NAURU COURT OF APPEAL
AT YAREN
APPELLATE JURISDICTION

Refugee Appeal No. 5 of 2018
[Supreme Court Refugee Appeal No. 25 of 2016]

BETWEEN: **OPK 023**

APPELLANT

AND: **REPUBLIC OF NAURU**

RESPONDENT

BEFORE: **Justice R. Wimalasena**
Justice C. Makail

DATE OF HEARING: **11/10/2022**

DATE OF JUDGMENT: **14/07/2023**

CITATION: **OPK 023 v. REPUBLIC OF NAURU**

KEYWORDS: **COURT OF APPEAL – Refugee appeal – Appeal against dismissal of appeal by Supreme Court – Appeal to Supreme Court from decision by Refugee Status Tribunal to affirm determination of Secretary to hold applicant not eligible for refugee status and owed complementary protection – Refugees Convention Act, 2012**

COURT OF APPEAL – Practice & Procedure – Application for leave to advance ground not taken in Supreme Court – Principles of leave discussed – Adequate explanation for not taking up ground in Supreme Court – Merits of ground – Prejudice to respondent – Interests of justice – Exceptional case – Serious error must be established – Manifestation of miscarriage of justice

LEGISLATIONS: **Refugees Convention Act, 2012, Nauru Court of Appeal Act, 2018**

CASES CITED: **TTY167 v. Republic of Nauru [2018] HCA 61; [2018] 93 ALRJ 111, Notting Hill Finance Ltd v. Sheik [2019] 4 WLR 146; [2019] EWCA Civ 1337 (25th July 2019), Singh v. Dass [2019] EWCA Civ 360 (07 March 2019), Jones v. MBNA International Bank Ltd [2000] EWCA Civ 314, WET 054 v. The Republic [2023] NRAC 8 (23 March 2023), Eastman v. R [2000] HCA 29; 203 CLR 1, Tawadokai v. State [2022] FJSC 13; CBV 0008.2019 (29 April 2022), Rimbunan Hijau (PNG) Limited v. Ina Enei & Ors (2017) SC1605 and Jonathan Paraia v. Mountain Catering Ltd (2017) SC1687, NAJT v. Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 51; [2005] FCAFC 134, Khalil v. Minister for Immigration, Citizenship. Migrant Services and Multicultural Affairs [2021] FCA 1134**

APPEARANCES:

COUNSEL for the Appellant: **Mr. A. McBeth**

COUNSEL for the Respondent: **Mr. C. Hibbard**

RULING

1. The appellant, OPK023 is a male from Jaffna District of Northern Sri Lanka. He claimed that he left his home country for fear of being persecuted because of, amongst others, an imputed opinion as a supporter of the Liberation of Tamil Tigers Eelam (*"LTTE"*) on account of assisting his father who at relevant time was a LTTE member.

Brief Facts

2. According to the appeal record and confining the facts to the events relating to the appellant's application for Refugee Status and onwards, on 19th August 2014 the appellant applied for Refugee Status. On 14th October 2014 he attended a Refugee Status Determination ("RSD") interview.

3. On 10th October 2015 the Secretary of the Department of Justice and Boarder Control ("the Secretary") made a determination that the appellant was not a refugee and not owed complementary protection.

4. On 22nd October 2015 the appellant applied to the Refugee Status Review Tribunal ("Tribunal") for review of the Secretary's determination.

5. On 15th April 2016 the Tribunal wrote to his representative inviting him to give evidence and present submissions. That hearing was fixed for 12th May 2016.

6. The letter also advised that if the appellant did not appear before the Tribunal on the date and time fixed, the Tribunal will proceed to make a decision on the review without taking further action to allow him to appear. The appellant did not attend the scheduled hearing.

7. On 5th July 2016 the Tribunal affirmed the Secretary's determination that the appellant was not recognized as a refugee and was not owed complementary protection under the *Refugees Convention Act,* 2012 (*"RC Act"*).

8. The appellant filed an appeal to the Supreme Court.

Appellant's Case

9. According to the appellant he had been actively engaged in the conduct of his case up to the date of the Tribunal hearing. He had provided

statements and evidence to the Secretary and participated in an interview with the Secretary for the purpose of his RSD.

10. Following a negative RSD, he continued to engage with the process, instructing his legal representative to apply to the Tribunal for review of the Secretary's decision. He provided a further statement for the Tribunal's consideration and instructed his legal representatives to prepare extensive legal submissions, which the Tribunal received.

11. The Tribunal issued an invitation for him to appear at a schedule hearing on 12th May 2016. The invitation was not addressed to him, but was addressed to "Blaise Alexander, Tema Leader, CAPS".

12. The Tribunal's decision record states at [8]-[9]:

"The applicant did not attend the scheduled hearing. As at the date of the Tribunal's decision, the Tribunal has received no further correspondence from either the applicant or his representative.

