IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M21 of 2017

BETWEEN:

MEG 027

MEG 026

Appellants

and

REPUBLIC OF NAURU

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication

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

Part II. Statement of Issues

2. The appeal raises the following issues:

   a. whether the Appellants should be permitted to raise new grounds for the first time on an appeal under s 44 of the *Appeals Act 1972* (Nr) and s 5 of the *Nauru (High Court Appeals) Act 1976* (Cth), in circumstances where those grounds were not raised in the proceedings before the Supreme Court of Nauru;

   b. whether the Refugee Status Review Tribunal's finding that the First Appellant's return to Iran would not breach Nauru's international obligations under the Convention to Eliminate All Forms of Discrimination Against Women (**CEDAW**)[1] was affected by error requiring remittal to the Tribunal;

[1] opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

Republic of Nauru
Level 30, 35 Collins Street
Melbourne, Victoria
3000

Telephone: 0457 000 678
Fax: *none available*
Email: rogan.oshannessy.nrst@gmail.com
Ref: Rogan O'Shannessy

c. whether the Tribunal failed to consider claims made by the Second Appellant that, on his return to Iran, he faced detention as a failed asylum seeker or separation from his mother in contravention of Nauru's obligations under the Convention on the Rights of the Child (**CRC**);[2]

d. whether the Tribunal failed to deal with submissions and country information in relation to the Appellants' claim that they might face harm as failed asylum seekers on their return to Iran.

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

3. The Respondent does not consider that notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Material facts

4. The First Appellant was born in Tehran on 23 November 1962, and is a citizen of Iran. The Second Appellant is her son who was born on 16 January 2001. They both arrived in Australia on 25 July 2013, following which they were transferred to Nauru for the assessment and determination of their protection claims.

5. On 16 December 2013, the First Appellant applied to be recognised as a refugee under Part 2 of the *Refugees Convention Act 2012* (Nr) (the **Convention Act**). The Second Appellant was included in the application as a dependent who claimed derivative status.[3] On 18 May 2014, the Secretary determined that the First Appellant was not a refugee and was not entitled to complementary protection, and that the Second Appellant could not be accorded derivative status.

6. The Appellants applied to the Tribunal for merits review of the Secretary's determination under Part 4 of the Convention Act. On 26 September 2014, the Tribunal affirmed the Secretary's determination.

7. The Tribunal did not accept that the First Appellant had a well-founded fear of persecution in Iran for reasons of her family's political profile, her agnostic (non-

---

[2] opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[3] See Convention Act, s 6(2).

Muslim) religious beliefs, her history with her former boss, her status as a woman or a divorced woman, or her status as a failed asylum seeker.

a. The Tribunal found that there was no reasonable possibility that the First Appellant would be imputed with an anti-government political opinion or that she would be persecuted due to her family background.[4] The Tribunal accepted that the First Appellant had been monitored by internal intelligence (Herasat) while she was a government employee, and that she had been regularly called for questioning at a Herasat office. However, the fact that Herasat did not take action against the First Appellant indicated that they did not regard her as politically suspect or untrustworthy. Although the Tribunal accepted that the First Appellant may have been discriminated against in relation to access to education and employment, she had been able to complete secondary education and to obtain employment, and any discrimination did not amount to a serious violation of fundamental human rights.

b. The Tribunal did not accept that the First Appellant would be regarded as an apostate or labelled as an infidel, and found that there was no reasonable possibility that she would be persecuted due to the non-practice of Islam.[5] The Tribunal did not accept that being required to wear modest Islamic clothing amounted to persecution, or impinged on the First Appellant's ability to express her own religious beliefs.[6]

c. The Tribunal found that there was no reasonable possibility that the First Appellant would be persecuted or imputed with an anti-regime political opinion on account of her dispute with her former boss.[7] The Tribunal expressed concerns about inconsistencies and embellishments which cast doubt on the veracity of the First Appellant's account. While accepting that the First Appellant may have been a victim of sexual harassment at work and had lost her job because she rejected advances from her boss, the Tribunal did not accept that her boss would make a political case against her or otherwise engage in activities to ensure that she was imprisoned. Nor did the Tribunal accept the First Appellant's claims that her boss would approach her husband and encourage him to return to court and contest custody of their son.

d. The Tribunal accepted that the First Appellant would suffer some discrimination as a woman and was more likely to receive unwanted sexual advances as a

