IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M151 of 2017

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN

EMP144
Appellant

and

The Republic of Nauru
Respondent

REDACTED APPELLANT'S SUBMISSIONS

I INTERNET PUBLICATION

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

II ISSUES

2. There are five principal issues for determination.

   a. Whether the Supreme Court of Nauru erred by failing to conclude that the Refugee Status Review Tribunal (**Tribunal**) had erred by failing to consider the Appellant's objections to relocation under the *Convention Relating to the Status of Refugees*[1] (**Refugees Convention**).

   b. Whether the Supreme Court of Nauru erred by failing to conclude that the Tribunal had erred by denying the Appellant procedural fairness in that it did not put the determinative issue to him, namely the question of whether it was reasonably practicable for him to relocate.

   c. Whether the Supreme Court of Nauru erred by failing to conclude that the Tribunal had erred by failing to consider integers of his complementary protection claim under s 4(2) of the *Refugees Convention Act 2012* (Nr) (**Act**), namely that returning him would involve a breach of Nauru's international obligations because he was at real risk of being arbitrarily deprived of his life, or subject to "torture, cruel, inhuman or degrading treatment or punishment".[2]

   d. Whether the Supreme Court of Nauru erred by failing to conclude that the Tribunal had erred by applying a relocation test to the Appellant's claim for complementary protection, where no such test exists at law.

   e. Whether the Supreme Court of Nauru erred by failing to conclude that the Tribunal had erred by denying the Appellant procedural fairness on the question of whether his son had been denied citizenship because of his

[1] Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954)

[2] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7 (**ICCPR**).

Allens
Deutsche Bank Place
126 Phillip Street
Sydney NSW 2000

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

political activities, rather than because of citizenship law, by putting the issue to him and not providing him with a meaningful opportunity to respond.

III SECTION 78B NOTICE

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

IV JUDGMENT BELOW

4. The citation for the decision of the Supreme Court of Nauru is *EMP144 v Republic of Nauru* [2017] NRSC 73.

V FACTUAL BACKGROUND

The Appellant's claim

5. The Appellant was born on 27 April 1980, in the village of Pakhu, in the Myagdi district and Dhaulagiri region of Nepal.[3] He is a Royalist and a member of the Rashtriya Prajatantra or Nepal National Democratic Party of Nepal, as is the rest of his family.[4]

6. In 2003 the Dhaulagiri region was taken over by the Nepal Communist Party Mao (**NCPM**).[5]

7. On 18 April 2004, the NCPM came to the Appellant's home and kidnapped his brother. That brother has not been seen since.[6]

8. On 26 June 2005, the Appellant's father was asked to join NCPM.[7] When he refused he was tortured, after which he fled to India and has not returned.[8]

9. In 2006, NCPM came into power in Nepal and mandated that the King be removed from any position of power or authority.[9]

10. [redacted] NNDP supports the King and promotes Nepal as a Hindu State.[11]

11. The Appellant's uncle was elected President of NNDP for the Dhaulagiri region.[12] On 7 August 2011 he was taken from a NNDP meeting to the market. There he was

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[3] Court book before the Supreme Court of Nauru, at page (**CB**) 4, 21.

[4] CB 11, 34-35.

[5] CB 35.

[6] CB 9, 11, 35, 99.

[7] CB 35.

[8] CB 35.

[9] CB 35.

[10] CB 11, 21, 33, 34.

[11] CB 35.

[12] CB 11, 34, 35.

painted black and had shoes tied around his neck. He was paraded through the streets to humiliate him.[13] The Appellant's uncle later fled to Kathmandu.

12. On 10 August 2011, approximately 15 members of the NCPM came to the Appellant's home in the village of Pakhu late at night.[14] The Appellant was able to escape out of a back window. For the next three months the Appellant hid in various places, including the outskirts of Benni Town, with his uncle in Ratneychaur, and with his wife's parents in Baglung.[15]

13. On 21 May 2012, the Appellant received a letter threatening to kill him if he did not join the NCPM.[16]

14. On 29 December 2012, members of the Youth Communist League (**YCL**) – the youth sector of the NCPM - came to the Appellant's house.[17] They broke down his door and dragged him outside, where they beat him until he was unconscious.[18] His mother was also threatened, and his wife was tied up inside their house and assaulted.[19]

15. On 30 December 2012, when the Appellant was released from hospital, he fled to the Baghlom district in fear for his safety.

16. On 2 January 2013, members of the NCPM burnt the Appellant's house down.[20]

17. In March 2013, the Appellant moved to Gangabu, Kathmandu, where he arranged to leave the country.[21]

18. The Appellant left Nepal on 25 May 2013.[22] He arrived in Australia on 13 September 2013.[23]

19. The Appellant was transferred to Nauru on 1 November 2013.[24] He lodged an application under the Act on 29 January 2014.[25]

20. The Appellant's claim for protection was refused by the Secretary of the Department of Justice and Border Control on 12 September 2014.[26] An application for review by the Tribunal was lodged on 2 October 2014.

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[13] CB 11, 34, 35.

[14] CB 35 112-114.

[15] CB 114.

[16] CB 11, 35, 99.

[17] CB 11, 35, 99, 112,.

[18] CB 115.

[19] CB 11, 35, 99, 112.

[20] CB 11, 35, 116.

[21] CB 4.

[22] CB 9-10, 24, 31.

[23] CB 10, 13, 31.

[24] CB 31.

[25] CB 17-37.

[26] CB 71-89.