In these circumstances, and pursuant to Section 41 of the Act, the Tribunal has decided the review without taking any further action to allow or enable the applicant to appear before it."

13. Further, the appellant claimed that there was no material before the Tribunal to indicate that he was aware of the hearing date or that he had made a deliberate decision not to attend the hearing. Furthermore, there was no material before the Tribunal to explain the extremely unusual situation where not only did he not attend, but his legal representative did not attend, and did not contact the Tribunal to advise of non-attendance, or request that the hearing be rescheduled, or advise that the representative no longer acted on behalf of him.

14. Finally, the appellant claimed that the Tribunal took no steps to satisfy itself that he was aware of the scheduled hearing and took no steps to contact his representative. The Tribunal was aware of the extreme consequences for him of the proceeding to make a decision without holding a hearing, namely that he would have no further avenue of merits review of his claim to be entitled to protection as a refugee, and therefore faced return to a place where there is fear of persecution.

15. The pertinent provision of the *RC Act* is Section 41. It states:

"Failure of applicant to appear before Tribunal

(1) Where the applicant:

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

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

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

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

16. According to learned counsel for the appellant, this case is substantively indistinguishable from the case of *TTY167 v. Republic of Nauru* [2018] HCA 61; [2018] 93 ALRJ 111 decided by the High Court of Australia in the exercise of the jurisdiction it then had as the highest appellate court in the judicial system of Nauru. That judgment, he contended, is equivalent in status to the appellate judgment of the Nauru Court of Appeal.

Grounds of Appeal in Supreme Court

17. In the Supreme Court the appellant relied on the following grounds in a Further Amended Notice of Appeal, dated 5th December 2017:

"1. The Tribunal erred on points of laws: by making findings without any evidentiary basis by failing to consider a claim (or competent integer) or evidence; and/or by making findings that were irrational, illogical or legally unreasonable.

The Tribunal accepted that the Appellant would be charged with departing Sri Lanka illegally and would be detained if he were returned, however, its subsequent findings concerning the fine, bail, term of imprisonment and prison conditions that the Appellant would face are erroneous.

2. The Tribunal erred on a point of law by its failure to reschedule the Tribunal hearing or delay its decisions on the review, in order to enable the Appellant to appear before it pursuant to s 41(2) of the Act, and thereby breached s40(1) of the Act and denied the Appellant procedural fairness.

Particulars

The Appellant did not appear at the Tribunal hearing. The Tribunal proceeded to determine the review in the absence of any appearance from the Appellant.

3. *The Tribunal erred on a point of law by making adverse credibility findings against the Appellant that were reached without any logical or probative basis; were based upon legal unreasonableness; and/or , were based on minor or trivial inconsistencies that could not support the findings.*

Particulars

The Appellant did not attend the RSD interview. The Appellant's representatives and in the process of obtaining the RSD interview recording with a view to having it transcribed. Upon receipt of such evidence, the particulars will be provided, with leave of the Court." **(Bold and Underlining added).**

18. At the hearing of the appeal in the Supreme Court, Ground 2 was not pursued by the appellant. Learned counsel for the appellant also informed this Court that this ground was not pursued and this Court notes that this is consistent with [28] of the judgment of the Supreme Court which reads *"At the outset of the hearing counsel for the Appellant indicated that Ground Two was no longer pressed".*

19. The remaining grounds of appeal were heard and dismissed by the Supreme Court on 22nd March 2018.

Appeal to Court of Appeal

20. On 27th September 2018 the appellant filed an appeal to the Court of Appeal. The grounds of appeal were directed to the decision of the Supreme Court to dismiss the remaining grounds of appeal.

21. Subsequently, on 01st September 2022 he filed an Amended Notice of Appeal. By the Amended Notice of Appeal, the appellant deleted the original grounds pleaded in the Notice of Appeal and replaced them with one ground. This was the ground, his counsel says, was not pressed at the hearing in the Supreme Court but he now seeks to take up on appeal.

22. It is relevant to set out this ground because the appellant formally sought leave of this Court at the hearing to rely on it in this appeal. It is pleaded as follows:

"1. *The Supreme Court ought to have found an error of law in the decision of the Tribunal, in that the Tribunal acted unreasonably in proceeding to make a decision in the absence of the appellant or his legal representative, without first attempting to contact the appellant or his legal representative,*

Particulars

(a) *The appellant had been actively involved at the status determination stage before the Secretary and in instructing his legal representative to put detailed submission before the Tribunal.*

(b) *The Tribunal had received no correspondence from the appellant or his legal representative to indicate that neither the appellant nor his representative would be attending the hearing.*

(c) *The Tribunal could easily have contacted either the appellant or his legal representative to enquire whether they were aware of the hearing and had intended to attend.*

(d) *There was no information before the Tribunal to support an inference that the appellant had made a deliberate decision for both himself and his representative not to attend the Tribunal hearing and to give no notice to the Tribunal of their non-attendance.*

(f) *The Tribunal took no steps to contact the appellant's intention to be heard before the Tribunal before exercising the extraordinary power to dismiss his application without a hearing."*

23. It is the sole ground on which the appeal rests. As it was not pressed at the hearing in the Supreme Court and the appellant seeks to reintroduce and rely on it, leave is necessary.

