IN THE SUPREME COURT OF NAURU

AT YAREN

Appeal No. 22 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:

AV25

Appellant

AND:

REPUBLIC OF NAURU

Respondent

Before: Brady J

Date of Hearing: 13 August 2025

Date of Judgment: 19 November 2025

CITATION: *AV25 v Republic of Nauru*

CATCHWORDS:

APPEAL - *Refugees – Refugee Status Review Tribunal – Failure to Arrange a Medical Examination – Whether Tribunal's Failure to Arrange Medical Examination Caused Decision to be Affected by Legal Unreasonableness – Tribunal's Decision Not Legally Unreasonable – Appeal Dismissed*

LEGISLATION:

Refugees Convention Act 2012 (Nr), ss 22, 24, 43, 44, 49; *Migration Act 1958 (Cth)* ss 425, 427

CASE AUTHORITIES:

DWN 034 v The Republic [2018] NRSC 57; Case 32 of 2017 (14 December 2018) and [2025] NRCA 4 (on appeal); *DWN072 v Republic of Nauru* [2016] NRSC 18; *ROD122 v Republic of Nauru* [2017] NRSC 39; *CRI029 v Republic of Nauru* [2017] NRSC 75; *HFM043 v Republic of Nauru* [2017] NRSC 43; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992; *DWN080 v The Republic* [2023] NRCA 4; *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21; *ROD124 v Republic of Nauru* [2025] NRCA 5; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332); *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992.

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 national of Bangladesh. On 9 March 2024, the Appellant made an application to the Republic to be recognised as a refugee, or as a person owed complementary protection. The Appellant claims to fear persecution in Bangladesh because of his political opinion as a supporter of the Bangladesh National Party (**BNP**). He also claims to fear persecution on the basis that he is a member of a particular social group, being a victim of a family dispute.

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 10 April 2025 (**Tribunal Decision**). The Tribunal confirmed a determination of the Acting Secretary of the Department of Multicultural Affairs (**Secretary**) dated 4 September 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 under the Act.

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.

GROUND OF APPEAL

4. On 14 July 2025, the Appellant filed an amended notice of appeal advancing a single ground of appeal in the following terms:

   > The Tribunal Decision is affected by legal unreasonableness in that it did not exercise the power under s 24(1)(d) to obtain a medical report.

PROCEDURAL HISTORY

5. The Appellant arrived in Australia in February 2024. On 18 February 2024, he was transferred to Nauru pursuant to the Memorandum of Understanding between the governments of Australia and the Republic of Nauru. On 9 March 2024, the Appellant made an application for Refugee Status Determination (**RSD**).

6. An RSD officer interviewed the Appellant on 25 May 2024 at which interview he was represented by his Claims Assistance Provider lawyer and also had the assistance of an interpreter.

7. The Secretary's Decision was made on 4 September 2024. The Appellant applied to the Tribunal for review of the Secretary's Decision by application dated 12 September 2024.

8. The Tribunal received a further submission made on behalf of the Appellant on 13 March 2025. A supplementary statement of the Appellant was also provided to the Tribunal at the same time.

9. On 14 March 2025, the Tribunal conducted a hearing. I consider the relevant events of that hearing below.

10. After the hearing, on 28 March 2025, the Appellant's representative wrote to the Tribunal enclosing certain mental health records.

11. The Tribunal Decision was delivered on 10 April 2025, affirming the Secretary's Decision.

12. On 23 April 2025, the Appellant filed a Notice of Appeal in this Court. The Amended Notice of Appeal was filed on 14 July 2025. The parties filed written outlines of submission and the appeal was heard before me on 13 August 2025.

THE APPELLANT'S CLAIMS

13. It is sufficient for the purposes of these reasons for me to summarise the Appellant's material claims for protection by replicating those set out in the Secretary's Decision in the following terms:

- The Applicant fears persecution in Bangladesh because he has a political opinion: In that he is a supporter of the BNP; and that he is opposed to the Awami League (**AL**). He also claims to fear persecution on the basis that he is a "member of a particular social group" being a "victim of a family dispute".

- Following the death of his grandfather's first wife (his paternal grandmother), his grandfather remarried. The grandfather gave all his property to the children of the wife of the second marriage. The Applicant does not recall when either his grandmother or grandfather died because he was very little.

- The Applicant's father did not know about the grandfather's gifting of his property. By the time, his father knew, his father had married and had all of his children (including the Applicant). His father worked the land, unaware he had no ownership rights.

- About 10-11 years prior, the Applicant's elder brother went to the "family land" to work. His elder brother spoke to the father's stepbrother… whom the Applicant refers to as "uncle". There was conflict. The Applicant's uncle beat his elder brother (in company with others). [The uncle] supports the AL and believes that because the Applicant's family supports the BNP, his family do not have power to call [the uncle] out to try and reclaim the land. The Applicant's elder brother tried to go back to work on the land but was prevented by [his uncle]. His father never worked on the land again.

- The Applicant claims that his brother had some mental issues after this happened. There was no money to seek treatment. He was married but eventually, because of these mental health issues, his wife left him. He started living with the Applicant's parents but could not work.

- In 2007, the Applicant went to India to work. He claims his family is poor and he could not find work in the village. He would send money home from India. Following his return to Bangladesh, he has worked in construction as a labourer. The Applicant claims that [his uncle] heard that the Applicant had been talking about taking the land back from him. In late 2023, [his uncle] threatened the Applicant that if he tried to get the land back, he would do the "same thing" to the Applicant as what he did to his brother.

- The Applicant says his parents became very fearful. They told the Applicant to "leave and at least be safe". This is the reason the applicant claims that he left Bangladesh.

- The Applicant fears harm from [his uncle] if he returns due to the characteristic of [his uncle] being an AL supporter. The family being BNP supporters, the Applicant claims no one will protect him. The Applicant claims the police will not protect him as he does not support "them" (being the AL).

- The Applicant fears relocation is not possible because he will have to visit his parents and he will come to harm when he goes home to his village. [*sic*] [footnotes omitted]

THE ARGUMENT OF LACK OF LEGAL REASONABLENESS

14. The sole ground of appeal now pursued by the Appellant is that the Tribunal Decision was affected by legal unreasonableness because the Tribunal did not exercise its power under s 24(1)(d) of the Act to obtain a medical report.

