



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

Civil Appeal Number 21 of 2025
Supreme Court Civil Case Number
22 of 2025

BETWEEN: AV25 Appellant

AND: Republic of Nauru Respondent

BEFORE: Khan P
Palmer JA
Coates JA

Date of Hearing: 7 May 2026
Date of Judgment: 10 June 2026

Case may be cited as : AV25 v The Republic

CATCHWORDS: APPEAL – Asylum seeker - Legal unreasonableness - Claim that appellant may be suffering mental health issue - Such issue may hinder presentation of case - Such issue may explain his observed demeanour during the hearing - Refugee Convention Act 2012 gives discretion to seek medical opinion - Capacity.

APPEARANCES:

Counsel for the appellant: Mr. A Aleksov (instructed by International Crossover Pty Ltd)
Counsel for the respondent: Ms. J Lucas (instructed by the Republic of Nauru)

JUDGMENT

1. In this appeal an asylum seeker claims that the decision against him by the Refugee Status Review Tribunal (the Tribunal) was shaped by legal unreasonableness because the Tribunal never called for a medical report, in circumstances which suggested such may be of assistance to his case.
2. The appellant seeks that the Supreme Court appeal judgment, delivered 19 November 2025, which upheld the Tribunal decision, delivered 10 April 2025, which upheld an administrative decision that the appellant was not a refugee, should be overturned and a new hearing occur.
3. The respondent Republic opposes the appeal.

RELEVANT BACKGROUND

4. The appellant arrived illegally in Australia in February 2024 and pursuant to an agreement between Australia and Nauru, was transferred to Nauru on 18 February 2024, where he could make an application for Refugee Status Determination (RSD) if he so chose.
5. He exercised that right pursuant to the Refugee Convention Act 2012 (the Act) on 9 March 2024 and filed his application.
6. His personal background is that he is a national of the country of Bangladesh, and his claims that he feared persecution in Bangladesh are because of his political opinions, and being a supporter of the Bangladesh Nationalist Party (the BNP), he was at risk of persecution by members of an opposing party, the Awami League (AL).
7. In giving context to his claims, the applicant said family conflict existed as well and his father's stepbrother, whom he called uncle, was a supporter of AL. He said the uncle had beaten his elder brother in company with others, causing him severe injury. He said his uncle held the belief that because the appellant's family supported the BNP the family had no power to ask him to intervene in a land dispute, the particulars of which are not relevant here.
8. What appears to be relevant is his claim that his brother had some mental health issues due to physical disputes with his uncle, and after his brother married, his wife left him because of mental health issues. No particulars or identification of the alleged mental health issues were put, nor any evidence of any diagnosis.
9. The appellant's claim at appeal is that he may be suffering undiagnosed mental health issues, manifesting themselves in not being able to present his case for refugee status properly.
10. The appellant relied on the fact that the International Health and Medical Service (the IHMS), which provides medical support to asylum seekers on Nauru, had obtained assessments of the appellant under the Kessler Psychological Distress Scale.

