IN THE SUPREME COURT OF NAURU

AT YAREN

Case No. 32 of 2017

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T17/00375 brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

DWN 034 Appellant

AND

THE REPUBLIC Respondent

Before: Justice I Freckelton

Appellant: Ms Christine Melis
Respondent: Mr Hamish Bevan

Date of Hearing: 17 April 2018
Date of Judgment: 14 December 2018

CATCHWORDS

APPEAL – natural justice – failure to arrange a medical examination - s 24(1)(d) of the *Refugees Convention Act 2012* (Nr) – s 22 *Refugees Convention Act 2012* (Nr) – s 40 *Refugees Convention Act 2012* (Nr) – APPEAL DISMISSED.

JUDGMENT

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

> *(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. A "refugee" is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951 ("the Refugees Convention")*, as modified by the *Protocol Relating to the Status of Refugees 1967* ("the Protocol"), as any person who:

> "*Owing to 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 his nationality and is unable to, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable to or, owing to such fear, is unwilling to return to it …*"

3. Under s 3 of the Act, complementary protection is defined to means protection for people who are not refugees but who also cannot be returned or expelled to the frontiers or territories where this would breach Nauru's international obligations.

4. The determinations open to this Court are set out in s 44(1) of the Act:

> *(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.*

5. The Refugee Status Review Tribunal ("the Tribunal") delivered its first decision on 23 October 2015 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of 26 June 2015, that the Appellant is not recognised as a refugee under the 1951 Refugees Convention relating to the Status of Refugees, as amended by the 1967 Protocol, and is not owed complementary protection under the Act.

6. The Appellant filed a Notice of Appeal against the decision of the first Tribunal with this Court.

7. Crulci J delivered judgment on the appeal on 23 March 2017, remitting the matter to the Tribunal for reconsideration.

8. On 23 May 2017, the Appellant appeared before the second Tribunal to give evidence and present arguments. On 25 July 2017, the second Tribunal delivered its decision again affirming the decision of the Secretary.

9. The Appellant filed a Notice of Appeal against the decision of the second Tribunal on 18 July 2017. An Amended Notice of Appeal was filed on 19 December 2017.

BACKGROUND

10. The Appellant is a Pakistani man of Pastun ethnicity and Sunni Muslim religion from the Hangu District of Khyber Pakhtunkhwa ("KPK"), Pakistan. His father was killed in 2010 and his brother in July 2012. His mother, younger brother, and younger sister remain in their home village. The Appellant attended school for three years and worked in construction from 2010 to 2013. He drilled for water and worked for the family business in Kurram.

11. The Appellant claims a fear of persecutory harm on the basis of an imputed anti-Taliban political opinion arising from his family performing services for the Pakistani government and army, and government-run schools. For the same reason, the Appellant claims a fear of harm on the basis of his membership of the particular social group of his family and also his membership of the particular social group of returned failed asylum-seekers.

12. The Appellant travelled to Australia in July 2013 via Thailand, Malaysia, and Indonesia, arriving on Christmas Island on 3 August 2013. He was transferred to Nauru on 25 January 2013 for the purposes of having his claims assessed.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

13. The Appellant attended a Refugee Status Determination ("RSD") interview on 21 June 2016. The Secretary summarised the material claims presented at that interview as follows:

    - *He fears that, if he returns to Pakistan, he will be killed, abducted and/or otherwise seriously harmed by the Taliban for reason of any imputed political opinion in opposition of the Taliban because he works for the Pakistan government and schools. He also fears he will be killed for this reason because the Taliban would assume he is a spy as he has been away from Darsamand for some time.*
    - *He also fears harm from the Taliban as a member of the particular social group of Kadim Khan's (his father) family and the Taliban seeks to harm the male members of his family because of the work his family has done for the government, army and schools.*
    - *His father was killed about 4 years ago in the Kurram Agency area of Sadah by the Taliban for drilling a well for a school.*
    - *After his father's death, he and his brother, Shahab, became more actively involved in the family's well drilling business. No further business was done in Kurram Agency because it was too dangerous.*
    - *In 2012, the Taliban moved into their area and established a big base in a place called Kattakan about an hour away from his village.*
    - *He and Shahab worked for the government, schools and an army base in their area.*
    - *The Taliban told Shahab not to drill a well for an army school. Shahab decided to continue with the work because he was being well paid and because he was concerned that if he did not he would be accused of being affiliated with the Taliban. About 10 – 15 days after Shahab received threats from the Taliban in 2012 he was killed by them. That night, the family became concerned for Shahab when he had*

not returned home by 11pm after going to the cricket. Shahab was found at 1am next to some hay.

- *He was the only male adult left in the family. His mother was concerned for his safety and he kept an extremely low profile. As soon as he was able, he departed Pakistan to avoid the same fate as his brother and father.*[1]

14. The Secretary accepted the following elements of the Appellant's material claims as credible:

    - The Appellant originated from Darsamand and is a Sunni Bangash Pashtun;
    - The Appellant has worked in the operation of a well drilling machines; and
    - The Appellant went into hiding after his brother's death.

