IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S267 of 2017

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN:

WET 052
Appellant

and

THE REPUBLIC OF NAURU
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

Ground 1

2. The Tribunal rejected the bulk of the Appellant's protection claims because it found him not to be credible. The first reason identified by the Tribunal, and detailed at length, for finding that he was not credible was the Appellant's alleged failure to mention his father's drug involvement at the Transfer Interview. That finding was perverse, illogical or unintelligible for the following reasons, together or separately.

    a. *The Transfer Interview was not a claim for refugee status and the interview did not purport to elicit a refugee claim.* The Transfer Interview did not ask the Appellant to state his claims for refugee status. The refugee application process does not commence until a prescribed application form has been lodged: *Refugees Convention Act* 2012, s. 5(1), (2).

        The record of the transfer interview reveals the factual basis for two nascent claims (physical abuse by the father, and involvement in political demonstrations). The questions asked were not aimed at eliciting a refugee claim and should therefore not be taken as a process which would necessarily elicit a claim for protection: contrast the form used for his application for refugee status: **AB150-151**. The US Court of Appeals has warned against entry interviews being treated as a preliminary application for asylum: *Balasubramanrim v Immigration and Naturalization Service*, [1998] USCA3 289; 143 F.3d 157 (1 May 1998).

    b. *The Tribunal made findings on the basis of the absence of three words ("and drug addict") from a record which was unreliable because it was another person's*

written record of what an interpreter summarised to be the oral response of the Applicant. Australian and overseas Courts have warned on numerous occasions of the difficulties in relying on a summary of the asylum seeker's case provided at entry through an interpreter by the interviewer: *W375/01A v Minister for Immigration & Multicultural Affairs* **JBA 527-528** per Lee, Carr and Finkelstein JJ at [11] and [15]. The Tribunal also did not rely on any recording of that transfer interview, even though it had power to seek it.

c. *That the questions asked of the Appellant at the transfer interview did not call for an exhaustive answer.* The Appellant answered 55 questions in 75 minutes through an interpreter (**AB127**). The questions asked were general in nature such as *Why did you leave your country of nationality?* (**AB137**) The Appellant's answer was responsive to that question, and was not and did not purport to be an exhaustive statement of his history and protection claims.

d. *The words said to be omitted were, at best, of minor importance when taken in the above context.* The alleged omission provided no proper basis upon which to determine he had fabricated his later claims and did not contradict his later claim. The same claim and history was relayed by the Appellant in substantively the same terms throughout the subsequent claims process.

3. The finding of adverse credibility and fabrication was not open on the evidence because the finding was logically and reasonably constrained by the fact the Transfer Interview was not an initial refugee claim; its inherent unreliability as a summary record of what was interpreted; the Appellant's description of its unreliability; and because it was not and was not meant to be exhaustive.

Ground 4

4. The Tribunal erred by failing to consider the totality of the evidence in support of the Appellant's clearly articulated claim that he feared harm as a returned asylum seeker from the West, namely his express and early statement that he had participated in demonstrations against the 2009 elections in Iran: AB 137.

5. In his application for refugee status the Appellant said he had a subjective fear of returning to Iran based on being a failed asylum seeker: AB165.38-50. He then relied on country information which showed that a returnee who had been involved in political protest was at increased risk of harm: eg AB210.30-211.12 [116].

6. The Secretary considered specifically the association between being a failed asylum seeker and political involvement in examining the Appellant's claim. The Secretary said that involvement in anti-government demonstrations was likely to provide a political profile to a failed asylum seeker returning to Iran such as to increase the risk of relevant harm: AB 178.26 AS [51].

7. The Appellant made it clear in his submissions to the Tribunal that he had a fear based on "imputed political opinion ... because he had sought asylum in a non-Muslim country": AB193.10 [45(a)(iv)], 193.40 [49].

8. At the hearing the Tribunal was aware that failed asylum seekers who were involved in political activities were at increased risk of harm: AB273.45-274.18.

9. The Tribunal understood that the Appellant was claiming a fear of persecution based on being a failed asylum seeker: AB 17 [49].

10. The Tribunal was of the opinion that political involvement may exacerbate harm to failed asylum seekers: AB17.16 [50]. The Tribunal considered this in the context of the Appellant's claim to fear harm as a failed asylum seeker.

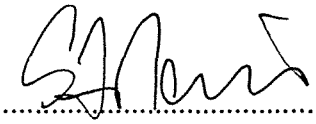
11. The Tribunal did not consider the Appellant's involvement in political activities in the context of assessing the future risk of harm to him as a failed asylum seeker, or at all: AB17.36 [51].

12. The claim to have a well-founded fear of harm based on political imputation arising from being a failed asylum seeker was well articulated by the Appellant and recognised as such by the Tribunal. The Tribunal missed a vital piece of evidence in a document which it otherwise considered was sacrosanct: the mention of the 2009 demonstrations in the Transfer Interview. That information altered the level of risk on return for the Appellant, but the Tribunal did not evaluate it.

13. It cannot be the case, as the Respondent effectively asserts, that a document, squarely before the Tribunal with express information from the Appellant relevant to his claim for protection, has been abandoned because its existence and relevance is not repeated.

14. As concerns Ground 4(b), the Tribunal simply failed to consider the country information in support of the proposition that failed asylum seekers *per se* have been persecuted without any additional political involvement: summarised at Appellant's submissions [55].

Dated: 15 June 2018



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