NAURU COURT OF APPEAL
AT YAREN
APPELLATE JURISDICTION

Refugee Appeal No. 06 of 2022
[Supreme Court Refugee Appeal Case No. 01 of 2018]

BETWEEN: **TTY 152**

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: **30/11/2023**

CITATION: **TTY 152 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**

NATURAL JUSTICE – Breach of natural justice – Legally unreasonable – Non-appearance of applicant at Tribunal hearing – Duty of Tribunal to reschedule hearing – Rule of natural justice – Refugees Convention Act, 2012 – Section 41

LEGISLATIONS: **Refugees Convention Act, 2012, Nauru Court of Appeal Act, 2018**

CASES CITED: **TTY167 v. Republic of Nauru [2018] HCA 61; [2018] 93 ALRJ 111 and Kaur and Another v. Minister for Immigration and Border Protection and Another [2014] FCA 915**

APPEARANCES:

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

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

JUDGMENT

1. This is an appeal from a decision of the Supreme Court of Nauru constituted by Wheatey J on 06 December 2022 dismissing an appeal against a decision of the Refugee Review Tribunal (*"the Tribunal"*) made on 29 September 2016. There is a single underlying contention: that the Tribunal acted unreasonably in exercising its discretion under Section 41(1) of the *Refugees Convention Act,* 2012 (Nr) (*Refugees Act*) to make a determination on the review without taking further action to allow or enable the appellant to appear before it.

Background Facts

2. The background facts are conveniently set out in the judgment by Wheatly J which we respectfully adopt for the purpose of deciding this appeal. These are, the appellant, TTY 152 is a male national of India. His claims, before the Secretary for Justice and Border Control (*Secretary*), centered on his relationship with the daughter (Manpreet Kaur) of a powerful Indian politician (Chautala), who did not support the relationship. He claimed to fear harm from Chautala in India. He participated in an interview with the delegate in support of his claims.

3. On 20 September 2014, the appellant applied to the Secretary to be recognized as a refugee under Section 5 of the *Refugees Act*.

4. On 11 October 2015, the Secretary determined under Section 6 of the *Refugees Act* that the appellant is not recognized as a refugee and is not a person to whom the Republic of Nauru (*the Republic*) owed protection obligations.

5. On 22 October 2015, the appellant applied to the Tribunal for merits review of the Secretary's determination under Section 31(1) of the *Refugees Act*.

6. On 22 July 2016, the Tribunal wrote to the appellant's representatives by email and attached a draft schedule of the proposed Tribunal's sittings. The draft schedule included the proposed hearing date for hearing of the appellant's review application, being on 12 August 2016. The email from the Tribunal also invited the appellant's representatives to advise should any changes to the schedule be required.

7. Also on 22 July 2016, the appellant's representatives responded advising, amongst other matters, that all of the relevant applicants the subject of the draft schedule including the appellant were in Nauru and that no changes were required. However, the appellant's representatives stated if something was noted, it would be brought to the Tribunal's attention.

8. On 24 July 2016, the appellant made a detailed statement in support of his claims, which statement was *"accurately and completely interpretated"* to him before he signed it. Notably, at paragraph 4, the statement said: *"I take this opportunity, ahead of my Hearing before the Refugee Status Review Tribunal, to provide additional information in clarification and support of my protection claims."*

9. On 29 July 2016, the Tribunal issued a letter addressed to Blaise Alexander, who was described as the "Team Leader" at "CAPS". The letter relevantly stated:

> *"Blaise Alexander*
>
> *Team Leader*
>
> *CAPS*
>
> *Dear Ms Alexander*
>
> *TTY152*
>
> *The above named applicant has applied to the Tribunal for review of his/her refugee status determination and is invited to appear before the Tribunal to give evidence and present arguments as follows:*
>
> *Date: Friday 12th August 2016*
>
> *Time: 2:00 pm*
>
> *Location: Tribunal Hearing Room*
>
> *Level 1*
>
> *Recreational Building*
>
> *RPC 1"*
>
> *Please inform the Tribunal in writing of any person from whom the applicant would like the Tribunal to take oral evidence.*
>
> *Please note that, if the applicant does noy appear before the Tribunal on the date and time specified, the Tribunal may make a decision on the review without taking further action to allow the applicant to appear.*
>
> *Ramillah Diema*
>
> *Registrar*
>
> *29/07/16."*

10. On 03 August 2016, Ms Alexander, on behalf of the appellant, made detailed submissions in support of his application for review.

