IN THE SUPREME COURT OF NAURU

AT YAREN

Case Nos. 32, 33, 34, 35 of 2016

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T15/00159, T15/00162, T15/00164. T15/00166, brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

XND 012, XND 035, XND 036 Appellants

XND 037

AND

THE REPUBLIC Respondent

Before: Judge Marshall

Appellant: Julian Gormly
Respondent: Angel Aleksov

Date of Hearing: 22 February 2018
Date of Judgment: 8 May 2018

CATCHWORDS

APPEAL – failure to consider an integer of the Appellants' claims – whether the Tribunal considered if the Appellants would face racial discrimination amounting to degrading treatment in the circumstances – whether the Tribunal considered evidence in support of conversion to Christianity – APPEAL DISMISSED.

JUDGMENT

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

> **43 Jurisdiction of the Supreme Court**
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> (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.
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> (2) The parties to the appeal are the Appellant and the Republic.
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> ...

2. The determinations open to this Court are defined in s 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 decisions on the review applications of XND 035, XND 036, XND 012, and XND 037 on 23 April 2016. The Tribunal affirmed the decisions of the Secretary of the Department of Justice and Border Control ("the Secretary") of 7 October 2015 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 are not owed complementary protection under the Act.

4. The Appellants filed Notices of Appeal on 14 October 2016 and the daughter, XND 037, filed an Amended Notice of Appeal on 22 January 2018. Orders were made granting the Appellants extensions of time within which to commence an appeal under s 43(3) of the Act on 15 September 2016.

BACKGROUND

5. The Appellants are a family from Iran consisting of a father (XND 035), mother (XND 036), son (XND 012), and daughter (XND 037). The family are of Ahwazi Arab ethnicity. They lived in Ahwaz, Iran, and are part of the Khasrai tribe. The father, XND 035, operated his own supermarket for seven years before leaving Iran, and from 2010, the son, XND 012, operated a tyre repair business. The mother, XND 036 obtained a primary school education up to Grade 5, but has

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

never been in paid employment. The daughter, XND 037, has completed secondary and tertiary education, and found employment as a teacher at a private primary school.

6. The family, variously, claim to fear harm or serious discrimination based on their Ahwazi Arab ethnicity, their conversion from Islam to Christianity or being the parents of converts to Christianity, their gender, and being failed asylum seekers. The daughter also fears being forced into an arranged marriage with another member of the Khasrai tribe, after refusing a marriage proposal from a tribal member. The other family members claim a related fear of harm on the basis of being members of the particular social groups of "Arab tribal members who have defied tribunal customs and elders" or "Arab tribal members who have defied the customs, traditions and expectations of their tribe or family".

7. The family departed Iran for Australia in June 2013, and travelled via Malaysia and Indonesia. The family arrived on Christmas Island on 27 August 2013 and were transferred to Nauru on 22 March 2014.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

8. The Appellants attended Refugee Status Determination ("RSD") Interviews on 8 and 9 September 2014. The Appellants all said that they had experienced systematic discrimination in Iran as Ahwazi Arabs and made the following claims:

    - Ahwazi Arabs are discriminated against by the Iranian government and people when it comes to accessing education, employment and public services, such as heath care and owning their own businesses, and are not able to speak Arabic and practice their religion and culture freely;[2]
    - In 2012, the family was celebrating *Eid* publicly in Arab costume when the Basij interrupted the celebration and arrested people;[3]
    - In 2013, the authorities confiscated the family's satellite dish, which they used to watch Arab programs;[4]
    - The father owned a supermarket and local Persian council members would take things without paying;[5]
    - In 2013, men from their tribe came to the house and told the father that the daughter was to marry within the tribe. The father and daughter rejected this proposal. About six weeks later, the men from the tribe returned and threatened the family;[6]
    - The daughter, as a single woman of the Ahwazi Arab ethnicity, has faced ongoing harassment by Persian men when walking the streets, and she fears she may be targeted for "organ harvesting";[7]
    - The daughter is discriminated against under Iranian law and in her employment opportunities because of her gender.[8]

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[2] XND 012: BD 205; XND 035: BD 221; XND 036: BD 239; XND 037: BD 254.
[3] XND 012: BD 205; XND 035: BD 222.
[4] XND 012: BD 205; XND 035: BD 222.
[5] XND 035: BD 222.
[6] XND 012: BD 206; XND 035: BD 222; XND 037: BD 254.
[7] XND 037: BD 254.
[8] XND 037: BD 254.

