



IN THE SUPREME COURT OF NAURU

AT YAREN

Case No. 20 of 2017

IN THE MATTER OF an appeal
against a decision of the Refugee
Status Review Tribunal TFN
T15/00198, brought pursuant to s 43
of the *Refugees Convention Act 2012*

BETWEEN

REF 001

Appellant

AND

THE REPUBLIC

Respondent

Before: Justice I Freckelton

Appellant: Ms Catherine Symons

Respondent: Mr Rogan O'Shannessy

Date of Hearing: 19 – 20 March 2018

Date of Judgment: 14 December 2018

CATCHWORDS

APPEAL – failure to put credible, relevant and significant information to the Appellant – failure to consider evidence – failure to consider all the Appellant's claims – complementary protection – *Convention on the Elimination of All Forms of Racial Discrimination* – APPEAL ALLOWED.

JUDGMENT

1. This matter is before the Court pursuant to s 43 of the *Refugees Convention Act* 2012 (“the Act”) which provides that:
 - (1) *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 point of law.*
 - (2) *The parties to the appeal are the Appellant and the Republic.*
 - ...
2. A “refugee” is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951* (“the *Refugees Convention*”), as modified by the *Protocol Relating to the Status of Refugees 1967* (“the *Protocol*”), as any person who:

“Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable to or, owing to such fear, is unwilling to return to it ...”
3. Under s 3 of the Act, complementary protection means protection for people who are not refugees but who also cannot be returned or expelled to the frontiers or territories where this would breach Nauru’s international obligations.
4. The determinations open to this Court are set out in s 44(1) of the Act:
 - (a) *an order affirming the decision of the Tribunal;*
 - (b) *an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.*
5. The Refugee Status Review Tribunal (“the Tribunal”) delivered its decision on 30 May 2016 affirming the decision of the Secretary of the Department of Justice and Border Control (“the Secretary”) of 10 October 2015, that the Appellant is not recognised as a refugee under the 1951 *Refugees Convention*, as amended by the *Protocol*, and is not owed complementary protection under the Act.
6. The Appellant filed a Notice of Appeal on 20 April 2017 and an Amended Notice of Appeal on 22 February 2018.

BACKGROUND

7. The Appellant is a single male from Ahwaz, Iran, of Arab ethnicity and Shi’a Muslim religion. He completed ten years of secondary education, and undertook his compulsory military service from 2006 to 2008. He was a taxi driver from 2009 to June 2013. His parents, three sisters and three brothers remain in Iran.
8. The Appellant claims a fear of persecutory harm because of his Ahwazi Arab ethnicity, imputed political opinion and being a failed asylum-seeker.

9. The Appellant departed Iran in April 2013, and travelled to Australia via Malaysia, Dubai, and Indonesia, arriving on Christmas Island on 18 August 2013. He was transferred to Nauru on 27 July 2014.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

10. The Appellant attended a Refugee Status Determination (“RSD”) interview on 21 October 2014. The Secretary summarised the material claims advanced at that interview as follows:

- *The Applicant is of Arab race; and was born and resided in Ahwaz, Khuzestan province, Iran until he departed in 2013.*
- *In Iran the Applicant is severely discriminated against, including social and economic discrimination, on account of his Arab race. This includes:*
 - *being unable to speak Arabic or dress in traditional Arabic clothing freely in Iran, without facing arbitrary arrest or attention from the intelligence agencies;*
 - *being unable to buy property in Ahwaz or in other regions populated by Persians due to heavily inflated prices, and being unable to rent a property as Arabs are perceived as trouble;*
 - *Accessing medical services, as the doctors and medical staff are Farsi-speaking and always disrespect Arabs;*
 - *being barred from seeking employment in publically owned companies, difficulties in finding employment in oil companies as an Arab, and not being selected for a position in an oil company in Ahwaz, despite being suitably qualified, because he is an Arab;*
- *Because he is an Arab, the Applicant is also imputed with a political opinion as being opposed to the Iranian government.*
- *Each year Iranians celebrate the Islamic Revolution which has anti-American and anti-Western sentiments. As an Arab, the Applicant does not participate in these celebrations as he does not want to be part of such political feuds.*
- *As a result of not participating the government views him as siding with the United States and other western countries.*
- *During his military service he was forced to participate in these celebrations. He tried to run away from participating. As punishment two weeks were added to the end of his military service.*
- *In 2004 or 2005 three of the Applicant’s cousins were involved in a demonstration called ‘Ahwaz for us’ calling for equal rights in Iran.*
- *Arabs were arrested and killed during the demonstration.*
- *The Applicant’s cousins were later identified as participants after the intelligence agencies interrogated other people they had arrested.*
- *His cousins were arrested. One cousin remains detained by the authorities, while the other two remain under constant surveillance by the authorities.*
- *Arabs are viewed with suspicion about sympathies they might have to neighbouring countries like Iraq, because Iran does not have good relations with them.*
- *Arabs are often arbitrarily detained or arrested. In the Applicant’s home area the intelligence service can come and take people away with no reason given for these arrests.¹*

11. The Secretary considered the following material claims advanced at the Interview to be credible:

¹ Book of Documents (“BD”) 68.

- The Appellant is an Iranian citizen of Arab race from Khuzestan province in Iran;
- The Appellant has experienced discrimination in his life including in areas of education, employment and the ability to express or participate in Arabic dress or cultural events;
- He has had minor altercations with the authorities because of his failure to obtain proper signage or licensing for his taxi, and an argument with a nurse in a hospital;
- The Appellant's cousins were arrested, detained and imprisoned in approximately 2005 following participation in a demonstration calling for Arab equal rights;
- The Appellant was deported back to Iran from Malaysia in 2013, where the authorities questioned him and retained his passport for two months;
- The Appellant's personal details were released onto the Department of Immigration and Border Protection ("DIBP") website in February 2014.²

12. However, the Secretary doubted the credibility of the Appellant's claim to have received anonymous phone calls from the authorities over a period of eight years.³ The Secretary noted that the Appellant's evidence in respect of this claim was inconsistent. In his interview, the Appellant initially said that the callers told the family to "keep silent and not to talk", although later in the same interview the Appellant said the caller was silent, and just wanted to ascertain whether the Appellant was male or female.⁴ The Appellant also gave inconsistent information as to the frequency of these phone calls.⁵ Further, given the significant public crackdown on Arab activists by intelligence services from 2005, the Secretary considered the Appellant would have been easily identifiable to the services, and they would have taken more substantial action against him if he were of adverse interest to them.⁶

13. In relation to the Appellant's claimed fear of harm due to his Arab ethnicity, the Secretary noted country information indicating that Arabs face marginalisation and government discrimination in the areas of employment, education, housing, and civil and political rights, such as the rights to practise their religion and speak their language in schools and other institutions.⁷ In Khuzestan province particularly, country information reflects the continual repression of Arabs and related civil unrest and violence.⁸ The Secretary expressed the view that, while the Appellant may face harassment by the authorities upon return, this would not be so severe or prolonged as to amount to persecution.⁹

14. Regarding the Appellant's claim to fear harm because of an imputed anti-government political opinion due to his association with his cousins, the Secretary

² Ibid 73 – 74.

