IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No S 267 of 2017

BETWEEN:

WET 052

Appellant

THE REPUBLIC OF NAURU

Respondent

RESPONDENT'S SUBMISSIONS

I. INTERNET PUBLICATION

1. The respondent (the **Republic**) certifies that this submission is in a form suitable for publication on the Internet.

II. STATEMENT OF THE ISSUES

2. The Republic agrees that the substantive issues presented by the appeal are the issues identified in Part II of the appellant's submissions. That is, the substantive issues are whether either of the two proposed grounds of appeal set out in the proposed amended notice of appeal should be allowed. A related issue arises as to whether the appellant's second ground extends substantially beyond the case he advanced to the Supreme Court and, if so, whether leave ought to be given to advance that ground.

III. S 78B NOTICES

3. The Republic has considered whether any notices should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth), and agrees that no such notices need be given.

Filed on behalf of the Respondent by:

Rogan O'Shannessy
Level 30, 35 Collins Street
Melbourne, Victoria
3000

Date of this document: 26 February 2018

Telephone: 0457 000 678
Facsimile: *none available*
E-mail: roganoshannessy@naurursd.com

IV. MATERIAL FACTS

4. The Republic largely accepts the accuracy of the statements in Part III of the appellant's outline of submissions, save that in various respects what are identified therein as "facts" may only be treated by the Court as information provided by the appellant to, or otherwise available to, the Refugee Status Review Tribunal (the **Tribunal**). Particular aspects of that information that are relevant to the grounds of appeal are identified below.

V. ARGUMENT

(A) GROUND 1 – IRRATIONAL OR UNREASONABLE FINDING

Summary of argument

5. The appellant contends that the Tribunal made an "adverse credibility finding ... that certain claims for protection were untrue because they had not been mentioned at the transfer interview". The appellant contends that this finding was "without logical and probative foundation", or alternatively was "legally unreasonable".

6. The Republic responds as follows:

6.1. The Tribunal did not find that the appellant's claims regarding his and his father's drug use and trafficking were untrue because they had not been mentioned at the transfer interview. Rather, the Tribunal considered that the appellant's failure to refer to these claims at his first opportunity "casts strong doubt" as to the truth of the claims. In effect, the appellant's failure to refer to these claims earlier caused the Tribunal to be *sceptical* as to their truth. The Tribunal's ultimate conclusion that it was not satisfied as to the credibility of these claims was based on cumulative concerns discussed in detail in its written statement.

6.2. It was open to the Tribunal to doubt the appellant's claims, given the appellant's failure to refer to them at his first opportunity. The appellant has not demonstrated true illogicality, irrationality or unreasonableness. Rather, the appellant's submissions amount to emphatic disagreement with the Tribunal's conclusion.

Applicable principles

7. The Republic accepts that credibility findings are not insusceptible to judicial review.[1] Whether a credibility finding is tainted by legal error is not to be assessed by reference to fixed categories or formulae, to the effect that a decision within a particular category or formula is always or never affected by legal error.[2]

8. There is a risk in the appellant's submissions, which place reliance on cases such as *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 and *SZRKT v Minister for Immigration and Border Protection* (2013) 212 FCR 99, of transposing principle relating to the valid formation of a state of satisfaction by the Administrative Appeals Tribunal under the *Migration Act 1958* (Cth) to the notions of unreasonableness or irrationality as a vitiating legal error by the Tribunal under the *Refugees Convention Act 2012* (Nr) (the **Act**). Nevertheless, it is sufficient for present purposes to proceed on the assumption that the the Secretary in determining an application to be recognised as a refugee under section 6(1) of the Act, and the Tribunal in determining an application for merits review of such a determination under section 34, must act reasonably in the sense that its reasons for its determination must not infringe a framework of rationality imposed by the Act.[3]

9. On this assumption, unreasonableness or irrationality sufficient to give rise to legal error by the Tribunal must involve reasoning which no rational or logical decision-maker could arrive at on the same evidence. "[T]he correct approach is to ask whether it was open to the Tribunal to engage in the process of reasoning in which it did engage and to make the findings it did make on the material before it."[4] "Whilst there may be varieties of illogicality or irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker."[5] "If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from

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1 Cf. appellant's submissions at [32]. See also, for example, *CQG15 v Minister for Immigration and Border Protection* (2016) 70 AAR 413 at [36]-[44] (Full Court); *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109 at [83] (Full Court).

