IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal No. 24 of 2018
Supreme Court Refugee Appeal Case No. 32 of 2017

BETWEEN

DWN 034

APPELLANT

AND

THE REPUBLIC OF NAURU

RESPONDENT

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

DATE OF HEARING: **6 July 2023**

DATE OF JUDGMENT: **27 June 2025**

CITATION:	**DWN 034 v The Republic of Nauru**
KEYWORDS:	Refugee; procedural fairness; discretion to request medical examination
LEGISLATION:	s 22 , 24 & 40 of Refugee Convention Act 2012
CASES CITED:	DWN 080 v Republic [2023] NRCA 4; Minister for Immigration and Citizenship v SZGUR [2011] HCA 1
APPEARANCES:	
COUNSEL FOR the Appellant:	**NM Wood SC**
COUNSEL FOR the Respondent:	**HPT Bevan SC**

JUDGMENT

1. This is an appeal against the Supreme Court judgment delivered on 14 December 2018 affirming the decision of the Refugee Status Tribunal (second Tribunal) made on 25 July 2017.

2. The Appellant in this appeal is a Pakistani national who arrived on Christmas Island on 03 August 2013. He was subsequently transferred to Nauru on 25 January 2014. The Appellant made an application for Refugee Status Determination on 21 May 2014 to be recognized as a refugee or as a person to whom the Republic of Nauru owes complimentary protection under its

international obligations. On 26 June 2015 the Secretary for Justice and Border Control (the Secretary) determined that the Appellant was not a refugee and was not owed complimentary protection.

3. The Appellant made an application to the Refugee Status Tribunal (first Tribunal) on 02 July 2015 to review the Secretary's determination. On 23 October 2015 the first Tribunal affirmed the determination by the Secretary. Being aggrieved by the decision of the first Tribunal the Appellant appealed to the Supreme Court and on 23 March 2017 the Supreme Court quashed the decision of the first Tribunal and the matter was remitted to the Refugee Status Tribunal for reconsideration according to law.

4. On 25 July 2017 the second Tribunal affirmed the determination of the Secretary that the Appellant is not recognized as a refugee and is not owed complimentary protection under the Refugees Convention Act 2012 (the Refugee Act). The Appellant appealed the decision of the second Tribunal to the Supreme Court and filed an amended Notice of Appeal on 19 December 2017. The Supreme Court dismissed the appeal and affirmed the decision of the second Tribunal on 14 December 2018. Being aggrieved by the Supreme Court Judgment, the Appellant filed a Notice of Appeal in the Nauru Court of Appeal on 18 December 2018.

5. The Notice of Appeal sets out the following Ground of Appeal:

> "The primary judge erred by failing to find that the Refugee Status Review Tribunal (the Tribunal) erred in law by its failure to require the Secretary to arrange for the making of a medical examination of the Appellant and to have a report of that examination given to the Tribunal under s 24(1)(d) of the Refugees Convention Act 2012 (the Act) for the purposes of its review. This failure amounted to a breach of the rules of natural justice at common law, s 22, and s 40 of the Act in that the Tribunal did not afford the Appellant the right to a real and meaningful hearing."

6. It should be noted at this juncture, that the Appellant sought to advance an additional ground of appeal, but at the hearing, conducted on 06 July 2023, that application was withdrawn and only the original ground of appeal was advanced.

7. We will now consider the submissions made by the parties regarding the sole ground of appeal based on denial of natural justice. The Appellant submitted that section 24(1)(d) of the Refugees Act, when read in light of section 22, must be exercised according to the principles of natural justice and the substantial merits of the case. Section 24(1)(d) of the Refugees Act provides:

> "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".

8. Section 22(b) provides that the Tribunal shall act according to the principles of natural justice and the substantial merits of the case. Section 40 provides for the Tribunal to invite the applicant and present their case.

9. In the written submissions filed by the Appellant, it was highlighted that the primary judge's decision that there was no requirement for the Tribunal to exercise its powers under section 24(1)(d) to arrange a medical examination was based on two reasons: firstly, there was no expert evidence or clinical record before the Tribunal to support the claim that the Appellant suffered from PTSD or any other mental illness; and secondly, because the Appellant appeared at the hearing and was able to 'participate in a real and meaningful sense'.

