IN THE SUPREME COURT OF NAURU

AT YAREN

Case No. 14 of 2015

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T14070, brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

DWN 080 Appellant

AND

THE REPUBLIC Respondent

Before: Justice I Freckelton

Appellant: Ms T. Baw
Respondent: Mr A. Aleksov

Date of Hearing: 4 December 2017
Date of Judgment: 27 November 2018

CATCHWORDS

APPEAL – asylum seeker – refugee – medical examination – detention fatigue – capacity to participate – powers of inquiry – reasonableness of decision – 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 mean protection for people who are not refugees but who also cannot be returned or expelled to the frontiers or territories on the basis that 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 decision on 17 January 2015 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") on 24 August 2014, 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 an Amended Notice of Appeal on 2 February 2017 and a Further Amended Notice of Appeal on 1 June 2017.

BACKGROUND

7. The Appellant is a Pakistani man of Punjabi ethnicity and Sunni Muslim religion. He was born in Baluchistan Province, although shortly after birth moved to Punjab.

8. The Appellant claims a fear of harm based on his imputed political opinion as an opponent of the Taliban, his Sunni religion, and his membership of the particular

social groups of returning asylum-seekers who have sought asylum in the West, and businessmen or Sunni businessmen who have not complied with the demands of the Taliban.

9. The Appellant left Pakistan for Indonesia in April 2013. In Indonesia, he boarded a boat for Australia, which was intercepted, and he was taken to Christmas Island. On 7 September 2013, the Appellant was transferred to Nauru for the purpose of having his claims assessed.

INITIAL APPLICATION FOR REFUGEE STATUS DETERMINATION

10. The Appellant attended a Refugee Status Determination ("RSD") Interview on 27 March 2014. The Secretary summarised the material elements of the Appellant's claim as follows:

    - *In 24 September 2010 his father's CD shop in Rawalpindi was burnt down and his father also perished in the fire. They attempted to put the fire out by themselves and when they asked for the authorities to help them no one showed up to put out the fire or locate the father. The police did not investigate the cause of the fire and they made fun of the Applicant when he asked them to investigate the cause of the fire.*
    - *In 2012 he was travelling home on his motorcycle from his job. He was attacked by a group of approximately 3 masked men. They beat him and took his motorcycle. He sustained injuries to his head and to his foot. This incident prompted him to renew his passport because he feared for his safety and life in Pakistan.*
    - *In January 2013 he was driving his car when masked men riding motorcycles stopped his car. They put guns to his head and stole his car. The Applicant did not report those incidents to the police as they had not investigated the death of his father.*
    - *Approximately 15 days after his car was stolen, the Applicant received a phone call from the same people who had previously demanded money from him. The caller told him he might have forgotten but they were the same people who had killed his father and he could not run away from them. The caller told him if he did not pay them they would kill him. The men said they belonged to the Taliban and they had killed his father because he had refused to pay. They told him they killed his father because he was selling dirty CDs and refused to close down his shop. Shias used to frequent his father's shop and get their Ashura ceremonies copied.*
    - *The Applicant changed his phone and made arrangements to flee Pakistan as he feared he would be killed by the Taliban. He left Pakistan on 27 April 2013*.[1]

11. The Secretary did not accept that the Appellant's father was killed and his shop burnt down by the Taliban in 2010, or that the Appellant was targeted by the Taliban, or criminal gangs posing as the Taliban, or that the Taliban stole his motorbike and car.[2]

12. In making these adverse findings, the Secretary considered it implausible that the Pakistan authorities would not attend to a fire in the capital when a person had been killed,[3] or that the police would not investigate a fire because the Appellant was unable to provide the names of the people who caused the fire as alleged.[4]

[1] Book of Documents ("BD") 59.
[2] BD 67.
[3] BD 61.
[4] Ibid.

