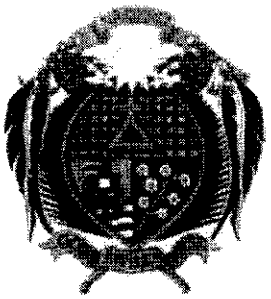

IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal No. 14 of 2018
[Supreme Court Refugee Appeal Case No. 15 of 2017]

BETWEEN: **SOS 005**

APPELLANT

AND: **REPUBLIC OF NAURU**

RESPONDENT

BEFORE: **Justice R. Wimalasena**
Justice Sir A. Palmer
Justice C. Makail

DATE OF HEARING: **06/07/2023**

DATE OF JUDGMENT: **14/11/2023**

CITATION: **SOS 005 v. REPUBLIC OF NAURU**

KEYWORDS:

COURT OF APPEAL – Refugee appeal – Appeal against dismissal of appeal by Supreme Court – Appeal to Supreme Court from decision by Refugee Status Tribunal to affirm determination of Secretary to hold applicant not eligible for refugee status and owed complementary protection – Refugees Convention Act, 2012

APPREHENSION OF BIAS – Natural justice – Remittal hearing of Tribunal – Allegation of apprehension of bias – Common member of Tribunal – Objection to common member presiding – Waiver of objection – Question of whether objection was taken – Clear and unambiguous objection

NATURAL JUSTICE – Breach of natural justice – Legally unreasonable – Duty of Tribunal to invite applicant to comment on certain aspects of applicant's case before decision – Rule of natural justice – Refugees Convention Act, 2012 – Section 41

COURT OF APPEAL – Practice & Procedure – Application for leave to advance ground not taken in Supreme Court – Principles of leave discussed – Adequate explanation for not taking up ground in Supreme Court – Reasonable prospect of success of proposed fresh ground – Exceptional circumstances – Interests of justice

LEGISLATIONS:

Refugees Convention Act, 2012, Nauru Court of Appeal Act, 2018

CASES CITED:

SOS 005 v. Republic of Nauru [2018] NRSC 12, WET 054 v. The Republic of Nauru [2023] NRCA 8, WET 066 v. Republic of Nauru [2023] NRCA 9, OPK 023 v. Republic of Nauru [2023] NRCA 16, TTY 167 v. Republic of Nauru [2018] HCA 61, [2018] 93 ALRJ 111, VEA 026 v. Republic of Nauru [2018] NRSC 19, SOS 011 v. Republic of Nauru [2018] NRSC 22, Eastman v. R [2000] HCA 29; 203 CLR 1, Tawadokai v. State [2022] FJSC

13; CBV 0008.2019 (29 April 2022), Notting Hill Finance Ltd v. Sheik [2019] 4 WLR 146; [2019] EWCA Civ 1337 (25th July 2019), NAJT v. Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 51; [2005] FCAFC 134, Chen v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFA 41; Refugee Review Tribunal, Re: Ex parte H [2001] HCA 28; 179 ALR 425, Vakauta v. Kelly (1989) 167 CLR 568, Reg v. Secretary of State for the Home Department, Ex parte Budgaycay [1987] A.C. 514, Re McCory; Ex parte Rivett (1895) 21 VLR 3, Re Alley; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation (1985) 60 ALJR 181, SZBEL v. Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; (2006) 228 CLR 152, Kaur and Another v. Minister for Immigration and Border Protection and Another [2014] FCA 915, F Hoffman La Roche and Co; AG v. Secretary of State for Trade and Industry [1975] AC 295, Commissioner for Australia Territory Revenue v. Alphaone Pty Ltd (1994) 49 FCR 576 and Minister for Immigration and Multicultural Affairs, Ex parte Miah [2001] HCA; (2001) 206 CLR 57.

APPEARANCES:

COUNSEL for the Appellant: **Mr. N M Wood SC**

COUNSEL for the Respondent: **Mr. H P T Bevan SC**

JUDGMENT

1. By notice of appeal filed 23 October 2018 the appellant appeals from a judgment of the Supreme Court constituted by Freckelton J delivered on 22 March 2018 pursuant to Section 19(2)(d) of the *Nauru Court of Appeal Act,* 2018 (*"Court of Appeal Act"*). The judgment has been published as *SOS005 v. Republic of Nauru* [2018] NRSC 12.

Introduction

2. In the judgment, his Honour affirmed a decision of the Refugees Status Review Tribunal (*"the Tribunal"*) which in turn, affirmed a determination of the Secretary for Justice and Border Control (*"Secretary"*) that the appellant is not recognized as a refugee and is not owed complementary protection under the *Refugees Convention Act,* 2012 (Nr) *("Refugees Act")*.

Brief Facts

3. It is not disputed that the appellant, SOS005 is from Quetta, Balochistan in Pakistan. He was born on 03 April 1985 and is a Sunni Muslim from Pashtun ethnicity. He has worked in his father's fruit selling business since 199. His father was threatened in 2011 by men who extorted money out of him.

