IN THE SUPREME COURT OF NAURU

AT YAREN

[APPELLATE DIVISION] **Appeal No.** 01 of 2018

IN THE MATTER OF an appeal against a decision of the Refugee Status Review Tribunal TFN T15/00210 brought pursuant to s43 of the *Refugees Convention Act* 1972

BETWEEN: TTY152 Appellant

AND: REPUBLIC OF NAURU Respondent

Before: Wheatley J

Dates of Hearing: 26 October 2022

Date of Judgment: 6 December 2022

CITATION: *TTY152 v Republic of Nauru*

CATCHWORDS:

APPEAL - refugees - legal unreasonableness - where appellant failed to attend Tribunal hearing - where Tribunal made a decision pursuant to s 41 of the *Refugees Convention Act 2012* (Nauru) - where Tribunal did make enquiry as to Appellant's whereabouts – APPEAL DISMISSED.

APPEARANCES:

Appellant:	J.F. Gormley
Respondent:	R. O'Shannesy

JUDGMENT

Introduction to the Statutory Framework

1. This is an appeal from a decision of the Refugee Status Review Tribunal (**Tribunal**) pursuant to section 43 of the *Refugees Convention Act 2012* (Nauru) (**the Act**) which relevantly provides:

> *"43 **Jurisdiction of Supreme Court***
>
> *(1) A person may appeal to the Supreme Court against a decision of the Tribunal on a point of law.*
>
> ...
>
> *(2) The parties to the appeal are the appellant and the Republic.*
>
> *(3) The notice of appeal shall be filed within 42 days after the person receives the written statement of the decision of the Tribunal.*
>
> *(4) The notice of appeal shall:*
>
> *(a) state the grounds on which the appeal is made; and*
>
> *(b) be accompanied by the supporting materials on which the appellant relies."*

2. Section 44 of the Act provides that the Court may make the following orders, on such an appeal:

> ***"44 Decision of Supreme Court on Appeal***
>
> *(1) In deciding an appeal, the Supreme Court may make either of the following orders:*
>
> *(a) an order affirming the decision of the Tribunal; or*
>
> *(b) an order remitting the matter to the Tribunal for reconsideration in accordance with any directions of the Court.*
>
> *(2) Where the Court makes an order remitting the matter to the Tribunal, the Court may also make either or both of the following orders:*
>
> *(a) an order declaring the rights of a party or of the parties; and*
>
> *(b) an order quashing or staying the decision of the Tribunal."*

3. Section 3 of the Act defines the Tribunal as the Refugee Status Review Tribunal established under section 11 of the Act. Part 3 of the Act establishes the Tribunal. Pursuant to section 31 of the Act, *"a person may apply to the Tribunal for merits review of any of the following"*:

> *"(a) A determination made under section 6(1) of the Act; or*
>
> *(b) A decision to cancel a person's recognition as a refugee made under section 10(1) of the Act."*

4. Pursuant to section 5 of the Act, a person may apply to the Secretary, being, at the relevant time, the Secretary of the Department of Justice & Border Control (**Secretary**) to be recognised as a refugee. Pursuant to section 6, the Secretary shall determine an application made pursuant to section 5 of the Act. Section 3 of the Act defines '*refugee*' as a person who is a refugee under *Refugees Convention* as modified by the *Refugees Protocol* (each of which is relevantly defined in section 3 of the Act). A refugee is defined by Article 1A(2) of the *Convention Relating to the Status of Refugees 1951* (**Refugees Convention**) as modified by the *Protocol Relating to the Status of Refugees 1967* (**Refugees Protocol**), as any person who:

> *"...owing to 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 his nationality and is unable to, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable to or, owing to such fear, is unwilling to return to it."

5. The Act also defines *complementary protection* as:

> *"means 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 the Republic's international obligations;"*

6. Without being exhaustive, the following provisions regarding the Tribunal, as comprising part of the relevant statutory framework, are also relevant. Division 1 Part 3 of the Act provides for the establishment and membership of the Tribunal. Section 13 provides for the appointment of members. Section 13(2) provides that a person is eligible for appointment as the Principal Member or as a Deputy Principal Member if that person is qualified to be appointed a Judge of the Supreme Court, has been member of the Tribunal and has been admitted as a barrister or solicitor or legal practitioner (of various jurisdictions), for not less than five years and has not been struck off. Section 13(3) provides that the Regulations may prescribe eligibility requirements for appointment as a member. Section 4 of the *Refugees Convention Regulations 2013* (Nauru) provides, in relation to section 13(3) of the Act, that a person is eligible for appointment as a member of the Tribunal if the person has at least two years' experience in refugee merits review matters at a tribunal or equivalent level and a proven capacity to conduct administrative review, has a thorough knowledge of the UNHCR Refugee Status and Guidelines and has demonstrated skills in:

   a) research;

   b) clear oral and written communication; and

   c) the use of word processing software.

7. Division 2 of Part 3 provides for the constitution, sittings and powers of the Tribunal. Section 19 requires that the constitution of the Tribunal for merits review will be by the Principal Member or a Deputy Principal Member who will preside and two other members. Pursuant to section 20 the Principal Member has a discretionary power to be

able to reconstitute the Tribunal if one or more of the three members who constitute the Tribunal stops being a member or for any reason is not available for the purposes of the review, or the Principal Member thinks the reconstitution is in the interests of achieving the efficient conduct of the review.

8. Section 20(2) states:

> ***"20 Reconstitution if necessary***
>
> *(1) ...*
>
> *(2) The Tribunal as reconstituted is to continue to finish the review and may have regard to any record of the proceedings of the review made by the Tribunal as previously constituted."*

9. Section 22 of the Act provides for the overarching way that the Tribunal is to operate, as follows:

> ***"22 Way of Operating***
>
> *The Tribunal:*
>
> *(a) is not bound by technicalities, legal forms or rules of evidence; and*
>
> *(b) shall act according to the principles of natural justice and the substantial merits of the case."*

10. The Tribunal is expressly required to act in accordance with the principles of natural justice.

11. Pursuant to section 34 of the Act the Tribunal may, for the purposes of a merits review of a determination or decision, exercise all the powers and discretions of the person who made the determination or decision. Section 34 allows the Tribunal, on a merits review, to:

> *"(a) affirm the determination or decision;*
>
> *(b) vary the determination or decision;*
>
> *(c) remit the matter to the Secretary for reconsideration in accordance with directions or recommendations of the Tribunal;*
>
> *(d) set the determination or decision aside and substitute a new decision or determination; or*

(e) determine that a dependant, of the person in respect of whom the determination or decision was made, is recognised as a refugee or is owed complementary protection."

