IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION] Case No. 27 of 2016

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN 14061, brought pursuant to s43 of the *Refugees Convention Act* 1972

BETWEEN

ROD122 Appellant

AND

THE REPUBLIC Respondent

Before: Crulci J

Appellant: T. Baw
Respondent: G. R. Kennett SC

Date of Hearing: 27 September 2016
Date of Judgment: 22 June 2017

CATCHWORDS

APPEAL - *Refugees – Refugee Status Review Tribunal – Psychological investigation – Procedural fairness – Invitation to Comment – Political opinion – Appeal ALLOWED*

JUDGMENT

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

> **43 Jurisdiction of the Supreme Court**
>
> (1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.
>
> (2) The parties to the appeal are the Appellant and the Republic.
> ...

2. The determinations open to this Court are defined in section 44 of the Act:

> **44 Decision by Supreme Court on appeal**
> (1) In deciding an appeal, the Supreme Court may make either of the following orders:
> (a) an order affirming the decision of the Tribunal;
> (b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

3. The Court notes that the Appellant filed the Notice of Appeal outside the 28-day period specified in s 43(3) of the Act; that an application was made for an extension of time to lodge the Notice of Appeal on 22 June 2016, which was not opposed by the Respondent. The Court extended the time under s 43(5) by order on 24 June 2016.

4. The Refugee Status Review Tribunal ("the Tribunal") delivered its decision on the 15 March 2015 affirming the decision of the Secretary of the Department of Justice and Border Control ("the Secretary") of the 22 September 2014, that the Appellant is not recognised as a refugee under the 1951 Refugees Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees ("the Convention"), and is not owed complimentary protection under the Act.

BACKGROUND

5. The Appellant is a 28 year-old single man from a village in the Narayanganj District, central Bangladesh. He has a widowed mother and a married sister. He did not complete his schooling. He left Bangladesh in 2007 and spent six years in Malaysia. He held a valid work visa for the first three years.

6. In his written statement dated 27 January 2014, the Appellant noted that there are two main parties in Bangladesh: the Awami League ("AL") and the Bangladesh Nationalist Party ("BNP"). He said that both parties were forcibly trying to recruit new members, and he was subject to attacks and

threats by both parties, even though he did not wish to join any political party. He claimed that if he were to be returned to Bangladesh he "will be detained, seriously harmed or killed by members and supporters of the Awami League or the BNP for refusing to join their political parties".

7. At the refugee status determination interview, the Appellant gave details of various attacks and threats to himself by both the AL and the BNP, beginning around four years before the Appellant left Bangladesh (mid 2007). The Appellant stayed in Malaysia from 2007 to 2013, and then travelled to Indonesia and on to Australia later in 2013. The Appellant was transferred to Nauru on 28 October 2013.

8. It was noted that the Appellant provided "inconsistent evidence", including mixed responses to questioning about the timing of the attacks and which party was involved. Therefore the Secretary concluded that "the story has been fabricated and learnt to support a claim for refugee status" and rejected the Appellant's application for refugee status.

9. The Secretary was not satisfied that the Appellant had a well-founded fear of persecution for a Convention reason and for the same reasons determined that there was not a reasonable possibility that the Appellant would be subjected to torture or cruel, inhuman or degrading treatment or punishment if returned to his home country. Nor that there was a reasonable possibility of the Appellant facing harm which would contravene Nauru's international obligations.

REFUGEE STATUS REVIEW TRIBUNAL

10. At the hearing before the Tribunal, the Appellant recounted various attacks by AL and BNP officers. The Tribunal recorded the attacks by the AL as follows:

> *One day at the bazaar, a man called Anisoor Rahmen Dipur, a local AL leader from Nopunkalar, asked the applicant to join the AL. The applicant declined, saying he was the only son and had to support his mother and sister. Mr Dipur then punched him and said "If you don't come, I'll kill your mother". So the applicant went to the AL premises.*
>
> *When the applicant got to the AL premises, "he" (presumably Mr Dipur) opened a big box and took our (sic) two pistols and a mobile phone, offering them to the applicant. The applicant said he didn't want them but Mr Dipur said "If you are to stay in this place, you have to get involved. Otherwise it won't work". The applicant did not say how he departed the AL premises, but said that he never went back there.*[1]

11. In regards to the attacks by the BNP, the Tribunal said as follows:

> *The applicant was asked if he had ever been approached by the BNP. He said they went to his mother's house one day and asked for his whereabouts*

[1] Book of Documents ("BD") 144 at [30], [31].

