IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal No. 20 of 2018
Supreme Court Refugee Appeal Case No. 49 of 2016

BETWEEN

WET066

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: **WET066 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; home area; relocation; Appellant S395 principle
LEGISLATION:	s.19(2)(d), 22(1), 48, 43(3) of the Nauru Court of Appeal Act 2018; s.3,5, 31, 43, 44(1)(a) Refugees Convention Act 2012
CASES CITED:	WET054 v The Republic of Nauru Refugee Appeal 07 of 2019; Appellant S 395/2002 v Minister for Immigration & Multicultural Affairs [2003] HCA 71; BC200307490; (2003) 203 ALR 112; Minister of Immigration and Ethnic Affairs v Gou and another 191 CLR 559; CS015 v Minister for Immigration and Border Protection and another [2018] FCAFC 14; NAJT v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 51; [2005] FCAFC 134; EHV18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 649; Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 26; Eastman v R [2000] HCA 29; 203 CLR 1; Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611

APPEARANCES:

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

JUDGMENT

1. The Appellant is a married individual of Nepalese nationality, and of Buddhist faith. His wife and two children are residing with his wife's parents in Solu, a district near Khotang district, Nepal. On 25 April 2013, the Appellant departed from Kathmandu airport lawfully, and traveled to Malaysia before embarking on a boat to Christmas Island. Notably, the Appellant did not arrive in Christmas Island with a valid passport. Subsequently, he was transferred to

Nauru on 20 July 2014. The Appellant has claimed that he fears harm as a result of having slaughtered a cow in his village. He asserted that he left his village due to threats and that if he were to return to Nepal, he would be subjected to persecution.

2. The principle of non-refoulment is enshrined in section 4 of the Refugees Convention Act 2012 (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. The Appellant made an application on 17 September 2014 for Refugee Status Determination. On 11 October 2015, the Secretary for Department of Justice and Border Control (Secretary) made a determination that the Appellant is not a refugee within the Refugees Act, and his fear is not well-founded. Also, it was decided that Nauru does not owe complimentary protection obligations to the Appellant.

6. Pursuant to section 31 of the Refugees Act, the Appellant made an application to the Refugee Status Review Tribunal (Tribunal) on 22 October 2015 for merits review. On 24 August 2016, 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. The Appellant then appealed the decision of the Tribunal to the Supreme Court of Nauru on 29 January 2017, pursuant to section 43 of the Refugees Act.

7. The Supreme Court affirmed the decision of the Tribunal pursuant to section 44(1)(a) of the Refugees Act and the appeal was accordingly dismissed on 27 November 2018. Being aggrieved by the said judgment, the Appellant filed a timely notice of appeal on 18 December 2018 to appeal to the Nauru Court of Appeal.

8. 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".

9. Subsequently, on 05 July 2022, the Appellant filed an amended notice of appeal with the following ground of appeal:

> "The Supreme Court erred in not quashing the decision of the Tribunal, on the basis that the Tribunal had failed to consider whether the appellant's having lived in Kathmandu was itself an act of relocation away from harm, or that the absence of a desire to return to his home village was the result of a fear of persecution engaging the "Appellant S395 principle", with the result that the Tribunal had to consider the question of relocation for any return to Kathmandu."

10. On 02 September 2022, the Appellant once again filed an amended notice of appeal with the second ground of appeal, which was not run in the court below:

> " The Supreme Court ought to have found that the Tribunal made an error of law in its approach to the appellant's evidence, in that:
>
> (a) The Tribunal's insistence that the dates provided in the transfer interview were accurate was irrational in the circumstances; and / or
>
> (b) The Tribunal engaged in an erroneous approach to credibility; and / or
>
> (c) The Tribunal failed to give proper consideration to the evidence of the appellant explaining the reasons for the earlier inaccuracies and the reasons why the dates provided to the Tribunal were the accurate dates."

11. The Court of Appeal Act explicitly lays down provisions regarding the amendment of notice of appeal and the requisite procedure for making such amendments. 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).