15. However, the Secretary considered the following elements of the Appellant's claims not to be credible:

    - The Appellant has been involved in drilling wells for government-run schools and/or buildings that have accommodated Pakistani security forces, and he received threats from the Taliban because of this; and
    - The Appellant's father and brother were threatened and killed by the Taliban because of his work at government schools.[2]

16. In reaching these adverse conclusions as to the Appellant's credibility, the Secretary considered that, while the Appellant gave a detailed account of well-drilling machinery, the Appellant's testimony on the number of well-drilling jobs he had worked on, and the areas in which he had worked, was lacking in detail and evasive.[3] The Appellant's account of finding out about the threats received by his brother from the Taliban at the interview was inconsistent with the account presented in his written statement of claim where he said that the Taliban stopped him and his brother in a vehicle, and then threatened his brother, but at the RSD interview the Appellant said he was at home when he found out about the warning.[4] Furthermore, the Appellant's accounts of "going into hiding" after his brother's death were inconsistent, as he claimed variously during the RSD interview that he had changed his home frequently, and that he simply stayed in hiding with his mother and sister.[5]

17. While the Secretary afforded the Appellant the benefit of the doubt in accepting that his father and brother were killed by the Taliban, noting country information that the Taliban was operating aggressively in Darsamand during the period in question, the Secretary did not accept that the circumstances were as claimed by the Appellant. There were substantial inconsistencies in the Appellant's testimony about his brother's death, including the date and time of the death. The Secretary considered a supposed police report on the death to carry no weight.[6]

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[1] Book of Documents ("BD") 56 – 57.
[2] Ibid 57.
[3] Ibid 59 – 60.
[4] Ibid 60.
[5] Ibid.
[6] Ibid 61.

18. Given the Secretary's conclusion that the Appellant's family had not been targeted because of their work for the Pakistani government, army and schools, the Secretary rejected that the Appellant would be harmed because of his membership of the particular social group constituted by his family.[7] In relation to the Appellant's fear of harm on the basis of an imputed anti-Taliban political opinion, the Secretary cited country information pointing to substantial activity by the Taliban commanders, Pakistani security forces, and other unknown militants, in the Darsamand area at the relevant time.[8] The Secretary concluded that the Appellant faces a reasonable possibility of being killed or seriously injured by a local militant group if returned to Darsamand, on account of being perceived to be a political opponent to a militant group because of his residence in Darsamand.[9]

19. However, the Secretary considered that relocation to Karachi was a relevant and reasonable prospect for the Appellant, as there was no reasonable possibility of the Appellant being targeted or harassed in Karachi on the basis of his Pashtun ethnicity, or any political association.[10] He is also a single-male, who can speak Pashto, Urdu and some English, and can operate drilling machinery.[11] As it was reasonable for the Appellant to relocate, the Secretary found the Appellant not to have a well-founded fear of persecution in Pakistan, and thus that he was not owed refugee status.[12] Based on the same factual findings, the Secretary also found the Appellant not to be owed complementary protection.[13]

FIRST REVIEW BY REFUGEE STATUS REVIEW TRIBUNAL

20. On 18 August 2015, the Appellant appeared at the first Tribunal hearing. He elaborated on his account of his father being threatened and killed by the Taliban because of the drilling work he was performing for the government. He also reiterated his evidence as to the take-over of the family business by his brother after his father's death, the threatening and killing of his brother by the Taliban in 2012, and his period in hiding for four months before he fled Pakistan.

21. The Tribunal accepted that the Taliban killed the Appellant's father in 2010 because he was drilling a well at a government school,[14] the Appellant was involved in the construction business drilling wells, and the Appellant and his brother were threatened by the Taliban because of a work contract they were carrying out for the government.[15] In view of country information about Taliban activity in the Darsamand area, the Tribunal accepted that the Appellant's brother may have been shot dead by the Taliban in 2012.[16] However, the Tribunal did not accept that the Appellant continued to be a Taliban target after he finished

[7] Ibid 62.
[8] Ibid 62 – 65.
[9] Ibid 65.
[10] Ibid 66.
[11] Ibid 68.
[12] Ibid 70.
[13] Ibid.
[14] Ibid 173 at [16].
[15] Ibid 175 at [27].
[16] Ibid at [28].

carrying out work contracts for the Pakistani government, and the Taliban continued to inquire about the Appellant after he left Darsamand.[17]

22. Nonetheless, due to his past employment, family connections, and residence in Darsamand, the Tribunal accepted there was a reasonable possibility of the Appellant suffering serious harm amounting to loss of life or liberty if returned to Pakistan.[18] In relation to the question of relocation, the Tribunal recognised the Appellant's claim that "as he is now the oldest male in the family, he will be expected to relocate his mother and younger siblings and they will be extremely vulnerable and uncomfortable in the city",[19] and that "the Taliban has extensive networks in Pakistan and will find him and kill him".[20]

23. However, the Tribunal considered relocation to Lahore was relevant and reasonable, given it is a large city with apparent Western influence, there is a large community of Pashtuns from KPK,[21] and the Appellant is a young man with practical work experience and technical skills, and income from the family land that would assist in establishing himself in Lahore.[22] The Tribunal considered the Appellant's fear of persecutory harm not to be well-founded, and rejected the Appellant's claims to refugee status, as well as to complementary protection.[23]

FIRST APPEAL TO THIS COURT

24. The Appellant first appealed to this Court on the grounds that there was an error of law in failing to consider the Appellant's claim that, in assessing whether relocation was reasonable, the Tribunal must take into account his responsibility to his mother and younger siblings; in failing to consider the Appellant's claim that the Taliban has informants throughout Pakistan; and in failing to put to the Appellant country information that was contrary to this claim.

