IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M21 of 2017

BETWEEN:

MEG027
First Appellant

MEG026
Second Appellant

and

REPUBLIC OF NAURU
Respondent

APPELLANTS' SUBMISSIONS

Part I: Publication

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

Part II: Statement of Issues

2. This appeal raises the following issues:

   a. In what circumstances will this Court consider grounds of appeal that were not raised in the Supreme Court of Nauru?

   b. Did the Refugee Status Review Tribunal (**Tribunal**) err by concluding that the Respondent (**Nauru**) does not owe the First Appellant, a woman claiming protection under the *Refugees Convention Act* 2012 (Nr) (**the Convention Act**), 'any obligation' under s 4 of that Act arising from the Convention on the Elimination of Discrimination against Women (**CEDAW**)?

   c. Did the Tribunal err by denying the Second Appellant natural justice, contrary to s 22(b) of the Convention Act, in that it did not consider integers of his protection claim, namely, that there was a real possibility that, on return to Iran, he would be:

      i. detained as a failed asylum seeker, contrary to Article 37(b); and/or

      ii. separated from his parents, or abducted by or on behalf of his mother's former boss, contrary to Articles 9 and/or 35 respectively,

      of the Convention on the Rights of the Child (**Children's Convention**)?

   d. Did the Tribunal err by failing to deal with submissions and country information provided by the Appellants to the Tribunal relating to issues which were determined negatively in respect of their protection claims, in breach of s 22 and/or s 34(4)(d) of the Convention Act?

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Part III: Section 78B of the *Judiciary Act* 1903 (Cth)

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

Part IV: Citations

4. The citation for the decision of the Supreme Court of Nauru is *MEG026 v Republic of Nauru* [2017] NRSC 5. The decision of the Tribunal was made on 26 September 2014 (**Tribunal decision**).

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Part V: Factual background

5. The First Appellant and her son, the Second Appellant, are nationals of Iran.[1]

6. On 25 July 2013, the Appellants arrived in Australia to seek asylum. They were subsequently transferred to Nauru against their will for the purpose of having their asylum claims assessed.

7. On 16 December 2013, the First Appellant made an application to be recognised as a refugee or a person owed complementary protection under the Convention Act.[2] The First Appellant claimed protection on the basis of:

   a. being a woman and a divorced woman;

20 b. her family's political profile;

   c. her religion (being agnostic);

   d. an incident of sexual assault by her former boss and threats by him, including that he would forcibly take the Second Appellant from her; and

   e. being a failed asylum seeker.

   The Second Appellant was included as an accompanying dependent.[3]

8. On 18 May 2014, the Secretary determined that the Appellants were not refugees nor owed complementary protection.[4]

9. On 23 May 2014, the Appellants applied to the Tribunal for review of the Secretary's decision pursuant to s 31 of the Convention Act.[5]

30 10. The Tribunal hearing took place on 23 July 2014.

11. On 6 August 2014, ten days after the Tribunal hearing, the Appellants' representatives submitted additional independent country information to the

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[1] Tribunal decision at [11] (Court Book in the Supreme Court of Nauru (**Court Book**) 213).

[2] See s 5 of the Convention Act; Application for Refugee Status Determination dated 16 December 2013, (Court Book 19–46) (**December 2013 Application**); see also letter from Craddock Murray Neumann Lawyers dated 24 January 2014 containing country information on persecution of women and failed asylum seekers in Iran at pages 1-17 (Court book 59-75) (**January 2014 country information**).

[3] See s 5(1A) of the Convention Act and the relevant definition of 'derivative status' and 'dependent' under s 3 of the Convention Act.

[4] See s 6 of the Convention Act; Negative Refugee Determination Decision Record and Complementary Protection Assessment Decision Record dated 20 May 2014 (**Secretary's determination**) (Court Book 77–91).

[5] Refugee Status Review Tribunal Review Application form received 23 May 2014 (Court Book 93).

Tribunal corroborating the claims that the Iranian government considers Iranian asylum seekers to be traitors and spies.[6]

12. The Tribunal handed down its decision on 26 September 2014. That decision affirmed the decision of the Secretary.

13. The First and Second Appellants subsequently brought an 'appeal' to the Supreme Court of Nauru pursuant to s 43 of the Convention Act on the ground that the Tribunal fell into error by:
    a. failing to consider all of the First Appellant's evidence in support of her claim that her ex-husband would take custody of the Second Appellant if they were returned to Iran, in determining if they are refugees or owed complementary protection; and/or
    b. failing to set out the reasons and refer to the evidence or other material on which it based its findings that the First Appellant's ex-husband would be unsuccessful in such a custody action, in breach of s 34(4) of the Convention Act.

14. On 7 February 2017, Khan J of the Supreme Court of Nauru dismissed the appeal and affirmed the decision of the Tribunal, pursuant to s 44(1)(a) of the Convention Act.

