IN THE COURT OF APPEAL OF NAURU
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal No. 22/2018
Supreme Court Refugee Appeal No. 14/2015

BETWEEN

DWN 080

AND

APPELLANT

The Republic

RESPONDENT

BEFORE: **Justice Dr. Bandaranayake, Acting President**
Justice R. Wimalasena
Justice C. Makail

DATE OF HEARING: **13/09/2022**

DATE OF JUDGMENT: **10/02/2023**

CITATION: **DWN 080 v The Republic**

KEYWORDS: Appeal, Refugee, Asylum seeker, Refugee Review Tribunal, Whether failure to request for a medical report was unreasonable or constituted jurisdictional error, Whether such failure amounted to not adhering to procedural

	fairness, Discretionary powers of the Refugee Review Tribunal
LEGISLATION:	Refugees Convention Act 2012
CASES CITED:	Minister for Immigration and Citizenship v SZGUR [2011] HCA 1, 241 CLR 594, Minister for Immigration and Citizenship v SZIAI [2009] HCA 39, WAGJ v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 277, Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223,Minister for Immigration and Citizenship v Li (2013) 249 CLR 332,Minister for Immigration and Border Protection v SZVFW and Others [2018] HCA 30, SOS 034 v Republic of Nauru [2017] NRSC 39, CRI 029 v Republic of Nauru [2017] NRSC 75, DWN 072 v Republic of Nauru [2016] NRSC 18, HFM 043 v Republic of Nauru [2017] NRSC 43, Paramananthan v Minister for Immigration and Multicultural Affairs [1998] 160 ALR 24, KIOA v West (1985) 159 CLR 550, FAI Insurance Ltd v Winneke (1982) 151 CLR 342,NAMJ v Minister for Immigration and Multicultural and Indigenous Affairs 76 ALD 56, SZODV v Minister for Immigration and Citizenship 126 ALD 290
APPEARANCES:	
COUNSEL FOR **Appellant**:	**P. Knowles**
COUNSEL FOR **Respondent** :	**R. O'Shannessy**

JUDGMENT

1. This is an Appeal from the Judgment of the Supreme Court dated 27/11/2018. By that judgment the Supreme Court had dismissed the

Appeal filed by the Appellant and had affirmed the decision of the Refugee Status Review Tribunal (hereinafter referred to as the Tribunal) dated 17/01/2015. That Tribunal had affirmed the decision of the Secretary of the Department of Justice and Border Control (hereinafter referred to as the Secretary) dated 24/08/2014, that the Appellant cannot be recognised as a Refugee under the 1951 Refugees Convention relating to the Status of Refugees, as amended by the 1967 Protocol and is not owed complementary protection under the said Act.

2. The Appellant, being aggrieved by the decision of the Supreme Court, came before the Court of Appeal against the said decision to obtain an Order to reverse the decision of the Supreme Court on three Grounds of Appeal.

3. The said Grounds of Appeal are as follows:

    a. 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 exercise its power to determine if the Appellant had the mental capacity to appear at the review.

    b. The primary Judge erred by failing to find that the Tribunal erred on a point of law by failing to afford the Appellant procedural fairness in breach of the common law and section 40 of the Act by failing to require a medical examination of whether the Appellant had the mental capacity to appear at the review.

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

4. The facts of this Appeal, albeit brief, as submitted by the Appellant are as follows. The Appellant, a sunni Muslim of Punjab ethnicity, is a citizen of Pakistan. He was forced to leave his hometown in the year 2004 due to the conflicts between Shias and Sunni Muslims and the Appellant had claimed that on one occasion he got injured due to the conflicts between the two groups.

5. Thereafter the Appellant had relocated to Rawalpindi, where his father had established a shop selling CD's that contained music and on 24/09/2010, the shop was burnt down. His father was killed in the fire.

6. The Appellant was attacked by three men in 2012, while he was riding his motorcycle where he was hit on the head and stabbed in the foot. On that occasion a gun had been placed on his head.

