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<http://www.legislation.govt.nz/act/public/2009/0051/latest/DLM1440836.html>

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 52/2018
[2019] NZSC 13**

| | |
|----------------|--|
| BETWEEN | H (SC 52/2018) Appellant |
| AND | REFUGEE AND PROTECTION OFFICER Respondent |

Hearing: 29 October 2018

Court: Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ

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

Judgment: 25 February 2019

JUDGMENT OF THE COURT

- A The appeal is allowed.**
 - B The order of the High Court dismissing the proceeding is set aside.**
 - C In its place, an order is made declining the respondent's application to dismiss the proceeding for want of jurisdiction.**
 - D The proceeding is remitted to the High Court for hearing.**
 - E Costs are reserved.**
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REASONS
(Given by O'Regan J)

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Application for judicial review

[1] Section 249 of the Immigration Act 2009 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).¹ 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. In addition, s 249(4) of the Act requires any application for leave to commence judicial review proceedings to be made within 28 days after the claimant has been notified of the Tribunal's decision.²

[2] In the present case, the appellant, a claimant for recognition as a refugee under the Act, commenced judicial review proceedings challenging the decision of the Refugee and Protection Officer responsible for dealing with his claim to determine the claim without interviewing the appellant and the resulting decision to decline to recognise the appellant as a refugee. He argued s 249 did not prevent the Court from considering his application for judicial review because of the unusual circumstances

¹ All references to statutory provisions are to provisions of the Immigration Act 2009, which we will call "the Act".

² See also Immigration Act 2009, s 247.

in which his claim to be recognised as a refugee was dismissed, the details of which we describe below.³ Mindful of the potential application of s 249, the appellant also appealed to the Tribunal. That appeal is on hold until the outcome of these proceedings is known.

[3] 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 hear the proceeding until the appellant's appeal had been determined by the Tribunal. The High Court accepted the respondent's argument that s 249 applied and dismissed the appellant's application for judicial review for want of jurisdiction.⁴

[4] The appellant's appeal to the Court of Appeal failed.⁵

[5] This Court granted leave to appeal, the approved question being whether the Court of Appeal was right to dismiss the appellant's appeal to that Court.⁶

Issue

[6] The issue for determination is whether, given the circumstances in which the Refugee and Protection Officer determined that the appellant should not be recognised as a refugee, judicial review proceedings could be brought in respect of that decision (or the antecedent decision to determine the claim without interviewing the appellant) without the appellant having first appealed to the Tribunal and that appeal having been determined by the Tribunal.

[7] We will begin by setting out the factual background. We will then describe the statutory scheme, before analysing the application of the law to the facts.

³ At [8]–[18].

⁴ *H v Refugee and Protection Officer* [2017] NZHC 2160, [2017] NZAR 1518 (Gordon J) [*H* (HC)].

⁵ *H (CA580/2017) v Refugee and Protection Officer* [2018] NZCA 188 (Cooper, Brown and Clifford JJ) [*H* (CA)].

⁶ *H (SC 52/2018) v Refugee and Protection Officer* [2018] NZSC 79.

Background

[8] The appellant is a Pakistani national. He left Pakistan in 2015 and travelled to New Zealand via stops in Fiji and Samoa. In March 2017, he made a claim for recognition as a refugee in New Zealand, on the basis that he is at risk of being killed by the Taliban if he returns to Pakistan. He provided certain information, including a personal statement, in support of his claim.

[9] Consistent with the standard practice of the Refugee Status Branch of New Zealand Immigration, which is part of the Ministry of Business, Innovation and Employment, the Refugee and Protection Officer scheduled an interview with the appellant for Wednesday 10 May 2017. In the letter scheduling the interview the following text appeared:

It is very important that you attend this interview. If you are unable to attend because of illness [or] disability, please notify the RSB [(Refugee Status Branch)] Interpreter Coordinator immediately. You must also supply a medical certificate from a registered medical practitioner no later than **4.00 pm** on the day of your scheduled interview. To be acceptable, the medical certificate must specify:

1. The date you were examined;
2. your illness or disability;
3. the expected duration of the illness and disability;
4. the reason, in the opinion of the medical practitioner, why you are unable to attend the interview; and
5. the medical practitioner's opinion as to when you will be fit and able to attend an interview.

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.

[10] On Tuesday 9 May 2017, the appellant developed stress-related diarrhoea and a headache. He saw a doctor at an emergency clinic, who provided him with a medical certificate saying he was unfit for one week from 9 May 2017.

[11] Early on Wednesday 10 May 2017, the appellant's lawyer emailed the Refugee and Protection Officer advising of the appellant's illness and consequent inability to

attend the interview that day. The Refugee and Protection Officer replied, indicating that he required a medical certificate complying with the requirements in the letter scheduling the interview.

[12] The appellant's lawyer emailed a copy of the medical certificate issued by the doctor to the Refugee and Protection Officer later in the day. The lawyer explained that the medical certificate did not comply with the specified requirements but he also attached the doctor's medical notes, which did specify the illness. The Refugee and Protection Officer replied that the medical certificate could not be printed, as it was in the wrong format (picture format, not Word or PDF). He added that there was also a possible issue, because it did not satisfy the requirements for cancelling an interview (this indicated that the format issue did not prevent him from reading the certificate and medical notes). The Refugee and Protection Officer advised he would discuss the matter with his manager the next day.

[13] On Friday 12 May 2017, the Refugee and Protection Officer issued his decision, declining the appellant's claim for refugee and protected person status. If he did discuss the matter with his manager as he indicated he would, he did not give any indication to the appellant's lawyer of the outcome and, in fact, did not get in touch with the lawyer at all.

