IN THE SUPREME COURT OF NAURU

AT YAREN

Appeal No. 11 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: **AL24**

Appellant

AND: **REPUBLIC OF NAURU**

Respondent

Before: Brady J

Dates of Hearing: 29 April 2025

Date of Judgment: 15 August 2025

CITATION: *AL24 v Republic of Nauru*

CATCHWORDS:

APPEAL - *Refugees – Refugee Status Review Tribunal – Whether Appellant was deprived of opportunity to put his case – Whether practical injustice – Appellant not deprived of reasonable opportunity to put his case – No practical injustice - Appellant Appeal Dismissed*

LEGISLATION:

Refugees Convention Act 2012 (NR) Sections 22, 24, 43, 44

CASE AUTHORITIES

BJB16 v The Minister for Immigration and Border Protection [2018] 260 FCR 116 at [43]; *Minister for Immigration, Citizenship and Multicultural Affairs v NDBR* [2024] FCAFC 114 at [80]; *Kamal v Minister for Immigration, Citizenship And Multicultural Affairs* [2023] 300 FCR 106 at [17], [31]; *Sullivan v Department of Transport* (1978) 20 ALR 323 at 342;

APPEARANCES:

Counsel for Appellant:	Mr A Aleksov (instructed by Craddock Murray Neumann)
Counsel for Respondent:	Mr N Wood SC (instructed by Republic of Nauru)

JUDGMENT

INTRODUCTION

1. The Appellant is a Bangladeshi national. He arrived in Australia in early February 2024. On 18 February 2024 he was transferred to Nauru pursuant to the Memorandum of Understanding between the governments of Nauru and Australia. On 14 March 2024, the Appellant made an application for Refugee Status Determination (**RSD**).

2. The Appellant says that he has never been politically active, but his brothers have been. In 2013, a local Awami League (**AL**) supporter was murdered. The Appellant, as well as his younger brother, were named as suspects in relation to the murder. The Appellant was able to avoid prosecution in subsequent years, although his brother has been arrested and bailed on at least two occasions in relation to the charges.

3. Contending that he fears the prospect of legal action against him, as well as the possibility of execution, the Appellant fled Bangladesh. Since departing Bangladesh, pressure has been exerted on the Appellant's family. He says that his wife and son have been threatened and abused. The Appellant contends that he continues to hold a fear of returning to Bangladesh.

4. Pursuant to s 43 of the *Refugees Convention Act* 2012 (Nr) (**the Act**), the Appellant appeals from a decision of the Refugee Status Tribunal (**Tribunal**) made on 16 December 2024 (**Tribunal Decision**). The Tribunal affirmed a decision of the Secretary of Multicultural Affairs (**Secretary**) dated 9 August 2024 (**Secretary's Decision**) not to recognise the Appellant as a refugee and also to find that the Appellant is not owed complementary protection under the Act.

5. By s 43 (1) of the Act, the Appellant may appeal to this Court on a point of law.

6. By s 44(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 reconsideration in accordance with any directions of this Court.

GROUND OF APPEAL

7. By his Amended Notice of Appeal filed 28 March 2025, the Appellant advances a single ground of appeal in these terms:

> The Tribunal erred by denying the Appellant procedural fairness, involving a failure to afford him a reasonable opportunity to adduce evidence as to his psychiatric condition, or mental health, in support of his case.

EVENTS LEADING TO THE SECRETARY'S DECISION

8. On 14 March 2024, the Appellant made his RSD application to the Republic in order to be recognised as a refugee or a person owed complementary protection. The Appellant attended an RSD interview on 27 May 2024.

9. By letter dated 31 May 2024, the RSD officer wrote to the Appellant's representative, inviting comments on certain matters so as to comply with the RSD officer's obligation to provide natural justice. In that letter, the RSD officer said[1] the following:

> I understand there are concerns regarding the [Appellant's] mental health and cognitive capacity. I would be assisted in assessing the [Appellant's] credibility with:
>
> - Any IHMS[2] records addressing the applicant's mental health or cognitive capacity.

[1] Book of Documents (BD) Page 35

[2] IHMS is a reference to International Health and Medical Services, contracted to provide health services to transferees from Australia to Nauru who are in Nauru.

- Any assessment as to the [Appellant's] current mental state, and his likely state at the time of the interview.

- Any assessment of the [Appellant's] intellectual functioning.

10. The Appellant's representative responded to this natural justice letter by letter dated 25 July 2024. In response to the passage I have extracted above concerning the Appellants' mental health and cognitive capacity, the Appellant's representative responded in these terms:

> Our requests to IHMS for assessment of the [Appellant's] cognitive capacity and mental health have not been successful. We submit that there's no access to cognitive/intellectual functioning assessments in Nauru.

