IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S267 of 2017

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN

WET052
Appellant

AND

Republic of Nauru
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

Part I: INTERNET PUBLICATION

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

Part II: REPLY

2. **Ground 1** centres on the Appellant's complaint that the absence of a mention of his father's drug addiction, alongside the mention of his father's alcohol addiction, was an emphasised and important link in the chain of reasoning of the Tribunal which led to the Appellant's claims for protection being rejected on credibility grounds. The basis of the complaint is fundamentally five-fold:

    a. The Tribunal took the Appellant's response to be non-exhaustive of the nature of his protection claims, but the question he was answering, and the context he was answering it in, did not necessitate an exhaustive explanation of his
20 protection claims;[1]

    b. The Appellant gave evidence on oath to explain that he did not omit to mention his father's drug addiction at the transfer interview, even if this is not what was recorded by the interviewer. His evidence was 'I said he was an alcoholic and addicted. Maybe there was misinterpretation here, that they heard that he was addicted to alcohol';[2]

    c. The Tribunal could not reasonably expect a person, working through an interpreter and without a lawyer, with no experience of the refugee claims assessment process and no legal training to foresee the need to particularise every aspect of his claim and history in response to general questions about
30 why he left his country and what would happen if he returned;[3]

    d. The Tribunal did not find that his statement at the transfer interview

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[1] *W375/01A v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 89; 67 ALD 757 at [11], [15] and see, similarly, Hathaway and Foster *The Law of Refugee Status*, (2014) OUP, pp 144-147
[2] CB 153 lines 22 - 23
[3] See footnote 1.

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contradicted his subsequent evidence of drug addiction and drug trafficking by his father, just that it was an incomplete statement of his protection claims;

e. At every subsequent opportunity,[4] the Appellant gave consistent and clear evidence to the Tribunal about the nature of his father's addiction. That consistency was undermined in the Tribunal's mind by the failure to have his claim precisely and exhaustively recorded by someone else at the first instance.

In sum, the ground arises and is made out by the disproportionate treatment given by the Tribunal to a minor omission in the record[5] of a process that was non-exhaustive of the breadth of a refugee claim – that is, to adopt by analogy the language of the criminal law, the probative value of the minor omission in someone else's record of the evidence given through an interpreter was given such disproportionate prejudicial weight as to be lacking in an intelligible justification.

3. The Respondent's submissions dated 26 February 2018 at paragraph (**RS**) [6.1] and [24] seek to de-emphasise the importance of the Tribunal's treatment of the omission in the transfer interview record of mention of the Appellant's father's drug habits by stating that the Tribunal's ultimate conclusion adverse to the Appellant 'was based on cumulative concerns'. That may be right, but it is not to the point. The length of the analysis by the Tribunal concerning the omission and the primacy it is given in the Tribunal's analysis of the Appellant's credibility make it plain that the Tribunal regarded it as an important reason for the adverse conclusions it reached. This was one important link in its chain of reasoning. If that link was broken, the chain was too.

4. Similarly, the Respondent's assertion at RS [6.2], [25] and [30] - that 'it was open to the Tribunal' to make adverse credibility findings and therefore it was intelligible - is beside the point. It is always 'open' for the Tribunal to make adverse credibility findings. However, such findings can only be lawfully made if they have an intelligible justification and a probative basis. The unintelligibility of the (mis)use of the omission in the transfer interview record in this case is revealed by analogy with the reasoning underlying the (second) principle from *Jones v Dunkel*.[6] Pursuant to that principle, an absence of evidence can be a basis for an inference adverse to the person who could have given it, but only if there is an evidentiary basis for the inference made.[7] In this case the decision maker inferred that a claim that the Appellant's 'father is a drug addict' was 'fabricated'[8] from an omission in the transfer interview record. There was no positive evidence of fabrication of this claim, which was consistently put by the Appellant at every opportunity when asked of his refugee claims. To draw an inference of fabrication from an omission in someone else's record of what the Appellant said