15. Section 24(1)(d) of the Act is in the following terms:

> (1) For the purpose of a review, the Tribunal may:
>
> ...
>
> (d) require the Secretary to arrange for the making of an investigation, or a medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.

19. I note also that the parties have agreed the following fact:

> The only in-person mental health services available to the Appellant in Nauru at the time of the Tribunal's Decision were services provided through IHMS.

20. The reference to "IHMS" in that agreed fact is a reference to International Health and Medical Services, the contracted health care services provider on Nauru.

RELEVANT EVIDENCE

21. In his original Statement of Claim dated 9 March 2024 made as part of the RSD process, the Appellant did not specifically refer to any difficulties that he had with his mental health or any concerns that he had about his mental capacity. Other than a brief reference to the Appellant's distress at recounting the details following his brother's

beating, the Secretary's Decision did not record any observations or concerns about the capacity or mental health of the Appellant.

22. Prior to the Tribunal hearing, the Appellant delivered detailed submissions in support of his case as well as a further statement by him dated 7 March 2025. Relevantly, that statement recorded the following:

Capacity

2. The difficulties that I faced in Bangladesh, especially in relation to the incident with my brother, financial destitution and constant threats of violence have deeply impacted my memory and personality.

3. The boat trip from Indonesia was also very traumatic and scary for me. I have not been able to process it. I cannot even bring myself to describe it or talk about it but I know I am affected by it. Life in Nauru is also very hard as I am unaccustomed to this climate and environment. I miss my family and worry about them.

4. I find that I am very withdrawn and lack any kind of initiative. Even with assistance, I am unable to always recall what is relevant to my situation as my memory is also impacted.

5. I have been seeing the IHMS mental support team but I do not think the sessions are necessarily helpful. The sessions are short and they only engage with the person I am today and because I am not violent or have any thoughts of self-harm, they just record how I present on a particular day.

6. They have not asked me any in-depth questions about my experiences or how to stop feeling so overwhelmed and numb. I have not found any kind of resolution or any meaningful engagements from these sessions and my anxiety around my status and fear of returning to Bangladesh remain on the forefront of my mind. The trauma that I have suffered also remains largely unexamined and unprocessed.

7. I present to the appointments as I am generally a compliant person and I am trying my best to adapt to this new environment, but I do not find the appointments necessarily helpful.

THE HEARING BEFORE THE TRIBUNAL

23. During the hearing before the Tribunal, the following exchange occurred as recorded at T3:

> *Ms W Boddison*: So good afternoon and welcome to the Tribunal. How are you feeling today?
>
> *The Interpreter*: I am okay.
>
> *Ms Boddison*: Okay. You all right to talk with us today?
>
> *The Interpreter*: No problems.

...

Ms Boddison: ... We are also going to be asking you questions and if you do not understand any of the questions, please say so and we will try and rephrase the questions. And if at any time you would like a break, you just say so and we will take a break and we will take breaks during the hearing and we will definitely take a break before we finish so you can talk to your representative and make sure that you have covered everything that you want to cover.

24. After the questioning of the Appellant, at T27 the Appellant's representative (Ms Magill) and the Tribunal engaged in the following exchange:

Ms Magill: Sure, thank you. It is just a couple more things all right. Okay. I would say in terms of the narrative that you have heard, I am sure that you have heard that there is a real struggle with sequencing and dates as he has gone through that. So as I did mention, we have sort of IHMS records that we are just waiting back on. I do understand that he has had period s- periodic attendances there, but has not - perhaps has not engaged out of a sense of hopelessness around the process.

Ms Boddison: Do you need more time to ...

Ms Magill: It would be beneficial. I think sitting in this room today listening to the sequencing, I do (in distinct).

Ms Boddison: When were they requested so we have an idea of that?

Ms Magill: (indistinct) to the end of day.

Ms Boddison: Okay.

EVENTS AFTER THE TRIBUNAL HEARING

25. After the hearing before the Tribunal, the Appellant's representatives sent a letter to the Tribunal dated 28 March 2025 relevantly in the following terms:

Please find **enclosed** IHMS records relating to the Applicant's mental health.

During the course of the hearing, the Applicant was observed to struggle with the sequencing of events or dates. This was consistent throughout the hearing, including events that the Applicant would have reasonably expected to have greater clarity on.

The **enclosed** records have limited information available to form an accurate basis on the mental state of [the Applicant]. Noting this limitation, the following points are of note from these records:

- The most recent Kessler Distress Scale report was conducted on 4 September 2024, so there is no currency of assessment available in relation to the mental health of the applicant.

- The Applicant's previous Kessler Distress Scale report was undertaken on 12 March 2024. The Applicant's score at that time was 28. The Royal Australian College of General Practitioners scores this in the high moderate mental health disorder range, noting a score of 30 or higher is classified as having a severe mental health disorder.

- To provide a context in relation to the health results available, we note the Applicant's further RSRT statement dated 5 March 2025 which has explained that he has not felt able to engage with the IHMS Services, and has for the most part simply attended as someone who has a compliant nature.

26. The IHMS records provided to the Tribunal consisted of two principal types of documents:

    (a) two Kessler Psychological Distress Scale reports printed out from electronic records (one dated 12 March 2024 and one dated 4 September 2024); and

    (b) two mental health assessment forms printed out from electronic records (one assessment dated 12 March 2024 and one dated 4 September 2024).

27. The IHMS records appear to record two separate assessments undertaken in March and September 2024. In the first assessment, the Appellant was found to have a score of 28 (out of a maximum possible 50) indicating moderate distress. The second assessment found the Appellant to have a score of 12, indicating that the Appellant was well.

28. The mental health assessment records did not reveal any diagnosed mental health conditions.

29. The March 2024 assessment recorded a depressed mood, but otherwise "nil formal thought disorder". The Appellant was described as "reactive" and his affect was congruent with his mood. His behaviour was recorded as pleasant and cooperative. His appearance was neat and tidy and he had normal speech. He had good insights and good judgment and had no perceptual disturbance. His risk assessment for self-harm, suicidality or harm to, or from, others was in each case low. The Appellant was observed to have difficulties with sleep, anxiety symptoms and mood symptoms. The only recorded diagnosis is that he was underweight.