11. The Secretary made his decision on 9 August 2024, finding that the Appellant did not have a well-founded fear of persecution and that complementary protection was not owed to the Appellant.

12. The Appellant made a review application to the Tribunal on 15 August 2024.

EVENTS LEADING TO THETRIBUNAL DECISION AND MEDICAL RECORDS

13. On 25 September 2024, the Appellant's representative made detailed submissions to the Tribunal in support of the Appellant's claim. The Appellant's representative relevantly said:

> [6] We further note that it was submitted during the RSD hearing that [the Appellant] may have a mental health issue and/or a cognitive impairment.
>
> [7] [The Appellant's] clinical records from IHMS are attached to this submission...
>
> [8] From the IHMS clinical records, we note that [the Appellant] has been diagnosed with the DSM Disorder Insomnia. The IHMS records contain a number of references to poor sleep.
>
> [9] [The Appellant] has been prescribed the medication mirtazapine for at least two months.
>
> [10] As the IHMS records only became available two days prior to the writing of this submission, the above are some preliminary observations. We reserve the right to provide further information about the contents of the IHMS report.
>
> [11] We also note that a request was made in May 2024 for a cognitive assessment from [the Appellant] ... No response was received to this request and we understand that no cognitive assessment has been undertaken for [the Appellant].
>
> [12] According to the American National Alliance on Mental Illness (NAMI),

Insomnia is rarely an isolated medical or mental illness, but rather a symptom of another illness to be investigated for a person and their medical doctors.

[13] We understand that under s 24 (1) (d) of the *Refugees Convention Act* 2012, the Tribunal has the power to require the Secretary to arrange for the making a medical examination of the [Appellant] [sic]. It is requested that if this power is sought to be enacted by the Tribunal we request that a suitably qualified, independent and experienced medical professional be engaged for the medical examination. We further request that the name and experience of the medical professional be provided to the [Appellant] and his representative prior to the medical examination, and the results of the medical examination are provided to the [Appellant] and his representative with an opportunity for comment, prior to a decision.

[14] We further note that while s37 of the *Refugees Convention Act* 2012 has been repealed according to s7 of the *Refugees Convention (Amendment) Act* 2017, the principles of natural justice and procedural fairness continue to apply to the Tribunal, which includes the provision of information which may form the reason, or part of the reasons, to the [Appellant], and the [Appellant] is provided with sufficient time to respond. [footnotes omitted]

14. The submission to the Tribunal continued as follows:

[27] It is evident that at all levels of the decision-making process, from the interview with the RSD Officer, to the Request for Further Information, to the actual Decision Record, there exists a series of failures to properly consider the mental and cognitive state of the [Appellant].

[28] With regards to the conduct of the RSD interview, it is clear from the audio of the RSD interview there were submissions made as to the mental health and cognitive functioning of the [Appellant]. It is also clear the RSD Officer was aware of the possibility of issues for the [Appellant], including mental health and cognitive functioning. On at least one occasion during the RSD interview, an undertaking was given by the RSD Officer that enquiries would be made about making a request for a medical assessment, and an assurance was given that they would get back to the representative. No correspondence was received from the RSD Officer about this undertaking.

[29] It is clear that these issues were accepted as valid by the RSD Officer. For example, following the interview, a Request for Further Information was received, seeking information from the [Appellant] (via his representative) across a range of relevant issues, from mental health, cognitive capacity, and intellectual functioning.

[30] As the mental health and cognitive functioning appears to be a relevant consideration for this [Appellant], and given this was acknowledged during the RSD interview and in the written request, it would be expected that some consideration is provided in the Decision Record. A thorough review of the text of the Decision Record reveals a failure to consider these important

presenting factors. Apart from the word "illiterate" appearing in the text no reference is made to these issues.

[31] Indeed, throughout the Decision Record there exist a number of adverse plausibility findings regarding the [Appellant], including his lack of detail and vagueness, which leads the RSD to conclude a number of his claims are implausible. There is no evidence of consideration being given to his cognitive situation or his mental health. There is not even an acknowledgement by the RSD Officer that further information was requested about these presenting issues.

[32] It is submitted that these failures need to be considered in relation to the [Appellant's] status as a vulnerable person. According to the RSD Handbook, the RSD Officer is able to make a number of special provisions when interviewing the vulnerable applicants. Even though it was evident during the interview there may be cognitive function and/or mental health issues, the interview appeared to be run as per normal. The Decision Record does not address this issue or specify if any of the listed measured [sic] were used. Indeed, as noted above it appears the issue does not even exist for the RSD Officer as it is not referred to in the Decision Record or taken into account when considering the plausibility of the [Appellant's] claims.

