



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

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

BETWEEN: AX25 Appellant

AND: Republic of Nauru Respondent

BEFORE: Khan P
 Palmer JA
 Coates JA

Date of Hearing: 05 May 2026
Date of Judgment: 22 May 2026

Case may be cited as: AX25 v The Republic

CATCHWORDS: Asylum sought – Error of law claimed by non-compliance with Act – Tribunal not properly constituted for hearing – New Tribunal constituted – Legislation requires issue of invitation to attend hearing – Applicant may forego attendance – Qualified consent to proceed without further appearance – Whether consent is real – Did Tribunal discharge its duty – No question of law apparent.

APPEARANCES:

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

JUDGMENT

1. **BY THE COURT:** There are four asylum seeker appeals before the court in which the facts are identical. Counsel for each appellant and the respondent (the Republic of Nauru is respondent in each case) submitted that the determination of the facts in the matter heard, *AN 25 and Republic of Nauru*, would determine the outcome for the other matters being *AX 25 and Republic of Nauru*, *AP 25 and Republic of Nauru* and *AQ 25 and Republic of Nauru*.
2. What that means is that all issues have been put before us in this matter with regard to the appellant AX 25.

THE CASE

3. The appellant seeks to overturn the decision of the Supreme Court of 19 November 2025 which would subsequently see a quashing of the decision of the Refugee Status Review Tribunal (the Tribunal) made 17 April 2025, resulting in subsequent orders for a new Tribunal hearing.
4. The hearings began after Nauru's Secretary of Multicultural Affairs determined that the appellant was not owed a duty of protection under the *Refugees Convention Act 2012* (the Act) – the Act reflecting Nauru's acceptance of internationally accepted obligations for the protection of refugees.
5. The appellant arrived illegally in Australia, was taken into custody and then sent to Nauru under agreements between Australia and Nauru for the determination of any claim for refugee status to occur under the law of the Republic of Nauru.
6. Because the question to be decided is narrow in scope, being a question of law, there is no need to refer further to the antecedent background of the appellant, which has been adequately recorded in the decisions of the Tribunal and the Supreme Court.
7. That is not to treat him as a mere anonymised number, but indicates that the antecedents are legally irrelevant to the decision to be made by this court.
8. The appellant's case is that both the Tribunal and the Supreme Court hearings, and thus the decisions, were vitiated by error of law, in that the Tribunal hearing did not comply with the requirements of Section 40 of the Act.
9. Particularising the complaint, the appellant claims that no hearing occurred, despite the events we will outline below.
10. As the case turns on a reading of s40 of the Act, we will reproduce the section here:
 - (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.
11. At this stage for the purposes of comprehension, we will go to relevant facts in case.
 12. The court was taken to the chronology of material events to be viewed through the correspondence, after a purported Tribunal hearing of the case conducted during sittings of the Tribunal between 30 October 2024 and 6 November 2024.
 13. On 4 December 2024 the principal member of the Tribunal, Ms Wendy Boddison, alerted the representatives for the appellant that hearings conducted between 30 October 2024 and 6 November 2024, were not conducted by a Tribunal properly constituted under the Act.
 14. The appellant's case was one of eight heard by the improperly constituted Tribunal.
 15. One of the Tribunal members was not properly sworn in and Mrs Boddison indicated that the two other members who heard the appellant's application, with a newly appointed third member, would have to rehear the matter.
 16. The correspondence asked whether the appellant wished to be invited to a new hearing, or whether he consented to the newly constituted Tribunal relying on the evidence given at the original hearing.
 17. She pointed out in that correspondence of 4 December 2024 that pursuant to s40(2)(b) of the Act, that the appellant could consent to such a procedure.
 18. The representatives for the appellant were informed of the appellant's predicament by email on 5 December 2024.

19. On 27 December 2024, the appellant's representative sent email correspondence to Ms Boddison in the following terms:

... [AX25] would not like to proceed with a new hearing. However, if the reconstituted Tribunal is not satisfied on credibility, or otherwise has any adverse concerns, it should exercise its discretion positively under s7(1)(a)(iii) and (vi) of the Act to request the further information, or have certain information verified by way of statutory declaration (which covers the situation where evidence on a certain matter was not explored orally at hearing). [Applicant] 926-013 consents to the Tribunal deciding the review without the applicant appearing before it pursuant to s40(2)(b) of the Act. Please do let me know if you require any further clarification in relation to the above.

20. Section 7(1)(a)(iii) and (vi) define certain powers which may be exercised.
21. On 3 January 2025, the Tribunal Registrar wrote to the representative for the appellant in answer to the above correspondence of 27 December 2024, seeking case management information:

...could you please confirm that all applicants consent to the reconstituted Tribunal, relying on the evidence they have given at the previous hearing. That correspondence said if the applicants do not consent, they will be invited to a further hearing.

22. That correspondence stated that if the applicant did not consent, he would be invited to a hearing.
23. On 9 January 2025, correspondence to the Tribunal from the lawyers for the appellant indicated that the appellant was generally agreeable to having a hearing without a further appearance, but conditions were stated in the form of these words:

3. Whilst the Applicants do not oppose the Tribunal relying on the evidence already proffered as a matter of *general* principle, they maintain that depending on the circumstances of each case, there may be an obligation on the Tribunal to exercise certain discretionary powers to ensure that the Applicants have been provided a meaningful opportunity to present their case, whether that be in the interests of ensuring procedural fairness, and/or natural justice and/or legal reasonableness.