9. When asked to expand upon these claims, the Appellants provided the following details:

    - The father had to pay bribes for the son to be accepted into school, and the son was prevented from speaking Arabic, which resulted in him getting bad grades;[9]
    - When the son could not find work, the father bought him a car to start his own taxi service, although he was not able to get a taxi licence and was regularly fined for operating the service illegally;[10]
    - After he ceased operating the taxi service, he tried to open a small tyre repair business but the authorities closed it down because it was deemed to be unsafe and not a registered business;[11]
    - The father and son were unable to practice their culture and religious beliefs openly in Arabic. When there were celebrations such as *Eid* and *Nowruz*, and the Arabs dressed in their traditional dress, the Basiji would try to break up the celebrations. When the Arabs would go to pray, the Basiji would also come and arrest and detain people, although they had never been detained;[12]
    - The father was unable to pray at the mosque in Arabic, and was harassed by the Basiji and mullah and told to pray in Farsi;[13]
    - The father constantly needed to bribe government and local council officials to access public services such as health care, and to obtain a passport;[14]
    - The father was denied a licence to sell goods on the pavement outside his store, and was constantly fined by the local council for this;[15]
    - The father lost his job along with the other Ahwazi Arabs after the company he worked for was taken over by the government. Ahwazi Arabs had no chance of promotion when employed and were paid far less than Persians;[16]
    - After finishing her education, the daughter went to job interviews and was told by prospective employers that because she was a woman and an Arab she needed to have connections to get a job.[17]

10. The family also claimed that they would experience harm on return to Iran on account of being members of the particular social group of "Arab tribal members who have defied tribunal customs and elders", and their status as failed asylum seekers. The mother and daughter further claimed they would be exposed to harm upon return because of their membership of the particular social group of "women in Iran", with the daughter also claiming she would be exposed to harm as a "Single Ahwazi Arab Woman from Iran", and that she would be forced into an arranged marriage.

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[9] XND 012: BD 207.
[10] XND 012: BD 207.
[11] XND 012: BD 207.
[12] XND 012: BD 208; XND 035: BD 224.
[13] XND 035: BD 223.
[14] XND 035: BD 224.
[15] XND 035: BD 224.
[16] XND 035: BD 225.
[17] XND 037: BD 255.

11. The Secretary found the Appellants' accounts of their profiles and experiences to be generally detailed, consistent and plausible, and, on balance, capable of being believed. The material details set out at [8] above were therefore accepted as true.[18]

12. While acknowledging that the family was subject to low-level discrimination,[19] the Secretary noted that they were not denied the rights to an education,[20] to practice their religion,[21] to access healthcare,[22] to operate businesses,[23] to own their own home,[24] to obtain a passport or drivers licence,[25] and were able to dress in their traditional Arabic dress privately.[26] As such, the Appellants had not been denied their fundamental rights or subject to discrimination amounting to persecutory conduct on account of their Ahwazi Arab background.[27]

13. In relation to the fear of harm on the basis of membership of the particular social groups arising from the daughter's refusal to marry within the tribe as demanded by the uncle, the Secretary took into account that the family had had no interactions with the uncle since February 2013, and there was no evidence that other tribal members were involved, or the matter became a tribal issue.[28] The Secretary also took into account these matters in considering the daughter's claim that she would be forced to marry her uncle's son, or be subject to an honour killing for refusing to marry.[29] The Secretary also noted country information in relation to this claim suggesting that honour killings in Iran usually involved the husband killing his wife or male family members killing their daughter or sister for having a relationship outside of marriage, and said that this is not relevant to the daughter's situation.[30] The Secretary concluded that the tribe would not physically harm the father, mother, or son for defying tribal customs, or that the daughter would be forced to marry or subject to an honour killing.[31]

14. Regarding the mother and daughter's fear of harm as women from Iran, the Secretary recognised that discrimination against woman is well documented in that education, employment, dress code, legal right and travel is restricted. However, access to services such as medical attention, ownership of property or a business and education is not denied.[32] The mother had been able to access some education and health care, and provide support to her family as a wife and mother, and the daughter had obtained tertiary education, found employment as a teacher at a private primary school, and exercised her right to choose whether