[33] It is submitted there were opportunities for the RSD Officer to raise any matters of concern again, either at a subsequent interview or later in the RSD process. With the exception of the letter dated 31 May 2024 (which as discussed below is overly complex and confusing) these options were not chosen. As a consequence, it appears aspects of the protection claim of [the Appellant's] have not been afforded proper consideration.

15. The reference in paragraph [2] of the submission to the Tribunal to an attached email request for cognitive assessment was a reference to an email dated 29 May 2024 from Ms Neha Prasad to Nauru Case Coordination, a division of the Department of Home Affairs in the Australian Government. The email said:

> We need to organise a cognitive assessment for the [Appellant]. He was recently interviewed by a Case officer who would like the outcome to be sent to him via CAPs.
>
> Marg [Le Soeur, the Appellant's representative] has made preliminary enquiries through IHMS who have said that the assessment request needs to come from NST.
>
> Please could you assist with next steps.

16. This request was not answered. Nor is there any evidence to suggest that it was followed up by CAPs.

17. Included with the submission to the Tribunal was a statement of the Appellant dated 24 September 2024. In that statement, the Appellant relevantly said:

[3] I am stressed and anxious about my current situation. I have mental health issues and I regularly see someone at IHMS at the regional processing centre for my mental health. The IHMS staff have been prescribing sleeping pills for me as I cannot sleep. I have not been able to sleep well since I arrived on Nauru.

[4] I have made a request at the IHMS office for my health records to be released to my representative.

[5] I think there were some misunderstandings during the Refugee Status Determination (RSD) interview. I have tried to explain some of the misunderstandings in this statement and will do my best to answer questions in the upcoming hearing.

18. Also included with the submission of the Appellant dated 25 September 2024 was a bundle of documents which had been obtained from IHMS. The IHMS records go back to the commencement of the Appellant's presence on Nauru from early 2024. Most of the records relate to various GP consultations, testing for various diseases, vaccinations and things of that nature. However, from early June 2024, there are records of the Appellant's engagement with mental health specialists at IHMS.

19. On 3 June 2024, there is a record of the Appellant meeting with a mental health nurse and it appears that this was likely the first occasion on which the Appellant had presented to see the mental health team. The record on this occasion was in the following terms:

> Presented as agreeable to IHMS clinic entry process. He submitted an MRF to see MH as dealing with a lot of tension and worry around his family. States he is the main financial support for his family and is struggling with not being able to support them. Is beginning to affect his sleep, appetite and increasing ruminating thoughts around the uncertainty of his future. Denies any thoughts of self-harm/suicide. Family and faith are a strong protective factor. Discussed techniques to distract from constant thoughts - maintaining a routine and having structure for the day. Participating in activities offered by MTC, engaging in social activities with his cohort, exercising, etc. Discussed sleep hygiene and educated on techniques to aid sleep - breathing exercises explained. [The Appellant] acknowledged and responded he will try but feels ambivalent that anything will help as he believes his tension and worries will resolve if he is given the ability to gain employment.
>
> Discussed option to see the psychiatrist if in the coming days, his sleep, appetite and mood deteriorate. [The Appellant] agreeable to see psychiatrist for possible PRN sleep aid. Psychiatrist due on island in coming days. MHN will schedule appointment for psychiatrist and advise [the Appellant].
>
> MSE: 35 yo, Bengali male, appears stated age, average height and build. Clean shaven and well groomed. Dressed in neat, clean attire of shorts and t-shirt. Wearing a face mask. Calm and cooperative, No psychomotor agitation/retardation. Good eye contact. Engaged well through interpreter. Normal speech. Nil FTD. Nil risks identified.

20. The Appellant next met with a mental health nurse on 28 June 2024. The nurse noted that the Appellant had previously submitted an MRF to see the mental health team for compliance around poor sleep. The records show that the mental health nurse spoke to the Appellant about techniques to improve his ability to get to sleep. According to the nurse, the Appellant raised no other concerns and did not want regular follow-up by mental health nurses, just an appointment with the psychiatrist to discuss sleep aid medication.

21. On 8 July 2024, the Appellant saw a psychiatrist, Dr Andrew Mohanraj. Dr Mohanraj recorded that the Appellant had problems with initiating sleep because of ruminative thoughts. He recorded no history of the Appellant being treated for any mental health condition and no history of non-prescription medication. No history of family mental illness was recorded and no previous self-harm was reported. Dr Mohanraj noted that the Appellant reported feeling tired during the day because of poor sleep the previous night, but that there were no other significant psychiatric concerns. He noted that the Appellant appeared healthy, was suitably dressed and groomed. He was euthymic and congruent in his affect. There was no evidence of psychosis, or delusions. There were no gross cognitive deficits. His insight and judgement appeared intact and fair.

