

BETWEEN:

ETA 067

Appellant

and

10

REPUBLIC OF NAURU

Respondent

RESPONDENT'S REDACTED SUBMISSIONS

Part I: PUBLICATION ON THE INTERNET

---

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

Part II: ISSUES

---

2. The Republic submits that the issues in the appeal are:

In relation to ground 1:

- 20 a. Whether the Court should infer from the statement of reasons prepared by the Refugee Status Review Tribunal, that the Tribunal failed to consider the appellant's evidence in relation to his friend, [REDACTED]
- b. If the Court infers that the Tribunal failed to consider the appellant's evidence with respect to [REDACTED] whether that justifies remittal to the Tribunal under s 44 of the *Refugees Convention Act 2012* (Nr) (the RC Act)?

In relation to ground 2:

- c. Did the Tribunal fail to comply with the requirements of procedural fairness in not specifically mentioning to the appellant the possibility that it might find that he was not a member of the Bangladesh National Party (the BNP)?

---

Filed on behalf of the Respondent by:

Rogan O'Shannessy  
Level 30, 35 Collins Street  
Melbourne, Victoria  
3000



Date of this document: 5 March 2018

File ref: HCA 17-M167  
Telephone: 0457 000 678  
Facsimile: none available

E-mail: roganoshannessy@naurursd.com

### **Part III: 78B NOTICE NOT REQUIRED**

---

3. The Republic has considered whether any notice is required under s 78B of the *Judiciary Act 1903* (Cth) and considers that such notice is not required.

### **Part IV: FACTUAL BACKGROUND**

---

4. The Republic does not dispute the appellant's summary of the background to this matter under the heading "Part V. Facts" in his written submissions.

### **Part V: RELEVANT PROVISIONS**

---

5. The Republic submits that the only relevant legal instrument is the RC Act as in force on 30 September 2015.

### **10 Part VI: ARGUMENT**

---

#### **Two bases supporting the decision**

6. The question for the Tribunal under the RC Act was whether the appellant was a refugee under the Refugees Convention (ss 3, 6, 31, and 34 of the RC Act). The criteria in that respect are set out in Ar 1A(2) of the Refugees Convention, which required satisfaction of at least four cumulative elements, being that:
- a. the appellant was outside Bangladesh;
  - b. (a) was "owing to" a well-founded fear of persecution;
  - c. (a) and (b) were "for reasons of" race, religion, nationality, membership of a particular social group or political opinion;
  - 20 d. the appellant was unable, or owing to (b) and (c) unwilling, to avail himself of the protection of Bangladesh.
7. If the appellant failed to satisfy any one of the above criteria (amongst others), he could not be recognised as a refugee.

8. The Tribunal found that the appellant's fear of persecution was not well-founded (Reasons [40]), and that he was not outside of Bangladesh "owing to"<sup>1</sup> any fear of persecution (because he could relocate) (Reasons [41]).
9. Even if the appellant demonstrates error in relation to the findings that his fear of persecution was not "well-founded", that does not affect the Tribunal's findings that the appellant was not outside of Bangladesh "owing to" any fear of persecution.<sup>2</sup> The inverse applies if the appellant demonstrates error affecting the Tribunal's findings in relation to relocation.
10. The Republic submits, therefore, that the appellant must demonstrate relevant error in relation to the Tribunal's findings that his fear of persecution was not well-founded and that he could relocate to avoid any harm. That is, the appellant must succeed on both grounds one and two to obtain any relief.

### **Ground 1**

#### *The duty of the Tribunal to "consider" material*

11. The Republic accepts that:
- a. The Tribunal is under a duty to afford procedural fairness to a review applicant<sup>3</sup> and that one requirement of that obligation is to consider clearly articulated arguments.<sup>4</sup>
  - b. The statutory obligation of the Tribunal to perform "merits review" under Div 1 of Pt 4 requires the Tribunal to consider all claims made by a review applicant as to why they should be found to be a refugee or found to be owed complementary protection.<sup>5</sup>

---

<sup>1</sup> *SZATV v Minister for Immigration* (2007) 233 CLR 18, 24-26 [15]-[22].

<sup>2</sup> *SZMCD v Minister for Immigration* (2009) 174 FCR 415, 438 [121]-[122].

<sup>3</sup> *BRF 038 v Republic of Nauru* (2017) 91 ALJR 1197.

<sup>4</sup> *Dranichnikov v Minister for Immigration* (2003) 197 ALR 389, 394 [24].

<sup>5</sup> *NABE v Minister for Immigration (No 2)* (2004) 144 FCR 1, 19-21 [61]-[63].

and therefore, that:

- c. A failure by the Tribunal to consider a clearly articulated argument, or a claimed basis on which a review applicant is said to be a refugee or to be owed complementary protection, may justify an order under s 44 of the RC Act remitting the matter to the Tribunal for reconsideration.