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[18] XND 012: BD 206; XND 035: BD 222; XND 036: BD 240; XND 037: BD 255.
[19] XND 012: BD 211; XND 035: BD 228; XND 036: BD 243; XND 037: BD 261.
[20] XND 012: BD 211; XND 035: BD 226; XND 036: BD 248; XND 037: BD 261.
[21] XND 012: BD 211; XND 035: BD 226.
[22] XND 035: BD 226; XND 036: BD 243.
[23] XND 012: BD 211; XND 035: BD 226; XND 036: BD 243.
[24] XND 012: BD 211; XND 035: BD 228; XND 036: 243; XND 037: BD 261.
[25] XND 012: BD 215; XND 035: BD 226; XND 036: BD 248; XND 037: BD 265.
[26] XND 012: BD 211; XND 035: BD 228; XND 037: BD 261.
[27] XND 012: BD 215; XND 035: BD 232; XND 036: BD 248; XND 037: BD 265.
[28] XND 012: BD 213; XND 035: BD 229; XND 036: BD 244.
[29] XND 037: BD 257.
[30] XND 037: BD 258.
[31] XND 012: BD 213; XND 035: BD 229; XND 036: BD 244; XND 037: BD 258.
[32] XND 036: BD 245; XND 037: BD 261.

to marry.[33] The mother and daughter had therefore not been subject to discrimination amounting to persecution on account of being women in Iran.[34]

15. Regarding the daughter's fear of harm due to her membership of the social group of "Single Ahwazi Women from Iran", the Secretary noted that on her RSD statement, the daughter said she did not feel safe walking to University on her own, and on one occasion a man tried to kidnap her so he could rape her and sell her kidneys. However, at the RSD Interview, the daughter said this did not happen to her, rather, she had read and heard about such incidents occurring. The Secretary therefore rejected the daughter's claim that Persian men would target her as an Arab woman for kidnapping, rape, or to have her organs stolen.[35]

16. While acknowledging reports of mistreatment and detention of failed asylum seekers upon return to Iran, the Secretary found that the reports indicated that such persons also had some degree of an anti-government profile.[36] The family departed Iran lawfully using their own passports, their applications for asylum in Nauru have been conducted in a confidential manner, and they had never been members of any political organisation or group.[37] Therefore, while the family may be questioned upon arrival in Iran, they would not be subject to harm due to their status as failed asylum seekers.[38]

17. Having made these findings, the Secretary considered that the family does not face a reasonable possibility of harm or discrimination amounting to persecution if returned to Iran, and their fear of harm was not well-founded. The Secretary found that the family was therefore not eligible for refugee status under the Convention.[39] For the same reasons the Secretary found their fear of harm not to be well-founded, the Secretary found that the family was also not eligible for complementary protection.[40]

REFUGEE STATUS REVIEW TRIBUNAL

18. The Appellants appeared before the Tribunal on 5 February and 7 February 2016. The family advanced similar claims as those put before the Secretary regarding their fear of persecution on ethnic and gender based grounds, as well as their membership of particular social groups. The son and daughter added that they feared harm upon return due to their conversion from Islam to Christianity while on Nauru. The father and mother indicated that they feared harm as a result of their children's conversion.

19. The Tribunal noted country information regarding the mistreatment of Ahwazi Arabs in Iran, including a crackdown in Ahwazi Arab areas following the June 2009 election, and arrests during protests in April 2011, and accepted that

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[33] XND 036: BD 246; XND 037: BD 262.
[34] XND 036: BD 246; XND 037: BD 262.
[35] XND 037: BD 259.
[36] XND 012: BD 213; XND 035: BD 230; XND 036: BD 247; XND 037: BD 263.
[37] XND 012: BD 213; XND 035: BD 230; XND 036: BD 247; XND 037: BD 263 – 264.
[38] XND 012: BD 213; XND 035: BD 231; XND 036: BD 247; XND 037: BD 264.
[39] XND 012: BD 215; XND 035: BD 232; XND 036: BD 249; XND 037: BD 265.
[40] XND 012: BD 216; XND 035: BD 233; XND 036: BD 249; XND 037: BD 266.