Part VI: Argument

15. This is an appeal from the decision of the Supreme Court of Nauru. The three grounds of appeal raised in this Court were not raised before the Supreme Court of Nauru.

A. Jurisdiction and raising new grounds on appeal

Appeal as of right

16. In this case, the High Court is called upon to exercise its original jurisdiction under s 76(ii) of the Constitution to determine this appeal.[7]

17. This appeal from the Supreme Court of Nauru is brought as of right. Section 5(1) of the *Nauru (High Court Appeals) Act* 1976 (Cth) (the **Nauru Appeals Act**) confers jurisdiction on this Court to hear appeals from the Supreme Court of Nauru as provided in the Agreement between Australia and Nauru, which is schedule 3 to that Act. Article 1(A)(b) of the Agreement provides that an appeal lies as of right from a final judgment, decree or order of the Supreme Court of Nauru exercising original jurisdiction in a civil case.

18. This is such a case. Section 43 of the Convention Act confers jurisdiction on the Supreme Court of Nauru to hear an 'appeal' on a point of law from the Tribunal. Despite being styled as an 'appeal', the Supreme Court proceeding constituted the first time that judicial power was exercised in respect of the Appellants' claims. Analogously to s 44 of the *Administrative Appeals Tribunal* Act 1975 (Cth) (**AAT**

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[6] See the letter from Craddock Murray Newman dated 6 August 2014 (**Post-hearing submissions**) (Court book 207-209).

[7] *Ruhani v Director of Police* (2005) 222 CLR 489 (***Ruhani***) at 500 [10] per Gleeson CJ, 500-501 [14] per McHugh J, 522 [89] per Gummow and Hayne JJ; *Diehm v Director of Public Prosecutions (Nauru)* (2013) 88 ALJR 34 at 45 [56] per French CJ, Kiefel and Bell JJ; *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561 (***Clodumar***) at 571 [26] per French CJ, Gummow, Hayne and Bell JJ.

Act), which provides for an 'appeal' on a question of law from the AAT to the Federal Court, such 'appeal' being heard in the original jurisdiction of that court,[8] the 'appeal' to the Supreme Court of Nauru was a first instance application for judicial review.[9] All previous decisions - being the determination as to the Appellants' protection claims by the Secretary's delegate, under Part 2 of the Convention Act, and the decision of the Tribunal in reviewing that determination, under Part 4 - were exercises of executive power. As such, the orders subject to appeal in this case arise from the first invocation of judicial supervision of administrative power and, therefore, an exercise of original jurisdiction by the Supreme Court of Nauru.[10]

Raising new grounds

19. The question that then arises in this case is: in what circumstances can this Court consider new grounds of appeal not raised before the Supreme Court of Nauru?

20. In respect of the Convention Act, this Court sits as the first court to hear a matter other than by way of first instance judicial review. This Court is, therefore, in a similar position to the Full Court of the Federal Court of Australia in appeals in proceedings initiated under s 44 of the AAT Act, and in appeals from first instance review decisions under s 476 or 476A of the *Migration* Act 1958 (Cth) (the **Migration Act**) and equivalents. In appeals of this kind, new questions of law may be raised on appeal before the Full Court of the Federal Court if it is "expedient and in the interests of justice" to do so.[11] The same test has been applied in this Court where a new point is sought to be raised on appeal.[12]

21. Of course, unlike the Full Court of the Federal Court, the High Court exercises original jurisdiction in the present case. As such, it has the enlarged powers under s 32 of the *Judiciary Act* 1903 (Cth) to:

> 'grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter; so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined ...'.

This power extends, for example, to the reception of new evidence not placed before the court or tribunal below.[13]

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[8] See, eg, at *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 at 346 [78], 347-348 [80]-[83] (and the authorities there cited) per Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ.

[9] See, eg, *Ruhani* at 508 [43] per McHugh J.

[10] See *Ruhani* at 511-512 [49]-[51] per McHugh J and the authorities there cited, 528 [108] per Gummow and Hayne J, 543 [165] per Kirby J, 569 [274] per Callinan and Heydon JJ. See also *Minister for Navy v Rae* (1945) 70 CLR 339 at 349 per Dixon J.

[11] *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 at 347 [79]-[80] per Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ; *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 at 598 [46] per Kiefel, Weinberg and Stone JJ.

[12] See, eg, *Water Board v Moustakas* (1988) 180 CLR 491 at 497 per Mason CJ, Wilson, Brennan and Dawson JJ, 506 per Gaudron J.

[13] *Clodumar* at 574 [34]-[35] per French CJ, Gummow, Hayne and Bell JJ; *Federal Commissioner of Taxation v Lewis Berger & Sons (Australia) Ltd* (1927) 39 CLR 468 at 469-470 per Starke J.

