IN THE NAURU COURT OF APPEAL
CIVIL APPELLATE JURISDICTION
AT YAREN

Civil Appeal Number 3 of 2026
Supreme Court Civil Case Number 44 of 2025

BETWEEN	BP25	Appellant
AND	Republic of Nauru	Respondent

Before: Khan P
Palmer JA
Coates JA

Date of Hearing 12 June 2026
Date of Judgment 25 June 2025

Case may be cited as : *BP25 v The Republic*

CATCHWORDS: APPEAL – Asylum seeker – Error of law alleged - Representation – Guide for unrepresented litigants – Representation – No positive case may be put forward – Court's duties – Authorities – Rules of Appeal - No case

APPEARANCES

Mr Kenneally for the Appellant
Mr O'Shannessy for the Respondent

JUDGMENT

1. Issues of fundamental law and procedure for legal practitioners and the court have been raised in this appeal, relating to cases in which the appellant's lawyers have withdrawn their representation.

2. The appellant seeks asylum on the ground that he has a well-founded fear of persecution in his own country, Bangladesh, because of his political activities.

3. The appellant is aged 28. He arrived illegally in Australia in May 2024.

4. Pursuant to an agreement for the consideration of refugee claims by asylum seekers between Nauru and Australia, he was transferred to Nauru on 1 June 2024. He exercised his right to seek a Refugee Status Determination (RSD) under the *Refugees Convention Act 2012* (the Act) on 24 June 2012.

5. The Secretary for Multicultural Affairs(the Secretary) determined that he was neither a refugee nor was he was owed complimentary protection under the Act.

6. The process then open to him was to go before the Refugee Status Review Tribunal and then, if dissatisfied, to the Supreme Court on appeal, with the last appeal being exercised by this Court.

7. Under the agreement between Australia and Nauru, legal aid is provided to asylum seekers.

8. The majority have their cases prepared and presented by lawyers and as an observation, we will say that the representation is of a high standard.

9. On occasion, lawyers withdraw their representation and this could occur for a number of reasons, which may include a failure by the litigant to follow instructions, a failure by a litigant to give instructions, a failure by a litigant to follow legal advice, some admission by a litigant which causes a conflict of interest between themselves and their lawyer, a vexatious claim, where no case is apparent, or, a psychological or psychiatric impairment.

10. The reasons may vary widely and apart from some impairment, the court does not usually enquire into the reasons why a litigant represents themselves, as such is irrelevant to determination of their cause of action.

11. When faced with an unrepresented litigant, particularly in applications such as this where issues of a very personal nature are apparent, where the litigant is from, a cultural and legal background quite different from that in which the court is constituted and operates within, and when interpreters are required, the difficulty for the court is immense.

12. Most litigants are not lawyers and have no idea of advocating their case against a framework of the law to be applied and the rules to be followed for proper preparation and management of cases.

13. It is fair to say that most litigants, whether in this migration jurisdiction, or any other jurisdiction, often reduce their cases to their personal measure of what is in their best

interest, almost always underlined by their view of what is fair and without legal assistance, and cannot possibly separate personal views from legal issues.

14. On becoming aware that a number of asylum seekers, including the appellant here, had lost their representation, and upon hearing from them, as well as a lawyer acting as friend of the court, and lawyers for the Republic, this Court delivered a ruling on 15 May 2026 as to future conduct of such matters.

15. We ordered litigants who had been represented remain represented if they wanted representation to continue, as under the memorandum of understanding between Australia and Nauru, legal costs are met by Australia.

16. However, we are also aware that it is very possible that lawyers may withdraw from individual cases in the future, and may do so on proper ethical grounds as a matter of professional duty, but where that is contemplated, they must seek leave of the court to do so. Following that ruling, we are grateful that the law firm involved in this particular matter is representing the appellant.

17. We are also aware that courts cannot order a person to accept representation[1], and if that is the choice, then a litigant is entitled to that personal choice.

18. In representing the appellant, counsel informed the Court that he could not advance positive argument that the decision being appealed was affected by legal error. In doing so, he discharged his higher duty to the court. He then proceeded to represent the appellant on the appellant's widely stated appeal – that errors of law had occurred in the decision below.