³ Ibid 74.

⁴ Ibid 71 – 72.

⁵ Ibid 72.

⁶ Ibid.

⁷ Ibid 76.

⁸ Ibid 77.

⁹ Ibid 81.

noted that the Appellant did not experience any adverse attention after his cousins' arrest, or in the eight-year period that followed.¹⁰ The Appellant had also undergone security checks after his deportation from Malaysia that did not result in any mistreatment of the Appellant, suggesting there would be no reasonable possibility of harm upon return to Iran because of any imputed political opinion.¹¹

15. In relation to the Appellant's claimed fear of harm due to being a failed asylum-seeker, the Secretary acknowledged some reports of the mistreatment and detention of failed asylum-seekers,¹² but noted that most of these returnees had an anti-government or Arab activist profile, and for that reason came to the adverse attention of the authorities.¹³ This fact, when combined with his previous affirmative security checks after being deported from Malaysia, and that he would be returning on his genuine passport, points to the absence of any reasonable possibility that the Appellant would experience persecutory harm upon return due to his status as a failed asylum-seeker.¹⁴
16. The Secretary concluded that the Appellant's fear of harm on the basis of his Ahwazi Arab ethnicity, any imputed anti-government political opinion, and his status as a failed asylum-seeker, was not well-founded and the Appellant was not owed refugee status.¹⁵ In addition, there was no evidence the Appellant would encounter torture, cruel or inhuman or degrading treatment or punishment, meaning Nauru's complementary protection obligations were not activated, and the Appellant was also not owed complementary protection.¹⁶

REFUGEE STATUS REVIEW TRIBUNAL

17. On 1 April 2016, the Tribunal received a further statement from the Appellant in which the Appellant expanded upon his previous claims, and put forward additional claims. In that statement, the Appellant claimed as follows:

- *He was detained on "numerous" occasions, the longest being for 48 hours. Each time he was "insulted, beaten and humiliated";*
- *He was "beaten, humiliated and insulted" throughout his 11 months of military service;*
- *The "threatening" silent phone calls occurred between 2004 and 2005. Everyone in the family got them. After the uprising began he received multiple calls each day for about three weeks, and then they lessened over time. He was only a teenager (18) and it was a long time ago so he cannot recall all the details;*
- *He knew that his calls were being listened to, but he was allowed to live freely for all those years because the government was just investigating and gathering data;*
- *When he had said in his RSD interview that he had not been involved in any political activity, he had meant not in a formal way. He has never been a member of a political party or group. However he has "worked against them";*
- *In 2011, he distributed 500 leaflets to some small villages. The leaflets named a date for a peaceful demonstration and contained a brief history of the Arabs,*

¹⁰ Ibid 81 – 82.

¹¹ Ibid 82.

¹² Ibid 78.

¹³ Ibid 80.

¹⁴ Ibid 84.

¹⁵ Ibid 85.

¹⁶ Ibid.

describing the loss of their lands and so on. He got this information from his oldest cousin (in prison) via that cousin's mother. His cousin gave the information to his mother when she visited him in prison. People were too scared to participate in the demonstration;

- In 2012, he joined the Basij for 6 months in order to look as though he was on the side of the government and to guarantee he could travel without any problems. He knew that his cousin would one day confess to the applicant's involvement in distributing the leaflets;*
- His imprisoned cousin knew that the applicant "used to be involved in politics" and he believes his cousin has recently revealed this involvement under torture because of the incidents involving his father and brother set out below;*
- His elderly, blind father was abducted by masked men around 16 November 2015 and held for 7 days. He was questioned about the applicant and told that the applicant had distributed 500,000 pamphlets;*
- His brother was also abducted by Ettela'at (Ministry of Intelligence, MOIS) around 25 November 2015. He was also held for 7 days, beaten and asked the same questions as his father had been asked;*
- As the government now knows that he distributed leaflets, he will be treated very differently on return to Iran by contrast with how he was treated on return in 2013.¹⁷*

18. The Appellant reiterated the claims advanced before the Secretary and in the further statement at the oral hearing. The Appellant also provided further details regarding his verbal, and on one occasion, physical abuse, by the "special forces" for not having a taxi sign or licence; being compelled to pay five times more for medical care than other citizens; his cousins' arrests and political activity; and his distribution of leaflets about a protest. It was further claimed that the discrimination the Appellant would face because of his Ahwazi Arab ethnicity would amount to "degrading treatment", engaging Nauru's complementary protection obligations.

19. As with the Secretary, the Tribunal noted and discussed with the Appellant information that Ahwazi Arabs continued to be subject to systematic discrimination in Iran, and that security forces disproportionately repressed protests by ethnic minorities including Ahwazi Arabs.¹⁸ However, the Tribunal did not accept that the Appellant faced a real possibility of discrimination amounting to persecution if returned to Iran, noting that the Appellant's family members were able to own their home,¹⁹ the Appellant was able to complete his schooling,²⁰ and had been in employment as a plasterer and taxi driver until he left Iran.²¹ While he may have experienced some harassment or mistreatment in the past, this was occasional and did not involve serious physical harm.²²

20. In relation to the Appellant's claimed fear of harm due to any imputed anti-government political opinion, the Tribunal reasoned that given many Arabs were detained and arrested in the eight years between the 2005 uprising and his departure from Iran, but neither the Appellant nor his family were ever questioned or detained, the family was not of adverse interest to the authorities, despite the

¹⁷ Ibid 204 – 205.

¹⁸ Ibid 208 at [56]; Ibid 215 at [107]-[108].

¹⁹ Ibid 219 at [134].

²⁰ Ibid at [135].

²¹ Ibid at [137].

²² Ibid at [137]-[138].

arrest of their cousins.²³ Further, while the Tribunal accepted that the Appellant and family may have received some phone calls around the time of the 2005 uprising, the Tribunal rejected the claim that the phone calls that were received three or four times a month for three or four years.