12. In conducting a review pursuant to section 35, an applicant may give a statutory declaration in relation to a matter of fact that the applicant wishes the Tribunal to consider and may give written arguments as well. Further, the Tribunal may invite a person to provide information pursuant to section 36 of the Act. Where such an invitation is made by the Tribunal, but not responded to, pursuant to section 39 the Tribunal may make a decision on the review without taking further action to obtain information, comment or a response.

13. *"The Tribunal shall invite the applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the determination or decision under review"* pursuant to section 40 of the Act. Such an invitation is not necessary where the Tribunal considers it should decide the review in the applicant's favour on the basis of the material before it or the applicant consents to the Tribunal deciding the review without the applicant appearing before it. Where the applicant is invited to appear before the Tribunal and does not so appear, the Tribunal may make a decision on the review without taking further action to allow or enable the applicant to appear before it, pursuant to section 41 of the Act. However, section 41(2) expressly provides that the section does not prevent the Tribunal from rescheduling the applicant's appearance or from delaying its decision on the review to enable the applicant to appear.

Procedural Background

14. On 20 September 2014, the Appellant applied to the Secretary for Refugee Status Determination (**RSD**) for recognition as a refugee and for complementary protection pursuant to the Act. As part of that process, the Appellant was interviewed about his RSD application and he submitted additional documents, after that interview.

15. On 11 October 2015, the Secretary made a decision (**Secretary's Decision**) on the Appellant's RSD application and determined that the Appellant was not a refugee within the meaning of that term in the Act and was also not a person to whom Nauru owed complementary protection obligations.

16. On 13 October 2015, the Appellant signed an acknowledgement of receipt of the Secretary's Decision, which included a document entitled "Fact Sheet for Applicants",[1] regarding the Refugee Status Review Tribunal (being the Tribunal).

17. On 22 October 2015, the Tribunal received an application for merits review of the Secretary's Decision.

18. On 22 July 2016, the Tribunal wrote to the Appellant's representatives by email and attached a draft schedule of the proposed Tribunal sittings.[2] That draft schedule included the proposed hearing date for hearing the Appellant's review application, being on 12 August 2016. That email from the Tribunal also invited the Appellant's representatives to advise it should any changes to the schedule be required.

19. Also on 22 July 2016, the Appellant's representatives responded advising (amongst other matters) that all of the relevant applicants the subject of the draft schedule (including the Appellant) were on Nauru and that no changes were required. However, the Appellant's representatives stated if something was noted, it would be brought to the Tribunal's attention.

20. The Appellant made a further statement in support of his application and review before the Tribunal dated 24 July 2016 (**Further Statement**). That Further Statement expressly stated (amongst other matters):

> *"[3] The following is only a summary of my response to the Secretary's decision. It is not a complete account of the reasons why I cannot return to India. I will be able to provide further information during my hearing before the Refugee Status Review Tribunal.*
>
> *[4] I take this opportunity, ahead of my Hearing before the Refugee Status Review Tribunal, to provide additional information in clarification and support of my protection claims."*

21. On 29 July 2016, the Tribunal invited the Appellant to appear before it on 12 August 2016 at 2:00pm, to give evidence and present arguments. The hearing invitation, addressed to Blaise Alexander, provided the details of the hearing and requested that the Tribunal be informed in writing of any person from whom the Appellant would like

[1] Exhibit 2, on the Appeal.
[2] Affidavit of Ms R Gleeson affirmed 9 May 2018 at [4] and "RG-1".

the Tribunal to take oral evidence. The hearing invitation provided the following warning:

> *"Please note that, if the applicant does not appear before the Tribunal on the date and time specified, the Tribunal may make a decision on the review without taking further action to allow the applicant to appear."*

22. On 3 August 2016, the Appellant's representatives provided written submissions to the Tribunal (**Tribunal Submissions**), together with the Further Statement in support of the Appellant's review application.

23. On 12 August 2016, the day of the hearing, the Appellant did not attend. There is a file note made by the Appellant's representatives dated 12 August 2016 at 2:00pm which records the following (**File Note**):

> *"FILE NOTE*
>
> | | |
> |---|---|
> | *Date: 12 August 2016* | *Time: 2.00pm* |
> | *Boat ID: TTY152*
Client Name: (the Appellant) | *Type of attendance:*
Admin |
> | *By Whom: BA* | *On Whom: Client* |
>
> *Tribunal telephoned to inquire whether (the Appellant) had arrived for his scheduled hearing, as they were under the clear impression that he probably would not attend. I advised that he was not here as yet. They advised that they would continue with the morning hearing as it was going over time, and would be making a decision on the papers for (the Appellant), as he and CAPS had no explanation or basis for seeking an adjournment or further opportunity for him to attend on another date.*
>
> *Follow up required*
>
> *1. None at this stage."*

24. On 15 August 2016, an email was sent from the Service Integration Liaison Coordinator, Nauru Regional Processing Centre (**SILC**) to the Appellant's representatives, which relevantly records the following (**SILC email**):

"Blaise,

Response received from (the Appellant) TTY152 on Friday 12/08/16 after three interactions:

- *Refusal to receive appointment slip on 11/08/16 upon realising it was for his RSRT hearing.*
- *Approached by case manager for follow up on 12/08/16 to find out why he had refused slip-case manager was met with despondence and minimal engagement, but no explicit explanation.*
- *Approach by myself and case manager approximately one hour later. (The Appellant) allowed us to approach him, but then briskly pushed past us to exit the tent upon hearing I wanted to speak with him about his RSRT hearing. (The Appellant) appeared visibly affronted at being approached a second time this morning."*

25. On 17 August 2016, the Appellant's representatives wrote to him regarding his failure to attend the hearing on 12 August 2016 at 2:00pm (**August letter**). The August letter relevantly stated:

"Dear Sir,

Re: Refugee Status Review Tribunal (RSRT) Hearing – failure to attend

We previously advised you that the Refugee Status Review Tribunal (RSRT) scheduled a Hearing in relation to your application for review on ***Friday 12 August 2016 at 2.00PM****.*

You failed to attend that hearing*.*

We clearly informed you in person and by letter that if you do not engage in the review process, fail to attend your hearing, and you do not come to CAPs to explain why then we cannot assist you to provide this information to the tribunal.

It is likely a decision will be made in your case without you having the opportunity to give further evidence in support of your claims. As previously advised this may well be very detrimental to your case and will likely result in

the tribunal coming to the same decision as the Secretary did for your RSD (a negative outcome).

