IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal No. 01 of 2021
Supreme Court Refugee Appeal Case No. 03 of 2018

BETWEEN

ETA082

AND

APPELLANT

THE REPUBLIC OF NAURU

RESPONDENT

BEFORE: **Justice R. Wimalasena**
Justice C. Makail

DATE OF HEARING: **13 October 2022**

DATE OF JUDGMENT: **21 April 2023**

CITATION: **ETA082 v The Republic of Nauru**

KEYWORDS:	Refugee; complimentary protection; new ground of appeal not raised in the court below; amendment of notice of appeal; supplementary notice of appeal; misunderstanding of evidence; credibility finding; evidence lacking details.
LEGISLATION:	s.19(2)(d), 22(1), 48 of the Nauru Court of Appeal Act 2018; Rule 36 of the Nauru Court of Appeal Rules 2018; s.3,5, 31, 43, Refugees Convention Act 2012
CASES CITED:	WET054 v The Republic of Nauru Refugee Appeal 07 of 2019; QLN 047 v Republic of Nauru [2018] NRSC 23; Plaintiff M1/2021 v Minister for Home Affairs (2022) 96 ALJR 497; NAJT v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 51; Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 26; WET066 v Republic of Nauru Refugee Appeal No 20 of 2018.

APPEARANCES:

COUNSEL FOR the Appellant:	**A McBeth**
COUNSEL FOR the Respondent:	**C Hibbard**

JUDGMENT

1. The Appellant, a married Muslim male and a citizen of Bangladesh from Mollakandi village in the Sharaitpur district, relocated to Dhaka in 2011. He left Bangladesh through Dhaka airport in November 2013 for Malaysia, while his wife and son remained in Bangladesh. From Malaysia, he traveled to Indonesia by boat. He arrived in Australia by boat in December 2013. Later, he was transferred to Nauru in January 2014. On 03 April 2014, the Appellant made an application for Refugee Status Determination pursuant to section 5 of the

Refugees Convention Act 2012 (Refugees Act). In July 2015, he was evacuated to Australia following an assault on him.

2. The Appellant claimed that he would face harm based on his political opinion, imputed political opinion, membership of a particular social group consisting of his family, and membership of a particular social group consisting of family members of a person involved in a blood feud. Additionally, he claimed that he would face a significant risk of harm in the form of arbitrary deprivation of life and/or cruel and inhumane treatment if he were to return to Bangladesh.

3. Section 5 of the Refugees Act provides for a person to make an application to the Secretary to be recognized as a refugee. It is therefore, imperative for Nauru to assess whether the Appellant could be recognized as a Refugee or as a person to whom the Republic of Nauru owes complementary protection under its international obligations.

4. The principle of non-refoulment is enshrined in section 4 of the Refugees Act:

> "(1) The Republic shall not expel or return a person determined to be recognized as a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, except in accordance with the Refugees Convention as modified by the Refugees Protocol.
>
> (2) The Republic shall not expel or return any person to the frontiers of territories in breach of its international obligations".

5. In accordance with section 3 of the Refugees Act, a refugee is defined as *a person who is a refugee under the Refugees Convention as modified by the Refugees Protocol.*

Moreover, as stated in the amendment to the Refugees Convention 1951 by the 1967 Refugees Protocol [Article 1A(2)]:

> "A refugee is any person who, owing to a 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 their nationality and is unable or unwilling to avail themselves of the protection of that country, or who, not having a nationality and being outside the country of their former habitual residence, is unable or unwilling to return to it".

6. Complementary protection is defined in section 3 of the Refugees Act as: *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.*

7. After reviewing the application for Refugee Status Determination, the Secretary of Justice and Border Control (Secretary) concluded on 26 April 2015 that the Appellant did not satisfy the criteria to be recognized as a refugee within the meaning of the Refugees Act. Further it was decided that the Appellant is not entitled to complimentary protection under Nauru's international obligations.

8. Thereafter, the Appellant made a review application to the Refugee Status Review Tribunal (Tribunal) on 05 May 2015 pursuant to section 31 of the Refugees Act. On 15 January 2018 the Tribunal affirmed the determination of the Secretary that the Appellant is not recognized as a refugee and is not owed complementary protection under the Refugees Act.

