IN THE SUPREME COURT OF NAURU

AT YAREN

Cases No. 42 and 43 of 2016

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN 15/00248 and 15/00252, brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

CRI 041 and CRI 042 Appellants

AND

THE REPUBLIC Respondent

Before: Freckelton J

Appellant: Theresa Baw
Respondent: Angel Aleksov

Date of Hearing: 7 December 2017
Date of Judgment: 22 March 2018

CATCHWORDS

APPEAL – refugee status – adjournment – rescheduling – competence to participate in a hearing – procedural fairness – legal unreasonableness – APPEAL DISMISSED.

JUDGMENT

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

> *(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 section 3 of the Act, complementary protection 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 defined in s 44 of the Act:

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

5. The Refugee Status Review Tribunal ("the Tribunal") delivered its decisions on 17 March 2016 affirming the decisions of the Secretary of the Department of Justice and Border Control ("the Secretary") of 2 October 2015, that the Appellants are not recognised as refugees under the 1951 Refugees Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Refugees Convention, and are not owed complementary protection under the Act.

BACKGROUND

6. The Appellants are husband and wife. The First Appellant, the husband, originates from the Jessore District of Bangladesh. He is of Bengali ethnicity and Sunni Muslim religion. The Second Appellant, his wife, originates from Indonesia and is of Malay ethnicity and Sunni Muslim religion. The couple were married in Malaysia on 15 January 2010. The Second Appellant gave birth to a son in Malaysia in November 2011.

7. The First Appellant claims a fear of harm based on his support for the Jamaat-e-Islami ("JI"), the illegal residence of his wife and son in Bangladesh, and his family's opposition to his marriage to a non-Bangladeshi. The Second Appellant also claims a fear of harm based on the illegal residence of her husband and son in Indonesia, and her family's opposition to her marriage to the First Appellant. The Second Appellant also claims that it would be against the best interests of her son to be brought up in Indonesia, that she would be discriminated against in Indonesia, and that she would be unable to earn a living and subsist.

8. The Appellants and their son travelled to Australia via Thailand, Malaysia, and Indonesia in November 2013. They were transferred to Nauru in April 2014.

INITIAL APPLICATION FOR REFUGEE STATUS APPLICATION

First Appellant

9. The First Appellant attended a Refugee Status Determination ("RSD") Interview on 8 September 2014. At that interview, the First Appellant said he became affiliated with the JI in 2002, and actively supported the JI between 2002 and 2007 by encouraging people to attend meetings and rallies, and putting up posters. In 2006 or 2007, at a rally at a bazaar, the Awami League ("AL") supporters threw bricks at participants, and the Appellant was hit on the ankle and ran away. In 2007, the AL attacked participants at another rally, and the First Appellant was hit on his right shoulder and suffered a fracture. He ran off and hid in the bush until his cousin found him.

10. The First Appellant said that the persecution of JI supporters by the AL escalated in the lead up to the election. Fearing being killed or seriously harmed, the First Appellant fled to Malaysia. He said that his father and uncle were members of the AL but were unable and unwilling to offer him any protection. He left Bangladesh in 2007 and went to Malaysia. He tried unsuccessfully to obtain Malaysian citizenship repeatedly between 2007 and 2009.

11. The First Appellant remained outside Bangladesh until November 2013, when he returned for about two weeks. He said that his family informed the AL that he had returned. He was afraid of being beaten, tortured or harmed so he fled to Indonesia with his wife. The First Appellant's wife, the Second Appellant, is an Indonesian citizen. While he was there, his wife's family threatened him with a knife because they did not accept the marriage.

12. In April 2014, the First Appellant's youngest brother said his older brother would have killed the First Appellant if he returned because the First Appellant wanted to claim the property his family bought using money the First Appellant sent to them, and also because he was a member of JI.