(he was out working on a farm at the time). His mother replied that he was at work. When the applicant came home, his mother told him that the BNP had come looking for him. The Tribunal was not able to ascertain how the mother knew that they were BNP; however, the applicant asserts that this was so and added that his mother said that they were "bad boys".

To circumvent any more visits to his mother, the applicant went by himself to the BNP premises in the nearby village. After he arrived, they locked the doors and sat him down, asking if he was going to join. He replied (sic) that he was the only son and could not afford to get involved with the BNP. His arms were pinioned behind his back by two men and the man who appeared to be the leader slapped his face. This went on for a couple of hours with a constant harangue about his joining, which from what the Tribunal gathers, seemed to alternate between threats and inducements. The applicant eventually said he needed a week to consider their offer and the BNP people agreed, adding that if he did not return to the BNP premises in a week's time, he would be sorry. [2]

12. The Appellant said that he did not return to the BNP premises but instead stayed with friends in the neighbouring village. Eventually his mother got together some money and arranged for him to leave Bangladesh.

13. In answer to the Tribunal's questions, the Appellant said that his mother had visited the Union Chairman to ask for help in stopping the attacks, but he said they were AL and did not offer any help. The Appellant also said that, since leaving Bangladesh, he had learnt that the AL were in power, and had visited his mother's house and tortured her. After further questions the Appellant agreed that it was his nephew who had said his mother had been tortured. The interpreter clarified that the word "torture" in Bangla can encompass a range of things from humiliation to physical harm.

14. The Appellant said that if he returned to Bangladesh he would be killed. He maintained that this would be the case despite that Bangladesh is no longer in a state of emergency, as it was when he left in 2007. The Appellant said that he could not live elsewhere in Bangladesh because people living in Narayanganj are "notorious", and he would be rejected if he tried to move elsewhere.

Tribunal's Decision

15. The Tribunal noted that the Appellant had been suffering from acute mental illness and was too ill to attend the first scheduled hearing. The Appellant attended the postponed hearing but it "was evident to the Tribunal – although not medically qualified – that the applicant was still far from well"[3].

16. At the postponed hearing on 29 January 2015, the Tribunal said of the Appellant's behaviour at the hearing:

[2] BD 144 at [33], [34]
[3] BD 143 [10]

"The applicant did not make normal eye contact: he occasionally stared, but unseeingly, directly at a Tribunal member. However, for most of the hearing, he sat slumped forward, staring at the floor, repeating a chant or a mantra over and over, almost inaudibly.

His attention could be caught by the interpreter speaking to him in his own language and the applicant answered, fairly peremptorily, the questions put to him. He frequently said he could not remember."[4]

17. The Tribunal had been formally advised about the Appellant's medical progress at the beginning of the hearing. It received a medical certificate dated 22 January 2015, before the hearing took place, which said that the Appellant was "*acutely psychotic and unable to communicate. He is taking medications that also affect his mental state. He is currently not capable of understanding his legal processes and is unable to instruct his lawyers*".[5]

18. The Tribunal indicated that[6]:

"the post-hearing submission states that despite this last sentence above, the applicant had recovered sufficiently to give instructions and to attend the hearing. This may explain why this medical certificate was not forwarded to the Tribunal at the time it was written."

19. In light of the medical considerations, the Tribunal noted in the written record:

"... the Tribunal does not intend to draw adverse credibility findings from the fact that the applicant's oral testimony at the hearing diverged from his previous statement written a year earlier. Hence it will rely heavily on country information and place the applicant's general story against this.[7]

20. The Tribunal accepted that members of the AL and BNP pressured the Appellant to join the parties, causing him actual harm and/or intimidating him. The Tribunal found that the account of being slapped by a man while the Appellant had his arms pinned behind his back rang true.