11. Despite counsel for the appellant stating that he did not know what that test was, we can say that it is a psychological test often used for preliminary mental or psychological health assessments and it is used in Australia. It is now obviously used in Nauru, the evidence being that the appellant had given at least two readings under the Kessler Distress Scale.
12. In the Supreme Court appeal, his Honour, at paragraph 32 of the judgment, indicated that the Tribunal was aware of the IHMS records which contained the Kessler results and that the records indicated that on 12 March 2024 the appellant was given a score of 28 and on 4 September 2024 he was given a score of 12.
13. There is no need for further understanding of the method of assessment for this appeal, other than, as it was put, that a score of 28 means the appellant may be suffering a mental health issue, while a score of 12 does not indicate that.
14. Time is crucial in this case in the assessment and weighing of evidence allegedly going to the appellant's mental health. The appellant arrived on Nauru on 18 February 2024. He underwent the first Kessler stress test on 12 March 2024 and received the score of 28 and by on his second test on 4 September 2024, he received a score was 12.
15. The Tribunal had the reports and the medical records of the IHMS, and was also aware of relevant information - evidence - that the Royal Australian College of General Practitioners considers that a score of 28 may mean a high to moderate mental health disorder range, and that a score around 12 indicates no issues being apparent. We should state that there was no evidence that the Kessler test is so reliable that it is evidence which must be acted upon.
16. The Supreme Court held that it was apparent that the Tribunal gave detailed consideration to the IHMS medical records and analyzed and considered the Kessler distress reports.
17. In considering the medical information the Tribunal also considered the relevant and persuasive evidence that the score of 12 meant that the appellant was likely to be well and the conclusion was that there was "limited information available in the medical records to form a view as to the applicant's mental state and any impact it has on his capacity. No other medical evidence has been provided".
18. During the Tribunal hearing it was observed that the appellant was tired and withdrawn and there was other evidence that he would not engage fully with medical authorities.
19. It was these factors which his counsel used to build a case that the Tribunal should have exercised a discretionary power under s24 of the Act to call for a medical examination.
20. Section 24(1)(d) is in the following terms:

"For the purposes of a review the Tribunal may...require the Secretary to arrange for the making of an investigation, or a medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination".

21. Counsel put that the discretion so stated indicated that the Parliament, in enacting this provision, knew that the Tribunal members were unlikely to have medical qualifications and so it could call for such expert evidence when appropriate.
22. He said there was enough evidence to put the Tribunal on notice that they could not know the appellant's state of mind, and a disorder may indicate why he was found to be struggling during the hearing, why he was unable to articulate his claims, why he had an inability to discuss where his brother lives and why he gave inconsistent evidence. We should state that the Tribunal indicated that some of his evidence was consistent.
23. Counsel stated that the appellant should be given proper consideration in relation to this evidence, and the matter returned to the Tribunal for rehearing.
24. He said the circumstances indicated a real and substantial issue about his mental health which had an impact on the quality of his evidence.
25. He said there was no intelligible reason why the Tribunal did not order a medical report and the exercise of such a power was expressly considered by the Parliament to be of such importance that it inserted the power into the Act.
26. Counsel for the appellant referred to DWN080 v Republic of Nauru¹ in that failure to exercise the power to request a medical report could be unreasonable.
27. Given that, a return to earlier consideration of this area of law is instructive. When consulting what could be said to be the foundation case of unreasonableness, or at least that case which began sharp focus on the concept, Associated Provincial Picture Houses Ltd v Wednesbury Corp², we see two types of unreasonableness are apparent in Lord Greene MR's judgment, when he stated:

"It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word unreasonable in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v Pool Corporation*³ Gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that all these things run into one another... It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and in this case, the facts do not come anywhere near anything of that kind".