30. The September 2024 assessment recorded that he had a "good" and "happy" mood. He had a bright and reactive affect and no formal thought disorder. His speech was normal and he had settled, pleasant and cooperative behaviour. He had good insights and judgment and was orientated and concentrated well. He had no perceptual disturbance. His risk assessment for self-harm, suicidality or harm to or from others, was in each case low. The Appellant is recorded as having declined to engage in goal planning. The only recorded diagnosis is that he was underweight.

RELEVANT PARTS OF THE TRIBUNAL DECISION

31. At paragraph [9] of the Tribunal Decision, the Tribunal set out the detail of, amongst other things, the Appellant's statement as to his capacity as extracted at paragraph

[22] above. The Tribunal also set out at paragraph [33] the terms of the submission received after the Tribunal hearing on 25 March 2025, including the IHMS material, which I have extracted at paragraph [25] above.

32. At paragraph [35] of the Tribunal Decision, the Tribunal recorded that the IHMS records indicated that on 12 March 2024, the Appellant scored 28 and on 4 September 2024 he scored 12 on the Kessler Distress Scale. He disclosed no history of torture or trauma. The only diagnosis recorded was him being underweight.

33. The Tribunal commenced a detailed consideration of the impact of the Appellant's mental state upon its decision, starting at paragraph [49] of the Tribunal Decision. For the purposes of this judgment, it is appropriate for me to set out the relevant passages from the Tribunal's judgment in full:

> *The Applicant's mental state*
>
> [49] After hearing, the advisor submitted that during the hearing, the applicant was observed to struggle with the sequencing of events or dates, including events that the applicant would have reasonably expected to have clarity on. She obtained IHMS medical records but noted there was limited information available in them to form an accurate basis on the applicant's mental state. She did, however, state the applicant's most recent Kessler Distress Scale report was conducted on 4 September 2024 and his previous Kessler distress scale report was undertaken on 12 March 2024 when the applicant's score was 28 which she noted, according to the Royal Australian College of General Practitioners was in the high-moderate mental health disorder range since a score of 30 or higher was classified as having a severe mental health disorder.
>
> [50] She also stated after 12 March 2024, the applicant explained he had not felt able to engage with the IHMS services, and has for the most part simply attended as someone who has a compliant nature.
>
> [51] The Royal Australian College of General Practitioners document the adviser provided states the Kessler psychological distress (also referred to as a mental disorder) is a simple measurement of psychological distress and is used as a brief screen to identify distress levels.
>
> [52] The Tribunal accepts the applicant obtained a score of 28 on 12 March 2024, which according to the Kessler distress scale, meant at that stage, he was likely to have moderate psychological distress. He obtained a score of 12 on 4 September 2024, which meant at that stage, he was likely to be well.
>
> [53] Given this, the Tribunal agrees with the advisor's submission there is limited information available in the medical records to form a view as to the applicant's mental state and any impact it has on his capacity. No other medical evidence has been provided.

[54] In this case however, the Tribunal accepts the applicant's mental state is relevant for the following reasons:

Taking the applicant's mental state into account, was he given an adequate opportunity to present his claims?

[55] The applicant did not talk about his mental health in his RSD application but in his second statement dated 7 March 2025, the applicant said the difficulties he faced in Bangladesh, especially in relation to the incident with his brother, financial destitution and constant threats of violence had deeply impacted his memory and personality. He also stated the boat trip was very traumatic and scary and life in Nauru was very hard as he was unaccustomed to the climate and environment, and missed and worried about his family. He also stated he found himself withdrawn and lacked any kind of initiative, and that even with assistance, he was unable to always recall what was relevant to his situation as his memory was also impacted. He referred to his visits to the IHMS mental support team but said he did not think them necessarily helpful as they just recorded how he presented on a particular day.

[56] The applicant's representative stated in her submission dated 13 March 2025 that the applicant experienced significant distress and trauma in connection with the violent attack on his brother and because of the boat trip from Indonesia to Australia. She stated he periodically attended IHMS mental support team and while he did not report being suicidal, he reported being withdrawn and struggling to recall events.

[57] At hearing, the applicant indicated he was alright and there were no problems with him talking to the Tribunal. The Tribunal observed, however, that the applicant was somewhat timid and withdrawn. It therefore took many breaks and approached the evidence in a slow and calm way and notes the applicant's engagement with the Tribunal improved over the course of the hearing.

[58] The Tribunal readily accepts the applicant's journey up to this point has been difficult. However, the Tribunal also finds the applicant's evidence consists of two statements which were prepared with the assistance of a professional advisor and interpreter and totalled five pages. In addition, he participated in the RSD interview and hearing. His advisor submitted a pre-hearing 26-page submission followed by a further post-hearing submission.

[59] The Tribunal therefore finds that over time, the applicant has had considerable help to present his RSD claims and to respond to any adverse information including at and after the Tribunal hearing.

[60] The applicant claimed that previous incidents have deeply impacted his memory and personality, including the incident with his brother, financial destitution and constant threats of violence. However, it is the Tribunal's observation that along with the applicant's omissions

and inconsistent evidence, there have been aspects of the applicant's evidence at hearing, especially those claims closest to his 7 March 2025 statement where he provided consistent evidence such as details about how many people were at the BNP meeting that was allegedly attacked by the Awami League three years ago. This suggests to the Tribunal he does have the capacity to recall information.

[61] Accordingly, while the Tribunal accepts there have been things in the applicant's life that have affected him deeply, it finds that given the assistance he has accessed over time, he has been able to present his claims and respond to any adverse information.

Does his mental state explain the omissions and inconsistencies?

[62] Given the applicant was able to articulate his claims, the Tribunal still needs to make findings about whether his mental state explains the inconsistencies in his evidence.

