IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA760/2023
[2025] NZCA 614

BETWEEN	KAREL SROUBEK Appellant
AND	MINISTER OF IMMIGRATION Respondent

Hearing: 6 March 2025

Court: French P, Katz and Whata JJ

Counsel: B J R Keith and R L Fletcher for Appellant
S M Earl and M J Mortimer-Wang for Respondent

Judgment: 24 November 2025 at 2 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no award of costs.

REASONS OF THE COURT

(Given by French P)

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Introduction

[1] Does Mr Sroubek face time-related barriers in seeking to appeal a decision of the Immigration and Protection Tribunal (the Tribunal) and in seeking to bring judicial review proceedings against the Minister of Immigration?

[2] The High Court held that he did in a preliminary jurisdictional decision delivered by Fitzgerald J.[1] Mr Sroubek now appeals that decision to this Court.

[3] At issue is the interpretation of three key sections in the Immigration Act 2009 (the Act), namely ss 245, 247 and 249, and the recent Supreme Court decision in *H (SC 52/2018) v Refugee and Protection Officer*.[2]

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1 *Sroubek v Minister of Immigration* [2023] NZHC 2717 [judgment under appeal].
2 *H (SC 52/2018) v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433.

Background

[4] Mr Sroubek is a Czech national. He arrived in New Zealand on 16 September 2003 using a false passport in the name of Jan Antolik. He was initially granted a visitor visa.

[5] Unbeknown to the New Zealand authorities at the time, Mr Sroubek was wanted by the Czech police as a result of convictions for violent offending that had occurred in 1999. He had been sentenced to serve a four and a half year sentence. Also unbeknown to the New Zealand authorities, shortly before arriving in New Zealand, he had been accused of involvement in a fatal shooting in Prague.

[6] In 2007, Mr Sroubek was given police diversion in New Zealand for possession of a knife and, in 2008 and 2009, he faced charges of assault, but was subsequently acquitted.

[7] On 6 June 2008, Mr Sroubek was granted a New Zealand residence visa in the same false name of Jan Antolik.

[8] The false identity was eventually discovered and, on 4 November 2011, Mr Sroubek was found guilty at trial of possessing a false passport and giving false information. A District Court Judge, however, granted him a discharge without conviction, having been assured he had no convictions in the Czech Republic and that he was genuinely fearful of returning there.[3] The Judge was unaware that between 2007 and 2009, Mr Sroubek had in fact returned to his homeland on three separate occasions.

[9] In September 2014, Mr Sroubek was charged with importing Class B drugs (MDMA) to a street value of $375,000. He defended the charge, but in June 2016 he was convicted and imprisoned for a term of five years and nine months.[4]

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3 *R v Antolik* DC Auckland CRI-2009-004-025486, 21 December 2011.
4 *R v Antolik* [2016] NZDC 10561.

[10] While Mr Sroubek was still in prison,[5] Immigration New Zealand initiated an inquiry into his possible deportation. However, on 19 September 2018, the then Minister of Immigration, Mr Lees-Galloway, cancelled the liability for deportation and granted Mr Sroubek a resident visa under his true identity on the condition he provide a valid Czech passport in his real name.

[11] The Minister's decision was controversial and attracted considerable publicity.

[12] On 27 November 2018, the Minister made Mr Sroubek liable for deportation on the different ground that the resident visa had been granted as a result of an administrative error under s 155(1)(a) of the Act, because his conviction and sentence rendered him an excluded person.

[13] Mr Sroubek then lodged appeals against the Minister's decision in the Tribunal on 18 December 2018. Under the Act, there are two types of appeal available in respect of deportation liability, being an appeal on the facts and an appeal on humanitarian grounds.

[14] Section 202 provides that an appeal on the facts is available where the liability to deportation is said to have arisen from a visa being granted in error, a visa being held under a false identity, fraud or forgery, the existence of new information regarding character or the cancellation of refugee or protected status. In a deportation case, the focus of such an appeal is on whether the relevant tests for making someone liable for deportation have been made out on the facts.

