IN THE HIGH COURT OF AUSTRALIA

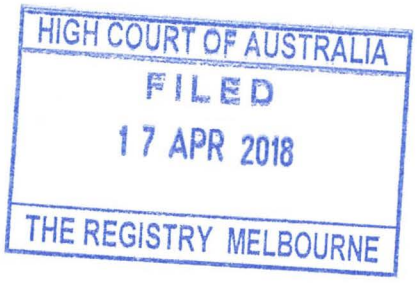
SYDNEY REGISTRY No S46 of 2018

B E T W E E N:

TTY167

Appellant

and



THE REPUBLIC OF NAURU

10 Respondent

APPELLANT'S SUBMISSIONS

Part I: INTERNET PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

Part II: ISSUES

2. The Appellant does not press ground 2 of the Notice of appeal filed on 12 March 2018.
3. There are three principal issues for determination.

   a. First, whether the Appellant should be able to raise grounds of appeal that were not raised in the Supreme Court of Nauru, in circumstances, among others, where he was not represented before that Court.

20 b. Second, whether the Refugee Status Review Tribunal (**Tribunal**) erred by issuing the invitation to the only hearing before it to a lawyer, not to the Appellant, and then acted on the premise that the invitation had been given to the Appellant in order to decide the application without hearing from the Appellant, contrary to ss 40 and 41 of the *Refugees Convention Act 2012* (Nr) (**Convention Act**).

   c. Third, whether the Tribunal was legally unreasonable when it made a decision on the review without hearing from the Appellant in circumstances where:

      i. He had been active in pursuit of his claims to protection for almost two

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years, including since making the application to the Tribunal;

ii. His statement, filed with the Tribunal some two weeks before the hearing, indicated that he was mentally unwell and had difficulty with memory and his sense of time;

iii. The Tribunal was uncertain whether the Appellant's reference to his various mental health issues went to explaining his evidence at the primary stage, or whether he was saying that would have difficulty participating in a hearing before the Tribunal;

iv. He was physically close to the Tribunal hearing room and the Tribunal did not locate him or his adviser on the hearing day, or prior to the decision, to understand why neither had appeared; and

v. Where the statutory scheme expressly permits a hearing to be reconvened if the Appellant does not attend at the appointed time.

Part III: Section 78B of the *Judiciary Act* 1903 (Cth)

4. The Appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act* 1903 (Cth) and concluded that no notice is required.

Part IV: Citations

5. The citation for the decision of the Supreme Court of Nauru is *TTY167 v Republic of Nauru* [2018] NRSC 4. The decision of the Tribunal was made on 3 July 2016.

Part V: Factual background

6. The Appellant was born in Chittagong Province, Bangladesh on 16 May 1990.[1] He is a Sunni Muslim[2] and is ethnically Bengali.[3]
7. Aged 17, he joined the student wing of the political movement called Jamaat-e-Islami (JI), which is known as Chatra Shibir.[4] He became a full member the following year.[5]
8. In 2009, the Awami League political party formed government in Bangladesh.[6] On 2 August of that year, the Appellant's family home was raided by members of the Awami League. During that raid, the Appellant's mother and younger siblings were beaten and

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[1] Appellant's Book of Further Materials at page ("AFM") 7, 18, 22, 42, Core Appeal Book ("CAB") 7, 20.
[2] AFM 7, 22, 36, CAB 6, 20 [13].
[3] AFM 7, 22, CAB 6.
[4] AFM 12, 22, 36 [11], CAB 9, 10, AFM 49 [7], 57 [21], CAB 21 [19]-[21], 25 [27].
[5] CAB 9, AFM 49 [7], 57 [21], CAB 23 [24], 25 [27].
[6] AFM 36 [13], CAB 9, 21 [21].

the Awami League attackers threatened to kill members of the Appellant's family if they continued to support JI.[7] Days later, the Appellant fled with his family and went into hiding.[8]

9. Frustrated by the political climate, the Appellant became politically active again in 2013.

10. He participated in a protest in Dhaka against the government on 5 May 2013. That protest was attacked by government supporters with many protesters killed or injured.[9] The Appellant's father was beaten and severely injured at that protest. His brother went missing and has not been heard from since.[10]

11. The Appellant himself was attacked and beaten by Awami League supporters at the same protest and had to spend two days in hospital as a result.[11] On release from hospital, the Appellant went into hiding again while he made arrangements to flee Bangladesh.[12]