4. In May 2013 the appellant's father received three threatening phone calls where men demanded money from his father, but he refused to pay. Following this event. A suspicious car was seen at his father's business and the appellant stopped going to work in fear for his life. His father has reduced his visibility in the business but continues to own it.

5. On 12 August 2013 the appellant departed Quetta for Karachi and departed Pakistan on 31 August 2013. He arrived in Nauru on 13 November 2013.

6. A transfer interview was conducted on 01 December 2013. The appellant's refugee status determination was held on 10 April 2014. In a written decision dated 25 September 2014 the Secretary found that the appellant was not a refugee. The appellant applied for a review of the Secretary's decision to the Tribunal. A hearing was held before the Tribunal on 30 January 2015. A decision of the Tribunal dated 08 April 2015 affirmed the determination of the Secretary.

7. On appeal, the matter was remitted from the Supreme Court of Nauru on 23 March 2016. The remittal hearing at the Tribunal was listed on 02 June 2016 and the appellant was invited to appear by way of a notice dated 16 May 2016. He did not attend the scheduled hearing before the Tribunal on 02 June 2016. However, further submissions dated 31 May 2016 were provided on behalf of the appellant. The Tribunal made a decision on the review dated 03 August 2016 pursuant to Section 41(1) of the *Refugees Act.* It affirmed the determination of the Secretary.

Grounds of Appeal

8. The sole ground of appeal reflected the same ground that was argued before the primary judge. This ground was maintained in an amended notice of appeal dated 12 October 2022 as Ground 1(a). It is reproduced hereunder:

"The primary judge erred by failing to find that the Refugee Status Review Tribunal (the Tribunal) erred on a point of law by failing to act in accordance with section 22 of the Refugees Convention Act 2012 and the principles of procedural fairness by:

(a) not alerting the appellant to the matters in issues or giving him the opportunity to comment or respond to them;

i. the matters in issue and those that were the subject of adverse findings that the Tribunal failed to put to the appellant for comment or reasons are at paragraphs [91] – [119] of the Tribiunal's decision."

9. Subsequently, the appellant filed a supplementary notice of appeal on 06 July 2023 pursuant to Rule 36(1) of the *Nauru Court of Appeal Rules ("Rules")* and retained ground 1(a) of the notice of appeal filed 12 October 2022 and pleaded the following additional fresh grounds:

"2. The Supreme Court erred by failing to find that the decision of the Refugee Status Review Tribunal (Tribunal) made on 25 July 2017 was affected by apprehended bias in breach of the rules of natural justice of common law and s 22 of the Refugees Convention Act 2012.

Particulars

a. On 8 April 2015 the Tribunal (constituted by Members Boddison, Godfrey and Zelinka (1st Tribunal) affirmed the determination of the Secretary that the appellant is not recognized as a refugee and is not a person to whom the Republic owes protection obligations. In so doing, the Tribunal did not accept certain evidence given by the appellant and (at least implicitly made adverse credibility findings.

b. On 23 March 2016, the Supreme Court quashed the 1st Tribunal's decision.

c. *On 3 August 2016, the Tribunal (constituted by Members Fisher, Boland and Zelinka) (2nd Tribunal) affirmed the Secretary's determination. In so doing, the Tribunal did not accept certain evidence given by the appellant and (at least implicitly) made adverse credibility findings.*

d. *A reasonable lay observer might consider that the decision of the 2nd tribunal might have been affected by prejudgment, or otherwise departed from the true course of decision-making, in circumstances where one of the members of the 2nd Tribunal was also a member of the 1st Tribunal (Member Zelinka).*

3. *If the Tribunal's decision is affected by apprehended bias, the Court has no power under section 44(1)(a) of the Act to affirm the decision of the Tribunal, and would not properly exercise any discretion to refuse to grant relief to the appellant."*

Application for Leave to Advance Fresh Ground of Appeal

10. Section 48(1)(a) of the *Court of Appeal Act* provides that a notice of appeal can be amended without leave of the Court at any time before 14 days of the date fixed for hearing of the appeal by way of a supplementary notice of appeal. The supplementary notice of appeal was filed on 06 July 2013 which was on the date of hearing of the appeal and leave is necessary under Section 48(1)(b) of the same Act.

11. We note the proposed grounds in the supplementary notice of appeal are fresh grounds as they were not argued in the Court below and leave is necessary for that too. Accordingly, we will consider both applications for leave to file supplementary notice of appeal and leave to advance fresh grounds of appeal together. The power to grant leave is discretionary and must be exercised based on proper principles.

12. In this jurisdiction this Court extensively examined the matters relevant to amendment of a notice of appeal and introduction of fresh ground of appeal in the case of *WET 054 v. The Republic of Nauru* [2023] NRCA 8. Amongst others, the Court referred to the cases of *Eastman v. R* [2000] HCA 29; 203 CLR 1, *Tawadokai v. State* [2022] FJSC 13; CBV 0008.2019 (29 April 2022), *Notting Hill Finance Ltd v. Sheik* [2019] 4 WLR 146; [2019] EWCA Civ 1337 (25th July 2019) and *NAJT v. Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51; [2005] FCAFC 134.