21. At the start of November 2014, the Appellant's wife went to the district administration office to obtain Nepalese citizenship for their son. She was unable to obtain it. One result of this is that their son is not able to attend school.[27]

22. When the Appellant's wife was at the district administration office, a YCL member recognised her. They found her later and demanded that she tell them the Appellant's whereabouts. In fear of her life, she told them where the Appellant was.[28]

The Tribunal's decision

23. On 17 January 2015 the Tribunal affirmed the Secretary's decision,[29] on the basis that the persecution that the Appellant faces is localised, and that he can relocate elsewhere in Nepal.[30]

24. The Tribunal found the Appellant to be a credible witness.[31] The Tribunal accepted that the Appellant was an active member of the NNDP, as was his uncle.[32] The Tribunal accepted too that the Appellant's brother disappeared in 2004, and that his father left Nepal for India, both incidents attributable to adverse conditions brought about by Maoists.[33] The Tribunal accepted that the Appellant's uncle had been subjected to public humiliation as well.[34] The Tribunal accepted that the Appellant was assaulted in his house and was hospitalised, and that a few days later his house was burned down.[35] The Tribunal also accepted the more recent events in November 2014 involving the Appellant's wife and YCL members.[36] As a result, the Tribunal concluded that the Appellant would suffer serious harm – harm amounting to persecution – at the hands of local Maoist groups, for reasons of his political opinion if he were to return.[37]

25. The Tribunal considered whether returning the Appellant to Nepal would breach Nauru's international obligations arising under, relevantly for present purposes, the ICCPR and any obligations under the *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia* (**the MOU**), and in particular article 19(c) thereof which obliges Nauru to refrain from transferring any asylum seeker to another country where such removal would breach Nauru's obligations. The Tribunal stated that there were 'no arguments advanced as to why the applicant would suffer' any harm giving rise to a complementary protection claim.[38]

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[27] CB 123.

[28] CB 123.

[29] CB 187-197.

[30] Tribunal decision, 9[42].

[31] Tribunal decision, 5[24]. The Tribunal refers to the NNDP by their Nepalese name, RRPN.

[32] Tribunal decision, 5[25].

[33] Tribunal decision, 5[25].

[34] Tribunal decision, 6[29].

[35] Tribunal decision, 7[30].

[36] Tribunal decision, 7[30].

[37] Tribunal decision, 7[31].

[38] Tribunal decision, [43].

26. The Tribunal's reasons in respect of the Appellant's claims to complementary protection[39] are difficult to decipher. It seems that the Tribunal ultimately rejected the Appellant's complementary protection claims for one of two reasons: either because

    a. 'no arguments were advanced as to why [he] would suffer' relevant harm; or

    b. he could reasonably relocate away from such harms.

    If the Court is of the view that the Appellant's complementary protection claim was rejected on the basis that the Appellant could reasonably relocate, the Appellant relies on grounds 1, 2, and 4. If the Court is of the view that the Appellant's complementary protection claim was rejected because 'no arguments were advanced as to why [he] would suffer' relevant harm, the Appellant relies on ground 3.

The decision of the Supreme Court

27. The Appellant appealed to the Supreme Court of Nauru. The Supreme Court heard the appeal on 6 May 2016.

28. Almost 17 months later, it dismissed the appeal and affirmed the decision of the Tribunal, pursuant to s 44 of the Act. It found that the Tribunal had acted correctly in its application of the relevant principles, when determining that the Appellant could reasonably relocate within Nepal.

29. Judge Khan did not identify which of the two possible constructions of the complementary protection reasons set out at 26 above he preferred.

30. This is an appeal from that decision of the Supreme Court of Nauru. The appeal lies as of right to this Court.[40]

VI ARGUMENT

Ground 1: Failure to take into account the Appellant's objection to internal relocation

31. The determinative issue of the Appellant's claim to refugee protection was the Tribunal's conclusion that he could relocate elsewhere in Nepal.[41]

32. It is well established that in order to make out a claim under the Refugees Convention the refugee claimant must establish that there is not only a reasonable possibility of persecution in one place, but that it would not be reasonable for that person to relocate from the country of asylum to elsewhere in the country of origin away from the risk of persecution.[42]

33. 'There are two aspects to the internal relocation principle that need to be considered. The first is whether there is a place (or places) in the country of nationality where the applicant for refugee status would not have a well-founded fear of persecution on a Convention ground. The second is whether it would be reasonable in the circumstances for the person to relocate to that place (or one of those places).'[43] The enquiry on the reasonableness of relocation:

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[39] See discussion below at 54.

[40] *BRF038 v The Republic of Nauru* [2017] HCA 44 at [40]-[41] per Keane, Nettle and Edelman JJ; *HFM045 v The Republic of Nauru* [2017] HCA 50 at [5] per Bell, Keane and Nettle JJ

[41] Reasons of the Tribunal [42].

[42] *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, per Bingham LJ

[43] *CID15 v Minister for Immigration and Border Protection* [2017] FCA 780 at [32] per Moshinsky J.

a. requires a consideration of a broader range of matters specific to the relevant person than the enquiry as to whether there is a real chance of persecution;[44]

b. is forward-looking – it has regard to the prospective reasonableness of the person moving to reside at the proposed place of relocation;[45] and

c. is made by reference to a proposed, identified[46] place of return in the country of origin.[47]

34. The Tribunal dealt first with the question of whether the Appellant could be removed from the risk of persecution at paragraphs 33 – 38. Then, in paragraphs 39 – 41, it turned its attention to whether the Appellant could reasonably relocate. Those reasons were as follows:

> 39. The Tribunal is satisfied that the applicant could reasonably be expected to establish himself elsewhere in Nepal and live a normal life without undue hardship. It notes that he lived for about three months in both neighbouring Baglang district (with his parents-in-law) and in Kathmandu before leaving Nepal. It notes that he is reasonably young (34 years) and able-bodied. He has completed year 10 of high school (leaving at 18 years) and is literate. He speaks the major language of Nepal and observes the religion of the large majority of his countrymen.
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> 40. The Tribunal notes that the applicant has shown resourcefulness in the past. When the road came to his district, he quickly learned to drive and was soon accomplished enough to be employed as a driver, taking passengers on journeys to destinations up to five hours away. He must have shown some political and/or leadership skills in order to be made the vice-president of his local RRP(N) branch, and may also have acquired other organising/administrative skills through his frequent work in the RRP(N) office in Benni from 2010.
>
> 41. In short, the Tribunal notes that in Nepal, "The law provides for freedom of internal movement, foreign travel, emigration and repatriation" and is satisfied that the applicant can freely move to, and settle in, any place outside the Pakhu/Benni area of Myagdi District.

