



IN THE SUPREME COURT OF NAURU
AT YAREN

Case No. 14 of 2025

IN THE MATTER OF an appeal
against a decision of the Refugee
Status Review Tribunal TFN
T24/00466, brought pursuant to s 43 of
the *Refugees Convention Act 2012*

BETWEEN

AN 25

Appellant

AND

THE REPUBLIC

Respondent

Before: Justice I Freckelton

Appellant: Mr A Aleksov

Respondent: Mr L Brown SC

Date of Hearing: 4 June 2025

Date of Judgment: 8 August 2025

CATCHWORDS

APPEAL — Fear of persecution – irrationality in reasoning – consent to decision
without appearance – APPEAL DISMISSED

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 an appeal pursuant to s43(1) of the Act against the decision of the decision of the Refugee Status Review Tribunal (“the Tribunal”) of 16 February 2025 (“the decision”) with a Notice of Appeal dated 7 March 2025.
6. By an Amended Notice of Appeal dated 19 May 2025 against the decision of the Tribunal”) the Appellant sought 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

7. The Appellant has stated that he is a national of Bangladesh born on 10 October 1984 and that he is the holder of a Bangladeshi passport which is currently missing.
8. He claims to have travelled to Jordan on a work visa in 2004, Malaysia on a tourist visa from 2016 to 2021, and Malaysia on a work visa from 2021 to February 2022 and again from September 2022 to October 2023.

9. The Appellant has stated that he travelled to Indonesia where he stayed unlawfully en route to Australia.
10. The Appellant arrived in Australia on 16 February 2024 and was transferred to Nauru on 19 February 2024.
11. He applied for refugee status on 8 March 2024.
12. The Acting Secretary of Multicultural Affairs declined to recognise the Appellant as a refugee under the *Refugee Convention Act 2012* (Nr) and concluded he is not owed complementary protection on 30 July 2024.
13. On 8 August 2024 the Appellant applied for a review to the Tribunal and relied upon a statement made on the same date. He said that he was a supporter of the Bangladesh National Party (BNP) and that he had been targeted by the Awami League (AL) in his village. He said that he felt that when he sat in his village, “people are tracking me.” He felt that people were asking each other whether his family supported the AL and he supported BNP. He said he did not feel peaceful and that after seeing atrocities committed by AL people “I have decided that I won’t stay in Bangladesh. I will stay somewhere where I can live peacefully”.
14. He also provided a statement dated 23 August 2024 in which he raised a specific incident. He asserted that in around 2010 when he was working in his tailoring shop he was approached by members of the Awami League who demanded money from him. He did not have any and they became angry and beat him with sticks and stabbed him, leaving with a scar on his right upper arm.
15. At this point he decided to leave Bangladesh and thereafter spent nearly all of the succeeding years abroad.
16. In a submission dated 1 September 2024 on his behalf he stated that he was a supporter of the Bangladeshi Nationalist Party (BNP) although he was not politically active. He reiterated that in around 2010, while he was working in his tailoring business, he was approached by members of the Awami League (AL) who demanded money from him and when he refused to make payment he was beaten by sticks and stabbed.
17. The Appellant stated that every time he returned to Bangladesh “he felt a sense of unease and discomfort and felt that he was at risk of harm due to his perceived wealth.”¹
18. It was submitted on his behalf that the essential and significant reasons for his claimed fear of persecution were:

- i. His actual and/or imputed political opinion, as a supporter of the BNP;

¹ Submissions, 1 September 2024 at para 7, Appeal Book, p87.

ii. His particular social group, as a returnee from overseas who is perceived to be wealthy, and/or a perceived wealthy person; and

iii. His particular social group, as someone with mental health issues.

19. In the course of the hearing before the Tribunal the following important exchange took place:

MS IRENE O'CONNELL: Okay. I just did want to ask the one thing though, you – are you concerned if you were to go back to Bangladesh, would people perceive you to be wealthy?