Ahwazi Arabs are discriminated against in relation to employment, housing and education.[41] The Tribunal accepted that there were restrictions on speaking Arabic, that Arabs may receive less favourable treatment in public if they wore Arab clothes,[42] that the daughter faced discrimination in obtaining teaching work in a government school, and the mother and daughter were harassed and intimidated on occasion.[43] However, the Tribunal found that this treatment, while discriminatory, did not amount to persecution within the meaning of the Convention.[44] The Appellants' testimony indicated that they were able to exercise their basic rights – the father was able to own land, a house, and premises from which he operated a business,[45] and could pray in Arabic at the back of the mosque,[46] the son was able to find employment so that he could buy a motorbike and travel outside of Iran for pilgrimages and holidays,[47] and the daughter was able to obtain teaching work at a private school.[48]

20. In relation to the claimed threat of harm from their tribe because of the daughter's refusal to enter an arranged marriage with a tribal member, the Tribunal identified a number of inconsistencies between the Appellants' evidence, including why the threats from the uncle had not been mentioned previously, whether the threats commenced four months before departure from Iran as initially claimed or closer to the time of departure, and whether threats were made when the uncle visited the family home.[49] Due to these inconsistencies and shifts in the Appellants' accounts the Tribunal did not accept that the daughter refused a marriage proposal from a tribal member, and this resulted in threats being geared towards the family. As with the Secretary, the Tribunal therefore found that the Appellants had no well-founded fear of persecution due to their membership of the particular social groups of "Arab tribal members who have defied tribunal customs and elders", or "Arab tribal members who have defied the customs, traditions and expectations of their tribe or family".[50]

21. The Tribunal noted that the son and daughter claimed to fear of harm on the basis of their conversion to Christianity for the first time at the hearing. The Tribunal was lead to doubt whether their conversion was genuine because of a number of factors, including the son's claim that he did not have a bible and did not know whether his sister had one, the son and daughter did not start attending church until late 2015 when they claimed to have developed an interest in

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[41] XND 012: BD 557 at [41]; XND 035: BD 585 at [41]; XND 036: BD 610 at [37]; XND 037: BD 634 at [32].
[42] XND 012: BD 557 at [43]; XND 035: BD 586 at [42]; XND 036: BD 610 at [38]; XND 037: BD 634 at [32].
[43] XND 012: BD 558 at [48]; XND 035: BD 586 at [45]; XND 036: BD 611 at [40]; XND 037: BD 634 at [33].
[44] XND 012: BD 558 at [50]; XND 035: BD 586 at [46]; XND 036: BD 611 at [41]; XND 037: BD 634 at [33].
[45] XND 012: BD 557 at [41]; XND 035: BD 585 at [41]; XND 036: BD 619 at [37]; XND 037: BD 634 at [32].
[46] XND 012: BD 585 at [42].
[47] XND 012: BD 557 at [42]; XND 035: BD 585 at [41].
[48] XND 036: BD 611 at [40]; XND 037: BD 634 at [32].
[49] XND 012: BD 561 – 562 at [65]; XND 035: BD 589 – 591 at [67]; XND 036: BD 613 – 615 at [56]; XND 037: BD 637 – 639 at [50].
[50] XND 012: BD 565 at [77]; XND 035: BD 594 at [77]; XND 036: BD 617 at [67]; XND 037: BD 641 at [55].

Christianity on Christmas Island in 2013, the son was baptised the first time, and the daughter the fifth time, they attended the Menen church service, they were baptised ten days after receiving their negative RSD decisions, the lack of serious discussion between the parents and children regarding their conversion, and their lack of understanding of the Christian faith (see [43] below).[51] Accordingly, the Tribunal found that the son and daughter did not renounce their Islamic faith, and therefore had no well-founded fear of persecution on the basis of their religion. Following on from this, the father and mother held no well-founded fear of persecution due to being parents of converts to Christianity.[52]

22. In respect of the claimed fear of harm due to being failed asylum seekers, the Tribunal, as with the Secretary, considered that as the family departed Iran lawfully and would be returning using their own passports, and none of the family members had adverse political profiles, the Appellants would not be subject to anything more than routine security checks and questioning upon arrival in Iran.[53] Concerning the female Appellants' fear of harm on the basis of their gender, the Tribunal gave weight to the facts that the mother was able to raise children who are now adults, the mother has not been the victim of domestic violence and does not fear such violence in the future, the daughter is not at risk of being the victim of an honour killing or an arranged marriage, the daughter has been tertiary educated and employed as a teacher, and both women dress modestly and had no difficulty conforming with the dress code.[54] This being the case, the Appellants also held no well-founded fear of persecution on these grounds.