25. Crulci J accepted that the Tribunal only dealt with whether relocation would be reasonable for the Appellant as a single man, and did not consider in its reasons the Appellant's claim as to his family responsibilities and the impact his relocation would have on his family. Therefore, she inferred that the Tribunal failed to consider an integer of the Appellant's claim and the first ground of the appeal succeeded.[24]

26. The Respondent accepted that the Tribunal did not identify for the Appellant each individual item of country information it considered persuasive in disposing of the Appellant's claim surrounding the presence of Taliban informants throughout Pakistan, but argued that the information accorded in substance with the information put to the Appellant at the hearing. On balance, the Court found that the Tribunal did not afford the Appellant an opportunity to give evidence on

[17] Ibid 176 at [34].
[18] Ibid at [36].
[19] Ibid 179 at [48].
[20] Ibid 177 at [39].
[21] Ibid 180 at [54].
[22] Ibid at [55].
[23] Ibid 180 [58] – BD 181 at [60].
[24] Ibid 191 at [48] – [49].

the Taliban's ability to locate him throughout Pakistan. Her Honour therefore also concluded that the second ground of appeal succeeded.[25]

27. Orders were made quashing the decision of the first Tribunal and remitting the matter to the Tribunal for reconsideration according to law.[26]

SECOND REVIEW BY THE REFUGEE STATUS REVIEW TRIBUNAL

28. On 23 May 2017, the Appellant appeared before the second Tribunal. The Appellant claimed a fear of persecutory harm on the same bases as articulated before the first Tribunal. In submissions from the Appellant's representatives dated 22 May 2017, the representatives advised that the Appellant had "suffered from severe memory problems, insomnia and stress although no medical reports were available to verify this". The representatives also "observed his inability to focus and engage in topics that triggered traumatic memories".[27] The Appellant submitted post-hearing submissions dated 6 June 2017, and the Tribunal noted with respect to those submissions:

> "*The applicant's representative outlined the difficulties they had in engaging with the applicant and submitted that his recent lack of engagement with the RSD process should not be regarded as his disrespect or disregard for the importance of his remittal hearing and his second opportunity to give evidence before the Tribunal. It was submitted there were 'multiple mitigating circumstances' that have compounded his stress and inhibited his ability to fully participate in the RSD process, including that he finds it very difficult to speak of his experiences in Pakistan. It was submitted that his current behaviours including his extreme forgetfulness and continuous avoidance of any expert mental health assistance to cope with his pain and stress are indicative of his post-traumatic stress disorder (PTSD) and that any lack of medical evidence to support a clinical diagnosis of depression or PTSD should not discount the real likelihood that the applicant suffers from these illnesses.*"[28]

29. The Appellant's evidence before the second Tribunal largely echoed the evidence put before the first Tribunal as to the factual foundations of his claimed fear of harm, and his inability to relocate. As had the first Tribunal, the second Tribunal accepted the Appellant's evidence with respect to the threatening and killing of his father by the Taliban,[29] the family's well-drilling business,[30] and the threatening and killing of his brother by the Taliban in 2012.[31] However, noting that the Appellant stopped carrying out work contracts for the Pakistani government when requested, and that his uncles who finished the work have not been targeted, the Tribunal did not consider there to be any reasonable possibility of the Taliban targeting the Appellant in the reasonably foreseeable future.[32]

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[25] Ibid 193 at [58] – [60].
[26] Ibid at [61].
[27] Ibid 270 at [35].
[28] Ibid 272 at [53].
[29] Ibid at [54].
[30] Ibid at [55].
[31] Ibid 273 at [60] – [61].
[32] Ibid 275 at [66].

30. Unlike the Secretary and first Tribunal, while the second Tribunal identified a level of militant activity in the Darsamand area, the Tribunal did not consider that this suggested the Appellant would be targeted for a Convention reason.[33] The Tribunal further found that the fact the Appellant would be returning from a Christian country, as a failed asylum-seeker, would not mean that he would be perceived as a supporter of western ideologies and a traitor. It found it to follow that the Appellant had no well-founded fear of persecution by reason of any actual or imputed anti-Taliban political opinion, or because of his membership of the particular social groups of his family, or returned failed asylum-seekers.[34]

31. The second Tribunal found that the Appellant's claim for refugee status also failed on the basis that the Appellant would be able to relocate to avoid any risk of harm in his home area. The Tribunal identified that relocation to Islamabad, Rawalpindi and Lahore, and other cities in Punjab, was relevant and reasonable. Those cities are practically, safely and legally accessible to the Appellant, and the Appellant did not have such a prominent profile that the Taliban would target him in these other areas.[35] The Tribunal also did not accept that it would be necessary for him to relocate with his family,[36] noting that his mother earns an income from her land, his brother attends school and plays cricket after school, his uncles remain in the area, and they are in good health.[37] While the Appellant may not have any relatives or friends in Punjab, there is a large community of Pashtuns in Lahore and elsewhere in Punjab.[38] The second Tribunal took into account that the Appellant is a young man with practical work experience and technical skills and experience in the operation of machinery.[39] The Tribunal noted the Appellant's submission that he suffered from PTSD, depression, and possibly anxiety, but did not consider that these conditions would impinge upon his ability to relocate.[40]

32. In light of these conclusions, the Appellant was found by the Tribunal not to have a well-founded fear of persecution in his home area for a Convention reason, or, if he did, he was able to relocate. Thus, the Tribunal found that the Appellant is not a refugee.[41]

33. In relation to complementary protection, the Tribunal found that there was no reasonable possibility of the Appellant being subject to harm under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the International Covenant on Civil and Political Rights.[42] The Appellant would also not be subject to any discrimination upon return that would amount to degrading treatment.[43] Further, given the lack of medical evidence before the Tribunal to indicate that the Appellant suffers from PTSD or any other

