IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **No M28 of 2017**

BETWEEN:

BRF 038

Appellant

THE REPUBLIC OF NAURU

Respondent

RESPONDENT'S SUBMISSIONS

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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 issues presented by the appeal include the issues identified in Part II of the appellant's submissions save that, in relation to the alleged denial of procedural fairness which is the subject of ground 1, the Republic submits that s 37 of the *Refugees Convention Act 2012* (Nr) (**Refugees Act**) was repealed with effect from 10 October 2012 and has no relevance to the resolution of this appeal.

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 has concluded that no such notices need be given.

IV. MATERIAL FACTS

4. The Republic accepts the accuracy of the statements in Part III of the appellant's outline of submissions, save as follows:

   4.1. The Secretary is only required to determine whether an 'asylum seeker' is owed complementary protection if he or she is not recognised as a refugee (cf. AS [11]).[1]

   4.2. The appellant applied to the Supreme Court by way of appeal against the decision of the Refugee Status Review Tribunal (the **Tribunal**) on a 'point of law' under s 43(1) of the Refugees Act.[2] The Supreme Court dismissed the appellant's 'appeal', not his 'application' (cf. AS [12]).

V. LEGISLATION

5. The Republic agrees that the legislative provisions and treaties annexed to the appellant's submissions are applicable or otherwise relevant to the issues arising on the appeal.

6. The Republic submits that the following additional legislative provisions are applicable or otherwise relevant to the issues arising on the appeal:

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[1] This is the effect of section 6(1) of the Refugees Act, read with the definition of 'complementary protection' which applies to people who are not refugees as defined in the Act.

[2] To the extent the term 'judicial review' is apt to describe an appeal of that nature, it may be accepted that the appellant 'sought judicial review' (see AS [12]).

6.1. s 10 of the *Refugees Convention (Amendment and Validation) Act 2016* (Nr);

6.2. ss 2, 5, 6 and 24 of the *Refugees Convention (Derivative Status & Other Measures) (Amendment) Act 2016* (Nr) (**2016 Amendment Act**); and

6.3. ss 2, 4, 5, 6 and 7 of the *Refugees Convention (Amendment) Act 2017* (Nr) (**2017 Amendment Act**).

VI. ARGUMENT

(A) LEGISLATIVE FRAMEWORK AND JURISDICTION OF THE HIGH COURT

Assessment of refugee status under the Refugees Act

7. The *Refugees Act* permits a person to apply to the Secretary to be recognised as a refugee: s 5(1). Upon making such an application, the person is referred to as an 'asylum seeker': see the definition in s 3. As soon as practicable after a person becomes an asylum seeker, the Secretary must determine whether he or she is recognised as a refugee or is owed complementary protection: s 6(1), (3). A 'refugee' is a person who is a refugee under the Convention Relating to the Status of Refugees done at Geneva on 28 July 151: s 3. 'Complementary protection' is defined to mean 'protection for people who are not refugees as defined in this Act, but who also cannot be returned or expelled to the frontiers of territories where this would breach Nauru's international obligations': s 3.

8. A person may apply to the Tribunal for merits review of a determination by the Secretary that he or she is not recognised as a refugee, or that he or she is not owed complementary protection: s 31(1) of the Refugees Act. On review, the Tribunal stands in the shoes of the Secretary and may (inter alia) affirm the Secretary's determination or set it aside and substitute a new determination: s 34.

9. The Tribunal is required by s 22(b) of the Refugees Act to 'act according to the principles of natural justice'. Further, the Tribunal is, subject to certain exceptions, required by s 40 to invite an applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the determination under review.

10. The Tribunal was previously required by s 37 of the Refugees Act to give to an applicant clear particulars of information that the Tribunal considered would be the reason (or a part of the reason) for affirming a determination under review, to ensure (as far as reasonably

practicable) that the applicant understands why that information is relevant, and to invite the applicant to comment on or respond to the information.

11. However, as a result of the 2016 Amendment Act and the 2017 Amendment Act:

11.1. s 37 of the Refugees Act is repealed with effect from 10 October 2012: ss 2 and 24 of the 2016 Amendment Act; s 4 of the 2017 Amendment Act;[3]

11.2. for the avoidance of doubt, any decision or purported decision of the Tribunal made between 10 October 2012 and 23 December 2016 'which would have been validly made if at the time of the application, s 37 ... had not been enacted, is taken to have been validly made on the day it was in fact made': s 5 of the 2016 Amendment Act;

11.3. for the avoidance of doubt, the rights, liabilities, obligations and status of all persons are declared to be, and always to have been, the same as if s 37 of the Refugees Act had not been enacted: s 5 of the 2017 Amendment Act.

