**IN THE SUPREME COURT OF NAURU**

**AT YAREN**

**[APPELLATE DIVISION]** **Appeal No.** 14 of 2019

**IN THE MATTER OF** an appeal against a decision of the Refugee Status Review Tribunal TFN T17/00397 brought pursuant to s43 of the *Refugees Convention Act* 1972

**BETWEEN:** QLN133 Appellant

**AND:** REPUBLIC OF NAURU Respondent

**Before:** Wheatley J

**Dates of Hearing:** 25 October 2022

**Date of Judgment:** 6 December 2022

**CITATION:** *QLN133 v Republic of Nauru*

**CATCHWORDS:**

APPEAL- natural justice – reasonable apprehension of bias – involves consideration of a two-step analysis – where after successful appeal, Tribunal reconstituted twice – further hearings – where none of the original Tribunal members ultimately formed part of the Tribunal that made the decision on the review – APPEAL DISMISSED

**APPEARANCES:**

| | |
|---|---|
| Appellant: | J.F. Gormley |
| Respondent: | R. O'Shannesy |

# JUDGMENT

**Introduction to the Statutory Framework**

1. This is an appeal from a decision of the Refugee Status Review Tribunal (**Tribunal**) pursuant to section 43 of the *Refugees Convention Act 2012* (Nr) (**the Act**) which relevantly provides:

*"43 Jurisdiction of Supreme Court*

*(1) A person may appeal to the Supreme Court against a decision of the Tribunal on a point of law.*

...

*(2) The parties to the appeal are the appellant and the Republic.*

*(3) The notice of appeal shall be filed within 42 days after the person receives the written statement of the decision of the Tribunal.*

*(4) The notice of appeal shall:*

*(a) state the grounds on which the appeal is made; and*

*(b) be accompanied by the supporting materials on which the appellant relies..."*

2. Section 44 of the Act provides that the Court may make the following orders, on such an appeal:

*"44 **Decision of 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; or*

*(b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.*

*(2) Where the Court makes an order remitting the matter to the Tribunal, the Court may also make either or both of the following orders:*

*(a) an order declaring the rights of a party or of the parties; and*

*(b) an order quashing or staying the decision of the Tribunal."*

3. Section 3 of the Act defines the Tribunal as the Refugee Status Review Tribunal established under section 11 of the Act. Part 3 of the Act establishes the Tribunal. Pursuant to section 31 of the Act, "*a person may apply to the Tribunal for merits review of any of the following*":

*"(a) A determination made under section 6(1) of the Act; or*

*(b) A decision to cancel a person's recognition as a refugee made under section 10(1) of the Act."*

4. Pursuant to section 5 of the Act, a person may apply to the Secretary, being, at the relevant time, the Secretary of the Department of Justice & Border Control (**Secretary**) to be recognised as a refugee. Pursuant to section 6, the Secretary shall determine an application made pursuant to section 5 of the Act. Section 3 of the Act defines '*refugee*' *"as a person who is a refugee under Refugees*

*Convention as modified by the Refugees Protocol*" (each of which is relevantly defined in section 3 of the Act). A refugee is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951* (**Refugees Convention**) as modified by the *Protocol Relating to the Status of Refugees 1967* (**Refugees Protocol**), as any person who:

> "*...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable to or, owing to such fear, is unwilling to return to it*".

5. The Act also defines *complementary protection* as:

> "*means protection for people who are not refugees as defined in this Act, but who also cannot be returned or expelled to the frontiers of territories where this would breach the Republic's international obligations;*"

6. Without being exhaustive, the following provisions regarding the Tribunal, as comprising part of the relevant statutory framework, are also relevant. Division 1 Part 3 of the Act provides for the establishment and membership of the Tribunal. Section 13 provides for the appointment of members. Section 13(2) provides that a person is eligible for appointment as the Principal Member or as a Deputy Principal Member if that person is qualified to be appointed a Judge of the Supreme Court, has been member of the Tribunal and has been admitted as a barrister or solicitor or legal practitioner (of various jurisdictions), for not less than five years and has not been struck off. Section 13(3) provides that the Regulations may prescribe eligibility requirements for appointment as a member. Section 4 of the *Refugees Convention Regulations 2013* (Nr) provides, in relation to section 13(3) of the Act, that a person is eligible for appointment as a member of the Tribunal if the person has at least two years' experience in refugee merits review matters at a tribunal or equivalent level and a proven capacity to conduct administrative review, has a thorough knowledge of the UNHCR Refugee Status and Guidelines and has demonstrated skills in:

(a) research;

(b) clear oral and written communication; and

(c) the use of word processing software.

7. Division 2 of Part 3 provides for the constitution, sittings and powers of the Tribunal. Section 19 requires that the constitution of the Tribunal for merits review will be by the Principal Member or a Deputy Principal Member who will preside and two other members. Pursuant to section 20 the Principal Member has a discretionary power to be able to reconstitute the Tribunal if one or more of the three members who constitute the Tribunal stops being a member or for any reason is not available for the purposes of the review, or the Principal Member thinks the reconstitution is in the interests of achieving the efficient conduct of the review.

8. Section 20(2) states:

> ***"20 Reconstitution if necessary***
>
> *(1) ...*
>
> *(2) The Tribunal as reconstituted is to continue to finish the review and may have regard to any record of the proceedings of the review made by the Tribunal as previously constituted."*

9. Section 22 of the Act provides for the overarching way that the Tribunal is to operate, as follows:

> ***"22 Way of Operating***
>
> *The Tribunal:*
>
> *(a) is not bound by technicalities, legal forms or rules of evidence; and*
>
> *(b) shall act according to the principles of natural justice and the substantial merits of the case."*

10. The Tribunal is expressly required to act in accordance with the principles of natural justice.

11. Pursuant to section 34 of the Act "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 34 allows the Tribunal, on a merits review, to:

*"(a) affirm the determination or decision;*

*(b) vary the determination or decision;*

*(c) remit the matter to the Secretary for reconsideration in accordance with directions or recommendations of the Tribunal;*

*(d) set the determination or decision aside and substitute a new decision or determination; or*

*(e) determine that a dependant, of the person in respect of whom the determination or decision was made, is recognised as a refugee or is owed complementary protection."*

12. In conducting a review pursuant to section 35, an applicant may give a statutory declaration in relation to a matter of fact that the applicant wishes the Tribunal to consider and may give written arguments as well. Further, the Tribunal may invite a person to provide information pursuant to section 36 of the Act. Where such an invitation is made by the Tribunal, but not responded to, pursuant to section 39 the Tribunal may make a decision on the review without taking further action to obtain information, comment or a response.

13. *"The Tribunal shall invite the applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the determination or decision under review"* pursuant to section 40 of the Act. Such an invitation is not necessary where the Tribunal considers it should decide the review in the applicant's favour on the basis of the material before it or the applicant consents to the Tribunal deciding the review without the applicant appearing before it. Where the applicant is invited to appear before the Tribunal and does not so appear, the Tribunal may make a decision on the review without taking further action to allow or enable the applicant to appear before it, pursuant to section 41 of the Act. However, section 41(2) expressly provides that the section does not prevent the Tribunal from rescheduling the applicant's appearance or from delaying its decision on the review to enable the applicant to appear.

**Procedural Background**

14. The Appellant first arrived in Nauru on 2 August 2014 as a transferee from Australia. The Appellant participated in a Transfer Interview on Nauru on 14 September 2014.

15. On 21 October 2014, the Appellant applied to the Secretary for Refugee Status Determination **(RSD)** for recognition as a refugee and for complementary protection pursuant to the Act. As part of that process, the Appellant participated in an interview, provided a statement and he submitted documents in support of his RSD application.

16. On 21 November 2016, the Secretary made a decision on the Appellant's RSD application (**Secretary's Decision**). The Secretary's Decision was that the Appellant was not a refugee within the meaning of that term in the Act and was also not a person to whom Nauru owed complementary protection obligations.

17. On 2 December 2016, the Tribunal received an application for merits review of the Secretary's Decision from the Appellant.

18. The Appellant was invited on 12 January 2017, to appear before the Tribunal to give evidence and present arguments on 6 February 2017 at 9:30am. The Tribunal also requested that it be informed in writing of any person from whom the Appellant would like the Tribunal to take oral evidence.

19. On 20 January 2017 the Appellant provided a further statement to the Tribunal dated that same day (**January Statement**).

20. On 5 February 2017, prior to the hearing, the Appellant's representatives provided written submissions in support of the Appellant's application for review.

21. On 6 February 2017, the Appellant appeared before the Tribunal as constituted by Mr Fisher (Presiding) Ms Zelinka and Ms Boland (**the First Tribunal**).

22. At the hearing the Presiding member informed the Appellant that Ms Zelinka would mainly be asking questions, but that other members of the Tribunal may ask some questions as well. On a review of the transcript that is how the hearing took place. The transcript of this first hearing is approximately 33

pages and records that the hearing commenced at 9.34am and concluded at 1.08pm (being approximately 3.5 hours, including breaks).

23. On 10 February 2017, the Appellant's representatives provided post-hearing submissions in support of the application for review. Those submissions expressly addressed the Appellant's ability to answer questions (from [51]-[56] of those submissions). It was submitted that the Appellant's confusion and loss of memory may be the result of post-traumatic stress disorder and that medical attention was being sought. It was submitted that stress and anxiety was being suffered by the Appellant and it should be taken into account when assessing his evidence. As such, it was submitted that adverse conclusions against the Appellant's credibility should not be drawn until his capacity issues can be fully considered and assessed. The Appellant's representatives advised that the Appellant was seeking a referral to Overseas Services to Survivors of Torture and Trauma (**OSSTT**).

24. On 24 March 2017, the Appellant's representatives provided further post-hearing submissions, which also included a report dated 17 March 2017 from Ms Sue Mitchell from OSSTT (**First post-hearing submissions**). In the report, Ms Mitchell describes herself as having 25 years' experience in trauma counselling, is a psychologist registered with the Australian Health Practitioners Registration Authority and a member of the Australian Psychological Society (**the OSSTT Report**).