---

4 Decision record at [23].
5 Decision record at [30].
6 Decision record at [33].
7 Decision record at [59].

divorced woman, but found that this treatment did not amount to persecution.[8] While acknowledging that the awarding of custody of older children discriminated against women in Iran, the Tribunal found that the First Appellant had had full custody of her son (the Second Appellant) since he was 12 months old, and did not accept that there was a reasonable possibility that her ex-husband would take action to obtain custody or would be successful in any such action.

e. The Tribunal accepted that, on the First Appellant's return to Iran, the authorities would assume that she was a failed asylum seeker and that she would be questioned about her reasons for leaving Iran and about what she had done outside Iran. However, the Tribunal did not accept that the First Appellant had a political profile, and found that she would not be perceived to have opposed the government of Iran because she had applied for asylum in Australia or Nauru.[9]

8. In relation to complementary protection, the Tribunal did not accept that the discrimination experienced by the First Appellant on her return to Iran would reach such a level of severity as to amount to degrading treatment,[10] and found that her return would not breach Nauru's intentional obligations arising under CEDAW.[11]

9. Pursuant to Part 5 of the Convention Act, the Appellants appealed to the Supreme Court of Nauru against the Tribunal's decision. The Amended Notice of Appeal contained two grounds, each of which was concerned with the manner in which the Tribunal dealt with the First Appellant's claim that her ex-husband would take custody of the Second Appellant if they returned to Iran. The Appellants submitted that the Tribunal had failed to consider the evidence in support of this claim, and had failed to set out its reasons and to refer to the evidence on which it based its finding that the ex-husband would be unsuccessful in any action to obtain custody of the Second Appellant.

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

---

8 Decision record at [73].
9 Decision record at [81].
10 Decision record at [87].
11 Decision record at [88]-[90].

11. On 21 February 2017, the appellants filed a Notice of Appeal in the High Court of Australia pursuant to s 44 of the *Appeals Act 1972* (Nr) and s 5 of the *Nauru (High Court Appeals) Act 1976* (Cth).[12]

Part V: Applicable constitutional provisions, statutes and regulations

12. The following constitutional provisions, statutes and regulations are applicable:

    a. *Refugees Convention Act 2012* (Nr)

    b. *Refugees Convention (Amendment) Act 2014* (Nr)

    c. *Refugees Convention (Amendment) Act 2015* (Nr)

    d. *Refugees Convention (Validation and Amendment) Act 2015* (Nr)

    e. *Refugees Convention (Derivative Status and Other Measures) (Amendment) Act 2015* (Nr)

    f. *Appeals Act 1972* (Nr), Part VI (ss 44-46), Part VII (ss 47-53).

    g. *Nauru (High Court Appeals) Act 1976* (Cth), ss 3-10 and Schedule.

    h. *Judiciary Act 1903* (Cth), ss 31, 32, 37.

    See generally Annexure A of the Appellants' Submissions dated 28 March 2017 (**Appellants' Submissions**).

Part VI: Argument

Leave to raise new grounds

13. The Respondent accepts that, on an appeal under s 5 of the *Nauru (High Court Appeals) Act 1976* (Cth), the Court has jurisdiction to consider new grounds of appeal not raised before the Supreme Court of Nauru. The question is whether the Court should exercise its discretion to do so.

14. The general position is that a party requires leave to raise new grounds for the first time on appeal. This reflects the orthodox principle that, other than in exceptional

[12] On 2 March 2017, the Appellants filed an amended notice of appeal to correct an error in the identification of the Appellants that was present in the original notice of appeal.

cases, a party should be bound by the conduct of his or her case.[13] In *Coulton v Holcombe*,[14] a majority of this Court observed:

> It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.

15. This principle, and the established rules directed at the question of whether leave should be granted to raise new grounds, are capable of application to an appeal from the Supreme Court of Nauru, notwithstanding that this Court exercises original rather than appellate jurisdiction. This Court's function on an appeal under the *Nauru (High Court Appeals) Act 1976* (Cth) is sufficiently analogous to the function of the Full Federal Court in an appeal from a first-instance decision on an application for judicial review brought under s 476 of the *Migration Act 1958* (Cth). Indeed, the Appellants do not suggest to the contrary.[15]

16. Accordingly, the Appellants should not be permitted 'to simply put aside and ignore' the judgment of the Supreme Court of Nauru and to ask this Court to conduct afresh a judicial review of the Tribunal's decision.[16]

17. In order to raise a new ground on appeal, the Appellants must demonstrate that it is expedient and in the interests of justice to allow the ground to be raised.[17] It is necessary to take into account such matters as whether the new arguments have a reasonable prospect of success, whether the appellant has given an acceptable explanation for failing to raise the grounds in the court below, the prejudice to the respondent in allowing the appellant to raise the new argument, and the integrity of

---

[13] See eg. *Metwally v University of Wollongong* (1985) 60 ALR 68, 71; *H v Minister for Immigration and Multicultural Affairs* (2000) 63 ALD 43, 44-45 [6]-[8]; *Gomez v Minister for Immigration and Multicultural Affairs* (2002) 190 ALR 543.