22. It follows that the test for the introduction of new grounds where the High Court exercises original jurisdiction must be at least as liberal as that which applies on an appeal proper. In the present case, it is expedient and in the interests of justice to allow the Appellants to raise new grounds on appeal in this Court for the following reasons:

    a. Each of the three grounds has merit, for the reasons set out below.

    b. The grounds raise issues of public interest. They invite this Court to determine important questions arising from the Convention Act for the first time. The ground concerning CEDAW is of unusual public interest in that it is the first time an apex court of any country has been called upon to consider whether that Convention gives rise to a non-refoulement obligation.[14]

    c. While the grounds were not raised in the Supreme Court, they concern matters which *were* raised before the Tribunal. No new facts or evidence are relied upon to substantiate the grounds, which each concern a question of law.

    d. There would be no relevant prejudice to the Respondent (other than potentially, with respect to costs).

B. Grounds of appeal

Ground 1: the non-refoulement obligation under CEDAW

23. The First Appellant claimed to be at risk of harm on return to Iran because she was a woman, and especially so because she was divorced. She made this claim by express reference to CEDAW (as well as the *Convention Relating to the Status of Refugees* 1951 (the **Refugee Convention**)).[15] Further, she contended that s 4(2) of the Convention Act, which provides that Nauru 'must not expel or return any person to the frontiers of territories in breach of its international obligations',[16] gave rise to a non-refoulement obligation on Nauru which was engaged by the risk to the First Appellant of suffering discrimination of the kind prohibited by CEDAW.[17] Nauru ratified CEDAW on 23 June 2011.[18]

24. In response to her claim for complementary protection under CEDAW,[19] the Tribunal 'acknowledge[d] that Iran has not complied with some of the articles of CEDAW'.[20] It also made positive findings on discrimination the First Appellant had

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[14] *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477, 516–17.

[15] See December 2013 Application at [14], [32], [44], [49] (Court book 42, 44, 45); January 2014 country information at pages 1-11 (Court book 59-68); her material claims as recorded in the Secretary's determination at pages 5, 8, 11 (Court book 81, 84, 87); her 26 May 2014 statement (**May 2014 Statement**) at [16]-[18] (Court book 157-158); her 20 July 2014 submissions to the Tribunal (**Submissions**) at [40]-[46], [55], Appendix A and Appendix E (Court book 107-108, 110, 111-119, 149-155).

[16] Note that the focus of s 4(2) is on the international obligations of Nauru, not on the person claiming protection as such.

[17] Submissions at [44]-[45] (Court book 108).

[18] Office of the High Commissioner for Human Rights, *Reporting Status for Nauru* (25 March 2017) <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=NRU&Lang=EN>.

[19] Section 6 of the Convention Act required the Secretary to determine whether the appellants were owed complementary protection, a determination subject to review by the Tribunal pursuant to s 31(d).

[20] Tribunal decision at [90] (Court book 226).

suffered and would (if returned) suffer in Iran, including findings that the First Appellant:

a. was 'reprimanded if she was not in proper Islamic dress (such as having hair showing under her hijab)'[21] and was 'required to adopt Islamic dress';[22]

b. was 'propositioned by an officer' of the Iranian moral police;[23]

c. may have been a victim of sexual harassment at work by her former boss (who was the head of a government department) a few months prior to leaving Iran;[24]

d. 'lost her job because she rejected the advances of her boss';[25]

e. 'does not enjoy the equal rights in relation to inheritance and child custody';[26] and

f. 'will suffer some discrimination as a woman and is more likely to receive unwanted sexual advances as a divorced woman'.[27]

25. The Tribunal also referred to various reports which stated that:

a. divorced women who live on their own in Iran are at risk of 'being seen as morally depraved' and therefore 'may be in danger of harassment and may risk sexual abuse'; and

b. Iranian women in general face systemic discrimination and sexual harassment '[i]n the legal system and the workforce'.[28]

26. However, the Tribunal rejected the claim for complementary protection under CEDAW on the ground that Nauru was not bound by any non-refoulement obligation. It did so for the reason that '[t]here is no obligation created that is breached, either by return of a woman to a country that has not ratified CEDAW or to a country that is in breach of obligations created under CEDAW.'[29]

27. This narrow interpretation of CEDAW is incorrect as a matter of law. The United Nations Committee on the Elimination of Discrimination Against Women (the **CEDAW Committee**) has noted that, like the International Covenant on Civil and Political Rights (**ICCPR**), CEDAW does not contain an explicit non-refoulement provision. However, as with the ICCPR, the Committee has concluded that a State's