13. It was held that the discretion to grant leave to advance a fresh ground of appeal must be exercised only in exceptional circumstances. This should only be done when it is expedient and in the interest of justice, particularly, in cases where serious error of law is apparent. That case was adopted in subsequent decisions of this Court in *WET 066 v. Republic of Nauru* [2023] NRCA 9 and *OPK 023 v. Republic of Nauru* [2023] NRCA 16.

14. One of the matters to consider is whether the appellant has provided an adequate explanation for not taking up the proposed ground of appeal in the Court below. According to the learned counsel for the appellant, the previous solicitors of the appellant did not identify this proposed ground on apprehended bias as one of the grounds of appeal and did not include it in the notice of appeal. When the current solicitors were engaged, they identified this proposed ground as one of the grounds of appeal.

15. The learned counsel relied on affidavits from two solicitors of the appellant to affirm his submission. The first affidavit was by Ms Neha Prasad and the second by Mr Salmaaan Shah. Both are solicitors in the law firm of Craddock Murray Neumann Lawyers (*"CMN Lawyers"*). They started work at the law firm in April 2020.

16. At [6] of her affidavit, Ms Prasad deposed that she reviewed the office file for this matter and *"confirmed that there is nothing in the file that suggests that anyone (including any CMN Solicitor or any barrister) at any time before the Supreme Court's judgment on 22 March 2018 conceived of a possible ground to the erect that the Tribunal's decision the subject of this appeal was affected by bias (whether actual or apprehended)"*.

17. According to Mr Shah the appellant briefed counsel for representation at the appeal hearing only in late May 2023. Upon a review of the office file for this matter, he noted that the appellant had filed written submissions to make clear the points that the appellant wished to press at the hearing. At [7] of his affidavit, he deposed that, *"By the time the Appellant's legal representatives reviewed the existing appeal documents to ensure alignment between the submissions and those documents, the 14th day prior to the appeal hearing (by when the Appellant could file a supplementary notice of appeal without leave) had passed."*

18. Based on these assertions, it is undoubtably clear that that the identification of the proposed fresh ground of appeal is directedly attributed to the change of counsel for the appellant because the appellant's previous counsel did not perceive that apprehension of bias was a ground of appeal. In *WET 054* (supra), this Court considered the

appellant's contention that change of counsel was inadequate explanation for not advancing the proposed fresh ground of appeal in the Court below at [30] thus:

> *"It should be noted with regret that simply stating that a change of counsel was the reason [for the failure to raise the ground of appeal] is not something that a court can seriously consider when evaluating an application of this nature."*

19. In *OPK 023* (supra) this Court held at [48] that the explanation that a change in the legal position in favour of the appellant by virtue of a Court decision was necessary for the appellant to take that point up in the appeal as a fresh ground of appeal was inadequate.

20. The learned counsel for the Republic submitted that there can be no suggestion having regard to the fact that there were solicitors and experienced counsel that the appellant did not during the relevant period, have access to professional assistance to at least to the extent necessary to formulate and explain the grounds of appeal including those which ought to have been taken in the Court below.

21. We accept the Republic's submission because it highlights the duty of counsel to identify, formulate and reformulate grounds of appeal where an appeal is being proposed and to ensure that all possible grounds of appeal are exhausted. This may include seeking a second opinion from an independent counsel to ensure that all possible grounds of appeal are not left out.

22. In this case it would not be in the interest of justice and contrary to the rule of finality in litigation to accept the explanation that because of change of counsel that the appellant be allowed to advance this proposed ground that was not identified by the previous counsel in the Court below.

Reasonable Prospect of Success of Proposed Fresh Ground of Appeal

23. It is alleged in the proposed fresh ground of appeal that the decision of the second Tribunal made on 25 July 2017 was affected by apprehended bias in breach of the rules of natural justice at common law and Section 22 of the *Refugees Act* because one of its members (Member Zelinka) was a member of the first Tribunal. In its decision, the second Tribunal did not accept certain evidence given by the appellant (at least implicitly) and made adverse credible finding in relation to the appellant.

24. It is common ground between the parties that Member Zelinka was a member of the first Tribunal and the nature of the findings was affected by a reasonable apprehension of bias owing to Member Zelinka's membership of the second Tribunal and her participation in the determination of the review, consistent with the Supreme Court's decisions in *VEA 026 v. Republic of Nauru* [2018] NRSC 19 at [60] – [61] and *SOS 011 v. Republic of Nauru* [2018] NRSC 22 at [74] – [75]. According to the Republic there is no broader concession.

25. In *VEA 026* (supra) and *SOS 011* (supra) Freckleton J found that where a (first) Tribunal makes adverse credibility findings in relation to an applicant and the matter is later remitted to the Tribunal for reconsideration, the second Tribunal will be affected by apprehended bias if both the first and second panels have a member in common.

26. However, the Republic contended that the proposed ground has no reasonable chance of success because the appellant waived any objection with respect to bias by not taking the point.

