IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 52/2018

[2018] NZSC TRANS 17

BETWEEN **H**

Appellant

AND **REFUGEE AND PROTECTION OFFICER**

Respondent

Hearing: 29 October 2018

Coram: Elias CJ
William Young J
Glazebrook J
O'Regan J
Ellen France J

Appearances: F M Joychild QC and D Mansouri-Rad for the Appellant
U R Jagose QC and J A Cassie for the Respondent

CIVIL APPEAL

MS JOYCHILD QC:

Good morning Your Honours. Ms Joychild and Mr Mansouri-Rad for the appellant.

ELIAS CJ:

Thank you Ms Joychild, Mr Mansouri-Rad.

SOLICITOR-GENERAL:

E ngā Kaiwhakawā, tēnā koutou. Kei kōnei māua ko Ms Cassie, mō te Karauna. I appear with Ms Cassie Your Honours.

ELIAS CJ:

Thank you Madam Solicitor, Ms Cassie. Yes Ms Joychild.

MS JOYCHILD QC:

Your Honours, I'll firstly just go through the outline of the submissions and then go into that submissions, unless you don't need me to go through the summary?

ELIAS CJ:

No, a summary would probably be a useful introduction, but we have read the submissions Ms Joychild.

MS JOYCHILD QC:

So the context of this case is a key criterion to take account of in the construction. Mr H is a young man, barely out of his teenage years when he arrived in New Zealand, making a claim to New Zealand authorities for refugee status. He's alone thousands of miles away from his family, outside his culture and language, and needing the assistance of interpretation services. He does speak some English. He says he fears that he will be killed if he returns home. By his accounts he's experienced a traumatic event. He lived in Taliban controlled Pakistan. He says he was kidnapped by the Taliban and told if he did not return to be a member of their army he would be killed. He fled to an uncle in Samoa and then when his visa ran out there he came to New Zealand. he is likely to be experiencing stress and trauma. Consequently Mr H has a prima facie claim to be declared a refugee under the Convention and the New Zealand has obligations under the Convention to assess that claim against the Convention. These obligations have been met by the enactment of Part 5 of the Immigration Act 2009. The executive has set up the processes and procedures and published a detailed information booklet advising claimants what the process is. The Act provides that the IPA

determines a claim and further is able to do so solely on the information, evidence and submissions provided by the claimant. Implicit within this is statutory recognition of the right of the claimant to provide such material prior to the refugee and protection officer determination, and that of course is supported by section 27 of the New Zealand Bill of Rights Act 1990. It would be unthinkable that someone could have a refugee determination made against them without being given an opportunity to be heard. The mechanism through which the claimant provides the material is the interview. Here the RPO has determined the claim against Mr H without providing him the opportunity to submit evidence, information and submissions to the RPO. That is the critical thing, rather than the interview the Act talks about information, evidence and submissions, and that's what he hasn't been able to…

ELIAS CJ:

Well, he did provide information but I suppose although it's not said explicitly in the RPO's decision, it's not substantiated in any way which is presumably what the interview and the opportunity to assess credibility is for.

MS JOYCHILD QC:

Yes, Ma'am, he didn't provide evidence and he didn't provide submissions. He just provided information in the way of a bare outline of his claim.

ELIAS CJ:

Well, he had the statement.

MS JOYCHILD QC:

Yes, yes. But he had the statement knowing that there would be an interview where all the other material would be put. So there's only one situation the Act envisages where someone does not have a power, doesn't, where the RPO has the power to make a determination without an interview and that is where they fail to attend the interview, but Mr H had good cause not to attend the interview. He conveyed this to the RPO and requested another interview date. The RPO has made egregious errors. He's acted outside his statutory

powers and against the spirit of the Convention, has breached Mr H's right to be heard in the extreme way possible. This claim is not just that the hearing was unfair, truncated, held without time to prepare or biased. Here there was no opportunity at all to be heard and that's distinguished from the statement that he had made, but this was when he had the chance to put his evidence and submissions.

The RPO has acknowledged the decision was harsh. It's likely that if judicial review were permitted now the respondent would consent to provide Mr H with a new interview time and date which is what he seeks from his review application. There need not even be a judicial review hearing. However, the Court says section 249(1) applies. Mr H must move forward and appeal. Only then can leave to judicial review be sought.

In response, the appellant says that the Court has erred and that the refusal to accept the medical certificate is not a decision within the jurisdiction of the Tribunal. Due to its gravity it should be treated in its own right, not as a decision on the way to another decision.

Alternatively, section 249 cannot be applied in a blanket manner. The Bill of Rights Act and case law require that each case be considered individually to ensure the appeal right will cure the prejudice caused by the error and this is set out primarily in *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA) which is cited in *Singh (Malik) v Attorney-General* [2000] NZAR 136 (CA) which is the decision which the Court of Appeal has relied on in this case, but also there are different expressions of that in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 (SC), *Re Minister of Immigration and Multicultural Affairs Ex Parte Miah* 206 CLR 57, (2001) HCA 22 and also the texts. In this case the Tribunal hearing the de novo appeal does not start again and rehear as the RPO would, and this is a very important point.

ELIAS CJ:

I know the legislation says it's a de novo appeal but that's not a defined term, is it?

MS JOYCHILD QC:

I did check it out in the – I'm going to take you to Graham Taylor's text on what de novo means.

ELIAS CJ:

Thank you.

MS JOYCHILD QC:

Importantly, it will not give Mr H – well, basically, I'll address that now. The de novo appeal is where you sit in the shoes of the first hearer and you determine the appeal as the first hearer would, first person determining it. But the first person in this case, the Refugee and Protection Officer, provides a draft of their report to the claimant and the claimant can then make further submissions on it before it's finalised.

ELIAS CJ:

Is that a matter of statute or is that a practice?

MS JOYCHILD QC:

It's a practice which has been publicly advised to all refugee claimants and it's certainly evident when, I'll take the Court through the decisions of the Immigration and Protection Tribunal, that this fact is very important in determining credibility.

ELIAS CJ:

And do we have a copy in the materials of the practice?

MS JOYCHILD QC:

Yes.

ELIAS CJ:

It's a practice note, is it?

MS JOYCHILD QC:

Yes. I'll take you to it. Well, it's an information booklet.

ELIAS CJ:

I see, yes.

MS JOYCHILD QC:

So as well as there not being a true de novo hearing in the situation, the appeal right has much less value and benefit to Mr H without there being a full RPO report before the Tribunal. He is disadvantaged going on appeal without the interview. He cannot support his credibility by showing consistency, and although consistency is not the only matter which the Tribunal has to determine, as you will see from the decisions that I am going to take you to it is a critically important first criterion and if someone doesn't get through the credibility barrier it's very difficult to succeed as a refugee applicant.

The case is distinguishable from *Tannadyce* in that the error there could be immediately appealed to the High Court with appeal grounds so wide they could address judicial review claims. That was what Justice Tipping asserted. Mr H here only has a right to seek leave to the High Court down the track, so it's quite a different statutory scheme to the one under the Tax Administration Act 1994 section 109.

The case is also distinguishable from *Singh* in that Mr Singh had a hearing and would have the –

ELIAS CJ:

Sorry, I don't quite – I read your submission on that but the issue surely is simply whether the appeal offered within the system, so the appeal to the Tribunal, is curative or can be curative.

MS JOYCHILD QC:

Yes, yes.

ELIAS CJ:

It's only if the Tribunal falls into error that there'd be any question of further judicial review on the argument put forward by the respondent. So don't we just have to close on what the Tribunal appeal achieves? And you've said….

MS JOYCHILD QC:

Well, my reading, and I could be wrong, of course, of the majority in *Tannadyce* was that Justice Tipping said there are no issues here because he can go on appeal straight away from this error. He can immediately access the High Court and – or he can go to the Taxation Review Authority. He had an option, Tannadyce had an option of doing either, and before the High Court the appeal right was so broad it would cover concerns about fairness. Here, the Tribunal right is prescribed. It's very limited by statute and it certainly could not consider issues of fairness that happened with the medicate certificate being rejected. And though a different legal system, *Miah* supports Mr H's claim as it shows the height and need for fairness at first instance in refugee claims. So the lower Court's construction of section 249, it is also submitted, weakens the refugee assessment system and this can't have been intended by Parliament.

So I'll now start the full submissions, and I'll start at the narrative of facts at paragraph 15 and take the Court to the green evidence volume, and we'll just work backwards.

When he first arrived he had to fill out a claim and that is at B-079k, tab 19, and you will see at B-098 at question 18 he says, "I will explain more in my statement," and at B-095 he gives a brief summary of what happened to him at question 11 and 12.

ELIAS CJ:

Sorry, you were going to take us also to the statement because that's at –

MS JOYCHILD QC:

Yes. So this was the first document.

ELIAS CJ:

Yes, yes.

MS JOYCHILD QC:

So this is what he filed when he first came into the country, when he first sought application. And then the next statement is tab 18 and this is the statement, and he had legal advice for this, didn't he? Mr Rad helped him prepare this statement, or just made sure it was in English that was comprehensible, and that's obviously more detailed.

And then the next tab, tab 17, contains – well, let's go to tab 16 first which is the medical certificate that was sent in and it just says, "The patient has reported to me today and was examined. He will be unfit for one week from the 9th of May." So that is not good enough and Mr Rad was asked to get a better certificate that met five criterion.

ELIAS CJ:

Those criterion, where are they specified? Are they in the –

MS JOYCHILD QC:

They are in the decision. Would you like –

ELIAS CJ:

I've seen them and – I've seen what they are but –

MS JOYCHILD QC:

They're not in statute. They're…

ELIAS CJ:

But are they in the guidelines? What are they?

MS JOYCHILD QC:

Yes, they are in a practice note. Yes, they're in the – the letter he received from interview set them out.

ELIAS CJ:

No, I know that, but where do they come from, do you know?

MS JOYCHILD QC:

My friends might be best able to answer that.

ELIAS CJ:

All right, I'll ask them, thank you.

O'REGAN J:

But they're not statutory requirements though, are they?

MS JOYCHILD QC:

No, definitely not.

ELIAS CJ:

No, but are they a –

O'REGAN J:

And there's no regulation or rules?

MS JOYCHILD QC:

No, not that I understand. It's beyond, it's lower down than that. So –

GLAZEBROOK J:

And do we have a copy of the letter he was sent?

MS JOYCHILD QC:

Yes. Do you want me to take you to that now?

GLAZEBROOK J:
No, no, just when you're ready.

MS JOYCHILD QC:
So then, of course, the morning of the interview when Mr Mansouri-Rad was told that it wasn't good enough, the GP who had been on that day, the locum, was no longer there, so they couldn't give a certificate in exactly the format that was sought. But the clinic, and you'll see at B-075, "Dear Colleague, Mr H attended our surgery today. Enclosed please find the clinical records for the consultation," and here are the clinical records showing that he'd had a headache and diarrhoea for three days which I think links up with the date he was first told he had an interview. He – due to a job interview, well, the doctor didn't get that quite right but he had an interview. He was very stressed, not sleeping well, goes on to describe his conditions, stress, type 2 symptoms and dehydration and that he would have one day off work. So that was forwarded to through to the Refugee and Protection Officer.

And then if we go to the Refugee and Protection Officer's correspondence with Mr Mansouri-Rad at tab 15, and he says, "Can you please inform your client the medical certificate cannot be printed out as it is not in the correct format. It is in picture format and should be in Word or PDF. Also there could be an issue that the medical certificate does not satisfy the requirements for cancelling an interview. I will discuss this tomorrow with my immigration manager."

And at B-071, you'll see Mr Mansouri-Rad has written, or first of all 072, the Refugee and Protection Officer says, "Please ensure the medical certificate complies with the requirements laid out in the standard interview form. If it is not…we may proceed to a decision," and then Mr Rad says, "I note the certificate doesn't specify the illness. The medical centre has now provided the doctor's medical notes which specify the illness. Period is for one week. My earliest available opportunity is Monday, the 29th of May," goes on, and he also, "Please note the earlier interview date was cancelled by the RSB and beyond Mr H's control."

Now the next thing that happened, there was no further communication from the Refugee and Protection Officer. Mr Rad read his letter that he would, "Discuss it tomorrow with my immigration manager," that obviously that there would be further communication, but in a two-page letter, one and a half-page letter, the Refugee and Protection Officer writes that, "We received your claim on 13 March. You have not been recognised as a refugee under the Convention or a protected person under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 or under the International Covenant on Civil and Political Rights 1966." There were three opportunities to be given protection. "The reasons for this decision are stated in the attached Decision," and then, "You may appeal," and, "You may also make a humanitarian appeal," and advice about the timeframe.

Mr Mansouri-Rad at the bottom of B-064 and B-065 then writes, "Hi, Dougal, further to our telephone conversation today I was quite taken aback when I received the decline decision which is dated 12 May. As I mentioned on the phone, the doctor had not mentioned in the letter why he had come to the conclusion that the client was not fit, but it ought to have been clear to the officer that when a person is suffering from diarrhoea and headache, he could not attend the interview regardless if the same was spelled out by the doctor. It is also reasonable that the doctor felt it was obvious that when a person was suffering diarrhoea, he could not be fit for an interview let alone a headache. I attach both the doctor's initial letters and the clinical notes which I had sent to Mr Newth. I am of the view that reading them together the case for postponement on medical grounds had been adequately made out. Please also note that the doctors at White Cross normally work shifts, therefore the same doctor was not available," and he says Mr H is a 20 year old man ready to proceed to an interview but for the illness he suffered the day before the interview and continuing on the interview date. "Declining a claim on a mere technicality as here, I submit, is clearly unfair and quite unacceptable." Now Mr –

O'REGAN J:

Do we know whether the immigration officer actually saw the medical certificate because he –

MS JOYCHILD QC:

He did see it.

O'REGAN J:

He says, "I can't open it." Was it re-sent in a format he could open it or did he find some –

MS JOYCHILD QC:

Yes. Well, you can see from his decision, which I'll take you to, that he did see it.

O'REGAN J:

Right, so did Mr H's lawyer send a reformatted one? Was that what happened or was in fact there no problem after all?

MS JOYCHILD QC:

Yes, they sent a reformatted one.

O'REGAN J:

They sent it again, right.

ELIAS CJ:

The actual decision is in another volume, is it?

MS JOYCHILD QC:

Yes.

ELIAS CJ:

It's in A-57, is that right? That's what I've pulled together anyway.

MS JOYCHILD QC:

The blue volume, yes.

ELIAS CJ:

But it was attached to the letter?

MS JOYCHILD QC:

It was attached to the letter. So perhaps we should go to the decision before we go to the letter, then. I think that would make sense. So if we go to the blue volume, volume A, at tab 11. So it starts with the document recording the decision of the Refugee and Protection Officer on the claim to refugee status and also his status as a protected person.

ELIAS CJ:

Can I just ask, because I'm not, I'm afraid I didn't have, I haven't gone through the legislation, the confirmation of claim, the claim was accepted, was it, because that's not the appeal provision that's in issue here?

MS JOYCHILD QC:

It was accepted for consideration.

ELIAS CJ:

It was accepted for consideration and then there's a requirement of a confirmation of claim, is there?

MS JOYCHILD QC:

Well, it looks like the form itself, once it's signed off and sent back, is a confirmation of claim.

ELIAS CJ:

Is that a statutory thing, the confirmation of claim?

MS JOYCHILD QC:

Well, the statute certainly talks about confirming claims, yes.

ELIAS CJ:

Okay.

MS JOYCHILD QC:

I'll take you to that bit, yes. The first step, some people don't even get their claim accepted.

ELIAS CJ:

No, but then there's an appeal provision for that eventuality.

MS JOYCHILD QC:

Yes.

WILLIAM YOUNG J:

Why? Because they don't invoke an appropriate ground –

MS JOYCHILD QC:

Come by boat, I think, or –

WILLIAM YOUNG J:

Sorry?

MS JOYCHILD QC:

It's quite rare but it's if they've come unlawfully sometimes.

ELLEN FRANCE J:

The Regulations also deal with confirmation of claim.

MS JOYCHILD QC:

Thank you.

ELIAS CJ:

Where do we find the Regulations?

ELLEN FRANCE J:

I don't think we've got them.

ELIAS CJ:

We haven't got them?

MS JOYCHILD QC:

I'm sorry.

ELIAS CJ:

So it may be that some of the questions I've been asking are dealt with in Regulations rather than in practice notes?

ELLEN FRANCE J:

I'm not sure about that but certainly the Immigration (Refugee and Protection Status Processing) Regulations 2010 deal with confirmation of claim must be in the form approved, et cetera, and has some material about that and then deals with notification of the decision to accept the claim, et cetera.

MS JOYCHILD QC:

They are approved by the Minister apparently, the refugee form, but I apologise for not having the Regulations, Your Honours.

ELIAS CJ:

No, they may not be necessary.

