IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S160 of 2017

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN:

YAU026
Appellant

And

REPUBLIC OF NAURU
Respondent

APPELLANT'S SUBMISSIONS

Part I:

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

Part II:

2 The Appellant claimed refugee protection in Nauru. His claims were assessed by the Secretary and reviewed by the Refugee Status Review **Tribunal**. The Tribunal relied on undisclosed adverse information to dismiss his claims. The Appellant claimed that he feared a real risk of significant harm if he returned to Bangladesh and was involved in Bangladesh National Party (**BNP**) protests. The Appellant contends that the appeal raises four questions.

3 *First*, whether the Supreme Court of Nauru erred in rejecting the Appellant's claim that the Tribunal denied him procedural fairness or breached s 37 of the *Refugees Convention* ***Act*** 2012 (Nr) by relying on undisclosed adverse information. This question also raises the issue of whether s 37 had been retrospectively repealed. *Second*, whether there was no evidence to support the Tribunal's finding concerning the 'information' said to be before it.

4 *Third*, whether the Court erred in rejecting the Appellant's claim that an integer of his protection claim was not considered by the Tribunal. *Fourth*,

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whether the Court failed to provide adequate reasons for rejecting the third ground as it was advanced in the Court below.

Part III:

5 The Appellant certifies that, by his lawyers, he has considered whether notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice should be given.

Part IV:

6 The Supreme Court of Nauru Decision (Khan J) is cited as *YAU026 v The Republic of Nauru* Appeal No. 65/2015.

Part V:

7 The Appellant's claim was initially assessed by the Secretary of the Department of Justice and Border Patrol (Nr). The Secretary accepted the Appellant's claim to be the General Secretary of the Chatra Dal [redacted] **CB57**. The Secretary also accepted that the Appellant may have been involved in physical altercations with Awami League (**AL**) members as a result of that role, but did not accept his specific claims of past physical harm: **CB58**. The Secretary was not persuaded that the Appellant's position with Chatra Dal was sufficiently significant to bring him to the attention of Bangladeshi authorities, and so did not accept that he would be harmed if he returned to Bangladesh: **CB60 and CB61**.

8 The Appellant appealed to the Tribunal. The Tribunal's findings of fact are set out at paragraphs 9 to 12 below.

9 The facts relating to the Appellant's identity were set out at **CB168** at **[8]**, and accepted by the Tribunal at **CB171** at **[17]**. [redacted]

10 The Chatra Dal is the student wing of the BNP: **CB173** at **[23]**, however, it is not necessary to be a student in order to belong to it: **CB174** at **[26]**.

11 The Tribunal rejected the Appellant's claim that he was a member or supporter of the BNP or the Chatra Dal, or appointed to the position of General Secretary of the Chatra Dal [redacted]: **CB175** at **[30]**. The Tribunal found that he may have been present at public events such as meetings, rallies or strikes staged in his area by BNP or Chatra Dal,

but only in his capacity as a member of the public: **CB175** at **[30]**; **CB179** at **[45]**.

12 The Tribunal rejected the Appellant's claim that he was attacked and injured by AL members in two incidents in 2008 or 2013: **CB178** at **[42]**. Nor did the Tribunal accept that members of the AL visited his house and shop with threats to kill him, or set fire to his farm after he left the country. The Tribunal did not accept that the Appellant was frequently beaten when he attended BNP or Chatra Dal rallies or other public events.

13 The Appellant appealed to the Supreme Court. In a section headed '*background*' the Court set out the following matters, which on their face are findings of fact. The non-contentious facts found by the Tribunal and set out at paragraph 7 of these submissions were repeated at J[4] to J[7]. However, the Court then went on to apparently find facts that are inconsistent with the Tribunal's reasons, set out at paragraph 14 and 15 below.

14 According to the Court, the Appellant was a supporter of Chatra Dal: J[8]. He joined Chatra Dal in 2007 or 2008 and his father and family had been supporters of BNP. He was appointed to the position of the general secretary [redacted], which is one of the nine wards in his local area: J[9]. He worked for the party, going house to house in different villages to encourage people to join. This provoked the AL members and in particular a man by the name of [redacted] from a neighbouring village. He and [redacted] had several arguments about politics : J[10].