[63] Firstly, the applicant was able to provide some consistent claims. Given that, it doubts his mental state does explain his inability to be consistent about (in the advisor's words) the sequencing of events or dates, including events the applicant would have reasonably expected to have greater clarity on. To put it another way, the Tribunal remains at somewhat of a loss to understand how the applicant was able to consistently repeat minutia in claims he made in his 7 March 2025 statement but was unable to consistently state where he lived after he returned from India in 2007 or how his step-uncle owned land he said belonged to his father. Although acknowledging his withdrawn demeanour, there is no diagnosis, or medical evidence of mental health issues that would affect his recall of events.

[64] Given the applicant's inability at hearing to discuss where his brother lives, the Tribunal finds it is more probable the applicant did not live in [D] village with his family after he returned from India but was living elsewhere including in Chittagong. In addition, taking into account the applicant's failure to disclose in his RSD statement he attended BNP meetings and processions or that he was allegedly attacked three years ago at a BNP meeting and his inconsistent statements in relation to when he allegedly started attending BNP meetings and processions, the Tribunal does not accept the applicant attended BNP meetings or processions or that about three years ago, at a BNP meeting in his village, he was attacked. Neither does the Tribunal accept any cut on the applicant's head is as a result of this alleged attack.

[65] Given the applicant's inconsistent evidence at hearing in relation to how many times his brother was attacked as well as the fact that the attack he mentioned to the RSD officer was not raised in his RSD statement or in his statement dated 7 March 2025, neither does the Tribunal accept after the applicant left Bangladesh, they beat his father and brother and did damage during an election.

[66] Given the applicant initially stated in his RSD application his grandfather gave his property to the son and daughter of his second marriage (or the applicant's step-uncle) combined with his significant inconsistent evidence in relation to whether the assault on his brother happened either before he went to India in 2007 or after he returned from India and many years later in 2013/2014, the Tribunal finds it is more probable the applicant's grandfather gave his property to his step-uncle a long time ago and the applicant and his family have adapted (even somewhat reluctantly) to that state of affairs. The Tribunal therefore rejects the claim there was a land dispute. Neither does it accept the applicant's father was a victim of land dispossession and misappropriation. While the Tribunal is also prepared to accept the applicant's brother has mental health issues, because of the applicant's inconsistent evidence in relation to when the assault on his brother happened, the Tribunal does not accept his brother was attacked in the manner described nor that he sustained injuries or developed mental health issues because of the attack. Nor does it accept the applicant was threatened by his step-uncle in 2023.

[67] In reaching all these conclusions, the Tribunal readily accepts the applicant's journey up to this point has been difficult, but not for the reasons claimed.

THE APPELLANT'S SUBMISSIONS

34. In written submissions, Mr Aleksov for the Appellant submitted that it is "plain enough" that the Appellant has mental health struggles and this might have impacted his ability to present his case. The Appellant notes that the Tribunal is not an expert on mental health questions, which is the very reason why s 24(1)(d) of the Act exists.

35. The Appellant submits that the Tribunal purported to determine – outside of its competency - that the Appellant was sufficiently well to participate in the hearing. The Appellant accepts that so much might not have been legally unreasonable. The Appellant's case is not that there is a question about the Appellant's *capacity* to participate. He instead submits that it was legally unreasonable to find that his mental health issues did not – in absolute terms – account for inconsistencies and other issues with his evidence. The Appellant submits that such a conclusion was outside of the Tribunal's competence to assess.

36. The Appellant submits that in circumstances that indicated a real and substantial issue about the Appellant's mental health and its impact on the quality of his evidence, there is no intelligible reason not to have exercised the power to require a medical report.

37. Counsel for the Appellant drew the Court's attention to case law in both Australia and Nauru. The starting point for that examination was the decision of Freckelton J of this Court in ***DWN 034*** *v The Republic* [2018] NRSC 57; Case 32 of 2017 (14 December 2018). In that case, starting at [52], his Honour considered the number of cases in the Australian context concerning the parameters of a Tribunal's obligation to obtain evidence concerning the mental state of a party appearing before it. His Honour summarised the Australian law at [72] in these terms:

> [72] Thus Australian law has in general been reserved about requiring a Tribunal to exercise its powers to inform itself, acknowledging the inquisitorial, non-adversarial nature of tribunals, but distinguishing between powers and duties. However, it has identified that inherent in the right to being invited to appear is that the invitation must be "real and meaningful".

38. His Honour noted however that the law had, to some degree, developed further in the "distinctive jurisprudence of Nauru": at [73]. His Honour specifically referred to four Nauru cases being *DWN072 v Republic of Nauru* [2016] NRSC 18 at [30], *ROD122 v Republic of Nauru* [2017] NRSC 39 at [62]-[64], *CRI029 v Republic of Nauru* [2017] NRSC 75 and *HFM043 v Republic of Nauru* [2017] NRSC 43. Having considered those cases in some detail, Freckelton J went on to hold:

> [80] It is apparent then that Nauru has developed the national law on when a Tribunal is obliged to take its own steps to obtain evidence necessary for its fact-finding practice, including by adjourning a matter for such a purpose and, more particularly, by using the powers which it has under s 24(1)(d) of the Act in order to accord procedural fairness or fulfil its obligations under s 22(b) of the Act, which stipulates that the Tribunal is to "act according to the principles of natural justice and the substantial merits of the case." As pointed out by Gummow and Hayne JJ in [*Minister for Immigration and Multicultural and Indigenous Affairs v*] ***SGLB*** [(2004) 78 ALJR 992], it is a significant step to go beyond recognising the existence of a power to order the undertaking of investigations and to conclude that there is a duty to take investigations so as to accord procedural fairness or act according to the substantial merits of a case.
>
> [81] However, there are scenarios where a Tribunal is on notice from its own observations of an applicant or from other reliable material properly placed before it that it needs to procure further information in the exercise of its inquisitorial powers to accord fairness to an applicant – whether to assure itself that the applicant is able to participate meaningfully in a hearing or to deal with issues of contention in an application for refugee status or for complementary protection.

39. Mr Aleksov submits that the position in Nauru is to treat the requirement to investigate as a more onerous requirement then is the case in Australia.

