iran, the Tribunal considers that these findings case strong doubt over the credibility of his claims in general.[69]
>
> 33. Given these findings the Tribunal does not accept that the applicant would be at risk of persecution in Iran on the [following] Convention ground[s]...[70]

31. When the issue was raised in the Court below Khan J held that the Tribunal was not precluded from considering the timing of the claim and dismissed the ground.[71]

No logical or probative foundation

32. While it is trite law that findings on credibility are ordinarily the province of the Tribunal, two recent decisions of the Full Court of the Federal Court have reiterated that credibility findings are still susceptible to judicial review for jurisdictional error.[72] A detailed, case-specific assessment is required to determine whether any adverse credibility finding gives rise to jurisdictional error.[73] Among the bases upon which jurisdictional error can be found in respect of credibility assessments is where a finding is reached without a logical or probative basis.[74] Jurisdictional error can arise 'where a finding on credit on an objectively minor matter of fact is the basis for a tribunal's rejection of the entirety of an applicant's evidence and the entirety of the applicant's claim'.[75] This is so because 'adverse decisions on credibility by the Tribunal should be restricted to the most obvious cases'.[76]

---

[67] Tribunal decision, CB 221[22].
[68] Tribunal decision, CB 223[31].
[69] Tribunal decision, CB 223[32].
[70] Tribunal decision, CB 223[33].
[71] *WET052 v Republic* [2017] NRSC 96 at [81], p. 29.
[72] *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146 per McKerracher, Griffiths and Rangiah JJ at [40] – [42]; *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174 Griffiths, Perry and Bromwich JJ at [83]; *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089; 233 FCR 451 per Flick J at [20]-[21]; *SZSHV v Minister for Immigration and Border Protection* [2014] FCA 253 per Flick J at [31].
[73] *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317 at [77].
[74] *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174 [83].
[75] *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317 at [78], (2013) 212 FCR 99 at 121, approved at *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146 at [41].
[76] *W168/00A v Minister for Immigration & Multicultural Affairs* [2001] FCA 538 at [12] per Lee J.

33. In *WAGO v Minister for Immigration and Multicultural and Indigenous Affairs* the Full Court held that:[77]

> The unwarranted assumptions of the Tribunal as to matters relevant to formation of a view on the credibility of the corroborative witness caused the Tribunal to disbelieve and disregard that evidence and constituted a failure by the Tribunal to duly consider the question raised by the material put before it.

34. The Tribunal's credibility finding was not based on logical grounds and probative evidence because of the matters that follow.

35. **First**, the Transfer Interview was a general interview on transfer from Australia to Nauru and was not an application for refugee status, such an application being made subsequently.

36. **Second**, the Tribunal was required to assess refugee status at the time of assessment not at the time of departure: *Minister for Immigration and Ethnic Affairs v Mayer.*[78]

37. **Third**, the circumstances in which an applicant for refugee status fled his or her country of nationality will ordinarily be the starting point in ascertaining his or her present status: *Chan v Minister for Immigration and Ethnic Affairs.*[79] Question 1 of Part C of the Transfer Interview addressed only the starting point of the refugee status process: why he had left his country of nationality and residence.

38. **Fourth**, the Appellant was not asked to provide the basis for his claim for refugee status at the Transfer Interview. Those questions were left until lodgement of his RSD application. The Tribunal damned the Appellant's credibility on the basis that he had not stated his claims fully when he had not been asked to state his claims to refugee status.

39. **Fifth**, the Appellant's claims relating to his father's drug trafficking and detailed in his statement as part of his RSD application were not found by the Tribunal to be inconsistent with his answer to Question 1 of Part C of the Transfer Interview.[80]

40. **Sixth**, the Appellant told the Tribunal he was confused and stressed at the time of the Transfer Interview.[81] Serious reservations have been expressed by the Federal Court including the Full Court about comparing entry statements with statements later made at

---

[77] [2002] FCAFC 437; 194 ALR 676 Lee and RD Nicholson JJ at [54], Carr J agreeing at [57].
[78] [1985] HCA 70; (1985) 157 CLR 290 at 302; *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 per Dawson J at 405-406, Gaudron J at 414.
[79] *Chan* per Dawson J at 399.
[80] Tribunal decision, CB 220[20].
[81] Tribunal decision, CB 220[21].

interview.[82] As the Full Court has said, 'a person escaping persecution or worse, often not knowing if there will ever be an opportunity to see loved ones again, is likely to be quite distressed and nervous upon arrival in a foreign country for the first time, obviously not knowing what might occur.'[83]

41. **Seventh**, the Appellant was not assisted by a legal representative or a claims assistant at the Transfer Interview as he was later.

