IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M27 of ~~2017~~ 2018

BETWEEN:

QLN 147

Appellant

and

THE REPUBLIC OF NAURU

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication on the Internet

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

Part II. Statement of Issues

2. The Republic accepts the appellant's statement of issues identified in paragraph [3] of his written submissions.

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

3. The Republic has considered whether any notice is required under s 78B of the *Judiciary Act 1903* (Cth) and considers that such notice is not required.

Part IV: Material facts

4. The Republic generally accepts the Appellant's account of the factual background but would emphasise the following matters:

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a. On 14 December 2014, following the appellant's Refugee Status Determination (**RSD**) interview, the appellant's representative provided to the RSD officer, country information in support of his protection claims and in particular, the claim that the appellant would be detained upon his return to Sri Lanka by reason of his irregular departure, and that there was a 'real risk' that while in detention, the appellant would experience 'significant harm'. The information included an extract from the *2012 Country Report on Human Rights Practices - Sri Lanka* (19 April 2013) that the United States Department of State had noted that Sri Lanka's *'prison conditions [are] poor and [do] not meet international standards due to gross overcrowding and lack of sanitary facilities'.*[1]

b. On 28 June 2016, the appellant's representative provided written submissions to the Tribunal in support of the appellant's protection claims (identified in the appellant's submissions as 'the Document').[2] The representative noted in the Document that if removed to Sri Lanka, the appellant may be detained or imprisoned - even if such detention or imprisonment is purely for the purposes of further investigation, or because of the appellant's prior unlawful departure from Sri Lanka. In this context, the Document included information that described the conditions of prisons (generally) in Sri Lanka[3] and referred to, by way of a series of footnotes,[4] three further sources that were said to provide support for the separate propositions that: (i) prison conditions in Sri Lanka have been recognised as likely to breach article 3 of the European Convention on Human Rights (phrased in equivalent terms to article 7 of the *International Covenant on Civil and Political Rights* (**the ICCPR**)) and hence to amount to inhuman or degrading treatment or punishment, and (ii) that Sri Lanka's prisons have been found to suffer from severe overcrowding, antiquated infrastructure and limited access to food and basic assistance.

c. On 8 July 2016, the appellant participated in a Tribunal hearing. He was assisted by an interpreter in the Tamil language and his representative. During the

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1 Appellant's Book of Further Materials, 63.
2 Appellant's Book of Further Materials, 92-121.
3 Appellant's Book of Further Materials, 110, 118 [100]-[101].
4 Appellant's Book of Further Materials, 118 and footnotes 47, 48 and 49.

hearing, the following exchange took place between the Tribunal and the appellant:[5]

> TRIBUNAL: Thank you. There's another aspect of this which you mentioned a little earlier, and that is you say, "Well, I left Sri Lanka illegally and so I'll be in trouble when I go back. So the tribunal does have information about what happens to people who go back after having left the country illegally...
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> ...
>
> There's no record of people who have returned and being charged with having left illegally, having been sent to gaol. If the person arrives at Katunayake on a weekend or maybe a holiday, it won't be possible to go to the Magistrates Court immediately and so they may be held on remand in Negombo Gaol for one, two, three days, something like that. It's not a very nice place. It's old and it's dirty and it's crowded but there is no information to indicate that people who are held on remand there for just this fairly brief period of time have been harmed. Could you comment on that.
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> INTEPRETER: We have mentioned that - no reports mentioned about the people harmed or missing while they were in gaol but I do remember that last year there was a report by the New Zealand government. There was a government officer lady visited Sri Lanka and she gave a report that many people who returned back to Sri Lanka went missing and one lady who was in custody was raped by the authorities. So that was an official report by the New Zealand government. So do you say that was wrong information?
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> TRIBUNAL: I'm not exactly aware of the particular report that you're referring to but it does seem to be talking about a slightly different issue. I was really just talking to you about the treatment that people receive because they've committed this offence under the law in Sri Lanka of leaving unlawfully.

d. The appellant did not produce any further material or make any further submissions after the hearing, including directed at the condition of prisons in Sri Lanka.

5. In its written statement, the Tribunal:

   a. Noted that '[i]n a covering submission the representative canvasses legal issues, outlines the [appellant's] claims and cites a range of country information relative to human rights conditions in Sri Lanka, the treatment of the Tamil minority and the forms of harm the [appellant] claims to fear on return';[6] and

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[5] Appellant's Book of Further Materials, 238-239.