27. The appellant's case is built around the notion that there is a distinction between litigant and curial proceedings and administrative or quasi-judicial proceedings. In the former there is a set of procedure to adopt to make an application for recusal of a judicial officer and if not taken, a waiver will operate against an applicant if an allegation of apprehended bias is raised when the decision is against the applicant. In the latter case, it is informal and less rigid and an objection can be taken at any stage of the hearing.

28. The learned counsel for the appellant submitted that in his judgment, the majority of the cases Freckleton J cited when referring to waiver related to litigants and curial proceedings. None of them related to refugee proceedings or an asylum decision. Furthermore, none of the cases Freckleton J cited in the judgments in *VEA 026* (supra) and *SOS 011* (supra) related to refugee proceedings or an asylum decision.

29. To reinforce his submissions, learned counsel referred to the case of *Chen v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFA 41 at [37]; Refugee Review Tribunal, Re: Ex parte H [2001] HCA 28; 179 ALR 425 and contended that this is despite the fact that when applied outside the judicial system, the rule in relation to apprehended bias *"must take account of the different nature of the body or tribunal whose decision is in issue and the different character of its proceedings"*; and *"regard must be had to the statutory provisions, if any, applicable to the proceedings in question, the*

nature of the inquiries to be made and the particular subject matter with which the decision is concerned."

30. According to the learned counsel for the appellant, the concept of waiver ultimately is concern with fairness. In the particular circumstances of this appeal, the interest in a fair Tribunal, which was vitiated by the apprehension of bias for the above given reasons, prevails over the utility of the concept of waiver. In *VEA 026* (supra) and *SOS 011* (supra), despite accepting an apprehension of bias, Freckleton J held that the applicants had waived their rights by not making an application to the Tribunal for the relevant member to recuse themselves. That aspect of Freckleton's judgments should not be followed. The facts and circumstances did not warrant any finding of waiver.

31. It was further submitted that the case of *Vakauta v. Kelly* (1989) 167 CLR 568 at 572 which Freckleton's J repeatedly referred to in his reasoning in relation to waiver is distinguishable from this case because that was a case in which a trial judge, sitting without a jury, was critical of evidence given by the defendant's medical witnesses in previous cases. According to the learned counsel for the appellant, that case is far removed from this case because this case is not one involving two parties engaged in adversarial proceedings. Rather, it concerns an administrative decision assessing an asylum seeker's protection claims.

32. Finally, the learned counsel submitted that the distinction between litigant and curial proceedings and administrative or quasi-judicial proceedings must be observed to ensure fairness in any given case as confirmed by judges throughout common law jurisdictions. As Lord Bridge confirmed in *Harwich in Reg v. Secretary of State for the Home Department, Ex parte Budgaycay* [1987] A.C. 514 at 531:

> *"The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."*

33. In the case of Nauru, such scrutiny is fundamental to upholding its international obligations under the *Refugees Act* and adopting J Goudkamp "The Rules Against Bias and the Doctrine of Waiver" (2007) 26 Civil Justice Quarterly 310 at 326, a serious breach of fairness in the Tribunal's assessment of protection claims in the form of a reasonable apprehension of bias cannot be waived in the light of the public interest in the impartiality of tribunals assessing refugee claims.

34. These principles outlined by learned counsel for the appellant highlight how the Court in each of the cases referred to above, applied the doctrine of waiver where apprehension of bias is alleged. Underlying all the discussions above is the application of the principle of fairness in any hearing be it judicial or quasi-judicial in nature because rights of a party are at risk and of paramount importance is the right to life. Refugee cases are no exception. A judicial or non-judicial officer must accord a party a fair hearing.

35. In the case where apprehension of bias is alleged, except for *VEA 026* (supra) and *SOS 011* (supra) because they are distinguishable for the reasons given above, the majority of the cases support the view that an applicant must take the objection. In *Re McCory; Ex parte Rivett* (1895) 21 VLR 3 at 6, Hood J observed:

> *"A litigant who knows (as the applicant did here), that there may be some objection to the constitution of the Bench is bound to mention it at once, in fairness both to the magistrate and the other side, and even if the objection be a good one the litigant cannot otherwise be allowed to complaint if with knowledge, he remains silent."*

36. In the Australian High Court decision in *Re Alley; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 60 ALJR 181 at 182 the Court observed:

> *"The law has, in the past, taken a strict view of the consequences of the failure of a party to object to the participation in proceedings by a member of a tribunal who is said to be biased. In some cases it has been held that a party entitled to object to the participation of an adjudicator, disqualified by interest or likelihood of bias, will be deemed to have waived that entitlement, if, being fully aware if the circumstances, he fails to object as soon as is reasonably practicable. In other cases, it has been held that a party failing to take objection may be refused if he seeks a discretionary remedy."*

37. While we note the appellant's submissions to draw a distinction between litigant and curial proceedings and administrative or quasi-judicial proceedings because of the nature and character of each proceedings, the underlying factor is the obligation to take an objection whether it be prior to, at the beginning or during the hearing. Freckleton's J reference to the statement by Brennan, Deane and Gaudron JJ in *Vakauta v. Kelly* (supra) in *VEA 026* (supra) and *SOS 011* (supra) is a useful reminder to a party to take the objection before it is too late:

".....a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such a party has waived the right subsequently to object."