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[21] Tribunal decision at [21] (Court book 214); see also [32] (Court book 216-217).
[22] Tribunal decision at [68] (Court book 222). While the Tribunal found that this did not amount to 'persecution' for the purposes of Article 1A of the Refugee Convention (see Tribunal decision at [33], Court book 217), it made no finding on the submission that this treatment of the First Appellant breached the provisions of CEDAW.
[23] Tribunal decision at [31] (Court book 216); see also May 2014 Statement at [14]-[15] (Court Book, 157).
[24] Tribunal decision at [56] (Court book 221).
[25] Tribunal decision at [56] (Court book 221).
[26] Tribunal decision at [67] (Court book 222); see also [62] (Court book 221).
[27] Tribunal decision at [73] (Court book 223).
[28] Tribunal decision at [71] and [72] (Court book 222-223).
[29] Tribunal decision at [89] (Court book 226). While it did not refer to s 4(2) of the Convention Act, the Tribunal evidently considered that the absence of an express non-refoulement provision in CEDAW meant that the return of the First Appellant to Iran could not breach Nauru's 'international obligations' within the meaning of that section.

obligations under CEDAW include a duty not to return a woman to a state where she would experience serious violations of the rights protected under CEDAW.[30]

28. According to the CEDAW Committee, under CEDAW, States parties have an obligation to ensure that no woman will be expelled or returned to another State where her life, physical integrity, liberty and security of person would be threatened, or where she would risk suffering serious forms of discrimination, including serious forms of gender-based persecution or gender-based violence. What amounts to serious forms of discrimination against women, including gender-based violence, will depend on the circumstances of the case.[31]

29. Further, the CEDAW Committee has stated that States parties have a responsibility under Article 2(d) of CEDAW[32] not to return women to places where their rights under CEDAW would be breached. That duty encompasses the obligation of States parties to protect women from being exposed to a real, personal and foreseeable risk of serious forms of discrimination against women, including gender-based violence, irrespective of whether such consequences would take place outside the territorial boundaries of the sending State party: if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that the person's basic rights under the Convention will be seriously at risk in another jurisdiction, the State party itself may be in violation of the Convention. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later.[33]

30. Other jurisprudence of the CEDAW Committee confirms this interpretation.[34] In *MEN v Denmark*,[35] the Committee relevantly concluded that:

> 'As to the State party's argument that nothing in the Committee's jurisprudence indicates that any provisions of the Convention have extraterritorial effect, the Committee recalls that, under article 2 (d) of the Convention, States parties undertake to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation. *This positive duty encompasses the obligation of States parties to protect women from being exposed to a real, personal and foreseeable risk of serious forms of gender-based violence, irrespective of whether such consequences would take place outside the territorial boundaries of the sending State party: if a State party takes a decision*

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[30] 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 (**Recommendation 32**), [23].

[31] Ibid.

[32] Article 2(d) provides that 'States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake ... [t]o refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation'.

[33] Recommendation 32, [22].

[34] *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].

[35] *MEN v Denmark*, communication no 35/2011, 26 July 2013 at [8.9].

relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Convention will be violated in another jurisdiction, the State party itself may be in violation of the Convention. For example, a State party would itself be in violation of the Convention if it sent back a person to another State in circumstances in which it was foreseeable that serious gender-based violence would occur. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later. What amounts to serious forms of gender-based violence will depend on the circumstances of each case and would need to be determined by the Committee on a case-by-case basis at the merits stage, provided that the author had made a prima facie case before the Committee by sufficiently substantiating such allegations...'. (Emphasis added.)

31. As the CEDAW Committee has repeatedly recognised, then, Nauru, as a signatory to CEDAW, *does* have a non-refoulement obligation under that convention. The Tribunal thereby was wrong in its conclusion to the contrary. Because of this error, the Tribunal failed to consider whether, in all the circumstances, Nauru would breach its non-refoulement obligation under CEDAW, and therefore s 4(2) of the Convention Act, if it returned to the First Appellant to Iran.

Ground 2: failure to consider integers of Second Appellant's protection claim

32. Pursuant to s 22 of the Convention Act, the Tribunal:

    '(a) is not bound by technicalities, legal forms or rules of evidence; and

    (b) must act according to the principles of natural justice and the substantial merits of the case.'

33. The Tribunal failed to accord the Second Appellant natural justice because it failed to consider integers of his protection claim relating to the risk that, on return to Iran, he would be detained as a failed asylum seeker, contrary to Article 37(b) of the *Convention on the Rights of the Child* (**Children's Convention**), and/or separated from his mother or abducted by his mother's former boss, contrary to Articles 9 and/or 35.

34. Before the Tribunal, submissions were made that the Second Appellant was entitled to complementary protection on the ground that returning him to Iran would breach Nauru's international obligations under the Children's Convention, contrary to s 4(2) of the Convention Act (discussed above).[36] As with his mother's claim under CEDAW, the Second Appellant's claim was founded on Nauru's obligation under the Children's Convention in addition to the Refugees Convention and the ICCPR. Nauru ratified the Children's Convention on 27 July 1994.[37]

35. As with the ICCPR and CEDAW, there is no explicit non-refoulement provision in the Children's Convention. Nevertheless, the United Nations Committee on the Rights of the Child (the **Children's Committee**) has concluded that the Children's Convention contains an implied obligation of this kind, offering children broad

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[36] Submissions at [40], [46], [48]-[55] (Court book 107-110).