12. The Appellant fled Bangladesh illegally by boat on 19 May 2013.[13] He arrived in Australia on 19 August 2013 and was transferred to Nauru on 5 July 2014.[14]

13. On 20 September 2014, the Appellant made an application to be recognised as a refugee or a person owed complementary protection under the Convention Act.[15] The Appellant claimed protection on the basis of:

    a. His political opinion, as an active supporter of JI and a person opposed to the Awami League;

    b. His Muslim religion; and

    c. As a member of a particular social group, being failed asylum seekers or persons who left Bangladesh illegally.[16]

14. On 9 October 2015, the Secretary determined that the Appellant was neither a refugee nor owed complementary protection.[17]

15. On 17 December 2015, the Appellant applied to the Tribunal for review of the Secretary's determination pursuant to s 31 of the Convention Act.[18]

16. Five months later, the Tribunal sent an invitation to a hearing to a lawyer on Nauru, and

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[7] AFM 36 [14]-[15], CAB 9, AFM 50 [17], 67 [103], 69 [119], 83 [203], CAB 21 [21], 26 [36].
[8] AFM 6, 33, 36, CAB 22 [21].
[9] AFM 12, 37 [20], CAB 9, AFM 50 [15], 69 [120], 78 [171], 82 [201], CAB 22 [21], 23 [24], 25 [27].
[10] AFM 37 [21]-[22], CAB 9, AFM 50 [15], 78 [208], CBA 22 [21], 27 [37].
[11] AFM 37 [20], CAB 9, AFM 50 [15], 74 [152], 82 [201], CBA 21 [20], 22 [21], 23 [24], 25 [27], 27 [37].
[12] AFM 37 [22], CAB 9, 22 [21], 24 [24].
[13] AFM 14, 25, 33.
[14] AFM 32, 33.
[15] See s 5 of the Convention Act, AFM 18, CAB 19 [5].
[16] CAB 23, 28 [42].
[17] See s 6 of the Convention Act; CAB 6, 16, 19 [6].
[18] AFM 45, CAB 19 [7].

not the Appellant.[19] The Appellant filed a statement of evidence five days later. That statement included evidence that his 'memory had deteriorated. I am anxious and depressed... My mind goes blank sometimes and I lose my sense of time.'[20] His lawyer made a written submission in support of his claims to protection a further fortnight later.[21]

17. The Tribunal hearing took place on 6 May 2016.[22] The Appellant did not attend.

18. On 3 July 2016, the Tribunal affirmed the decision of the Secretary and found that he was neither a refugee nor owed complementary protection. The Tribunal concluded that many of the Appellant's claims were 'vague and lacking in detail'[23] and that it would have explored those claims with the Appellant to see if they could be established had he attended the hearing. As it stated, 'many questions remain unanswered and many lines of enquiry unexplored'.[24]

19. On 24 November 2016, the Appellant filed a Notice of Appeal (which was subsequently amended on 5 October 2017) in the Supreme Court of Nauru pursuant to s 43 of the Convention Act. The Appellant was self-represented from the time he filed his notice of appeal in the Supreme Court of Nauru. His grounds of appeal were that:

    a. the Tribunal erred by not adjourning the hearing;
    b. the Tribunal's decision was unreasonable, including because it did not give the Appellant an opportunity to address it in person.[25]

20. On 20 February 2018, the Supreme Court of Nauru dismissed the appeal and affirmed the decision of the Tribunal, pursuant to s 44 of the Convention Act.

Part VI: Argument

21. This is an appeal from that decision of the Supreme Court of Nauru. The appeal lies as of right to this Court.[26] The grounds of appeal raised in this Court were not raised before the Supreme Court of Nauru in their current form.

A. Raising new grounds on appeal

22. The first issue for determination in this case is: in what circumstances can this Court

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[19] AFM 47, CAB 19 [8].
[20] AFM 49.
[21] AFM 54.
[22] CAB 19 [9].
[23] CAB 25 [30], [32], 26 [34], [35], [36], 27 [37], [39], 28 [41], 29 [49].
[24] CAB 26 [35].
[25] CAB 39 [19].
[26] *BRF038 v The Republic of Nauru* [2017] HCA 44 at [40]-[41].

consider new grounds of appeal not raised in the same terms before the Supreme Court of Nauru?

