IN THE COURT OF APPEAL OF NAURU
AT YAREN
CIVIL APPELLATE JURISDICTION

Refugee Appeal Nos. 8 & 9/2018
Supreme Court Refugee Appeal Case Nos. 42 & 43/2016

BETWEEN

CR1 041 & CR1 042

AND

APPELLANTS

Republic of Nauru

RESPONDENT

BEFORE: **Justice Dr. Bandaranayake, Acting President**
Justice R. Wimalasena
Justice C. Makail

DATE OF HEARING: **13/09/2022**

DATE OF JUDGMENT: **14/02/2023**

CITATION: **CR1 041 & CR1 042 v The Republic**

KEYWORDS:	Appeal, Refugee, Asylum seekers, Refugee Review Tribunal, Unreasonableness, Whether failure to grant further extension is unreasonable,
LEGISLATION:	Refugees Convention Act 2012
CASES CITED:	Minister for Immigration and Citizenship v Li and Another [2013] HCA 18, Associated Provincial Picture Houses Ltd v Wednesbury Corporation ([1948] 1 KB 223),Council of Civil Service Unions v Minister for the Civil Service([1985] AC 374), R (DSD and NBV) v The Parole Board ([2018] 3 All E R 417), R v Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd ([1999] 2 AC 418),R (DSD and NBV) v The Parole Board ([2018] 3 All E R 417),Minister for Immigration and Border Protection v SZVFW and Others ([2018] HCA 30)

APPEARANCES:

COUNSEL FOR **Appellants**:	**P. Knowles**
COUNSEL FOR **Respondent**:	**R. O'Shannessy**

JUDGMENT

1. These are Appeals from the Judgment of the Supreme Court dated 22/03/2018. By that Judgment the Supreme Court had dismissed the Appeals filed by the Appellants and had affirmed the decision of the Refugee Status Review Tribunal (hereinafter referred to as the

Tribunal) dated 17/03/2016. That Tribunal had affirmed the decision of the Secretary of the Department of Justice and Border Control (hereinafter referred to as the Secretary) dated 02/10/2015, that the Appellants cannot be recognised as Refugees or owed complementary protection.

2. At the outset both learned Counsel for the Appellants and the Respondent agreed that since the issues are the same in both Appeals, submissions would be made together and that there could be one Judgment for both Appeals.

3. Accordingly the Appeals were so heard.

4. The Appellants, being aggrieved by the decision of the Supreme Court, came before the Court of Appeal against the said decision to obtain an Order to reverse the decision of the Supreme Court on two Grounds of Appeal.

5. The said Grounds of Appeal were as follows: 1. The primary judge erred by failing to find that the Refugee Status Review Tribunal erred on a point of law by its decision to refuse the further adjournment applications, and in doing so: (a) Failed to afford the Appellant procedural fairness in breach of the common law and breached section 22(b) of the Act, and/or (b) Acted with legal unreasonableness.

6. At the hearing, the Counsel for the Appellants informed the Court that, although he has referred to two Grounds of Appeal, he would only be making submissions on the ground of legal unreasonableness.

7. Accordingly it was agreed that only the ground of unreasonableness would be taken into consideration and this Court heard both Counsel only on that ground.

8. The facts of this Appeal, albeit brief, as submitted by the learned Counsel for the Appellants are as follows.

9. The Appellant in CRI 041 (hereinafter referred to as the First Appellant) is married to Appellant in CRI 042 (hereinafter referred to as the Second Appellant). The First Appellant is a citizen of Bangladesh whereas the Second Appellant is a citizen of Indonesia. The First Appellant is of Bengali ethnicity and Sunni Muslim religion whereas the Second Appellant is of Malay ethnicity and Sunni Muslim religion. The First and the Second Appellants had got married on 15/01/2010 in Malaysia and the Second Appellant had given birth to a son in Malaysia on 31/12/2011.

10. The First Appellant claimed to be a supporter of a political movement known as Jammat-e-Islami in Bangladesh since 2002. He had actively supported the said movement between the years 2002-2007 by encouraging people to attend meetings and rallies. On account of his support given to this movement, he had feared torture, death or other harm, especially from a rival political movement known as Awami League. In order to avoid any such harm he fled to Malaysia in the year 2007. The First Appellant had been repeatedly unsuccessful in obtaining Malaysian citizenship between the years 2007-2009.