[14] In his decision, the Refugee and Protection Officer first recorded the circumstances which led to the appellant not attending his scheduled interview. The Refugee and Protection Officer concluded that, as the medical certificate and accompanying documentation did not meet the relevant criteria, s 149(4) of the Act applied.⁷ This must have meant that the Refugee and Protection Officer considered that the appellant had "failed to attend" the meeting. The Refugee and Protection Officer then concluded:

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. As such, it cannot be determined whether Mr [H] is a refugee within the meaning of Article 1A(2) of the 1951 Convention relating to the Status of Refugees ("the Convention"), as amended by the 1967 Protocol.

⁷ See below at [37].

...

For these reasons Mr [H] is not recognised as a refugee within the meaning of the Convention. Refugee status is declined.

[15] The decision was signed by the Refugee and Protection Officer and countersigned by another New Zealand Immigration official described as “Refugee and Protection Officer, Quality Assurance Programme, Refugee Status Branch”.

[16] On Tuesday 16 May 2017, the appellant’s lawyer contacted the Refugee Status Branch, having just received the Refugee and Protection Officer’s decision. He complained that to decline the appellant’s claim on a mere technicality relating to the form of medical certificate was unfair and unacceptable. He explained that he had tried to get the doctor to re-issue the medical certificate in the correct form on 10 May, but this was not possible as the doctor who had issued the medical certificate on 9 May was not on duty on 10 May. This was why he had obtained the medical notes to augment the information stated on the medical certificate itself. The Refugee Status Branch accepted that communication as a formal complaint.

[17] The Refugee Status Branch responded to that complaint in a letter dated Friday 19 May 2017. In that letter, the Branch Manager of the Refugee Status Branch concluded:

Given the above [description of events], 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 an RPO [(Refugee and Protection Officer)] to be re-opened once made. Section 138(3) Immigration Act 2009 states this very clearly.⁸ I realise that this does not assist your client nor resolve the above, but unfortunately, having notified the decision to him, the RSB is unable to now retract or annul its decision.

I have spoken to the RPO who acknowledges that the decision was, in the circumstances, harsh. ...

This letter and your correspondence regarding the complaint will be on your client’s file should Mr [H] wish to appeal the decision.

⁸ Section 138(3) provides that the decision of the Refugee and Protection Officer is final, unless overturned by the Tribunal on appeal.

[18] The appellant subsequently filed his application for judicial review of the Refugee and Protection Officer's decision.⁹ He also appealed to the Tribunal. The application for judicial review challenged the Refugee and Protection Officer's decision to reject his medical certificate as being unreasonable and unfair.

Statutory scheme

[19] The appellant is a claimant for recognition as a refugee. This claim invokes the United Nations Convention Relating to the Status of Refugees¹⁰ (1951) and the Protocol Relating to the Status of Refugees¹¹ (1967). New Zealand is a party to both the Convention and the Protocol. We will refer to the Convention and Protocol as the Refugee Convention.

[20] Part 5 of the Act deals with claims for refugee status under the Refugee Convention and protection status under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹² It also codifies certain obligations under the International Covenant on Civil and Political Rights.¹³ As the appellant's claim was for recognition as a refugee, we will deal only with the refugee aspect of Part 5.

[21] The purpose of Part 5 of the Act is set out in s 124(a), the relevant part of which provides that the purpose is to "provide a statutory basis for the system by which New Zealand ... determines to whom it has obligations under the [Refugee Convention]".

⁹ The appellant also filed an application for leave to bring judicial review proceedings. Leave is required under s 249(3), but the appellant's application was not made in accordance with s 249 and there does not appear to be any requirement for leave if the appellant is correct that s 249 does not apply in relation to his judicial review claim.

¹⁰ United Nations Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954).

¹¹ Protocol Relating to the Status of Refugees 606 UNTS 267 (opened for signature 31 January 1967, entered into force 4 October 1967).

¹² United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

¹³ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

[22] Under s 125(1), a person seeking recognition as a refugee under the Refugee Convention must have that claim determined in accordance with the Act. Section 127 relevantly provides:

127 Context for decision making

- (1) Every claim under this Part must be determined by a refugee and protection officer.
- (2) In carrying out his or her functions under this Act, a refugee and protection officer must act—
 - (a) in accordance with this Act; and
 - (b) 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 consistent with New Zealand’s obligations under the Refugee Convention.

...

[23] Section 129(1) provides that a person must be recognised as a refugee in accordance with the Act if he or she is a refugee within the meaning of the Refugee Convention.

[24] Section 133(3) specifies how a claim for recognition as a refugee must be made. It requires a claimant “to provide to a refugee and protection officer all information relevant to his or her claim”.

[25] Once a claim has been made, a Refugee and Protection Officer must determine whether to accept the claim for consideration. This is provided for in s 134, which sets out the relevant factors and the basis on which such claim could be rejected.

[26] Once a claim is accepted for consideration it is the responsibility of the claimant to establish the claim. Section 135(2) provides that the claimant “must ensure that, before a refugee and protection officer makes a determination on his or her 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”.

[27] Section 136 stipulates how a claim is to be determined:

136 How refugee and protection officer to determine claim

- (1) For the purpose of determining a claim, a refugee and protection officer must determine the matters set out in section 137.
- (2) In doing so, the refugee and protection officer may seek information from any source, but is not obliged to seek any information, evidence, or submissions further to that provided by the claimant.
- (3) The refugee and protection officer may determine the procedures that will be followed on the claim, subject to—
 - (a) this Part; and
 - (b) any regulations made for the purposes of this Part; and
 - (c) any general instructions given by the chief executive.
- (4) 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 concerned.