[14] (1986) 162 CLR 1, 7.

[15] Appellants' submissions at [20].

[16] *Iyer v Minister for Immigration and Multicultural Affairs* (2001) 192 ALR 71, 86 [61] (per Gyles J); *MZYPO v Minister for Immigration and Citizenship* [2013] FCAFC 1 [63]-[68] (per Lander and Middleton JJ).

[17] *O'Brien v Komesaroff* (1982) 150 CLR 310, 319.

the appellate process.[18] It is also generally understood that where the new ground could possibly have been met by calling evidence at the hearing, leave will be refused.[19] In this respect, had the matters identified in appeal ground 3 been raised in the Supreme Court, the Republic may have been able to put on evidence about the receipt of and attention given to the post-hearing submissions that are the subject of the Appellants' argument on that ground.

18. The present appeal to this Court involves a wholesale departure from the issues that were ventilated by the Appellants before the Supreme Court of Nauru. Not a single ground advanced below is maintained before this Court. The issues sought to be raised are entirely new. The Appellants have not provided any explanation for this departure. They were legally represented by both a law firm and counsel in the proceeding before the Supreme Court. In so far as the new grounds sought to be raised before this Court reflect a difference of opinion between legal representatives, any such explanation would be inadequate and unsatisfactory.[20]

19. The question of prejudice to the respondent, identified by the appellants as being a matter that might be ameliorated by an order for costs,[21] should be given a cautious application. As was noted by Gyles J in *Iyer v Minister for Immigration and Multicultural Affairs*:[22]

> In public law matters like this, it can always be said that no actual prejudice apart from costs is suffered by the respondent compared with the prejudice to the appellant. It can easily be overlooked that there is a significant public interest in the timely and effective disposal of litigation. This aspect has particular force in this area of public law, where delays in dealing with applications for protection visas are obviously to be avoided if possible.

20. Further, for the reasons that are set out below, the new grounds sought to be advanced do not have sufficient merit to warrant consideration by this Court.

---

[18] See eg. *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588, 598—9 [48]; *VAAC v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 168, 177 [26].

[19] See eg. *Water Board v Moustakas* (1988) 180 CLR 491, 497 [13].

[20] See eg. *AYJ15 v Minister for Immigration v Border Protection* [2016] FCA 863 [17].

[21] Appellants' submissions at [22(d)].

[22] (2001) 192 ALR 71, 86 [62].

21. In all of these circumstances, the Court should refuse leave to the Appellants to raise the new arguments on the appeal.

Ground 1: Nauru's international obligations under CEDAW

22. Having found that the First Appellant was not a refugee within the meaning of the Refugees Convention,[23] the Tribunal went on to find that she was not owed complementary protection.[24] In particular, the Tribunal found that *'returning the* [First Appellant] *to Iran would not breach Nauru's international obligations under CEDAW'*.[25]

23. Contrary to the Appellants' submissions, the Tribunal did not reject the claim for complementary protection under CEDAW on the ground that Nauru was not bound by any non-refoulement obligation.[26] The Tribunal's reasons for decision must be given a beneficial construction in the context of the evidence and submissions that were before it, and in the light of the case that was put to the Tribunal on behalf of the First Appellant. In this regard:

a. In relation to complementary protection, the submissions provided to the Tribunal on behalf of the appellant by letter from Craddock Murray Neumann Lawyers dated 20 July 2014 (the **Tribunal submissions**) themselves drew a distinction between 'international non-refoulement obligations',[27] and other 'international obligations' of Nauru which might be breached by removal to a country of origin.[28] CEDAW was addressed as falling into the second category (along with the *International Covenant on Civil and Political Rights* (**ICCPR**)), which similarly does not contain any express non-refoulement provision). The Tribunal submissions expressly asserted that, for the purposes of complementary protection, 'international obligations' in relation to removal were not limited to

---

[23] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), as amended by the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967); Decision record at [84].

[24] Decision record at [91].

