IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M167 of 2017

BETWEEN:

Appellant

AND:

THE REPUBLIC OF NAURU

Respondent

CBR.

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Filed on behalf of the Appellant by
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Part I: Certification

1. This outline may be published on the internet.

Part II: Outline

***Ground One** [AS [38]-[67]; Reply [3]-[14]]*

2. The Tribunal was obliged to consider and deal with any case advanced by the appellant or apparent on the face of the material before it: *Refugees Convention Act 2012* (Nauru) s.22(b) ("the Act");[1] *DWN027* [2018] HCA 20 at [17] adopting *NABE* (2004) 144 FCR 1 at [58], [60].

3. Here, the gist of the case the appellant advanced (and apparent on the material) was as follows. The appellant asserted a well-founded fear of persecution by reason of his political opinion as a person who supported the BNP and whose views were adverse to AL. He said that he feared "persecution"[2] because he feared assault by AL (for refusing to join AL). To establish that fear (and its foundation) he relied upon threats of violence to himself (if he did not join AL) and also on actual assaults by AL on a friend[3] (for not joining AL) and other named persons[4] (for not joining AL).

4. It is common ground that the Tribunal's reasons do not deal *expressly* with the case relying upon assaults on his friend and others (although it had been addressed by the Secretary: AB 141.33). An "inference that the Tribunal ... failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons" (*WAEE* (2003) 236 FCR 593 at [47]), particularly when there is a duty to provide reasons.

5. Nauru says two things in response to this ground.

6. First, at RS [17] and [20] Nauru says that the case based on those assaults was considered and "embrace[d]" by the Tribunal at [31]. However, the Tribunal's findings at [31] cannot be read as an acceptance that the assaults occurred: **(i)** [31] does not mention the assaults on the friend or the other persons; **(ii)** it cannot be said of the Tribunal's reasons that "the issue [i.e. assaults on others] has at least been identified at some point": *WAEE* at [47]; **(iii)** there is no mention of threats *of violence*; **(iv)** there is no consideration of whether assaults occurred; **(v)** there is no consideration of whether assaults on others gave rise to a well-founded fear of persecution; **(vi)** [31] accepts merely that the BNP and AL "*may* engage in antagonistic behaviour towards their political opposites" but does not find that "antagonistic behaviour" occurred (far less that assaults on others occurred); **(vii)** the focus of [31] is on "antagonistic behaviour" (harassment, mockery, pushing etc) which "did not involve harm amounting to persecution" as distinct from assault (of which the appellant is the only stated victim); **(viii)** if the evidence of assaults on others had been considered it would have been specifically dealt with: it would have been rejected or accepted and a different conclusion reached (or considered) that harm to others amounting to persecution had occurred (and may be suffered by the appellant): *MZYTS* (2013) 230 FCR 431 at [52].

7. Secondly, at RS [21]-[24] Nauru submits that, even if this argument was not considered and dealt with by the Tribunal, there should be no remittal because this Court would be satisfied that even if the Tribunal had accepted all of the evidence of assaults (for not joining AL) that evidence was not in any way conducive to a finding

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[1] See also s.34(4) (duty to provide reasons) and ss.31(1), 33(1), 34(1), 34(2) and 42 (obligation to conduct a "review" of the Secretary's decision).
[2] And serious harm warranting complementary protection.
[3] AB 26.25-27.20, 132.20-133.30, 139.43, 140.24, 141.28-142.25, 147.20, 6.29.
[4] AB 70.40-71.1, 141.28-142.25, 54.30-58.50, 25.40, 26.25, 11.15, 147.20.

that the appellant's fear of assaults (for not joining AL) was well-founded. However: **(i)** this evidence could easily have led to a finding that his fear of assaults was well-founded; **(ii)** this Court would not lightly reach the conclusion that the evidence could not have made any difference (and only proceeding with caution: *Stead* (1986) 161 CLR 141 at 145); **(iii)** the merits of the appellant's argument were for the Tribunal.

8. If this ground succeeds, it also impacts on the Tribunal's reasons at [41]: that paragraph is predicated upon an acceptance of the fear of harm at [31] (not the fear of harm which the Tribunal did not deal with).

Ground Two *[AS [68]-[83]; Reply [15]-[19]]*

9. The Tribunal found that the appellant was never a member of the BNP: [25]. At [25], the Tribunal referred to material about joining the BNP from the BNP official website (which apparently refers to a "form" and a "fee" of 5 taka) and rejected the appellant's evidence (see [12]) that he joined the BNP and became a member (AB 42-43). The Tribunal's finding that the appellant was never a member affected its reasoning on well-founded fear of harm: [24]-[25], [41].

10. There are two problems for Nauru.

11. The *first* problem is that the material on the BNP website (which is used at [24]-[25] to reject the appellant's evidence of membership) was never raised with him and he was given no opportunity to respond to it. That was a breach of the principles of natural justice (s.22(b): *Alphaone* (1994) 49 FCR 576 at 591C, 592A, *BRF038* (2017) 91 ALJR 1197 at [59], *SZSSJ* (2016) 259 CLR 180 at [83]).