11. However, on 12 August 2016, the appellant did not appear at the scheduled hearing. A file note taken by Ms Alexander read as follows:

> *"Tribunal telephoned to inquire whether (the appellant) had arrived for his scheduled hearing, as they were under the clear impression that he probably would not attend. I advised that he was not here as yet. They advised that they would continue with the morning hearing as it was going over time, and would be making a decision on the papers for [the appellant], as he and CAPS had no explanation or basis for seeking an adjournment or further opportunity for him to attend on another date."*

12. On 15 August 2016, an email was sent from the Service Integration Liaison Coordinator, Nauru Regional Processing Centre (SILC) to the appellant's representatives, which relevantly recorded the following (SILC email):

> *"Blaise,*
>
> *Response received from (the appellant) TTY152 on Friday 12/08/16 after three interactions:*
>
> - *Refusal to Refusal to receive appointment slip on 11/08/16 upon realizing it was for his RSRT hearing.*
> - *Approached by case manager for follow up on 12/08/16 to find out why he had refused slip-case manager was met with despondence and minimal engagement, but no explicit explanation.*
> - *Approached by myself and case manager approximately one hour later. (The appellant) allowed us to approach him, but then briskly pushed past us to exit the tent upon hearing I wanted to speak with him about his RSRT hearing. (the appellant) visibly affronted at being approached a second time this morning."*

13. On 17 August 2016, the appellant's representatives wrote to him regarding his failure to attend the hearing on 12 August 2016 at 2:00 pm. The letter stated:

"Dear Sir,

Re: Refugee Status Review Tribunal (RSRT) Hearing – failure to attend

We previously advised you that the Refugee Status Review Tribunal (RSRT) schedules a Hearing in relation to your application for review on Friday 12 August 2016 at 2.00pm.

You failed to attend that hearing.

We clearly informed you in person and by letter that if you do not engage in the review process, fail to attend your hearing, and you do not come to CAPs to explain why then we cannot assist you to provide this information to the tribunal.

It is likely a decision will be made in your case without you having the opportunity to give further evidence in support of your claims. As previously advised this may well be very detrimental to your case and will likely result in the tribunal coming to the same decision as the Secretary did for your RSD (a negative outcome).

If you had a very good reason why you did not participate in your hearing, we urge you to request a CAPs appointment and speak with the CAPs representative about this reason.

You must provide a strong reason to the tribunal, including medical records from IHMS to substantiate your request. You must sign a form at CAPs if you want us to access your medical records to support your case."

14. On 15 September 2016, the appellant's representatives wrote to him again regarding his failure to attend the hearing on 12 August 2016 at 2:00 pm. That letter was in similar terms to that of the letter of 17 August 2016. However, that letter concluded by stating *"We will not contact you again regarding this matter, until we receive a decision from the Tribunal."*

15. The Tribunal recorded its reasons for its discretionary decision under Section 41(1) of the *Refugees Act* in its decision recorded dated 29 September 2016. Relevantly, the Tribunal stated:

"[2] The applicant did not appear at the scheduled time and place. No reason was advanced for his non-appearance by

his representatives, nor any request that the hearing be rescheduled.

[3] *Consequently, the Tribunal determined pursuant to s.41(1) of the Act to make a decision on the review without taking further action to allow or enable the applicant to appear before it."*

Grounds of Appeal

16. The appellant relied on a sole ground of appeal in the notice of appeal dated 22 December 2022 which states:

> *"The primary judge erred by failing to find that:*
>
> *1. The Tribunal's exercise of its discretion under s 41 of the Act to decide, in the absence of the appellant, to make a decision on the review without taking further action, including to adjourn the hearing, was legally unreasonable in the circumstances."*

Law – Section 41 of Refugees Convention Act, 2012

17. The ground of appeal brings into contention the correct construction and application of Section 41 of the *Refugees Act.* 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."*

18. As to its construction, 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.

19. 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.