13. The Secretary considered the following elements of the First Appellant's claims to be credible:

- He is a supporter of JI and had a low level of involvement with JI prior to 2007;
- He was exposed to some general political violence while involved with JI prior to 2007;
- His step brothers did not want him to remain in Bangladesh because he wanted to claim back the properties that they had purchased with his money but put in their names;
- His step-brothers may have used old political affiliations to intimidate him into leaving Bangladesh in 2013.[1]

14. However, the Secretary did not consider the following elements of the First Appellant's claims to be credible:

- His step-brothers threatened him in 2007; and
- He was forced to leave Bangladesh in 2013 due to his past involvement with JI.[2]

15. In finding that the First Appellant had only low level involvement with the JI, the Secretary took into account that he did not mention his involvement with the JI in the Transfer Interview, that his knowledge of the JI was very general,[3] that he gave inconsistent evidence as to whether he was a member of the JI and whether most residents in his village supported the JI or the AL.[4]

16. In finding that the First Appellant was not threatened by his step-brothers, and did not leave Bangladesh in 2013 due to his involvement with the JI, the Secretary took into account that, at the time the First Appellant fled Bangladesh in 2007, he was 27 years of age, and his step-brothers were only 12 and 10 years of age.[5] The First Appellant's evidence at the RSD Interview also indicated that the main reason for his leaving Bangladesh in 2013 was that his Indonesian wife and child were not accepted by his family in Bangladesh, and his family did not want to hand over the properties they purchased with money sent by the First Appellant.[6]

17. The Secretary accepted that the First Appellant may have been harmed at two rallies, but did not accept that he was specifically targeted; rather the harm was due to generalised political violence that was common in Bangladesh at the time.[7] In addition, the activities carried out by the First Appellant for the JI were consistent with being a low level supporter, meaning the First Appellant would have only had a low level political profile. The First Appellant has also not lived or been politically active in Bangladesh since 2007, and left in 2013 for reasons unrelated to politics. The Secretary therefore did not accept that the First Appellant faces a reasonable possibility of harm upon return by reason of any actual or imputed political opinion.[8]

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[1] BD 106.
[2] Ibid.
[3] BD 107.
[4] Ibid.
[5] BD 108.
[6] BD 109.
[7] BD 107.
[8] BD 113.

18. However, the Secretary did accept that the First Appellant may have difficulty residing in his home area if returned in the reasonably foreseeable future due to the threats from his family.[9] The Secretary considered that, given the First Appellant was able to live in Malaysia for seven years without support, he would be able to relocate away from his home area within Bangladesh with his wife and child.[10] If the First Appellant did relocate away from his home area, the Secretary considered that there was no reasonable possibility of the First Appellant facing harm from his family.

19. As there was no reasonable possibility of the First Appellant facing harm, the Secretary considered that his fear of persecution was not well-founded. The First Appellant was not granted refugee status.[11] While he may face intimidation and threats from his family if returned to Bangladesh, this would not amount to torture, cruel, inhuman or degrading treatment or punishment, and, in any case, the First Appellant could avoid this intimidation or threats by relocating. The First Appellant was therefore also not granted complementary protection.[12]

Second Appellant

20. The Second Appellant attended an RSD Interview on 9 September 2014. She said that she is an Indonesian citizen, and lived illegally in Malaysia between December 2009 and November 2013. In 2013, she returned to Bangladesh with her husband (the First Appellant). They were threatened by his family so fled Bangladesh for Indonesia. However, her family in Indonesia would not accept her husband as he was Bangladeshi, and he was threatened with knives. The Appellants then fled Indonesia to seek asylum in Australia. The Second Appellant said she would struggle to subsist in Indonesia because she has no work experience, and it would not be in the best interests of her son to be brought up in Indonesia.[13] The Secretary considered these claims were capable of being believed, and accepted them as true.[14]

21. The Secretary noted that the Appellants are of the same religion, and that authorities in Indonesia do not oppose inter-racial marriages, and found that the Second Appellant would not face discrimination because of her marriage to a Bangladeshi.[15]

22. The Secretary considered that the wife's concerns about being unable to subsist in Malaysia, and it being against the best interests of her son to be brought up in Indonesia, were not well-founded as the son is eligible for Indonesian citizenship and the wife could sponsor her husband for residency.[16] While the Secretary considered that there may be an absence of State protection in the Second

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[9] BD 114.
[10] BD 116.
[11] BD 117.
[12] BD 118.
[13] BD 123.
[14] BD 124.
[15] BD 125.
[16] BD 126.