[37] United Nations Treaty Collection, *Status of Treaties: Convention on the Rights of the Child* (25 March 2017) https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en.

protection in circumstances where there is a real possibility that they would, if returned, be subject to harm of a kind, which would violate the convention. Specifically, the Children's Committee stated:

> 'Furthermore, in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention... *Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequences of action or inaction.* The assessment of the risk should be conducted in an age and gender-sensitive manner...'.[38] (Emphasis added.)

36. The Children's Committee has further stated that a decision to return a child to their country of origin should only be determined by reference to the best interests of the child. This requires consideration of whether return would lead to a risk of the violation of rights of the child; the prevailing safety, security and other conditions; the views of the child; and the duration of absence from the home country.[39] The Children Committee's view of the content of the non-refoulement obligation contained in the Children's Convention has been adopted by the UN High Commissioner for Refugees, as well as the Inter-American Court of Human Rights.[40]

37. Nauru's 'international obligations' under s 4(2) of the Convention Act therefore included an obligation under the Children's Convention not to return a child, including the Second Appellant, to a country if there is a real possibility that he or she will be subject to harm upon return to that country of a kind which would be in breach of that convention.

38. In her application for refugee status, the First Appellant identified her fear that she and her son, the Second Appellant, would be harmed as returning asylum seekers.[41] This fear was elaborated through country information[42] which made explicit reference to evidence of failed asylum seekers being detained, interrogated and physically harmed by the Iranian authorities upon their return.[43] Before the Tribunal, the Second Appellant specifically claimed through his mother

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[38] 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 (**General Comment No 6**), [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 (**2007 Advisory Opinion**), [19].

[39] General Comment No 6, [84].

[40] 2007 Advisory Opinion [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.

[41] Statement at [43] (Court book 45).

[42] January 2014 country information at pages 1, 11-17 (Court book 59, 69-75).

[43] See further Secretary's determination at pages 5, 12-14 (Court book 81, 88-90).

that he would be detained as a failed asylum seeker on return to Iran.[44] Further, as well as seeking protection under the Refugee Convention, he expressly relied on Nauru's obligations under the Children's Convention.[45]

39. The Tribunal accepted that 'there is a real possibility that the Iranian authorities will assume that [the First Appellant] is a failed asylum seeker'[46] and that she would be questioned by authorities.[47] It recited country information to the effect that 'returnees will therefore be held for a few days until it is clear to the police that they have not been involved in any political activity.'[48] While the Tribunal did 'not accept that [the Second Appellant] will be *harmed* as a failed asylum seeker'[49] under the heading 'Refugee Claims',[50] it did not consider the Second Appellant's claim for complementary protection against detention by the Iranian authorities under the more expansive obligations owed to him as a child under the Children's Convention.

40. Article 37(b) of the Children's Convention provides that:

> 'The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'[51]

The Children's Committee has made it clear that unaccompanied or separated children should not, in general, be detained and that any detention cannot be justified solely on the basis of the child's migratory or residence status.[52] The Second Appellant's claim as a person at risk of detention on return to Iran was not considered by the Tribunal by reference to the Children's Convention at all.[53]

41. The Second Appellant also claimed that he was at real risk of being separated from his custodial parent, or abducted by or on behalf of his mother's former boss, in breach of Article 9 of the Children's Convention.[54] Article 9 provides that:

> 'States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.'

Article 35 of the same Convention provides that:

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[44] See, in addition to the material in the preceding two footnotes, her Submissions at Appendix E (Court Book 122-129).
[45] Submissions at [40], [46], [48]-[55] (Court book 107-110).
[46] Tribunal decision, [75] (Court book 223). Logically, the same conclusion had to apply to her son.
[47] Tribunal decision, [76] (Court book 223).
[48] Tribunal decision, [79] (Court book 224). It failed, however, to have regard to the contents of the Post-hearing submissions. This is discussed in the context of appeal ground 3.
[49] Tribunal decision, [81] (Court book 225) (emphasis added).
[50] Tribunal decision at [13] (Court book 213).
[51] There is no equivalent provision in the Refugees Convention.
[52] General Comment No 6, [61].
[53] In considering his claim for complementary protection, the Tribunal considered only whether he would be 'imputed with dissenting political views in light of familial links and will also be perceived to share the [First Appellant's] non belief in Islam' and whether 'his father will have custody of him on return to Iran', concluding that this would not occur: Tribunal decision at [92] (Court book, 226).
[54] December 2013 Application, [31], [36] (Court book 44); Secretary's determination, page 5 (Court book 81); Submissions at [54] (Court book 109-110); May 2014 Statement, [19]-[21] (Court book 158).

'States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of... children for any purpose or in any form.'