File Note of 12 August 2016

20. The contest is in relation to how the Tribunal applied the discretion to the facts of this case. The first point to note is the parties held differing views in relation to the characterization of the file note taken by Ms Alexander on 12 August 2016 at 2:00 pm. It reads:

> *"Tribunal telephoned to inquire whether (the appellant) had arrived for his scheduled hearing, as they were under the clear impression that he probably would not attend. I advised that he was not here as yet. They advised that they would continue with the morning hearing as it was going over time, and would be making a decision on the papers for [the appellant], as he and CAPS had no explanation or basis for seeking an adjournment or further opportunity for him to attend on another date."*

21. The learned counsel for the appellant submitted that from the language used in the file note and as the appellant did not appear at the schedule hearing on 12 August 2016, it can be inferred that on that day, the Tribunal decided not to take further action to allow or enable the appellant to appear before it. The position the Tribunal took on that day is further confirmed in its recorded reasons for its discretionary decision under Section 41(1) of the *Refugees Act* dated 29 September 2016 and relevantly:

> *"[2] The applicant did not appear at the scheduled time and place. No reason was advanced for his non-appearance by his representatives, nor any request that the hearing be rescheduled.*

> [3] *Consequently, the Tribunal determined pursuant to s.41(1) of the Act to make a decision on the review without taking further action to allow or enable the applicant to appear before it."*

22. It was submitted that the word "determined" used in the reasons for decision by the Tribunal is in past tense and reinforced the temporal point in the file note. Reading it in full, it means the Tribunal made a decision under Section 41 of the *Refugees Act* on 12 August 2016, not to "take further action to allow or enable the applicant to appear before it."

23. According to the learned counsel for the appellant, the decision taken is further confirmed by the next important word which is "Consequently" used in the reasons for decision by the Tribunal. It indicated that the Tribunal decided to exercise its discretion not to "take further action to allow or enable the applicant to appear before it" simply or only because of the reasons stated at [2] above, being:

1. First, the applicant did not appear at the scheduled time and place.
2. Second, no reason was advanced for his non-appearance by his representatives, and
3. Third, no request was made by the representatives that "the hearing be rescheduled".

24. It was submitted that those reasons manifested unreasonableness.

Email from Service Integration Liaison Coordinator of 15 August 2016

25. The second reason, advanced on behalf of the appellant is that, as Ms Alexander's file note on 12 August 2016 recorded that the Tribunal advised her that "they were under the clear impression that [the appellant] would probably not attend" the hearing, the other information apparently available to the Tribunal when it made that decision was an email from Isla Maclaurin a "Service Integration Liaison Coordinator" at the Nauru Regional Processing Centre, to the appellant's representatives on 15 August 2016. According to the learned counsel, this email sets out matters that would form the basis for the Tribunal's "impression". The email reads:

> *"Blaise,*

Response received from (the appellant) TTY152 on Friday 12/08/16 after three interactions:

- *Refusal to Refusal to receive appointment slip on 11/08/16 upon realizing it was for his RSRT hearing.*

- *Approached by case manager for follow up on 12/08/16 to find out why he had refused slip-case manager was met with despondence and minimal engagement, but no explicit explanation.*

- *Approached by myself and case manager approximately one hour later. (The appellant) allowed us to approach him, but then briskly pushed past us to exit the tent upon hearing I wanted to speak with him about his RSRT hearing. (The appellant) visibly affronted at being approached a second time this morning."*

26. It was submitted on behalf of the appellant that the matters set out in Ms Maclaurin's email would be a basis upon which the Tribunal could have formed the "impression" that the appellant would not appear at the hearing. The primary judge was invited to draw the inference that the matters set out in Ms Maclaurin's email were the basis of the Tribunal's "impression". Furthermore, the respondent could have but, did not seek to adduce any other evidence from the Tribunal members to rule out the inference. Accordingly, the primary judge should have, and this Court should infer that the matters set out in Ms Maclaurin's email were the basis of the Tribunal's "impression" which led to it not to "take further action to allow or enable the applicant to appear before it."

TTY167 v. The Republic [2018] HCA 61; [2018] 93 ALRJ 111

27. A further reason advanced on behalf of the appellant to show that the Tribunal's decision was legally unreasonable is the decision in *TTY167 v. Republic of Nauru* [2018] HCA 61; [2018] ALRJ 111 where the High Court of Australia held that the power of the Tribunal under Section 41 of the *Refugees Act* is constrained by an "standard of legal reasonableness implied as a condition of exercise of the power." The High Court acknowledged that the standard is a "demanding" one "particularly in light of the concerns of informality and the need for efficiency that underlie Tribunal hearings and the wide latitude that the Tribunal has in making a decision under s 41(1)."