19. We will come to the substance of the submissions shortly, but during submissions, counsel was asked what the court's duty was when he put that no positive legal error could be identified.

20. His reply was to the effect that the court still had to consider whether there was a case to be determined, a proper response and one supported by counsel for the Republic.

21. While there was representation in this case, that a positive case could not be put as to error in the decision appealed, and much of the submission being based on the appellant's views and beliefs, a situation was created similar to that of the unrepresented litigant.

22. We examine this without any criticism whatsoever of counsel, who represented the appellant in a professional manner, in the best traditions of the Bar.

23. While courts have always faced the prospect of unrepresented litigants, in recent years and for a variety of reasons, more and more people represent themselves, some simply because of costs, and some by choice and some for other reasons.

24. With the growth of unrepresented litigants, focus has moved to the courts and how such litigants are treated, and the principles apply generally to cases such as this where no positive submission could be made.

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1 *Burwood MC v Hervey* (1995) 86 LGERA 389, Kirby P.

25. In Reisner v Bratt & Anor[2], a useful statement was put as to the court's duty.

26. Justice of Appeal Hodgson, with whom Ipp JA agreed (on a two judge bench), stated:

> "[3] The claimant is unrepresented, and was unrepresented before the primary judge. Before considering the grounds on which the claimant seeks to rely, it is necessary to say something about the role of the Court in cases where a party is unrepresented and for that reason a case is not adequately presented to the Court.
>
> [4] Parties are entitled to appear unrepresented in proceedings in the Court, and sometimes, because of lack of funds or other reasons, they have no alternative. The Court has the duty to give such persons a fair hearing, and it may be appropriate for the Court to give some assistance to such persons in order to fulfil that duty. However, the Court hearing a case between an unrepresented litigant and another party cannot give assistance to the unrepresented litigant in such a way as to conflict with its role as an impartial adjudicator.
>
> [5] In deciding what to do when a case is not adequately presented by an unrepresented litigant, it is appropriate for the Court to take into account that, in some cases, the circumstance that one party is unrepresented can place far greater burdens of time and costs on the other party than would be involved if both litigants had competent representation. There are a number of reasons for this, including the following: the time and costs involved in trying to understand and answer claims that are not formulated so as to clearly raise relevant issues can be much greater than where relevant issues are clearly raised; adjournments are often required, because an unrepresented party is not ready to proceed with the case, either because material required for presentation of the case is not available or for other reasons; and when a case is actually heard, the hearing itself may be much longer than if both sides were represented by a lawyer.
>
> [6] Where a case is brought before the Court by an unrepresented litigant, and material required for adequate consideration of that person's case is not available or not presented to the Court, it is not generally the case that the Court should itself undertake an investigation of whether such material exists, and if so, seek to have it brought to the Court so that it can be considered. It may be sometimes appropriate for the Court to attempt to have such material available, particularly if the deficiency of the material is obvious and can be remedied without prejudice to the other side; but otherwise, it would generally conflict with the Court's position as an impartial adjudicator for it to take steps to seek to improve an unrepresented litigant's case by investigating whether there is more material to support that case than has been presented to the Court, and then taking steps to obtain that material.
>
> [7] Accordingly, in my opinion, this Court must decide this application on the material actually presented to it, and not speculate as to what additional material might have been presented. However, I would qualify this by saying that I have thought it appropriate to look at the file in the Common Law Division to see if there is relevant material there bearing on the applicant's case. Moreover, the decisions of the

[2] [2004] NSWCA 22 (10 March 2004)

primary judge, both on 14 April and 17 April, must be considered in the light of the material actually presented to him, not on the basis of material he might have had if he had taken it upon himself to investigate the matter further."