15 About six months after joining the BNP he received a warning that [redacted] and a group of AL members had planned to ambush him: J[11]. The Appellant and his friends were going to [redacted] village at the time of the Eid festival. They took a different route but were confronted by [redacted] and seven of his supporters who were armed with wooden sticks and torches. There was an altercation and [redacted] threatened to kill the Appellant: J[11].

Part VI:

Summary of Argument

16 **First**, the Tribunal failed to comply with s 37 of the Act or provide procedural fairness. In particular, the Tribunal failed to disclose information it relied on to find that there was a difference between membership and executive positions in the BNP or Chatra Dal. The Court erred in holding that s 37 of the Act had been retrospectively repealed. Even if the Tribunal was not required to comply with s 37 of the Act, the Court erred in failing to comply with its common law obligation to give the Appellant an opportunity

to know and respond to relevant matters adverse to his interest. The Tribunal identified 'information' that there was a difference between membership and executive positions in the BNP or Chatra Dal. This information was adverse to the Appellant's claim, and ought to have been provided to him for his comment.

17 **Second**, and in the alternative to the first ground, the 'information' identified by the Tribunal was the only basis for the finding that there was a difference between membership and executive positions in the BNP or Chatra Dal. There was no evidence to support that finding.

18 **Third**, the Tribunal failed to consider the claim that the Appellant would be subject to harm if he is returned to Bangladesh and attends BNP rallies in the future. In the Court below, the Republic accepted that this was a Convention claim, but contended that the claim was hypothetical. The Appellant submits that the claim was made with sufficient particularity to require consideration by the Tribunal. The claim was supported by substantial evidence about the risk of harm to those attending BNP rallies. The claim was inherently plausible in light of the Tribunal's acceptance that the Appellant may have attended BNP rallies in the past.

19 **Fourth**, the Court failed to give adequate reasons in rejecting the third ground as advanced below. The Court merely summarised the submissions made by each party and then stated in a compendious fashion that a number of grounds were without merit.

Breach of s 37 of the Act and procedural fairness obligations

20 In the Court below, the Appellant contended that he was denied procedural fairness because the Tribunal relied on information about the relationship between membership and executive positions in the BNP and Chatra Dal without disclosing that information to the Appellant. The Tribunal's failure was a breach of s 37 of the Act and the common law obligations of procedural fairness. There are three limbs to the Appellant's submissions on this ground.

21 **First**, s 37 of the Act regulated the procedural fairness obligations before the Tribunal. The Tribunal conducts a hearing in private and is bound by the rules of natural justice: ss 22-23 and s 40(1) of the Act. The Tribunal procedures set out in ss 35-41 of the Act generally mirror provisions in the *Migration Act 1958* (Cth), but are not accompanied by a statement that they are intended to be an exhaustive statement of the natural justice hearing rule in the manner of s 422B(1) of the Migration Act.

22 Section 37 of the Act imposed the following procedural fairness obligations on the Tribunal:

> The Tribunal must:
>
> (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of information that the Tribunal considers would be the reason, or a part of the reason, for affirming the determination or decision that is under review; and
>
> (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the determination or decision that is under review; and
>
> (c) invite the applicant to comment on or respond to it.

23 The Court below held at J[27] that:

> section 37 was repealed by s 24 of the Refugees Convention (Derivative Status and Other Measures) (Amendment) Act 2016 (the **Amending Act**) which came into effect on 23 December 2016. Further, the repeal of s 37 is deemed to have commenced on 10 October 2012. In the case of *DWN066 v the Republic* it was held at [32] that:
>
> > ... further, the repeal of s.37 of this Act is deemed to have commenced on 10 October 2012. This is provided for by s.23 of the Amending Act so I cannot deal with this ground under s.37 of the Act and must deal with it under the principles of natural justice as provided for by the common law of Nauru.
>
> (emphasis added, footnote omitted)

24 Section 2 of the Amending Act provides that:

(1) Sections 10, 16 and 22 of this Act are deemed to have commenced on 21 May 2014.

(2) Section 23 of this Act is deemed to have commenced on 10 October 2012.

