IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION]

Case No. 18 of 2017

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T16/00366, brought pursuant to s 43 of the *Refugees Convention Act* 1972

BETWEEN

QLN 133

Appellant

AND

THE REPUBLIC

Respondent

Before:	Crulci J
Appellants:	C. Symons
Respondent:	R. O'Shannessy
Date of Hearing:	22 June 2017
Date of Judgment:	13 October 2017

CATCHWORDS

APPEAL - *Refugees – Refugee Status Review Tribunal – Procedural Faimess – Failure to Consider Argument – Appeal ALLOWED*

JUDGMENT

1. This matter is before the Court pursuant to section 43 of the *Refugee Convention Act* 2012 ("the Act") which provides:

> **43 Jurisdiction of the Supreme Court**
>
> (1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.
>
> (2) The parties to the appeal are the Appellant and the Republic.
>
> ...

2. The determinations open to this Court are defined in section 44 of the Act:

> **44 Decision by Supreme Court on appeal**
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> (1) In deciding an appeal, the Supreme Court may make either of the following orders:
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> (a) an order affirming the decision of the Tribunal;
> (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

3. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on 26 March 2017 affirming the decisions of the Secretary of the Department of Justice and Border Control ("the Secretary") of the 21 November 2016 that the Appellants are not recognised as refugees under the 1951 Refugees Convention[1] relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees ("the Convention"), and is not owed complementary protection under the Act.

4. The Appellants filed a Notice of Appeal 4 April 2017, being beyond the 42-day time limit within which to lodge an appeal of a decision of the Tribunal under s 43 of the Act. On 25 May 2017, an Amended Notice of Appeal was filed. On the same day, orders were made by consent to the effect that the Appellant be granted leave under s 43(5) to file and serve an Amended Notice of Appeal giving complete particulars of each ground relied upon by 25 May 2017.

BACKGROUND

5. The Appellant is a married-man born in the Matale District of the Central Province of Sri Lanka. The Appellant's wife, three children, mother, and some of his siblings continue to live in Sri Lanka. He has been employed in the past as a mason and as a tractor driver.

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[1] 1951 Refugee Convention and 1967 Protocol, also referred to as "the Refugees Convention" or "the Convention".

6. The Appellant claims a fear of harm for reason of his political beliefs; as a past supporter of the Liberation Tigers of Tamil Eelam ("LTTE"); and his race, as a Tamil. The Appellant further claims a fear of harm arising from his membership of the following social groups: Sri Lankan Tamils who supported and assisted the LTTE; Sri Lankan Tamil men living in Mannar, Northern Province; Sri Lankan Tamils who have applied for asylum in other nations; and Sri Lankan Tamils previously resident in India as refugees.

7. He claims complementary protection on the basis that Nauru would breach its international obligations by returning him to Sri Lanka. This appeal focuses on the claim that Nauru would breach its international obligations by returning him to a state where there is a reasonable possibility of him experiencing discrimination in breach of the *International Covenant on the Elimination of All Forms of Racial Discrimination* ("*CERD*").

8. In March 2014, the Appellant left Sri Lanka for India, and on 27 July 2014, travelled to Australia by boat. He was transferred to Nauru on 2 August 2014.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

9. The Appellant attended a Refugee Status Determination ("RSD") Interview on 23 November 2014. The Secretary summarised the Appellant's material claims presented at that interview as follows:

    - *He is a citizen of Sri Lanka and has no right to enter and reside in any other country.*
    - *As a baby, he moved with his parents to Vavuniya and from 1990 to 2004 lived with his family in a refugee camp in Dharmapuri District, Tamil Nadu Province, India.*
    - *In 2004, he returned to Sri Lanka to marry and lived in Chettikulam, Vavuniya. In early 2010, he moved from Chettikulum to Madhu Temple in Manner District and then to Murugian Temple in Pesalai, until he fled to India in March 2014. In June 2014, he left India to seek asylum in Australia.*
    - *From 2006 to 2010, he worked as a mason for "Govindaraj" and from 2011 to 2012 as a tractor driver for the Mannar Regional Council.*
    - *Between 2006 and 2008, the LTTE would come to the applicant's family home and he and his family would provide them with food. He and his family were also asked by the LTTE to buy over the counter medicines for them. The LTTE could not buy their own because they were in uniform. The applicant and his family were heavily scrutinised by the Sri Lankan Army (SLA) travelling to and from the pharmacy. The SLA would ask them why they were buying the medicines. He and his family lied and said they were for them.*
    - *In 2010, the applicant's brother-in-law, Tharma, was visiting when the Criminal Investigation Division (CID) came to the front door. The CID asked for the applicant but he was not at home. The CID suspected Tharma was also involved with the LTTE and arrested him. No one has seen or heard since from Tharma.*
    - *From then until he left Sri Lanka, the applicant never returned home and was always in hiding. The applicant's wife fled with their children to her mother's house.*
    - *With the assistance of a church leader, the applicant found a place to live in Madhu, and his family joined him.*