23. The Tribunal proceeded to conclude that the Appellants were not refugees within the meaning of the Convention.[55] With respect to complementary protection, the Appellants' representative submitted that the harm feared by the Appellants in Iran constituted torture, cruel, inhuman or degrading treatment or arbitrary deprivation of life, and they were therefore owed protection under the international treaties ratified and signed by Nauru. The Tribunal concluded that, neither the questioning the Appellants may be subject to upon return as failed asylum seekers, nor any discrimination they may face as Arabs or women, would amount to torture so to engage Nauru's international obligations.[56] The Appellants were not owed complementary protection.[57]

THIS APPEAL

24. The first ground in the Notice of Appeal filed in respect of each Appellant reads as follows:

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[51] XND 012: BD 569 at [100]; XND 037: BD 649 – 650 at [100].
[52] XND 035: BD 595 at [81]; XND 36: BD 618 at [71].
[53] XND 012: BD 574 at [122]; XND 035: BD 595-BD 598 at [86], [95]; XND 036: BD 624 at [101]; XND 037: BD 651 – 654 at [108], [118].
[54] XND 036: BD 620 at [85]; XND 037: BD 643 at [64].
[55] XND 012: BD 574 at [126]; XND 035: BD 599 at [99]; XND 036: BD 624 at [105]; XND 037: BD 654 at [121].
[56] XND 012: BD 575 at [130]-[133]; XND 035: BD 599 – 560 at [104]-[107]; XND 037: BD 655 – 656 at [126]-[129].
[57] XND 012: BD 576 at [135]; XND 035: BD 600 – 601 at [111]-[113]; XND 037: BD 656 at [131].

1. *The Tribunal constructively failed to exercise its jurisdiction in that it did not consider an integer of the appellant's claims for complementary protection, namely that the discrimination on the grounds of race experienced and faced by the appellant on return of itself amounted to "degrading treatment or punishment" under Article 7 International Covenant on Civil and Political Rights (ICCPR) because this discrimination was on the basis of race and was therefore and in the circumstances inherently degrading. This is to be distinguished from the quantitative assessment of the severity of the differential treatment actually meter out to Arabs and to the appellant in his own past experience (considered in isolation from its racial basis) to which the Tribunal limited its review.*

25. The daughter's Amended Notice of Appeal contains a second ground that reads as follows:

2. *The Tribunal constructively failed to discharge its review obligations under s 22(b) of the Act to act according to the substantial merits of the case in that it misunderstood and failed to assess evidence which was highly relevant to the appellant's claims to have had a deep interest in Christianity since being on Christmas Island and to have made a genuine conversion from Islam to Christianity.*

Particulars

i. *The evidence was of the appellant's participation in a weekly Christian prayer service from the time of her arrival in Nauru from Christmas Island in March 2014 until she began attending religious services at the Menen Hotel in September 2015.*
ii. *The Tribunal characterised this service as "Christian lessons" which the appellant attended "when she first arrived in Nauru", as if there was no religious service component and as if the appellant's weekly attendance did not continue after her arrival.*
iii. *The Tribunal did not take into account the appellant's participation each Sunday at the weekly prayer service in its assessment of the appellant's claims to have had a deep interest in Christianity and to have made a genuine conversion.*

CONSIDERATION

The ICCPR Ground

26. Each Appellant raises a common ground of appeal alleging that the decision of the Tribunal in each case was affected by an error of law. That error is said to be the failure of the Tribunal to consider an argument made by the Appellants concerning the possibility of racially based discrimination amounting to degrading treatment within the meaning of the *International Covenant on Civil and Political Rights* ("*ICCPR*").

27. The Tribunal has an obligation to consider evidence that is centrally relevant and important to the review it conducts; see *Minister for Immigration and Border Protection v SZSRS* at [58].[58]

[58] (2014) 309 ALR 67.

28. The *ICCPR* ground concerns claims for complementary protection relating to the Appellants' ethnicity as Arabs from Ahwaz and, in the case of the female Appellants, as Arab women from Ahwaz. The Appellants submitted before the Tribunal that, in general, Ahwazi Arabs suffered systematic discrimination in Iran on account of their ethnicity.

29. In pre-hearing written submissions to the Tribunal, the Appellants' advisors made a claim for complementary protection in reliance on the decision of the European Commission for Human Rights in *East African Asians v United Kingdom* ("*East African Asians*").[59] In that case, the Commission held that racial discrimination may, in certain circumstances, amount to "degrading treatment".

