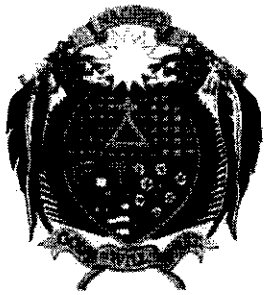

IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal No. 7 of 2019
Supreme Court Refugee Appeal Case No. 26 of 2016

BETWEEN

WET054

AND

APPELLANT

THE REPUBLIC OF NAURU

RESPONDENT

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

DATE OF HEARING: **12 October 2022**

DATE OF JUDGMENT: **23 March 2023**

CITATION: **WET054 v The Republic of Naur**

KEYWORDS:	Refugee; complimentary protection; new ground of appeal not raised in the court below; amendment of notice of appeal; supplementary notice of appeal; fear of future harm; apostasy
LEGISLATION:	s.19(2)(d), 22(1), 22(3), 24, 27(c), 48, 43(3) of the Nauru Court of Appeal Act 2018; Rule 36 of the Nauru Court of Appeal Rules 2018, s. 3, 5, 31 of the Refugees Convention Act 2012
CASES CITED:	Eastman v R [2000] HCA 29; 203 CLR 1; Tawadokai v State [2022] FJSC 13; CBV0008.2019 (29 April 2022); Notting Hill Finance Ltd v Shekh [2019] EWCA Civ 1337; [2019] 4 WLR 146; Jones v MBNA International Bank Ltd [2000] EWCA Civ 314; VUAX v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 158; CGA15 v Minister for Home Affairs [2019] FCAFC 46; NAJT v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 51; [2005] FCAFC 134; QLN 133 v The Republic [2017] NRSC 82; Appeal case 178 of 2017; WAEE v Minister for Immigration [2003] FCAFC 184; REF 001 v Republic [2018] NRSC 54;
APPEARANCES:	
COUNSEL FOR the Appellant:	**A McBeth**
COUNSEL FOR the Respondent:	**C Hibbard**

JUDGMENT

1. The Appellant is a citizen of Iran. He left Iran on 09 June 2013 through Tehran airport, and his passport was later confiscated by Indonesian Police. He arrived in Australia by boat in 2014 to seek asylum. Later, he was transferred to Nauru on 25 January 2014 and the Appellant made an application for Refugee Status Determination on 27 May 2014. He requested that he may be recognized as a refugee pursuant to section 5 of the Refugees Convention Act 2012 (Refugees

Act) or as a person to whom Republic of Nauru owes complimentary protection under its international obligations.

2. 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".

3. Section 5 of the Refugees Act provides for a person to make an application to the Secretary to be recognized as a refugee. As per the Refugees Act, a refugee means *a person who is a refugee under the Refugees Convention as modified by the Refugees Protocol.* According to 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".

4. Complimentary 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.*

5. On 9 October 2015, the Secretary of Department of Justice and Border Control (Secretary) decided that the Appellant's fear is not well-founded, and he is not a refugee within the meaning of the Refugees Act. Further the Secretary decided that the Appellant is not found to be a person to whom Nauru has complementary protection obligations.

6. The appellant made an application for merits review on 10 October 2015 pursuant to section 31 of the Refugees Act. The decision of the Secretary was then reviewed by the Refugee Status Review Tribunal (Tribunal) and on 23 June 2016 the Tribunal affirmed the decision of the Secretary. Under section 43 of the Refugees Act the Appellant appealed the decision of the Tribunal to the Supreme Court of Nauru. By the judgment dated 19 April 2018, the Supreme Court affirmed the decision of the Tribunal. Being aggrieved by the said judgment, the Appellant filed notice of appeal on 17 June 2019 in the Nauru Court of Appeal.

7. Section 19(2)(d) of the Nauru Court of Appeal Act 2018 (Court of Appeal Act) stipulates that:

> "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".

8. Section 22(1) of the 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.* It appears that the Appellant had been late by 1 year and 12 days to lodge this

appeal. However, the Appellant had filed an application for extension of time to appeal on 14 June 2019. Accordingly, time for filing the appeal had been extended on 18 February 2020, by a single Justice of Appeal pursuant to section 22(3)(b) and 27(c) of the Court of Appeal Act.

9. The following grounds of appeal were stated in the initial notice of appeal filed on 17 June 2019, which were later abandoned by the Appellant :

> "The primary judge erred by failing to find that the Refugee Status Review Tribunal erred in law by:
>
> 1. Making a finding in relation to the security protocol of the Appellant's former employer, at D[98], that: was unsupported by an evidentiary basis; failed to deal with the evidence; or was irrational or illogical.
> 2. Making a finding in relation to the information sought from the Appellant during a threatening telephone call, at D[97] and D[98], that: was based on a misunderstanding or misconstruction of the evidence; failed to deal with all of the evidence; over irrational or illogical or legally unreasonable.
> 3. Making findings in relation to not notifying his family of the threat, at D[95], and the non-recording of the threatening call, at D[96] that: misconstrued or misunderstood the evidence; or was irrational, illogical or illegally unreasonable".