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[4] See citations in the primary submissions of the Appellant at [27]
[5] See citations in the primary submissions of the Appellant at footnote 75.
[6] (1959) 101 CLR 298, 308, 312, 322; see also *RPS v R* (2000) 199 CLR 620 at [26] per Gaudron ACJ, Gummow, Kirby and Hayne JJ
[7] *Gaskell v Denkas Building Services Pty Ltd* [2008] NSWCA 35 at [48] per Bryson AJA (with whom Hodgson and Basten JJA agreed); *Trkulja v Markovic* [2015] VSCA 298 at [96] per Kyrou, Kaye JJA and Ginnane AJA
[8] Tribunal decision CB 223 [31]

through an interpreter,[9] in the absence of contradiction, where there is no evidence of fabrication itself and where there is sworn evidence to explain how it came to not appear in that record, makes that adverse finding unintelligible.

5. The Respondent highlights at RS [12] the instruction from the transfer interviewer to the effect that the interviewee should be 'honest and accurate with the information you provide, to the best of your ability'. It is notable that interviewees are not instructed to be exhaustive of their protection claims, nor are they instructed to verify the contents of the resulting record as a final and complete statement of their claims. Yet that is what the Tribunal expected the Appellant understood about the interview.

6. In *W375/01A v Minister for Immigration and Multicultural Affairs,* the Full Court of the Federal Court warned about undue emphasis being placed on the arrivals officer's interview record of an asylum seeker.

> It should not be assumed that the translation is precise. It may be anticipated that the information recorded will be a brief summary of the applicant's true case, and will often be given in words which the applicant would not have chosen were he able to speak English. ... It may be that the interpreter acts in the mistaken belief that a summary of the applicant's case is sufficient."[10]

The US Court of Appeals has similarly warned that caution is required in such circumstances because of the numerous factors which make it difficult for an asylum seeker to articulate his or her circumstances, such as language difficulties and dealing with traumatic memories.[11]

7. The Respondent places emphasis at RS [15], [17], [27] and [30] on the additional question noted at the bottom of the Part C Question 1 box, concerning the Appellant's prediction of what would happen to him on his return to Iran. The Appellant's response was that he would be 'killed by my dad'.[12] Two matters should be noted about this.

   a. This is directly responsive to the question asked and it is not inconsistent with the Appellant's father being an abusive addict.

   b. This question is not equivalent to the questions that might have reasonably been expected to elicit a response concerning the Appellant's father's drug habits. Those questions were, by contrast, asked later when the refugee assessment-focused application was before the Appellant. Those questions included 'state your reasons for claiming to be a refugee', 'who do you think may harm/mistreat you' and 'why do you think this will happen to you'? Had the Appellant been asked these questions in the transfer interview and not mentioned his father's drug habits in the response, this ground of appeal would have no merit. As it is, these questions were not asked and no equivalent

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[9] The parties agree that what is on the transfer interview form is the record of the interviewer, not the Appellant nor the interpreter; see RS [11].
[10] [2002] FCAFC 89; 67 ALD 757 at [11], [15] and see, similarly, Hathaway and Foster *The Law of Refugee Status*, (2014) Oxford University Press, pp 144-147
[11] *Zubeda v Ashcroft* (USCA, 3rd Cir., 2003) at 476-477
[12] CB 13

question which would necessarily and directly concern his father's drug habit was asked at the transfer interview.

8. The Respondent's submissions at RS [6.1] and [23] attempt to juxtapose:

   a. the Tribunal's finding that the omission 'casts strong doubt on the truth of his subsequent claims'[13] and gives rise to a conclusion of 'fabrication';[14] and

   b. the Tribunal finding that the claims were untrue because of the omission.

   This is a distinction without a difference. It could not be a basis to diminish the significance of the omission to the Tribunal's reasoning, contrary to the submissions of the Respondent.

10 9. On ground 1, the Appellant submits that the *omission* of one line in the transfer interview record was overtaken by the repeated, consistent evidence given by the Appellant thereafter on the omitted topic from the transfer interview record. On ground 4, the tables turn and the Respondent essentially submits that the *statement* of one line in the transfer interview record was overtaken by the omission in the evidence given by the Appellant thereafter on the expressly stated topic from the transfer interview. This appeal therefore turns on whether the transfer interview record is sacrosanct or not. If it is not, the appeal should be allowed on ground 1. If it is, ground 4 should be allowed.