- *Later in 2010, the CID came looking for him at his home in Madhu. The applicant had left for work at 5 am and the CID came at 11 am. The applicant's wife called to warn him and he fled into the jungle.*
- *In late 2010, the applicant moved his family to Pesalai, his wife's home village. The applicant's father in law found the applicant temporary employment as a tractor driver, enabling his family to remain there.*
- *The applicant remained afraid to go to work. If he saw the CID or SLA, he would hide and his colleagues would cover for him.*
- *In July 2012, the CID came looking for the applicant at his wife's parent's house while he was at work. The CID told his wife to tell the applicant they had called.*
- *The applicant took leave from work. He suspects his neighbours in Chettikulum told the CID that his wife was from Pesalai and that's why they found him there.*
- *A week later the CID returned in the evening while everyone was sleeping. His wife answered the door. The applicant overheard the conversation and saw a white van outside. He fled into the judge (sic) and remained there until he departed Sri Lanka in March 2014.*[2]

10. The Secretary accepted the following claims as credible:

- The Appellant is an ethnic Tamil, born in Matale district in the Central Province of Sri Lanka;
- He is married with three children, who are all living in Pesalai, Sri Lanka;
- The Appellant fears returning to Sri Lanka as a failed asylum seeker;
- The Appellant fears the Sri Lankan authorities will harm him on his return because he is a Tamil from the north of the country.[3]

11. However, the Secretary considered that the following claims lacked credibility:

- The Appellant was involved with the LTTE by providing food and medicines from 2006 to 2008 or in any other capacity or at any other time during his life in Sri Lanka;
- The Appellant's brother-in-law was taken by the authorities because of the Appellant's activities with the LTTE or for any other reason;
- The Crime Investigation Division ("CID"), the Army or any other branches of the Sri Lankan authorities have an ongoing interest in the Appellant as someone suspected of working for the LTTE or for any other reason.[4]

12. In making these credibility findings, the Secretary took note of the following matters:

- In his RSD statement, the Appellant claimed to have been involved with the LTTE. In the RSD Interview, he said that he had no involvement. Upon further questioning, he said that he obtained Panadol and food for the LTTE. He was unable to expand on this testimony;[5]

[2]Book of Documents ("BD") 89-90.
[3]Ibid 94-95.
[4]Ibid 95.
[5]Ibid 91.

- In his RSD statement, the Appellant said his conduct was scrutinised by the SLA. In the RSD Interview, he said he "*purchased only small amounts of medicine so they didn't notice*";[6]
- The Appellant's marriage certificate, and the birth certificate of the Appellant's son in 2006, states that the Appellant and his family were living in Pesalai, not in Chettikulum as claimed;[7]
- The Appellant was unable to provide any convincing explanation as to why the authorities waited until 2008 to question him;[8]
- The Appellant's evidence as to whether other family members were involved in supporting the LTTE was inconsistent;[9]
- Independent country information indicated that the jungle area the Appellant claims to have traversed when travelling to Madhu was heavily controlled by SLA forces;[10]
- In the RSD application, the Appellant said the CID came looking for him again in 2010. In the RSD Interview, the Appellant said this happened in 2009;[11]
- It was doubtful the CID would have simply told the Appellant's wife the Appellant must report to the CID office given the human rights abuses committed against former LTTE workers;[12]
- The Appellant's explanation as to how he evaded the SLA when escaping to Pesalai with his family by using minor roads was unconvincing;[13]
- The Appellant's claims concerning the CID's search for him in August 2012 were implausible;[14]
- The Appellant's claims to have avoided arrest between August 2012 and March 2014 were inconsistent with country information on the large number of LTTE supporters and Tamil civilians arrested;[15]
- The Appellant's claims of the CID coming to his homes without questioning his family (aside from his brother-in-law) is inconsistent with country information on the arrest of family members of suspects;[16]
- The Appellant's evidence of continuous employment is inconsistent with his claims of ongoing discrimination.[17]