21. Importantly, the Tribunal noted that the Appellant was not involved, or suspected of being involved, in any political activity while in Iran, such as distributing leaflets, or since his departure. The Tribunal arrived at this conclusion after weighing up a number of matters, including that the Appellant did not mention distributing leaflets until his further statement to the Tribunal,²⁴ the Appellant was unable to recall when the protest referred to in the leaflets was due to take place,²⁵ such activity was inconsistent with the Appellant's previous refusal to become involved in Arab activist groups in accordance with his mother's wishes,²⁶ and it was difficult to believe that the Appellant's cousin in prison would have requested the Appellant to distribute these leaflets given the Appellant had no contact with his cousin for six years before the request, and such protests were organised by Arab activists every year in any event.²⁷ The Appellant has also not manifested any likelihood of becoming politically active upon return to Iran, given his lack of knowledge of annual protests, and his involvement with the Basij, which participated in crackdowns on Ahwazi Arabs who were advocating for the rights he claimed to value.²⁸ Given the Appellant had no political profile of interest, the Tribunal rejected the proposition that the Appellant faced a reasonable possibility of harm upon return on account of his imputed political opinion. The fact the Appellant was able to leave Iran, re-enter, and leave again without confrontation confirmed the Appellant was not of adverse interest to the authorities.²⁹

22. In relation to the Appellant's claimed fear of harm on the basis of being a failed asylum-seeker, the Tribunal accepted the Appellant may be identified as a failed asylum-seeker and questioned upon arrival, and that the Appellant's personal information was inadvertently disclosed online by the Australian Department of Immigration and Border Protection.³⁰ However, the Tribunal reasoned that, even if the Iranian authorities became aware of the Appellant's residence in Nauru pending finalisation of his asylum claims through the data breach, they would have become aware of this upon return to Iran anyway.³¹ As with the Secretary, the Tribunal considered that being a failed asylum-seeker would only expose the Appellant to a risk of harm if he had an anti-government or Arab activist profile, and the Appellant had no such profile.³² There was no evidence that the Appellant would be mistreated upon return merely because of being an Arab.³³ The Tribunal concluded that there was no reasonable possibility of the Appellant

²³ Ibid 216 at [113].

²⁴ Ibid 217 at [118].

²⁵ Ibid at [119].

²⁶ Ibid at [120].

²⁷ Ibid at [121].

²⁸ Ibid 218 at [128]-[130].

²⁹ Ibid at [124].

³⁰ Ibid 220 at [142]-[143].

³¹ Ibid at [144].

³² Ibid at [145] – BD 221 at [146].

³³ Ibid at [152].

being detained or subject to torture, cruel or inhumane treatment or punishment upon return on account of being a failed asylum-seeker.³⁴

23. The Tribunal did not accept the Appellant faces any real possibility of suffering persecutory harm because of his race, imputed political opinion, or membership of the particular social group comprising failed asylum-seekers. The Appellant's fear of persecution was therefore not well-founded and he was not owed refugee status.³⁵ Referring to its findings with respect to the Appellant's Convention claims, the Tribunal concluded that the Appellant would also not face treatment upon return that would amount to a breach of Nauru's international obligations, including any discrimination amounting to "degrading treatment", and thus that the Appellant was also not owed complementary protection.³⁶

THIS APPEAL

24. The Appellant's Amended Notice of Appeal filed on 22 February 2018 reads as follows:

1. *The Tribunal failed to comply with s 22(b) and/or s 40(1) of the Act in that it did not act according to the principles of natural justice.*

Particulars

- a. *The Tribunal did not give the appellant the opportunity of being heard in that it did not identify for the appellant or allow him the chance to ascertain and comment on the nature and content of adverse country information.*
 - b. *The Tribunal failed to identify for the appellant at **least five items** of country information that had the potential to undermine (including when considered cumulatively) the appellant's claim to fear harm as a result of his (prospective) profile as a failed asylum seeker.*
 - c. *This information contributed to the Tribunal's rejection of the appellant's claim he risked persecution or serious harm for reason of seeking asylum in a Western country.*
 - d. *The Tribunal's failure to identify the country information for the appellant (and the significance of that country information) deprived the appellant of an opportunity to provide a response and amounted to a denial of natural justice.*
2. *The Tribunal erred on a point of law when it constructively failed to exercise its jurisdiction, and/or did not accord the appellant natural justice pursuant to s 22(b) of the Act, by failing to consider a claim made by the appellant.*

Particulars

- a. *The appellant made claims and submissions to the Tribunal that he was entitled to complementary protection for the reason that returning him to Iran would expose him to racial discrimination of a kind prohibited by the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD claims and submissions").*

³⁴ Ibid 222 at [154].

³⁵ Ibid 223 at [156]-[157].

³⁶ Ibid at [159]-[160].

- b. *The Tribunal was required to consider the CERD claims and submissions as they were substantial, clearly articulated and relied upon established facts.*
- c. *The Tribunal did not consider or advert at all to the CERD claims and submissions in its decision.*
- d. *The Tribunal assessed the appellant's claim to fear persecution and harm that would give rise to complementary protection obligations by reason of his status as a failed asylum seeker on the erroneous basis that the country information identified by the appellant supported the proposition that the risk of harm to failed asylum seekers was determined solely by the person's political profile. In fact, the country information identified by the appellant supported the proposition that the act of seeking asylum could, of itself, be a reason for the Iranian authorities to subject a returnee to various forms of ill-treatment.*
- e. *The Tribunal failed to consider or advert at all to the claim (and related submissions) made by the appellant that he would be subject to greater scrutiny and potentially, at risk of greater harm, on return to Iran for the reason that he had already made attempts to seek asylum.*

25. A footnote to particular 1b. of the Amended Notice of Appeal reads: "This information was referred to by the Tribunal at [145] (see footnote 16), [148] (see footnote 19), [150] (see footnote 21) and [151] (see footnotes 21 – 24) of the Tribunal's decision".

Submissions on Ground 1

26. The Appellant submits that the Australian High Court authority of *BRF 038 v Republic of Nauru*³⁷ ("*BRF 038*") confirms that the principles of procedural fairness apply to the Nauruan Tribunal in exercising its powers of review, including in relation to any reliance upon country information to determine the review. The Appellant submits that, in *BRF 038*, the High Court:

- cited with approval (in the Nauruan context) the decision of *Minister for Immigration and Border Protection v SZSSJ* and the principle that procedural fairness requires that a person whose interest is apt to be affected by a decision be put on notice of "the nature and content of information that the repository of power undertaking the inquiry might take into account as a reason for coming to a conclusion adverse to the person";³⁸
- cited with approval (in the Nauruan context) the statement taken from the decision of a Full Court of the Australian Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* that "where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker";³⁹ and

³⁷ [2017] HCA 44.