28. Nevertheless, it was submitted that in *TTY167* the Tribunal identified six reasons, in combination, rendered the approach of the Tribunal

unreasonable in the circumstances of that case. The High Court found that first, the appellant had been highly engaged with pursuing his application for protection. This was evidence from, amongst other matters, submissions of a substantial written statement in support of his application prior to the RSD interview and attendance at the first scheduled RSD interview even though he was unwell.

29. Secondly, the appellant's statement to the Tribunal, just over two weeks before the hearing, had indicated that he intended to attend the hearing and to provide further evidence and even the submissions of the appellant's lawyers only two days before the hearing, also indicated their expectation that the appellant would take the opportunity to appear before the Tribunal.

30. Thirdly, it was considered that the appellant give oral evidence before the appellant's claims were considered by the Tribunal to be lacking in details and unsupported by other evidence. Fourthly, the Tribunal was aware that the appellant claimed to be suffering from mental health problems.

31. Fifthly, the Tribunal knew of the appellant's illiteracy and limited understanding of English and the Tribunal could not reasonably infer that the appellant had not an informed decision not to attend the hearing. Sixthly, it would have been a simple matter for the Tribunal to have contacted either the appellant's lawyers or person at CAPS who the Tribunal would reasonably have been aware were assisting the appellant, even on short notice. The Tribunal did not do so.

Kaur and Another v. Minister for Immigration and Border Protection and Another [2014] FCA 915

32. Finally, it was urged upon the Court to draw an analogy from 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 where it was decided based on an identical provision to Section 41.

33. 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.

34. 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.

35. According to the learned counsel for the appellant, the major point of contention which is pivotal to the appeal is that while in *Kaur* was decided under the Migration Act, 1958 which deemed that the appellant had received the invitation to the hearing, there was also reasons to doubt that the appellant had received it. Her Honour held at [95] of the judgment:

> *"An objective consideration of the course of conduct between the Tribunal and the first appellant, of the nature of the first appellant's communications with the Tribunal and her evidence determination to provide sufficient information to the Tribunal leads to the conclusion, in my opinion, that the Tribunal ought to have realized the failure to file a response to the hearing invitation, and the non-appearance at the second hearing, were out of character, and departed from the pattern of conduct for the first appellant in terms of her attitude to the review."*

36. In the present circumstances of this case, it was submitted that all five grounds identified by the High Court in *TTY167* are present and go to establish that the decision of the Tribunal is legally unreasonable. We outline the major points of the learned counsel for the appellant's submissions below.

37. First, the primary judge correctly found that the appellant had actively and highly engaged with the process before his non-appearance at the hearing at [99c)] and [100] of the judgment but erred when she failed to have regard to these matters in assessing the extremely sparse reasoning of the Tribunal in support of the approach that it took in response to the appellant's non-appearance on 12 August 2016.

38. Secondly, there is no contest that Section 40 of the *Refugees Act* was complied with when the appellant's representatives received the notice of the scheduled hearing, but given the particular circumstances of the case, the Tribunal was on notice of issues as to whether the appellant himself had received the notice and/or was in a fit state to appear or carefully make decisions about his future. According to learned counsel, it was the latter matter that bore on the reasonableness of the Tribunal's approach.

39. Thirdly, the primary judge's approach to the question of whether the appellant had knowledge of the hearing involved some confusion of

thought. The issue is not a question of fact for the Court. It was not about whether the appellant did, or did not, know about the hearing date. Rather, the question is focused on the material before the tribunal which, amongst others, the content of email of Ms Maclaurin and ought to have cast doubt in the Tribunal's mind about the appellant's actual knowledge and state of mind.

40. Fourthly, the primary judge appeared to give significance to the fact that the Tribunal took some action after the appellant failed to appear. According to the file note by Ms Alexander, it phoned CAPS. However, this was not "action to allow or enable the applicant to appear before it." Otherwise, it was a very minimal action. The Tribunal was informed that the appellant had not yet attended their offices and the Tribunal indicated it would be taking no steps.