10. The Appellant filed a *'further amended notice of appeal'* on 02 August 2022 with a new ground of appeal instead of the first three grounds of appeal:

> "The primary judge erred by failing to find that the Refugee Status Review Tribunal erred in law by:

4. Failing to consider and determine a claim by the appellant to invoke the Republic's protection obligations, including on that basis that he had a well-founded fear of being persecuted in Iran consequent to a fellow asylum seeker or refugee in Nauru (Mr X), whose father was a member of Sepah and whose family members were members of an Iranian intelligence unit, threatening that he may make a phone call requesting that the appellant be harmed in Iran - including on the basis of actual or imputed political opinions (not holding loyalty to the Iranian government) or race (his Azerbaijani ethnicity)".

11. Again, on 01 September 2022 the Appellant filed a *'second further amended notice of appeal'* with an additional new ground of appeal. The 5th ground of appeal reads:

> "The primary judge erred by failing to find that the Refugee Status Review Tribunal erred in law by:
>
> Asking itself the wrong question, namely whether the appellant was genuinely committed Christian, rather than whether he would be perceived by the Iranian authorities to be an apostate".

12. Court of Appeal Act sets out explicit provisions in respect of amendment of notice of appeal and the manner in which such amendments must be done. 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).

13. Section 48 indicates that obtaining leave to amend notice of appeal is not obligatory if the amendment is made at least 14 days prior to the appeal hearing, as evident from a plain reading of the section. The Appellant made the second amendment to the notice of appeal on 01 September 2022, well in advance of the 12 October 2022 hearing date. Hence, there is no need to seek leave to amend the notice of appeal.

14. While there is no procedural restriction on making the two amendments to the notice of appeal, in our opinion, it certainly poses a legal predicament. The Appellant wishes to introduce two fresh grounds of appeal through these amendments, which were not pursued in the lower court. These two new grounds of appeal are the only ones that the Appellant will argue before this Court, as they have relinquished the original grounds of appeal. Although leave is not necessary to amend a notice of appeal according to section 48(1)(a), it will still need Court's permission to pursue those new grounds. However, we will delve into that matter in greater detail later.

15. It should be noted at this juncture that an amended notice of appeal shall be filed by way of a supplementary notice of appeal in Form 24 as per the provisions in the Court of Appeals Act and the Nauru Court of Appeal Rules 2018 (Rules). Parties must comply with Rules (see Rule 5) and the Court has power to strike out an appeal for non-compliance of Rules and the provisions of the Act (see Section 26).

16. The procedure for amending a notice of appeal is laid down in the Rules and Rule 36 is reproduced below to emphasize the significance of adhering to them:

"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".

17. Be that as it may, we will now address the issue of new grounds of appeal. The Appellant had already abandoned the three original grounds of appeal by the time this appeal was taken up for hearing. The Appellant therefore sought permission of the Court to pursue the fourth and fifth grounds of appeal, which were not raised in the Court below. Advancing new grounds of appeal that were not run in the court below has always been a bone of contention, as it has potential to alter the nature of an appeal and lead to various other legal implications. Particularly, in the final appellate court allowing an appellant to agitate a new ground of appeal could deprive the other party of the right to appeal. In spite of that, in recent times the courts in different jurisdictions have exhibited a much flexible approach towards allowing new grounds, predominantly on points of law.

18. In Eastman v R [2000] HCA 29; 203 CLR 1, the High Court of Australia elaborated in detail on the introduction of new grounds of appeal:

> "[246] The question whether, in the exercise of its appellate jurisdiction, this Court may receive new evidence is, to some

extent, analogous with the question whether the Court may allow a new ground of appeal to be raised for the first time, **one which has not been considered earlier in the courts of trial or appeal below** (emphasis added).