Appellant's home village because of the threats from his wife's family, the Secretary found that it was relevant and reasonable for the family to relocate within Indonesia. The threat from the wife's family would then dissipate, especially given the population density of Indonesia.[17]

23. As with the First Appellant, the Secretary found that the Second Appellant's fear of harm was not well-founded and she was not a refugee.[18] Given there was no reasonable possibility of harm on the basis of her husband and son's legal status, tensions with her family, being unable to subsist in Indonesia, and it being against the best interests of her son to be brought up in Indonesia, the Second Appellant was also found not to be owed complementary protection.

REFUGEE STATUS REVIEW TRIBUNAL

24. On 28 September 2015, the Secretary made determinations that the Appellants were not refugees or owed complementary protection, and the Appellants' son was not eligible for derivative status. On 2 October 2015, the First Appellant and his son, and the Second Appellant and her son, applied for review by the Tribunal. On 27 January 2016, they were invited to appear before the Tribunal on 4 February 2016. They were advised that if they failed to attend, the Tribunal may make a decision without taking further action to allow the Appellants to appear.

25. On 28 January 2016, the Tribunal received a letter requesting an adjournment for at least one month. The Appellants advised their representatives that their mental health had declined to the point that they were unable to communicate properly or provide instructions to their representatives. As the Tribunal had no medical evidence as to the Appellants' condition, the Tribunal re-scheduled the hearing until 11 February 2016. On 6 February 2016, the Tribunal received a report from International Health and Medical Services ("IHMS"), an age which provides medical care to asylum-seekers in Nauru, stating that, while the Appellants were clinically depressed, their cognitive functions were intact. The Tribunal decided to proceed with the hearings.

26. On 11 February 2016, the Appellants failed to appear and their representatives advised that they had not been instructed to make a further application for an adjournment. On 4 March 2016, the representatives provided additional medical evidence consistent with the report provided to the Tribunal. In the absence of any new medical evidence, the Tribunal decided to undertake the review without taking further action to allow the Appellants to appear.

27. As with the Secretary, the Tribunal found that each Appellant's fear of harm because of the legal status of their spouse and son in either Bangladesh or Indonesia was not well-founded. The First Appellant's wife and the son had a legal right to reside in Bangladesh, and the son had a legal right to reside in Indonesia, with the wife being able to sponsor her husband to reside in Indonesia.[19]

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[17] BD 128.
[18] Ibid.
[19] BD 180 at [31]; BD 191 at [30].

28. In relation to the First Appellant's claimed fear of harm from the AL due to being a supporter of the JI, the Tribunal indicated concern about similar matters as the Secretary, including the First Appellant's failure to mention his own involvement with the JI during the Transfer Interview, inconsistent evidence as to whether his father, uncle and brother were involved with the JI or AL, and his limited knowledge of the JI. The First Appellant also gave inconsistent evidence during the Transfer Interview as to whether most residents of his village supported the JI or the AL.[20] The Tribunal further noted that at the Transfer Interview, the First Appellant said he had never been attacked because of his political involvement, but said in his RSD application that he had been attacked on two occasions.[21] The Tribunal was therefore unable to be satisfied that the First Appellant was involved in JI or his father, uncle and stepbrother were involved in the AL. As a result, the Tribunal found that the First Appellant did not have a well-founded fear of harm by reason of his actual or imputed political opinion.[22]

29. On the information before the Tribunal, it also considered that the main reason the First Appellant feared his family in Bangladesh was because of the property dispute, and not because he married a non-Bangladeshi. The Tribunal also did not accept that the Appellants' son would be subject to harm amounting to persecution because of the property dispute, nor would he be persecuted by the JI or AL, given that the Tribunal was unable to be satisfied that the First Appellant was involved with the JI or his relatives involved in the AL.[23] The First Appellant's fear of harm to his wife and son because his family did not accept his marriage, or to his son by the AL or because of the property dispute, was also found not to be well-founded.[24]

