IN THE SUPREME COURT OF NAURU

AT YAREN

Case No. 10 of 2025

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T24/00464, brought pursuant to s 43 of the *Refugees Convention Act 2012*

BETWEEN

AJ 25 Appellant

AND

THE REPUBLIC Respondent

Before:	Justice I Freckelton AO
Appellant:	Mr A Aleksov
Respondent:	Mr L Brown SC
Date of Hearing:	2 June 2025
Date of Judgment:	4 June 2025

CATCHWORDS

APPEAL — APPEAL UPHELD.

JUDGMENT

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

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

2. A "refugee" is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951 ("the Refugees Convention")*, as modified by the *Protocol Relating to the Status of Refugees 1967* ("the 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 ..."*

3. Under s 3 of the Act, complementary protection means protection for people who are not refugees but who also cannot be returned or expelled to the frontiers or territories where this would breach Nauru's international obligations.

4. The determinations open to this Court are set out in s 44(1) of the Act:

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

5. The Appellant filed a Further Amended Notice of Appeal on 29 May 2025 against the decision of the Refugee Status Review Tribunal ("the Tribunal") decision of 3 February 2025, seeking that the appeal on a point of law should be allowed and that the matter be remitted to the Tribunal and that pursuant to section 44(2)(b) of the Act, the decision of the Tribunal be quashed.

BACKGROUND

6. The Appellant is a 33 year old man from Bangladesh. He lived and worked in Malaysia from 2017 to 2019.

7. He left Bangladesh on 7 February 2024 and arrived in Australia by boat on 16 February 2024. He was transferred to Nauru on 19 February 2024.

8. On 11 March 2024 the Appellant made an application to be recognised as a refugee or a person owed complementary protection (RSD application).

9. On 1 August 2014 the Secretary made a determination that the Appellant is not a refugee and is not owed complementary protection.

10. On 8 August 2024 the Appellant applied to the Tribunal for review of the Secretary's decision.

11. On 5 September 2024 at a hearing before the Tribunal the Appellant gave evidence and presented arguments. He was assisted by an interpreter in the Bengali and English languages.

12. After the hearing, the Tribunal became aware that it had not been constituted in accordance with the *Refugees Convention Act 2012* (the Act) and it notified the Appellant of the issue. Ultimately, the application proceeded to decision by a newly constituted Tribunal, consisting of W Boddison (presiding) and Members I O'Connell and S Murray (Ms Murray).

13. Ultimately, the Tribunal concluded that over the course of the RSD process the Appellant had embellished and exaggerated his claims and it identified inconsistencies in his account. In addition, it found that the political landscape in Bangladesh had materially changed with the result that it concluded that any risk of harm that the Appellant may have faced as a result of his support for the BNP had diminished. It concluded that: "There is no reasonable possibility that the Applicant would be killed or otherwise seriously harmed due to his low level political activities in support of the BNP [Bangladesh Nationalist Party], any fear of persecution is not well-founded and he is not a refugee within the meaning of the Convention on this basis."[1]

14. The Tribunal also found that the Appellant "does not have a fear of being harmed by people smugglers or agents" and is not a refugee on this basis,[2] that he does not have a well-founded fear that he will be persecuted because of the way his travel to Australia was facilitated and is not a refugee on this basis[3] or that he will be persecuted as a failed asylum-seeker[4] or because of debts that his father had incurred.[5] Considering his claims individually and cumulatively, it found that he did not meet the criteria for being account a refugee.[6]

15. The Tribunal did not accept that the Appellant faced a risk of harm as a result of climate change or being arbitrarily deprived of his life and/or subject to torture, cruel, inhuman (or inhumane) or degrading treatment or punishment, including deprivation of social, economic rights sufficient to arouse feelings of fear and anguish or the imposition of the death penalty to return to Bangladesh.[7] Thus, it found that returning the Appellant to Bangladesh would not breach Nauru's international obligations.[8]

---

[1] Tribunal decision, at [96].
[2] Tribunal decision, at [99].
[3] Tribunal decision, at [105].
[4] Tribunal decision, at [108
[5] Tribunal decision, at [119].
[6] Tribunal decision, at [120[.
[7] Tribunal decision, at [131].
[8] Tribunal decision, at [132].

