IN THE SUPREME COURT OF NAURU

AT YAREN

Appeal No. 16 of 2025

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:

AP25

Appellant

AND:

REPUBLIC OF NAURU

Respondent

Before: Brady J

Dates of Hearing: 12 August 2025

Date of Judgment: 19 November 2025

Citation: *AP25 v Republic of Nauru*

CATCHWORDS:

APPEAL - *Refugees – Refugee Status Review Tribunal – whether Tribunal failed to comply with s.40(1) of the Refugees Convention Act 2012 (Nr) – whether Tribunal failed to afford procedural fairness by deciding a point without previous notification to the Appellant – Tribunal did not breach s.40(1) of the Refugees Convention Act – No failure to afford procedural fairness – Appeal Dismissed*

LEGISLATION:

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

CASE AUTHORITIES:

AN25 v The Republic [2025] NRSC 46, *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 757, *Mustac v Medical Board of Western Australia* [2007] WASCA 128, *Bond v Hale* (1969) 89 WN (NSW) (Part 1) 404, *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576

APPEARANCES:

Counsel for Appellant: Mr A Aleksov (instructed by Craddock Murray Neumann)

Counsel for Respondent: Mr R O'Shannessy (instructed by Republic of Nauru)

REASONS FOR JUDGMENT

INTRODUCTION

1. The Appellant is a Bangladeshi national. He arrived in Australia in November 2023 and was transferred to Nauru on 23 November 2023. The Appellant claims to fear persecution in Bangladesh should he return because he is a supporter and worker in Bangladesh's main opposition party, the Bangladesh Nationalist Party (**BNP**).

2. Pursuant to s.43 of the *Refugees Convention Act 2012 (Nr)* (**the Act**), the Appellant appeals from a decision of the Refugee Status Review Tribunal (**Tribunal**) made on 7 March 2025 (**Tribunal Decision**). The Tribunal affirmed a determination of the Secretary of the Department of Multicultural Affairs (**Secretary**) dated 8 August 2024

(**Secretary's Decision**). The Secretary decided not to recognise the Appellant as a refugee under the Act and found that the Appellant was not owed complementary protection.

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

GROUNDS OF APPEAL

4. By his amended notice of appeal filed 17 June 2025, the Appellant pursued two grounds of appeal:

   1. The Tribunal failed to comply with s.40(1) of the *Refugees Convention Act*.

   2. The Tribunal failed to afford procedural fairness to the Appellant, by relying on a point that was not reasonably open on the known material, without notifying the Appellant of the point. The point was the potential conduct of other asylum seekers in Nauru, upon any return to Bangladesh.

APPELLANT'S CLAIMS

5. The Appellant submitted an RSD application on 13 May 2024. His material claims can be summarised as follows:

   (a) The Appellant fears persecution in Bangladesh because he is a supporter of the BNP. He has an uncle who is a senior party official and the Appellant has done fieldwork for him and has himself participated in various national elections;

   (b) As a BNP supporter, he faced discrimination at the hands of Awami League (**AL**) officials and government officials.

   (c) The Appellant was beaten on election day in 2019 by AL supporters. He was injured, but his injuries were minor.

   (d) The Appellant also fears persecution due to his extensive borrowings from his relatives and also from a loan shark.

   (e) He fears harm as a result of his political opinions and he fears that the loan shark will place undue pressure on him to repay his borrowings.

PROCEDURAL HISTORY

6. The Secretary's Decision was made on 8 August 2024. On 5 September 2024, the Appellant applied to the Tribunal for review of the Secretary's Decision.

7. On 28 October 2024, the Appellant's representative made extensive written submissions to the Tribunal, and also provided the Tribunal with a further statement by the Appellant dated 24 October 2024.

8. The Appellant appeared before the Tribunal to present his case and arguments on 31 October 2024.

9. After the Tribunal hearing, various correspondence ensued between the Appellant's representatives and the Tribunal. I set out the detail of that correspondence further below.

10. The Tribunal did not conduct any further hearing with the Appellant and proceeded to deliver the Tribunal Decision on 7 March 2025.

11. The Appellant appealed to this Court on 24 March 2025. An Amended Notice of Appeal was filed on 17 June 2025. After the parties delivered their respective written submissions, I heard the appeal in this matter (together with the matters of AX25 and AQ25, where the same appeal ground as ground 1 here were also pursued) on 12 August 2025.

