IN THE SUPREME COURT OF NAURU

AT YAREN

Appeal No. 05 of 2024

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

BETWEEN:

AE25

Appellant

AND:

REPUBLIC OF NAURU

Respondent

Before: Brady J

Dates of Hearing: 2 May 2025

Date of Judgment: 04 July 2025

Citation: *AE25 v Republic of Nauru*

CATCHWORDS:

APPEAL – Refugees – Refugee Status Review Tribunal – Whether leave to appeal out of time – Extension granted where Appellant adequately explained delay pursuant to s 43(5) Refugees Convention Act – Whether the Tribunal afforded procedural fairness to the Appellant by failing to notify him of issue on review which was not apparent to the Appellant? – Tribunal failed to afford procedural fairness – Order to quash Tribunal decision – Order to remit the matter to the Tribunal for reconsideration – APPEAL ALLOWED.

LEGISLATION AND OTHER MATERIAL

Refugees Convention Act 2012 (Nr) ss 40, 41, 43, 44.

CASES CITED

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152 at [32]-[36], [46]-[49]; *Commissioner for Australian Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591, 592; *SOS 005 v Republic of Nauru* [2023] NRCA 18 at [73]-[78]; *Minister for Immigration and Multicultural Affairs, Ex parte Miah* [2001] HCA; (2001) 206 CLR 57 at [31]; *DWN 84 v Republic of Nauru* [2017] NRSC 84; *QLN 116 v Republic of Nauru* [2017] NRSC 63 at [56]

APPEARANCES:

Counsel for Appellant:	Mr A Aleksov (instructed by Craddock Murray Neumann)
Counsel for Respondent:	Mr R O'Shannessy (instructed by Republic of Nauru)

JUDGMENT

INTRODUCTION

1. The Appellant is a national of Bangladesh who arrived in Australia in May 2024. On 1 June 2024, he was transferred to Nauru, pursuant to the Memorandum of Understanding between the governments of Nauru and Australia. He made an application for refugee status in Nauru on 23 June 2024.

2. The Appellant claims to be a supporter of the Bangladesh Nationalist Party (**BNP**). He claims to have attended a BNP meeting with 60 people on or around 2 October 2017. He says that around 100 supporters of the Awami League (**AL**) came to the meeting and a fight broke out between BNP and AL supporters. The Appellant says that he was beaten and suffered an injury for which he received stitches.

3. The Appellant thereafter left his village. He returned to visit his family in October 2023. He claims that he was confronted by AL supporters on that occasion.

4. Pursuant to section 43 of the Refugees Convention Act (Nr) (**The Act**), the Appellant appeals from a decision of the Refugee Status Review Tribunal (**Tribunal**) made on 10 January 2025 (**Tribunal Decision**). The Tribunal affirmed a decision of the Acting Secretary of the Department of Multicultural Affairs (**the Secretary**) dated 28 August 2024 not to recognise the Appellant as a refugee. It also found that he is not owed complementary protection under the Act.

5. By subsection 43(1) of the Act, the Appellant may appeal to this Court on a point of law. By subsection 41(1) of the Act, this Court may make either of the two following orders:

    a. an order affirming the Tribunal Decision; or

    b. an order remitting the matter to the Tribunal for consideration in accordance with any directions of this Court.

6. Subsection 44(2) of the Act provides that where this Court makes an order remitting the matter to the Tribunal, the Court may make either or both the following orders:

    a. An order declaring the rights of a party or of the party; and

    b. An order quashing or staying the decision of the Tribunal.

GROUND OF APPEAL

7. By his amended notice of appeal filed 28 March 2025, the Appellant pursues a single ground of appeal as follows:

    "1. The Tribunal did not afford procedural fairness to the Appellant, by failing to notify him of an issue in the review that was not apparent to the Appellant, being his attendance at the October 2017 meeting."

THE FACTS AS CONTENDED BY THE APPELLANT

8. The Appellant makes the following contentions.

9. The Appellant is a supporter of the BNP. He grew up in a family of BNP supporters and actively started supporting the party in 2015.

10. The Appellant's support for the BNP involved attending meetings and processions and by helping to recruit new members.

11. On 2 October 2017, the Appellant attended a BNP meeting with 60 people in a village near his hometown. Approximately 100 supporters of the AL came to that venue and a fight broke out between BNP and AL supporters. The Appellant was beaten and suffered a gash to his head for which he received stitches.

12. The Appellant's father told him to leave the village as he wanted a peaceful life. The Appellant and his family were intimidated by AL supporters and feared that false charges would be filed against them.

13. On 4 October 2017, the Appellant left his village for Dhaka. On 9 October 2017, the Appellant flew to Malaysia. His travel was organised by his maternal uncle.

14. Whilst the Appellant was in Malaysia, he found out that AL supporters had lodged a case against everyone who had attended the BNP meeting in October 2017. His family paid corrupt authorities, and nothing came of the case.

15. The Appellant returned to Bangladesh to visit his family in October 2023. At a tea stall in his home village, he was confronted by AL supporters who asked him why he did not support the AL. They told him to register as a voter for the upcoming election, but he refused, and a fight broke out.

16. The night before the election in early 2024, the Appellant was visited at home by AL supporters. They asked him if he was voting the next day. He told them that he was not going to vote as he had not registered. They told him to turn up anyway.

17. On election day, the Appellant found out that AL supporters in his village were furious that he had not voted and had discussed assaulting him. The Appellant left his home that night and went to his aunt's house.