12. In WET054 v The Republic of Nauru Refugee Appeal 07 of 2019 this court discussed the issues of amendment of notice of appeal and introducing of fresh grounds of appeal for the first time, in greater detail. As per section 48, it is evident that seeking leave to amend the notice of appeal is not required if such amendment is done no later than 14 days before the scheduled date of the appeal hearing. However, if a party seeks to pursue a new ground of appeal that was not run in the court below, it was decided in WET054 v The Republic of Nauru (supra) that the Court has to exercise its discretion to decide whether to allow or disallow such an application.

13. Be that as it may, we will deliberate on the permissibility of the proposed second ground of appeal at a later stage, while at present, we will proceed to address the first ground of appeal.

Ground 1

14. The Appellant asserts that the Supreme Court erred in not quashing the Tribunal decision on the basis that the Tribunal's failure to consider whether

the Appellant's living in Kathmandu constituted an act of internal relocation away from harm. The counsel for the Appellant submitted that the Appellant hails from a village in the District of Khotang. After slaughtering a cow and thereby offending the Hindu population in the village, he was forced to leave his home area. Subsequently, the Appellant fled to Kathmandu and resided there for some time before leaving Nepal. The Appellant's counsel argued that the Tribunal erred by failing to address if the Appellant had a well-founded fear of persecution in his home area, Khotang district. The counsel contended that the Tribunal should have asked this crucial question, and if the answer were affirmative, the Tribunal should have considered whether there is another safe place where the Appellant could relocate. The counsel further argued that the Tribunal should have finally examined whether it would be reasonable, taking into account all the personal circumstances of the Appellant, for him to relocate to that safe place. The Appellant's counsel argued that the Tribunal failed to ask those three questions.

15. It was submitted on behalf of the Appellant that the Appellant grew up in Khotang and resided there until his twenties. It was further submitted that the Appellant had to flee from the district due to fear of harm and his wife and children have been residing in a village on the outskirts of Khotang district since then.

16. The counsel for the Appellant referred to paragraph 5 of the Supreme Court judgment and paragraph 8 of the Tribunal decision to persuade this Court that Khotang is the Appellant's home area. For the sake of convenience, the paragraphs from the Supreme Court judgment and the Tribunal decision are quoted below:

> [5] The Appellant is a married man of Nepalese ethnicity and Buddhist religion from Khothang village, Sagarmatha Province, Nepal. He is married and has two children who live with his wife's parents in Solu, a village that is close to Khotang. The

Appellants parents and four married sisters continue to live in Khotang. He worked with his father on the farm in Khotang, and opened a small restaurant (called a "store" by the Appellant) when he moved to Kathmandu. - **Supreme court Judgment.**

[8] He is married and has two children. His wife and children are living with his wife's parents in Solu, close to Khotang. His parents are living Wodare in Khotang district. His father has land which he farms. His four sisters are married and live in different villages in Khotang district. The applicant completed secondary school. He told the Tribunal that he did not work in Khotang., other than to help his father on the farm sometimes. - **Tribunal decision.**

17. The counsel for the Appellant contended that the Appellant's wife and children were residing in a village located on the outskirts of Khotang district. It was submitted that, Khotang was his home area, and Kathmandu could not be considered as such. The counsel argued that Kathmandu could only be viewed as a place for relocation. Additionally, it was submitted on behalf of the Appellant that he had to flee Nepal because even Kathmandu was not a safe place for him to live. The counsel further stated that if the Appellant were to return to Nepal, the Tribunal should have considered Khotang as the place to return to, as that is where his family, especially his wife and children, reside. If that is the case, then the Tribunal needs to determine whether there would be a well-founded fear of persecution if the Appellant were to return to Khotang. The Appellant's argument was that if Khotang is not safe, then the question of relocation must be considered by the Tribunal.