MS JOYCHILD QC:

I think I have read them but yes. So they go, at the beginning on 057, the officer talks about, the third paragraph, an interview was scheduled on the 10th of May at 9.00 am. On the 4th of May a letter was sent to his last residential address. Now he received that. On the same date a letter was also sent to his representative and this was what the letter said in it, "A claimant must provide a refugee and protection officer with a current" – no, that's just talking about contact details, and then in the further paragraph, in

the interview reschedule letter he was advised that if he failed to attend the interview the RSB would be unable to make any findings of fact or credibility. He was advised that in such circumstances his claim would be determined on the basis of all the information available to the RSB, and then the decision goes on, “Mr H failed to appear for his scheduled interview. To date, the RSB has received no acceptable reason for Mr H’s failure to attend his interview. A medical certificate was received on 10th of May. However, it is considered to be insufficient. In the interview scheduling letter there was an underlined section,” and that reads, “It is very important that you attend this interview. If you are unable to attend because of illness and disability, please notify the RSB Interpretation Co-ordinator immediately.” Mr H did this, Mr H’s lawyer did this before 8.00 am in the morning. “You must supply a medical certificate no later than 4.00 pm. To be acceptable, the certificate must specify the date,” well, that was in there, “the illness or disability, the expect duration of the illness or disability,” those three things were all in it, “the reason, in the opinion of the medical practitioner, why you are unable to attend the interview; and the medical practitioner’s opinion as to when you will be fit to attend. If the RSB determines that the medical certificate meets the above criteria, the interview may be rescheduled. If you fail to attend your interview the RSB will be unable to make any findings of fact or credibility. Your claim will be determined on the basis of all information available to the RSB.”

And then there’s a section, “Why the medical certificate and accompanying document does not meet the criteria.” So it goes through the chronology that I’ve taken you through and then if you go down one, two, three, four, five, to the sixth paragraph, “When the RPO examined both documents it was not clear that Mr H had satisfied the abovementioned criteria. An email was sent to the representative indicating that the medical certificate did not satisfy the requirements for cancelling an interview. No response from the medical representative has to date been received.” Now that wasn’t right, of course. The letter was at the least ambiguous in that it said, “I’m going to talk to my manager tomorrow,” and Mr Mansouri-Rad was not told it did not satisfy. I think he was told it may not satisfy.

And then it goes on, “The above patient has reported to me today,” that’s always in it, that was in it, and then he talks about the patient consultation notes provided with the medical certificate do state the reason why he cannot attend the interview and when he will be able to, and then at the end the problem is, “There is no explanation as to why Mr H cannot attend an interview and there is no expressed opinion from the practitioner when he can.” Now what had been attached was the note saying seven days and the description of the illness. “The RSB finds that for this reason the two documents do not satisfy two of the five requirements outlined above for a valid medical certificate. According to section 149(4) of the Act, the RSB can determine Mr H’s claim to refugee and protection status in the absence of an interview,” and that’s what that section in the Act says. When you fail to attend an interview they are allowed to proceed without you.

And then the RPO concludes, “Having considered all the information available to the RSB regarding Mr H’s claim to refugee and protection status and in his absence, no findings of credibility or fact can be made.” So by his standards that first statement was not considered good enough to determine a claim. “As such, it cannot be determined,” so the words “it cannot be determined” are important to the appellant’s argument, “whether Mr H is a refugee within the meaning of the Convention, nor can it be determined whether there are substantial grounds for believing that he could be in danger of being subjected to torture,” and then it goes on, “or arbitrary deprivation of life or cruel treatment,” under the other two statutes that New Zealand has obligations in relation to.

ELIAS CJ:

Is there any impediment in the legislation for people applying again?

MS JOYCHILD QC:

Well, the instructing solicitor applied again, asked for one, but they said they were bound by section 149 not to do it because the decision is considered final. And this is the essence of what –

ELIAS CJ:

No, no, I mean even if the decision had been accepted, is there any impediment in the legislation which prevents someone from applying again for refugee status.

MS JOYCHILD QC:

At a later time if the facts have changed, yes, if the facts have altered.

ELIAS CJ:

The facts have to alter. Can you give me the provision?

MS JOYCHILD QC:

Can I take you through?

ELIAS CJ:

Yes, all right.

MS JOYCHILD QC:

Just when we get to the – go through this whole Act in one…

ELIAS CJ:

Yes, that's fine, yes.

MS JOYCHILD QC:

"So then for these reasons Mr H is not recognised as a refugee within the meaning of the Convention." So basically the RPO couldn't make a decision, he said he couldn't make a decision, so therefore he declined, and the reason was that he'd failed to attend the interview.

O'REGAN J:

The decision is signed by another officer as well. Is that the person the RPO said he was going to consult about it?

MS JOYCHILD QC:

Presumably, Your Honour, yes.

ELIAS CJ:

The manager.

O'REGAN J:

Well, it says somebody from the quality assurance programme.

MS JOYCHILD QC:

But, of course, there was – the RPO wasn't quite correct in saying, "Well, I never heard back from the lawyer." In fact, his email suggested that he would talk to his manager about it, not that the lawyer had not, the lawyer had just not replied any more. He was waiting himself to get a reply when he got the decline decision.

So that takes us through the facts. Would you like to go to the scheme of the Act now or would you like to go to the Court of Appeal decision?

ELIAS CJ:

I would find it useful to go to the scheme of the Act.

MS JOYCHILD QC:

Section 140 is the section, Ma'am, that you are asking for.

ELIAS CJ:

Thank you.

MS JOYCHILD QC:

So if we go to the red volume, volume 1 of the authorities, and we start at page 107, Part 5, "Refugee and protection status determinations." It has its own complete part in the Act.

WILLIAM YOUNG J:

Sorry, what – I missed that, I'm sorry.

MS JOYCHILD QC:

It's section 124. It's actually page 107. They're pages at the bottom of – no, it's just section 124. Those pages aren't sequential. So this is the whole of Part 5 here, and so if we look at the purpose, is to provide a statutory basis for the system by which New Zealand determines to whom it has obligations under the United Nations Convention Relating to the Status of Refugees and Protocol, and they are set out in Schedule 1 of the Act. It codifies certain obligations, determines to whom it has obligations, under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights.

So even though you apply for refugee status, the Government also considers at the same time whether you fit within the protections under the Convention against Torture and the Civil and Political Covenant.

So section 125. It's to be determined, refugee and protection status is to be determined under the Act, and that person must have a claim determined in accordance with the Act. That's section 125(1).

ELIAS CJ:

Is there anything in the Refugee Convention that you are relying on?

MS JOYCHILD QC:

No.

ELIAS CJ:

No. Thank you.

MS JOYCHILD QC:

Simply the fact that after – the Protocol says that after 1951 it covers everyone. Well, I mean, the definition in the Refugee Convention, I guess, is what we're relying on. The definition of a refugee. I'll take you to that then.

ELIAS CJ:

Well, not if it's scooped up in the legislation.

MS JOYCHILD QC:

Well, actually, it's not, because – sorry, so they talk – yes, so if you go to the Schedule 1 which is at the back close to the end of the tab, you've got the preamble where at the second paragraph, "The United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of their fundamental rights and freedoms," and then if you go to the next page, Chapter 1, "General Provisions," paragraph (2), "As a result of events occurring before January 1951," and this has now been changed to, without an end date, "and 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 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 as a result of such events, is unable to or, owing to such fear, is unwilling to return to it." That's the key definition which is not spelt out in the Act but it's referred to, referred back to this provision.

Section 127 is also very important because it talks about the context for decision-making and the refugee and protection officer. Now every claim under this Part of that must be determined by a refugee and protection officer. In carrying out his or her functions under this Act, the officer must act in accordance with the Act. So that's another important provision that we emphasise. So to the extent that a matter relating to a refugee or a person claiming recognition as a refugee is not dealt with in this Act, in a way that – is not dealt with in this Act, it's in a way that is consistent with New Zealand's obligations under the Convention. he text of the Convention is set out in Schedule 1.

And then at section 129, to answer your question directly, Ma'am, "A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Convention."

And then I'd like to take Your Honours to section 133, "How a claim is made." "A claim is made as soon as a person signifies his or her intention to seek recognition as a refugee or a protected person in New Zealand. Once a claim is made, the claimant must, on request by a representative of the Department, confirm the claim in writing in the prescribed manner. A claimant must as soon as possible endeavour to provide a refugee and protection officer all information relevant to his or her claim," including a statement of the grounds for the claim seeking recognition as a refugee, a statement of any other grounds.

And then at section 134, the first step is whether to accept the claim for consideration, and there are the reasons where they do not have to even consider it: if there is an international agreement where the person has had the opportunity to lodge it in another country, for example, and then at subsection (3), the RPO must decline to accept for consideration a claim for recognition if the officer is satisfied that the person's acting otherwise than in good faith or for a purpose of creating grounds for recognition.

Section 135, which is our client has got through that first hurdle, so 135, it is the responsibility of a claimant to establish his or her claim for recognition under section 129, 130, 131. To this end the claimant must ensure that, before a refugee and protection officer makes a determination on his claim, all information, evidence, and submissions that the claimant wishes to have considered in support of the claim are provided to the refugee and protection officer, and any other matters they want to be considered for another potential claim to do with the Convention on Torture or the Civil and Political Right.

And then at section 136, sets out how the refugee and protection officer is to determine a claim. They must determine the matters set out in section 137.

ELIAS CJ:

Sorry, just looking at this section 135A, a power of suspension in accordance with regulations, do you know what sort of reasons can be used for suspending?

MS JOYCHILD QC:

I think I –

ELIAS CJ:

No, don't worry, that's fine.

MS JOYCHILD QC:

Yes, I won't guess, Your Honour. So going to 136, for the purpose of determining a claim, a refugee and protection officer must determine the matters set out in 137. In doing so, they may seek information from any source but are not obliged to seek any information, evidence, or submissions further to that provided by the claimant. The refugee and protection officer may determine the procedures that will be followed on the claim subject to the Act, any regulations made for the purposes and any general instructions given by the chief executive. To avoid doubt, the refugee and protection officer may determine the claim on the basis only of the information, evidence, and submissions provided by the claimant.

So we say that implicit within this is the right for the claimant to have the opportunity to present information, evidence and submissions in support of their claim. In fact, that may be the only information that is used to determine the claim. The Refugee and Protection Officer can do their own research, they can find other matters but they're not obliged to.

So the matters that the Refugee and Protection Officer must consider in each claim is, subsection (1), whether to recognise the claimant as a refugee on the ground set out in section 129. If we go back, that the person is a refugee in a accordance with the covenant and then whether they are a protected person

under the Convention against Torture and then a protected person under the Civil and Political Covenant. For each claim –

WILLIAM YOUNG J:
So we're at 129, are we?

MS JOYCHILD QC:
Sorry?

WILLIAM YOUNG J:
We're 129?

MS JOYCHILD QC:
Yes. Well, I'm at 137. I was just…

WILLIAM YOUNG J:
Yes, yes, but that's to call – that's what we're reliant on.

MS JOYCHILD QC:
For each claim accepted for consideration, a refugee and protection officer must also determine, as part of the process, whether there are serious reasons for considering that they've committed a crime against peace, war, humanity, committed a serious non-political crime outside New Zealand before they entered or been guilty of acts contrary to the purpose and principles of the UN.

Of course, what we will show you is none of these matters were considered in the decision which is said to be the final decision. Nothing was gone through in this order, or in any order. It was simply said that we cannot determine whether the person is a refugee, therefore they are not, they are declined.

At subsection (5), it's another important subsection. To avoid doubt, a refugee and protection officer in determining the matters specified in this section, may make findings of creditability or fact, must determine all the

matters described in subsections (1), (2) and (4) regardless of whether the claim was only made on some of the grounds.

So that's how they must consider their job, their task. That's what their task is and we say the refugee and protection officer has not complied with his task under the Act.

Then next section, 138, "Decision on a claim," a refugee and protection officer must recognise a person as a refugee if satisfied that the grounds for recognition in section 129 have been met. That's if they meet the Convention definition. And then it goes on, however, if they have got the protection of another country they may refuse to recognise them as a refugee.

And this is what the Department has relied on as not re-opening the decision, subsection (3). The decision of the refugee and protection officer is final unless overturned by the Tribunal on appeal under section 194.

So maybe this the time to take you to the letter from the manager of the Refugee Status Branch. Now this is the last bit of the evidence where he sets out his construction of that provision. I think it's in the green volume. Yes, it's the green volume, tab 12. So Mr Wright has written a complaint saying it's unfair to be denied refugee status on a technicality to do with the medical certificate, and Mr Dougal Ellis, who is the branch manager, has replied about a week or so later, and in the second paragraph, "As you know, I asked a senior Refugee Status Branch staff member who was not involved with the decision to review the file, discuss the events with the RPO in question and make a recommendation to me," and he just goes through those sequence of events that the Court has seen in terms of the documentation.

Over the page at B-062, first paragraph, "The requirements of a medical certificate for the purpose of postponing an interview are not new and have been in place at the RSB for a number of years. The RSB's requirements are consistent with the IPT's approach as set out in the practice note 2/2015." I think that's in the bundle. "The requirements for a medical certificate ensure

the refugee and protection process is not subject to unnecessary or abusive delays. The medical certificate requirements are clearly set out in the interview scheduling letter which also states, 'If you fail to attend your interview the RSB will be unable to make any findings of fact or credibility.'"

Next paragraph, "The medical certificate you provided, in and of itself, did not satisfy the requirements which you acknowledged in your email on the day of the interview. Even taking into account the consultation notes in addition to the medical certificate, the five requirements were not met for the reasons set out in the decision. Your efforts to obtain a compliant medical certificate was not known to the RPO at the time. Therefore, I consider the decision of the RPO was not unreasonable. However, I also take into account the following: your explanation that you attempted to have the doctor re-issue the medical certificate according to the requirements," second bullet point, "The email from the RPO to you stated there could be an issue," so he didn't say there was, "there could be an issue and indicated he would discuss this tomorrow with his manager. One reading of this is that he may respond to you before proceeding further. Both," and they also took into account the fact that both medical certificate and medical notes were provided by the specified time, 4.00 pm on the day of the interview. Although two requirements were not explicitly met, inferences could be drawn as to the reason why the client could not attend the interview from the nature of the illness and when he would be fit to attend the interview, from the period of the illness, and this was in the medical certificate.

"Given the above, I acknowledge that there are genuine grounds for complaint and in the circumstances we would consider granting your client another interview. However, the Act does not permit a decision of the RPO to be re-opened once made. Section 138(3) Immigration Act states this very clearly. I realise that this does not assist your client nor resolve the above but unfortunately, having notified the decision to him, the RSB is now unable to retract or annul its decision. I have spoken to the RPO who acknowledges that the decision was, in the circumstances, harsh. He advised that had he known of the full facts, he may have proceeded differently. He also

understands that his email may have been interpreted as intimating that there may be a further opportunity to provide additional information. This letter and your correspondence regarding the complaint will be on your client's file should Mr H appeal the decision." So that is the final of all the evidence.

So looking again at section 138(3), the Refugee Status Branch has interpreted subsection (3) as meaning it was a decision, it's final, it can't be gone back on.

ELIAS CJ:
In the functus. Yes.

MS JOYCHILD QC:
Yes. He had no further powers.

WILLIAM YOUNG J:
There is a provision in the Interpretation Act 1999 that creates a power to correct errors.

MS JOYCHILD QC:
Yes, Your Honour, we did raise this at the Court of Appeal.

WILLIAM YOUNG J:
Section 13?

MS JOYCHILD QC:
Mmm.

WILLIAM YOUNG J:
It might be a bit of a stretch to rely on that as against subsection (3) but it was a possible.

MS JOYCHILD QC:
That's true, we did raise that, but my friends, not Ms Jagose but my colleague at the Court of Appeal did not think that was able to alter the decision.

WILLIAM YOUNG J:

As excluded the power, being treated as inconsistent with subsection (3) of 138.

GLAZEBROOK J:

On the other hand, if they had made an error in the decision, one would have thought they could nevertheless, ie, a genuine error that they had made, ie, mixed up who the person was and thought it was someone else or something of that nature, one wouldn't have thought you say, "Oh, well, sorry. We're not allowed to correct our error."

MS JOYCHILD QC:

Yes, yes.

ELIAS CJ:

But your argument is that subsection (3) is capable of being a reference, or is capable of being read not as an indication that the primary decision-maker is functus but simply that if the decision is maintained it's the final decision unless it's set aside.

MS JOYCHILD QC:

Well, our argument is that this is actually not a decision that the Act contemplates the RPO making and that's where the *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) matter comes in. We say, if you look back at what the RPO has to do at section 136, he did none of that. He didn't go through the claim and look at all, and these are must, matters that they must determine.

ELIAS CJ:

Well, he doesn't even deal with the information that he has been provided with.

MS JOYCHILD QC:

No, that's right.

ELIAS CJ:

Now I suppose one can read the decision and one can infer from the decision that because it's unsubstantiated it needed to be verified before it could be taken at face value.

MS JOYCHILD QC:

Yes.

ELIAS CJ:

But he doesn't actually say that either.

MS JOYCHILD QC:

No, no. That's right, Your Honour, and in some jurisdictions they actually do make, if they can clearly see that there is a refugee, that the person meets the refugee definition, they just do it without even interviewing the person.

ELIAS CJ:

I suppose it might also depend on what information they've been given about where the person has come from and the circumstances and in some cases the officer may be able to determine without very much else that it's made out.

MS JOYCHILD QC:

But the New Zealand scheme is that, you know, you provide information, evidence, and submissions. That's your responsibility to do, and the mechanism that the executive have set up is the interview to do that. That's how the whole process is. It's the interview.