9. The Appellant then appealed the decision of the Tribunal to the Supreme Court of Nauru, invoking section 43 of the Refugees Act. Section 22(1) of the Nauru Court of Appeal Act 2018 (Court of Appeal Act) provides that; *where a person desires to appeal under this Part, he or she shall file and serve a notice of appeal within*

30 days of the date of the delivery of the final judgment, decision or order of the Supreme Court.

10. Be that as it may, Section 19(2)(d) of the Court of Appeal Act confers jurisdiction on this Court. This jurisdiction is limited to hearing appeals under the Refugees Act on questions of law only. Section 19(2)(d) stipulates:

> "An appeal shall lie under this Part in any civil proceeding to the Court form any final judgment, decision or order of the Supreme Court sitting under the Refugees Convention Act 2012 in its appellate jurisdiction on questions of law only".

11. The Appellant filed the Notice of Appeal on 06 July 2021. To avoid any confusion regarding the time limit for appealing, it should be noted that although the judgment is dated as 16 April 2021 by Freckelton J, it had been actually delivered on 17 June 2021 by Fatiaki CJ. Accordingly, the time for appealing has been calculated based on the date of the delivery of the judgment. Therefore, I consider that the Appellant has presented a timely appeal.

12. Subsequently, on 01 July 2022 the Appellant filed an 'amended notice of appeal'; with the following ground of appeal:

> "The Supreme Court erred in not accepting ground 1 below, in that the decision of the Tribunal is affected by a misunderstanding of the appellant's case.
>
> a. The appellant's case in relation to the land dispute with BM was that BM might perceive the appellant to be a threat to BM's claim to the land, and take pre-emptive action against the appellant.
> b. The case for why the appellant might be seen by BM as a threat was that BM was now the eldest male in the family. For the reason, the

appellant was "responsible" (apparently in a familial sense) for the dispute.

c. There was material that surrounded this claim which was not terribly important, including a notion that the appellant had some "power" which his family members did not.
d. The Tribunal responded to the claim at Reasons [60].
e. It found that the appellant's family "cannot take BM to court". This was wrong. There was never a claim that the family could not take BM to court, but only that they were scared to do so (and in any event, doing so is the appellant's responsibility). There was peripheral information that even if anyone in the appellant's family (including possibly the appellant) took BM to court, they might suffer poor prospects of success. But that was immaterial.
f. The material issue was BM's perception of the existence of a threat. And the case for this threat was the appellant have a responsibility to take steps to recover the land, and an apparent motivation and skill to do so (being greater than his family members).
g. Whether or not it is correct that the appellant had some better motivation, skill or right, title or claim, to the land, relative to other family members; the case was that BM might perceive the appellant as a threat when his family members were not, principally because the appellant had the (familial) responsibility to take action. So, if anyone might take action, it would be the appellant and not any other member of the family.
h. This case was not addressed by the Tribunal, but instead, a different case was addressed.

13. Again, on 01 September 2023 the Appellant filed a 'further amended notice of appeal' with an additional ground of appeal (proposed second ground of appeal):

"The Supreme Court ought to have found that the Tribunal made an error of law, in that it was unreasonable for the Tribunal to rely primarily on the supposed vagueness or lack of detail in the appellant's evidence in making an adverse credibility finding, in circumstances where the Tribunal accepted the legitimacy of the appellant's mental health issues and accepted the need to follow the recommendations of the mental health assessment report that had been provided to the Tribunal."

14. For the sake of emphasizing the importance of compliance, it is pertinent at this juncture to outline the law related to amending grounds of appeal. Section 48 of the Court of Appeal Act provides:

> "(1) A notice of appeal or respondent's notice may be amended and served:
>
> a) without the leave of the Court at any time before 14 days of the date fixed for hearing of the appeal; or
>
> b) with the leave of the Court at any time less than 14 days of the date fixed for hearing of the appeal.
>
> (2) The amended appeal or respondent's notice shall be by way of **Supplementary notice of appeal** or respondent's notice" (emphasis added).