11. In 2013 the First Appellant had returned to Bangladesh for two weeks and he was made aware that people, including his own family

members, had informed the Awami League of his return and therefore he again felt threatened. The First Appellant had stated that his youngest brother had informed that his older brother would have killed the First Appellant if he returned to Bangladesh as the First Appellant wanted to claim the property his family had bought with the money the First Appellant had sent to them.

12. The First Appellant also claimed that he feared harm due to the illegal residence of the Second Appellant and their son in Bangladesh and his family's opposition to his marriage.

13. The Second Appellant had claimed a fear of harm based on the illegal residence of the First Appellant and their son in Indonesia as her family had not been in favour of her marriage to the First Appellant. She had also said that whilst they were in Indonesia, her family had threatened the First Appellant with a knife as they had not accepted their marriage.

14. The Second Appellant had also stated that due to the aforementioned disagreements, it would be against the best interest of her son to be brought up in Indonesia and that she would be discriminated against in Indonesia.

15. On 28/09/2015, the Secretary made a determination that the Appellants cannot be regarded as refugees or owed complementary protection. The Secretary had further stated that the Appellants' son was not eligible for derivative status.

16. On 02/10/2015 the Appellants applied for review by the Tribunal. On 27/01/2016 the Appellants were invited to appear before the Tribunal on 04/02/2016. The Appellants did not appear before the Tribunal on 04/02/2016, but sought for a postponement. The Tribunal adhered to the said request and re-scheduled the inquiry for 11/02/2016.

17. On 11/02/2016, the Appellants did not appear before the Tribunal and had instructed their representatives to request for an adjournment on an 'indefinite basis' until they are well enough to appear before the Tribunal. The Tribunal had, however, decided to undertake the review without taking further action to allow the Appellants to appear.

18. Later, the Tribunal had considered the applications of the Appellants, and had decided that it was unable to be satisfied that the Appellants were refugees, and they were not granted complementary protection.

19. Being aggrieved by the decision of the Tribunal, the Appellants went before the Supreme Court. Before that Court the Appellants alleged that the Tribunal had failed to follow the principles of procedural fairness as it had proceeded with the hearing, when the Appellants were not present and that the failure by the Tribunal to adjourn and reschedule their hearing was legally unreasonable. On 22/03/2018 the Supreme Court made Order affirming the decision of the Tribunal.

20. As stated earlier, thereafter the Appellants came before this Court and the Appeals were argued only on one Ground, which was as follows.

21. **Ground of Appeal -** The Primary Court Judge erred by failing to find that the Refugee Status Review Tribunal erred on a point of law by its

decision to refuse the further adjournment applications and in doing so acted with legal unreasonableness.

22. Learned Counsel for the Appellants contended that the main issue in contest is whether there was a legal error in the proceedings of the Tribunal not to adjourn a hearing when the Appellants did not attend as they had claimed that their mental condition was insufficient to allow them to participate at the hearing. He further contended that in such circumstances, it was unreasonable for the Tribunal to have proceeded to deliver its decision without hearing the Appellants.

23. Learned Counsel for the Appellants submitted that the hearing before the Tribunal was scheduled to be held on 04/02/2016 and the invitation had been sent to the Appellants' legal representative. The legal representative had informed the Tribunal that the First Appellant had informed that the Second Appellant is not in a position to attend the scheduled hearing and had further said that both Appellants have had a serious decline in their mental health where they are unable to communicate properly and provide instructions. It had also been mentioned that the Appellants had sought assistance or referral from an IHMS mental health team. Accordingly the legal representative had informed the Tribunal that the First Appellant had requested for a postponement of the hearing by one month.

24. Learned Counsel for the Appellants submitted that, after considering the request by the Appellants, the Tribunal had postponed the date of hearing not as requested by one month, but just by one week to 11/02/2016.

25. Having said that, Learned Counsel for the Appellants however conceded that there had been medical evidence before the Tribunal. An e-mail by one Dr. Mohanraj, a Psychiatrist, giving an assessment of the Appellants mental condition had been forwarded to the Tribunal which had stated that both Appellants were clinically depressed and that the First Appellant's condition was more severe with predominant anxiety features as well. However, Dr. Mohanraj was of the opinion that both the Appellants had the capacity to participate at the hearing.

26. Learned Counsel for the Appellants further submitted that on 11/02/2016, the Appellants' representative had informed the Tribunal that the Appellants had attended a pre-hearing meeting, but they had instructed their Solicitors that they were mentally not well enough to participate in the hearing and that they need a further indefinite adjournment until they are well enough to come before the Tribunal.