18. The Appellant returned to Malaysia. His visa expired on 21 March 2024 but because of the most recent incidents that occurred when he last returned to Bangladesh, he could not return again and therefore left for Australia to seek asylum.

PROCEDURAL HISTORY

19. The Appellant made his application for refugee status determination (**RSD**) on 23 June 2024. On 4 July 2024, the Appellant was interviewed together with a representative by the Claims Assistance Provider and was assisted by an interpreter.

20. The Secretary made a decision (**Secretary's Decision**) on 28 August 2024. The Appellant applied to the Tribunal on 5 September 2024 to review the Secretary's Decision.

21. The Appellant's representative made detailed written submissions to the Tribunal on 13 December 2024 (**Appellant's Submissions**). The Appellant's Submissions were accompanied by a further statement of the Appellant dated 11 December 2024. On 17 December 2024, the Appellant appeared before the Tribunal to give evidence and present arguments. He was represented at that hearing and was assisted also by an interpreter.[1]

22. The Tribunal Decision was delivered on 10 January 2025.

23. The notice of appeal to this Court was filed on 10 February 2025. I heard argument on the appeal, and the application for extension of time in respect of the appeal, on 2 May 2025.

LEAVE TO APPEAL OUT OF TIME

24. As I have noted above, the Tribunal Decision was delivered on 10 January 2025. On the same day, a copy of the decision was provided by email to the Appellant's representative.[2] Consistent with the provisions of subsection 43 (3) of the Act, the Appellant then had 21 days to commence his appeal. That period expired on 31 January 2025. The appeal to this Court was not commenced until 10 February 2025.

25. The Appellant therefore has sought leave to commence the appeal out of time in accordance with section 43 (3) of the Act.

Explanation for the Delay

26. On 26 November 2024, the limitation period for commencing appeals to this Court under s 43(3) of the Act was reduced from 42 days to 21 days, following the commencement of the *Refugee Convention (Amendment) Act* 2024 (Nr).

27. Ms Neha Prasad is a barrister and solicitor of the Republic of Nauru. She affirmed her affidavit in support of the Appellant's application for leave to commence this appeal out of time. Ms Prasad is employed by Craddock Murray Neumann Lawyers (**CMN**) who are contracted to provide legal assistance to asylum seekers in the conduct of appeals in this Court. She oversees the conduct of this matter.

28. Ms Prasad relevantly deposes as follows:

> "[8]. At the time that I received the [Tribunal Decision i.e. 10 January 2025], I was on leave due to pre-existing arrangements with CMN and was not scheduled to return to the office until 13 January 2025, noting that the offices of CMN were closed from 20 December 2024 to 6 January 2025. However, due to contracting a severe stomach bug whilst abroad in Delhi, India, I was unable to return to work until 18 January 2025.
>
> [9]. Upon returning to work on 18 January 2025, I began organising and allocating work on the basis that the limitation period under s 43(1) of the RC Act had

[1] I note that paragraph 12 of the Tribunal Decision refers to an appearance on 12 December 2024. This appears to be in error given that the transcript of the hearing is dated 17 December 2024. Nothing turns on this error.
[2] Affidavit of Neha Prasad sworn 23 April 2025 (**Prasad Affidavit**) at [7].

not changed, such that the Appellants receiving a negative decision by the Tribunal were afforded 42 days to file a notice of appeal within time. The work referred to includes instructing staff to conduct a hand down of Decisions and advising Appellants of their appeal rights.

[10]. On this basis, I am confident that my first reading of the Registrar's email [attaching the Tribunal Decision] would have caused me to subsequently forecast the final date for filing the notice of appeal within time as 21 February 2025. More so, I have projected deadlines filing notices of appeals commenced under the RC Act in this fashion since commencing my employment with CMN in March 2020.

[11]. On 10 March 2025, I received an email from Mr Rogan O'Shannessy, solicitor for the Republic in this matter, and solicitor acting for the Republic in statutory appeals commenced by Appellants pursuant to s 43(1) of the RC Act…

[12]. I confirm that from the commencement of the Amendment Act until receipt of Mr O'Shannessy's email dated 10 March 2025, our offices have not otherwise received any correspondence or notification regarding said legislative amendments. For these reasons, I believe that the delay in the filing of the notice of appeal arose from a genuine and honest gap in information given that the parties have historically operated under the timelines previously in effect.

[13]. I note that since the commencement of my employment in March 2020, the Republic has not opposed applications for extension of time under s 43(3) of the RC Act, whilst fully acknowledging the responsibility to stay abreast of legislative and/or procedural amendments. In this connection, we sincerely apologise to the Court and the Respondent for the belated commencement of this appeal and respectfully seek for an extension of time to be granted."

29. Thus, as can be seen from Ms Prasad's affidavit, the explanation for the delay in filing the notice of appeal was a belief within the Appellant's solicitor's office until 10 March 2025 that the 42-day period after the Secretary's Decision remained the relevant appeal period for the purposes of making an application to this Court. Unbeknownst to Ms Prasad, the legislation had changed in late November 2024, reducing the 42-day period to 21 days. I am satisfied that the Appellant has adequately explained the 10-day delay between the expiry of the appeal period on 31 January 2025 and the appeal being lodged on 10 February 25.

Outcome of the Application

30. The Republic does not take issue with the Appellant's explanation for the need for delay. It accepts that there is an adequate explanation for the delay. The Republic does not submit that it would suffer any specific prejudice if leave were to be given to the Appellant to appeal out of time.