11.4. for the avoidance of doubt, all proceedings, matters, decrees, acts and things taken, made or done under the Refugees Act in relation to an application to the Tribunal for merits review of a determination by the Secretary are declared to have, and to have had, the same force and effect as they would if s 37 of the Refugees Act had not been enacted: s 6 of the 2017 Amendment Act.

12. These amendments do not 'displace ... any obligation imposed on the Tribunal under the common law of Nauru to act according to the principles of natural justice and to afford procedural fairness with respect to an application to the Tribunal under s 31 of [the Refugees Act] for merits review of a decision or determination of the Secretary': see s 6 of the 2016 Amendment Act; s 7 of the 2017 Amendment Act.

'Appeal' to the Supreme Court

13. Section 43(1) of the Refugees Act provides that a person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a

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[3] Prior to the 2017 Amendment Act, a drafting error in the 2016 Amendment Act meant that it was arguable that the repeal of s 37 of the Refugees Act only had effect from 23 December 2016 (rather than 10 October 2012). The 2017 Amendment Act subsequently made it clear that the repeal of s 37 of the Refugees Act had retrospective effect from 10 October 2012. See the Explanatory Memorandum to the *Refugees Convention (Amendment) Bill 2017*, which noted that the Bill was designed 'to correct several minor drafting errors' in the 2016 Amendment Act. See also *DWN 066 v Republic of Nauru* [2017] NRSC 23, [32].

point of law. In deciding an appeal, the Supreme Court may make an order affirming the decision of the Tribunal, or remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court: s 44. Where the Tribunal remits the matter, it may also 'quash' the Tribunal's decision.

14. The word 'appeal' is used to described many different forms of proceeding, including 'appeals on questions of law, appeals by way of rehearing, appeals by rehearing de novo, appeals which, on examination can be seen to be an exercise of original jurisdiction'.[4] Accordingly, where a process is described as an 'appeal', it is important to identify the character of the process including the duties and powers of the court or tribunal conducting it.[5] Which of its various different meanings the term 'appeal' has may depend on the context in which the term is used, the history of the legislation, the surrounding circumstances, and sometimes an express direction as to what the nature of the appeal is to be.[6]

15. Accordingly, the substance of the Refugees Act determines whether the Supreme Court, in an appeal brought under s 43(1), is invested with original or appellate jurisdiction.[7] The Republic agrees that the Supreme Court is invested with original jurisdiction in the nature of judicial review (see appellant's submissions at [15]). It is particularly significant, in this context, that the 'appeal' to the Supreme Court under s 43(1) is from an administrative decision. A 'strong presumption' arises that the 'appeal authorises a fresh hearing by the court, in the exercise of an original rather than appellate jurisdiction'.[8]

'Appeal' to the High Court

16. The *Nauru (High Court Appeals) Act 1976* (Cth) (the **Nauru Appeals Act**) gives effect to an agreement between Australia and the Republic relating to appeals to the High Court from the Supreme Court (the **Agreement**). Section 5 of the Nauru Appeals Act provides as follows:

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4 *Eastman v The Queen* (2000) 203 CLR 1, 97 [290] (per Hayne J) (***Eastman***') (footnotes omitted).

5 *Walsh v Law Society (NSW)* (1999) 198 CLR 73, 90—1 [51] (per McHugh, Kirby and Callinan JJ).

6 *Eastman* (2000) 203 CLR 1, 40-41 [130] (per McHugh J).

7 *Ruhani v Director of Police (No 1)* (2005) 222 CLR 489, 507—508 [41] (per McHugh J) (***Ruhani***'); *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652, 657 (per Dixon CJ); *Watson v Federal Commission of Taxation* (1953) 87 CLR 353, 371; *Hembury v Chief of General Staff* (1998) 193 CLR 641, 653—654 [31]-[33] (per Gummow and Callinan JJ).

8 *Workers' Compensation (Dust Diseases) Board v Veskens* (1993) 32 NSWLR 221, 237-238. See also *Ruhani* (2005) 222 CLR 489.

(1) Appeals lie to the High Court of Australia from the Supreme Court of Nauru in cases where the Agreement provides that such appeals are to lie.