38. The question to be determined is, given that the Republic is relying on waiver, whether the proposed fresh ground alleging apprehension of bias has a prospect of success. In this case, in the letter to the CAPS lawyer Stephanie Lee dated 16 May 2016 the Tribunal invited the appellant to a hearing before the Tribunal on 02 June 2016. On 16 May 2016 CAPS lawyer Blaise Alexander sent an email to the Tribunal, the relevant part of the email is set out hereunder:

"We refer to the above matter listed for a Refugee status Review Tribunal hearing on Thursday 2 June 2018.

We note that the matter has been remitted from the Supreme Court of Nauru, the first instance of its kind. In light of the novelty of the situation we would respectfully like to seek clarification on the nature and scope of the proposed hearing.

Constitution of the tribunal

Could you please advise of the tribunal's position on the constitution of the tribunal members for remitted hearings? We note that for each sitting coming up at least one member was part of the tribunal comprised to make the first decision. However, we would like to respectfully provide our view that it would be preferable that the tribunal be constituted differently, in order to avoid any apprehension of prejudice based on a pre-established view of the applicant's claim."

39. It is plain from the date of email of 16 May 2016 that the issue of composition of the second Tribunal was raised prior to the hearing of 02 June 2016 and to that extent, lean support to the appellant's claim that there was no waiver. However, the content of the email is crucial to decide whether an objection was taken by the appellant to Member Zelinka from being one of the members of the second Tribunal on account of apprehended bias.

40. The learned counsel for the appellant submitted that the only issue in relation to the email, is its clarity. It may not be clearly expressed, but according to counsel, it has been delicately put to the Tribunal to consider, and it is appropriate and to be expected that legal representatives, or parties, or individuals before Tribunals, would have put it in that way, in raising a concern about bias.

41. The Principal Member of the Tribunal Rea Hearn MacKinnon responded to Blaise Alexander's email in an email dated 19 May 2016. The relevant part of the email is reproduced hereunder:

> *"Thanks for raising these matters.*
>
> *I intend to consider whether a remitted case can be reheard by one or more of the same members of needs a completely different tribunal on a case by case basis depending on the nature of the error identified by the court.*
>
> *I note that the error in this case is a failure to address aspects of the claims and that only one of the members is the same and two, including the presiding member, are different. These circumstances do not appear to be to give rise to a potential apprehended bias. I also note that the tribunal comprises only nine members on total and sists as a three member panel and sittings are planned a year in advance so the capacity to provide a completely different panel is limited."*

42. According to the learned counsel for the appellant, it is plain from the response by Ms MacKinnon that it was a polite way of saying no to the appellant's request to reconstitute the Tribunal without any member from the first Tribunal, needless to say the reason that the circumstances do not appear to give rise to a potential apprehended bias is self-serving and that the explanation in relation to the administration arrangements put in place for the constitution and sittings of the Tribunal being planned a year ago are irrelevant and unnecessary.

43. The CAPS representative Stephanie Lee acknowledged the response by Ms MacKinnon in an email dated 19 May 2016 as follows:

> *"Thank you for providing this information. We appreciate your considered response.*
>
> *We understand your reasoning and we will be ready for our client to be heard in the June sittings as scheduled."*

44. According to the learned counsel for the appellant, it would have been completely unnecessary and counter-productive, given that the Tribunal had declined the appellant's request, to engage in further submissions in reply or retort. As far as the appellant was concerned, the matter of reconstituting the Tribunal without any member from the first Tribunal was raised, it was resolved, and the appellant was ready to proceed with the hearing. In the situation as described, there can be no waiver.

45. The learned counsel for the Republic acknowledged the delicacy of the statement in the email by Blaise Alexander to the Tribunal but contended that it does not convey an objection but a preference and is not even an insistence. Moreover, the issue of waiver turns on the proper characterisation of the events leading to the decision, especially emails exchanges on 16 and 19 May 2016. In an email Ms McKinnon responded to the email by Blaise Alexander on 19 May 2016 that *"whether a remitted case can be reheard by one or more of the same members or needs a completely different tribunal on a case by case basis depending on the nature of the error identified by the court."*

46. According to the learned counsel for the Republic before it was a preference and in response to that, the appellant and his legal representatives were informed that it will not be based on their preference but on what the Tribunal perceived to be the case and the reason for that was the circumstances did not give rise to an apprehension of bias. If the position was going to be maintained on behalf of the appellant that a different view should be taken, then according to the learned counsel, that was an opportunity at which to take it. Notably, that view was not expressed.

47. Furthermore, according to the learned counsel for the Republic, the significance of that emerged in a very practical way because of what Ms Mackinnon went on to talk about explaining some of the practical logistical and exigencies which arise because of constitution of the Tribunal. Finally, because of these issues, Ms Mackinnon asked them to provide further evidence on any aspect of the appellant's claims including new claims.