41. According to the learned counsel for the appellant, given the explanation above, there was also no basis upon which the Tribunal could understand why the appellant had not attended CAPS either. It was submitted that the Tribunal's approach was preemptory and unreasonable in light of the information before it cast doubt on whether the appellant had received notice of the hearing and/or was in a fit state to appear and/or make decisions about his case.

Consideration

42. However, on the question of factual consideration alone, we accept the learned counsel for the respondent's submissions that the factual premise of the appellant's argument is a contention that the Tribunal's reasons at [2]-[3] show that the exercise of discretion was complete on 12 August 2016 is not a fair reading of the Tribunal's reasons on point of fact. We accept that the statements at [2] are statements of fact. It is plainly clear that the appellant did not appear at the hearing, no reasons was given by his representatives for his non-appearance (at any stage); and there was no request for the hearing to be rescheduled.

43. The Tribunal reached out to the appellant by contacting his representatives by telephone and received no confirmation in relation to whether the appellant would attend the scheduled hearing on 12 August 2016. As it happened, the appellant did not attend it. As the primary judge held at [99(e)] of the judgment:

> *"The Tribunal Decision manifest a consideration by the Tribunal of an absence of any further contact from the Appellant or the Appellant's representatives regarding an explanation of his failure*

to attend, or seeking a further hearing or for that matter, any communication in relation to the Appellant's matter at all."

44. We accept that as the finding at [99] of the judgment makes clear, this was what the Tribunal was aware of from 12 August 2016 until it made its decision on 29 September 2016.

45. Further, we accept the learned counsel for the respondent's submissions that nothing in the appellant's submissions as outlined in [24] above detracts from this. Whether the appellant's representatives, in fact, had any understanding as to why the appellant did not appear or whether they had instructions not to apply for another hearing overlooks what the Tribunal was aware of in this period. Furthermore, contrary to the appellant's counsel's submission that there is no evidence that the appellant's representatives had instructions whether or not to request a rescheduling of the hearing, it is not a conjecture. If the appellant's representatives had instructions to apply for another hearing, then presumably and consistently with those instructions, they would have done so. They did not, as the Tribunal found.

46. Moreover, the Tribunal's findings at [25] and [26] of its decision which referred to the appellant's representatives' letters of 17 August 2016 and 15 September 2016 and set out at [13] and [14] above is, apart from logic, also forecloses this speculation.

47. In countering the appellant's submissions in relation to the words "Consequently" and "determined", the learned counsel for the respondent submitted and we accept, those submissions do not advance the point. It was in the circumstances in [2] of its decision, that is, between 12 August and 29 September 2016, as the primary judge found, that the Tribunal decided to exercise its discretion under Section 41(1).

48. In relation to the submissions on the *Kaur* case, the learned counsel for the respondent submitted that the *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. As correctly noted by the appellant *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.

49. 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.* As a matter of statutory construction, 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.

50. 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. As we noted at [18] and [19] above, there is no question as to the construction of Section 41.

51. The question is whether the facts in *Kaur* supported the appellant's claim that the Tribunal's decision is legally unreasonable. 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.

52. 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.

53. We accept the respondent's submissions that *Kaur* is factually different 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.

54. 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.

55. 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.

56. 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."*

57. In this case, following an invitation to appear at the hearing by notice dated 29 July 2016 the appellant's representatives Craddock Murray Neumann Lawyers (*"CMN Lawyers"*) submitted pre-hearing submissions dated 03 August 2016. Following that, the appellant was to appear at the hearing before the Tribunal on 12 August 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 the pre-hearing

submissions from the appellant's legal representatives. The Tribunal assessed or evaluated all this information and arrived at a decision.

58. As a matter of law, we accept the submissions of the learned counsel for the respondent that the legal premise of the appellant's argument also must fail. We accept that the appellant misstated the nature of the discretion conferred on the Tribunal under Section 41 as a decision "not to take further action to allow or enable the applicant to appear before it." This does not reflect the statute. Section 41(1) is plain and unambiguous. As it states, if an applicant does not appear at the scheduled time and place of the hearing the subject of the invitation, then:

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

59. We accept the learned counsel for the respondent's further submissions that where there is no appearance of an applicant at the scheduled time and place of hearing, it was open to the Tribunal to exercise the discretion which would involve the making of the decision on the review in the circumstances without taking further action. The appellant's submissions skipped over or omitted the making of a decision and wrongly characterised the discretion as a determination not to take the steps set out in the final phrase. This inverts the provision. It must be read together with Section 41(2). It follows we uphold the primary judge's construction of Section 41 at [100] of the judgment:

> *"Section 41(2) expressly recognizes that section 41 does not prevent the Tribunal from rescheduling the appearance before it or from delaying its decision on the review in order to enable an applicant's appearance. Construing section 41 as a whole, noting that section 41(1) provides the Tribunal with the discretion to make a decision without taking further action to allow an applicant to appear before it, together with section 41(2). Section 41 does not place an obligation or duty on the Tribunal. Further, it does not place an onus on an applicant either. However, it does provide an applicant (including the Appellant) with an opportunity to seek that the Tribunal reschedule the hearing."*

60. To read Section 41 in its entirety reinforces Section 34(5) which states that a decision on a review is taken to have been made on the date of the written statement. That date was 29 September 2016. In our view, the primary judge's findings at [99] as to the awareness of the Tribunal from 12 August to 29 September 2016 are correct in law. We accept her Honour's findings:

"Therefore, as at the time of the hearing on 12 August 2016 and then by the time of the Tribunal Decision on 29 September 2016, the Tribunal was aware that:

(a) prior to sending the invitation to attend the hearing, the Tribunal had expressly given advanced notice of the proposed schedule of the hearing to the Appellant's representatives and invited comment as to the suitability of the proposed schedule. No change was required at that time or any time subsequently;

(b) the invitation to attend the hearing had been provided to the Appellant's representatives in reasonable time and those representatives were authorized by the Appellant to receive such a document;

(c) the Appellant had been actively engaged with his Further Statement and the Tribunal Submissions both of which acknowledged the upcoming hearing before the Tribunal and showed engagement with the process by the Appellant in the period leading up to the hearing;

(d) on the date of the hearing, 12 August 2016, the Tribunal undertook the relatively simple matter of contacting the Appellant's representatives to enquire whether the Appellant had arrived for his scheduled hearing. No reason or explanation was offered for the Appellant not attending. No request for a postponement or adjournment was requested and no reason was apparent as to why an adjournment might be appropriate. The Tribunal also advised that they would be (future tense) making a decision on the papers due to the Appellant's failure to attend;

(e) the Tribunal did not proceed immediately to make a decision but made a decision on 29 September 2016 approximately seven weeks after that communication. The Tribunal Decision manifest consideration by the Tribunal of an absence of any further contact from the Appellant or the Appellant's representatives regarding an explanation of his failure to attend, or seeking a further hearing or for that matter, any communication in relation to the Appellant's matter at all."

61. Accordingly, we uphold the primary judge's decision to uphold the Tribunal's decision that it was not legally unreasonable at [101] of the judgment:

> *"In all of the particular circumstances of this case, the decision of the Tribunal pursuant to section 41 of the Act to make a decision on review was one within the area of "decisional freedom" available to the Tribunal. It had material before it which would have supported its reasoning that the Appellant was aware of the scheduled hearing and hence his on-attendance was, in the circumstances where an upcoming hearing was known, even if the precise date was not known until later. It also had material before it which supported reasoning that the Appellant was highly engaged with the process and hence it should not proceed to make a decision without making any enquiry about the Appellant's absence. The Tribunal, did make that enquiry. As such, it was open in all the circumstances for the Tribunal to exercise its discretion pursuant to section 41 of the Act and make a decision on the review, which it did."*

62. Finally, we note that the appellant made extensive submissions outlining grounds which make this case no different from *TTY167*, but we accept the submissions of the learned counsel for the respondent that the primary judge addressed each of them in the judgment. Her Honour properly took those matters into account in the assessment of the totality of the circumstances and, having properly directed herself with respect to the relevant principles at [64] to [68] of the judgment, concluded that the decision was not legally unreasonable.

Conclusion

63. For all the foregoing reasons, we find the primary judge's judgment is free of error. We dismiss the appeal.

Order

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

a) The appeal is dismissed.

b) Costs to the respondent.

Dated this 30 day of November 2023.

Justice Colin Makail

Justice of the Court of Appeal

Justice Rangajeeva Wimalasena

I agree.

Acting President of the Court of Appeal

Justice Sir Albert Palmer

I agree.

Justice of the Court of Appeal