31. Nevertheless, the Republic opposes the grant of an extension of time in this case on the basis that it is not necessary in the interests of the administration of justice to make an order extending time because the appeal does not enjoy sufficient merits.

32. For the reasons that I set out below, I consider that but for the need for leave to appeal, the appeal would succeed.

33. Accordingly, in circumstances where the delay is explained, no prejudice is alleged by the Republic, and the ground of appeal would otherwise succeed, I consider it appropriate to make an order pursuant to s 43(5) of the Act extending the 21-day period prescribed by s 43(3) to 5:00 pm on 10 February 2025.

GROUND OF APPEAL – LACK OF PROCEDURAL FAIRNESS

Nature Of Ground

34. The Appellant argues that he was not afforded procedural fairness as required under the Act because the Tribunal failed to notify him of a significant issue in the review. In essence, one of the Appellant's significant claims was that he had participated in a BNP meeting in October 2017 which had been disrupted by rival political operatives and which led to him suffering violence.

35. The Secretary accepted that the Appellant attended this meeting. He also accepted that the Appellant was beaten and suffered an injury as a result of his attendance at that meeting.

36. The Tribunal, however, did not accept that the Appellant attended the meeting or that he was attacked and injured.

37. The Appellant contends that he was asked about the meeting by the Tribunal only very briefly. He says that it was procedurally unfair to conduct the review without notifying him that his attendance at the BNP meeting in October 2017 was in doubt. The Appellant therefore contends that the Tribunal did not afford him procedural fairness and the matter ought to be remitted to the Tribunal.

Relevant Passages from the Secretary's Decision

38. The findings of fact and credibility commenced on page 4 of the Secretary's Decision. In relation to the BNP meeting in October 2017, the following passage is found at page 5 of the Secretary's Decision:

> "The [Appellant] claimed to have attended a BNP meeting at [B] bazaar attended by approximately 60 other people. He claimed this was attended by local BNP leaders and was called to discuss future planning and strategies for the parties. The [Appellant] claimed that AL supporters found out about the meeting and approximately 100 of them came to the venue to disrupt it. A fight erupted between BNP supporters and AL supporters. The [Appellant] claimed he was injured by a blow to the head with a stick. Others were far more seriously injured than him.
>
> The [Appellant's] description of the meeting was sufficiently detailed and plausible as to be credible. The attendance at such a meeting by AL supporters and the eruption of a fight between the rival groups is consistent with country information regarding the climate of political violence in Bangladesh, discussed further below. Accordingly, I accept the [Appellant's] claim that he attended a rally in October 2017."

39. The summary of findings regarding the Appellant's claims is found starting on page 7 of the Secretary's Decision. One of the relevant findings was in the following terms:

> "I find the following of the [Appellant's] claims to be credible:
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> ...
>
> - The [Appellant] attended a BNP meeting with 60 people in [B] bazaar on or around 2 October 2017. Around 100 supporters of the AL came to the venue and a fight broke out between BNP and AL supporters. The [Appellant] was beaten and suffered a gash to his head for which he received stitches."

Transcript of the Tribunal Hearing

40. The Appellant appeared before the Tribunal on 17 December 2024 together with his representative and an interpreter. The following passages from the transcript of that hearing were specifically referred to by the parties during the course of argument during the appeal.

41. At T2 lines 19 to 24, the following passage appears:

> "Ms Boddison: ... And so we look over all material and what you tell us today, and we make a completely new decision as to whether or not you're a refugee or owed complementary protection. And because it's a completely new decision, you shouldn't assume that we're going to come - we could agree with some that the Secretary accepted, or we might disagree with some of the things the Secretary accepted."

42. At T10 commencing at line 8, the following passage appears:

Ms Boddison:	Okay. With your involvement with the BNP, how many meetings or processions did you go to roughly?
The interpreter:	To a lot. It is hard for me to confirm.
Ms Boddison:	When you say a lot, did you go to them, you know, weekly, monthly?
The interpreter:	Sometimes in 2, 3 months, sometimes once in a month.
Ms Boddison:	And you've said that there was one in October 2017, that you were injured at. Were you ever injured in any other meetings or processions?
The interpreter:	No.
Ms Boddison:	So why was there being a meeting held in October 2017?
The interpreter:	Since the election in 2018 was upcoming, we were getting ready. And this meeting happened in [X] so, this meeting would be with around 100 people more or

less than that, however, it was held in the BNP office. And the Awami League people came there, and they were asking us, why are you holding this meeting. We told them, this is our meeting, we are not harming anyone. We are just meeting with people here, and we are trying to get more people to involved in here. They didn't like it, they said, you cannot do it here, then they went away to get even more people so that they can create problem. Then they came back and there was this fighting going on, they started beating us up. I don't know, at one point somehow, I got a strike on my head, and probably it was with a rod, I'm not sure. But there was a fracture, and then I somehow fled to my maternal uncle's house.

Ms Boddison: When you say fractured, do you mean broken bone or broken skin?

The interpreter: I needed a stitch.

Ms Boddison: Where did you get it stitched?

The interpreter: In my maternal uncle's place.

Ms Boddison: Was [R] at that - was he one of the Awami League people that came?

The interpreter: In the beginning, he was not but I don't know whether he came later.

Ms Boddison: So you're not sure whether he's there or not?

The interpreter: Not sure.

43. Starting at T13 line 13, the following passage appears:

Ms Boddison: And you told the RSD officer that you didn't really want to leave Bangladesh. You couldn't see that there was really a problem, but it was your father that was insistent on you leaving.