48. Having outlined the submissions of the parties, we consider that underlying the litigant and curial proceedings and administrative or quasi-judicial proceedings is the notion that an objection must be taken to the judicial officer or non-judicial decision-maker to recuse from hearing of the matter if apprehended bias is alleged. The objection must be clear and unambiguous. As the learned counsel for the Republic puts it aptly, the appellant must "take the point". A casual or lack of a positive statement of disagreement with the Tribunal will not be sufficient to

constitute an objection. Further, a lack of reservation of rights will fall short of an objection to the constitution of the Tribunal where apprehended bias is alleged.

49. We accept the Republic's submissions that the issue of waiver turns on the proper characterisation of the events leading to the decision, especially emails exchanges on 16 and 19 May 2016. It is plain from that email by Blaise Alexander dated 16 May 2016 that the statement is an expression of a preference as to the composition of the Tribunal to avoid an apprehension of bias. While perhaps, however, it does not make an express objection to the continued constitution of the Tribunal on this basis, but instead raised to obtain the Tribunal's view on the issue. Properly, the Tribunal gave its view and said, plainly, that the Tribunal did not consider that the facts gave rise *"to a potential apprehended bias"* (emphasis added).

50. Thereafter, the point was not expressly maintained on behalf of the appellant; there was no positive statement of disagreement with the Tribunal's view; nor was there any reservation of rights.

51. In all the circumstances, we agree with the learned counsel for the Republic that the better view of the email correspondence is that it is an expression of concern that did not rise to the level of an objection, especially having regard to the Tribunal's response. In our view, therefore, the proposed fresh ground fails to reveal a serious error of law and has insufficient prospects of success to warrant a grant of leave. For the reasons discussed above, we do not see any reason to grant leave to advance fresh grounds of appeal. Moreover, for the same reasons, we refuse to grant leave to file the supplementary notice of appeal.

Legally Unreasonable

52. Turning to the primary ground of appeal, the remittal hearing at the Tribunal was listed on 02 June 2016 and the appellant was invited to appear by way of a notice dated 16 May 2016. He did not attend the scheduled hearing before the Tribunal on 02 June 2016. However, further submissions dated 31 May 2016 were provided on behalf of the appellant. Further communications providing country information were sent on 02 July 2016. The Tribunal made a decision on the review dated 03 August 2016 pursuant to Section 41(1) of the *Refugees Act*. It affirmed the determination of the Secretary.

53. Relevantly, Section 41 states:

"Failure of applicant to appear before Tribunal

(1) Where the applicant:

(a) is invited to appear before the Tribunal; and

(b) does not appear before the Tribunal on the date on which, or at the time and place at which, the applicant is scheduled to appear,

the Tribunal may make a decision on the review without taking further action to allow or enable the applicant to appear before it.

(2) This Section 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."

54. There is no contest to the appellant's submissions that there are two parts to this provision which conferred discretion on the Tribunal. First, it provides that if the applicant is invited to appear before the Tribunal and does not appear before the Tribunal on the day, time and venue of the hearing, the Tribunal may make a decision on the review without taking any further action to allow or enable the applicant to appear before it.

55. Secondly, the Tribunal is not prevented 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 on the rescheduled date, time and venue.

56. Section 41 comes into contention because of a statement by the Tribunal at [114] of its decision, which reads:

"Conclusion on Credibility

114. Having conducted a preliminary review of the claims and evidence, the tribunal identified various matters of concern as to whether the applicant was a refugee or owed complementary protection. The Tribunal had intended to alert the applicant to the matters in issue at the hearing, but he has not availed himself of the opportunity to appear before the Tribunal. On the evidence before it, the Tribunal's concerns remain, and it does not accept as credible the applicant's claim to be facing any ongoing

threat of serious or significant harm in Quetta, whether from Baluchi separatists or anyone else."

57. Based on the above statement, it will be noted that the Tribunal conducted a preliminary review of the claims and evidence, and it identified various matters of concern as to whether the appellant was a refugee or owed complementary protection. The Tribunal intended to alert the appellant to the matters in issue at the hearing and put its concerns to him to give him opportunity to comment, but the appellant had not avail himself of the opportunity to appear before the Tribunal and it found the appellant's claims were not credible.

58. The learned counsel for the appellant submitted that at that point, while there was no reason given for the appellant not to attend the hearing or no reasons to seek an adjournment of the hearing to another date, on a proper construction of Section 41, it did not mean that it was the end of the matter. The Tribunal had two options; first, it should have rescheduled the hearing to another date and time to give the appellant an opportunity to comment on them. Secondly and alternatively, it should have invited the appellant to make supplementary submissions in relation to its concerns over the credibility of its claims.