7. Thereafter in 2013, the Appellant was held at gunpoint and the attackers had stolen his car. About 15 days after the attack, the Appellant had received a threatening telephone call. The caller had identified himself as part of the Talibans. He had informed him that the Appellant's father was killed because he was selling CD's and that he had refused to close his shop. The caller had threatened the Appellant that if he did not give him money that he would be killed.

8. The Appellant had also stated that he had attempted to re-open his father's CD shop.

9. He had claimed that he feared harm due to his political opinion, as he opposed Pakistani Talibans, his religious beliefs as a sunni muslim and his membership of a particular social group as a 'businessman in Pakistan, Sunni businessman or returning asylum seeker, who have sought asylum in the West'.

10. Therefore the Appellant claimed to be at risk of torture, cruel, inhuman and degrading treatment and/or arbitrary deprivation of life.

11. In addition to his substantive claims, the Appellant mentioned that he suffered from significant mental illness.

12. The Tribunal accepted that the Appellant's father operated a CD shop and in that capacity was targeted for extortion and when he had refused to pay he had been killed in September 2010. The Tribunal had also accepted that the Appellant was involved with that business. However, the Tribunal did not accept that those who were involved were the Taliban, and had found that they were ordinary criminals. The Tribunal was of the view that they were motivated purely by profit. The Tribunal accepted that the Appellant was mugged and that the motorcycle was stolen in 2012, but did not accept that this was related to the incident with the CD shop nor that any further consequences flowed from that event.

13. The Tribunal did not accept that the Appellant reopened or attempted to reopen the CD shop nor that he was subjected to threats and extortion demands by the Taliban or anyone else.

14. After having considered the Appellant's claims, the Tribunal was of the view that it is not satisfied that the Appellant has a well founded fear of being persecuted in the event he returns to Pakistan.

15. Since the Tribunal did not accept the Appellant's account regarding the stealing of his motorcycle and believed that it to be an isolated criminal act, it was of the view that the Tribunal is not satisfied that the Appellant faced a real possibility of degrading or other treatment such as to enliven Nauru's international obligations.

16. Accordingly the Tribunal decided that it is not satisfied that the Appellant owed complementary protection.

17. The Tribunal therefore affirmed the determination of the Secretary, that the Appellant is not a refugee and does not owe complementary protection under the Refugees Convention Act 2012.

18. Being aggrieved, the Appellant came before the Supreme Court and had advanced three grounds of review. Each of those three grounds dealt with how the Tribunal had approached the issue of his mental health. The fundamental grievance raised by the Appellant was that it was an error of law for the Tribunal to proceed with making findings in the way it had done without taking steps to obtain medical evidence with regard to his mental health. The Appellant was of the view that, considering the circumstances of his case, the Tribunal could not have

performed its statutory function of assessing the Appellant's claims, without taking steps to obtain medical evidence.

19. After considering all three Grounds, the Supreme Court dismissed the Appeal and affirmed the decision of the Tribunal.

20. At the hearing before this Court, the learned Counsel for the Appellant informed the Court that Grounds 1 and 3 are to be taken together and they were so heard.

21. **Ground 1 - Failure to exercise power to obtain information**
Ground 3 - The Tribunal acted in a manner that was legally unreasonable

22. It is not disputed that Grounds 1 and 3 overlap with each other and therefore it would be of essence to consider the two Grounds together. Considering the context of Grounds 1 and 3 of the Appeal before the Nauru Court of Appeal, the main contention of the learned Counsel for the Appellant was that the Tribunal should have obtained expert assistance in the form of a medical report regarding the mental health of the Appellant before proceeding to make findings on the Appellant's claims and since the Tribunal had not taken steps to obtain such medical assessment, the Tribunal had acted in a manner that was unreasonable.

23. The fundamental submission of the learned Counsel for the Appellant was that the Tribunal is empowered under section 24(1)(d) of the Refugee Convention Act to order a medical examination regarding the

Appellant's mental health and mental capacity and that the Tribunal had not proceeded to carry out that duty.