[28] Section 137 sets out the matters to be determined by the Refugee and Protection Officer and makes it clear that, in making the necessary determinations, the Refugee and Protection Officer may make findings of credibility or fact.¹⁴

[29] Section 138 deals with the decision of the Refugee and Protection Officer. Under s 138(1) the Refugee and Protection Officer must recognise a person as a refugee, if satisfied that the grounds for recognition in s 129 have been met. Importantly, in the context of the present case, s 138(3) provides:

The decision of the refugee and protection officer is final, unless overturned by the Tribunal on appeal under section 194.

[30] This provision was invoked by the Refugee Status Branch as explaining why it was not possible to reopen the claim when the Refugee Status Branch became aware of the circumstances in which the Refugee and Protection Officer's decision was made.¹⁵ Whether the Refugee Status Branch was correct in the view that it could not consider the claim further is something it is unnecessary to decide.

¹⁴ Section 137(5)(a).

¹⁵ There is provision to reopen a decision in the event that it transpires that the person recognised as a refugee is not, in fact, entitled to that recognition: see ss 145 and 146.

[31] Section 149 of the Act provides Refugee and Protection Officers with a number of specific powers to assist in the discharge of their statutory functions. Under subs (1)(f), a Refugee and Protection Officer may require a claimant to attend an interview.

[32] Although there is no statutory requirement to conduct an interview, it was accepted by the respondent that an interview would normally be expected because of the importance of an assessment of the credibility of the claim made by the claimant and the supporting documentation. This is reflected in the explanatory booklet published by New Zealand Immigration.¹⁶ In that booklet, the process by which a Refugee and Protection Officer considers a refugee claim is said to involve four stages, described under the following headings:

1. Submit a written statement.
2. The interview.
3. Interview Report and final submissions.
4. Decision.

[33] The booklet describes the interview in these terms:¹⁷

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.

[34] The booklet continues:¹⁸

The interview at the RSB *is a key moment in your claim*. It is important to tell the truth, because false or misleading statements may lead to your claim being disbelieved.

[35] Later, the booklet says:¹⁹

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.

¹⁶ New Zealand Immigration *Claiming Refugee and Protection Status in New Zealand* (Ministry of Business, Innovation and Employment, June 2015).

¹⁷ At 8.

¹⁸ At 8 (emphasis added).

¹⁹ At 9.

[36] The text under the heading “Interview Report and final submissions” provides:²⁰

After your interview the RPO will write a report (Interview Report) summarising your claim within three (3) weeks. The report will be sent to you and/or your representative. When you receive the Interview Report you have three (3) weeks to comment on that report and to make any further submissions in support of your claim. ...

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 Interview Report.

[37] Section 149(4) is an important provision in the context of this case. It provides:

Where a person who is required to attend an interview fails to attend at the appointed time and place, the refugee and protection officer may determine the claim or matter without conducting the interview.

[38] The phrase “fails to attend” must be construed in its statutory context. The context is that s 149(4) appears in the Part of the Act that establishes the procedure by which New Zealand complies with its obligations under the Refugee Convention and for a claimant, the interview is an important part of that procedure. A determination that a claimant has failed to attend an interview leads to the claim being determined against the claimant without an interview. That occurred in the present case even though the Refugee and Protection Officer acknowledged it was not possible to determine whether the appellant was a refugee. The Refugee Status Branch considered that, given the terms of s 138(3) of the Act, the determination could not be reopened even though it accepted the decision was unfair. Against that background, we do not consider it is open to a Refugee and Protection Officer to determine that a claimant has failed to attend an interview and, consequentially, dismiss the claimant’s claim, when the information before the Refugee and Protection Officer shows the claimant is unable to attend the interview for medical reasons. If, in the present case, the medical certificate had been accepted by the Refugee and Protection Officer as meeting all the requirements set out above at [9], the fact that the appellant did not attend the interview

²⁰ At 10.

would obviously not have been regarded as a failure to attend that justified the determination of his claim without an interview under s 149(4).²¹

[39] Interpreted in this way, s 149(4) does not provide that mere absence from the interview necessarily indicates a failure to attend. What is required is an assessment of the information available to the Refugee and Protection Officer as to the circumstances leading to the non-attendance to determine whether there has been a “failure” on the part of the claimant to attend. That assessment must be undertaken against the background of the context mentioned above.

[40] Appeals are dealt with in Part 7 of the Act. The purpose of Part 7 of the Act is set out in s 184. Section 184(a) says the purpose is “to provide comprehensively for the system of appeal and review in respect of decision making under this Act”. In relation to appeals against decisions relating to refugee or protection status, the relevant provisions are ss 193–200. For present purposes, the key provision is s 194(1)(c), which gives a right of appeal to the Tribunal against the decision by a Refugee and Protection Officer to decline a claimant’s claim to be recognised as a refugee. The appeal must be brought within 10 working days after notification of the Refugee and Protection Officer’s decision, though this period can be extended if there are special circumstances.²²

[41] Section 198(1)(a) provides that, in an appeal against the decision declining a claim for recognition as a refugee, the Tribunal must determine the matter de novo.²³ So the Tribunal must determine for itself whether the claimant should be recognised as a refugee. The Tribunal may dismiss or allow the appeal, but there is an express prohibition on the Tribunal referring the claim back to the Refugee and Protection Officer for reconsideration.²⁴

[42] The Tribunal’s procedure is provided for in ss 225–239 and sch 2. Its process normally requires that an oral hearing is convened²⁵ and we are told that the Tribunal

²¹ The requirements relating to medical certificates set out above at [9] apply “if you are unable to attend because of illness [or] disability”.

²² Section 194(2)(b) and 194(3).

²³ See also s 198(1)(b).

²⁴ Section 198(3).