27. Another court dealing with very personal matters, the Family Court of Australia, laid down guidelines for determining the cases of unrepresented litigants in Re F, Litigant in Person Guidelines[3], Nicholson CJ, Coleman, O'Ryan JJ, stating:

"[6] The Full Court considered it was necessary to revisit the Guidelines: *Minogue v Human Rights and Equal Opportunity Commission* [1999] FCA 85; (1999) 84 FCR 438, *Secretary, Department of Health and Human Services v JWB and SMB* [1992] HCA 15; (1992) 175 CLR 218 referred to. It noted that internal tensions within the *Johnson* guidelines are mirrored by tensions between the guidelines and other legislative provisions / rules of court, such as the obligation of judges to ensure that proceedings are not unduly protracted (s97(3) Family Law Act) and to have regard to the need to provide a prompt and inexpensive resolution to matters in dispute between parties (Order 4 rule 4 Family Law Rules).

[7] Noting the admonition in the Guidelines Noting the admonition in the Guidelines against the giving of legal advice, the Full Court observed:-

"We think that guidelines must not risk compromising the neutrality of the court, or the perception of the Court's neutrality. Such neutrality is a key feature of the adversarial system. Judicial assistance cannot make up for lack of representation without an unacceptable cost to matters of neutrality. However, in our view, the obligation to provide a fair trial has principal significance for a court of law and it must take some steps to assist a litigant in person in order to do justice between the parties with an eye to the reality of the prevalence and diversity of litigants in person in this jurisdiction.

...

We do not disagree with the formulation of the Full Court in Johnson as to the reasons why it is usually undesirable for the judge to give legal advice, particularly, when it is of a strategic nature. We do however think that there can be circumstances where the requirement to conduct a fair trial requires a judge to give assistance of a legal nature to a litigant in person even though such assistance may ***risk compromising the appearance*** *of impartiality and neutrality from the perspective of the other side.*

As with the law that has developed in respect of the appearance of bias, we think it is necessary to appreciate that the imperative to do substantive justice as between the parties requires the conduct of the presiding judge to be assessed by a standard which is properly informed. The informed nature of that standard must, in our view, take account of the responsibility of the Court seized of the family law matter to properly understand the litigant in person's position within the litigation.
...

[3] [2001] FamCA 348

"We have noticed that a number of litigants in person are endeavouring to use the alleged breach of the guidelines as a ground of appeal in itself. We do not think it is appropriate for the guidelines to be used in this way as there may well be good reason in particular cases to depart from some of the guidelines but always remembering the Court's obligation to provide procedural fairness and a fair trial. Thus, if in the circumstances of a particular case, a trial judge does not follow the guidelines, it does not follow that there has not been procedural fairness and a fair trial.

[8] The Full Court determined to revise what were guidelines 4,5, and 7 in *Johnson and Johnson* (1997) FLC 92-764 and to add a further guideline which should be the first guideline. The revised Guidelines are as follows: -

1. *A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;*

2. *A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses;*

3. *A judge should explain to the litigant in person any procedures relevant to the litigation;*

4. *A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation;*

5. *If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;*

6. *A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;*

7. *If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights;*

8. *A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated. (Neil v Nott [1994] HCA 23; (1994) 121 ALR 148 at 150);*

9. *Where the interests of justice and the circumstances of the case require it, a judge may:*

- *draw attention to the law applied by the Court in determining issues before it;*
- *question witnesses;*
- *identify applications or submissions which ought to be put to the Court;*
- *suggest procedural steps that may be taken by a party;*
- *clarify the particulars of the orders sought by a litigant in person or the bases for such orders.*

The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.."

28. The court's duty then, as an institution under the *Constitution* for the resolution of legal disputes and matters between citizens and those within its jurisdiction, as is often stated but necessary to repeat, is to deliver justice according to law, which entails fair and impartial treatment for both sides involved in litigation.

29. Given the very competent representation of the appellant, counsel limited by instructions as to a positive case, discharged his duty in the best traditions of the Bar, and took us to all of those necessary issues identified above, so there was no need for the Court to explain issues to the appellant.

30. The litigant's case taken from the grounds of appeal, is that "The Tribunal made errors of law in its decision".

31. As can readily be perceived, there were no particulars of what the errors were or what type of error was made and in counsel's professional opinion, he could then not make positive submissions on the legal concept of error expressed in the Notice of Appeal.

32. On applying the authorities, the Court is not relieved from examining the case to determine if there has been a mistake in the decisions below, although it does so without running the appellant's case which would be prejudicial to the respondent's case.