40. The way in which the Appellant's mental health might impact him in this case is, as explained by Mr Aleksov, that it may explain some of his evidence and, in particular, inconsistencies, omissions and vagueness in relation to the evidence which he gave to the Tribunal. The Appellant's case is that in those circumstances, the relevant unreasonableness attaches to the Tribunal making findings adverse to his credit in circumstances where it seemed entirely plausible, if not likely, that aspects of his evidence were affected by his mental health condition.

41. Counsel for the Appellant accepted that there was no evidence before this Court to indicate that the Appellant or his representatives investigated the possibility of

obtaining mental health expert opinion. He accepted that this was a weakness in his client's case. However, he submitted that this was not fatal because this Court is to assess the conduct of the Tribunal and, whilst the conduct of the Appellant and his representative may be relevant, it is not the determinative issue. The determinative issue, on the submissions for the Appellant, was whether the Tribunal had a justifiable basis for not exercising the power in s 24(1)(d) of the Act.

42. Mr Aleksov submitted that the Tribunal made findings based on its own observations of how the Appellant presented, which was timid and withdrawn. In making its findings, it accepted that his past has impacted his memory and his personality.[1] The Tribunal however purported to make findings about what is the appropriate way to manage this circumstance. It appears that the Tribunal thought the appropriate way to manage this circumstance was to take breaks and approach the evidence in a slow and calm way. The Tribunal noted that the Appellant was able to give minute details of some issues in a consistent way, but not on others. The Tribunal's own view in relation to that was that it was at "somewhat of a loss" to understand how that was possible in circumstances where it accepted that he had a deeply impacted memory.

43. Having regard in particular to the observations of Freckelton J at paragraph [81] of *DWN034* as noted above, Mr Aleksov submitted that "it would be hard to imagine a case that better fits the discussion at [81]." Bearing in mind the inquisitorial function of the Tribunal, and that the duty to inquire in Nauru has moved away from the Australian position, a conservative approach is not to be taken and the specific contemplation of Parliament that the Tribunal should have the power in s 24(1)(d) for purposes that could not have arisen more acutely than in this case.

44. That submission is made notwithstanding the failure of the Appellant to request the exercise of the power in s 24(1)(d) and notwithstanding that there was a limited amount of evidence concerning the Appellant's mental state before the Tribunal. The Appellant submits that the limited amount of evidence before the Tribunal was in favour of the argument that the Tribunal ought to have been uncertain as to the mental state of the Appellant and did not have sufficient information before it, but nevertheless it took it upon itself to form a view that his acknowledged problems with his mental state did not justify the benefit of the doubt.

THE REPUBLIC'S SUBMISSIONS

45. The Republic submits that the Tribunal was not bound to exercise its power under s 24(1)(d) and relies on authorities in both this jurisdiction and Australia in support of its case. The Republic also notes that the Appellant's representative could have (and on the Appellant's submission, should have) but did not request the Tribunal to consider the exercise of its powers under s 24(1)(d).

46. In oral submissions, Mr O'Shannessy for the Republic started by addressing me on the correct legal position. He first drew the Court's attention to the decision of the Court of Appeal in ***DWN080*** *v The Republic* [2023] NRCA 4. He drew attention to the Court of Appeal's apparent approval at [40] of the decision of the Australian High Court in *Minister for Immigration and Citizenship v* ***SZGUR*** (2011) 241 CLR 594. In

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1 I note that the actual finding of the Tribunal at [61] was that "there have been things in the applicant's life that have affected him deeply"

particular, he highlighted the statement by the Nauru Court of Appeal at [40] that there is no legal obligation on the Refugee Review Tribunal in Australia to either consider exercising its powers, or to make enquiries, concerning the health condition of the applicant.

47. I was also taken to the decision of the Nauru Court of Appeal in the appeal from the decision of Freckelton J in *DWN034*, the appeal decision of which is cited as *DWN034 v Republic of Nauru* [2025] NRCA 4. The Court there emphasised that the Tribunal is primarily required to act upon the material presented to it by an applicant. The Tribunal's role is to assess the material provided by the applicant and it is entitled to decide the case on the material before it. The Tribunal is not under a general duty to consider exercising its discretionary powers unless specific circumstances justify it: at [22].

48. The Republic submits that the conclusion at [81] of the first instance decision in *DWN034* (extracted at [38] above) was directed at two issues: firstly, whether there the applicant had *capacity* and secondly, whether the question of the mental health of the applicant might be a relevant *integer of the claim for refugee status*. Neither of those two elements applies in this case. There is no line of authority in Nauru that says when an applicant is making inconsistent statements, or when he is leaving things out from an interview, the Tribunal has some obligation to inquire whether that might be the result of his mental health. The Republic submits that nothing Freckelton J said in *DWN034* suggests to the contrary.

49. In relation to the facts of this case, the Republic emphasises that no application was made for the Tribunal to exercise its powers under s 24(1)(d) of the Act. The Tribunal did carefully consider the evidence before it in relation to the Appellant's state of mental health. Proceeding in the way that it did was not, in the circumstances of this case, in any sense unreasonable. The Tribunal is entitled to assess the matter on the evidence before it, which it did.

CONSIDERATION

When is a failure to exercise a power unreasonable?

50. As the Nauru Court of Appeal has recognised in cases such as *DWN080*, the question of unreasonableness in this jurisdiction has travelled beyond what was once known as "Wednesbury unreasonableness" as taken from the principles set out in *Associated Provincial Picture Houses Ltd v* ***Wednesbury*** *Corporation* [1948] 1 KB 223. Unreasonableness is tied not just to *Wednesbury* principles or when it is demonstrated that a decision was so unreasonable that no reasonable decision-maker could have made it: see *DWN080* at [45]-[46].

51. Now, a broader perspective of unreasonableness is to be applied. In *DWN080*, the Nauru Court of Appeal said:

> [46] Therefore when one considers the principles enumerated in *Wednesbury* ..., it is apparent that an executive decision would only be set aside if the reviewing body concluded that the decision was so unreasonable that no reasonable decision maker could have made it.

[47] However, it is to be taken note of that several decades later, in 2013, a broader perspective regarding the concept of unreasonableness was considered by the High Court of Australia in *Minister for Immigration and Citizenship v* ***Li*** (2013) 249 CLR 332), where it was held that unreasonableness is not just tied to *Wednesbury* principles or to decisions that are completely irrational.