30. As the Appellants failed to attend their hearings, the Tribunal was unable to explore many aspects of their claims with them, and many were lacking in detail. In particular, the Tribunal was not able to clarify with the Second Appellant the problems she believed her son would face being brought up in Indonesia,[25] the nature of the discrimination she believes she would be subject to if returned to Indonesia,[26] the nature and degree of the harm she feared from her family if they remained in Indonesia,[27] or why she believed she would be unable to find work in Indonesia given her extensive work experience in Malaysia.[28]

31. In the absence of any further evidence, the Tribunal was unable to be satisfied that the Appellants were refugees within the meaning of the Convention.[29] Similarly, the Tribunal said it was unable to be satisfied that the Appellants would face harm prohibited by the international treaties ratified by Nauru if returned to

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[20] BD 180 at [32]-[36].
[21] Ibid at [34].
[22] BD 181 at [38].
[23] BD 183 at [48]-[49].
[24] BD 181 at [43].
[25] BD 191-192 at [31].
[26] BD 192 at [32].
[27] Ibid at [33]-[36].
[28] BD 191-192 at [31]-[32].
[29] BD 183 at [54]; BD 193 at [43].

Bangladesh, including the *Convention on the Rights of the Child*. The Appellants were not granted complementary protection.[30]

THE APPEAL

32. By Further Amended Notices of Appeal, dated 7 December 2017, the Appellants contended that:

> 1. *The Tribunal erred on a point of law by its decision to refuse the further adjournment applications, and in doing so:*
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> *(a) failed to afford the Appellant s procedural fairness in breach of the common law and breached section 22(b) of the Act; and*
> *(b) acted with legal unreasonableness.*
>
> *Particulars*
>
> *The Tribunal failed to do the following:*
> *(i) Initially adjourn the scheduled Tribunal hearing for at least a month; and*
> *(ii) Further postpone the Tribunal hearing in light of the Appellants' diagnosis of suffering severe major depression.*

THE PROCEDURAL FAIRNESS GROUND

33. The Appellants placed emphasis upon the following sequence:

- Their hearing was scheduled on 28 January 2016 for 4 February 2016;[31]
- On 28 January 2016, a request was made for adjournment for "at least one month or until such time that they have capacity to appear and give evidence";[32]
- On 29 January 2016, the Tribunal emailed the Appellants' Claim Assistance Providers ("CAPs") proposing to reschedule the hearing by one week to 11 February 2016 as no evidence had been provided as to the Appellants' incapacity to participate in the hearing or to provide instructions;[33]
- On 29 January 2016, CAPs responded to the Tribunal stating it would attempt to obtain medical evidence/assessments and keep the Tribunal informed of medical appointments obtained and attended;[34]
- On 4 February 2016, CAPs wrote to the Tribunal stating it was yet to receive any medical evidence from the First Appellant in support of his claim that he was unable to participate in a hearing. CAPs stated that the Tribunal would be kept informed;[35]
- On 6 February 2016, an email report by Dr Mohanraj of IHMS stated that the First Appellant was clinically depressed and that his condition was more

[30] BD 184 at [58]; BD 194 at [49].
[31] BD 139; BD 141.
[32] BD 145-146.
[33] BD 147.
[34] BD 149.
[35] BD 152-153.

severe than that of his wife "with predominant anxiety features as well. I have prescribed appropriate psychotropic medications for the two of them. The two of them were not keen to attend the review hearing ... While the couple is understandably devastated psychologically, both their cognitive functions are intact and their thought processes are not in any way impaired to the extend [sic] that they are unable to participate in the review hearing."[36]

34. On 6 February 2016, CAPs again wrote to the Tribunal stating that: "We note that Dr Mohanraj's assessment is that both applicants are clinically depressed and have been prescribed medication for this, he also states that they are "not in any way impaired to the extend [sic] that they are unable to participate in the review hearing." On the basis of this assessment and our previous correspondence in this matter, we request an indication from the Tribunal as to whether or not you are minded to grant a further adjournment in this matter, or whether the Tribunal wishes to proceed with a hearing on Thursday 11/02/2016."[37]