42. **Eighth**, as the Appellant faces return to a country which he fears will persecute him the Tribunal's task should be approached with a degree of solemnity[84] and it should not effectively dismiss his primary claim on the basis of an omission at his first interview.

43. **Ninth**, if the Tribunal's approach is correct then a similar credibility finding could be made against a person who had left his or her country for a non-Convention reason (travel, business) but who nonetheless had a legitimate and well-founded fear of persecution if he or she was to return to that country.

44. As the above demonstrates, the Tribunal reached a central finding which lacked a probative or logical basis and the Tribunal's reasons are infected by jurisdictional error.

Legally unreasonable

45. In the alternative, the same arguments may be made to substantiate that the Tribunal has acted legally unreasonably in the sense that it was irrational or illogical and amounted to jurisdictional error.[85] Rationality is implied into the Secretary's power under s. 6(1) of the Convention Act to determine an application for refugee status[86] and for the Tribunal to exercise the Secretary's power on a merits review under s. 34(1).

46. In the application of that test this Court has said that the correct approach is to ask whether it was open to the Tribunal to engage in the process of reasoning in which it did engage and to make the findings it did make on the material before it.[87] Similarly in *Minister for Immigration and Citizenship v Li*, concerning the exercise of a discretion, Gageler J said

---

[82] *Selliah v Minister for Immigration & Multicultural Affairs* [1999] FCA 615 per Einfeld and North JJ at [2]. See also James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) pp 144-149.
[83] *Selliah* at [2].
[84] *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at 8 [22]; [2004] HCA 62. The remarks were made with respect to the relevant Australian tribunal.
[85] In the sense accepted by the High Court in *Re Minister for Immigration and Multicultural Affairs; ex parte S20/2002* [2003] HCA 3; 198 ALR 659 per McHugh and Gummow JJ at [34], [37].
[86] Unlike the *Migration Act* 1958 there is no requirement for satisfaction. Section 6(1) of the Convention Act requires that the Secretary determine the application to be recognised as a refugee.
[87] *Minister for Immigration and Citizenship v SZMDS* [202] HCA 16; 240 CLR 611 per Crennan and Bell JJ at [133]

that:

> Review by a court of the reasonableness of a decision made by another repository of power 'is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process' but also with 'whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law'.[88]

47. In applying that part of his Honour's decision, the Full Court of the Federal Court in *Minister for Immigration and Border Protection v Singh*[89] drew a contrast between the outcome of the exercise of power *and* reasonableness review which concentrates on an examination of the reasoning process by which the decision was arrived.[90] As regards the latter, the Full Court said that where there are reasons for the exercise of the power, "it is to those reasons to which a supervising court should look in order to understand why the power was exercised as it was".[91]

48. The adverse credibility finding of the Tribunal fell outside the range of possible, acceptable outcomes for the nine reasons set out above. The error is plainly demonstrated at paragraph [20] of the Tribunal's decision where it bases its adverse finding on the (apparent) failure of the Appellant to mention certain claims for refugee status at the Transfer Interview when he was only asked to state why he had left Iran. The adverse finding was not open on the evidence because the Tribunal, irrationally and illogically, assumed that the Appellant would state all his claims for refugee status when the Appellant was not asked to state his claims for protection. As such, the reasons lacked an intelligible justification and were irrational.

Ground 4: The Tribunal erred by failing to consider an integer of the Appellant's claims to protection and/or to consider his claims cumulatively, namely,

(a) that he had a political profile which would lead him to be at particular risk as a failed asylum seeker from the West; and

(b) that he was at risk as a failed asylum seeker per se.

49. The Appellant claimed protection because, *inter alia*, he would face a real possibility of relevant harm on return to Iran as a failed asylum seeker from the West.[92] The claim was made in his RSD application dated 26 May 2014.[93] Relevant to that claim was, first, that in

---

[88] *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 per Gageler J at [105].
[89] [2014] FCAFC per Allsop CJ, Robertson and Mortimer JJ at [44], [47]
[90] At [47]
[91] At [47]
[92] Appellant's statement, CB 41[20].
[93] Appellant's statement, CB 41[20(d)].

his Transfer Interview he stated that he had been involved in the 2009 demonstrations against the Iranian election; and, second, that there was country information which indicated that persons returning to Iran were being persecuted by Iranian officials because they were failed asylum seekers, without necessarily having been involved in political activity. Both matters were not addressed by the Tribunal in its decision and, given their importance to this part of his claim for protection, the Tribunal erred by failing to consider an integer of the Appellant's claim (either singly or cumulatively).