15. Moreover, it is notable that Rule 36 of the Nauru Court of Appeal Rules 2018 (Court of Appeal Rules) prescribes the procedure governing the amendment of grounds of appeal:

> "Rule 36 of Nauru Court of Appeal Rules 2018
>
> **36 Amendment of notice of appeal or respondents' notice**
>
> 1) A notice of appeal or respondent's notice may be amended by filing and serving a **supplementary notice of appeal** or respondent's notice in **Form 24** in Schedule 1 without the leave of the Court at any time prior to 14 days of the date fixed for hearing of the appeal (emphasis added).

2) Where leave of the Court is required to amend the notice of appeal or respondent's notice at any time less than 14 days of the date fixed for hearing of the appeal, the applicant shall file and serve:

   a) a summons seeking an order to amend the notice of appeal or respondent's notice with any other appropriate orders in Form 25 in Schedule 1; and

   b) one or more affidavits in support of the application for and on behalf of the applicant.

3) The affidavit in subrule (2) shall include:

   a) the purpose of the intended amendment;

   b) the merits of the intended amendment in relation to the determination of the substantive issues or grounds of appeal;

   c) the nature, length and reasons for the delay in amending the appeal under subrule (1);

   d) whether the proposed amendment may prejudice the other parties to the appeal; and

   e) any other matters which the party may deem necessary.

4) The summons and affidavit under subrule (2) shall be served to the other parties to the appeal at least 3 clear days before the hearing of the application or as directed by the Court.

5) Where subrule (4) is not complied with, the Court may adjourn, dismiss or stay the application or proceed to hearing of the substantive appeal without the intended amendment.

6) A party who seeks to oppose the application may file and serve an answering affidavit before the returnable date of the application in subrule (2) or as directed by the Court.

7) The Court shall give such directions or make such orders as it deems fit for the purpose of the hearing and determination of the application.

8) Where the Court grants leave to amend the notice of appeal or respondent's notice, a supplementary notice of appeal or respondent's notice shall be filed and served to the other parties within 7 days from the date of the grant of such leave or as directed by the Court".

16. It should be noted that compliance with the Rules is mandatory for the parties, and failure to comply may result in the appeal being struck out under section 26 of the Court of Appeal Act.

17. Be that as it may, section 48(1)(a) stipulates that if an amendment is made to the notice of appeal at least 14 days prior to the hearing of the appeal, leave to amend the notice of appeal is not required. The Appellant filed the second amendment to the notice of appeal on 01 September 2022, which was well in advance of the hearing date of 13 October 2022. As such, the Appellant is not obliged to seek leave to amend the notice of appeal as per section 48(1)(a).

18. However, the second ground of appeal is a fresh ground that was not raised before the court below. Although grounds of appeal can be amended without leave of the court 14 days before the hearing, introduction of new grounds of appeal that were not previously raised in the court below through an amendment of notice of appeal must be approached differently. This Court has previously addressed the issue of advancing a fresh ground of appeal that was not raised in the court below in WET054 v The Republic of Nauru Refugee Appeal No. 7 of 2019. In any event, we will address this issue in detail after considering the first ground of appeal.

Ground 1

19. The Appellant contends that the Tribunal misconceived the Appellant's case and thus failed to address the case that the Appellant had in fact presented. It was argued that a significant aspect of the Appellant's case, which relates to the first ground of appeal, is based on the claim that a distant relative named Bolo Molla had unlawfully seized a family land that belonged to the Appellant's

family in Bangladesh. The Appellant's claim is that Bolo was a powerful individual with ties to the ruling political party in Bangladesh, Awami League. The counsel submitted that the Tribunal acknowledged that Bolo had wrongfully seized the Appellant's family land. However, the Appellant's counsel stated that since the Appellant's family still resided there and had not been subjected to any harm by Bolo, the Tribunal refused to accept that the Appellant's return to Bangladesh would alter the circumstances. The Appellant's counsel further submitted that Bolo would perceive Appellant's return to Bangladesh as a threat to his unlawful possession of the family land. Hence, the Appellant's counsel argued that the pertinent question for this ground of appeal is whether the Tribunal adequately considered the Appellant's claim that his return to Bangladesh would expose him or his family to the risk of harm from Bolo.