35. On 6 February 2016, the Tribunal emailed CAPs that: "Based on the medical evidence provided the Tribunal intends to proceed with the hearing on Thursday 11 February 2016."[38]

36. According to a filenote of a meeting with all three members of the Tribunal, CAPs explained that:

- The clients had instructed CAPS "that they feel too mentally unwell to participate in the hearing and they wish to let CAPS know when they do feel well enough";
- CAPs encouraged the clients to at least go to explain how they feel;
- CAPs explained they had not been able to advise the clients what the psychiatrist said and why the Tribunal was unwilling the adjourn their hearing;
- They were still instructed to seek further adjournment but it appears to be on an indefinite basis – i.e. until the clients instruct that they are well enough;
- CAPs advised the Tribunal members that CAPs would try to obtain any further records and if they contained any further information that would be of assistance, they would undertake to send that to the Tribunal;
- The Tribunal members tentatively discussed a deadline of two weeks for this information to be provided, but this was not settled.[39]

37. On 14 February 2016, the Tribunal wrote to CAPs by email confirming that in the absence of further medical evidence in relation to their non-attendance at the hearing scheduled for Thursday 11 February 2016, the Tribunal would proceed to make a decision on the papers.[40]

38. On 4 March 2016, CAPs communicated as follows with the Tribunal:

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[36] BD 157.
[37] BD 155.
[38] BD 159.
[39] Affidavit of Walid Babakarkhil, affirmed 28 November 2017.
[40] BD 161.

"These Applicants instructed CAPs that they did not have the capacity to participate in their hearing process at the scheduled date and time. Please find attached relevant pages extracted from IHMS records in support or the Applicant's assertions. The reports indicated that both Applicants are suffering from significant mental and emotional conditions and present with a diagnosis of clinical depression. Both Applicants have been prescribed psychotropic medication for these symptoms. ... We respectfully submit that whilst the Applicants' may have cognitive capacity (ie they are not psychotic or dissociative) to comprehend questions and possibly formulate answers, at this time they do not have the psych-emotional capacity to effectively present their claims nor the mental and emotional durability to sustain a hearing of several hours.

We therefore implore the tribunal to consent to a postponement of their RSRT hearing to a time in the future when they are able to effectively engage with the Tribunal regarding their claims for protection."[41]

39. The medical records in question in respect of the First Appellant contained a note dated 5 February 2016 by Dr Mohanraj:

"Gradually began to loose interest in life and had low mood every day thinking of his future. He felt hopeless and thought that it was unfair that others like the Rohingyas are favoured over him ... Many times he felt it would be better if he just died in his sleep ... He had palpitations and would be fearful without any real reason. He stayed away from friends and would pace up and down outside his accommodation ... His neighbours called him "the mad one" ... He says he might not be in a position to attend the review session as he will not be capable of answering questions posed. At times he feels like breaking his head so these thought would not trouble him so much.

Major Depressive Disorder with predominant anxiety symptoms."[42]

40. The further medical records in question in respect of the Second Appellant included a note dated 5 February 2016 by Dr Mohanraj:

"Low mood, hopelessness, loss of interest in pleasurable activities, poor sleep and creased sleep, hopelessness, death wishes – 2 month duration.
... She sees no point in attending the review session as she is sure the result would be a negative RSD."[43]

41. On 5 March 2016, the Tribunal emailed CAPs:

"On 11 February 2016 ... [t]he Tribunal was informed by Ms Farmer that a further application for a postponement was not being made by CAPs. The Tribunal confirmed that the matter would be dealt with on the material before it (and confirmed this in an email dated 14 February 2016).