Practice and Procedure for Application for Leave to Advance New Ground of Appeal

24. There is no expressed provision in the *Nauru Court of Appeal Act,* 2018 (*"NCA Act"*) or *Nauru Court of Appeal Rules, 2018 ("NCA Rules")* for

practice and procedure for application for leave to advance a new ground of appeal that was not raised in the Court below. This is because an appeal is not intended to be a retrial where evidence is received and assessed. The appellate Court's exercise of jurisdiction is restricted to matters that were placed or raised in the Court below and it should not readily accept new grounds or issues that were not placed or raised in the Court below.

25. The point was made in *Notting Hill Finance Ltd v. Sheikh* [2019] EWCA Civ 1337; [2019] 4 WLR 146 where the Court of Appeal of England cited with approval the 'most authoritative and frequently applied statement of the approach to the question of whether to permit a new point to be taken on appeal:'

"The stance which an appellate court should take towards a point not raised at the trial is in general well settled: [citation omitted]. It is perhaps best stated in Ex parte Firth, In re Cowburn (1882) 19 Chd 419, 429, per Sir George Jessel M.R:

> *"the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduces which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instances, so as to enable the other party to give evidence."*

26. In the same judgment, the Court of Appeal of England and Wales cited with approval the more recent judgment of Haddon-Cave LJ in *Singh v. Dass* [2019] EWCA Civ 360 [15]-[17] (07 March 2019):

"The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.

First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.

Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence....."

27. However, there is Section 48 of the *NCA Act,* which states:

*"**Amendments***

(1) A notice of appeal or respondent's notice may be amended and served:

(a) without the leave of the Court at any time before 14 days of the date fixed for hearing of the appeal; or

(b) with leave of the Court at any time less than 14 days of the date fixed for hearing of the appeal.

(2) The amended appeal or respondent's notice shall be by way of Supplementary notice of appeal or respondent's notice."

28. Briefly, Section 48 permits, an amendment of a notice of appeal:

(a) without leave of the Court if the amendment is done at any time before 14 days of the date for hearing of the appeal; or

(b) with leave of the Court if the amendment is done less than 14 days before the date for hearing of the appeal; and

(c) the amendment is indicted by the appellant filing a supplementary notice of appeal.

29. Rule 36 of the *NCA Rules* reinforces Section 48 by setting out the procedure for amendment of a notice of appeal without leave of the Court and with leave of the Court in these terms:

*"**Amendment of notice of appeal or respondents' notice***

1) A notice of appeal or respondent's notice may e amended by filing and serving a supplementary notice of appeal or respondent's notice in Form 24 in Schedule 1 without the leave of the Court at any time prior to 14 days of the date fixed for hearing of the appeal.

2) Where leave of the Court is required to amend the notice of appeal or respondent's notice at any time less than 14 days of the date fixed for hearing of the appeal, the applicant shall file and serve:

a) a summons seeking an order to amend the notice of appeal or respondent's notice with any other appropriate orders in Form 25 in Schedule 1; and

b) one or more affidavits in support of the application for and on behalf of the applicant.

3) The affidavit in subrule (2) shall include:

a) The purpose of the intended amendment;

b) The merits of the intended amendment in relation to the determination of the substantive issues or grounds of appeal;

c) The nature, length and reasons for the delay in amending the appeal under subrule (1);

d) Whether proposed amendment may prejudice the other parties to the appeal; and

e) any other matters which the party may deem necessary.

4) The summons and affidavit under subrule (2) shall be served to the other parties to the appeal at least 3 days before the hearing of the application or as directed by the Court.

5) Where subrule (4) is not complied with, the Court may adjourn, dismiss, or stay the application or proceed to hearing of the substantive appeal without the intended application.

6) A party who seeks to oppose the application may file and serve an answering affidavit before the returnable date of the application in subrule (2) or as directed by the Court.

7) The Court shall give such directions or make such orders as it deems fit for the purpose of the hearing and determination of the application.

8) Where the Court grants leave to amend the notice of appeal or respondent's notice, a supplementary notice of appeal or respondent's notice shall be filed and served to the other parties within 7 days from the date of the grant of such leave or as directed by the Court."