30. Counsel for the Appellants submit that the Tribunal failed to address or identify that claim. The precise claim was contained at [66] to [68] of the advisors' joint written pre-hearing submissions to the Tribunal, which were set out at [45] of the Appellants' written submissions on the appeal:

> *"Significantly for the remaining ground of appeal, the advisors' joint pre-hearing written submissions to the Tribunal under the heading 'Traditional Non-Refoulement Obligations' make a new claim for complementary protection on the basis of a decision of the former European Commission for Human Rights, East African Asians v United Kingdom:*
>
> > *66. The types of harm feared by our clients in Iran constitute torture, cruel, inhuman or degrading treatment and/or the arbitrary deprivation of life. Refoulement to face such forms of harm is prohibited by Nauru's international obligations under the ICCPR and CAT, as well as under Article 19(c) of the MOU.*
> >
> > *67. In particular, it is our submission that discrimination (on account of race or gender) may amount to a form of 'degrading treatment' sufficient to engage in Nauru's non-refoulement obligations. We submit that such discrimination may amount to 'degrading treatment' even if the Tribunal does not accept that it is of sufficient severity to amount to 'persecution'.*
> >
> > *68. As per East African Asians v United Kingdom (1973), racial discrimination may, in certain circumstances, of itself amount to 'degrading treatment'. According to the European Commission on Human Rights, 'publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity', which may 'therefore be capable of constituting degrading treatment'."*

31. Counsel contends that the legal basis of the claim is that, in certain circumstances, "degrading treatment" under Art 7 of the *ICCPR* may arise from discrimination based on race. Counsel submits that there is a distinction as made in *East African Asians* between the severity of the treatment meted out and the racial basis for that treatment. Counsel says that "special affront to human dignity" from the racial basis of the differential treatment is "a kind of moral harm to which quantitative judgments do not apply".

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[59] (1973) 3 Eur Comm HR 76.

32. At [50] of his written submissions, counsel says:

> *"The distinction is that between having to sit at the back of the bus or at the left side of the food counter on the one hand, and on the other hand, having to sit at the back of the bus or on the left side of the food counter because you are a "negro". The same distinction applies between having to live in a particular area and having to live in that place because you are a "coloured person"; or not being allowed to swim in a public pool at certain times because you are aboriginal; or having to wear a yellow star because you are a Jew. In none of these instances of racial segregation would the differential treatment, considered apart from its racial basis, of itself amount to extreme humiliation".*

33. At [52] to [55] of his written submission, counsel for the Appellants says:

> *"The Tribunal did not consider whether, in the circumstances of the case, the very racial basis of the discrimination which the Tribunal accepted was experienced and faced by the appellants as Arabs rendered the differential treatment to be degrading – whatever the severity of that treatment.*
>
> *Instead the Tribunal limited its assessment of "degrading treatment" to the differential treatment suffered by the appellants which it accepted to be discriminatory, ie less favourable treatment, but it did not consider whether the ground of the discrimination, ie race, was itself inherently degrading in the circumstances.*
>
> *The Tribunal's reference to the claim of severity of discrimination as amounting to degrading treatment and its specific references to [189] and [195] of East African Asians show that it did not identify or address the East African Asians claim made at [67] – [68] of the advisors' pre-hearing submissions. The relevant paragraphs of the East African Asians decision supporting the claim are [207]-[208].*
>
> *Instead the Tribunal addressed another and quite different claim at [70] of the advisors' pre-hearing submissions. This claim was in respect of the severity of the differential treatment, and not in respect of the 'special affront to human dignity' from the racial basis of that differential treatment."*

34. Counsel for the Republic refers to *East African Asians* as a case concerning racially discriminatory legislation in the United Kingdom ("UK") that prohibited UK citizens of Asian origin who were living in east Africa from entering the UK. Counsel submits in his written submissions at [16]:

> *"The East African Asians Case concerned openly racially discriminatory UK legislation that precluded UK citizens of Asian extraction who were then living in east Africa from entering the UK. One principle emanating from the case is that a measure which discriminates on the ground of race may be such an affront to human dignity that it is to be regarded as "degrading treatment", even where the measure itself does not inflict degrading treatment directly."*

35. The Appellants relied on *East African Asians* to submit that the discrimination they will face if returned to Iran on account of their race and gender (in the case of the female Appellants) would amount in its severity to "degrading treatment". This claim was made at [70] of the advisors' written submissions before the Tribunal. It flows from what was said earlier and set out above at [66] to [67] of those submissions.

36. It must be borne in mind that *East African Asians* does not say that racial discrimination, irrespective of the circumstances, amounts to degrading treatment but that it would only do so in certain circumstances; *East African Asians* at pp 82 and 86. The whole claim of the Appellants on this point was not made on the basis of racial discrimination per se but racial discrimination in the relevant circumstances, emphasising its severity.