The interpreter: That is true. In 2017, my father insisted this to my uncle that, arrange something so that he can leave the country, otherwise, something bad might happen, and then I will have to go through that. Therefore, my uncle arranged everything and sent me overseas.

Ms Boddison: But did you think something bad might happen if you didn't go overseas?

The interpreter: Yes.

Ms Boddison: And what did you think might happen?

The interpreter: I would have met some sort of accident, I'm sure. And since I was younger, it was my young age, and there is an arrangement so that I can go overseas, since I am having issues in the country, let's go overseas.

Ms Boddison: Sounds a bit different to what you told the RSD officer. You (indistinct) volunteer, that it was your father, and you didn't think you really needed to leave, there wasn't a problem.

The interpreter: Yes. That is true, but I also thought that there is good in it for me. I will be saved from these issues, and on top of that, I will be able to go overseas.

Ms Boddison: Okay. And I will just cover one thing right before we have a break. You said that your false charges were laid against you whilst you were overseas.

The interpreter: Yes.

Ms Boddison: And when were they laid?

The interpreter: It was done in that same - at the same time in 2017, but I got to know about it later when my father told me, there has been a false case against you, but don't worry about it, I'll see what I can do about this issue. Therefore, my father spent some money. And it took two and a half years to resolve that issue. It cannot be resolved in one day, he had to do it step by step.

Ms Boddison: And what were you charged with? What was the allegation?

The interpreter: Can I get a clarification please?

The allegation was that I am making bad remarks, talking ill about them. I am making bad comments about the government, and therefore, people are becoming angry.

Ms Boddison: And do you know whether anyone else had these false charges laid against them?

The interpreter: Yes, another two people.

Ms Boddison: Two people. Were they also at that meeting?

The interpreter: Yes, they were in the meeting.

Ms Boddison: We might just – we've been going for about an hour, so we might just have a short break. So the hearing is adjourned at 10:40.

Ms Boddison: The hearing is resumed at 10:52. I just want to ask you a few more questions about these false charges. The other two people who were charged, do you know who they were?

The interpreter: Yes, I know.

Ms Boddison: And do you know why it was just the three of you that were charged?

The interpreter: I know that three of us were charged, but there might be other people whom I don't know about.

Ms Boddison: So how did you know about the other two?

The interpreter: Because they are from my neighbouring village.

Ms Boddison: Oh, you were in contact, sorry?

The interpreter: On top of that, we used to hang around together.

Ms Boddison: So were you in contact with them after the demonstration – meeting, sorry?

The interpreter: No, no contact with them because I got to know about these things from my father.

Ms Boddison: You previously said that everyone at the meeting was charged with these false charges?

The interpreter: Yes, I know these two were from [X] village, but I don't know the others.

Ms Boddison: Well, both in your statement and at the RSD interview, you said your father had told you that everybody at the meeting was charged.

The interpreter: I'm not entirely incorrect [sic] about this, but I say that most of the men were charged because they were in a meeting, that sort of thing.

Ms Boddison: And you told the RSD officer that the charge involved making a bomb?

The interpreter: When I told that the charges were against me and those other people, that we are harming the country, we are creating a bomb so that it can harm the country, it can make the people angry. We were commenting against

the government and as a result, we were creating unrest and problems.

Ms Boddison: But before the break, I asked you what the charges were, and you said it was saying bad things about the government.

The interpreter: That is true. Bad things - saying bad things or commenting about the government and creating problems in the country.

Ms Boddison: But you didn't mention the bomb.

The interpreter: Because my father couldn't correctly tell me whatever was involved in the charges and I somewhat guessed what can be in the charges because it was saying that we are - we were doing bad things for the country, creating problems, getting people angry, commenting bad things about the government. So we sort of - the charges were sort of different bad things, and one of them can be making a bomb to create problems. And what my father told me, you don't have to think about the details regarding this case. Since you're in Malaysia, just focus on your work, I'll handle these things here."

The Relevant Passages from the Tribunal Decision

44. The Tribunal started its assessment of the evidence at [89] of the Tribunal Decision. At [90], the Tribunal noted that "there was much about the [Appellant's] account that did not make sense or was implausible". The Tribunal found that there were "a number of significant inconsistencies" which reflected adversely on his credibility.

45. Commencing at [93], the following passage is found:

"[93]. The [Appellant] has never voted for the BNP as he has never had a voter ID card. The Tribunal accepts that there was an error in his birth certificate that caused an issue for him getting a voter ID card. It was eventually rectified in November 2023. The Tribunal does not understand why he did not try to rectify this earlier, say once he was 18, to enable him to vote if he was a BNP supporter. In any event, this does not convey any sense that the [Appellant] is politically engaged.

[94]. The [Appellant] claims that he was at a meeting of the BNP in 2017. According to his account at the RSD interview, this was not a procession, but a smallish meeting of around 60 people attended by a few members of the general public and the secretaries and influential leaders of the BNP. The purpose of the meeting was to discuss tactics and policies. The meeting was about future planning about how to run the party and what strategies to implement, how to treat people, and how to revive the party. On the [Appellant's] account, he was one of the few members of the general public

present. Given he was not a member and he was not a voter, there would be no reason for him to attend a high-level meeting of the party like this.

[95]. Although the Tribunal acknowledges that the [Appellant] has been generally consistent regarding this claim, due to the above concerns and the general credibility issues discussed below, the Tribunal does not accept that the [Appellant] was involved in a confrontation with the Awami League at a BMP meeting where he was attacked and injured. The [Appellant] may have a scar but the Tribunal does not accept that it was caused in the way the [Appellant] claimed.