[25] Decision record at [90]. The source of the obligation of the Tribunal to consider Nauru's 'international obligations' is the combined operation of the definition of 'complementary protection' in s 3 of the Act, read with ss 6, 31, 33 and 34 of the Act.

[26] Appellants' Submissions at [26].

[27] Referring to Article 19(c) of the *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia Relating to the Transfer to and Assessment of Persons in Nauru and Related Issues*; and Article 3 of the Convention Against Torture. See Tribunal submissions at [36]-[39]

[28] Tribunal submissions at [40]-[46].

'international non-refoulement obligations' and went 'beyond express duties not to refoule in certain circumstances'.

b. In relation to non-refoulement obligations, the First Appellant's case was that she faced a risk of 'grievous discrimination on account of her gender and religious beliefs' which would amount to 'degrading treatment' for the purposes of Article 19(c) of the Memorandum of Understanding even if it did not amount to persecution. The Tribunal directly addressed and responded to that submission in its reasons for decision.[29]

c. In relation to other 'international obligations', the First Appellant submitted that, for the purposes of s 4 of the Refugees Convention Act, it would be contrary to Nauru's international obligations under CEDAW if a woman was returned to circumstances where she would experience any discrimination contrary to the requirements under CEDAW – including, for example, the obligation of Nauru as a party to CEDAW to ensure the effective protection of women against any act of discrimination and to take appropriate measures to guarantee equal enjoyment of human rights and fundamental freedoms. It should be noted that such an obligation was not described or framed by the First Appellant as an 'international non-refoulement obligation'. Further, as submitted below, there is no support in the international jurisprudence for such an expansive extra-territorial operation of the obligations of States parties to CEDAW.

24. In responding to the First Appellant's submissions in relation to Nauru's international obligations under CEDAW, the Tribunal observed that CEDAW creates obligations on States parties to take actions and measures within their national borders, and that 'there are no non-refoulement obligations as there are in the Refugees Convention (article 32) or the Convention Against Torture (article 3)'.[30] There is nothing incorrect or inaccurate about those observations.[31] It was implicitly accepted by the First Appellant in the Tribunal submissions that CEDAW did not contain a non-refoulement provision, and did not in terms impose an 'international non-refoulement obligation' in the same manner as a treaty such as the Convention Against Torture. The Tribunal was doing no more than setting out that accepted position. This did not necessarily deny any possible obligation under CEDAW in relation to the removal of a person from

[29] Decision record at [86]-[87].
[30] Decision record at [89].
[31] However, the reference to non-refoulement obligations under the Refugees Convention should probably have referred to Art 33 instead of or in addition to Art 32.

Nauru, in so far as that removal would involve action taken within the national borders or jurisdiction of Nauru.

25. The Tribunal proceeded on the basis that CEDAW did not create an obligation on Nauru that would be breached simply because the country to which a woman was returned had not ratified CEDAW, or was in breach of obligations under CEDAW. This statement deals with and responds to a submission that was made to the Tribunal by the First Appellant to that effect.[32] The Tribunal acknowledged that Iran had not complied with some articles of CEDAW.[33] Nevertheless, the Tribunal found that the return of the First Appellant to Iran would not breach Nauru's international obligations under CEDAW. For the reasons set out below, this finding was open to the Tribunal and did not involve any error which raises a point of law.

26. In summary:

    a. it cannot be said that there is an international obligation under CEDAW not to return a woman to a country in which there is <u>any</u> discrimination against women that is or would be contrary to one or more provisions of CEDAW;

    b. in so far as there is an obligation under CEDAW not to return a woman to a country in which she would be exposed to any real, personal and foreseeable risk of serious forms of gender-based violence, on the Tribunal's findings of fact, the First Appellant faced no such risk on her return to Iran;

    c. in particular, the Tribunal made findings of fact that the First Appellant had family support and protection in Iran, and that any gender-based discrimination that she might experience both did not amount to persecution[34] and did not reach the level of severity as to amount to degrading treatment.[35]

---

[32] Tribunal submissions, para [44] and Appendix E. The First Appellant submitted that, although Iran had not signed or ratified CEDAW, 'the extent to which the Iranian government has acted (and failed to act) in violation of CEDAW is relevant for the purposes of the [Convention Act]', and that '[i]t is our submission that Nauru has international obligations, as a party to CEDAW, to protect persons in its territory from exposure to treatment in breach of that treaty (including through removal to their countries of origin).'