35. This analysis reveals an error of law in the form of a failure by the Tribunal to deal with the specific integers that the Appellant himself had told it that made relocation unreasonable in his personal circumstances. Those reasons included:

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[44] *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307 at [49],[55],,[61] per Mortimer J; *SZQPY v Minister for Immigration and Border Protection* [2013] FCA 1133 at [69],[73][74] per Kenny J.

[45] *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307 at [12] per Mortimer J quoting James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014).

[46] *Plaintiff M13/2011 v Minister for Immigration and Citizenship* (2011) 85 ALJR 740 at 743 [19], [22] per Hayne J.

[47] *Minister for Immigration and Border Protection v SZSCA* (2014) 254 CLR 317 at 331 [39] per Gageler J; *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307 at [12] per Mortimer J quoting James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014). Noting the use of the term 'return' in Refugees Convention Article 1A and 33 and contra terminology of 'home area'. See, for example, *SZQEN v Minister for Immigration and Citizenship* (2012) 202 FCR 514 at 522 [36] per Yates J.

a. His family and he would 'face substantial prejudice in accessing education, employment and essential services'[48]

b. That he lived in hiding when he lived away from his home area[49] and he did so, in part, because he wished to ensure he did not publically express his political views, which he continues to hold, because "there is no freedom to express one's political views" throughout Nepal.[50] It is well established that hiding an inherent attribute to avoid harm is not a reason for a Tribunal to conclude that there is no risk of that harm;[51]

c. He does 'not have any tertiary or professional education, and I have no professional skills. I have only ever worked as a self-employed farmer and driver';[52] and

d. He holds ongoing fears for the safety of his wife and young son.[53]

None of these objections to relocation were mentioned or dealt with by the Tribunal when it considered the reasonableness of relocation of the Appellant in its reasons.

36. In applying the relocation test, the decision-maker must be satisfied that it is reasonable, in the sense of being practicable, for the applicant to relocate to another part of their country of origin. This inquiry "must depend on the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality".[54] The question of whether relocation to an identified place is reasonable is a separate question to whether the applicant faces a real chance of harm in the proposed place of relocation.[55]

> ...a range of issues may become relevant to the question of whether internal relocation is reasonable, depending on the circumstances and the issues raised by an applicant for refugee status, and, when they do, must be carefully regarded by the decision-maker.[56]

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[48] CB 36 [21]; see also 77

[49] CB 118 [69]

[50] CB 36 [23]

[51] *RT (Zimbabwe) and others (Respondents) v Secretary of State for the Home Department (Appellant)* [2012] UKSC 38 at [25]-[26]; *Minister for Immigration and Border Protection v SZSCA* (2014) 254 CLR 317 at 325 [17] per French CJ, Hayne, Kiefel and Keane JJ

[52] CB 118 and see also transcript of the Tribunal hearing p 5 line 6

[53] CB 119 [71]

[54] *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 27 [24] per Gummow, Hayne and Crennan JJ. See also *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 442 per Black J.

[55] The relevant authorities on this point are collated at *MZZZA v Minister for Immigration and Border Protection* [2015] FCA 594 at [34] per Mortimer J; and see also *MZZYC v Minister for Immigration and Border Protection* [2015] FCA 1426 at [18] per Davies J and *SZQPY v Minister for Immigration and Border Protection* [2013] FCA 1133 at [69],[73]-[74] per Kenny J

[56] *MZZQV v Minister for Immigration and Border Protection* [2015] FCA 533 at [68] per Barker J endorsed by the Full Court of the Federal Court at *MZAEU v Minister for Immigration and Border Protection* [2016] FCAFC 100 at [33] per North, Rangiah and Moshinsky JJ

This inquiry is "fact intensive". "Generalities will not suffice".[57] As explained by Mortimer J in *MZANX v Minister for Immigration and Border Protection*:

> ... detailed consideration of the circumstances "on the ground" in the area proposed for relocation will be required. General statements will be insufficient, because what is in issue is the practical and realistic ability of an individual to re-start her or his life in a new place, without undue hardship.... Likewise, the circumstances of that individual – her or his personal strengths and weaknesses, skills, material and family support, will need to be considered in some detail. A broad brush approach will not satisfy the requirements of the task to be performed. In order to determine whether, as a conclusion, relocation is "practicable" and "reasonable" for a particular individual, a level of comfortable satisfaction based on probative material must be reached by the decision-maker about what will face that particular individual and how she or he will cope.[58]

37. The error in this case is a denial of natural justice, contrary to s 22 of the Act. Objections to relocation are materially the same in this respect as integers of a protection claim itself. Section 22 of the Act required that the Tribunal "act according to the principles of natural justice".[59] In *Dranichnikov*, 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.[60]

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[61] and a corresponding entitlement to be heard by the decision-maker when the information is given.[62]

38. In this case, the Tribunal failed to respond to a substantial, clearly articulated argument (namely, that the Appellant could not reasonably relocate for expressly articulated reasons, detailed above) relying upon established facts (namely, that the Appellant had relocated within Nepal previously and unsuccessfully, which caused him to flee Nepal altogether).

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[57] *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307 at [51].

[58] *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307 at [55].

[59] The scope of procedural fairness under this Act was discussed by this Court in *BRF038 v The Republic of Nauru* [2017] HCA 44 at [54]-[56] per Keane, Nettle and Edelman JJ

[60] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24] per Gummow and Callinan JJ, see also at 1093 [32] per Gummow and Callinan JJ, approved and applied by a unanimous High Court in *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319 at 356 [90]

[61] *Minister for Immigration and Border Protection v SZSSJ, Minister for Immigration and Border Protection v SZTZI* (2016) 259 CLR 180 at 207 [83] per French CJ, Kiefel, Bell, Gageler, Keane, Nettle, Gordon JJ; see also the authorities summarised at *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [159]-[166] per Bromberg J

[62] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 45 [140] per Callinan J and *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 at 578 [389] per Flick J

39. It follows from the above that the Tribunal committed an error of law by failing to consider the substantial, clearly articulated claim of the Appellant that there were reasons particular to him which made relocation unreasonable. This was an error of law in that it was a breach of the Act.