27. The learned Counsel for the Appellants further submitted that having considered the opinion expressed by Dr. Mohanraj, the Presiding member of the Tribunal had informed that the Tribunal is not in a mind to grant any further adjournments. Having said that the Tribunal had taken the Appeals for consideration.

28. The contention of the learned Counsel for the Appellants was that, although the Tribunal has the power to decline an adjournment, it is legally unreasonable to exercise such authority, without valid reasons. In support of his contention, learned Counsel for the Appellants relied on the decision of the High Court of Australia in **Minister for Immigration and Citizenship** v **Li and Another** ([2013] HCA 18) and strenuously contended that even considering the opinion given by

Dr. Mohanraj, there were no good reasons to refuse to grant the requested adjournment.

29. Learned Counsel for the Respondent was of the view that the power of the Tribunal to grant an adjournment is limited to someone who is not in a position to participate and therefore the Tribunal should have a valid reason to exercise its discretion in granting an adjournment of a hearing.

30. Learned Counsel for the Respondents further contended that since there was a clear medical opinion before the Tribunal, it had to exercise its discretion based on that report. Accordingly the contention on behalf of the Respondent was that the Tribunal had not acted unreasonably by not granting any further adjournments.

31. It is not disputed that on 06/10/2015 the Appellants had filed applications to the Tribunal for a review of the negative determination and on 27/01/2016 the Tribunal had sent an invitation for the Appellants to appear before the Tribunal to give evidence and present arguments on 04/02/2016.

32. On 28/01/2016, the Solicitors of the Appellants had made a request for an adjournment from the Tribunal where it had been stated thus:

> *'the Appellants had instructed us they have had a serious decline in their mental health over the past month. They instruct that, whilst they have struggled in the conditions in Nauru for a long time, they have now deteriorated to the point that they are unable to communicate properly*

and provide instructions to their Solicitors or to provide evidence before the Tribunal'.

33.It is evident that the Tribunal had taken note of the request made by the Appellants, as on 29/01/2016, the Tribunal had confirmed that the hearing which was scheduled for 04/02/2016 was to be postponed to 11/02/2016. It is also of importance to note that, at that stage the Tribunal had informed the Appellants that 'if there is to be a further request for an adjournment that there should be medical evidence'.

34.As stated earlier, the Solicitors of the Appellants had informed the Tribunal on 04/02/2016, referring to the Appellants that 'they do not feel well enough even to meet their representatives to assist them to prepare their cases for review'. However, it is to be admitted that there had been no material before the Tribunal to indicate that this position taken up by the Appellants had been supported by medical evidence. Moreover, it is an obvious fact that those statements by the Appellants were a clear indication that both of them were not willing to participate at the hearing before the Tribunal.

35.Be that as it may, it is to be noted that the Tribunal had taken into consideration that the requests made by the Appellants for adjournments were all based on their deteriorating mental conditions. This is quite clear as the Tribunal had informed the Appellants to submit medical evidence in the event there are requests for further adjournments.

36.In this backdrop, it is vitally important to examine the email by Dr. Mohanraj, that was submitted to the Tribunal by the representatives of

the Appellants. The email, which contains the report by Dr. Mohanraj reads as follows:

> *"I examined [the Appellants] this morning [05/02/2016]. Clearly they are both clinically depressed. The [First Appellant's] condition is more severe with predominant anxiety features as well. I have prescribed appropriate psychotropic medications for the two of them.* ***The two of them were not keen to attend the review hearing saying that they expect a second negative RSD and feel the hearing will be a futile exercise.*** *The [First Appellant] appeared more vehement with his stand. On further discussion the [Second Appellant] decided it would be best for them to appear at the hearing. The [First Appellant] appears to be more contemplative and said that he "might" attend the hearing if he felt well on that day.*
>
> ***With regards to their capacity to participate in the hearing both [Appellants] understand the proceeding of the review hearing.*** *They agree that they have both been adequately briefed by the legal representation they have.* ***While the couple is understandably devastated psychologically, both their cognitive functions are intact and their thought processes are not in anyway impaired to the extend that they are unable to participate in the review hearing [sic].***

I hope this helps. Kindly see their respective clinical notes for further details".