[247] Opinions have been expressed that entertaining such a new ground of appeal is, or may be, impermissible because it alters the appellate character of the process: *Pantorno v The Queen [1989] HCA 18; (1989) 166 CLR 466 at 475-476; Mickelberg v The Queen [1989] HCA 35; (1989) 167 CLR 259 at 272-273; Gipp v The Queen (1998) 194 CLR 106 at 123-129.* How can one have an "appeal" involving a point of argument raised for the first time in a final Court? Yet, despite this suggestion, this Court has reserved to itself the right, in exceptional circumstances, to admit new grounds of appeal if justice demands that course: *Giannarelli v The Queen [1983] HCA 41; (1983) 154 CLR 212 at 221, 222, 223, 229-230, 231; Pantorno v The Queen (supra); Cheatle v The Queen [1993] HCA 44; (1993) 177 CLR 541 at 548; Gipp v The Queen (supra).* The fact that this course has been taken frequently and recently: *cf Bond v The Queen (2000) 74 ALJR 597 at 602; 169 ALR 607 at 614,* indicates a rejection by the Court the notion that there is any constitutional restriction on the power of the Court to hear and determine an appeal on a new ground. Such a ground might involve a detailed reconsideration of the facts and evidence: *cf State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq) [1999] HCA 3; (1999) 73 ALJR 306; 160 ALR 588,* although not (it seems) a point the reconsideration of which would involve a relevant procedural unfairness to a party, for example one which, had it been raised earlier, could have been answered by evidence in the courts below: *Sutter v Gundowda Pty Ltd [1950] HCA 35; (1950) 81 CLR 418; Louinder v Leis [1982] HCA 28; (1982) 149 CLR 509 at 512, 519; Coulton v Holcombe [1986] HCA*

33; (1986) 162 CLR 1 at 7-8. The retention of this measure of flexibility to permit the Court to consider and determine fully an exceptional issue when the proceeding is still within the Judicature, illustrates the error of adopting an absolute exclusion of new evidence, whatever its purpose and legal significance. Procedure, under our Constitution, ultimately bends to the insistent demands of justice" (Authorities were interpolated by removing endnotes from the paragraphs).

19. Furthermore, Gleeson CJ reiterated that a new ground of appeal may be permitted if a serious error has occurred or if there has been a major miscarriage of justice in Eastman v *R* (supra):

> "[280] Consistent with the opinion which I expressed in Gipp v The Queen (supra), I do not doubt that, in an exceptional case where a serious error is brought to light concerning what would otherwise be a manifest miscarriage of justice, a new ground of appeal may be permitted in this Court, although never previously raised, argued or determined in the courts below: cf Gipp v The Queen (supra) at 113 per Gaudron J; contra at 123-129 per McHugh and Hayne JJ" (Authorities were interpolated by removing endnotes from the paragraphs).

20. Also, it appears that the approach of the courts to this issue differs from jurisdiction to jurisdiction as the ability to raise a new ground of appeal primarily depends on the applicable law in a particular jurisdiction. The Supreme Court of Fiji made the following observations on the permissibility of raising new grounds of appeal in Tawadokai v State [2022] FJSC 13; CBV0008.2019 (29 April 2022) as below:

> "[13] The inescapable conclusion is that the complaint being made to the Supreme Court now – that the Tribunal had wrongly taken into account Mr Waqa's Tukutuku Rabara – is a new one, raised neither in

the High Court or the Court of Appeal. The Supreme Court is very reluctant to allow new grounds of appeal to be argued in the Supreme Court for the first time. It may do so exceptionally if the new ground of appeal raises a pure issue of law on which no further evidence is necessary. But the Supreme Court will be particularly reluctant to allow a new ground of appeal to be argued where the new ground, if successful, would result in further hearings which would have been unnecessary if the ground of appeal had been advanced in the High Court. In this case, if the Supreme Court permitted this new ground of appeal to be argued, and if the ground was successful, the consequences would not be that ST would be named the Tui Vanua. The consequence would be that the case would have to be remitted to the Tribunal for it to consider (i) whether Mr Waqa's Tukutuku Rabara satisfied the conditions of admissibility in section 7(3), and (ii) if it did not, whether the outcome of the appeal to it would be any different".

21. The general discretion that an appellate court exercises to allow a new ground of appeal was described extensively by Snowden J in Notting Hill Finance Ltd v Sheikh [2019] EWCA Civ 1337; [2019] 4 WLR 146 and his Honour referred to a number of authorities including Jones v MBNA International Bank Ltd [2000] EWCA Civ 314 as follows:

> "[26] These authorities show that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.

[27] At one end of the spectrum are cases such as Jones in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in Jones (at [38]), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at [52]), there might nonetheless be exceptional cases in which the appeal court could properly exercise its discretion to do so.

[28] At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see e.g. Preedy v Dunne [2016] EWCA Civ 805 at [43]-[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime".

22. In the case of VUAX v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 158, the Federal Court of Australia commented on the practice of raising new grounds of appeal, while refusing to grant leave to raise a new ground of appeal due to lack of merit:

"[46] In our view, the application for leave to rely upon the sole ground of appeal now raised should be refused. Leave to argue a ground of

appeal not raised before the primary judge should only be granted if it is expedient in the interest of justice to do so: O'Brien v Komesaroff (1982) 150 CLR 310; H v Minister for Immigration & Multicultural Affairs; and Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd (2001) 117 FCR 424 at [20]-[24] and [38].