[96]. Consequently, the Tribunal does not accept that this was the incident that prompted him to leave Bangladesh. The Tribunal notes that the [Appellant] already had a passport and on his own evidence was planning to leave Bangladesh to live and work abroad. The Tribunal does not accept that he left any earlier than he otherwise planned.

[97]. The Tribunal notes the significant inconsistencies regarding the [Appellant's] evidence regarding the false charges that he claimed were brought against him as consequence of attending this meeting. His initial evidence was that everyone at the meeting was charged, he told the RSD officer almost everyone at the meeting was charged; he told the Tribunal that, to his knowledge, he and two others were charged. He could not explain this inconsistency other than to say there may have been others charged who he did not know about.

[98]. At every stage he said that he was not really clear about the details of the charges as his father said he would take care of it. The Tribunal would have expected the [Appellant] to take an interest and have more knowledge of the charges in light of the fact his evidence to the RSD officer was that they involved very serious matters and took over two years to resolve. Further, given he told the Tribunal he contributed to the money that his father paid to resolve the charges, the Tribunal would have expected him to take a greater interest.

[99]. There is a discrepancy in what he could remember about the charges, telling the RSD officer that they involved creation of a bomb, doing damage to the country, setting fire on cars and buses and damaging government property. He told the Tribunal he was accused of making bad remarks and talking ill about the government, making bad comments about the government - therefore people are angry. The Tribunal is of the view that this is significantly different. Due to the inconsistencies in the [Appellant's] account and the vague nature of his evidence, the Tribunal does not accept that false charges were laid against the [Appellant].

[100]. This also reinforces the Tribunal's view that the [Appellant] was not involved in an altercation at a meeting in October 2017."

46. The Tribunal summarised its findings at paragraph [125] of the Tribunal Decision in the following terms, relevantly:

"[The Appellant] did not participate in a BNP meeting in October 2017 that was attacked by the Awami League. The [Appellant] was not injured whilst participating in any meeting of the BNP."

Relevant Case Law

47. In his submissions, counsel for the Appellant, Mr Aleksov, took the Court in some detail through the facts and findings of the decision of the Australian High Court in ***SZBEL*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152. For the purposes of this part of the judgment, it is only necessary for me to record the following passages of the decision of the High Court (Gleeson CJ, Kirby, Hayne, Callin and Haydon).

48. The High Court starting at [32] referred to the decision in *Commissioner for Australian Territory Revenue v* ***Alphaone*** *Pty Ltd* (1994) 49 FCR 576 at 590 - 591 and adopted what the Full Court there said at [27] in these terms:

> It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. *That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues*, and to be informed of the nature and content of adverse material." (emphasis added to Full Court decision contained in High Court's quote).

49. The High Court proceeded as follows:

> [33] The Act defines the nature of the opportunity to be heard, that is to be given to an applicant for review by the Tribunal. The applicant is to be invited "to give evidence and present arguments relating to *the issues arising in relation to the decision under review*" [Section 425(1] (emphasis in original). The reference to "the issues arising in relation to the decision under review" is important.
>
> [34] Those issues will not be sufficiently identified in every case by describing them simply as whether the applicant is entitled to a protection visa. The statutory language "arising in relation to the decision under review" is more particular. The issues arising in relation to a decision under review are to be identified having regard not only to the fact that the Tribunal may exercise (section 415), all the powers and discretions conferred by the Act on the original decision maker (here, the minister's delegate), but also to the fact that the Tribunal is to review that *particular* decision, for which the decision maker will have given reasons.
>
> [35] The Tribunal is not confined to whatever may have been the issues that the delegate considered. The issues that arise in relation to the decision are to be identified by the Tribunal. But if the Tribunal takes no step to identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what that other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are "the issues arising in relation to the decision under review". That is why the point at which to begin the identification of issues arising in relation to the decision under review will

usually be the reasons given for that decision. And unless some other additional issues are identified by the Tribunal (as they may be), it would ordinarily follow that, on review by the Tribunal, the issues arising in relation to the decision under review would be those which the original decision maker identified as determinative against the applicant. .

[36] It is also important to recognise that the invitation to an applicant to appear before the Tribunal to give evidence and make submissions is an invitation that need not be extended if the Tribunal considers that it should decide the review in the applicant's favour. Ordinarily then, as was the case here, the Tribunal will begin its interview of an applicant who has accepted the Tribunal's invitation to appear, knowing that it is not persuaded by the material already before it to decide the review in the applicant's favour. That lack of persuasion may be based on particular questions the Tribunal has about specific aspects of the material already before it; it may be based on nothing more particular than a general unease about the veracity of what is revealed in that material. But unless the Tribunal tells the applicant something different, the applicant would be entitled to assume that the reasons given by the delegate for refusing to grant the application will identify the issues that arise in relation to that decision.

...

[46] Three further general points should be made.

[47] First, there may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor. But where, as here, there are specific aspects of an applicant's account, that the Tribunal considers may be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted.

[48] Secondly, as Lord Diplock said in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*:

> "the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished."

Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On

the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment.

[49] Finally, even if the issues that arise in relation to the decision under review are properly identified to the applicant, there may yet be cases which would yield to analysis in the terms identified by the Full Court of the Federal Court in *Alphaone.* It would neither be necessary nor appropriate to now foreclose that possibility." (emphasis added)

50. Like s 425(1) of the *Migration Act* referred to in SZBEL, in this jurisdiction s 40(1) of the Act provides that 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".