[6] Core Appeal Book of the Appellant (**Core Appeal Book**), 11 [16].

b. Stated that in assessing the appellant's claims, it had 'had regard to the independent country information cited in the Secretary's decision and in the submission of 28 June 2016 from the [appellant's] representative (this being a reference to the Document), as discussed with the [appellant] at the hearing'.[7]

6. The Tribunal then recorded findings against the various protection claims made by the appellant including, relevantly for the appeal, the findings recorded at paragraphs 57 to 60 (under the heading 'failed asylum seeker')[8] and at paragraphs 65 and 67 (under the heading 'assessment of complementary protection claims') which are set out in full below:

> [57] In this context the Tribunal accepts that, as he claims, the applicant left Sri Lanka by boat in October 2013 when he travelled to India apparently in breach of Sri Lanka's *Immigrants and Emigrants Act* requiring, among other things, that those leaving the country do so through an established port of departure using a valid travel document. The Tribunal has considered whether this would put him at risk of harm if he were to be returned to Sri Lanka.
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> [58] DFAT reporting cited in the Secretary's decision indicates that Sri Lankan citizens, whatever their ethnicity, who return to Sri Lanka and who are believed to have left the country in breach of the *Immigrants and Emigrants Act* are arrested at the airport and brought before a magistrates court. There, if they plead guilty, they are subjected to a fine determined on a case-by-case basis which they can pay off in instalments. Those who plead not guilty are routinely given bail and will need to return to the court at a later date for the matter to be heard when, if convicted they are fined. If the arrival occurs over a weekend or on a public holiday the returnee is placed in the remand section of Negombo prison, possibly for some days, until the next opportunity for magistrates court appearance arises. Although the Act provides for penalties of both imprisonment and fines on conviction for illegal departure, the information before the Tribunal indicates that magistrates and judges have discretion in imposing penalties, and that in practice those who have breached the terms of the Act in the method of their departure are only fined. The Tribunal does not accept there is a reasonable possibility that the applicant would be jailed or subjected to any other form of penalty beyond a fine for this offence.
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> [59] When the applicant was invited to comment on this information he said he remembers a New Zealand government report from 2015 which found that many of those who return to Sri Lanka go missing. One woman had been

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[7] Core Appeal Book, 15 [31].

[8] Core Appeal Book, 21-22.

raped by the authorities while in custody. Asked about the more specific issue of the treatment of those who leave the country illegally he reiterated his claim about this incident, adding that the authorities are trying to hide the information. In his situation his life would be at risk because the authorities would question him and discover his background.

[60] On the information before it the Tribunal finds that Sri Lanka's *Immigrants and Emigrants Act* is a law of general application, adopted for the legitimate and unexceptional purpose of regulating the movement of people across the country's borders. There is no credible evidence to indicate that the law would be imposed on the applicant in a discriminatory way, such as with a harsher penalty or treatment, because of his Tamil ethnicity or for any other reason. Nor is there any credible evidence that the fine which would be imposed on him or any brief period spent in remand awaiting a hearing in the magistrates court would rise to the level of persecution or other harm such that returning him to Sri Lanka would amount to a breach of Nauru's international obligations, or that they would be imposed on him for one of the Convention reasons.

...

[65] The representative submits that the applicant faces a real risk of torture, cruel, inhuman or degrading treatment, and/or arbitrary deprivation of life in Sri Lanka and that removing him there would be in breach of Nauru's international obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; and the August 2013 Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia. It is submitted that the prohibited treatment would arise in the context of physical treatment, imprisonment in unacceptable conditions and discrimination on the basis of the applicant's race.

...

[67] As noted, the Tribunal accepts that on return to Sri Lanka the applicant could be arrested and charged with a breach of the *Immigrants and Emigrants Act* over his illegal departure for India in 2013. The Tribunal accepts that he would be fined if convicted of such an offence but does not accept there is a reasonable possibility of his being sentenced to a term of imprisonment because of it. While it is possible that he could be held on remand for a small number of days while awaiting a hearing in a magistrates court, in cramped and unsanitary conditions, the Tribunal does not accept that this in itself would constitute torture or cruel, inhuman or degrading treatment or punishment of a kind prohibited by Nauru's international human rights commitments. While there are reports of prisoners having been tortured in Sri Lankan jails, the evidence before the Tribunal does not indicate that

returnees who have been charged with illegal departure and remanded in custody have been tortured whilst on remand and the Tribunal does not accept that the applicant will be tortured whilst being held on remand.