[47] In Coulton v Holcombe (1986) 162 CLR 1, Gibbs CJ, Wilson, Brennan and Dawson JJ observed, in their joint judgment, at 7:

> "It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish."

[48] The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. 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 be generally be refused. In our view, the proposed ground of appeal has no merit. There is no justification, therefore, for permitting it to be raised for the first time before this Court".

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.

24. Numerous authorities illustrate the standards established in different jurisdictions to persuade an appellate court to allow a new ground of appeal. While there appears to be no strict criteria to be applied, the merits of the proposed ground of appeal seems to be the primary consideration across the board. In CGA15 v Minister for Home Affairs [2019] FCAFC 46 the Federal Court of Australia dealt with the significance of this issue in refugee appeals as follows:

> "[35] In a case such as the present, where the proposed new ground could not possibly have been met by calling evidence in the hearing below, an appellate court has a discretion to permit an appellant to argue a new issue on appeal where it considers that it is expedient in the interests of justice to entertain the issue: Water Board v Moustakas (1988) 180 CLR 491 at 497 (Mason CJ, Wilson, Brennan, and Dawson JJ). Generally speaking the court is more likely to permit a fresh issue to be raised on appeal where the new point turns only upon a question of construction or upon a point of law, or where the facts are not in controversy: O'Brien v Komesaroff (1982) 150 CLR 310 at 319 (Mason J); Melbourne Stadiums Ltd v Sautner [2015] FCAFC 20 at [126] -[131] (Tracey, Gilmour, Jagot and Beach JJ).
>
> [36] There is a particular sensitivity to whether the interests of justice favour a grant of leave in refugee cases, because an adverse

decision may have very serious consequences for an appellant: Iyer v Minister for Immigration and Multicultural and Indigenous Affairs [2000] FCA 1788 at [22] (Heerey, Moore and Goldberg JJ). The merit of the proposed new ground is an important consideration. As Mortimer J observed in ARK16 v Minister for Immigration and Border Protection [2018] FCA 825 at [25]:

> The likely merit of a proposed ground of appeal, in the context of judicial review, will almost invariably be important because it is generally likely in the interests of the administration of justice for this Court to ensure that as administrative decision arguably affected by jurisdictional error is not carried into effect, especially effects which are capable of resulting in a deprivation of liberty, which is the case under the Migration Act for persons who do not hold a valid visa. This is a consequence of upholding and applying the rule of law.

See also SZQBN v Minister for Immigration and Border Protection (2014) 226 FCR 68; [2014] FCA 686 at [55] (Flick J)".

25. The Court proceeded to discuss the factors that must be taken into account when exercising court's discretion to permit a new ground of appeal in CGA15 v Minister for Home Affairs (supra):

> "[37] In NAJT v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 51; [2005] FCAFC 134 at [166] Madgwick J (with whom Conti J agreed) set out a non exhaustive list of the considerations relevant to a grant of leave, which have been applied in numerous decisions. One consideration weighing against a grant of

leave in the present case is that the appellant did not provide an explanation for the failure to raise the proposed new ground before the Federal Circuit Court. While the fact that the appellant had legal representation below can be seen to weigh against a grant of leave, it is not decisive. A new ground of appeal may be allowed even where the proceedings below have been conducted with legal representation and all that can be said by way of explanation was that its significance may not have been apparent to the appellant's lawyers in the hearing below: Chan v Minister for Immigration and Border Protection [2018] FCA 1323 at [43] (Yates J).

[38] All the other relevant considerations in the present case point in favour of a grant of leave. First, the new ground raises a question of law. The facts are not in controversy and the issue involves the proper construction of the Tribunal's reasons. Second, having regard to the abandonment of Ground 2 the addition of the new ground will not involve any further sitting time. Third, the Minister does not contend that he will suffer any prejudice if leave is granted, whereas the prejudice suffered by the appellant may be significant if leave is refused. Fourth, and most importantly, not only do we consider that proposed new Ground 3 has merit; for the reasons we explain we consider this ground of appeal should succeed. In the circumstances we are satisfied that it is expedient in the interests of justice to grant leave to advance the new ground".

26. In NAJT v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 51; [2005] FCAFC 134 at [166] the following non-exhaustive list of questions were formulated to consider if leave can be granted to raise a new ground of appeal:

    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?*

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.

