Supreme Court of New Zealand
Te Kōti Mana Nui

25 February 2019

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

H (SC 52/2018) v REFUGEE AND PROTECTION OFFICER

(SC 52/2018) [2019] NZSC 13

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Please note that under s 151 of the Immigration Act 2009 (the Act), the appellant may not be identified. This means that the appellant's name and any identifying particulars of him, his claim to be recognised as a refugee and his status as a claimant must all remain confidential.

Section 249 of the Act restricts the availability of judicial review of certain decisions made under the Act that may be subject to an appeal to the Immigration and Protection Tribunal (the Tribunal). The effect of s 249 is that, where it applies, a person who is dissatisfied with a decision made under the Act must first appeal to the Tribunal and may commence judicial review proceedings only after the Tribunal has determined the appeal and then only with leave. This appeal deals with the application of s 249 in a case where the decision under challenge was made without any consideration of the substantive matters at issue.

The appellant, a Pakistani national, made a claim for recognition as a refugee in New Zealand in March 2017.

The Refugee and Protection Officer (Refugee Officer) handling his claim scheduled an interview with the appellant on 10 May 2017. The appellant became ill the day before the scheduled interview. His lawyer emailed the Refugee Officer advising him that the appellant would not

therefore be able to attend the scheduled interview. The Refugee Officer indicated that a medical certificate complying with the requirements set out in the letter scheduling the interview needed to be provided. A medical certificate was provided, but it did not comply with those requirements. However, a copy of the doctor's medical notes that were sent to the Refugee Officer by the appellant's lawyer did include much of the required detail.

The Refugee Officer advised the lawyer that he would discuss the matter with his manager, but two days later he issued a decision declining the appellant's claim for refugee status. In the decision, the Refugee Officer concluded that, as the medical certificate and accompanying documentation did not meet the specified requirements, s 149(4) of the Act applied. Section 149(4) provides that, where a person who is required to attend an interview fails to attend at the appointed time and place, the Refugee Officer may determine the claim without conducting the interview.

The Refugee Officer noted in his decision that, as the appellant had not attended the interview, no findings of credibility or fact could be made. Thus it could not be determined whether the appellant was a refugee. But, despite this, he concluded that the appellant was not a refugee and declined the claim for refugee status.

The appellant's lawyer complained to the Refugee Status Branch of Immigration New Zealand. A manager of the Branch accepted that there were genuine grounds for complaint about the way the appellant had been treated. However, the manager said it was not possible to reopen the appellant's claim. The appellant was advised to file an appeal to the Tribunal.

The appellant commenced judicial review proceedings in the High Court challenging the decision to reject his claim for refugee status. Mindful of s 249, he also commenced an appeal to the Tribunal. But he wished to pursue the judicial review proceedings immediately, arguing that s 249 did not apply in the circumstances of the case.

The respondent applied to the High Court to dismiss the appellant's application for judicial review on the basis that the High Court had no jurisdiction to deal with it unless and until the appellant's appeal to the Tribunal had been dealt with. The High Court accepted the respondent's position and dismissed the claim, and that decision was upheld by the Court of Appeal.

The Supreme Court has unanimously allowed the appeal and reinstated the appellant's judicial review proceedings. The case will now return to the High Court for those proceedings to be dealt with on their merits.

The Court considered that, although s 249 provides that no review proceedings may be brought in respect of a decision unless an appeal is made to the Tribunal and is finally determined, it operates in practice to preclude judicial review of the Refugee Officer's decision.

The Court observed that there was nothing in the decision of the Refugee Officer that indicated that he had given any consideration to the appellant's claim to refugee status. Although the decision was, in form, a decision to refuse to recognise the appellant as a refugee, in substance it was a refusal to consider the appellant's claim because the appellant had failed to attend the scheduled interview.

This meant that the decision was, in substance, a refusal to engage with the intended statutory process for dealing with refugee claims, and this was something that the appeal process could not correct. The Court considered that s 249 did not prevent the Court from exercising its supervisory jurisdiction to ensure that the requirements of the Act are met and that the appellant's claim is considered lawfully. It concluded that the appellant was not precluded by s 249 from commencing judicial review proceedings and the High Court is not precluded from dealing with those proceedings and granting a remedy if it considers it appropriate to do so. The Court therefore allowed the appeal.

Contact person:
Kieron McCarron, Supreme Court Registrar (04) 471 6921