22. On 25 July 2024, the Appellant again saw the mental health nurse. Her assessment at that time was that the Appellant remained pleasant and polite, was well groomed and had good eye contact, rapport and engagement. He reported no anxiety or irritability. He sat calmly throughout the consultation and had no psychomotor agitation. His mood was euthymic and he reported feeling "good". His speech was linear and thoughts were goal directed and relevant. There were no perceptual disturbances. He appeared orientated and his insight and judgment was intact.

23. On 2 August 2024, the Appellant saw Dr Priscilla Nad. Dr Nad noted that her mental state examination of the Appellant that day was "uneventful". There were no overt subjective or objective findings from the client (except for a fever that he had after a recent COVID episode).

24. Dr Nad saw the Appellant again on 12 August 2024. Dr Nad prepared detailed progress notes in relation to this examination. Relevantly, those notes reveal:

> No pressing mental health concerns.
>
> ...
>
> No risks divulged to author ... denied [thoughts of self-harm], no risk to self, from others, towards others;
>
> [Mental state examination]: Neatly attired, well-kempt, Bengali speaking, in bright orange round collared t-shirt and shorts, man of stated age, remained appropriate, respectful, spoke well, audible, remained coherent, spoke in an even tone, rest of speech was normal (great tempo/prosody) linear/sequential goal directed conversation, not tangential, no FTD, denied perceptual disturbances, remained cooperative and there were no other oddities or abnormal mannerisms elicited. He is not psychotic, no psychomotor agitation evident. His affect is somewhat restricted, otherwise congruent to his mood, feeling all right nodded his head as well, not fully conversant this morning,

had nothing to report since the last session with him. He remained OTPP, no global cognitive deficits elicited, MMSE not done/not warranted. Judgment: intact, suicide is against his religious beliefs.

Insight: fair - minimal health literacy, needs psychoeducation to continue display; cognitive dissonance (+ - COVID, residual s/s)

Risk to self-: none, denied by client.

Risks to others -: none, denied by client.

Risk from others -: none, denied by client.

25. Dr Mohanraj saw the Appellant again on 30 August 2024 and noted that the Appellant "was doing much better" that he was in the community and that his sleep issues required sedation only two or three times a week. He described the Appellant as "cooperative, good rapport, articulate. Euthymic, congruent affect. Low risk of non-suicidal/suicidal, self-harm. No gross cognitive deficits. Future focused."

26. A further appointment with a mental health nurse occurred on 30 August 2024. Again, the low risk of suicide was noted. According to the mental health nurse, "the [Appellant] is aware of avenues to access further support from IHMS, but denies that this is currently necessary outside routine medication review."

THE TRIBUNAL DECISION

27. Under the heading, "The applicant's mental health/cognitive abilities" in the Tribunal Decision, the Tribunal considered issues that were raised concerning the Appellant's state of mental health. The relevant issues are discussed in considerable detail and the pertinent passages range over about five pages of the Tribunal Decision between paragraphs 18 and 42.

28. Most relevantly, the following passages appear:

[19] At the RSD interview the [Appellant's] advisor stated that "her feeling" was that the [Appellant] may have a mild intellectual disability and she would like him assessed. The RSD Officer said that he was concerned with the level of distress exhibited by the [Appellant] in the interview and would like to know if the [Appellant] had any diagnosed mental illness. There was a discussion as to how an assessment could be arranged with the RSD Officer indicating he would make enquiries.

[20] It is apparent that no assessment has been undertaken.

[21] The [Appellant's] IHMS medical record was provided to the Tribunal.

29. At paragraph 22 of the Tribunal Decision, the Tribunal set out in some detail relevant contents of the IHMS medical record, relevant parts of which I have already extracted above.

30. Continuing at [23] of the Tribunal Decision:

[23] Thus the medical notes indicate that the [Appellant] has been seen by mental health professionals on several occasions over a three-month period and they have no concerns about his intellectual ability, his ability to communicate or his cognitive functioning. There is no evidence before us that indicates the [Appellant] has a cognitive deficit or intellectual disability. He has had difficulty sleeping that has improved with medication and he is taking it less often than prescribed.

[24] The [Appellant's] advisor at the hearing noted that the medical notes were brief and that he had not been assessed by a psychologist or trauma specialist. It would appear that the medical notes are relatively brief as when the [Appellant] was examined no abnormalities or concerns were elicited other than the sleep issues that were treated. We note that the tension he mentions as the cause of his sleep issues, related to his situation being in Nauru - concern for his family due to his separation from them and his uncertain future.

[25] At the hearing he said that he was okay to take part. He said that he had been taking medication for poor sleep but the problem had largely resolved - except for the four - five days immediately before the hearing when he had some difficulty sleeping because he had tension.