13. The Secretary noted country information that human rights violations against Sri Lankan Tamils continue to occur, but said that they are mostly against persons with certain political or social profiles, and the Appellant did not have such a profile. The Secretary therefore did not accept that the Appellant would face discrimination amounting to persecution if he were to return to Sri Lanka.[18] For this reason, the Secretary further did not accept that there is a reasonable

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[6]Ibid 91.
[7]Ibid.
[8]Ibid 92.
[9]Ibid.
[10]Ibid.
[11]Ibid 93.
[12]Ibid.
[13]Ibid.
[14]Ibid.
[15]Ibid.
[16]Ibid 94.
[17]Ibid.
[18]Ibid 97-98.

possibility the Appellant would be harmed upon return as a failed asylum seeker.[19] The Appellant did not have a well-founded fear of persecution and was not a refugee.

14. For the same reasons, the Secretary was not satisfied that the Appellant would face harm if returned to Sri Lanka that would breach Nauru's international obligations and the Appellant was not owed complementary protection.[20]

REFUGEE STATUS REVIEW TRIBUNAL

15. Before the Tribunal, the Appellant gave evidence on his claims relating to his return to Sri Lanka from India, the provision of supplies to LTTE personnel, the incident in 2008 whereby the Appellant's brother-in-law was taken by the CID, the Appellant's subsequent move to Madhu, the seeking out of the Appellant by the CID in Madhu, the move to his wife's parent's home in Pesalai, and the Appellant's hiding in the jungle after the CID found him in Pesalai.[21]

16. The Tribunal considered that there were significant issues in relation to the veracity of the Appellant's evidence, and aspects of his evidence lacked consistency and plausibility. The Tribunal accepted that prolonged detention and living in stressful conditions can affect memory, but noted that there were marked inconsistencies between the Appellant's evidence given in his RSD statement and RSD interview, which occurred within two months of arrival in Nauru, and between the Appellant's statement to the Tribunal, and testimony at the oral hearing two weeks later.[22] According to the Tribunal, the discrepancies were sufficiently serious for the Tribunal to find his claims were not credible.[23]

Claims about helping LTTE

17. The Tribunal did not accept that the Appellant provided support to the LTTE over a prolonged period or this came to the attention of the Sri Lankan authorities. It also did not accept that the CID came looking for the Appellant in Chettikulam, and detained his brother-in-law when the Appellant could not be found; that the Appellant went into hiding as a consequence; or that the CID came looking for the Appellant in Madhu or Pesalai around the time he left Sri Lanka.[24]

18. In making these findings, the Tribunal considered it unlikely that ten LTTE cadres would have gone to the Appellant's house every three days for two years for supplies as claimed;[25] it was unlikely the CID would request the Appellant to present at the CID headquarters 250 km away in Colombo in exchange for the release of his brother-in-law;[26] the Appellant's testimony on moving from Chettikulam to Madhu, and then to Pesalai, was confused;[27] the Appellant said

[19]BD 99.
[20]Ibid 100.
[21]Ibid 235-237.
[22]Ibid 240-241 at [79].
[23]Ibid 242 at [87].
[24]Ibid 243 at [95].
[25]Ibid 242 at [89].
[26]Ibid at [90].
[27]Ibid 242 at [91].

he was in Madhu until mid-2010 when documentation indicates he was in Pesalai at this time for the birth of his second child;[28] the Appellant claimed to have been in hiding when his third child was born in Pesalai, however, the child's birth certificate lists the Appellant as attending the Registry some distance away to sign the certificate;[29] and at the Tribunal hearing, contrary to earlier evidence, the Appellant made no claim of the CID attending his house in Pesalai.[30]

Claim based on Tamil race

19. The Tribunal said that, while there is some ongoing discrimination against Tamils in Sri Lanka, this did not amount to persecution.[31] The Tribunal noted that UNHCR risk profiles of 2010 and 2012 suggest that being a Tamil from northern Sri Lanka did not of itself give rise to protection obligations.[32]