37. I reject the Appellant's argument that *East African Asians* supports a contention that there are two integers to the Appellants' claim for complementary protection – one based on racial discrimination per se and one based on racial discrimination in the Appellants' circumstances. I read the submissions of the Appellants' advisors as advancing the later claim only. I read *East African Asians* as being directed only to that later claim. Whether racial discrimination amounts to degrading treatment depends on the factual circumstances involved.

38. I agree with the submissions of counsel for the Republic that when read fairly there is no basis upon which it may be inferred from the Tribunal's reasons that it failed to consider the argument based on *East African Asians.*

39. Counsel for the Republic accurately records the Tribunal in each case:

- referring to the Appellants as Arabs and discussing country information relevant to the treatment they may expect to face by reason of their race;
- considering whether that treatment was sufficiently serious to give rise to protection obligations under the Convention and finding that it was not sufficiently serious to do so;
- considering whether the same factual circumstances identified for the purpose of the Convention gave rise to any complementary protection obligation and found that they did not;
- applying *East African Asians* as to what may constitute degrading treatment.

40. The Tribunal dealt with each Appellant's complementary protection claim of "degrading treatment" based on race. It noted that, in each case, a claim that the discrimination faced on return would be so severe as to amount to degrading treatment. It referred to cases in other jurisdictions which define degrading treatment as "gross humiliation". It mentioned *East African Asians*. In each case, as noted at [23] above, the Tribunal did not accept that the discrimination which the Appellant would experience on return to Iran reached the level of severity as to amount to degrading treatment.

41. Given the matters addressed in the foregoing paragraph, it is difficult to see how it can be said that the Tribunal failed to consider the possibility that racially based discrimination would amount to degrading treatment. It did consider that argument but found that the treatment the Appellants would suffer to be not sufficiently serious to be described as degrading treatment.

42. Whether the Tribunal was correct or not in coming to that view of the facts is not a matter for this Court on appeal. The Court can only intervene to correct errors of law and must not engage in disguised merits review.

The Christianity Claims

43. Appellant XND 037, being the younger female Appellant, has a separate ground of appeal relevant only to her. The question arising on that appeal ground is expressed in her counsel's written submissions as follows:

> *"Whether the Tribunal was obliged to and did consider evidence in support of the appellant's claim to have a deep interest in Christianity since being on Christmas Island and to have made a genuine conversion to Christianity, this evidence being the appellant's participation in a weekly prayer service from the time of her arrival in Nauru from Christmas Island in March 2014 until she began attending religious services at the Menen Hotel in Nauru from September 2015."*

44. The Tribunal rejected the Appellant's claims based on being a convert to Christianity. The Tribunal dealt with this matter at [100] and [101] of its reasons for decision. At [100] to [101], the Tribunal said:

> *"The Tribunal has therefore considered whether the applicant has genuinely converted to Christianity. Several aspects of her evidence case doubt on that claim.*
>
> - *She claimed to have developed an interest in Christianity in Christmas Island and was clear in her evidence that she no longer regarded herself as Muslim. She also told the Tribunal that she regarded herself as a Christian before she left Christmas Island. Even if she had not formally changed her religion prior to being transferred to Nauru her evidence to the Tribunal was that she did not regard herself as a Muslim. However she stated that she was Shi'a in her transfer interview, described to the RSD officer six months later how she practised the Shi'a Muslim religion and described herself as religious. Even if she was not sure about calling herself a Christian as she had not formally converted to Christianity, the Tribunal would have expected her to indicate that she either had no religion, was thinking of converting and talked about her religious classes on Christmas Island or at the very least not described herself as a practising Muslim.*
> - *Her failure to mention her interest in Christianity until just prior to the Tribunal hearing could also indicate that her interest was superficial, and the fact that she did not alert the Secretary to it indicates that it was of little or no significance to her at the time.*
> - *The applicant claimed to attend the Menen church and be part of its Christian community yet gave evidence that she had attended church only four times before she was baptised in October 2015 despite being transferred to Nauru in March 2014. This was also not consistent with her claim to have had a deep interest in Christianity since being on Christmas Island. Despite her claim to be part of the Menen Christian community, she did not attend the Christmas services at the church during Christmas 2015.*
> - *She was unable to explain to the Tribunal what the significance was of being baptised was to her or describe a spiritual journey towards Christianity. Her preparation for baptism was cursory. Her evidence was that she had not had prior knowledge that she would be baptised on 18 October. She had attended church that day and found out that there was a sufficient number to hold a ceremony. This does not demonstrate a decision to be baptised or that that she had contemplated the significance of baptism. She also said that it was not until*

just before she was baptised that she truly accepted Christianity, but she could not cogently explain what truly accepting Christianity meant to her.