¹ [2023] NRCA 4

² [1948] 1KB 223 at 229-230

³ [1926] Ch 66 at 90-91

28. It is clear then that unreasonableness may be based on not following the law, refusing or failing to act, performing an unauthorised action or just making an improbable decision. It is also apparent, from the last sentence of the judgment, that the court weighed the evidential facts before it, to determine whether they were reasonable in themselves, or unreasonable when taking into account all circumstances.
29. That seems to be how this particular factual issue has been treated in Nauru. Counsel for the respondent Republic referred to a matter in which a mental health question arose, *DWN034 v Republic of Nauru*.⁴
30. In that matter no legal unreasonableness finding was reached after a consideration of the facts. The Tribunal there was not asked to obtain a medical report, it had limited information to form an accurate assessment of the appellant's state of mental health, it considered in detail the appellant's capacity when given adequate opportunity to present his claims, it considered whether his mental health could explain omissions and inconsistencies, it considered his presentation at the hearing, it considered that he gave consistent evidence on some issues and, that the power under s24(1)(d) was discretionary.
31. Counsel for the Republic asks this Court to apply the reasoning of *DWN034* to conclude that there is no legal unreasonableness apparent, as this Tribunal considered the case in line with the consideration given in *DWN034*.
32. We note that the word capacity has been referred to in the decisions, but no explanation given, in circumstances where the legal meaning of capacity is relevant.
33. Adults are assumed to have capacity, usually in their ability to exercise a legal right or follow an obligation, that is they may enter contracts, manage finances, sue or be sued, take up in a relationship and vote and do any of those acts which adults can do. Children of course are age limited in what they can do and have a legal consequence, because they are considered not to possess such capacity.
34. Capacity is a legal, as well as a medical concept, and the two are not necessarily the same.
35. But legal capacity in this matter has been referred to in passing – that the appellant had capacity.
36. The concept of how capacity is to be determined or judged was not put to the Tribunal or the Supreme Court, however, it is apparent that this is a basic question being put on appeal.
37. In an older Australian case, *Gibbons and Wright*⁵, the High Court of Australia, in dealing with a contract, examined a long list of authorities in which capacity to understand was in issue. Putting aside the separate issue of contract law, the judge there in the court below addressed principles which have general application. The High Court, consisting of Dixon CJ, Kitto and Taylor JJ, stated (we have left the footnotes as recorded in the law report):

⁴ [2025] NRCA 4

⁵ [1954] 91 CLR 423 at 437 and 438

"The learned Chief Justice was clearly right in treating the validity of the instruments in suit as depending upon the possession by Ethel Rose Gibbons and Olinda Gibbons of a degree of understanding relative to the nature of that which they were doing. The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation. The case of *Ball V. Manmn* though somewhat confusedly reported, is an authority in point. The House of Lords had before it certain exceptions to a charge delivered to a jury. The trial judge, after saying that the question to be tried was whether the person whose deed was in question was a person of unsound mind, added that to constitute such unsoundness of mind as should avoid a deed at law, the person executing the deed must be incapable of understanding and acting in the ordinary affairs of life [(I) (1829) 1 Dow. & Cl. 380 [6 E.R. 568]; SBlIN.S. 1 [4E.R. 1241]. As to this, Lord *Tenterden*, who delivered the leading judgment, said; "...perhaps in that he went too far, but that was a matter of which the plaintiff in error was not, under this bill of exceptions, entitled to complain " (1). Then he turned to the appellant's main contention, that in order to avoid a deed the unsoundness of mind of the party executing it must amount to that degree of unsoundness which constitutes idiocy, a test which, it was said " implies a total absence and deprivation of the faculty of reason in the party, and is not a question of degrees, but of the nature and quality of the mind and faculty, directly at variance with the language and direction of the learned judge " (2). To this contention their Lordships gave no countenance. They approved a statement in the charge that as one test of the requisite capacity the jury was at liberty to consider whether the person concerned was capable of understanding what he did by executing the deed, when its general purport was explained to him. The principle which the case supports, and for which *Boughton v. Knight* (3) ; *Jenkins v. Morris* (4); *Birkin v. Wing* (5) and *Estate of Park* (6) may also be cited, appears to us to be that the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained. As *Hodson* L.J. remarked in the last-mentioned case, " one cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject-matter of the particular case " (7).

Ordinarily the nature of the transaction means in this connection the broad operation, the " general purport " of the instrument; but in some cases it may mean the effect of a wider transaction which the instrument is a means of carrying out: *Manches V. Trimhorn* (8). In the present case, it was necessary, we think, that the two sisters should have been capable of understanding, if the matter had been explained to them, that by executing the mortgages and the memorandum of transfer they would be altering the character of their interests in the properties concerned, so that instead of the last survivor of the three joint tenants becoming entitled to the whole,

each of them would be entitled to a one-third share which would pass to her estate if she still owned it at her death”.

(1) (1829) 1 Dow. & Cl., at p. 391 [6E.R., at p. 572].