²⁵ Section 233.

normally conducts an inquisitorial process, though it is entitled to proceed on an adversarial basis as well.²⁶ As is the case in relation to the Refugee and Protection Officer process, the claimant remains responsible for ensuring all material that the claimant wishes to be considered is provided to the Tribunal,²⁷ but the Tribunal also has available to it the Refugee and Protection Officer file,²⁸ and may require New Zealand Immigration or the claimant to provide further information.²⁹ The Tribunal also has the power to summon witnesses.³⁰

[43] The feature of the statutory scheme that was emphasised by both parties to the present appeal, though for different reasons, is that the Act contemplates two independent assessments of the claim. Both the Refugee and Protection Officer and the Tribunal are able to make their own findings of fact and of credibility and the Tribunal's process is not in any way limited by the material that was under consideration by the Refugee and Protection Officer. For the appellant, Ms Joychild QC emphasised the fact that the statutory regime anticipates two independent processes, which provide two opportunities for the claimant to establish a case for recognition as a refugee. On the other hand, Ms Jagose QC, counsel for the respondent, emphasised that the *de novo* assessment by the Tribunal ensures that a claimant who misses out on a complete assessment of his or her claim before the Refugee and Protection Officer for reasons of the kind that arose in the present case is nevertheless entitled to put his or her case in full before the Tribunal. She argued that means the Tribunal's assessment provides for a proper merits assessment of the claim and thereby cures the defects in the process before the Refugee and Protection Officer.

[44] Appeals from decisions of the Tribunal are permitted only with leave and only on a question of law.³¹ If the High Court declines leave to appeal, application may be made to the Court of Appeal for leave, and if either the High Court or the Court of Appeal gives leave, then the claimant may appeal to the High Court on the specified

²⁶ Section 218. See also Immigration and Protection Tribunal *Practice Note 2/2018 (Refugee and Protection)* (16 May 2018) [Tribunal Practice Note] at [26.1].

²⁷ Section 226(1).

²⁸ Section 226(2)(b).

²⁹ Sections 228 and 229(1) and sch 2, cl 10.

³⁰ Schedule 2, cl 11.

³¹ Section 245(1).

question of law.³² The decision by the Court of Appeal to refuse leave to appeal to the High Court is final.³³ If the High Court allows the appeal, it may confirm the decision in respect of which the appeal is being brought, remit the matter to the Tribunal or make such other orders in relation to the matter as it thinks fit.³⁴

[45] A further right of appeal from the High Court to the Court of Appeal is provided for in s 246, again subject to leave being granted and limited to an appeal on a question of law. The Act is silent as to whether a further appeal to this Court is available.

[46] The provisions on which the current appeal turns are ss 247 and 249. The relevant parts of these sections provide as follows:

247 Special provisions relating to judicial review

- (1) Any review proceedings in respect of a statutory power of decision arising out of or under this Act must be commenced not later than 28 days after the date on which the person concerned is notified of the decision, unless—
 - (a) the High Court decides that, by reason of special circumstances, further time should be allowed; or
 - (b) leave is required, under section 249(3), before proceedings may be commenced (in which case section 249(4) applies).

...

249 Restriction on judicial review of matters within Tribunal's jurisdiction

- (1) 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 unless an appeal is made and the Tribunal issues final determinations on all aspects of the appeal.
- (2) No review proceedings may be brought in any court in respect of any matter before the Tribunal unless the Tribunal has issued final determinations in respect of the matter.
- (3) Review proceedings may then only be brought in respect of a decision or matter described in subsection (1) or (2) if the High Court has granted leave to bring the proceedings or, if the High Court has refused to do so, the Court of Appeal has granted leave.

³² Section 245(1).

³³ Section 245(1A).

³⁴ Section 245(4).

...

[47] In summary, the statutory scheme envisages that claims for recognition as a refugee will be dealt with under a process which typically involves:

- (a) the initial decision on the merits of the claim being made by a Refugee and Protection Officer, after interviewing the claimant and providing an opportunity for the claimant to comment on and correct the record of the interview;
- (b) a de novo appeal on the merits to the Tribunal normally involving an inquisitorial hearing by the Tribunal at which the claimant can confront the concerns raised in the Refugee and Protection Officer's decision. This process does not replicate the "opportunity to comment" aspect of the Refugee and Protection Officer process;
- (c) an appeal to the High Court, only if leave is granted and only on a point of law (with a time limit for applying for leave);
- (d) a further appeal to the Court of Appeal, only if leave is granted and only on a point of law (with a time limit for applying for leave); and
- (e) a right to seek judicial review, only if leave is granted (with a time limit for applying) and only after exercising the right of appeal to the Tribunal.

High Court

[48] In the High Court, counsel for the appellant argued that the restriction on judicial review did not apply because the appellant was seeking review of the decision of the Refugee and Protection Officer to reject his medical certificate, rather than the decision of the Refugee and Protection Officer to decline his claim for recognition as a refugee. The argument for the appellant was that the former decision was not amenable to appeal to the Tribunal, and therefore the restriction on the commencement of judicial review proceedings in s 249(1) did not apply.

[49] Gordon J rejected that argument, holding that the decision to reject the medical certificate (and to hold that the appellant had failed to attend his interview) could not be divorced from the final decision on the appellant's claim for recognition as a refugee.³⁵ This conclusion was said to be reinforced by the fact that any order for relief that could be granted in relation to a decision on judicial review of the Refugee and Protection Officer's decision to reject the medical certificate would necessarily include an order quashing the final decision to decline recognition of the appellant as a refugee.³⁶

[50] Gordon J also concluded that, given the fact that the appeal to the Tribunal involved a de novo consideration of the claim, and in light of the broad powers of the Tribunal in relation to an appeal, it was entirely possible that any errors alleged by the appellant in respect of the challenged decisions could be remedied on appeal without recourse to judicial review.³⁷ The Judge also rejected a submission that the actions of the Refugee and Protection Officer constituted an abuse of power which should be amenable to judicial review.³⁸ She concluded that s 249(1) did not prevent the appellant from bringing judicial review proceedings (it was not a privative clause) and that it was open to him to apply for leave to commence judicial review proceedings after his appeal to the Tribunal had been dealt with.³⁹

Court of Appeal

[51] The Court of Appeal said it was necessary to address the issue in the context of the scheme and purpose of the Act. It noted that the enactment of the Act and the way in which it had subsequently been amended showed a clear intent by Parliament "to streamline the procedures for determination of applications under the Act, including by creating a carefully designed appellate pathway and, in s 249, by postponing the opportunity for judicial review".⁴⁰ It noted that the Tribunal was required to determine the matter de novo and gave some importance to the fact that

³⁵ *H* (HC), above n 4, at [11]–[12], citing *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [59] per Blanchard, Tipping and Gault JJ.