Ground 2: Appellant was denied procedural fairness by not having the opportunity to respond to the determinative issue, namely that it was reasonable for him to relocate

40. The decisive issue in the rejection of the Appellant's refugee claim was the Tribunal's opinion that he could reasonably relocate within Nepal, notwithstanding that it accepted that there was a reasonable possibility that he would suffer persecution in the future in some parts of Nepal.

41. The Tribunal failed to draw to the attention of the Appellant and his representative the critical issue on review, namely whether it would be reasonable (in the sense of being practicable) for him to relocate elsewhere in Nepal. All the Tribunal raised – albeit briefly – was the risk of persecution to the Appellant elsewhere in Nepal which was only one of the criteria it had to consider in order to determine this question and his claim to protection.[63]

42. The relevant passage of the transcript is the following:

> MS ZELINKA: Okay. I think we're just about getting up to a natural justice brief. Can you see our points that we're looking at? We're looking at a very localized harm.
>
> MS PALMER: Is that on location?
>
> MS ZELINKA: So the harm is very localised that he has suffered – that he recognises the Maoists, they recognise him. It's a tiny place. And so, it seems reasonable to be anywhere else other than in that particular village, especially given the changes of circumstances.
>
> MS McINTOSH: ..... be relocation? Wouldn't be a relocation issue because he has said he's not going back to the village.
>
> MR FISHER: .....
>
> MS McINTOSH: That's different. Yes. It may not be a question of relocation.
>
> MR FISHER: No. Well, when - - -
>
> MS ZELINKA: That may be a semantic problem because it's – if he - - -
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> MS McINTOSH: It's a – yes. ..... the test might not be - - -
>
> MS ZELINKA: - - - EM144 says I am not going back to that particular village because my house has been burned down and chooses another location, then we're just racking our brains to see if that is the same test as relocation. But you may as well look at it under that....., but it does seems to be a localised fight with the participants knowing each other and so on. And, but we also look to the fact that even those localised fighters may very well have stopped. There's no evidence of them continuing in – over 5 the last year.

[63] See the relevant authorities discussed above at 33.

MS PALMER: So if he can replace or ..... if there is a still ongoing persecution, is it just the case that you will advance the ..... ?

MS ZELINKA: Yes, is there ongoing – yes, that's - - -

MS PALMER: Thank you.

MS ZELINKA: All right. Well, you can go to him and we will - - -

MR FISHER: So, the hearing is adjourned at 4.54 pm.[64]

It is notable that the Appellant did not speak *at all* during this brief exchange. It was almost exclusively between the Tribunal members themselves (the Tribunal members were: Mr Fisher, Ms Zelinka, and Ms McIntosh). But the error arises from the failure to alert the Appellant to the issue that was ultimately dispositive of his claims, namely the reasonableness of his relocation: he was given no opportunity to address that question in the course of the Tribunal's brief (and somewhat confused) discussion of a related point.

43. This involves a breach of either or both of two provisions of the Act. Section 22(b) requires that the Tribunal 'act according to the principles of natural justice'. Section 40(1) requires that the Tribunal 'must invite the applicant to appear' before it.

44. The wording of s 40(1)-(2) mirrors that found in s 425(1)-(2) of the Australian *Migration Act* 1958 (Cth). Of that section, the Australian courts have held that the obligation arising from the mandatory requirement to invite the Applicant to appear:

> ... indicate[s] a legislative intention that an applicant is to have an opportunity to attend an oral hearing for the purpose of giving evidence and presenting argument. *The invitation must not be a hollow shell or an empty gesture*... what is clear is that the Parliament has made compliance with s 425 of the Act a necessary condition and element of a fair hearing by the Tribunal...[65] [emphasis added]

The same Full Federal Court went on to hold that:

> ...the Tribunal did not comply with s 425 of the Act. It did not extend a meaningful invitation to the respondent. The respondent did not receive the fair hearing required by the Act. Consequently the Tribunal made a 'jurisdictional error.'[66]

The same reasoning applies with equal force to this case.

45. The Tribunal was obliged by the Act to inform the Appellant that it was considering whether it would be reasonable and practicable for him to relocate elsewhere in Nepal. This turned out to be the decisive issue. At no point was it raised directly with him. Sections 22 and / or 40 of the Act required that it be. The failure to raise this with him and / or his representative was a breach of either or both provisions.

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[64] Transcript, 41-42.

[65] *Minister for Immigration & Multicultural & Indigenous Affairs v SCAR* (2003) 128 FCR 553 at 559-561 [31]-[37] per Grey, Cooper and Selway JJ.

[66] Ibid [41]. This decision remains good law see *Antipova v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 584 at [90]-[91] per Gray J.

Ground 3: The failure to deal with integers of the Appellant's claims to complementary protection.

46. The Tribunal's brief reasons for rejecting the Appellant's claim to complementary protection were as follows:

> Having found that the applicant is not a refugee, the Tribunal now turns to consider whether he is owed complementary protection. In addressing this question, his representative asserted that if the applicant were returned to Nepal, he would face "physical violence, discrimination and deprivation of economic and social rights". *There are no arguments advanced as to why the applicant would suffer these various types of harm, other than to state that removal to Nepal constitutes circumstances where the applicant has "a well-founded fear". However, the Tribunal has already found this not to be the case.*
>
> The representative has cited a small amount of country information indicating that torture has been practised in Nepal but there is no argument as to why this may be relevant to the applicant. The representative has also put forward legal opinion indicating that discrimination may constitute "degrading treatment", but again there is nothing to relate this to future circumstances of the applicant. The Tribunal considered the applicant's past and future circumstances in reaching its decision on his Convention-related claims and there is nothing before it to support the representative's written statement that "there is a reasonable possibility that the applicant will be denied economic and social rights in Nepal". This is a mere assertion.
>
> In short, the Tribunal does not find that the applicant is owed complementary protection. [emphasis added][67]

47. The Tribunal was in error to conclude that 'There are no arguments advanced as to why the applicant would suffer these various types of harm, other than to state that removal to Nepal constitutes circumstances where the applicant has "a well-founded fear"' and that 'there is no argument as to why [torture] may be relevant to the applicant.'