25. The OSSTT Report was based on an assessment conducted on 13 March 2017. It briefly noted that the Appellant's family history and trauma background were not investigated in the initial assessment appointment (but stated that the Appellant had requested that counselling continue). The OSSTT Report provided the following observation regarding he Appellant:

> *"(The Appellant) was observed to be hyper aroused throughout the assessment interview. His breath was shallow, posture was ridged and upright, his hands fidgeting and eyes hyper alert. His affect was restricted throughout the session. He was softly spoken but cooperative."*

26. Further the OSSTT Report provided the following observations regarding the Appellant's psychological functioning:

*"In response to my inquiry (the Appellant) described symptomology consistent with a formal diagnosis of Post Traumatic Stress Disorder including:*

- ***Intrusion** – frequent nightmares of arrest and imprisonment (content pertaining to reported actual event) and flashbacks ("feels just like when I was arrested") triggered by sighting men in uniforms.*
- ***Avoidance** – of men in uniforms (as far as is practicable in his current context); of police and army in any context.*
- ***Alterations in Cognitions and Mood** – consistent worry and preoccupation in regard to this three young children and wife resulting in what he said was an inability to think "normally", difficulty concentrating, depressed mood.*
- ***Alterations in Arousal** – Chronic primary insomnia, secondary insomnia following nightmares, loss of appetite, exaggerated startle response."*

27. The OSSTT Report concluded noting that it was not based on a full assessment, as Ms Mitchell had only met the Appellant on one occasion. However, from the observations and the subjective reporting of the Appellant himself, Ms Mitchell stated that her opinion was that the Appellant's "*cognitive function would reasonably be expected to be adversely affected at the interview*" and that such cognitive function are "*routinely inhibited*" when the person is in such a state.

28. The First post-hearing submissions also made submissions regarding the Appellant's ability during the hearing and his ability to respond to questions. It was submitted that the Appellant's psychological impairments have caused him to perform poorly at the hearing, it affected his ability to answer questions, to maintain a consistent account of his background and organise his thoughts coherently during this process. This, it was submitted, was not a deliberate attempt to evade questions or concoct stories. Further, the First post-hearing submissions contended that appropriate consideration needs to be given to the Appellant's mental state, his presentation and ability to answer questions of the

Sri Lankan authorities should he be returned to Sri Lanka, as there is a reasonable risk that such conduct would heighten the suspicions of the Sri Lankan authorities (as it may appear he has something to hide) and could expose him to torture or other forms of serious harm.

29. On 26 March 2017, the First Tribunal delivered its decision which affirmed the determination of the Secretary that the Appellant is not recognised as a refugee and is not owed complementary protection under the Act (**First Tribunal Decision**).

30. In the First Tribunal Decision (particularly from [42] to [64]) observations were made regarding the Appellant's inconsistent and contradictory evidence as between his earlier testimony, the transfer interview and his first statement made. The First Tribunal Decision considered both of the written post-hearing submissions (from [65] to [74]) which included the OSSTT report. The First Tribunal made the following findings in relation to the Appellant's credibility:

***"Credibility***

*79. The veracity of the applicant's claims was in issue. The Tribunal put to the applicant during the hearing that his testimony had changed in many respects over the course of the RSD process. He responded that his memory was poor. The Tribunal put to him that the changes in testimony may indicate that he was making things up rather than recounting incidents that actually took place. The Tribunal accepts that prolonged detention and living in stressful conditions can affect memory. This may explain changes occurring between initial testimony, such as that given at the transfer interview, and that given at a review hearing perhaps two or more years later. However, in the applicant's case, his transfer interview, RSD statement and RSD interview all occurred within a two-month period soon after the applicant arrived in Nauru, but even within that time there were marked changes. Similarly, there were significant changes between his last statement written on 20 January 2017 and his oral testimony at hearing some two weeks later.*

80. *Some of the claims that the applicant made, such as when he reiterated that he was in Madhu until mid-2010 (see paragraph 36), appeared to reflect him recalling what he had previously written in a statement, rather than recalling what in fact had taken place. This claim is difficult to accept given that there was a memorable event in mid-2009 verifiable by reference to the supporting documentation, namely the birth of his second child, which on the applicant's own evidence actually places him in Pesalai at this time (see paragraph 52).*

81. *Other claims were contradictory, such as the claim that the CID was specifically looking for him in Pesalai when his testimony at the hearing suggested that the CID turned up in the village to conduct more general inquiries. The suggestion that the CID had only come looking for him personally after a gap of three years during which no contact was made also struck the Tribunal as implausible. A number of more significant contradictions, inconsistencies and implausible assertions are set out in more detail below where the specific Convention claims are considered.*

82. *In assessing the implausibility of a number of the applicant's arguments, and his inability to account for or reconcile certain inconsistencies, the Tribunal has had regard to the arguments that the Tribunal should not lightly form an adverse view of the applicant's credibility, and that the shortcomings in his evidence may be attributable to the length of time he has spent in detention, his background of trauma and persecution, and memory problems and possible mental health issues arising from these experiences. While the Tribunal acknowledges that the applicant had been in detention for a long period of time, as noted above, many of the contradictions in his evidence emerged within the first few months of that period.*

83. *Furthermore, even accepting the applicant's evidence at its highest it was not apparent, at least not until the second post-hearing submission, that he had in fact experienced a background of trauma and persecution. While the applicant's own evidence indicates that his family was displaced by war, he has not described any particular*

*incident of personally traumatic significance from that period, and prior to meeting with the OSSTT counsellor he made no claim to have ever been arrested, detained, interrogated or otherwise mistreated by the Sri Lankan authorities or anyone else. His claim, rather, was that through good fortune he had managed to avoid just that eventuality.*

84. *As noted above, the OSSTT report relies on a number of assertions by the applicant that he has...*

> *...frequent nightmares of arrest imprisonment (content pertaining to reported actual event) and flashbacks ("feels just like when I was arrested") triggered by sighting men in uniforms.*

85. *The difficulty the Tribunal has with these assertions is that they are completely at odds with his evidence throughout the process to that point.*

86. *The submissions made on behalf of the applicant urge the Tribunal to attribute the shortcomings in the applicant's evidence to the effects mental health issues and PTSD, as well as to his prolonged detention, contending that these factors may have impeded the applicant's capacity to give evidence, but as put to the applicant at the hearing there is another explanation for those shortcomings, and indeed for any anxiety the applicant may have felt about giving evidence at an interview, namely that his claims are not true. The OSSTT report only compounds the Tribunal's credibility concerns, relying as it does on statements which are completely at odds with the applicant's earlier claims and evidence.*

87. *The shortcomings in the applicant's evidence are not limited to an inability to recall events, or minor confusion over dates; they include stark contradictions which cannot be reconciled, and the Tribunal is not satisfied that they can be explained by mere memory lapses or anxiety about the interview process. To paraphrase the language of the Nauru RSD Handbook quoted in the applicant's submissions, the discrepancies in his claims are sufficiently serious for the Tribunal to*

*find that the claims are not credible, and the Tribunal funds [sic] accordingly that the applicant is not a credible witness, and concludes that much of his story has been fabricated."*

31. The Appellant appealed the First Tribunal Decision and on 13 October 2017 the Supreme Court of Nauru (Crulci J) allowed that appeal (*QNL 133 v Republic* [2017] NRSC 82).

32. The orders of the Court on 13 October 2017 were that:

    *The Appeal is allowed.*

    *(1) The decision of the Tribunal TFN T16/00366 dated 26 March 2017 is quashed.*

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

33. On 25 January 2018 the Appellant was invited to appear before the Tribunal to give evidence and present arguments at a hearing on 19 February 2018 at 9:00am.

34. On 15 February 2018, the Appellant provided a further statement dated the 13 February 2018 (**First Remittal Statement**). In the First Remittal Statement the Appellant provided further evidence regarding his memory, anxiety and his state of confusion, as well as seeking to address and explain the previous findings in the First Tribunal Decision and his fear of returning to Sri Lanka. There was no further evidence in the First Remittal Statement regarding any continued counselling or continued medical attention.

35. On 16 February 2018, the Appellant's representatives provided further submissions to the Tribunal (**First Remittal Submissions**). The First Remittal Submissions specifically stated that those submissions were additional to and were to be read in conjunction with all other information and submissions provided in support of the Appellant's RSD application. The First Remittal Submissions also addressed the concerns stated in the First Tribunal Decision, regarding the veracity of the Appellant's claims, further country information, the Appellant's specific claims for protection and his risk profile. The First

Remittal Submissions also addressed "*Health and capacity issues*" claiming that the Appellant was suffering from detention fatigue and that errors, omissions or misunderstandings cannot automatically be attributed to his credibility but rather to his poor mental health (which included his memory).

36. On 20 February 2018, the Tribunal, as constituted by Ms Mackinnon (Presiding), Ms Zelinka and Mr Mullin (**Second Tribunal**) held the first remitted hearing. The transcript states it took place on 20 February 2018 but the hearing invitation stated that the hearing was to be on 19 February 2018. Neither party made submissions on this, nor is there an explanation for this difference in the material. After the Appellant and the Interpreter were affirmed, the Presiding Member stated the following:

*"MS HEARN MACKINNON: Thanks, very much. So welcome to you all. (Appellant), as you know, the tribunal previously decided you are not a refugee and now (sic) owed complementary protection, but the Supreme Court decided that the tribunal made an error in the way it approached your case. So your case has been sent back to be reconsidered. Okay. Now, the tribunal can have regard to all of the evidence that you have previously provided in your written statements at your.... interview and at your earlier tribunal hearing, and we will have regard to any new evidence that you provide today and your new written material. Okay. Now, you might recall that Ms Zelinka was on the tribunal that heard your case the first time.*

*THE INTERPRETER: Sorry, can you say that again?*

*MS HEARN MACKINNON: You might recall that Ms Zelinka was on the tribunal that heard your case - - -*

*THE INTERPRETER: Okay.*

*MS HEARN MACKINNON: - - - the first time, but Mr Mullin and I were not. The Tribunal makes a combined decision so you have new eyes looking at your evidence, and you have an opportunity today to give the further evidence that might make a difference to the findings that the first tribunal made. Okay. So please tell us if you don't understand the questions. It's really important that we know if you haven't understood."*

37. At this hearing the Presiding member informed the Appellant that it would be Mr Mullin who would be mainly asking questions, but that other members of the Tribunal may ask questions as well. On a review of the transcript that is how the hearing took place. The transcript of this second hearing is approximately 98 pages and records that the hearing commenced at 9.07am. The conclusion time is not stated on the transcript, however, I note there is a break towards the end of the transcript which records the hearing resuming at 5.30pm. It appears this hearing lasted all day.

38. On 4 June 2018, the Tribunal wrote to the Appellant's representatives informing them that the Tribunal had decided to again reconstitute certain matters as each of those Tribunals included, amongst its composition, a member of the original Tribunal which made the original tribunal decision that was quashed (ie, in this case, a member of the First Tribunal). The Appellant's case was amongst those to be reconstituted. That email made express reference to the judgment of the Supreme Court of Nauru in *SOS011*.