³⁸ Appellant's submissions at [14]; *BRF 038* at [58].

³⁹ Appellant's submissions at [14]; *BRF 038* at [59].

- confirmed that procedural fairness requires a person to be given the opportunity to deal with all information that is “credible, relevant and significant” to the decision.⁴⁰

27. The Respondent points to the language used by the High Court in *BRF 038*, that the information must be “integral to the Tribunal’s reasons” (at [61], [63]), or “directly dispositive of the issue” (at [62]), for any error of law to flow from the Tribunal’s failure to identify the information and put it to the applicant for comment. It is further the nature of the information that is critical, rather than the particular use of the information by the Tribunal,⁴¹ and no error is established with respect to “information of which the applicant is or should be aware”.⁴²

28. The Appellant originally submitted that the Tribunal failed to put eight items of country information to the Appellant for comment. Upon commencement of the hearing before this Court, the Respondent raised an objection to the inclusion of one of the eight items of country information in the Book of Documents - an IranWire article entitled “*Traitors and spies: New Expatriate Group Meets Hardline Opposition*”, dated 29 January 2014. The Tribunal appears to have cited the title of the article inaccurately at footnote 23 to [151] of the Decision Record; the footnote reads: “*A joint venture of a group of Iranian journalists in the Diaspora*”: see reference below”, when the “reference below” is a report of the Immigration and Refugee Board of Canada Research Directorate, which refers to the “*Traitors and spies*” article, and quotes the same passage quoted by the Tribunal at [151]. There was no evidence the “*Traitors and spies*” article was before the Tribunal in its entirety, or that the Tribunal had any regard to the article independent of its consideration of the quote from the Canadian source. I made an order removing the article from the Book of Documents.

29. The remaining seven items of country information that are the focus of the Appellant’s allegations in Ground 1 were:

- a report by the United Kingdom Home Office entitled “*Country Guidance Note Iran*”, dated 17 June 2013 (“UK Home Office report”);
- a report by the Australian Department of Foreign Affairs and Trade entitled “*DFAT Country Information Report Iran*”, dated 29 November 2013 (“DFAT report”);
- a report by Amnesty International entitled “*We are ordered to crush you’: Expanding Repression of Dissent in Iran*”, dated 28 February 2012 (“Amnesty International report”);
- a LandInfo report entitled “*Iran: On Conversion to Christianity, Issues concerning Kurds and Post-2009 Election Protestors as well as Legal Issues and Exit Procedures*, February 2013 (“LandInfo report”);
- a European Union, European Commission, European Migration Network report entitled “*Ad-Hoc Query on Returns of Rejected Asylum Seekers to Iran*”, dated 20 May 2014 (“European Union report”);

⁴⁰ Appellant’s submissions at [14]; *BRF 038* at [60].

⁴¹ Supreme Court Transcript Part 2 6 at In 20 – 33, citing *HFM 045 v Republic of Nauru* [2017] HCA 50 at [49].

⁴² See McHugh J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim* [2000] 175 ALR 205 at [22].

- an Australian Refugee Review Tribunal document identified as “*IRN37255*”, dated 19 August 2010 (“RRT report”); and
- a report by the Immigration and Refugee Board of Canada Research Directorate entitled “*Iran: Treatment by Iranian authorities of failed refugee claimants and family members of persons who have left Iran and claimed refugee status*”, dated 10 March 2015 (“Canadian Immigration and Refugee Board report”).

30. The Respondent submits that, of the seven pieces of country information referred to by the Appellant:

- the Appellant was already on notice of the DFAT report, the Amnesty International report, and the LandInfo report, those documents having been referred to in the Appellant’s submission to the Tribunal, and by the Secretary;
- the UK Home Office report contained some information that had been referred to by the Secretary, and other information that was not relevant;
- the European Union report contained information that was of no additional relevance to the information in other reports,⁴³ was not significant to the decision, and was not adverse;⁴⁴
- the RRT report was outdated, not relied upon by the Tribunal for an adverse purpose, and could not be regarded as “credible, relevant and significant” to the decision;⁴⁵ and
- the Canadian Immigration and Refugee Board report contained information that was not relevant or adverse to the Appellant’s case.⁴⁶

31. The Appellant accepts that the Amnesty International and LandInfo Reports were before the Secretary, and the Appellant could thereby be taken to have been on notice of that material.⁴⁷ The Appellant also accepts that the DFAT report was referred to in the Appellant’s submissions to the Tribunal, and concedes the Appellant had notice of the report, but emphasises that the Appellant did not have notice of the fact the Tribunal would purport to rely on the report.⁴⁸

32. The Appellant submits that the Tribunal relied upon the remaining five items of country information in finding that it is the political profile of a returnee to Iran that is decisive of any risk of harm upon return, as opposed to simply being a failed asylum-seeker, a finding that ultimately disposed of the Appellant’s claim with respect to his status as a failed asylum-seeker.⁴⁹ The Appellant submits that, if this Court is satisfied the Tribunal ought to have put one of the five items of country information to the Appellant, this is sufficient for an error to be established in relation to Ground 1.⁵⁰

⁴³ Supreme Court Transcript Part 2 9 at In 42 – 45.

⁴⁴ Ibid 10 at In 14 – 17.

⁴⁵ Ibid 10 at 38 – 40.

⁴⁶ Ibid 11 at In 6 – 7.

⁴⁷ Supreme Court Transcript Part 1 15.

⁴⁸ Ibid 16 at In 25 – 28.

⁴⁹ Ibid at In 3 – 5.

⁵⁰ Supreme Court Transcript Part 2 51 at 32 – 34.