If you had a very good reason why you did not participate in your hearing, we urge you to request a CAPs appointment and speak with the CAPs representative about the reasons.

You must provide a strong reason to the tribunal, including medical records from IHMS to substantiate your request. You must sign a form at CAPs if you want us to access your medical records to support your case."

26. On 15 September 2016 the Appellant's representatives wrote to him again regarding his failure to attend the hearing on 12 August 2016 at 2:00pm. That 15 September letter was in similar terms to that of the August letter. However, the September letter concluded by stating "*We will not contact you again regarding this matter, until we receive a decision from the Tribunal.*"

27. The Appellant provided evidence to this Court[3] wherein he stated, in effect, that he did not remember anything about being informed directly or through an interpreter that the hearing before the Tribunal would take place on 12 August 2016 at 2:00pm and further that he did not remember seeing the August letter or the letter dated 15 September 2016.

28. On 29 September 2016 the Tribunal affirmed the determination of the Secretary that the Appellant is not recognised as a refugee and is not owed complementary protection under the Act (**Tribunal Decision**).

29. The Tribunal recorded the following in its reasons for decision, in relation to the Appellant's non-attendance at the hearing:

"[1] ...the review application was made on 22 October 2015, and the applicant was invited to attend a Tribunal hearing scheduled for 12 August 2016.

[2] The applicant did not appear at the scheduled time and place. No reason was advanced for his non-appearance by his representatives, nor any request that the hearing be rescheduled.

[3] Affidavits of the Appellant dated 8 May 2018 and 9 May 2018.

[3] Consequently, the Tribunal determined pursuant to s.41(1) of the Act to make a decision on the review without taking further action to allow or enable the applicant to appear before it.

...

[66] However, having conducted a preliminary review of the claims and evidence, the Tribunal identified various other matters of concern as to the credibility of the applicant's claims, and whether or not he is a refugee or owed complementary protection. The Tribunal invited the applicant to attend a hearing to give evidence and present arguments and informed him if he did not appear before the Tribunal on the date and time specified the Tribunal may make a decision on the review without taking further action to allow him to appear. The applicant did not avail himself of the opportunity to appear before the Tribunal.

[67] On the evidence before it, the Tribunal's concerns remain, and for the following reasons it does not accept as credible the applicant's claim to be facing ...

...

[79] The applicant has not availed himself of the opportunity to respond in person to the concerns identified by the Tribunal. The most recent written materials provided to the Tribunal do not, despite the contentions to the contrary, address most of the concerns identified by the Secretary, nor do they establish that the applicant's account is credible. While some of the individual concerns outlined above would not necessarily give rise to an adverse credibility assessment, having regard to these concerns in their totality the Tribunal finds on the evidence before it that the applicant is not a credible witness."

30. The Appellant acknowledged notification of the Tribunal Decision on 26 January 2018 and filed the original Notice of Appeal in this Court on the same day.

31. The Notice of Appeal was amended by the Appellant on 23 April 2018 and again further on 3 October 2022. The Further Amended Notice of Appeal advances one ground of appeal which is as follows:

"1. That the Tribunal's exercise of its discretion under s 41 of the Act to decide, in the absence of the appellant, to make a decision on the review without taking further action, including to adjourn the hearing, was legally unreasonable in the circumstances.

Particulars

a. The Tribunal had given an Invitation to Appear before the Tribunal under s 40 of the act to the appellant's Claims Assistance Providers (CAPS) as if the CAPS advisors had authority to receive the Invitation to Appear;

b. The authority the appellant had given to his CAPS advisors to act for him on the review extending to receiving the Invitation to Appear from the Tribunal: s 101 Interpretation Act 2011 (Nr);

c. The CAPS advisors did not inform the appellant of the time, date and place of the scheduled hearing more than the 7 days before the hearing provided by s 40 of the Act;

d. The appellant was reliant on his CAPS advisers to give him this information;

e. The CAPS advisers in the Transferee Information Leaflet (referred to in the respondent's form "Application for Refugee Status Determination" (RSD)) had represented to applicants for review of negative RSD decisions that CAPS would attend an interview with the "Reviewer".

f. The Tribunal had represented to the appellant in a "Fact Sheet for Applicants" before it that it would send the appellant (as an applicant before it) an invitation to a hearing more than seven days before the hearing;

g. The Tribunal was aware the appellant was informed of the hearing only on the day before the hearing was scheduled;

h. In the alternative to g., the Tribunal ought reasonably to have apprehended the appellant may not have been informed of the hearing until the day before, and it was unreasonable for it not to have made

enquiries of the CAPS advisors by which the Tribunal could have ascertained this;

i. The appellant's failure to appear was at odds with his previous high engagement with his case to the Tribunal, including by providing, less than three weeks before the hearing, a further statement which indicated inter alia that he would be attending a hearing;

j The issues arising in relation to the Refugee Status Determination under review by the Tribunal included credibility issues which the appellant was seeking to address;

k. The Tribunal did not give the CAPS advisers an opportunity to seek instructions from the appellant which might explain his failure to appear before deciding to exercise its discretion under 41 of the Act to vacate the hearing and make a decision without taking further action to allow or enable the appellant to appear before it;

l. The appellant had been held in closed detention in Australia since his arrival at Christmas Island on 19 August 2013 and since his transfer to Nauru on 5 July 2014."

32. Although the Further Amended Notice of Appeal is signed by the solicitors who previously represented the Appellant, it was clarified at the hearing of this appeal that those solicitors were no longer acting for the Appellant, although counsel continued to appear for the Appellant (for which the Court was grateful).

Background to the Appellant's Refugee Status Determination Application

33. The Appellant is a citizen of India of Indian ethnicity and Hindu religion from Pehowa, Haryana State of India.

34. In the Secretary's Decision, the Appellant's claims and accounts were found to be lacking in the level of detail which could reasonably be expected (Secretary's Decision at pages 8-10). The Secretary had serious concerns regarding the Appellant's claims, finding that such claims were lacking in detail, inconsistent with known country information and generally implausible. As such, the Secretary did not accept any of the Appellant's material claims for protection (Secretary's Decision at pages 10-14).

35. In the Tribunal Submissions (at [10] and [33]) it was expressly recognised that the Further Statement provided additional details in an attempt to clarify the concerns of the Secretary. Further, the Tribunal Submissions contain express references to the Appellant's instructions in seeking to address those concerns.