The Secretary also noted inconsistencies in the Appellant's evidence as to the period of operation and location of the CD shop,[5] and the Appellant's claim regarding the burning down of his father's CD shop. In addition, the subsequent death of his father was not a matter raised by the Appellant at his transfer interview.[6] The Secretary also concluded that it was implausible that the Taliban would have killed the Appellant's father, and not targeted the Appellant's family, when the Appellant went into hiding following the threatening phone call.[7] The Secretary also considered it significant that the Appellant was not targeted during the three years between the fire and his departure, and was able to remain in Pakistan for close to four months after the threatening phone call without coming to harm. It found that these facts suggested he was not of adverse interest to the Taliban.[8]

13. As the Secretary found the Appellant's claims to lack credibility, the Secretary found that the Appellant had no well-founded fear of harm upon return to Pakistan. While there were reports of attacks and suicide bombs throughout Pakistan, the adverse security conditions generally affected religious minorities or persons specifically targeted by militant groups.[9] The Secretary noted that, as a Sunni Muslim, the Appellant is part of the religious majority.[10] The Secretary further noted that Rawalpindi has experienced lower levels of violence than other major cities, and therefore considered that there was no reasonable possibility of the Appellant facing harm in Rawalpindi due to militant acts of violence.[11]

14. In light of those findings, the Secretary concluded that the Appellant was not a refugee within the meaning of the Act.[12] As there was no evidence of any reasonable possibility of the Appellant facing harm prohibited by the international treaties ratified and signed by Nauru upon return, the Appellant was also not owed complementary protection.[13]

REFUGEE STATUS REVIEW TRIBUNAL

15. The Appellant provided to the Tribunal further written submissions, a supplementary statement, relevant country information, and medical evidence about the Appellant's mental and physical health. At the hearing, the Appellant elaborated on his claims regarding the incident in which the Appellant's step-mother and siblings were alleged to have been killed, the Appellant's involvement in his father's CD shop, the Taliban's attempts to extort money from the Appellant's father, and the successive attacks in which the Appellant's motorcycle, and then car, were stolen.

16. The Tribunal noted that the Secretary's adverse credibility findings relied, in part, on the mistaken belief that the Appellant had not raised the fire and father's death

[5] BD 61.
[6] Ibid.
[7] BD 62.
[8] Ibid.
[9] BD 68.
[10] Ibid.
[11] BD 69.
[12] Ibid.
[13] BD 70.

in the transfer interview, when the incident in fact was referred to, albeit in a different part of the transfer interview form.[14] However, the Tribunal also had concerns about the credibility of this aspect of the Appellant's claims. While the Appellant initially claimed at the hearing that the CD shop ceased operation after the fire, he then said that he tried to reconstruct the shop and reopen the business.[15] The Tribunal considered it implausible that the Appellant would try to reopen a business that the Taliban had destroyed, even to sell Islamic rather than Western CDs.[16] While country information indicates that CD shops were targeted by the Taliban, there was no evidence of this taking place in Islamabad or Rawalpindi, and the attacks in other areas were driven by ideological, as opposed to commercial, factors.[17] Consequently, while the Tribunal accepted that the Appellant's father was targeted for extortion, and the shop was destroyed in a bomb or arson attack when he refused to pay, in light of the available country information, the Tribunal did not accept that the Taliban was responsible for the attack.[18]

17. As to the incident in which the Appellant was attacked and his motorcycle taken, the Tribunal had difficulty accepting that the Taliban would seek the Appellant out more than two years after his father's shop was destroyed, and noted that the Appellant gave inconsistent responses to questions on where the attack took place.[19] It also found it to be implausible that, if there were a connection between the attack and the fire, the Taliban would simply mug the Appellant and let him go. Given the attack was mentioned by the Appellant at the outset, and he has scars consistent with the attack, the Tribunal found that the Appellant was attacked and his motorcycle taken, but that this was an isolated criminal attack.[20]

18. As to the incident in which the Appellant's car was allegedly stolen, the Tribunal did not find the Appellant's account to be credible and was not satisfied that the incident occurred at all. It did not accept that the Appellant could have been located at night, in a borrowed car, on a road he rarely used.[21] It noted that the Appellant also gave inconsistent responses as to how he learned the attackers were those involved in the fire, and was doubtful that the Appellant would have assumed the attackers to be "common people" as claimed, given the proximity of the attack to the motorbike incident.[22]

19. In light of the above, the Tribunal was not satisfied that the Appellant has any real possibility of being persecuted by the Taliban in the reasonably foreseeable future if returned to Pakistan.[23] In addition, on the basis of country information indicating that Shia Muslims are more often the victim of attacks than Sunnis, and the absence of country information suggesting that failed asylum-seekers who sought asylum in the West are targeted by the Taliban, the Tribunal was not