30. It will not be necessary for the appellant to seek leave to amend the Notice of Appeal because the Amended Notice of Appeal was filed on 01st September 2022. This was a month before the 14 days of the date fixed for the hearing of the appeal on 11th October 2022. However, the appellant requires leave to advance the new grounds pleaded in the Amended Notice of Appeal because it was not advanced in the Court below.

31. As to the time for hearing of the application for leave, there is no hard and fast rule on when it is heard. It may be heard prior to the date fixed

for hearing of the appeal or concurrently at the date of hearing of the appeal. Either way, each has its benefits. Time and costs spent for a hearing prior to the date fixed for hearing of the appeal may be less if leave is refused. Similarly, time and costs may be less if the application for leave is concurrently heard at the date fixed for hearing of the appeal with one decision to follow suit. In another instance, a respondent will have a strong case for a separate hearing to prevent prejudice in its defence of the appeal where it is shown that evidence will be adduced to respond to the new ground.

32. In this case, the appellant filed an Amended Notice of Appeal and his learned counsel made submissions covering leave and merits of the appeal based on the ground that was not pressed in the Supreme Court. The Court decided to rule on the application for leave before the appeal.

Principles of Leave to Advance New Ground of Appeal

33. The power conferred on the Court of Appeal to grant leave is discretionary and is exercised based on proper principles. One of the cases which provides a useful information as to the principles of leave is the decision of Snowden J in *Notting Hill Finance Ltd* where his Honour referred to number of authorities including *Jones v. MBNA International Bank Ltd* [2000] EWCA Civ 314 as follows:

> *"[26] These authorities show that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have been taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.*
>
> *[27] At one end of the spectrum are cases such as Jones in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ*

said in Jones at [38], it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances, but as May LJ also observed (at [52]), there might nonetheless be exceptional cases in which the appeal court could properly exercise its discretion to do so.

[28] At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see e.g. Preedy v Dunne [2016] EWCA Civ 805 at [43]-[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime."

34. The Courts in other common law jurisdictions such as those in the Pacific Region like Australia, New Zealand, Fiji and Papua New Guinea have adopted and expressed similar views relating to the principles of leave in the context of their applicable legislations and facts of a given case. Some examples are *Eastman v. R* [2000] HCA 29; 203 CLR 1; *Tawadokai v. State* [2022] FJSC 13; CBV 0008.2019 (29 April 20220; *Rimbunan Hijau (PNG) Limited v. Ina Enei & Ors* (2017) SC1605 and *Jonathan Paraia v. Mountain Catering Ltd* (2017) SC1687.

35. However, there is one more significant test to apply. It is the exceptional circumstances test. As the discretion to permit a ground of appeal that has not been advanced in the lower Court must not be too readily exercised, in *Eastman v. R,* Gleeson CJ observed that a new ground of appeal may be permitted in an exceptional case where a serious error has occurred. His Honour stated:

"[280] Consistent with the opinion which I expressed in Cipp v. The Queen, I do not doubt that, in an exceptional case where a serious error is brought to light concerning what would otherwise be a manifest miscarriage of justice, a new ground od appeal may be permitted in this Court, although never previously raised, argued or determined in the courts below."

36. In the case of a Refugee Appeal, in *WET 054 v. The Republic* [2023] NRCA 8 (23rd March 2023) at [29], this Court took a view that the proper test is an appellant must establish an exceptional case for leave to be granted. This Court observed thus:

".....although the Court of Appeal Act does not explicitly provide for seeking leave to advance a new ground of appeal that was not

presented in the lower court, the Court of Appeal has discretion to allow a new ground of appeal on a point of law in exceptional circumstances when it is expedient and in the interest of justice."

37. A case closer to the one under consideration is *NAJT v. Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51; [2005] FCAFC 134 at [166] where these principles were expressed in a questionnaire form as follows:

"1) Do the new legal arguments have a reasonable prospect of success?
2) Is there an acceptable explanation of why they were not raised below?
3) How much dislocation to the Court and efficient use of judicial sitting time is really involved?
4) What is at stake in the case for the appellant?
5) Will the resolution of the issues raised have any importance beyond the case at hand?
6) Is there any actual prejudice, not viewing the notion of prejudice narrowly, to the respondent?
7) If so, can it be justly and practically cured?
8) If not, where, in all the circumstances, do the interests of justice lie?"

38. These statements of principles may be summarized in five main principles which this Court will be guided in determining the question of leave. These are whether there is an acceptable explanation for not taking up this ground at the hearing in the Supreme Court, whether this ground is meritorious, whether it will be of no prejudice to the respondent and that in all the circumstances of the case, it is in the interest of justice that this ground be allowed to be considered by this Court. Finally, and ultimately whether this is an exceptional case for leave to be granted.