23. In respect of the Convention Act, this Court sits as the first court to hear a matter other than by way of first instance judicial review. This Court is, therefore, in a similar position to the Full Court of the Federal Court of Australia in appeals in proceedings initiated under s 44 of the *Administrative Appeals Tribunal Act*, and in appeals from first instance review decisions under s 476 or 476A of the *Migration Act* 1958 (Cth) (**Migration Act**). In appeals of this kind, new questions of law may be raised on appeal before the Full Court of the Federal Court if it is 'expedient and in the interests of justice' to do so.[27] The same test has been applied in this Court where a new point is sought to be raised on appeal.[28]

24. Unlike the Full Court of the Federal Court, the High Court exercises original jurisdiction in the present case.[29] As such, it has the enlarged powers under s 32 of the *Judiciary Act* 1903 (Cth) to:

> grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter; so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined ...[30]

25. It follows that the test for the introduction of new grounds where the High Court exercises original jurisdiction must be at least as liberal as that which applies on an appeal proper. A previous decision of this Court in an appeal from Nauru indicates that the only relevant consideration is whether the grounds of appeal are meritorious.[31] Each of the grounds has

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[27] *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73 at [19]-[20] per Griffiths and Perry JJ; *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 at 347 [79]-[80] per Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ; *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 at 598 at [46] per Kiefel, Weinberg and Stone JJ.

[28] See, eg, *Water Board v Moustakas* (1988) 180 CLR 491 at 497 per Mason CJ, Wilson, Brennan and Dawson JJ, 506 per Gaudron J.

[29] *Ruhani v Director of Police* (2005) 222 CLR 489 and *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561 at [26] per French CJ, Gummow, Hayne and Bell JJ.

[30] This power extends, for example, to the reception of new evidence not placed before the court or tribunal below see *Clodumar* at 574 [34]-[35] per French CJ, Gummow, Hayne and Bell JJ; *Federal Commissioner of Taxation v Lewis Berger and Sons (Australia) Ltd* (1927) 39 CLR 468 at 469-470 per Starke J.

[31] *WET044 v The Republic of Nauru* [2018] HCA 14 at [7], [18], [27].

merit, for the reasons set out below.

26. In the present case, if it be the test, it is also expedient and in the interests of justice to allow the Appellant to raise new grounds on appeal in this Court for the following reasons:

    a. As to the reasons why the grounds in their current form were not run below, the Appellant was not represented before the Supreme Court of Nauru. He made his submissions to the Supreme Court through an interpreter,[32] has no legal training in any jurisdiction and only completed primary school.[33] In this context, it is inherently unlikely that the Appellant, for some strategic advantage, did not raise grounds below deliberately.[34]

    b. While the grounds were not raised in terms in the Supreme Court of Nauru, they concern matters which were raised before the Tribunal. No new facts or evidence are relied upon to substantiate the grounds - each concern only a question of law.[35]

    c. There would be no relevant prejudice to the Respondent (other than potentially, with respect to costs).[36]

    The nature of the case also makes it in the interests of justice to allow the new grounds to be raised. It is 'centrally relevant'[37] and a matter of 'particular sensitivity... in refugee cases'[38] that 'serious consequences... may attend a wrongful refusal'.[39] In addition, there is a discernible public interest in this Court determining the new grounds of appeal which raise issues of 'general application' and 'importance'.[40] These factors should also lead to new grounds being heard and determined on appeal in this Court.

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[32] AFM 95, 98, 99.
[33] This can be inferred from his education having ended at 7th grade; AFM 33, 35, CAB 20 at [13].
[34] *Linkhill Pty Ltd v Director, Officer of the Fair Work Building Industry Inspectorate* (2015) 240 FCR 578 at [70].
[35] Further, the fact that the Appellant feared harm upon return to Iran by reason that he was a failed asylum seeker and a Kurd was recognised by the Supreme Court and recorded in its judgment (*WET044 v Republic of Nauru* [2017] NRSC 66 at [6]), albeit that these matters were not the subject of the grounds of appeal raised by the Appellant.
[36] *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 at [62].
[37] *SZKCQ v Minister for Immigration and Citizenship* [2009] FCA 578 at [9].
[38] *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 at [22].
[39] *SZEPN v Minister for Immigration and Multicultural Affairs* [2006] FCA 886 at [16]; see also *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73 at [56-58] per Mortimer J.
[40] *Lobban v Minister for Justice* (2016) 244 FCR 76 at [73]-[74], and see also *Parker v Minister for Immigration and Border Protection* [2016] FCAFC 185 at [31].