FIRST GROUND OF APPEAL – SECTION 40(1) OF THE ACT

12. The following paragraphs dealing with the first ground of appeal are substantially replicated in my discussion of the same ground of appeal in the reasons for judgment in the matters of AQ25 and AX25.

13. The first ground of appeal in this case alleges that the Tribunal failed to adopt the mandatory procedure set out in s.40(1) of the Act. It is convenient here to set out the relevant parts of s.40:

> **40. Tribunal Shall Invite Applicant to Appear**
>
> (1) The Tribunal shall 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) (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
>
> (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it.

Relevant Evidence

14. As I have noted in paragraph 8 above, the Appellant was interviewed by the then-constituted Tribunal on 31 October 2024. The Appellant was assisted by an interpreter.

15. On 4 December 2024, the principal member of the Tribunal, Ms Boddison, sent an email to Ms Prasad of Craddock Murray Neumann (**CMN**), the Appellant's representative. That email attached a letter which was relevantly in the following terms:

> I have become aware that for the sittings conducted from 30 October to 6 November 2024, the Tribunal was not constituted in accordance with the *Refugees Convention Act 2012* (the Act).
>
> This sitting involved the following Applicants:
>
> ...
>
> 925-009 [being the boat number of the Appellant]
>
> ...
>
> These cases will be reconstituted to a new Tribunal. It is envisaged that the cases will be constituted to two of the members from the original Tribunal with a third new Member.
>
> 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 applicant's consent to the Tribunal deciding the review without the applicant appearing before it pursuant to s.40(2)(b) of the Act.
>
>   Or
>
> 2. The applicants wish to be invited to and participate in a new hearing.

16. On 5 December 2024, Ms Prasad responded to the Principal Member advising that she would seek instructions and revert.

17. Ms Boddison responded the same day, 5 December 2024, by email advising Ms Prasad that Dr O'Connell had not been appointed in accordance with s.13(2) of the Act and accordingly the Principal Member had formed the view that his appointment to the Tribunal was not valid. Hence, the cases would need to be reconstituted with a new presiding member.

18. On 27 December 2024, Ms Prasad responded by email to the Principal Member advising:

> We have received instructions from our clients and confirm the following:
>
> 1. ...95-009... would not like to proceed with a new hearing. 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 (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).

...

Please do let me know if you require any further clarification in relation to the above.

19. On 3 January 2025, Ms Temaki, the Tribunal Registrar, emailed Ms Prasad with a letter of the same date. The letter was relevantly in the following terms:

> I refer to the correspondence of 4 December 2024 and your response dated 27 December 2024.
>
> Could you please confirm that all applicants consent to the reconstituted Tribunal relying on the evidence they have given at the previous hearing.
>
> ...
>
> Could you also confirm that all applicants consent to the reconstituted Tribunal deciding the review without the applicant appearing before it pursuant to s.40(2)(b) of the Act. If the applicants do not consent, they will be invited to a further hearing.
>
> Could you please provide your response by 10 January 2025.

20. On 9 January 2025, Mr Zhang of CMN sent an email in response to Ms Temaki. The response was relevantly in these terms:

> 1. We refer to your letter dated 3 January 2025 regarding the reconstitution of matters which we are instructed to act in and referred to above.
>
> 2. Subject to the qualifications at [3]-[5] hereof, the applicants (forthwith, **the Applicants**) assigned the following NOM IDs are *generally* agreeable to the Tribunal promulgating a decision in accordance with s.40(2)(b) of the *Refugees Convention Act 2012* (Nr) (**the Act**) without further appearance from the Applicants:
>
> ...
>
> (d) 925-009;
>
> ...
>
> 3. Whilst the applicants do not oppose the Tribunal relying on the evidence already proffered as a matter of *general* principle, they maintain that depending on the circumstances of each case, there may be an obligation on the Tribunal to exercise certain discretionary powers to ensure that the applicants have been provided a meaningful opportunity to present their case, whether that be in the interests of ensuring procedural fairness and/or natural justice and/or legal reasonableness.