(3) All other provisions in this Act commence upon certification by the Speaker.

25 Section 37 of the Act was repealed by s 24 of the Amending Act (as the Court held at J[27]), not s 23 (as the Court incorrectly held in *DWN066 v the Republic* [2017] NRSC 23, which was also referred to at J[27]). The repeal date therefore depends on the date of certification by the Speaker: s 2(3) Amending Act. The Speaker gave that certification on 23 December 2016: Gazette number 234 dated 30 December 2016. Unlike s (2)(2) of the Amending Act, s 2(3) is not a deeming provision, and is not intended to operate with retrospective effect.

26 Although not referred to by the Court below, on 5 May 2017 the Republic passed a second piece of retrospective legislation, the *Refugees Convention Amendment Act* 2017 (Nr) (the **Second Amending Act**). The Second Amending Act:

(a) repeals s 37 of the 'principal act' with retrospective effect to 10 October 2012;

(b) states that, for the avoidance of doubt, the rights of all persons are declared to be the same, and to always have been the same, as if s 37 of the 'principal act' had not been enacted; and

(c) states that, for the avoidance of doubt, all proceedings taken, made or done, or purporting to have been taken, made or done, in relation to an application to the Tribunal under s 31 of the 'principal act' are declared to have the same force and effect before and after the commencement of the Second Amending Act, as if s 37 of the 'principal act' had not been enacted.

27 The Second Amending Act was certified on 5 May 2017, after the hearing below but before the delivery of judgment. The Respondent did not inform the Court of this development. To the extent that the Respondent seeks to rely on the Second Amending Act to validate the errors made by the Tribunal and the Court below, it must satisfy this Court that it is in the

interests of justice for the issue to be raised: *Coulton v Holcombe* (1986) 162 CLR 1 at 19.

28 In interpreting legislation with retrospective effect, the Court will 'focus upon the constructional choices which are open on the statute according to established rules of interpretation and to identify those which will mitigate or minimise the effects of the statute, from a date prior to its enactment, upon pre-existing rights and obligations': Australian Education Union v General Manager of Fair Work Australia (2012) 246 CLR 117 at 136 [32] (French CJ, Crennan and Kiefel JJ). The 'principal act' is undefined in the Second Amending Act. Although references to the 'principal act' may be construed as references to the Act, it is open to this court to take a strict approach to construing the Second Amending Act to minimise the effects of the statute, upon pre-existing rights and obligations.

29 In any event, the Second Amending Act does not purport to retrospectively address, or cure, the exercise of judicial power by the Court below. As such, it does not cure the Court's error. At best, it raises the question of whether remitter to the Tribunal would be futile. For the reasons set out at paragraphs 35 to 37 of these submissions, the common law obligations of procedural fairness resolve any issues of futility.

30 Section 37 of the Act was a mandatory obligation on the Tribunal to provide clear particulars of information that is part of the reason for affirming the decision below.

31 Analogous provisions in the *Migration Act 1958* (Cth), including s 359A and s 424A(1)(a), have been the subject of extensive judicial exegesis. For s 424A(1)(a) of the Migration Act to be engaged, the material in question must in its terms contain a "*rejection, denial or undermining*" of the review of the applicant's claims: *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1195 [17] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ and *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507 at 513 [22] per French CJ, Heydon, Crennan, Kiefel and Bell JJ.

32 "*Information*" (as that term is used in s 37 of the Act and the corresponding provisions of the *Migration Act 1958* (Cth)) refers to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence: *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1196 [18]. Language which fails to identify information with 'sufficient specificity' or fails to 'unambiguously' set forth information may fail to comply with the

requirement to provide 'clear particulars' of information: *SZMTJ v Minister for Immigration and Citizenship (No 2)* (2009) 232 FCR 282 at 294-295 [45].

33 Unlike s 424A(3)(a) of the *Migration Act 1958* (Cth), s 37 of the Act does not exclude information that is not specifically about the applicant and is only about a class of persons, of which the applicant is a member.

34 A breach of s 37 of the Act constitutes an independent jurisdictional error by the Tribunal. For the reasons developed at paragraphs 39 to 45 of these submissions, the Tribunal failed to comply with the provision.