The Second Appellant's claim as a person at risk of being separated from his custodial parent, or abducted on return to Iran was also not considered by reference to these provisions of the Children's Convention by the Tribunal at all.

42. The Tribunal's failure to give consideration to whether returning the Second Appellant to Iran would give rise to a risk of detention, contrary to Article 37 of the Children's Convention, or of separation or abduction, contrary to Article 9 and/or 35, constituted a failure to consider either of those integers of his claim to complementary protection against those obligations. Given that the obligations, with their singular focus on the protection of *children*, are framed in much broader terms than the Refugees Convention or other relevant sources of complementary protection at international law, it was significant to the rejection of his claims that this assessment against the Children's Convention was not undertaken by the Tribunal.

43. As noted, s 22 of the Convention Act required that the Tribunal 'act according to the principles of natural justice'. In *Dranichnikov v Minister for Immigration and Multicultural Affairs*, the High 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.[55]

This analysis reflects the second of the two aspects of the hearing rule, which requires both that the affected person have an opportunity to provide information[56] and a reflex entitlement to be heard by the decision-maker when the information is given.[57]

44. In this case, the Tribunal failed to respond to a substantial, clearly articulated argument (namely, that the Second Appellant was at risk of abduction by his mother's former boss and was at risk of detention on return as a failed asylum seeker) relying upon facts established by the material before the Tribunal (namely, that the Second Appellant was a child who was threatened, through his mother, with abduction by his mother's former boss and who would, if returned, have the status of a failed asylum seeker).

45. It could be no answer to say that the Second Appellant had failed specifically to identify Articles 35 and 37 (cf Article 9) as the source of rights which he feared would be violated if he were returned to Iran. 'Proceedings before the Tribunal are not adversarial; and issues are not defined by pleadings, or any analogous

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[55] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24] (see also [32]), approved and applied by a unanimous High Court in *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319 at 356 [90]. See further, eg, *Htun v Minister for Immigration* (2001) 233 FCR 136 at 152 [42] ('[t]o make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on') per Allsop J, Spender J agreeing.

[56] *Minister for Immigration and Border Protection v SZSSJ, Minister for Immigration and Border Protection v SZTZI* (2016) 90 ALJR 901 at 915 [82]-[83]; see also the authorities summarised at *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [159]-[166] per Bromberg J.

[57] *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.

process.'[58] Accordingly, in contrast with adversarial proceedings, a decision-maker in the position of the Tribunal charged with an *investigative* or inquisitorial function is not entitled to limit its determination to the case expressly articulated by the applicant 'if the evidence and material which it accepts, or does not reject, raises a case on a basis not articulated by the [applicant]'.[59] An applicant for asylum is not required to 'pick the correct Convention "label" to describe his or her plight'.[60] In any event, on a fair reading of the material submitted to the Tribunal, the Second Appellant based his claim for complementary protection on the risk of violation of his rights under the Convention arising from detention or removal from his mother.

46. The Tribunal breached s 22(1) of the Convention Act and thereby committed an error of law by failing to consider two substantial, clearly articulated claims of the Second Appellant arising under the Children's Convention. That failure led the Tribunal into the consequential error of not considering whether Nauru would be in breach of its international obligations in returning the Second Appellant to Iran, an action precluded by s 4(2) of the Convention Act.

Ground 3: failure to deal with submissions and country information concerning risk of harm to failed asylum seekers

47. Consistently with the obligation under s 22 of the Convention Act to 'act according to the principles of natural justice and the substantial merits of the case', the Tribunal is obliged under s 34(4)(d) to 'give... a written statement that... refers to the evidence and other material on which the findings of fact were based.' Section 34(4)(a)-(d) adopts the wording of section 430(1)(a)-(d) of the Migration Act. Of that section, this Court has held:

> 'The Court is entitled to take the reasons of the Tribunal as setting out the findings of fact the Tribunal itself considered material to its decision, and as reciting the evidence and other material which the Tribunal itself considered relevant to the findings it made. Representing as it does what the Tribunal itself considered important and material, what is present — and what is absent — from the reasons may in a given case enable a Court on review to find jurisdictional error...'[61]

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

[59] *Htun v Minister for Immigration* (2001) 233 FCR 136 at 140 [13] per Merkel J. See further, to the same effect, *Paramanathan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28 at 63 per Merkel J, citing *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 425 per Brennan J; *Satheeskumar v Minister for Immigration and Multicultural Affairs* [1999] FCA 1285 at [15] per Wilcox, Tamberlin and Madgwick JJ; *Sellamuthu v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 287 at 293-294 per Wilcox and Madgwick JJ; *Chen v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 157 at [114] 180 per Merkel J; *Giraldo v Minister for Immigration and Multicultural Affairs* [2001] FCA 113 at [56]-[59] per Sackville J.

[60] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1097 [56], 1100 [78] per Kirby J; *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2000] FCA 1801 at [49] per Whitlam, Tamberlin and Sundberg JJ.