THE INTERPRETER: Yeah, *it doesn't matter whether people will think about me, whether I'm a rich person or poor person, but it's my hope that I came here so that I can stay here, and I would be better off here than when I went back to my country, I will be better off. It's my hope.*

MS IRENE O'CONNELL: Okay

INTERPRETER: Yeah, *for example, someone who stays on the side of the road, that person also hope to become rich sometime in that person's life , till the death.*² [emphasis added]

20. On 4 December 2024 the Tribunal wrote to the representatives for the Appellant informing them that the Appellant's case, among others, would be reconstituted to a new Tribunal. It asked:

Could you please advise whether these applicants:

1. Wish to be invited to a hearing with the newly constituted Tribunal or whether they consent to the newly constituted Tribunal relying on the evidence they have given at the previous hearing and if this is the case, whether the applicants consent to the Tribunal deciding the review without the applicant appearing before it pursuant to section 40(2)(b) of the Act or
2. The applicants wish to be invited to an participate in a new hearing.

21. On 5 December 2024 Ms Prasad of Craddock Murray Neumann Lawyers Pty Ltd indicated that instructions would be sought from the clients.

22. On 27 December 2024 Ms Prasad wrote back to the Tribunal in relation to the Appellant and other clients stating that they:

would not like to proceed with a new hearing. However, if the reconstituted hearing is not satisfied on credibility or otherwise has any adverse concerns, it should exercise its discretion positively under sections 7(1)(a)(iii) and (vi) of the Act to request further information or have certain information verified by way of statutory declaration (which covers the situation where evidence on a certain matter was not explored orally at hearing).

² Transcript of Proceedings before the Refugee Status Review Tribunal, 4 November 2024, p20, Appeal Book, p205.

23. In the same email Ms Prasad informed the Tribunal that another applicant consented to the Tribunal deciding the review without the applicant appearing before it pursuant to section 40(2)(b) of the Act.

24. On 3 January 2025 the Tribunal wrote again to Ms Prasad about the issue, referring to the previous correspondence, and asking for confirmation that all applicants, including the Appellant, “consent to the reconstituted Tribunal relying on the evidence they have given at the previous hearing.” She confirmed that one applicant consented to the reconstituted Tribunal deciding the review without him appearing before it pursuant to section 40(2)(b) of the Act.

25. In the same correspondence, the Tribunal also asked:

Could you also confirm that all applicants consent to the reconstituted Tribunal deciding the review without the applicant appearing before it pursuant to section 40(2)(b) of the Act. If the applicants do not consent they will be invited to a further hearing.

26. On 9 January 2025 Mr Zhang on behalf of Ms Prasad responded, stating that the Appellant and others “are *generally* agreeable to the tribunal promulgating a decision in accordance with section 40(2)(b) of the *Refugees Convention Act 2012* (Nr) (the Act) without further appearance from the Applicants.” [italicisation in the original communication] He then canvassed issues once more in relation to the Tribunal’s reliance on evidence already before the Tribunal and referred back to previous correspondence. Separately, at the end of the two page letter, Mr Zhang stated that another applicant did not consent to proceeding in accordance with section 40(2)(b) and requested an invitation to re-appear before the Tribunal.

THE TRIBUNAL DECISION

27. In its reasons for decision the Tribunal noted that in his first statement, dated 8 March 2024, the Appellant stated that he feared persecution because he was a supporter of the BNP and was targeted by AL, relating that he had maintained that even when he went to Bangladesh for a holiday from Malaysia “AL people in his village came to him and said we know you have come from Malaysia. ‘We know that you have lots of money and you are a BNP supporter, if you don’t give us money, we will beat you and we will make a false case against you.’”³

28. It also noted the representative’s submission, dated 1 September 2024.⁴

29. It accepted the substance of the Appellant’s account and also that a person returning from overseas may be viewed as a wealthy person who could be subject to intimidation and extortion.⁵

30. However, the Tribunal did not accept that this would be the case for the Appellant on his return to Bangladesh:

³ Tribunal Decision, at [41].

⁴ Tribunal Decision, at [46].

⁵ Tribunal Decision, at [58].