4. The gravamen of this submission was advanced at paragraph [1] of email correspondence from Ms Neha Prasad of our office to the Tribunal dated 27 December 2024. Specifically, it is the applicants' position that if the Tribunal is not positively satisfied on credibility or otherwise has <u>any</u> adverse concerns, the discretionary powers conferred under s.7(1)(a)(iii), 7(1)(a) (v) and 7(1)(a) (vi) and 7(1)(b) of the Act become relevant for the purposes of promulgating a decision. The conferral of these statutory powers allows the Tribunal to request further information or have further information verified by way of statutory declaration (which deals with the situation where evidence on a certain matter was not satisfactorily explored orally at hearing).

5. For the avoidance of doubt, where adverse concerns are a reason or part of a reason for promulgating a decision which affirms the determinations made by the Secretary, the Applicants request notice of such concerns and an opportunity to comment and/or file submissions on such concerns in accordance with well-established legal principles about procedural fairness and/or natural justice and/or legal reasonableness.

THE RELEVANT PARTS OF THE TRIBUNAL DECISION

21. The Tribunal Decision was delivered on 7 March 2025 by Mr Silva (presiding), Dr O'Connell and Mr Lynch. The Tribunal dealt with the history of the application starting at paragraph [3] of the Tribunal Decision. The following passage appears from paragraph [8]:

[8] After the hearing, it came to the Tribunal's attention that the Tribunal had not been constituted at the hearing on 31 October 2024 in accordance with the *Refugees Convention Act 2012.*

[9] Accordingly, on 4 December 2024, the Principal Member wrote to the representative advising of this and whether in these circumstances a further hearing with a newly constituted Tribunal was sought. The Principal Member's preliminary view was that all issues at the 31 October 2024 hearing were properly canvassed and the applicant had been given full opportunity to make out his case to the Tribunal.

[10] In a response dated 27 December 2024, the representative appeared to confirm that the applicant consented to a decision without a hearing, under s.40(2)(b) of the Act, but went on to state:

> "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 (vi) of the Act [...]."

On 3 January 2025, the Tribunal Registrar wrote to the applicant's representative seeking clarification.

[11] On 9 January 2025, the applicant's representative replied that the applicant does not oppose the Tribunal relying on evidence already provided, subject to "well-established legal principles about procedural fairness and/or natural justice and/or legal reasonableness", and then restated the comments about the Tribunal's exercise of its discretionary powers in addressing "any adverse concerns".

[12] Having reviewed the material, the Tribunal has confirmed that the applicant has had a meaningful opportunity to present his case, including to address any credibility concerns, and that the principles of natural justice do not require further correspondence. As such, the Tribunal considers that he has consented to it proceeding to decide the review under s.40(2)(b).

The Appellant's Submissions

22. In his written submissions, counsel for the Appellant argues that the 9 January 2025 letter from CMN does not amount to the "consent" required in order to trigger the application of s.40(2)(b) of the Act. He describes the representative's expression as being "sub-optimal", but that the substance of what was conveyed was that the Appellant consented to proceed without a further hearing, but only if the Tribunal informed him in writing of any adverse issues, as to credit or otherwise, and gave him an opportunity to put further written evidence or material before the Tribunal on that issue.

23. In that sense, the Appellant submits that he was not giving consent to proceeding without a hearing for the purposes of s.40(2)(b) because he was giving *conditional consent* to that course. It could not be said that "the applicant consents to the Tribunal deciding the review without the applicant appearing before it", being the words of s.40(2)(b) of the Act, because such "consent" as was given was not consent to the unqualified proposition in s.40(2)(b). It was consent to a different position, which does not match the statutory language required of s.40(2)(b) so as to trigger the operation of the chapeau of s.40(2) so that subsection 40(1) does not apply.

24. By the time of the hearing of the appeal before me on 12 August 2025, Freckelton J of this Court had delivered a decision in *AN25 v The Republic* [2025] NRSC 46 on 8 August 2025.

25. In that case, the same argument was put concerning the question of whether the "consent" required by s.40(2)(b) had been given. Indeed, the Appellant in that case was also named in the same correspondence that I have set out above at paragraphs [14], [17], [18] and [19]. Effectively, the Appellant in *AN25* was in precisely the same factual position concerning the correspondence with the Tribunal as is the Appellant in this case.