[26] The Republic of Nauru Refugee Status Determination Handbook notes:

> "The presumption in RSD is that the applicant is competent. On the evidence either of a formal psychological assessment or, in the absence of such evidence, other evidence and observations available to the decision maker, the applicant may be found to suffer from a mental disorder. This should lead to an enquiry as to whether the applicant is competent to proceed with RSD. If the applicant is found to be competent but has impaired cognitive ability, it is important to address how the applicant's ability to participate in RSD may be affected."

[27] The Tribunal acknowledges that the [Appellant] became very upset at the RSD interview when discussing his family and very upset in the hearing when referring to boat journey to Australia (which in the medical reports he describes as treacherous and feels he was lucky to have made it to Australia) but otherwise he answered questions spontaneously and without obvious distress and discomfort.

...

[36] It is submitted that "the evidence before the Tribunal, including the evidence led by the [Appellant] the [Appellant's] presentation to the RSD Officer, and the RSRT Members shows that the [Appellant] may have mental health issues beyond his recent diagnosis of insomnia and there may be an underlying issue with neuro-cognitive functionality." The Tribunal takes into account that the mental health professionals who have examined the [Appellant] have

specifically stated that they have not identified any cognitive defects or formal thought disorder.

[37] Neither the RSD Officer nor the representative who assisted the [Appellant] at the RSD interview, are mental health professionals. His presentation at the hearing did not raise concerns regarding his cognitive ability or mental health.

...

[39] The Tribunal does not propose to make directions under section 22 and 24 of the Act that further assessments be undertaken of the [Appellant].

[40] We agree with the representative's submission that natural justice requires that the [Appellant] be given a fair hearing. We were satisfied that the [Appellant] had a reasonable opportunity to present his case and respond to adverse information at the hearing. No concerns were raised by the [Appellant's] representative at the hearing in this regard.

[41] Based on the material provided, the Tribunal is not satisfied that the [Appellant] has any cognitive deficit or mental health issues (other than the sleep concerns that are being treated and apparently resolving), such that he is unable to participate in the RSD process.

[42] The Tribunal notes that the representative raised mental health concerns in the context of addressing the [Appellant's] inconsistent and somewhat confused evidence about the claimed murder charges. These are relevant to the credibility assessment that follows.

THE EVIDENCE OF MS PRASAD

31. The Appellant relies upon an affidavit of Ms Neha Prasad. Ms Prasad is a barrister and solicitor of the Republic of Nauru and is employed by Craddock Murray Neumann Lawyers (**CMN**). CMN is contracted to provide legal assistance to asylum seekers in the conduct of appeals in this Court.

32. Ms Prasad's Affidavit deals with the availability of mental health treatment on Nauru. In summary, she deposes that:

    a. All transferees to Nauru have access to IHMS for the provision of health care services in the Republic;

    b. The Appellant is living in the community in the Republic, but the forms of support available to him do not extend to enabling him to access a psychiatric or neuropsychological expert to prepare expert evidence as to his mental state;

    c. Apart from services provided by IHMS or otherwise provided by the Republic, there is no service available within the Republic for a person such as the Appellant to access an expert witness who might opine on the Appellant's state of mind;

d. Based on Ms Prasad's experience as a solicitor acting for persons seeking refugee status in Nauru, otherwise than as provided by the Republic, those persons do not have access to professionals who might act as an expert witness as to their state of mind and state of mental health;

e. A transferee does not have available to them, whether at cost or at no cost, any person who might examine them to give an opinion as to whether the transferee suffers from psychiatric injury or any other ill-health that might impact the transferee's state of mind;

f. In particular, a person seeking refugee status in Nauru does not have access to any person who might give expert evidence to the Tribunal, or to this Court, as to the Appellant's capacity to participate in a hearing, or whether their cognition is impaired as at the time of a hearing, or any other matter relating to mental health which might bear upon the person's claim to refugee status;

g. The Appellant's representatives considered whether it was necessary, or at least appropriate, that the Appellant's mental health and state of mind more generally be examined by a person with suitable qualifications and experience to give expert opinion evidence as to his capacity to participate in hearing, the state of his cognition, or any other matter relating to mental health which might bear upon his claim to refugee status and equality;

h. The Appellant attended his RSD interview with the assistance of a representative who knew, as it was known to staff assisting transferees, that a forensic assessment of the Appellant's state of mind, including matters concerning his cognition and intellectual functioning, could be facilitated by the Nauru Support Team (**NST**) (being a branch of the Australian Government Department of Home Affairs) that is physically located in RPC - 1 and involved in assisting the Government of Nauru with the processing of transferees;

i. Ms Prasad wrote to the NST by email on 29 May 2024 as I have set out above, confirming the need to organise a cognitive assessment for the Appellant;