33. More particularly, the Appellant contends that the significance attached to the European Union Report derives from the fact that the Tribunal appears to have taken from it the proposition that several European countries reported that they forcibly returned failed asylum seekers to Iran in 2013.⁵¹ While this may appear to carry no relevance to the treatment of the failed asylum-seekers after being forcibly returned, it is the weight attributed to it by the Tribunal that means it ought to have been identified to the Appellant.⁵² The Canadian Immigration and Refugee Board Report contained the extract from the IranWire report reproduced at [151] of the Tribunal Decision Record, which suggests a shift in focus on the part of the Iranian authorities, from taking particular issue with returnees who were “non-political Iranians”, to those who are “political activists”.⁵³
34. The UK Home Office Report, in the submission of the Appellant, is significant because it records incidents of returnees being mistreated who have been involved in activist activity,⁵⁴ and the RRT Report details, significantly, the mistreatment of returnees perceived to be dissidents.⁵⁵ The significance of the RRT Report, in the submission of the Appellant, was not clear upon an examination of the content, which serves to further the argument that the information ought to have been put to the Appellant for comment.⁵⁶
35. As to the matters of credibility and relevance, counsel for the Appellant submits that the documents were produced by established bodies, including DFAT, and contained information pertinent to the appeal that was used by the Tribunal in disposing of the review.⁵⁷
36. For reasons set out at [30] above, the Respondent submits that there was no practical injustice in the Tribunal failing to identify the items of country information complained of, and affording the Appellant an opportunity to respond. Contrary to the Appellant’s submission, grounded on *Jagroop v Minister for Immigration and Border Protection*,⁵⁸ that practical injustice is inherent in that the Appellant has been denied an opportunity to address adverse material,⁵⁹ the Respondent asserts that *Jagroop* ought not be followed,⁶⁰ and the “practical injustice” inquiry is always necessary when considering a purported breach of procedural fairness, regardless of the specific nature of the breach claimed.⁶¹
37. As a final point, the Respondent notes that the Appellant was “on notice” that the Tribunal may take the view that the class of failed asylum-seekers subject to mistreatment upon return was limited to those with a prominent political profile,

⁵¹ Supreme Court Transcript Part 1 21 at In 6 – 10.

⁵² Ibid 22 at In 17 – 20.

⁵³ Ibid 23 at In 3 – 6.

⁵⁴ Ibid 27 at In 3 – 4.

⁵⁵ Ibid at In 37 – 38.

⁵⁶ Ibid at In 22 – 23.

⁵⁷ Ibid 20 at In 23 – 33.

⁵⁸ (2014) 255 FCR 482.

⁵⁹ Supreme Court Transcript Part 1 29 at 3 – 20.

⁶⁰ Supreme Court Transcript Part 2 7 at In 7 – 9.

⁶¹ Ibid 6 at In 33 – 36.

both from the reasons of the Secretary,⁶² and the questions asked of the Appellant at the Tribunal hearing.⁶³

Submissions on Ground 2

38. Particulars (a) to (c) assert that the Tribunal failed to address a claim advanced by the Appellant's representative that the Appellant was entitled to complementary protection on the basis that Nauru would breach its international obligations under the *Convention for the Elimination of Racial Discrimination* ("CERD") by returning the Appellant to Iran, where he would inevitably be exposed to significant discrimination on account of his Ahwazi Arab ethnicity. Being a substantial, clearly articulated claim relying upon established facts, the Tribunal was required to consider and deal with it.⁶⁴ The Appellant contends that the error may also be framed as a constructive failure to exercise jurisdiction.

39. The Appellant places reliance on the decision of Crulci J in *QLN 133 v Republic of Nauru*,⁶⁵ in which the Court was confronted with a very similar factual scenario, and claims and submissions centred on the CERD. In particular, the Appellant draws attention to the reasoning of her Honour that:

*"Given the CERD submission meets the test set out in Dranichnikov, it was a submission that the Tribunal ought to have considered. The fact that the submission may have lacked merit because the Appellant's claims could not have engaged Nauru's complementary protection obligations is not to the point. The Tribunal is required to deal with both meritorious and unmeritorious submissions. This ground succeeds."*⁶⁶

40. The Respondent submits that the CERD claims and submissions are misconceived, as Article 5(b) of the CERD does not contain any obligation preventing States Parties from returning persons to a place outside their jurisdiction where returnees may encounter harm prohibited by the CERD, for example, inequality before the law with respect to political, economic, social, and cultural rights. At its highest, the argument based on Article 5(b) suggests that, if Nauru were to expel a person to a country where he or she is exposed to a risk of serious harm, and that expulsion was done because of reasons of race, colour or national or ethnic origin, Nauru may be in breach of the CERD. This is the situation comprehended in General Recommendation 30 of the Committee on the Elimination of Racial Discrimination at [26].⁶⁷ However, no such argument is advanced before the Court.

41. In the submission of the Respondent, the decision of Crulci J in *QLN 133* was "plainly wrong". Given the CERD claims and submissions were bound to fail, there was no practical injustice in the Tribunal failing to consider those claims and

⁶² BD 83.

⁶³ Ibid 188 at ln 30 – 34.

⁶⁴ See *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26 at [24].

⁶⁵ [2017] NRSC 82.

⁶⁶ Ibid at [49].

⁶⁷ Committee on the Elimination of Racial Discrimination, "General Recommendation 30: Discrimination against non-citizens", 64th session, 23 February – 12 March 2004, UN Doc CERD/C/64/Misc.11/rev.3.

submissions. The Appellant lost no opportunity of a successful outcome, and no legal error results.⁶⁸ To this submission, the Appellant responds that to reject a claim on the basis of a lack of practical injustice, the court must be satisfied that on no view could the claim have succeeded. Counsel for the Appellant submits that this is a “very high bar” to be satisfied, with very prejudicial consequences for the asylum-seeker.⁶⁹

42. For completeness, even if legal error were to be established, the Respondent submits that granting relief by remitting the matter to the Tribunal for reconsideration would be futile, given the Tribunal was bound to decide the claim based on the *CERD* against the Appellant, and the same outcome would result.
43. In relation to Ground 2, particular (d), the Appellant directs the attention of the Court to the Full Court of the Australian Federal Court decision of *Minister for Immigration and Border Protection v MZYTS* (“MZYTS”),⁷⁰ in which the Full Court held that the relevant Tribunal could not make a decision on the review without having a correct and complete understanding of the basis upon which the visa Applicant claimed to have a fear of persecution in Zimbabwe. In failing to consider certain claims and information, the Tribunal could not be said to have had such a correct and complete understanding.
44. In the case currently before the Court, the Appellant submits that the Tribunal failed to consider country information in the form of a report by the Organisation Suisse d’aide aux Refugies that referred to the case of a female asylum-seeker with no political profile being arrested,⁷¹ stating that Iranian authorities deal with returnee asylum-seekers in an “arbitrary” and “unpredictable” manner.⁷² In addition, the Tribunal failed to consider a statement by an Iran Human Rights’ spokesperson that authorities have recently indicated that Iranians who have sought asylum abroad should be charged with “dissemination of false propaganda against the Islamic Republic of Iran”.⁷³ The Respondent submits the Tribunal was justified in not directly referring to these reports as they do not advance any evidence of mistreatment, and are not sufficiently cogent or relevant.⁷⁴ To the extent the reports advanced a proposition that being a failed asylum-seeker in itself could be a basis for mistreatment upon return to Iran, this proposition was considered and rejected by the Tribunal.
45. As to particular (e), the Appellant submits that the Tribunal failed to consider the claim that the Appellant would be at greater risk of harm upon return because of having twice fled Iran to seek asylum. This impugned the Tribunal’s assessment of the Appellant’s risk of harm as a failed asylum-seeker, and also its cumulative risk assessment. As to this, the Respondent says that the Tribunal’s finding, that a returnee’s risk factor attaches to any political profile the returnee may have, means any question of how many times the returnee may have unsuccessfully

⁶⁸ Supreme Court Transcript Part 2 17 at In 21 – 22.