10. In respect of the first reason the Appellant submitted that the absence of a medical report to assess the mental status of the Appellant was itself the valid reason to require the Appellant to be medical examined under section 24(1)(d). It appears that in the pre-hearing submissions and the post hearing

submissions filed before the Tribunal, the Appellant's representative has mentioned about the Appellant's mental health. The primary judge has acknowledged this as follows:

> [35] In the pre-hearing submissions, the Appellant's representative outlined with respect to the Appellant's general mental health:
>
> > "[DWN 034] instructed us that he is currently suffering from severe memory problems, insomnia and stress triggered by the upcoming Tribunal Hearing. [DWN 034] has missed eight CAPs appointments in the last two weeks due to his inability to remember he had appointments scheduled or that he had attended appointments just the day before and reminded of subsequent appointments. It would appear that his current short term memory problem is compounded by his lack of sleep and stress regarding his Tribunal Hearing. These are also symptoms or signs associated with detention fatigue, frequently noted by IHMS professionals in their clinical reports. Whilst [DWN 034] does not currently have medical reports to support his mental health and engage in topics that triggered traumatic memories, were observed by CAPs throughout our consultations with him in preparation for his hearing. In these circumstances when assessing his evidence and claims."
>
> [39] In the post- hearing submissions, the Appellant's representatives informed the Court that they had been unsuccessful in obtaining the relevant information from the Appellant. The representative said:
>
> > "[DWN 034] advised at the hearing that he would like to submit recent articles regarding the current situation in Pakistan that would subject him to persecution and/or serious harm as a Pashtun. We have subsequently organized 6 appointments to

> obtain further instructions from [DWN 034] and have tried to the best of our ability to reach him but have been unsuccessful in re-engaging [DWN 034]."
>
> [40] The submission then purported to explain the Appellant's forgetfulness and avoidance of mental health assistance by reference to studies on PTSD in refugee determinations. The representatives requested that the Tribunal take this into account in considering the Appellant's "behaviours, evidence and claims".

11. Therefore, it is clear that the Tribunal was well aware of the Appellant's claimed mental condition during the hearing. In any event, it does not appear that the Appellant's representatives, at any stage, requested that he be referred for a medical examination to obtain a report on his mental health. Nevertheless, the primary judge noted that the Tribunal had considered the Appellant's mental health, as follows:

> [41] In the Tribunal Decision Record, the Tribunal noted the submission of the Appellant's representatives relating to the Appellant's poor mental health, saying (at [35]):
>
> > "In submissions dated 22 May 2017 the applicant's representatives advised they were instructed by the applicant that he suffered from severe memory problems, insomnia and stress although no medical reports were available to verify this. The representatives stated that they observed his inability to focus and engage in topics that triggered traumatic memories."

12. The second reason identified by the Appellant for the primary judge's conclusion that the Tribunal was not required to exercise its power to obtain a medical report was the fact that the Appellant had appeared at the hearing.

Furthermore, the Appellant submitted that his contention was not that his mental illness made it impossible for him to participate in the hearing. Rather, his argument was that his evidence should have been assessed in light of the effects of his claimed mental condition.

13. During the oral submissions, counsel for the Appellant submitted that the Tribunal, in a way, acknowledged that the Appellant had a problem with his memory. This was manifested when Ms Boddison stated at page 304 of the proceedings: 'We will be asking you questions today, and if you don't understand our questions, please say so and we will try to rephrase them. Also, from a submission by your representatives, I understand there are certain things you have difficulty talking about, and we do not propose to question you about the circumstances of your father's or brother's death today". However, it was further submitted that when the Tribunal made its decision, it did not accept the Appellant's claim that people came looking for him 14 months after he left, thereby indicating that the Tribunal did not take into account the submissions made by his representatives regarding the Appellant's mental state as the Tribunal stated as follows in its decision:

> "[63] At the Tribunal hearing the applicant claimed that about 14 months after he left persons came asking about him. The applicant was not able to provide any further details. The first Tribunal was of the view that the applicant would have mentioned such inquiries earlier in the RSD process if they had been occurring. Given the applicant had not mentioned this before his first Tribunal hearing and the lack of detail he was able to provide, the Tribunal does not accept that anyone came looking for him or made enquiries about him after he left Darasamand."