ELIAS CJ:

Well, when you say that though, what are you relying on for saying that? Is that the –

MS JOYCHILD QC:

Okay, well, let's go to the – if you go to the purple tab 24, this is an official publication of the Ministry of Business, Innovation and Employment and it's called *Claiming Refugee and Protection Status in New Zealand*.

So at the beginning is a map, two pages over, and so the first top left, they complete the confirmation of claim form, and then it's received and acknowledged. Then the asylum seeker submits a written statement outlining the details of the claim. Then they're interviewed by the RPO four weeks from claim lodgement. Then the interview report is sent to the asylum seeker and/or their representative for comment, and then they've got three weeks to put final submissions in, and within three to four weeks of the final submissions the claim is determined by the RPO.

If it's approved, they can apply for a temporary entry class visa or a permanent visa.

If it's declined, they can lodge an appeal within the IPT. Then there is an appeal process where, it's an inquisitorial model where they are interviewed and give evidence, and it's either approved or the claim is declined.

That's the overall structure of the system, and in terms of the status offered it says in the introduction on the next page, page 3, "You have claimed asylum in New Zealand. The purpose of this brochure is to provide information on the refugee and protection claim process, as well as your rights and responsibilities."

So over the next page at 1 that's really just setting out the definition of a refugee, and then it's the asylum procedure. Now I'd like to just go through. That's sort of technical information about how you lodge it and details and address and legal aid, but if you go through to page 7, at 2.3 it talks about the process when you get to the Refugee Status Branch, and it says your claim will be assigned to an RPO. They decide your claim within 140 days or 20 weeks. There are four stages to the claim process at the RSB. Number 1,

submit a written statement. After you have lodged your claim you must provide a full, written statement of your experiences and circumstances that have led you to claim refugee and protection status. It should be submitted at least one week before your interview. And then we go on to the interview. The rest is just information, technical information.

The RPO will interview you about your claim approximately four weeks after you have lodged it. At the interview you will be asked about yourself, your family, your home country, why you fear returning to your home country, and then next page, "The interview is your chance to tell us why you are claiming asylum in New Zealand. You must be able to satisfy the RPO about who you are and the country you are from. Under section 135 it is your responsibility to establish your claim," and in bold, "You must ensure that you provide all information that may be important to your case, even if no direct question is asked." And then there's advice that providing wrong information is a criminal offence.

And then the next paragraph, which is a key one that we rely on, "The interview at the RSB is a key moment in your claim. It is important to tell the truth, because false and misleading statements may lead to your claim being disbelieved," and again it is your responsibility to provide all the evidence and submissions that you wish to have considered in support of your refugee process, and they give examples.

Over at the second column, this third paragraph down, another very important paragraph for the appellant. "Your interview will be recorded electronically and the RPO will also make a written record of the interview. You can request a copy of the recording and the RPO's interview notes afterwards. Most interviews," gives the time and place where they are held.

And then if you go over to the next page, page 9, "Attending the interview." "It is very important that you attend your interview. If you fail to attend your interview the RPO will be unable to make any findings of fact or credibility.

Your claim may therefore be determined on the basis of all information available to the RPO."

And then it says, "What to do if you are unwell," and once again these criteria for the medical certificate are set out, and then it says if the RSB determines that the medical certificate meets the above criteria, the interview may be rescheduled.

What to do if you are unable to attend for another reason. That's not relevant.

The next stage, at number 3 on page 10, is also very important in the appellant's arguments. "After your interview the RPO will write a report summarising your claim within three weeks. The report will be sent to you and/or your representative. When you receive the interview report you have three weeks to comment on that report and to make any further submissions in support of the claim."

And then right at the bottom of this page is another section that we rely on. "It is very important that you read the interview report carefully, and in your response state whether you agree that it is a correct summary of what you have told the RPO. If it is not correct, you need to state what information is wrong and what it should say." You should also answer any further questions or concerns raised in the RPO report. And then at the top of the next column, "If you have a representative they will assist you to respond to the interview report."

So that's why we're saying this isn't a de novo appeal because this step is left out. The Tribunal does not give you a chance to look at a draft.

ELIAS CJ:

And you said the Tribunal conducts an inquisitorial inquiry?

MS JOYCHILD QC:

Mostly inquisitorial. It's got inquisitorial and adversarial powers and I think it's primarily inquisitorial. But because you're speaking in a second language usually, and certainly here you are, and I'll show you the cases that say this, it's very easy to get things wrong or to get misperceptions. That's why it is so important to have the chance to see what the refugee officer understands you are saying and to say to the refugee officer, "No, that's not right. I didn't mean that. I meant this," and Mr H will not have that opportunity when he goes on appeal.

And then there's the decision and it says what will happen. "The RPO assesses each claim on its merits. The RPO will make the decision based on all the information you have provided, and any other information he or she has about you or your home country," and then they'll assess: are your statements truthful and credible? Does your claim meet the criteria contained in Article 14A? So they are the two things that the RPO is going to do and that also the Tribunal is going to do.

And "The Decision" tells what you do, and then if you move over at page 11, if you are not recognised, if you do not meet the criteria as a refugee and you are denied protection status you will receive a decision explaining the reasons for this refusal. Now he didn't have – he hasn't received a decision explaining the reasons. All he's received is a decision that said you didn't, you didn't attend the interview and therefore we haven't found you to be a refugee. He has been told what his rights are to appeal and he has lodged an appeal.

WILLIAM YOUNG J:

Does he have a right to be interviewed by the Tribunal?

MS JOYCHILD QC:

Yes, he does have a right to an oral hearing in this case. The statute provides –

WILLIAM YOUNG J:

That assumes the Tribunal will – I mean I'm just looking at section 233(3). Is that a provision that applies to these appeals?

MS JOYCHILD QC:

Yes. It applies to these proceedings.

WILLIAM YOUNG J:

So if he'd been interviewed then would he not be entitled to an oral hearing?

MS JOYCHILD QC:

Not necessarily, although I believe they do do it regularly.

WILLIAM YOUNG J:

Sorry, you believe they usually do it?

MS JOYCHILD QC:

Mmm.

WILLIAM YOUNG J:

And you're resting on the assumption that the Tribunal would accept that he hadn't in fact been given an opportunity to be interviewed?

MS JOYCHILD QC:

Yes.

ELIAS CJ:

There is a difference, of course, between an oral hearing and an interview.

MS JOYCHILD QC:

Yes.

ELIAS CJ:

So what is envisaged in 233 is an oral hearing in which he may be speaking for himself or presumably may be being represented but –

MS JOYCHILD QC:

No, it's – yes.

ELIAS CJ:

– it doesn't – does that necessarily envisage…

MS JOYCHILD QC:

Well, from my experience, Ma'am, there is a difference. You're sitting in an office in the Refugee Status Branch with a refugee officer. It's much more informal and much more relaxing, as relaxed as you can ever be when you're a refugee claimant, but – and it's a backward and forward process. When you get to the Tribunal – and you can take breaks, very easily take breaks, and they check all the time whether you need a break. You get to the Tribunal and it's more like this where you're talking, you are answer from the chair, there's a microphone, my recall, and it's much more formal.

ELIAS CJ:

But I mean I'm not sure that it's envisaging, and maybe I'm misreading this reading it quickly, but I'm not sure that it's envisaging anything that replicates the interview process and presumably the reason why you don't have to provide an oral hearing if the person was interviewed is because it can be done on the papers. It's a rehearing, it's de novo, but it can be done on the material that's provided.

MS JOYCHILD QC:

Yes.

ELIAS CJ:

If you haven't been interviewed you have to hear them. But that's not necessarily the same thing as – I mean I imagine you can provide information but it's not necessarily the same thing as an interview.

MS JOYCHILD QC:

No, no. Yes, Your Honour, I agree with that.

ELLEN FRANCE J:

The general approach would be though that the appellant as they were before the Tribunal would give oral evidence.

MS JOYCHILD QC:

Yes. That's the normal process. But what the Tribunal has, of course, is the full report from the RPO and it has – which goes in detail about what the person said about each issue and it has the confidence of knowing that the refugee claimant has confirmed this is correct. They've had an opportunity to tell the RPO if it's wrong. So they, you know, they can really rely on it and, so I'll take you to the cases, they rely hugely on what the RPO report says to rely on what the claimant has said previously.

WILLIAM YOUNG J:

So on the appeal is the claimant giving evidence being led by counsel or is the complainant just being –

MS JOYCHILD QC:

No. The counsel sits from my, when I've been there, counsel sits with the appellant but the dialogue is primarily between the two and the member of the Tribunal and the claimant, they speak for themselves. There's often an interpreter, so it goes through an interpretation process. But then the lawyer can make submissions.

So that's the process. So back to the Act. Your Honour asked about the subsequent claims. At section 140 talks about – sorry, I'll just go back to 138 further up the page. Once a decision on a claim is made and notified to a claimant, any RPO may, in his or her absolute discretion, re-open the claim for consideration under any of sections 143 to 147. Now that's the only time it can re-open a claim.

ELIAS CJ:

Sorry, which section are you referring to?

MS JOYCHILD QC:

Section 138(5), and if we go to sections 143 and 147 we see it's where the person, I understand it's more likely to be cancellation than cessation. Cessation of refugee status is if the person has voluntarily gone back to their own country and they're living there, and cancellation is when some information comes to the notice of the RPO that the person gave fraudulent untrue evidence.

If you look at section 145(b), the Refugee and Protection Officer has determined that the recognition may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information, or the person has been convicted of an offence where it's established that their evidence – they acquired recognition through fraud.

ELIAS CJ:

So is this a power of rehearing directed only at declining?

MS JOYCHILD QC:

No. So you may be granted refugee status, and this has happened in New Zealand and then four, five, six years later some information comes to the knowledge of the branch that you lied.

WILLIAM YOUNG J:

Yes, so it's for declining.

ELIAS CJ:

Yes, it's only for declining. It's –

GLAZEBROOK J:

Well, it's to, to –

MS JOYCHILD QC:

No, you may be a refugee already.

O'REGAN J:
Yes, but the reason for re-opening is to decline.

MS JOYCHILD QC:
Yes, yes, Sir, so they can take it away from you, yes.

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
Removal of status.

MS JOYCHILD QC:
Yes. And that requires a whole process to be gone through as well. You can appeal that to the Tribunal.

And then at section 140 the limitation on subsequent claims, which Your Honour asked me about earlier, a refugee and protection officer must not consider a subsequent claim for recognition unless the officer is satisfied there has been a significant change in circumstances material to the claim since the previous claim was made. So Mr H can't make a subsequent claim.

WILLIAM YOUNG J:
Sorry, what section is that?

MS JOYCHILD QC:
Section 140(1). So he can't make a subsequent claim at the moment.

The importance of credibility, if we look at section 141, in a subsequent claim, a claimant may not challenge any finding of credibility or fact made by an RPO or the Tribunal in relation to a previous claim, and the refugee and protection officer determining the subsequent claim may rely on these findings. This is why it's so important to have your chance to say exactly what happened. It's going to come back right through the process potentially.

Section 143, that's where recognition is ceased and as I said that's basically, section 143(b), where one of the following apply and where the Refugee Convention has ceased to apply to the person or the Convention against Torture, and I understand it's often when they have gone back to their own country voluntarily.

Section 145, now every person who is declared a refugee is at risk under this section. So it can come back at you. It's not something you have forever. An RPO may cancel the recognition and then, as I've shown before, under (b)(1), it's been determined you've been fraudulent in what you've said.

And so then in section 146 they have the power to cancel, but they must apply to the Tribunal for cancellation. They can cancel if they're not a New Zealand citizen but if they are they have to apply to the Tribunal to cancel.

Now looking at section 149, the powers of the refugee and protection officers, they may require such information within timeframes as the officer reasonably requires. They may require the claimant to produce documents that are in their possession. They may inform the person that any other person may be required to produce relevant information, and the important matter for this claim is subsection (f), they may require the person to attend the interview, and that's what has happened here. Mr H was required to attend the interview, and then they may seek information from any source and determine the claim only on the basis of the information, evidence and submissions by the person.

Now under subsection (4), this was the provision which the officer, RPO, relied on in this case was section 149(4). Where a person who is required to attend an interview fails to attend at the appointed time and place, the RPO may determine the claim or matter without conducting the interview. So that's what he has relied upon, and we say that section doesn't apply in this case.

WILLIAM YOUNG J:

What, because there was good reason not to?

MS JOYCHILD QC:

Yes.

WILLIAM YOUNG J:

Or you just say it's subject to a natural justice requirement?

MS JOYCHILD QC:

Yes.

Then we move to the appeal provisions. Section 193.

ELIAS CJ:

Is there a provision in the Act for dismissing claims for failure to prosecute, you know, failure to…

MS JOYCHILD QC:

Turn up?

ELIAS CJ:

Well, leaving this aside…

GLAZEBROOK J:

Well you just have timeframes.

MS JOYCHILD QC:

I think it's so tightly controlled.

GLAZEBROOK J:

The timeframes do it.

ELIAS CJ:

Yes, I suppose that's right.

MS JOYCHILD QC:

Yes, very tightly controlled.

GLAZEBROOK J:

And then the requirement for them to prove, so if they don't they haven't proved, I presume.

MS JOYCHILD QC:

Yes, yes.

GLAZEBROOK J:

Which is probably what this should have actually, decision should have said rather than how it was put. But that's effectively what it's saying, there isn't proof and therefore you are not – I decline the application.

MS JOYCHILD QC:

Yes, yes. So it is a decision but we say it's not a decision that's caught by the kind of – the clause that says you can't seek judicial review.

GLAZEBROOK J:

Well, the way it's put it probably isn't a decision. There's simply an argument that it isn't a decision. I can't determine it rather. But what it must be read in context I think is that you have failed to prove as you're required to.

MS JOYCHILD QC:

Yes, yes. So I mean he decided something but it's nothing that the Act anticipated he would be deciding.

So at section 193, every appeal relating to whether a person should be recognised as a refugee must be determined in accordance with the Act, and also whether the person should continue to be recognised.

So at section 194, this is the right of appeal and under section 194(1)(c) is where Mr H's right of appeal sits. He's been declined under section 129.

WILLIAM YOUNG J:
Sorry, what's that section again?

MS JOYCHILD QC:
Section 194(1)(c). He's been declined under sections 129, 130 and 131 but in fact he's been declined without reasons. There was no real substantive consideration.

And then the next provision is section 198, and this is determination of an appeal against declining of a claim for recognition, cancellation of recognition, or cessation of recognition. So this is what the Tribunal must do in Mr H's case. It must determine the matter de novo and it must determine it in a particular order which first of all looks to see whether he meets the refugee grounds, then whether he meets the Convention on Torture grounds, then –

WILLIAM YOUNG J:
Sorry, I've actually missed a point, sorry. Are we looking at section 194(1(b)?

MS JOYCHILD QC:
Section 198.

WILLIAM YOUNG J:
No, I know, but just going back a bit. I'm just trying to track it through and I may have missed it. Section 194(1)(b). Was that the appeals?

ELIAS CJ:
(c).

MS JOYCHILD QC:
(c).

O'REGAN J:
(1)(c) was the…

WILLIAM YOUNG J:

Sorry, that's just where I had gone haywire. Thank you.

GLAZEBROOK J:

The (b) is where they don't accept it.

WILLIAM YOUNG J:

Yes, yes. I thought it had it wrong.

MS JOYCHILD QC:

So there's a prescribed order in which they must consider things.

WILLIAM YOUNG J:

So this is 198?

O'REGAN J:

Mmm.

WILLIAM YOUNG J:

Back on track.

MS JOYCHILD QC:

And this is where –

ELIAS CJ:

But that order doesn't much matter here because it was only ever section 129, wasn't it?

MS JOYCHILD QC:

Well, no, the Act requires the RPO to go through each of those three obligations the Government has. Even if you only apply as a refugee they also consider whether you meet the Convention against Torture or the Civil and Political Covenant obligations. New Zealand has ratified –

ELIAS CJ:

Well, I – because you took us to that provision that says they must do it but that wouldn't really be…

MS JOYCHILD QC:

They do. They go through –

ELIAS CJ:

I see.

MS JOYCHILD QC:

Yes, they do go through in every case whether they also meet the other two.

ELIAS CJ:

I see.

MS JOYCHILD QC:

So at section 198(3), the Tribunal may dismiss or allow the appeal, but may not refer the claim back to an RPO for reconsideration. So that's once again the unfairness that has happened to him, he can't, the Tribunal can't do anything about that. All it can do is hear his claim.

WILLIAM YOUNG J:

Is there a reason for that? Is it just making – or deliberate speed?

MS JOYCHILD QC:

I think so. I think it's just part of that tight structured process.

ELIAS CJ:

Well, it's making it clear that the Tribunal has to decide whether he is to have that status.

MS JOYCHILD QC:

It also makes it clear that there is no judicial review available, implicitly.

WILLIAM YOUNG J:
Of what?

MS JOYCHILD QC:
Well, my friend has made an application for a judicial review of the RPO's decision to decline the medical certificate and go on to hear the claim without hearing from him. In the, this is my point, the in *Tannadyce* case my reading of it, the majority, was that they said, well, he will be able to raise judicial review grounds in the hearing and he will be able to raise them with the High Court if he wants to. The appeal is going to enable him to raise his judicial review grounds in the High Court, so there's no problem. That's –

ELIAS CJ:
But there is no problem if it's cured. That's the issue really, isn't it?