24. The said section 24(1)(d) of the Refugee Convention Act reads as follows:

> *"For the purposes of a review, the Tribunal may . . . require the Secretary to arrange for the making of an investigation or a medical examination that the Tribunal thinks necessary with respect to the review and to give to the Tribunal a report of that investigation or examination".*

25. Learned Counsel for the Appellant further relied on section 36 of the Refugee Convention Act, which provides that,

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

26. Referring to the decision in **Minister for Immigration and Citizenship** v **SZGUR** ([2011] HCA 1; 241 CLR 594), learned Counsel for the Appellant accepted the fact that the Tribunal is under no obligation to exercise its powers to obtain further information relevant to the review, including a medical report.

27. However, he was of the view that although that is the general view, in a particular case where there are different circumstances, the failure to

obtain a medical report would amount to a constructive failure to perform the statutory function of the review.

28. In support of his contention, the learned Counsel for the Appellant relied on the decision of the High Court of Australia in **Minister for Immigration and Citizenship** v **SZIAI** ([2009] HCA 39). He submitted that in **SZIAI** (supra), the High Court of Australia had accepted that legal error could arise in the context of a merits review of a decision regarding immigration where a) the inquiry is obvious, b) the inquiry is about a critical fact; c) the existence of that critical fact is easily ascertained and d) the inquiry could have made a difference to the review.

29. The learned Counsel for the Appellant further contended that the approach taken in **SZIAI** (supra) had been adopted by the Nauru Supreme Court in **TOX 093** v **Republic** ([2017] NRSC 80).

30. Accordingly the contention of the learned Counsel for the Appellant was that on the basis of the decision in **SZIAI** (supra), it is apparent that the Tribunal had clearly erred in its decision.

31. It is not disputed that there was no directive given by the Tribunal for the Appellant to be sent before a medical examination. Considering the documents before the Court of Appeal as well as the submissions that were made before this Court on behalf of the Appellant, it is evident that the Appellant was relying on section 24(1)(d) of the Refugee Convention Act and the decision in **SZIAI** (supra) in support of the position that the Tribunal erred in law as it failed to inquire into the Appellant's mental health.

32. There is no doubt that provision has been made under section 24(1)(d) of the Refugee Convention Act, for the Secretary to make arrangements for a medical examination that the 'Tribunal thinks necessary' for its review. It is however, important to note that such an examination is not a mandatory requirement and the Secretary has to carry out such instructions for a medical examination, only if the Tribunal is of the view that such a medical examination is necessary for the review.

33. Considering the actions taken by the Tribunal and on an examination of what had transpired before the Tribunal, it is apparent that the Tribunal had taken a considered decision that it was not necessary for the Appellant to undergo a medical examination for the purpose of the review. In such circumstances, the question that arises is whether the failure of the Tribunal to exercise its power to request for a medical examination could be regarded as unreasonable?

34. A careful consideration of the decision in **SZIAI** (supra), it is obvious that although the High Court of Australia had accepted that the Refugee Review Tribunal might on certain occasions be subjected to a duty to inquire, the Court had left the issue open without coming to a final conclusion. It is also to be noted that the High Court had suggested that the common law requirements of procedural fairness would not normally support a duty to inquire.

35. The High Court in **SZIAI** (supra) also kept open the question of whether the ground of unreasonableness would support a limited duty to inquire.

36. However, the High Court had accepted that a failure to inquire might give rise to a jurisdictional error if there is a failure to make 'an obvious inquiry into a critical fact which could be easily ascertained'.

37. As referred to earlier the Appellant was relying on the position that he should have been subjected to a medical examination to assess his mental condition.

38. According to section 24(1)(d) of the Refugee Convention Act, the Tribunal is possessed with powers to give directions to the Secretary to carry out a medical examination and the contention of the learned Counsel for the Appellant was that on the basis of the said section, the Tribunal should have taken steps for such an examination.

39. However, the issue to be considered is whether that authority in terms of section 24(1)(d) of the Refugee Convention Act is a mandatory or a discretionary authority that had been granted to the Tribunal. It is common ground that the words used in section 24(1)(d) of the Refugee Convention Act are, that the "... Tribunal may require ...."