39. On 21 November 2018, the Appellant's representatives provided additional submissions which included updated country information and addressed the Appellant's claims, ahead of the further hearing on 23 November 2018 (**Second Remittal Submissions**). The Second Remittal Submissions specifically stated that those submissions were additional to and were to be read in conjunction with all other information and submissions provided in support of the Appellant's RSD application.

40. On 23 November 2018, the Tribunal of Ms Condoleon (Presiding) (formerly Ms Mackinnon), Mr Mullin and Ms Pinto comprised the Tribunal for this hearing (**Third Tribunal**). After the Appellant and the Interpreter were affirmed, the Presiding Member stated the following:

*"MS CONDOLEON: - - - today – sorry, February, of this year and we've asked you to come back for another hearing today. Okay. Now, the reason we've done this because – well, as you know also – well, you will remember that one Tribunal made a decision on your case and then you appealed that decision to the Supreme Court and the Supreme Court sent the case back to the Tribunal to reconsider. Well, when the – so the Tribunal did reconvene to*

*hear your case in February but we didn't make a decision from – on from that hearing because we wanted to make sure that it was an entirely new Tribunal that was considering our case. Okay. Not – so that your case wasn't being considered by a Member who said on the first Tribunal. So that's why we're giving you the opportunity for another hearing and your case will be decided by 3 Members who were not part of the first Tribunal. Okay.*

*So – so two of us were – heard your evidence in February but we've all read all of the material that you've provided, listened to the recordings of your interviews and read transcripts of your interviews and your hearings. Sorry. Okay. Now, we can have regard to all of that evidence that you've already provided and make our decision and because we've already taken a lot of evidence from you we're not going to go through all your claims again today but we do have just a few questions that we want to ask you and – and we want to discuss some country information with you. Also we're going to give you an opportunity to tell us anything you want to tell us about your case. Okay.*

*So please tell us if you don't understand the questions or the things we're discussing with you. Okay. So it's important we know if you haven't understood and our interpreter's role is to interpret what we say but it's not her role to explain to you what we mean and please let us know if you're having any trouble understanding our interpreter."*

41. On a review of the transcript, it is apparent that all Members asked questions on this third hearing by Third Tribunal. The transcript of this third hearing is approximately 28 pages and records that the hearing commenced at 3:13pm and concluded at 5:28pm (being approximately 2.25 hours, including a break).

42. The Third Tribunal did raise with the Appellant at the third hearing whether he was having any counselling at the present time. The Tribunal asked the Appellant questions regarding that counselling and any continuing ongoing appointments relating to any mental health care. The Third Tribunal also asked the Appellant whether he was currently on any medication to which the Appellant replied "*only cold and flu medication*". The Third Tribunal also sought to clarify that part of the OSSTT Report regarding the reference to a

reported experience of arrest and imprisonment (transcript of the Third Tribunal P-16 to P-19). Towards the end of the hearing the Appellant's representatives raised an issue regarding the constitution of the Tribunal, which was as follows:

> *"MR LEWIS: ... I have one more issue that I want to raise and this is the most important issue that I wanted to discuss today and that is that when these matters were remitted they were remitted, as far as I understand, to a new Tribunal hearing. From what I – I can see this is not a new Tribunal hearing. There's one new Member and two of the previous Members from the remitted hearing.*
>
> *MS CONDOLEON: no, actually – so what happened is (the Appellant's) case was remitted and it was constituted and – to a Tribunal and heard and the remitted case was heard in February but on that Tribunal was a Member who had been part of the original Tribunal. So the case has been reconstituted so that it will now – it is now being considered by a – a Tribunal that was not part of the original Tribunal. Was that – sorry. So – okay – so Mr Lewis is saying that the Tribunal that's going to decide your case is this – is – is, in part, the same Tribunal as heard your case the first time because it was remitted by the Court. But your case – when your case was remitted by the Court it was reconstituted and heard in February – there was a hearing in February but on that Tribunal was a Member who had been part of the first Tribunal and so that's why your case has been reconstituted again to new Member – to a new Member so that it's an entirely new Tribunal that is going to make a decision.*
>
> *MR LEWIS: I suppose what I was trying to say was that it – in my submission, it's not an entirely new Tribunal and that the Tribunal appears to be intending to rely on evidence from the previous Tribunal hearing.*
>
> *MS CONDOLEON: Yes.*
>
> *MR LEWIS: It's not my role at this point to make submissions about nature but it's just something I wanted to flag."*

43. On 24 November 2018, the Appellant's representatives wrote to the Tribunal regarding the reconstitution. It was alleged by the Appellant's representatives that he was provided with the further hearing by an even further reconstituted

Tribunal because his matter was affected by the apprehension of bias. This was alleged to be on the basis that one member of the First Tribunal, the decision of which had been quashed, remained as part of the Second Tribunal (this was with specific reference to *VEA 026 v Republic* and *SOS 011 v Republic*). The correspondence ended with (that the Appellant characterised as an objection):

> *"Consequently, on behalf of Appellants, ..., ..., QLN133, ... and ..., please be advised that we do not consent to one or more Members who were present on earlier panels sing (sic) ag ain (sic) on these reconstut ed (sic) Panels, nor do we consent to material collected at the pre-reconstuon (sic) hearings being used in making our clients' refugee determinaion (sic) decisions. W e (sic) submit that the hearing provided to (QLN133) on 23 November 2018 was affected by the apprehension of bias and the remaining hearings, if conducted in the same manner as set out above, will similarly be."*

44. On 25 November 2018, the Tribunal responded regarding the Appellant and stated that the Third Tribunal did not agree that the hearing in February 2018 was affected by apprehended bias and nor did it accept that the Third Tribunal as currently constituted could not refer to or rely on evidence provided at that hearing in February 2018. The Third Tribunal referred to section 20(2) of the Act regarding the Tribunal's ability as reconstituted to have regard to any record of the proceedings of the review made by the Tribunal as previously constituted. However, in order to seek to alleviate the concerns of the Appellant, the Third Tribunal offered the Appellant a further hearing to provide him with a further opportunity to add or clarify evidence provided earlier.

45. On 30 November 2018 the Third Tribunal provided the Appellant with a further hearing (being the fourth hearing). At this fourth hearing, the Tribunal outlined the history of the matter emphasising that all of the members came to the matter with fresh eyes and they have not made up their minds about the Appellant's case. The Appellant's representatives made an express submission that the hearing from November was affected by apprehended bias because of the way the Tribunal was constituted. In addition, it was further submitted that the further hearing being offered on 30 November 2018 was an implicit acknowledgement of that apprehended bias. The Tribunal recorded its

disagreement with those submissions and observed that the hearings were an evidence-gathering process and as such did not accept that apprehended bias arose. The transcript of this fourth hearing is approximately 10 pages and records that the hearing commenced at 3:08pm and concluded at 4:47pm (being approximately 1.5 hours, including a break).

46. On 15 January 2019 the Third Tribunal made its decision (**Tribunal Decision**) and it affirmed the determination of the Secretary that the Appellant is not recognised as a refugee and is not owed complementary protection under the Act. The Third Tribunal was aware of the issues regarding its composition and expressly dealt with such matters in its decision as follows:

> *"[9] On 20 February 2018 the applicant attended a hearing of the Tribunal (the second Tribunal) to give evidence and present arguments. The Tribunal was assisted by an interpreter in the Tamil and English languages. The applicant's representative attended the hearing.*
>
> *[10] At the commencement of the hearing on 20 February 2018, the second Tribunal reminded the Applicant that one of its Members was a Member of the first Tribunal, which made a decision in his case. The second Tribunal explained that the decision would be a joint one and that the three Members forming the panel would bring fresh eyes to the evidence he was presenting. Neither the applicant nor his representative made any objection to the hearing proceeding before the second Tribunal in these circumstances.*
>
> *[11] Notwithstanding that no objections were raised by the applicant or representative regarding the composition of the Tribunal at the hearing on 20 February 2018, in view of the comments and decisions of the Supreme Court in matters of VEA026 v The Republic and SOS011 v The Republic, on 19 April 2018 the Tribunal invited the applicant to attend a further hearing and he appeared before the present Tribunal on 23 November 2018. His legal representative attended the hearing and the Tribunal was assisted by an interpreter in the Tamil and English languages. The Tribunal discussed with him aspects of his previous evidence and gave him an opportunity to raise*

*any new claims or identify questions he wished the Tribunal to put to him. In oral submissions at the conclusion of the hearing, the applicant's representative raised the issue of the composition of the Tribunal and foreshadowed further written submissions.*

*[12] On 24 November 2018 the Tribunal received a written submission from the applicant's representative raising an objection, on the grounds of apprehended bias, to the Tribunal to proceeding to make a decision in the applicant's case (and other cases) The representative stated that '... we do not consent to one or more Members who were present on earlier Panels sitting again on these reconstituted Panels, nor do we consent to material collected at the re-constitution (sic) hearings being used in making our clients' refugee determination decisions ...'. The representative submitted that the hearing before the Second Tribunal on 14 February 2018 was affected by apprehended bias because the Tribunal comprised a member from the first Tribunal. The representative submitted that the members of the present Tribunal who were also members of the second Tribunal were tainted by their association with the member of the first Tribunal and that the present Tribunal should not rely on evidence provided by the applicant at the hearing before the Second Tribunal because that evidence was also tainted.*

*[13] The Tribunal does not accept the representative's submission that the hearing in February 2018 was affected by apprehended bias. A hearing is an evidence-gathering exercise not involving any findings. The present Tribunal has carefully considered all of the evidence provided by the applicant in the course of the review, including at the hearing in February 2018, and listened to the hearing recordings. Section 20 of the Act empowers a reconstituted Tribunal to have regard to any record of the proceeding made by the Tribunal as previously constituted. The applicant has had the opportunity to provide detailed evidence in support of his claims and was invited to attend a further hearing to provide new evidence and to correct or clarify any evidence already provided.*

*[14] Following receipt of the submission of 24 November 2018 the Tribunal invited the applicant to a further hearing and he appeared again before the present Tribunal on 30 November 2018. The Tribunal explained its decision in response to the representative's submission regarding the composition of the Tribunal. The applicant was given a further opportunity to add anything to his claims, identify any misunderstanding he felt might have occurred in his previous evidence or suggest any further questions the Tribunal might ask him. Issues arising in his evidence and relevant country information were also discussed with him."*

47. The Tribunal decision sets out and considers the Appellant's claims that were made before the Secretary (Tribunal Decision at [15]-[22]). The claims, submissions and the decision of the First Tribunal (Tribunal Decision at [22]-[32]). This included express reference to the OSSTT Report (Tribunal Decision at [29]). The Tribunal decision also then considered the post-remittal position including the First Remittal Submissions, the First Remittal Statement, the hearing before the Second Tribunal, the Second Remittal Submissions to the Third Tribunal and the third and fourth hearings, each of which was conducted before the Third Tribunal (Tribunal Decision at [33]-[37]).