50. At the Transfer Interview the Appellant gave the following evidence when asked about involvement 'in any... protests against the government':

> In 2009 I was involved in demonstrations, mainly in the evening – about the election.[94]

51. The Secretary considered the Appellant's claim for protection as a failed asylum seeker in his decision[95] but the Appellant's involvement in the 2009 demonstrations is not mentioned. The transcript of the interview was not before the Tribunal. The Secretary found that 'the likelihood of a returned asylum seeker coming to harm on return to Iran is proportionate to the political profile that they have'.[96] The Secretary then remarked that,

> ... in all examples [of failed asylum seekers facing 'difficulties' on return] it related to people who had partaking [sic] in activities either in Iran or outside Iran that were clear illustrations of anti-government sentiment *such as well covered demonstrations*. A person such as the Applicant, who was not politically active or had a profile, will not a person of particular interest to the authorities in Iran.[97]

52. It seems reasonable to conclude that the Secretary was not cognisant of the Appellant's involvement in the 2009 demonstrations but did recognise that involvement in such demonstrations would be political activity that was likely to expose a failed asylum seeker to adverse treatment on return. The Secretary also concluded that absent political involvement 'it is unlikely that all failed asylum seekers would be perceived as anti-regime, and/or mistreated upon their return'.[98]

53. As the Secretary had limited country information before him, the Appellant's representatives made extensive submissions on the issue including reliance on country

---

[94] Transfer Interview, CB 13.
[95] Secretary's Decision, CB 60-61.
[96] Secretary's Decision, CB 61.
[97] Secretary's Decision, CB 61, emphasis added.
[98] Secretary's Decision, CB 61.

information reporting 'ill-treatment in prison' for returnees to Iran[99] for periods of up to 'many months'[100] involving beatings,[101] torture or inhuman or degrading punishment.[102]

54. The country information included the following from an Amnesty Information Report of 2012, quoting an Iranian judge who said,

> '... asylum seekers are interrogated on return, whether or not they have been political activists in Iran or abroad. If they have tried to conduct propaganda against Iran, then they are culpable and are detained until a judge decides the sentence. ...Returnees will therefore be held for a few days until it is clear to the police, that they have not been involved in political activity. ... *If the person was politically active in Iran before leaving*, or has been active abroad, they must be tried and receive a punishment appropriate to their activities.'[103] (emphasis added)

55. In addition, the Appellant provided detailed examples of asylum seekers who were arrested, detained for extended periods and beaten, without an apparent history of political involvement. Examples include: the extended detention of an unaccompanied minor who had returned to Iran after seeking asylum in Norway;[104] a young male and a female asylum seeker detained on return to Iran and the male ill treated after arrest;[105] a man detained for 'many months' with extensive interrogation;[106] interrogation of a woman on arrival for up to 5 hours on arrival;[107] and reports of routine interrogation and beating of asylum seekers on return to Iran.[108]

56. The Tribunal found that those who possessed 'certain profiles may be harmed on return to Iran' including 'student activists, Arab political activists, criminals and asylum seekers who have received Western media attention'.[109] It then found that 'there is, however, *nothing in the information* to indicate that the act of applying for asylum in itself attracts harm or that those who [are] without these identified profiles are at risk of harm' (emphasis added).[110]

57. No mention is made in the Tribunal's decision of the Appellant's involvement in the 2009 demonstrations. The Tribunal accepted that the Iranian 'authorities might come to suspect that [the Appellant] had applied for asylum... and that he might be questioned on arrival as

---

[99] Pre-hearing Submissions, CB 101[119].
[100] Pre-hearing Submissions, CB 102[123].
[101] Pre-hearing Submissions, CB 103[125].
[102] Pre-hearing Submissions, CB 105[136]-[137].
[103] Pre-hearing Submissions, CB 99-100[116].
[104] Pre-hearing Submissions, CB 100[118(b)].
[105] Pre-hearing Submissions, CB 101[119].
[106] Pre-hearing Submissions, CB 102[123].
[107] Pre-hearing Submissions, CB 103[124].
[108] Pre-hearing Submissions CB, 103[125].
[109] Tribunal decision, CB 228[50].
[110] Tribunal decision, CB 228[50].