[33] This does not mean that Iran was in breach of international obligations under CEDAW, because it is not a party to that Convention.

[34] Decision record at [73]. In relation to claims of gender-based persecution under the Refugees Convention, the First Appellant relevantly submitted that she faced harm and threats of harm from her former employer because she was a woman, and more generally that women (in particular divorced women) in Iran faced a risk of discrimination and harassment amounting to persecution: see Tribunal submissions, para [17], Appendix A.

[35] Decision record at [87].

27. In so far as the disposition of ground one depends upon a proper identification of Nauru's international obligations under CEDAW, this analysis must necessarily commence with the terms of CEDAW and not, as the Appellants' contend, with s 4(2) of the Convention Act. Section 4(2) turns on an identification of the 'international obligations' of Nauru, but does not itself assist in the identification of those international obligations.

28. The Appellants' Submissions make specific reference to article 2(d) of CEDAW.[36] Article 2(d) relevantly provides that 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'*. The Appellants' implicit submission that the return of the First Appellant to Iran would itself be 'an act or practice of discrimination against women' should be rejected.

29. While noting the limits of the assistance to be derived from guidance material issued by the United Nations Committee on the Elimination of Discrimination Against Women (**UNCEDAW**), the Respondent accepts that UNCEDAW General Recommendation No 32 (**Gen Rec 32**)[37] identifies an obligation under article 2(d) 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'*, and that this obligation may be breached by decisions taken within the jurisdiction of the sending State which have such necessary and foreseeable consequences.[38] It was the view of UNCEDAW that States parties have an obligation not to expel or return a woman 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'*.[39]

---

[36] Appellants' Submissions at [29].

[37] UNCEDAW, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women,* UN Doc CEDAW/C/GC/32 (14 November 2014).

[38] Gen Rec 32 at [22].

[39] Gen Rec 32 at [23].

30. It is only in this sense that it might be suggested that there is an implied obligation of '*non-refoulement*' under CEDAW. However, such terminology may be apt to mislead, in so far as there is no express obligation under CDEAW not to 'refoule' persons to territories which do not fully comply with CEDAW obligations. Whilst a substantive obligation owed by Nauru under CEDAW might, in certain circumstances, be breached by the expulsion or removal of a person to another country, such a breach would be of a substantive obligation (such as article 2(d)) rather than any express or implied obligation of 'non-refoulement'.

31. The substantive obligation that arises by reference to article 2(d) is engaged in circumstances where a woman may be exposed to harm of a kind which is 'serious', which is gender-based, and which can fairly be described as involving 'violence'.[40] Significantly, the First Appellant did not articulate any claim, and none arose on the material that was before the Tribunal, that raised the possibility that the First Appellant would be subject to gender-based violence on her return to Iran.

32. To the extent that the First Appellant made claims that were directed at the possibility of gender-based discrimination upon her return to Iran, the Tribunal made findings in respect of these claims as follows.

    a. The Tribunal accepted that the First Appellant might have been a victim of sexual harassment at work and that she had lost her job because she rejected the advances of her boss, but did not accept that her boss would engage in activities to ensure that the First Appellant would be imprisoned, nor that he had constantly telephoned her or had stood outside her home. The Tribunal found that the First Appellant's fear of persecution on the basis of her dispute with her former boss was not well-founded.[41]

    b. The Tribunal did not accept that the First Applicant had been or would be discriminated against in relation to the custody of her son.[42]

---

[40] This conclusion follows from Gen Rec 32 together with the UNCEDAW communications referred to in the Appellants' Submissions: see *MNN v Denmark,* communication No 33/2011, 15 July 2013, at [8.7]-[8.10]; *MEN v Denmark,* communication No 35/2011, 26 July 2013, at [8.6]-[8.9]; *N v Netherlands*, communication No 39/2012, 26 July 2013, at [6.4]; and *YW v Denmark,* communication No 51/2013, 2 March 2015, at [8.5]-[8.7].

[41] Decision record at [56] and [59].