2 *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [77] (Robertson J).

3 Cf. *SZMDS* at [124]-[131] (Crennan and Bell JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

4 *SZMDS* at [133] (Crennan and Bell JJ).

5 *SZMDS* at [135] (Crennan and Bell JJ).

that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another conclusion."[6]

10. Thus, "'irrational' and 'illogical' in this context 'are analogues of arbitrary or perverse' and 'are not used with a lesser colloquial meaning that may be applied where the words are introduced in debate to emphasise the degree of dissent from a disputed conclusion or point of view'".[7] Accordingly, a conclusion that a tribunal's finding is irrational or lacks any probative foundation should not be reached lightly.[8] In particular, a high degree of caution must be exercised so as to ensure that the court does not embark impermissibly on merits review.[9] As this Court observed in *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [34], "[i]t has been recognised that to describe reasoning as irrational or unreasonable may merely be an emphatic way of disagreeing with it".[10]

Relevant evidence

The transfer interview

11. The evidence before the Tribunal included a written record of a "transfer interview" with the appellant conducted in Nauru on 21 February 2014. The written record was marked as being "for official use only", and was evidently completed by the interviewer based on what the appellant said during the interview.

12. Part A of the written record relevantly states as follows

> *The purpose of this interview is to gather information about you and your circumstances for the Government of Nauru. The information will be kept on file in the Department of Justice in the Republic of Nauru. While the main purpose of today's interview is to collect background information on you and your circumstances, the information that you give will also be read and used by the*

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6 *SZMDS* at [131] (Crennan and Bell JJ). See also, e.g., *Gupta v Minister for Immigration and Border Protection* [2017] FCAFC 172 at [34] (Full Court); *BTW17 v Minister for Immigration and Border Protection* [2018] FCAFC 10 at [21] (Full Court).

7 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [40] (Gleeson CJ and McHugh J); *Minister for Immigration and Citizenship v SZLSP* (2010) 187 FCR 362 at [41] (Full Court); *SZMDS* at [124] (Crennan and Bell JJ). The Federal Court has frequently described the requisite standard as involving "extreme" illogicality or irrationality: see *ARG15* at [47] and the cases there cited.

8 *SZMDS* at [130]. "Not every lapse in logic will give rise to jurisdictional error. A court should be slow, but not unwilling, to interfere in an appropriate case."

9 *SZMDS* at [96]; *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2 at [56] (Full Court).

10 Citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [5] (Gleeson CJ).

> *people who will be assessing your claim for refugee status. It may be compared against the information you give in your refugee application.*
>
> *We encourage you to be honest and accurate with the information you provide, to the best of your ability ...*

13. It should be inferred from the box ticked at the bottom of the page that the interviewer read this statement to the appellant, and that the appellant indicated that he understood.

14. Consistently with the explanation in Part A that one purpose of the interview was to gather information about the interviewee's claim for refugee status, Part C of the written record includes various questions clearly designed to elicit information that is potentially relevant to a claim.[11] In particular, Part C includes question 1 – "Why did you leave your country of nationality (country of residence)?".

15. In this case, the completed box underneath question 1 records a reasonably detailed answer given by the appellant, and the fact that the interviewer asked further questions. In particular, the completed box indicates that the interviewer asked the appellant a follow up question: "What do you think would happen to you if you were to return to Iran?"

16. The reasonably detailed answer given by the appellant in response to question 1 included more than simply *what* abuse he claimed to have experienced at the hands of his father. It included an explanation of *why* his father abused him. Thus, the appellant explained that his father was an "alcoholic"; "[e]very time he came home he was drunk". He also explained that his father "disagreed with [him] to go to further study at University"; "[h]e forced me to go and work, bring money home".

17. In his submissions to this Court, the appellant seeks to give significance to the fact that the form did not itself pose the question what did he think would happen to him if returned to Iran,[12] and also that the refugee status determination application form that was completed later by the appellant included a greater number of questions designed to elicit information about claims.[13] Neither matter is significant. Regardless of the content of the transfer interview form itself, in this case, the interviewer did ask the appellant what he thought would happen to him if he returned to Iran. And, logically, whether and if so what

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11 The appellant agrees, see his submissions at [22].
12 Appellant's submissions at [22].
13 Appellant's submissions at [25].

significance could be given to the appellant's answers to questions asked during the transfer interview must depend on what the appellant was told and asked at that time.