MS JOYCHILD QC:
Yes, yes, it is.

ELIAS CJ:
You have to convince us that it's not possible for the…

MS JOYCHILD QC:
Yes.

ELIAS CJ:
Well, that's one of the ways you'd get home, if it's not possible to cure it, I suppose there's still the argument that if something's gone off the rails it is better actually to put it back on the rails.

MS JOYCHILD QC:
Yes, start the process at the beginning the way the Act intended.

WILLIAM YOUNG J:
All right, well, just pause there. The Tribunal will be able to take into account the fact that he didn't get an interview through no fault of his own.

MS JOYCHILD QC:

Yes.

WILLIAM YOUNG J:

And presumably for that reason the Tribunal will have an oral hearing with an interview process under section 233(3).

MS JOYCHILD QC:

Yes, yes.

WILLIAM YOUNG J:

So the wrong, I won't say it's necessarily been completely reversed but it's at least addressed.

MS JOYCHILD QC:

Well, we've got two arguments about that. The first is he hasn't got a de novo hearing because he has not got the opportunity to see the way the decision-maker's thinking because he's not going to have a draft of the decision-maker's –

WILLIAM YOUNG J:

Okay, slight – I said addressed. I agree it's slightly different.

MS JOYCHILD QC:

Yes, yes, yes. The Refugee Status Branch always sends the file up to the Tribunal, so they will have the file. Usually the file has the full report of the interview and the transcript of the interview. In this case all it's got is this decision saying, "We can't make a decision."

WILLIAM YOUNG J:

All right, had there been an interview and refugee status had been declined then it would be apparently anyway, on the statute open to the Tribunal, not to have an oral hearing.

MS JOYCHILD QC:

I understand that although I understand they always do have hearings.

WILLIAM YOUNG J:

Okay, all right.

MS JOYCHILD QC:

Because credibility is so important for them, and basically what they do is, I'll take you to the cases, they try to the catch the person out on what they've said at the RSB.

ELIAS CJ:

Well, that would be, of course, if the matter had been declined at first instance on the basis of credibility then you'd have to tackle that head on, but it would depend what the ground of the decision was and what the grounds of the appeal were.

MS JOYCHILD QC:

Well, there basically are two matters that the RPO's looking at in its decision and you'll see there's – it's always credibility first and then it's are the grounds under the Convention met, and the Tribunal does exactly the same thing and they have a pro forma decision thing. Credibility first and then are the grounds met. So the Tribunal's always looking at someone who has been declined.

GLAZEBROOK J:

Of course they may have been declined on the second ground rather than the first.

MS JOYCHILD QC:

Yes.

GLAZEBROOK J:

Even accepting everything you say, which we do, you are not in danger or whatever the – so you don't meet the grounds for whatever reason.

MS JOYCHILD QC:

Yes. Perhaps it's a good time to take you through, to –

ELIAS CJ:

And in some cases presumably people, not very often, will put up some sort of substantiation, some other sort of circumstantial or direct evidence so that credibility will be less important than where you simply have assertions that I…

MS JOYCHILD QC:

Well, interestingly, I'll take you to a decision where the Tribunal has a rule of thumb that credibility of documents follows credibility of the person because there are so many forged documents in so many parts of the world that if you don't make it out on your own credibility they're not going to believe a document.

ELIAS CJ:

I see, yes, yes.

WILLIAM YOUNG J:

I suppose what your complaint is that the system gives you two factual hearings and in a sense an iterative process where if something goes wrong the first time you may be able to fill in the gaps and you're only going to get one –

MS JOYCHILD QC:

Only going to get one, and it's not going to be the same as the first one because you're not going to have the chance to know the way the decision-maker is thinking and correct the decision-maker on misperceptions of fact, and also taking you through you'll see the critical role that credibility

plays in Tribunal decisions. So I'll take the Court to some of the Tribunal decisions now.

ELIAS CJ:
And also the point that you make in your submissions that with interpreters involved there may be more capacity for confusion and you will have had the opportunity to address that in a more measured way than you will get if you're –

MS JOYCHILD QC:
Completely.

ELIAS CJ:
So it's a second –

MS JOYCHILD QC:
Bite.

ELIAS CJ:
– thoughts may be better but here you're only going to get first and last impression.

MS JOYCHILD QC:
Yes, and with no input from the refugee as to whether your impression's right or not.

So if we go to the red volume, tab 2. This is a claim from a person from India, and first of all the first 14 pages sets out the claim, which we don't need to go through. At page 15 the assessment begins and the Tribunal notes its responsibilities. It's got to determine whether a person is a refugee, whether they are a protected person under the Convention Against Torture or Civil and Political Rights.

And then at paragraph 80 the Tribunal says, “In determining whether the appellant is a refugee, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant’s account.”

And paragraph 81, “The evidence of the appellant was credible. Her evidence was detailed, spontaneous and consistent between her previous statements, her interview before the Refugee Status Branch, and subsequent statements and evidence before the Tribunal.”

And then over the page it notes that they had one reservation on credibility. It was I think she was someone who was in a particular type of arranged marriage and whether she was oblivious to the primary motive for the marriage, but it didn’t accept her on that point but at 85 it basically, otherwise it said it accepted the appellant’s account in its entirety.

That’s an example of someone who – there’s just a short discussion of credibility then they go on to the Refugee Convention, and the rest of the decision is made up with considering whether she meets the Refugee Convention criterion, and you’ll see they – there’s an enormous amount of access to special reports and country reports.

This is another one where there is – the next one, tab 3, this is a young man from Afghanistan, 18 year old man, single man, and then if we go to page 6 the Tribunal was looking at his credibility. At paragraph 22, it found him to be a credible witness, having seen and heard from him, noting the documentary evidence filed in support of his claim, and taking into account the general consistency between his account and the relevant country information.

And then it explored concerns, at 23, it had with some aspects of his account, and then the third line, these were also concerns articulated by the RSB about the same issue and the timing and communication of the threats. So they’ve looked at what the RSB said. However, after a careful analysis of the questions asked and the answers given by the appellant both at the initial

interview and subsequently, the Tribunal is of the view the inconsistencies are likely to be the result of imprecision in the questions and answers as interpreted and a lack of appreciation by the appellant about how precise his answers had to be. And they give an example from the – when he was asked by the RSB whether he knew of the relationship, he answered, "I know one month before of their relationship," but it's unclear basically what he was talking about. So at the end of that sentence, "The Tribunal resolves any concerns in the appellant's favour. His account is accepted in its entirety."

When we come to the rest of the decisions, which are all decline decisions, the importance of credibility and that first hearing becomes much more evident. So at tab 4 is a person from Colombia, and if we look at credibility at page 7, at paragraph 41, the Tribunal did not find the appellant or AA to be a credible witness. There were a large number of matters about which they gave evidence that was inconsistent with his earlier statements about events that occurred in Colombia and with answers he had given when interviewed about his claim by the RSB. Go to paragraph 42, at his RSB interview, he claimed this, and that's one point. Paragraph 43, this is another (inaudible 11:28:20) point, at the hearing he was asked, he claimed that within 50 minutes of the March 2013 meeting he was approached. Second sentence, "At the RSB, the appellant stated the approach from DD was made the week after the meeting," and they asked him why this is inconsistent and he said he may have been confused. This is rejected. The variation is too great to be plausibly explained by genuine confusion.

Then the text messages. Fourth line down, as noted, affidavits in support of the appellant's claim were provided to the RSB and filed with the Tribunal, and then it goes on to discuss the RSB evidence.

Paragraph 45, when interviewed by the RSB, he gave evidence of a car chase and then later on when asked why he told the RSB that the car chase took place in the morning and told the Tribunal it occurred in the afternoon, he stated that he became confused between mornings and afternoons at the RSB.

So they go through each of these points. Paragraph 49, when asked about a graffiti incident, whether he reported it to the police, he said he did not because he was thinking of leaving the country. However, at his RSB interview he'd stated that he did report it to the police and that he had a copy of the report. He subsequently retracted this statement in response to the interview report.

So right through his – it just goes on and on, paragraph 54, 55, 56, 57, 58, 59 and 60 all examining his evidence, comparing what he said at the RSB to what he said at the Tribunal. And then the –

WILLIAM YOUNG J:
It may be an advantage to only have to give evidence once.

MS JOYCHILD QC:
Yes. Well, that's true and that's what my friends said, but if you're a genuine refugee it's an advantage that you've got the earlier decision.

ELIAS CJ:
If they are placing so much emphasis on consistency, if you are genuine I suppose consistency is one of the tools you've got.

MS JOYCHILD QC:
Yes.

ELIAS CJ:
We should take the morning adjournment now, but what do you want to take us through after this? What are you proposing to do?

MS JOYCHILD QC:
Well, I would like to just take you through some of the other decisions. You've got the gist of them but I do want to point out some of the other

comments that are made about credibility and earlier statements, and then to finish –

ELIAS CJ:
Why would you – you've made that point really, haven't you?

MS JOYCHILD QC:
Have I made the point? Okay.

ELIAS CJ:
Is there any reason particularly to take us to them?

MS JOYCHILD QC:
I'll do it very briefly because there are some important points.

ELIAS CJ:
All right. And then?

MS JOYCHILD QC:
And then finish – then looking at these provisions in the Act, section 249 and 247, the key provisions.

ELIAS CJ:
Thank you, good. We'll take 15 minutes now, thank you.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.47 AM

MS JOYCHILD QC:
Your Honours, before the break I said I'd just take you to two short references. So this is the red volume, volume 1, tab 4, paragraph 69, page 14, and just saying the Tribunal acknowledges it's appropriate to be cautious when rejecting credibility based on inconsistencies. Quotes the authors of a leading text that trivial and minor inconsistencies should not be used to undermine

credible testimony and then they just go on in this case the sheer volume of consistencies meant it was different. Then if you go to tab 6.

ELIAS CJ:
I really think we can accept this from you that –

MS JOYCHILD QC:
Okay, but tab 6, just to show what the, a question I answered, at paragraph 50, the documentary evidence provided cannot be accepted at face value. The ease with which false documents can be obtained to support an untrue claim means the practice of the Tribunal is that the credibility of documentary evidence usually follows the appellant.

Now, we haven't yet looked at the appeal and review provisions. So back to tab 1 of the red volume. First of all, section 247, "Special provisions relating to judicial review," and there's a general review power there with a limit of 28 days.

And then section 249 is a restriction on judicial review of matters within the Tribunal's jurisdiction, and this is what this appeal is all about. "No review proceedings may be brought in any Court in respect of a decision where the decision (or the effect of the decision) may be subject to an appeal to the Tribunal under this Act." Now first point I'd like to point out is the heading, "Restriction on judicial review of matters within Tribunal's jurisdiction," and the Tribunal does not have any jurisdiction to deal with the decision that was made under section 149 to reject the medical –

ELIAS CJ:
Sorry, which heading are you talking about?

MS JOYCHILD QC:
Section 249. So this is the key provision that the Court is being asked to construe. The heading says, "Restriction on judicial review of matters within Tribunal's jurisdiction," and so our first point is that the decision to reject the

medical certificate and continue on to a hearing without hearing from the – continue on to a decision without hearing information, evidence, and submissions, was a decision that's not within the Tribunal's jurisdiction.

But subsection (1) says, "No review proceedings may be brought in any Court in respect of a decision where the decision (or the effect of the decision) may be subject to an appeal…under this Act unless an appeal is made and the Tribunal issues final determinations on all aspects of it."

So no review proceedings may be brought, at subsection (2), in the High Court, or until the Tribunal has issued its final determinations. Subsection (3), so there's a further filter, they may only be brought in respect of a decision if the High Court has granted leave. So there's a leave requirement. Then at subsection (4), the criteria for leave. Well, there's a time limit of 28 days. Subsection (5), you can appeal the leave one to the Court of Appeal.

Then at subsection (6), in determining whether to grant leave you've got to demonstrate that the review proceedings would involve issues that could not be adequately dealt with in an appeal against the final determination of the Tribunal and whether those reasons are, by reason of their general or public importance or for any other reason, issues that ought to be submitted to the High Court for review.

WILLIAM YOUNG J:
So what's the nature of the appeal from the Tribunal to the High Court?

MS JOYCHILD QC:
On law only.

WILLIAM YOUNG J:
With leave or not?

MS JOYCHILD QC:

Yes. Sorry, so if we go backwards, section 245 starts the appeal right.

WILLIAM YOUNG J:

245, thank you.

MS JOYCHILD QC:

So it's only if it's, by law that party may with the leave of the High Court or with the leave of the Court of Appeal appeal to the High Court on that question of law, and the decision of the High Court to refuse leave to appeal is final, and then there's a time limit of 28 days but it can be extended.

At subsection (3) the leave to grant the leave to appeal, the test is whether the question is one that by reason of its general or public importance or for any other reason ought to be submitted and the High Court has got the power to confirm, to remit the matter to the Tribunal with the High Court's opinion or to make such other orders.

And then the appeal to the Court of Appeal, under section 246, the Court must have regard to whether the question of law involved is general or public importance. Sorry, I should have taken the Court to them first.

So they are the provisions, and if we go to the submissions of the – or maybe we'll go to the Tribunal, the Court of Appeal decision next, which is in the blue volume. Both the High Court and the Court of Appeal – the High Court decision was reasonably brief. They used very similar reasoning.

So the Court of Appeal decision is at tab 3 of the blue volume, and just go through to the Court's analysis which starts at paragraph 27. At paragraph 28 the Court noted Parliament's clear intention to streamline the procedures for a determination of applications, including by creating a carefully designed appellate pathway and, in section 249, by postponing the opportunity for judicial review.

ELIAS CJ:

We have, of course, read these decisions so you can just make the submission.

MS JOYCHILD QC:

You have looked at it? Okay. Good, okay. Well, I'm at paragraph 41 pointing out the Refugee And Protection Officer is a pivotal person within the statutory scheme.

GLAZEBROOK J:

Sorry, what page? What paragraph?

MS JOYCHILD QC:

41.

ELIAS CJ:

Of your submissions.

MS JOYCHILD QC:

Of my submissions, yes. Page 12. And emphasising again at section 127 the fact that he must act in accordance with the Act. And then that the RPO has that set, strict limit of, strict prescription of what he must consider at sections 136 and 137.

At paragraph 56, making the point about the very important constitutional role of judicial review and that it ensures when public officials exercise the powers conferred on them by Parliament they act within them. We say that this is a situation where the RPO most definitely needs to be held accountable by the High Court for his actions. Also noting that the context that bona fide refugee claimants are an especially group of persons seeking to gain access to the Courts. A wrong decision can have life and death consequences for them and such factors increase the obligation to act fairly.

So that's been iterated in many decisions of the High Court, that this is the context, but it's also iterated again in the decision of the High Court of Australia, and I'll just briefly point out the paragraphs, it's tab 16 of the purple volume, where Justice McHugh, it was a majority decision, that this was a first instance man, he had had his interview and then after the interview the refugee and protection officer noted that there had been elections in Bangladesh and a more liberal group had got into power. So the Refugee and Protection Officer thought oh, he's not going to be at risk if he goes back. He didn't ask the claimant to make comments on that. He just decided, and so the issue was he'd had his hearing but a relevant fact came before the officer and he was not given the opportunity to respond to it, and Justice McHugh goes through all the factors on each side, and then he balances them, at page 102, paragraph 146, "Balancing the factors above in relation to these proceedings, the right of appeal to the Tribunal" –

ELIAS CJ:
Was he in the majority?

MS JOYCHILD QC:
Yes.

WILLIAM YOUNG J:
Sorry, what para? 102?

MS JOYCHILD QC:
Page 102, para 146, but it's the last paragraph of 146.

WILLIAM YOUNG J:
Was there a privative clause here?

MS JOYCHILD QC:
Yes.

WILLIAM YOUNG J:
All right, okay.

MS JOYCHILD QC:
So the right of appeal, "Is insufficient to conclude that Parliament intended that the delegate was not required to accord natural justice in the manner asserted. The only factor truly pointing to an intention to exclude the rules of natural justice is the de novo right of review by an independent Tribunal." Apologies, Your Honour, there may not have been. I think in Australia the rule is that case law is if there's a de novo appeal there is no right of review until the de novo appeal has been heard. But important though the de novo right is, "It does not outweigh the inference to be drawn from the fact that the refusal of the application may put an applicant's life or liberty at risk and, as a practical matter, will often – perhaps usually – mean that an applicant will be detained in custody." Last sentence, "That being so, it is proper to infer that the Parliament, by giving a right of review, did not intend to exclude the common law rules." Then Justice Kirby, who's also in the majority –

ELIAS CJ:
Isn't it really a matter of degree because if the breach of natural justice is in an incidental determination, it may well be able to be cured by de novo appeal, but if it goes to the actual determination, as in this case, where – and arguably in this case also, then it may be different?

MS JOYCHILD QC:
Yes. Yes, Your Honour, it is a matter of degree, and what we're saying here is, well, going through my submissions, at paragraph 57, so the point I was making there is just that we're dealing with people who are at risk of their lives if a decision goes the wrong way, and that's recognised in New Zealand and internationally.