20. It was also argued on behalf of the Appellant that the word 'power' used in relation to the Appellant was misunderstood by the Tribunal. The counsel for the Appellant asserted that what the Appellant meant by the word 'power' is the legitimacy he has to claim the land back from Bolo as the eldest son in the family. He further stated that it could be cultural legitimacy or legal legitimacy or both. But the counsel for the Applicant submitted that the Tribunal misconstrued the word 'power' as political power.

21. To bolster this argument the counsel for the Appellant cited an explanation given by the Appellant's representative at the Tribunal hearing [page 231]:

> "In relation to the land dispute that the tribunal flagged as a concern, Mr Molla has instructed me that to really clarify what he meant, and towards the end of our discussion today - so Mr Molla used language like power and those kinds of words, but what he was trying to explain is the, sort of, cultural understanding of power being the eldest brother comparatively to his younger brothers, and what being an older brother signifies in terms of the power dynamic and his right to claim the land back if he were to return. The reason that it would be of concern to Bola

Molla would be that if my client, Mr Molla was to return, he would have a legitimate claim."

22. Moreover, the counsel for the Appellant directed the Court's attention to paragraph 60 of the Tribunal decision to highlight as to how the Tribunal dealt with the issue of perceiving the Appellant as a threat. Paragraph 60 of the Tribunal decision states:

> "In the Tribunal's view the claim that Bholo will harm the applicant is problematic. While the Tribunal is willing to accept that there may be a land dispute between the applicant's family and a distant relative called Bholo Molla, the prospect of Bholo harming the applicant appears remote. This is, firstly, because Bholo has now taken control of the disputed land and has held this for at least a year since the applicant's father's death. While the applicant's family may hold documents relating to the land, the applicant states in his further statement that his family cannot take Bholo to Court given the power differential between the families. He has been unable to explain why his return to Bangladesh would change this situation. Despite the submission of the representative the applicant has been unable to establish why he would have a legitimate claim different to that of his brothers or other family, nor has the Tribunal been presented with evidence of the cultural understanding of power of the eldest brother compared to the other brothers. The Tribunal does not accept that the applicant returning to Bangladesh would cause Bholo, locally politically powerful and having now seized the land, to feel threatened such that he would seek to harm the applicant in anyway."

23. It was also argued on behalf of the Appellant that it was incorrect to suggest that no evidence was presented regarding the Appellant's cultural understanding of power, as the Appellant had indeed given evidence on this matter. In addition, the counsel submitted to the Court that the Respondent had relied on several Australian authorities that involve jurisdictional error. It was

contended that there is a clear distinction between the principles governing Refugee appeals in Nauru and Australia and in Nauru, what is required by the law is an error of law, rather than jurisdictional error, for a Tribunal decision to be remitted.

24. The Respondent's counsel, on the other hand, contended in response that the Tribunal had comprehensively understood and duly considered the claim in question and had not committed any error of law. The counsel for the Respondent then directed the attention of the Court to the following paragraph of the Tribunal decision, which elucidates the Tribunal's considerations regarding the claim at issue.

> "[57] At hearing the applicant was unable to explain why Bholo would seek to harm the applicant if the applicant returned given that Bholo now had the land he wanted. He said that Bholo was a leader of AL in the district, and agreed that this meant Bholo had power. When asked why the applicant's return to Bangladesh would threaten Bholo, the applicant said because Bholo would think the applicant would try and get the land back. It was pointed out that if Bholo had political power and he now held the land, there did not seem to be a reason why Bholo would be threatened by the return of the applicant. The applicant said his younger brother had told Bholo that if the applicant returned Bholo would not be able to hold the land. The applicant said that his family was too scared to go to court and his brothers have not taken any action as they have no power. When asked why it would be different if he returned he said it would be different like day and night. He struggled to explain why his return, even as the eldest brother, would change the current situation, saying that he had more power than his brothers but being unable to explain how and why. He said that they believe he can rescue the land but he did not know why they think that.