Claim based on being a failed asylum seeker

20. The Tribunal did not accept that there was any reasonable possibility of the Appellant being persecuted in Sri Lanka in the reasonably foreseeable future because of being a failed asylum seeker.[33] The Tribunal noted that while the Appellant is likely to be questioned at Colombo international airport upon return, such questioning and any intelligence is unlikely to establish the Appellant as a person of adverse interest to the authorities, given the Tribunal's finding that he had no links of any significance with the LTTE.[34] The Tribunal also considered that, while the Appellant may be charged with leaving Sri Lanka illegally, it was unlikely the Appellant would be mistreated during questioning or while on remand.[35]

Claim about being a Sri Lankan Tamil who has spent time in India as a refugee

21. The Tribunal was not satisfied that there was a reasonable possibility of harm befalling the Appellant upon return to Sri Lanka on the basis of spending time in India as a refugee or illegal visitor.[36] The Appellant raised no claims that the he had had any problems in Sri Lanka upon return from India as a refugee.[37]

22. The Tribunal therefore considered that the Appellant had no well-founded fear of persecution for a Convention reason, or otherwise, and the Appellant is therefore not a refugee within the meaning of the Convention.[38]

Complementary Protection

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[28] BD at [92].
[29] Ibid at [93].
[30] Ibid 242-243 at [94].
[31] Ibid 244 at [101].
[32] Ibid 243 at [100].
[33] Ibid 246 at [116].
[34] Ibid 244 at [105].
[35] Ibid 246 at [114].
[36] Ibid 247 at [120].
[37] Ibid at [118].
[38] Ibid at [121]-[122].

23. The Appellant submitted that if returned to Sri Lanka, he risks physical mistreatment; is at risk from prison conditions in Sri Lanka; and risks being subject to racial discrimination. However, referring back to the reasons given for rejecting the Appellant's claim to refugee status, the Tribunal said that there was no reasonable possibility of the Appellant facing torture, cruel, inhuman or degrading treatment or punishment and/or arbitrary deprivation of life.

24. The Tribunal concluded that returning the Appellant to Sri Lanka would not breach Nauru's international obligations and that the Appellant is not owed complementary protection.[39]

THIS APPEAL

25. The Appellant's Amended Notice of Appeal filed on 25 May 2017 reads as follows:

> 1. *The Tribunal made errors of law in its decision when it failed to afford the Appellant natural justice pursuant to s 22(b) of the Act.*
>
> *Particulars*
>
> *i. the Appellant made claims and submissions to the Tribunal that he was entitled to complementary protection for the reason that returning him to Sri Lanka would expose him to racial discrimination of a kind prohibited by the International Convention on the Elimination of All Forms of Racial Discrimination (CERD claims and submissions);*
> *ii. the Tribunal was required to consider the CERD claims and submissions as they were substantial, clearly articulated and relied upon established facts;*
> *iii. the Tribunal did not consider or advert at all to the CERD claims and submissions in its decision;*
> *iv. the failure of the Tribunal to consider or advert at all to the CERD claims and submissions constituted a denial of the Appellant's right to natural justice pursuant to s 22(b) of the Act.*
>
> 2. *The Tribunal erred on a point of law when it constructively failed to exercise its jurisdiction or failed to carry out its statutory task by failing to lawfully consider a claim made by the Appellant.*
>
> *Particulars*
>
> *i. the Appellant made the CERD claims and submissions;*
> *ii. the Tribunal failed to consider, or even refer to the CERD claims and submissions;*
> *iii. the Tribunal therefore committed an error of law.*

26. In Ground 1, the Appellant submits that a failure by a Tribunal to consider a submission worthy of serious consideration amounts to a denial of procedural fairness. The Appellant draws the Court's attention to *Dranichnikov v Minister for Immigration and Multicultural Affairs* ("*Dranichnikov*"), in which the High Court of Australia characterised a failure by the Refugee Review Tribunal ("RRT") to respond to a "*substantial, clearly articulated argument relying upon established*

[39] BD at [127].

facts" as a failure to accord the party procedural fairness and a "*constructive failure to exercise its jurisdiction*".[40]

27. The Republic responds by submitting that the Appellant made no claim that could have engaged Nauru's obligations under the *CERD* (see [32]-[33]), or, alternatively, the Tribunal's findings of fact were sufficient to dispose of any claim relating to Nauru's obligations under the *CERD*.