So the first argument is that there are actually two decisions at issue. One is the decision of the RPO to decline the medical certificate and to proceed to

determine the claim without enabling Mr H to provide information, evidence and submissions in support.

The second decision is to decline refugee status without having provided him with an opportunity to provide information, evidence and submissions in support.

ELIAS CJ:
I must say I found this quite difficult in your reasons because I don't who was why you resist the determination being the decision to decline made, you would say, in breach of natural justice. What does it matter?

MS JOYCHILD QC:
Well, it matters because the judicial review claim has been made currently on the grounds of section 149(4), rejection of the medical certificate and the continuation on without giving the person an opportunity to be heard, and also there is an argument that that decision on a plain reading of the Act, that decision does not fall within the jurisdiction of the Tribunal. Therefore, judicial review can happen straight away. That's why we have…

ELIAS CJ:
I don't understand why it's necessary to split it up into the constituent decisions and why if these are the errors that led to the determination being declined one doesn't just – it just seems very technical and unnecessarily complex.

MS JOYCHILD QC:
Well, I guess it's trying to keep all our eggs in the basket.

ELIAS CJ:
Yes.

MS JOYCHILD QC:
That's really, I mean, you know, of course, they are all connected together.

ELIAS CJ:
Yes.

MS JOYCHILD QC:
But the power to make that first decision was made under a different power. On a reading of the Act it is not within the Tribunal's jurisdiction so he can go back on that point alone to be judicially reviewed. That's the point we're making.

So the first question is the loss of opportunity to be heard by the RPO, is that rectified on appeal? So just going through what I've already taken the Court through, the content of the first right. So we'll just go to paragraph 60. It's a very full right to be heard that the RPO, the hearing before the RPO, and if you look at the points, it's the opportunity to present information, evidence and submissions at interview, the opportunity to see a draft report and be able to clarify and correct factual misperceptions or understandings, address reasoning and analysis, provide further information focused on areas the RPO considers are unproven, and often the RPO will say they want further information from you and they'll list the areas. So you've got this full right to engage with the RPO and the RPO has to make sure they fully understand your case. And then he's – the right, if unsuccessful, to have a second factual assessment via an appeal. In that second factual assessment to have the foreknowledge of the areas that the claim is considered weak or misunderstood and the ability to place a focus on and address them. He doesn't have that. He's got no idea where his case might look weak. The opportunity for an interview in a less formal, entirely non-adversarial setting, such opportunity being significant for persons who will often be stressed and traumatised, and to have a claim for recognition decided by the RPO at the first available opportunity without having to go on appeal.

So he's still – and then we're looking at the content of the second right. It's still available to him. Appeals are de novo hearings. In his situation he's got the right to an oral hearing. However, unlike in a hearing where the RPO acted lawfully and granted an opportunity to provide the information, the

Tribunal hearing Mr H's case will not have before it a merits-based written report assessing his information, evidence and submissions. All it will have is that initial claim, the statement that's a bare outline and the decision which is entirely empty of content. It's devoid of any information, evidence and a merit-based analysis.

The lack of – I'm at paragraph 62. The lack of such documentation places him and other bona fide claimants at a considerable disadvantage when trying to make out their claim before the Tribunal. There's no RPO narrative for comparison. So I think made that point.

So then at paragraph 66, the content of the de novo appeal right Mr H retains is of far less value to him than it would have been if preceded by the first right. He's lost a right of great value to him. It will not be rectified on appeal because he cannot reply on his amplified narratives and explanations given over two hearings to strengthen his credibilities, he's had no opportunity to correct any misperceptions of the decision-maker by reading and commenting on a draft and he's got no automatic right of second appeal on the facts from the Tribunal.

At paragraph 67, if he succeeds on appeal then he may not face ongoing prejudice but that's as high as it can be put because, as we've seen from the statute, refugee status can be removed in the future. He's got to go back to the Tribunal. Once again, that lack of an RPO interview is going to disadvantage him in trying to prove that he was credible and that he didn't fabricate his evidence.

And so at paragraph 68, in summary, the High Court and Court of Appeal have erred in law in not taking into account the significant detriment caused to him in having to appeal to the Tribunal in a situation where through no fault of his own he lost his first right to a hearing. The de novo hearing is not equal in content to the enhanced right. Further, when it's exercised without a prior interview and report, it's reduced and significantly of less value.

So if he succeeds he's lucky though he's not free from potential ongoing prejudice, and if he doesn't succeed he is going to suffer potential ongoing prejudice.

And the next question is can judicial review after the IPT hearing remove the prejudice? So if he's successful on appeal to the Tribunal then section 249 becomes operative. However, judicial review is still not automatically available. He's got to apply for leave. There's a 28-day period. He can seek leave to extend time. He can seek leave to the Court of Appeal if the High Court declines, but if the Court of Appeal declines that's the end of the matter, and those decisions are all discretionary ones.

There are further barriers. He's got to demonstrate that the issues couldn't be adequately dealt with in the appeal and, further, that those issues are, by reason of their general or public importance, ones which should be submitted.

Also, presumably, judicial review would have to be of the most recent decision, namely the Tribunal decision. A claim would have to be made that some aspect of it was tainted by the earlier unlawful and unfair decision of the RPO. This would be a difficult and complex claim to make. He would be dealing in speculation as to what he might have said to the RPO which would have bolstered his claim, including credibility aspects, in front of the Tribunal.

So in conclusion of that, the appeal right does not rectify the prejudice caused to Mr H by both RPO decisions.

And there's one other matter that I omitted to mention just about the statute. Section 150 says when you first come in and you make an application for refugee status, you have a refugee visa which enables you to work. As soon as the Refugee and Protection Officer makes a decision on your claim, Mr H no longer has any right to work, he no longer has any right to a visa, he must leave the country. So there are very dramatic consequences from that first right that has been exercised against him. So there are, as in *Miah*, the Court, one of the factors it looked at was the consequences of the decision.

The consequences are significant for him even though he's got the appeal right. So –

WILLIAM YOUNG J:
So pending appeal he can remain in New Zealand but he can't work.

MS JOYCHILD QC:
Can't work. He has no visa. Yes. Okay, he can work until the appeal but he has – if that upholds the appeal he has no right to claim any other visa. He must leave the country. So as soon as the RPO makes the decision, that kicks in. Well, that's not – he can work. Yes, so it's – yes, okay.

ELIAS CJ:
All right, so there is no additional disadvantage from not being able to get judicial review immediately?

MS JOYCHILD QC:
No, but once that RPO decision is made he's – unless he can change it on appeal, he has lost his access to any other.

ELIAS CJ:
Well, one would have thought that would be the consequence.

MS JOYCHILD QC:
Yes, yes.

ELIAS CJ:
All right.

MS JOYCHILD QC:
But that happens at the RPO decision level, in theory, he's lost his right –

ELIAS CJ:
Unless he appeals?

MS JOYCHILD QC:
Unless he wins on appeal.

So being aware that Your Honour finds the technicality of the argument that I've set here, at paragraph –

ELIAS CJ:
Well, there's a pretty technical argument run against you too, so maybe don't feel inhibited.

MS JOYCHILD QC:
Okay, thank you. So the issue to be determined is whether either or both decisions of the RPO are decisions, so the word is "decision", further to section 249(1) and in relation to the second decision whether it is a decision within the meaning of section 138(3), and that's the section that says the decision of the RPO is final.

So just looking very briefly at the intention of Parliament, the provisions are there. Basically, the Minister, that's at footnote 38, reassured the country when he introduced it that, "The new system maintains New Zealand's high standards of fairness, but unlike the current system the Bill enables a single Tribunal to consider all grounds of appeal for a single appellant, and that will significantly streamline the process." So the Refugee Status Appeal Authority went and we had an IPT and the four branches like the residents, the removal, deportation, they all came into the one Tribunal, but the assurance is that although it's streamlining everything, everything is – fairness is still being guaranteed. So there was no intention to reduce fairness.

At paragraph 75, the former or the Opposition Justice spokesperson at the time made specific comment on two clauses. One of them is 249.

ELIAS CJ:
I don't know why, and the Crown has done this too, I do not know why we are citing so widely from parliamentary materials. It's a habit that's creeping in but

it may be something that this Court is going to have to say something about, but my understanding is that we generally look to the policy that the Minister responsible says that the Act is designed for if that would be helpful, but it's not sort of a wide-ranging inquiry into the opinions held of the legislation by Members of Parliament.

MS JOYCHILD QC:
No. I guess it wasn't the fact that it was an opinion that was – I accept that, Ma'am. I had understood Hansard could be produced. But – and it was the Opposition Justice spokesperson and just noting that this is a significant change. Yes, so that's all I was pointing out.

And also then Justice Palmer, looking at the materials, made the comment that it was to stop people gaming the system was why they had tightened up on review and appeal. And that decision is in the authorities.

So looking at paragraph 77, or just above it, 76. The submission is that it's evident from the parliamentary materials and from the High Court in *RM v Immigration and Protection Tribunal* [2016] NZHC 735 that there were very good reasons for restricting the right to judicial review in an immigration context, again connected with claimants with hopeless cases drawing out the inevitable. And the point here is that there was no intention to reduce standards of fairness, cut one of the two rights to a hearing and force a claimant to proceed to appeal without a prior RPO decision except in one situation that does not apply here.

So to be caught by section 249(1) each decision must relate to matters that are within the Tribunal's jurisdiction as set out in the section heading and subject to an appeal to the Tribunal. If they are not caught Mr H can apply with leave to judicially review the RPO decisions under 247, and he can do that now, and we say that he can do that now, most definitely with the first decision to reject the medical certificate and proceed to consider the claim without a hearing.

On a plain reading of the text in light of its purpose the Tribunal has no jurisdiction to hear an appeal of the decision to decline the medical certificate. There's no appeal right from it. The power was exercised under 149(4), not 138(3). Consequently –

WILLIAM YOUNG J:
But do you say that if you went along to the Tribunal and said it's so unfair they rejected the medical certificate the Tribunal wouldn't agree with you and say, well, in that case we'd better hear your client?

MS JOYCHILD QC:
The Tribunal cannot hear that – well, it has to hear the client because the client has put in an appeal, but the Tribunal –

WILLIAM YOUNG J:
But it has to hear it on the – it would have to –

MS JOYCHILD QC:
It can't send it back.

WILLIAM YOUNG J:
Yes, I know that, but wouldn't its basis for hearing it, wouldn't it be able to say, "Well, we must hear him because he didn't fail the excuse, proper excuse to turn up for the interview," and in that way reject the conclusion of the RPO that there wasn't a good excuse?

MS JOYCHILD QC:
Well, I think it's just routine that they're heard. My friends can – on my understanding is it's absolutely routine that everyone who appeals has a hearing. Perhaps it's different if they're – I don't know in some situations but…

So we say that even in the course of an appeal in relation to the second decision, the Tribunal cannot remedy the first decision. The remedy for the

first decision, we say, is to re-interview or to provide Mr H with an interview. That's the remedy that he's seeking. All he's seeking is for the Act to be complied with. Nothing more than that. It's…

Now the lower Courts say this decision is caught under section 249 as it's a challenge to the legality of the process which led up to the final decision and it cannot be divorced from the first, and they rely on Justice Tipping's decision in *Tannadyce* for that. Well, while there is authority to suggest that some decisions can be considered in this light, it is submitted that this is not one. Such interpretation minimises the significant and ongoing detrimental impact the decision has upon Mr H's rights, does not give due recognition to the seriousness of the error. It's a decision that warrants its own separate analysis with no gloss on the language.

And here, Your Honours, I get into the Bill of Rights Act and how that might help. So accepting that there are two meanings properly open to the Court, one is that that decision is within the section and one that it's not, then an NZBORA analysis must be undertaken. Now because there are two decisions, counsel has chosen to follow the *Moonen* order rather than *Hansen* but we say whether it's *Hansen* or *Moonen* the outcome is the same, but the commentary appears to be that if you have more than one decision then the *Moonen* criterion apply.

So looking at the *Moonen* criterion, at paragraph 80, the rights at issue at section 27(1) and (2). The first meaning is that the decision does come within section 249 as it's an integral part of the second decision and that would be following Justice Tipping's comment. The second meaning is that it does not. So they're the two meanings, and they're both open to the – they must be open because both the High Court and the Court of Appeal have said one meaning is the meaning whereas the appellant says that the first meaning is – the second meaning is. So the meaning which constitutes the least possible limitation on the right to natural justice and judicial review is clearly the second meaning. It allows the decision to be judicially reviewed at this stage. This enables retention of the all important first right to the enhanced hearing

and for the processes in the Act to proceed in the intended order. In contrast, the first meaning results in a major intrusion on the right to judicial review as it prevents forever the right to the enhanced first hearing and results in ongoing potential prejudice and also, very importantly, which my friend has pointed out to me, there is no accountability of this critically important statutory office if the first meaning is taken. It means that they can continue to act harshly, unfairly, oppressively. I'm not saying they want to do that but they've done it once and there's no accountability. This has to be very wrong.

So then at paragraph 81 I look at justification. So the first limb of that is is there a rational connection between the Act's purposes and the limit? Well, it is rationally connected in that to avoid delay and streamline processes it defers review until appeals have been heard. So that's accepted. But then the next limb is of the two which impairs the right less, and of the two meanings the second impairs the right as least as possible because the first removes the right to a hearing in its entirety, despite the Act intending there to be two full factual hearing opportunities. It replaces it with just one which lacks the enhanced characteristics of the first. This impairs the right in a major way and it's neither necessary at all to meet the objectives nor is it a proportionate response to them.

The objectives are to stop people getting a decision they don't like, judicially reviewing it, climbing up the ladder to the next one, getting a decision they don't like, judicially reviewing it, and then going on further up which is what happened. In this case, there's no replication in the appeal, in the judicial review and the decision because the decision is totally devoid of content. It's empty. So the objective of stopping that doubling up at every level is not met and it doesn't need, we don't need that objective here because there was no doubling up. He's not trying to double up. He's just trying to get a hearing, and the RPO has not done that.

So following, looking at that and the proportionality, the second meaning is to be preferred and must be applied. It's not proportionate, and this is, I've

added this in, because there are no issues of gaming the system here or having a review and appeal from the same decision.

So that now we look at the second decision which is the decision to decline refugee status without a hearing which my friends say is the only decision at issue in this case. On a plain reading of the text it would appear to be a decision within the Tribunal's jurisdiction being a decision to decline the person's claim to be recognised as a refugee. However, we submit that when the decision at issue was considered in light of the scheme of the Act as a whole as it relates to refugee claimants and the Act's purpose then it's submitted that it is not a decision that's caught by that section.

This is because the Act intends there to be a substantive hearing by the RPO where information, evidence and submissions can be presented by the claimant. The decision which sections 138 and 249 refer to are ones made after a consideration of the factors set out in the Refugee Convention. The Act anticipates that when the Tribunal hears a de novo appeal on the facts from an RPO decision, such decision will be one made after the RPO has considered information, evidence and submissions by the claimant. The interview, which is referenced in the Act, is the claimant's opportunity, provided for under the Act, to be heard by the RPO and to put forward their material in support of their claim, and as said before there's only one situation where the Act anticipates the Tribunal will hear the appeal without the claimant having had the opportunity and it doesn't apply here.

At paragraph 84, the RPO did not have the power to determine the claim under this provision, section 149(4), as Mr H does not fall within this exception. His medical certificate and GP consultation notes contained all the content required for an adjournment of the interview for medical reasons. In rejecting the medical certificate, deciding he had failed to attend the interview and consequently declining his refugee status as he could not make credibility findings, the RPO has acted in breach of natural justice. It's failed to give him an opportunity to be heard and it's also acted unlawfully under the Act. The Act requires claimants in Mr H's situation to have the opportunity to

provide information, evidence and submissions to the RPO before a decision is made and, further, the RPO is explicitly obligated to act in accordance with the Act. His decisions are harsh (as acknowledged), grossly unfair and oppressive and they do come within the type of invalid decision identified in *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) and *Anisminic* and this factor is relevant to the NZBORA analysis.

This process set out in the Act has not been followed. The decision has been – I've said that, yes.

At paragraph 86, now once again looking at the New Zealand BORA analysis, taking the *Moonen* position because there are two meanings properly open to the Court. The first brings the decision within section 249 and defers review. The second construes it outside section 249. The one with least possible limitation on the right to natural justice is the second meaning. That complies with the right fully. This is a major intrusion for the same reasons set out in (i) above. Even the decision-maker accepted the result was harsh and would have reversed it but for section 249.

Again, section 249 is rationally connected with its purposes. However, the right is impaired drastically and disproportionately under the first meaning whereas under the second it is fully compliant with section 27(1) and (2). And there are other important policy reasons to adopt the second meaning. If the High Court and Court of Appeal decisions stand then an RPO is unaccountable for arbitrary, oppressive and unlawful actions which prejudice refugee claimants. In an area where people are particularly vulnerable this is most undesirable. Section 249 was not intended to permit an RPO to act outside his powers. Rather it was intended to require simple procedural fairness claims to be deferred except in exceptional circumstances.