(2) The High Court has jurisdiction to hear and determine appeals mentioned in subsection (1).

(3) Where the Agreement provides that an appeal is to lie to the High Court of Australia from the Supreme Court of Nauru with the leave of the High Court, the High Court has jurisdiction to hear and determine an application for such leave.

17. Article 1 of the Agreement relevantly provides that, subject to Article 2,[9] appeals are to lie to the High Court from the Supreme Court in the following cases:

A. In respect of the exercise by the Supreme Court of its original jurisdiction –

...

(b) In civil cases –

(i) as of right, against any final judgment, decree or order; and

(ii) with the leave of the trial judge or the High Court of Australia, against any other judgment, decree or order.

B. In respect of the exercise by the Supreme Court of Nauru of its appellate jurisdiction –

In both criminal and civil cases, with the leave of the High Court.

18. By reason of the matters outlined in paragraphs 13 to 15 above, the Republic accepts the present proceeding is covered by Article 1.A(b)(i) of the Agreement, and that the appellant may therefore appeal 'as of right' against the judgment of the Supreme Court.

19. The High Court, in the exercise of its jurisdiction under the Nauru Appeals Act, may affirm, reverse or modify the judgment given or order made by the Supreme Court, and may give such judgment or make such order as ought to have given or made by the Supreme Court: s 8 of the Nauru Appeals Act.[10]

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[9] Article 2 of the Agreement provides that an appeal does not lie to the High Court from the Supreme Court in various matters, including (for example) where the appeal involves the interpretation or effect of the Constitution of Nauru.

[10] The High Court's jurisdiction under the Nauru Appeals Act is original rather than appellate in nature: see *Ruhani* (2005) 222 CLR 489, 499-500 [9]-[10] (per Gleeson CJ), 507-508 [39]-[41] and 510-511 [49] (per McHugh J), 527-528 [107]-[110] (per Gummow and Hayne JJ). Nevertheless, the powers conferred on the High Court by s 8 of the Nauru Appeals Act reflect the powers conferred on the Court by s 37 of the *Judiciary Act 1903* (Cth) in the exercise of its appellate jurisdiction.

(B) GROUND 1 – PROCEDURAL FAIRNESS

20. The appellant's first ground of appeal is that the Supreme Court 'erred in its application of the principles of procedural fairness required by ss 22 and 37 of the [Refugees Act], in finding that procedural fairness did not require the [Tribunal] to put to the appellant material relating to the tribal composition of the Somali police force before making an adverse finding based on that information'.

The information and the Tribunal's reasons

21. The 'material' or 'information' that is the subject of the appellant's complaint was drawn from a report by the United Kingdom Home Office which indicated that 'there are police from every tribe in Somaliland'. To understand the significance (if any) of that information to the Tribunal's review, it is necessary to identify the context in which the information was referred to.

22. Paragraphs 39 to 48 of the Tribunal's reasons addressed the question identified in the heading to that section, namely, 'Is there a reasonable possibility that the applicant will be persecuted as opposed to being discriminated against on return to Somalia?' The Tribunal identified the 'main issue' as 'whether the harm that the applicant feared was, in fact, discrimination or whether it was so serious that it could rightly be called persecution' (at [40]). The Tribunal observed that it 'must consider whether the past treatment of the applicant and his family, and the treatment of the Gabooye tribe generally, amounts to persecution and whether this would mean that there was a reasonable possibility that he would be persecuted for reasons of being a Gabooye on return to Somaliland in Somalia' (at [41]).

23. The Tribunal stated that the appellant had submitted that '[he] would be denied economic and social rights'; that is, '[h]e would be denied basic needs though his inability to access services that are necessary for his health and survival would be subjected to real risk of existence below the level of bear minimum' [sic] ([42]). The Tribunal's conclusions in relation that claim were expressed in paragraphs 47 and 48 (emphasis added):

> The Tribunal finds that the harm the applicant and his family faced in the past was discrimination. It was not of sufficient seriousness to amount to persecution and their living conditions were not intolerable. It did not amount to a breach of his non derogable human rights. He was able to obtain an education and the family was able to earn a bare living. The Tribunal does not accept, based on his and his

family's past experiences and the country information, that there is a reasonable possibility that the applicant would be subjected to a threat to his life or physical freedom as a member of the Gabooye tribe in Somaliland.