to why he had done so.'[111] However, the Tribunal found that the Appellant would not have a political opinion imputed to him because of involvement with his father's drug dealing or contravention of Sharia law or on the basis he had converted to Christianity.[112] It also found that 'there is no other evidence before the Tribunal to indicate that he has come to the attention of the authorities or would do so following his return.'[113]

58. The Appellant raised the Tribunal's failure to deal with an integer of his claim for protection in Ground 1 of his amended notice of appeal in the Court below and asserted that the Tribunal had failed to consider the cumulative risk to the applicant if he was to return.[114] It was made clear in oral submissions that the ground concerned the risk to the Appellant when questioned on return in relation to his claim of asylum and what other activities he might have been involved in[115] (which included conversion to Christianity[116]). Khan J accepted the Republic's argument that the matters had been taken into account cumulatively by the Tribunal's use of the words 'taking these matters together' and 'in light of all the information'.[117]

59. In *Dranichnikov v Minister for Immigration and Multicultural Affairs*, this Court held that:

> To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord [the Appellant] natural justice.[118]

60. The passage was also applied in *M61/2010E v Commonwealth of Australia.*[119] This Court held that to fail to deal with a claim of this kind involves a constructive failure to exercise jurisdiction and a denial of procedural fairness.[120] Further, in *NABE v Minister for Immigration and Multicultural Affairs (No 2)*[121] the Full Court of the Federal Court held that where claims that were clearly articulated or clearly arose on the material before the decision maker are not considered the tribunal fails to provide a claimant with procedural fairness.[122] Section 22 of the Convention Act requires that the Tribunal 'act according to the principles of natural justice'.

---

[111] Tribunal decision, CB 228 [51].
[112] Tribunal decision, CB 228[51].
[113] Tribunal decision, CB 228[51].
[114] Amended notice of appeal Ground 1 particular (l).
[115] Tribunal transcript, CB 145.17-30.
[116] Transcript p [32] – [38]
[117] *WET052 v Republic* [2017] NRSC 96 at [39(4)] p 20.
[118] [2003] HCA 26; (2003) 77 ALJR 1088 per Callinan and Gummow JJ at 1092 [24] see also [32].
[119] *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41; (2010) 243 CLR 319 at [90].
[120] *Plaintiff M61* at [90]; *Dranichnikov* at 1092 [24], Hayne J agreeing [95].
[121] [2004] FCAFC 263; 144 FCR 1.
[122] *NABE* at [55].

61. That analysis reflects the second of the two aspects of the hearing rule, which requires that the affected person have an opportunity to provide information[123] and a corresponding entitlement to be heard by the decision-maker when the information is given. [124] 'Proceedings before the Tribunal are not adversarial; and issues are not defined by pleadings, or any analogous process.'[125] Jurisdictional error arises when 'a submission of substance'[126] or evidence of 'significance'[127] is not evaluated.[128]

62. Of course, this 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*.[129] In *Minister for Immigration and Citizenship v SZGUR*[130] French CJ and Kiefel J said that there is a distinction between the omission of a matter from the Tribunal's reasons as indicating the Tribunal did not consider the matter material, and that omission indicating the Tribunal did not consider the matter at all.[131]

63. The failure of the Tribunal to mention the Appellant's involvement in the 2009 demonstrations falls into the latter category identified in *SZGUR*, not the former, because of the Tribunal's direct advertence to the impact of political activities on failed asylum seekers.[132] The Appellant's political involvement in Iran and its impact on whether he was at risk of adverse treatment as a returned asylum seeker was an essential integer of his claim[133] and his participation in the demonstrations was evidence readily available to

---

[123] *Minister for Immigration and Border Protection v SZSSJ, Minister for Immigration and Border Protection v SZTZI* (2016) 90 ALJR 901 at 915 [83]; see also the authorities summarised at *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [159-166] per Bromberg J.

[124] *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at [172] per Callinan and Heydon JJ; *Forrest and Forrest Pty Ltd v Minister for Mines and Petroleum* [2017] WASCA 153 at [103] per Murphy, Mitchell and Beech JJA and *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 at 578 [389] per Flick J.

[125] *S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473* at [1] per Gleeson CJ; *Minister for Immigration and Citizenship v SZQPA* (2012) 133 ALD 292 at [42] per Gilmour J see also the reference to a 'clearly articulated argument', not a pleading, at *Dranichnikov* at [24]; see also *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307 at [58] per Mortimer J.