Subsequent claims

18. On 26 May 2014, the appellant made an application under section 5(1) of the Act to be recognised as a refugee. In support of that application, the appellant provided a statement. In that statement, following the heading "Why I left Iran" the appellant immediately and repeatedly made assertions relating to his and his father's drug use and trafficking. Thus, in the first paragraph under the heading, the appellant describes his father as a drug abuser, says that his father pushed drugs on him from a young age, and says that the abuse he suffered at the hands of his father was because of his father being a drug addict ([7]). And, in the second paragraph, the appellant claimed that his father forced him to supply drugs, and then when the appellant refused his father abused him ([8]). The appellant claimed to fear being punished by Iranian authorities for using and/or trafficking drugs, including the death penalty, torture and inhuman prison conditions ([17]).

19. Henceforth, the appellant's evidence relating to his and his father's drug use and trafficking assumed central significance in his claim to be a refugee.

Tribunal's concern about possible fabrication, and appellant's explanations

20. At the hearing on 4 December 2015, the Tribunal raised its concern regarding the fact that the appellant made no mention was made of his claims relating to his and his father's drug use and trafficking at the transfer interview, and gave the appellant an opportunity to comment (Transcript, pp 32-34). The appellant offered various explanations both at the hearing, and then subsequently in submissions made by his agent on his behalf. These were fairly summarised by the Tribunal in its written statement as follows ([20]):

> *[H]e said, in summary, that he was not questioned about it and had only responded to the questions which were put to him. He suggested, alternatively, that there may have been a problem of interpretation, so that when he said his father was addicted it was interpreted that his father was an alcoholic. In submissions to the Tribunal he instructs, additionally, that he was confused and stressed at the time of the transfer interview as well as in his RSD interview. He did not understand the purpose of the questions or that he was required to provide evidence or satisfy a burden of proof of his situation. He attempt to answer the questions as fully as possible, but did not comprehend that the interviewer might require more substantiating information or might not have found his claims to be plausible. The transfer interview was brief and he had tried to mention some aspects of what happened in*

> *Iran. He was asked only one question (that is, why it was that he left Iran) and spoke about domestic violence. The next question related to military service and he did not expand on the situation that led to him leaving. Later, with the aid of his representative, he provided further information in his RSD statement. In his transfer interview he had stated what happened to him physically while in his second interview, with his representatives, he described how these things had come about.*

Tribunal's decision

21. On 1 February 2016, the Tribunal affirmed the determination of the Secretary that the appellant is not recognised as a refugee and is not owed complementary protection. The Tribunal dealt with the appellant's claims regarding his and his father's drug use and trafficking in some detail at paragraphs [18] to [31].

22. With respect to the appellant's explanations for his failure to make reference to those claims at the entry interview, the Tribunal stated as follows ([21]):

> *The Tribunal has considered these responses but does not accept that they satisfactorily explain why so important an area of the applicant's claims would not have been mentioned by him at the first opportunity he was given to do so, when he was asked in the transfer interview why it was that he had left Iran. The Tribunal notes that in responding to this question he provided a reasonably detailed account of a childhood of severe physical harm suffered at the hands of a violent alcoholic father whom he had vainly tried to escape on a number of occasions but who always made him come home. He feared that if he returned to Iran there was a higher risk of that [sic] his father would kill him. The Tribunal is not satisfied that there was anything which might have prevented him from touching on his current and far more extensive claims to fear harm – that if returned to Iran and forced to continue to transport drugs for his father he may be caught with considerable quantities of drugs in his possession, leading to his arrest, imprisonment and, possibly, to his execution; alternatively, that his father might use his friendship with police and other officials to have him set up with drugs planted on him, leading once more to his imprisonment and possible execution; and that it is not only his father whom he fears but also a range of other corrupt officials who are complicit with him.*