Part V: Argument

Inferences from the statement of reasons

7. An appellant before the Supreme Court of Nauru, and before this Court, bears the "burden of persuasion" to satisfy the Court that there has been some legal error by the Tribunal.[9] Where an appellant seeks to show that some matter was not considered by the Tribunal by pointing to the omission to mention that matter in the statement of reasons, the starting point for resolving that argument is to observe the limited nature of the obligation to produce a statement of reasons under s 34(4) of the *Refugees Convention Act 2012* (Nr) (**RC Act**).

8. Importantly, s 34(4) required the Tribunal to set out "the findings on any material questions of fact" (ie, the Tribunal's findings on the issues it considered material)[10] and refer to "the evidence or other material *on which findings of fact were based*". The Appellant's submissions tend to elide these requirements by referring to "information". The duty to give reasons did not encompass any obligation to canvass evidence which the Tribunal chose not to rely upon[11] (whether because it was not considered relevant or not considered persuasive). The obligation in s 34(4) therefore does not provide a proper basis for an inference that (a) the Tribunal did not consider parts of the Document that were not mentioned, or (b) the Tribunal considered those matters but did not regard them as relevant to its decision.

9. Nor can either inference properly be drawn from the material before the Court. The Tribunal stated expressly that it had had regard to the country information cited in the Document, "as discussed with the applicant at the hearing" (at [31]), and referred to the country information in the Document in connection with the treatment of

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[9] *SZSSC v Minister for Immigration and Border Protection* (2014) 317 ALR 365, [81(g)].

[10] Cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (see especially at 330-331 [4], [5], [9] (per Gleeson CJ), 337-338 [30]-[35] (per Gaudron J), 345-346 [66]-[69] (per McHugh, Gummow, Hayne JJ).

[11] Cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at [64]-[65].

returning asylum seekers (at [52]). Those express references contradict any suggestion that the Tribunal deliberately or inadvertently ignored some part of that material.[12] The Tribunal also referred specifically to part of the Appellant's oral evidence in dealing with the issue of whether the treatment he might face as a result of having left Sri Lanka illegally (including conditions in prison while on remand) would amount to persecution (at [59]). It then referred back to its findings when canvassing the question whether that treatment would constitute treatment of the kind prohibited by the ICCPR or the CAT (at [67]). The Tribunal expressed clear conclusions on these issues and the proper inference is that, to the extent that the Document and the Appellant's oral evidence pointed to different conclusions, they were not found persuasive. That does not indicate any error.

10. The Tribunal's reference to "cramped and unsanitary conditions" (at [67]) does not point to any different conclusion. As the Supreme Court held (at [40]), it adequately "captures the flavour" of the material, which relevantly contained the following elements:

    a. The UN Special Rapporteur was quoted as expressing concern about "very deficient infrastructure and pronounced overcrowding" in all prisons, which resulted in more specific problems (including insufficient ventilation).

    b. It was asserted that Sri Lanka's prisons had been found to suffer "severe overcrowding, antiquated infrastructure and limited access to food and basic assistance". The source for this assertion was a decision by an Australian court in a judicial review case, quoting findings at the same high level of generality by Australia's Refugee Review Tribunal.

    c. It was then argued that Article 7 of the ICCPR can be breached by inhumane prison conditions, including overcrowding, lack of food and water and denial of medical treatment (a proposition of international law), and (without citing any further factual sources) that Sri Lankan prisons had those characteristics.

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[12] *WET 044 v The Republic of Nauru* [2018] HCA 14, [11]; *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at 606 [33] per French CJ and Kiefel J.

d. The oral evidence added the suggestion that people who returned to Sri Lanka had gone missing and a woman had been raped. The Tribunal referred to this at [59] but evidently did not find it to be of assistance in understanding the conditions the Appellant might face in Negombo prison.