37.A plain reading of the Report by Dr. Mohanraj clearly indicates that the Appellants were in a position to participate at the hearing that was scheduled for 11/02/2016. However, as submitted by the learned Counsel for the Appellants, irrespective of the opinion given by Dr. Mohanraj, it was the decision of the Appellants, not to participate at the hearing.

38.Taking that into account the Tribunal had informed the representatives of the Appellants by email that,

> *"I confirm that in the absence of further medical evidence in relation to the [Appellants] non attendance at the hearing scheduled for Thursday 11 February 2016, the Tribunal will proceed to make a decision on the papers".*

39.In such circumstances the issue that has to be considered is whether the action taken by the Tribunal to refuse further adjournment applications submitted by the Appellants, would amount to having acted with legal unreasonableness.

40.The principle of unreasonableness as a ground for judicial review could be traced back to the landmark decision in **Associated Provincial Picture Houses Ltd** v **Wednesbury Corporation** ([1948] 1 KB 223) in which it introduced a test for reasonableness of an administrative decision that later became known as Wednesbury unreasonableness. Examining the concept that was considered in the decision in

Associated Provincial Picture Houses Ltd (supra), Lord Diplock in **Council of Civil Service Unions** v **Minister for the Civil Service**([1985] AC 374) referred to it as irrationality and went on to state that

> *"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' . . . . It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".*

41. A careful examination of the Wednesbury unreasonableness clearly indicates that there are two limbs to this concept. Firstly, what it means is that the Court is entitled to investigate the action of the administrative authority to see whether they have taken into consideration what they ought not to have or conversely have refused to take into account matters they should have taken into account. Secondly, when the first question is answered in favour of the administrative authority, it could still be possible to say that although the administrative authority has considered all matters they ought to consider, they have nevertheless come to a conclusion so unreasonable, that no reasonable administrative authority could ever have come to such a conclusion. Lord Diplock in **Council of Civil Service Unions** (supra) had defined in detail the aforementioned second limb of the Wednesbury unreasonableness.

42. The first limb that was discussed in **Associated Provincial Picture Houses Ltd** (supra) is still being considered in judicial review and a

good example would be **R (DSD and NBV)** v **The Parole Board** ([2018] 3 All E R 417). In this the issue was a controversial decision given by the Parole Board to release from prison, John Radford, then known as John Worboys, who was convicted after trial in the Crown Court at Croydon of 19 serious sexual offences committed between October 2006 and February 2008, involving 12 victims. The Administrative Court quashed the decision of the Parole Board stating that it had acted unreasonably as the Parole Board had not taken into consideration certain offences committed earlier by John Radford and therefore ordered it to reconsider its decision.

43. It is however to be noted that there are several decisions where the concept of Wednesbury unreasonableness as a ground of review has been criticized as not only being complex, but also incoherent. For instance, Lord Cooke in **Council of Civil Service Unions** v **Minister for the Civil Service** (supra), criticized Lord Greene's formulation of unreasonableness in **Associated Provincial Picture House Ltd** (supra) 'as an apparently briefly considered case, [which] might not be decided the same way today'. Lord Cooke had further stated thus:

> *" . . . . the judgment of Lord Greene MR twice uses the tautologous formula 'so unreasonable that no reasonable authority could ever have come to it'. Yet judges are entirely accustomed to respecting the proper scope of administrative discretions.* ***In my respectful opinion they do not need to be warned off the course by admonitory circumlocutions****" (emphasis added).*

44.Be that as it may, it cannot be said that the principle of Wednesbury unreasonableness has fallen totally out of favour. In fact attempts had been made to broaden this test and the decision by Lord Diplock in **Council of Civil Services Unions** v **Minister for the Civil Service** (supra) could be cited as an example where the test of proportionality was introduced to the English Law in order to strengthen the concept introduced by Wednesbury unreasonableness.

45.A closer examination of the later developments in the arena of judicial review in administrative action clearly indicate that the position in Australian jurisdiction is somewhat different as the Australian Federal Government had enacted the Administrative Decisions Judicial Review Act that had codified most of the common law grounds of judicial review. Although there are benefits in this process, it could be clearly seen that such codification has shrouded the development of the common law judicial review process that could have been easily achieved through the decisions of the Courts.

46.However, notwithstanding such restrictions, there are decisions of the Australian Superior Courts, which clearly show the significant expansions in the review process of administrative decisions on the grounds of legal unreasonableness.