[14] BD 188 at [16].
[15] BD 191 at [33]; BD 193 at [41].
[16] BD 192 at [36].
[17] BD 193 at [42]-[43].
[18] BD 194 at [45].
[19] Ibid at [46].
[20] Ibid at [47].
[21] BD 195 at [50].
[22] Ibid.
[23] BD 196 at [55].

satisfied that there was any real possibility of the Appellant being persecuted because of sectarian violence between Sunni and Shia Muslims, or because of having sought asylum abroad.[24] Regarding the Appellant's claimed fear of persecution due to being a member of the particular social groups of businessmen, or Sunni businessmen, the Tribunal considered that businessmen in Pakistan are not targeted by virtue of being a member of that particular social group; rather they are targeted because they are lucrative targets. The Tribunal further considered that the Appellant had not established a well-founded fear of harm amounting to persecution due to being a Sunni businessman.[25]

20. The Tribunal concluded that, having found that the Appellant had no well-founded fear of being persecuted if returned to Pakistan in the reasonably foreseeable future, the Appellant was not a refugee.[26] In addition, having made the above findings with respect to the Appellant's Convention claims, the Tribunal found that the Appellant did not face a real possibility of degrading or other treatment so to enliven Nauru's international obligations, and was not owed complementary protection.[27]

THIS APPEAL

21. The Appellant's Further Amended Notice of Appeal reads:

    1. *The Tribunal erred on a point of law by failing to exercise its power to determine if the Appellant had the mental capacity to appear at the review.*

    Particulars

    At the Tribunal hearing the Appellant consistently referred to his deteriorating mental health, and even his suicidal thoughts, yet the Tribunal failed to require a medical examination into the mental health of the Appellant pursuant to its powers in sections 24(1)(d) and 36 of the Act.

    2. *The Tribunal erred on a point of law by failing to afford the Appellant procedural fairness in breach of the common law and s 40 of the Act by failing to require a medical examination of whether the Appellant had the mental capacity to appear at the review.*

    Particulars

        i. *The Tribunal failed to ensure that the Appellant had the capacity to give evidence and present arguments which was a real and meaningful, in the sense that the Appellant would have been given a real opportunity to present his case.*
        ii. *The absence of a medical examination on the Appellant's mental capacity rendered the invitation to attend the review an empty gesture.*

[24] BD 196 at [57]; BD 197 at [59].
[25] BD 197 at [62]-[63].
[26] BD 198 at [64]-[65].
[27] Ibid at [67].

3. *The Tribunal erred on a point of law by its failure to require a medical examination of whether the Appellant had the mental capacity to appear at the review, as it was legally unreasonable to conduct the review and make credibility findings against the Appellant in the circumstances.*

Particulars

i. *The Tribunal was clearly on notice of the Appellant's serious mental health issues by the medical evidence; the oral evidence of the Appellant since the beginning of the hearing; and the Appellant's submissions.*
ii. *Accordingly, the Tribunal should have made inquiries and/or requested an expert opinion as to the Appellant's mental capacity to appear at the review and the failure to do so lack an evident and intelligible justification.*

4. *The Tribunal erred on a point of law by failing to address all the integers of a claim at D[42].*

22. Upon commencement of the oral hearing, the Appellant indicated that ground 4 was no longer pressed.

Ground 1

23. The Appellant submits that the failure to exercise a statutory discretion, such as that in s 24(1)(d), and s 36, may constitute a breach of the Act that amounts to an error of law in conducting the review.[28]

24. While accepting that Australian courts have held there is no general "duty to inquire" on the part of a tribunal, the Appellant submits, with reference to the Australian High Court authority of *Minister for Immigration and Citizenship v SZIAI* ("*SZIAI*"), that a tribunal may fall into error where the inquiry was an obvious inquiry about a critical fact the existence of which could be easily ascertained, and the inquiry could have made a difference to the outcome of the review.[29]

25. The Respondent submits that this statement is to be taken in the context of the *Migration Act 1958* (Cth), which lays down an exhaustive statement of the content of procedural fairness in the conduct of a review, and the Australian concept of "legal unreasonableness".[30] Their Honours also found it necessary for the applicant to demonstrate that a favourable result could have been achieved if the Refugee Review Tribunal had made the inquiry.[31] The Respondent notes that the Appellant, in the current case, has not provided any evidence as to whether a favourable result could have been achieved if the Tribunal had arranged a medical examination.[32]