(2) (1829) 1 Dow. & Cl., at pp. 386-387 [6 E.R., at p. 5701.

(3) (1873) L.R. 3 P. & D. 64, at j). 72.

(4) (1880) 14 Ch. D. 674.

(5) (1890) 63 L.T. 80.

(6) (1954) P. 112.

(7) (1954) P. 112, at j). 136.

(S) (1946) 174 L.T. 344, at ji. 345.91 C.L.R.] OF AUSTRALIA. 439

38. From the judgment, approved in other cases, we can glean that there is no prescribed or fixed standard for the existence of capacity, but that, if the transaction was explained, the person will have the capability of understanding it and further, will understand the outcome of the transaction.
39. Determining whether someone has this attribute of capacity occurs in daily life.
40. When dealing with legal matters, lawyers are under an obligation to seek a litigation guardian or seek court direction or withdraw from a matter if they form the view, however that view is formed, that their client lacks capacity in the sense described in *Gibbons v Wright*.
41. Similarly, a Tribunal which formed the view on the basis of the actions of the person before it, that the person may not have capacity to understand the cause and effect of the proceeding once explained, would properly exercise a discretionary power to seek medical evidence or cause a representative for that person's interest to be appointed.
42. It is that normal observation of human affairs and actions which a Tribunal such as this deals with on a regular basis.
43. That counsel for the appellant states that the Tribunal was unreasonable not to exercise its discretion to seek a medical report, and we say this with the greatest of respect, is to mistake the considerations necessary when based on mere aspects of the appellant's appearance.
44. That he may struggle, and there was no particularisation of what that actually meant in relation to presentation of his case, does not indicate that a mental health or psychological issue affecting his understanding of the case is present.
45. A reading of the transcript does not indicate that the Tribunal ignored the need to consider his presentation, and it did so to determine whether his state of mind was such that on observance it could be said that he lacked capacity. While the decision did not go into such an assessment in detail in terms of the *Gibbons* and *Wright* decision, it is the assessment the Tribunal was making, with the appellant not presenting as a person lacking understanding of the proceeding. Not being able to express oneself clearly, or mixing up facts and claims, is not a capacity issue per se.

46. Discretion is exercised after considering the facts of a case, and which include assessment of the person under examination, as that is a natural consequence of making decisions in the context of the Tribunal.
47. We do not then accept that the Tribunal had evidence or circumstances before so that it could exercise its discretion to seek a medical report, and further, this issue of a medical report is so vague that the highest the submission went was that he may be suffering from a mental health issue. Further, on that vague description, the Tribunal would not be able to stipulate what type of report would be of assistance. We would also state that not all mental health issues prevent a person from understanding events which are occurring, whether in relation to issues such as a contract or merely navigating daily life.
48. On the appellant's part, his representative did not raise the issue of obtaining a medical report in relation to mental health in the Tribunal, so it must be assumed that the appellant was giving instructions of relevance to his application for asylum. If he is giving such instructions he understands the process. While it would appear to be a circular argument that the appellant bears an onus to prepare and present his case, and that such could not occur if he was lacking capacity, his safeguard would lay in his legal representatives being alert to the situation where they considered he did not understand the proceeding or the possible outcomes of the proceeding. If he did not because of a lack of capacity in the Gibbons and Wright sense, such then would have been put to the Tribunal. In pressing ahead with representation, and without something outstanding occurring during the hearing to indicate a lack of capacity, the Tribunal would have no factual basis to exercise its discretion to obtain a medical report addressing psychological or psychiatric issues. It can then be seen that there was no unreasonableness apparent in the Tribunal's determination.
49. On that basis we dismiss the matter.

ORDER

1. The appeal is dismissed.

DATED this 10 day of June 2026



Khan P
President of the Nauru Court of Appeal





Palmer JA
Justice of the Nauru Court of Appeal



Coates JA
Justice of the Nauru Court of Appeal