[33] Ibid at [71].
[34] Ibid 276 at [76].
[35] Ibid 279 at [89], [92].
[36] Ibid 282 at [105].
[37] Ibid 281 at [101].
[38] Ibid 284 at [113].
[39] Ibid at [114].
[40] Ibid at [117].
[41] Ibid 285 at [121].
[42] Ibid at [123].
[43] Ibid 286 at [127].

mental illness, the Tribunal dismissed claims that any questioning by the authorities upon return would amount to cruel or inhuman treatment because of his vulnerable psychological state, that removal would exacerbate his mental illness, and that he required specialised medical attention that would be unavailable in Pakistan.[44] Nauru would therefore not breach any international obligations, including any arising under the Convention on the Rights of Persons with Disabilities, and the Appellant was not owed complementary protection.[45]

THIS APPEAL

34. The Appellant's Amended Notice of Appeal filed on 19 December 2017 reads:

> "*The Tribunal erred in law by its failure to require the Secretary to arrange for the making of a medical examination of the appellant and to have a report of that examination given to the Tribunal under s 24(1)(d) of the Act for the purposes of its review. This failure amounted to a breach of the rules of natural justice at common law, s 22 and s 40 of the Act in that the Tribunal did not afford the appellant the right to a real and meaningful hearing.*"

THE ARGUMENTS

35. In the pre-hearing submissions, the Appellant's representative outlined with respect to the Appellant's general mental health:

> "*[DWN 034] instructed us that he is currently suffering from severe memory problems, insomnia and stress triggered by the upcoming Tribunal Hearing. [DWN 034] has missed eight CAPs appointments in the last two weeks due to his inability to remember he had appointments scheduled or that he had attended appointments just the day before and reminded of subsequent appointments. It would appear that his current short term memory problem is compounded by his lack of sleep and stress regarding his Tribunal Hearing. These are also symptoms or signs associated with detention fatigue, frequently noted by IHMS professionals in their clinical reports. Whilst [DWN 034] does not currently have medical reports to support his mental health and engage in topics that triggered traumatic memories, were observed by CAPs throughout our consultations with him in preparation for his hearing. In these circumstances, we respectfully request the Tribunal to have regard to these mitigating circumstances when assessing his evidence and claims*."[46]

36. The representatives continued with respect to the Appellant's impaired ability to speak about the death of his father and brother:

> "*Further, whilst it is very distressing and difficult for [DWN 034] to discuss the circumstances of his father and brother's deaths – not just because of the lapse of time since these events have occurred but also mostly because of the traumatic nature of these memories – we are instructed that he will try to the best of his ability to address any of the previous Tribunal's concerns regarding his claims. However, given that the occurrence of these events was accepted by the previous Tribunal to be plausible, we respectfully ask the Tribunal to adopt that same finding and refrain from questioning our client in detail regarding these specific matters. From our*

[44] Ibid 286 at [128] – BD 287 at [131].
[45] Ibid 287 at [133].
[46] Ibid 198 at [4].

experiences with [DWN 034], he has severe difficulty continuing to speak at the very mention of these events, and we have had to suspend our interviews when we probed further and asked him to recall in detail. In the interests of our client's welfare as well as the efficient running of the hearing, we would be grateful to the Tribunal if it could give its utmost consideration to our client's fragile mental health in this regard."[47]

37. The Tribunal acknowledged this request of the Appellant at the Tribunal hearing, with a Tribunal member indicating: "I understand there's certain things you have difficulty talking about and we don't propose to question you about the circumstance of your father or your brother's death today".[48]

38. During the hearing, the Appellant said that he was in possession of some recent news articles on violent activity in Darsamand, and that he would provide the relevant country information the day after the Tribunal hearing. The Tribunal asked why the Appellant did not bring the information to the hearing, and the Appellant explained that he was meant to give the information to his representative before the hearing, but did not do so.[49] Prior to the conclusion of the hearing, the Appellant's representative requested two weeks to provide the further information, and this request was granted.[50]

39. In the post-hearing submissions, the Appellant's representatives informed the Court that they had been unsuccessful in obtaining the relevant information from the Appellant. The representative said:

"*[DWN 034] advised at the hearing that he would like to submit recent articles regarding the current situation in Pakistan that would subject him to persecution and/or serious harm as a Pashtun. We have subsequently organised 6 appointments to obtain further instructions from [DWN 034] and have tried to the best of our ability to reach him but have been unsuccessful in re-engaging [DWN 034].*"[51]

40. The submission then purported to explain the Appellant's forgetfulness and avoidance of mental health assistance by reference to studies on PTSD in refugee determinations. The representatives requested that the Tribunal take this into account in considering the Appellant's "behaviours, evidence and claims".[52]

41. In the Tribunal Decision Record, the Tribunal noted the submission of the Appellant's representatives relating to the Appellant's poor mental health, saying (at [35]):

"*In submissions dated 22 May 2017 the applicant's representatives advised they were instructed by the applicant that he suffered from severe memory problems, insomnia and stress although no medical reports were available to verify this. The*

[47] Ibid 199 at [9].
[48] Ibid 218 at 37 – 39.
[49] Ibid 241 at ln 24 – 44.
[50] Ibid 245 at ln 14 – 45.
[51] Ibid 250 at [3].
[52] Ibid 251 at [8].

representatives stated they observed his inability to focus and engage in topics that triggered traumatic memories."[53]

42. The Tribunal considered this submission in the context of its assessment on relocation and complementary protection, and noted that there was no evidence as to how the Appellant's mental health issues would affect his ability to relocate (see [31] above), or how questioning upon arrival in Pakistan, the process of removal, and the medical care available in Pakistan would give rise to a valid claim to complementary protection (see [33] above).[54]

43. The Appellant contends that the medical report the Tribunal ought to have obtained would therefore have been relevant to the issues of the Appellant's capacity to participate in the review hearing, the opportunity to provide the additional country information to which reference was made at the hearing, and the assessment of the Appellant's complementary protection claims.