It's also important that a precedent not be established, which allows for the removal of the RPO interview step, without it falling under the exceptions under section 149(4). Such precedent weakens the robustness of the decision-making process itself. It will be far more difficult for Tribunals to

make sound decisions on credibility without reports from the RPO. In a situation where under half of refugee appeals are granted, credibility assessments are critical. They assist the country to differentiate between those it owes obligations to under the Convention and those it does not. And I've put the annual report in the materials showing the – it's 36% of appeals are successful at the Tribunal.

WILLIAM YOUNG J:
36%.

MS JOYCHILD QC:
And then just briefly looking at the lower Courts finding that *Tannadyce*, *Singh*, *Bulk Gas* and *Love v Porirua City Council* [1984] 2 NZLR 308 (CA) supported their construction of section 249. Our response to that is that they wrong to find that *Tannadyce* supported their construction of section 249, and once again I make this point which I'm not sure the Court understands, or I may not be making the right point, but the point is that in *Tannadyce* in the Tax Administration Act section 109 the exclusionary clause was extremely wide. The appeal rights in that Act were extremely wide, enabled matters of natural justice to be addressed by the High Court on appeal.

ELIAS CJ:
Well, they could be addressed by the High Court in *Tannadyce*.

MS JOYCHILD QC:
Yes, they could.

ELIAS CJ:
And Justice Tipping emphasises that and says that – well, anyway, yes.

MS JOYCHILD QC:
Yes, Your Honour, that's the very point I'm making. They cannot be addressed by the Tribunal here. I mean –

ELIAS CJ:

I would have thought myself that we were in *Reid v Rowley* [1977] 2 NZLR 472 (CA), *Calvin v Carr* [1980] AC 574, [1979] 2 All ER 440 (PC) territory rather than in *Tannadyce* territory, but perhaps that's an argument for the Solicitor-General.

MS JOYCHILD QC:

Yes. Well, this is simply a response to the cases that were put by the Solicitor-General and which the Court accepted.

O'REGAN J:

You are just going over what you've given us already. We've read all this.

MS JOYCHILD QC:

Yes. Well, *Singh*, I'd like to talk about *Singh*. That's an important case because the Court of Appeal have relied on *Singh*. *Singh* is a Court of Appeal decision. Mr Singh arrived in the country claiming refugee status at a time when there was an APEC meeting and so there were security measures in place. He was interviewed very – he was – his claim was taken and he was given a very short time in which to prepare for his RPO interview. He objected but the interview went ahead. He had a full interview but he said, "I didn't have enough time to prepare," and Mr Hooker, his counsel, took judicial review proceedings and was not successful.

Basically, Justice Tipping in *Singh* relies upon the case of *Nicholls* where the test is ongoing prejudice and Justice Tipping says, "Well, there's no ongoing prejudice here to Mr Singh," but the facts of that were he had had his interview. Okay, it wasn't perfect but he had adequate time to prepare for the appeal. So the Court rejected that and one can see possibly why it was rejected, but we're in a completely different ball game in this case where the natural justice error is so much more egregious because there has been absolutely no right to be heard.

Other relevant decisions, just pointing out, at the conclusion, pointing out *Li v Chief Executive of the Ministry of Business, Innovation and Employment* [2017] NZHC 2977. That's a deportation decision. It's gone on appeal to the Court of Appeal at the moment and Mr Li was seen driving a car dropping off air conditioning equipment for his wife's business and he was on a visa where he could only work for his own business and he was subject to deportation. He said, you know, "I haven't had a chance to explain that I was not working. What does 'working' mean?" Well, on appeal he can only appeal on humanitarian grounds, so the argument there is that he has no right to appeal this decision and therefore section 249 doesn't apply and he has the right to judicially right. Now it's a different –

ELIAS CJ:
It's a different provision.

MS JOYCHILD QC:
It's a different provision but it's another – I'm simply putting it in to show a situation where section 249 cannot cover all situations and should not be applied in a blanket manner.

I've got no further submissions.

ELIAS CJ:
Thank you, Ms Joychild. Thank you, Madam Solicitor.

SOLICITOR-GENERAL:
May it please Your Honours. In the respondent's submission the Courts below were right to find that Mr H has to have his appeal determined first to the Immigration Protection Tribunal because in effect what is, the challenge is to the lawfulness of that decision. As Your Honour, the Chief Justice, has just mentioned to my friend, the decision, in my submission, is best described as a decision to decline refugee status in breach of natural justice. Even at its highest point, accepting that there was a breach of natural justice, the decision that can be challenged is the one declining refugee status.

That decision is final says section 138(3) unless and until it's overturned by the Tribunal and, as you've just been going through, on section 249 the –

ELIAS CJ:
Or quashed arguably. That's your argument, that's the area of argument.

SOLICITOR-GENERAL:
That decision has to be set aside before it can –

ELIAS CJ:
Yes.

SOLICITOR-GENERAL:
Yes, and section 249, as you've just been hearing, no judicial review in respect of any decision where the decision can be subject of an appeal to the IPT. And I accept, as the RPO has and as the Refugee Status Branch has, that the decision made was harsh and that it might better have been made differently as that final letter of review goes through, but the fact is that the decision was made. It's capable of review to the Tribunal.

O'REGAN J:
Well, was it made though, because it says, "I can't make a decision." Couldn't the Immigration superior person have just said, "Well, he purported to make a decision but in fact he failed to because he acknowledges himself he couldn't and we'll just go back to square one and have an interview and do it properly"?

SOLICITOR-GENERAL:
Well, the decision is to say that Mr H is not recognised as a refugee and refugee status is declined.

O'REGAN J:
Yes, but in a later paragraph he says, "I can't make that decision."

SOLICITOR-GENERAL:

Well, he says, “Having considered all the information available, and in his absence, I can’t make certain findings of credibility and so I can’t determine whether he’s a refugee, therefore I don’t.”

O’REGAN J:

If you can’t determine whether he’s a refugee or not shouldn’t you wait till you get some information so you can determine it?

SOLICITOR-GENERAL:

I think it is unhappily worded, as the Court of Appeal noticed, that decision, because what in fact is being said is that, “I haven’t got enough in front of me to decide it so I decline it.”

O’REGAN J:

So do you say that it wasn’t open to his superior to say, “He’s miscued here and we’ll just go back and do it properly”?

SOLICITOR-GENERAL:

Yes. In light of the statutory scheme –

O’REGAN J:

And if not, why not? I mean what’s the point of that?

SOLICITOR-GENERAL:

Well, because the decision was, I mean we now accept that the decision was harsh. In fact –

O’REGAN J:

Well, it’s unlawful, isn’t it, because he did comply with section 149? He didn’t fail to turn up to the interview. He wanted to come but he was sick.

SOLICITOR-GENERAL:

That was the RPO's decision at the time and having reviewed it with the benefit of the exchange with Mr H's counsel even the RPO says, "Well, yes, I see if I knew that then I might have come at it differently." But –

WILLIAM YOUNG J:

See, I mean, I, just a – I'm slightly attracted by section 13 of the Interpretation Act. This was a decision made in error. I'm by no means convinced that a Tribunal that makes a decision in error isn't entitled to rectify the error.

SOLICITOR-GENERAL:

I don't accept that the decision was one that we can, that can necessarily have been said by the RPO to have been made in error. It's not the sort of decision that Justice Glazebrook mentioned in exchange where the RPO thinks, "Oh, heavens, that's the wrong, I've been thinking about the wrong person. I've looked at the wrong file." You know, perhaps to use the language validity, you know, it's that sort of flagrant invalidity.

WILLIAM YOUNG J:

What's this section that precludes challenge, requires appeal?

O'REGAN J:

138(3).

SOLICITOR-GENERAL:

249.

O'REGAN J:

No. 138(3).

SOLICITOR-GENERAL:

138(3) says it's final until it's been – unless it's overturned.

WILLIAM YOUNG J:

Okay, well, so a decision of the High Court that's said to be final can nonetheless be re-called.

SOLICITOR-GENERAL:

Yes, for error.

WILLIAM YOUNG J:

Yes.

SOLICITOR-GENERAL:

But the decision-maker here, the RPO's decision was to say, "I don't see that I've got my five reasons that I need from the medical certificate and so I'm not going to reschedule and I am going to determine it in your absence," as actually he's entitled to do.

ELIAS CJ:

But it might be entirely understandable, one is not criticising him making that decision, but it's come to be realised that really it's wrong. So…

SOLICITOR-GENERAL:

And in this context with a full appeal to the next specialist Tribunal –

ELIAS CJ:

Well, does that mean that you're going to accept the appeal, that you're going to admit that the appeal should be allowed?

SOLICITOR-GENERAL:

Well, no, because the factual and credibility determinations have to be made by the Tribunal.

O'REGAN J:

Yes, but the remedy that is sought is that the RPO does his job and has an interview and the Tribunal can't give them that.

SOLICITOR-GENERAL:

No, I accept that the Tribunal cannot give – they're not allowed to send it back even if they agree that it's been unfair, even if they think the process could have been better they're not allowed to send it back. They can either determine the matter or not. But in my submission it cannot be right to say that an RPO's or any administrative decision-maker after which there is a full de novo appeal must be right in every aspect of process before that de novo appeal becomes something that is curative.

ELIAS CJ:

No, and no one's suggesting that it has to be right in every aspect of process.

SOLICITOR-GENERAL:

So my submission is that even accepting there was a natural justice failure on the way –

GLAZEBROOK J:

Well, it's a vitiating natural justice error on the argument that's being run. It's a matter of degree.

SOLICITOR-GENERAL:

Well, yes, and the argument that's being run as I understand it is that the RPO has to make a decision in accordance with the law and one of the failings to make the decision in accordance with law is a failure to give an interview. Now I can only put this at this point, the statute doesn't require an interview at the RPO point but I do accept that I can't put too much pressure or effort on that point because in fact in practice and in substance that is what happens and my friend's taken Your Honours to the….

GLAZEBROOK J:

And section 149(4) does suggest that the interview, while it's not prescribed by statute, it is certainly noted in statute and I would have thought that 149(4) has to be read as in fact the Immigration Branch does to say without reasonable excuse failed to turn up at an interview.

SOLICITOR-GENERAL:

Yes, that's right and that was the RPO's view at the time.

GLAZEBROOK J:

And, of course, that's – so that fails to attend an interview has to have a reading without reasonable excuse. That is how it's in fact interpreted by the Immigration Branch, or the refugee, whichever –

SOLICITOR-GENERAL:

Sorry, I'm not following Your Honour's question to me.

GLAZEBROOK J:

Well, just failing to attend an interview in 149(4) assumes that there is an interview.

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

And it's not merely failure to turn up because it's failure to turn up without reasonable excuse.

SOLICITOR-GENERAL:

Section 149(4) is unusual, I think, in that it seems to me to be a provision that is there really to avoid doubt because if one of the other powers had been exercised in section 149(1), say, that the officer asked the claimant to produce certain documents and they couldn't or didn't, then I would say just as a matter of law they were also able to determine the matter without seeing those documents. So it is an unusual sort of belts and braces, subsection (4). Yes, you are entitled to ask them to an interview. If they don't attend, you can determine the matter anyway. I don't think that a reference to who fails to attend at the appointed time and place needs any more gloss. I just find it an unusual provision because, of course, if a decision-maker asks for things that they don't get, they can make the decision. So I don't know that

subparagraph (4) takes us any further on whether this is a sort of vitiating error, such that this decision is said to be…

ELIAS CJ:

It's pretty vitiating if the person making the decision says, "I can't make a decision because I haven't had the interview."

SOLICITOR-GENERAL:

Well, "I can't recognise you as a refugee," yes.

WILLIAM YOUNG J:

Well, is it one – we sort of get hung up sometimes with language and nullity and so on, but to try to avoid that there really wasn't a hearing here.

SOLICITOR-GENERAL:

There absolutely wasn't a hearing, I accept that.

WILLIAM YOUNG J:

And the scheme of the statute is there will be a hearing and if the refugee claimant is unsuccessful a second hearing.

SOLICITOR-GENERAL:

Well, Sir, that was the point I was making earlier. That's not in the statute that there will be a hearing, that the interview may be – that the Refugee and Protection Officer may invite the claimant to a hearing.

WILLIAM YOUNG J:

No, yes, I'm not necessarily talking –

ELIAS CJ:

There has to be a hearing though.

WILLIAM YOUNG J:

I'm talking about a hearing or generally probably it will be an interview, but the claimant has to be given an opportunity to –

ELIAS CJ:

Section 27 Bill of Rights Act, and section 3.

GLAZEBROOK J:

Well, in any event they say that you have to provide all the information, therefore you must be given an opportunity to provide the information. So there's a requirement that –

SOLICITOR-GENERAL:

By contrast to the IPT's powers where they must give an interview if there hasn't been one in the lower Tribunal.

WILLIAM YOUNG J:

We'd sort of – in a way it –

O'REGAN J:

Yes, but the fact that he said, "I can't deal with this without an interview," is indicative that the process requires it as a matter of fact even if it's not as a matter of detailed process required by the statute.

SOLICITOR-GENERAL:

And as I've already submitted and I say it again, I can't put that very high because the whole process as set out in the documents, that's at tab 24 of the authorities, anticipates and tells the claimant, "This is a really important part of your process." I accept that. But in my submission that can be cured by the de novo appeal like other –

WILLIAM YOUNG J:

But it is a different process then though, isn't it? That's the point that the –

SOLICITOR-GENERAL:

Well, it's different but I reject, you know, actually quite strongly resist the proposition that my friend put to you that the RPO process is better. The RPO

process is, you know, the Executive Branch, the Immigration New Zealand person.

ELIAS CJ:

Well, so is the Tribunal, the Executive Branch, may be under a duty – it may be independent and it may be under a duty to act judicially but that's where it's positioned.

SOLICITOR-GENERAL:

Thank you, yes, I accept that, but the point that you have just made is not ours to make. An independent specialist Tribunal where – I just would like to take Your Honours to their process because –

O'REGAN J:

But I don't think Ms Joychild was saying the Tribunal is inferior to the RPO. She was saying having one hearing at the Tribunal is inferior to having two, one at the RPO and one at the Tribunal. So she wasn't trying to downgrade the benefit of the Tribunal. She was just saying it's not as good if you haven't had a proper process at the first instance.

ELIAS CJ:

Sorry, can I just say do we even need to grade them as better or not? This is the statutory scheme.

SOLICITOR-GENERAL:

Well, the question as to whether the de novo appeal can cure the error –

ELIAS CJ:

Yes, well, that's I think the issue.

SOLICITOR-GENERAL:

– does rely on what can or does happen at the IPT, and I if I could just address Your Honour, Justice O'Regan's, point, I do understand my friend to say that because the RPO provides what she says is a draft of the RPO's

decision, which I don't agree is the case, and because that doesn't happen at the Tribunal, there isn't an opportunity to understand the Tribunal's thinking in the same way that there is for the RPO and it is a lesser – in fact the written submissions put it in that way. It's an enhanced right before the RPO. That's a separate point, as I understand it, than two goes at credibility are better than one. Can I take you –

ELIAS CJ:

It's just an extra procedural step that you get at one level and you don't get at the other, which was just as I understood it a back-up argument for saying that especially in this context that that extra procedural step is important because of interpretation difficulties and matters of that nature.

SOLICITOR-GENERAL:

Well, what is in fact –

O'REGAN J:

But all she's saying is a proper process at both levels is better than a proper process at one level. I mean that's just incontrovertible, isn't it?

SOLICITOR-GENERAL:

Well, I can accept that but the reason that there is an appeal is because something has gone wrong the first time round and a de novo –

O'REGAN J:

But in this case it went so wrong that there wasn't a decision.

SOLICITOR-GENERAL:

Well, I must, I have to accept that there will be those decisions. I say this isn't one of them. So this is a decision that is flawed –

WILLIAM YOUNG J:

There's a whole line of cases of this that are now perhaps old-fashioned but they go back to *Denton v Auckland City Council* [1969] NZLR 256.

SOLICITOR-GENERAL:

Yes.

WILLIAM YOUNG J:

And I agree that perhaps increasingly there has been a view that an unfair first instance hearing can be dealt with by an appeal. But those are cases that in a way are sort of slightly more rigidly reasoned. If you look at it in broad terms there hasn't – I mean to my way of thinking there really wasn't a hearing the first time round, and the bar, the bar on judicial review of decisions of the RPO may not have been intended to capture situations where there hasn't been a hearing in any real sense.

SOLICITOR-GENERAL:

Well, I can't agree with that, Sir. I would say that the scheme of the Act shows that the RPO's process is one which yes, it must be, of course, compliant with natural justice and it must, of course, be compliant with our obligations to treat refugees, claimants of refugee status fairly, with utmost fairness. But if that doesn't happen, as it must be admitted will happen, what happens next is an entirely fresh process with a specialist Tribunal that, if I take Your Honours through the practice note, the claimant is given an oral hearing, is represented if they wish to be represented by counsel, counsel are entitled to re-examine them after the Tribunal has questioned them, so all those concerns that my friend raised about not understanding where the decision-maker was coming from and where they might be making mistakes in my submission can be cured. If the matter is to go to the IPT, Mr H has filed an appeal, there's no question there, he must, he must have that process, and can I just point out a matter that Your Honour, Justice Young, was inquiring about? That section that says the IPT must give an interview unless the person…

WILLIAM YOUNG J:

Doesn't have to if.