11. To conclude that the Tribunal fell into error because its summary description of prison conditions did not refer to lack of adequate food, water or medical services would be to ignore the advice of authorities such as *Minister for Immigration v Wu Shan Liang*.[13] Further, this summary description came in the course of stating a *conclusion* and should not be analysed as if it purported to be a complete statement of the claims or evidence. In accepting a possibility that the Appellant would be held for a few days "in cramped and unsanitary conditions", the Tribunal accepted the thrust of the evidence presented in the Document, which was consistent with other material before the Tribunal (but did not accept that it met the test of cruel, inhuman or degrading treatment).[14] Alternatively, if the Tribunal's conclusion is properly construed as not encompassing a lack of food, water or medical services, the proper inference – bearing in mind the Tribunal's express reference to having considered the information cited in the Document – is that it was not persuaded by those aspects of the Appellant's case. The Tribunal was entitled not to be persuaded. On either construction, no failure to consider the material can be discerned.

12. The Appellant's case therefore fails on the facts. There is (as the Supreme Court found at [40]-[41]) no basis to find that the Tribunal overlooked part of the evidence before it, or that it mistakenly excluded that evidence as irrelevant. In particular, it is implausible to suggest that the Tribunal accepted "cramped and unsanitary" conditions in prison as relevant to a possible breach of the ICCPR but (without any discussion) excluded denial of food and medical treatment as irrelevant (cf AS [44.1]).

13. Nor, on the evidence, did the Tribunal fail in its duty to explain the reasons for its decision, to set out its findings of fact, or to refer to the evidence upon which its

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[13] (1996) 185 CLR 259 at 271-272.

[14] There was no error in treating the short duration of any detention as relevant to that question. See the decision of the European Court of Human Rights in *Ireland v United Kingdom* (1978) 25 Eur Court HR (ser A) [162] regarding article 3 of the European Convention on Human Rights (this is regarded as analogous to article 7 of the ICCPR).

findings were based. Even if it did so, that would not in itself justify an order setting aside the decision.[15]

Legal error in not considering material

14. Even where a Court is satisfied that a Tribunal has failed to consider some matter, that does not immediately justify a finding of "legal error". In so far as specific *arguments or issues* are not grappled with, that does not constitute legal error in the absence of a requirement to consider those issues.[16] A failure to consider relevant *material* does not of itself constitute an error of law. It will only do so where the material was centrally important to the review, with the correlative consequence that the error was sufficiently serious to justify a conclusion that the Tribunal has failed to exercise jurisdiction or denied procedural fairness to an appellant.[17]

15. As outlined above, it is plain that the Tribunal turned its mind to whether the Appellant faced a risk of being detained, what would be the duration and conditions of such detention, and whether as a consequence his return to Sri Lanka by Nauru would breach Nauru's international obligations. There is no sensible foundation for a finding that the Tribunal narrowed that inquiry so as to treat some aspects of the conditions in Negombo prison as relevant and others as irrelevant. Nor can it sensibly be suggested that the Tribunal, despite referring to the Document and the Appellant's evidence, actually overlooked this material. Even if the Tribunal overlooked some of the factual propositions in the document (ie, the assertions concerning inadequate food, water and medical services), that would not sound in relief for reasons outlined in the previous paragraph.

Part VI: Notice of contention/cross-appeal

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[15] The Republic would respectfully adopt the analysis of Tracey J in *Kennedy v Australian Fisheries Management Authority* (2009) 182 FCR 411 at [60]-[74] (and see *Soliman v University of Technology, Sydney* (2012) 207 FCR 277 at [50]). The later decisions cited by the Appellant at note 24 do not refer to this analysis. It may also be noted that the Full Federal Court in *Ekinci* (2014) 227 FCR 459 did not need to consider what relief if any should flow from its conclusion that the tribunal had not complied with the requirement to give reasons (see at [121]). In the earlier case of *Civil Aviation Safety Authority v Central Aviation Ltd* (2009) 179 FCR 554, the Tribunal's decision was set aside in circumstances where an order requiring the provision of proper reasons was not feasible (see at [42]).

[16] *Foster v Minister for Customs and Justice* (2000) 200 CLR 442, 452 [23], 456-457 [38]; *Drake-Brockman v Minister of Planning* (2007) 158 LGERA 349, 385 [126].

[17] *SZSRS,* 80 [58]-[59]; *SZRKT,* 127 [97], 128-129 [102].

16. The Republic does not intend to file a notice of contention or a notice of cross-appeal.

Part VIII: Oral argument

17. The Republic estimates that it requires 45 minutes to present oral argument.

Dated: **3 May 2018**

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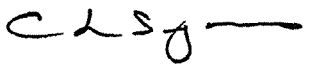

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