[59] At the end of the hearing the applicant's representative submitted that when the applicant used language like 'power' what he was trying to explain was the cultural understanding of power of the eldest brother compared to younger brothers, and the right of an older brother to claim the land back if he were to return. It was submitted the reason this would be of concern to Bholo was that if the applicant was to return he would have a legitimate claim to pursue the land claim, and Bholo would eliminate the threat by harming or killing the applicant."

25. It was the argument of the Respondent that in order to fully comprehend the Tribunal decision, it is imperative to analyze the reasoning presented in paragraph 60 of the decision in conjunction with the preceding paragraphs. It was demonstrated to the Court that the Appellant provided evidence on the issue in question in an ambiguous and imprecise manner, and subsequently attempted to expand the claim beyond the initial statement made during the RSD interview. The Respondent invited the court to look at the following exchange transpired before the Tribunal hearing to support this argument (at page 217-218):

MS MURPHY:	So why would it be any different if you were to return?
THE INTERPRETER:	Me and them are - are big difference like day and night.
MS MURPHY:	Why is that?
THE INTERPRETER:	An example if Tony Abbott and Tony Abbott's brother standing in the election it will not be the same result.
MS MURPHY:	No but I understand that you're the eldest son in the family but in your absence couldn't your brother take action in relation to the land dispute?
THE INTERPRETER:	No. No, they did not do it and they cant. They don't have that much power.

MR BAKER: What would be different if you went back?

THE INTERPRETER: If I go back it is big big news for them, If - if they knew I am in Bangladesh then it will be different. It is different news.

MR BAKER: Why?

THE INTERPRETER: Yes. They- they believe that I have this ability that I can rescue the land.

MR BAKER: Why would they think that?

THE INTERPRETER: I don't know why.

MR BAKER: I mean you say your brothers don't have that much of power. Do you have more power than they do?

THE INTERPRETER: Of course, yes.

MR BAKER: How?

THE INTERPRETER: Yes. Because I am the eldest son I used to look after my business. For political affiliation I can talk. My ability to do something. That's why they believe that I have more power. More ability to do things. When I used to run the business and they're running the business so they're actually 50 per cent less. The business is running 50 per cent less than what I used to run.

MR BAKER: So, I mean, in terms of political affiliation you're affiliated with a political party which is deregistered and banned from competing in elections. And so I'm not sure that Bola Molla would be concerned that Jamaat would get into any kind of government because that can't compete in elections. And I m not sure what that political affiliation would lead to or would - it would give you more power.

THE INTERPRETER: I'm – I'm still alive. I did not – I'm – I'm not passed – passed away yet. If I am still alive then somewhere I can find out the way to rescue the land.

26. The Respondent predominantly submitted Australian authorities to explain the legal position with regard to failure to consider a claim or critical evidence. Also the Respondent quoted QLN 047 v Republic of Nauru [2018] NRSC 23 where the Supreme Court of Nauru discussed the relevant principle:

> "[50] If the Tribunal makes an error of fact in misunderstanding or misconstruing a claim brought by an applicant and, importantly, if it bases its conclusion in whole or in part upon the misunderstood or misconstrued claim, its error is "tantamount to a failure to consider the claim and on that basis can constitute jurisdictional error."

27. It is important to note that, as highlighted by the counsel for the Appellant, the Court of Appeal Act does not consider 'jurisdictional error' as relevant in Nauru, unlike in the Australian legal system. While there is a distinction between error of law and jurisdictional error, the Court is not precluded from considering the principles enshrined in Australian authorities regarding the principles relating to misunderstanding of evidence, as they shed light on this matter.

28. The Respondent further drew the Court's attention to an analogous context in the case of Plaintiff M1/2021 v Minister for Home Affairs (2022) 96 ALJR 497, in order to substantiate their argument that the Tribunal's decision did not contain any errors:

> "[25] It is also well-established that the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness. What is necessary to comply with the statutory requirement for a valid exercise of power will necessarily depend on the nature, form and content of the

representations. The requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things, according to the length, clarity and degree of relevance of the representations. The decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them".

