IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M 132 of 2017

BETWEEN:

WET 044
Appellant

and

Republic of Nauru
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

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

Introduction

2. The appellant should not be granted leave to advance two new arguments for the first time on appeal to the High Court because it would not be expedient in the interests of justice to permit the appellant to do so: see *Coulton v Holcombe* (1986) 162 CLR 1, 7-8. In this regard:

   (a) the new arguments would require consideration of evidence about the contents of country information about Iran and that evidence was not before the Supreme Court of Nauru; and

   (b) the new arguments do not have sufficient prospects of success to warrant the grant of leave.

First proposed ground of appeal – failed asylum seeker claim

3. The appellant seeks to argue that, in respect of his claims to fear persecution in Iran as a failed asylum seeker, the Tribunal:

   (a) failed to consider his written submissions, including the country information to which those submissions referred; and

   (b) therefore did not comply with s 22 or 34 of the *Refugee Convention Act 2012* (Nr).

4. It is unclear how any purported non-compliance with s 34 of the Act would of itself vitiate the Tribunal's decision: cf. *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, [67]-[69].

5. As to purported non-compliance with s 22 of the Act, the Tribunal did not deny the appellant natural justice. The available materials do not show that the Tribunal failed to have regard to the appellant's written submissions. Those materials show that the Tribunal referred to and took into account those submissions at the hearing before it (**AB:** 174.34-43 and 175.10-19) and in its decision (**AB:** 193 [69] and 199 [100]). See also: **AB:** 128.10-12; **AB:** 177.1-11.

6. In particular, the Tribunal informed the appellant and his representative at the hearing (**AB:** 174.57-175.19) that:

   (a) in considering country information about the treatment of failed asylum seekers in Iran, it had had regard to the written submissions; and

(b) it nonetheless remained concerned that a person's status as a failed asylum seeker did not, of itself, give rise to a well-founded fear of persecution or complementary protection obligations.

7. The Tribunal subsequently afforded the appellant and his representative an opportunity to respond to that concern (**AB:** 176-178). In the circumstances, no denial of procedural fairness arises.

8. The appellant otherwise seeks to rely on:

(a) the Tribunal's reference in its decision to country information in the Secretary's decision; and

10 (b) the lack of reference to certain items of country information to which his written submissions referred.

Neither of those matters establishes that the Tribunal failed to have regard to the appellant's submissions.

9. First, it cannot be said that the Tribunal 'confined itself' to consideration of the country information before the Secretary.

10. Second, and in respect of items of country information mentioned in the appellant's written submissions, the Tribunal was not obliged to give, in its decision, a line-by-line refutation of information contrary to its findings of material fact: see, for example, *Re Minister for Immigration and Multicultural*
20 *Affairs; ex parte Durairajasingham* (2000) 168 ALR 407, [65]. Section 34 of the Act did not impose such an obligation on the Tribunal.

11. Further, the appellant has not shown how any express rejection of information in the written submissions might have constituted a necessary reason for the Tribunal's decision (RS, [35]-[38]; cf. AS, [31]). The absence of an express rejection of that information by the Tribunal in its decision does not give rise to an inference that the information was ignored or overlooked. In particular, the appellant has not established that that information was 'not before the Secretary' and 'contradicted the analysis and conclusion of the Secretary' with which the Tribunal had expressed its agreement.

30 **Second proposed ground of appeal – Faili Kurd claim**

12. The appellant seeks to argue that, in respect of his claims to fear persecution in Iran as a Faili Kurd, the Tribunal failed to put adverse country information to him, and therefore denied him procedural fairness and did not comply with s 22 of the Act.

13. Section 22 of the Act will ordinarily require that the Tribunal give an applicant a reasonable opportunity to comment on adverse information that is credible, relevant and significant. However, neither s 22 nor procedural fairness more generally requires the Tribunal to reveal to an applicant that the Tribunal intends to rely on information of which the applicant already is or should be aware: see, for example, *Re Minister for Immigration and Multicultural Affairs; ex parte Cassim* (2000) 175 ALR 209, [22].

14. The appellant's new argument relates to the Tribunal's reference in its decision to two pieces of country information about the treatment of Kurds in Iran (**AB:** 198 [90]). The argument is unsustainable because the two pieces of information were, or should have been, known to the appellant and the Tribunal's findings based on that information were obviously open.

15. The first piece of information was, or should have been, known to the appellant because it was quoted by the Secretary in his decision (**AB:** 64). The Tribunal's findings based on the information were obviously open to it. Relying on that information, the Secretary had stated that '[c]ountry information does not support a finding that a Kurdish person would be imputed with an adverse political opinion in Iran purely on the basis of his or her ethnicity, without further political or cultural activism on [the] part of the individual'. The Secretary had also found that the appellant did not have such a profile, had completed military service in Iran, and had departed Iran lawfully on his genuine Iranian passport.

16. The second piece of information was, or should have been, known to the appellant because it was contained in a report cited in the appellant's written submissions (**AB:** 104; cf. fn 7 on **AB:** 198). Those submissions also contained a general statement that 'Faili Kurds are Shi'a Muslim Kurds" (**AB:** 82) and that general statement was in no way qualified in relation to the appellant. Having regard to the known information before the Tribunal, it was obviously open to the Tribunal to find that the appellant was 'part of the majority religion' in Iran.

Conclusion

17. The appeal should be dismissed.

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