³⁶ At [13].

³⁷ At [14]–[15], citing *Tannadyce*, above n 35, at [6] per Elias CJ and McGrath J.

³⁸ At [18]–[19].

³⁹ At [19]–[20].

⁴⁰ *H* (CA), above n 5, at [28].

s 233(3) required the Tribunal to provide the appellant with an oral hearing.⁴¹ The Court noted that the focus of the argument in the Court of Appeal (as distinct from the High Court) was on the final decision to decline the appellant's claim for recognition as a refugee but rejected the argument made on behalf of the appellant that the decision made by the Refugee and Protection Officer to reject the medical certificate was not a decision to which s 249 applied.⁴²

[52] The Court accepted that the fact that the Refugee and Protection Officer had said "it cannot be determined whether Mr [H] is a refugee" was at odds with the statutory requirement that a person must be recognised as a refugee if he or she is a refugee. But it considered that the Refugee and Protection Officer's decision was properly understood as saying that the appellant had not established his claim for recognition.⁴³ The Court then considered the argument that s 249 did not apply to judicial review of a decision under s 149(4) and accepted that an argument to that effect would be to give the words in s 249 their plain meaning.⁴⁴ But when s 249 was construed in the context of the relevant scheme and purpose, the Court considered that the s 149(4) decision did fall within the scope of an appeal against the decision to decline to recognise the appellant as a refugee, and the appellant could make the argument he now seeks to make in judicial review in the oral hearing that the Tribunal would conduct in relation to his appeal.⁴⁵

[53] The Court noted the argument that the appellant would, on this basis, lose his opportunity to have his credibility assessed twice. But it concluded that the de novo appeal could cure any breach of natural justice in the first tier decision of the Refugee and Protection Officer.⁴⁶

One decision or two?

[54] The appellant renewed in this Court the argument that had been advanced unsuccessfully in the High Court and Court of Appeal that the decision of the Refugee

⁴¹ At [31] and [34].

⁴² At [39]–[40].

⁴³ At [42] and [45].

⁴⁴ At [48].

⁴⁵ At [51]–[52].

⁴⁶ At [53]–[56], citing *Singh v Attorney-General* [2000] NZAR 136 (CA).

and Protection Officer to reject his medical certificate was separate from the decision to decline to recognise him as a refugee. The essence of that argument was that the Refugee and Protection Officer's decision in relation to the medical certificate led to the conclusion that the appellant had failed to attend the scheduled interview, which in turn provided a legal basis on which the Refugee and Protection Officer could determine the appellant's claim without conducting the interview. The appellant argued that he did not fail to attend the interview: rather, he was unable to do so because of illness and the medical certificate, while not strictly complying with all of the requirements of the Refugee Status Branch, established the genuineness of his reason for not attending the interview. The appellant argued the decision under s 149(4) is not amenable to appeal to the Tribunal and therefore not caught by the restriction on judicial review in s 249(1).

[55] Ms Joychild emphasised the significance of the decision under s 149, which deprived the appellant of the ability to pursue his claim in any meaningful way and led to the Refugee and Protection Officer's decision to decline his claim without any serious consideration of the material that had been provided to the Refugee and Protection Officer. She argued that if there is any doubt about the availability of judicial review of the decision under s 149(4), the Court should interpret the restriction on the availability of judicial review in s 249 in a way which best gives effect to the rights of the appellant under s 27(2) of the New Zealand Bill of Rights Act 1990.

[56] We do not consider that it is realistic to separate the decision under s 149(4) from the substantive decision made by the Refugee and Protection Officer. We agree with the Courts below that what the appellant seeks to challenge is "the effect of the decision".⁴⁷ A successful challenge to the decision under s 149(4) would, of necessity, require that the Court set aside the substantive decision which, if not set aside, would remain extant in accordance with s 138(3). We do not see any room for an interpretation of s 249 to the contrary.

⁴⁷ Section 249(1) refers to review proceedings "in respect of a decision where the decision (*or the effect of the decision*)" may be subject to appeal (emphasis added).

[57] That means the issue for determination is whether s 249 prevents the appellant from bringing judicial review proceedings in respect of the Refugee and Protection Officer's decision until after his appeal to the Tribunal has been finally determined.

[58] There is no doubt that the Refugee and Protection Officer's decision to refuse to recognise the appellant as a refugee is amenable to an appeal to the Tribunal. Ms Jagose argued that this was the starting point for the analysis of the application of s 249 to the present facts. She argued the appeal process provided an effective avenue for the appellant to obtain a remedy for the deficiencies in the Refugee and Protection Officer's decision because the Tribunal would provide a forum for a fresh consideration of the appellant's case through a demonstrably fair process.

The effect of s 249(1)

[59] While s 249(1) provides for the deferral of judicial review until after an appeal has been heard and determined by the Tribunal, it is arguable that if it were applied to the Refugee and Protection Officer's decision in this case, it would preclude judicial review of the Refugee and Protection Officer's decision in practical terms.