B. Grounds of appeal

Ground 1: The Tribunal erred by failing to comply with ss 40 and 41 of the Convention Act, namely by failing to invite the applicant to appear before the Tribunal.

27. The Appellant in this case did not attend the one and only hearing convened by the Tribunal to consider his claims to protection. That hearing was convened and the decision was reliant upon[41] the Tribunal having purportedly sent an invitation in compliance with its statutory obligations under the Convention Act. The Tribunal then purported to rely upon s 41(1) of the Convention Act to 'make a decision on the review without taking further action to allow or enable the applicant to appear before it.'

10 28. Section 40 of the Convention Act mandates that:

> (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the determination or decision under review...
>
> (3) An invitation to appear before the Tribunal must be given to the applicant with reasonable notice...

Nothing in the Act requires or suggests[42] that the term 'the applicant' should be understood to be anyone other than a reference to the applicant himself or herself – that is, the word 'applicant' retains its natural meaning in this statutory scheme. Unlike the equivalent Australian legislation, the Convention Act contains no 'authorised recipient'
20 provisions[43] which have the effect that the invitation would be deemed to be given to the applicant if it was given to their lawyer, for example.

29. Notwithstanding this, the Tribunal issued the invitation to its only hearing for this Appellant to 'Blaise Alexander, Team Leader, CAPS' (Claims Assistance Provider).[44] This was so even though that invitation was in response to the Appellant's application to the Tribunal which did not refer to CAPs nor Ms Alexander at all.[45]

30. Section 40 is in mandatory terms and is a critical part of the statutory scheme for affording applicants procedural fairness. As this Court has held of a relevantly analogous

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[41] CAB 19 [8] - [9], 25 [30].
[42] See the use of the same term in ss 8, 16, 24, 25, 26, 27, 34, 35, 39 and 49.
[43] *Migration Act* ss 379G, 441G, 473HG and 494D.
[44] AFM 47.
[45] AFM 45.

provision of the Australian *Migration Act*:

> ...the language of the Act and its scope and objects point inexorably to the conclusion that want of compliance with [this provision] renders the decision invalid. Whether those steps would be judged to be necessary or even desirable in the circumstances of a particular case, to give procedural fairness to that applicant, is not to the point. The Act prescribes what is to be done in every case.[46]

> If the requirement... is mandatory, then failure to comply means that the Tribunal has not discharged its statutory function. There can be no "partial compliance" with a statutory obligation to accord procedural fairness. Either there has been compliance or there has not. Given the significance of the obligation in the context of the review process (the obligation is mandated in every case), it is difficult to accept the proposition that a decision made despite the lack of strict compliance is a valid decision under the Act.[47]

In that case, this Court found that the failure amounted to jurisdictional error.

31. In this case, this Court need only be satisfied that there was an error of law in order to remit the matter to the Tribunal.[48] It can readily be so satisfied given the clear and unequivocal terms of both s 40 of the Convention Act and of the invitation itself. The conclusion of the Court below to the contrary was erroneous and did not have regard to the terms of the Act as against the addressee of the invitation.[49]

32. The provision of an invitation to the applicant himself is also a precondition to the exercise of power in s 41(1) of the Convention Act. The discretionary power of the Tribunal to 'make a decision on the review without taking further action to allow or enable the applicant to appear before it' is conditioned on 'the applicant [being] invited to appear before the Tribunal'.[50] The Appellant was not so invited. It follows that a condition on the exercise of the power in s 41(1), by which the Tribunal in this case purported to make its decision,[51] did not exist. Its decision was therefore not in compliance with the Convention Act and was thus infected by an error of law.

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[46] *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; 228 CLR 294 at [208] per Hayne J, see also [173] per Kirby J and [77] per McHugh J.
[47] *Ibid* at [77] per McHugh J.
[48] Convention Act, s 43(1)
[49] CAB 40 [22], 41 [32], [34].
[50] Convention Act, s 41(1)(a).
[51] CAB 19 [9].