THIS APPEAL

16. The Appellant's Further Amended Notice of Appeal dated 29 May 2025 asserts that:

    1. The Tribunal was not correctly constituted as Member Murray did not meet the eligibility criteria under reg 4 of the Refugee Convention Regulations.
    2. The Tribunal failed to undertake sufficient effort to consider the appellant's country information submissions.
    3. The Tribunal relied on country information at footnote 5 that was not notified to the appellant, which was procedurally unfair.

Ground 1

17. Ground 1 is a new ground, not raised in the Amended Notice of Appeal. Pursuant to cl 14 of Practice Note No 2 of 2015 issued by the Court on 22 October 2015, an Appellant can amend their grounds of appeal "no later than 28 days prior to the day fixed for hearing of the appeal." To do so otherwise requires leave of the Court.

18. On 21 March 2025, this matter was listed for hearing in June. Thus, the Appellant requires leave to rely on the new ground. The Respondent has opposed this grant of leave and has argued that it is not necessary in the interests of justice for time to be extended and it would be unjust to grant the leave.

19. In an affidavit dated 29 May 2025, Neha Prasad, a solicitor employed by Craddock Murray Neumann Lawyers (the solicitors for the Appellant) explained that on 13 May 2024 counsel settled the grounds and submissions in the current case and that she was unwell and that she made an error in filing the grounds, omitting the first ground identified by counsel and replaced it with an incorrect ground on the amended notice of appeal. She took full responsibility for the error.

20. Eric Zheng Yu Zhang, a solicitor employed as a Senior Associate by Craddock Murray Neumann Lawyers, who represent the Appellant, also swore an affidavit, dated 29 May 2025, going to whether the error of Ms Prasad has perpetrated an unfairness on the Respondent. He contends that the Respondent has been on notice for several months that Member Murray's eligibility to sit on the Tribunal as a decision-maker has been contested.

21. On 28 March 2025 he emailed the Solicitor for the Respondent regarding refugee appeals to be heard in April 2025, expressing such concerns about Ms Murray's eligibility and on 30 March 2025 the Respondent received an email from him stating, amongst other things, that:

    > With respect to Ms Murray, we note that regulation 4 of the Refugee Convention Regulations 2013 (Nr) does not require 'two years of experience sitting on a Tribunal.' We trust this addressed your 'concerns'.

22. It is apparent that the issue in relation to Ms Murray has been raised on other matters. Mr Zhang attached printout from Ms Murray's LinkedIn profile. The solicitor for the Respondent supplied a copy of the same document, along with the resume upon which Ms Murray relied for her appointment. They have been provided to the Court.

LEGISLATIVE PROVISIONS

23. Section 13(1) of the Act provides that the members of the Tribunal "must be appointed by Cabinet in consultation with the Chief Justice" and section 13(3) provides that "the Regulations may prescribe other eligibility requirements for appointment as a member."

24. Cabinet has promulgated regulations under the *Refugees Convention Act 2012* (Nr). They include reg 4 of the *Refugees Convention Regulations 2013* (Nr) which provides as follows:

> **Tribunal Members – eligibility requirements**
> For the purpose of Section 13(3) of the Act, a person is eligible for appointment as a member of the Refugee Status Review Tribunal only if the person has:
> (a) at least 2 years' experience in refugee merits review at a tribunal or equivalent level;
> (b) proven capacity to conduct administrative review;
> (c) thorough knowledge of the UNHCR refugee status guidelines and standards; and
> (d) demonstrated skills in research, clear oral and written communication and use of word-processing software.