Although the applicant has been subjected to discrimination in the past, the Tribunal does not accept that he would suffer torture or cruel, inhuman or degrading treatment or punishment in Somaliland. The country information indicates that there are police from every tribe in Somaliland so he would have some redress from the acts of others. The applicant may only be able to work in lowly paid employment but would be able to subsist as he did in the past and as his family members currently do. He was able to obtain a limited education in the past and although the Tribunal accepts that he would not be able to study agriculture, the Tribunal does not find that this can be called a serious breach of his human rights and it is therefore not persecution. The applicant's family has somewhere to live, albeit a basic dwelling. The Tribunal finds that the discriminatory conduct that the applicant may be subjected to on return to Somalia, even when considered cumulatively, does not amount to persecution within the meaning of the Convention. Consequently the Tribunal finds that the applicant does not have a well-founded fear of persecution for reason of his membership of the Gabooye tribe and that he is not a refugee on this basis.

The Supreme Court's decision

24. The appellant's notice of appeal to the Supreme Court complained that the Tribunal had failed to afford procedural fairness by failing to disclose to him what was characterised as 'material adverse to the interests of the appellant', and contended that '[t]his fact formed the basis for the Tribunal's finding that the appellant would be able to access state protection if he were subjected to acts of persecution on the basis of his membership of a particular social group, being the Gabooye clan' (ground (e)).

25. The appellant's notice of appeal did not specifically complain that the Tribunal breached s 37 with respect to the country information. However, in his written submissions to the Supreme Court, the appellant submitted that the failure of the Tribunal to put the country information breached both its 'general obligation' under s 22 to act according to principles of natural justice, and also its specific obligation under s 37 (at [67]). The appellant also submitted that the country information was a 'critical part of the Tribunal's evidence for its findings' (emphasis added).

26. In oral argument before the Supreme Court, the appellant and the Republic specifically addressed argument as to whether the Tribunal had denied the appellant natural justice in this context by failing to identify to the appellant an 'issue critical to the decision', in accordance with the principle articulated by the Full Court of the Federal Court in

Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd.[11] The appellant did not, however, contend that the Tribunal breached s 40 of the Refugees Act.

27. The Supreme Court held that, while the Tribunal 'did not put to the appellant that all tribes are represented in the Somali police force', this observation was 'not seen to be critical to the decision that the appellant did or did not suffer discrimination so as to amount to persecution for a Convention reason' (at [42] (emphasis added)). Accordingly, there was no breach of procedural fairness by the Tribunal.

Alleged breach of s 37

28. The appellant's principal submission in support of ground 1 of the appeal is that the Supreme Court erred in failing to find that the Tribunal breached s 37 of the Refugees Act ([19]-[26]). However, that submission is inconsistent with the operation of the 2016 Amendment Act and the 2017 Amendment Act.[12]

29. The appellant submits that s 37 of the Refugees Act was repealed only with effect from 23 December 2016. Whether or not that was the case, s 5 of the 2017 Amendment Act now makes it clear that the repeal of s 37 is taken to have commenced on 10 October 2012 (*i.e.* before the appellant applied to the Tribunal for merits review of the Secretary's decision). It follows that the Tribunal cannot have 'breached' s 37 of the Refugees Act.

30. Further, and in any event, the appellant's submissions do not take into account other provisions in the 2016 Amendment Act and the 2017 Amendment Act which would render any notional 'breach' of s 37 of the Refugees Act of no significance. In particular, s 5 of the 2016 Amendment Act provides that any decision or purported decision of the Tribunal 'which would have been validly made if at the time of the application, s 37 of the [Refugees Act] had not been enacted, is taken to have been validly made on the day it was in fact made'. The consequence of that provision (alone or in combination with the provisions of

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[11] (1994) 49 FCR 576, 591 ('***Alphaone***').

[12] The Republic notes that, as at the date that the appellant's submissions were filed in this Court, the 2017 Amendment Act had not yet been enacted. That Act was enacted on 27 April 2017.

the 2017 Amendment Act) is to remove the legal consequences of any notional 'breach' of s 37.

Alleged breach of s 22 and the 'principles of natural justice'

31. The appellant correctly submits that the common law of Nauru incorporates the common law of England as at Nauruan independence on 31 January 1968, with such adaption as considered by the Nauruan courts to be necessary to the circumstances of Nauru.[13] However, as both the appellant and the Republic submitted to the Supreme Court, Australian law and jurisprudence is properly a very significant influence on the law of Nauru. To this end, both the appellant and the Republic sought to support their submissions to the Supreme Court with respect to the alleged breach of procedural fairness principally on the basis of Australian case law and jurisprudence (including *Alphaone*).