36. The Further Statement (at [6]) and under the heading, "*Secretary's Determination*" the Appellant expressly stated what he understood the Secretary did not accept and he stated that he wished to address those specific concerns. This must be read together in the context of the Further Statement as a whole, including the paragraphs (set out above) that the Appellant stated that this Further Statement was not a complete account and further information would be provided at the hearing.

37. The Tribunal Decision made the specific observations regarding the Appellant's non-attendance, as are set out above.

38. The Tribunal noted that the matter before it was conducted as a *de novo* consideration of the Appellant's claims and that the Tribunal did not agree with all of the findings of the Secretary.

39. Given the ground of appeal, it is sufficient to briefly identify the basis of the Appellant's claims. In the Tribunal Decision, it outlined the "essence of claim", as follows:

> *"[11] The applicant states that he is a Hindu who had a forbidden romance with a Sikh woman named [NAME], who was a member of a politically powerful family led by her father [FATHER NAME], a Sikh. Despite reservations based on religion and cast, her family eventually agreed in January 2013 to sanction the marriage if the applicant's father handed over the family property, but he refused. In April 2013 the couple eloped together to (neighbouring) Punjab but were later discovered when her relatives saw him working as a waiter at a reception centre. On recognising the relatives, the applicant ran away, but they came to his house the following day, beat him badly and took [NAME] with them. The applicant subsequently learned that [NAME] had died in hospital from injuries inflicted by her family. Her father nevertheless blames the applicant for [NAME]'s death and wants to kill him too. His family has now shunned him as well, so he fled abroad."*

40. Ultimately, the Tribunal did not accept the Appellant's claims and was therefore not satisfied that the Appellant had a well-founded fear of persecution for any Convention reason advanced. The Appellant had not advanced a discrete basis for claims of complementary protection, but relied on the same factual matrix claimed to have placed him at risk for a convention reason. As the Tribunal did not accept those claims, the Tribunal also was not satisfied that the Appellant was owed complementary protection.

The Ground of Appeal

41. Only one ground of appeal is now advanced. That ground can be summarised as that the Tribunal's discretion under section 41 of the Act to decide the review, in the absence of the Appellant and without taking further action, was legally unreasonable.

The Appellant's Submissions

42. The Appellant submitted that it is a condition of the exercise of power under section 41 of the Act that it be exercised reasonably.[4] Therefore, when a decision is to be made pursuant to section 41, the exercise of that discretion is to be done within the limits set by the subject matter, scope and purpose of the statute according to the rules of reason and justice, such that the decision is to be according to law.[5]

43. The Appellant submitted and accepted that the standard of legal unreasonableness applying to the exercise of the discretion in section 41 of the Act is a demanding standard. This submission was made with reference to *TTY167* noting that that standard is such, "*particularly in light of the concerns of informality and the need for efficiency that underline Tribunal hearings and the wide latitude the Tribunal has in making a decision under section 41(1) to decide the matter in an applicant's absence*".[6] Nevertheless, even applying that standard, the Appellant submitted that (like *TTY167*), there are reasons in the circumstances of this particular case that make it so exceptional that the Tribunal proceeded to decide the matter in the absence of the Appellant, which made it legally unreasonable.

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[4] *TTY167 v Republic of Nauru* [2018] HCA 61; (2018) 362 ALR 246 at [24] (***TTY167***).
[5] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [24]-[29], [63]-[65] and [88]-[92] (***Li***); *Minister for Immigration and Border Control v SZVFW* (2018) 264 CLR 541 at [89] (***SZVFW***).
[6] *TTY167* at [24].

44. The Appellant accepted that the circumstances of this matter are not the same as *TTY167*. However, the Appellant did not advance a position that *TTY167* should be simply applied as a precedent if all the circumstances are the same. The Appellant submitted that the assessment of whether a decision 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 any factual similarities or differences between individual cases.[7]

45. The Appellant did not submit that he was not given an invitation to appear in breach of section 40 of the Act (which had been advanced on an earlier version of the Notice of Appeal). It was also not contended by the Appellant that the invitation to appear was not given without reasonable notice.

46. However, the width of the Appellant's representatives' authority and the Appellant's reliance upon his advisors were relevant to section 40(3) of the Act requiring the invitation to be given with reasonable notice, on the Appellant's submission. This was in the context of the Appellant's submission that it should be found that he was not personally told of the hearing until the day before. To be clear, as outlined above, this was not submitted by the Appellant to support an argument that there was a breach of section 40 of the Act, but as part of the circumstances of this case which supported the submission that exercising the discretion under section 41 of the Act to make the decision on the review as it did, was legally unreasonable. The Appellant submits that an inference can be drawn from the SILC email (as set out above) that the Appellant only received notice that the Tribunal hearing was to take place on 12 August, on 11 August 2016, that is, the day before. This inference was to be drawn from the following matters recorded in the SILC email, being the Appellant's refusal to receive the appointment slip on 11 August 2016 and the Appellant's apparent reaction as recorded in that email. In addition to those matters, the Appellant sought to support this submission and finding by reference to the Appellant's affidavit of 9 May 2018 and the lack of evidence from one of his representatives about when the Appellant had been informed of the hearing.

47. The Appellant submits that the File Note made by the Appellant's representatives on the day of the hearing, indicates that the Tribunal had its own source of information for

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[7] *SZVFW* at [84].

the "*clear impression*" that the Appellant "*would probably not attend*". The Appellant expressly submitted that it could be inferred that the source of that information was the SILC and specifically the officer who sent the SILC email. The Appellant also submitted that the File Note indicated that the Appellant's representatives were expecting the Appellant to appear.

48. The Appellant's submissions went further and submitted that it should be inferred that the Tribunal was aware that the Appellant had only been informed of the hearing the day before. This was in circumstances where the Tribunal's own Fact Sheet stated that the Appellant would have at least seven days' notice of the hearing. In addition to this the Appellant submitted that the Tribunal was also aware that the Appellant had reacted in an emotional and self-defeating way to being told of the hearing the next day. This, it is submitted by the Appellant, supports the submission that the Tribunal could not have reasonably inferred that the Appellant had made an informed decision not to attend the hearing.

49. The Appellant was aware, so he submitted, that his credibility was in issue and the Tribunal proceedings were recognised as the place where this would be addressed.

50. Finally, the Appellant sought to support his submission that the Tribunal's decision was legally unreasonable because the Appellant's failure to appear was at odds with his previously high engagement with his case in the Tribunal. This included providing, less than three weeks before the hearing, the Further Statement which expressly indicated he would be attending. Further, the Tribunal Submissions included references to the Appellant's instructions, again indicating his engagement with his case.