26. The Appellant took the Court to a number of Australian and Nauruan authorities to illustrate that statutory discretionary power can, in some cases, transmogrify into an obligation on a decision-maker to exercise that power. The Respondent

[28] Appellant's Submissions at [7].
[29] (2009) 111 ALD 15 at [25].
[30] Respondent's Further Submissions at [13].
[31] *SZIAI* at [26].
[32] Respondent's Further Submissions at [15].

responds to the points made by the Appellant on these authorities, and submits the Court should "be slow in simply adopting the approach adopted by Khan and Crulci JJ".[33]

Submissions on Case Law of Supreme Court of Nauru

27. In *DWN 072 v Republic of Nauru* ("*DWN 072*"), Khan J considered whether the Appellant would be at reasonable risk of harm from the Pakistani Taliban because of his religious and political views, and indicated that he adopted the principles stated in *Paramanathan v Minister for Immigration and Multicultural Affairs*,[34] and found that "the Tribunal was under a duty because of its inquisitorial procedures to make inquiries whether the appellant would be harmed because of his religious and political views".[35]

28. In *HFM 043 v Republic of Nauru* ("*HFM 043*"),[36] Khan J considered whether the Tribunal ought to have adjourned the hearing to enable a medical examination of the Appellant, who was in obviously poor mental health. His Honour found that, given the matter was raised by the Appellant in her statutory declaration, and the Tribunal made its own observation of the Appellant's poor mental state, the Tribunal ought to have adjourned the hearing and asked the Appellant to obtain a full medical report. As the Tribunal failed to do so, it fell into error of law.[37]

29. The Respondent submits that, in *DWN 072* and *HFM 043*, the Appellants claimed that their psychological conditions formed an integer of their protection claims, and therefore can be distinguished from the facts of the current case.[38]

30. In *CRI 029 v Republic of Nauru* ("*CRI 029*"),[39] Khan J again considered whether it was incumbent on the Tribunal to arrange for a medical report to be ordered in circumstances where it was on notice of the Appellant's mental health issues, and adjourned the case to enable an assessment to be completed, albeit not one that eventuated in a medical report of the nature detailed in the UNHCR Handbook. Khan J, relying on the comments of Kirby J in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* ("*SGLB*") regarding a comparable situation in which his Honour considered the procedures to be "unfair", found that the failure to arrange such an examination was unfair and constituted jurisdictional error.[40]

31. The Respondent submits that Khan J's finding in *CRI 029* lacks persuasiveness for a number of reasons, including that his Honour relied on the dissenting judgment of Kirby J in *SGLB*, his Honour's reference to "jurisdictional error" may reflect a misplaced immersion in Australian law,[41] and his Honour's reliance on

[33] Supreme Court Transcript 32 at ln 34 – 35.
[34] (1998) 160 ALR 24.
[35] [2016] NRSC 18 at [29].
[36] [2017] NRSC 43.
[37] Ibid at [65].
[38] Supreme Court Transcripts 14 at ln 3 – 5.
[39] [2017] NRSC 75.
[40] Ibid at [50].
[41] Supreme Court Transcript 16.

the UNHCR Handbook as the yardstick by which to measure the utility of a medical report is "dubious".[42]

32. In *ROD 122 v Republic of Nauru* ("*ROD 122*"),[43] Crulci J considered a similar situation and whether the failure to arrange an examination may result in a breach of s 40 of the Act and procedural fairness at common law. Her Honour said:

> "*The issue that arises is whether this obligation requires the Tribunal to actively turn its mind to whether the Applicant appearing before it might have a medical condition that would affect his or her capacity to give evidence, and, if so, to consider what effect the medical condition has on the Applicant*."[44]

33. Her Honour found that the Appellant had been denied a "real and meaningful opportunity to participate in the hearing", as, despite the evidence before the Tribunal as to the Appellant's poor mental health and cognitive abilities, and the Tribunal's own concerning observations, the Tribunal failed to adjourn the hearing and order a medical examination.[45]

34. In *SOS 034 v Republic of Nauru* ("*SOS 034*"),[46] Crulci J followed her Honour's decision in *ROD 122*, finding that the Tribunal failed to afford the Appellant a "real and meaningful hearing" by proceeding with the hearing in the face of clear evidence the Appellant was suffering from cognitive impairment, the requests for adjournments during the hearing, and the remarks made by the Appellant that his "brain is not functioning properly" and he "can't remember" certain matters.[47]

