IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M132 of 2017

BETWEEN:

WET044
Appellant

and

THE REPUBLIC OF NAURU
Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I:

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

Part II:

Ground 1

2. The Tribunal 'agree[d] with and adopt[ed] the reasoning and findings of the Secretary' on the Appellant's risk of harm for reasons of returning as a failed asylum seeker (AB 216 [95]). Those findings were premised on such persons only being at risk if they had a political profile independent of their status as failed asylum seekers (AB 63-65).

3. The Secretary's decision five months earlier was based upon the country information before him.

4. After the Secretary's decision, the Appellant's representative submitted substantial country information to the Tribunal directly bearing on the question of the risk of harm to him returning to Iran as a failed asylum seeker, including for those without a political profile (AB 101-107). It noted, for example, the severe mistreatment accorded to those in pre-trial detention of the kind that is common for returned asylum seekers (AB 104).

5. The Respondent concedes that some relevant country information was provided to the Tribunal by the Appellant, but was either not before the Secretary or had not been referenced nor mentioned at all by the Secretary (Respondent's submissions [37]-[38]).

6. The Tribunal committed an error of law because it failed to consider and evaluate the country information actually before it; instead, it simply adopted the reasoning and findings of the Secretary which were based on a different suite of material.

7. It can be inferred that the Tribunal did not consider and evaluate the relevant country information because it does not mention that country information in its reasons and reaches a conclusion directly contradicted by that information. Further, it expressly relied on reasons which pre-dated the giving of that country information (s 34(1)(d) Convention Act, *Yusuf*, *MZYTS* [49]-[60]).

Ground 2

8. The Tribunal concluded that the Appellant was not at risk of relevant harm in Iran because he is a Faili Kurd.

9. The quoted basis for that determination was two specific pieces of country information. The effect of that country information was, according to the Tribunal, that a Faili Kurd would not be subject to harm or discrimination if that person 'plainly accepts and lives by the Islamic regime' (AB 198 [90]) and showed 'devotion to the Islamic republic and the tenets of Shia Islam' (AB 198 [91]).

10. On the basis that the Appellant 'is part of the majority religion' and that there was 'nothing to show that he does not "accept and live by the Islamic regime"', the Tribunal concluded that he would not be subject to relevant harm for reason of his ethnicity.

11. The proposition extracted from the country information by the Tribunal was not the subject of argument, submission, or questioning from the Tribunal. The sources of relevant country information were relied upon by the Secretary and the Appellant respectively for quite distinct propositions. The Appellant was not on notice of the possibility that the Tribunal might make findings of the kind referred to in paragraph 10 above and then rely on these findings to deny his claim. At no previous point had the issue of the Appellant's religious identification played a role in the assessment of his claims. The Secretary did not rely on it for his decision. The Tribunal did not mention it at the hearing. Indeed, the only time religion arose before the Tribunal was when it asked the Appellant if he would like to give his evidence on oath or affirmation and he responded that he wanted the 'non-religion' option (AB 127 line 36 - 40).

12. Further, the available evidence did not support the Tribunal's conclusion about the Appellant's adherence to the tenets of Shi'a Islam and the Islamic regime; it was to the contrary effect.

13. It is an error of law, in the form of a denial of procedural fairness contrary to s 22 of the Convention Act, for the Tribunal to fail to provide an opportunity to the Appellant to consider and respond to the nature and content of information taken into account in reaching an adverse conclusion to the Appellant. This case draws a direct analogy with *BRF038 v Republic of Nauru* [2017] HCA 44.

Grounds not raised in the Supreme Court of Nauru

14. The two grounds of the appeal were not raised in the Supreme Court of Nauru. Leave should be granted to raise each of the grounds because it is expedient and in the interests of justice to do so. This is so because:

    (a) They have merit, for the reasons elucidated in the submissions;

    (b) The Appellant was not represented in Court below, has poor English and has no legal training (AB 8, 44);

    (c) There would be no relevant prejudice to the Respondent; and

    (d) The potential consequences of a refusal to entertain the appeal are significant for the Appellant.