14. The counsel for the Appellant further submitted that the primary judge mentioned in paragraph 82 of the judgment that "Moreover, the Applicant appeared before the Tribunal and answered a significant number of questions

unremarkably and without any manifest inability to comport himself effectively as a witness on his own behalf". But the Appellant's counsel argued that the Tribunal erred by failing to apply its own reasoning consistently. While the Tribunal made an adverse credibility finding based on the timing and lack of detail in the Appellant's evidence, the Appellant's counsel asserted that it failed to properly consider the explanation that the Appellant experienced a stress reaction when discussing traumatic events, including threats made against him and the deaths of his father and brother. Although the primary judge noted that the Appellant answered many questions without difficulty, counsel submitted that this did not negate the specific challenges he faced when addressing sensitive topics. These difficulties, it was argued, could reasonably account for the delayed or vague nature of his evidence.

15. The Respondent argued that the Tribunal was not under any legal obligation to obtain a medical report regarding the Appellant's mental health under section 24(1)(d) of the Refugees Convention Act. That provision confers a discretionary power, not a mandatory duty, to arrange such examinations. It was submitted that at no point during the proceedings did the Appellant or his representatives request that the Tribunal exercise this power pursuant to section 24(1)(d). The Respondent further noted that no medical evidence was presented to substantiate the Appellant's claims of mental illness. Instead, the submissions relied on observations made by the Appellant's legal representatives and references to academic literature, which do not constitute admissible medical evidence. It was the Respondent's argument that in the absence of such evidence or a formal application, there was no basis for the Tribunal to undertake further investigative steps.

16. In support of this position, the Respondent referred to the decision in DWN 080 v Republic [2023] NRCA 4, where this court affirmed in an earlier occasion that the Tribunal's power to order a medical examination is discretionary and may only be exercised where it is necessary in the interests of justice and not merely because an unsubstantiated claim has been made:

> [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.

17. It was further submitted by the Respondent that the Tribunal conducted the hearing fairly and made accommodations for the Appellant in several respects, including granting breaks and refraining from questioning him about distressing subjects such as the deaths of his father and brother, following requests made by his legal representatives. Despite the claims of mental health issues, the Appellant appeared at the hearing, provided instructions to his lawyers, and responded to questions clearly and coherently. It was brought to the attention of this Court that both the Tribunal and the primary judge acknowledged these circumstances and found no manifest inability on the Appellant's part to engage meaningfully in the hearing process.

18. There is no argument that the learned Judge of the court below correctly identified and applied the relevant legal principles regarding the inquisitorial role of the Tribunal, as discussed in the authorities cited in the judgment. Therefore, we do not consider it necessary to undertake an analysis of the legal position adopted in this jurisdiction concerning the Tribunal's inquisitorial role. The crux of the argument advanced by the Appellant is that the Tribunal ought to have exercised its power under section 24(1)(d) to assess the Appellant's mental state, which, in turn, would have enabled the Tribunal to evaluate his evidence in light of the findings from a medical examination.

19. In view of those submissions, it would be pertinent to ascertain as to how the primary Judge dealt with this issue. In this respect the primary judge stated the following in his Honour's judgment:

> [81] However, there are scenarios where a Tribunal is on notice from its own observations of an applicant or from other reliable material properly placed before it that it needs to procure further information in the exercise of its inquisitorial powers to accord fairness to an applicant – whether to assure itself that the applicant is able to participate meaningfully in a hearing or to deal with issues of contention in an application for refugee status or complimentary protection.
>
> [82] In the current case, the information before the Tribunal consisted of little more than assertions by the Applicant's solicitors in pre and post hearing submissions, unsupported by any expert material or clinical files. Moreover, the Applicant appeared before the Tribunal and answered significant number of questions unremarkably and without any manifest inability to comport himself effectively as a witness on his own behalf. The Tribunal communicated in response to pre-hearing submissions that it proposed not to ask the Applicant questions about the circumstances of his father's and his brother's death, and it stood the matter down for 16 minutes for the Applicant to have a smoke, but in general the Applicant answered questions responsively and clearly. Thus, the case shared features in common with the facts in SZNVW, where, if anything, there was additional information in the form of a psychologist's report that the applicant suffered from anhedonia. In this matter, the Appellant undertook to provide some additional material to the Tribunal at various stages of the hearing but ultimately, for reasons that are known, the material was not provided.
>
> [83] There was no clear indication from the hearing, other than submissions by the Applicant's solicitors before and afterwards, that justice would not be done if an expert medical assessment was not

conducted on the Appellant. No application was made for an order under section 24(1)(d) or for a further adjournment. He was able to participate in a real and meaningful sense in the hearing so there was no failure to accord him procedural fairness or to act on the substantial merits of the case. This means that the amended ground of appeal by the Applicant fails.