35. The Respondent submits that, on the facts of this case, the question identified by Crulci J in *ROD 122* does not arise, as the Tribunal did turn its mind to whether the Appellant had a medical condition that would affect his capacity to give evidence, and the effect the condition was having on the Appellant, noting the information as to the Appellant's medical incapacity before it at [23] – [25] of the Tribunal Decision Record. The Respondent says that the absence of any comment as to the content of a requirement for a "real and meaningful opportunity to participate in a hearing" renders the authority of minimal persuasive relevance to the Court.[48] On the contrary, the Respondent submits that her Honour's approach in *SOS 034* is consistent with the approach urged upon the Court by the Respondent, in that her Honour turned to the evidence before the Court as to the Appellant's incapacity, including relevant exchanges between the Tribunal and Appellant in the Tribunal transcript.[49]

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[42] Supreme Court Transcript 17 at ln 40 – 41.
[43] [2017] NRSC 39.
[44] Ibid at [53].
[45] Ibid at [62].
[46] Ibid 92.
[47] Ibid 92 at [46].
[48] Supreme Court Transcript 29 at ln 31- 47.
[49] Ibid 30 at ln 35 – 42.

Submissions

36. The Appellant submits that the Tribunal was aware of the Appellant's mental health difficulties, and accepted that:

- the Appellant's medical records show his mental state is very fragile; that his mental state adversely impacts on his capacity to participate in the Refugee Status Determination process, including his ability to recall incidents of past persecution and articulate his fears for the future;
- the Appellant had twice attempted to commit suicide in Pakistan;
- while in detention on Nauru, the Appellant has been diagnosed with detention fatigue and is at chronic risk of suicide; and
- he has difficulties with sleeping, attention and concentration, and his medical notes show that in August 2014 more trauma and torture symptoms emerged.[50]

37. The Appellant emphasises that his mental capacity was a critical fact to the review and whether he would have a fair opportunity to be heard, and a medical examination and report would have been easy to obtain.[51]

38. The Respondent disputes the Appellant's submission that his mental health was a "critical fact", given it did not form any part of his claim for refugee status. The Respondent also criticises the construction of s 36 of the Act contended for by the Appellant. The Respondent observes that s 36 does not confer on the Tribunal any compulsory power:

> **Tribunal may seek information**
>
> In conducting a review, the Tribunal may:
>
> (a) invite, either orally (including by telephone) or in writing, a person to provide information; and
> (b) obtain, by any other means, information that it considers relevant.

39. The Respondent also invites the Court to pay close attention to the phrasing of s 24(1)(d):

> **Evidence and procedure**
>
> (1) For the purpose of a review, the Tribunal may:
> …
> (d). 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.

The Respondent submits that the condition that the Tribunal "thinks it necessary" has not been met in this case; in fact, it appears the Tribunal considered it to be unnecessary, noting the Tribunal's observation that the Appellant was capable of

[50] Appellant's Submissions at [4].
[51] Ibid at [11].

giving "very detailed" evidence.[52] In these circumstances, the Respondent submitted, ground 1 must fail.

Ground 2

40. The Appellant submits that the counterpart of s 425(1) of the *Migration Act 1958* (Cth), requiring a Tribunal to invite an applicant to appear before it to "give evidence and present arguments relating to the issues arising in relation to the decision under review", is found in s 40 of the Nauruan Act. Section 40(1) reads as follows:

> "*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.*"

41. The Appellant's submissions cite a number of Australian authorities on s 425 suggesting that the invitation to appear "must not be a hollow shell or an empty gesture",[53] and must be a "real and meaningful" invitation to a hearing.[54]

42. Counsel for the Appellant points to several points in the Tribunal transcript at which the Appellant gave indications that he was suffering from poor mental health and finding the hearing mentally challenging. Shortly after the commencement of the hearing, the Appellant indicated he wished to say something, and said:

> "*I had said this in my previous interview as well, that – that they should – they should have a mental health check-up on me and after… I've had a lot of stress or tension and I have been smoking a lot of cigarettes and my mental health situation has deteriorated after that."*[55]

The Appellant submits that this comment, that "they should have a mental health check-up on me", is to be construed as a request from the Appellant for an adjournment to enable a medical examination to take place.[56]