Appellant's Submissions

39. According to learned counsel for the appellant, leave is being sought to rely on this ground because it relates to the Tribunal's exercise of discretion under Section 41(1) of the *RC Act*. While it was initially pleaded and the subject of written submissions, it was not pressed at the hearing.

40. Learned counsel submitted that there is no prohibition in the *NCA Act* for an appellant to rely on a ground of appeal that was not raised before the Supreme Court. In so far as this Court has discretion to refuse relief to the appellant because the ground of appeal was not raised below, that discretion should not be exercised in this case because the interests of justice plainly favour the appellant being permitted to rely on this ground of appeal. Learned counsel lists the following reasons:

(a) There is a good explanation for raising the ground at this stage when it was not pressed in the Supreme Court. That is the High Court of Australia's judgment in *TTY167*, on a materially identical situation, had not been handed down at the time of the Supreme Court hearing in this matter, but was published on 05th December 2018.

(b) The ground is plainly meritorious.

(c) The appellant does not seek to rely on any additional evidence, and it is inconceivable that the ground could have been met by the respondent calling any evidence if it had been run below.

(d) There is no conceivable prejudice to the Republic in permitting the appellant to rely on this ground of appeal.

(e) The extreme consequences for the appellant, namely that he faces return to a place where he claims his life is in danger, require that he be permitted to challenge the legality of the Tribunal's decision.

Respondent's Submissions

41. The Republic accepts that, on an appeal brought pursuant to Section 19(2)(d) of the *NCA Act* this Court has jurisdiction to consider new grounds of appeal not raised before the Supreme Court. But it submits that it is not correct for the appellant to submit that there is no prohibition in the *NCA Act* for an appellant to rely on a ground that was not raised before the Supreme Court. As this Court has observed above, there is no expressed provision in the *NCA Act* or the *NCA Rules* which allows or prohibits a new ground that was not advanced in the Court below to be advanced in this Court. However, a judicial trend has developed where allowing such new ground is at the discretion of the Court. The real question is, has the appellant made out a case for grant of leave?

Explanation for Not Advancing the Ground Earlier

42. The appellant gave no explanation for not pursuing this ground at the hearing before the Supreme Court. However, he explained that the facts of his case are indistinguishable from the *TTY167* case, which was decided by the High Court of Australia on 05th December 2018 after his appeal in the Supreme Court was heard on 05th December 2017 and decision delivered on 22nd March 2018. The High Court upheld the appeal by the appellants on the grounds that the decision of the Tribunal

was legally unreasonable. He says that the proposed new ground raises the same issue of the decision of the Tribunal being legally unreasonable in this appeal.

43. His learned counsel reinforced this assertion in his submissions that, *"……...there is good explanation for raising the ground at this stage when it was not pressed in the Supreme Court. That is that the High Court of Australia's judgment in TTY167, on a materially identical situation, had not been handed down at the time of the Supreme Court hearing in this matter, but was published on 5 December 2018."*

44. According to learned counsel, *TTY167* is a case that is indistinguishable from this case. That decision favoured the appellant because the High Court of Australia upheld the second ground of appeal which alleged that the Tribunal acted unreasonably in the exercise of its power under Section 41(1) of the *RC Act* to decide the matter without taking further action to allow or enable the appellant to appear before it. This proposed ground raises an important point of law but was not pressed at the hearing in the Supreme Court.

45. Learned counsel for the Republic counters these submissions by arguing that the "ground relating to the Tribunal's exercise of the s 41(1) discretion" raised (but not pressed) in the Supreme Court and the new ground raised before this Court are different. The former is based on procedural fairness and the latter, unreasonableness. If the appellant were given leave to rely on unreasonableness, the Republic would be denied the opportunity to put in evidence relevant to resisting that allegation.

46. Having carefully read the ground that was not pressed in the Supreme Court and the new ground sought to be advanced before this Court, it is noted that the language used in the former clearly puts the Republic on notice that the appellant will be relying on breach of procedural fairness to have the decision of the Tribunal, set side. For example, expressions such as *" ……reschedule the Tribunal hearing or delay its decision on the review, in order to enable the Appellant to appear before it pursuant to s 41(2) of the Act, and thereby breached s40(1) of the Act and denied the Appellant procedural fairness"* are used to describe how the Tribunal did not follow the established statutory procedure for a hearing under Section 41(1) and as a consequence, the appellant was denied procedural fairness.

47. On the other hand, the expressions used in the proposed new ground such as *"…...the Tribunal acted unreasonably in proceeding to make a decision in the absence of the appellant or his legal representative, without first attempting to contact the appellant or his legal*

representative" go to support the ground that the Tribunal's decision was legally unreasonable. The question of legal unreasonableness of the Tribunal's decision arises from the construction of Section 41(1) & (2) where the Tribunal did not reschedule the appellant's appearance before it, or from delaying its decision on the review, in order to enable the appellant's appearance before it on a rescheduled date. It follows that while the appellant claims that he has reformulated the ground by expanding the pleadings, the reformulation has raised a new ground on legal unreasonableness.