23. Accordingly, the Tribunal found that the appellant's failure to make reference to these "centrally important aspects of his account" at the first opportunity that he had to do so "casts strong doubt on the truth of his subsequent claims as to his father's, and his, involvement in drug taking and drug dealing" ([22], emphasis added). The Tribunal did not, as the appellant suggests, find that the appellant's claims were untrue on this basis.[14] In

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14 Cf. *MZZJO v Minister for Immigration and Border Protection* (2014) 239 FCR 436 at [56]-[57]. The Full Court suggested that "some caution should be exercised by decision-makers in relation to omissions by applicants of matters at entry interview". However, the Tribunal's concerns arose not only from such omissions, but from other matters as well. "We consider its approach was open to it as a merits decision-maker".

effect, the appellant's failure to refer to these claims in his transfer interview in all of the circumstances caused the Tribunal to be skeptical of the truth of the claims.

24. The Tribunal's ultimate conclusion that it was not satisfied as to the credibility of these claims ([31]) was based on cumulative concerns discussed in detail in its written statement ([18]-[30]). These concerns included: that it was implausible in all of the circumstances that the appellant's father would set him with planted drugs and thereby attract a risk that he himself would be detected and punished ([23]-[25]); inconsistencies in the appellant's evidence about his father's role in his cousin's alleged arrest for drug possession ([26]-[28]); and that it was implausible in all of the circumstances that the appellant's father forced him to distribute drugs on a full-time basis for a period of up to three or four years before he left Iran ([29]-[30]).

No legal error

25. Having regard to the matters outlined above, the question raised by the first ground of appeal is whether it was open to the Tribunal strongly to doubt (or to be skeptical of) the appellant's claims relating to his and his father's drug use and trafficking in light of the fact that the appellant did not mention them in his transfer interview. The Republic submits that the answer to that is, clearly, yes.

26. The appellant submits that the Tribunal did not consider "the limited nature of the Transfer Interview".[15] However, the Tribunal expressly set out the various explanations which the appellant and his representatives had given for the appellant's failure to refer to the drug-related claims at the transfer interview (including as to the scope and circumstances of that interview), and expressly said that it had considered them. In light of those statements, it is most improbable that the Tribunal failed to do so.

27. The Tribunal's doubt as to the veracity of the appellant's claim arose from: the fact that the appellant did have an opportunity at the transfer interview to explain not only why he left Iran but why he feared going back; the fact that when presented with this opportunity at the transfer interview the appellant did give a reasonably detailed account but did not refer to any claims arising from his or his father's drug use or trafficking (including from

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15 Appellant's submissions at [29].

the Iranian authorities as compared to his father); and the fact that those drug-related claims subsequently formed an important part of the appellant's claims to be a refugee.

28. The Tribuna's doubt was rational, and it was reasonable. Many of the nine matters enumerated by the appellant and suggested to impugn the Tribunal's finding[16] amount to a reiteration of explanations that were put to the Tribunal, but which failed to assuage the Tribunal's doubt about the credibility of the claims given their timing. Taken as a whole, they amount to no more than emphatic disagreement with the Tribunal's conclusion.

29. And some of those appellant's submissions are wrong. In particular, the appellant is wrong to submit[17] that he was only asked at the transfer interview why he had left Iran.[18] He was also asked what he thought might happen to him in Iran. His answer was that he faced being killed by his father: "through an ashtray to my head and the other physical attack or even mentally". The appellant's later claim that he would be harmed by Iranian authorities (death penalty etc) as a result of his drug use or trafficking were quite different.

30. It was plainly open to the Tribunal at least to doubt that the appellant:

30.1. when presented with an opportunity to explain what he feared would happen to him on return to Iran;

30.2. in circumstances where the interviewer had indicated to him that the information he gave would be used for the purpose of assessing his refugee claim, and where the appellant had indicated that he understood that;

30.3. when he had given a detailed answer to the question of why he had left Iran; and

30.4. when the drug-related claims presented later assumed central significance,

would not refer to any relevant facts or fears in relation to his or his father's drug use or trafficking, if those claims were true.

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16 Appellant's submissions at [34]-[43].

17 Appellant's submissions at [37]. See also [48]: "[The Tribunal] bases its adverse finding on the (apparent) failure of the Appellant to mention certain claims for refugee status at the Transfer Interview when he was only asked to state why he had left Iran".