4. The gravamen of this submission was advanced at paragraph [1] of email correspondence from Ms Neha Prasad of our office to the Tribunal dated 27 December 2024. Specifically, it is the Applicants' position that if the Tribunal is not positively satisfied on credibility or otherwise has any adverse concerns, the discretionary powers conferred under s7 (1)(a)(iii), 7(1)(a)(v) and 7 (1)(a)(vi) and 7(1)(b) of the Act become relevant for the purposes of promulgating a decision. The conferral of these statutory powers allows the Tribunal to request further information, or have certain information verified by way of statutory declaration (which deals with the situation where evidence on a certain matter was not satisfactorily explored orally at hearing).

5. For the avoidance of doubt, where adverse concerns are a reason or part of a reason for promulgating, a decision which affirms the Determinations made by the Secretary, the Applicants request notice of such concerns and an opportunity to

comment and/or file submissions on such concerns in accordance with well-established legal principles about procedural fairness and/or natural justice and/or legal reasonableness.

6. Separately, the applicant bearing NOM ID 926-013 **does not** [emphasis in the correspondence] consent to proceeding in accordance with s40(2)(b) of the Act. 926-013 requests an invitation to re-appear before the tribunal.
24. There were other similar statements made in correspondence between the Tribunal and lawyers for the appellant.
25. Counsel for the appellant submits that this correspondence indicates that there was no agreement that the appellant would absent himself from a hearing under s40(2)(b), pursuant to the request by the Tribunal for a hearing.
26. The Tribunal went ahead with the hearing without inviting the appellant to a further hearing.
27. The proposition by the appellant is that factually there was no consent to proceed without compliance with s40 to issue of an invitation.
28. Counsel conceded that the appellant's lawyers appeared to have been in some manner attempting to bargain or negotiate with the Tribunal, and while that should not have occurred, that issue is separate from whether procedural fairness had been given to him.
29. The case then is that the alleged failure to comply with s40(1) by the Tribunal to issue an invitation to attend a hearing is most certainly a question of law, and an error of law has occurred as the section is fundamental to the rights of an applicant seeking asylum.
30. Counsel for the Republic, conceded that it was a finely balanced question, but that all correspondence from the appellant was in the same terms, and the Republic did not accept that there was non-compliance with the requirements of s40.
31. The Supreme Court decision held that the correspondence amounted to consent.
32. As a matter of statutory interpretation, and without needing to determine any strained meaning of the words, the Tribunal discharges its duty when it invites an applicant to a hearing.
33. It has to discharge that duty, the verb "shall" being directive, the opening words of the section stating "The Tribunal shall invite the applicant to appear". The word "shall" is the qualifier that the invitation has to be issued under s40(1), so that an applicant may present his or her case.
34. In certain terms, the Tribunal invited the Appellant to a properly constituted Tribunal hearing, indicating that he may consent to not attending, with the Tribunal relying on the evidence taken at the first hearing, which is allowed under s40 (2)(b).
35. On a proper application of the section, its function is that the Tribunal notifies the applicant to obtain consent to attend or not to attend and that is a yes or no answer.

36. What the lawyers for the appellant did was to attempt to lead the Tribunal astray by raising qualifications to an attendance by stating that the appellant would not attend other than in circumstances where adverse issues may arise. Talking of the use of the Tribunal's discretionary powers, as reproduced in paragraph 23 above, to ensure the appellant had a meaningful opportunity to present his case was superfluous submission, as the Tribunal is under a statutory duty to afford applicants such. It may have been an attempt to impose by authoritative decision **on** steps to be taken by the Tribunal over and above those stated in the Act and those already imposed by the authorities.
37. The Act does not allow for what appears to be a negotiation for the applicant to attend on his own terms.
38. The status he sought, of being classified a refugee, is one based on evidence, not on some misconceived advantage thought to be obtained by dictating the terms of an appearance before the Tribunal.
39. The Tribunal does not have a discretionary power to act in the manner proposed by the appellant.
40. The Tribunal understood that it had complied with the need to issue an invitation.
41. It went as far as entering into correspondence, not as a form of negotiation to the demands being made of when the appellant would appear, but to ensure the appellant understood that he could appear or choose not to appear.
42. In complying with the statutory duty, the Tribunal had begun the journey of ensuring procedural fairness was being extended to the appellant.
43. The appellant appears not to have understood the Tribunal's position and its statutory duties.
44. We do not know of course the quality of the advice given to the appellant or his appreciation of his case, but the Republic, through the Tribunal could be said to have bent over backwards to give him the opportunity to appear, an offer rejected.
45. We note that the correspondence containing the invitation the Tribunal entered into was in plain language, unlike the rather high-handed letters and demands being sent by the representatives for the appellants.
46. As the court below found, and as we find, there was no lack of fairness, and subsequently no question of law arises on the facts.
47. We dismiss the appeal.

ORDER

1. The appeal is dismissed.

Dated this 22 day of May 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