18. However, it appears that the submissions by the Appellant do not seem to be correct as per the evidence adduced before the Tribunal regarding Khotang. The counsel for the Respondent submitted to Court that paragraph 5 of the Supreme Court judgment, that was relied on by the Appellant, is factually

incorrect in regard to the manner in which villages and districts are mentioned. It was elicited that Khotang is not a village, and it is a district. Moreover, it was shown to the Court that Solu is not a village, and it is also a district according to the evidence.

19. The Respondent argued that only the Appellant's parents were residing in a village called Wodare in Khotang district, while the Appellant's wife and children were residing in a different district, Solu, which is not a nearby village to Khotang. It was further stated that the Appellant had completed his secondary school in Khotang and occasionally helped his father on the farm. Therefore, the Respondent's counsel contended that it was incorrect to claim that the entire family of the Appellant resided in Khotang. Respondent's counsel drew the attention of the Court to page 160 of the appeal book to support this position:

> MS MACKINNON: Right. Is Khotang the village - the name of the village?
> INTERPRETER: It's a district.
> MS MACKINNON: Khotang is the district? okay. So are there 50 or 70 families in the village or in the district?
> INTERPRETER: So in the village.
> MS MACKINNON: Okay. And what's the village called?
> INTERPRETER: Wodare

20. Additionally, the counsel for the Respondent directed the Court's attention to the location where the Appellant's wife and children are currently residing. (page 161):

> MS MACKINNON: And whereabouts ?
> INTERPRETER: It is in a place called Solu and it's very close from my village.

MS MACKINNON: Okay in Khotang district?

INTERPRETER: No. It's different. It's Solu.

MS MACKINNON: Solu? Is that a district?

INTERPRETER: Yeah.

MS MACKINNON: Okay. And how long have they been there?

INTERPRETER: I think it's around three and half years.

21. The Respondent's counsel challenged the Appellant's assertion that Khotang is the Appellant's home area, relying on the evidence presented. It was also pointed out that Khotang is a district and Wodare is a village within Khotang district. Furthermore, the evidence suggests that the Appellant's wife had resided with him in Kathmandu before moving to Solu, which is also a district (page 183). It was also highlighted by the Respondent that the Appellant's other relatives, uncles and aunts live in Kathmandu as per evidence (page 162). It was demonstrated to the court that the Appellant's counsel's assertion regarding the Appellant's familial ties to Khotang was predicated on inaccurate evidence. In view of these, it must be stated that the Appellant's position is contrary to the evidence presented.

22. Against that backdrop we will now consider if Appellant S395/2002 is applicable in this case. The principle Appellant S395/2002 derives from the Australian High Court decision, Appellant S 395/2002 v Minister for Immigration & Multicultural Affairs [2003] HCA 71; BC200307490; (2003) 203 ALR 112, where it simply says that an asylum seeker cannot be expected to avoid persecution in the home country by hiding or changing their behaviour. It was a case where two individuals feared persecution based on their sexual identity or orientation. The High Court of Australia held that requiring a person to suppress their sexual identity to avoid persecution goes against the purpose of the 1951 Refugee Convention as the objective is to provide protection to individuals who face a well-founded fear of persecution on account of their race, religion, nationality, membership of a particular social group, or political opinion.

23. We are not inclined to accept that the principle of S395/2002 has any relevance to the matter under consideration. The Tribunal did not require the Appellant to live in hiding or change his behaviour to avoid persecution. Rather, it found that the Appellant had been living in Kathmandu for a considerable period of time prior to leaving Nepal, and concluded that returning to Kathmandu would not entail any risk of harm. Therefore, it cannot be viewed as a requirement to hide or change behaviour. We are of the opinion that the principle of S395/2002 does not bear any significance as far as this matter is concerned.

24. The Respondent's counsel further submitted that there is no need to discuss relocation as this was merely an orthodox situation to determine whether the appellant could return to his home country. It was shown to the Court that only the appellant's parents live in Wodare village in Khotang district, while the appellant's family resides in a different district named Solu according to the evidence. The counsel asserted that the Tribunal correctly considered Kathmandu as the place where the appellant would return based on the evidence presented.