28. In any event, there was no practical unfairness to the Appellant in that the alleged failure did not deprive the Appellant of the opportunity of a positive outcome,[41] because the Appellant was not owed complementary protection as a result of any obligation owed by Nauru under the *CERD*, or the opportunity to be heard.[42]

29. In Ground 2, the Appellant submits that, in order to discharge its statutory function, the Tribunal is required to consider the claim or claims (including their component integers) advanced by an Applicant for review. As the Appellant's claims and submissions regarding the *CERD* were not mentioned in the Tribunal Decision Record, it can be inferred that those claims and submissions were not considered by the Tribunal to be material. According to the Appellant, a line of Australian authority suggests that the Tribunal's reasons reflect what the Tribunal considered to be the material questions of fact, and may therefore shed light on whether the Tribunal took into account an irrelevant consideration, or, as the Appellant contends, failed to take into account a relevant consideration.[43]

30. The Republic responds by submitting that there was no failure of the Tribunal to discharge its statutory function because the *CERD* submission was not relevant to the application for review as the Appellant made no claim that could have engaged Nauru's obligations under the *CERD*. Alternatively, the Republic argues that the Tribunal's findings of fact were sufficient to dispose of any claim relating to Nauru's obligations under the *CERD*.

31. However in the written submissions, the Republic submitted "*the alternative grounds of the appeal, and the alternative bases on which it is defended, are mere matters of form*". The critical issue, according to the Republic, is whether Nauru would breach an international obligation under the *CERD* by returning the Appellant to Sri Lanka, and, if so, whether that claim was disposed of by the Tribunal's findings in relation to complementary protection, i.e., whether the Appellant would face a reasonable possibility of harm prohibited by the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("*CAT*"), or the *International Covenant on Civil and Political Rights* ("*ICCPR*").

32. The Republic submits that the Appellant has not identified an international obligation under the *CERD* that may be breached if Nauru was to return the

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[40] *Dranicknikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 ("*Dranichnikov*") at [24]-[25].
[41] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 14 [37].
[42] *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 342 at [59].
[43] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [37] and [69] and *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114 ("*MZYTS*") at [49].

Appellant to Sri Lanka. Rather, the Appellant appears to assert that the *CERD* requires that the Appellant not be returned to Sri Lanka because he would be:

a. exposed to "*racial discrimination of a kind prohibited by the CERD*";
b. exposed to the "*perpetuation of discriminatory policies*";
c. deprived of "*specified rights, including economic, social and cultural rights*" (though those rights are not specified);
d. exposed to "*racial discrimination against Tamils in Sri Lanka*", including "*interrogation*", "*conviction and financial penalty*", "*surveillance and continuing military presence*", and "*Sinhalese economic growth based on Tamil dispossession*".

33. According to the Respondent, secondary sources of international law, including General Recommendations by the United Nations Committee on the Elimination of Racial Discrimination ("UNCERD"), indicate that States Parties are only required to refrain from returning non-citizens to another state where the non-citizens would be at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment. Concluding observations of the UNCERD on reports submitted by States Parties are consistent with these recommendations. It is therefore apparent that none of the obligations owed under the *CERD* are relevant to the principle of *non-refoulement*, which is upheld in part through the concept of complementary protection. Notably, Art 5(b) of the *CERD* does not require Nauru to "*guarantee the right of everyone... to equality before the law*" in countries other than Nauru. This being the case, the only relevant obligation imposed by the *CERD* is that the *non-refoulement* obligations must be observed by Nauru without distinction as to race, colour or national or ethnic origin.

34. The Appellant contends that the issues identified at [31] do not arise on the appeal and were issues that were not considered by the Tribunal. The Court would also be engaging in impermissible merits review to determine whether the Appellant's claims engaged Nauru's obligations under the *CERD*. In any case, the Appellant submits that a proper construction of Nauru's obligations under the *CERD* encompasses the obligation not to return the Appellant to Sri Lanka where he would be exposed to the treatment identified at [32].

35. According to the Appellant, a reading of Art 5 in the context of the *CERD* as a whole suggests that the obligation on a State party to guarantee the right of everyone to equality before the law in the enjoyment of a prescribed right, comprehends an obligation to take steps to prevent the person's enjoyment of the right being compromised in the country to which he or she is to be returned. In addition, this reading of Art 5 is consistent with the purpose of the *CERD* as a Convention with humanitarian character, being to "*safeguard the very existence of certain human groups and... to confirm and enforce the most elementary principles of morality*".[44] The construction of the *CERD* promulgated by the Republic conflicts with this purpose. Further, recommendations and concluding observations of the UNCERD do not suggest that the principle of *non-*

[44] Sir Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement: Opinion" in Erika Fuller et al (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2001) 104.

refoulement should be limited such that persons can be "refouled" under customary international law to states where they may experience treatment prohibited by the *CERD*.