51. The decision in *SZBEL* has been followed by the Court of Appeal in *SOS 005 v Republic of Nauru* [2023] NRCA 18 at [73]-[78]. Having quoted with apparent approval paragraphs [35] and [47] of *SZBEL* set out above, the Court of Appeal (Wimalasena P, Palmer and Makail JJ) proceeded in these terms:

[75] However, we note that it is not always the case that where a Tribunal has identified certain aspects of an applicant's case during its deliberations, it will be obliged to invite an applicant to comment on them in case the decision it will eventually make will be against the applicant. We note that in addition to explaining this rule of natural justice, the primary judge referred to relevant cases in the High Court of Australia and Federal Court of Australia including a passage by Lord Diplock in F Hoffman La Roche and Co; *AG v. Secretary of State for Trade and Industry* [1975] AC 295 at 369 at [61] of the judgment ...

[76] At [65] of the judgment, the primary judge quoted a passage from the judgment of the Full Court of the Federal Court in *Commissioner for Australia Territory Revenue v. Alphaone Pty Ltd* [1994] FCA 1074; (1994) 49 FCR 576 at 592:

> "Where the exercise of a statutory power attracts the requirement for procedural fairness a person likely to be affected by the decision is entitled to put information and submissions to the decision=maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submissions, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question."

[77] Further, at [64] of the judgment, the primary judge referred to *Minister for Immigration and Multicultural Affairs, Ex parte Miah* [2001] HCA; (2001) 206 CLR 57 at [31] where:

> "Gleeson CJ and Hayne J held that even in a case where an application may be made to a judicial decision-maker and curial standards of procedural fairness apply to the fullest extent, "fairness does not require a judicial officer to make a running commentary upon an applicant's prospects of success, so that there is a forewarning of all possible reasons for failure." To adopt such a course would likely to run a serious risk of conveying an impression of prejudgment."

52. The decision of the High Court in *SZBEL* has also been adopted in this jurisdiction in various first instance decisions, for example *DWN 084 v Republic of Nauru* [2017] NRSC 84 (per Crulci J). The Full Federal Court decision in *Alphaone* has also been adopted at first instance: see *QLN 116 v Republic of Nauru* [2017] NRSC 63 at [56] (per Crulci J).

The Appellant's Arguments

53. The Appellant argues that upon attending the Tribunal hearing, he was entitled to assume that, unless indicated otherwise by the Tribunal, the issues in the case before the Tribunal were those issues which the Secretary had determined adversely to the Appellant. That submission is based upon, in particular, paragraph [35] of SZBEL.

54. The Appellant notes that before the Tribunal, he was asked about the contended October 2017 meeting only very briefly. He submits that the "only question" about the meeting was "why was there a meeting held in October 2017?". Importantly, the Appellant argues that he was never asked about why he was in attendance at the meeting, nor was he asked any question that suggested that the occurrence of the meeting was in any doubt.

55. The Appellant submits that a fair reading of the transcript indicates that the Tribunal did not have any doubts that the meeting occurred at the time of the hearing, or at least did not raise any such doubts with the Appellant. The real issue that arises from the transcript was whether the Appellant experienced the harm he claimed to have experienced at, or following, this meeting.

56. However, the Appellant points to [94] - [96] and [125] of the Tribunal Decision to submit that he was disbelieved about the meeting ever occurring. That was for two reasons: first, being the general adverse credibility issues in relation to other evidence; and second, the Appellant had no reason to be in attendance at a meeting of the kind he had described, since he was not formally a member of the BNP.

57. The Appellant submits that it is not possible to disentangle these two strains of reasoning from the overall conclusion on this point at reasons at [94] - [96]. Nevertheless, the Appellant submits that it is plain enough that the second reason was a material contributing factor to the conclusion (if not the primary reason). Accordingly, the Appellant submits that it was procedurally unfair to conduct the review, and especially the hearing, without notifying him that the occurrence of the BNP meeting in October 2017, and his attendance at that meeting, were factual issues which were in doubt.

58. That was against a background where the Secretary had found favourably to the Appellant on the issue of the occurrence of the meeting. The Secreytary did not doubt

the Appellant's attendance at it. The Appellant was not questioned about the meeting in any robust way so as to expressly, or even implicitly, indicate that he might not be believed about his attendance at that meeting. Instead, the only questioning on the topic might reasonably have indicated to him that the Tribunal accepted that the occurrence of the meeting, and his attendance at it, was not in doubt.

The Republic's Arguments

59. The Republic accepts that the Tribunal is not confined to whatever may have been the issues that the Secretary considered. The Republic points to *SZBEL* to the effect that the Appellant is entitled to assume that the issues arising in relation to the decision under review remain the same as those considered dispositive by the Secretary unless told otherwise.

60. The Republic draws attention to the caution expressed by the Nauru Court of Appeal in *SOS 005* at [75] to the effect that:

> "... It is not always the case that where a Tribunal has identified certain aspects of an Applicant's case during its deliberations, it will be obliged to invite an Applicant to comment on them in case the decision it will eventually make will be against the Applicant."

61. Accordingly, the Republic submits that it follows that any obligation on the Tribunal to ensure that the Appellant was on notice of the dispositive issues does not require the Tribunal to expose its mental processes or provisional views, nor does it require the Tribunal to provide a running commentary on the evidence.

