IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M27 of 2018**

BETWEEN:

QLN147
Appellant

THE REPUBLIC OF NAURU
Respondent

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APPELLANT'S REPLY

I. INTERNET PUBLICATION

20 The Appellant certifies by his lawyers that this reply is in a form suitable for publication on the Internet.

II. REPLY

Scope of obligation to give reasons

1. The Republic contends that the duty of the Tribunal under section 34(4) of the Act to give reasons for the decision does "not encompass any obligation to canvass evidence which the Tribunal chose not to rely on". On that basis, the Republic contends that absence of reference in the Tribunal's written reasons to the relevant matters referred to
30 the appellant's submissions dated 28 June 2016 does not give rise to an inference that the Tribunal *either*: (a) did not consider those matters; or (b) considered those matters but did not regard them as material to its decision (RS [8]).

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2. That submission should be rejected. The Republic relies, solely, on a decision of McHugh J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407. However, in that decision, his Honour held that the obligation of the Tribunal under section 430(1)(b) of the *Migration Act 1958* (Cth) "will often require the Tribunal to state whether it has rejected or failed to accept evidence going to a material issue in the proceedings". Further, his Honour held that "[w]henever rejection of evidence is one of the reasons for the decision, the Tribunal must set that out as one of its reasons ([65]).

3. Subsequently, in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, the Court explained that section 430 "entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material" ([69]).[1] There is a substantial body of Federal Court authority that applies, and is consistent with, this explanation. An example is *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67, where the Full Court held at [34] as follows:

> *... [W]here a particular matter, or particular evidence, is not referred to in the Tribunal's reasons, the findings and evidence that the Tribunal has set out in its reasons may be used as a basis for inferring that the matter or evidence in question was not considered at all. The issue is whether the particular matter or evidence that has been omitted from the reasons can be sensibly understood as a matter considered, but not mentioned because it was not considered material. In some cases, having regard to the nature of the applicant's claims and the findings and evidence set out in the reasons, it may readily be inferred that if the matter or evidence had been considered at all, it would have been referred to in the reasons, even if it were then rejected or give little or no weight.*

Inference to be drawn here

4. The Republic contends (RS [9]) that the Tribunal considered all of the relevant matters referred to in the appellant's submission, because it said in its written statement that it had "had regard to the independent country information" in that submission ([31]). However, a general and self-serving statement of that kind is not determinative of whether the Tribunal has in fact had regard to all relevant matters, let alone has done so lawfully.[2]

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1 See also *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [27] ff. Cf. *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 183 at [25], discussing the circumstance where a decision-maker is not obliged to give reasons, and the difficulty in drawing the negative inference in such a circumstance that a matter has not been considered by the decision-maker.

2 See, for example, *Buadromo v Minister for Immigration and Border Protection* [2017] FCA 1592 at [27], and the authorities there cited, as to the caution which the courts should exercise in evaluating the

5. The Republic contends that "the proper inference" is that, to the extent that the relevant matters in the appellant's submission "pointed to different conclusions" from those which the Tribunal made, "they were not found persuasive" (RS [9], also [11]). But the Republic appears to accept that a denial of food, water and medical treatment would be *relevant* to whether conditions in prison would infringe Article 7 of the ICCPR, and that the Tribunal accepted that to be so (RS [12], [15]). So, the Republic's argument must be that the "proper inference" is that the Republic did not accept the *accuracy* of the information indicating that inadequate food, water and medical treatment is available in Sri Lankan prisons.

6. But that is a most improbable inference. Given the significance of the information to the evaluative task required by Article 7 of the ICCPR (if accepted), it is to be expected that the Tribunal would say so if it did not accept the accuracy of the information (and explain why). It did not. As the Full Court held in *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at [50], "an expression of a preference for some evidence over other evidence generally requires an articulation of the different effects of the evidence concerned, and then some indication as to why preference is given". "The absence from the recitation of country information of the material referred to in the post-hearing submissions is indicative of omission and ignoring, not weighing and preference".

7. Finally, the Republic submits that "[t]o conclude that the Tribunal fell into error because its summary description of prison conditions did not refer to lack of adequate good, water or medical services would be to ignore the advice of authorities such as *Minister for Immigration v Wu Shan Liang* [(1996) 15 CLR 259 at 271-272]". That submission should also be rejected.

8. Of course, the Court must not seek to over-zealously scrutinise reasons with an eye attuned to the perception of error.[3] However, that is not a principle of deference to the

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significance of "stock standard" or "formulaic" statements in reasons. "Recitations, for example, that particular matters have been 'noted' or 'considered' does not preclude an analysis as to whether such matters have been given such consideration as required by law".

3 However, as the Federal Court held in *Buadromo v Minister for Immigration and Border Protection* [2017] FCA 1592 at [31], "[t]he degree of care with which a statement of reasons may be scrutinized depends in large part upon the statutory context in which reasons are to be given and the degree of care with which it may be expected that the reasons are prepared".

Tribunal. As the Federal Court explained in *SZBCT v Minister for Immigration and Multicultural Affairs* [2007] FCA 9 at [26], the concept of "beneficial construction" as used in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 has a "specific meaning", and "was certainly not intended to mean that any ambiguity in the Tribunal's reasons be resolved in the Tribunal's favour", nor that a court should "assume that a vital issue was addressed when there is no evidence of this and, indeed, the general thrust of the Tribunal's comments suggest that the issue was overlooked".[4]

Legal error if material not considered

9. The Republic appears to accept that the Tribunal will make a legal error if it fails to consider information or evidence that is "centrally important to the review" (RS [14]). Given that the question of whether the conditions in Negombo Prison would involve a breach of Article 7 of the ICCPR necessarily involves a cumulative assessment of those conditions, information to the effect that adequate food, water and medical services is not available was plainly "important" to the Tribunal's task in the requisite sense. The Republic's unexplained suggestion to the contrary (RS [15]) should be rejected.

Inadequate reasons

10. The Republic contends that, even if the Tribunal failed to comply with its obligation under section 34(4) to give adequate reasons for its decision, "that would not in itself justify an order setting aside the decision" (RS [13]). That submission is denied.

11. However, the Supreme Court did not dismiss the appeal to it on the basis now suggested by the Republic. The Supreme Court simply rejected the notion that the Tribunal had given inadequate reasons, holding (at [42]) that "[t]here was no requirement to deal with each item of material that touched on prison conditions in Sri Lanka in the absence of material directly relevant to short term remand prisoners held at Negombo".

12. This proceeding is an appeal from the Supreme Court's judgment. The Republic has not filed a notice of contention, and has submitted that it does not intend to do so (RS [16]).

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[4] This observation has been approved on numerous occasions: see, e.g., *SZSZQ v Minister for Immigration and Border Protection* [2018] FCA 403 [93] (Katzmann J). To similar effect, in *Sadsad v NRMA Insurance* [2014] NSWSC 1216, the Supreme Court has explained: "It is one thing to give a 'beneficial construction' to the reasons of an administrative decision maker. It is another thing to fill in the gaps in the path of reasoning by reference to an assumption that the decision was made according to the relevant law".

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