26. Having set out the detail of the communications, Freckelton J referred to the correspondence of 3 January 2025 from the Tribunal. His Honour then dealt with this correspondence as follows:

[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 s.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 s.40(2)(b) consent.

[57] I find that the procedure of the Tribunal conformed with what is required by s.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 s.40(1) to invite him formally to appear before the reconstituted Tribunal did not apply.

27. His Honour therefore rejected this ground of appeal.

28. Mr Aleksov for the Appellant argued that the decision in *AN25* does not resolve any questions of law. All that it decided is a factual issue. He submitted that the decision does not carry the weight of authority before me, and I am not bound by it. I was invited by the Appellant to give effect to my own view about the evidence, without affording deference in a formal sense to the view expressed by Freckelton J in *AN25*.

29. If the Appellant's submissions in that regard were not accepted and I found that the decision in *AN25* ought to be followed, Mr Aleksov conceded that his Honour's decision was not "clearly wrong" and that I would follow it, whatever my views about the correctness of the Appellant's argument.

30. The Appellant's counsel accepts that the instructions conveyed by CMN ought to have been conveyed more clearly. However, what was being expressed was that the Appellant would not like to proceed with a new hearing but he wanted to be invited to answer any adverse credit concerns in writing. The use of the expression "on the condition" in the 9 January 2025 correspondence makes the position clear, on the Appellant's case.

31. The Appellant submits that his consent to the Tribunal deciding the review without requiring the applicant to appear before it must be unqualified. If there is "murkiness or muddiness or a lack of clarity about whether an applicant has consented to that unqualified proposition", then the requirement of consent for the purposes of s.40(2)(b) has not been met. In effect, the argument is a simple one, that on a proper construction of the correspondence from CMN, s.40(2)(b) was not complied with because no <u>unconditional</u> consent was given.

The Republic's Submissions

32. The Republic submits that the responses given in writing by Ms Prasad, and then subsequently by Mr Zhang, on behalf of the Appellant, constituted the requisite consent for the purposes of s.40(2)(b) of the Act. The concept of "conditional consent" is not established on the facts of the communications viewed in a holistic context. In particular, the Republic submitted that it is not open to conclude that the Appellant reserved his rights to have a hearing, contrary to the general agreement so conveyed, if (and only if) the Tribunal informed the Appellant in writing that it did not have any adverse issues as to credit or otherwise, and that if it did, he would be given an opportunity to put on further written material. In reality, the Republic submits that the communications were a submission as to the potential exercise of statutory powers of information gathering.

33. The Republic accepts that this Court is not bound by what Freckelton J said in *AN25*. However, the situation of having two different factual findings from two different judges of this Court on precisely the same set of facts (involving precisely the same correspondence) would be undesirable.

34. My attention was drawn to the decision of the Australian Federal Court in *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 757. French J (as his Honour was before his appointment to the High Court) noted that it is well established that a judge of the Federal Court of Australia should follow an earlier decision of another judge unless of the view that it is plainly wrong. His Honour cites a number of authorities for that proposition which I will not include here. His Honour also sets out an extract from the decision of Burchett J in *La Macchia v Minister for Primary Industries and Energy* (1992) 110 ALR 201 at 204 where His Honour said:

> The doctrine of *stare decisis* does not, of course, compel the conclusion that a judge must always follow a decision of another judge of the same Court. Even a decision of a single justice of the High Court exercising original jurisdiction, while "deserving of the closest and respectful consideration" does not make that demand upon a judge of this Court... But the practice in England, and I think also in Australia, is that "a judge of first instance will, as a matter of judicial comity, usually follow the decision of another judge of first instance unless he is convinced that the judgement was wrong..." The word "usually" indicates that the approach required is a flexible one, and the authorities illustrate that its application may be influenced, either towards or away from an acceptance of the earlier decision, by circumstances so various as to be difficult to comprehend within a single concise formulation of principle…

35. As French J went on to note, the requirements of judicial comity are not merely to advance mutual politeness as between judges, but also to uphold the authority of the Courts and confidence in the law by the value it places upon consistency in judicial decision making.