29. Upon careful consideration of the arguments presented by the parties and the Tribunal decision, it is evident that the Tribunal has made significant efforts to clarify and understand the Appellant's evidence in order to make a well-reasoned decision. In addition, we are not inclined to accept that the Tribunal misunderstood the Appellants claim as the Tribunal has clearly articulated its reasoning as follows:

> "[59] At the end of the hearing the applicant's representative submitted that when the applicant used language like 'power' what he was trying to explain was the cultural understanding of power of the eldest brother compared to younger brothers, and the right of an older brother to claim the land back if he were to return. It was submitted the reason this would be of concern to Bholo was that if the applicant was to return he would have a legitimate claim to pursue the land claim, and Bholo would eliminate the threat by harming or killing the applicant.
>
> [60] In the Tribunal's view the claim that Bholo will harm the applicant is problematic. While the Tribunal is willing to accept that there may be a land dispute between the applicant's family and a distant relative called Bholo Molla, the prospects of Bholo harming the applicant appears remote. This is, firstly, because Bholo has now taken control of the disputed land and has held this for at least a year since the applicant's father's death. While the applicant's family may hold documents relating to the land, the applicant states in his further statement that his family cannot take Bholo to Court given the power differential between the families. He has been unable to explain why his

return to Bangladesh would change this situation. Despite the submission of the representative the applicant has been unable to establish why he would have a legitimate claim different to that of his brothers or other family, nor has the Tribunal been presented with evidence of the cultural understanding of power of the eldest brother compared to the other brothers. The Tribunal does not accept that the applicant returning to Bangladesh would cause Bholo, locally politically powerful and having now seized the land, to feel threatened such that he would seek to harm the applicant in any way."

30. Furthermore, it appears that the Tribunal has noted the absence of evidence regarding the cultural understanding of power of the eldest brother. When examined in its full context, it is clear that the Tribunal has made this remark because there was no other independent evidence to support the Appellant's claim. The Tribunal was not persuaded to believe the fact based solely on the Appellant's evidence. In our opinion, the Tribunal has appropriately considered the Appellant's claim regarding the fear of harm arising from a long-standing family dispute over a land ownership. However, the Appellant's evidence lacked sufficient clarity to demonstrate why only the Appellant would face harm and not other members of the family. The Tribunal made attempts to seek clarity on this issue, but the Appellant's evidence was vague and ambiguous. The Tribunal did not misunderstand the Appellant's case, but rather found the Appellant's evidence unpersuasive and lacking in credibility.

31. Based on the manner in which the Appellant has presented the basis of his claim, we do not believe that the Tribunal could have acted differently. There is no indication that the Tribunal has misunderstood the evidence, as it made every effort to understand and consider the claim presented by the Appellant. Therefore, based on the reasoning provided in the Tribunal decision, we find no grounds to conclude that the Tribunal erred in its understanding of the Appellant's case. This ground lacks merit.

Ground 2

32. The second ground of appeal was not raised before the court below and the counsel for the Appellant sought leave to advance the proposed second ground. The counsel for the Appellant stated that the reason for the failure to raise it in the court below was due to change of counsel. We have discussed the issue of raising a fresh ground of appeal in detail, in the judgment of WET054 v The Republic of Nauru (supra):

> "[23] Granting permission to advance a new ground of appeal is not a common occurrence, and it should certainly be viewed as the exception rather than the rule. An appeal is not intended to be a retrial of a matter. It is certainly a process to review a decision of a lower court. Allowing a new ground to be advanced could invariably distort the fundamental purpose of the appeal process. The appellate courts seem to have exercised discretion in granting permission to argue new grounds of appeal only in exceptional circumstances where it is expedient and where interest of justice demands it. Allowing a new ground of appeal to be raised in the final appellate court, in particular, deprives the Respondent of their right to appeal, as there is no other forum to challenge the correctness of a decision so founded on a new ground of appeal. As a result, there will always be prejudice to the other party and this should be seriously taken into account by the courts."