[48] The decision in *Li* (supra) clearly reflects a new judicial trend that makes provision to provide protection against arbitrary decision based on statutory provisions which attempt to exclude procedural fairness.

[49] Accordingly, the Australian courts introduced a broader justification in order to decide whether a decision is unreasonable or not by stating that:

> Unreasonableness is a conclusion which may be applied a decision which lacks an evident and intelligible justification" (emphasis added)

...

[53] In considering the issue before the Court, Gageler J, in [*Minister for Immigration and Border Protection v]* ***SZVFW*** [[2018] HCA 30] had stated thus:

> The question of whether or not a decision made or action taken in purported exercise of a statutory power is legally unreasonable is accordingly a question directed to whether or not the decision or action is within the scope of the statutory authority conferred on the repository ... The constitutional entrenchment of judicial power in courts of competent jurisdiction leaves no room for doubt that 'the judicial duty is to ensure that [an] administrative agency stays within the zone of discretion committed to it by its organic act" (emphasis added)

[54] It is therefore abundantly clear that in terms of section 24(1)(d) of the *Refugees Convention Act* 2012, it is only a discretionary power that the Tribunal is empowered with, to make arrangements for an Applicant to undergo a medical examination. It is apparent that there cannot be any compulsion for such an action to be taken by the Tribunal and therefore relevant action would be considered by the Tribunal only if it thinks that it is necessary to take such measures.

[55] The role of an administrative authority, such as a Tribunal, is limited to carry out an investigation to review the issue before it and reach a considered decision. In order to arrive at a decision, such a body would have to function within the given parameters by the statute it was formed.

52. The following matters arise from the Court of Appeal's reasons:

(a) a decision will be unreasonable not just when it so unreasonable that no reasonable decision-maker could have made it, but also where the decision lacks an evident and intelligible justification; and

(b) section 24(1)(d) is a discretionary power and there cannot be any compulsion to exercise the power unless the Tribunal thinks it necessary to exercise it.

53. The characterisation of a decision as legally unreasonable because of illogicality or irrationality, or unreasonableness, is not easily made: ***Djokovic*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21 at [33]. The approach of the Court in *Djokovic* to questions of legal unreasonableness was referred to with approval by the Nauru Court of Appeal in *ROD124 v Republic of Nauru* [2025] NRCA 5 at [35].

54. The task of this Court, then, is to ascertain, through understanding the approach of the Tribunal and characterising its reasoning process, whether its decision is affected by legal unreasonableness because it did not exercise the s 24(1)(d) power. In other words, was the Tribunal Decision one that no rational or logical Tribunal could reach, or was it otherwise one that lacked evident and intelligible justification, in the absence of a medical report?

Case law on the potential application of s 24(1)(d) of the Act

55. A significant part of the argument before me was occupied by submissions about the impact of the decision both at first instance, and on appeal, in *DWN034*. In that case, the Appellant was a Pakistani national who at first instance alleged that the Tribunal erred in law by failing to require the Secretary to arrange for the making of a medical examination under s 24(1)(d) of the Act. This failure was said to amount to a breach of the rules of natural justice at common law and the requirements of ss 22 and 40 of the Act, in that the Tribunal did not afford the Appellant the right to a real and meaningful hearing. I immediately note that the same argument was not deployed by the Appellant in this case.

56. At first instance in *DWN034*, Freckelton J considered both relevant Australian and Nauruan cases. His Honour first noted the terms of s 425 of the *Migration Act 1958* (Cth) which is the Australian provision which requires that the Australian tribunal must invite an applicant to appear before it to give evidence and present arguments.

57. His Honour reviewed cases such as *Minister for Immigration and Citizenship v* ***SZNVW*** (2010) 183 FCR 575. In that case, a Full Court of the Federal Court of Australia held that s 425 imposes on the Australian tribunal an obligation to issue an invitation to attend a hearing, thereby evincing a legislative intention that an applicant is to have an opportunity to attend the hearing and the invitation "must not be a hollow shell or an empty gesture": at [14], quoting the Full Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at [33]. That is to say, the Tribunal must provide a real and meaningful invitation. If the applicant does not have the capacity to give an account to the Tribunal or present arguments, then he may have been deprived of a "real and meaningful" invitation: see *DWN034* at [64].

58. Freckelton J noted at [68] that in *SZGUR*, the High Court dealt with a case where the applicant suffered from mental health conditions, but the Tribunal failed to make inquiries as to the significance of his medical condition and how it might have impacted his capacity to present his case.

59. French CJ and Kiefel J (with whom Heydon and Crennan JJ agreed) held in *SZGUR* that the Tribunal was under no obligation to make further inquiry about his condition: at [41]. It held that the Tribunal was under no obligation from the legislation to obtain an independent medical report and was entitled to decide the case on the material before it: see *SZGUR* at [41]. Gummow J observed that the section of the Australian legislation is not "the source of any obligation on the Tribunal to go further and seek more information that might enhance, detract from or otherwise be relevant to information which it had already received": at [86].

60. In *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, Gleeson CJ concluded at [19]:

> Fairness does not ordinarily require the Court or Tribunal to undertake a psychiatric or psychological assessment to investigate the extent to which the person in question may be at a disadvantage; and ordinarily it would be impossible to tell.

61. Gummow and Hayne JJ drew a distinction between powers and duties at [43]:

> ...Whilst section 427 of the Act confers power on the Tribunal to obtain a medical report, the Act does not disclose any duty or obligation to do so. Rather, section 426 provides that even if an applicant requests that the Tribunal take oral or written evidence from a witness (such as a medical practitioner or psychiatrist), the Tribunal is not required to obtain such evidence. Thus, the Tribunal is under no duty to inquire.

62. Callanan J stated at [124]:

> Under section 427 of the Act, the Tribunal may require the Secretary to arrange, and report upon, any investigation or medical examination that the Tribunal thinks necessary with respect to a review. That does not mean that the Tribunal is bound to make particular enquiries or to obtain evidence on medical or other matters....Even if the respondent had made a request that a particular psychologist or psychiatrist give evidence, the Tribunal was not obliged to comply with it. It certainly made no jurisdictional error in not undertaking further enquiries. It had a discretion and not an obligation to pursue such other inquiries, if any, as it saw fit.