[42] Decision record at [61]-[64], [67].

c. The Tribunal rejected the First Appellant's claim that she was a single woman without male protection, referring to her evidence that she had lived with her mother and two single brothers.[43] The First Appellant had both a support network and an earning capacity.[44]

d. The Tribunal rejected the First Appellant's claim that she would be persecuted by virtue of her status as a woman or a divorced woman, having regard to country information. The Tribunal noted that the First Appellant was not in the same situation as the women referred to in the country information – she was not facing criminal charges, she did not live in a rural area, she was not married, she was not planning to study, and she was not a victim of rape or domestic violence.[45]

e. In relation to the First Appellant's claim that she would be at risk as a divorced woman who lived on her own in Iran, the Tribunal found that she did not live on her own and, while she would suffer some discrimination as a woman and would be more likely to receive unwanted sexual advances as a divorced woman, such treatment did not amount to persecution.[46]

f. In relation to the First Appellant's claim that, as a woman or divorced woman, she would face discrimination that amounted to degrading treatment, the Tribunal found that the First Appellant would not be discriminated against in marriage and divorce or in the criminal justice system on return to Iran. The Tribunal did not accept that the discrimination that the First Appellant would experience on her return to Iran would reach the level of severity as to amount to degrading treatment.[47]

33. The Tribunal's findings were responsive to the claims articulated by the First Appellant in respect of the risks of gender-based discrimination in Iran, and supported the ultimate finding that returning the First Appellant to Iran would not breach Nauru's international obligations under CEDAW.

34. Even if the obligations derived from article 2(d) of CEDAW were held to extend beyond serious forms of gender-based violence which are a necessary and foreseeable consequence of return to the country of origin, and to encompass other serious forms of discrimination against women, the principle of 'non-refoulement' which has been

---

[43] Decision record at [65].
[44] Decision record at [69].
[45] Decision record at [66].
[46] Decision record at [73].
[47] Decision record at [87].

invoked by UNCEDAW as informing those obligations under article 2(d) is directed to 'serious violations of human rights, notably arbitrary deprivation of life or torture or other cruel, inhuman or degrading treatment or punishment'.[48] In circumstances where the Tribunal found that any gender-based discrimination that might be experienced by the First Appellant in Iran did not amount to persecution or to degrading treatment,[49] it could not be said that Nauru would breach its international obligations under article 2(d) of CEDAW by returning the First Appellant to Iran.

35. Alternatively, even if the Tribunal's interpretation of the obligations under CEDAW was too narrow, this did not affect the outcome of its decision. The concept of 'serious forms of discrimination' should be understood as being analogous to, or at least no broader than, the concepts of persecution or significant harm for the purposes of the Refugees Convention and the ICCPR respectively. It is clear that the obligations in respect of the return of a person to another State cannot extend to the prevention of any form of discriminatory treatment in the receiving State that would be contrary to the obligations imposed on States parties to CEDAW. Accordingly, the Tribunal's rejection of the First Appellant's claims that she would experience discrimination amounting to persecution or degrading treatment as a woman or divorced woman in Iran foreclosed any possibility of a positive finding that her return to Iran would be in breach of Nauru's international obligations under CEDAW.

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

36. The Appellants contend that the Tribunal failed to consider whether Nauru owed the Second Appellant complementary protection connected with its obligations under the Convention on the Rights of the Child (the **CRC**). The appellants identify article 37(b) and articles 9 and 35 as the source of these obligations.

---

[48] Gen Rec 32 at [21]; and see eg. *MNN v Denmark,* communication No 33/2011, 15 July 2013, at [8.8].
[49] Decision record at [73], [87].

37. The Respondent accepts that Nauru, as a State party to the CRC, must 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.[50]

38. Before the Tribunal, the appellants made submissions directed at Nauru's obligations to the Second Appellant under the CRC.[51] The Tribunal submissions made reference to specific articles of the CRC, including how it was said such articles were engaged on the facts of the Appellants' case. Notably, no reference was made to articles 35 or 37(b) of the CRC and no claim was made to the effect that the Second Appellant would be subject to the kind of treatment comprehended by article 37(b) in connection with either his status or his mother's status as a failed asylum seeker. With the possible exception of article 9, no relevant claim was made by the appellants or arose on the materials before the Tribunal which engaged the articles of the CRC that are now identified by the Appellants on appeal.

39. Ground 2(a) alleges a failure by the Tribunal to consider whether there was a real possibility that the Second Appellant would be detained as a failed asylum seeker, contrary to article 37(b) of the CRC. The Tribunal made a specific finding that the Second Appellant would not be harmed as a failed asylum seeker on his return to Iran.[52] This finding reflected the Second Appellant's derivative status on this particular issue (noting, as observed above that no claim was made that connected the Second Appellant directly to harm associated with the act of seeking asylum), and implicitly incorporated the Tribunal's reasoning concerning the First Appellant (as the mother of the Second Appellant). The Tribunal found that there was no reasonable possibility that the First Appellant would be imputed with an anti-government political opinion due to her family background,[53] or on account of her dispute with her former boss.[54] Nor would the First Appellant be perceived to have opposed the Iranian government because she unsuccessfully applied for asylum in Australia or Nauru.[55] Accordingly,