36. The Republic also drew my attention to authorities to the effect that considerations of judicial comity have no operation in relation to findings of pure fact. In *Mustac v Medical Board of Western Australia* [2007] WASCA 128, the Western Australia Court of Appeal referred to various authorities which do not support the proposition

that the considerations of judicial comity extend to issues of fact: see [45] of that decision. That is also supported by comments of Street J in *Bond v Hale* (1969) 89 WN (NSW) (Part 1) 404.

37. The Republic submitted that, ultimately, considerations of judicial comity come down to supporting certainty in the application of the law. It would be undesirable to have two different conclusions arising from precisely the same facts from two different judges of this Court.

38. Accordingly, although I am not bound to follow the decision of Freckelton J, I would usually follow his Honour's decision unless I was convinced that he was wrong.

39. Mr O'Shannessy in his oral submissions noted that the "qualifications" contained in the 9 January 2025 letter from the Appellant's representative do not relate to a further hearing. It is instead a plea to the Tribunal to comply with its existing statutory obligations to ensure that procedural fairness is met. Provided a meaningful opportunity to present his case is given, then the issue of whether an invitation is required under s.40(1) is fully disposed of by the response. The consent to proceed without a hearing was not itself conditional. Such consent was unconditional. To the extent that qualifications were made later in that correspondence, those matters related to asking the Tribunal to ensure that the requirements of procedural fairness were met. It was not an invitation to conduct a further hearing in the event that any concerns were to be raised in relation to the credit of the Appellant or otherwise.

Consideration

40. Because I have independently come to the same conclusion as Freckelton J in *AN25*, it is unnecessary for me to consider the detail of the authorities that address questions of judicial comity. His Honour's conclusions in relation to this aspect of the appeal are precisely the same as the conclusions which I would otherwise have reached without regard to his Honour's own conclusions. Accordingly, it is unnecessary to wade into questions as to what judicial comity might have required in the particular circumstances of this case.

41. I agree with the submissions of the Republic that the consent to proceed without a further hearing was not itself qualified. Whilst paragraph 2 of the 9 January 2025 letter does refer to the agreement to the Tribunal proceeding to a decision in accordance with s.40(2)(b) of the Act without further appearance from the Appellant as being "subject to the qualifications at [3]-[5] hereof", those qualifications are not in fact qualifications dealing with whether consent is given under s.40(2)(b). The "qualifications" did not amount to an indication that the Appellant would require a further hearing to be conducted if the Tribunal was not satisfied of the Appellant's credit or had any other "adverse concerns".

42. In other words, the Appellant's representative made it clear that no further hearing was required. What they did assert was that the Tribunal had an obligation to exercise certain identified discretionary information-gathering powers. However, the Appellant's representative said nothing to suggest that if the Tribunal had a different view about the need to exercise discretionary powers, that a hearing would be required.

43. In particular, at paragraph [5] of the 9 January 2025 letter, the Appellant's representative said that where adverse concerns were a reason, or part of a reason, for making a decision to affirm the Secretary's Decision, the Applicants requested notice of such concerns and "an opportunity to comment and/or file submissions on such concerns". It is tolerably clear in the context of that letter (and the earlier correspondence) that the opportunity requested was an opportunity to make a written comment or submission, not an opportunity to attend a further hearing.

44. The Tribunal made perfectly clear in its correspondence that it was asking whether consent was being given under s.40(2)(b) of the Act. The consent provided was not rendered conditional by reason of the fact that the Appellant's representative then proceeded to raise an argument about how procedural fairness was otherwise to be afforded. The letter was not phrased so as to narrow the consent given consistent with s.40(2)(b).

45. Finally, as the Tribunal itself held at paragraph [12], "the Tribunal has confirmed that the applicant has had a meaningful opportunity to present his case, including to address any credibility concerns, and that the principles of natural justice do not require further correspondence". Having reached that conclusion, the "conditions" that the Appellant argues rendered his consent under .s 40(2)(b) ineffective were not met in any event.

46. I am satisfied that the combined responses of CMN on 27 December 2024 and 9 January 2025 constituted consent for the purpose of s.40(1)(b) of the Act. The Tribunal therefore properly proceeded to determine the Appellant's matter without giving him a further invitation to appear before them. The Appellant has not made out ground 1 of the Amended Notice of Appeal.