32. In assessing whether the Supreme Court erred in failing to find that the Tribunal breached natural justice, it is useful to distinguish between two distinct but related principles.

32.1. First, natural justice ordinarily requires a person who will be affected by a decision to be given an opportunity to deal with 'adverse information that is credible, relevant and significant' to the decision to be made.[14] Nevertheless, country information is often not aptly characterised as 'adverse' information for such purposes, particularly where it is of a general nature and not personal to the applicant. It is often not possible to characterise such general country information, in advance of the making of a decision,[15] as necessarily adverse to an applicant's claims.

32.2. Secondly, natural justice sometimes requires the disclosure of country information on the basis that 'the subject of a decision is entitled to have his or her mind directed to the critical issue or factors on which the decision is likely to turn in order to have an opportunity of dealing with it'.[16] But this principle ordinarily requires

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[13] *Customs and Adopted Laws Act 1971* (Nr), s 4.

[14] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 256 [2] ('***Saeed***').

[15] *Cf. Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 96 [17]. See also, in relation to s 424A of the *Migration Act 1958* (Cth) (the **Migration Act**), *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609, 615 [17].

[16] *Alphaone* (1994) 49 FCR 576, 591; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 162 [32] ('***SZBEL***'); *Saeed* (2010) 241 CLR 252, 261 [19].

the disclosure of country information only if the information is 'of crucial importance', or is 'determinative' or 'decisive' of the application for review.[17]

33. Here, the Tribunal did not fail to afford natural justice to the appellant by failing to provide him with an opportunity to comment on or respond to the specific country information drawn from the UK Home Office report.

34. First, the information drawn from the UK Home Office report should not be characterised as adverse information. The information was not personal to the appellant. It did not contradict any claim made by the appellant. In its terms, the information was not addressed to the question whether the police in Somaliland provided effective protection against any persecution feared by the appellant.[18]

35. Second, as the Supreme Court found, the information did not go to a 'critical' issue within the meaning of *Alphaone* (nor an 'important', 'determinative' or 'decisive' one). The issue of State protection was not critical because the Tribunal made a finding that was sufficient to dispose of the appellant's claim, and which was logically anterior to any question as to the effectiveness of State protection.[19] The Tribunal found that the discriminatory conduct that the appellant had faced in the past for reasons of his membership of the Gabooye tribe, or to which he may be subjected on his return to Somaliland, was not of sufficient seriousness to amount to 'persecution' within the meaning of the Convention (at [47], [48]). In particular, the Tribunal did not accept that there was a reasonable possibility that the appellant would be subjected to a threat to his life or physical freedom as a member

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[17] *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at 633-635 [131]-[137] per (per McHugh J), 654-655 [229]-[236] (per Kirby J), 661-662 [263]-[268] (per Hayne J, with whom Gummow J agreed, dissenting on this point), *cf.* 611 [30] (per Gleeson CJ) and 618 [64] (per Gaudron J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 85-86 [97]-[99] (per Gaudron J), 96-97 [140]-[141] (per McHugh J), 117-118 [193]-[194] (per Kirby J). See also *SZBEL* (2006) 228 CLR 152, 165 [44], where the Court referred to a failure to afford procedural fairness (not involving country information) because the appellant had not had a sufficient opportunity to address two of the three 'determinative issues'.

[18] *Cf. Tahiri v Minister for Immigration and Citizenship* (2012) 87 ALJR 225, 230-231 [22]-[24].

[19] If the Tribunal finds that a person does not have a well-founded fear of being persecuted by non-State agents for a Convention reason, then it is unnecessary to consider the effectiveness of State protection against that feared harm: see, for example, *SZRZV v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 848, [14], [24]-[25] (unreported, Jacobson J, 15 August 2013). The phrase 'being persecuted' in Article 1 of the Convention comprises two essential elements, succinctly summarised by Lord Hoffman in *R v Immigration Appeal Tribunal and Another; Ex parte Shah* [1999] 2 AC 629, 653 as follows: "Persecution = Serious Harm + The Failure of State Protection". See also *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, 39-40 [118] (per Kirby J); *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1, 34-35 [100] (per Kirby J). In the present case, the Tribunal found that there was no reasonable possibility that the appellant would face serious harm.

of the Gabooye tribe (at [47]), or that he would suffer torture or cruel, inhuman or degrading treatment or punishment (at [48]).