40. In **Minister for Immigration and Citizenship** v **SZGUR** (supra) the Court had to consider, on the basis of a provision which stated that it "may .... require", would make the Refugee Review Tribunal to get Migration Officials to make arrangements for a medical examination. The Court referring to the decision in **WAGJ** v **Minister for Immigration and Multicultural and Indigenous Affairs** ([2002] FCAFC 277) stated that there is no legal obligation for the Refugee

Review Tribunal to either consider exercising its powers or make inquiries.

41. In this backdrop it would be of interest to note as to the process that had taken place before the Tribunal. According to the proceedings, at the very outset of the inquiry, a member of the Tribunal had explained in detail the process and procedure of the Tribunal. After explaining the procedure, the member of the Tribunal had informed the Appellant that,

> *"These proceedings are confidential so you should feel confident that you can speak candidly to us without what you tell us going beyond these walls and our interpreter has just made a solemn declaration not to disclose anything he hears here . . . ."*

42. It was not disputed that the proceedings before the Tribunal had taken over 5 hours with breaks that had been given in between whenever such requests were made by the Appellant or otherwise.

43. It is to be noted that according to the proceedings before the Tribunal, at no stage there had been a request by or on behalf of the Appellant to undergo a medical examination to consider his mental health. In fact at the end of the inquiry, the Tribunal had granted time for the Representative of the Appellant to make a statement and even at that stage he had not made any effort to do so. Instead he had referred to the reports he had provided by a psychiatrist and several doctors.

44. It is in this backdrop that it will have to be considered whether there had been a jurisdictional error in not making inquiries into the Appellant's mental health.

45. Since 1948 it was the concept known as 'Wednesbury unreasonableness' that had been applied as the test to decide whether a decision had been taken reasonably or not. Referring to Wednesbury unreasonableness, as stated by Lord Diplock in **Council of Civil Service Unions** v **Minister for the Civil Service** ([1985] A.C.374),

> *"It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".*

46. Therefore when one considers the principle enumerated in **Associated Provincial Picture Houses Ltd** v **Wednesbury Corporation** ([1948] 1 KB 223), it is apparent that an executive decision would only be set aside if the reviewing body concluded that the decision was so unreasonable that no reasonable decision maker could have made it.

47. However, it is to be taken note of that several decades later, in 2013, a broader perspective regarding the concept of unreasonableness was considered by the High Court of Australia in **Minister for Immigration and Citizenship** v **Li** ((2013) 249 CLR 332), where it was held that unreasonableness is not just tied to Wednesbury principles or to decisions that are completely irrational.

48. The decision in **Li** (supra) clearly reflects a new judicial trend that makes provision to provide protection against arbitrary decisions based on statutory provisions which attempts to exclude procedural fairness.

49. Accordingly, the Australian Courts introduced a broader jurisdiction in order to decide whether a decision is unreasonable or not by stating that

> *"unreasonableness is a conclusion which may be applied to a decision which* ***lacks an evident and intelligible justification****" (emphasis added).*

50. On a consideration of the totality of all the aforementioned, it is of importance to refer to the decision of the High Court of Australia in **Minister for Immigration and Border Protection** v **SZVFW and Others** ([2018] HCA 30). In that matter, the respondents' applications for Protection Visas were rejected by the Minister's delegate. The respondents sought review of that decision by the Refugee Review Tribunal. When the Refugee Review Tribunal invited the respondents to appear before the Tribunal to give evidence and present arguments, they did not adhere to the said request.

51. The Tribunal had decided to proceed in terms of section 426 A (1) of the Migration Act 1958 and the question in issue was whether the Tribunal's decision to proceed in the absence of the respondents was legally unreasonable.

52. The High Court held that the Tribunal had not acted unreasonably in choosing to make the decision without taking any further action to allow or enable the respondents to appear before it.