43. In the context of questioning regarding the Appellant's alleged periods "in hiding" before fleeing Pakistan, the Appellant said:

> "*At – at the moment my – my mental health condition is so bad that I don't – that I – I'm feeling that I am going crazy. Sometimes I feel like I should just finish myself and that would be…* "[57]

44. The Tribunal then adjourned the hearing to enable the Appellant to have a break. Shortly after resuming, the Appellant again referred to his mental health difficulties:

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[52] BD 189 at [24].
[53] *Mazhar v Minister for Immigration and Multicultural Affairs* (2000) 183 ALR 188 ("*Mazhar*") at [31].
[54] *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 ("*SCAR*") at 561.
[55] BD 140 at ln 20 – 24.
[56] Supreme Court Transcript 36 at ln 26 – 28.
[57] BD 162 at ln 35 – 37.

> "*I want to – I want to say that – that only I know that – how hard it is for me to try to answer all your questions. And while ago you had noticed that – how hard it was for me to bear this.*"[58]

45. The Appellant also made comments that he felt as if his "head is going to explode now",[59] and "my brain is not working".[60]

46. Before the conclusion of the hearing, the Appellant's representative also addressed the Tribunal on the Appellant's turning to opium to relieve his anguish, and the Appellant's difficulty concentrating:

> "*I did receive a concern from my client, he just… a piece of information with you as he did not want to previously provide is that by smoking cigarettes he meant Opium, and… affected him mentally and physically to the very severe extent that he has a very hard time to be able to concentrate and live a normal life. I submit that any matter that is related to the fact that he was unable to express himself, or he was unable to remember or concentrate, he has a medical and physical reason of having a previous addiction. Our client would like this piece of information to remain as a private information because he does not – he did not even disclose it to IHMS*…"[61]

47. With respect to the authorities cited by the Appellant in support of ground 2, the Respondent again points out that the statutory context of those authorities renders them of limited use to this Court when interpreting the requirements of s 40(1) of the Act. The Respondent submits that what is essential under the Act is "fair procedure" in inviting an applicant to attend a hearing. The question of whether there has been fair procedure is an "essentially practical" question, which does not require an assessment of whether the hearing itself met any particular standard.

48. The Respondent also postulates that there must have also been some practical injustice suffered by the review applicant. In this regard, the Respondent relied upon the authority of *NAMJ v Minister for Immigration and Multicultural and Indigenous Affairs* ("*NAMJ*"),[62] in which Branson J observed that an applicant bears the onus of establishing he or she was unfit to take part in a Tribunal hearing.[63] While there was medical evidence before the Court that the Appellant suffered from post-traumatic stress disorder and depression, and displayed symptoms of psychomotor retardation and slowness of speech, Branson J noted that:[64]

> "*No evidence was led to suggest that that diagnosis had any practical significance for present purposes over and above the symptoms which the applicant was observed to display*."[65]

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[58] BD 164 at ln 11 – 13.
[59] BD 170 at ln 1.
[60] BD 172 at ln 10.
[61] BD 182 at ln 17 – 29.
[62] [2003] FCA 983.
[63] *NAMJ* at [69]. Her Honour relied on *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 at [36]; *Rose v Bridges* (1997) 79 FCR 378 at 386 per Finn J.
[64] *NAMJ* at [67].
[65] Ibid at [60].

49. In the absence of such evidence, the Appellant had not satisfied his onus of proving that he was unfit to participate in the hearing.[66]

50. The Respondent submits that no evidence has been put before the Court to establish that the Appellant was so mentally unfit that he was unable to participate in the hearing in this case.[67] To the contrary, as noted, the Respondent submits it was apparent to the Tribunal that the Appellant was capable of giving detailed testimony. The only evidence before this Court is the submissions of the Appellant's representatives, and IHMS medical notes, which the Respondent submits are not to be taken as expert opinion on the Appellant's condition.[68] The Respondent submits that this is insufficient to ground a finding that the Appellant lacked the mental capacity to participate in the review, and can only lead to a finding that the Appellant was, in fact, mentally fit, in which case there could have been no practical injustice or "denial of an opportunity which in fairness ought to have been given", the opportunity being the loss of opportunity to give evidence and present arguments in a procedurally fair way.[69] The lack of any request for an adjournment, or any direct submission the Appellant lacked the capacity to participate, lends further support to that there was no practical injustice.[70]