48. The Tribunal Decision makes an assessment of the Appellant's convention-related claims. The Tribunal Decision does not contain a separate section headed "Credibility" which deals with, in an overarching way, the Appellant's credibility and veracity of his claims. The Third Tribunal considers the Appellant's convention related claims, together with the genuineness of those claims by undertaking an assessment of each of the Appellant's claims. The Third Tribunal observes that it carefully considered the descriptions of the activities he had undertaken which he provided at the various stages of the process by which he claimed to be a refugee and the Tribunal stated that it believed there were good reasons to doubt the truth of his account of the central aspect of his claim to fear harm in Sri Lanka. Relevantly, from the Tribunal Decision, its assessment stated the following:

*"[43] First, the applicant has provided notably inconsistent information concerning his alleged residence in* [PLACE]. *His claim in his transfer interview to have been providing assistance to the LTTE while living in* [PLACE] *(or '*[PLACE]*') from 2009 to 2011 was amended to 2006-2008 in his RSD statement. Also amended was the claim that he had been living in India from 2011 to 2014, replaced with the information that he had actually been living in Sri Lanka during this period. These are sizeable discrepancies, and they weighed heavily in the Secretary's assessment of the applicant's credibility. While the Tribunal is prepared to accept that he may, as he claims, have a problem in recalling dates so in the circumstances of the transfer interview, he may simply have become confused about when it was that he returned to Sri Lanka from India, other and more concerning discrepancies are evident in his subsequent claims regarding* [PLACE]. *"*

49. The Tribunal Decision then provided five bullet points of discrepancies regarding his claimed place of residence.

50. The second aspect to the Tribunal's reasoning was as follows:

*"[44] Second, and in addition to its doubts about the applicant's claim to have resided in* [PLACE], *the Tribunal has concerns about the truth of his claim to have helped the LTTE."*

51. The Tribunal Decision then provides four bullet points in relation its concerns regarding the LTTE and states:

*"[45] Having considered these responses the Tribunal considers that the applicant has provided significantly inconsistent claims about his alleged support for the LTTE and it is not satisfied that he has provided sufficient explanations for the discrepancies."*

52. The third aspect to the Tribunal's reasoning, in the Tribunal Decision was as follows:

*"[46] Third, the Tribunal finds aspects of the applicant's claims about of his alleged pursuit by the CID in* [PLACE], [PLACE] *and* [PLACE], *as a*

*result of his alleged support for the LTTE, to be inconsistent and implausible."*

53. The Tribunal Decision then sets out ten points regarding that issue to support its reasoning. The Tribunal then concluded that:

> *[49] Taking together the aspects of the applicant's evidence discussed above the Tribunal is unable to be satisfied as to the truth of his claim to have lived in* [PLACE] *and to have supplied the LTTE with food and medicine there in the period from 2006 to 2008. There is no credible evidence to suggest that he assisted the LTTE in any other way or at any other time. The Tribunal is not satisfied that he was targeted by the CID because he helped the LTTE or that he was forced to go into hiding or to flee to* [PLACE], *to* [PLACE] *or, ultimately, to India. Nor is the Tribunal satisfied as to the truth of the associated claim that his brother-in-law* [NAME] *was arrested by the CID during a visit to his house and has not been heard of since. The Tribunal does not accept that he was of any adverse interest to the CID or other Sri Lankan authorities at the time he left for India in 2014. Nor does it accept that he has any adverse record of support for the LTTE which would bring him to the adverse interest of the authorities should he return.*

54. Ultimately, the Third Tribunal in a detailed decision (some 40 pages) affirmed the determination of the Secretary.

**Grounds of Appeal**

55. The Appellant acknowledged notification of the Tribunal decision on 16 October 2019 and filed a Notice of Appeal in this Court on the same day. That Notice of Appeal has been subsequently amended by the Appellant on 24 June 2020.

56. The grounds of appeal which are agitated by the Amended Notice of Appeal are as follows:

***"Ground 1***

*The decision of the Tribunal is affected by an apprehension of bias, because the second Tribunal panel, with Member Zelinka (who sat on the first, quashed decision) moved along so far with her participation in that panel that members Condeleon (sic) and Mullin might realistically be seen as having been affected in their thinking by Member Zelinka.*

***Ground 2***

*The decision of the Tribunal is affected by legal unreasonableness in that the Tribunal unreasonably failed to request a medical report in relation to the appellant's mental health.*

1. *Reasons [52] recognises that the Tribunal did not have any expertise in judging the influence of mental ill-health on the giving of evidence.*
2. *Yet at Reasons [55], the Tribunal concluded that his ill-health could not explain the deficiencies in his evidence.*
3. *The possibility for mental ill-health to have explained some or all of he deficiencies in the appellant's evidence was a question that could readily have been answered by the Tribunal taking the easy step of requesting a medical report in circumstances where the Act provides a specific power to do so. There was no apparent difficulty in pursuing that course for the Tribunal.*
4. *On the contrary, the appellant did not have any realistic means of providing such evidence to the Tribunal himself, owning to the inability to access qualified experts."*

**Ground 1 – Apprehended Bias**

The Appellant's Submissions

57. The Appellant submits that the Tribunal Decision, being the decision of the Third Tribunal, is affected by apprehended bias because the constitution of the First Tribunal included Member Zelinka. The First Tribunal made adverse credibility findings against the Appellant. That decision of the First Tribunal was quashed by the Supreme Court of Nauru. The Tribunal was reconstituted to the Second Tribunal but, Member Zelinka remained a member of the Second Tribunal, together with members Condoleon and Mullin. The Second Tribunal provided the Appellant with a hearing. Subsequently, the Tribunal was reconstituted again with members Condoleon and Mullin from the Second Tribunal and a new third member, comprising the Third Tribunal. The Third Tribunal provided the Appellant with further hearings. Member Zelinka no longer formed part of the Third Tribunal that made the decision, the subject of this appeal. The Appellant submits that the continued participation of Member Zelinka, together with the two new members of the Second Tribunal and ultimately the Third Tribunal, might realistically be seen as having affected the Third Tribunal's decision.

58. The Appellant submits that Member Zelinka's role in the First Tribunal was prominent as she was the "*chief interrogator*". The Appellant submits that the First Tribunal Decision that was adverse to the Appellant was based in large part on findings adverse to the Appellant about his credibility as a witness of truth. The Appellant further submits that Member Zelinka's involvement in the Second Tribunal tainted that process with an apprehension of bias because of her participation and adverse findings of credit in the decision of the First Tribunal. The second hearing before the Second Tribunal, so the Appellant submits, reveals active participation by Member Zelinka which a lay observer would form the impression that Member Zelinka was going to have an equal involvement in the process of reaching a joint decision of the Second Tribunal.

This it is further submitted "*would plainly extend to seeking to influence those members to her way of thinking*" (Appellant's written submissions at [7]).

59. The Appellant puts the submission thus:

> "*[8] It is very likely that Member Zelinka brought her thoughts and opinions to bear in this process, potentially influencing or affecting the thinking of Members Condoleon or Mullin, or both (and in turn, Member Pinto being influenced by these two members). The lay observer would know this, and – at least – would be left with the impression that there was a possibility that Member Zelinka might have influenced the members which decided this case.*
>
> *[9] The lay observer would be aware that Member Condoleon (sic) had already formed a serious adverse view about the Appellant's credibility as a witness of truth. The need for the appearance of a fair hearing required that she not be involved in any way in a decision by the Tribunal, including by not influencing other members.*"

60. The reference in the second quoted paragraph above to Member Condoleon would appear to be an error and should be a reference to Member Zelinka. The Appellant made clear at the hearing of this appeal that the submission being made was not one of actual bias but of a reasonable apprehension of bias. The Appellant submitted that Member Zelinka's potential influence was sufficient to establish the reasonable apprehension of bias, it was not that Member Zelinka would, or wanted to, influence the ultimate decision, but that there could be an apprehension from her role in the First Tribunal bearing in mind the findings of credit and then her continued role in the Second Tribunal. Again, in the hearing, the Appellant submitted that Member Zelinka was in a position to influence the other two members in relation to, what were presumably her expressed views, being the decision of the First Tribunal, on the credibility of the Appellant. These matters of appearance, it was submitted by the Appellant, supported the first ground of appeal that the decision of the Third Tribunal was affected by a reasonable apprehension of bias.

Respondent's Submissions

61. The Respondent specifically noted the four hearings conducted, those being:

    (a) The first hearing by the First Tribunal;

    (b) The second hearing by the Second Tribunal;

    (c) The third hearing by the Third Tribunal;

    (d) The fourth hearing by the Third Tribunal.

62. The Respondent also submitted that the Tribunal Members are akin to professional decision-makers and each member would not take on some personal involvement in relation to the proceedings that are before them. The Respondent submitted that the proposition advanced by the Appellant that it is important which member was asking the questions in a particular hearing was unsupportable.

63. The Respondent submitted that the Appellant's argument had to be, in effect, that Member Zelinka had closed her mind to the possibility that the Appellant would tell the truth and furthermore that this would thereby infect the other members of the Tribunal, such that the Third Tribunal would not alter its conclusion .

64. The Respondent noted the relevant provisions of the Act from Division 1 of Part 3 in relation to the establishment and membership of the Tribunal. The Respondent also referred to Division 2 of Part 3 of the Act dealing with constitution, sittings and powers of the Tribunal.

65. The Respondent submitted that the fair-minded lay observer would know the following matters (from the Respondent's written submission), which would lead to there being no reasonable apprehension of bias in the current circumstances:

*"In this case, the fair-minded lay observer would know:*

> (a) *the statutory framework governing the Tribunal and its functions in the conduct of reviews, including on remittal;*

(b) *the practical constraints on the Tribunal in terms of the availability of members and travel to Nauru;*

(c) *the constitution of the First Tribunal and the first decision including the adverse credibility findings;*

(d) *the remittal of the matter by the High (sic, Supreme) Court;*

(e) *the next available sitting periods of the Tribunal and its constituent members in each period;*

(f) *the constitution of the Second Tribunal, including that one member was common to the First Tribunal;*

(g) *the judgment of this Court in SOS011;*

(h) *the constitution of the Third Tribunal, including that two members were common to the Second Tribunal, and that no members had participated in the First Tribunal;*

(i) *that the members of the Third Tribunal knew that the Third Tribunal was constituted to avoid any apprehension of bias due to the involvement of a member of the First Tribunal;*

(j) *the appellant's mental health problems and need for mental health care;*

(k) *the Tribunal's concern about the adverse impact of further delays on the appellant's mental health; and*

(l) *the practical circumstances confronting applicants, including the appellant, in Nauru."*

66. The Respondent submits that a finding of apprehension of bias depends on a finding that Member Zelinka's presence in the Second Tribunal would have tainted the decision of the Third Tribunal of which she was not a member.