- *As noted above conversion to Christianity is a significant step with serious consequences in Iran. The applicant has indicated that her parents were practising Muslims yet she seemed to have a very casual attitude to her change in religion, had not discussed it with her parents and seemed not to think it was something important that she would discuss with them. She had not talked to them about why she had left Islam. Further she did not immediately tell them when she was baptised.*
- *The applicant formally converted through baptism ten days after receiving the negative RSD Determination. She would have been aware that conversion could be the basis of a favourable decision. The sequence of events, together with her failure to mention her interest in Christianity at an earlier time, could indicate that the decision to be baptised was not based on a conversion from Islam to Christianity, but to strengthen her case on review.*
- *The applicant gave evidence that she told her brother in Australia that she had converted and she said that he was happy she had. Yet she did not discuss with him why he was happy that she had changed her religion and claimed not to know her brother's religion, despite her mother's evidence that her brother had also converted to Christianity. As a new convert to Christianity the Tribunal would have expected her to have known or found out that her brother was a convert when she discussed her own conversion with him.*
- *While the Tribunal would not expect a recent convert to have an in depth knowledge of her new faith, the applicant showed little interest in the content of the bible, and was very vague about those sections with which she claimed to be more familiar.*
- *Finally the applicant is still wearing a hijab, a symbol of the Islamic faith. She claimed it was a habit to wear a hijab and was more cultural than religious. On its own this may not be a significant factor but when taken together with the other concerns the Tribunal has in relation to her claimed conversion, in the Tribunal's view it indicates that the applicant still regards herself as a Muslim.*

There are also the general credibility concerns outlined above. Looking at the applicant's circumstances as a whole the Tribunal does not consider credible, and does not accept, that the applicant has genuinely converted to Christianity. Therefore it does not accept that she will practice that religion if she returns to Iran, nor that she would wish to do so."

45. Counsel for the Appellant submits that the Tribunal ignored highly relevant evidence about the Appellant's participation in a weekly Christian prayer service from her arrival in Nauru in March 2014 until she started attending services at the Menen Hotel. Counsel submits that in considering her religious conversion claims, the Tribunal did not make any findings on the Appellant's claims to have attended those services. There was some evidence that the services may be properly described as classes or services within classes.

46. Counsel for the Republic submits, and the Court agrees, that the Appellant's submission stems from a misreading of the reasons of the Tribunal. At the third dot point in [100], the Tribunal discussed the Appellant's claim to be part of the Menen church and Christian community. It was not discussing any other attendance by her at any classes or services elsewhere in Nauru. As Counsel for the Republic contends, it was the Appellant's lack of involvement with the Menen church community which is at the heart of the Tribunal's finding that she did not

have a deep interest in Christianity since being on Christmas Island. At that part of its reasons, the Tribunal was not saying that the Appellant's only connection with Christian teaching is the few times she attended the Menen church. The whole of [100] deals with aspects of the Appellants' evidence which cast doubt on her claim. Clearly, the Tribunal did not view evidence about attendance at Christian classes as casting doubt on her claim.

47. The Tribunal had earlier at [77] made specific mention that the Appellant had said when she first arrived in Nauru, "people came to the camp and gave Christian lessons which she attended". Having made specific reference to that evidence it cannot be said that the Tribunal ignored that evidence.

48. Counsel for the Republic submits, in the alternative, that if the Court considers the evidence about the Christian classes was not considered by the Tribunal there is still no error of law. Counsel refers to the many reasons relied on by the Tribunal at [100] to [101] for rejecting the claim based on Christianity. He refers in his written submissions to "strands in the thread" (at [33]). I agree with counsel that even if there was an error affecting one of those strands, the remaining reasons for the Tribunal's conclusion are many and overwhelming.

49. The Court orders as follows:

1. The decision of the Tribunal is affirmed pursuant to s 44(1)(a) of the *Refugees Convention Act 2012* (Nr).

2. The appeal be dismissed.

3. There be no order as to costs.

Shane Marshall

Judge Shane Marshall
Dated this 8th of May 2018