47.The Australian High Court decision in **Minister for Immigration and Citizenship** v **Li and Another** (supra) could be regarded as a watershed in the recent past where the Australian Courts reached out of the restricted standard of Wednesbury unreasonableness. In its decision in **Li and Another** (supra) it was clearly stated that,

"The legal standard of unreasonableness is not limited to a decision so unreasonable that no reasonable person could have arrived at it. The standard is addressed to whether the statutory power, on its true construction, has been abused. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification".

48. In **Li and Another** (supra), the question that arose was with regard to the issuance of a Skilled-Independent Overseas Student (Residence) (Class DD) visa. Li, a Chinese national, had provided with her visa application a skills assessment from a relevant assessing authority. The Minister's delegate had refused the visa application because some of the information provided to Trade Recognition Australia (hereinafter referred to as TRA) was not genuine. Following that, Li had applied to the Migration Review Tribunal for review of the decision. Before the Tribunal hearing Li had submitted a second skills assessment application to TRA. At the time the Tribunal hearing took place, Li had not received her second skills assessment. Following the hearing, the Tribunal had invited further comment from Li and her agent had responded informing the Tribunal that Li had received an unfavorable second skills assessment, but that she had applied to TRA for review of that assessment. The agent asked the Tribunal to withhold the making of a decision until the second skills assessment was finalized. The Tribunal refused the request and affirmed the decision of the delegate.

49. It is of interest at this juncture to note the views expressed by French CJ, in **Li and Another** (supra), where in dismissing the Appeal by the Minister for Immigration, it had been stated that,

"A distinction may arguably be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable. It is not necessary for present purposes to undertake a general consideration of that distinction which might be thought to invite a kind of proportionality analysis to bridge a propounded gap between the two concepts. ***Be that as it may, a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut, may be characterized as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves****" (emphasis added).*

50. In the light of the aforementioned, it would be of importance to examine the decision given by the High Court of Australia just five years after the decision given in **Li and Another(supra)** in **Minister for Immigration and Border Protection** v **SZVFW and Others** ([2018] HCA 30). In this matter, the High Court of Australia had discussed in detail the judicial review process of an administrative discretion exercised by the Refugee Review Tribunal.

51. According to the facts in **SZVFW** (supra) SZVFW and his wife were refused protection visas by a delegate of the Minister for Immigration and Border Protection. They applied to the Tribunal for a review of that decision. It is to be noted that on the day of their review hearing, SZVFW and his wife did not appear before the Tribunal. The Tribunal affirmed the earlier decision to refuse the protection visas.

52. Thereafter SZVFW and his wife sought judicial review of the Tribunal's decision stating that the decision of the Tribunal to proceed in their absence was legally unreasonable. The Primary Judge, agreed with the contention taken by SZVFW and his wife and decided that the decision of the Tribunal was unreasonable. The Minister appealed to the Full Court of the Federal Court of Australia, which dismissed the Appeal. The Minister then appealed to the High Court of Australia, which had unanimously decided that the appeal should be allowed.

53. In delivering the decision in **SZVFW** (supra), Nettle and Gordon, JJ had clearly stated that, 'the decision by the Tribunal, for the reasons it gave, was not legally unreasonable'. The High Court had taken note of other reasons in addition to the reasons given by the Tribunal which they thought were relevant in this regard and one such reason that was specifically mentioned was that,

> *" . . . . prior to the decision of the delegate, [SZVFW and wife] had not attended a scheduled interview with the Department, despite apparently being made aware of the interview by letters sent to their nominated address and a telephone call rescheduling the interview".*

It is of interest to note as to the assumption that followed this narrative in Nettle and Gordon, JJ's decision.

> ***"It would have been reasonable to infer that a rescheduled hearing before the Tribunal might have been futile"*** *(emphasis added).*

54. Moreover it is of importance to refer to the views on legal unreasonableness that were expressed in **SZVFW** (supra), where it was stated thus:

> *" . . . . legal unreasonableness is invariably fact dependent and requires a careful evaluation of the evidence. That is, assessment of whether a decision was beyond power because it was legally unreasonable depends on the application of the relevant principles to the particular factual circumstances of the case, rather than by way of an analysis of factual similarities or differences between individual cases. Where reasons are provided, they will be a focal point for that assessment.* ***It would be a rare case to find that the exercise of a discretionary power was unreasonable where the reasons demonstrate a justification for that exercise of power****" (emphasis added).*

55. The decision in **SZVFW** (supra) intimates a clear indication that when exercising its authority in judicial review, a Court will have to be mindful that there should be justification in the exercise of its authority. It was in **Li and Another** (supra) that had observed the necessity to apply the discretion that has been granted to an administrative authority, only according to law and the rule of reason and justice.