59. Further, it was submitted that it was crucial for the appellant to respond to the various matters of concern identified by the Tribunal so that the Tribunal would take into account the response when evaluating the evidence and if it did, its decision might have been different. The learned counsel for the appellant referred to [127] of the Tribunal's decision to reinforce the point:

> *"A question nevertheless arises on the facts as to whether the applicant has been targeted for reason of his membership of a particular social group comprising his family, in order to pressure his father into meeting the extortion demands. The Tribunal considers that this claim, if made out, would bring the applicant within the scope of the Convention definition of a refugee. However, in light of the credibility findings set out above, the Tribunal is not satisfied that the applicant had been targeted in this way, and is therefore not satisfied that there is a more than a remote possibility of the applicant being persecuted on this basis of he returns to his home Quetta in the reasonably foreseeable future."*

60. When the Tribunal did not, in that sense, it was unreasonable, or it acted unreasonably.

61. To strengthen this submission, the learned counsel for the appellant relied on the decision of Mortimer J (as she then was) in *Kaur and Another v. Minister for Immigration and Border Protection and Another* [2014] FCA 915 and submitted that, the reasoning in that case be followed because it was decided based on an identical provision to Section 41.

62. Two material aspects of that case were identified which this Court was asked to adopt. First, where an applicant is deemed to have received an invitation to appear at a hearing, Section 362B of the *Migration Act* 1958 provides that if the applicant is invited to appear before the Tribunal and does not appear before the Tribunal on the day, time and venue of the hearing, the Tribunal may make a decision on the review without taking any further action to allow or enable the applicant to appear before it.

63. Secondly, the Tribunal is not prevented 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 on the rescheduled date, time and venue.

64. The learned counsel for the Republic submitted that *Kaur* case is factually different from this case because as the appellant was applying for a visa, she must be able to have sufficient funds, including country and bank accounts to meet the financial capacity requirement. We note that *Kaur* was decided under the *Migration Act,* 1958. The appellant's visa application was dismissed by the Migration Review Tribunal (Tribunal). She sought a review of the decision on the ground that it was legally unreasonable.

65. The *Migration Act* has similar provisions in relation to conduct of hearing of the Tribunal to those found in the *Refugees Act*. Relevantly, a comparison was made between Section 362B of the *Migration Act* and Section 41 of the *Refugees Act*.

66. In that case the Tribunal invited the first appellant to appear at a hearing by notifying her of the day, time and place of hearing. A letter containing this information was sent by pre-paid post and the first appellant was deemed to have received the invitation after seven days. However, the first appellant did not appear at the hearing. The Tribunal went ahead and made a decision without taking any further action or enable the appellant's appearance before it on a rescheduled date, time and place.

67. The first appellant's case was that the Tribunal should have adjourned or delayed its decision and, its failure to do so was legally unreasonable in the circumstances where she had a history of responding to the Tribunal

when contacted, she had not received the invitation so was not aware of the hearing date, time and the Tribunal was actually or constructively aware that she had not received the invitation because it was returned to the Tribunal prior to the date of its reasons for refusing the visa.

68. We have considered the judgment in *Kaur* and we accept the Republic's submissions that *Kaur* is factually distinguishable from this case although the principles discussed by Mortimer J (as she then was) are relevant to determine the question of whether the Tribunal's decision was legally unreasonable. First, unlike this case where the appellant was represented by representatives from CAPs, she was not. All communications by the Tribunal were directedly made to her. Secondly, unlike this case where the appellant's representatives received the invitation to attend a hearing from the Tribunal, she did not because the letter of invitation of hearing sent to her by pre-paid post was returned to the Tribunal prior to the date of its decision to refuse the visa.

69. Thirdly, we note Mortimer J's (as she then was) finding at [138] of the judgment, that it had taken almost two years for the Tribunal to come to a point of even considering the first appellant's review application. Amongst other matters, her Honour found that after the first hearing appropriately making some allowance for the fact she was not represented, the Tribunal's officers and the Tribunal member allowed the first appellant some time to gather the necessary documents from overseas in India to support her application.

70. Further, there was no suggestion that the first appellant was not being honest or incapable of providing the necessary documentation. During the five months or so when the Tribunal and the first appellant engaged in a series of communications, all communications were by telephone and email aside from two hearing invitations and at least on two occasions the Tribunal officers actively followed up with the first appellant by telephone when the Tribunal had sent her an email.

71. According to [141] of the judgment, based on the Tribunal's request for the appellant to gather necessary documents and engagement in series of communications between the parties over an extended period of time formed the basis for her Honour to conclude that the Tribunal's exercise of power under Section 362B(1) was legally unreasonable. In any event, at [142] of the judgment, her Honour was satisfied that there was a denial of procedural fairness by the Tribunal to the first appellant. Her Honour observed:

> *"Having decided that it needed to hear again from the first appellant, having recognized she may have been able to explain*

matters which remained unclear to the Tribunal and having recognized that she could have provided evidence to persuade the Tribunal of matters over which it still had concerns, for the Tribunal to make a decision on the review without making any attempt whatsoever to get in touch with the first appellant by phone or email when she did not respond to the hearing invitation or appear on 20 February 2013 was a failure to give her a reasonable opportunity to present her case."