*Determining whether there has been a failure to consider some matter*

12. An appellant before this Court bears the “burden of persuasion” to show that some matter has not been considered.<sup>6</sup> In order to discharge this burden, an appellant will usually point to the statement of reasons prepared by the Tribunal and highlight an omission by the Tribunal to mention that matter.
13. That alone does not necessarily justify an inference that the matter was not considered. Much will depend on the circumstances of each review, having regard to the statement of reasons prepared by the Tribunal. Some matter may have been considered but found not to be material, and so, not requiring specific mention in the reasons.<sup>7</sup> Further, the Tribunal is not required to refer to every piece of evidence and every contention made by an applicant,<sup>8</sup> nor is it necessary for the Tribunal to give a line by line refutation of material put to it.<sup>9</sup> Some matters may not have been mentioned because they are subsumed in findings of greater generality or because a premise of that matter has been resolved in a way that makes further mention of that matter otiose.<sup>10</sup>

*It cannot be inferred that the Tribunal failed to consider evidence regarding* [REDACTED]

14. Relevantly, the appellant claimed that he was involved with the BNP until 2008, whereupon people associated with the Awami League (**the AL**) sought to persuade him to join the AL. The AL were initially approaching him at the

---

<sup>6</sup> *SZSSC v Minister for Immigration* (2014) 317 ALR 365, 391 [81(g)].

<sup>7</sup> *Minister for Immigration v SZSRS* (2014) 309 ALR 67, 75 [34].

<sup>8</sup> *Applicant WAEE v Minister for Immigration* (2003) 236 FCR 593, 604 [46].

<sup>9</sup> *Re Minister for Immigration; Ex parte Durairajasingham* (2000) 168 ALR 407, 422-423 [65]-[67].

<sup>10</sup> *Applicant WAEE v Minister for Immigration* (2003) 236 FCR 593, 604-605 [46]-[47].

rate of once or twice a week, which increased to around twice or three times per week at the time of his departure from Bangladesh in 2013.

15. The appellant did not claim that the AL had caused him any specific form of violent harm, and the only incident of violence befalling him was during altercations in the lead up to the 2008 election (Reasons [31]).
16. The appellant argued that the conduct of the AL was likely to escalate if he were returned to Bangladesh (Tribunal Statement [12]-[16]). He gave as an example the circumstances of ██████ (who was initially described by the appellant as a "poor man" (RSD Statement [11]), but whom the Secretary records was also said by the appellant to be "a younger BNP member" (Secretary's determination 48.6) and the appellant later said was his "friend" (Tribunal Statement [13])). This evidence was an example of the adverse conduct of the AL towards those whom the AL has "attempt[ed] to forcibly recruit" but who had resisted recruitment (Tribunal Statement [12]-[13]).
17. In paragraph 31 of its reasons, the Tribunal accepted that groups of young men associated with the BNP and the AL "may engage in antagonistic behaviour towards their political opposites". This statement embraces the evidence regarding ██████ because what was claimed to have happened to ██████ comfortably fits within the expression "antagonistic behaviour" (being a demonstration of opposition or hostility towards another) and that behaviour was toward a "political opposite", noting that ██████ was a member of the BNP and was beaten was because he had refused to join the AL (a demonstration of political opposition to the AL).
18. The appellant is incorrect to assert that the appellant had never identified ██████ as a member of the BNP (AS [56]); the Secretary states (Secretary's determination 48.6):
- ...the Applicant stated that it was because the AL wanted him to join their party and that the same thing happened to many people, including a younger BNP member named ██████ (emphasis added)
- 30 The appellant has not challenged the correctness of the Secretary's record.

19. Although it is unclear how it could assist the appellant's case, he is any event also incorrect to assert that the Tribunal in paragraph 31 of its reasons did not deal with conduct any more serious than harassment, mocking, pushing or shoving (AS [57]); the Tribunal in that paragraph accepted that the appellant had been "physically beaten" in altercations in the lead up to the 2008 election.
20. It follows that the Court should read the statement by the Tribunal at paragraph 31 as dealing with the evidence of [REDACTED] together with other evidence of political antagonism, at a level of generality which made otiose any more specific mention of each piece of evidence on that topic.
- 10 *Any failure to consider the evidence regarding [REDACTED] does not justify remittal*
21. If the Court infers that the Tribunal did not consider the evidence regarding [REDACTED] the Republic submits that any failure to consider that evidence does not justify remittal.
22. The appellant's evidence was that over hundreds of interactions with the AL in which the AL sought to recruit the appellant, across a period of several years, he had not been harmed. Nor was there any evidence that the behaviour of the AL toward the applicant had escalated in severity. For this reason, the Tribunal did not accept the appellant's claims that there was a real chance of escalation of harm in respect of the appellant, to the point where it might rise to the level of persecutory; as the appellant appears to accept at AS [53], this is implicit in the finding in paragraph 31 of the reasons, and the conclusion expressed in paragraph 40 of the reasons.
- 20
23. There was no specific evidence about whether or not [REDACTED] had experienced any similar circumstances, and the most that can be said is that the appellant sought to draw some relationship between his situation and that of [REDACTED] with the expression "in this manner" in his Tribunal Statement at [13], referring back to the claimed gradual escalation of AL actions in his Tribunal Statement at [12]. It is not clear if this was meant to suggest that [REDACTED] had also experienced hundreds of non-violent interactions with the AL before being beaten. This lack of clarity seriously diminished any merit in the comparison
- 30

between the appellant's own experiences with those of [REDACTED]. Indeed, even if the Tribunal engaged in terms with the evidence regarding [REDACTED] what more could it have said other than that "we do not know enough about the circumstances of [REDACTED] to compare his situation them with the appellant's situation"?