25. The counsel for the Respondent further argued that the Tribunal correctly addressed the issue of whether the Appellant would face a well-founded fear of persecution now or in the foreseeable future. To buttress his contention the Respondent's counsel relied on Minister of Immigration and Ethnic Affairs v Gou and another 191 CLR 559 and drew the attention of the Court to page 574:

> "The course of the future is not predictable, but the degree of probability that an event will occur is often, perhaps usually, assessable. Positive events are not a certain guide to the future, but in many areas of life proof that events have occurred often provides a reliable basis for determining the probability - high or low - of their recurrence. The extent to which past events are a guide to the future depends on the degree of

probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity. In many cases, when the past has been evaluated, the probability that an event will occur may border on certainty. In other cases, the probability that an event will occur maybe so low that, for practical purposes, it can be safely disregarded. In between these extremes, there are varying degrees of probability as to whether an event will or will not occur. But unless a person or tribunal attempts to determine what is likely to occur in the future in relation to a relevant field of inquiry, that person or tribunal has no rational basis for determining the chance of an event in the field occurring in the future."

26. Citing the aforementioned authority and in consideration of its underlying reasoning, counsel for the Respondent contended that the Tribunal arrived at its decision based on the evidence presented in regard to fear of persecution. The attention of the court was further drawn to the following paragraph of the Tribunal decision:

> "[52] The Tribunal is satisfied that the VDC imposed penalty on the applicant when he killed the cow and that he complied with that penalty and that he has not suffered any harm since then because he killed a cow. For the reasons set out above, the Tribunal does not accept that any villagers or thugs acting on behalf of any villages have been threatening or harassing the applicant in Kathmandu or that the applicant or his family members have suffered any harm from villagers or people acting on behalf of villagers since he left khotang. In the absence of any past harm, the Tribunal is satisfied that there is not the real possibility the applicant will suffer any harm from villagers or people acting on behalf of villagers because he killed a cow if he returns to Kathmandu".

27. The counsel for the Respondent submitted that the Tribunal assessed the past incidents based on the evidence before it and evaluated the likelihood of future events to determine any potential harm. The counsel asserted that this was an orthodox method for the Tribunal to arrive at its final conclusion regarding the claims of the appellant. The following paragraphs were highlighted to demonstrate that the decision made by the Tribunal is based on this line of reasoning:

> "[53] The applicant has not claimed that he will open another business if he returns to Kathmandu however, Tribunal accepts that he may do so. The Tribunal accepts that he may experience some harassment or have people not paying for food or goods again in future. The evidence before the Tribunal does not indicate that the applicant will face persecution or other serious harm as a business owner in Kathmandu and the Tribunal is satisfied that he does not face a real possibility of persecution or other harm such that returning him to Nepal would be a breach of Nauru's international obligations.
>
> [54] The Tribunal accepts that the applicant may suffer harm if he kills a cow again in the future. The applicant did not claim that he would kill another cow and the Tribunal is satisfied that he will not as he has only done it once in his life and in view of his awareness of the consequences.
>
> [57] Having regard to the evidence and findings set out above, the Tribunal is not satisfied that the applicant has a well-founded fear of persecution now or in the reasonably foreseeable future because of his membership of a particular social group of persons in Nepal who have killed a cow or an imputed political opinion arising from having killed a cow or his race or his religion, separately or cumulatively.