---

[50] *Cf.* United Nations Committee on the Rights of the Child, *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* 1 September 2005, 10 [27].
[51] Submissions dated 20 July 2014 at [48]-[54].
[52] Decision record at [81].
[53] Decision record at [23] and [80].
[54] Decision record at [59].
[55] Decision record at [81].

the First Appellant did not have a profile such that she would be at risk of harm on her return to Iran.[56] In such circumstances, while the Tribunal accepted that the First Appellant would be questioned on her return, it found that she would not face any subsequent adverse treatment. The Tribunal did not find that the First Appellant or the Second Appellant would be detained on their return to Iran. To the extent that the Tribunal found that they might be held for a short period for questioning, there was no suggestion that this would not be in accordance with law or that the Second Appellant would at any time be separated from his mother or unaccompanied. In such circumstances, no claim arose before the Tribunal, or on the Tribunal's findings, that the return of the Second Appellant to Iran might involve treatment in contravention of article 37(b) of the CRC.

40. Ground 2(b) alleges a failure on the part of the Tribunal to consider whether the Second Appellant would be separated from his parents or abducted by or on behalf of his mother's former boss, contrary to articles 9 and 35 of the CRC. It is not clear how an alleged breach of those articles of the CRC would, in the context of the material presented to the Tribunal (as well as more generally), constitute irreparable harm such as to engage an obligation of *non-refoulement* on the part of Nauru.

41. But in any event, the Tribunal made clear and specific findings in relation to the alleged threat of separation or abduction posed by the First Appellant's boss. These findings removed the factual basis for any claim that might otherwise have been said to engage articles 9 or 35 of the CRC. The Tribunal rejected the First Appellant's claims that her former boss would engage in activities to ensure that the First Appellant was imprisoned;[57] or that the First Appellant's boss would encourage her husband to return to court and contest custody of the Second Appellant.[58] Each of those findings dealt with the possibility that the Second Appellant might be separated from his mother.

---

[56] Decision record at [80]-[81].

[57] Decision record at [41], [46], [51], [56]. See also Tribunal submissions at [53]-[54]; Statement of First Appellant dated 26 May 2014, paras [19]-[21].

[58] Decision record at [47], [57].

42. Aside from the claim that the First Appellant's ex-husband would obtain custody of the Second Appellant, there was no relevant claim raised on the material before the Tribunal that the Second Appellant would be 'abducted', whether by the First Appellant's ex-husband or by her boss. In so far as the Appellants allege that the Tribunal failed to consider whether the Second Appellant might be separated from 'his parents', this misrepresents the claims made to the Tribunal. The material and submissions to the Tribunal were concerned only with a potential separation of the Second Appellant from his mother, the First Appellant, as a result of her ex-husband being awarded custody or otherwise obtaining custody of the Second Appellant (for example, if the First Appellant were to be imprisoned). The Tribunal made findings that engaged with, and were responsive to, the claims raised by the Appellants.

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

43. The Tribunal is not required to refer in its written statement to each and every argument or piece of evidence, including country information, put before the Tribunal by a review applicant.[59] Rather, s 34(4) of the Convention Act requires the Tribunal to set out the reasons for its decision, its findings on any material questions of fact, and the evidence or other material *on which its findings of fact were based*. The Tribunal is not required to set out the evidence or other material *on which its findings of fact were <u>not</u>* based.[60] Further, the written statement may indicate that a particular claim has been considered, notwithstanding that the Tribunal does not refer to the claim in the precise terms in which it has been advanced by a review applicant.

---

[59] See, by analogy of reasoning, *Applicant WAEE v Minister for Immigration and Multicultural Affairs* (2003) 236 FCR 593, 604 [46].

[60] See, by analogy of reasoning, *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 331 [9]-[10] (per Gleeson CJ), 337-8, [33]-[34] (per Gaudron J), 346 [68] (per McHugh, Gummow and Hayne JJ).

44. Before the Tribunal, the Appellants advanced claims, relevantly, that:

a. the First Appellant feared harm for reasons of her imputed political opinion – including that she would be perceived to oppose the government of Iran because she had applied for asylum in Nauru;[61] and

b. the First Appellant feared harm as a failed asylum seeker and, in particular, as someone who had sought asylum in a Western, non-Muslim country.[62]

45. The Tribunal considered, and made findings, with respect to these claims.[63] In doing so, the Tribunal:

a. engaged with submissions made on behalf of the Appellants;

b. engaged with country information identified by the Appellants' representative; and

c. engaged with the issue of whether the act of seeking asylum would, *of itself*, expose a person to harm upon return to Iran.