35 **Second**, even if s 37 of the Act did not apply to the Tribunal hearing, common law duties of procedural fairness required the Tribunal to disclose the information to the Appellant. Unlike the *Migration Act 1958* (Cth), the Act does not contain a provision that the statutory obligations are an exhaustive statement of the natural justice rules. Nor are the provisions implicitly exhaustive.[1] As such, the common law obligations of procedural fairness continue to operate. The provisions of the Act are, however, the starting point in the analysis of the common law obligations: *Kioa v West* (1985) 159 CLR 550 at 614 (Brennan J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 94-95 [130].

36 The Supreme Court of Nauru considered the scope of the common law obligations of procedural fairness in *DWN066 v Republic of Nauru* [2017] NRSC 23. The Court held that the *Customs Adopted Law Act* 1971 (Nr) adopted the principles of common law in force in England on 31 January 1968: at [34]. The Court then identified two core procedural fairness obligations of impartiality and a fair hearing at [35], relying on a mix of Australian and English law.

37 The common law obligation of procedural fairness as it relates to the provision of information for comment was authoritatively stated in *Kioa v West* (1985) 159 CLR 550. Brennan J held that where no problem of confidentiality arises, an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made: at CLR 629. The failure to give the Appellant an opportunity to respond to prejudicial information before making an order leaves a risk of prejudice: at CLR 629. There is no suggestion that the information in the Appellant's case was of a character that foreclosed its disclosure (in

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[1] For the same reason that corresponding provisions of the Migration Act were held not to be an exhaustive code in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 94-95 [130].

contrast to cases such as *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448).

38 **Third**, both the common law of Nauru and s 37 of the Act required the Tribunal to clearly identify, and expose for comment, the adverse information it relied on to find that membership of the BNP or Chatra Dal and the holding of positions on executive bodies within them are separate matters.

39 The Appellant's primary protection claim was based on his fear of persecution on return to Bangladesh because of his membership of the BNP or Chatra Dal. The Tribunal rejected the Appellant's claim that he was a member of the BNP or Chatra Dal. This rejection was fatal to the Appellant's claim that he feared persecution by reason of his actual political opinion: Tribunal Reasons at [45] and [46]. An essential element of the Tribunal's reasoning was that the rejection of the Appellant's evidence that his membership with the Chatra Dal was coextensive with his appointment to an executive committee.[2]

40 The Tribunal stated at [24] that 'the information before the Tribunal indicates that formal membership of the BNP or Chatra Dal and the holding of positions on executive bodies within them are separate matters.' At [22] and [23] of the Tribunal's reasons the information was also used to support a finding that the Appellant's responses were 'confused and conflicting on a matter which is not complicated and where the Applicant's evidence could reasonably be expected to be clear and consistent if his claims were true'.

41 The information was critical to the Tribunal's reasoning process for three reasons. **First**, the Appellant's claim was based on his actual political opinion, arising from his membership of Chatra Dal and the BNP. The information relied on by the Tribunal directly contradicted the Appellant's membership claims. If the Appellant's membership of the Chatra Dal was not coextensive with membership of the committee, then it follows that the Appellant was not a member of Chatra Dal. **Second**, the Tribunal also relied on this issue to raise doubts about the credibility of the Appellant. **Third**, the information was also relevant to the Tribunal's finding that the Appellant had not been attacked in the past because of his membership of Chatra Dal. If the Appellant was not a member of Chatra Dal, it logically followed that he was not beaten because of his membership.

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[2] As was observed in Part V of these submissions, this aspect of the Court's reasons is difficult to follow in light of the Court's apparent finding of fact that the Appellant *'was appointed to the position of the general secretary* [redacted]*, which is one of the nine wards in his local area'* J[9].

42 The Court's reasons adopted the Republic's submissions that '*the Applicant was on notice of the issue and the Tribunal was not obliged to identify the specific information*': see J[41]. That statement is contrary to authority.