33. The starting point is to consider that the usual practice on appeal is to consider that the judgment below is correct, which is simply part of the doctrine that there must be an end to litigation.

34. It is the bar which all appellants must cross and as harsh as it seems, it is far from being an impossible test.

35. That the appellant represented himself before the Supreme Court is perhaps a general indicator that a mistake may have occurred, however, the appellant had representation before the Tribunal.

36. Counsel for the appellant stated that during the Supreme Court appeal, His Honour, Brady J, examined relevant issues, summed up at paragraphs 17 to 19 of the judgment delivered 24 February 2026.

37. These issues focused on the appellant's claims that he was a member of the youth wing of the Bangladesh Nationalist Party (BNP) from 2018, and involved himself in associated politics in the years following when the BNP was in conflict, violent at times, with the then ruling Awami League (AL) party. We note that AL is no longer the ruling party.

38. He claimed he had been attacked, injured and taken to hospital and was otherwise targeted for his political activity.

39. However, the Tribunal found, as did Brady J, that there were glaring credibility gaps in the appellant's evidence.

40. His Honour referred to the Tribunal decision, some of which we reproduce for an understanding of what the appellant must put before us.

41. From paragraph 16 of the Supreme Court decision:

> "[19] Various aspects of the applicant's written and oral evidence are unsupported by independent and reputable reporting on the recent political history of Bangladesh.
>
> This causes the tribunal, to seriously doubt the applicant's narrative in respect of his claimed past political conduct, the sincerity of his asserted political views, and the reliability of his evidence more broadly.
>
> [20] The applicant stated in the RSD application, during the RSD, interview, and in the material provided to the tribunal, prior to the hearing, that he was a polling agent for the BNP in the January 2024 election. He told the tribunal explicitly that as a polling officer, it was his job to attend the polling centre, and encourage people to vote for the BNP candidate, including handing them pamphlets. His evidence was that he did this in a national election on one occasion, in January 2024, in support of the BNP candidate [R]."

42. The Tribunal did not accept, as a matter of fact, that he could have acted as a polling officer for [R], as [R] and the BNP did not contest that specific election according to independent sources.

43. The appellant produced documentary evidence of BNP membership, however, country information from the Australian Department of Foreign Affairs and Trade reported that there was high prevalence of fraudulent documents provided for asylum seeker claims, and on this point the Tribunal, accepted by the Supreme Court, stated:

> [31] "In the context of the applicant's unpersuasive and shifting evidence regarding his claimed BNP involvement, it does not afford any weight to the membership lists".

44. Other areas of the appellant's evidence were addressed, including hospital lists concerning an injury from alleged political activity which was not accepted as being

authentic, and that he had failed to mention the killing of another associated person, [Y], in his initial RSD application.

45. As counsel for the Republic stated, the main findings, those which went to rejection of the appellant's case, went to credit.

46. It was this issue then that the appellant had to present on appeal to this Court as to what legal question arose, and the questioning of fact finding is perhaps one of the hardest issues to address upon judicial review.

47. We do not lose sight of the fact that there may have been an issue of unreasonableness being pursued by the appellant in the decisions, without him being able to competently state that – but on reading the Supreme Court judgment and the Tribunal decisions, it is apparent that the appellant was given adequate time to answer questions, with many questions being put about his claims and answers given, and the decisions themselves followed his evidence.

48. By way of example of examining the transcript of the Tribunal inquiry, this exchange occurred.

Questioning went to the imprisonment of a person Khaleda Zia. A leading question was put, which was possibly in the appellant's favour, did the appellant know her and did he know if anything happened to her in 2018.

Interpreter: I know she has been very sick for a long time. I know she has been arrested, she has been detained by Awami league. That's what I know.

Mr Simmons (Tribunal member): Okay.

Interpreter: in and out, into an out during that time, I know, that's why.

Mr Simmons: Because you indicated that in 2018 was the year that you became more active and more involved, and that was when you joined the Jubodal [youth organisation]. So I'm just wondering if you remember specifically anything that year happened in relation to Khaleda Zia?