51. Finally, the Appellant did submit that it was unreasonable for the Tribunal to have made a decision "*on the spot*"[8] to decide the matters on the papers. The reference to it being made "*on the spot*" seemed to be drawn from the File Note. This submission was clarified during the hearing of the appeal and it was not put on the basis that the power was 'spent' on 12 August 2016. The Appellant sought to draw the Court's attention, in terms of section 41, that it is a discretionary power that is available to the Tribunal, it does not place an onus on the Appellant to do something. The discretion remains one on the Tribunal that it can make a decision and it is in this context the Appellant

[8] Appellant's submissions at [39].

submits that, taking into account all of the circumstances of this case, that the Tribunal's decision was legally unreasonable.

The Respondent's Submissions

52. The Respondent submitted that the test for unreasonableness is necessarily stringent because the Court will not lightly interfere with the exercise of a discretionary statutory power.[9] The Respondent submitted that the principle has an extremely confined scope and is context specific.[10] Determination of whether the purported exercise of the statutory power is so unreasonable that no reasonable repository of that power could have so exercised it is informed by the terms, scope and policy of the statute, together with the fundamental values anchored in the common law.[11]

53. The Respondent submitted that the usual requirement for legal unreasonableness in the exercise of a decision-maker's power is a high threshold. It is not to be assessed through the lens of procedural fairness but requires a close focus upon the particular circumstances of the exercise of the statutory power: the conclusion is drawn from the facts and from the matters falling for consideration in the exercise of that statutory power.[12]

54. This demanding standard, the Respondent submitted, was emphasised in *TTY167* in relation to a decision under section 41 of the Act. The Respondent observed that the Court in *TTY167* found six independent factors, together which gave rise to circumstances that were so exceptional as to justify a finding of legal unreasonableness. The Respondent did not submit that the proper approach is one which requires a consideration of any factual similarities or differences between this matter and *TTY167*. In any event, it was submitted that the facts of this case do not reflect those exceptional circumstances.

55. The Respondent advanced five bases to support its submission that there should be no finding of legal unreasonableness in relation to the Tribunal's exercise of its discretion pursuant to section 41 of the Act. First, and submitted to be fatal to the ground of appeal, was the File Note that established that the Tribunal did make an enquiry of the

[9] *SZVFW* at [11]; *TTY167* at [24].
[10] *SZVFW* at [52] and [59].
[11] *SZVFW* at [59].
[12] *Minister for Home Affairs v DUA16* (2020) 271 CLR 550 at [26] citing *Li* at [76].

Appellant's representatives. The Respondent observes that the ground of appeal as articulated in the Further Amended Notice of Appeal relies on the Tribunal making its decision "*without making any enquiry about the Appellant's absence on the date of the hearing*". The Respondent also notes the absence of such enquiry in *TTY167*, for which the Tribunal was criticised. The Respondent submits on this basis that the ground of appeal as advanced cannot be made out, as the Tribunal did make such an enquiry.

56. Secondly, the Appellant must be taken to have had reasonable notice of the Tribunal hearing given that the Appellant now accepts that his representatives had the authority to receive documents on his behalf and the invitation to appear was dated 29 July 2016. The Respondent submitted that the inference that the Appellant seeks draw that he was only informed of the hearing the day before is not supported by the evidence and that he at least knew that the hearing was coming up. The timeline providing the draft schedule on 22 July 2016, the Further Statement of 24 July, the invitation to appear on 29 July and the Tribunal Submissions of 3 August all support, at least, a finding that the Appellant knew his hearing was coming up.

57. Thirdly, on 3 August 2016 the Appellant's representatives provided the Tribunal Submissions on the review application together with the Further Statement which expressly recognised that the Appellant was taking that opportunity ahead of his hearing before the Tribunal, to provide additional information. The Respondent noted that both of those documents were provided to the Tribunal after it had invited the Appellant to attend the hearing. Such that, on receipt of those documents the Tribunal could reasonably assume, at least nine days prior to the scheduled hearing, that the Appellant was aware of the hearing.

58. Fourthly, the Respondent submits that it is relevant that the Tribunal did not make its decision until 29 September 2016. In this context, the Respondent also points to the August letter and the 15 September 2016 letter from the Appellant's representatives to the Appellant. The Respondent submits in this context the Appellant had approximately seven weeks from the day before or the date of the hearing to provide an explanation for his failure to appear or to ask the Tribunal to reschedule the hearing.

59. Fifthly, in relation to the SILC email, the Respondent observes that such evidence was not before the Tribunal at the time it made its decision. This, it is submitted, prevents

any conclusion that the decision was unreasonable on the "*outcome focused*" basis described in *SZVFW*.

60. The Respondent also submits, contrary to the Appellant's position, that the File Note did not establish that the Appellant's representatives expected him to appear.

61. Further, the Respondent submits that the Tribunal did not make a decision "*on the spot*". The Tribunal exercised its power under section 41 of the Act on 29 September 2016, when it proceeded to make the decision.

62. Finally, the Respondent takes issue with the reference in the Further Amended Notice of Appeal and the Appellant's submissions to the reference to "*closed detention*". This was not pressed by the Appellant at the oral hearing.

63. In all of the circumstances, the Respondent submits that the Tribunal's exercise of its discretion was not legally unreasonable, it did not lack an evident or intelligible justification, it was an orthodox exercise of discretion and within the zone of decisional freedom available to the Tribunal, when exercising its discretion pursuant to section 41 of the Act.

Consideration - Relevant Legal Principles

64. Legal unreasonableness does not depend on a "*definitional formulae or one verbal description rather than another*".[13] There are two different contexts in which the concept of unreasonableness can be employed: firstly, a conclusion after the identification of jurisdictional error for a recognised species of error and secondly, an "*outcome-focused*" conclusion.[14] There is only one correct answer to the question of legal unreasonableness.[15] Findings of legal unreasonableness are rare.[16] That is, in part, because it is a demanding standard which is required to establish legal unreasonableness,[17] when considering section 41 of the Act.