21. The key question identified by the Tribunal was whether there was a reasonable possibility that the Appellant would face serious harm amounting to persecution for a Convention reason if he were returned to Bangladesh. Considering Country Information before it, the Tribunal considered that there was no evidence that apolitical people like the Appellant would be targeted.

22. In any event, the Tribunal appeared to question whether the expression of no political view would qualify as a "political opinion" under the Convention, given the "very useful" definition of the term by Professor Guy

[4] Ibid., 143 at [11], [12].
[5] Ibid., 143 at [15] (emphasis added).
[6] Ibid., 143 at [16]
[7] Ibid.,147 at [48].

Goodwin-Gill relied on by the Tribunal.[8] In addition, the Tribunal said that the Appellant was not targeted by reason of not having a political view, but rather because the parties were trying to recruit the Appellant as a member.

23. The Tribunal also noted that, at the time of the attacks by the AL and BNP, there was a caretaker government in office in Bangladesh who was restricting political activities and arresting leaders of the AL and BNP. The Tribunal said that the caretaker government would have viewed the attacks on the Appellant adversely. Given that the caretaker government likely would have been willing and able to provide protection to the Appellant, the Appellant's fear of persecution was not well-founded.

Complementary Protection

24. For the same reasons that the Tribunal was satisfied that the Appellant did not have a well-founded fear of persecution for a Convention reason, the Tribunal was satisfied that there was no reasonable possibility of being subjected to cruel, inhuman or degrading treatment or punishment if he were to return to Bangladesh.

25. The Tribunal also considered Country Information about mental health services in Bangladesh, and note the World Health Organisation Report of 2007 ("WHO Report"), which said that[9]:

> *"Bangladesh's mental health policy, strategy and plan was approved in 2006 as part of policy, strategy and action plan for surveillance and prevention of Non-Communicable Diseases (NCD) and community based activities in mental health is the main approach of the policy. A list of essential medicines is present in the country including antipsychotics, anxiolytics, antidepressants, mood stabilizers and antiepileptic drugs."*

26. The Tribunal was also therefore satisfied that the Appellant could access mental health services in Bangladesh and that it was not a breach of his human rights to be returned. The Appellant therefore was not owed complementary protection by Nauru.

GROUNDS OF APPEAL

27. The Appellant filed his Notice of Appeal on 6 September 2016. An Amended Notice of Appeal was filed on 19 September 2016 and a Further Amended Notice of Appeal on 27 September 2016. That Notice reads as follows:

    1. The Tribunal erred in law by failing to exercise its powers as required by the following sections of the Act:

[8] Ibid., 148 at [56].
[9] Ibid., 151 at [75].

a. the Tribunal failed to exercise its powers under s.24(1)(d) of the Act to require the Secretary to arrange for the making of a psychiatric or psychological investigation or examination into the mental health of the Appellant and his ability to recall matters and to give evidence or arguments about them to the Tribunal;

b. further or in the alternative, the Tribunal failed to exercise its powers under ss.7(1)(b) and 34(1), or under s.36 of the Act, to arrange a psychiatric or psychological investigation or examination into the mental health of the Appellant and his ability to recall matters and to give evidence or arguments about them to the Tribunal; and

c. the failure(s) of the Tribunal in Ground a.i and/or ii above, lead the Tribunal to breaches of sections 22 and 40 of the Act by omitting to take such necessary steps to ensure that the Appellant had the capacity and ability to participate in a real and meaningful Tribunal hearing and to give evidence and present arguments.

2. The Tribunal erred in law by failing to give the Appellant procedural fairness in breach of the common law and s. 37 of the Act.

Particulars

a. The Tribunal's failure to arrange a psychiatric or psychological investigation into the mental health of the appellant and his ability to recall matters and to give evidence or arguments about them to the Tribunal, whether under s.24(1)(d) of the Act or otherwise, lead to the Tribunal's failure to ensure, as far as reasonably practicable, that the Appellant understood the information presented to him at the review and the consequences of it being relied on in affirming the determination or decision that was under review.

b. The Tribunal failed to invite the Appellant to comment on or respond to a World Health Organisation Report of 9 years old on the mental health policy of Bangladesh which was relied upon by the Tribunal.

c. The Tribunal failed to invite the Appellant to ensure that he understood the relevance and consequences of information being relied upon and then invite the Appellant to comment on or respond to that information. The Tribunal never put to the Appellant the following information: (i) an assumption of the Tribunal that the Appellant's evidence that he was harassed and threatened to join political parties occurred during a state of emergency in Bangladesh; and (ii) consequently the Tribunal believed that a publication by the Immigration and Refugee

Board of Canada, dated 9 October 2007, was relevant, ss D[57]-[60].