CONSIDERATIONS

36. At the hearing before the Court, the Appellant disagreed in strong terms with the submissions made by the Respondent in relation to the *CERD* submissions, and sought time to reply to these. The Respondent did not object to the Appellant having additional time to formulate their response. In light of this the Court agreed to allow the Appellant to file additional submissions and left if open for the Respondent to file submissions in reply to the new submissions. The Court has considered all the submissions before it when determining the appeal.

Ground 1

37. The relevant principles to be taken into account when considering whether a tribunal failed to deal with an Applicant's submission are clear.[45] As relied on by the Appellant, the seminal statement of authority comes from the Australian High Court case of *Dranichnikov*, in which Gummow and Callinan JJ said "*To fail to respond to a substantial, clearly articulated argument relying on established facts was at least to fail to accord Mr Dranichnikov natural justice*".[46] This statement has been frequently cited by, and approved of, in Australian authorities.[47]

38. The *CERD* submission (that the Appellant was entitled to complementary protection because returning him to Sri Lanka would expose him to racial discrimination of a kind prohibited by the *CERD*), was clearly articulated in the pre- and post-hearing submissions by the Appellant's representative.[48]

39. In *SZSSC v Minister for Immigration and Border Protection & Anor* ("*SZSSC*"), Griffiths J said in relation to the Tribunal's duty to deal with "*substantial*" arguments:

> "*In my opinion, the duty to review obliges the tribunal to consider and deal with submissions of substance which are clearly articulated. As noted above, in assessing whether a submission is one of substance it may be relevant to take into account whether it relies upon an established fact, but that is not the only way in which that requirement may be met. Substantiality might also be established by the fact that, for example, a submission has been made in direct response to an important issue which the tribunal has raised which bears upon the state of the satisfaction which it is required to meet under s 65 of the Act.*"[49]
> (emphasis added)

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[45] *AXU15 v Minister for Immigration and Border Protection* [2017] FCA 850 at [33] (per Besanko J).
[46] *Dranicknikov*, Supra note 40 at [24].
[47] See, eg, *SZSSC v Minister for Immigration and Border Protection & Anor* (2014) 317 ALR 365 ("*SZSSC*") at [75]; *MZAPB v Minister for Immigration and Border Protection* [2016] FCA 1393 ("*MZAPB*") at [6]; *MZAES v Minister for Immigration and Border Protection* [2015] FCA 1133 ("*MZAES*") at [66].
[48] BD 137-138 at [96]-[97] (pre-hearing submissions); BD 213 at [50] (post-hearing submissions).
[49] *SZSSC*, Supra note 47 at [81].

40. The Tribunal put to the Appellant that the treatment of Tamils in Sri Lanka has improved in recent years, such that the Appellant would be unlikely to be persecuted because of his race. At the Tribunal hearing, the following exchange occurred:

> TRIBUNAL MEMBER: But it's not clear, and I don't think we've seen any evidence, to suggest that simply being a Tamil man from Mannar gives rise to a well-founded fear of being persecuted.
>
> TRIBUNAL MEMBER: Sir, did you – do you have a fear on this ground, or you think that just because you were a Tamil living Mannar this would make you – give you some sort of risk if you returned?
>
> THE INTERPRETER: Yes.
>
> TRIBUNAL MEMBER: Why? Why would you be at risk? Because you had been living in Mannar?
>
> THE INTERPRETER: If CID comes to Mannar there will be problems, or because of that I am very fearful.[50]

41. The *CERD* submission, which frames discrimination as a basis for securing complementary protection, as opposed to refugee status, may be seen as responding to this issue raised by the Tribunal.