48. The Court upholds the submissions of the Republic to that extent that the ground on breach of procedural fairness is different from the ground on legal unreasonableness of the Tribunal's decision, and to that extent, the ground on legal unreasonableness of the Tribunal's decision was not pressed before the Supreme Court. However, it is quite clear that it was after the decision in *TTY167* that the appellant decided to advance this ground on legal unreasonableness in this appeal. The explanation that there has been a change in the legal position by virtue of the *TTY167* decision and necessary for the appellant to take up the ground on legal unreasonableness of the Tribunal's decision is inadequate.

49. Learned counsel for the Republic further contended that the change of legal representation of the appellant is not an adequate explanation for the appellant in not pressing the ground in the Supreme Court. There is no dispute that the appellant was legally represented in the Supreme Court by a different counsel and this ground was not pressed. There is merit in the Republic's contention because the appellant was legally represented, and he cannot now claim that his legal counsel failed to pursue this ground and that he be given the opportunity to advance it in this appeal.

50. As the Federal Court of Australia observed in *Khalil v. Minister for Immigration, Citizenship. Migrant Services and Multicultural Affairs* [2021] FCA 1134 at [35], *"Without more, the fact that there has been a change of counsel is insufficient to justify a grant of leave...."* However, this consideration is not determinative of the question of leave. It must be weighed against the question of whether the new ground is meritorious, whether the Republic will be prejudiced by the new ground and where the interests of justice lie.

Merits of Ground

51. It is quite clear that the new ground is based on the legal unreasonableness of the Tribunal's decision. The Court accepts the learned counsel for the appellant's contention that the appellant's case based on the new ground of legal unreasonableness is indistinguishable

from the *TTY167* case. In *TTY167* case, the High Court considered Section 41 of the *RC Act* and held that the exercise of discretion under Section 41(1) was unreasonable due to a combination of factors, which are arguably applicable in the present case. In particular, the High Court noted:

(1) The appellant and his legal representative had been actively involved in the RSD stage and in prosecuting the review application in the Tribunal.

(2) The appellant's oral evidence at the hearing was of considerable importance for the Tribunal because the appellant's claims were considered by the Tribunal to be lacking in detail and unsupported by other evidence.

(3) The Tribunal was aware of the appellant's lack of English literacy and could not reasonably have inferred that the appellant had made an informed decision not to attend the hearing.

(4) That Nauru is a small island and that it would usually be easy to contact the appellant's lawyers at reasonably short notice.

52. It is arguable that the appellant had been actively engaged in the conduct of his case up to the date of the Tribunal hearing. Amongst other matters he has asserted above, he had provided statements and evidence to the Secretary and participated in an interview with the Secretary for the purpose of his RSD right up to the Tribunal. It was only at the Tribunal hearing that he did not attend. The Tribunal issued an invitation for the appellant to appear at a scheduled hearing on 12th May 2016. The invitation was not addressed to the appellant, but was addressed to "Blaise Alexander, Team Leader, CAPS".

53. As noted above, the Tribunal's decision record stated at [8]-[9]:

"The applicant did not attend the scheduled hearing. As at the date of the Tribunal's decision, the Tribunal has received no further correspondence from either the applicant or his representative.

In these circumstances, and pursuant to Section 41 of the Act, the Tribunal has decided the review without taking any further action to allow or enable the applicant to appear before it."

54. It is arguable there was no material before the Tribunal to indicate that the appellant was aware of the hearing date or that he had made a deliberate decision not to attend the hearing. Furthermore, there was no material before the Tribunal to explain the extremely unusual situation where not only did he not attend, but his legal representative did not attend and did not contact the Tribunal to advise of his non-attendance, or request that the hearing be rescheduled, or advise that the representative no longer acted on behalf of him.

55. Finally, it is arguable the Tribunal took no steps to satisfy itself that the appellant was aware of the scheduled hearing and took no steps to contact his representative. The Tribunal was aware of the extreme consequences for him of the proceeding to make a decision without holding a hearing, namely that he would have no further avenue of merits review of his claim to be entitled to protection as a refugee, and therefore faced return to a place where there is fear of persecution.

56. Based on the *TTY167* case and the facts of this case, this Court is satisfied that the appellant has demonstrated that the ground on legal unreasonableness of the Tribunal's decision is arguable.

Prejudice to the Republic

57. As to the question of prejudice, the appellant took a position that he does not seek to rely on any additional evidence, and it is inconceivable that the ground could have been met by the respondent calling any evidence if it had been run in the Court below. Based on this, his counsel submitted that there is no conceivable prejudice to the Republic in permitting the appellant to rely on the ground of appeal.