[126] *SZSSC v Minister for Immigration and Border Protection* (2014) 317 ALR 365 at [75]-[76], [78]-[81] per Griffiths J, citing *Dranichnikov* at [24] per Gummow and Callinan JJ, *SZRBA v Minister for Immigration and Border Protection* (2014) 314 ALR 146 at 149 [11] per Siopsis, Perram and Davies JJ and *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114; 230 FCR 431 per Kenny, Griffiths and Mortimer JJ at [38].

[127] *Minister for Immigration and Multicultural Affairs v SBAA* [2002] FCAFC 195 at [44] per Wilcox and Marshall JJ; see also *W280 v Minister for Immigration and Multicultural Affairs* [2001] FCA 1606 at [26] per French J.

[128] See also *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157 [47].

[129] [2001] HCA 30; (2001) 206 CLR 323 at [10], [34], [68].

[130] (2011) 241 CLR 594.

[131] *SZGUR* at [31] Heydon and Crennan JJ agreeing.

[132] Tribunal decision, CB 228[50].

[133] See *MZYTS* at [52].

substantiate his claim. If the Tribunal had considered the involvement in the demonstrations it would have had to determine whether it accepted that evidence and whether such involvement in political activities was likely to create a risk of harm to the Appellant on his return to Iran. Further, the Tribunal was at pains to indicate that a central claim for refugee status should be mentioned at the first available opportunity[134] and would impliedly have given weight to the Appellant's political involvement. That is, the involvement in the 2009 demonstrations was centrally material to the Tribunal's determination of his claim as a failed asylum seeker but was not considered.

64. The error was jurisdictional because the Tribunal did not perform its statutory task to consider all of the Appellant's claims to refugee status. Its omission should not be dismissed as merely a failure to consider an individual item of evidence because the omission concerned particular evidence which was central to determination[135] of whether a person who had been involved in political demonstrations was at risk of adverse treatment on return to Iran.

65. We turn then to the country information in support of the contention that asylum seekers, without a history of political activities contrary to the Iranian government, are at risk of adverse treatment by Iranian authorities. The Tribunal said that it considered 'the country information cited in the Secretary's decision', and 'the submissions together with more recent DFAT reporting' to find that that those with 'certain profiles' may be harmed on return to Iran.[136] As mentioned, whether failed asylum seekers *per se* faced adverse treatment was an issue considered and rejected by the Secretary.[137] The Appellant had as a result put on evidence in the form of country information to rebut that finding. The Tribunal had before it the Secretary's finding and the new material which were at odds.

66. The contest raised an obligation on the Tribunal to resolve it in the way identified in *MZYTS*:

> The Tribunal's reasons disclose no process of weighing evidence and preferring some over the other. In the context of two or more pieces of apparently pertinent, but contradictory, evidence an expression of a preference for some evidence over other evidence generally requires an articulation of the different effects of the evidence concerned, and then some indication as to why preference is given. All these are matters for the trier of fact. The absence from the recitation of country information of the

[134] Tribunal decision, CB 220-221[21]-[22].
[135] *MZYTS* at [70]; *SZRKT* at [98].
[136] Tribunal decision, CB 228[50].
[137] Secretary's Decision, CB 61.

material referred to in the post-hearing submissions is indicative of omission and ignoring, not weighing and preference.[138]

67. Instead the Tribunal said there was 'nothing in the information' to indicate that failed asylum seekers, as such, are at risk of harm'.[139] Such a conclusion could not have been reached if the material averted to above had been taken into account. The Tribunal was required to consider that information and determine why it preferred some evidence over other evidence. It was open to it to reject the Appellant's evidence and submissions on the issue. However, by stating that there was 'nothing in the information' to substantiate the Appellant's claim it is patent that it did not consider the material in support of adverse attention being given to failed asylum seekers on return to Iran. In doing so it failed to consider an integer of the Appellant's claim.

68. This error was jurisdictional because it was central to determination of whether the Appellant had a well-founded fear of persecution based on being a failed asylum seeker per se. The evidence ignored provided the objective basis required to substantiate his subjective fear of being adversely treated on his return to Iran because he would be a failed asylum seeker. The omission of the material meant that the Appellant's evidence on the issue was limited to his subjective fear. In failing to consider the material the Tribunal failed to undertake it statutory task to consider an integer of the Appellant's claim.