28. The Respondent's counsel further submitted that the matter did not involve any issue of relocation based on the aforementioned reasoning. Nonetheless, the counsel referred to the case of CS015 v Minister for Immigration and Border Protection and another [2018] FCAFC 14 to demonstrate that even if there were multiple home areas, the Tribunal did not commit any error as per the reasoning in the CS015 decision:

> "[42] The correct question is: to where will an applicant return, or be returned? Identifying a place which may have, in the past, being a person's "home area" or "home region' may assist in answering that question. But he's not, in and of itself, the answer to the question which must be asked for the statutory task to be lawfully performed. That is because under both Art 1A and the complementary protection regime, what is to be examined is the place to which a person will be returned, and what risks a person faces on return to that place. At least one location within a country of nationality must be identified for this task to be undertaken. Ascertaining a person's former "home area" or "home region" may be an important step along the way in a decision-makers fact finding, but is not the end of the task. As SZSCA illustrates, once a decision-maker has identified a region or place to which it is likely a person will return, an assessment of the risks a person might face on return to that place or region may, in some factual circumstances, require consideration of what is reasonable and practicable in terms of how that person will live and work in that place. Separately, and distinctly, because it is sourced in a different limb of Art 1A (as Gageler J pointed out in the passages we have extracted at [29] above), this assessment will invariably be required if the region or place is "new' for the person, and internal relocation (or "internal protection") principles apply. If it is not a "new" area, then decision-makers will need to remain alive to the factual issues raised in cases such as SZSCA."

29. On behalf of the Respondent, it was further argued that the Tribunal's only obligation was to consider if the Appellant could return to Kathmandu, as that

was where he was residing prior to leaving Nepal. Once satisfied that there was no well-founded fear of persecution in returning to Kathmandu, the Tribunal was not obliged to determine if there were any other places in the country that the Appellant might return to. To support this argument, the counsel referred to the following passages from CS015 (supra):

> "[45] Read literally, that submission cannot be accepted. A decision-maker will not perform the task required of her or him if she or he simply searches for "a place' within a country of nationality where a particular applicant will not have a well-founded fear of persecution. **The decision-maker must assess, on the material before her or him, the place or places to which an individual is likely to return. The first step of the decision-maker's assessment is to make findings about, at least, one of those places** (emphasis added).
>
> [46] If a decision-maker finds the place to which an individual is likely to return is one where the individual's fear of persecution is well-founded, or where the individual faces real risk of significant harm, then the decision-maker should determine whether there are any other places to which the individual is likely to return, then engage in the same fact finding.
>
> [47] It is only if the place or places to which an individual is likely to return are places in which the person has a well-founded fear of persecution or faces a real risk of significant harm, that decision maker must look at *any other places* in the individual's country of nationality where neither of those kinds of risks exist. That is: places that are new or unfamiliar locations for the individual. These must be places to where it is reasonable and practicable to expect that individual to relocate, if that terminology is to be used. It is not simply a matter of a decision-maker finding "a place" where an individual might not be exposed to persecution for a Convention reason, or to the risk of significant harm. At this final step, there must be an assessment of the reasonableness and

practicability of the particular individual living in that (new) place, as the authorities have explained that assessment."

30. It is evident that the Tribunal concluded that Kathmandu is the likely place for the Appellant to return to, based on the available evidence. Additionally, the Tribunal determined that there is no well-founded fear of persecution or significant harm in Kathmandu. Based on the evidence presented, we cannot envisage any other possible conclusion that the Tribunal could have reached. Moreover, during the Tribunal hearing, the Appellant was asked the following question, and his and his representatives responses clearly demonstrate that the Tribunal had ample reasons to consider Kathmandu as a likely place of return (page 202):

"MS MACKINON: We have to consider whether you could return safely to your home area in Nepal and obviously your village was- you know, is your home area or is a home area, but it also seems to us that Kathmandu is also a home area that we can consider you against because you have lived there for - you lived there for a number of years. And you've said that you moved there in 2011, but also in the material you've said that you moved there in 2006 and we have to consider obviously when we think that you moved there. But in any event you have lived in Kathmandu for at least several years before you left Nepal. So on that basis it would seem that Kathmandu is also your home - can also be considered to be a home area for you. Do you want to say anything about that?

INTERPRETER: No.

MS MACKINNON: Okay. Ms Stotz, did you want to say anything about that?