62. The Republic submits that contrary to the Appellant's submissions, the Tribunal did not "expressly reject the Appellant's claim about this meeting ever occurring". The Republic notes that the Tribunal's findings were more specific than that and were limited to (relevantly) findings that the Appellant:

    (a) was not involved in a confrontation with the AL at a BNP meeting where he was attacked and injured (at [95] Tribunal Decision);

    (b) did not participate in a BNP meeting in October 2017 that was attacked by the AL (at [125] of the Tribunal Decision); and

    (c) was not injured whilst participating in any meeting of the BNP (at [125] of the Tribunal Decision).

63. The Republic notes that these findings led the Tribunal to conclude that the October 2017 BNP meeting did not prompt the appellant to leave Bangladesh (at [96] of the Tribunal Decision). Moreover, the rejection of the claim of harm arising out of the October 2017 meeting, in conjunction with the Tribunal's rejection of the Appellant's other evidence of past harm caused by his support for the BNP, permitted the Tribunal to make the finding that the Appellant had not experienced harm as a result of his low-level support for the BNP (at [133] of the Tribunal Decision).

64. The Republic submits that the question of the Appellant's attendance at the October 2017 meeting was not a matter that the Tribunal considered to be significant. The

Republic submits that the determinative issue for the Tribunal, on the Appellant's evidence, was whether the Appellant had been harmed at such a meeting.

65. In relation to this question, the Republic submits that the Tribunal's statements and questioning at the hearing of the review application were sufficient to put the Appellant on notice that the injuries he claimed he sustained at a meeting on 2 October 2017 were in issue:

(a) Firstly, where the Tribunal at the outset of the hearing advised that it may not necessarily consider the same issues as the Secretary found to be relevant (T2, lines 21-24);

(b) Second, the Tribunal asked the Appellant about the purpose of the 2 October 2017 meeting (T10, line 16), the injuries the Appellant sustained at that meeting (T10 line 28), where the Appellant sought assistance stitching his wound (T10 line 30) and whether [R] was one of the AL people that came to the October 2017 meeting (T10 line 33). The Republic submits that such questioning made clear to the Appellant that the Tribunal considered the injuries he claimed resulted from that meeting were the relevant issue.

(c) Third, the Tribunal asked the Appellant a number of questions about the false charges that were said to have been laid against him in respect of the 2 October 2017 meeting, and vigorously tested that evidence (T13 line 32 to T16 line 2) The Tribunal highlighted inconsistencies in it during the course of its questioning. Such questioning indicated to the Appellant that the existence of the false charges was also in issue, and further made clear that his evidence as to the event on which those claims were based was also in issue.

Consideration

66. It is first necessary to identify the basis for the relevant parts of the Tribunal Decision.

67. At [133], the Tribunal noted that the Appellant had not experienced harm as a result of his low-level support of the BNP. At [125], the Tribunal summarised its relevant finding in these terms:

> "[The Appellant] did not participate in a BNP meeting in October 2017 that was attacked by the Awami League. The [Appellant] was not injured whilst participating in any meeting of the BNP."

68. On its own, these findings do not make clear whether there was a finding that the Appellant did not participate in a BNP meeting in October 2017 *at all*. But it is clear that the Tribunal did find that he did not participate in such a meeting that was attacked by the AL. Thus, he was not injured whilst participating in such a meeting because he did not participate in a meeting that was attacked by the AL.

69. It is clear enough that the finding was that he was not injured because there *was* no such meeting which was attacked by the AL.

70. An understanding of the reasoning process by which the finding in [125] was made is to be found in paragraphs [93] to [95]. At [93] it was noted that the evidence did not convey any sense that the Appellant was politically engaged. The purpose of the

October 2017 meeting was said to discuss tactics and policies: at [94]. On the Appellant's account, he was one of the few members of the general public present: at [94].

71. However, "[g]iven he was not a member and he was not a voter there would be no reason for him to attend a high level meeting of the party like this": at [94].

72. At [95], the Tribunal concluded that due to *this matter* (that is, the finding that there would be no reason for him to have attended a high-level meeting of the BNP) and also due to general credibility concerns, the Tribunal did not accept that the Appellant was involved in a confrontation with the AL at a BNP meeting where he was attacked and injured.

73. Thus, it can be seen that the conclusion that the Appellant was not attacked and injured rested on two grounds: first, the finding that there was no reason for him to attend a high-level meeting as described; and second, general credibility concerns about the Appellant described elsewhere in the Tribunal Decision.

74. The reference to "general credibility concerns" is reflected in the terms of paragraph [90] of the Tribunal Decision which noted that "[t]here was much about the [Appellant's] account which did not make sense or was implausible. There was also a number of significant inconsistencies that reflected adversely on his credibility". The evidence in that regard was set out earlier in the Tribunal Decision (e.g. see [39], [41], [46], [53]).

75. The Republic draws attention to one aspect of those general credibility concerns: that related to the Appellant's evidence in relation to the charges that he was said to have faced after he fled Bangladesh. That is dealt with at [97] of the Tribunal Decision where the Tribunal noted "significant inconsistencies" regarding the Appellant's evidence in relation to the false charges he described.

76. Despite there being a suite of general concerns expressed by the Tribunal as to the Appellant's credit, it is nevertheless apparent that one significant aspect of its rejection of his account about being injured in October 2017 was the Tribunal's rejection that he ever attended such a meeting at which the AL attacked the participants.