69. There were a number of reasons articulated by the Appellant as to why he feared that harm including his association with his father and his drug related activities, actual or perceived contravention of Sharia law, and membership of a social group comprising failed asylum seekers.[140] The Appellant was entitled to rely on them separately or cumulatively. His involvement in the 2009 demonstrations was set out in his Transfer Interview and had a bearing on the risk posed on his return to Iran (hence the inclusion of the relevant question in the application form[141]) in that it exacerbated the risk.

Raising a new or reformulated ground

70. Before the Supreme Court of Nauru eight grounds were advanced by the Appellant many of which were broadly framed. Ground 4 pursued before this Court is conceptually consistent with Ground 1(l) below, but is framed more precisely. If leave is required to proceed with any of the grounds in their present form, the Appellant seeks it. The Appellant

---

[138] *MZYTS* at 447 [50].
[139] Tribunal decision, CB 228[50]
[140] Tribunal decision, CB 216[5]-[8].
[141] Transfer Interview, CB 13.

says he should be permitted to raise it now notwithstanding that it was, on one reading, not in terms raised in the Supreme Court.

71. In respect of the Convention Act, this Court sits as the first court to hear a matter other than by way of first instance judicial review. This Court is, therefore, in a similar position to the Full Court of the Federal Court of Australia in appeals in proceedings initiated under s 44 of the AAT Act, and in appeals from first instance review decisions under s 476 or 476A of the *Migration Act* 1958 (Cth). In appeals of this kind, new questions may be raised on appeal before the Full Court of the Federal Court if it is 'expedient and in the interests of justice' to do so.[142] The same test has been applied in this Court where a new point is sought to be raised on appeal.[143]

72. Unlike the Full Court of the Federal Court, the High Court exercises original jurisdiction in the present case. As such, it has the enlarged powers under s 32 of the *Judiciary Act* 1903 (Cth) to grant all such remedies in respect of any legal or equitable claim in the cause or matter so that the controversy between the parties may be completely and finally determined.

73. It follows that the test for the introduction of a new ground where the High Court exercises original jurisdiction must be at least as liberal as that which applies in an appeal proper. In the present case, it is expedient and in the interests of justice to allow the Appellant to raise a reformulated ground on appeal in this Court because:

    a. Ground 4 has merit, for the reasons set out above.

    b. Ground 4 is strongly linked with matters raised in the Court below (whether the Court had failed to consider an integer of the claim, namely protection as a failed asylum seeker).

    c. There is nothing to suggest that the Appellant for some strategic advantage did not raise Ground 4 in their present form below deliberately.[144]

    d. While Ground 4 was not raised in terms in the notice of appeal below it was raised on both oral argument in the Supreme Court and before the Tribunal.

    e. No new facts or evidence are relied upon to substantiate Ground 4, which concerns questions of law.

---

[142] *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73 [19-20] per Griffiths and Perry JJ; *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 at 347 [79]-[80] per Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ; *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 at 598 [46] per Kiefel, Weinberg and Stone JJ.

[143] See, eg, *Water Board v Moustakas* (1988) 180 CLR 491 at 497 per Mason CJ, Wilson, Brennan and Dawson JJ, 506 per Gaudron J.

[144] *Linkhill Pty Ltd v Director, Officer of the Fair Work Building Industry Inspectorate* (2015) 240 FCR 578 [70].

f. There would be no relevant prejudice to the Respondent if the Appellant is now permitted to raise the grounds identified below.[145]

74. The nature of the case also makes it in the interests of justice to allow the new ground to be raised. It is 'centrally relevant'[146] and a matter of 'particular sensitivity... in refugee cases'[147] that 'serious consequences... may attend a wrongful refusal'.[148] In addition, there is a discernible public interest in this Court determining Ground 4 because it raises issues of 'general application' and 'importance'.[149] These factors should also lead to the reformulated ground being heard and determined on appeal.

Part VII: Legislative provisions

10 75. The applicable statutes and regulations are attached as Annexure A.

Part VIII: Orders sought

76. The Appellant seeks the following Orders:

1. The appeal be allowed.
2. The orders made by the Supreme Court of Nauru of 6 November 2017 be set aside.
3. The matter be remitted to the Refugee Status Review Tribunal for reconsideration according to law.
4. The respondent pay the Appellant's costs of the Appeal to this Court.