25. It is open to the President, with the consent of Cabinet, under section 17(1) of the Act to remove a member of the Tribunal from office on the ground of misconduct or physical or mental incapacity. In addition, section 17(2) states that the President may (not must) remove a member from office if:

> (a) the member ceases to be eligible to be appointed a member (and the ground on which the person ceases to be eligible was prescribed before the appointment of the member); or
> (b) the member fails, without reasonable excuse, to comply with his or her obligation as a member.

26. For the purpose of a particular review, section 19(1) provides that:

> The Tribunal is to be constituted by:
> (a) The Principal Member or a Deputy Principal Member, who will preside; and
> (b) 2 other members.

27. By section 20 of the Act the Principal Member is empowered to reconstitute the Tribunal under certain designated circumstances where the Tribunal's membership would drop below three.

28. Part 5 of the Act deals with appeals from the Tribunal. Importantly, section 43 confers jurisdiction on the Supreme Court:

> (1) A person who, by a decision of the Tribunal, is not recognised as a refugee may appeal to the Supreme Court against that decision on a point of law.

29. Section 44(1) provides that in deciding an appeal, the Supreme Court "may make either of two orders": an order affirming the decision of the Tribunal; or an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.

30. Where the Court makes an order remitting a matter to the Tribunal, it "may" also make either or both of the following orders:

> (a) an order declaring the rights of a party or parties; and
> (b) an order quashing or staying the decision of the Tribunal.

EVIDENCE AS TO MEMBER MURRAY'S BACKGROUND

31. The material before the Court attached to the affidavit of Mr Zhang makes it apparent that Ms Murray has diverse experience within government as a senior policy and research officer and manager. Since August 2024 she has been a member of the Tribunal. Earlier, between January and December 2015 she worked as a "Refugee Status Determination Lawyer" for the Republic of Nauru. She described her duties as including preparation of refugee status determination (RSD) decision records, legal documents, templates, forms, advice, policies and guidelines, as well as day-to-day management of the RSD office, stakeholder management and oversight of RSD Registry staff. In addition, between September 2013 and September 2014 she worked as a Legal Officer for the Migration Review Tribunal & Refugee Review Tribunal, describing her duties to include provision of oral and written legal advice and support to Tribunal members and staff in relation to migration, privacy and administrative law matters.

SUBMISSIONS ON BEHALF OF THE APPELLANT

32. On behalf of the Appellant Mr Aleksov of counsel contended that Member Murray was ineligible for appointment because she did not have "at least 2 years' experience in refugee merits review at a tribunal or equivalent level" as required by Regulation 4. Thus, when she sat on the Tribunal in the case involving the Appellant she was ineligible to do so by reason of her appointment not having been in compliance with what was open by law to Cabinet by virtue of its own Regulation. Accordingly, the Tribunal was only constituted by two members with

the result that it was not quorate in terms of the requirement under section 19 of the Act.

33. On the interpretation of Regulation 4 he contended that Ms Murray not only needed to have experience in "refugee merits tribunal", but that that experience needed to be "at a tribunal (or equivalent level) and it needed to have extended for at least two years.

34. He accepted that the expression "at tribunal or equivalent level" allows for some flexibility as to how the "refugee merits review" experience has been obtained – it need not be on a Tribunal per se but allows for service at an "equivalent level". However, he argued that the "equivalency" contemplated requires at least that the refugee decision-making be at least review of (on the merits) another person's decision – to constitute actual decision-making, not mere provision of advice. He contended that that might comprehend non-statutory processes that have, at times, been used in Australia such as the International Treaty Obligations assessment (ITOA) or similar mechanisms. He argued that at least this much is required; otherwise the "equivalency" is meaningless – primary or first instance decision-making, and certainly giving of guidance or policy advice, or drafting documentation, are not equivalent to review level decision-making. This meant that Member Murray does not have the requisite experience in decision-making and so was ineligible to be one of the members making the decision in relation to the Appellant.

35. He emphasised that the appeal brought by the Appellant was against a decision of the Tribunal. He stated that it was not to the point that Ms Murray participated in the decision; the issue was that the Tribunal made a decision with only two properly appointed members, contrary to the requirements of section 19 of the Act, meaning that as a matter of law it did not have authority to make the decision against which the Appellant appealed.