43 The Respondent proffered this passage of the Tribunal transcript as having satisfied the Tribunal's procedural fairness obligations (see J[33]):

> [TRIBUNAL MEMBER]: Well, many people join a political party, such as the BNP or Chatra Dal, without taking an executive committee position, such as general secretary of a ward. So the question is why wouldn't you just join the party without taking a position on the executive committee?
>
> [THE INTERPRETER]: So as you've seen, I then joined Chatra Dal without the position. So this...students. First you have to join BNP party, and then the BNP party leaders will realise that you're capable. Then they will recruit you.

44 That transcript passage does not provide a basis for finding that the Tribunal exposed the adverse information to the Appellant for comment. Procedural fairness requires a decision maker to expose adverse information to the Appellant to enable the Appellant to respond to the information. It is not enough to merely disclose the conclusion reached from that information.

45 The Tribunal's procedural fairness obligations were heightened by the clear language and interpretation difficulties faced by the Appellant during the hearing. It is obvious from the exchange set out at paragraph 43 above that the Appellant was struggling to communicate his claim through the interpreter. The Tribunal was aware of these issues, because the Appellant, or the interpreter, expressed the concerns towards the beginning of the hearing: T16.40 / **CB118**. The Tribunal offered to find a replacement interpreter, however the Appellant agreed to continue with the hearing as there was no alternative available: T18.1-5 / **CB120**.

46 The interpretation difficulties may have been severe enough to engage the principles discussed in *Perera v Minister for Immigration & Multicultural Affairs* (1999) 92 FCR 6 at 16-17 [20], to the effect that the Migration Act's obligation to afford a hearing requires an interpreter of a minimum standard. They were certainly sufficiently severe to inform the Tribunal's obligation to provide a fair hearing. In order to provide procedural fairness, the Tribunal needed to disclose the information to the Appellant in a manner that could

be understood by him. That was not done, and it caused the Appellant substantial injustice.

No evidence

47 Before the Court, the Respondent accepted that it was not possible to discern *'precisely what information the Tribunal was referring to'* at [24] of the Tribunal's reasons (see paragraph 40 above): Respondent's submissions at J[33]. The observation is unsurprising. There was no evidence before the Tribunal in the Appellant's hearing to support the Tribunal's reasons.[3]

48 The no evidence ground is satisfied if the Tribunal failed to "*base [a] decision on evidence*": *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at 232-233 [26]. The evidence must be probative: *Rajamanikkam* at 232 [25]. The necessary evidence can be either direct or based on reasonable inference: *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 999 [41] (Gummow and Hayne JJ, Gleeson J agreeing), and insufficiency of evidence is not enough: *VAAW of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 202 at 11-12 [33]-[37] (Spender, Tamberlin and Kenny JJ).

49 Nothing before the Tribunal constituted probative evidence to support the Tribunal's finding that the Appellant's membership of Chatra Dal was different to his holding a position on its executive body. The Court ought to have found that there was no evidence to support the Tribunal's finding.

Failure to consider an integer of the Appellant's claim

50 The Tribunal was required to consider the Appellant's fear of persecution if he returned to Bangladesh and attended BNP rallies in the future. The claim was made and supported by evidence. It ought to have been considered by the Tribunal. This is particularly so in circumstances where the Tribunal accepted that the Appellant may have attended BNP rallies in the past, and the Republic conceded below that this might fairly be characterised as a Convention reason for fearing persecution: Respondent's submissions at [58].

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[3] It may be that this evidence was before the Tribunal in respect of different proceedings brought by a different Applicant. The hearing transcript indicates at T49 / **CB151** that the Tribunal was hearing similar cases at the same time, and evidence from those other hearings was referred to by the Tribunal during the course of this hearing.

51 In *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at 604 [45] French, Sackville and Hely JJ identified two elements as key to demonstrating that a tribunal has failed in the discharge of its duty under s 414 of the Migration Act to conduct a review of the decision, namely: *'If the Tribunal fails to consider a contention that the applicant fears persecution for a particular reason which, if accepted, would justify concluding that the applicant has satisfied the relevant criterion, and if that contention is supported by probative material, the Tribunal will have failed in the discharge of its duty...to conduct a review of the decision. This is a matter of substance...'.* The obligation has its limits - it is not necessary for those making a decision to refer to every "piece of evidence and every contention" made by a party: *WAEE* at 604 [46]; *Reece v Webber* (2011) 192 FCR 254 at 277 per Jacobson, Flick and Reeves JJ.