36. In this context, the Tribunal's reference (at [48]) to country information that there were police from every tribe in Somaliland, and its observation that the appellant 'would have some redress from the acts of others', must be taken as referring to conduct that would not amount to persecution within the meaning of the Convention. The Tribunal was not making a finding that there was effective State protection against persecution by non-State actors. Having found that the discrimination to which the appellant might be subjected on his return to Somaliland did not amount to persecution, it was unnecessary for it to consider the effectiveness of State protection.

37. Addressing the appellant's situation as a member of the Gabooye tribe in Somaliland, the Tribunal concluded that 'although the [appellant] and his family members have been discriminated against as a result of their tribe, they have not suffered any serious violation of their human rights and have not been persecuted on account of being members of the Gabooye tribe' (at [38]).

38. In arriving at this conclusion, the Tribunal took into account an incident when the appellant was 12 years old where he had been threatened with a gun by a member of a majority tribe after a dispute during an informal football match, noting that others had intervened to help the appellant and that there were 'no further repercussions as a result of this incident' (at [27]). The Tribunal also had regard to an occasion where the appellant's mother's shop had been robbed in 2009 (at [29]). The Tribunal nevertheless found that Somaliland was 'reported to be the safest region within Somalia with a functioning government, judiciary and security forces' (at [33]). Further, despite any 'cultural stigma and discrimination within Somali society' against the Gabooye, the appellant was able to complete 10 years of education and he and his family were able to obtain employment and earn a bare living (at [30], [31], [36]).

39. Accordingly, as the Supreme Court found (at [40] and [42]), the country information as to the composition of the composition of the police force 'had no real bearing on the Tribunal's determination' because of its finding that the appellant would not suffer harm amounting to persecution for the purposes of the Convention if he were returned to

Somaliland. The observation that all tribes were represented in the Somali police force was not 'critical' to the issue whether the discrimination to which the appellant had been or might be subject was such as to amount to persecution for a Convention reason.

40. In so far as the appellant submits that the Tribunal failed to advise him that there was an issue in the review as to whether he would get effective protection from the authorities in Somaliland, the appellant was plainly aware that this was a potential issue, given that a central element of his claims was that the authorities would *not* provide him with effective protection (see Tribunal's reasons at [20] and [39]). In any event, that issue did not ultimately arise, given that the hearing and decision turned on the 'main issue' identified by the Tribunal as to whether the harm that the applicant feared was sufficiently serious to amount to persecution.

41. The appellant's suggestion that the Supreme Court erred by failing to find that the Tribunal breached s 40(1) of the Refugees Act should be rejected. First, the appellant did not contend on his appeal to the Supreme Court that the Tribunal had breached s 40(1). Second, and in any event, the appellant was aware of the issue of State protection and addressed that issue in his submissions to the Tribunal.

42. Not only was the appellant aware of that issue, but the reasons of the Secretary in determining that he was not a refugee specifically put him on notice that 'the institutions of Somaliland authority promote equality before the law'. Thus, in so far as the question whether the Somaliland authorities would refuse to protect him on the basis that he was a member of the Gabooye tribe arose on the review, the appellant suffered no practical unfairness in appreciating that issue and advancing whatever evidence or submissions he wished to about it. Accordingly, the Tribunal did not breach s 40(1) by failing to identify any such 'issue' in the sense explained by the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (by reference to s 425(1) of the Migration Act).[20]

43. For the reasons set out above, the Supreme Court did not err in holding that there was no breach of procedural fairness or natural justice by the Tribunal. In particular, the Tribunal was not required to give the appellant an opportunity to comment on or respond to

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[20] Cf. *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152.

country information about the tribal composition of the police in Somaliland, nor to put the appellant on notice that the effectiveness of State protection was an issue on the review.

(B) GROUND 2 – TEST FOR PERSECUTION

44. The appellant's second ground of appeal is that the Supreme Court 'erred in applying the incorrect test for persecution under international law for the purposes of an assessment under s 6 of the [Refugees Act]'. In support of this contention, the appellant submits that the Tribunal 'applied an incorrect test to the question of persecution, in that it effectively required the deprivation of his human rights to be absolute, rather than a systematic and serious violation of his rights' (at [39]).