77. The Republic contends that "the determinative issue for the Tribunal … was whether the Appellant had been harmed at such a meeting", and not whether he had in fact attended the October 2017 meeting. Whilst the ultimate issue was whether the Appellant was harmed, the process of the Tribunal's reasoning demonstrates that it formed the view that he was not harmed, in part, *because* he was not at the meeting.

78. The second issue is whether this finding by the Tribunal was inconsistent with the Secretary's conclusions. The inconsistency between the conclusions of the Secretary and the Tribunal is clear. The Secretary found the Appellant's description of the meeting to be "sufficiently detailed and plausible as to be credible". The Secretary expressly accepted that the Appellant attending a meeting as he described in October 2017. It also found that he was beaten and suffered a gash to his head for which he received stitches. These findings are directly at odds with the Tribunal's findings as set out above.

79. The third issue is whether the Tribunal identified to the Appellant that it considered there to be a question as to whether:

a. he ever attended the contended October 2017 meeting;

b. the meeting was attacked by AL supporters; or

c. he was injured by the AL supporters.

80. The Tribunal was not confined to whatever may have been the issues considered as relevant by the Secretary. But unless the Tribunal took some steps to identify that these issues were in contention and did not tell the Appellant of this, then the Appellant was entitled to assume that the issues that the Secretary considered dispositive were the "issue[s] arising in relation to the determination under review": see *SZBEL* at [35]; also s 40(1) of the Act. Consistent with *Alphaone,* the Tribunal was required to give the Appellant the opportunity of ascertaining the relevant issues.

81. The Tribunal did start the hearing noting that it was to make a "completely new decision" and that the Appellant should not assume that it would agree with the Secretary or that it might disagree with some of the things that the Secretary said: T2 lines 21-24. However, that very general statement was not sufficient to put the Appellant on notice of which *specific issues* found in his favour by the Secretary were nevertheless in issue before the Tribunal and that he should specifically further address those matters by way of evidence and submission. The Tribunal's obligation to afford procedural fairness cannot be met merely by a general incantation of such breadth at the commencement of the hearing as occurred here. Despite that, it is a relevant factor that the Appellant was informed at the outset that the Tribunal may not agree with the Secretary's findings.

82. I have closely considered the transcript of the hearing before the Tribunal. Whilst there was obviously detailed questioning about the allegedly false charges, in my view there was nothing in the questions concerning the Appellant's presence at the October 2017 meeting to put the Appellant on notice that, despite the Secretary's finding, there was a serious question as to whether he had in fact attended the meeting at all. To the contrary, I consider that the questions asked would have reasonably led the Appellant and those representing him to the conclusion that there was no question about his attendance at the alleged meeting. For example, he was asked: "[H]ow many meetings or processions did you go to, roughly?" (T10 lines 8-9). He was asked: "Were you ever injured in any other meetings or processions?" (T10 line 16). In relation to the question of who else was charged following the meeting, the Appellant identified two people and was asked: "Were they also at that meeting?" (T14 line 12).

83. None of the questions asked of him made it apparent that, contrary to the Secretary's finding, the Tribunal considered that there was a question as to whether he in fact attended the relevant meeting at all.

84. I conclude that the Tribunal did not take any step to identify that it considered there to be an issue as to whether he attended the October 2017 meeting.

85. I accordingly find that the Tribunal did not meet the obligation on it to afford procedural fairness to the Appellant consistent with *SZBEL* and the cases that have applied it in this jurisdiction.

86. During the course of argument, I asked counsel for the Republic whether, if I found the reasoning of the Tribunal was to say that the Appellant was not injured at the October 2017 meeting *because* he was not at the meeting, what course I ought to take. Mr O'Shannessy responded in these terms (T25 lines 36-40):

> "So [the Appellant's] claim that he was injured at the meeting when it was attacked by Awami League supporters. Now, if the Tribunal were to reject those two propositions merely because it forms the view that he did not attend the meeting – if that's your Honour's reading of the reasons, then this is matter that your Honour should remit on that basis."

87. I have found that the Tribunal's course of reasoning was to reject that the Appellant was injured in October 2018 both because of general credit concerns but also because the Appellant did not attend the meeting because he was not a BNP member or voter and there was no reason for him to attend such a meeting. The latter matter was clearly part, indeed apparently a substantial part, of the basis of the Tribunal's ultimate finding that the Appellant was not injured.

88. Thus, whilst it cannot be said that the Tribunal rejected the Appellant's contention "merely" because he did not attend the meeting, the finding that he did not attend the meeting was a matter of significance to the ultimate finding. It was also a matter of central relevance to his credit generally.

89. For those reasons, I find that the Tribunal failed to afford the Appellant procedural fairness by failing to identify that the question of his attendance at the October 2017 meeting was in issue before the Tribunal, notwithstanding the Secretary's findings in favour of the Appellant on that issue.

CONCLUSION AND DISPOSITION OF THE APPEAL

90. I am satisfied that it is necessary in the interests of the administration of justice to make an order extending the time for the filing of this appeal.

39. I therefore make an order pursuant to s 43(5) of the Act extending the 21-day period prescribed by s 43(3) to 5:00 pm on 10 February 2025.

91. For the reasons set out in this judgment, I have found that the sole ground in the Notice of Appeal is made out.

92. The appeal is allowed. Pursuant to section 44 of the Act, I make orders:

(a) quashing the Tribunal Decision; and

(b) remitting the matter to the Tribunal for reconsideration.

93. I make no order as to the costs of the appeal.

JUSTICE MATTHEW BRADY

04 July 2025