65. The question of whether a decision is legally unreasonable is directed to whether or not the decision or action is within the scope of the statutory authority conferred on the

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[13] *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 (***Stretton***) at [2].
[14] *Stretton* at [6]-[9] and [12]-[13], [61(c)] and [91]-[92]; *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 (***Singh 2014***) at [44]; *Li* at [27]-[28] and [72].
[15] *SZVFW* at [18], [20], [60], [76] and [117].
[16] *Li* at [113]; *Stretton* at [4]-[5] and [61(d)] and [58]-[65].
[17] *TTY167* at [24].

decision-maker. It involves an assessment of whether the decision was lawful having regard to the scope, purpose and subject matter of the statutory source of power. This can be satisfied when the decision lacks an "*evident and intelligible justification*".[18]

66. There is an area of "*decisional freedom*"[19] or "*genuinely free discretion*"[20] within which reasonable minds might differ. That is not sufficient to establish error on the basis of legal unreasonableness. That reasonable minds may differ as to the exercise of that discretion, is not legal unreasonableness.[21]

67. Consideration of legal unreasonableness is context specific and must be considered in the particular circumstances of a specific case; it is not the correct approach to engage in a comparison of any factual similarities or differences between earlier authorities and the particular circumstances of this specific case, with a view to establishing error.[22] It is the application of principle which is the task which must be undertaken. It is an invariably fact-dependent exercise which requires a careful evaluation of the evidence.

68. Finally, in terms of outlining the relevant principles, a conclusion of legal unreasonableness might be drawn if the decision is plainly unjust, arbitrary, capricious or lacking in common sense,[23] however an inference of unreasonableness will not be supported merely because a decision appears to be irrational.[24]

Consideration – Ground of Appeal

69. The Tribunal Decision is dated 29 September 2016. The Appellant first filed his appeal in this Court on 26 January 2018. However, the Appellant did not acknowledge notification of the Tribunal Decision until 26 January 2018. Section 43(3) of the Act requires a notice of appeal to be filed within 42 days after the person receives the written statement, and hence the Appellant's appeal is within time.

70. The ground of appeal from the Further Amended Notice of Appeal seeks to establish legal unreasonableness in relation to the Tribunal's exercise of its discretion pursuant to

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[18] *Li* at [76]; *SZVFW* at [10] and [82]; *Singh v Minister for Home Affairs* (2019) 267 FCR 200 (***Singh 2019***) at [61].
[19] *Stretton* at [7] and [92].
[20] *Stretton* at [56]; *SZVFW* [51] and [97].
[21] *Stretton* at [7], [22], [92] and [101]-[102]; *Li* at [28]; *SZVFW* at [155].
[22] *Singh 2014* at [41]-[42]; *SZVFW* at [59], [84] and [133]-[135].
[23] *Stretton* at [11], [87] and [90]; *Li* at [28] and [110]; *Singh 2014* at [44]; *Singh 2019* at [61].
[24] *SZVFW* at [10], [82]; *Li* at [68].

section 41 of the Act in context. As such, it is worth setting out that provision, in full, which states:

> *"41 **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 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."*

71. The exercise of the discretion afforded to the Tribunal pursuant to section 41 of the Act, must not be exercised in a way which would be regarded as being legally unreasonable.

72. As such, it is necessary to consider the particular circumstances of this case. Relevantly, the Tribunal provided a draft schedule of the Tribunal's sittings with an invitation to the Appellant's representatives that should any changes to that schedule be required, the Tribunal should be informed. The Appellant's representatives responded advising that they could not see any changes which were required but if something occurred to them, they would let the Tribunal know.

73. After the Appellant's representatives had received the draft schedule, on 24 July 2016 the Appellant and his representatives had the Further Statement prepared and executed. The Court has not been provided with evidence of the time of the transmission of the invitation to appear and when the Appellant attended with his representatives and actually executed his Further Statement. The Appellant's 9 May 2018 affidavit describes a process of appointment slips being provided to him. The Appellant states that when he had received such slips previously, the slip was not given to him directly but put on his bed or a friend in his tent gave it to him. That is, it appears that such appointment slips are not given on the same day as the appointment, to allow sufficient time for the Appellant to receive the slips and attend the appointment. On the basis of such a process, an appointment slip may have been provided to the Appellant for the

taking and signing of his Further Statement prior to the invitation to appear at the hearing dated 24 July 2016 being received. If the Further Statement was prepared and executed prior to the invitation to appear, the execution of this Further Statement could not support a finding that the Appellant knew of the actual hearing date.

74. Further, in this regard even though the Appellant's representatives were provided with the draft schedule and the Further Statement was prepared after that draft schedule was received, that does not establish that the Appellant personally knew of the 'draft' hearing date of 12 August 2016.

75. In the absence of specific times of the receipt of the invitation to appear by the Appellant's representatives from the Tribunal and the preparation and execution of the Further Statement, it is not possible to draw an inference that the Appellant personally knew on 24 July 2016 that the Tribunal had invited him to a hearing on 12 August 2016. I am not prepared to draw such an inference on the basis of the Appellant's representatives having received the draft schedule.

76. However, the terms of the Further Statement itself and in the context of the relevant timeline, it does support a finding that the Appellant did know that a Tribunal hearing was approaching. The Further Statement expressly states that the Appellant would be able to provide further information during the hearing before the Tribunal. This does support a finding that as at 24 July 2016, the Appellant was aware that a hearing before the Tribunal was approaching.

77. Further, the preparation and execution of the Further Statement also establishes that the Appellant was engaged with pursuing his application for review of his RSD application. Further, that at time, he indicated that he intended to attend the approaching Tribunal hearing and provide further evidence.

78. The Appellant's representatives then prepared and provided the Tribunal Submissions dated 3 August 2016, together with the Further Statement, to the Tribunal. The Tribunal Submissions expressly refer to instructions of the Appellant and indicate some involvement in the preparation of those submissions by the Appellant. The Tribunal Submissions are dated and provided to the Tribunal after the invitation to appear at a hearing was received on 29 July 2016, by the Appellant's representatives. However, there is no direct evidence, even on the preparation of the Tribunal Submissions, of the Appellant having personal knowledge of the Tribunal hearing on 12 August 2016.

79. The terms of the Tribunal Submissions, in the context of the relevant timeline, do support a finding that the Appellant did know that a Tribunal hearing was approaching. In addition, the Tribunal Submissions also support the engagement of the Appellant in his review application to the Tribunal.

80. Therefore, from the Tribunal's point of view, it had received the Further Statement (dated prior to the date of the invitation to appear at a hearing), the Tribunal Submissions (dated after the date of the invitation to appear at a hearing) and it was aware that the hearing invitation contained a warning regarding what the Tribunal may do if the Appellant did not appear on the date and time specified.