10. On **ground 4**, the Respondent's submission is, in essence, that the Appellant only raised his attendance at a political protest at the transfer interview, so it can be ignored
20 in the analysis by the Tribunal. This is at odds with the Tribunal's own assessment of material which only appeared before it because it was in the transfer interview record. In that regard, the Tribunal highlighted that it is important that this was 'the first opportunity [the Appellant] was given to... explain... so important an area of [his] claims.'[15] In that light, the fact that the Appellant stated it – at a time when he was without legal representation – elevated its importance to a level commensurate with the importance given to the omission in evidence on the very same page of the transfer interview record, which is the subject of ground 1.

11. The Respondent otherwise addresses a different point to the one made in the submissions in respect of what it terms '**the particular claim**' at RS [31]. It is not the
30 Appellant's submission that a standalone integer of the claim was made out by the Appellant's statement that he attended political protests; contrary to RS [39]-[42], [49]. The Appellant's submission is that in respect of his claim to be at real risk of relevant harm as a failed asylum seeker (as the Respondent acknowledges at RS [45]) it was accepted that the profile of such a returnee would be determinative of that risk, and he had such a profile by reason of his attendance at political protests before he fled Iran. His evidence about that profile – being a submission of substance and directly relevant to the inquiry – was given no attention at all by the same Tribunal that was eager to otherwise emphasise the importance of that which was said by the Appellant at the transfer interview. Whether one calls such crucial, personal information an 'integer' or

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[13] CB 221 [22]
[14] CB 223 [31]
[15] CB 220-221

'a submission of substance' or 'evidence of significance'[16] is beside the point – it was evidence given by the Appellant which the Tribunal was obliged to take into account given that it was directly relevant to its assessment of whether he was at risk of harm as a failed asylum seeker with a history of political protest. The country information was clear that such persons were at increased risk.

12. It follows that this is a case that fits neatly into the case law cited by the Respondent at RS [33]- [35]. That is, it arose 'clearly' and no 'creativity' was needed on the part of the Tribunal. As soon as the Tribunal was of the view – which was open on some of the material – that the risk of harm to a failed asylum seeker was determined by their personal profile, including any history of involvement in political protests, it was then obliged to consider the effect of this Appellant having such a history. It did not do that. It was not the role of, nor the expectation of law of, the Appellant that he would give the same evidence repeatedly (contrary to RS [46]) or under neat, pleadings headings (contrary to RS [40]) for that information to be a matter the Tribunal needed to consider. Courts, including this one, have repeatedly rejected the notion that claims to protection need to be articulated with that level of precision in order to be the subject of mandatory consideration by the Tribunal.[17] The Tribunal assured the Appellant at the hearing that 'we're going to, very seriously, consider everything you've said'.[18] This is what the law required of it. Yet, that country information and the Appellant's statement directly on point were not considered by the Tribunal. Given that the assessment of refugee status is one that is fundamentally one of 'degree and proportion',[19] this omission in the analysis could well have had determinative significance.

13. In respect of what the Respondent terms **'the general claim'** at RS [31.2] – to fear harm as a failed asylum seeker *per se* – the complaint is different from that concerning 'the particular claim'. In that respect, the flaw in the Tribunal's analysis was in failing to weigh country information which was directly on point and which demonstrated that no particular profile was needed to be at real risk of harm as a failed asylum seeker. The context highlighted by the Respondent at RS [48] is important in this respect since it is the Tribunal's rejection of this aspect of the claim that was made, absent analysis of the country information, that gives rise to this sub-ground of appeal.

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[16] Submissions of the Appellant at [59]-[61]
[17] *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 v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [24]; see also *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307 at [58] per Mortimer J
[18] CB 168 lines 28 - 29
[19] *BRF038 v The Republic of Nauru* [2017] HCA 44 at [43], [63] per Keane, Nettle and Edelman JJ