GROUND 2 – PROCEDURAL FAIRNESS

47. The second ground of appeal is that the Tribunal failed to afford procedural fairness to the Appellant by relying on a point that was not reasonably open on the known material without notifying the Appellant of the point. The point is said to arise from the terms of paragraph [99] of the Tribunal Decision. Paragraph [99] refers to the Tribunal having "flagged at hearing" that it considers it unlikely that the people smuggler responsible for arranging the Appellant's travel to Australia would seek to harm him or any other transferees if he was returned to Bangladesh. The relevant passages of the Tribunal Decision are as follows:

> [33] In his updated statement, the applicant said that he decided to travel to Australia because he heard from other people who were in Malaysia about the possibility of travelling to Australia to get work. He said that travelling to Australia seemed to solve many of his problems. He stated that a Bangladeshi called [M] helped him contact a broker called [A]. [M] helped the Appellant to get to Indonesia to meet [A].
>
> ...
>
> [36] In his updated statement, the Appellant stated that he was interviewed by the Australian Federal Police (AFP) on Nauru and questioned about his

travel history, where he stayed in Indonesia and what he had paid. He said that while at the Regional Processing Centre, Nauru, he telephoned [K], an employee of his agent [A], and told [K] what he had told the AFP. The applicant stated that he fears harm from [A] who would have learnt from [K] of the applicant's AFP interview. He said [A] is a powerful, corrupt man with operations in Malaysia, Indonesia and Bangladesh.

[37] The applicant's advisor submitted that the applicant fears harm from [A] and his associates on his return to Bangladesh, as the fact the applicant was interviewed by the AFP is known in his village, as well as what he told the AFP about his travel arrangements and the people he dealt with for his trip to Australia.

....

[98] As to the applicant's possible exposure to harm being a police informer, the advisor submitted that at least 51 Bangladeshis, including the applicant, on Nauru had given information about [A] to the AFP. It was submitted they run the risk of [A] and his accomplices harming, intimidating and taking retaliatory action against them, including the applicant.

[99] The Tribunal notes the applicant's claim that he was extremely angry with [A's] failure to get the applicant into Australia and into employment there, and that he called [K] from Nauru to complain about the failed arrangements and his money being wasted. As the Tribunal flagged at hearing, it considers it unlikely that [A] would make contact the applicant in Bangladesh [sic] and seek to harm him or any other transferees, especially if other transferees felt the same as the applicant. The Tribunal considers it unlikely that [A] would risk this number of dissatisfied and/or fearful clients reporting him to the Bangladesh authorities. The Tribunal notes the applicant gave evidence ... that [A] would not call him in Nauru for fear of the applicant reporting him to the police.

[100] On the evidence before it, the Tribunal finds there is no reasonable possibility that the applicant would face harm from ... [A] or [his] associates amounting to persecution on return to Bangladesh or in the reasonably foreseeable future. The Tribunal finds that the applicant's fear of persecution on this basis is not well founded.

Evidence before the Tribunal

48. In the Secretary's Decision, the Secretary dealt with the Appellant's claim of fear arising from his role as an informant to the Australian Federal Police. The Secretary deals with this matter at some length under the heading "Disclosure of being an informant". Relevantly for present purposes, the Secretary said:

> I accept that the Applicant informed the AFP of the circumstances surrounding his travel to Australia and similarly accept that he told an acquaintance in Malaysia of his circumstances in Nauru. I do not accept that [A] would have a motive or ability to harm the applicant as the smuggler was paid to organise

transport to Australia, which has been completed. The likelihood of legal repercussion for smugglers will be outlined below.

49. Under the heading "Summary of findings regarding the Applicant's claims", the Secretary accepted that the Appellant had provided details of the arrangements made with the smugglers to organise his trip to Australia to the AFP. However, it found his claim that he would be killed by [A] or someone he hires, if returned to Bangladesh on account of him being an informant, was not credible.

50. Under the heading "Failed asylum seeker - informer on people smugglers to the authorities in Australia and/or Indonesia", the Secretary set out a detailed consideration of the issue. Whilst not precisely the same issue as that set out above, the Tribunal did conclude that the Appellant's subjective fear, whilst accepted, was not consistent with the country information. The country information suggested that it was not likely that [A] will be pursued by the authorities either in Bangladesh or in Indonesia. There was no evidence to indicate that smugglers were regularly convicted on the strength of failed asylum seeker testimonies, or that smugglers seek retribution. Accordingly, the Secretary was not satisfied that there was a "reasonable possibility" of harm.