3. The Tribunal erred in law by concluding that the Appellant's fear of persecution was not for a Convention reason. That is contrary to international law which recognises the freedom not to hold and not to have to express political opinions.

RELEVANT LAW

28. The relevant provisions of the Act provide as follows:

Section 22: Way of Operating

The Tribunal:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to the principles of natural justice and substantial merits of the case.

Section 24: Evidence and procedure

(1) For the purposes of a review, the Tribunal may:

(a) take evidence on oath or affirmation; or

(b) adjourn the review from time to time;

...

(d) 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.

Section 34: Decision of Tribunal on application for merits review

(1) The Tribunal may, for the purposes of a merits review of a determination or decision, exercise all the powers and discretions of the person who made the determination or decision.

Section 36: Tribunal may seek information

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.

Section 37: Invitation to applicant to comment or respond *(Repealed)*

Section 40: Tribunal must invite applicant to appear

(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the determination or decision under review.

SUBMISSIONS

Ground 1

29. The Appellant submits that, where there is evidence before the Tribunal that the Appellant might have a medical condition that would affect his or her capacity to give evidence, the Tribunal may need to consider what effect the medical condition has on the application and a failure to do so may amount to an error of law by the Tribunal. The Appellant submits that the Tribunal had clear reason in light of the matters mentioned at [15] to [17] above to consider the effect of the Appellant's mental illness and order a medical examination under s 24(1)(d) or obtain further information under s 36 of the Act.

30. The Respondent submits that neither s 22 nor s 40 of the Act require the Applicant to satisfy any competence requirement at the time he or she appears before the Tribunal.

31. In the view of the Respondent, that while the case law cited by the Appellant in relation to Ground 1 supports that an opportunity to participate in a hearing must be "real and meaningful", the case law does not go so far as to suggest that the statutory requirement for a hearing extends to the pro-active obtaining of medical reports. The Respondent also submits that Australian authorities on s 425 of the *Migration Act* 1958 (Cth) ("Migration Act") are of little benefit in interpreting the Act in this jurisdiction because, unlike s 425, s 40 is not part of an exhaustive code and therefore should not be interpreted on the basis that general law principles of procedural fairness are excluded.

32. In addition the Respondent contends that ss 24(1)(d) and 34(1) are discretionary in nature, and there is no obligation on the Tribunal to exercise its information-gathering powers in a particular manner. In any event, there is no basis for concluding that the Tribunal did not consider whether to exercise the powers, given that the Tribunal is not required to canvass these matters in its reasons under s 34(4).

Ground 2 (Part 1)

33. The Appellant submits that the Tribunal is obliged to afford an Applicant the right to participate in a "real and meaningful hearing". This can be ascertained from decisions of the High Court of Australia in respect of s 425 of the Migration Act, which is very similar to s 40 of the Act.

34. The Tribunal failed to uphold the Appellant's right to a real and meaningful hearing because, while the Tribunal declared that it would not make adverse credibility findings on account of the Appellant's illness, it did not ensure the Appellant had full mental capacities, including an ability to think clearly, express articulately and rely on unhindered memory. The Tribunal's questioning on the account of the Appellant's mother being tortured by AL authorities, is an example of the Appellant being pushed to recall a detail he might not have had the mental capacity to bear.

35. The Respondent submits that Ground 2 (Part 1) raises the same substantive complaint as Ground 1, and for the same reasons, procedural fairness did not require the Tribunal to pro-actively obtain medical reports. It also stressed that the Tribunal's approach led to no practical injustice.

Ground 2 (Part 2)

36. In relation to the WHO Report,[10] the Appellant submits that it was a denial of procedural fairness under s 37 of the Act for the Tribunal to make a conclusion that was adverse to the Appellant from material that was not even made known to the Appellant at the time of the hearing.