18 Appellant's submissions at [37].

(B) GROUND 4 – FAILED ASYLUM SEEKER CLAIM

Summary of argument

31. The appellant contends that:

31.1. he claimed to the Tribunal to be a refugee both on the alternative bases that "he had a political profile which would lead him to be at particular risk as a failed asylum seeker from the West" (the **particular claim**), or that "he was at risk as a failed asylum seeker per se" (the **general claim**); and

31.2. the Tribunal erred by failing to consider those claims, or by failing to consider them cumulatively.

10 32. The Republic responds as follows:

32.1. The appellant did not make the particular claim.

32.2. The appellant made the general claim, and the Tribunal considered that claim.

Applicable principles

33. It is trite that the Tribunal would err if it failed to consider a claim made by an applicant to be a refugee. With respect to the anterior question of whether a claim was actually made, the authority most frequently cited is the decision of the Federal Court in *NABE v Minister for Immigration and Border Protection (No 2)* (2004) 144 FCR 1, which in turn considered and applied this Court's decision in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088.

20 34. In *NABE*, the Full Court held that a claim may be made expressly or "impliedly". However, for a claim to be "implied", it must arise "squarely" and "clearly" on the materials before the tribunal. The existence of a claim cannot depend on the "constructive or creative activity of the Tribunal". "A judgment that the Tribunal has failed to consider a claim not expressly made is ... not lightly to be made".

35. More recently, in *Minister for Immigration and Citizenship v SZRMA*,[19] a Full Court approved of the following statement by Allsop J (as his Honour then was) in *NAVK v Minister for Immigration and Multicultural and Indigenous Affairs*:[20]

> *Whatever adverb or adverbial phrase is used to describe the apparentness of the unarticulated claim, it must, it seems to me, either in fact be appreciated by the Tribunal or, if it is not, arise sufficiently from the material to require a reasonably competent Tribunal in the circumstances to appreciate its existence. A practical and common sense approach to everyday decision-making requires the unarticulated claim to arise tolerably clearly from the material itself, since the statutory task of the Tribunal is to assess the claims by reference to all the material, not to undertake an independent analytical exercise of the material for the discovery of potential claims which might be made, but which have not been, and then subjecting them to further analysis to assess their legitimacy.*

36. To a similar effect, Gleeson CJ sounded the following note of caution in *Appellant S395 v Minister for Immigration and Multicultural Affairs*:[21]

> *There is a risk that criticism of the reasoning of a decision-maker at an earlier stage might overlook the forensic context in which such reasoning was expressed ... Proceedings before the Tribunal are not adversarial; and issues are not defined by pleadings, or any analogous process. Even so, this Court has insisted that, on judicial review, a decision of the Tribunal must be considered in light of the basis upon which the application was made, not upon an entirely different basis which may occur to an applicant, or applicant's lawyers, at some later stage in the process.*

37. Another relevant part of the forensic context is whether the applicant was represented or assisted in making his claims. If the applicant was so represented or assisted, and could therefore be expected to clearly articulate the basis for his claims, a court may be more reluctant to conclude that an "implied claim" has been made.[22]

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19 (2013) 219 FCR 287 at [70].

20 [2004] FCA 1695 at [15].

21 (2003) 216 CLR 473 at [1]. This statement has been frequently cited with approval. See, for example, *Minister for Immigration and Border Protection v SZSWB* [2014] FCAFC 106 at [33] (Full Court).

22 *Kasupene v Minister for Immigration and Citizenship* [2008] FCA 1609 at [21] (Flick J). See also *SZSGS v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FMCA 162 at [36] (Cameron FM) (upheld on appeal in *SZSGS v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 774 at [36]; special leave to appeal to the High Court refused in *SZSGS v Minister for Immigration, Multicultural Affairs and Citizenship* [2014] HCASL 126).

Relevant evidence

Information before the Tribunal

38. In this case, the foundation for the appellant's contention that he advanced the particular claim is the factual answer that he gave in response to a question during the transfer interview. The appellant was asked whether he had been involved in any activities or protests against the Iranian government in the past. The record of the interview indicates that he answered "yes", and gave details to the following effect: "In 2009 I was involved in demonstrations, mainly in the evening – about the election".