j. At the time of sending the email on 29 May 2024, Ms Prasad was satisfied that her team had made all available enquiries with respect to obtaining a specialist assessment for the Appellant to determine whether or not he had a diagnosable mental health condition which could have a bearing on his capacity to participate in the RSD process;

k. With the knowledge that such assessments could only be facilitated through NST, and that further direct requests to IHMS would have no utility, Ms Prasad took the view that such assessments would only be available to the Appellant provided that the NST responded to her 29 May 2024 email;

l. If the assessment confirmed the suspicions that the Appellant suffered from a cognitive deficiency, this would have formed the basis of submissions to the Tribunal as to how the Tribunal should conduct the hearing and how it should examine the Appellant's evidence;

m. No response was received from NST to the email dated 29 May 2024;

n. The request to the Tribunal for it to exercise its own powers to obtain a medical assessment was an attempt to fill the lacuna as to expert mental health evidence left by the Appellant's inability to obtain an assessment of his own volition; and

o. The Appellant was entirely reliant on the assistance of the Republic to obtain critical evidence relevant to his case.

33. Ms Prasad was cross-examined. She accepted that the effect of her evidence was that there was no *free* service (in the sense of being a service without charge) available to a person such as the Appellant other than IHMS. She gave evidence that in this case, she had not explored whether there was a psychiatrist or other expert located outside of the Republic who would be willing to provide an opinion. However, she stated that she had undertaken research to locate such a psychiatrist or other expert in Australia in other matters and had been unable to find any practitioner who would offer this service on a *pro bono* basis.

THE APPELLANT'S SUBMISSIONS

34. The Appellant submits that in advancing the case on behalf of their client, his representatives formed a suspicion that he suffered from a cognitive deficit. That suspicion emerged during the interview with the RSD officer.

35. Mr Aleksov's contention that the Appellant did not have the capacity to obtain an assessment is based on the evidence of Ms Prasad as set out above. In essence, the Appellant was unable, in the sense of it being impossible for him, to obtain evidence of the kind which was considered necessary, or at least appropriate, to fully advance his case.

36. The Appellant made every effort to obtain such evidence himself, including by making a request of the only practicably available method to do so, through the Nauru Support Team.

37. It was in this context that the Tribunal came to assess the case.

38. There are two basic contentions advanced on behalf of the Appellant, First, there was a legitimate issue being agitated by the Appellant's representative, being that he wished to present psychiatric evidence as to his state of mind, or evidence of his mental health more generally. Secondly, he was unable to adduce such evidence as he wished to adduce.

39. The Appellant submits that the fact that he was seen by IHMS staff is irrelevant. Those assessments were done for clinical purposes and were not undertaken for the purpose of forensically examining him or for the preparation of a report to be used in the Tribunal proceedings. Critically, the Appellant submits that the bulk of the nursing and psychiatric assessment undertaken by IHMS was done by reference to self-reporting, rather than administering diagnostic or forensic tests.

40. The nub of the Appellant's case was that he did not have a reasonable opportunity to advance his case before the Tribunal because he was unable to obtain clearly relevant evidence and was thus deprived of procedural fairness.

41. The Tribunal noted that it had a power to require that a mental health assessment be undertaken pursuant to s 24(1)(d) of the Act. The Tribunal considered the exercise of that power and gave reasons for why it was not exercised. The Appellant does not contend that the decision not to require a mental health assessment was the affected by some legal error. However, the Appellant submits that a lawful approach to the exercise of the discretion in s 24(1)(d) of the Act does not necessarily mean that procedural fairness overall has been afforded.

42. The Appellant submits that in order to be afforded a reasonable opportunity to present his case, the Appellant needed to have the opportunity to adduce relevant evidence insofar as he considered it appropriate to adduce it. The Appellant gave evidence before the Tribunal of the impossibility of obtaining his own evidence that he wished to seek out. In any event, regardless of whether and how the Appellant might have raised this argument with the Tribunal, in this case it does not deny the fact that the Appellant considered that the Tribunal should have evidence before it about his state of mind and that he was unable to obtain such evidence himself. His case might have been adversely affected by the absence of such evidence.

43. According to the Appellant, it is immaterial that there was "some" evidence as to the Appellant's mental health from his IHMS records. The opportunity to which he was entitled under the Act was to adduce whatever relevant evidence he wished to adduce. In this case, that included expert opinion evidence which would naturally rely on forensic techniques as well as clinical observations or assessment. That opportunity was denied to the Appellant.