52 The Court should have determined that (i) the Appellant made a claim that he would suffer harm if he returned to Bangladesh, by reason of his likely attendance at rallies of the BNP; (ii) the claim was supported by evidence; and (iii); the claim supported a well-founded sense of fear for his safety if he was to return to Bangladesh.

53 The Appellant made the claim in submissions dated 22 March 2015 at paragraph [21] 'we have provided independent country information ... in support of [YAU026]'s claim that, if removed to Bangladesh, he would be persecuted for the reasons he has claimed': **CB73** at **[21]**. These reasons included his 7 March 2015 statement, **CB100** at **[50]**:

> As I have explained above, due to the power and prevalence of the Awami League throughout Bangladesh, and the tight-knit nature of Bangladeshi society, there is nowhere in Bangladesh where I can be safe from the Awami League. Even in the most densely populated areas of Bangladesh, everyone knows everyone else's political affiliation, and so once the Awami League members in any area of Bangladesh become aware that I am a BNP member, they will continue to target and harm me.

54 The Appellant also identified at T6.3-4 / **CB 108** that the harm he feared if he returned to Bangladesh was *'[i]f I return to Bangladesh so I will be harmed like I was harmed earlier'*. His claims of past harm included that he had been beaten while attending BNP rallies. As such, his claim that *'he will be harmed like I was harmed earlier'* included a claim that he would be harmed if he attended BNP rallies on his return to Bangladesh.

55 The matters identified at paragraphs 53 and 54 above raised the claim that if the Appellant returned to Bangladesh he would suffer harm as a result of his attendance at Chatra Dal and BNP rallies.

56 The claim was supported by evidence about the risk of harm faced by attendees of Chatra Dal and BNP rallies. In particular, the country information provided by the Appellant's representative below at **CB78 to CB90** confirms that:

(a) *'[a]ctual and perceived opposition political activists, members and supporters may experience violence, harassment, arbitrary arrests, detention, enforced disappearances, extra-judicial killings, torture, destruction of property and forced displacement'* (United Kingdom Home Office February 2015 Country Information and Guidance report): **CB79**;

(b) *'police, the Border Guards of Bangladesh and the Rapid Action Battalion have shot live ammunition and rubber bullets into unarmed crowds'*, killing *'at least 40 people, including bystanders'* on December 4, 2013 (Human Rights Watch): **CB81; CB85**; and

(c) law enforcement agencies will *'attack with batons, throwing tear gas shells or rubber bullets'* when citizens *'bring out a procession or organise meetings to protest against any action of the state'*: (Odhikar): **CB84.**

57 The closest the Tribunal comes to considering these claims is at **CB178** [42], where the Tribunal rejected the claims of past attacks (in 2008 or 2013) and said that the inconsistencies *'casts doubt over the reliability of other claims ... including the claim that he was frequently beaten when he attended BNP or Chatra Dal rallies ... and it does not believe that the benefit of the doubt can reasonably be extended to him in respect of these claims'*.

58 However, the claim based on future harm is not disposed of by the rejection of the past claims of harm (contrary to the submissions of the Republic made below at [60] and [61] of its written submissions). The Appellant's claims of past harm were based on specific historical incidents. The claims based on future harm involve an evaluation of prospective risk and, therefore require an assessment of the country information set out at paragraph 56 above.

59 If the Tribunal accepted that the Appellant would be likely to attend BNP rallies in the future, the country information would then provide a credible

basis for finding that the Appellant would suffer harm as a result of his attendance. Even if the Appellant was found to not be a member of the BNP, the harm would still be a result of his imputed political beliefs. The country information does not suggest that government forces distinguished between members and non-members of the BNP in inflicting violence on public rallies. The analysis of the claim is not present in the Tribunal's reasons.

Failure to give adequate reasons

60 The Court below failed to provide adequate and sufficient reasons to reject the third ground of appeal as it was advanced below. At J[42]-[56], the Court summarised the submissions made by the Appellant and Respondent and then, in a compendious response to five separate grounds, stated '*Ground 3 has no merit*' at J[57].