28. On the other hand, if we consider the scenario where section 24 of the Court of Appeal Act permits the introduction of fresh evidence in exceptional circumstances, one can argue that advancing a new ground of appeal may become inevitably inescapable in light of such new evidence. Section 24(1) of the Court of Appeal Act states that the Court has no jurisdiction to admit or allow new evidence determining an appeal which were not part of the records of the proceedings of a cause or matter before the Supreme Court in its original or appellate jurisdiction subject to subsection (2). Subsection (2) provides:

> "An application for leave to admit fresh evidence in an appeal may be allowed by the Court where it is shown that the evidence:

(a) Could not have been obtained with reasonable diligence for use at the trial;

(b) Must be such that if admitted would more probable than not influence the result of the case; and

(c) Must be such as to be believed or credible'.

29. Therefore, we believe that although the Court of Appeal Act does not explicitly provide for seeking leave to advance a new ground of appeal that was not presented in the lower court, the Court of Appeal has the discretion to allow a new ground of appeal on a point of law in exceptional circumstances when it is expedient and in the interest of justice. We believe that refugee appeals involving refugees must be considered with utmost care, particularly to avoid any errors of law in the process. These are exceptional circumstances in which the courts deal with individuals who have fled their own countries due to fear of harm and persecution, seeking protection from a new country. They claim entitlement to protection under local and international laws that states are obliged to honor. While courts follow local and international laws in determining the rights of these individuals, it is of utmost significance that no room is left for any errors of law in determining these rights. In these circumstances we decide to exercise the Court's discretion to consider if the proposed new grounds of appeal can be allowed in this case.

Justification for not having raised the grounds of appeal earlier

30. The counsel for the appellant submitted that the reason for the failure to raise these grounds of appeal was due to a change of counsel. However, no further elaboration was provided to satisfy this court as to why this should be accepted. It should be noted with regret that simply stating that a change of counsel was the reason is not something that a court can seriously consider when evaluating an application of this nature.

31. Be that as it may, we will now consider the merits of the proposed new grounds of appeal.

Ground 4

32. The Appellant filed an outline of submissions on 02 August 2022 in respect of the proposed new ground of appeal number 4. The Appellant submits that the Tribunal failed to consider future harm and claims that the proposed ground is meritorious, and it meets the threshold to be granted leave. According to the Appellant's Counsel, the fourth ground for appeal was introduced due to the Tribunal's alleged disregard of the Appellant's assertion of future harm.

33. For two reasons we cannot concur with that assertion. Firstly, it is evident that the Tribunal persistently investigated the alleged threats posed by two persons as per the Appellant's claims. Secondly, the Tribunal thoroughly evaluated those claims in their reasoning before reaching the final decision.

34. The Appellant spoke of two persons. The first person had already left Nauru according to the Appellant. When the full context of the answers given by the Appellant to the Tribunal is considered, it appears that the Tribunal had valid reasons to hold the view that those claims are unmeritorious. The Appellant stated during the Tribunal hearing (page 296):

> "This person used to gather- or approach people, even those who didn't want to be in any contact with him, asking and chatting with them, trying to show himself as a friendly person, talking to them about their cases, their reasons about Islam and that kind of subject. He also knew about people who had converted, changed their religion; about the ones who were talking not so pleasant things against the leadership. He had information about all of them; to the extent that after he decided that he was going back, he asked some people for their addresses and phone numbers so that he could call their families back home on his return, saying that they were ok."

35. However, when the Appellant was asked whether that person had given any family details or if the Appellant thinks that person had given any information to Iranian authorities, the Appellant had vaguely stated that *'collection of the conditions of the detention centre can be misused to give a wrong impression about the image of detention centre'*. Apart from that the Appellant had not stated anything about what the Iranian authorities would do if that person supposedly passed those details to Iranian authorities.

36. In page 298 of the Tribunal proceedings the Appellant stated as follows when he was asked as to why he is concerned about the person whose father is supposedly a retired Sepah and the Appellant replied:

> "I am not sure of the topic of conversation that we argued over. However, I remember that he had mentioned to someone else after that argument that all that it took for him was a phone call and that they would do something to his family; that. "they will be praying a hundred times a day also wishing that they were dead, and that if I wish I would not let him have a day of joy or, you know, a minute of comfort wherever he goes, be it (redacted) or any other cometary or any other holy place, it wouldn't matter".

37. It appears that the claims made by the Appellant are very vague and scarcely credible. Yet, the Tribunal had given due regard to these claims and had continued to look into these matters. On page 301 of the Tribunal proceedings, a member of the Tribunal examined the threats by one of the two persons as follows:

> "Ms McIntosh: You've tried to be friendlier to him after you realized that he'd been making these threats about you and then he confided in you about his family background.

Interpreter: Yes. And even to date, no matter what he says – and also which might be right – I will still say, "Yes, you're right. Everything you say is correct."