20. It should be noted that, in our view, medical evidence is not necessarily required for the Tribunal to exercise its power under section 24(1)(d). The provision clearly empowers the Tribunal to order a medical examination if it considers such a step necessary. The Tribunal has the discretion to make that determination based on the circumstances of each case. In particular, where a claim is made regarding an applicant's mental state, the Tribunal may either assess the evidence in light of that claim or, if it has reservations or considers that further assessment is required, order a medical examination.

21. It must also be emphasised that the Tribunal is primarily required to act upon the material presented to it by the applicant. If the Appellant's legal representatives were of the view that a medical examination was necessary to assess his mental state, it was incumbent upon them to request that he be referred for such an examination. In the present case, no such request was made. The only request was for the Tribunal to consider the information submitted by the legal representatives regarding the Appellant's perceived difficulties.

22. Besides, the Respondent brought to the notice of this Court that the Appellant had previously rejected such examination as per the written submissions filed before the Supreme Court. It was stated in Minister for Immigration and Citizenship v SZGUR [2011] HCA 1 that the Tribunal's role is to assess the material provided by the applicant, and that it is entitled to decide the case on

the material before it. The Tribunal is not under a general duty to consider exercising its discretionary powers, unless specific circumstances justify it.

23. Notably, there is no allegation that the Tribunal refused to consider the submissions made on behalf of the Appellant regarding his mental health. However, the counsel for the Appellant submitted that, although the Tribunal acknowledged the claims concerning the Appellant's mental condition, it failed, according to paragraph 63 of the Tribunal's decision, to evaluate the Appellant's evidence in the context of his mental state. We do not accept that submission. It appears to rely on a narrow interpretation suggesting that the Tribunal made an adverse finding despite being aware of the Appellant's mental health concerns.

24. However, when paragraph 63 is read in the context of the Tribunal's reasons as a whole, it cannot be said that the Tribunal disregarded the Appellant's mental health claims. Even accepting the Appellant's representative's submissions regarding mental health issues at their highest, the Tribunal is not precluded from assessing the evidence to reach a conclusion. The fact that the Tribunal decided not to accept a portion of the Appellant's evidence, for reasons clearly set out in its decision, does not necessarily mean it failed to consider that evidence in light of the Appellant's mental health claims.

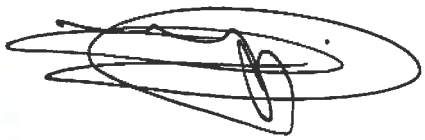
25. Furthermore, we have considered the findings of the second Tribunal. It appears that the Tribunal gave due regard to the information provided by the Appellant, and its final conclusion was reached in view of the entirety of that material. We are not inclined to accept that the second Tribunal denied the Appellant a fair hearing or breached the rules of natural justice merely because a medical examination was not ordered. When the reasons of the second Tribunal are considered in their full context, it appears that the Appellant's mental state was taken into account. We do not find any error in the Tribunal's decision merely because it did not exercise its discretion to request a medical examination of the Appellant.

26. For the foregoing reasons, we do not find that the second Tribunal failed in its duty by not requiring the Secretary to arrange a medical examination of the Appellant. Accordingly, we do not accept that the second Tribunal denied the Appellant the right to a real and meaningful hearing. We are of the view that the primary judge did not err in concluding that the Appellant was accorded procedural fairness and was afforded the opportunity to participate in a real and meaningful manner.

27. In the circumstances, the appeal is dismissed with costs.

Dated this 27 June 2025.

Justice Rangajeeva Wimalasena



President

Justice Sir Albert Palmer

Justice of Appeal

Justice Colin Makail

Justice of Appeal