33. If it be relevant, the Appellant acknowledges that it can be inferred from the statement made by the Appellant days after the invitation was sent[52] and his statement to the Court below that he was unwell at the time of the hearing,[53] that the Appellant may have known that the Tribunal would, and did, at some time after mid-April 2016 convene a hearing concerning his application to the Tribunal. However, the absence of the Applicant at the hearing, coupled with his active engagement in the protection claim assessment process either side of that (discussed below), indicate that the errors of law identified above were consequential for this Appellant. Had he known of the exact time, date and place of the hearing and the name of the responsible Tribunal officer provided on the invitation, he could have, at least, sent someone to ask the Tribunal to reconvene to hear his case when he was able to attend.

Ground 3: The Tribunal acted in a way which was legally unreasonable by proceeding to make a decision without adjourning the only hearing it convened in order to hear from the Appellant.

34. As noted above, the Tribunal in this case exercised the discretionary power granted to it by the Convention Act to 'make a decision on the review without taking further action to allow or enable the applicant to appear before it' if the applicant did not appear. To avoid doubt, s 41(2) of the Convention Act provides that:

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

35. It is well established that discretionary statutory powers are implicitly qualified by the requirement that they be exercised in a way that is legally reasonable.[54] In the circumstances known to the Tribunal in this case, the exercise of the power in s 41(1) was not exercised in a way that was legally reasonable.

36. Review for legal unreasonableness is invariably fact dependant.[55] How the Tribunal exercises its discretion under s 41(1) is affected by its functions under the Convention

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[52] AFM 52.
[53] As recorded at CAB 39 [19].
[54] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [29], [63], [88], [90]; *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at 445.
[55] *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, 447 at [48].

Act, the subject matter of the particular review, the Appellant's situation and conduct throughout the review and other surrounding circumstances.[56] That these matters are to be taken into account are also expressly contemplated by s 41(2) of the Convention Act.

37. In this case, where the exercise of a discretionary power is alleged to be legally unreasonable, and the Tribunal has provided reasons for that decision, those reasons must be examined for their justification and intelligibility in the exercise of power.[57] The Tribunal outlined the factual history, as the Tribunal understood it, and stated the provision under which the Tribunal exercises its power to decide the review. The only reasons which purported to provide a justification for the exercise of that power were
10 that:

> [n]o information has been provided to the Tribunal as to why the applicant had failed to attend the hearing and no application to have the hearing rescheduled has been received.[58]

38. In addition to the issues raised concerning the invitation above, the factors which made the exercise of the discretionary power legally unreasonable in this case were the following:

    a. The Appellant had been actively engaged in the pursuit of his protection claims at every opportunity for a period of almost two years before the Tribunal hearing. In particular, he had:

20 i. participated in a transfer interview in September 2014,[59]

    ii. attended an interview for a refugee status determination in October 2014,[60]

    iii. emailed to request an adjournment of a further hearing concerning his claims because of ill-health and noted that was he 'eager to attend an RSD interview' in November 2014,[61]

    iv. attended the rescheduled interview with the Secretary for a refugee status

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[56] *Kaur v Minister for Immigration and Border Protection* (2014) 236 FCR 393, 416 at [83].
[57] *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, 446 at [47].
[58] CAB 19 [9].
[59] AFM 5.
[60] CAB 9.
[61] AFM 40.

determination in December 2014,[62]

v. applied to the Tribunal for review shortly after the Secretary's belated decision in December 2015,[63]

vi. provided a further statement to the Tribunal itself shortly before the belated hearing in April 2016,[64] and

vii. instructed his lawyers to prepare and submit a submission on his claims for protection in May 2016.[65]

In this context, the Appellant's non-attendance on the day of the hearing was an aberration on the basis of what was known to the Tribunal.

10 b. The Appellant's statement directly to the Tribunal, shortly before the hearing, included the following:

> My mental health has been affected by being in detention for nearly three years. My memory has deteriorated. I am anxious and depressed. Sometimes I feel frustrated and helpless. All of these affects my ability to talk about my case and provide information clearly... My mind goes blank sometimes and I lose the sense of time.[66]

That is, the Tribunal was on notice that the Appellant was not only unwell, but that his ill-health was claimed to be having an impact on his memory and capacity to keep track of or recall time.