44. The Appellant submits that the failure of the Tribunal to arrange a medical examination of the Appellant's mental condition under s 24(1)(d) of the Act constituted a denial of procedural fairness under s 22, and a failure to afford the Appellant a real and meaningful hearing under s 40(1). The Appellant further submits that it constituted a failure to "make an obvious inquiry about a critical fact, the existence of which is easily ascertained", in the sense described by the Australian High Court in *Minister for Immigration and Citizenship v SZIAI* ("*SZIAI*") as constituting jurisdictional error.[55]

45. According to the Appellant, various authorities emerging from the Supreme Court of Nauru, considered at [74] – [79] below, support that it was procedurally unfair to the Appellant not to examine his mental state where the Tribunal was apprised of his mental health issues through the pre- and post-hearing submissions. Given that the Appellant's mental health may have had a direct bearing on the outcome of the review, an examination and report on the Appellant's mental state was "an obvious inquiry about a critical fact, the existence of which is easily ascertained".[56] Had the Tribunal exercised this power, this may have led to the Tribunal making important findings on the Appellant's mental health claims, or adjourning the hearing to enable the Appellant to receive treatment.[57]

46. The Respondent submits that the Nauruan authorities referred to by the Appellant do not lend support to his case that he was denied procedural fairness.

47. The Respondent further recites Australian authority, and submits that the principle to be drawn from *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* ("*SGLB*")[58] is that procedural fairness does not ordinarily demand that a Tribunal take steps to inform itself of an applicant's mental state.

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[53] BD 270 at [35].
[54] Ibid 284 at [117].
[55] (2009) 259 ALR 429 at [26].
[56] Appellant's Submissions at [35].
[57] Ibid at [19].
[58] (2004) 78 ALJR 992.

48. The Respondent also refers to *Minister for Immigration and Citizenship v SZGUR* ("*SZGUR*")[59] to emphasise that it is for an applicant to put forward the evidence he or she wishes the Tribunal to consider. While a Tribunal may accept that an applicant has a certain medical condition, in the absence of evidence, it may be unable to find that the condition impaired an applicant's memory in a way that was detrimental to their ability to advance his or her case, and it is not the responsibility of the Tribunal to seek such evidence.[60] The Respondent further notes that the Court in *SZGUR* cited *SGLB* with approval.[61]

49. In the Respondent's submission, the Appellant's assertion that there was any duty on the Tribunal to inquire into the Appellant's mental health is unfounded. The examination and report did not constitute "an obvious inquiry about a critical fact the existence of which is easily ascertained".[62] Given the Appellant's apparent aversion to medical practitioners, it was unlikely that further information as to the Appellant's mental state could have been "easily ascertained", and, for that reason, the inquiry would also have been lacking in utility.

50. The Respondent submits that the Appellant's assertion that the Tribunal erred in failing to obtain a medical report into the Appellant's capacity lacks a factual foundation. There was no evidence before the Tribunal to suggest that the Appellant was unable to give an account of his experiences, present arguments, or understand and respond to questions. There was no indication to the Tribunal that the Appellant was unfit to participate in the hearing. The Appellant has therefore failed to discharge its burden of persuasion that he lacked the capacity to appear before the Tribunal: *NAMJ v Minister for Immigration and Multicultural and Indigenous Affairs* ("*NAMJ*") at [69].[63]

51. In regards to the claim concerning the opportunity to provide further country information, the Respondent observes that the Appellant was on notice by way of the decisions of the Secretary and first Tribunal that the question of relocation was in issue, and had ample opportunity to provide further information during and after the second hearing. The Appellant did not avail himself of the opportunity, despite the indication that he had the information in his possession (see exchange detailed at [38] above). The Respondent says that, given the Appellant's own representatives failed in eliciting the country information from him, it seems unlikely that any additional medical examination ordered by the Tribunal under s 24(1)(d) of the Act would have been fruitful. In any case, any further medical examination was directed at informing the Tribunal of the Appellant's mental health issues, and not at eliciting the information.

[59] (2011) 241 CLR 594.
[60] Ibid at [85].
[61] Ibid at [20], [55], [75].
[62] *SZIAI* at [22].
[63] [2003] FCA 983.

CONSIDERATION

52. The terms of the Australian legislation that has generated case law in the Federal Court and the High Court of Australia are important for the evaluation of its relevance to the sovereign state of Nauru.

53. Section 425 of the *Migration Act 1958* (Cth) provides that:

> *Tribunal must invite applicant to appear*
>
> 1. *The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.*
> 2. *Subsection (1) does not apply if:*
>
> a. *the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or*
> b. *the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or*
> c. *subsection 424C(1) or (2) applies to the applicant.*
>
> 3. *If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.*

54. Under s 40(1) of the Nauruan Act, the Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the determination or decision under review.

55. Under s 22(b) of the Act, the Tribunal "[m]ust act according to the principles of natural justice and the substantial merits of the case."

56. If the applicant is invited to appear before the Tribunal and does not do so, s 40(1)(b) provides that "the Tribunal may make a decision on the review without taking further action to allow or enable the applicant to appear before it." Section 41(2) stipulates that s 41 does not "prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review, in order to enable the applicant's appearance before it as rescheduled."