The information now provided is essentially the same information that was provided on 6 February 2016 [sic]. In the absence of new medical evidence as to [the Appellants'] capacity to participate in a hearing on 11 February 2016, the Tribunal

[41] BD 163-164.
[42] BD 165.
[43] BD 168.

does not propose to reschedule a hearing for [the Appellants]. The Tribunal confirms that it will make a decision without taking any further action to allow or enable the applicants to appear before it."[44]

42. Section 40 of the Act provides that:

> 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 determination or decision under review.*
>
> 2. *Subsection (1) does not apply if:*
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> 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.*
>
> 3. *An invitation to appear before the Tribunal must be given to the applicant with reasonable notice and must:*
> a. *specify the time, date and place at which the applicant is scheduled to appear; and*
> b. *invite the applicant to specify, by written notice to the Tribunal given within 7 days, persons from whom the applicant would like the Tribunal to obtain oral evidence.*
>
> 4. *If the Tribunal is notified by an applicant under subsection (3)(b), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice.*

43. The invitation must not be a "hollow shell or an empty gesture."[45] Put another way, an applicant must be given a "real and meaningful" invitation to a hearing.[46] In *ROD 122 v The Republic* ("*ROD 122*"), Crulci J interpreted this to require a 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."[47] In that case, the Court concluded that:

> *"All these matters taken cumulatively ought to have alerted the Tribunal that objectively the Appellant lacked the capacity to give an account of his experiences, present argument in support of his claims and respond to questions put to him, such that he was deprived of a 'real and meaningful' hearing."*[48]

44. However, the circumstances under consideration in *ROD 122* were significantly different factually, as conceded on behalf of the Appellants, as the Tribunal was in a position to make its own observations of the difficulties under which the Applicant was labouring as he attended the Tribunal hearing.

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[44] BD 171.
[45] *Mazhar v Minister for Immigration and Multicultural Affairs* (2000) 183 ALT 1888 at [31].
[46] Minister for Immigration and Multicultural and Indigenous Affairs v SCAR (2003) 128 FCR 553 at 561; see too Minister for Immigration and Citizenship v Li (2013) 249 CLR 332 at 362 at [61] per Hayne, Kiefel and Bell JJ.
[47] *ROD 122 v The Republic* [2017] NRSC 39 at [53].
[48] Ibid at [59].

45. The submission on behalf of the Appellants here was that the Appellants' case was stronger than that of the Appellant in *ROD 122* because not only did the Tribunal fail to turn its mind actively to the relevant issue, but its failure to reschedule the hearing meant that the Appellants were completely deprived of any hearing at all, let alone participating in a "real and meaningful" hearing.

46. The Respondent accepted that in some circumstances the Tribunal may need to give an adjournment to afford an applicant a further opportunity to attend an oral hearing in order to provide a fair procedure.[49] Thus where a person lacks the capacity to participate in an oral hearing, a Tribunal may be regarded as having adopted an unfair procedure in not adjourning a hearing. However, the existence of such capacity is a question of fact for the Tribunal.[50]

47. The Respondent contended that the Appellants in this case did have the opportunity to attend the hearing. It is correct in this respect. Multiple opportunities were extended to the Appellants to attend the hearing. It cannot accurately be said on the evidence that they were so psychiatrically unwell that they were deprived of the capacity for meaningful participation in the hearing. On 5 February 2016, in his clinical records, Dr Mohanraj diagnosed the First Appellant as having a Major Depressive Disorder with predominant anxiety symptoms, but did not provide any view to the effect that he could not attend or participate in the hearing.[51] His diagnosis did not go so far in respect of the Second Appellant.[52] The proposition that she had the capacity to attend and participate in the hearing is even stronger.

48. To the contrary, in his email of 6 February 2016, Dr Mohanraj stated tellingly that "both their cognitive functions are intact and their thought processes are not in any way impaired to the extend [sic] that they are unable to participate in the review hearing."[53] There was no medical evidence that supported the submissions by CAPs on 4 March 2016; the extant medical evidence was not consistent with the CAPs submissions to the Tribunal. It was unsurprising that the Tribunal did not accept them and that it determined to proceed with the hearing. It committed no error in terms of affording procedural fairness by doing so.

THE UNREASONABLENESS GROUND

49. The Appellants contended that the failure to adjourn and reschedule their hearing was legally unreasonable by reference to the statements of the High Court in *Minister for Immigration and Citizenship v Li* ("*Li*").[54]

50. In *Li*, French CJ said:

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[49] *BRF v Republic of Nauru* [2017] HCA 44 at [56].
[50] *NAMJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2003) 76 ALD 56 at [46].
[51] BD 165.
[52] BD 168.
[53] BD 157.
[54] (2013) 249 CLR 332.