42. The *CERD* submission may also be construed as responding to Secretary's statement that "*Although, I accept discrimination occurs against Tamils in Sri Lanka, I do not accept that the applicant would face discrimination amounting to persecution if he were to return to Sri Lanka*".[51] In the pre- and post-hearing submissions to the Tribunal, the Appellant's representative submitted that, even if the discrimination the Appellant would experience upon return to Sri Lanka does not amount to persecution, it would amount to prohibited treatment under the *CERD*, and therefore enlivens Nauru's complementary protection obligations. This is also indicative that the *CERD* submission was one of substance.[52]

43. The authorities of *MZAPB v Minister for Immigration and Border Protection*[53] and *MZAES v Minister for Immigration and Border Protection* ("*MZAES*")[54] suggest that a fact is an "*established fact*" if it has been testified to by the Appellant, and evaluated by the Tribunal.[55] At [101] of the Decision Record, the Tribunal said as follows:

> "*While the Tribunal accepts that there is some ongoing discrimination against Tamils in Sri Lanka on the basis of their race, it is not satisfied that there is a reasonable possibility of the applicant experiencing serious or significant harm capable of amounting to persecution for this reason if he returns to Sri Lanka in the reasonably foreseeable future, whether this is characterised as being on the basis of his race, or*

[50] BD 190 ln 34 – BD 191 ln 2. See also BD 85 ln 24 – BD 186 ln 2; BD 195 ln 28 – 36.
[51] Ibid 98.
[52] *MZAPB*, Supra note 47 at [10].
[53] Ibid.
[54] *MZAES*, Supra note 47.
[55] *MZAPB*, Supra note 47 at [15]; *MZAES*, Supra note 47 at [67].

for reason of his membership of a particular social group comprising Sri Lankan Tamil men living in Mannar, Northern Province."
(emphasis added)

44. At [125] of the Decision Record, the Tribunal made findings with respect to complementary protection, and said as follows:

> "*... To the extent that the applicant may be said to be claiming to be at risk of harm not amounting to persecution for those reasons, the Tribunal acknowledges that the country information indicates that many Tamils do continue to experience discrimination in Sri Lanka. However, having regard to both that country information, and what the Tribunal accepts of the applicant's own claims and past experiences, it is not satisfied that there is a real risk that he would face cruel, inhuman or degrading treatment in Sri Lanka for reason of his race, or indeed for any other reason.*"
> (emphasis added)

45. The Republic submits that the *CERD* submission is not supported by "*established facts*" because of the above findings that the ongoing discrimination did not give rise to a reasonable possibility the Appellant would suffer persecution, and that the discrimination did not constitute cruel, inhuman or degrading treatment.[56]

46. However, it should be noted that the *CERD* submission does not assert that the discrimination likely to be suffered by the Appellant amounts to persecution, or even cruel, inhuman or degrading treatment (within the meaning of the *CAT* or *ICCPR*), but rather discrimination prohibited by the *CERD*. The above statements of the Tribunal reflect their acceptance that Tamils suffer discrimination in Sri Lanka, thereby providing a factual foundation for the *CERD* submission.

47. While the Tribunal did not make any specific findings as to the likely form of the discrimination, the authorities establish that it is not necessary to show that all the underlying facts are "*established*" in all cases.[57] In *SZSSC*, Griffiths J said:

> "*First, I do not accept that procedural fairness occurs only if the tribunal has failed to deal with a substantial and clearly articulated submission which relies upon an established fact.*
> ...
>
> *It may well be that, in a particular case, a submission which has not been evaluated will not be seen to be a submission of substance if it does not rely on an established fact but, given the wide variety of potential circumstances in which such an issue can arise, it is imprudent to state an inflexible principle in this regard."*[58]
> (emphasis added)

48. The Republic acknowledges that the Tribunal did not deal with submissions made with respect to the *CERD*, or any obligation owed by Nauru under the *CERD*, in the Decision Record.[59] In *SZSSC*, Griffiths J said that, in ascertaining whether a tribunal considered a submission, it is relevant to consider the manner in which the reasons describe and deal with submissions, and the structure of the

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[56] Respondent's submissions at [38]-[40].
[57] *MZAES*, Supra note 47 at [67]; *SZSSC*, Supra note 48 at [79].
[58] *SZSSC*, Supra note 47 at [78]-[79]. See also *MZAES*, Supra note 47 at [67].
[59] Respondent's Submissions at [14]

reasons.[60] Given the structure of the Decision Record, if the Tribunal considered the *CERD* submission, it would likely have been described and dealt with under the "Complementary Protection" section. However in this section, racial discrimination is only considered insofar as it might amount to torture, cruel, inhuman or degrading treatment (i.e. whether it would breach the *CAT* or *ICCPR*), and not insofar as it might deprive the Appellant of equality before the law in his enjoyment of an economic, social or cultural right (i.e. whether it would breach the *CERD*).