[60] If the appellant is required to pursue his appeal to the Tribunal and the appeal fails, he will need to seek leave to commence judicial review proceedings challenging the decision of the Refugee and Protection Officer.⁴⁸ Ms Jagose argued that a court is likely to give leave if it could be shown that, despite a de novo appeal, the taint of the failed process at the Refugee and Protection Officer stage remained. We doubt this because once the Tribunal has made a decision on an appeal from the decision of the Refugee and Protection Officer, the inevitable focus of any review proceedings will be on the decision of the Tribunal, not on that of the Refugee and Protection Officer.

[61] Even if leave were given, a court would be unlikely to remit the matter to the Refugee and Protection Officer to make a fresh merits assessment of the appellant's claim when the Tribunal has dismissed that claim on appeal. And, even if the Court did remit the matter to the Refugee and Protection Officer, the Refugee and Protection

⁴⁸ Immigration Act, s 249(3).

Officer would be unlikely to decide the claim inconsistently with the determination of the Tribunal.

[62] That leads us to conclude that, although s 249 provides for the deferral of judicial review of the Refugee and Protection Officer's decision, the reality is that, in practice, it operates to preclude judicial review of the Refugee and Protection Officer's decision. For this reason we treat s 249 as, in effect, a privative provision.

[63] Given the constitutional importance of judicial review, reinforced as it is by s 27(2) of the Bill of Rights Act, the courts approach privative clauses cautiously and in particular will give anxious consideration to their interpretation and application. As noted in the reasons of the majority in *Tannadyce Investments Ltd v Commissioner of Inland Revenue*, judges should be slow to conclude that an ouster provision precludes applications to the High Court for judicial review alleging unlawfulness of any kind.⁴⁹ That caution is appropriate in this case. What is required is a construction of s 249 that recognises Parliament's intention to prevent duplicative proceedings but also preserves the ability of the Court to supervise the exercise of public power and prevent injustice occurring when a statutory process fails because the decision-maker acts unlawfully and an injustice results.

[64] In the present case, the error made by the Refugee and Protection Officer in concluding that the appellant had failed to attend the interview, when the evidence available to him showed the appellant was unable to attend, led to the statutory process derailing. The outcome was that the Refugee and Protection Officer made a decision to refuse to recognise the appellant as a refugee even though he acknowledged in the decision that he was not in a position to do so. In effect, there was no consideration of the merits of the claim at all.

⁴⁹ *Tannadyce*, above n 35, at [56] per Blanchard, Tipping and Gault JJ, citing *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133. The majority in *Tannadyce* held there was no need to strain to reconcile the ouster provision in the Tax Administration Act 1994, s 109, with the general availability of judicial review because the challenge procedure in the Tax Administration Act had a built-in right for the taxpayer to take the matter to the High Court: at [57].

[65] Nevertheless, Ms Jagose argued that the nature of the de novo appeal right is such that it is capable of curing any breach of natural justice caused by the Refugee and Protection Officer's decision, even in the circumstances of this case.

[66] Ms Joychild argued that the reference to a decision in s 249(1) must have contemplated a decision under s 138 that actually addressed the claim and evaluated the material that the appellant had submitted in support of the claim. She argued that if this was unclear, that lack of clarity would be resolved by interpreting s 249 in a way that was consistent with the right of review in s 27(2) of the Bill of Rights Act. In the absence of such a decision, the right of appeal to the Tribunal could not provide an effective remedy because it could not provide what the Act contemplates. In effect, the de novo appeal becomes a first instance consideration and the appellant loses, through no fault of his own, the benefit of the two-tier system of evaluation of claims that is provided for in the Act. That meant that the cases relied on by the respondent, where the statutory appeal process provided an avenue for dealing with the complaints of the applicant in a comprehensive way, were distinguishable.⁵⁰ To evaluate that submission, we will consider whether the appeal available to the appellant in this case can remedy the flaws in the process at the Refugee and Protection Officer stage.

Does the appeal process remedy the flaws in the Refugee and Protection Officer process?

[67] As noted earlier, the process for consideration of claims for recognition as a refugee contemplates that the Refugee and Protection Officer will consider all material and in the normal course will interview the claimant. The Refugee and Protection Officer will then make an assessment of the claim, including making findings of fact and an assessment of the credibility of the account given by the claimant. A significant aspect of this process is the procedure whereby the Refugee and Protection Officer prepares a summary of the interview and provides an opportunity for the claimant to correct any aspect of the record or deal with any concerns about the claim raised by the Refugee and Protection Officer. A three week period is allowed for this process.

⁵⁰ See the discussion of these cases below at [80]–[87].

[68] Once that comprehensive process has concluded, the Refugee and Protection Officer will issue a reasoned decision. If it is adverse to the claim, the claimant may then pursue the appeal to the Tribunal. The Tribunal process effectively allows a second opportunity to establish the claim before an independent Tribunal chaired by a judge. The Tribunal has access to all of the material that was before the Refugee and Protection Officer, but can also receive new evidence and in most instances, such as those of the appellant, would conduct an oral hearing which allows the appellant to engage directly with the Tribunal and tell his or her story.

[69] The Tribunal does not have a process like that of the Refugee and Protection Officer, allowing time for the claimant to correct the record and address concerns. Ms Joychild argued that meant the Tribunal process did not provide the same opportunity to understand the decision-maker's thinking as the Refugee and Protection Officer process did. We do not see any reason to criticise the Tribunal's process, which provides for the Tribunal to address questions to the claimant on his or her statement of evidence and a chance for re-examination after this has occurred.⁵¹ That allows the claimant to address concerns raised by the Tribunal. But the Tribunal's process is intended to be an appeal process, not a first instance process.