51. In light of these conclusions by the Secretary, the Appellant delivered a further statement and further submissions to the Tribunal. In his further statement the Appellant said:

[54] Once I was on Nauru, I was interviewed by the Australian federal doc. They asked me about my travel history, where I stayed in Indonesia, what I paid. Questions like that. They showed me a photo of someone but I didn't know who they were.

[55] While I was in the RPC I called [M's] farther in law, [K], who also works for [A].

[56] I understand the Secretary does not think there is any chance [A] will harm me because of what I have told the AFP.

[57] [A] is a powerful man with many, many people working for him who are all very corrupt. They operate in Malaysia, Indonesia and Bangladesh. He knows my address in Bangladesh.

[58] Through [K] he would know I had talked to the Australian authorities about him.

[59] Here on Nauru, about 50 of us came through [A]. I was part of the first 12 who arrived, after that came 39. In total there were 51 of us. We have all told the AFP about [A] and how he operates.

[60] I don't know what everyone paid but if like me they paid [amount noted] taka then [A] made a lot of money from us.

[61] He is a powerful, wealthy man. He will have protections in place so he would not be caught by the police. Corrupt police would be assisting him.

[62] He will be extremely angry with those of us who have threatened his business model.

[63] I am sure if he and his criminal cronies will harm me at the first chance they get to take their revenge and teach others a lesson not to do anything to disrupt his business.

52. In their written submissions to the Tribunal, the Appellant's representives provided detailed submissions about the impact of the Appellant's role as a police informant. That part of the submissions ranges over approximately five pages of single-spaced type. By way of summary:

(a) The representative submitted that an important consequence for the Appellant rested with the fact that he and 50 other Bangladeshis currently held on Nauru were all facilitated to travel to Australia by [A] and had provided extensive information to the AFP about their journey, the costs, as well as [A] and his accomplices;

(b) The seriousness of the potential consequences for the transferees, including the Appellant, should not be underestimated nor be judged solely on the unlikeliness of [A] or his criminal associates being caught and convicted as per the Secretary's determination, and contrary to the AFP's advice;

(c) It is not farfetched to conclude that the Appellant and others in Nauru have potentially destroyed [A's] reputation, disrupting his business model;

(d) [A's] losses are huge and he will have made an enormous amount of money from moving the more than 50 persons on Nauru that he smuggled to Australia;

(e) It was reasonably possible that [A] and his criminal associates based in Bangladesh would actively seek out returnees, such as the Appellant, to silence or punish those who they would hold reasonable for the disruption of a lucrative business. [A], and those working with him, are also now at risk of arrest and prosecution. It is not unreasonable to conclude that their reach extends throughout Bangladesh and that they are enabled by a multitude of corrupt authorities. The Appellant is therefore unable to seek effective state protection anywhere within the country.

53. The issue of the Appellant's fear arising from the information which he gave to the AFP was dealt with by the Tribunal in the hearing conducted on 31 October 2024 at some length. The relevant part of the transcript occupies approximately four pages. After exploring with the Appellant how he was initially put in contact with [A] and how he went about dealing with him, the Tribunal asked about the Appellant's interview with the AFP and what he told other people about that interview.

54. The Appellant explained that he told [K] by telephone about the fact that he had been interviewed by the AFP. He said that he "mentioned everything to police and so they will caught you and you might have to go to jail and have to face other consequences" [sic]. The Appellant expected [K] to talk with [A] about his call.

55. The Tribunal asked the Appellant whether it occurred to him that it might be potentially risky for him and his family to raise this matter with [K]. The Appellant responded, "I did not think anything about that".

56. At the time of the conversation, the Appellant thought that he was staying in Nauru so there was nothing they could do to harm him. The Appellant told [K] to tell [A] that "We mentioned everything about [A] ... and other things to the police". The purpose of the Appellant's call was to complain about the change in arrangements for the Appellant to come to Australia, but also to let him know that the Appellant's intention was to do that so that no other people would not be exploited by him in the same way that he had been exploited.