SOLICITOR-GENERAL:

Well, there was just a critical second subparagraph that Your Honour didn't get taken to or didn't see there. It's where the person hasn't been interviewed by the RPO and the Tribunal considers that they are likely to be vexatious or…

WILLIAM YOUNG J:

Yes.

SOLICITOR-GENERAL:

It's a pretty high…

ELIAS CJ:

It's "or", isn't it? It's not – does it double up?

SOLICITOR-GENERAL:

No, it was an "and" in that.

GLAZEBROOK J:

Which section are we, sorry? I was looking for it before and couldn't find it again.

SOLICITOR-GENERAL:

Section 233.

WILLIAM YOUNG J:

No, I was aware of (b) was in there.

SOLICITOR-GENERAL:

Because what Mr H needs to do is unhook the RPO's decision, and now I'm facing the challenge that that can be done just on a basis of saying that decision was so flawed that we don't view it as a decision, such that he can just start again.

ELIAS CJ:

Well, it's not the scheme that's been provided by the statute.

SOLICITOR-GENERAL:

No. I must accept that and I must accept the decision was not a good one. But it –

ELIAS CJ:

Well, why not cut through it?

SOLICITOR-GENERAL:

Well, as you saw from the decision that was – the letter that you were taken to by the manager, the decision is said by that statute to be final until or unless it's overturned, and that in my submission means that RSB just can't say, "Oh, yes, I agree."

WILLIAM YOUNG J:

But why does that have that effect in relation to the RPO decision but not the same effect in relation to a judgment of a Court declared to be final?

SOLICITOR-GENERAL:

I'd say in combination with section 249 which says what you do next is go through to the IPT and no judicial review can be brought until that matter has been determined. That's a powerful combination of finality, or rather not – of finality or another step, and this is in a context of a statutory framework which is clearly established to move things along. Yes, fairly, of course, but to keep things moving. I mean the Court has recognised that as the way the established, sorry, the way the statute is established to move processes forward so that there can't be, not suggesting that this is the case here, but there can't be delays and hold-ups as under previous systems. So it does need to keep moving. I think that is a very powerful counter to section 13 of the Interpretation Act which, yes, often is resorted to to say, "That was an error and I'll do it again."

ELIAS CJ:

Can I just, sorry, on section 233, so is the effect of 233(3) that the Tribunal can't form the view or can't exercise that by forming the view that it's prima facie manifestly unfounded or abusive or relates to a subsequent claim unless there has been an interview at first instance?

SOLICITOR-GENERAL:

I think that must be right because they –

ELIAS CJ:

I think that is what that's saying which does tend to again indicate that in the statutory scheme the interview by the RPO is pretty important.

SOLICITOR-GENERAL:

Yes, although again the provision –

ELIAS CJ:

Because on your argument why wouldn't the Tribunal – I see, yes, yes.

SOLICITOR-GENERAL:

I was only going to point out the other provision that I've already gone to that that allows the RPO to determine a matter without the interview if the person doesn't turn up and yes, I accept that here there are good reasons why that didn't happen, but it must still keep moving. That is really the basic submission, that the statute is clearly setting up a process that keeps moving to a much – to a very wide open process at the Tribunal which, in my submission, can cure what went wrong.

ELIAS CJ:

All right, but if it has gone off the rails you say it can be fixed by appeal. Why can't it be fixed fast by a review which allows the RPO to hear and determine according to law?

GLAZEBROOK J:

Or fixed by the supervisor in fact saying, "This went wrong. Let's do it again."

ELIAS CJ:

Yes, let's do it.

GLAZEBROOK J:

"We agree it went wrong. Let's do it again." Could have been fixed within a week.

SOLICITOR-GENERAL:

Well, I've addressed that point, Your Honour, with the statutory scheme that says it's final.

GLAZEBROOK J:

Well I know you have except that it doesn't actually – the issue about judicial review doesn't answer the point about the Interpretation Act in terms of the powers of the immigration officer or the Immigration Office to open, re-open that decision if they've made an error, and to say it's not the type of error that's been looked at didn't really answer that for me.

SOLICITOR-GENERAL:

Well, because the error that is made is a process error, natural justice error on the way to making a decision, the judicial review would have to be of the decision itself.

GLAZEBROOK J:

No, no, I'm not talking about that. I'm saying why can't the immigration officer or the supervisor in this case on the 19th of May, why couldn't he have said, "Whoops, we have made this error"? That would have been by far the quicker way of dealing with this. It would have been dealt with by another interview being scheduled within a week or so and the whole thing would have gone away.

SOLICITOR-GENERAL:

I, I have answered that, yes.

ELIAS CJ:

Or do you say that's because the statute says it's final and therefore they are functus?

SOLICITOR-GENERAL:

And the statute is clearly anticipating not allowing judicial reviews of process and parts but keeping decisions together through to a specialist Tribunal and at that point –

GLAZEBROOK J:

But that still doesn't answer for me why the Immigration Office itself could not decide as it actually did that this was an unfair process, had been wrongly done and should be done again.

SOLICITOR-GENERAL:

I feel like I've really answered that question, sorry. I can't –

WILLIAM YOUNG J:

I suppose you don't really want to open up another front of judicial review.

SOLICITOR-GENERAL

The Tribunal might do it. The Tribunal might overturn it. That's what the RPO's view is. "I can't do anything now. I'm left, I've made it."

ELIAS CJ:

That could really be a much longer process than simply the Court – I know that this is not what Justice Glazebrook is examining with you but I'm intrigued by why the quickest thing, if you're right, that there is no slip rule that can be invoked in this case, by the Court saying go back and do it again on judicial review and the Crown could acquiesce in that on your argument.

SOLICITOR-GENERAL:

If the final decision hadn't been taken I think that is right. Section 247 would have said – let's just say it went slightly differently. If the person said, "I'm not going to reschedule your interview," and Mr H moved then to seek judicial review of that decision, that would be possible, section 247 would allow that to happen.

ELIAS CJ:

Well, isn't that in substance what is happening?

SOLICITOR-GENERAL:

No, because the critical thing on our case is that the final decision has been made and the statute says that goes to an appeal, to a fresh decision-maker.

ELIAS CJ:

But it was done in one hit. Sorry, yes.

O'REGAN J:

Surely that would make people running this process within the Immigration Department cautious about jumping the gun in the way that happened here. If that really is right, that by making a final decision completely prematurely that's cut off a judicial review that would otherwise be available, surely that means they should be cautious about doing that, doesn't it?

SOLICITOR-GENERAL:

Well, it should lead to good decision-making, I agree with that, and I think this is a good case to learn that from.

O'REGAN J:

So effectively the RPO gets to immunise his actions from judicial review by making a premature final decision.

SOLICITOR-GENERAL:

Well, I would say not entirely because if the matter goes through the Tribunal and the taint or the unfairness is not cured then the High Court will consider an application for leave for a judicial review and the applicant will say, "I had this unfair thing that happened over here. It has continued to be a…

GLAZEBROOK J:

But how could it possibly continue if your argument is that appeal cures it?

SOLICITOR-GENERAL:

My argument is to say that it doesn't entirely close off the judicial review prospect in answer to Justice O'Regan because if it doesn't cure it, if it cures it, no issue.

GLAZEBROOK J:

But you say just by its nature it's going to cure it, as I understood.

WILLIAM YOUNG J:

You're saying it's a long stop and if for some reason or other it's not a cure, well, then there's judicial review.

SOLICITOR-GENERAL:

Quite so.

GLAZEBROOK J:

Well…

SOLICITOR-GENERAL:

On which the Court has very broad discretion to grant leave if it's…

O'REGAN J:

Yes, but by then the – if on this hypothesis the – Mr H is lost in the Tribunal otherwise he wouldn't be seeking judicial review, and you've now got a merits decision by the Tribunal saying your claim fails. You know, I mean that's a very difficult thing.

SOLICITOR-GENERAL:

Well, we don't know why – I mean, it's very difficult for us actually.

O'REGAN J:

And he's saying, "Well, my claim failed," but in fact something really bad happened a year before in a completely different process, the Court is not going to be that interested, is it?

SOLICITOR-GENERAL:

Well, it's very difficult for us now to hypothesise, of course, about what the Tribunal might find. The Tribunal might not find on a credibility basis at all. It might be a factual basis. It might be something else entirely as to why Mr H might succeed or fail at the next step.

O'REGAN J:

But that makes a complete happenstance as to whether judicial review post-IPT will be of any help to him at all.

SOLICITOR-GENERAL:

Well, if the High Court considers there to be any reason whatsoever to grant leave then leave can be granted.

O'REGAN J:

And you're saying the High Court could then order that the whole process goes back to the RPO and starts again?

SOLICITOR-GENERAL:

In my submission the High Court could knock over both the Tribunal and the RPO's decision at that point and a judicial review if there was an error such that wasn't able to be and wasn't cured through the process. And I know Your Honours have the challenge for the Crown about, well, it would have been a lot better and a lot quicker if it had been done differently. That was considered. It was considered not open. It would have been a lot quicker to have had that appeal heard and we would actually know the answer and

whether it did cure the natural justice breach, and that's the step that we say the Court of Appeal and the High Court were right.

ELIAS CJ:

Well, it may cure the natural justice breach but is it in conformity with the scheme of the legislation, and surely if the RPO had simply been told by the High Court, "Reconsider," that would have been the fastest and would have been in accordance with the statutory scheme, what's envisaged, otherwise why not in all cases go straight to the Tribunal?

SOLICITOR-GENERAL:

Well, the Tribunal has to be capable of hearing the appeal. It has to be within the jurisdiction of the Tribunal. So there might be decisions that aren't that. For example, a decision that the RPO says, "I'm not going to give you a hearing at which I undertake to maintain confidentiality of your name or your family's names," the person could and I would say should seek the Court's oversight of that sort of administrative decision-making, and it can't be dealt with by the Tribunal because if the hearing went ahead on that basis, of course, confidentiality, the problem is done and can't be cured. So if there wasn't a final decision, yes, the supervising power of the Court should be brought to bear. Anyway, I'm repeating my argument which I understand Your Honours have, that the decision is final.

ELIAS CJ:

Sorry, we should take the adjournment. But I don't understand that answer because there will always be a final decision. It may be a decision to decline or to grant but that's the final decision and you say that that's it.

SOLICITOR-GENERAL:

But it has to be a final decision that the Tribunal can consider on appeal.

ELIAS CJ:

And you can never get judicial review of that on your argument until it's gone on appeal.

SOLICITOR-GENERAL:
Yes.

ELIAS CJ:
Okay. All right, we'll take the adjournment now, thank you.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.17 PM

ELIAS CJ:
Thank you, Madam Solicitor.

SOLICITOR-GENERAL:
Thank you, Your Honours. We were at the point at the break I think you'd understood the Crown submission that this is a matter that was not open to the Refugee and Protection Officer to set aside, and I do urge Your Honours to be slow to insert what I would say is a fresh de facto review right if the RPO is said to have been able to determine for himself the lawfulness of his decision having made it, because if I come to the purpose of the statutory regime, I mean it's quite clear, and I'll take Your Honours to the parts of the statute that say so, but that's intended to be a streamlined process that removes the incentives on any person here, a refugee, I don't mean Mr H in particular but generally a person who is invoking the protection of the Court, sorry, of the state, to delay or to avoid having their case finally determined if that case will inexorably lead them to deportation. So the statute I would submit is a code in that it is intended to be strict with processes that offer fairness but don't offer opportunities for delay.

The purpose provision of Part 7, which is the appeals, reviews and other proceedings, the purpose of the Part is, at section 184, to provide comprehensively for a system of appeal and review. In my submission, this Court ought not insert what I would describe as a de facto review process encouraging a completed RPO decision to be subject to further submissions

and process as to whether it was unlawful such that it could be considered to have been set aside.

Your Honours might say in response to that, well, shouldn't the Court in judicial review be able to make that determination and what's wrong with that, and in my submission we come straight up against section 249(1) again. No judicial review of any decision or effect of any decision that can be taken to the Tribunal can be the subject of judicial review until that matter is determined.

Before I leave the RPO's decision, might I come back to one point that Justice O'Regan was raising with me before the break? The Court of Appeal says it better than I did, in response to you, Sir, at paragraph 42 when they observed that the phraseology the RPO used of "cannot be determined" is, as they say, a little at odds with the statutory requirement that a person must be recognised as a refugee if they are a refugee, the Court going on at 45 to say, "In our view, the RPO's decision is properly understood as saying Mr H has not established his claim for recognition," and that decision is effective on its terms until it is successfully appealed or reviewed. That, I say, is the right approach to the statutory scheme. It is the right approach in terms of the modern approach to validity. I was thinking about the exchange we had before lunch and was concerned to think that we might be driven back into thinking about void and voidable decisions of that absolute theory of invalidity if it is left open for an RPO to set aside their own decision on the basis that it was so unlawful as to vitiate it. Better, in my submission, and more consistent with the scheme of the Act to say –

ELIAS CJ:

But you might be driven to void, voidable. That's the whole point that *Anisminic* was directed at curing but that was by saying that any material error of law can't be – the jurisdiction of the Courts to supervise can't be ousted. You want to say the jurisdiction of the Courts is ousted, so it rather does or…

SOLICITOR-GENERAL:

Sorry, I don't mean to shake my head at Your Honours. I don't say it's ousted. I say it is delayed or…

ELIAS CJ:

It's trammelled, yes.

SOLICITOR-GENERAL:

Yes. Delayed or regulated, but I absolutely don't, I say, submit that this isn't a privative clause of the type that properly would draw the attention of the Court to look at and what circumstances might the Court be able to look. The Court can and in my submission would likely give leave if it could be shown that even despite a de novo appeal at the Tribunal the taint or the breach or the effect of that breach has not been removed.

ELIAS CJ:

But this taint can't be removed if the taint is simply that the statutory scheme hasn't been observed and it will always be cured, so you are effectively only going to ever be able to get judicial review of the Tribunal's decision.

SOLICITOR-GENERAL:

Well, Your Honour, I disagree, with respect, that that's the statutory scheme that hasn't been followed. The scheme anticipates decisions being taken without interview. A person might not even be invited for interview, and having been invited for interview the RPO is entitled to make the decision if that person doesn't turn up.

GLAZEBROOK J:

Well, they can't under the policy not be invited for interview.

SOLICITOR-GENERAL:

It's true that the policy, the policy anticipates that they'll be invited to interview.

GLAZEBROOK J:
And so does 149 –

SOLICITOR-GENERAL:
(4).

GLAZEBROOK J:
– (5) or (4) or whatever it is.

SOLICITOR-GENERAL:
Well, I'm not sure that that subsection takes us to that. It's just saying if you've been invited to an interview and you don't turn up that can be determined without you. But I do accept the policy does anticipate and encourages claimants to appreciate that's a really important part of their process. I can't get past that.

GLAZEBROOK J:
Well, it would be just about impossible to look at credibility, wouldn't it, except effectively through interview? So in practice it would not be possible for somebody lawfully to conduct a review without actually having seen the person.

SOLICITOR-GENERAL:
Well, I don't agree with that sort of as in a complete statement because I think it is possible. The RPO –

GLAZEBROOK J:
Well, there may be circumstances where the grounds, even if you accepted the full story, would not meet but that's a different matter.

SOLICITOR-GENERAL:
But here I'm happy to accept the proposition that what was before the RPO without more was insufficient for the – well, as the RPO himself decided, he was unable to –

GLAZEBROOK J:

No, I'm not denying that, it's just that all I was saying is that it wouldn't have been open to the officer in that case to say, "I'm not having an interview. I'm not actually going to try and test credibility because I don't feel like it, and I'll deny the claim because the statement isn't sufficient." Whether there had been judicial review of that or what is another matter but it would not have been performing the duty that they had been required to perform under the Act.

SOLICITOR-GENERAL:

In that it would be reviewed as a capricious decision, if we approach it in just public law terms, but not because it's not complying with any aspect of the legislation. I do want to come back to that point that the Chief Justice has raised, because Your Honour's point to me before was that the Tribunal cannot cure where an RPO fails to comply with provisions of the legislation. So the first part to my submission there is that they're not specific provisions of the legislation requiring interview but even if they were that can be cured by the Tribunal because the Tribunal's decision is a, well, as Your Honours will know, a fresh decision. Everything is at large. It matters not whether the IPT, sorry, whether the –

ELIAS CJ:

No, I'm sorry, all I was really referring to was the structure of the legislation which envisages the – leaving aside your point that you don't have to have an interview but it's a two-tier system, and it is appeal, and it doesn't have the ability to, as was said, to comment, doesn't have that elaboration. So it isn't really what is envisaged. Something has gone a bit wrong here in terms of the statutory scheme.

SOLICITOR-GENERAL:

Yes, and I can't resist that, that that is true. Something has gone wrong here. So my submission then is that it can be cured by the Tribunal.

Now I wanted to take Your Honours to two things that you have already seen but I want to emphasise different parts. They are both –

ELIAS CJ:
Sorry, can I just say on your submission it will inevitably be cured. There really won't be anything left to complain about once the Tribunal's given its decision unless the Tribunal falls into additional error.

SOLICITOR-GENERAL:
Yes, as I understand Mr H's complaint it is that, "I haven't had an opportunity to tell my story and that was unfair, and I don't have a basis from which the Tribunal can assess whether I've been consistent in the way I've told my story before." In my submission all of that can be cured by the Tribunal –

ELIAS CJ:
Yes.