37. Section 37 of the Act was repealed by s 24 of *the Refugees Convention (Derivative Status and Other Measures) (Amendment) Act* 2016 ("Amending Act"). Section 4 of the *Refugee Convention (Amendment) Act* 2017 clarifies that the repeal of s 37 is taken to have commenced on 10 October 2012.

38. Therefore the claims specific to s 37 are redundant. Section 6 of the Amending Act reiterates, however, that the principles of natural justice are preserved. That section provides:

> *"For the avoidance of doubt, nothing in this Act displaces any obligation imposed on the Tribunal under the common law of Nauru to act according to the principles of natural justice and to afford procedural fairness with respect to an application to the Tribunal under section 31 of the principal Act for merits review of a decision or determination of the Secretary."*

39. According to the Appellant, procedural fairness required the Tribunal to have made the Report known to the Appellant, ensure he understood its relevance, and invite him to respond. That way, the Appellant would have had the opportunity to point out that the Report was 9 years old, did not

[10] Referred to at [23] above.

confirm whether the policy had been implemented, and how accessible and affordable such medicines and treatment was in Bangladesh.

40. The Respondent submits that the Tribunal was not obliged to invite the Appellant to comment on the WHO Report under s 37 because it was not "information that the Tribunal considers would be the reason, or part of the reason, for affirming the determination or decision that is under review". The Appellant failed to put forward any claim that the adequacy of the mental health services available was relevant to Nauru's complementary protection obligations, and thereby may have affected whether or not the Tribunal affirmed the decision under review.

Ground 3

41. The Appellant submits that the Tribunal erred in finding that the Appellant's fear was not Convention-based because he did not have a political opinion. In support of this submission, the Appellant cites the authority of *RT & Ors v Secretary of State for the Home Department* [2012] UKSC 38. In that case, country information suggested that the Applicants, who were apolitical, were at risk of persecution unless they could demonstrate "positive support" for the ruling regime. The UK Supreme Court said (at [42]):

> *"First, the right not to hold the protected beliefs is a fundamental right which is recognised in international and human rights law and, for the reasons that I have given, the Convention too. There is nothing marginal about it. Nobody should be forced to have or express a political opinion in which he does not believe. He should not be required to dissemble on pain of persecution. Refugee law does not require a person to express false support for an oppressive regime, any more than it requires an agnostic to pretend to be a religious believer in order to avoid persecution."*

42. The Respondent submits that appeal Ground 3 misconceives the nature of the Tribunal's findings in relation to this point. The Tribunal found that the Appellant was being targeted because the parties wanted him to take part in their political activities, not because of being apolitical.

43. Regardless, the Respondent submits that the conduct was not persecution under the Convention because it was not endorsed by the State and there therefore had been no failure of State protection. Finally, despite any error that may have been made in relation to past persecution, the Tribunal correctly had regard to country information that suggests that apolitical persons are unlikely to be targeted in the current environment. It follows, according to the Respondent, that Appellant therefore would be unlikely to suffer any persecution in the reasonably foreseeable future if he were returned to Bangladesh.

CONSIDERATION

44. For expediency, the Court will consider the Ground 3 first, followed by Grounds 2 and 1 of the Appellant's Amended Notice of Appeal.

Ground 3

45. The Respondent accepts that *RT (Zimbabwe) v Secretary of State for the Home Department*[11] correctly recognises that the ground of "political opinion" in the Refugees Convention encompasses the right not to have a political opinion. What is contested is whether the Appellant was persecuted *because of* his lack of political opinion. A careful reading of the Tribunal's reasons supports the submission of the Respondent. The Tribunal said, in relation to the Appellant's fear of persecution[12]:

> "*He feared persecution because he was targeted by both sides of politics as an able-bodied young man who would boost their ranks. He did not have a political opinion (he admits he has never voted) and refused to join either party and was not targeted* ***for reason of not*** *having a political opinion*".

46. The Tribunal's emphasis of the words "for reason of not" makes plain this finding. In light of this, the Court finds that Ground 3 of the Appellant's appeal is not made out, and this ground fails.

Ground 2(2)

47. For Ground 2 to be made out, it must be established that the Tribunal's failure to invite the Appellant to comment on the WHO Report led to a failure to afford the Appellant natural justice.