53. In considering the issue before Court, Gageler, J., in **SZVFW and Others** (supra) had stated thus:

> *"The question of whether or not a decision made or action taken in purported exercise of a statutory power is legally unreasonable is accordingly a question directed to whether or not the decision or action is within the scope of the statutory authority conferred on the repository. . . .**The constitutional entrenchment of judicial power in courts of competent jurisdiction leaves no room for doubt that 'the judicial duty is to ensure that [an] administrative agency stays within the zone of discretion committed to it by its organic act'"** (emphasis added).*

54. It is therefore abundantly clear that in terms of section 24(1)(d) of the Refugees Convention Act 2012, it is only a discretionary power that the Tribunal is empowered with, to make arrangements for an Applicant to undergo a medical examination. It is apparent that there cannot be any compulsion for such an action to be taken by the Tribunal and therefore relevant action would be considered by the Tribunal only if it thinks that it is necessary to take such measures.

55. The role of an administrative authority, such as a Tribunal, is limited to carry out an investigation to review the issue before it and reach a

considered decision. In order to arrive at a decision, such a body would have to function within the given parameters by the statute it was formed.

56. On a consideration of the totality of the material placed before this Court and the submissions made by the learned Counsel for the Appellant as well as the Respondents, it is clear that the Tribunal has neither failed to exercise its powers to obtain information nor has it acted unreasonably.

57. In the circumstances, Grounds 1 and 3 of this Appeal clearly fail.

58. **Ground 2 - Denial of Procedural fairness**

The main contention of the learned Counsel for the Appellant was that the law of Nauru is not as restrictive as some of the Australian authorities and accordingly under the law of Nauru Procedural fairness requires that the Tribunal take steps to accommodate and understand any mental illness suffered by an asylum seeker. Accordingly, the learned Counsel for the Appellant contended that depending on the facts of the case and the type of the claims that had been made, it would require the Tribunal to take steps to obtain a proper 'diagnosis' of the condition of the asylum seeker. In support of his contention, the learned Counsel for the Appellant relied on the decisions in **SOS 034** v **Republic of Nauru** ([2017] NRSC 39, **CRI 029** v **Republic of Nauru** ([2017] NRSC 75, **DWN 072** v **Republic of Nauru** ([2016] NRSC 18 and **HFM 043** v **Republic of Nauru** ([2017] NRSC 43.

59. In **DWN 072** v **Republic of Nauru** (supra), the Supreme Court of Nauru had considered the role of the Tribunal regarding inquiries and

had been of the view that the Tribunal has to ensure that the Applicant understands the relevance and consequences of the information being relied on clearly. Referring to the decision in **Paramananthan** v **Minister for Immigration and Multicultural Affairs** ([1998] 160 ALR 24) the Supreme Court had further stated that, the inquiries before the Tribunal are not limited to the material, evidence and arguments that are presented to it, but that the Tribunal could review the decision according to the merits of the case.

60. Traditionally the concept of procedural fairness, involves two basic requirements: the fair hearing rule and the rule against bias. According to the fair hearing rule, a decision maker must afford a person the opportunity to be heard before making a decision affecting his interests. There are several authorities which supports this concept and in **Kioa** v **West** ((1985) 159 CLR 550) Gibbs CJ, quoting Mason J, in **FAI Insurance Ltd** v **Winneke** ((1982) 151 CLR 342) had stated thus:

> *" . . . the fundamental rule is that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power".*

With regard to the second limb of the fair hearing, the rule against bias ensures that the decision maker has to be impartial and should not have pre-judged the decision in issue.

61. It is common ground that the Appellant had participated at the hearing. It is also not disputed that the Appellant had not claimed that he was suffering from any form of sickness and that he was not in a

position to participate at the inquiry. In fact a careful perusal of the proceedings before the Tribunal clearly indicates that the answers given by the Appellant were coherent and intelligible. An examination of the transcripts also shows that the Tribunal had been fully aware of the Appellant's mental condition as it had received medical assessments and reports. The proceedings clearly show that during the hearing there had been frequent breaks and wherever necessary clarifications had been allowed.