20 In a similar case, the Supreme Court of Nauru found that it was an error of law for the Tribunal not to have obtained medical advice concerning the Appellant itself.[67] Even if it could be said that the Tribunal was not on notice that he was unwell on the day of the hearing itself, that does not diminish the significance of the Appellant's ill-health on the lawfulness of the process undertaken by the Tribunal.[68]

c. The Tribunal could have readily found out where the Appellant was and why he

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[62] CAB 8.
[63] AFM 45.
[64] AFM 49 [5].
[65] AFM 54.
[66] AFM 49.
[67] *CRI029 v Republic* [2017] NRSC 75 at [49]-[51]. This decision was not appealed by the Republic.
[68] See, by analogy, *BJB16 v Minister for Immigration and Border Protection* [2018] FCAFC 49 at [41] per Kenny, McKerrracher and White JJ.

had not attended the hearing on the day of the hearing. The hearing by the Tribunal was conducted at Regional Processing Centre (RPC) 1 on Nauru.[69] The Appellant's statement to the Tribunal noted that he was 'currently being held in immigration detention on Nauru'. RPC 1 was one of three places within walking distance of one another at which the Appellant was 'being held'. It was, at the relevant time, a criminal offence for the Appellant to leave his RPC of residence without prior approval.[70] That is, the Tribunal knew or ought to have known that the Appellant was either in one of the three RPCs (possibly even in the one in which the hearing itself was held) or he would have been authorised to have left, which authorisation would have been recorded at one of those three RPCs.

In a country two square kilometres smaller than Melbourne's Tullamarine airport, finding a specific person requires no great effort. On a small island there is, realistically, nowhere to hide nor any way to go missing.

At [10] of its reasons, the Tribunal itself cited a passage from a decision of the Federal Court of Australia concerning its obligations. The page reference cited included the following:

> ... in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision making power in a manner so unreasonable that no reasonable person would have so exercised it.[71]

Similarly, this Court has held that:

> ...there may be circumstances in which a merits reviewer's failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, can be seen to supply a sufficient link to the outcome of review to constitute a constructive failure to exercise jurisdiction.[72]

This is such a case. The obvious inquiry, which in the circumstances of Nauru, was easily ascertainable, was to find out where the Appellant was, and why

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[69] AFM 47.
[70] *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nr), s 18C.
[71] *Prasad v Minister for Immigration & Ethnic Affairs* [1985] FCA 46; 6 FCR 155 at 170 per Wilcox J.
[72] *Wei v Minister for Immigration and Border Protection* [2015] HCA 51 at [49].

neither he nor his representative had appeared at the appointed time. The critical underlying fact was the evidence he could have given to support his claims to protection. In short, he was known to be residing in close proximity to the Tribunal, in a location which was very easy to identify.

Self-evidently, he could not have provided responses to the 'many questions [which] remain unanswered and many lines of enquiry unexplored' because of his absence.[73]

d. Finally, the Tribunal was alert to an uncertainty surrounding the Appellant's participation in the hearing. After referring to the lack of medical evidence provided about his anxiety and depression and flashbacks, the Tribunal said, when commencing the assessment of his claims:

> ..... Further, it is unclear whether the applicant was explaining why he may not have been able to answer questions during the RSD interview because of his mental state or whether he was indicating that he would have difficulty participating in a hearing before the Tribunal.[74]

The Tribunal failed to resolve the uncertainty and proceeded to make its decision without hearing from him regardless.

39. The Appellant had much at stake in the proceedings before the Tribunal, and the consequences of the Tribunal's decision to exercise its power under s 41(1) were severe. Having regard to that alongside:

a. the statutory context in which s 41(1) appears, including ss 22(b) and 40(1);

b. the nature of the invitation to appear, being addressed to Ms Alexander and not the Appellant;

c. the Appellant's previous conduct and the inference that he was eager to engage and attend at the hearing; and

d. the importance of an oral hearing in the circumstances,

the Tribunal's exercise of power under s 41(1) was legally unreasonable.

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[73] CAB 26 [35].

[74] CAB 25 [31].

Conclusion

40. For the reasons outlined above, it is respectfully submitted that the High Court ought, pursuant to s 8 of the *Nauru (High Court Appeals) Act* 1976 (Cth), make the orders set out in Part VIII below;

Part VII: Orders sought

41. The orders sought by the Appellant are:

a. The appeal be allowed.

10 b. The orders made by the Supreme Court of Nauru on 20 February 2018 be quashed.

c. The matter be remitted to the Refugee Status Review Tribunal for reconsideration according to law.

d. The Respondent pay the Appellant's costs of the appeal to this Court.

e. Such further or other orders as the Court deems appropriate.

Part VIII: Oral argument

42. The Appellant estimates that he will require 1½ hours to present oral argument.

Dated: 17 April 2018

20 .....

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