57. The Appellant confirmed that since this telephone call with [K], the Appellant has not had contact with [A]. However, [K] informed him that [A] became very angry and asked why he informed to the Australian Federal Police. The Appellant said that he thought that [A] was not threatening him over the telephone because [A] thought that the Appellant might provide further information about him to the police.

Appellant's Submissions

58. The Appellant draws attention to the particular passage at [99] of the Tribunal Decision where the Tribunal said "...as the tribunal flagged at hearing". The reference there by the Tribunal was to the Tribunal considering it unlikely that [A] would make contact with the Appellant in Bangladesh and seek to harm him or other transferees. The Tribunal considered it unlikely that [A] would risk a large number of dissatisfied and/or fearful clients reporting him to the Bangladesh authorities.

59. Counsel for the Appellant submitted that notwithstanding the Tribunal Decision indicating that this issue was "flagged" during the hearing, a review of the transcript reveals that this was not in fact the case. At no point did the Tribunal raise with the Appellant the attitude of *other persons* in Nauru towards [A], and how that might impact on the Appellant's case.

60. The Appellant submits that it was not reasonably foreseeable by him on the known material in the case that the Tribunal would take the view that it was unlikely that [A] would contact him because this would risk a large number of complaints to Bangladesh authorities.

61. The Appellant submits that he was denied an opportunity of making an argument against this reasoning. He was further deprived of the opportunity of obtaining evidence that would go to the state of mind or attitude of the 50 other transferees on Nauru who might be able to give relevant evidence on this issue.

The Republic's Submissions

62. The Republic accepts that the Tribunal did not, in terms, indicate to the Appellant that it considered it unlikely that he would be harmed, or that other transferees would be harmed if they felt the same way as the Appellant. According to the Republic, however, that conclusion was nevertheless open and was not one for which any procedural unfairness specifically arose.

63. That is so particularly having regard to the findings of the Secretary, as well as the evidence of what the Appellant submitted to the Tribunal prior to the Tribunal hearing. The Republic submits that the Tribunal's conclusion could have been properly reached on the known material, namely the information that the Appellant had himself provided as to the number of transferees on Nauru who had informed on the smuggler. The Tribunal's finding in this regard was not an issue *per se*, and it is not adverse information considered by the Tribunal without the Appellant having had any opportunity to comment upon it. The Tribunal was not obliged to expose its mental processes or provisional views and seeking comment on them before making the decision by way of finding as it did.

Consideration

64. In the decision of the Australian Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, the Full Court of the Federal Court said the following at 590-591:

> 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: *Dixon v Commonwealth* (1981) 55 FLR34 at 41. However, as Lord Diplock said in *F Hoffman - La Roche Co AG v The Secretary of State for Trade and Industry* [1975] AC 295 at 369:
>
> > .... 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 that were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would be abolished.

65. This case does not concern information in the possession of the Tribunal which was not made known to the Appellant. The Appellant's complaint is that he was not informed of an issue in the case that was not readily apparent to him on the face of the material otherwise available.

66. This submission must be rejected. The Appellant was well aware from at least the terms of the Secretary's Decision that there was a serious question as to whether [A] would have a motive or ability to harm the Appellant where he returned to Bangladesh.

67. This information then led the Appellant to make detailed submissions and provide a detailed further affidavit directly addressing this issue. The Tribunal had all of that evidence before it.

68. True it is that the Tribunal did not "flag at hearing" that it considered it unlikely that [A] would make contact with the Appellant in Bangladesh and seek to harm him or

others because it was unlikely that [A] would risk taking this course. However, as the court in *Alphaone* made clear in the extract set out above, it was not necessary for the Tribunal to disclose what it was minded to decide so that the Appellant may have an opportunity of criticising that mental process before the final decision was reached.

69. The Appellant was well aware that there was a serious question that he needed to address as to whether [A] would seek to harm him if he was returned to Bangladesh. He directly addressed that issue. There is nothing in the Tribunal's findings at [99] that deprives the Appellant of any procedural fairness. The Appellant knew what the issue was, and he addressed it in his evidence. This ground of appeal is not established.

CONCLUSION

70. For the reasons which I have set out, the Appellant has failed in respect of both of his two grounds of appeal. Accordingly, the appeal is dismissed.

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

72. I make no order as to costs of the Appeal.

JUSTICE MATTHEW BRADY

19 November 2025