48. In this case, a range of harms were expressly raised by the Appellant before the Tribunal. Each was a claim detailed and made by reference to past experience leading to a future risk of harm to the Appellant. Each was sufficiently defined by reference to a potential breach of Nauru's international obligations under the ICCPR, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[68] (**CAT**) and clause 19(c) of the 2013 *Memorandum of Understanding between Nauru and Australia*.

49. The Appellant claimed that he was at real risk of being subject to:

    a. Arbitrary deprivation of his life, contrary to Article 6 of the ICCPR by those who are his political opponents, as occurred to 25 of his political colleagues in his area[69] and as was probably experienced by his brother who has disappeared;[70]

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[67] Reasons of the Tribunal [43-45].

[68] Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987)

[69] CB 35 [14], 77.

b. Torture, contrary to Article 6 of the ICCPR and Article 3 of CAT on the basis that his father was tortured because he held the same political opinions as the Appellant;[71]

c. Degrading treatment contrary to Article 6 of the ICCPR on the basis that his uncle was subject to humiliation[72] in the form of being painted black and paraded publically with shoes hanging around his neck because that uncle held the same political opinions as the Appellant.[73]

50. 'Proceedings before the Tribunal are not adversarial; and issues are not defined by pleadings, or any analogous process.'[74] As has been recently stated by the Federal Court of Australia in a refugee law context:

> ...it is important to recall that the task of the reviewer is to form a state of satisfaction on the basis of all the material before her or him, including what might reasonably be known because of the decision-maker's experience and expertise, and the material regularly provided to decision-makers for the purposes of making decisions about Australia's protection obligations. It is, as the courts have said many times, an inquisitorial task, informed by what an applicant puts forward, but not necessarily confined to those matters.[75]

51. In this instance, the Tribunal was in error when it determined the Appellant's complementary protection claims on the basis that 'no arguments [were] advanced as to why the applicant would suffer these various types of harm'. They were so advanced.

52. To fail to deal with a claim of that kind involves a constructive failure to exercise jurisdiction and a denial of procedural fairness.[76] The Tribunal was obliged to deal with them in order to comply with s 22 for the reasons set out at paragraph 37 above.

Ground 4: Relocation test applies in refugee claims but not in complementary protection claims

53. In the alternative to his claims to be a refugee under the Act, the Appellant submitted that he was owed complementary protection, on the basis that there was a real risk that he would face, *inter alia*, arbitrary deprivation of life, torture or degrading treatment. The Tribunal rejected this claim, arguably,[77] because it concluded that it could not be made out for the same reason that his claim under the Refugees

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[70] CB 11, 34 [5], 36 [22], 77, 99 [18], 115 [42], 116 [52], 123, 147, 148, 153, 170.

[71] CB 35 [11], 36 [22], 77 and 183.

[72] *Moldovan v Romania,* European Court of Human Rights, Application Nos 41138/98, 64320/01 (12 July 2005), [101]; *Greek case*, European Commission on Human Rights, Application Nos 3321/67, 3322/67, 3323/67, 3344/67 (18 November 1969), 12 Yearbook of the European Convention on Human Rights 170; *East African Asians v United Kingdom* (1973) 3 EHRR 76 [189].

[73] CB 35 [13], 36 [22], 55, 63.

[74] *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 478-479 [1] per Gleeson CJ.

[75] *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307 at [58] per Mortimer J.

[76] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 356 [90] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ ; *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24] per Gummow and Callinan JJ and 1102 [95].per Hayne J.

[77] See discussion at 26 above.

Convention failed, namely because he could reasonably relocate elsewhere. For the reasons set out below, this was an error of law.

54. Section 4(2) of the Act states that Nauru must not 'expel or return any person to the frontiers of territories in breach of its international obligations'.[78] Nauru's international obligations include those arising under the ICCPR.[79] This instrument, as well as other international treaties to which Nauru is party[80] including the CAT,[81] the *Convention on the Rights of the Child*[82] and the *Convention on the Elimination of All Forms of Discrimination Against Women*[83] contain express or implied non-refoulement obligations. This series of non-refoulement obligations is known collectively as 'complementary protection'[84] – so called because they complement the

[78] See also the definition of 'complementary protection' in s 3, read together with ss 6(1), 31, 33 and 34.

[79] Nauru has signed but not yet ratified the ICCPR. However, it has 'expressed an intention to be bound by' that treaty; United Nations Human Rights Council Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1,* 10th sess, UN Doc A/HRC/WG.6/10/NRU/1 (5 November 2010) at [32].

[80] Office of the High Commissioner for Human Rights, *Reporting Status for Nauru* (11 November 2017) <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=NRU&Lang=EN>.

[81] Article 3(1).

[82] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) Article 6 and 37 as discussed at United Nations Committee on the Rights of the Child, General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, UN Document no CRC/GC/2005/6, 1 September 2005, [27]. See, further, United Nations High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol, 26 January 2007, [19]; Inter-American Court of Human Rights, Advisory Opinion OC-21/14, Rights and Guarantees of Children in the context of Migration and/or in need of International Protection, 19 August 2014, [220]-[222]; see also Farmer, Alice, 'A Commentary on the Committee on the Rights of the Child's Definition of Non-Refoulement for Children: Broad Protection for Fundamental Rights" (2011). Res Gestae Paper 8, 43-44.

[83] Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) Article 2(d), as discussed at United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, UN document no CEDAW/C/GC/32, 14 November 2014, [23]; *MNN v Denmark*, communication no 33/2011, 15 July 2013 [8.10]; *N v Netherlands*, communication no 39/2012, 17 February 2014, [6.4]-[6.5]; *SO v Canada,* communication no 49/2013, 27 October 2014, [9.5]; *YW v Denmark,* communication no 51/2013, 2 March 2015, [8.6]-[8.7].