45. The appellant's characterisation of the Tribunal's reasons is wrong. The Tribunal did not articulate any 'test' for persecution, as the appellant suggests. To the contrary, the Tribunal correctly cited the UNHCR Handbook, including a passage stating that '[t]here is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success' (at [43]).

46. The Tribunal quoted with apparent approval from the various other observations in the UNHCR Handbook, and the Nauru RSD Handbook, to the following effect:

46.1. A threat to life or freedom for a Convention reason is always persecution. 'Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case.'

46.2. 'In general, serious violations of non-derogable rights would normally constitute persecution. Serious breaches of other rights would generally also be considered persecution, particularly if these have a systematic or repetitive element. Discrimination can constitute persecution if it is linked to a protected right ... or if there has been a pattern of discrimination.'

46.3. '[A]n applicant may have been subjected to various measures not in themselves amounting to persecution (e.g., discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim

to well-founded fear of persecution on 'cumulative grounds'. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status.'

46.4. 'Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g., serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities.'

47. The appellant does not identify any error in these statements of principle.

48. Contrary to the appellant's submissions, the Tribunal did not 'focus' on whether he faced a 'total deprivation' of rights to property, education and work. Nor did the Tribunal fail to consider whether the appellant faced a 'sustained and systematic breach' of those rights. It is clear from the cited passages of the UNHCR Handbook and Nauru RSD Handbook that the Tribunal accepted that serious breaches of rights 'would generally ... be considered persecution, particularly if these have a systematic or repetitive element', and that various factors may combine to justify a claim for persecution on 'cumulative grounds'.

49. The appellant's true complaint is not with the principles identified by the Tribunal to assist it to make its decision, but with the Tribunal's application of those principles to the evidence before it.[21] This is a complaint about the merits of the Tribunal's decision, which does not raise any error 'in point of law' by the Tribunal.

50. As the Full Court of the Federal Court recently explained in *SZTEQ v Minister for Immigration and Border Protection*,[22] following a thorough survey of international case law and jurisprudence, an assessment of whether an applicant has suffered (or will suffer)

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[21] That is not to imply that the explication of the concept of 'persecution' is simple. As the Full Court of the Federal Court recently explained in *SZTEQ v Minister for Immigration and Border Protection* (2015) 229 FCR 497, 518 [78] ('***SZTEQ***'), 'there is much debate amongst academic commentators about how to articulate the concept of persecution, and the most effective ways in which refugee decision-makers should go about using and applying the concept while staying true to the purposes of the Convention'.

[22] (2015) 229 FCR 497, 518 [77].

persecution is inevitably a 'fact-dependent' one, about whether there will be 'legitimate scope for reasonable minds to differ about the evaluative assessment involved' in a given case.[23] 'Persecution' requires conduct at 'a certain level of seriousness or intensity', where 'threats to life or freedom are more readily characterised as having the necessary quality of seriousness or intensity of harm'.[24]

51. The Tribunal evaluated the discrimination that had been experienced by the appellant and his family in the past, and found that it was not of sufficient seriousness to amount to persecution. It did so consistently with the principles and guidance referred to in the UNHCR Handbook and the Nauru RSD Handbook. These were matters involving questions of fact and degree for the Tribunal, which made no error of law in the making its evaluative assessment. Accordingly, the Supreme Court correctly found that the Tribunal's findings were open on the evidence, and that the Tribunal did not apply a wrong test regarding what constitutes persecution within the meaning of the Convention (at [31]).

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[23] See also *SZTEQ* (2015) 229 FCR 497, 524 [105] ('the decision whether conduct does or does not constitute persecution involves an evaluative exercise, no matter what the conduct is'), 535 [153] ('the evaluation of whether what a person claims to fear is 'serious harm' will be a question of fact and degree, often complicated and quite specific to the individual concerned'). See also *Prahastono v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 260, 268, 271 (per Hill J); *Ahwazi v Minister for Immigration and Multicultural Affairs* [2001] FCA 1818, [45] (unreported, Carr J, 17 December 2001); *Mandavi v Minister for Immigration and Multicultural Affairs* [2002] FCA 70, [25] (unreported, Carr J, 8 February 2002).

[24] *SZTEQ* (2015) 229 FCR 497, 522 [100], interpreting and applying *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

VIII. ESTIMATE OF TIME FOR ORAL ARGUMENT

52. The Republic estimates that presentation of its oral argument will take 1.5 hours.

Dated: 10 May 2017

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