48. The question of whether the failure of the Tribunal to invite an Appellant to comment on information led to a denial of procedural fairness was considered recently by Khan J in *DWN066 v The Republic.*[13] In that matter, his Honour approved of the statement of Brennan J in the Australian High Court authority of *Kioa v West*[14] that

> *"A person whose interests are likely to be affected by the exercise of the power must be given an opportunity to deal with the relevant matters adverse to his interest which the repository of the power proposes to take into account in deciding its exercise. The person whose interest is likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance…*
>
> *Nevertheless in the ordinary case when no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made."*

49. It was apparent on the evidence before the Tribunal that the Appellant had suffered two serious mental health events (psychotic episodes) in the recent past, and the Appellant was under the care of a psychiatrist. When considering Nauru's international obligations and determining if returning

[11] [2012] UKSC 38.
[12] BD 150 at [67]
[13] [2017] NRSC 23.
[14] *Kioa v West* (1985) 159 CLR 550

him to Bangladesh would be in breach of his human rights the Tribunal was required to put to him evidence that they regarded as 'credible, relevant and significant' to their decision as to the Appellant being able to access the requisite medical services. They failed to do so. This ground succeeds.

Ground 1 and 2(1)

50. Ground 1 and 2(1) of the Appellant's Amended Notice of Appeal alleges that the Tribunal's failure to require the Secretary to arrange for a medical examination of the Appellant under s 24, or to itself seek further information under ss 34 or 36, led the Tribunal to breach ss 22 and 40 of the Act.

51. Section 40 is properly interpreted as a statutory summation of the Tribunal's more general procedural fairness obligations (RS [21]).

52. Section 40(1) of the Act is substantially similar to s 425(1) of the Migration Act. That sections provides as follows:

> *"The Tribunal must invite the applicant to appear before the Tribunal to give evidence and documents relating to the issues arising in relation to the decision under review."*

53. The Appellant submits, and the Respondent accepts, that the Australian authorities on s 425(1) establish that the provision confers an obligation on the Tribunal to afford the Applicant the right to a "real and meaningful hearing".[15] The issue that arises is whether this obligation requires the Tribunal to actively turn its mind to whether the Applicant appearing before it might have a medical condition that would affect his or her capacity to give evidence, and, if so, to consider what affect the medical condition has on the Applicant.

54. In *SZIWY v Minister for Immigration*,[16] the Appellant, a woman who allegedly fled from China because of her religious beliefs, was suffering from mental impairments. Her initial visa application was rejected by the Delegate, and this decision was affirmed by the Tribunal. At the core of the Tribunal's decision were "grave credibility concerns" due to inconsistent evidence given by the Appellant. The Appellant's solicitor expressed concerns to the Secretary about the Appellant's "mental ill-health", and how it impacted on her ability to "provide consistent evidence". Upon reviewing the transcript of the hearing before the Tribunal, Smith FM noted that at no time did the Tribunal ask questions about the Applicant's mental health (at [16]), or consider whether to obtain a psychiatric assessment (at [20]).

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[15] See, eg, *SZFDE v Minister for Immigration & Citizenship* [2007] HCA 35; *Applicant NAFF of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 221 CLR 1; *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 77*; *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] HCA 63.

[16] *SZIWY v Minister for Immigration & Anor* [2007] FMCA 1641.

55. The decision of Smith FM in *SZIWY* was the subject of some criticism by the Full Court of the Federal Court in an appeal from a similar decision of Smith FM in *Minister for Immigration and Citizenship v SZNVW.*[17] In the first instance decision, Smith FM considered that the Appellant's depressive symptoms and behaviours impaired his ability to make rational decisions. Keane CJ, with whom Emmett and Perram JJ agreed, said "*s 425 of the Act did not require the Tribunal to press the respondent to call further evidence of his psychological problems or to expand his arguments relating to the ramifications of his problems for any aspect of the case he sought to present*" (at [20]). However, importantly, his Honour proceeded to say that if the Applicant's condition was "*such as to deny him the capacity to give an account of his experiences, to present argument in support of his claims, to understand and to respond to questions put to him*", the Applicant would have been deprived of the "meaningful opportunity" required by s 425 (at [20]).