57. In terms of active steps that the Tribunal may take to obtain information not formally provided to it, s 36 provides that in conducting a review the Tribunal can invite a person to provide information and "obtain, by any other means, information that it considers relevant." There are timeframes within which the Tribunal "must conduct merits review." Section 33(1) provides that "[t]he Tribunal must complete a review of a determination or decision within 90 days after the day on which the Secretary gives the Registrar the documents relevant to the review."

58. The Tribunal is empowered under s 24(2) to summons persons to appear and give evidence before it and require a person appearing before it to give evidence on oath or affirmation, and is empowered under s 24(1)(d) to "require the Secretary to arrange for the making of an investigation, or a medical examination,

that *the Tribunal thinks necessary with respect to the review*, and to give to the Tribunal a report of that investigation or examination." (emphasis added)

59. Thus, the question for the current proceedings is whether the Tribunal is empowered or, more relevantly, obliged to obtain information about an applicant's health, additional to that which is provided by an applicant, and if so what it is obliged by law to do to that end.

60. In *Minister for Immigration and Multicultural Affairs v Paramananthan*,[64] Davies J of the Australian Federal Court emphasised the inquisitorial procedures of tribunals and observed that in appropriate cases the Refugee Review Tribunal may undertake its own inquiry and in some instances may be obliged to do so. However, it did not go further than this.

61. In *Chen v Minister for Immigration and Multicultural Affairs* ("*Chen*"),[65] the Full Court of the Australian Federal Court observed that in *Minister for Immigration and Multicultural Affairs v Cho,*[66] Tamberlin and Katz JJ discussed the terms of s 425 in a previous form and stated:

> *"According to its terms the section simply requires that an opportunity be given to the applicant to appear and give evidence. Obviously if there is no real opportunity given then the section has not been complied with. This could arise, for example, where relevant evidence is not admitted or misleading statements are made by the decision-maker which discourage an applicant from calling or proceeding with a particular line of evidence."*[67]

62. In *Chen*, Lingren, Tamberlin and Mansfield JJ concluded that:

> "*It is not the obligation of the Tribunal to put to the appellant all matters which might be expected to be put by a contradictor in adversarial proceedings. The position of the Tribunal is explained by Gummow and Hayne JJ in Abebe v Commonwealth of Australia [1999] HCA 14; (1999) 197 CLR 510 at [187] in the following terms:*
>
> > *"The proceedings before the tribunal are inquisitorial and the tribunal is not in the position of a contradictor. It is for the applicant to advance whatever evidence or arguments she wishes to advance in support of her contention that she had a well-founded fear of persecution for a Convention reason. The tribunal must then decide whether that claim is made out."*[68]

63. A leading authority on the parameters of a tribunal's obligations is that of the Full Court of the Australian Federal Court in *Minister for Immigration and Citizenship v SZNVW* ("*SZNVW*").[69] The Applicant's psychological impairment was raised before the Refugee Review Tribunal in respect of evidence that he gave. A Federal Court magistrate formed the view on appeal that the applicant had been deprived of a "real and meaningful" opportunity to participate in the hearing, and

[64] [1998] FCA 517
[65] [2001] FCA 1671 at [12].
[66] (1999) 92 FCR 315.
[67] *Chen* at [12].
[68] Ibid at [19].
[69] (2010) 183 FCR 575.

to have his evidence fairly assessed in light of his impairments, relying on *Minister for Immigration and Multicultural Affairs v SCAR*.[70]

64. The Full Court of the Federal Court on appeal held that s 425 of the Australian Act imposes on the Tribunal an obligation to issue an invitation to attend a hearing, thereby evincing a legislative intention that an applicant is to have an opportunity to attend the hearing – "the invitation must not be a hollow shell or an empty gesture."[71] Thus, the Tribunal must provide a "real and meaningful" invitation. The Court provided instances of where an invitation would not be real and meaningful, such as where it would deny the applicant the capacity to give an account of his experiences, to present argument in support of his claims, and to understand and to respond to questions put to him.[72]

65. The Full Court focused upon logistics rather than a scenario in which the capacity of an applicant would be impaired by symptomatology of mental illness. In the case before the Full Court, the Applicant did give evidence, although, he may have been adversely affected by his symptoms. The Full Court was emphatic that there was no legislative warrant for the view that the Tribunal is duty-bound to press an applicant to call further evidence on an issue or to seek an adjournment of the hearing to enable him or her to do so, "or to seek out such evidence itself."[73] It observed that, in the circumstances, it was called upon to consider the Applicant was not disabled by his psychological deficits from giving evidence and presenting arguments. This meant that the required hearing was "not nullified by a mere failure by an applicant to present his case in the best possible light."[74] It noted that there was no authority for the view that the legislative requirements in relation to a hearing were not met because the applicant might, if better advised, have chosen to present a more compelling case.[75]

66. The Full Court also noted that in *NAMJ*,[76] Branson J observed that it was unlikely that the legislature intended that a hearing before the Tribunal could not proceed by reason of "some measure of psychological stress and disorder in the applicant."[77]

67. The approach of the Full Court in *NAMJ* was applied by Tracey J in *Minister for Immigration and Citizenship v SZNCR.*[78]

68. In *SZGUR,* the High Court dealt with a scenario in which the Applicant suffered from Bipolar Disorder, depression and forgetfulness, but the Tribunal failed to