SOLICITOR-GENERAL:
– as you say unless it falls into error, of course.

Tab 24 of the second bundle of authorities, which is purple. We've seen this before. It's the MBIE pamphlet. I understood my friend to be making the submission that one of the superior things about the RPO's process was that the claimant gets a draft decision report.

GLAZEBROOK J:
Sorry, where are you?

SOLICITOR-GENERAL:
At tab 24 in the purple second volume, and page 10 of that document, in the middle of that first column. After your interview the RPO will write a report (interview report) summarising your claim. The report will be sent to you and your representative. When you receive the interview report you have

three weeks to comment on that report and to make further submissions in support of your claim. That is what is sent.

It goes on to say, after that heavy line on the page, read it carefully, in your response say whether you agree it is a correct summary of what you have told the RPO. If it is not correct, you should state what information is wrong and what it should say. You should also answer any further questions or concerns that are raised in the interview report. But that interview report is a summary of the claim as understood by the RPO.

By contrast, if you turn two tabs on, 26, to the Immigration Protection Tribunal's practice note, at page 24, very bottom of the page, "Procedure at Hearing."

Sorry, before I go on to that might I just note in passing, paragraph 19 on page 22? I don't think that's contentious but just to point out all appeals proceed by way of hearing de novo, and all issues of law, credibility and fact are at large, except the Tribunal may rely on previous credibility or fact by it or other appeal bodies, or on any conviction.

But the point that I was wanting to turn up is at page 26, very bottom of the page. Sorry, page 25. It sets out the process. So the member hearing the matter introduces it. The appellant, who is able to be represented by counsel as the appellant is here, makes opening submissions. The decision might be taken then to take evidence as read but otherwise the appellant is called and, and any other witnesses are called and questioned in that order.

So the Tribunal asks questions and both the appellant and the appellant's counsel are capable of hearing from the Tribunal the questions and the issues that they want to get the applicant, appellant as they are there, to answer. It will be clear in my submission from a good process at the Tribunal what is bothering, if anything, the Tribunal member and what matters they are being very careful to ensure they've got all of the details to determine.

The next steps involve cross-examination by counsel for the respondent. The respondent is a party. The respondent Ministry, Immigration New Zealand, is a party to every appeal but as this practice note also identifies invariably the respondent doesn't appear and the matter is done on the informal process with the appellant and the Tribunal. But it in any event, it allows for cross-examination. But then, in my opinion, submission, critically, re-examination by the appellant's counsel. Then, absent the respondent, closing submissions.

That, in my submission, is a very full exposition of the issues and the case that the Tribunal has to answer, much more so than the RPO offers.

So if in this matter the appellant who has an appeal which is stayed as I understand pending the outcome of this challenge, if he was to say to the Tribunal that he is very aggrieved, as we, you know, as I'm prepared to accept and understand, very aggrieved at the process that has gone one, it's open to the Tribunal to tailor its own processes to ensure that whatever it is that aggrieves the appellant can be dealt with substantively. Not technically. They can't technically send it back, but in substance.

ELLEN FRANCE J:

But that, the tailoring of the processes, wouldn't get them to saying, for example, or would it, that the RPO officers need to change their processes?

SOLICITOR-GENERAL:

Well, in my submission, Your Honour, I think it is open to the Tribunal to make such a criticism of the process below. It is set in place to be an independent and specialist Tribunal with members chosen particularly for their understanding of law and of immigration matters. I think it is entirely open to them to say this was what happened in the Court, sorry, in the decision below. "We were unassisted. It was not helpful to us." Whatever is the criticism they want to make about the process, and in addition, in my submission, the Chair of the Tribunal might well raise with the head of Immigration New Zealand

such a process flaw. Those are, sorry, Your Honours, if you could take it from me that those are communications that occur between the Chair and the Ministry as to process and how things are run. I would certainly anticipate that either through the appeal itself and the decision or through that process criticism of process below will be raised.

O'REGAN J:
It's not quite the same as *Tannadyce* though, is it, where the challenge proceeding was actually commenced in the High, or could be, commenced in the High Court. So you got effectively a like for like process as judicial review where a High Court Judge could make directions about how the – and make criticisms of the Department if necessary and call them to account and in the same way as judicial review here, it's going to a lower Tribunal. It's a single member Tribunal, I think, isn't it?

SOLICITOR-GENERAL:
It can be. It can be single member, yes.

O'REGAN J:
Yes, and there isn't any – I mean they couldn't make a declaration, for example.

SOLICITOR-GENERAL:
No, that's right, and so those remedies, if they were to come, they would have to come from the High Court. I do accept that. If the problem isn't resolved or isn't adequately resolved, no the High Court will be, if the High Court is asked for leave to bring an appeal or to bring a judicial review then it might well be able to supervise which part goes where, but I do accept your point, of course, Your Honour, that it is after the Tribunal's decision.

The point that I want to make about 249, and I've already submitted that it's not privative, it needs to be read together with the general right to judicial review as provided in the Bill of Rights Act section 27(2), a right that is anticipated or – anticipated, that can be prescribed in time perhaps, that the

Courts have certainly accepted that prescriptions as to time limits are not privative but more regulatory or controlling how the right gets exercised.

ELIAS CJ:

It's a matter of degree though, isn't it, whether it actually impedes access to the Courts which is the issue.

SOLICITOR-GENERAL:

Yes, indeed. Yes, and the Court here has the power to extend those time restrictions if need be. Justice Palmer dealt with the discretion to grant leave in a case that's in the bundle, I don't need to take Your Honours to it, called *RM*. It's tab 14 in the authorities, and with respect I adopt what His Honour said there which is that the discretion to grant leave to judicial review is very broad, given that it is for matters that couldn't have been dealt with before the Tribunal or of general and public importance or for any other reason. His Honour said that's a window left open and it is for the Court in its discretion to open and close it.

ELIAS CJ:

But it's not for the party and that's the access to Court issue.

SOLICITOR-GENERAL:

Well, it's an application the party can make.

ELIAS CJ:

So it's privative as far as the litigants are concerned because it will require the Court to make the determination.

SOLICITOR-GENERAL:

But the Court – yes, quite so, but the Court determines it on very broad – for any other reason whatever.

GLAZEBROOK J:

What happens to the person in the meantime?

SOLICITOR-GENERAL:

The definition of "claimant" in the Immigration Act, I think – sorry, Your Honour, are you getting at what happens to the claimant in terms of their liability to be deported?

GLAZEBROOK J:

Yes.

SOLICITOR-GENERAL:

The definition of "claimant" which is in section 4 of the Immigration Act is a person who has sought – I'll just find it because it is expansive and it will continue to apply to the person so long as they have extant appeals or reviews. Claimant is a person who has made a claim and doesn't include a person whose claim has been finally determined. So the person who continues to pursue their claim, whether it's before the Tribunal or Courts, cannot be deported.

GLAZEBROOK J:

Is there something specific about that on review, because there is something specific on the appeal?

SOLICITOR-GENERAL:

Sorry, Your Honour, that…

GLAZEBROOK J:

Because I haven't looked at this recently but I thought that had changed, and I'm not sure they have work permits either, but I might be wrong.

SOLICITOR-GENERAL:

As I understand, if the claim, well, just going back to that definition, if the claim to refugee status has not been finally determined.

GLAZEBROOK J:

But what does "finally determined" mean because it has been finally determined under the Tribunal. There's just a review.

SOLICITOR-GENERAL:

And I think Your Honour is right that there is a difference if the appeals are over and there's still a judicial review on foot, but can I –

GLAZEBROOK J:

I'm just not sure of the answer to it.

SOLICITOR-GENERAL:

I should come back to you if I may with the right provision because I don't want to put you wrong on that important point.

ELLEN FRANCE J:

Yes, because that definition of claimant refers to the meaning of, within the meaning of 128 and 128 is dealing with appeal, appeals.

GLAZEBROOK J:

I'm sure the Crown doesn't deport while there's an extant judicial review but that's discretionary as against…

SOLICITOR-GENERAL:

Yes, thank you to Your Honour, Justice France, that's right, section 128. A matter is not finally determined until the expiry of the appeal period or, if they have lodged an appeal, the appeal is determined. So if appeals were completed but a review was continuing, that person might be able to be determined to be liable for deportation.

ELIAS CJ:

Why do you say the finality provision, the way it's expressed, doesn't also prevent judicial review? What's the – I'm sorry, I haven't got it in front of me. I'm just going back to that, because you –

SOLICITOR-GENERAL:
Do you mean 138(3)?

ELIAS CJ:
Yes.

SOLICITOR-GENERAL:
Sorry, Your Honour, I do say it prevents judicial review. Sorry, you mean in the end, after the appeal? I beg your pardon.

ELIAS CJ:
Well, I mean judicial review of the Tribunal.

SOLICITOR-GENERAL:
I'm sorry, I'm just not quite following your question. So in my submission the RPO makes his or her decision, then if there's an appeal to the Tribunal and it's determined.

ELIAS CJ:
And the Tribunal doesn't overturn.

SOLICITOR-GENERAL:
So also declines, well, in which case also declines to recognise him as a refugee. It's not a matter of finding an error in the process below, just the fresh decision.

ELIAS CJ:
Yes.

SOLICITOR-GENERAL:
And your question I think that is why cannot there not be a judicial review?

ELIAS CJ:
Well, does this provision also mean that there is no judicial review available?

SOLICITOR-GENERAL:

Because it hasn't been overturned by the Tribunal.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Actually, that isn't the submission that is made.

ELIAS CJ:

No, but I'm just wondering why.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

I'm just trying to – it's sort of reductio ad absurbdum I'm, I'm feeling for here. It's not terribly well drafted, any of this, is it?

SOLICITOR-GENERAL:

Actually that's not – no, it's isn't, and it's not a submission that the Crown would make actually to say that that would hold off the judicial review Court even after…

ELIAS CJ:

Well, maybe not today, Madam Solicitor.

SOLICITOR-GENERAL:

Well, I have to give that section 249 its proper reading and it does say that the prohibition on judicial review is until the matter has been determined by the Tribunal. Once determined, and not unhooked –

ELIAS CJ:

Yes, I suppose that'd set up a conflict otherwise. But it's not very happily expressed.

SOLICITOR-GENERAL:

It would be most common for the Tribunal decision to be the one that gets challenged, but there must be instants, this might be one of them, where what has happened in the process below is of such import and not cured that 249(1) anticipates that it could be got at.

ELIAS CJ:

Really 249(1), that's the – (1) is the prohibition on review of interlocutory steps.

SOLICITOR-GENERAL:

That's 249(2), I would say, was the interlocutory steps. Matters that are already before the Tribunal, you can't bring review proceedings in respect of any matter, which has its own definition in 183.

ELIAS CJ:

And is this a matter before the Tribunal if there's an application for review of the RPO which would mean that there isn't anything to be appealed? I mean these things could be to stop judicial review which would the Tribunal getting on with the hearing. It can perhaps be read in that way. I haven't read it that way because I was following the submissions but now that I look at it, it may be a very much more limited protection than your submission would suggest.

SOLICITOR-GENERAL:

Is Your Honour looking at subsection (2) or (1)?

ELIAS CJ:

Well, I'm looking at the whole really.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Reading it as a whole.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

That it's only about matters being dealt with by the Tribunal.

SOLICITOR-GENERAL:

But subsection (1), I might misunderstand Your Honour, subsection (1) is about decisions or the effect of decisions that may be subject to an appeal. So I think that's a reference to what's within the Tribunal's jurisdiction in the heading.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Because unless an appeal is made, so it's sort of future looking, unless the appeal is made and it's determined, and then subparagraph (2) is about within Tribunal matters, I would say.

ELIAS CJ:

Yes, yes.

O'REGAN J:

But arguably this is a matter before the Tribunal now because Mr H did appeal, and so an appeal number will have been allocated and it will be a current proceeding for the Tribunal, won't it?

SOLICITOR-GENERAL:

Yes, and 183 defines matters, although a matter, says 183, means an application made by an RPO under section 144 or 147 relating to cessation or cancellation of recognition, so it's not one of those, or an application made by the Minister under section 212 to the Tribunal about whether a person has

breached their conditions, so it's not one of those either. So if "matter" is given its definition meaning…

ELIAS CJ:
And what's the definition again?

SOLICITOR-GENERAL:
An application made by a refugee and protection officer under section 144 or 147 in relation to cessation or cancellation of recognition.

GLAZEBROOK J:
So you say it's subsection (1) always, is that the submission?

SOLICITOR-GENERAL:
Yes.

GLAZEBROOK J:
I think that's probably right.

SOLICITOR-GENERAL:
(2) is –

ELIAS CJ:
But I thought we had been looking at (2) but (2) doesn't seem to me to be the correct provision.

GLAZEBROOK J:
No, it's subsection (1).

SOLICITOR-GENERAL:
Now I'm going to make submissions on the issue of credibility and there was some discussion earlier with my friend about the substance of the complaint being that two goes at credibility were better than one, and I am bound to submit that depends which way it goes as, in fact, the cases that my friend took you to indicate, they indicate two things.

WILLIAM YOUNG J:

That you need to have a good memory if you're a liar.

SOLICITOR-GENERAL:

Indeed, yes.

GLAZEBROOK J:

But not too good.

SOLICITOR-GENERAL:

They are in the red volume. Well, yes, quite. Well, maybe. Maybe you don't want me to take you to these cases but –

ELIAS CJ:

Well, I don't know that it's necessary to. You can just tell us what you – yes, make the submission.

SOLICITOR-GENERAL:

Sure. The submission is twofold. One is that, well, obviously it goes both ways and that a lack of finding of credibility from the RPO is not a barrier that the person needs to hurdle and is showing that is wrong way. It'll be before the Tribunal, of course, but the appellant here is not on the back foot. He doesn't lack something when he comes to the Tribunal to say, "Believe me." But also I think those cases that my friend took you to show something else that's relevant about how the Tribunal goes about determining consistency. They look at a number of things, one of which is the decision from the RPO and the consistency with that. But they also look at the consistency of the person's written statement, which in this case the IPT has, and they also look for consistency of their story, I don't mean that in a pejorative way, of their narrative, with what they already know from country reports and other aspects of what they know about the countries that they're hearing about. So the absence of the RPO's findings on credibility aren't going to entirely hamstring the appellant from showing, "My story is consistent as across what you know is happening in my country, what I have said in my

written report and what I've said to you today, both in examination and re-examination."

Your Honours, do you have any further questions for me?

ELIAS CJ:
No, thank you.

SOLICITOR-GENERAL:
Nō reira anei aku tāpaetanga kōrero. Those are my submissions.

ELIAS CJ:
Thank you, Madam Solicitor.

MS JOYCHILD QC:
Very briefly. The matter of the – and I wrongly said it was a draft decision but it actually is more or less that in relation to the facts because the report lists what the person understand to be the facts and then it usually has a whole series of questions where the RPO does not consider the person credible, or the evidence credible, and asks them to comment on it, and there may be a big list. Also they have three weeks in which to read that report, think about it, talk about it with their lawyer, make sure they understand exactly what the credibility issue is and make submissions. The IPT, you're doing it in the one day. They just can't be compared in terms of fairness. But it is correct that it's not a draft decision although if you – it really is a draft decision of the facts until the person has replied to them, plus lots of pointers of where you haven't met the grade and to please explain further.

This is really a constitutional case. It is about access to the Courts. It's about accountability of officials, and I think in the application to adduce an expert report, it was pointed out there that this isn't a one-off. There's another person claiming torture who's in New Zealand at the moment who's so psychologically disturbed he was admitted to a psychiatric institution the day before the interview and his interview was also – he was declined. I mean

there is a real issue here that this body needs to be held accountable. It's dealing with the most vulnerable people and it's the High Court's inherent jurisdiction to hold them to account.

It's a huge problem for them. My submission is judicial review really has very limited breadth to move after the IPT decision has been made. You've got to pre-taint and you've got to speculate and say, "Well, I would have said this," or – it just doesn't work. It's really rendered it almost to be a privative clause by the way delay has the effect of it being a privative clause really unless access to the Courts can happen now.

And my friend says, well, you know he can go on to judicial review, but the High Court's very likely to say, just as my friends are saying to this Court, he's had a full fresh hearing on the facts. All the – he had everything he wanted. No need for judicial review. He doesn't have a right to the Court. He's got to persuade the Court and seeing my friends believe this is going to be a perfect re – right, why would they be arguing that he could have a judicial review now? He's really on the back foot trying to do judicial review later.

What happens to someone, why the appeal was filed was obviously to protect his rights because he would have been instantly deported if he hadn't have appealed.

Just to go back on that section 150, it is very significant to have a decision that declines you. Your status is changed forever. By that very decision, unless it can be appealed, his status is changed forever. He cannot get any other visa. He can't get a work permit. He can't marry anyone for I think five years. For a set number of years he's got to be out of the country. So it is a decision with significant ramifications and that it was made without a hearing, without any hearing at all, is just surely not what Parliament intended and not what section 249 should be read as permitting.

ELIAS CJ:

All right, thank you very much. Thank you, counsel, for your submissions. We will take time to consider our decision.

COURT ADJOURNS: 2.53 PM