[70] The crux of the appellant's complaint is that he is being deprived of the normal two-tier process. The appellant argues that having two opportunities to have his claim assessed is an important part of the process and that the consistency of a claimant's account between that given to the Refugee and Protection Officer and that given to the Tribunal can be of benefit to a claimant.⁵²

[71] Ms Joychild argued that if the appellant is required to pursue an appeal to the Tribunal, the Tribunal will effectively be making first instance findings of fact and credibility and the potential benefit of consistency of account will not be available to the appellant. Because the Tribunal does not have power to direct reconsideration of a claim by a Refugee and Protection Officer, the remedy that the appellant needs to

⁵¹ Tribunal Practice Note, above n 26, at [27]. Ms Joychild did not criticise the Tribunal's process either – rather, she highlighted this difference between the Refugee and Protection Officer's process and the Tribunal's process.

⁵² Citing as examples of this: *DI (India)* [2017] NZIPT 801051 at [81]; and *BK (Afghanistan)* [2018] NZIPT 801307 at [23].

put the process by which his claim is dealt with back on the rails is not available to him through the appeal process.

[72] Ms Jagose argued that a *de novo* consideration by the Tribunal is an effective remedy and disputed that there was an entitlement to two opportunities for credibility assessment. She said the Tribunal would still check the consistency of the appellant's account before the Tribunal with the written material the appellant had produced when making his claim and other evidence available to the Tribunal about the situation in Pakistan, so the opportunity to demonstrate consistency was not entirely lost in this case. Ms Jagose also argued that s 149(4) specifically contemplates that a claim may be dealt with without an interview.

[73] We do not accept that argument: in the context of the present case there is no doubt that if the Refugee and Protection Officer had accepted the medical certificate he would not have found that the appellant "failed to" attend the scheduled interview and an interview would have occurred. The material provided to the Refugee and Protection Officer by the appellant's lawyer (the medical certificate and the medical notes) provided, in combination, the information the Refugee and Protection Officer needed to establish the matters set out above at [9]. The Refugee Status Branch effectively acknowledged this in its 19 May 2017 letter.⁵³ The requirements relating to medical certificates that were set out in the letter scheduling the proposed interview for the appellant (set out above at [9]) are taken from the explanatory booklet referred to earlier.⁵⁴ These are not statutory requirements and need to be applied with some leeway to claimants, given the significance to them of their claims for refugee status.

[74] If the Refugee and Protection Officer had accepted the medical certificate, that would have meant that the appellant did have two opportunities to substantiate his claim, each involving an assessment of his credibility. The fact that there are circumstances in which no interview will occur does not alter the fact that, in the present case, it would have occurred and, through no fault of his own, the appellant has been deprived of that opportunity. The only way in which that expectation can be

⁵³ See above at [17].

⁵⁴ Above at [32]–[36].

restored to the appellant is by an order directing the Refugee and Protection Officer to conduct the process lawfully. The Tribunal is not able to provide that remedy.⁵⁵

[75] As is apparent from the extract from the Refugee and Protection Officer's decision quoted above, the decision in this case stated that the appellant was not recognised as a refugee.⁵⁶ But the Refugee and Protection Officer recognised that, in the absence of an interview, it could not be determined whether or not the appellant was a refugee. Although the conclusion of the Refugee and Protection Officer's decision begins with the words "Having considered all the information available to the Refugee Status Branch regarding [the appellant's] claim to refugee and protection status", there is nothing in the decision recording the Refugee and Protection Officer's views on that material. In particular there is no evaluation of the personal statement of the appellant, which outlined the basis on which his claim was made. Thus, although in form a decision to refuse to recognise the appellant as a refugee, the decision was, in substance, a refusal to consider the appellant's claim because the appellant had "failed" to attend the scheduled interview.

[76] In the absence of any privative provision, the appropriate response from a court on judicial review would be an order in the nature of mandamus requiring the Refugee and Protection Officer to consider the application as the Act requires, after providing an opportunity for the appellant to have an interview.

[77] The process for consideration of a claim for recognition as a refugee miscarried in the present case. The result was a decision that was, in substance, a refusal to engage with the intended statutory process, based on an incorrect application of s 149(4). The appeal process does not correct this deprivation of the process set up by the legislation.

[78] In those circumstances, the privative clause does not prevent the Court from exercising its supervisory jurisdiction to ensure that the requirements of the Act are met and the applicant's claim is considered lawfully. Since the decision of the Court of Appeal in *Bulk Gas Users Group v Attorney-General*, it has been settled law that a privative provision does not necessarily prevent scrutiny of a decision based on an

⁵⁵ Immigration Act, s 198(3), discussed above at [41].

⁵⁶ Above at [14].

error of law on the part of the decision-maker that is otherwise reviewable.⁵⁷ The Court may strike out review proceedings where the Court is satisfied that the available appeal rights provide a more appropriate pathway to a remedy than might otherwise have been sought in the review proceedings.⁵⁸ But for the reasons given, the deprivation of first instance determination as required by the statute could not be remedied by the alternative pathway of appeal in the present case.

[79] In reaching this conclusion, we have not overlooked the cases relied on by the respondent, in particular *Singh v Attorney-General* and *Tannadyce*.

[80] We deal first with the decision of the Court of Appeal in *Singh*, a decision that was also relied upon by the Court of Appeal in the present case.⁵⁹ Mr Singh was, like the appellant, a claimant for recognition as a refugee. Unlike the appellant he was given an interview, but he argued that he was given insufficient time to prepare and insufficient time to provide further information requested by the Immigration Officer. When his claim for recognition as a refugee was declined, he filed an appeal with the (then) appeal body, the Refugee Status Appeals Authority (the Authority), but just prior to the proposed hearing of his appeal by the Authority, he also filed judicial review proceedings and sought an interim order preventing his appeal from being heard until his judicial review application had been substantively determined.