Part IX: Oral argument

77. The Appellant estimates that he will require 90 minutes to present oral argument.

20 **Part X: Amendment of the Notice of Appeal**

78. The Appellant seeks leave to amend his Notice of Appeal by Summons, supported by Affidavit, filed with these submissions. Leave should be granted for the following reasons. First, the draft amended Notice of Appeal reduces the grounds of appeal from four to two thereby limiting the nature of the appeal and providing greater focus for the appeal. Second, Part 42 rule 3 of the *High Court Rules* 2004 requires that the notice of appeal be filed within 14 days of the date of judgment of the Supreme Court of Nauru being a relatively limited period. Third, the Appellant is a young man with relatively limited education. Fourth, the

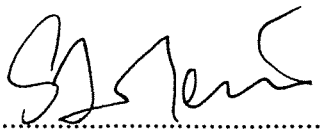
---

[145] *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 [62].
[146] *SZKCQ v Minister for Immigration and Citizenship* [2009] FCA 578 [9].
[147] *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 [22].
[148] *SZEPN v Minister for Immigration and Multicultural Affairs* [2006] FCA 886 [16]; see also *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73 [56-58] per Mortimer J.
[149] *Lobban v Minister for Justice* (2016) 244 FCR 76 [73]-[74], and see also *Parker v Minister for Immigration and Border Protection* (2016) 247 FCR 500 at [31].

Appellant was not legally represented by a solicitor until some 4 days before the notice of appeal was to be filed. Fifth, the Respondent was served with the draft amended Notice of Appeal at the same time as the Appellant's submissions on the grounds in the draft amended Notice of Appeal. Sixth, the only prejudice to the Respondent is on costs with respect to its consideration of the Notice of Appeal. In short, the Appellant seeks leave to amend his Notice of Appeal in order to ensure the effective and efficient running of the Appeal.

Dated: 5 February 2018

10



Simeon Beckett
Maurice Byers Chambers - (02) 8233 0300
Email: s.beckett@mauricebyers.com

Matthew Albert
Castan Chambers - (03) 9225 8265
Email: matthew.albert@vicbar.com.au

Annexure A

Part VII – Relevant legal provisions

Refugees Convention Act 2012 (Nr)

3. Interpretation

In this Act, unless the contrary intention appears:

...

'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;

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.

5. Application for refugee status

(1) A person may apply to the Secretary to be recognised as a refugee.

(1A) A person may include family members and dependents in an application for refugee status.

(2) The application 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 the application.

6. Determination of refugee status

(1) Subject to this Part, the Secretary must determine whether an asylum seeker is recognised as a refugee or is owed complementary protection.

(2) Dependents of an asylum seeker recognised as a refugee or owed complementary protection must be given derivative status.

(3) The determination must be made as soon as practicable after a person becomes an asylum seeker under this Act.

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.

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 that the person is not recognised as a refugee;

(b) a decision to decline to make a determination on the person's application for recognition as a refugee;

(c) a decision to cancel a person's recognition as a refugee (unless the cancellation was at the request of the person).

(d) a determination that the person is now owed complementary protection.

(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.

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; or

(d) set the determination or decision aside and substitute a new determination or decision.

(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 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 the findings of fact were based.

(5) A decision on a review is taken to have been made on the date of the written statement.

43. Jurisdiction of Supreme Court

(1) A person who, by a decision of the Tribunal, is not recognized as a refugee may appeal to the Supreme Court against that decision on a point of law.

(2) The parties to the appeal are the appellant and the Republic.

(3) The notice of appeal must be filed within 28 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.

Note for section 43
Under section 44(c) of the Appeals Act 1972, an appeal lies to the High Court of Australia, with the leave of the High Court, against any judgment, decree or order of

the Supreme Court in the exercise of its appellate jurisdiction under Part III of the Appeals Act or under any other written law.

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.

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 the person may have for review of the decision.

***Nauru (High Court Appeals) Act 1976* (Cth)**

3 Interpretation

In this Act, Agreement means the agreement between the Government of Australia and the Government of the Republic of Nauru relating to appeals to the High Court of Australia from the Supreme Court of Nauru that was signed on 6 September 1976, being the agreement a copy of the text of which is set out in the Schedule.

5. Appeals to High Court

(1) Appeals lie to the High Court of Australia from the Supreme Court of Nauru in cases where the Agreement provides that such appeals are to lie.

(2) The High Court has jurisdiction to hear and determine appeals mentioned in subsection (1).

(3) Where the Agreement provides that an appeal is to lie to the High Court of Australia from the Supreme Court of Nauru with the leave of the High Court, the High Court has jurisdiction to hear and determine an application for such leave.