39. However, neither during the transfer interview, nor at any later stage, did the appellant ever suggest that he had any subjective fear of being harmed by Iranian authorities as a result of his participation in demonstrations 5 years earlier, let alone that any such fear would be well-founded. It is necessary to consider how the appellant's claims developed.

40. First, and notably, during the transfer interview, the appellant did not offer the information about his involvement in 2009 demonstrations in response to the questions "Why did you leave your country of nationality?" or "What do you think would happen to you if you were to return to Iran?" The appellant's answers to those questions during the transfer interview indicated only that he feared suffering harm at the hands of his alcoholic father.

41. Subsequently, in his application to be recognised as a refugee, the appellant said nothing about his alleged involvement in demonstrations about an election in 2009. He advanced only the general claim to fear harm as a failed asylum seeker returning from the West. He did claim to have an "imputed political opinion against the Iranian regime", but only "for reason of my association with my father".

42. As the appellant notes in his submissions to this Court,[23] the delegate of the Secretary who refused his application to be recognised as a refugee did not mention the information in the transfer interview about his involvement in demonstrations in 2009. That is unsurprising, given that the appellant had not claimed to fear harm on this basis. However, what is more relevant for present purposes is what the appellant did do – and did not do – after the delegate's decision. This is addressed below.

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23 Appellant's submissions at [51].

43. After the delegate's decision, in support of his application for review to the Tribunal, the appellant's legal representatives provided a submission to the Tribunal dated 26 November 2015. That submission criticised the Secretary's decision in various respects, but said nothing about the Secretary failing to have regard to the appellant's involvement in demonstrations in 2009. One would expect, if the appellant considered that the Secretary erred by not being "cognisant" of his involvement in such demonstrations in assessing his claims (including his failed asylum seeker claim), that these submissions would have made that point.[24] They did not.

44. The appellant's submissions to the Tribunal did, however, expressly identify the bases why he feared harm from Iranian authorities for his "actual/imputed political opinion". Those bases were: "his association with his father who is a well known drug dealer"; his "profile with the Basij ... as the son of a drug addict, drug dealer who interacts on a regular basis with police, Basij, and Sepah authorities"; and the fact that he has "sought asylum in a non-Muslim country and because of his conversion to the Christian faith" ([45]).

45. The appellant's submissions to the Tribunal also specifically addressed the appellant's fear of harm as a failed asylum seeker ([104]-[107]). And yet, again, those submissions said nothing about the appellant's involvement in demonstrations in 2009. Aside from advancing the general claim, those submissions identified only one aspect of the appellant's conduct that aggravated his risk of harm as a failed asylum seeker returning from the West. That was that he had posted certain images of his baptism ceremony on the Internet, and had received messages of congratulations on his Facebook page, and that these sources would be checked and discovered by the Iranian authorities on his return.

46. During his hearing before the Tribunal on 4 December 2015, the appellant again said nothing about his involvement in demonstrations in 2009. The Tribunal did, however, ask him whether he had ever been arrested in Iran for any reason, or stopped, interrogated or detained. He said "no" (Transcript, p 40). Moreover, the Tribunal specifically put to the appellant country information to the effect that failed asylum seekers with particular profiles ("people who are dissidents, active dissidents, critics of the regime"; people with a "serious political background") might face a risk of harm on return, and invited his

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24 Cf. appellant's submissions at [52].

comment. The appellant indicated that he understood the question, and responded, but said nothing about his involvement in demonstrations in 2009 and spoke only of risks arising from his father's political connections (Transcript, pp 43-44)

47. Then, after the Tribunal hearing, the appellant's legal representatives provided a further submission to the Tribunal dated 19 December 2015. Again, that submission said nothing about the appellant's involvement in demonstrations in 2009. Those submissions referred to the Tribunal's apparent concern that the appellant did not have a "sufficient profile" to attract a risk of harm as a failed asylum seeker, and agreed that "asylum seekers per se may not face harm solely on the basis of seeking protection". However, the only "circumstances" that the submission identified that gave the appellant an adverse profile was his activities in posting certain material on Facebook (pp 11-12).