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

Ground 2

50. The error of constructive failure to exercise jurisdiction alleged by the Appellant arises from the same conduct of the Tribunal as with Ground 1. Australian authorities establish that, as well as constituting a denial of procedural fairness, the failure to respond to a substantial, clearly articulated argument relying upon established facts also constitutes a constructive failure to exercise jurisdiction.[61] In *SZSSC*, Griffiths J said in relation to findings by the High Court in *Dranichnikov*, and the Full Court of the Federal Court in *Minister for Immigration and Border Protection v MZYTS*[62]:

> *"The error as established in Dranichnikov was not merely described as a denial of natural justice (or procedural unfairness). It was also described as a constructive failure to exercise jurisdiction: see at [25] per Gummow and Callinan JJ and, to similar effect, at [95] per Hayne J. It might also be noted that at [44] of MZYTS, the Full Court described the absence of any evaluation by the tribunal of the visa applicant's submission and updated supporting country information as signifying, in the context of the tribunal's statutory task, "a constructive failure to exercise jurisdiction".*[63]
> (emphasis added)

51. Similarly, in *MZAES*, Murphy J considered that:

> *"Another way of understanding the Tribunal's constructive failure to exercise its jurisdiction is by reference to its failure to consider a "substantial, clearly articulated argument relying upon established facts" that would establish a well-founded fear of persecution if accepted. It is established that such a failure may amount to a failure to afford procedural fairness or a failure to exercise jurisdiction: Dranichnikov v Minister for Immigration and Multicultural Affairs..."*[64]

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[60] *SZSSC*, Supra note 47 at [81], [83].
[61] *Dranicknikov*, Supra note 40 at [25]; *SZSSC*, Supra note 47 at [80], [81] (d); *MZAES*, Supra note 47 at [66].
[62] *MZYTS*, Supra note 43.
[63] *SZSSC*, Supra note 47 at [80], [81] (d).
[64] *MZAES*, Supra note 47 at [66].

52. In *Htun v Minister for Immigration and Multicultural Affairs*,[65] the Full Court of the Federal Court found that a Tribunal fails to exercise its jurisdiction by making a decision without having considered all the claims. Allsop J, with whom Spender J agreed, said:

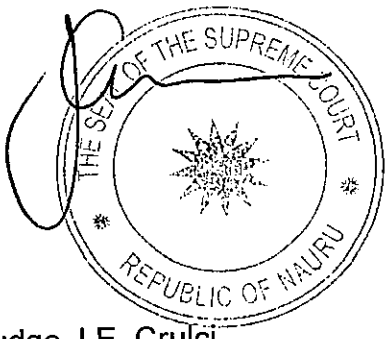
> "*The requirement to review the decision under s 414 of the Migration Act 1958 (Cth) (the Act) requires the Tribunal to consider the claims of the applicant. To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on.*"[66]
> (emphasis added)

53. The above statement of authority has been cited and approved in a number of other recent decisions by the Federal Court in Australia.[67] In light of these authorities, and the determination in relation to ground one (that the Appellant advanced a substantial, clearly articulated argument relying upon established facts within the meaning of *Dranichnikov*, and that the Tribunal failed to consider that argument), the Court finds that the Tribunal also failed to exercise jurisdiction. Ground two of the appeal is upheld.

54. In the light of the above determinations, the Court does not find it necessary to consider whether Nauru has international obligations under *CERD* in relation to complementary protection.

ORDER

55. (1) The Appeal is allowed.
    (1) The decision of the Tribunal TFN T16/00366 dated 26 March 2017 is quashed.
    (2) The matter is remitted to the Refugee Status Review Tribunal under section 44(1)(b) for reconsideration according to law.



Judge J.E. Crulci
Dated 13 October 2017.

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[65] *Htun v Minister for Immigration and Multicultural Affairs* (2001) 233 FCR 136 at [42].
[66] Ibid.
[67] *SZVRA v Minister for Immigration and Border Protection* [2017] FCA 121 at [35] (per Markovic J); *CDC15 v Minister for Immigration and Border Protection* [2017] FCA 18 at [28] (per Charlesworth J); *AQS15 v Minister for Immigration and Border Protection* [2016] FCA 1362 at [41] (per Perry J).