58. The Republic strenuously objected to the appellant's submission. The appellant should not be permitted to depart from his case in the Supreme Court in the way he has articulated in the Further Amended Notice of Appeal and his submission. The Republic would have sought to adduce evidence to respond to the new ground in the Supreme Court, as set out in the affidavit of Mr O'Shannessy, file 4th October 2022. This is fatal to the appellant's attempt to advance this ground in this Court.

59. In response, learned counsel for the appellant submitted that the claim that the Republic was unable to adduce evidence in response to the ground is incorrect because the ground was pleaded, and was the subject of written submission, but was not pressed at the hearing. Thus, the Republic was put on notice and should, but did not adduce evidence in response to the ground.

60. It is inherently inconceivable that there will be no prejudice to the respondent when it is sought to be asked to response to a belated ground of appeal. The real test is the nature and extent of the prejudice. The position taken by the Republic is well founded. First, contrary to the appellant's submissions, the pleadings at [2] of the Further Amended Notice of Appeal filed in the Supreme Court supported the ground of breach of procedural fairness and the appellant's case was built on breach of procedural fairness. It was not on legal unreasonableness of the Tribunal's decision.

61. Following on from that and secondly, the written submissions do not address the ground on legal unreasonableness of the Tribunal's decision, but breach of procedural fairness. Relevantly, it will be noted in the written submissions of the appellant's counsel at [22] of the Appeal Book under the sub-heading, "GROUND 2: A DENIAL OF PROCEDURAL FAIRNESS and A BREACH OF S.40 OF ACT" with specific emphasis at [27] onwards on when a duty arises for the Tribunal to allow the appellant to appear before it in a case where adverse credibility findings will and were made against the appellant. There were no submissions addressing the grounds on legal unreasonableness of the Tribunal's decision. Moreover, there were no submissions which outlined the matters identified in the *TTY167* case to form the basis for questioning the reasonableness of the decision-making process of the Tribunal.

62. On the other hand, the nature of the prejudice to the respondent is in relation to not being given accurate information to adduce evidence in response to the new ground. According to Mr O'Shannessy's affidavit, the Republic has had no opportunity to adduce evidence from the Tribunal to refute the claim of appellant's or appellant's representative's non-attendance at the Tribunal hearing under the ground of legal unreasonableness and outlined, for purposes of evidence, the following that would have been adduced had the appellant accurately outlined the ground:

(a) Emails between Mr O'Shannessy and Ms Wendy Boddison dated 04th September 2017 regarding a "CAPs rep" attendance at the Tribunal hearing on 12th May 2016, and

(b) Hearing Record of the Tribunal hearing of 12th May 2016 noted that *"CAPs Mr Simon Matherson"* and under the heading Comments *"Did not attend hearing waited until 10: 30."*

63. In addition, Mr O'Shannessy deposed that he would have made further enquiries with Ms Boddison, and enquired with the other members of the Tribunal, as to their recollection of the Tribunal's communications with

the appellant's representative on 12th May 2016, or at any other time proximate to the hearing or after the hearing and possibly tendered evidence of that recollection by way of affidavit.

64. Further, he would consider a further option to whether to make an application for orders directed at Craddock Murray Neumann Lawyers (CMN), the appellant's representatives before the Tribunal, in the form of a summons to produce documents of records of the appellant being notified by CMN of the date, time and or location of his scheduled appearance before the Tribunal; recording of any non-privileged communication between CMN, and the appellant, from 15th April to 5th July 2016 (inclusive); and recording of any communication between CMN, and the Tribunal, from 15th April to 5th July 2016 (inclusive), relating to the appellant.

65. Finally, Mr O'Shannessy deposed that he would have made enquiries of CMN as to the availability of Mr Simon Matherson, the appellant's representative before the Tribunal, Ms Blaise Alexander, the CMN Team Leader in Nauru at the time of the scheduled Tribunal hearing, to provide their recollections of any communication with the appellant, or the Tribunal, between 15th April and 5th July 2016 (inclusive), and if necessary, sought to tender such evidence.

66. Based on what Mr O'Shannessy has outlined, the Court is satisfied that there was substantial evidence and potential evidence that the Republic could have adduced or sought to adduce at the hearing in the Supreme Court if the ground on legal unreasonableness was advanced. As to the extent of the prejudice, learned counsel for the Republic postulated number of scenarios that may occur due to the passage of time, such as memories of witnesses to recall what transpired prior to and at the hearing of 12th May 2016 may have diminished and members of the Tribunal and representatives from CAPs may give affidavits and be cross-examined about what they remembered.