61 The importance of providing reasons in this case are compounded by the apparent factual findings (set out in paragraphs 14 and 15 of these submissions) that are directly inconsistent with the Tribunal's findings. It is impossible to reconcile those findings with the Court's bald statement that 'Ground 3 has no merit', as ground 3 included a ground that challenged the Tribunal's finding that the Appellant had been subject to frequent beatings and the findings at J[9] and J[10] appear to be inconsistent with the conclusions reached by the Court at J[57].

62 The duty to give reasons is an incident of judicial power: *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 257 that lies at the heart of the judicial process: *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110. A failure to provide sufficient reasons may potentially promote a "sense of grievance" and denies "both the fact and the appearance of justice having been done", thus working a miscarriage of justice: *Pollard* at [57] citing *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728. It includes an obligation to disclose the reasons for arriving at the decision. The duty is incumbent on Superior Courts from which an appeal lies to the High Court: *Ex parte Reid; Re Lynch* (1943) 43 SR (NSW) 207 at 212. Where there is a right of appeal, the reasons must be sufficient to allow that right to be exercised: *Soulemezis* at 247, 269 (Mahoney JA).

63 The duty still applies if the Court was exercising appellate jurisdiction. Appellate courts must afford appellants procedural fairness (see *Gattellaro v Westpac Banking Corporation* (2004) 204 ALR 258 at 278-279 [93]) and provide reasons for rejecting a ground of challenge: *QBE Insurance Ltd v Switzerland Insurance Workers Compensation (NSW) Ltd* (1996) 134 ALR

433 at 437. The two concepts are interconnected, as a failure to provide reasons may invoke principles of procedural fairness: *Waterways Authority v Fitzgibbon* (2005) 221 ALR 402 (Hayne J at 428 [129]; McHugh J and Gummow J separately agreeing at 409 [26] and 409 [28]).

64 The corresponding obligation of an appellate court to give reasons must '*enable the case properly and sufficiently to be laid before the higher appellate court*' and error lies in failing to do so: *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388 cited in *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 (Gibbs CJ at 666; Wilson, Brennan and Dawson JJ separately agreeing at 671, 675 and 678). A failure to provide any or any sufficient reasons for a decision may amount to an error of law: (*Pettitt* at 382).

65 Doing no more than setting out competing submissions and then declaring that a particular ground is devoid of merit does not constitute adequate reasons. The Court failed to explain adequately why the Respondent's case was preferred over that of the Appellant. The absence of the reasoning amounts to an error at law.

Part VII

66 The applicable legislative provisions are annexed. Only section 37 of the Act has been amended. The correct date of the amendment is addressed at paragraphs 21 to 29 of these submissions.

Part VIII

67 The Appeal be allowed.

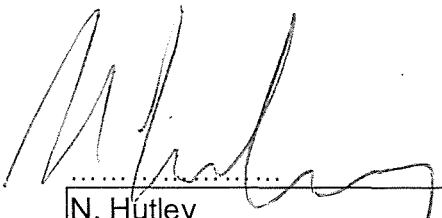
68 The orders of the Supreme Court of Nauru be set aside and in lieu thereof the following order be made:

(a) the matter be remitted to the Tribunal to be determined according to law.

69 The Respondent pay the Appellant's costs of and incidental to this appeal and the proceeding before the Supreme Court of Nauru.

Part IV

70 The Appellant estimates he will require 2.5 hours to present his oral argument.



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37 Invitation to applicant to comment or respond

The Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of information that the Tribunal considers would be the reason, or a part of the reason, for affirming the determination or decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the determination or decision that is under review; and

(c) invite the applicant in writing to comment on or respond to it.

38 Requirements for invitation

(1) An invitation by the Tribunal to provide information or to comment or respond to information must specify:

(a) the way in which the information, comment or response is to be given; and

(b) the time, date and place on which, or the period within which, the information, comment or response is to be given.

(2) The Tribunal may alter the time, date or place specified in an invitation or extend the period within which the information, comment or response is to be given.

39 Failure of applicant to respond

If a person is invited by the Tribunal to give information or to comment or respond to information but does not do so as required, the Tribunal may make a decision on the review without taking further action to obtain the information, comment or response.