[61] See *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (***Yusuf***) at [10], [34], [44], [68], [69], as summarised in *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 (***MZYTS***) at 447 [49] per Kenny, Griffiths and Mortimer JJ.

> '... 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.'[62]
>
> The provision entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material.[63]

48. It follows that a failure by the Tribunal to advert in its reasons to independent country information and submissions presented to it may lead to the conclusion that it failed to consider those matters (or that it considered them but found them not to be material).

49. It is settled that '[w]hen making a decision, administrative decision-makers are generally obliged to have regard to the best and most current information available'[64] to that decision maker 'at the time the decision is made.'[65] Jurisdictional error arises when 'a submission of substance' is not evaluated,[66] even if that submission is made after the oral hearing conducted in respect of the applicant's claim.[67]

50. In this case, ten days after the Tribunal heard the First Appellant's claims, her lawyers made a written submission on her behalf. That three-page submission[68] gave additional country information in response to the Tribunal's concern,[69] articulated during the hearing, that there was insufficient material to substantiate the First Appellant's claim that she was at risk of being harmed upon return to Iran by reason of having made a protection claim abroad based on her political opinion. In particular, it provided, amongst other information, translations of two 2011 articles which were concerned with prosecution by Iranian authorities of returned asylum seekers. That country information included the following:

> 'On extradition of Iranian asylum seekers to Iran, Amiry-Moghaddam [spokesperson for Iran Human Rights] said: "Iranian authorities have recently signalized [sic] that Iranians who have sought asylum abroad should be charged for 'dissemination of false propaganda against the Islamic Republic of Iran' and punished for that. This means that seeking asylum by itself could be a reason for the Iranian authorities to subject the asylum seekers who are extradited to Iran, to persecution, imprisonment and ill-treatment...'[70]

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[62] *Yusuf* at [44] per Gaudron J, referred to in *MZYTS* at 449 [60]. See further *Yusuf* at [10] per Gleeson CJ, referred to in *MZYTS* at 449 [59].

[63] *Yusuf* at [69] per McHugh, Gummow and Hayne JJ, referred to in *MZYTS* at 449 [61].

[64] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 299 [41] per Kirby J. See further *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 624 per Gaudron and Gummow JJ, Brennan CJ, Dawson and Toohey JJ agreeing at 609; *SZJTQ v Minister for Immigration and Citizenship* (2008) 172 FCR 563 at 571-572 [27]-[32] per Rares J.

[65] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 45 per Mason J.

[66] *SZSSC v Minister for Immigration and Border Protection* (2014) 317 ALR 365 at [75]-[76], [78]-[81] per Griffiths J, citing *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [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 [38].

[67] See, eg, *MZYTS* which concerned, like the present case, the reception of post-hearing submissions on a matter clearly relevant to determination of the application for asylum.

[68] Post-hearing submissions (Court book 207-209).

[69] See, eg, the transcript of the Tribunal hearing (**Transcript**) at T31.34-32.30 (Court book 191-192).

[70] Post-hearing submissions at page 2 (Court book 208).

'[The Iranian authorities] have clearly stated their intentions to prosecute Iranian asylum seekers – particularly politically active refugees – should they be deported back to Iran...

Article 7 of the Islamic Penal Code provides that individuals who are arrested in Iran for crimes that occurred outside the country are tried according to the Islamic Penal Code. The Islamic Republic considers all Iranian political asylum-seekers to be criminal propagating against the regime and has therefore promised prosecution of returned asylum-seekers under the provisions of Article 7.

...The regime's Chief Prosecutor, Mohsen Eje'i, has supported arguments articulated by retired judge and lawyer Abdoulnabi Molazadeh, who stated on February 17, 2011 that anyone who has filed a political refugee case is considered a person engaged in propaganda against the Islamic regime and therefore criminal and subject to prosecution under Article 7.'[71]

51. In respect of the First Appellant's claim of risk of harm as a failed asylum seeker upon her return to Iran, the Tribunal referred to a range of country information in relation to failed asylum seekers[72] which, in its view, 'indicates that it depends on the political profile of a failed asylum seeker as to whether they face a risk of harm on their return to Iran'.[73] On that basis, and given the Tribunal had found that the First Appellant did not have a sufficient political profile, it did not accept that the First Appellant would be at risk of harm on return.[74]

52. However, this assessment did not take into account country information contained in the post-hearing submissions which indicated that the Iranian authorities would consider *anyone* who has filed a political refugee case (as the First Appellant had done[75]) as a person engaged in propaganda against the Islamic regime and subject to criminal prosecution. The Tribunal was required to consider whether or not it was satisfied of the First Appellant's claims that she and her son would be harmed upon return to Iran because they had sought asylum on political grounds.