67. The Respondent also relied upon the reasoning of Spigelman CJ in *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209 at [31]-[32] where the proposition was rejected that a member who may be conflicted or perceived to be a "*rotten apple*" will necessarily taint the other decision makers of a multi-member decision-making body, such as the Tribunal.

**Legal Principles – Apprehension of Bias**

68. It is of fundamental importance that the public and the parties to litigation have full confidence in the integrity, including the impartiality, of those entrusted with the administration of justice.[1] This is applicable not only to Courts, but to quasi-judicial tribunals and administrative tribunals.

69. It is a fundamental rule of natural justice,[2] which the Act expressly stipulates applies to the Tribunal that the Tribunal must be free from bias, being each of actual bias and apprehended bias.

70. An allegation of apprehended bias must be "*firmly established*".[3] It is not sufficient if the reasonable bystander merely "*has a vague sense of unease or disquiet*".[4] The test for apprehended bias is whether a fair-minded lay observer, being a properly informed member of the public, might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question he or she is required to decide.[5] Such a reasonable member of the public is neither "*complacent nor unduly sensitive or suspicious*".[6] It is a question of "*one of possibility (real and not remote)*," not probability.[7]

71. Further, if the matter has already been decided, the enquiry does not require a conclusion about what factors "*actually*" influenced the outcome, nor is it necessary to inquire into the actual thought processes undertaken.[8] To establish error on the basis of an apprehension of bias, a two-step process is required to be considered.[9] First, it requires the identification of what it is said might lead the decision-maker to decide the matters in issue other than on its merits. Secondly, an articulation of the logical connection between the matters and the apprehended feared deviation of deciding the matter on its merits. The bare assertion that the decision-maker has an "interest" in the litigation or an interest

[1] *Webb v R* (1994) 181 CLR 41 at 50-52 and 68.
[2] *Johnson v Johnson* (2000) 201 CLR 488 at [38] (***Johnson***).
[3] *Re JRL; Ex parte* CJL (1986) 161 CLR 342 at 352.
[4] *Jones v Australian Competition and Consumer Commission* (2002) 76 ALD 424 at 441; [2002] FCA 1054 at [100]; *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507 at [135].
[5] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6].
[6] *Johnson v Johnson* (2000) 201 CLR 488 at [53].
[7] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [7].
[8] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [7].
[9] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [8].

in a party is of no assistance until the nature of the interest and the asserted connection with the possible departure from impartial decision-making is articulated, which will allow the assessment of the asserted apprehension of bias.[10]

72. The decisions of Freckelton J in *VEA 026 v Republic* [2018] NRSC 19 (***VEA 026***) as well as the decision in *SO S011 v Republic* [2018] NRSC 22 (***SOS 011***) in this Court are also relevant. Those judgments each refer to a number of Australian authorities regarding the principles of apprehended bias: see *SOS 011* at [56]-[70] and *VEA 026* at [42]-[56].

73. The High Court of Australia in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6]-[8] stated the following (Gleeson CJ, McHugh Gummow and Hayne JJ) (footnotes omitted):

> "6. *Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.*
>
> 7. *The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be*

[10] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [8].

*recognised. Deciding whether a judicial officer (or juror) might not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors actually influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.*

*8. The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."*

74. More recently, in *Charisteas v Charisteas* [2021] HCA 29 at [11], the High Court (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ) summarised the principles as follows (footnotes omitted):

***"Apprehended bias***

*11 Where, as here, a question arises as to the independence or impartiality of a judge, the applicable principles are well established, and they were not in dispute. The apprehension of bias principle is that "a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". The principle gives effect to the requirement that justice should both be*

*done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial – that it is conducted by an independent and impartial tribunal. Its application requires two steps: first, "it requires the identification of what it is said might lead a judge ... to decide a case other than on its legal and factual merits"; and, second, there must be articulated a "logical connection" between that matter and the feared departure from the judge deciding the case on its merits. Once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed.*

*12 As five judges of this Court said in Johnson v Johnson, while the fair-minded lay observer "is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice"."*

75. These principles, as stated by the High Court of Australia, are relevantly the same as those outlined by Freckelton J in *SOS 011* and *VEA 026*.

76. In *SOS 011* the ground of appeal was that the Tribunal erred in law by its failure to reconstitute itself *entirely* on the remittal by the Supreme Court of Nauru of the first tribunal's decision. That failure, it was alleged, amounted to an apprehension of bias. The first tribunal in *SOS 011* was constituted by Ms Boddison, Ms Zelinka and Mr Godfrey. The second tribunal was constituted by Ms Boddison, Mr Baker and Ms Murphy. In the circumstances of *SOS 011*, the second tribunal did make the decision that was then the subject of Freckelton J's judgment. The appellant submitted that as Ms Boddison sat on the first and second tribunals and as the presiding member, a fair minded and reasonably well-informed observer might reasonably apprehend that the Tribunal might be unable to bring an impartial and unprejudiced mind to the review.

77. In *SOS 011*, Freckelton J observed that the decision by the second tribunal to reconstitute itself with the same presiding member from the first tribunal was imprudent and "*constituted (an) undesirable practice likely to detract from confidence in the independence of the second Tribunal's decision-making, and*

*was in error on the basis that that member had already reached clear views as to the Appellant's credibility.*" (*SOS 011* at [74]). Further, in light of the seriousness of the decision involved in the matter and the centrality of a finding of credibility to the Tribunal's decision-making, Freckelton J found that a fair-minded lay observer might reasonably apprehend that the Tribunal member shared between first and second tribunal might not bring an impartial and unprejudiced mind to the resolution of the questions that the Tribunal was required to decide (*SOS 011* at [75]).

78. In *VEA 026,* the shared member between the first tribunal and the second tribunal was not the presiding member, however, Freckelton J made similar findings and made similar observations (*VEA 026* at [60]-[61]).

79. However, having made those findings, Freckelton J affirmed the decision of the Tribunal and dismissed the appeal on the basis that in each matter the Appellant was fully aware of the circumstances and should have been regarded as having made a forensic decision not to raise the issue with the Tribunal. Freckelton J held that in each matter, the appellants had waived their right to object on such a ground later. (*SOS 011* at [83], *VEA 026* at [69]).

80. In outlining the relevant applicable principles, the following reasoning of Spigelman CJ in *McGovern v Ku-Ring-Gai* Council [2008] NSWCA 209; 72 NSWLR 504 at [31]-[32], should also be referred to:

***"The Multi-Member Decision-Maker***

*[31] Even if either or both of the Councillors had pre-judged the issue and, accordingly, one or two members of the decision-making body was or were affected by apprehended bias, there remains the issue whether that affected the whole of the decision-making process. The actual decision-maker is the Council. The Appellant contends that an impartial observer might reasonably assume a process of infection – the rotten apple in the barrel test. Such a conclusion is not necessary and must depend on the circumstances of the statutory regime and of the case. An independent observer in administrative law, like the ordinary reasonable reader in defamation law, is not avid for scandal.*

*[32] As I have indicated above, the test for apprehended bias is applied more stringently in the case of judicial decision-makers. That also applies to jurors. However, even in the case of the jury, as a multi-member decision-maker, the rotten apple test is not automatically applied. The apprehended bias principle is the same (see Webb v The Queen (1994) 184 CLR 41 at 46-47, 53, 57, 68-69, 87-88). Nevertheless, the discharge of one juror, on the basis that s/he may not be impartial, does not necessarily require the discharge of the whole jury (see eg R v Goodhall [2007] VSCA 63; (2007) 15 VR673 ESP at [32]-[37]; R v Piccin [2001] NSWCCA 35 at [85]-[90])."*

81. Two additional cases were handed to the Court at the hearing. The first was a decision of the High Court of Australia in *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 (***Stollery***). In that case the owner of a greyhound sent to the manager of an association that conducted greyhound racing, who was also a member of the Greyhound Racing Control Board, an envelope containing a form nominating certain dogs for a race, together with $200 in cash. The manager asked for an explanation and was told it was a gift in respect of his recent marriage. The manager reported the incident to the Board and the Board conducted an enquiry. The Board resolved to charge the owner with conduct detrimental to the proper regulation and control of the sport and ultimately found the owner guilty and disqualified him for 12 months. The manager was present in the boardroom throughout the deliberations and the decision but took no part in them. The Court held that the manager was in the position of an accuser and was thereby disqualified from acting as a member of the Board in relation to that allegation. Although there was no dispute involving overt acts of the manager during the deliberation and decision process, the manager's presence during that process was inconsistent with the principles of natural justice, even though he did not participate in the deliberations or the decision. Barwick CJ considered the relevant authorities and observed that *"(t)he continued presence of a disqualified person is fatal to the validity of the decision taken as the result of deliberations in his presence"*.

82. Further, Barwick CJ outlined the following principles (at 519):

> *"...The basic tenet that justice should not only be done but be seen to be done does not, of course, warrant fanciful and extravagant assertions and demands. What justice requires will ever depend on circumstances, and the degree to which it should be manifest that it is being done will likewise be related to the particular situation under examination by a supervising Tribunal. But, in my opinion, dissatisfaction engendered in the mind of an observer aware of the facts, by the continued presence of Mr Smith in this boardroom, having regard to his personal connection with the matter in hand, is not extravagant or farfetched. As I have said, a reasonable man could very properly suspect that the clear opportunity which Mr Smith had for influencing the decision of the Board might well have been used."*

83. Menzies J in *Stollery*, to a similar effect, put it in these terms (at 525):

> *"It seems to me clear that Mr Smith had brought to the Board a matter requiring investigation and had done so by a report which disclosed that he had formed the conclusion that what the Appellant had done was, at least, seriously detrimental to the proper conduct or control of greyhound racing and that it was necessary to stamp out such conduct. He had also given the evidence upon which the charge against which the Appellant depended, ...*
>
> *In these circumstances, I have come to the conclusion that Mr Smith was disqualified from sitting as a member of the Board to consider and deal with the Appellant's conduct and that his presence when the other members of the Board did so and found the Appellant guilty as charged was not in conformity with the principles of natural justice. The basis of this conclusion is simply that in the circumstances, Mr Smith had a personal interest in the outcome of the proceedings before the Board and had formed a conclusion, adverse to the Appellant, about what their result should be. This is, of itself, enough to invalidate the proceedings and a Court will not investigate whether or not his presence did in fact influence the decision of the Board."*

84. Further, in *Stollery*, Gibbs J put it in these terms (at 526-527):

> *"... It is, however, clear that it would not be in accordance with the principles of natural justice for a person who was in truth the accuser to be present as a member of the tribunal when the charge which he had promoted was heard, even if he took no actual part in the proceedings: ... The very presence of a person who has brought forward a complaint may, even unconsciously, inhibit the discussions and affect the deliberations of the other members of the Tribunal."*

85. Gibbs J summed up the position of Mr Smith as being "*In substance, the accuser, and therefore was disqualified to act as a judge*".