72. In this case, following an invitation to appear at the hearing by notice dated 16 May 2016 the appellant's legal representatives CMN Lawyers submitted pre-hearing submissions dated 31 May 2016. Following that, the appellant was to appear at the hearing before the Tribunal on 02 June 2016, but he did not. From these facts, unlike *Kaur* where it took an extended period for the first appellant to gather necessary information and was engaged in series of communications with the Tribunal officers and Tribunal member, these activities did not occur in this case. This was a case where the Tribunal had all the information from the Secretary including those from the first Tribunal hearing in addition to the pre-hearing submissions from the appellant's lawyers. The Tribunal assessed or evaluated all this information and arrived at a decision.

73. Next, we note the primary judge quoted a passage at [45] of the judgment from the judgment of the High Court of Australia in *SZBEL v. Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 for the proposition that the Tribunal has an obligation to put matters relating to the appellant's credibility to the appellant as follows:

"The Tribunal is not confined to whatever may have been the issues that the delegate considered. The issues that arise in relation to the decision are to be identified by the Tribunal. But if the Tribunal takes no step to identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what that other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are "the issues arising in relation to the decision under review". That is why the point at which to begin the identification of issues arising in relation to the decision under review will usually be the reasons given for that decision. And unless some additional issues are identified by the Tribunal (as they may be), it would ordinarily follow that, on review by the Tribunal, the issues arising in relation to the decision under review would be those which the original decision-maker identified as determinative against the applicant."

74. Moreover, at [47] the High Court said:

> *"where.... there are specific aspects of an applicant's account, that the Tribunal considers maybe important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted."*

75. However, we note that it is not always the case that where a Tribunal has identified certain aspects of an applicant's case during its deliberations, it will be obliged to invite an applicant to comment on them in case the decision it will eventually make will be against the applicant. We note that in addition to explaining this rule of natural justice, the primary judge referred to relevant cases in the High Court of Australia and Federal Court of Australia including a passage by Lord Diplock in *F Hoffman La Roche and Co; AG v. Secretary of State for Trade and Industry* [1975] AC 295 at 369 at [61] of the judgment:

> *"The rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If that were a rule of justice only the most talkative of judges would satisfy it and trial by jury would be abolished."*

76. At [65] of the judgment, the primary judge quoted a passage from the judgment of the Full Court of the Federal Court in *Commissioner for Australia Territory Revenue v. Alphaone Pty Ltd* (1994) 49 FCR 576 at 592:

> *"Where the exercise of a statutory power attracts the requirement for procedural fairness a person likely to be affected by the decision is entitled to put information and submissions to the decision=maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submissions, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question."*

77. Further, at [64] of the judgment, the primary judge referred to *Minister for Immigration and Multicultural Affairs, Ex parte Miah* [2001] HCA; (2001) 206 CLR 57 at [31] where:

> *"Gleeson CJ and Hayne J held that even in a case where an application may be made to a judicial decision-maker and curial standards of procedural fairness apply to the fullest extent, "fairness does not require a judicial officer to make a running commentary upon an applicant's prospects of success, so that there is a forewarning of all possible reasons for failure." To adopt such a course would likely to run a serious risk of conveying an impression of prejudgment."*

78. Based on the discussions above, we uphold the analysis of the primary judge at [66] and [67] of the judgement that:

> *"66. Ms Melis for the appellant adduced on authority for extending the principle of procedural fairness to an obligation to adjourn a proceeding which an applicant had not attended as an incident of procedural fairness in order to extend to him or her a further opportunity to attend to answer questions or make submissions upon relevant issues. These cases upon which she relied focused upon the entitlement of an applicant to be given an opportunity to give evidence or make submissions where there was the potential for the Tribunal's reasoning to depart from the issues which had been found significant in an adverse decision by the Secretary.*
>
> *67. To import such a novel incident of natural justice is not just without precedent but it would be problematic by reference to the operation of s 41(1) of the Act, which explicitly entitles the Tribunal to proceed in the absence of an applicant, and does not incorporate a special exception for when matters which may be of consequence to the outcome of a hearing could usefully be traversed with the applicant or by receipt of submissions."*

79. In the final analysis, we uphold the conclusion by the primary judge at [68] of the judgment that *"Procedural fairness did not require the rescheduling of the proceedings in circumstances presented by this case, in spite of the fact that the reasoning by the Tribunal and that of the Secretary bore significant dissimilarities. It was a course that was open*

to the Tribunal but the failure by the Tribunal to do so did not constitute an error of law. We are of the view that the ground of appeal does not disclose an error of law. This ground of appeal lacks merit and is dismissed.

Conclusion

80. In the result, the application for leave to advance a fresh ground of appeal is refused and the appeal is dismissed in its entirety with costs.

Order

81. The final terms on the order of the Court are:

a) The application for leave to advance a fresh ground of appeal is refused.

b) The appeal is dismissed in its entirety.

c) Costs to the Republic.

Dated this 14 day of November 2023.

NAURU COURT OF APPEAL

Justice Colin Makail
Justice of the Court of Appeal

Justice Rangajeeva Wimalasena
I agree.

Acting President

Justice Sir Albert Palmer
I agree.

Justice of the Court of Appeal