[84] 'Complementary protection' is not to be confused with 'subsidiary protection', which is a codified scheme of European law that has been transposed into domestic law of European states; see Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (**Directive**), relevantly including Article 8. Among the differences between international complementary protection law and European subsidiary protection law are that:

1. complementary protection prohibits return to 'cruel treatment of punishment' (ICCPR Art 7) where subsidiary protection does not (Directive Art 15(b)); and
2. subsidiary protection prohibits return to a place where there is a 'serious and individual threat to a civilian's... person by reason of indiscriminate violence in situations of international or internal armed conflict' (Directive Art 15(c)) where complementary protection does not used this qualification at all, albeit that it might factually overlap to an extent with the prohibition on return to 'arbitrary deprivation of life' (ICCPR Art 6(1)); and
3. subsidiary protection is of a prescribed one year duration (Directive Art 24(2)), where complementary protection has no fixed time limit.

obligations of State signatories to the Refugees Convention by providing additional means to avoid return to harm prohibited by international human rights law.[85]

55. The content of those complementary protection obligations is relevantly different from those applicable where persons are claiming refugee status under the Refugee Convention. In Refugee Convention claims (as discussed further below) a person will not be entitled to protection if he or she can reasonably relocate to another part of the relevant country.

56. Article 7 of the ICCPR provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' This international obligation on Nauru in respect of such mistreatment is confirmed by clause 19(c) of the Memorandum by which the Republic 'assured' Australia that it would not 'send a Transferee to another country where there is a real risk that the Transferees will be subject to torture, cruel, inhuman or degrading treatment or punishment...'.

57. In this case, it follows from the findings of the Tribunal referred to at [24] above, that there is a real risk that the Appellant will be in danger of being subjected to 'cruel, inhuman or degrading treatment or punishment' as contemplated by the ICCPR and the MOU, if he were to be returned to Nepal. Specifically in the immediate area around Benni in the Myagdi district, the Tribunal found that there was a real possibility of harm and that the Appellant may not be afforded protection by the police or other authorities.[86] Accordingly the Supreme Court erred in failing to conclude that the Appellant was entitled to complementary protection given the findings of fact summarised at 24 above that are submitted to have engaged Nauru's complementary protection obligations.

58. The complementary protection obligation that arises by reason of Nauru's international obligations is not limited in any relevant way. The United Nations Human Rights Committee has explained that:

> *[t]he text of article 7 allows of no limitation...* States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement.*[87]

Article 7 has been described as providing an "absolute prohibition on return".[88]

59. Hence, under the international law of complementary protection, the only question is whether there is a "real risk of exposure to inhuman or degrading treatment or punishment", among other harms, in any place in the country of return. If there is, the applicant for protection should not be returned to the frontiers of that country.

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[85] See generally, McAdam, J., *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford, 2007).

[86] Reasons of the Tribunal [31] and [34]

[87] UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment),* 44th sess, UN Doc A/44/40 (10 March 1992) [3], [9]; see also UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add13 (21 April 2004) [12].

[88] McAdam, J., 'Australian Complementary Protection: A Step-By-Step Approach' (2011) 33(4) *Sydney Law Review* 687 at 708.

60. It is for this reason, at least in part, that Australia and other jurisdictions, including the European Union, the United Kingdom, Canada and New Zealand[89], have added an express relocation provision to the domestic determination of complementary protection claims, whereas they have not done so in respect of claims under the Refugees Convention (which itself contemplates internal relocation as discussed further in paragraph 66 below).

61. In *Minister for Immigration and Citizenship v MZYYL,*[90] the Full Court of the Federal Court of Australia accepted that the position under Australian refugee legislation and the position under the ICCPR in respect of relocation differ, accepting by implication that the ICCPR precludes return to the country of origin where the applicant for protection will be exposed to a risk of relevant harm in any part of that country, and regardless of whether the Appellant for protection could relocate within that country to avoid the risk. The Full Court stated (at 215 [18]):

> The express and implied *non-refoulement* obligations under the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CROC)... do not require the non-citizen to establish that the non-citizen could not avail himself or herself of the protection of the receiving country or that the non-citizen could not relocate within that country. Sections 36(2B)(a) and (b) [of the Australian *Migration Act*] have adopted a different and contrary position.[91]

62. In contrast, Nauru has not modified its complementary protection obligations. The parliament of Nauru chose to leave the obligations at international law in this regard unaltered, when they were incorporated into Nauru's domestic law in s 4(2) of the Act. The Nauruan parliament did not adopt the approach or terms of the Australian *Migration Act.*

63. Similarly, in its MOU with Australia, Nauru adopted cl 19(c). That clause reveals no exclusion in circumstances where the risk does not exist in part of the country. The text does not contemplate any internal relocation option as a qualification to the inquiry as to whether or not there is a real risk. It would have been easy for the parties to agree wording providing expressly for such a qualification if one had been intended and/or if the MOU had been drafted to reflect s 36 of the Australian *Migration Act.*

64. It follows that the Tribunal erred in applying a relocation test to the Appellant's claim for complementary protection. It was contrary to law for the Tribunal to apply (at paragraph 45) a relocation test in respect of the claim to complementary protection.

65. Having regard to the findings of fact made by the Tribunal, as identified at [24] above, the Appellant was entitled to complementary protection based on the existing findings of the Tribunal.

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[89] **European Union**: *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* (2011); **UK**: *Immigration Rules* (UK) paras 339C and 339O; **Canada**: *Immigration and Refugee Protection Act* 2001 (Can) s 97(1); **NZ**: *Immigration Act* 2009 (NZ) s 130(2).

[90] (2012) 207 FCR 211.

[91] This view is confirmed by Professor Jane McAdam quoting Professor Michelle Foster, two eminent scholars in asylum law, in McAdam, 'Australian Complementary Protection: A Step-By-Step Approach' (2011) 33(4) *Sydney Law Review* 687 at 706-707.