Ground 3

51. The Appellant relies upon the judgment of French CJ in *Minister for Immigration and Citizenship v Li* ("*LI*") in support of the proposition that reasonableness is a condition of the exercise of a discretionary power,[71] and the joint judgment of Hayne, Kiefel and Bell JJ in the same case, in which their owns specified that "*[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification*".[72] It follows, according to the Appellant, that a failure by a decision-maker to exercise its discretion to obtain information on a critical issue, that may be easily obtained, may be legally unreasonable.[73]

52. In further support of this proposition, the Appellant took the Court to *CRI 052 v Republic of Nauru* ("*CRI 052*"),[74] in which Crulci J found that there was no "evident and intelligible justification" disclosed in the Tribunal's reasons for the refusal of an adjournment because of the Appellant's poor mental health, where it was the first occasion the Appellant had a hearing before the Tribunal, and the first request for an adjournment.[75]

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[66] Ibid at [69].
[67] Respondent's Further Submissions at [36], see also Supreme Court Transcript 37 at ln 21 – 24.
[68] Supreme Court Transcript at ln 46 – 47.
[69] *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 at [60] (per Kiefel, Bell and Keane JJ); see Supreme Court Transcript Pt 2 5 at ln 44.
[70] Respondent's Further Submissions at [35] – [39], see also Supreme Court Transcript at ln 3 – 8.
[71] (2013) 249 CLR 332 at [25].
[72] Ibid at [76].
[73] Appellant's Submissions at [18].
[74] [2017] NRSC 33.
[75] Ibid at [58].

53. Because of the matters set out at [41] – [45] above, the Appellant submits that the Tribunal was on notice of the Appellant's poor mental health, and by failing to exercise its discretion to order a medical examination and report, the Tribunal acted unreasonably in a legal sense.

54. The Respondent submits that the Appellant's ground 3 substantially overlaps with ground 1, in that it asserts that the Tribunal erred in law by not exercising the power in s 24(1)(d).

55. The Respondent challenges the relevance of *CRI 052* on the basis that legal unreasonableness cannot be inferred from the lack of any "evident and intelligible justification" for a decision in the Tribunal's reasons; it is to be inferred from the objective circumstances. The Tribunal's statutory obligation to provide reasons for its decision on an applicant's protection claims under s 33(1) of the Act is also not to be conflated with any duty to provide reasons for refusing an adjournment.[76]

56. In any event, the Respondent's argument is that there is no basis for the allegation the Tribunal acted legally unreasonably in not ordering an examination and medical report.[77] It noted that the Tribunal is expected to act as quickly and efficiently as possible, and not delay the review in the absence of any clear indication an Appellant is unfit. Neither the Appellant nor his representatives argued that a medical examination should be ordered, and the Tribunal had the benefit of observing the Appellant's capacity at the hearing and was satisfied he was well enough to participate.[78] The Respondent also submitted that it was unclear whether there was any practical injustice to the Appellant in not ordering the examination.

CONSIDERATION

<u>Ground 1</u>

57. The Tribunal had before it a collection of medical records from between 3 June 2014 and 28 August 2014. In one more expansive report dated 19 August 2014, the IHMS mental health nurse noted a "Decline in mental state functioning and hopefulness. Increase in symptomatology, increased distress".[79]

58. However, in the way in which the case was argued before the Tribunal the Appellant's mental state did not figure prominently, in particular as a ground for his case. Put another way, it was not an integer of his case. This means that the reasoning adopted in *DWN 072* and in *HFM 043* is not relevant.

59. Similarly, the decision of Khan J in *CRI 029* relied upon a dissenting judgment of Kirby J in *SGLB* and, to that extent, is of limited utility.

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[76] Supreme Court Transcript 32 at ln 26 – 33 at ln 4.
[77] Respondent's Further Submissions at [43].
[78] Ibid at [45].
[79] BD 125.

60. The decisions of Crulci J in *ROD 122* and in *SOS 034* both relate to scenarios in which the Tribunal was on notice that the applicants were significantly impaired in their ability to participate meaningfully in their hearings. By contrast, in the current case, the Appellant, while identifying difficulties he was having in relation to his mental state, comported himself effectively and answered a great many questions from the Tribunal lucidly and in a responsive fashion. It is apparent that the Tribunal addressed its mind to the mental state of the Appellant by virtue of its observation that he was capable of giving "very detailed" evidence.