36. He argued that the Court should give leave to permit the additional ground of appeal outside the period permitted for amendment of grounds of appeal, namely "no later than 28 days prior to the day fixed for hearing of the appeal" on the basis that a reasonable explanation for the deficit had been provided by the affirmed affidavit of Ms Prasad and on the basis that the Respondent had known for some time about the concern raised by Craddock Murray Neumann Lawyers in relation to the appointment of Member Murray so was neither surprised by the ground nor prejudiced by it.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

37. Mr Brown of Senior Counsel for the Respondent opposed the grant of leave to rely on the new ground, contending that it was not necessary in the interest of the administration of justice for time to be extended, and that it would not be just to grant leave.

38. He argued that the jurisdiction of the Supreme Court does not extend to make a challenge to a collateral decision of Cabinet to appoint Tribunal members. He

contended that the decision would have consequences for Ms Murray, who was not a party to the appeal.

39. He argued too that the correct procedure would have been for an application for judicial review against the appointment of Ms Murray which would have required leave.

40. He also contended that Regulation 4 of the *Refugees Convention Regulations 2013* is inherently evaluative, *as* is apparent from the nature of the considerations required to be applied in paragraphs (b), (c) and (d) of the regulation, and so should be interpreted broadly.

41. He also argued that the requisite experience to comply with paragraph (a) was not confined to being a member of the Tribunal for the requisite period but could extend to the discharge of other duties in respect of "refugee merits review". He asserted that it was not appropriate for this Court to circumscribe the broad discretion of Cabinet in this regard.

42. Mr Brown pointed out that as a matter of fact Member Murray had been appointed to the Tribunal by Cabinet and that there exists flexibility for members to continue to discharge their functions, even in circumstances contemplated under section 17(2)(a) of the Act. He asserted that ineligibility for appointment does not automatically result in removal.

CONSIDERATION

Ground 1

43. The issue raised in proposed further amended Ground 1 is important. It goes to the entitlement to discharge their functions of an appointed member of a tribunal which carries statutory responsibilities in relation to the weighty matter of determination of refugee status.

44. The question of whether to allow a proposed new ground is fundamentally whether it is expedient to do so in the interests of justice.[9]

45. The bases for permitting such amendment include:

    1) Do the new legal arguments have a reasonable prospect of success?

    2) Is there an acceptable explanation of why they were not raised below?

    3) How much dislocation to the Court and efficient use of judicial sitting time is really involved?

    4) What is at stake in the case for the Appellant?

---

[9] *Water Board v Moustakas* (1988) 180 CLR 491 at 497 (Mason CJ, Wilson, Brennan and Dawson JJ

5) Will the resolution of the issues raised have any importance beyond the case at hand?

6) Is there any actual prejudice, not viewing the notion of prejudice narrowly, to the respondent?

7) If so, can it be justly and practicably cured?

8) If not, where, in all the circumstances, do the interests of justice lie?[10]

46. Generally speaking, courts are more likely to permit a fresh issue to be raised when the new point turns upon a question of construction or upon a point of law and where the facts are not in controversy.[11]

47. There is a particular sensitivity to whether the interests of justice favour a grant of leave in refugee cases because of the potential for very serious consequences to flow from a decision adverse to an Appellant.[12]

48. The merit of a proposed new ground is an important consideration.[13]

49. The proposed amended ground in this matter was filed late but an explanation for the error has been provided. It was attributable to human error as a result of unwellness. It is reasonable explanation. The issue is important and it has reasonable prospects of success (see below).

50. I find that it is in the interests of justice that so important a matter as the lawful constitution of the Tribunal be determined. The Respondent has been made aware of concerns about this issue for some time so has not been materially prejudiced by the issue being raised in the way that it has. Senior counsel for the Respondent assembled detailed arguments on the substantive issue with considerable subtlety and competence.