86. The second case provided at the hearing was one of the Queensland Civil and Administrative Tribunal, being a decision of the Deputy President Judge Allen QC in *Harirchian v Health Ombudsman* [2020] QCAT 392 (***Harirchian***). In that case the tribunal, which was constituted by a judicial member assisted by three assessors, was hearing the review of a decision of the Health Ombudsman. During the luncheon adjournment, one of the assessors struck up a conversation with two law students who had been sitting in the public gallery of the courtroom throughout the morning's hearing. During that conversation the assessor expressed the opinion that the case was "*boring*", that there was "*no case*" and it was "*quite clear what the outcome would be*". The assessor also expressed the opinion that no one would continue to seek treatment from a doctor if they knew that doctor had been convicted of the same offences as the applicant and that most people would agree with the suspension of a doctor following conviction for such offences. The applicant submitted that such statements which related directly to the issues in dispute, gave rise to a reasonable apprehension that the assessor had pre-judged the matter before hearing all of the submissions. The applicant submitted that there was a reasonable apprehension of bias by reason of pre-judgment and given the role of the assessor, such an apprehension of bias tainted the proceedings such as to give rise to a reasonable apprehension of bias of the tribunal hearing the review of the decision of the Health Ombudsman. The respondent accepted that such comments might engender "*a sense of unease*" and further even if there was a reasonable apprehension of bias of that assessor, that would not lead to a reasonable apprehension of bias of the tribunal as a whole. The tribunal

ultimately concluded, although observing that the matter was finely balanced, that the circumstances were such to give rise to a reasonable apprehension of bias and hence the tribunal should be differently constituted. It was observed that the comments were such that a fair minded observer might reasonably apprehend that the assessor might not have brought an impartial mind to the hearing and had prejudged the matter and was incapable of persuasion to the contrary.

**Consideration – Ground 1**

87. Therefore to consider the test for apprehended bias, which is whether a fair-minded lay observer, being a properly informed member of the public, might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question he or she is required to decide,[11] consideration must be given to the two-step analysis. First, consideration must be given to the identification of what is said might lead the decision-maker, in this case the Third Tribunal, to decide the matters in issue other than on the merits. Secondly, it is necessary to articulate the logical connection between the matters in issue and the apprehended fear that those matters will not be decided without any apprehension of bias.

First Question – Test for Apprehended Bias

88. The Appellant's submission is that the continued participation of Member Zelinka from the First Tribunal, to the Second Tribunal, might lead the Third Tribunal to decide the matter other than on the merits. Member Zelinka's continued involvement tainted the process and ultimately the decision of the Third Tribunal. Member Zelinka was a member of the First Tribunal, the Second Tribunal but not the Third Tribunal. The First Tribunal made adverse credibility findings as part of the First Tribunal Decision. The First Tribunal Decision was quashed by this Court and the matter remitted.

89. The second hearing by the Second Tribunal was the most substantive conducted by the Tribunal. Member Zelinka was an active participant during the second hearing conducted by the Second Tribunal. That active engagement does not

[11] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6].

evidence a closed mind. The Appellant expressly submitted that Member Zelinka would seek to influence the other members of the Second Tribunal to "*her way of thinking*" to such an extent that the other members of the Second Tribunal would no longer bring to bear an impartial and open mind to the review. That way of thinking, must, implicitly from the Appellant's submissions, be consistent with the adverse credibility findings made in the First Tribunal Decision. There is no evidence before the Court of Member Zelinka herself making any express comments or statements regarding the Appellant, his case or the matter under review. I do not accept that Member Zelinka would have sought to influence the other two members of the Second Tribunal and ultimately the Third Tribunal to "*her way of thinking*". Further, if Member Zelinka's mind was closed, it would not have been necessary for her to engage in any questioning and evidence gathering process that took place in the second hearing. I also do not accept that a lay observer would know or at least be left with the impression that Member Zelinka might have influenced the other two members to "*her way of thinking*". Tribunal Members are statutorily appointed and are required to be impartial and independent. A lay observer would know this.

90. The adverse credibility findings of the First Tribunal use strong language, such as "*that he was making things up*", "*claims were contradictory*", "*significant contradictions*, "*these assertions ... ... are completely at odds with his evidence*", "*only compounds the Tribunal's credibility concerns, relying as it does on statements which are completely at odds with the Applicant's earlier claims and evidence*" and that the Tribunal concluded that the Appellant "*is not a credible witness and concludes that much of his story has been fabricated*". The language employed by the Third Tribunal is quite different, although it still had credibility concerns in relation to the Appellant's evidence. The language of the Third Tribunal (at [42]) was somewhat more tempered in that it stated it "*believes there are good reasons to doubt the truth*" of the Appellant's account of one of the centrally important elements to his claim to fear harm in Sri Lanka. The Third Tribunal refers to inconsistencies and discrepancies in relation to the evidence. The Third Tribunal expressed concerns "*about the truth of his claim to have helped the LTTE*" (Third Tribunal Decision at [44]), concluding

that the Appellant had provided significantly inconsistent claims about this alleged support for the LTTE and it was not satisfied that he had provided sufficient explanations for the discrepancies. The Third Tribunal also considered the other aspects of the Appellant's claims and did find matters to be inconsistent and implausible as well as being unable to be satisfied as to the truth of the claims made by the Appellant. As such, I do observe that some of the conclusions by the Third Tribunal also do use strong language.

91. Further, the approach and reasoning process of considering the Appellant's credibility as is apparent from the face of the reasons of the First Tribunal Decision and the Tribunal Decision are markedly different. There is no overarching credibility consideration in the Tribunal Decision as there was in the First Tribunal Decision.

92. In considering these aspects of the Appellant's claims in the Tribunal Decision, the evidence gathered from the February hearing (being the second hearing conducted by the Second Tribunal) does feature prominently. That was when Member Zelinka formed part of the Tribunal. The second hearing was after the remittal from the Supreme Court. Pursuant to section 20(2) of the Act, the Tribunal is entitled to have regard to any record of the proceedings made by the Tribunal as previously constituted. This would extend to the any record of proceeding before the First Tribunal and the Second Tribunal.

93. It is possible that by Member Zelinka already having formed, as part of the First Tribunal, an adverse view about the Appellant's credibility that might leave the reasonable fair-minded lay observer with a sense of unease or disquiet. However, such a reasonable fair-minded observer would not be unduly suspicious of Member Zelinka and would not impute in her some sort of "*interest*" in seeking to maintain the findings of the First Tribunal.

94. The "*interest*" that the Appellant submits in relation to Member Zelinka's position is one of maintaining the findings particularly in relation to credibility, of the First Tribunal. Member Zelinka is not in the position of the accuser as in *Stollery* nor as observed above has made any separately expressed comments such as in *Harirchian*.

95. Member Zelinka has no personal stake or interest in the Appellant's RSD application or in the review before the Tribunal. She is an independent and impartial Tribunal Member statutorily appointed to perform reviews under the Act. From time to time Member Zelinka is appointed with other members to constitute various tribunals and make decisions; that is her responsibility as the fair-minded observer would appreciate. It is not her cause and she has no "*interest*" in it. Moreover, there is no controversy about material historical facts which Member Zelinka would have personal knowledge of or which could be relevant to the Appellant's review and therefore would then be under consideration by the Third Tribunal.

96. In relation to the first question, I do not accept the Appellant's submission that the identification of Member Zelinka's involvement from the First Tribunal to the Second Tribunal, but not ultimately to the Third Tribunal which made the decision under review, might lead the Third Tribunal (being the relevant decision-maker) to decide the matter other than on its merits.

Second Question – Test for Apprehended Bias

97. In relation to the second step, it requires the articulation of the logical connection between the matters in issue and the apprehended feared deviation of deciding those matters other than on the merits. The Appellant submits that the logical connection is that Member Zelinka was part of the Tribunal that made the First Tribunal Decision which contained adverse credibility findings; Member Zelinka participated in the second hearing in the Second Tribunal and that participation leads to an apprehended fear that the Third Tribunal would not make a decision on the merits.

98. Member Zelinka is not in the position of the accuser, as in *Stollery,* and she did not "*remain in the room*" during the deliberations of the Third Tribunal such that her very presence could be alleged, even unconsciously, to somehow inhibit the discussions and affect the deliberations of the Third Tribunal. By the time the Third Tribunal came to make its decision Member Zelinka was no longer a member of this Tribunal, it having been reconstituted. Although it is suggested in this case that Member Zelinka would seek to influence the two members of the Third Tribunal who were also part of the Second Tribunal, there is no

evidence to support such a finding. Such an approach, in my view is putting an unduly suspicious approach on the fair-minded lay observer and seeks to make a bare assertion against Member Zelinka that she has an "*interest*" in the litigation.

99. It is difficult to ascertain how Member Zelinka's involvement in the second hearing might lead the Third Tribunal to decide the review other than on its merits. In relation to the second question, I do not accept the Appellant's submission that the involvement of Member Zelinka from the First Tribunal to the Second Tribunal, which contained two of the same members of the Third Tribunal which ultimately made the Tribunal Decision, provides the logical connection between the matters and the apprehended feared deviation of deciding the matter other than on its merits.

Conclusion – Apprehended Bias

100. This case can be distinguished from Freckelton J's consideration of the issues in *SOS 011* and *VEA 026*. In each of those matters, a member of the original tribunal whose decision was quashed also formed a part of the tribunal to which the matter was remitted and which ultimately made a decision on the remitted hearing. That is not this case. In the circumstances of this case, the First Tribunal Decision which was quashed by the Supreme Court of Nauru, was ultimately remitted to an entirely reconstituted Tribunal, being the Third Tribunal. Further, and again a point of distinguishment is that the entirely reconstituted Third Tribunal conducted additional hearings, being the third hearing and the fourth hearing. In all the circumstances, the fair-minded, properly informed member of the public (is reasonable, intelligent[12] and neither complacent nor unduly sensitive or suspicious[13]) would not think it a real possibility that the Third Tribunal might not bring an impartial mind to its decision concerning the review of the Appellant's case.