MS STOTZ: Yes. I just want to say also in general situation in Kathmandu, just in the past year since the applicant has left, has also changed. Knowing because of the earthquake and the impact that has had in displacement of people in the village (indistinct) but also because of the different views that people have about the constitution and independence. So again I'd just like to submit that also politically the situation in Kathmandu has become much less stable than in the past".

31. After careful consideration, we believe that the issue of relocation did not arise in this matter. Rather, the Tribunal simply had to determine the place where the Appellant was likely to return. Based on the available evidence, it was reasonable for the Tribunal to conclude that Kathmandu was the Appellant's likely place to return to. Although the Appellant argued that these circumstances amounted to relocation, and the Tribunal failed to consider the same, we are not convinced to accept that position.

32. In the circumstances we are of the view that the first ground of appeal lacks merit. As such, the first ground of appeal must be rejected.

Ground 2

33. We will now turn to consider whether the proposed second ground of appeal can be allowed. The Appellant filed the second amendment to the grounds of appeal on the 02 September 2022 and the appeal hearing was on 12 October 2022. As per section 48 the Appellant is not required to seek leave for the amended ground of appeal if the amendment is made 14 days prior to the hearing date. Nevertheless, in the case of WET054 v The Republic of Nauru

(supra) this Court deliberated on legal predicaments that may arise when introducing a fresh ground of appeal that was not pursued in the court below regardless of section 48.

34. In WET054 v The Republic of Nauru (supra), this Court noted:

> "[24] 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".

35. Furthermore, we emphasize and reaffirm this Court's prior stance, in WET054 (supra) on the significance of this issue and the justifications for permitting new grounds to be introduced for the first time:

> "[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".

36. Accordingly, in WET054 (supra) this Court decided that it may exercise its discretion to allow a new ground of appeal which was not advanced in the court below, under exceptional circumstances and when it is expedient to do so in the interest of justice. The test to be followed in exercising discretion has been discussed in numerous authorities and 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?

37. The counsel for the Appellant submitted that the reason for failing to raise the proposed second ground of appeal in the lower court was due to a change of counsel, and that this Court should accept it as a reasonable explanation. It was submitted that change of counsel is an acceptable ground to allow a new ground of appeal and relied on EHV18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 649 to support his argument. In that case, Beach J of the Federal Court of Australia allowed a new ground of appeal, accepting change of counsel as a reasonable explanation:

> "[30] I will grant leave to the appellant to raise the new ground. Essentially the new ground can be readily dealt with by me and the Minister does not say that he will suffer any relevant prejudice if I deal with it. The reason why it was not run below is explained by the change of counsel. In the present context of an administrative law issue, that is good enough for me. Given that I would have to address the merits of the new ground in determining whether leave was granted or not, it is inefficient to do anything other than get straight to the heart of the matter, rather than further linger over leave principles".

38. In response, the counsel for the Respondent opposed allowing the new ground of appeal. It was submitted that aside from the intricate complications within the statutory framework and the complexities surrounding a new ground being considered in appeal, in numerous instances, the courts have ruled that a change of counsel is not a valid reason to justify allowing a new ground of appeal. The counsel for the Respondent cited Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 26 to support their contention:

> "[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."

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.

40. Be that as it may, we have decided to consider the merits of the proposed ground, in the interest of justice, given the fact it is a refugee appeal. When

dealing with individuals who have fled their own countries due to fear of harm and persecution, and are seeking protection in a new country, courts must exercise caution in assessing all the relevant circumstances. These individuals claim entitlement to protection under local and international laws, which states are bound to uphold. While it is important to adhere to these laws in making determinations, it is also crucial to ensure that no errors of law are made, and their entitlements to protection are not compromised. As Chief Justice Gleeson stated in Eastman v R [2000] HCA 29; 203 CLR 1, if a serious error has occurred or if there has been a significant miscarriage of justice, it would be justifiable to allow the Appellant to advance a new ground of appeal.:

> "[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).