44. As to the Tribunal's reference to the Refugee Status Determination Handbook as set out above, the issue of competence to participate in a hearing, whilst relevant, is different to whether cognition and other mental health concerns might exist even if a person is competent to participate in a hearing. The nature and impact of evidence as to cognitive deficit, or interference in other mental ill health, is broad in scope and admits of many degrees. Identifying that the Appellant was "competent" to participate is immaterial to the argument put by the Appellant.

45. The Appellant's argument was encapsulated orally by Mr Aleksov in these terms at T21 lines 9-16:

> Now I accept if we were in Australia, the fact that a person does not have money or a report would not assist them but it does not [sic] in Nauru because this person is stuck, in my submission, and his only practical option is to use the assistance of CAPS I would say, Your Honour, told you about the limits of what they could do. They pursued the pathway that they were aware of. Not the one that should have been pursued, and unexplained, it ran dead. So overall, the Appellant wished to have a cognitive assessment before the Secretary and before the Tribunal and could not. In my submission that is not a fair procedure over that issue.

THE REPUBLIC'S SUBMISSIONS

46. The Republic notes that the Tribunal was required by s 22(b) of the Act to ensure that the Appellant had a reasonable opportunity to present his case. However, the requirement is of a "reasonable" opportunity, not an "optimal" one. Further, there is no denial of procedural fairness where no practical injustice is shown.

47. If it is alleged that a person in the position of the Appellant was denied a "reasonable opportunity" by reason of their alleged psychological condition, they "must establish more than the fact of the condition": ***BJB16*** *v The Minister for Immigration and Border Protection* [2018] 260 FCR 116 at [43]. Thus, if it is alleged that a person's condition was such that they were in some way impaired from presenting their case, they must also establish this by evidence. It is axiomatic that this is for the Appellant to establish. The burden cannot be shifted to the Tribunal or to the republic. Generally, it is insufficient for a person in the position of the Appellant to show no more than a medical condition *may* have deprived them of the ability to put their case to best advantage: *Minister for Immigration, Citizenship and Multicultural Affairs v* ***NDBR*** [2024] FCAFC 114 at [80].

48. The Republic notes that there is no medical evidence that suggests that the Appellant suffered, either at the RSD interview or at the Tribunal hearing, any medical condition that impaired his ability to present his case. The Tribunal reviewed the medical evidence relating to the Appellant provided from IHMS. That evidence showed that the Appellant had been assessed by both a mental health nurse and psychiatrists in relation to his mental health and cognitive capacity. Those documents do not indicate that the Appellant suffered any relevant condition. The Appellant does not say that the Tribunal made any error in this respect.

49. Accordingly, the Appellant's case falls far short of what is necessary to establish that he has been denied procedural fairness. His case rises no higher than conjecture.

50. As to the Appellant's argument that he was denied procedural fairness on the basis that he was prevented from obtaining medical evidence, the Republic rejects that contention for three reasons.

51. First, the obligation on the Tribunal was to ensure that the Appellant had a "reasonable" opportunity to present his case. It was not an obligation to ensure an "optimal" opportunity.

52. Second, the Appellant did have the capacity to obtain medical services in Nauru and he did access those services. To the extent that he did so, the records suggest that he did not suffer any relevant mental health issue or cognitive deficit.

53. Third, the Act empowered the Tribunal to fill any gap caused by the Appellant having difficulty in accessing medical services by ordering a medical examination. The Appellant requested this, but in light of the evidence the Tribunal refused it. The Appellant does not contend that the Tribunal erred in that respect.

54. Accordingly, the Republic contends that the Appellant did have a reasonable opportunity to present his case. He has not suffered any practical injustice and no breach of the requirements of procedural fairness is made out.

CONSIDERATION

55. The starting point for a consideration of this appeal is the obligation imposed upon the Tribunal by s 22 of the Act. It is in the following terms:

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

56. The Australian equivalent of s 22 of the Act is to be found in provisions of the *Administrative Appeals Tribunal Act 1975* (Cth). One such provision is s 39(1) of the *Administrative Appeals Tribunal Act* which provides that the (Australian) tribunal shall ensure that every party to a proceeding before it is given a reasonable opportunity to present his or her case.

57. In *NDBR*, the Full Court of the Federal Court of Australia observed the following as to the obligation in s 39 of the *Administrative Appeals Tribunal Act*:

> [38] This obligation reflects the position at common law and is no higher than that obligation: *Kamal v Minister for Immigration, Citizenship And Multicultural Affairs* [2023] 300 FCR 106 [17] (Rares, Bromwich and Raver JJ). As Deane J put it in *Sullivan v Department of Transport* (1978) 20 ALR 323 at 342, it is a "statutory recognition" of the duty which the common law would imply. Importantly, the obligation is to provide a *reasonable* opportunity, "not necessarily an optimal one": *Kamal* at [31].
>
> [39] What constitutes a reasonable opportunity in a particular case will always depend on the facts. In *Kamal* at [18] the Full Court approved the following statement made by the primary judge [Mortimer J]:
>
> > "What is, and is not, a "reasonable opportunity" will of course be highly fact dependent. It can be accepted that the tribunal's discharge of its obligation may well require it in certain circumstances to be proactive, to be flexible and to actively consider the circumstances of a review applicant. All such matters inhere in the concept of what is a "reasonable" opportunity in a specific situation. None requires a gloss on the s 39(1) obligation itself."
>
> [40] Further, unless the aggrieved party is able to show that the breach by the tribunal of that obligation gave rise to "practical injustice", there is no procedural unfairness: *Lam* [37] (Gleeson CJ); *Minister for Immigration and Border*

Protection v SZMTA [2019] 264 CLR 421 at [38]; [45] – [46] (Bell, Gageler & Keane, JJ). The breach must result in a denial of the reasonable opportunity and that denial must be material to the tribunal's decision: *SZMTA* at [38]. In *Lam*, there was no practical injustice because it was not shown that the affected party lost an opportunity to put any information or argument to the decision hyper maker or otherwise suffered any detriment: *Lam* at [36].

58. It is important to bear in mind that the Appellant's argument here is not that the Tribunal erred in failing to make an order pursuant to s 24(1)(d) of the Act that a mental health assessment be obtained. Instead, the Appellant's case is a narrow one. He contends that he was denied procedural fairness on the basis that he was unable to obtain relevant medical evidence and thus was deprived of the reasonable opportunity to put his case and thereby suffered practical injustice.

59. There is a dispute between the parties as to whether the Appellant was, in a practical sense, deprived of the opportunity to obtain relevant medical evidence.

60. The evidence of Ms Prasad demonstrates the challenges in obtaining a forensic report on the Appellant's condition. However, in my view those challenges did not amount to practical impossibility, nor to the deprivation of a "reasonable opportunity" to put the case that he wished to put.

61. First, it is notable that despite the email of 29 May 2024 being sent to the Nauru Support Team requesting the preparation of such a report (apparently by IHMS), no response was received and there is no evidence of any follow-up to this request. The evidence does not establish that NST could not have arranged this report if followed up. In other words, a more proactive approach to NST on the part of the Appellant's representative may have yielded a different result

62. Second, and most importantly, insofar as the Appellant was otherwise unable to obtain a forensic report, the Act provided a solution in the form of s 24(1)(d). The Tribunal was empowered to order a medical examination. It was asked to do so by the Appellant and refused that request. That refusal is not the subject of challenge.

63. In my view, the Appellant was afforded a "reasonable" opportunity to advance his case. Whilst it is true that he was ultimately not able to adduce all the evidence that he desired, and in that sense his advancement of his case was not "optimal" from his perspective, he was nevertheless afforded a reasonable opportunity to advance his case.

64. Whether the Appellant suffered practical injustice is a more difficult question. There is no evidence before this Court of what any forensic report might have said, had it been able to be obtained. The evidence from the IHMS records was not suggestive of any significant mental health challenges beyond a degree of insomnia. It is little more than speculation as to whether a forensic report may have assisted the Appellant - although such evidence as exists does not support a conclusion that such a report would have assisted the Appellant's cause.

65. Against that remains the argument that the Appellant was deprived of the *opportunity* that a forensic report may have assisted him. That opportunity cannot be simply ignored.

66. In the factual circumstances of this case, I am not persuaded that the lost opportunity to lead this forensic mental health evidence amounted to practical injustice. The evidence that the Appellant suffered some relevant health condition amounts to little more than assertion on the part of the Appellant's representative. The IHMS records do not relevantly assist the Appellant. The Tribunal's observations of the Appellant at the hearing do little to assist him. In my view, it is not enough to establish practical injustice simply for an appellant to contend that a forensic report *may* have assisted his cause, when there is no real evidence to support such a conclusion, indeed such evidence as there is suggests otherwise.

67. The Appellant has thus not demonstrated that the contended deprivation of the reasonable opportunity to put his case amounted to practical injustice.

68. Accordingly, I find that the Appellant was not deprived of a reasonable opportunity to put his case. If I am wrong about that, any such deprivation did not, in any event, amount to practical injustice in the circumstances of this case.

69. Accordingly, the ground of appeal is not made out.

CONCLUSION AND DISPOSITION OF THE APPEAL

70. For the reason set out in this judgement, the Appellant has not established his single ground of appeal. The appeal is therefore dismissed.

71. Pursuant to Section 44(1) of the Act, I make an order affirming the Tribunal Decision.

72. I make no order as to the process of the appeal.

SUPREME COURT OF NAURU

MATTHEW BRADY
15 August 2025