Ms McIntosh: You don't know if he ever did pass any information about you to his friends or colleagues or family in Iran.

Interpreter: I cannot confirm that".

38. The Tribunal mentioned these claims in its decision from pages [69] – [74]. Having discussed the claims of the Appellant the Tribunal assessed those claims as follows:

> "112. The Tribunal accepts that the applicant may suspect that one or two Iranians on Nauru are linked to Sepah. At the tribunal hearing, the applicant clarified that the Iranian who has returned to Iran knew nothing about the applicant but his name. He did not claim that this man had ever threatened him or his family and the Tribunal is satisfied that he did not. The tribunal does not accept that this man was gathering information about the processing centre for the Iranian authorities given that the information he was purportedly gathering is publicly available.
>
> 113. The tribunal accepts that the applicant may have argued with another Iranian on Nauru. The tribunal does not accept that this man passed on information about the applicant which led to someone calling his sister and telling her that the applicant is on Nauru as it does not accept that such a call was made.
>
> 114. The tribunal does not accept that the Iranian authorities have shown any interest in the applicant's whereabouts since his departure. On the contrary the tribunal is satisfied that his

records in Iran would show him to have been a loyal and trustworthy citizen".

39. The Counsel for the Appellant submitted that the Appellant had stated in his supplementary statement made on 08 July 2014 that, *'I have serious concerns that some other Iranian transferees in the camp in Nauru are providing information to the Iranian government'*.

40. Further it was submitted that the Appellant had further stated that: *'I believe that other Iranians may start providing information to the Iranian Government out of fear of what might happen to them if they return to Iran. They decide to report other* [sic] *because it may mean that they may personally be spared harm if they return'*. The counsel for the Appellant drew the attention of the court to the following paragraphs of the supplementary statement as well to lay the foundation for the contention that the Tribunal did not consider the future risk posed to the Appellant if he were to return to Iran.

> "[15] I know of at least two of at least two Iranians in the camp who have links to Sepah. One of them has left the camp. He was a high ranking revolutionary guard and an air Marshall. He would brag to the other Iranians about his time as an Air Marshall. He told them that, "if you ever want to return Iran, just take this number, call it and mention general Mohammadi, that will solve all your problems." I believe that a person of that rank would not normally be a person who would get on a boat and travel to Australia. He was most likely put on the boat and then in the camp to collect information about other people travelling to Australia. Whilst in the camp he had also asked me more details about myself. I told him that I was a simple accountant. I did not want to tell him too much.

[16] The other person who is associated with the Iranian government is still here. He is the son of a Sepah officer. He was harassing and threatening me and at least two of my other friends. The harassment started around the same time as I had the conversation with my sister in March, 2014. He has since stopped bothering me. He would say that he would have done bad things to me up if we were in Iran. He would say to me, "you are miserable and I pity you and I think you should come here and lick my balls, otherwise I would do something to you and your family that you would never forget". He has not actually harmed me but we have had arguments that I have walked away from. He would also brag about how he would harm people back in Iran. He would say that he could message his father with the name and address and within two days a targeted person would disappear".

41. Therefore, the counsel submitted that these claims involve future harm and are not about what happened in the past. The Appellant's counsel contended that the claim of future harm in Iran from people connected to the second person (referred to in the Appellant's submissions as Mr X) was not addressed by the Tribunal in its decision, and therefore, the failure to consider the claim by the Appellant constitutes an error of law.

42. It was also submitted by the Appellant's counsel that, however much the Appellant's claims were vague or implausible, the Tribunal should not ignore them. To buttress this position, the Appellant's counsel relied on the Nauru Supreme Court judgment in QLN 133 v The Republic [2017] NRSC 82; Appeal case 178 of 2017 (at para 49), where it was stated:

> "The fact that the submissions may have lacked merit because the Appellant's claims could not have engaged Nauru's complimentary

protection obligations is not to the point. The tribunal is required to deal with both meritorious and unmeritorious submissions".

43. The Respondent argued that the claims made by the Appellant were sufficiently considered by the Tribunal, despite the fact that the claims about the two persons do not give rise to a claim for refugee status. The Respondent contended that there was no error as the Tribunal addressed these issues, and the attention of the Court was drawn to paragraphs 112 and 114 of the Tribunal decision (supra).

44. In support of its position, the Respondent invited the court to look at the decision in the case of Applicant WAEE v Minister for Immigration [2003] FCAFC 184. The Respondent pointed out that in that case, the Federal Court of Australia commented on situations in which claims have been subsumed into findings of greater generality:

> "[46] It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 at [87]-[97]) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The Tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be

scrutinized "with an eye keenly attuned to error". No is it necessarily required to provide reasons of the kind that might be expected of a court of law.