33. Further it was concluded in that judgment that only in exceptional circumstances the Courts can consider allowing the Appellant to raise a new ground of appeal:

> "[27] Taking into account the rationale of the decisions discussed above, we have decided to exercise our discretion to consider if the new grounds of appeal can be allowed. We do not perceive any absolute bar to advance a new ground of appeal in light of the aforementioned authorities, although the Court of Appeal Act does not explicitly provide

for it. Despite the provisions in section 48 of the Court of Appeal Act which allows amendment of a notice of appeal without leave of the Court up to 14 days before the hearing date, we believe that a new ground of appeal that was not raised in the lower court should only be permitted under exceptional circumstances and for compelling reasons, particularly when a serious error is uncovered".

34. Furthermore, to consider an application to advance a new ground of appeal, in the same judgment this Court adopted a non-exhaustive list of questions set out in NAJT v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 51; [2005] FCAFC 134 at 166, as a guideline:

1) *Do the new legal arguments have a reasonable prospect of success?*
2) *Is there an acceptable explanation of why they were not raised below?*
3) *How much dislocation to the Court and efficient use of judicial sitting time is really involved?*
4) *What is at stake in the case for the appellant?*
5) *Will the resolution of the issues raised have any importance beyond the case at hand?*
6) *Is there any actual prejudice, not viewing the notion of prejudice narrowly, to the respondent?*
7) *If so, can it be justly and practicably cured?*
8) *If not, where, in all the circumstances, do the interests of justice lie?*

35. Against that backdrop, we will now consider the Appellant's explanation for their failure to raise the second ground of appeal in the court below. The Appellant cited a change of counsel as the reason for the omission. However, they did not elaborate on how this change of counsel resulted in the failure to raise the ground. In Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 26 it was stated that:

"[35] Without more, the fact that there has been a change of counsel is insufficient to justify a grant of leave: see, for example, *BLX16 v Minister for Immigration and Border Protection* [2019] FCAFC 176 at [31] (Moshinsky, Steward and Wheelahan JJ); *DKT16 v Minister for Immigration and Border Protection* [2019] FCAFC 208 at [31] (Davies, Moshinsky and Snaden JJ). Even before s 37M was enacted, the Court's position was that leave to argue a point not raised before a primary judge should only be granted "if it is expedient in the interests of justice to do so": *VAUX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 at [46] (Kiefel, Weinberg and Stone JJ). In *VUAX* the Full Court observed at [48]:

> The court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused."

36. Further this Court concluded in WET066 v Republic of Nauru Refugee Appeal No. 20 of 2018:

> [39] We are of the view that the mere attribution of a failure to raise a particular ground of appeal, to a change of counsel cannot be deemed a reasonable explanation to introduce a new ground of appeal. Parties can change counsel for various reasons, and a change of counsel may not necessarily be in favour of an application for a fresh ground of appeal all the time. Therefore, the Appellant has a duty to explain how the change of counsel resulted in the failure to raise the ground of appeal. Merely stating that the failure was due to a change of counsel is insufficient, and the party so claims must present the surrounding circumstances that led to the failure. Hence, the explanation provided by the Appellant in this case is not acceptable as it fails to disclose how the failure resulted from changing the counsel. It is crucial for the court to carefully assess the circumstances of each case before accepting

explanations based on a change of counsel. Otherwise, accepting such excuses across the board would result in an inundation of applications for new appeal grounds, every time a new counsel comes on board.

37. As such, we are of the opinion that the explanation provided by the Appellant for the failure to raise the ground of appeal in the court below is unsatisfactory. However, in the interest of justice, we have decided to consider whether the proposed second ground of appeal carries any merits.

38. In WET054 v The Republic of Nauru (supra), this Court has emphasized the need for caution in assessing all relevant circumstances when dealing with cases of individuals who have fled their own countries due to fear of harm and persecution, and are seeking protection in a new country. These individuals rely on local and international laws for protection, which States are obligated to uphold. While it is important to adhere to these laws, it is equally important to avoid any errors of law that could compromise their entitlements to protection.

39. The second ground of appeal is based on the credibility findings of the Tribunal in relation to the Appellant's mental health issues. The Appellant's counsel contended that the Tribunal, having accepted the mental health assessment report, made credibility findings based on the Appellant's vagueness or lack of detail in the evidence presented. It was argued that the Appellant's mental health issues caused the lack of detail. The Appellant claimed that the Tribunal erred by adopting an unreasonable reasoning process, primarily based on the Appellant's lack of detail in the evidence presented.