Interpreter: What type of incident do you want to know or some occurrence or something like that or…

Mr Simmons: Because you indicated that 2018 was a year that you became more active and more involved, and that was when you joined the Jubodal. So I'm just wondering if you remember specifically anything that happened in relation to Khaleda Zia?

Interpreter: What type of incident do you want to know or some occurrence or something like that or…

Mr Simmons: Yeah. If there was anything significant in terms of her involvement with the BNP that just particularly impacted Khaleda Zia?

Interpreter: his involvement with the…

Mr Simmons: Khaleda Zia involvement with the BNP?

Interpreter: I don't know.

Mr Simmons: Okay. Because there's media reports that indicate that she was in prison and in February 2018?

Interpreter: February 2018.

Mr Simmons: and as a result, there were widespread BNP protests.

Interpreter: I just mentioned a – just a few minutes ago. She has been arrested, she was sick, she was going in and out. In that way, she was just, you know.

Mr Simmons: did – do you remember doing anything, though, in response to her imprisonment in February 2018? Did you take any action?

Interpreter: So BNP has conducted a number of processions and protests – sorry, and meeting for the – to – for her arrest, that nothing could change her arrest, nothing could stop or restrict her arrest or anything. But the BNP has done a lot of – a number of processions or something like that, that's why.

Mr Simmons: I just noticed that there is no mention of those events in you're I just noticed that there is no mention of those events in your are SD application RSD application?

Interpreter: Around 2018, do you mean?

Mr Simmons: Yeah.

Interpreter: Yeah. I probably haven't been asked specifically any particular questions regarding that incident or anything like that. That's why I probably haven't mentioned. Mr Simmons do you recall that incident? Was it significant for the BNP?

Interpreter: Yes, of course, I do believe that it's significant for BNP.

Mr Simmons: And do you know why she was imprisoned?

Interpreter: I exactly couldn't remember the – any – the reason why I actually she has been arrested.

This is just an example of the thorough testing of the appellant as to his political activities upon which he forms the fear of returning to Bangladesh. From the answers, a view was formed that his involvement with political activity was not what he claimed, as he knew some general occurrences, but not particulars of an arrest which a politically active person may be expected to know.

The transcript reflects much questioning with answers which dance around the subject of political activity, leading the Tribunal to form the view that the claims being made were not accepted.

The transcript also reveals questioning which went for about three hours, each question based on the appellant's narrative and designed to give the appellant opportunity to respond.

49. His counsel put that the appellant had the view that his case was rejected because he was Bangladeshi, which is a view that we cannot change. His representative made general statements to the effect that the Tribunal was not open minded, but such allegation needed to be very specific and such specificity was not made out before the Tribunal hearing. That uncomfortable questioning occurs in testing a litigant's allegations and claims in these matters is a situation which cannot be dispensed with, and in any case, before the Supreme Court this line of thought, and that is how it must be described, was abandoned.

50. When examining the decision for an error, this Court is bound by Rule 6 of its Rules – that an appeal is confined to the grounds stated in the Notice of Appeal. Here, and this is where the Court is aware of duties to self-represented litigants or those who prepare their own grounds for appeal, the Court may tease out if it can the real grounds, so a determination can be made. It could do so relying on Rule 4 which allow for the rules to be dispensed with, although such would require reasoning. As counsel adequately put the appellant's case, and as his appeal was so widely stated, simply that there were errors in the judgment, all that could be done for him was done, without any identification of a proper ground of appeal being before us. His views and beliefs are not grounds for appeal. The transcript reveals questions going to test the appellant's claims.

51. In a real sense, His Honour also probed the unrepresented appellant, as can be seen from paragraphs 28 to 32 of his judgment – each paragraph stating what he was asked in court in an effort to establish something amiss with the Tribunal decision.

52. It follows then that we cannot discover error of fact or law even though no positive assertion was made, that we cannot find unreasonableness as the Tribunal findings went to credit on activities related to party membership and elections, that we cannot find evidence of bias and that we cannot find a procedural fairness deficit as to opportunity to state the case and subject matter.

53. We therefore dismiss the appeal.

<u>ORDER</u>

1. The appeal is dismissed

DATED this 25 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