81. In this context, it should be observed that the Appellant seeks to draw a distinction between an argument based upon a breach of section 40 of the Act, and the facts, as contended for by the Appellant. The distinction is thus; the Appellant does not contend that:

    (a) there has been a breach of section 40 of the Act;

    (b) the Appellant was not given an invitation to the hearing in breach of section 40 of the Act; and

    (c) the invitation to appear was not given without reasonable notice.

82. However, (and despite these submissions), the Appellant does submit and seeks to draw a distinction between a breach of section 40 and when, in fact, the Appellant was personally told of the hearing on 12 August 2016. The Appellant's submissions contend that he was only personally told of the hearing on the day before, being on 11 August 2016. The obvious submission to follow from seeking such a finding is that the invitation to appear was not given with reasonable notice. However, as already observed, that is not how the Appellant advances his case. The Appellant seeks to advance this as part of his case, to seek this factual finding as part of the particular factual circumstances, for the proper consideration of whether the Tribunal's decision was unreasonable. These submissions seek to advance a potentially irreconcilable position. In that, even if the Appellant does establish he was only given notice of the hearing the day before, that must be taken together with his submission and acceptance that the invitation to appear was not given without reasonable notice.

83. However, having made that observation, I will consider the evidence that the Appellant relies upon to support his contended position, regarding personal knowledge of the

hearing. Further, consideration of whether or not the Tribunal's decision was legally unreasonable depends upon not only the particular factual circumstances of the case from the position of the Tribunal, but also on the statutory context. That statutory context includes sections 40 and 41 of the Act. Section 41 is set out above. Section 40 provides as follows:

> ***"40 Tribunal shall invite applicant to appear***
>
> *(1) The Tribunal shall invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the determination or decision under review.*
>
> *(2) Subsection (1) does not apply if:*
>
> *(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or*
>
> *(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it.*
>
> *(3) An invitation to appear before the Tribunal shall be given to the applicant with reasonable notice and shall:*
>
> *(a) specify the time, date and place at which the applicant is scheduled to appear; and*
>
> *(b) invite the applicant to specify, by written notice to the Tribunal given within 7 days, persons from whom the applicant would like the Tribunal to obtain oral evidence.*
>
> *(4) Where the Tribunal is notified by an applicant under subsection (3)(b), the Tribunal shall have regard to the applicant's wishes but is not required to obtain evidence, orally or otherwise, from a person named in the applicant's notice."*

84. Section 40(3) requires that the invitation to appear shall be given with reasonable notice and shall provide for those matters specified in subsections (a) and (b). By the Appellant's submission, it is not contended that the invitation to appear was in breach of section 40. The Appellant accepts that his representatives had authority to receive the invitation. This position is consistent with *TTY167* and service of a document

pursuant to sections 100 and 101 of the *Interpretation Act 2011* (Nauru). The effect of those provisions (as explained in *TTY167*) is that a document that is '*given*' may be done by giving it to a person authorised by the individual to receive the document, which in the circumstances of this case, was effected on 29 July 2016.[25]

85. The Appellant seeks to draw the inference that he was not personally told of the hearing by reference to the SILC email. This is because of his recorded reaction in refusing to be provided with the appointment slip on 11 August 2016. The Appellant's submission is that the reaction supports an inference being drawn that this was the first time that the Appellant had been told of the hearing date of 12 August 2016 (the next day). The SILC email does not, in my view, give rise to the reasonable and definite inference that the Appellant seeks to draw. At best, it may give rise to conflicting inferences of equal degrees of probability. That is insufficient to draw the inference.

86. The Appellant does not provide direct evidence that he was not told about the hearing on 12 August 2016. The Appellant's evidence[26] is that he does not remember anything or that he does not remember anything properly and he doesn't remember seeing documents now shown to him.[27]

87. The Appellant also relied upon an affidavit of one of his solicitors and team leader (**Honnery Affidavit**). The Honnery Affidavit states that he has reviewed the file for any letters addressed to the Appellant referring to a hearing being scheduled for 12 August 2016 and that no such letters, apart the August letter and letter dated 15 September 2016 were found. Further, the Honnery Affidavit states that no file notes were located that indicated the Appellant was informed he had a hearing scheduled for Friday, 12 August 2016. The Honnery Affidavit however, does not record whether the general practice of the solicitors was to make such file notes, nor what was the general practice of the solicitors to inform applicants whom they represented of their forthcoming tribunal hearings.

88. The Honnery Affidavit does not swear to there being no communication to the Appellant of the scheduled hearing on 12 August 2016, just an absence of a document (being either a letter or a file note) recording such communication. This is particularly

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[25] *TTY167* [21].
[26] Affidavits of the Appellant dated 8 May 2018 and 9 May 2018.
[27] Those documents being, the invitation to appear dated 29 July 2016, the SILC email, the August letter and the 15 September 2016 letter.

so in circumstances where the Further Statement of the Appellant and dated 24 July 2016 expressly refers to the upcoming hearing.

89. A further solicitor's affidavit dated 21 May 2019 was also sought to be relied upon (**Gleeson Affidavit**). However, the Gleeson Affidavit appears to relate to the Appellant's attendance before this Court in relation to an earlier scheduling of the hearing of his appeal. It is not of assistance on this issue.

90. The Appellant submitted that the File Note supported the following findings: first that the Appellant's representatives expected the Appellant to attend the hearing, given the language recording that he was not here "*as yet*". Secondly, that the Tribunal had additional information available to it, given the language recording that they were under "*the clear impression*" that he would probably not attend.

91. The Appellant's submission went further and submitted that the Tribunal's "*clear impression*" was derived from information provided to it by the SILC. It is unclear to the Court how that particular inference is able to be drawn. The Appellant was represented and consistent with evidence which is before the Court, the Tribunal communicated with the Appellant's representatives (by way of the draft schedule, the invitation to appear, and the telephone enquiry on the non-attendance).

92. The author of the File Note is one of the Appellant's representatives. The File Note does not record the actual words of the conversation and seek to attribute particular words to the Tribunal or to the Appellant's representatives. It is a summary of the author's understanding or impressions. The author did not provide an affidavit to this Court on the hearing of the appeal. I do not draw any inference, however, from that.

93. The following can also be observed from the File Note (which is consistent with the terms of the Notice of Motion, pursuant to which the File Note was produced):

    (a) It records the attendance as "*By Whom: BA*" and "*On Whom: Client*". If this was an attendance by Blaise Alexander, "BA" on the Tribunal, it would have been expected that the "On Whom" would have recorded the Tribunal and potentially the particular officer from the Tribunal. On this basis it appears that this is a written record of an attendance on the Appellant by his representatives reporting the earlier telephone enquiry by the Tribunal.