40. The counsel for the Appellant brought to the notice of the Court paragraph 23 of the Tribunal's decision where the mental health assessment report was discussed:

> "The medical evidence before the Tribunal consists of the mental health assessment report dated 8 October 2017 produced by a psychologist.

This report indicates that there was substantial impairment of attention and concentration, his speech was slow and hesitant and whilst there was a lack of detail further detail was provided when sought, that he reported difficulties with recent and long-term memory and that his ability to recall the sequence of events over his life had big been significantly impaired, and it was observed that these impairments were likely to be caused by the head and face injury he sustained, with his depression and traumatic experiences also contributing. The applicant reported finding it highly distressing to talk about the traumatic events he experienced in Bangladesh. He described having difficulty concentrating and a range of memory disturbances. The report concludes by noting the impairments are likely to impact on his ability to focus and maintain attention, provide a chronology of personal and traumatic events and may result in strong emotional arousal when speaking of traumatic events. The report recommended regular breaks, signposting and summarising throughout the process to assist the orientation of the applicant to the process. Gentle questioning was recommended to minimise emotional arousal."

41. The Respondent's counsel opposed the proposed second ground of appeal being allowed and submitted that it lacks merit. Furthermore, it was argued that the proposed ground invites the Court to embark on an inquiry that goes beyond the scope of examining an error of law. In any event the Respondent contended that the Tribunal had duly considered the findings in the mental health assessment report while evaluating the evidence presented by the Appellant. The Respondent further pointed out to the Court that the Tribunal had assessed the credibility of the Appellant after fully appreciating his mental health issues as discussed in the Tribunal's decision:

"[43] The tribunal has carefully considered the claims of the applicant and the response and explanations advanced for concerns raised by the Tribunal. The tribunal found the applicant's evidence on his

involvement with JI to be vague and lacking detail. Even if, as has been urged, his lack of detail about these things is to be attributed to the trauma he suffered from the assault on Nauru, the Tribunal remains concerned about the level of detail he provided prior to that event, considering his responses in the RSD interview were basic and lacking in any detail, as was his description of his involvement in his first statement."

42. Upon consideration of the submissions made by both parties regarding the proposed second ground of appeal, it is apparent that the Tribunal has properly acknowledged the findings of the mental health assessment report. Having reviewed the Tribunal's reasons as a whole, we are of the opinion that the Appellant's contention is untenable. Paragraph 44 of the Tribunal decision clearly outlines the extent of the Appellant's mental health issues, which were adequately considered by the Tribunal in evaluating his evidence:

> "However, as above, the Tribunal does not accept that the mental health assessment report does establish that the applicant does not have capacity, nor that he has diminished capacity, but identifies specific issues that the applicant may have in giving evidence. The tribunal conducted the hearing aware of these issues and in a manner which was intended to allow the applicant to provide as much detail as he could about the claims he was making. The tribunal prompted the applicant but he was unable to provide more than vague and general information. When the representative referred to the questioning back and forth in the hearing this was the Tribunal trying illicit more detail and provide the applicant with an ample opportunity to present his case. The Tribunal does not accept that someone who claims to have been involved with JI for eight years prior to his departure from Bangladesh in 2013, would be unable to provide more than the very basic information he did about JI's aims and activities and his own involvement in those, even accounting for the trauma he claims to have

experienced in Bangladesh and that he undeniably did from his assault on Nauru."

43. It is clearly discernible that when the assessment of mental health issues in the Tribunal decision is considered in the proper context, the Tribunal has given due weight to assessing the evidence and particularly the credibility. We are of the opinion that the Tribunal has properly considered the evidence in light of the mental health assessment report and it does not reveal any error.

44. In the circumstances the proposed second ground of appeal lacks merit.

Orders

45. The first ground of appeal is refused. The application to raise the second ground of appeal is refused.

46. The appeal is accordingly dismissed with costs.

Dated this 21 of April 2023

Justice Rangajeeva Wimalasena
Justice of the Court of Appeal

NAURU COURT OF APPEAL

Justice Colin Makail

I agree.

Justice of the Court of Appeal