67. Appreciating these different possibilities, the Court notes that a large part of the evidence will have been documentary including affidavits by Deputy Principal Member of the Tribunal and other members as outlined by Mr O'Shannessy in his affidavit. Unless lost or destroyed, documentary evidence in the form of records of the Tribunal and email communications between the Tribunal, CMN and the appellant would be easily accessed by the Republic. Similarly, unless the Deputy Principal Member of the Tribunal and other members are unavailable, the Republic should be able to locate them. A hearing where additional evidence and facts are uncontested is unlikely to involve cross-examination of deponents of the affidavits. Finally, the point on cross-examination was

also made, but not pressed in any detail by the Republic. For these reasons, the Court is satisfied that the prejudice to the Republic's interests is not substantial or irreparable such that the Republic would be denied a fair hearing.

68. Indeed, the Republic proposed that if leave is granted to the appellant to advance the new ground, it would seek a timetable in which to file evidence in this appeal, having regard to the steps that would be undertaken as outlined in the affidavit of Mr O'Shannessy.

Interests of Justice

69. The next consideration is where the interests of justice lie. There is no question that there is so much at stake between the parties. There is the interest of the appellant on the one hand and there is the interest of the Republic on the other to weigh up. Ultimately, as a matter of finality in litigation, both parties seek to bring the matter to a close, noting that it has been a long process beginning with the Secretary's determination and ending before this Court. A significant factor operating in favour of the appellant is the commitment made by the Republic under the Section 4 of the *RC Act* not to expel a person determined to be recognized as a refugee. Section 4 states:

> *"(1) The Republic shall not expel or return a person determined to be recognized as a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, except in accordance with Refugees Convention as modified by the Refugees Protocol.*
>
> *(2) The Republic shall not expel or return any person to the frontiers of territories in breach of its international obligations."*

70. In the case of Nauru, the *RC Act* refers to a refugee as defined in the *Refugees Convention* and as modified by the Refugees Protocol. According to Article 1A(2) of the *Refugees Convention,* 1951 as amended by 1967 Refugees Protocol:

> *"A refugee is any person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of their nationality and is unable or unwilling to avail themselves of the protection of that country, or who, not having a nationality and being outside the country of their former habitual residence, is unable or unwilling to return to it."*

71. In Nauru, a person may also claim complimentary protection provided under Section 3 of the *RC Act,* which states *"protection for people who are not refugees as defined in this Act, but who also cannot be returned or expelled to the frontiers of territories where this would breach Nauru's international obligations".*

72. As noted above, the parties had begun the process and are nearing its end. At the core of the process is the Republic's obligations to observe the established processes under the *RC Act* and *Refugees Convention* and Protocol and to give effect to its obligations under the *RC Act* and *Refugees Convention* and Protocol. The appellant claimed that he left his home country for fear of being persecuted because of, amongst others, an imputed opinion as a supporter of the LTTE on account of assisting his father who at relevant time a LTTE member.

73. Taking the interests of both parties into account and carefully weighing them up, the Court is of the view that they are evenly balanced.

Exceptional case

74. Finally, is this case exceptional such that it is beyond doubt that refusing leave will cause injustice in the circumstances? It has been demonstrated that the proposed ground is meritorious supported by potential serious ramifications for the appellant if leave is refused. However, this Court is not satisfied that a serious error has occurred such that on the face of the record, a miscarriage of justice has occurred and makes this case exceptional.

75. As this Court has found above, the ground that was pleaded but not pressed in the Court below was on denial of procedural fairness. For some unexplained reason the appellant did present the ground of legal unreasonableness of the Tribunal's decision. Nonetheless, the appellant had the opportunity to present this ground. And it was not a case where he had no opportunity at all to present it. It was after the decision in *TTY167* that he decided to advance this ground. However, as the Court has found, the *TTY167* decision is no explanation for his failure to present this ground in the Court below.

76. Following on from that and secondly, it does not make a case exceptional because the Court has upheld an appeal on a materially same fact as the present case. To permit an appellant to advance a ground based on a subsequent decision of the Court based on materially same facts does not raise a serious error in the judgment of the Court below but is tantamount

to an abuse of the Court process. An appellant should never be permitted to engage the Court process in this manner.

77. Finally, the appellant has failed to identify a serious error in the judgment of the Court below and how justice has been miscarried. Moreover, just because a subsequent case was decided and favoured the appellant's case does not mean that a serious error has occurred, and justice has miscarried and makes the case exceptional.

Conclusion

78. While it is acknowledged that this is a Refugee Appeal case, this Court is not satisfied that the appellant has demonstrated that this is an exceptional case, and he should be given leave to advance the new ground. Leave is refused.

Order

79. The final terms on the order of the Court are:

a) The application for leave to advance a new ground of appeal is refused.

b) No order as to costs.

Dated this 14th day of July 2023

NAURU COURT OF APPEAL

Justice Colin Makail

Justice of the Court of Appeal

Justice Rangajeeva Wimalasena

I agree.

Justice of the Court of Appeal