62. As referred to earlier, the Appellant was allowed to present his submissions by himself as well as through his representative. It is also to be noted that an opportunity was given to submit written submissions, in addition to the oral submissions made, to the Tribunal.

63. Further, it is to be noted that there has not been an iota of evidence that either the Tribunal did not allow the Appellant to present his case or that the Tribunal had decided the issue without hearing the Appellant.

64. Learned Counsel for the Appellant strenuously contended that in order to make a proper assessment, the fair procedure was to have expert assistance in the form of a medical report as the Appellant was not in a sound mental condition to have faced proceedings before the Tribunal.

65. Referring to the submissions made by the learned Counsel for the Appellant, learned Counsel for the Respondent referred to the decision in **NAMJ** v **Minister for Immigration and Multicultural and**

Indigenous Affairs (76 ALD 56) where the Federal Court of Australia had referred to the proceedings before the Tribunal where it had stated thus:

> *"The Appellant at times presented as being deranged, clutching his forehead, holding up one arm in the air, rolling his eyeballs, sighing loudly . . . . By the end of the two and a half hour hearing, the Tribunal was satisfied that the Appellant/ Applicant had given a comprehensive account of his claim".*

66. Referring to the claim of procedural unfairness, Justice Branson in **NAMJ** (supra) had stated that,

> *"It seems to me that, by analogy with a claim of procedural unfairness, the Applicant must bear the onus of establishing that he was unfit to take part in the Tribunal hearing".*

67. As stated earlier the hearing before the Tribunal does not indicate that the Appellant was not willing to participate in the investigation. There was no material before this Court to indicate that the Appellant was an unwilling participant at the inquiry. Moreover, it is to be noted that even the Appellant's representative had not made any request or raised any objection regarding the Appellant not being in a proper mental or physical condition to face the proceedings.

68. In **SZODV** v **Minister for Immigration and Citizenship** (126 ALD 290), the Federal Court of Australia, had to consider whether an

Applicant, who was admittedly suffering from schizophrenia, could face the inquiry before the Tribunal. Deciding in support of such participation, the Court had held that,

> *"The Tribunal is already on notice that the Appellant suffered from schizophrenia and took this into account in its dealings with the Appellant. Nonetheless, the Tribunal was satisfied that the Appellant was capable of giving evidence and presenting her case at a hearing before it".*

69. It is therefore abundantly clear that a Tribunal has discretionary authority to decide whether an Applicant is in a position to participate in an inquiry before the Tribunal or not. This does not mean that a Tribunal could arrive at such a decision arbitrarily. The Tribunal has to be mindful of the onerous statutory authority that has been granted and should exercise such authority bearing in mind that it should strictly adhere to the principles of procedural fairness with intelligible justification.

70. Moreover, it should be reiterated that the burden is on the Applicant to prove that he is not in a state of mind to participate in the inquiry and that cannot be shifted to the Tribunal.

71. It is not disputed that the Appellant first applied for refugee status determination in Nauru in December 2013. At that time he had provided a written statement to the Secretary. The Appellant faced the interview and based on that the Secretary made a determination that he was not recognised as a refugee nor for complementary protection. For the Tribunal, the Appellant had submitted written submissions as

well as a written statement. It is common ground that the Appellant went through the full hearing before the Tribunal.

72. Considering all the aforementioned it is abundantly clear that there had been no denial of procedural fairness and therefore, Ground 2 must fail.

73. For the reasons aforementioned the Appeal is dismissed and the judgment of the Supreme Court of Nauru dated 27/11/2018 is thereby affirmed.

74. I wish to place on record appreciation for both learned Counsel for the Appellant and the Respondent for their assistance rendered to this Court.

Shirani A. Bandaranayake

NAURU COURT OF APPEAL

Justice Dr. Shirani A. Bandaranayake
Acting President of the Court of Appeal

Justice Rangajeeva Wimalasena

I agree

Justice of the Court of Appeal

Justice Colin Makail

I agree

Justice of the Court of Appeal