At the hearing *the applicant did not express this fear, but rather suggested the contrary*. His oral evidence was that he did not wish to return to Bangladesh as he felt shame at not having successfully made it to Australia to earn money as a man is expected to earn money to support his family. [emphasis added]⁶

31. The Tribunal found that the Appellant does not have a well-founded fear of persecution for reason of his membership of the posited particular social groups:

- Returnee from overseas who is perceived to be wealthy and/or a perceived wealthy person;
- Somebody with mental health issues.

32. It concluded that on an individual and cumulative analysis the Appellant does not have a well-founded fear of persecution for a Convention reason and is not a refugee. It also found that returning him to Bangladesh would not breach Nauru's international obligations as it did not accept that there is a real risk or reasonable possibility that he would face harm such as arbitrary detention or be deprived of his life or be made subject to torture or inhuman/inhumane or degrading treatment on his return to Bangladesh.⁷

THIS APPEAL

33. The Appellant's Amended Notice of Appeal dated 19 May 2025 asserts that:

1. The Tribunal failed to comply with s40, or its decision is affected by procedural unfairness in not convening a hearing.
2. The Tribunal failed to consider, lawfully, the appellant's claim to being at risk of harm as someone who might be perceived to be wealthy.

LEGISLATIVE PROVISIONS

34. Section 40 of the Act provides that:

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

(2) Subsection (1) does not apply if:

(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or

⁶ Tribunal Decision, at [58].

⁷ Tribunal Decision, at [62]-[63].

(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it.

(3) An invitation to appear before the Tribunal must be given to the applicant with reasonable notice and must:

(a) specify the time, date and place at which the applicant is scheduled to appear; and

(b) invite the applicant to specify, by written notice to the Tribunal given within 7 days, persons from whom the applicant would like the Tribunal to obtain oral evidence.

(4) If the Tribunal is notified by an applicant under subsection (3)(b), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice.

34. Section 41 of the Act provides that:

(1) Where the applicant:

(a) is invited to appear before the Tribunal; and

(b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear;

the Tribunal may make a decision on the review without taking further action to allow or enable the applicant to appear before it.

(2) This section does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review, in order to enable the applicant's appearance before it as rescheduled.

SUBMISSIONS ON BEHALF OF THE APPELLANT

Ground One

35. On behalf of the Appellant Mr Aleksov of counsel contended that the 9 January 2025 letter from Ms Prasad was qualified. He conceded that its expression was suboptimal but argued that the substance of what was conveyed to the Tribunal was that the Appellant consented to proceed without a further hearing *if* the Tribunal was prepared to inform the Appellant in writing of any adverse issue (as to credit or otherwise) in writing and gave the Appellant an opportunity to put further written evidence or material before the Tribunal on that issue.

36. Thus, he said, the Appellant was not really giving consent to proceeding without a hearing for the purpose of section 40(2)(b); he was giving “conditional consent” to that course, with the condition being that if the Tribunal was against him on any issue, it would notify him of that and permit him to address the Tribunal further in writing.
37. Mr Aleksov characterised this as “an attempt at a sort of bargaining or negotiation with the Tribunal about the further hearing.” He emphasised that the Tribunal did not engage with this strategy and without justification determined the review without a further hearing and without communicating further with the appellant.
38. He contended that on 9 January 2025 it could not be said that the Appellant had consented to the Tribunal deciding the review without his appearing before it because of the fact that the consent that was given was conditional; it was not unconditional consent as required by section 40(2)(b).⁸ He said that this form of consent did not “match the statutory language required of s40(2)(b) so as to trigger the operation of the chapeaux in section 40(2), “subsection (1) does not apply.” In turn, he argued, section 40(1) continued to apply to the point of the Tribunal’s decision but it was not complied with.
39. Alternatively, he contended that the Tribunal was affected by procedural unfairness because the Appellant was not given the opportunity of an oral hearing.

Ground Two

40. Mr Aleksov referred to the transcript records of what occurred before the Tribunal and the answers given by the Appellant. He argued that they did not form a basis for the Tribunal’s conclusion at para [58] of its Reasons:

The Tribunal also accepts that a person returning from overseas may be viewed as a wealthy person who could be subject to intimidation and extortion. The Tribunal does not accept that this would be the case for the applicant on his return to Bangladesh. At the hearing the applicant did not express this fear, but rather suggested the contrary.