8 Form of judgment on appeal

The High Court in the exercise of its appellate jurisdiction under section 5 may affirm, reverse or modify the judgment, decree, order or sentence appealed from and may give such judgment, make such order or decree or impose such sentence as ought to have been given, made or imposed in the first instance or remit the case for re-determination by the court of first instance, by way of a new trial or rehearing, in accordance with the directions of the High Court.

Schedule

Section 3

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF NAURU RELATING TO APPEALS TO THE HIGH COURT OF AUSTRALIA FROM THE SUPREME COURT OF NAURU

The Government of Australia and the Government of the Republic of Nauru,

Recalling that, immediately before Nauru became independent, the High Court of Australia was empowered, after leave of the High Court had first been obtained, to hear and determine appeals from all judgments, decrees, orders and sentences of the Court of Appeal of the Island of Nauru, other than judgments, decrees or orders given or made by consent,

Taking into account the desire of the Government of the Republic of Nauru that suitable provision now be made for appeals to the High Court of Australia from certain judgments, decrees, orders and sentences of the Supreme Court of Nauru, and

Conscious of the close and friendly relations between the two countries,

Have agreed as follows:

ARTICLE 1

Subject to Article 2 of this Agreement, appeals are to lie to the High Court of Australia from the Supreme Court of Nauru in the following cases:

(A). In respect of the exercise by the Supreme Court of Nauru of its original jurisdiction –

(a) In criminal cases—as of right, by a convicted person, against conviction or sentence.

(b) In civil cases –

(i) as of right, against any final judgment, decree or order; and

(ii) with the leave of the trial judge or the High Court of Australia, against any other judgment, decree or order.

(B). In respect of the exercise by the Supreme Court of Nauru of its appellate jurisdiction—

In both criminal and civil cases, with the leave of the High Court.

ARTICLE 2

An appeal is not to lie to the High Court of Australia from the Supreme Court of Nauru—

(a) where the appeal involves the interpretation or effect of the Constitution of Nauru;

(b) in respect of a determination of the Supreme Court of Nauru of a question concerning the right of a person to be, or to remain, a member of the Parliament of Nauru;

(c) in respect of a judgment, decree or order given or made by consent;

(d) in respect of appeals from the Nauru Lands Committee or any successor to that Committee that performs the functions presently performed by the Committee; or

(e) in a matter of a kind in respect of which a law in force in Nauru at the relevant time provides that an appeal is not to lie to the High Court.

ARTICLE 3

(1) Subject to paragraph 2 of this Article and to Article 4 of this Agreement, procedural matters relating to appeals from the Supreme Court of Nauru to the High Court of Australia are to be governed by Rules of the High Court.

(2) Applications for the leave of the trial judge to appeal to the High Court of Australia in civil matters are to be made in accordance with the law of Nauru.

ARTICLE 4

(1) Pending the determination of an appeal from the Supreme Court of Nauru to the High Court of Australia, the judgment, decree, order or sentence to which the appeal relates is to be stayed, unless the Supreme Court of Nauru otherwise orders.

(2) Orders of the High Court of Australia on appeals from the Supreme Court of Nauru (including interlocutory orders of the High Court) are to be made binding and effective in Nauru.

ARTICLE 5

This Agreement shall come into force on the date on which the two Governments exchange Notes notifying each other that their respective constitutional and other requirements necessary to give effect to this Agreement have been complied with.

ARTICLE 6

(1) Subject to paragraph 2 of this Article, this Agreement shall continue in force until the expiration of the ninetieth day after the day on which either Government has given to the other Government notice in writing of its desire to terminate this Agreement.

(2) Termination of this Agreement is not to affect-

(a) the hearing and determination of an appeal from the Supreme Court of Nauru instituted in the High Court before the date of the termination; or

(b) the institution, hearing and determination of an appeal from the Supreme Court of Nauru in pursuance of leave of the trial judge or of the High Court of Australia given before the date of the termination.

IN WITNESS WHEREOF the undersigned being duly authorized by their respective governments have signed the present Agreement.

DONE at Nauru this Sixth day of September One thousand nine hundred and seventy-six in two originals in the English language.

A. L. FOGG
For the Government of
Australia

A. BERNICKE
For the Government of the
Republic of Nauru

***Judiciary Act 1903* (Cth)**

32 Complete relief to be granted

The High Court in the exercise of its original jurisdiction in any cause or matter pending before it, whether originated in the High Court or removed into it from another Court, shall have power to grant, and shall grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter; so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters may be avoided.