41. The proposed second ground of appeal is based on the inconsistencies of the dates provided by the Appellant. The counsel for the Appellant submitted that the Appellant gave different years for killing the cow in different instances: 2006 in the transfer interview, 2003 in the RSD application, and 2011 in his written submissions and oral evidence. The counsel for the Appellant asserted that the Tribunal chose the year in the middle to assess the evidence and reach its conclusion. Furthermore, the counsel for the Appellant argued that the Appellant had provided conflicting dates due to the difficulty in converting the Nepali calendar into the Gregorian calendar. It was argued that the Tribunal should have accepted the explanation given by the Appellant later, and that by failing to do so and accepting the dates provided by the Appellant in the transfer interview, the Tribunal acted irrationally in the circumstances.

Furthermore, it was contended that the Tribunal engaged in an erroneous approach to credibility as a result.

42. In response, the counsel for the Respondent argued in court that the Appellant had provided inconsistent dates related to the killing of the cow, the date of leaving Nepal, and other dates in a vague manner. The counsel further contended that the Tribunal had to select one date out of the inconsistent dates to reach a decision. The Respondent's position was that the Tribunal did not act irrationally or unreasonably in selecting the dates, as it had carefully considered the evidence in comparison with the events mentioned by the Appellant against those dates.

43. The counsel for the Respondent invited this Court to examine Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611 to support their position that irrationality could have been alleged if there was only one viable conclusion that could have been arrived at based on the available evidence, and the Tribunal failed to reach that particular conclusion using the same evidence. It was stated in the said judgment:

> "[132] .....The complaint of illogicality or irrationality was said to lie in the process of reasoning. But the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision of finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion."

44. In paragraph 22 of the Tribunal's decision, it described the process of selecting the dates among conflicting dates provided by the Appellant at different instances:

"The Tribunal finds that this event occurred in 2006 which is the date the applicant gave in his transfer interview. The Tribunal's reasons for finding that it occurred in 2006 (and not 2003 or 2011) because this is the date the applicant provided first, soon after he arrived on Nauru when the tribunal expects that he would have been better able to recall events before he left Nepal; and because it is consistent with his other evidence in his RSD application that he opened a business in Kathmandu in 2007. It is also consistent with his evidence that the Maoist did not care about cow killing. The Maoist insurgency had covered most of Nepal by 2004 and in 2006 the Maoist signed a comprehensive peace agreement and joined the new interim government with members of the existing government".

45. There is no argument that all witnesses may not remember dates or other incidents in a picturesque manner. Memory of a person varies from one individual to another. the Appellant's counsel cited a guideline provided by the UNHCR (United Nations High Commission for Refugees, Beyond Proof: Credibility Assessment in EU Asylum Systems, May 2013,59) on why decision-makers should not base credibility findings solely on inconsistent dates or estimated dates given by a person, due to the varying levels of memory between individuals.

46. But in the instant case, the Tribunal had chosen the dates that were most consistent with the evidence presented before it. We believe that without deliberating on the relevant dates, the Tribunal would not have been able to make a proper determination. Therefore, it had to engage in that exercise. In this instance, the Tribunal employed the most sensible approach by assessing the conflicting dates against the rest of the evidence. It is our considered view that the exercise carried out by the Tribunal cannot be labeled as irrational.

47. Further we must make a note on the scope of an appeal to the Court of Appeal under the Refugee Act. Section 19(2)(d) of the Court of Appeal Act explicitly

states that an appeal to the Court of Appeal can only be made on a question of law. However, with regard to the proposed second ground of appeal, it appears that it does not strictly qualify as a question of law. As the Respondent has aptly observed in the written submissions, this proposed ground invites the Court to embark upon a merit review, which is legally impermissible.

48. The proposed second ground of appeal lacks merit based on the reasons discussed above. Therefore, we disallow the advancement of the proposed second ground of appeal.

Orders

49. The first ground of appeal is refused. Application to raise the second ground of appeal is refused.

50. 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