53. In *MZYTS* – which also concerned a failure by the Tribunal to consider a post-hearing submission containing country information relevant to the risks faced by the applicant if he were returned – the Full Court of the Federal Court observed:

'The Tribunal's reasons disclose no process of weighing evidence and preferring some over the other. In the context of two or more pieces of apparently pertinent, but contradictory, evidence an expression of a preference for some evidence over other evidence generally requires an articulation of the different effects of the evidence concerned, and then some indication as to why preference is given. All these are matters for the trier of fact. The absence from the recitation of country information of the material

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[71] Ibid at pages 2-3 (Court book 208-209).
[72] Tribunal decision at [77]–[79] (Court book 223-224).
[73] Tribunal decision at [77] (Court book 223-224). This was the position expressed during the hearing by Tribunal member Boddison: see Transcript T32.8-28 (Court book 192).
[74] Tribunal decision at [80]-[81] (Court book 225).
[75] See, eg, December 2013 Application at [41], [49] (Court book 44, 45); Secretary's determination at pages 5 and 6-7 (Court book 81, 82-83); Submissions at [1(a)], [7], [13], [17(a)], [23(d)], Appendix D (Court book 97, 98-99, 100, 101, 103, 138-148).

referred to in the post-hearing submissions is indicative of omission and ignoring, not weighing and preference.'[76]

54. The same can be said of the reasons of the Tribunal in this case. It made no mention of the post-hearing submission at all. The Tribunal did not mention, let alone weigh,[77] the country information that the Appellants put before it to the effect that, having made a refugee claim based on political grounds, they were at risk of criminal prosecution. It reached a conclusion adverse to them in this regard[78] having ignored that information.

55. As in *MZYTS*, the Tribunal's reasons clearly reveal a failure by it to perform its statutory task.[79] As in *MZYTS*,[80] the only inference available from the failure of the Tribunal to refer to that information is that the Tribunal did not consider the material, contrary to ss 22 and 34(d) of the Convention Act.

56. The interplay between the matters the subject of appeal ground 1 and those the subject of appeal ground 3 compounds and underscores the error. The evidence before (and apparently accepted by) the Tribunal was to the effect that Iranian women 'face systemic discrimination and sexual harassment "[i]n the legal system and the workforce".'[81] The Tribunal also had before it country information to the effect that women in Iran are not afforded equality before the law, referring to disproportionate punishment for crimes and devaluation of testimony based on gender.[82] Having accepted that it was likely that the First Appellant would, by reason of having made an application for asylum on political grounds, be detained and questioned upon her return to Iran,[83] it was especially important for the Tribunal to consider the country information in the Post-hearing submissions which indicated that criminal prosecution of failed asylum seekers was not limited to those with an established 'political profile' but extended (at least) to anyone whose claim to refugee status was founded on their political views (whether imputed or otherwise). If such country information had been considered, and accepted, by the Tribunal, and it had thereby concluded that there was a foreseeable risk that the First Appellant would be detained and face criminal charges upon her return, this would have squarely raised the *further* risk of the First Appellant suffering serious, gender-based discrimination in the criminal justice system.

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[76] *MZYTS* at 447 [50].
[77] Cf *MZYTS* at 444 [38], 447 [50], 453 [76].
[78] Tribunal decision at [81] (Court book 225).
[79] See *MZYTS* at 449 [57].
[80] See *MZYTS* at 448 [52], contrasting the situation, contemplated by French CJ and Kiefel J in *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [31], where it may be inferred that a matter put forward by an applicant for asylum has been considered, but not mentioned by the Tribunal in its reasons. See, further, *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at 641 [49] per French CJ, Sackville and Hely JJ, where the Full Court of the Federal Court held that the failure by the Tribunal to refer in the discussion and findings in its reasons to the applicant's fear of persecution arising out of his son's marriage to a Muslim woman 'leads to the inescapable conclusion that it failed to address the issue'.
[81] Tribunal decision at [72] (Court book 223).
[82] Submissions, Appendix E at page 58 (Court book 154).
[83] Tribunal decision at [76], [79] (Court book 223, 224).

Conclusion

57. For the reasons outlined above, it is respectfully submitted that the High Court ought, pursuant to s 8 of the Nauru Appeals Act, make the orders set out in paragraph 59 below.

Part VII: Legislative provisions

58. The applicable constitutional provisions, statutes and regulations are attached as Annexure A.

Part VIII: Orders sought

59. The orders sought by the Appellants are:

    a. The appeal be allowed.

    b. The matter be remitted to the Refugee Status Review Tribunal for reconsideration according to law.

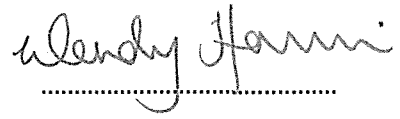
    c. The Respondent pay the Appellants' costs of the appeal to this Court.

    d. Such further or other orders as the Court deems appropriate.

Part IX: Oral argument

60. The Appellants estimate that they require two and a half hours to present oral argument.

Dated: 28 March 2017



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