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[70] (2003) 128 FCR 553; [2003] FCAFC 126.
[71] See also *Mazhar v Minister fir Immigration and Multicultural Affairs* (2000) 183 ALR 188; [2000] FCA 1759 at [31]; *Minister for Immigration & Multicultural & Indigenous Affairs v SCAR* [2003] FCAFC 126 at [33].
[72] *SZNVW* at [20], applying the reasoning of Gilmour J in *SZMSA v Minister for Immigration and Citizenship* [2010] FCA 345 at [20] – [25].
[73] *SZNVW* at [22].
[74] Ibid.
[75] Ibid at [30].
[76] (2003) 76 ALD 56.
[77] *SZNVW* at [33].
[78] [2011] FCA 369.

make inquiries as to the significance of his medical condition and how it bore on his condition. French CJ and Kiefel J held that the Tribunal was under no obligation to make further inquiry about his condition.[79] It held that the Tribunal was under no obligation from the legislation to obtain an independent medical report and was entitled to decide the case on the material before it.[80] If the material was insufficient to satisfy the Tribunal that the applicant was entitled to the grant of a protection order, its obligation was to affirm the delegate's decision.[81] Gummow J observed that s 424 is not "the source of any obligation on the Tribunal to go further and seek more information that might enhance, detract from or otherwise be relevant to information which it has already received."[82] Heydon and Crenan JJ agreed with the reasons given by French CJ and Kiefel J,[83] as well as by Gummow J.

69. In *SGLB,* Gleeson CJ concluded:

> "*Fairness does not ordinarily require the court or tribunal to undertake a psychiatric or psychological assessment to investigate the extent to which the person in question may be at a disadvantage; and ordinarily it would be impossible to tell*." [84]

70. Gummow and Hayne JJ drew an important distinction between powers and duties:

> "… *whilst s 427 of the Act confers power on the Tribunal to obtain a medical report, the Act does not impose any duty or obligation to do so. Rather, s 426 provides that, even if an applicant requests that the Tribunal take oral or written evidence from a witness (such as a medical practitioner or psychiatrist), the Tribunal is not required to obtain such evidence. Thus, the Tribunal is under no duty to inquire*."[85]

71. To similar effect Callinan J stated that:

> "*Under s 427 of the Act, the Tribunal may require the Secretary to arrange, and report upon, any investigation or medical examination that the Tribunal thinks necessary with respect to a review. That does not mean that the Tribunal is bound to make particular inquiries or to obtain evidence on medical or other matters. There is nothing to suggest in this case however that the Tribunal failed, whether it was bound to do so or not, to make all appropriate and sufficient inquiries. The Tribunal was faced with a request by the respondent that the hearing proceed, which it did, and it was well aware of the possibility that the respondent was stressed and made due allowance for that. Even if the respondent had made a request that a particular psychologist or psychiatrist give evidence, the Tribunal was not obliged to comply with it. It certainly made no jurisdictional error in not undertaking further inquiries. It had a discretion and not an obligation to pursue such other inquiries, if any, as it saw fit*."[86]

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[79] *SZGUR* at [41].
[80] Ibid
[81] Ibid.
[82] Ibid at [86].
[83] Ibid at [91] – [92].
[84] *SGLB* at [19].
[85] Ibid at [43].
[86] Ibid at [124].

72. Thus Australian law has in general been reserved about requiring a tribunal to exercise its powers to inform itself, acknowledging the inquisitorial, non-adversarial nature of tribunals, but distinguishing between powers and duties. However, it has identified that inherent in the right to being invited to appear is that the invitation must be "real and meaningful".

73. The law has to some degree been developed further in the distinctive jurisprudence of Nauru where a number of cases have arisen where it has been asserted that those who have spent a time awaiting final resolution of their asylum-seeker claims have become unwell.

74. In *DWN 072 v Republic of Nauru*,[87] Khan J emphasised the inquisitorial role of the Tribunal, reiterating the reasoning of the Australian Federal Court in *Paramananthan*.[88]

75. In *ROD 122 v Republic of Nauru*,[89] Crulci J noted that the applicant before the Tribunal had been suffering from acute mental illness and was too ill to participate in the first scheduled hearing, which was adjourned, but attended the second hearing. It was evident to the Tribunal in the second hearing that he was "still far from well." He sat slumped during the hearing, staring at the floor and repeating a mantra over and over. The Tribunal received a medical report before the hearing advising it that the applicant was acutely psychotic, unable to communicate and unable to understand his legal practitioners and give them instructions. However, while by the time of post-hearing submissions the applicant had recovered sufficiently to give instructions, at the time of the hearing he had been significantly impaired. Her Honour took into account the following facts: the Applicant at the Tribunal did not make normal eye contact, mostly stared at the floor and repeated a chant or mantra repeatedly, frequently said he could not remember in relation to questions posed of him, was acutely psychotic and unable to instruct lawyers, and had suffered two acute psychotic episodes in two months. This led Crulci J to the decision that the Applicant had been denied a real and meaningful hearing before the Tribunal, and thus the Tribunal breached s 40 of the Act.[90] She also found that the Tribunal should have adjourned the hearing and ordered medical reports into the ability of the applicant to participate in it.[91]

76. In *CRI 029 v Republic of Nauru*,[92] Khan J heard an appeal where the matter before the Tribunal was adjourned to enable the applicant to seek assistance from a psychologist. Clinical records were provided to the Tribunal with observations about the applicant suffering from detention fatigue and anxiety about the future. The Tribunal rescheduled the hearing and the Applicant appeared before it. The Tribunal affirmed the decision of the Secretary that he was not recognised as a refugee and was not owed complementary protection.

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[87] [2016] NRSC 18 at [30].
[88] (1998) 160 ALR 24.
[89] [2017] NRSC 39.
[90] Ibid at [62].
[91] Ibid at [64].
[92] [2017] NRSC 75.