61. It is notable too that the Appellant's legal representatives did not seek to adjourn the hearing on the basis of the Appellant's mental state or to seek to have the Tribunal require the Secretary to arrange for the making of an investigation, or a medical examination under s 24(1)(d) of the Act.

62. There is no positive duty for the Tribunal to undertake an inquiry under the Act and the circumstances in which the Tribunal should do so, as set out by the High Court in *SZIAI* are very limited. As Hayne and Gummow JJ observed in *SGLB*, the legislative provision does not impose a duty or obligation to obtain a medical report; it confers a power.[80] This observation was made in a context in which the Tribunal had considered it highly likely that the applicant was suffering from Post-traumatic Stress Disorder but the Court by majority held that the Tribunal was under no duty to inquire as to the effect of that condition.[81]

63. The *SZIAI* circumstances are not satisfied in this case. Moreover, were a s 24(1)(d) medical examination to have been ordered, no evidence has been adduced as to what would have been or been likely to have been the outcome of such an inquiry. The precondition that the Tribunal have concluded that an examination was necessary was not established; in fact, it is apparent that the view of the Tribunal was to the contrary.

64. No appealable error on the part of the Tribunal is established.

65. In these circumstances ground one fails.

Ground 2

66. Ground two of the Appellant's grounds of appeal raises for consideration the content and operation of s 40 of the Act. This provision requires an invitation to an applicant to attend to "give evidence and present arguments relating to the issues arising in relation to the decision under review." Such an invitation must not be empty or meaningless.[82]

67. However, the submissions for the Appellant confuse powers and obligations. There is no indication in this matter that the Appellant's state was such as to render the invitation to attend and give evidence hollow, insubstantial or meaningless. He attended and gave evidence, answering questions as described above. He gave fluent, coherent and generally intelligible responses. A number of

[80] *SGLB* at 999 [43].
[81] See too *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [20].
[82] See eg *Mazhar* at [31]; *SCAR* at 561; *Li* at 362 [61].

breaks were provided to him to facilitate his giving of evidence. Further, he gave written evidence to the Tribunal and, through his legal representatives, made written and oral submissions.

68. Not only has no evidence been adduced as to the Appellant's unfitness to participate in the hearing but no such assertion was made to the Tribunal by his legal representatives or him. The evidence of his unfitness is to the contrary by virtue of his answering of questions, as identified at [60] above. In short, there was no failure to afford the Appellant procedural fairness in breach of the common law or any statutory provisions, including s 40 of the Act.

69. Ground two fails.

Ground 3

70. Ground three advanced by the Appellant relies upon what is said to be unreasonableness in the Tribunal's failure to adjourn the matter to obtain further information on a critical matter under s 24(1)(d) of the Act, namely the mental state of the Appellant.

71. However, neither the Appellant nor his representatives argued that a medical examination should be ordered. Accordingly, no reasons were provided for the Tribunal's failure to do so. Furthermore the Tribunal had the benefit of observing the Appellant's capacity at the hearing and was evidently satisfied he was well enough to participate meaningfully in the hearing.

72. As Gageler J observed in *Li*:

> "*The MRT does not fail to perform its statutory duty to review a decision merely because the manner of its performance of a procedural duty or its exercise or non-exercise of a procedural power might be assessed in the result not to measure up to one or more of the requisite statutory exhortations or aspirations. The MRT does fail to perform its statutory duty to review a decision where: (i) the manner of its performance of a procedural duty, or of its exercise or non-exercise of a procedural power, is so unreasonable that no reasonable tribunal heeding those exhortations or adhering to those aspirations could have done what the MRT in fact did; and (ii) that unreasonableness, or neglect, on the part of the MRT is shown to be material to the outcome of the review that the MRT has undertaken in fact.*" [83]

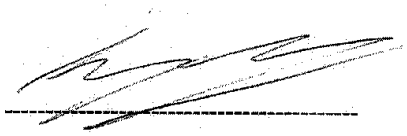
73. The preconditions to establishing unreasonableness as a matter of law have not been established in this instance.

74. Ground three therefore fails.

[83] *Li* at [98].

CONCLUSION

75. Under s 44(1) of the Act, I make an order dismissing the appeal and affirming the decision of the Tribunal.



Justice Ian Freckelton
Dated this 27th day of November 2018