[12] *Smits v Roach* (2006) 227 CLR 423 at [43] and [95].
[13] *Johnson* at [53].

101. The Third Tribunal was aware and expressly dealt with these matters at the hearings as set out above, to ensure that the Appellant could be comforted by the "*fresh eyes*" which the Third Tribunal brought to bear on the review.

102. Considerations of apprehended bias will always turn on the particular circumstances of a specific case. In this matter for the reasons outlined above, I am not satisfied that a fair-minded lay observer, being a properly informed member of the public, might reasonably apprehend that the Third Tribunal might not bring an impartial mind to the review of the Appellant' RSD application. As such, the Tribunal Decision is not infected by a reasonable apprehension of bias such that it contains an error of law. On this basis, ground 1 of the appeal should be dismissed.

**Ground 2 – Unreasonableness, Failure to Request a Medical Report**

The Appellant's Submissions

103. The Appellant submits that at [52] of the Tribunal Decision it recognised that there was an issue in the case about which the Third Tribunal did not have the requisite expertise, being in relation to the Appellant's mental ill-health in giving evidence. Paragraph [52] of the Tribunal Decision states as follows:

> "*[52] The Tribunal acknowledges that this report provides evidence of some degree of disorder in the applicant's mental functioning and does not seek to downplay the difficulties he may face. The Tribunal also acknowledges that it is not qualified to make its own diagnosis of the applicant's condition and must give due weight to the professional opinion which has been provided. Nevertheless, having carefully considered the information before it, the Tribunal is not satisfied that the applicant's mental state in itself adequately explains the defects which are evident in his evidence and which may have led the Tribunal to reject his claims to have supported the LTTE and to have been hunted by the authorities. The Tribunal has come to this view for the following reasons.*"

104. The Appellant then submits that the Tribunal Decision at [55] is where the Third Tribunal concluded that his ill-health could not explain the deficiencies in his evidence. Paragraph 55 concludes with "*the Tribunal is satisfied the applicant was able to participate fully in the hearings and give his evidence*".

105. The Appellant submits that the Act provides a ready solution by empowering the Tribunal to require a medical report be prepared to assess the Appellant's mental health status and to obtain an expert opinion about the role of any such ill-health upon his evidence. This, the Appellant submitted, is a specific power vested in the Tribunal and one appropriate for utilisation where issues of mental ill-health arise. This power is contained in section 24(1)(d) of the Act which relevantly provides:

> ***"[24] Evidence and Procedure***
>
> *(1) For the purpose of a review, the Tribunal may:*
>
> *(a) ...*
>
> ...
>
> *(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."*

106. The Appellant submits that the exercise of this power is one which must be exercised reasonably. This is because "*a legal presumption that a discretionary power, statutorily conferred, must be exercised reasonably in the legal sense of that word*"[14] the Appellant refers to Freckelton J's decision in *DWN 034 v Republic* [2018] NRSC 57 (***DWN 034***) at [73]-[81]. The Appellant submits that the Tribunal was on notice of the Appellant's need for a medical examination to determine his cognitive ability of being able to meaningfully participate in the hearing. This notice was by way of the OSSTT Report which was provided to the Tribunal as part of the material relied upon by the Appellant. The Appellant

[14] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (*Li*) at [29] and *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 (***SZVFW***) at [89].

seeks to further support this submission based on what is submitted to be a misunderstanding of the OSSTT Report. The Appellant claims that the misunderstanding is evident from the Tribunal Decision at [54], together with the transcript and concluding remarks that the recording of having a nightmare about something (in the OSSTT Report under heading, "Psychological Functioning – Intrusion") is not necessarily to claim that the nightmare was a replay of a real event. That misunderstanding, so the Appellant submitted, derailed the Tribunal's assessment of the Appellant's explanation of what the report was referring to and in turn the weight it would give to the OSSTT Report. Further, and seeking to distinguish the decision of the *DWN 080 v Republic* [2018] NRSC 49 (***DWN 080***), the Appellant has claimed, that throughout the three stages of the review process that his capacity to give an account of his experiences was compromised by his poor mental health.

The Respondent's Submissions

107. The Respondent disagrees with the Appellant's characterisation of the Tribunal's reasons at [52] and submits that the Tribunal expressly acknowledged it was not qualified to make its own diagnosis and accordingly must give due weight to the professional opinion. However, so the Respondent submits, notwithstanding the OSSTT Report which provided evidence of some degree of disorder in the Appellant's mental functioning, the Tribunal was not satisfied that the Appellant's mental state of itself was adequately explained.

108. The Respondent submits that the Tribunal's process and reasoning were entirely orthodox, it considered the medical evidence presented, gave that evidence the weight it thought appropriate and made findings on the totality of the evidence before it. The Respondent notes that the Appellant's submissions seem to be based on either a failure to make an obvious enquiry or unreasonably failing to exercise the discretion provided to it under each basis in relation to section 24(1)(d) of the Act. Although it does appear that the Appellant's submissions seek to raise matters regarding a failure to make an obvious enquiry (in the *SZIAI*[15] sense). The Amended Notice of Appeal raises no such ground and

[15] *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 at [26].

hence the Respondent submits that it is advanced as part of the argument in relation to unreasonableness.

109. The Respondent submits that section 24(1)(d) of the Act requires the Tribunal to be satisfied that such a medical examination is necessary with respect to the review and that evidently, the Tribunal was not so satisfied as it did not require such an examination. This, the Respondent submits with reference to *DWN 080* at [63] is a "*the precondition that the Tribunal (has) concluded that an examination was necessary* ..." must be established.

110. The Respondent submits that clearly the Appellant disagrees with the assessment made by the Tribunal however that is not sufficient. Further, the Appellant could have obtained further medical evidence or could have asked the Tribunal to obtain further medical evidence, however, there is no evidence of either of those matters.

**Legal Principles – Unreasonableness, Failure to Obtain**

111. Legal unreasonableness does not depend on a "*definitional formulae or one verbal description rather than another*".[16] There are two different contexts in which the concept of unreasonableness can be employed: firstly, a conclusion after the identification of jurisdiction error for a recognised species of error and secondly, an "*outcome-focused*" conclusion.[17] There is only one correct answer to the question of legal unreasonableness.[18] Findings of legal unreasonableness are rare.[19] That is, in part, because it is a demanding standard which is required to establish legal unreasonableness.[20] The question of whether a decision is legally unreasonable is directed to whether or not the decision or action is within the scope of the statutory authority conferred on the decision-maker; it involves an assessment of whether the decision was lawful having regard to the

[16] *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 (***Stretton***) at [2].
[17] *Stretton* at [6]-[9] and [12]-[13], [61(c)] and [91]-[92]; *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 (***Singh 2014***) at [44]; *Li* at [27]-[28] and [72].
[18] *SZVFW* at [18], [20], [60], [76] and [117].
[19] *Li* at [113]; *Stretton* at [4]-[5] and [61(d)] and [58]-[65].
[20] *TTY167* at [24].

scope, purpose and subject matter of the statutory source of power, this can be when the decision lacks an "*evident and intelligible justification*".[21]

112. There is an area of "*decisional freedom*"[22] or "*genuinely free discretion*"[23] within which reasonable minds might differ. That is not sufficient to establish error on the basis of legal unreasonableness. That reasonable minds may differ as to the exercise of that discretion is not legal unreasonableness.[24] Finally, in terms of outlining the relevant principles, a conclusion of legal unreasonableness might be drawn if the decision is plainly unjust, arbitrary, capricious or lacking in common sense, [25] however, an inference of unreasonableness will not be supported merely because a decision appears to be irrational.[26]

113. In *DWN 034*, Freckelton J was considering an appeal which alleged a failure to obtain a medical examination pursuant to section 24(1)(d) of the Act. In that case, the appellant's representatives had outlined matters of the appellant's general mental health stating he was suffering from severe memory problems, insomnia and stress triggered by the upcoming Tribunal hearing. Further submissions were also made regarding the appellant's ability to speak about the death of his father and brother. The Tribunal acknowledged those matters and raised relevant issues regarding country information with the appellant at the hearing. In post-hearing submissions, again the appellant's forgetfulness and avoidance of mental health issues were raised. The Tribunal noted those submissions in its decision. The Appellant in *DWN 034* submitted that the Tribunal failed to arrange a medical examination under section 24(1)(d) which constituted a denial of procedural fairness and a failure to make an obvious enquiry about a critical fact. It was submitted that where the Tribunal was appraised of the appellant's mental health issues through pre and post-hearing submissions, it was procedurally unfair to not require an examination of his mental state.

[21] *Li* at [76]; *SZVFW* at [10] and [82], *Singh v Minister for Home Affairs* (2019) 267 FCR 200 (***Singh 2019***) at [61].
[22] *Stretton* at [7] and [92].
[23] *Stretton* at [56]; *SZVFW* [51] and [97].
[24] *Stretton* at [7], [22], [92] and [101]-[102]; *Li* at [28]; *SZVFW* at [155].
[25] *Stretton* at [11], [87] and [90]; *Li* at [28] and [110]; *Singh 2014* at [44]; *Singh 2019* at [61].
[26] *SZVFW* at [10], [82]; *Li* at [68].