63. Freckelton J in *DWN034* observed that the law had to some degree developed further in the distinctive jurisprudence of Nauru: at [73]. As noted in paragraph [38] above, his Honour surveyed cases such as *DWN072 v Republic of Nauru* [2016] NRSC 18, *ROD122 v Republic of Nauru* [2017] NRSC 39, *CRI029 v Republic of Nauru* [2017] NRSC 75 and *HFM043 v Republic of Nauru* [2017] NRSC 43. He came to the conclusion at [81] that there are scenarios where a Tribunal is on notice from its own observations of an applicant or from other reliable material properly placed before it that it needs to procure further information in the exercise of its inquisitorial powers

to accord procedural fairness to an applicant – whether to assure itself that the applicant is able to participate meaningfully in a hearing or to deal with issues of contention in an application for refugee status or complementary protection.

64. His Honour's observations at [81] relate *first* to the issue of capacity and *secondly* to those cases where one of the integers of the refugee claim in fact relates to the mental health status of the refugee applicant. Neither of those two considerations applies to this appeal as has been made clear by counsel for the Appellant. There is no question of capacity. And the Appellant's claim does not include as one of its integers the Tribunal being satisfied of some mental health condition. Instead, the issue that arises in this case is whether a failure to exercise the s 24(1)(d) power in this case caused the Tribunal Decision (particularly concerning the Appellant's credit) to be rendered legally unreasonable.

65. The decision of Freckelton J in *DWN034* was appealed in the case reported as *DWN034 v The Republic of Nauru* [2025] NRCA 4. The appeal was dismissed. The Court of Appeal noted at [11] that the Tribunal was well aware of the Appellant's claimed mental condition during the hearing. At no stage did the Appellant's representatives request that he be referred for a medical examination to obtain a report on his mental health. Nevertheless, the Tribunal had considered the Appellant's mental health in its reasons. All those facts reflect those in the Appellant's case here.

66. The Court of Appeal said at [18]:

> [18] There is no argument that the learned Judge of the Court below correctly identified and applied the relevant legal principles regarding the inquisitorial role of the Tribunal, as discussed in the authorities cited in the judgment. Therefore, we do not consider it necessary to undertake an analysis of the legal position adopted in this jurisdiction concerning the Tribunal's inquisitorial role. The crux of the argument advanced by the Appellant is that the Tribunal ought to have exercised its power under section 24(1)(d) to assess the Appellant's mental state, which, in turn, would have enabled the Tribunal to evaluate his evidence in light of the findings from a medical examination.

67. The Court of Appeal then set out various paragraphs from the first instance decision, including paragraph [81], with apparent approval. The Court of Appeal went on to say:

> [20] It should be noted that, in our view, medical evidence is not necessarily required for the Tribunal to exercise its power under section 24(1)(d). The provision clearly empowers the Tribunal to order a medical examination if it considers such a step necessary. The Tribunal has the discretion to make that determination based on the circumstances of each case. <u>In particular, where a claim is made regarding an applicant's mental state, the Tribunal may either assess the evidence in light of that claim or, if it has reservations or considers that further assessment is required, order a medical examination.</u>
>
> [21] <u>It must also be emphasised that the Tribunal is primarily required to act upon the material presented to it by the applicant. If the Appellant's</u>

legal representatives were of the view that a medical examination was necessary to assess his mental state, it was incumbent upon them to request that he be referred for such an examination. In the present case, no such request was made. The only request was for the Tribunal to consider the information submitted by the legal representatives regarding the Appellant's perceived difficulties.

...

[23] Notably, there is no allegation that the Tribunal refused to consider these submissions made on behalf of the Appellant regarding his mental health. However, the Counsel for the Appellant submitted that, although the Tribunal acknowledged the claims concerning the Appellant's mental condition, it failed, according to paragraph 63 of the Tribunal's Decision, to evaluate the Appellant's evidence in the context of his mental state. We do not accept that submission. It appears to rely on a narrow interpretation suggesting that the Tribunal made an adverse finding despite being aware of the Appellant's mental health concerns.

[24] However, when paragraph 63 is read in the context of the Tribunal's reasons as a whole, it cannot be said that the Tribunal disregarded the Appellant's mental health claims. Even accepting the Appellant's representative's submissions regarding mental health issues at their highest, the Tribunal is not precluded from assessing the evidence to reach a conclusion. The fact that the Tribunal decided not to accept a portion of the Appellant's evidence, for reasons clearly set out in its decision, does not necessarily mean it failed to consider the evidence in light of the Appellant's mental health claims.

[25] Furthermore, we have considered the findings of the second Tribunal. It appears that the Tribunal gave due regard to the information provided by the Appellant, and its final conclusion was reached in view of the entirety of that material. We are not inclined to accept that the second Tribunal denied the Appellant a fair hearing or breached the rules of natural justice merely because a medical examination was not ordered. When the reasons of the second Tribunal are considered in their full context, it appears that the Appellant's mental state was taken into account. We do not find any error in the Tribunal's decision merely because it did not exercise its discretion to request a medical examination of the Appellant." [emphasis added]

68. The Court of Appeal decision in *DWN080* also must be considered for the purposes of this judgment. The Full Court there said:

[32] There is no doubt that provisions have been made under section 24(1)(d) of the *Refugee Convention Act*, for the Secretary to make arrangements for a medical examination that the "Tribunal thinks necessary" for its review. It is however, important to note that such an examination is not a mandatory requirement and the Secretary has to carry out such instructions for a medical examination only if the

Tribunal is of the view that such a medical examination is necessary for the review.

[33] Considering the actions taken by the Tribunal and on an examination of what had transpired before the Tribunal, it is apparent that the Tribunal had taken a considered decision that it was not necessary for the Appellant to undergo a medical examination for the purpose of the review. In such circumstances, the question that arises is whether the failure of the Tribunal to exercise its power to request for a medical examination could be regarded as unreasonable?