41. He emphasised that the Tribunal left the somewhat non-responsive communication where it lay, namely did not ask further questions of him on the issue, but at no stage did the Appellant abandon his claim made in writing as a person perceived to be wealthy. He argued that the Tribunal did not evaluate the Appellant’s claim to fearing harm on the basis of being perceived as a wealthy person, apparently on the basis that the Tribunal formed the view that he had abandoned this claim. He said it was wrong for the Tribunal to have drawn such an inference – it was “untenable”⁹ - and therefore it failed without justification to consider this claim.

⁸ Transcript, at p10.

⁹ Transcript, at p12.

42. Mr Aleksov conceded that the Appellant's answer about the issue before the Tribunal was non-responsive and was "strange".¹⁰

SUBMISSIONS ON BEHALF OF THE RESPONDENT

Ground One

43. Mr Brown of Senior Counsel for the Respondent maintained that the only question before the Court is evidentiary: did the Appellant through his representatives provide consent. He argued that the Tribunal complied with section 40 of the Act and did not otherwise breach its procedural fairness obligations to the Appellant. He noted that where an applicant did not consent to the proposed course, that was identified unequivocally by those representing the applicants.

44. Mr Brown submitted that what took place was in essence provision of consent to decide the proceedings plus a request, not a conditional or qualified consent. He characterised the use of the adverb "generally" on behalf of the Appellant as less than clear but that in substance it was a communication in context that the Appellant was generally agreeable to proceeding without a hearing. Moreover, he argued that the subsequent communication did not diverge from the consent already given to proceed without a hearing.

Ground Two

45. Mr Brown drew to the attention of the Court that the Appellant gave evidence that it did not matter whether people thought he was rich or poor.

46. He contended that the Appellant's claim to fear harm in relation to his wealth was based on a premise that the Tribunal rejected. He contended that before the Tribunal, when asked if he would be perceived as wealthy if he returned to Bangladesh, the Appellant diverged from the factual premise and did not express fear, but rather the opposite. He argued that the Tribunal's assessment of the evidence was accurate given the Appellant's failure to express fear – "the Tribunal needs to do no more to assess the claim once it has decided that the evidence of the applicant, that it accepts he doesn't have the subjective fear."¹¹

47. On these bases, he contended that the decision of the Tribunal should be affirmed.

CONSIDERATION

Ground 1

48. Section 40 of the Act obliges the Tribunal to invite an applicant to appear before the Tribunal and present arguments in relation to their application, but this obligation does not apply if, amongst other things, the applicant consents to the Tribunal deciding the review without the applicant appearing before it. By section 41, when an applicant is invited to appear before the Tribunal and fails to do so,

¹⁰ Transcript, at pp16-17.

¹¹ Transcript, at p22.

the Tribunal is authorised to make a decision on the review without taking further action to allow or enable the applicant to appear before it.

49. On 4 December 2024 the Tribunal wrote to various applicants, including the Appellant, asking whether they wished to be invited to a hearing before the newly constituted Tribunal. The Tribunal asked whether they consented to the newly constituted Tribunal relying on the evidence previously given and, if this was the case, whether they consented to the Tribunal deciding the review without their appearing before it in accordance with section 40(2)(b) of the Act. The communication also explicitly raised the option of whether the applicants wished to be invited to participate in a new hearing.
50. The letter was not phrased as clearly as it might have been but its essence was straightforward: a query whether the Appellant wanted to be invited to appear before the newly constituted Tribunal.
51. I note in this context that the obligation of the Tribunal was not to ask whether the Appellant wanted to be invited but to invite him, *unless* under section 40(2)(b) of the Act the applicant consented to the Tribunal deciding the review without the applicant appearing before it.
52. The response of Ms Prasad on 27 December 2024 was that most of the applicants, including the Appellant, “would not like to proceed with a new hearing” but she attempted to enter into a form of negotiation with the Tribunal, adding: “However, if the reconstituted Tribunal is not satisfied on credibility or otherwise has any adverse concerns, it should exercise its discretion positively under 7(1)(a)(iii) and (iv) of the Act to request further information or have certain information verified by way of statutory declaration (which covers the situation where evidence on a certain matter was not explored orally at hearing.” She consented to the Tribunal deciding the review without another applicant appearing before it pursuant to section 40(2)(b) of the Act.
53. The two matters conjoined by Ms Prasad were related but not the same and it appears that Ms Prasad’s communication was only partially responsive, presumably because she was seeking some form of forensic advantage in negotiations she was attempting to initiate with the Tribunal. It left some uncertainty.
54. On 3 January 2025, the Tribunal wrote once more, in an apparent attempt to deal with the uncertainty, the relevant paragraph being:

Could you also confirm that all applicable that all applicants consent to the reconstituted Tribunal deciding the review without the applicant appearing before it pursuant to section 40(2) (b) of the Act. If applicants do not consent they will be invited to a further hearing.
55. The communication from the Tribunal was clear in its meaning, which consisted of asking whether the Appellant consented to the Tribunal determining the review

without his appearance but preserving the entitlement to personal appearance if the Appellant did not agree to that course.

56. The situation was clarified by the response of Mr Zhang of Craddock Murray Neumann Lawyers Pty Ltd on 9 January 2025. His response was that the Appellant (and others) was “generally agreeable” to the Tribunal proceeding to a decision in accordance with section 40(2)(b) “without further appearance from the Applicants”. It is correct that the expression “generally agreeable” was infelicitous but, in my view the consent provided was not qualified or contingent by reason of the fact that he continued in succeeding paragraphs to negotiate about other matters. He did not do so in a way which was phrased as affecting the provision of section 40(2)(b) consent.

57. I find that the procedure of the Tribunal conformed with what is required by section 40(2)(b) and the consent provided on behalf of the Appellant was sufficiently clear to be regarded as constituting substantive consent to not being invited. It had the consequence that the obligation of the Tribunal under section 40(1) to invite him formally to appear before the reconstituted Tribunal did not apply.

58. This aspect of the Appeal is rejected.

Ground 2

59. In his statement of claim¹² the Appellant stated that he was threatened with a beating on the basis that he was a BNP supporter and “you have lots of money”.

60. He gave an account of this incident in a statement dated 23 August 2024 in which he maintained that he had been approached by members of the Awami League (AL) who demanded money and was beaten by sticks and stabbed when he refused to make payment. In submissions of 1 September 2024 he articulated a perception that he was “at risk of harm due to his perceived wealth.”¹³ This was the basis of his asserted fear of persecution.

61. The Tribunal endeavoured to engage the Appellant on the issue by asking him directly: “Are you concerned if you were to go back to Bangladesh, would people perceive you to be wealthy?”

62. The response of the Appellant was discursive and communicated in terms that it does not matter what people think about him, whether he is rich or poor. The general tenor of his response was that the issue was not his wealth that made him concerned about his safety.

63. The question posed by the Tribunal raised the issue that the Appellant had previously articulated directly and gave him an opportunity to explain whether he thought it was wealth or appearance of wealth that rendered him vulnerable to reprisal by AL members. Rather than stating this, he asserted that it did not

¹² Appeal Book, at pp26-27.

¹³ Appeal Book, at p87.

matter what people thought of him, whether he was rich or poor. In no way did he assert a fear in this regard, although it was open to him to do so.

64. The Tribunal expressed the view that “the applicant did not express this fear [about being perceived as a wealthy person] but rather suggested the contrary.”

65. It was asserted on behalf of the Appellant in the current appeal that this assessment was evidence of the Tribunal failing to consider, lawfully, the Appellant’s claim to being at risk of harm as someone who might be perceived to be wealthy.

66. In my opinion, it was open to the Tribunal to draw the inference that it did from the appellant’s answer, discursive though it was.

67. Accordingly, this aspect of the Appellant’s claim is also rejected.

CONCLUSION

68. Under section 44(1)(a) of the *Refugees Convention Act 2012* (Nr), the appeal is dismissed and the decision of the Tribunal dated 16 February 2025 is affirmed.

Ian Freckelton

Justice Ian Freckelton
Dated this 8th day of August 2025