"the requirement that officials exercising discretion comply with the canons of rationality means, inter alia, that their decisions must be reached by reasoning which is intelligible and reasonable and directed towards and related intelligibly to the purposes of the power. Those canons also attract requirements of impartiality and "a certain continuity and consistency in making decisions." They were reflected in the powers of the English Court of Chancery to control public bodies "if they proceed to exercise their powers in an unreasonable manner; whether induced to do so from improper motives or from error of judgment." They were acknowledged in the earliest years of this Court.

The rationality required by "the rules of reason" is an essential element of lawfulness in decision-making. A decision made for a purpose not authorised by statute, or by reference to considerations irrelevant to the statutory purpose or beyond its scope, or in disregard of mandatory relevant considerations, is beyond power. It falls outside the framework of rationality provided by the statute. To that framework, defined by the subject matter, scope and purpose of the statute conferring the discretion, there may be added specific requirements of a procedural or substantive character. They may be express statutory conditions or, in the case of the requirements of procedural fairness, implied conditions. Vitiating unreasonableness may be characterised in more than one way susceptible of judicial review. A decision affected by actual bias may lead to a discretion being exercised for an improper purpose or by reference to irrelevant considerations. A failure to accord, to a person to be affected by a decision, a reasonable opportunity to be heard may contravene a statutory requirement to accord such a hearing. It may also have the consequence that relevant material which the decision-maker is bound to take into account is not taken into account."[55]

51. Hayne, Kiefel and Bell JJ said:

"an appellate court may infer that in some way there has been a failure properly to exercise the discretion "if upon the facts [the result] is unreasonable or plainly unjust". The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification."[56]

52. In *Minister for Immigration and Border Protection v Stretton* ("*Stretton*"),[57] Allsop CJ considered the application of *Li.* He noted that the judgments in *Li* identified contexts in which the concept of legal unreasonableness was employed: "a conclusion after the identification of jurisdictional error for a recognised species of error, and an 'outcome-focused' conclusion without any specific jurisdictional error being identified." His Honour observed that:

"The terms, scope and policy of the statute and the fundamental values that attend the proper exercise of power – a rejection of unfairness, of unreasonableness and of arbitrariness; equality; and the humanity and dignity of the individual – will inform the

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[55] Ibid at [25] – [26].
[56] Ibid at [76].
[57] [2016] FCAFC 11 at [6].

conclusion, necessarily to a degree evaluative, as to whether the decision bespeaks an exercise of power beyond its source."[58]

53. The Appellants argued that in circumstances where the Appellants had provided medical evidence of their "questionable mental health; had not appeared before the Tribunal at the hearing; and their representatives had sought previous adjournments", the decision by the Tribunal lacked any intelligible justification.

54. The Appellants conceded that, although their representatives at the hearing did not press the earlier request for an adjournment, the Tribunal had the power independently to reschedule the hearing under s 41(2) of the Act, and in the circumstances, the Tribunal's decision to proceed with the hearing fell into legal unreasonableness and was an objectively unfair outcome for the Appellants – "There was no intelligible justification for the Tribunal to proceed to decide the review in the circumstances."

55. However, as the Respondent pointed out, it was far from unreasonable for the Tribunal to decline an adjournment and a rescheduling of the hearing when it had uncontradicted medical evidence before it that stated that in spite of the symptoms experienced by the Appellants, their cognitive functions were intact and their thought processes were not impaired to the extent that they were not able to participate in the hearing. [59] Notably, too, their legal representatives did not press for the adjournment and rescheduling at the actual hearing. This does not come close to fulfilling the requirements for unreasonableness outlined by the High Court in *Li* or by the Allsop CJ in *Stretton*.

56. This ground does not succeed.

57. Under s 44(1) of the Act, I make an order affirming the decision of the Tribunal.

Justice Ian Freckelton
Dated this 22nd day of March 2018

THE SEAL OF THE SUPREME COURT
REPUBLIC OF NAURU

[58] Ibid at [9].
[59] Compare *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1.