[34] A careful consideration of the decision in *SZIAI (supra)*, it is obvious that although the High Court of Australia had accepted that the Refugee Review Tribunal might on certain occasions be subjected to a duty to inquire, the Court had left the issue open without coming to a final conclusion. It is also to be noted that the High Court had suggested that the common law requirements of procedural fairness would not normally support a duty to inquire.

[35] The High Court in *SZIAI* (supra) also kept open the question of whether the ground of unreasonableness would support a limited duty to inquire.

[36] However, the High Court had accepted that a failure to inquire might give rise to a jurisdictional error if there is a failure to make "an obvious inquiry into a critical fact which could be easily ascertained."

69. The Court of Appeal went on to conclude:

[54] It is therefore abundantly clear that in terms of section 24(1)(d) of the Refugees Convention Act 2012, it is only a discretionary power that the Tribunal is empowered with, to make arrangements for an applicant to undergo a medical examination. It is apparent that there cannot be any compulsion for such an action to be taken by the Tribunal and therefore relevant action would be considered by the Tribunal only if it thinks that it is necessary to take such measures.

[55] The role of an administrative authority, such as a Tribunal, is limited to carry out an investigation to review the issue before it and reach a considered decision. In order to arrive at a decision, such a body would have to function within the given parameters by the statute it was formed."

The process of the Tribunal's reasoning

70. The first thing to note is that that neither the Appellant, nor his representative, ever asked the Tribunal to exercise the s 24(1)(d) power. Consistent with the approach of the Court of Appeal in *DWN034*, the Tribunal in this case was entitled to assess the evidence in light of the claim as made or, if it considered it necessary to do so, to order a medical examination. The Tribunal was primarily required to act upon the material presented to it by the Appellant. As the Appellant made no request for the

Tribunal to exercise its power under s 24(1)(d) of the Act, the Tribunal was never called upon to state in clear terms *why* it was not exercising the power in s 24(1)(d).

71. Second, the evidence before the Tribunal involved "limited information … to form an accurate basis on the [Appellant's] mental state": see Tribunal Decision at [49]. That is a perfectly reasonable summary of the evidence before the Tribunal. However, contrary to the Appellant's submission, this lack of clear information does not bespeak legal unreasonableness. The mere absence of clear evidence of the Appellant's state of mental health does not render it "necessary" for the purpose of s 24(1)(d) for the Tribunal to obtain a medical report. Nor does it render any decision made in the absence of such a report legally unreasonable.

72. Third, the Tribunal expressly accepted that the Appellant's mental state was relevant to its consideration. It undertook a detailed consideration of the issues arising from his claimed mental health challenges and the evidence presented to the Tribunal. The Tribunal proceeded to consider the Appellant's mental state, both in terms of firstly his capacity, secondly in terms of whether he was given an adequate opportunity to present his claims, and thirdly whether his mental state may have explained the omissions and inconsistencies in his evidence. That last consideration – being the relevant consideration for the purpose of this appeal - involved considering how the Appellant presented during the hearing, the contents of his March 2025 statement and the submissions made on his behalf, including the IHMS records.

73. Fourth, the Tribunal observed that the Appellant did give consistent evidence about details of some matters, suggesting that he had the capacity to recall information: at [60], [63]. Accordingly, the Tribunal doubted that his mental state explained his inability to be consistent about "the sequencing of events or dates": at [63]. The Tribunal could not understand how his condition could mean that he was able to have clear recall about minute aspects of some matters, but not others.

74. Fifth, it must be remembered in any event that the s 24(1)(d) power is purely discretionary and is only engaged where the Tribunal thinks it necessary to exercise the power. It is apparent from the detailed consideration of the health of the Appellant at paragraphs [49] to [61] of the Tribunal Decision that the Tribunal did not come to the view that it was necessary in order to deliver its reasons that the s 24(1)(d) power be exercised.

Effect of my consideration

75. I do not consider that there is any aspect of legal unreasonableness in the reasoning of the Tribunal in this case. It was not legally unreasonable to find that the Appellant's state of mental health did not account for inconsistencies in his evidence in the absence of the exercise of the s 24(1)(d) power. The Tribunal's findings adverse to the Appellant's credit are fully explained by the Tribunal. There is an evident and intelligible justification for them. The conclusions were not such that no reasonable decision-maker could have formed such a conclusion.

76. The Tribunal here assessed the evidence in light of the claims made by the Appellant. That included taking careful account of the claims made about the Appellant's mental state. There is no reason to think that the Tribunal considered that further investigation by way of obtaining a report under s 24(1)(d) was necessary. Nor was

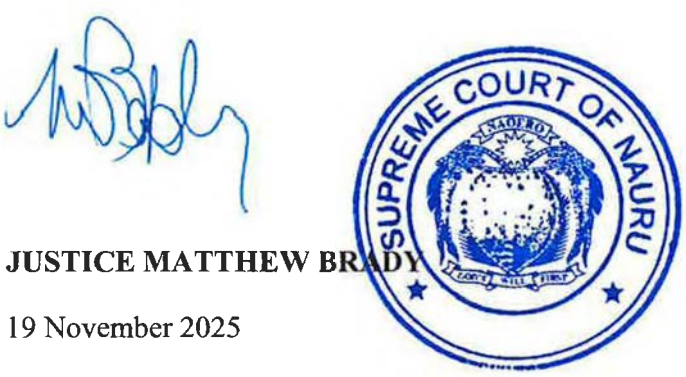
such a conclusion compelled by the evidence before the Tribunal. Indeed, the Appellant did not even request such a course. I do not consider that the Tribunal was required (either as a matter of procedural fairness or as a matter of legal reasonableness) to procure a medical report in the exercise of its inquisitorial powers.

77. The ground of appeal is not made out.

CONCLUSION

78. For the reasons which I have set out above, the Appellant has failed to make out the ground contained in his Amended Notice of Appeal. Accordingly, the Appeal is dismissed.

79. Pursuant to s 44(1) of the Act, I make an order affirming the Tribunal Decision. I make no order as to the cost of the Appeal.



JUSTICE MATTHEW BRADY

19 November 2025