[46] The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may rise a strong inference that it has been overlooked".

45. Furthermore, the Respondent argued that the Tribunal is not obligated to consider claims that are deemed unmeritorious, and urged the Court to disregard the decision in the Nauru Supreme Court case of QLN 133 v The Republic (supra). The Respondent contended that the position taken in QLN 133 was flawed, as it was not followed in the case of REF 001 v Republic [2018] NRSC 54. In that decision, Justice Freckelton disagreed with the reasoning in QLN 133 and stated as follows:

"[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 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".

46. According to the assessment of claims in the Tribunal decision, it does not appear that these claims were ignored by the Tribunal as alleged by the Appellant. In essence, the Tribunal had considered the claims in great detail. After considering the claims, the Tribunal did not accept that the first person mentioned by the Appellant was gathering information about the processing center for the Iranian authorities, given that the information he was purportedly gathering is publicly available. With regard to the second person (Mr X), the Tribunal accepted that the Appellant may have had an argument with him. However, the Tribunal did not accept that Mr X passed on information about the Appellant. According to the Tribunal's assessment of these two persons, the Tribunal did not believe that the Iranian authorities had shown any interest in the whereabouts of the Appellant. Since the Tribunal did not accept the Appellant's claims, there was no reason to consider any future risk, despite the contention by the Appellant's counsel. However, if the claims had been accepted, they might have indicated a potential for future risk.

47. Furthermore, the assessment of these claims by the Tribunal has to be looked at in the full context of its reasons. The determination made by the Tribunal based on the claims put forward by the Appellant is clearly encompassed in the following passage of the Tribunal decision, which concludes that there is no possibility of the Appellant being subjected to future harm.

> "[137] Having considered the claims and evidence set out above and in view of the findings regarding the possibility of harm, the Tribunal is not satisfied there is a reasonable possibility the applicant will be subjected to torture or to cruel, inhuman or degrading treatment or punishment or to any other treatment for

any reason which would amount to a breach of Nauru's international obligations if he were to be returned to Iran ..."

48. We are convinced that the Tribunal took into account the claims related to the two individuals mentioned by the Appellant. Additionally, we hold that the Tribunal is not obliged to address unmeritorious claims, and disregarding such claims does not amount to an error of law. We are satisfied that the Tribunal adequately evaluated claims in question and arrived at a well-reasoned conclusion. We have found no error of law, and therefore, the fourth proposed ground of appeal lacks merit.

Ground 5

49. The Appellant claims in the proposed fifth ground of appeal that the Tribunal asked the wrong question without considering whether the Appellant would be perceived by the Iranian authorities to be an apostate. The Appellant was born a Shia Muslim and he was baptised as a Christian on 02 August 2015 after arriving in Nauru. He claimed before the Tribunal that he will face risk of harm if he goes back to Iran.

50. The Appellant in his further statement made on 03 April 2016, stated the following about converting to Christianity (page 243):

"[31] If I am returned to Iran, I will be questioned upon my arrival at the airport because of my status as a failed asylum seeker, the length of time I have been absent from Iran, and the issues I had with the authorities of Iran prior to fleeing. As part of the questioning, they will ask me about my religion.

[32] I cannot lie about Jesus now that I have found him and have been Baptised test in Christ. Therefore, I will proudly

proclaim that I am a Christian. I know the penalty for this will be detention and physical harm, torture or even death, but this is what I will have to do because I cannot deny Jesus as God.

[33] I know that I will be harmed on the basis of my religion if I am returned to Iran because apostasy is a crime in Iran, punishable by death. The authorities view apostates as being against both Islam and the state, because Iran is an Islamic Republic".

51. The Appellant's counsel submitted that the Tribunal asked the wrong question: "was the Appellant a deeply committed Cristian" or "what were the reasons why the appellant turned to Christianity?' instead of asking "was there a real risk the Appellant would face harm on return to Iran, including the death penalty, because he was perceived as an apostate?".

52. The Appellant's counsel asserted that apostasy is established, when the Tribunal accepted that the Appellant baptised as a Christian in Nauru. According to the evidence before the Tribunal it appears that the only way to assess the credibility of the claim was to see if the conversion to Christianity was a genuine act of the Appellant. We do not see any other way that the Tribunal could have assess the claim for apostasy in this particular situation. Upon the Tribunal's assessment of the evidence before it, the Tribunal did not believe that the conversion was genuine.

53. The following paragraphs of the Tribunal decision reflects that the Tribunal gave due regard to the issue of apostasy in analyzing the evidence available to the Tribunal.

[124] Evidence has been submitted by the applicant's representative that converts from Islam to Christianity

face serious harm in that country. The tribunal accepts that apostates may be harmed in Iran.