51. Accordingly, it is appropriate that leave to amend the proposed grounds of appeal be given.

52. Cabinet, in consultation with the Chief Justice, has been given statutory responsibility for appointment of members of the Tribunal. It has chosen to do so by promulgating regulations, as is open to it under section 13(3) of the Act.

53. The fact that it is Cabinet that both appoints and makes regulations in this regard is not to the point. The legislature has established a legal process and Cabinet

---

[10] *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51; [2005] FCAFC 134 at [166] (Madgwick J with whom Conti J agreed).

[11] *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319 (Mason J); *Melbourne Stadiums Ltd v Santner* [2015] FCAFC 20 at [126]-[131] (Tracey, Jagot and Beach JJ).

[12] *Iyer v Minister for Immigration and Multicultural and Indigenous Affairs* [2000] FCA 1788 at [22] (Heerey, Moore and Goldberg JJ).

[13] *ARK16 v Minister for Immigration and Border Protection* [2018] FCA 825 at [25].

has promulgated subsidiary legislation in the form of the Regulations. By force of law, Cabinet must adhere to the Regulations, although at any time, of course, it is open to Cabinet to amend such regulations and to ease or tighten the criteria for appointment of Tribunal members.

54. However, should Cabinet appoint a person as a Member of the Tribunal who is not eligible for appointment, it fails to act consistently with its own Regulations, and the appointment is fundamentally flawed.

55. This could be challenged by an application to this Court for judicial review, as noted by the Respondent, but the availability of such recourse does not derogate from the fact that decisions made by a Tribunal containing an ineligible member are inquorate and fundamentally flawed as a matter of law.

56. Should a person be appointed by Cabinet when ineligible for appointment, the appointee cannot participate as a Member in decisions on merits review. For them to do so would result in merits review by a person whose appointment as a matter of law was not open. Such an appointment is void and of no effect because they were not eligible ab initio for appointment. In this way section 19, whose provisions are mandatory in respect of constitution, would be breached because the requisite number of members would not constitute the Tribunal and therefore its decision was void.

57. An important question, then, is whether it was open to Cabinet, extending suitable latitude to the decision, to conclude that Member Murray had "at least 2 years' experience in refugee merits review at a tribunal or equivalent level."

58. In my view, Regulation 4(a) is deliberately prescriptive and requires, amongst other things, a significant period of experience (at least two years) in the apposite area – refugee merits review. It is not necessary for the current purpose to determine the precise nature of the required experience, or to interpret the terms of paragraphs (b), (c) or (d), which plainly leave considerable scope for evaluation, but it is plain that the experience prescribed as mandatory in para (a) must be for the required period.

59. On any reasonable interpretation, Ms Murray did not have the requisite experience to satisfy Regulation 4(a), and the Respondent has not seriously argued to the contrary. Therefore she was not eligible for appointment and ipso facto to sit as one of the three members of the Tribunal which made its decision on 3 February 2025 that was contrary to the interests of the Appellant.

60. It is correct that the issue could, alternatively, have been raised by an application to this Court for judicial review of the decision by Cabinet to appoint Ms Murray but the constitution of the decision-making of the Tribunal is clearly an appeal against the decision "on a point of law", namely the lawfulness of the decision made by the Tribunal on 3 February 2025. Thus, I find that the appeal was properly brought on this basis.

61. I conclude that the decision by the Tribunal in this matter was not lawfully open to it by reason of the requirement for constitution of the Tribunal by three members as prescribed by section 19 of the Act. Therefore Ground 1 is made out.

62. In the light of my decision on Ground 1, it is not necessary for me to decide Grounds 2 or 3.

63. The decision of the Tribunal is quashed and the matter remitted to the Tribunal, as lawfully constituted.

CONCLUSION

64. Under section 44(1) and (2) of the Act, I make an order extending the time for amending the Appellant's grounds of appeal and order the quashing the decision of the Tribunal and remitting the matter for reconsideration by the Tribunal lawfully constituted in accordance with section 19 of the Act.

Justice Ian Freckelton AO
Dated this 4th day of June 2025