24. The Republic respectfully submits that these matters demonstrate that any failure to consider the evidence regarding [REDACTED] does not justify remittal.

*Additional response*

- 10 25. It is unclear how the appellant's argument is advanced by the suggestion that the Tribunal incorrectly stated that it had put some matters to the appellant (AS [53]), but in any event, these matters were put to the appellant (T29.24-T29.27, T33.22-T33.36).

**Ground 2**

- 20 26. The Republics accepts as applicable the statement of principle in *Alphaone Pty Ltd* (1994) 49 FCR 576, 591-592, that procedural fairness obligations extend to require the decision-maker to identify to the person affected, any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made, and that the Tribunal is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material.

27. Although the appellant ostensibly puts his case by reference to the requirement that the Tribunal draw attention to critical "issues" arising in a review, it appears that the appellant's substantive arguments are directed to the requirement that the Tribunal advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material.

28. On either basis, the appellant's substantive allegation is that he could not have been expected to know that the Tribunal may find that he was not formally a member of the BNP.

29. This challenge is made only “in the context of [the Tribunal’s] consideration of safe relocation within Dhaka” (AS [68]), which appears to spring from an acceptance of the matters set out in paragraphs 6-10 above.
30. There are three fatal difficulties with this argument insofar as it is based on the Tribunal’s obligation to draw attention to critical “issues” arising in a review.
31. First, the appellant’s formal membership, or not, of the BNP was not in any way relevant to the safety of his relocation. The Tribunal found that the appellant did not have a profile that would make him of interest to political activities in any context outside of his own suburb, based on the totality of his political activities (Reasons [41]). In circumstances where the appellant did not claim that he might resume any political activity, or that the bare fact of formal membership as opposed to practical affiliation or association were risk factors, the fact of whether or not he had formally been a member of the BNP up until 2008 had no bearing on whether or not the harm that he feared was localised, or not. It was not on any view a “critical issue or factor on which the administrative decision is likely to turn”.<sup>11</sup>
32. Second, although the decided cases have not clearly explained the level of specificity with which “critical issues” should be articulated or defined,<sup>12</sup> in this case the fact of the appellants formal membership of the BNP was not itself a discrete issue in the review and was just one fact going to the issue, which should be understood as being “the extent of the appellant’s political profile in Bangladesh”. He was plainly aware of this issue.
33. Third, the exchanges between the appellant and the Tribunal at T13-14 reveal that the appellant was directly questioned about membership processes, and the questioning was in the nature of a “test” or a “quiz”. Given that the appellant does not complain of any procedural unfairness in respect of the Tribunal’s reliance upon the country information mentioned in paragraph 24 of its reasons, or its questioning of him at the hearing, this was adequate to put

---

<sup>11</sup> *Kioa v West* (1985) 159 CLR 550 at 587; *Alphaone Pty Ltd* (1994) 49 FCR 576, 591

<sup>12</sup> Some attempts are made in *SZDFZ v Minister for Immigration* (2008) 168 FCR 1, [17]-[35]; *SZJUB v Minister for Immigration* [2007] FCA 1486, [12]-[28].



the appellant on notice that his formal membership, or not, of the BNP was an issue in the review.

34. Insofar as the appellant's case is put on the basis that his formal membership, or not, of the BNP was an adverse conclusion which would not obviously be open on the known material, this argument must fail in the absence of any procedural unfairness complaint in relation to the fatally contradictory country information mentioned in paragraph 24 of the Tribunal's reasons. Once it is appreciated that the known material before the Tribunal included the appellant's evidence of how he became a member of the BNP and  
10 contradictory country information about membership processes of the BNP, the adverse conclusion about his formal membership was plainly open.

35. It is unclear how the supposed inaccuracy of the Tribunal's recording of the appellant's evidence in paragraphs 12, 24 and 25 of its reasons assists his argument on ground two (AS [77]-[80]). Paragraphs 12 and 24 of the Tribunal's reasons are consistent with the evidence at the hearing (T13-14). Paragraph 25 of the reasons overstates the evidence, but this was immaterial to the Tribunal's finding that he was not a formal member of the BNP based on the divergence between the appellant's evidence and country information. No procedural unfairness is demonstrated in this respect.

20

**Part VIII: ESTIMATE OF ORAL ADDRESS**

---

33. The Republic estimates that it will require fifty minutes in oral submissions

Dated: 19 February 2018



**ANGEL ALEKSOV**

Castan Chambers

T: (03) 9225 6736

F: (03) 9225 8558

[aleksov@vicbar.com.au](mailto:aleksov@vicbar.com.au)