[125] The tribunal accepts that the applicant was a devout Shia Muslim as a younger person, that as an adult in Iran he was less sincere in his professed religiosity, that he has been baptised on Nauru and that he's thus now nominally a Christian.

[126] The Tribunal accepts that the person's religious belief and the manner in which he or she comes to that belief is a deeply personal issue and that no two people may experience a conversion in the same way.

[127] The tribunal accepts that the applicant has found some comfort in attending church services while on Nauru.

[128] However, having heard from him at length on this issue during the hearing, it has formed the view that his interest in Christianity is superficial and at most is a response to his current difficult circumstances as an asylum seeker.

[129] Further, he did not commence any activities or show any interest in Christianity until some months after his RSD interview, when he was already aware that his application may not be successful. I spoke to him at the hearing, his decision to attend church and religious classes was followed within a short timeframe of only two or three months by baptism, from which the Tribunal infers (despite his indicating otherwise to his representative) that he hoped to bolster his application for asylum by such action. Further, his reasons for moving from being non-

religious to becoming Christian do not demonstrate a commitment to the Christian faith.

54. As the Respondent rightly pointed out, the Tribunal assessed the credibility of the claim of apostasy by taking into account the Appellant's conversion to Christianity. It's important to note that in this case, the claim of apostasy cannot be evaluated in isolation. This is because the Appellant's consistent position was that of conversion to Christianity, rather than a mere renunciation of Islam. The Appellant's counsel attempted to separate the act of converting to Christianity from the claim of apostasy. While it's true that renouncing one's religion is sufficient to be considered apostate, converting to another religion can also be seen as evidence of apostasy. In this case, the Appellant claims apostasy not because he merely renounced Islam, but because he converted to Christianity. This creates a nuanced difference between the two positions, and it's important to note that renunciation cannot be considered in isolation in this situation. This is because the act of conversion is intertwined with the claim of apostasy. Since the Appellant claimed apostasy solely on the basis of converting to Christianity, it's reasonable to conclude that the Tribunal did not make an error in considering the claim of apostasy in that specific context.

55. The counsel for the Appellant submitted that the Tribunal was required to determine whether the Appellant would be considered an apostate upon returning to Iran. Furthermore, it was argued that the Tribunal must consider whether the Appellant has a well-founded fear of persecution and whether there is a risk of cruel, inhuman, or degrading treatment for the crime of apostasy, which would violate Nauru's obligations under the International Covenant on Civil and Political Rights. The following paragraphs clearly demonstrate that the Tribunal assessed the potential harm on the basis of conversion to Christianity. The Tribunal thereafter concluded that there is no possibility of harm or well-founded fear of persecution based on its findings. This reasoning is evident in the following paragraphs of the Tribunal decision:

"[130] In view of these concerns, and the Tribunal concerns about the credibility of the applicant's other claims, the Tribunal does not accept that the applicant has genuinely converted to Christianity or that he is a committed Christian or that he will practice as a Christian or proselytize if he returns to Iran.

[131] The applicant has not claimed that the Iranian authorities have become aware of his baptism, and the Tribunal is satisfied that they have not.

[132] The Tribunal does not accept that the applicant has told his sisters that he has converted because it does not accept his evidence that he rang them on a number in the name of a friend. In any event, even if the applicant has told his sisters, the Tribunal does not accept that this creates a risk for the applicant as the Tribunal does not accept that this creates a risk for the applicant as the Tribunal does not accept that the conversion is genuine or that his siters will reveal his claimed conversion to authorities.

[133] For the reasons set out above, the Tribunal does not accept that there is a real possibility that the applicant will be harmed on in Iran as a Christian convert".

56. As previously stated, the Tribunal's decision on the issue of apostasy must be viewed in its entirety, as discussed in WAEE v Minister for Immigration (supra). Based on its findings, the Tribunal determined that the Appellant's conversion to Christianity was not genuine. We find no error in this conclusion based on the evidence available to the Tribunal. When the Tribunal disbelieved that the conversion to Christianity was genuine, its opinion also subsumed the conclusion that there was no apostasy when viewed in full context.

Considering the Tribunal's assessment of this claim as a whole, we cannot arrive at any other conclusion.

57. Therefore, we disagree with the assertion that the Tribunal asked the wrong question or failed to ask the appropriate question in this regard, as the claim of apostasy was intertwined with the act of conversion to Christianity. Based on these factors, we find no error of law committed by the Tribunal, and we conclude that there is no merit to ground 5.

Orders

58. Application to raise the two new grounds of appeal is refused.

59. The appeal is accordingly dismissed with costs.

Dated this 23 of March 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