56. The main contention of the learned Counsel for the Appellants is that the decision of the Tribunal was unreasonable as it failed to take into

consideration and assess the Appellants mental health in refusing to grant a further adjournment of the hearing.

57. It is however to be noted that there is no dispute that the Appellants were granted an adjournment when they so requested at the very outset and the Tribunal had been specific in intimating to the Appellants that if there are further requests for adjournments, that such requests should be supported by medical evidence. It is common ground that a medical report pertaining to the mental health of the Appellants was before the Tribunal when they took the matter into consideration and the said medical report had specifically stated that the Appellants were in a position to participate at the hearing.

58. The contention of the Learned Counsel for the Appellants was that although there was a medical report before the Tribunal, as the Tribunal had the discretionary authority to reschedule the hearing under section 41(2) of the Refugees Convention Act, the Tribunal should have taken steps to grant an adjournment of the hearing.

59. Section 41 of the Refugees Convention Act clearly spells out the powers that has been granted to the Tribunal, and reads thus:

> *"(1) Where the applicant:*
>
> *(a) is invited to appear before the Tribunal; and*
> *(b) does not appear before the Tribunal on the day 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".

60. There is no doubt that according to said section 41(2) of the Refugees Convention Act, the Tribunal is empowered to reschedule a hearing. However it should be borne in mind that section 41(2) of the Refugees Convention Act cannot be read in isolation. Whilst accepting the fact that there is provision for the Tribunal to reschedule a hearing, it cannot be forgotten that 41(2) should be read in conjunction with section 41(1) of the said Act. Accordingly it is apparent that the Tribunal has the authority to make a decision on the review, without taking further action, to either allow or enable the applicant to appear before the Tribunal. On a careful reading of section 41 of the Refugees Convention Act, it is abundantly clear that the provision in section 41(2) provides the Tribunal an opportunity to exercise its discretion to consider whether the hearing should be rescheduled or not.

61. When an administrative authority is vested with discretion, it cannot be taken that it is an absolute power that can be exercised according to the 'whims and fancies' of such a body. A discretionary power has to be exercised within the boundaries of reason and justice, devoid of irrationality.

62. In 1891 in **Susannah Sharp** v **Wakefield** ((1891) AC 173) Lord Halisbury referred to discretionary authority in very forceful terms:

> *". . . . when it is said that something is to be done with the discretion of the authorities . . . that discretion is to be done according to the rules of reason and justice, not according to private opinion. . . . according to law , and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself".*

63. Considering the facts of this Appeal, it is not disputed that the Tribunal had granted permission for an adjournment at the request of the Appellants. It is also not disputed that when it came up for the hearing for the second time the Tribunal was possessed with the medical report concerning the Appellants mental condition. It is also not disputed that in that report the medical officer had clearly stated that he cannot see any reason that the Appellants are not in a position to face the hearing. It should therefore be borne in mind that it is in that backdrop that the Tribunal had taken the decision to continue with the hearing, which was scheduled after granting an adjournment at the request of the Appellants, in their absence.

64. There is no doubt that any authority with discretionary power should exercise that with caution. Such an authority cannot act arbitrarily in exercising its discretion, as it is necessary for the decision maker not only to be reasonable, but also that to be evident. The criteria to

assess the reasonableness of a decision would depend on having reasons that are based on intelligible justification.

65. On a consideration of the totality of the facts and circumstances in this Appeal, it is abundantly clear that the Appellants were given an opportunity by the Tribunal to await for their medical report. It is also clear that the Tribunal had not exercised their discretion arbitrarily, but with reasons based on intelligible justification. In such circumstances, there are no grounds that indicate that the Tribunal had acted unreasonably.

66. For the reasons aforementioned these Appeals are dismissed and the judgment of the Supreme Court of Nauru dated 22/03/2018 is thereby affirmed.

67. I wish to place on record appreciation for both learned Counsel for the Appellants and the Respondent for their assistance rendered to this Court.

Dated this 14th day of February 2023

NAURU COURT OF APPEAL

Justice Dr. Shirani A. Bandaranayake
Acting President of the Court of Appeal

Justice Rangajeeva Wimalasena

I agree

Justice of the Court of Appeal

Justice Colin Makail

I agree

Justice of the Court of Appeal