66. Thus there is a difference in relation to internal relocation between the principles applicable under the Refugee Convention and those applicable under other international obligations which provide for complementary protection, including the ICCPR. It is well-established that a relocation test (also referred to as an internal flight or internal protection test) applies to persons claiming refugee status under the Refugee Convention.[92] Thus a person is entitled to protection under the Refugees Convention only if:

> a. The person has a well founded fear of persecution for a Convention reason in one place in the country of return; and
>
> b. The person cannot reasonably relocate from the country of asylum to another part of the country of origin.[93]

67. The test is grounded in the text of the Refugee Convention definition itself[94] by reason of the causative condition in Article 1A(2) of the Refugee Convention. A person cannot be said to be "unable or, owing to such fear, unwilling, to avail himself of the protection of the [home] country" if he or she has access to protection elsewhere in that country.[95] As observed by the US Court of Appeal for the Eleventh Circuit:

> The [refugee definition] speak[s] consistently in terms of the geopolitical unit "country". ... [A] government may expect that asylum seekers be unable to obtain protection anywhere in his own country before he seeks the protection of another country.[96]

A person cannot be said to have a well-founded fear of persecution "where the protection of his country would be available to him and where he could reasonably be expected to relocate".[97]

68. As submitted above, this language is confined to the Refugees Convention and is not found in other international conventions which provide the legal basis for complementary protection. It therefore contrasts with the complementary protection obligation prevailing under Article 7 of the ICCPR, under the MOU, and under s 4(2) of the Act.

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[92] James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) p 334.

[93] As to the difference between the two analyses see, for example, *SZQPY v Minister for Immigration and Border Protection* [2013] FCA 1133 at [74] per Kenny J.

[94] *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 25-26 [19] per Gummow, Hayne and Crennan JJ.

[95] James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) p 332 and 336.

[96] *Mazariegos v Immigration and Naturalization Service* 241 F 3d 1320, 1327 (11th Cir, 2001). See also *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 442 per Black J.

[97] *Januzi v Secretary of State for Home Department* [2006] 2 AC 426 at 440. There is some debate as to whether the relocation test is located in the "well-founded fear" or "protection of the home country" aspects of the Convention definition: James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) p 335 – 336; *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 25-26 [19]-[22] per Gummow, Hayne and Crennan JJ, cf 36 [54]-[60] per Kirby J. It is not necessary to resolve this debate for present purposes.

Ground 5: The Tribunal erred in the way it dealt with country information about Nepali citizenship law relevant to the denial of the Appellant's son's Nepali citizenship application

69. Among the issues before the Tribunal was whether there was an ongoing risk of harm to the Appellant throughout Nepal. The Tribunal ultimately concluded that there was no such risk.

70. The most recent of the reasons that the Appellant claimed he was at real risk on return to Nepal was his claim that his own son was being denied citizenship because of the Appellant's political opinion.[98] This claim supported his more general claim that the persecution he faced was national in character, not local.

71. The Tribunal rejected this claim emphatically. It noted:

> The applicant seemed to be of the view that it was his political opinion, or some action of the Maoists, that was denying his son citizenship. However, the Tribunal put it to him quite clearly that citizenship can be established only with the active participation of the father.... The Tribunal emphasised that country information on this point is irrefutable: a child needs evidence that his father is Nepali in order for him to have Nepali citizenship, and therefore to be able to attend school. It is nothing to do with the applicant's politics but rather, the position of women in Nepali society.[99]

The Tribunal then cited and quoted from a single source to support this 'irrefutable' position, namely a US State Department 2013 country report on Nepal.[100]

72. The same approach and source was relied upon in the hearing. The hearing transcript contains the following relevant exchange in which the Appellant's own evidence on this question is summarily rejected - and in fact spoken over - by the Tribunal members.

> MS McINTOSH: Nepali women can't pass on citizenship.
>
> THE INTERPRETER: They will get the citizenship, but there should be one witness.
>
> MS McINTOSH: No. I'm telling you I know Nepali women cannot pass on citizenship to their children. Only Nepali men can do that. Yes. That's ...
>
> MS ZELINKA: That's a fact. That's the law.
>
> THE INTERPRETER: I don't know.
>
> MS McINTOSH: Yes, well it's a fact.
>
> MS ZELINKA: Yes. That is the law. So the problem that your wife is facing in trying to enrol your boy in school is the fact that both his father and his – and your father are both out of the country.

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[98] CB 123.

[99] Reasons of the Tribunal [20].

[100] Available at <http://www.state.gov/documents/organization/220612.pdf>.

> MS McINTOSH: So what she needs to do is to provide evidence to the school or whatever that either you have the citizenship of Nepal or your father has the citizenship of Nepal. And she just needs a document. I don't know if she actually needs you to be there, but she certainly needs to prove that.

This analysis was the basis for the negative finding in respect of the most recent reason the Appellant claimed to be continuing risk throughout the country of harm because of his political opinion.

73. The very same source on which the Tribunal formed this emphatic view in fact supports the view *opposite* to that which the Tribunal described as being 'irrefutable'. It relevantly states the following:

> The 2006 Citizenship Act, which allowed more than 2.6 million persons to receive certificates, states that anyone born to a Nepali mother or father has the right to Nepali citizenship.

Section 3 of the Nepal *Citizenship Act* 2063 (2006) relevantly provides:

> (1) A person born at the time when his/her father or mother is a citizen of Nepal, shall be a citizen of Nepal by descent.
>
> ...
>
> (3) Every child found in the territory of Nepal, whose paternal and maternal addresses are undetermined, shall be considered a citizen of Nepal by descent until his/her father or mother are found.

74. It follows from the above that the reason that the Appellant's son was recently denied citizenship was neither 'irrefutable' nor because of the Appellant's absence from Nepal. That leaves open the possibility that his son was denied citizenship, as the Appellant claimed, because of the Appellant's political activities. That, in turn, supports the proposition that the Appellant is at a continued risk of harm because his political activities are so well known as to be a reason for state authorities to deny his son citizenship.

75. By emphatically rejecting this possibility, the Tribunal erred in either or both of two ways. The Tribunal rejected this aspect of the claims of the Appellant without mentioning country information in the same document to the opposite effect and/or without giving the Appellant an opportunity to respond.

76. In respect of the first way of characterising the error, s 34(4)(d) of the Act obliges the Tribunal to 'give... a written statement that... refers to the evidence and other material on which the findings of fact were based.' It required that the Tribunal refer to all evidence it considered material to the questions before it in its 'written statement'. It follows that the fact the Tribunal did not refer to country information to the opposite effect means that the Tribunal did not consider it pertinent to the questions before it.