⁶⁹ Supreme Court Transcript Part 2 59 at In 29 – 30.

⁷⁰ [2013] FCAFC 114; (2013) 230 FCR 431.

⁷¹ BD 114 at [59(c)].

⁷² *Ibid.*

⁷³ *Ibid.* at [59(d)].

⁷⁴ Supreme Court Transcript Part 2 14 at In 6 – 15.

sought asylum abroad is not relevant.⁷⁵ As such, the Tribunal was not required to deal with the issue in its reasons. In any case, the Respondent submits, the Tribunal properly considered the likely impact of each claim on the Appellant's risk factor individually, and cumulatively.⁷⁶

CONSIDERATION

Ground One

46. As made plain by the decision of the High Court in *BRF 038*, and affirmed in *HFM 045 v Republic of Nauru* at [39], the Tribunal is required to put information to a review applicant for comment that is "credible, relevant and significant".⁷⁷

47. Accounting for the items of country information accepted to have been before the Secretary, and the item ruled inadmissible, there are six items of information the Appellant asserts ought to have been put before him for comment:

- the UK Home Office Report (referred to at [145] and footnote 16 of the Tribunal Decision Record);
- the DFAT Report (referred to at [145] and footnote 19 of the Tribunal Decision Record);
- a LandInfo Report (referred to at [149] and footnote 20 of the Tribunal Decision Record);
- the European Union Report (referred to at [150] and footnote 21 of the Tribunal Decision Record);
- the RRT Report (referred to at [151] and footnote 22 of the Tribunal Decision Record);
- the Canadian Immigration and Refugee Board Report (referred to at [151] and footnote 24 of the Tribunal Decision Record).

48. Save in relation to the LandInfo report, it was not contested between the parties that the above documents were not referred to in the decision of the Secretary.⁷⁸

49. The relevant paragraphs of the Tribunal Decision Record provide as follows:

"Reports by the UK Home Office and the Australian Department of Foreign Affairs (DFAT) in relation to the treatment of failed asylum seekers in Iran indicates that the risk of harm is determined by the person's political profile [UK Home Office, 2013, Country Guidance Note Iran, 17 June, and Department of Foreign Affairs and Trade, 2013, DFAT Country Information Report Iran, 29 November]. The applicant's representative referred to the cases of persons who were subjected to ill-treatment on return. These cases are consistent with the statement above. The persons involved all had a political profile as a result of their activities in Iran or their involvement in anti-regime activities outside Iran and this profile appears to be the reason for their ill-treatment on return. For the reasons discussed above, the Tribunal is satisfied that the applicant does not have such a profile. In contrast, the applicant's

⁷⁵ Ibid 15 at ln 45 – 47.

⁷⁶ Ibid 17 at ln 2 – 4.

⁷⁷ [2017] HCA 50.

⁷⁸ Supreme Court Transcript Part 1 19 at ln 33 – 34.

profile will reveal only that he was a Basij volunteer, which will indicate to the authorities that he is a pro-government citizen.

...

A 2013 LandInfo report quotes the Tehran branch of the International Organization for Migration (IOM) as stating that a long stay abroad in itself is not an issue as long as a person left Iran legally; and the Head of the Passport and Visa Department of Iran as stating that “the Iranian constitution allows for Iranians to live where they wish. It is not a criminal offense in Iran for any Iranian to ask for asylum in another country” [LandInfo – Country of Origin Information Centre, 2013, *Iran: On Conversion to Christianity, Issues concerning Kurds and Post-2009 Election Protestors as well as Legal Issues and Exit Procedures*, February].

Several European countries have reported that they forcibly returned failed asylum seekers to Iran in 2013, including Bulgaria, Germany, Norway, Poland, Romania, Sweden and the UK [European Union (EU), European Commission, European Migration Network (EMN), 2014, *Ad-Hoc Query on Returns of Rejected Asylum Seekers to Iran*, 20 May).

A 2010 report by the Australian Refugee Review Tribunal reported that “at least some returnees from Australia and elsewhere have been subjected to varying degrees of ill-treatment by authorities upon return, ranging from monitoring, interrogation, and detention” (Australia: Refugee Review Tribunal, 2010, IRN37255, 19 August] however the report’s focus was on the treatment of people perceived to be dissidents. In 2014, IranWire [“A joint venture of a group of Iranian journalists in the Diaspora”: see reference below] reported that “[d]uring Ahmadinejad’s time in office, efforts at repatriation were aimed at non-political Iranians... Currently... the Rouhani administration’s efforts are associated with the return of political activists. For hardliners, this is unacceptable... a “red line” that will not be crossed... the information minister has agreed that “those who have left the country can return, but if they have broken the law, the judiciary will prosecute [Immigration and Refugee Board of Canada Research Directorate, 2015, RN105089. *E Iran: Treatment by Iranian authorities of failed refugee claimants and family members of persons who have left Iran and claimed refugee status (2011-February 2015)*, 10 March].”⁷⁹

50. Key elements in the UK Home Office Report were referred to by the Amnesty International report of 2011 about which the Appellant knew, specifically, the Amnesty International report referred to incidents involving Mohammad Reza Fakhravvar and Rahim Rostami, which were mentioned by the Secretary.⁸⁰

51. The Appellant’s written submissions referred to the DFAT report.

52. The Secretary referred to the LandInfo report.⁸¹

53. The European Union report referred to the forcible repatriation of failed asylum seekers to Iran in 2013. This was information that the Appellant knew from the decision of the Secretary.⁸²

⁷⁹ BD 222 at [151] – [152].

⁸⁰ Ibid 78 – 79.

⁸¹ Ibid 79 fn 38.

⁸² Ibid 111 at [49].