Tribunal's decision

48. The Tribunal dealt with the appellant's failed asylum seeker claim at paragraphs [49] to [52] of its written statement. The Tribunal accepted that failed asylum seekers with certain profiles (including "political activists") may be harmed on return. However, it was not satisfied that "the act of applying for asylum in itself attracts harm or that those without these identified profiles are at risk of harm" ([50]). The Tribunal did not accept that the appellant would have such a profile with the Iranian for the reason he had actually claimed (i.e., his association with his father), nor did the Tribunal accept that he had or would come to the attention of Iranian authorities as a result of his activities on Facebook ([51]). The Tribunal found that there was "no other evidence before the Tribunal to indicate that he has come to the adverse attention of the authorities or that he would do so following his return". Taking those findings together, the Tribunal was not satisfied that the appellant would be subjected to persecution by reason of having sought asylum ([52]).

No legal error

49. Having regard to the matters outlined above, the appellant's second ground of appeal has no merit. A careful examination of the information before the Tribunal reveals that the appellant (who was legally represented) never claimed to fear harm as a result of his involvement in demonstrations in Iran in 2009 despite many opportunities.

50. This case presents a clear instance where the Court should heed Gleeson CJ's caution in *Appellant S395*: "a decision of the Tribunal must be considered in light of the basis upon which the application was made, not upon an entirely different basis which may occur to an applicant, or applicant's lawyers, at some later stage in the process".

51. And, having regard to the matters outlined above, there is also no foundation for the appellant's contention that the Tribunal failed to consider his general claim – *viz.*, "that he was at risk as a failed asylum seeker per se".

(C) NEW CHALLENGES TO THE TRIBUNAL'S DECISION?

52. If the Court accepts the Republic's submission that the grounds of appeal lack merit, that would be sufficient for the Court to dispose of the appeal. However, for completeness, the Republic notes that the appellant's second ground, in particular, is substantially new. (The fact that it may be "consistent with"[25] the appellant's general contention in particular 1(l) of the amended notice of appeal before the Supreme Court does not deny its novelty.[26])

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

54. There are important reasons why this Court should not readily permit an appellant to advance a new point not argued before the Supreme Court, and thereby to allow this Court to become a *de facto* court of original jurisdiction reviewing the Tribunal's decision for legal error. In *Coulton v Holcombe*,[27] a majority of this Court observed:[28]

> *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.*

55. This principle is capable of application to an appeal from the Supreme Court, notwithstanding that this Court exercises original rather than appellate jurisdiction. This

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25 Cf. appellant's submissions at [70].

26 That was that the Tribunal "was unreasonable or illogical in rejecting, or in not determining, the ... cumulative risk to the applicant if he were to return to Iran".

27 (1986) 162 CLR 1, 7.

28 See also, e.g., *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.

Court's function on an appeal under the Appeals Act 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). In that context, the Full Court has adopted a restrained approach to allowing new grounds.

56. The appellant should not be permitted "to simply put aside and ignore" the judgment of the Supreme Court, and to ask this Court to conduct afresh a judicial review of the Tribunal's decision.[29] The appellant must demonstrate that it is expedient in the interests of justice to permit him to advance the ground.[30] In that context, the Court should consider whether the new arguments has a reasonable prospect of success, whether the appellant has given an acceptable explanation for failing to advance it below, the prejudice to the Republic in allowing the appellant to raise the new argument, and the integrity of the appellate process.[31] 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.[32]

57. Prejudice to the Republic (in the costs of responding to the new point) may be ameliorated by an appropriate costs order. Nevertheless, as was noted by Gyles J in *Iyer v Minister for Immigration and Multicultural Affairs*:[33]

> *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.*

58. Here, on the basis that: the appellant's second ground lacks merit; he was legally represented below; he has failed to given any explanation for why the point was not run below; and the public interest in preserving the integrity of the appeals process, leave to advance the ground should be refused.

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29 *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).

30 *O'Brien v Komesaroff* (1982) 150 CLR 310, 319.

31 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].

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

33 (2001) 192 ALR 71, 86 [62].

VI. ESTIMATE OF TIME FOR ORAL ARGUMENT

59. The Republic estimates that presentation of its oral argument will take 45 minutes.

Dated: 26 February 2018

NICK WOOD

Owen Dixon Chambers West
T: (03) 9225 6392
F: (03) 9225 8395
nick.wood@vicbar.com.au