[81] The Court of Appeal did not accept that Mr Singh had made a case for an interim order to enable his judicial review application to be dealt with before his appeal to the Authority.⁶⁰ Mr Singh had argued, amongst other things, that the High Court's refusal to make such an interim order deprived him of access to a genuine two-stage hearing, made the first-stage hearing immune from review and deprived him of his lawful right under s 27 of the Bill of Rights Act to judicial review. The Court described these arguments as "contrary to authority ... and to common sense".⁶¹

⁵⁷ *Bulk Gas Users Group v Attorney-General*, above n 49.

⁵⁸ As occurred in *Tannadyce*, above n 35. See also *Love v Porirua City Council* [1984] 2 NZLR 308 (CA) where an application for judicial review of a decision of the Council was struck out, the Court having concluded that a claim of defect in the decision was appealable and capable of satisfactory resolution on appeal.

⁵⁹ *Singh*, above n 46.

⁶⁰ We express no view as to whether *Singh* was correctly decided.

⁶¹ *Singh*, above n 46, at 141.

[82] Ms Jagose argued that *Singh* was indistinguishable from the present case. She accepted that, in *Singh*, an interview had been conducted and a decision had been made on the merits, but argued that the allegation of breach of natural justice was similar in effect to what is alleged to have occurred in the present case. She relied in particular on the application by the Court of Appeal in *Singh* of a principle that a de novo appeal to the Authority was capable of curing any breach of natural justice in the initial decision-making process.

[83] We consider that *Singh* is distinguishable from the present case. In *Singh*, a decision on the merits of the claim for refugee status had been made, after an interview had been conducted. There were allegations of breach of natural justice in the way that process was carried out, but there was no suggestion that the process was other than a merit assessment of Mr Singh's claim. That can be contrasted with the present case, where in effect, there has not been a first instance process at all. Mr Singh had the opportunity on appeal for a de novo rehearing of his claim, at which he had the opportunity to address the reasoning of the Immigration Officer in declining to recognise him as a refugee and to provide the evidence and submissions required to support his case that the Immigration Officer had been wrong to decline to recognise him as a refugee.

[84] The respondent also relied on this Court's decision in *Tannadyce*. That case dealt with s 109 of the Tax Administration Act 1994, which provides that a disputable decision (which includes a tax assessment)⁶² may be disputed by challenge under Part 8A of the Tax Administration Act but otherwise may not "be disputed in a court or in any proceedings on any ground whatsoever".⁶³ The result is that disputes are channelled into the challenge procedure and there is an apparent complete exclusion of judicial review. Time limits for initiating challenge proceedings are provided for.⁶⁴

[85] In *Tannadyce*, the taxpayer had failed to commence challenge proceedings within time. However, it commenced judicial review proceedings alleging that the

⁶² Tax Administration Act, s 3.

⁶³ Section 109(a).

⁶⁴ Section 89AB.

assessments in question were acts of conscious maladministration involving abuse of power and breaches of natural justice.

[86] In this Court, Blanchard, Tipping and Gault JJ, who comprised the majority, held that judicial review of tax assessments was excluded unless the taxpayer could show that it was not practicable to invoke the statutory challenge procedure.⁶⁵ The majority found that the statutory challenge procedure provided for by the Tax Administration Act was the practical equivalent of and, from the point of view of the taxpayer, better than a right of judicial review.⁶⁶ The respondent argued that *Tannadyce* was authority for the proposition that a statutory process for appeal to a specialist tribunal must be followed before any application for review can be brought.

[87] We also consider that *Tannadyce* is distinguishable from the present case. The reasoning of the majority in that case rested on the premise that Parliament had created (in the challenge procedure available under Part 8A of the Tax Administration Act) an appeal process that was sufficiently comprehensive to render judicial review unnecessary, except where the challenge process could not be invoked. As the taxpayer could choose the High Court as the hearing authority for his or her challenge, s 109 of the Tax Administration Act did not prevent access by the taxpayer to the Court on matters of unlawfulness, but rather provided a statutory process for such access. In the present case, the Act envisages an initial decision by a Refugee and Protection Officer and a de novo appeal to the Tribunal. That statutory process failed in this case and judicial review is the only effective pathway to reinstate it and the only way of obtaining access to the Court for this to occur.

Conclusion

[88] We conclude that in the circumstances of this case, the appellant is not precluded by s 249(1) from commencing judicial review proceedings and the Court is not precluded from dealing with his application and granting a remedy if it determines in its discretion that it should do so.

⁶⁵ *Tannadyce*, above n 35, at [61].

⁶⁶ At [57] and [71].

Result

[89] We allow the appeal and set aside the orders made in the High Court. We find the High Court has jurisdiction to hear and determine the appellant's application for judicial review and we make an order declining the respondent's application to dismiss the proceeding for want of jurisdiction.⁶⁷ We remit the proceeding to the High Court for hearing.⁶⁸

Costs

[90] As we did not have submissions on costs, costs are reserved. If the parties do not agree on costs in this Court and the Courts below, submissions should be filed and served in accordance with the following timetable:

- (a) Appellant: by 25 March 2019;
- (b) Respondents: by 8 April 2019;
- (c) Appellant in reply: by 15 April 2019.

Solicitors:
Mansouri Law Office, Auckland for Appellant
Crown Law Office, Wellington for Respondent

⁶⁷ Although the appellant appears to have sought leave to commence his judicial review claim, we do not consider that s 249(3), which requires leave, applies in a situation like the present case where judicial review is not deferred until after resolution of an appeal to the Tribunal.

⁶⁸ We note the appellant commenced an appeal to the Tribunal at the same time as commencing the present proceeding. He will need to discontinue that appeal to enable the continuation of the present proceeding: see s 249(2) of the Act, quoted above at [46].