46. The Appellants' argument is that the material before the Tribunal, and in particular the post-hearing submissions, identified a discrete claim to the effect that the Iranian authorities would consider anyone (regardless of political profile) who had filed a '*political*' refugee case as a person engaged in propaganda against the Islamic regime and subject to criminal prosecution.[64]

47. However, close scrutiny of the material reveals that a claim to this effect was not articulated by, or on the Appellants' behalf. Rather, the material presented in the post-hearing submissions was responsive to a line of inquiry initiated by the Tribunal concerning the lack of independent country information to corroborate claims that Ayatollah Khameini had ever made statements to the effect that Iranian asylum seekers were traitors and spies.[65] The post-hearing submissions did not contain material that was directly responsive to this inquiry, and conceded that direct

---

[61] Appellants' submissions to the Tribunal dated 20 July 2014 at [17].
[62] Appellants' submissions to the Tribunal at [17].
[63] Tribunal decision at [74]-[81]. The dispositive finding in respect of each of these claims, to the extent that they can be considered discrete and/or divisible, is recorded at [81].
[64] Appellants' submissions at [52].
[65] Letter from Craddock Murray Neumann dated 6 August 2014 (**Post-hearing submissions**), p 1. See the Tribunal transcript, p 31 (lines 37-47).

evidence on this point was not available.[66] Instead, the post-hearing submissions referred to comments attributed to 'other prominent members of the Iranian authorities' to the effect that Iranian asylum seekers were 'traitors to the regime' who would be prosecuted for dissemination of false propaganda. The material cited in support was from 2011, some three years prior to the Tribunal's decision, and could not be objectively described as being cogent or of fundamental significance, nor as raising any new or discrete claim.[67]

48. In such circumstances, the absence of an explicit reference to this material in the Tribunal's written statement does not lead inevitably to the conclusion that the Tribunal failed to discharge its statutory function. The Tribunal made specific findings in relation to the treatment of failed asylum seekers on their return to Iran, and cited country information in support of those findings.[68] The country information on which the Tribunal relied was variously dated from 2012 and 2013, and from sources including the Department of Foreign Affairs and Trade and Amnesty International. In general, the choice and the assessment of the weight to be given to country information is a matter for the Tribunal as part of its fact-finding function.[69] The obligation to give a written statement of reasons under s 34(4) of the Convention Act does not contemplate that the Tribunal should be required to set out evidence that is contrary to its findings, nor give reasons for rejecting or attaching no weight to such evidence.[70]

---

66 Post-hearing submissions, p 1.

67 Compare *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99, 130—1 [111]-[112].

68 Decision record at [77]-[79]. Footnote 14 in paragraph [77] specifically referred to country information 'including that provided by the applicants' representative'.

69 *NAHI v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 10 [11]-[13]; see also *VQAB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 104 [26] (Beaumont, Weinberg and Crennan JJ); *VTAG v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 141 FCR 291, 298 [41] (Heerey, Finkelstein and Lander JJ); *NBKT v Minister for Immigration & Multicultural Affairs* (2006) 156 FCR 419, 440 [81], 441 [84] (per Young J, with whom Gray and Stone JJ agreed).

70 *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407, 422—3 [64]-[65], referring to *Addo v Minister for Immigration and Multicultural Affairs* [1999] FCA 940 [31] (Spender, O'Connor and Emmett JJ).

49. In the present case, the Tribunal made findings that were responsive to the Appellants' claims that they faced a real chance of serious harm as failed asylum seekers, and found that they would not be perceived to have opposed the government of Iran because they had applied for asylum in Australia or Nauru.

Part VII: Notice of contention/cross-appeal

50. The Respondent does not intend to file a notice of contention or a notice of cross-appeal.

Part VIII: Oral argument

51. The Respondent estimates that it requires two hours to present oral argument.

10

Dated: 20 April 2017

Chris Horan
Telephone: (03) 9225 8430
Facsimile: (03) 9225 8668
E-mail: chris.horan@vicbar.com.au

20

Catherine Symons
Telephone: (03) 9225 7560
Facsimile: (03) 9225 6355
E-mail: csymons@vicbar.com.au