(b) The language is in the past tense, which is consistent with a telephone enquiry being made by the Tribunal and then this File Note recording the subsequent attendance of the representatives with the Appellant and informing the Appellant of that earlier telephone enquiry.

(c) The attendance is recorded at 2.00pm. It is not recorded, on the face of the File Note, where the attendance took place. That is either at the representatives' office or the 'Recreation building, RPC 1' where the hearing was to take place or elsewhere.

(d) It records that at that stage, no follow-up was required. Whether a follow-up is required is consistent with this attendance being one between the Appellant's representatives and the Appellant.

94. Balancing all of these matters, the File Note does provide some support that the Appellant's representatives had an expectation that the Appellant would attend the hearing. If this File Note is a written record of a telephone attendance with the Appellant rather than with the Tribunal, it seems likely that similar language would have been used with the Tribunal, in terms of saying that the Appellant was not here "*as yet*". However, countervailing that is that if this is a telephone attendance by the Appellant's representatives and the Appellant at 2.00pm on the day of the hearing, with no further follow-up being required, at least by that time (the time of the hearing) the representatives no longer would have held that expectation. In terms of the "*clear impression*" recorded, that could be the representative's interpretation of the Tribunal's position or it could be the language used by the Tribunal. Either way, it does provide some support that the Tribunal was not expecting the Appellant to attend.

95. Having made those additional observations in relation to the File Note, however, what is evident is that the Tribunal did make a telephone enquiry as to the Appellant's whereabouts on the day of the hearing, either at the time of the hearing or shortly beforehand. This is important given that the Appellant's ground of appeal is that "... *the Tribunal's exercise of its discretion under section 41 of the Act to decide, in the absence of the Appellant, to make a decision on the review without taking further action, including to adjourn the hearing, was legally unreasonable in the circumstances*" (emphasis added). That limb of the ground "*without taking further action*" cannot be sustained on the particular factual circumstances of this case. The

Tribunal did take further action, it made enquiries of the Appellant's representatives as to his whereabouts.

96. The Appellant placed much reliance and emphasis on the Appellant's lack of knowledge as to the actual hearing date until the day before. However, the evidence does not support drawing an inference or making a finding that the Appellant was only told of the scheduled hearing on 11 August 2016. The SILC email is equivocal. The absence of letters or file notes in the representatives' file, is also not determinative, without knowing the usual practice of those representatives. The Further Statement and the Further Submissions contain express references to an approaching Tribunal hearing. Although dated after the hearing, the August letter and the 15 September 2016 letter, both refer to the Appellant being previously advised of the scheduled hearing, however, these are not determinative either. In this context, it should also be noted that the Appellant does not give evidence that he was not told of the hearing date, but that he can't remember.

97. The Appellant did give evidence in his Further Statement that his memory had deteriorated while he was living in Nauru, hence, he could not remember all of the matters relevant for his claims. The Appellant had not contended that he was suffering from mental health issues or that such issues could have been reasonably expected to affect the Appellant in making a decision to attend the hearing or to have affected his ability to be able to attend the hearing.

98. The Appellant also submitted that the Tribunal was aware that the Appellant was only personally informed of the hearing date of 12 August 2016 the day before the hearing was scheduled. This submission is based on drawing the inference sought by the Appellant about the SILC email, together with the submitted information which the Appellant contends appeared to be available to the Tribunal, from SILC, given its "*clear impression*". I do not accept this submission.

99. Therefore, as at the time of the hearing on 12 August 2016 and then by the time of the Tribunal Decision on 29 September 2016, the Tribunal was aware that:

    (a) prior to sending the invitation to attend the hearing, the Tribunal had expressly given advanced notice of the proposed schedule of the hearing to the Appellant's representatives and invited comment as to

the suitability of the proposed schedule. No change was requested at that time or any time subsequently;

(b) the invitation to attend the hearing had been provided to the Appellant's representatives in reasonable time and those representatives were authorised by the Appellant to receive such a document;

(c) the Appellant had been actively engaged with his Further Statement and the Tribunal Submissions both of which acknowledged the upcoming hearing before the Tribunal and showed engagement with this process by the Appellant in the period leading up to the hearing;

(d) on the day of the hearing, 12 August 2016, the Tribunal undertook the relatively simple matter of contacting the Appellant's representatives to enquire whether the Appellant had arrived for his scheduled hearing. No reason or explanation was offered for the Appellant not attending. No request for a postponement or adjournment was requested and no reason was apparent as to why an adjournment might be appropriate. The Tribunal also advised that they would be (future tense) making a decision on the papers due to the Appellant's failure to attend;

(e) the Tribunal did not proceed immediately to make a decision, but made a decision on 29 September 2016 approximately seven weeks after that communication. The Tribunal Decision manifests a consideration by the Tribunal of an absence of any further contact from the Appellant or the Appellant's representatives regarding an explanation of his failure to attend, or seeking a further hearing or for that matter, any communication in relation to the Appellant's matter at all.

100. Section 41(2) expressly recognises that section 41 does not prevent the Tribunal from rescheduling the appearance before it or from delaying its decision on the review in order to enable an applicant's appearance. Construing section 41 as a whole, noting that section 41(1) provides the Tribunal with the discretion to make a decision without taking further action to allow or enable an applicant to appear before it, together with

section 41(2), section 41 does not place an obligation or duty on the Tribunal. Further, it does not place an onus or obligation on an applicant either. However, it does provide an applicant (including the Appellant) with an opportunity to seek that the Tribunal reschedule the hearing.

101. In all of the particular circumstances of this case, the decision of the Tribunal pursuant to section 41 of the Act to make its decision on review was one within the area of "*decisional freedom*" available to the Tribunal. It had material before it which would have supported its reasoning that the Appellant was aware of the scheduled hearing and hence his non-attendance was, in the circumstances where an upcoming hearing was known, even if the precise date was not known until later. It also had material before it which supported reasoning that the Appellant was highly engaged with the process and hence it should not proceed to make a decision without making any enquiry about the Appellant's absence. The Tribunal, did make that enquiry. As such, it was open in all of the circumstances for the Tribunal to exercise its discretion pursuant to section 41 of the Act and make a decision on the review, which it did.

102. As such, the decision of the Tribunal was not legally unreasonable in the particular circumstances of this case and hence this ground of appeal is dismissed.

Conclusion

103. Under section 44(1) of the Act, I make an order affirming the decision of the Tribunal and make no order as to costs.

JUSTICE AMELIA WHEATLEY

Dated: 6 December 2022