77. Before Khan J, one of the grounds of appeal was the Tribunal's failure to exercise its powers under s 24(1)(d) to require the Secretary to arrange for the making of a mental health investigation into the Applicant's mental health and his inability to recall matters and to give evidence or arguments about them to the Tribunal. Khan J found that the mental health of the Applicant had been a live issue before the Tribunal, having been raised at an early juncture. He found that the procedures adopted by the Tribunal had been unfair and that the "apparent mental state of the [Applicant] was sufficient to cause the Tribunal to obtain a report on his condition."[93] However, the report that was made available was not from a fully independent expert nor a "medical report" as recommended by the UNHCR. He found that given the extent to which the Tribunal was on notice of the mental health issues of the Applicant, it should have arranged for an independent, medical report and its failure to do so breached the obligation to "act according to the principles of natural justice and the substantial merits of the case" under s 22(b) of the Act.[94]

78. Finally, in *HFM 043 v Republic of Nauru* ("*HFM 043*"),[95] Khan J heard an appeal where the evidence before the Tribunal about the Applicant was that when she attended an information session about her appeal to the Tribunal she was unable to participate as she cried uncontrollably throughout the meeting. In addition, the Tribunal observed her affect at the hearing, which was that of a person who was "very depressed". In a statutory declaration she explained the background to her depression and the fact that she had been taking strong anti-depressant medication that she asserted affected her at her RSD interview.

79. The Tribunal accepted that the Applicant had mental health issues and stated that it took these into account when assessing her application. The Tribunal found it to be "tolerably clear on the material" (using the phraseology of Allsop J in *NAVK v Minister for Immigration and Multicultural and Indigenous Affairs*[96]) that the Applicant would have difficulty in accessing mental health services in Malaysia because of cost, and that she would have similar challenges in Thailand if she were to return there, leading Khan J to find error by the Tribunal in a failure to consider all of her claims and thereby a denial of procedural fairness.[97]

80. It is apparent then that Nauru has developed the national law on when a tribunal is obliged to take its own steps to obtain evidence necessary for its fact-finding practice, including by adjourning a matter for such a purpose and, more particularly, by using the powers which it has under s 24(1)(d) of the Act in order to accord procedural fairness or fulfil its obligations under s 22(b) of the Act, which stipulates that the Tribunal is to "act according to the principles of natural justice and the substantial merits of the case." As pointed out by Gummow and Hayne JJ in *SGLB*,[98] it is an significant step to go beyond recognising the existence of a power to order the undertaking of investigations and to conclude

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[93] Ibid at [82].
[94] Ibid at [50].
[95] [2017] NRSC 43.
[96] [2004] FCA 1695 at [15], applying *NABE v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 263 at [55]–[63].
[97] *HFM 043* at [65].
[98] *SGLB* at [43].

that there is a duty to take investigations so as to accord procedural fairness or act according to the substantial merits of a case.

81. However, there are scenarios where a Tribunal is on notice from its own observations of an applicant or from other reliable material properly placed before it that it needs to procure further information in the exercise of its inquisitorial powers to accord fairness to an applicant – whether to assure itself that the applicant is able to participate meaningfully in a hearing or to deal with issues of contention in an application for refugee status or complementary protection.

82. In the current case, the information before the Tribunal consisted of little more than assertions by the Applicant's solicitors in pre- and post-hearing submissions, unsupported by any expert material or clinical files. Moreover, the Applicant appeared before the Tribunal and answered a significant number of questions unremarkably and without any manifest inability to comport himself effectively as a witness on his own behalf.[99] The Tribunal communicated in response to pre-hearing submissions that it proposed not to ask the Applicant questions about the circumstances of his father's and his brother's death,[100] and it stood the matter down for 16 minutes for the Applicant to have a smoke,[101] but in general the Applicant answered questions responsively and clearly. Thus, the case shared features in common with the facts in *SZNVW*, where, if anything, there was additional information in the form of a psychologist's report that the applicant suffered from anhedonia. In this matter, the Appellant undertook to provide some additional material to the Tribunal at various stages of the hearing but ultimately, for reasons that are not known, the material was not provided.

83. There was no clear indication from the hearing, other than submissions by the Applicant's solicitors before and afterwards, that justice would not be done if an expert medical assessment was not conducted on the Appellant. No application was made for an order under section 24(1)(d) or for a further adjournment. He was able to participate in a real and meaningful sense in the hearing so there was no failure to accord him procedural fairness or to act on the substantial merits of the case. This means that the amended ground of appeal by the Applicant fails.

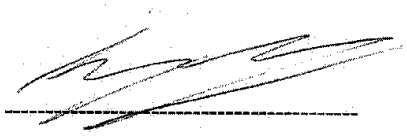
[99] BD 217–245. This appearance and engagement by the Appellant is one of the factors that distinguishes the current case factually from the facts taken into account by the High Court in *TTY 167 v Republic of Nauru* [2018] HCA 61 at [25]–[30] in determining that the Tribunal acted unreasonably in exercising its powers under s 41(1) of the *Refugees Convention Act 2012* (Nr) to decide the matter without taking further action to allow or enable the applicant to appear before it.

[100] Ibid 218 at ln 35–39.

[101] Ibid 234 at ln 34–38.

CONCLUSION

84. Under s 44(1) of the Act, I make an order dismissing the appeal and affirming the decision of the Tribunal and make no order as to costs.



Justice Ian Freckelton
Dated this 14th day of December 2018