12. Nauru has only one response in relation to this first problem: it asserts that even if this website material had been put to the appellant this court should be satisfied that it "could not possibly have made any difference to the outcome of the review" because "the decision could not have been affected by anything that the appellant might have said had the information been put to him".[5]

13. However: **(i)** this Court would not reach that state of satisfaction lightly; **(ii)** if the website material had been put to him, the appellant would have been able to point out that he had in fact paid the 5 taka membership fee, as he told the Secretary: AB 140.40; **(iii)** if the website material had been raised with him, he could also have pointed out that the difference (if any) between a new member's details being placed in a "form" and the new member's name being listed in a book (see his evidence at AB 42.46) was inconsequential or easily explained by a slightly faulty recollection or by a nuance of translation); **(iv)** the finding of no membership was clearly an important integer in the reasoning at [41]: the conclusion at [41] of "no profile within the BNP" may well have been different if he was found to be a member of the BNP; **(v)** the merits of his argument were for the Tribunal; **(vi)** where a party is denied a chance of making submissions on facts it is more difficult to conclude that the result could not have been affected: *Stead* at 145.

14. Nauru's *second* problem in relation to [41], [24] and [25] is that the appellant was never told by the Tribunal that his membership of the BNP was an issue and, in particular, never told that it was a significant issue on the review. Section 40(1) of the Act required that "the issues arising in relation to the determination or decision under review" be identified by the Tribunal, particularly where (as here) the issue had not been an issue resolved against the appellant by the Secretary (AB 142.17): *SZBEL* (2006) 228 CLR 152 at [32]-[35]. So did the requirements of natural justice (s.22(b)): *SZSSJ* at [83]; *Alphaone* at 592A.

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[5] Respondent's submissions on leave to amend at [8] and [11] citing *Stead* at 145-6

15. Nauru at RS [30] says there are "three fatal difficulties" with this second problem.

16. First, at RS [31] Nauru says that the appellant's membership (or otherwise) of the BNP was in no way relevant to the issue of whether relocation was reasonable. However: **(i)** at [41] the Tribunal clearly treated membership as relevant to the relocation issue; **(ii)** membership was relevant to relocation for the reason assigned by the Tribunal at [41], namely, because it affected (or was capable of substantially affecting) his profile within BNP (which was clearly relevant to his ability safely to relocate).

17. Secondly, at RS [30] and [32] Nauru suggests that an issue only needed to be identified if it was a "critical" issue on which the administrative decision was likely to turn. However: **(i)** this is not the test under s.40(1): issues arising in relation to the decision under review are the issues which must be disclosed: *SZBEL* at [32]-[35]; **(ii)** under the principles of natural justice (s.22(b)) the obligation to disclose issues is not confined to "critical" issues: *SZSSJ* at [83]; **(iii)** his membership (or otherwise) of the BNP was treated by the Tribunal at [41] as an issue which was relevant and of significance in relation to his profile within the BNP.

18. Thirdly, at RS [33] Nauru submits that the exchange between the appellant and the Tribunal at AB 42-43 put the appellant on notice that his membership of the BNP was an issue on the review. However: **(i)** the obligation is to identify issues: *SZBEL* at [32]-[35]; that requirement is not satisfied by asking questions which may bear some relation to an unidentified issue; **(ii)** those questions were focused (after the initial question at AB 42.19) on *when* he became a member (AB 43.19, 43.23) and *how* he became a member (AB 42.33), not *whether* he became a member; **(iii)** the questions would reasonably have been interpreted by a layman (particularly via an interpreter) in that way; **(iv)** on no view is the appellant told by the Tribunal that his membership of the BNP is an issue: that is, that issue was not "identified": *SZBEL* at [32]-[35]; **(v)** the material on the BNP website is on no view ever put to him; **(vi)** given that the Secretary did not hold that he was not a member (AB 142.17), he was entitled to assume (unless clearly told otherwise) that his membership of the BNP was not an issue before the Tribunal: *SZBEL* at [35].

19. At RS [34] Nauru says that, to the extent that the appellant relies on *Alphaone* at 592A[6], that requirement was not breached because the "adverse conclusion" of not ever having been a member was "obviously open on the known material", (namely, his evidence on the process of joining the BNP and the (supposedly contradictory) material on the BNP website). However: **(i)** the appellant's argument does not rely exclusively on *Alphaone* at 592A; **(ii)** it is not open to describe the material on the BNP website as "known material" when it was never put to the appellant and there is no evidence that he had any knowledge of that material; **(iii)** a conclusion of no BNP membership is not "obviously open" on the other material before the Tribunal (which includes reference to his payment of the fee: AB 140.39).

20. Because the no membership finding affects the reasoning on both fear of harm ([24]-[32]) and relocation ([41]), the appeal must be allowed if either of the two particulars of this ground is upheld.

Dated: 14 June 2018

G. O'L. Reynolds Julian Gormly David Hume

[6] "The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material".