56. Tracey J upheld the decision in *SZNVW* in *Minister for Immigration and Citizenship v SZNCR.*[18] In that case, Tracey J said that for an Applicant to have been denied a "real and meaningful" hearing, "*It must be demonstrated that the applicant was unfit (in the sense of being unable) to give evidence, present arguments and answer questions in the course of the hearing*" (at [30]).

57. As noted at [15] - [17] above, the Tribunal remarked on presentations in relation to the Appellant's mental ill-health. These indications include that:

    a. The Appellant did not make normal eye contact, and mostly stared at the floor and repeated a chant or mantra repetitively[19];

    b. The Appellant frequently responded to questions by saying that "he could not remember"[20];

    c. A psychiatrist said on 22 January 2015 (the hearing took place on 27 January 2015), that the Appellant was "currently acutely psychotic", and incapable of instructing lawyers[21];

    d. The Appellant had suffered two acute psychotic episodes in two months[22];

    e. The Appellant said that he had come off his medication three days before the hearing[23].

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[17] *Minister for Immigration and Citizenship v SZNVW* [2010] FCAFC 41.
[18] *Minister for Immigration and Citizenship v SZNCR* [2011] FCA 369.
[19] BD 143 [11]
[20] BD 143 [12]
[21] BD 143 [15]
[22] BD 143 [17]
[23] BD 84 [line 37]

58. The Tribunal's reasons reflect that the Appellant's ill-health was visible at the hearing, and the Tribunal observed that the Appellant was "far from well"[24]

59. The Court is of the view that all these matters taken cumulatively ought to have alerted the Tribunal that objectively the Appellant lacked the capacity to give an account of his experiences, present argument in support of his claims and respond to questions put to him, such that he was deprived of a "real and meaningful" hearing.

60. Although the Tribunal recorded the appellant's representative as

> "*The post-hearing submission states that despite this last sentence above*[25]*the applicant had recovered sufficiently to give instructions and attend the hearing…*"[26]

in fact the submission reads:

> "*We note the letter* of (the Appellant's) *treating psychiatrist dated 22 January 2015 indicates that, at the time, he was 'not capable of understanding legal processes and unable to instruct his lawyers'. However, we note that subsequent to this, we have been able to obtain instructions from (the Appellant) that he wanted to proceed with his Hearing before the Tribunal and has also instructed us as his representatives to advance these submissions post-Hearing.*"[27]

61. It is the view of this Court that there is a significant difference between "recovered enough to give instructions" and "been able to obtain instructions that he wanted to proceed with his hearing".

62. Considering all the evidence before the Tribunal as to the Appellant's mental health and cognitive abilities, combined with the Tribunals own observations of the Appellant, this is a case in which the Appellant has been denied a "real and meaningful" opportunity to participate in the hearing; accordingly the Appellant did not have a fair hearing before the Tribunal.

63. The Tribunal has powers section 24(1)(b) the power to 'adjourn the review from time to time' and ought rightly to have exercised its discretion under section 24(1)(d) and ordered medical reports into the Appellants ability to participate in the hearing. These grounds of appeal succeed.

ORDER

64. (1) The Appeal is allowed.

(2) The decision of the Tribunal TFN 14061 dated 15 March 2015 is quashed.

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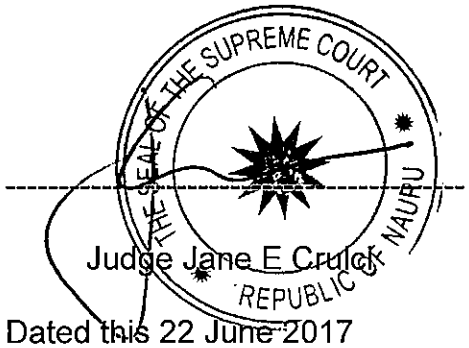
[24] BD 143 [10]
[25] BD 143 at [15]: "*He is currently not capable of understanding his legal processes and is unable to instruct his lawyers*"
[26] BD 143 [16]
[27] BD 117 [10]

(3) The matter is remitted to the Refugee Status Review Tribunal under section 44(1)(b) for reconsideration according to law.



Judge Jane E Crulck

Dated this 22 June 2017