54. The RRT report from Australia was a 19 August 2010 report that was old and not relied upon to the detriment of the Appellant.
55. The substance of the IranWire document asserted that returnees to Iran with political opinions hostile to the regime may incur the antagonism of hard-liners in Iran. However, this is minimally relevant to the circumstances of the Appellant.
56. The information in the Canadian Immigration and Refugee Board report was general and not adverse to the interests of the Appellant.
57. For these reasons it cannot reasonably be concluded that the Appellant was denied natural justice from the limited direct reference by the Tribunal to the documents to which the Appellant made reference. To a sufficient extent the Appellant was aware of the relevant matters to which the Tribunal may attach significance. Thus, Ground One is not established.

Ground Two

Particulars (a)-(c)

58. The Appellant's claim to complementary protection on the basis that his refoulement to Iran would result in Nauru breaching its obligations under the CERD was advanced before the Tribunal as follows:

83. *We acknowledge that the CERD contains no explicit non-refoulement obligations. However, the CERD does relate to Nauru's non-refoulement obligations in some respects. Article 5(b) of CERD, for example, has been declared by the Committee on the Elimination of Racial Discrimination (the principal UN body charged with the interpreting and monitoring of CERD) to require nations to ensure 'that the principle of non-refoulement is respected when proceeding with return of asylum-seekers to countries'. The text of article 5(b) states that States Parties are required to ensure '[t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by an individual group or institution'.*

l. It is our principal submission that Nauru's obligation under article 5 of CERD to 'guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law' and to the enjoyment of specified rights (including economic, social and cultural rights) extends to an obligation not to remove persons to conditions where they would be denied such rights.

m. However, if the Tribunal finds that CERD gives rise only to more limited non-refoulement obligations, it is our submission that article 5(b) requires Nauru to respect the principle of non-refoulement in extending to [REF 001] if his removal to Iran would endanger his right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.⁸³

59. Under the heading of "Complementary protection claims", the Tribunal, recognised that an applicant may be owed complementary protection if Nauru's obligations under the *Convention against Torture and Other Cruel, Inhuman or*

⁸³ Ibid 119 – 120 at [83].

Degrading Treatment or Punishment (“CAT”), the *International Covenant on Civil and Political Rights* (“ICCPR”), and the *Memorandum of Understanding between the Republic of Nauru and Commonwealth of Australia*, would be violated by returning the applicant to their country of origin. The Tribunal disposed of the Appellant’s complementary protection claims briefly at [159] – [160] of the Tribunal Decision Record, concluding:

“Having regard to the evidence and the findings of fact above, the Tribunal is not satisfied there is a reasonable possibility that the applicant will be subject to torture or cruel or inhuman treatment or punishment or any other mistreatment on return to Iran arising from his race or political views or status as a failed asylum seeker or for any other reason that would amount to a breach of Nauru’s international obligations.

The Tribunal finds that the applicant is not owed complementary protection.”

60. While the Tribunal stated that any mistreatment experienced by the Appellant on account of his race would not amount to torture or cruel or inhuman treatment under the *CAT* or *ICCPR*, it did not consider whether the mistreatment would be of such a nature that Nauru would breach its obligations under the *CERD* by returning the Appellant to Iran.

61. As noted, the Appellant places considerable reliance on an earlier decision of this Court in *QLN 133*, in which Crulci J found a failure to consider a substantial, clearly articulated claim relying upon established facts to constitute an error of law, without needing to delve into any inquiry as to whether any practical injustice flowed from the non-consideration of a claim that was fatally flawed. The Appellant invites this Court to follow her Honour’s decision, while the Respondent contends for a finding that the decision was “plainly wrong”.

62. Her Honour concluded (at [49]) that:

“Given the CERD submission meets the test set out in Dranichnikov, it was a submission that the Tribunal ought to have considered. The fact that the submission may have lacked merit because the Appellant’s claims could not have engaged Nauru’s complementary protection obligations is not to the point. The Tribunal is required to deal with both meritorious and unmeritorious submissions.”

63. I note that in *Re Minister for Immigration and Multicultural Affairs; ex Parte Dranichnikov*, Gleeson CJ observed that: “To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice.”⁸⁴

64. However, the ratio of Crulci J goes further than the reasoning of Gleeson CJ and, in my view, is not supported by authority. I respectfully disagree with the view of Crulci J that the Tribunal is obliged to consider a submission that lacks merit because of a fundamental consideration such as the fact that the claims of the Appellant could not have engaged complementary protection obligations. This is plainly incorrect. While it is good practice for the Tribunal to engage with

⁸⁴ (2003) 197 ALR 389, 394 [24]; [2003] HCA 26.

unmeritorious or ill-conceived submissions, it is not obliged to do so and its failure to do so does not constitute an error of law.

65. Article 5(b) of the *CERD* provides:

“In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without discrimination as to race colour, or national or ethnic origin, to equality before the law, notably in enjoyment of the following rights:

...

(b) The right to security of the person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.”

66. Article 5(b) does not impose a non-refoulement obligation. Nor can any such obligation be inferred.

67. Article 5(b) does no more than to provide that were Nauru were to expel or return a person to a country where they were exposed to a risk of serious harm and the expulsion or return were effected because of a distinction as to race, colour or national origin, then Nauru may be in breach of its international obligations under the *CERD*.

68. However, the assertion by the Appellant, for which authority is not relied upon, is that the Appellant is owed complementary protection if his return to Iran would violate the *CERD*.

69. First, this is a novel proposition that is unsupported by authority and is not accepted.

70. Second, as a matter of fact the Tribunal concluded that there was not a reasonable possibility that the Appellant would be subject to torture or cruel or inhuman treatment or punishment or any other mistreatment on return to Iran arising from his race or political views or status as a failed asylum seeker or for any other reason. The legitimacy of its arriving at this conclusion was not impugned by the Appellant. No error was committed by the Tribunal in this regard.

Particular (d)

71. The information the Appellant submits by way of particular (d) that the Tribunal failed, but ought to have, taken into account, information that appears in the written submissions of the Appellant’s representative to the Tribunal. The first piece of information, a report by the Organisation Suisse d’aide aux Refugies, indicates that a young Iranian male returnee was “arrested immediately upon his arrival and subjected to ill-treatment in prison”.⁸⁵ The report also speaks of the

⁸⁵ BD 114 at [59(c)].

arrest of a female returnee who was “arrested after her deportation to Iran although she had no political profile”, but does not specify the nature of any mistreatment that she encountered.⁸⁶ The second piece of information, a statement by an Iran Human Rights’ spokesperson, indicated that, should failed asylum-seekers be charged for the “dissemination of false propaganda against the Islamic Republic of Iran”, they could face “punishment, imprisonment and ill-treatment”.⁸⁷

72. The Respondent does not dispute that the Tribunal did not refer to this information in the Decision Record.

73. However, the Tribunal was justified in not directly referring to these reports as they do not advance any evidence of mistreatment. Thus they are not sufficiently cogent or relevant. To the extent the reports advanced a proposition that being a failed asylum-seeker in itself could be a basis for mistreatment upon return to Iran, this proposition was considered and rejected by the Tribunal. This does not constitute an error on the part of the Tribunal.