114. In *DWN 034* at [60]-[62], some of the Australian authorities are referred to in relation to what is required of the Tribunal in particular circumstances. At [63], Freckelton J referred to *Minister for Immigration and Citizenship v SZNVW* (2010) 183 FCR 575 (***SZNVW***) and described it as a leading authority on the parameters of a tribunal's obligation. In that case the applicant's psychological impairment was raised before the Refugee Review Tribunal in respect of evidence he gave. The Full Court of the Federal Court which described the obligation on the Tribunal in relation to the hearing that the invitation must not be a hollow shell or an empty gesture and that the Tribunal must provide a real and meaningful invitation. Such an invitation would not be real and meaningful where it would deny the applicant the capacity to give an account of his experiences, present arguments in support of his claims or understand and respond to questions put to him (*DWN 034* at [64]). The Full Court noted (*SZNVW* at [30]), as did Freckelton J (*DWN 034* at [65]) that there was no authority for the view that the legislative requirements, either in Australia or in Nauru by the Act, in relation to a hearing were not met because an applicant might, if better advised, have chosen to prepare and present a more compelling case. Freckelton J also referred to and applied the principles from *SZGUR*[27] where the High Court of Australia dealt with a matter in which the applicant was suffering from bipolar disorder, depression and forgetfulness. French CJ and Kiefel J set out the relevant statutory framework including section 427(1)(d) of the *Migration Act 1958* (Cth) (*SZGUR* at [18]) which is in very similar terms to section 24(1)(d) of the Act. French CJ and Kiefel J held (*SZGUR* at [41]) that "*the Tribunal was under no obligation to obtain an independent medical report. It was under no obligation derived from s427(1)(d) to consider whether to obtain such a report. It was entitled to decide the case on the material before it and if the material were insufficient to satisfy it that SZGUR was entitled to the grant of a protection visa, it was required to affirm the delegate's decision.*"

115. Freckelton J also referred to *SGLB*[28] (*DWN 034* at [69]-[71]) and I agree with those observations and that such observations are applicable to the circumstances of this case. The requirement to distinguish between powers and duties, to acknowledge the inquisitorial nature of the Tribunal and the right to

[27] *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594.
[28] *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992.

being invited to a hearing is one which must be "*real and meaningful*" are relevant principles which need to be applied in the context of the Act. In this regard, I agree with the comments of Khan J (as the Acting Chief Justice then was) in *DWN072 v Republic of Nauru* [2016] NRSC 18 at [30]:

> *"[30] I reiterate that I accept the principles in Paramananthan regarding the Tribunal's (sic) that "inquiries are not limited to the material, evidence, arguments presented to it and the Tribunal acting inquisitorially, to review the decision before it according to 'merits of the case' to be applicable in the cases before the Tribunal in this country"."*

116. In *ROD122 v Republic* [2017] NRSC 39 (*ROD122*), Crulci J allowed an appeal on the basis that the applicant had been denied a real and meaningful hearing before the Tribunal thus breaching section 40 of the Act. Crulci J also found that the Tribunal should have adjourned the hearing and ordered medical reports into the ability of the applicant to participate in the hearing (*ROD122* at [63]). Crulci J set out the following matters which were the subject of the Tribunal's observations in relation to the appellant's mental health (*ROD122* at [57]) (footnotes omitted):

> *"(a) The Appellant did not made normal eye contact, and mostly stared at the floor and repeated a chant or mantra repeatedly;*
>
> *(b) The Appellant frequently responded to questions by saying "he could not remember";*
>
> *(c) A psychiatrist said on 22 January 2015 (the hearing took place on 27 January 2015), that the Appellant "currently acutely psychotic" and incapable of instructing lawyers;*
>
> *(d) The Appellant had suffered two acute psychotic episodes in 2 months;*
>
> *(e) The Appellant said he had come off his medication three days before the hearing."*

117. Further, Crulci J noted (*ROD122* at [58]) that the Tribunal observed the appellant was "*far from well*". This led to the Court stating (*ROD122* at [59]):

*"[59] The Court is of the view that all of 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.*

...

*[62] Considering all the evidence before the Tribunal as to the Appellant's mental health and cognitive abilities, combined with the Tribunal's 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 Appellant's ability to participate in the hearing. These grounds of appeal succeed."*

118. I have also had regard to further decisions of Khan J in *CRI029 v Republic* [2017] NRSC 75 (*CRI029*) and *HFM043 v Republic of Nauru* [2017] NRSC 43 (*HFM043*). In *CRI029* it was clear that the mental health of the appellant was a "*live issue*" and was supported by certain medical material which was produced to the Tribunal (*CRI029* at [46]). Khan J observed that the "*the Tribunal had ample notice about the Appellant's mental health issues*" (*CRI029* at [50]).

119. *HFM043* was slightly different in that it was a ground of appeal being a failure to take into account the appellant's mental health problems, which led Khan J to find error by the Tribunal in failing to consider all of the appellant's claims and thereby denying procedural fairness. However, insofar as the evidence of the appellant's mental health was before the Tribunal, the Tribunal had recorded in its decision that during the information session it had conducted 12 days beforehand, the appellant had cried uncontrollably throughout the meeting and the Tribunal expressly observed during the hearing she was very depressed. The Tribunal also observed from the appellant's statutory declaration that she had

stopped taking antidepressant pills and although the appellant thought she spoke better not taking her pills, it meant she often cried uncontrollably and had trouble controlling her emotions. The Tribunal also recorded it had no formal evidence about the appellant's mental health issues.

120. In *DWN 080* the first ground of appeal was that the Tribunal had erred in failing to exercise its power to determine if the appellant had the mental capacity to appear at the review pursuant to its powers in sections 24(1)(d) and 36 of the Act. Freckelton J considered the particular circumstances of the case advanced and noted (*DWN 080* at [58]) that the way the case was argued before the Tribunal, the appellant's mental state did not figure prominently, that is, it was not an essential integer of his case. Further, the appellant while identifying difficulties he was having in relation to his mental state, answered a great many questions from the Tribunal lucidly and responsively (*DWN 080* at [60]). Further, it was noted that the appellant's legal representatives did not seek to adjourn the hearing on the basis of their client's mental state or seek to have the Tribunal require the Secretary to arrange for the making of an investigation or a medical examination under section 24(1)(d) of the Act. The Court observed that the precondition required by section 24(1)(d) that the Tribunal had concluded that an examination was necessary, was not in fact established. In all of the circumstances, the Court concluded that it was apparent that the view of the Tribunal was to the contrary (*DWN 080* at [63]).

121. Finally then, from *DWN 034*, Freckelton J observed as follows:

> *"[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 complementary protection.*
>
> ...

> *[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."*

**Consideration – Ground 2**

122. On the basis of principles outlined above, I note that most of the decisions of the Supreme Court of Nauru in relation to section 24(1)(d) have not been advanced on the basis of unreasonableness. However, relevant principles in relation to the genuinely free discretion that the Tribunal is granted pursuant to section 24(1)(d) have been discussed in those authorities.

123. The Appellant expressly submits that the Tribunal was on notice of the Appellant's need for a medical examination. I do not accept that submission. The Appellant in the particular circumstances of this case did meaningfully participate in the second, third and fourth hearings which were provided to him. There were no overt indicators that are apparent from the transcript or recorded in the Tribunal Decision regarding the Appellant's mental health such as to provide visible, obvious or evident displays by the Appellant which would have alerted the Tribunal objectively to the Appellant's lack of capacity to be able to participate meaningfully in any of those hearings. In the third hearing by the Third Tribunal which took place on 23 November 2018, some approximately 20 months after the OSSTT Report dated 17 March 2017, the Tribunal did ask the Appellant questions regarding any counselling or any ongoing appointments relating to his mental health. The evidence of the Appellant was that he had not been going to any appointments recently and further it was clarified that after the appointment for the report to be completed, the Appellant attended two more times with OSSTT.

124. The Second Remittal Submissions did not raise any specific issues in relation to the Appellant's mental health, however, the First Remittal Submissions did address *"health and capacity issues"*. The submission (First Remittal Submissions at [83]-[86]) was put on the basis of seeking to explain why it was that the appellant's memory was not as clear as it once was, expressly submitting *"that there may be errors, omissions or misunderstandings that cannot be automatically attributed to his credibility but rather to his poor mental health and memories"*.

125. In the particular circumstances of this specific case, the material before the Third Tribunal consisted of the OSSTT Report which was only based on one attendance with Ms Mitchell and submissions which sought to explain the inconsistencies, discrepancies and potential inaccuracies of the Appellant's evidence rather than to seek to claim that the Appellant was unable to participate in a real and meaningful way in any hearing before the Tribunal. In addition to this, there has been no claim until the appeal that the Tribunal should have exercised the powers under section 24(1)(d) of the Act to obtain a medical examination.

126. Insofar as the Appellant seeks to support his submissions by a claimed misunderstanding of the OSSTT Report, I am unable to accept that submission. The OSSTT Report (the relevant part which is set out in full above) recorded in relation to the frequent nightmares of arrest and imprisonment *"(content pertaining to reported actual event"* and *"('feels just like when I was arrested)"*. These passages do appear to seek to capture an actual event being reported by the Appellant to the report writer.

127. In any event, whether the words of the OSSTT Report expressly record an actual event being reported to the report writer, which is then said to be the basis of his frequent nightmares and flashbacks, or whether it was something less or different to that, it was open to the Tribunal to interpret the OSSTT report in that way.

128. There was no clear indication from either the second, third or fourth hearing of the Appellant's inability to participate, nor were there express submissions by the Appellant's representatives at any stage during the review process, which

was an extended timeline given the remittal and additional hearings which took place, that justice would not be done if an expert medical examination was not conducted on the Appellant pursuant to section 24(1)(d) of the Act.

129. In addition to this, and insofar section 24(1)(d) requires as a precondition to its exercise that the Tribunal must be of the view that it is necessary with respect to the review that a medical examination take place, such a precondition is not satisfied.

130. In the Tribunal Decision, it expressly had regard to the Appellant's mental state, as had been the subject of submissions to it and on the basis of the evidence in the OSSTT Report that was before the Tribunal. Paragraph [52] of the Tribunal Decision, do not, in my view, recognise that there is an issue in the case about which the Tribunal does not have the requisite expertise to judge. The Tribunal acknowledges that the OSSTT Report was provided and it did provide evidence of "*some degree of disorder in the Applicant's mental functioning*". The Tribunal acknowledges that it is not qualified to make its own diagnosis and that is an entirely appropriate observation. The Tribunal goes on to say that it must give due weight to the professional opinion which has been provided. Again, this is an entirely appropriate position for the Tribunal to take. There is nothing in that paragraph, in my view, which seeks to state that there was "*an issue in this case*" (Appellant's written submissions at [11]) which it did not have the requisite expertise to judge. What the Tribunal's reasons properly do is consider the evidence and submissions before it, acknowledge that it cannot make a diagnosis and it does not do so (of course, it is not required to do so) and then makes findings on the basis of the evidence before it.

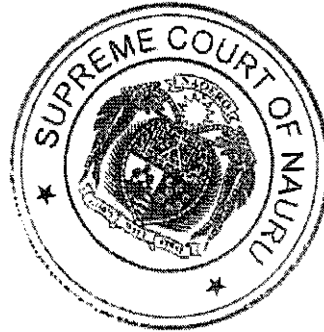
131. In all of the particular circumstances of this case there was no unreasonable refusal or unreasonable failure to exercise any power (as opposed to a duty) to request a medical examination in relation to the Appellant's mental health pursuant to section 24(1)(d) of the Act. The position of the Tribunal was open to it. This ground of appeal must be dismissed.

132. As neither ground of appeal has been successful, the appeal must be dismissed.

## Conclusion

133. Under section 44(1) of the Act, I make an order affirming the decision of the Tribunal dated 15 January 2019 and make no order as to costs.

**JUSTICE AMELIA WHEATLEY**




**Dated: 6** December **2022**