77. Section 34(4)(a)-(d) adopts the terms of s 430(1)(a)-(d) of the Australian *Migration Act* 1958 (Cth). Of that section, Australian courts have held that a failure to analyse material directly bearing on a determinative issue for the Tribunal is inconsistent with

the obligation on it to give real, genuine[101] and conscientious[102] consideration to matters of that kind.[103] Jurisdictional error arises when 'a submission of substance'[104] or evidence of 'significance'[105] is not evaluated.[106] As this Court has stated of the Australian sections "...the failure of the Tribunal to make findings with respect to a particular matter may... reveal failure to exercise jurisdiction, whether actual or constructive, and, also, failure to conduct a review as required by the Act."[107] In *MZYTS*, the Full Federal Court held that:

> ...the absence of any... evaluation [of submitted material] in the context of the Tribunal's statutory task, can only signify a constructive failure to exercise jurisdiction [and t]he absence from the recitation of... the material referred to... is indicative of omission and ignoring, not weighing and preference.[108]

The Full Court in that case found jurisdictional error on this basis. In a similar way, a differently constituted Full Federal Court endorsed and applied this reasoning in circumstances where material expressly raised with the decision-maker before the hearing was not evaluated.[109] That happened in this case. In that decision, the Court held that the Tribunal was required to 'deal with' such information, absent which error would be (and was) found.

78. The Tribunal in this case did not mention, let alone weigh, the country information which left open the possibility that the Appellant's son was denied citizenship throughout the country because of the Appellant's political opinions. As the Australian courts have found applying the same terms of the equivalent legislation, so too should this Court conclude that this omission amounts to error arising from the obligation on the Tribunal under s 34(4)(d) of the Act to provide a 'written statement' that includes 'evidence and other material on which the findings of fact were based.'

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[101] *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51 at 92-93 per Madgwick J; see also *Islam v Cash* (2015) 148 ALD 132 at 135 [14] per Flick J.

[102] *Mendoza v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 405 at 420 per Einfeld J.

[103] See also the authorities referred to by Davies J in *BXC15 v Minister for Immigration and Border Protection* [2017] FCA 682 at [19] and Rares J in *Telstra Corporation Ltd v ACCC* (2008) 176 FCR 153 at 181-182 [106].

[104] *SZSSC v Minister for Immigration and Border Protection* (2014) 317 ALR 365 at 387-388 [75]-[76], 388-390 [78]-[81] per Griffiths J, citing *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [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 *MZYTS* at 559 [38] per Kenny, Griffiths and Mortimer JJ.

[105] *Minister for Immigration & 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.

[106] See also *Linfox Australia Pty Ltd v Fair Work Commission* (2013) 240 IR 178 at 191 [47] per Dowsett, Flick and Griffiths JJ

[107] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 340 [44] per Gaudron J; see also *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 531 [37] per McHugh J.

[108] *Minister for Immigration and Border Protection v MZYTS* (2013) 136 ALD 547 at 560-562 [44, 50, and see also 49] per Kenny, Griffiths and Mortimer JJ.

[109] *Minister for Immigration and Border Protection v CZBP* [2014] FCAFC 105 at [65] per Gordon, Robertson and Griffiths JJ.

79. In respect of the second way of characterising the error, s 22(b) required that the Tribunal 'act according to the principles of natural justice'. Section 40(1) requires that the Tribunal 'must invite the applicant to appear' before it.

80. For the reasons outlined above at paragraphs 43-44 either or both of subsections 22(b) or 40(1) of the Act required not only that The Appellant have an opportunity to speak, but that the Tribunal listen to what he had to say. This was denied him by the Tribunal on this issue. As Flick J of the Federal Court of Australia put it in a case similarly concerned with the lack of a meaningful hearing in respect of refugee claims:

> The requirements of procedural fairness... extend beyond affording a claimant an opportunity to be heard. The opportunity extends to requiring a decision-maker to hear and genuinely take into account what he has been told. An opportunity to speak to a decision-maker who does not listen is no opportunity at all. Never has it been suggested that an opportunity to be heard is satisfied by an opportunity to speak to an unhearing and disinterested decision-maker. On one view, the opportunity is no opportunity at all; on another view, a decision-maker who is unwilling to listen is a decision-maker who displays actual bias, prejudice and prejudgment.[110]

81. As the transcript extracted at paragraph 72 makes clear, no such opportunity was afforded to the Appellant. He was not heard when he tried to direct the Tribunal to a view other than that which it described as being 'fact', 'law' and 'irrefutable'. By so doing, the Tribunal acted in breach of either or both of ss 22 and 40 of the Act.

Conclusion

82. For the reasons outlined above, it is respectfully submitted that the High Court ought, pursuant to s 8 of the *Nauru (High Court Appeals) Act* 1976 (Cth), make the orders set out in Part VIII below.

VII STATUTORY PROVISIONS

83. The applicable statutory provisions are set out in Annexure A.

VIII ORDERS SOUGHT

84. The orders sought by the Appellant are:

(1) The appeal be allowed.

(2) The orders of the Supreme Court of Nauru made on 27 September 2017 be set aside and in lieu thereof it be ordered that the appeal to the Supreme Court be allowed.

(3) A declaration that the Appellant is entitled to complementary protection pursuant to s 4(2) of the *Refugees Act.*

This declaration is sought if ground 1 is upheld; it is intended to avoid the need for a remittal.

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[110] *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 at 578 [389] per Flick J.

(4) The matter be remitted to the Refugee Status Review Tribunal for reconsideration according to law.

(5) The Respondent pay the costs of the Appellant of this appeal to the High Court of Australia.

(6) Such further or other orders as the Court deems appropriate.

IX ESTIMATE OF TIME

85. The Appellant estimates he will require 2 hours to present oral argument. If this matter was listed with CRI026 or DWN027, this estimate might be revised down, on account of ground 4 in this appeal being substantively common to all three appeals.

Date: 15 November 2017

J.W.K. BURNSIDE
Aickin Chambers
burnside@vicbar.com.au
03 9225 7488

M. L. L. ALBERT
Castan Chambers
matthew.albert@vicbar.com.au
03 9225 8265

Counsel for the Appellant