74. In *Minister for Immigration and Border Protection v SZSRS*, the Australian Federal Court held that:

“The fact that a matter is not referred to in the Tribunal’s reasons, however, does not necessarily mean that the matter was not considered by the Tribunal at all. The Tribunal may have considered the matter but found it not to be material. Likewise, the fact that particular evidence is not referred to in the Tribunal’s reasons does not necessarily mean that the material was overlooked. The Tribunal may have considered it but given it no weight and therefore not relied on it in arriving at its findings of material fact. But where 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 material. In some cases, having regard to the nature of the appellant’s claims and the findings and evidence set out in the reasons, it may be readily 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 given little weight”⁸⁸ (references omitted)

75. Given the Tribunal’s comprehensive examination of country information on the treatment of failed asylum-seekers upon return to Iran,⁸⁹ including information referred to by the Appellant in his submissions to the Tribunal (the DFAT report, the Amnesty International report, and the Landinfo report), the information in the Organisation Suisse d’aide aux Refugies report can be “sensibly understood” as having been considered by the Tribunal, but found to be lacking in materiality given the weight of evidence suggesting that it is the failed asylum-seekers with some degree of anti-government political profile who are most likely to face

⁸⁶ Ibid.

⁸⁷ Ibid at [59(d)].

⁸⁸ (2014) 309 ALR 67 at [34].

⁸⁹ BD 220 at [145] – BD 222 at [152].

mistreatment upon return. The weight to be attributed to country information is a matter of fact within the domain of the Tribunal.⁹⁰

76. The failure to refer to the material identified in particular (d) therefore does not constitute an error of law.

Particular (e)

77. The Appellant submits by way of particular (e) that he would be at greater risk of harm upon return due to having sought asylum outside Iran on two occasions. That claim was advanced in the written submissions as follows:

“It is our submission that the scrutiny that [REF 001] would face on return to Iran would now be informed and influenced by a combination of factors including his race, the fact this is now a repeated attempt to seek asylum abroad and by the Iranian authorities’ existing/renewed interest in [REF 001] and/or members of his extended family. We then submit the risks [REF 001] would face in the future following his current attempt to seek asylum abroad would be exacerbated as a result of these characteristics.”⁹¹

78. This was also a submission that was advanced before the Tribunal in the oral submissions of the Appellant’s representative.⁹²

79. The Tribunal did not expressly identify at [156], in undertaking its cumulative risk assessment, that the Appellant had twice sought asylum outside Iran unsuccessfully:

“For the reasons set out above, the Tribunal does not accept that the applicant faces real possibility of suffering harm amounting to persecution because of his race or his political opinion or his membership of a particular social group comprising failed asylum seekers. The Tribunal has considered the applicant’s claims separately and cumulatively and finds that he does not have a well-founded fear of persecution for a Convention reason on cumulative grounds.”⁹³

80. At [152] of its decision, the Tribunal stated that it accepted “that the applicant may be questioned at the airport on return to Iran, as occurred in 2013 but does not accept he will be detained or mistreated.”⁹⁴ It had noted earlier in its decision that the Appellant had been deported to Iran from Malaysia in 2013.⁹⁵

81. However, the fact that the Appellant would be a “second-time failed asylum-seeker” was not referred to explicitly in the findings by the Tribunal. I have given consideration to whether the Tribunal’s findings implicitly addressed this matter in the sense the High Court used that term in *CRI 028 v Republic of Nauru*.⁹⁶ While the evidence before the Tribunal was that a person without a problematic profile

⁹⁰ See, eg, *DWN 049 v Republic of Nauru* [2017] NRSC 52 at [61].

⁹¹ BD 112 at [55].

⁹² BD 195 at In 14 – 30; BD 196 at In 14 – 39.

⁹³ *Ibid* 223 at [156].

⁹⁴ *Ibid* 222.

⁹⁵ *Ibid* 213 [98]-[99].

⁹⁶ [2018] HCA 24.

would be unlikely to be disadvantaged on return to Iran after failing in a bid for asylum, the Tribunal's findings did not advert to the distinctive situation of a returning citizen being identified as having attempted on more than one occasion to gain asylum in another country. In my view the scenario of a second-time failed asylum-seeker was not inherent in its broad finding as to the absence of risk for a failed asylum-seeker. To the extent that it might be so regarded, such a finding is without evidentiary support. Notably, too, the Appellant was not questioned by the Tribunal about why he was of the view that he would be at greater risk on a second occasion of being deported to Iran. It is legitimate for this Court to take into account the fact that the Appellant was not questioned about the matter in assessing whether the Tribunal considered the issue.⁹⁷

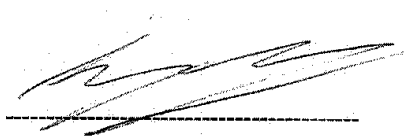
82. In my view, the fact that the Appellant would be in a position of being seen not just as a failed asylum-seeker on return from Nauru but as a person who has on multiple occasions sought to secure protection in another country may well provide him with a profile which draws him to the attention of Iranian authorities and expose him to significant risk over and above the very modest risk to which he would be subject as a first-time failed asylum-seeker. The failure on the part of the Tribunal to deal meaningfully with this argument was a serious deficit in its exercise of jurisdiction. In failing to engage with this argument raised by the Appellant, the Tribunal constructively failed to exercise its jurisdiction.

83. For the preceding reasons error is established in relation to particular (e). Moreover, it was an error that fundamentally impacted upon the outcome of the application to the Tribunal.

CONCLUSION

84. Under s 44(1) of the Act, I make the following orders:

1. The matter is remitted to the Tribunal for reconsideration.
2. The Court directs that the Tribunal be reconstituted for the purpose of the reconsideration of the application for review.
3. The decision of the Tribunal is quashed.



Justice Ian Freckelton
Dated this 14th day of December 2018

⁹⁷ *EMP 144 v Republic of Nauru* [2018] HCA 21 at [22].