[15] The second type of appeal — appeals on humanitarian grounds — are concerned with the effects of deportation and are governed by s 206. The Tribunal's jurisdiction is limited to the assessment of exceptional humanitarian circumstances as set out in a two-limb statutory test contained in s 207(1). Under that test, the Tribunal can only allow the appeal if satisfied that there are: exceptional circumstances of a humanitarian nature making it unduly harsh for the person to be deported; and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.

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5 He was released on parole on 4 September 2020.

[16] In this case, Mr Sroubek appealed on both facts and humanitarian grounds.

[17] In addition to filing a facts appeal and a humanitarian appeal in the Tribunal, Mr Sroubek initiated another proceeding under the Act which did not conclude until May 2022. We need say nothing more about this other proceeding. Its only relevance for present purposes is that along with the COVID-19 pandemic it helps explain the lengthy delays in this case.

[18] Meantime, in April 2021 the Tribunal held a hearing of the facts appeal. It released its decision in June of the following year, dismissing the facts appeal and upholding Mr Sroubek's liability for deportation (the facts decision).[6]

[19] The primary issue before the Tribunal in the facts appeal was whether Mr Sroubek had established his resident visa was not granted as a result of an administrative error.[7] In rejecting that contention, the Tribunal held that he was an excluded person within the meaning of the Act when granted a visa in a false identity. That constituted an "administrative error" for the purposes of the relevant section and, as the holder of that visa, his liability for deportation was able to be determined under s 155.[8] This conclusion required the Tribunal to consider the meaning to be accorded various phrases in the relevant statutory provisions such as "the holder" and "administrative error".

[20] In September 2022, the Tribunal heard Mr Sroubek's humanitarian appeal and delivered its decision on 8 December 2022 (the humanitarian decision). The Tribunal found by "a narrow margin" that there were exceptional humanitarian circumstances given that Mr Sroubek had spent most of his adult life in New Zealand.[9] However, it also found it would not be unjust or unduly harsh for him to be deported having regard to the circumstances giving rise to the reason for the deportation.[10]

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6 *Re Šroubek* [2022] NZIPT 600569 [facts appeal].
7 At [3].
8 At [132].
9 *Re Šroubek* [2022] NZIPT 600569A [humanitarian appeal] at [164].
10 At [228].

[21] On 4 January 2023, Mr Sroubek filed two applications in the High Court:

(a) an application under s 245 of the Act for leave to appeal both the Tribunal's humanitarian decision and its facts decision on questions of law; and

(b) an application under s 249 of the Act for leave to commence judicial review proceedings against the Minister's decision to render him liable to deportation.

The High Court decision

[22] After the proceedings were filed, two preliminary issues arose requiring resolution before the substantive hearing.

[23] The first issue was whether the application for leave to appeal the Tribunal facts decision (as distinct from the humanitarian decision) was out of time. The Judge held that on a correct interpretation of s 245 of the Act it was time-barred.[11]

[24] The second issue was whether Mr Sroubek needed to seek an extension of time before his application for leave to bring the judicial review claim could be heard. This issue turned on whether the application had been properly brought under s 249 of the Act or whether it should have been brought under s 247 of the Act. The Judge held the correct pathway was s 247 and therefore an extension of time was necessary.[12]

[25] Dissatisfied with these outcomes, Mr Sroubek sought and obtained leave to appeal the High Court decision on both preliminary issues to this Court.

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11 Judgment under appeal, above n 1, at [30].
12 At [69].

Issue 1: For the purposes of the time limits imposed by s 245(2), are facts appeals and humanitarian appeals in the Tribunal two separate appeals or one appeal?

Why it matters

[26] Resolution of this issue matters. That is because unless the facts and humanitarian appeals are one appeal, Mr Sroubek is time-barred from seeking leave in the High Court to appeal the facts decision. Only the humanitarian appeal will be in time.

[27] It will be recalled that Mr Sroubek lodged both his facts appeal and his humanitarian appeal in the Tribunal together on the same day. That was something he was required to do under s 203(1) of the Act. Section 203 is headed "[p]rocess when entitlement to appeal on facts and humanitarian grounds". Subsection (1) relevantly states "[a] person who is entitled to and wishes to appeal both on facts and on humanitarian grounds must lodge both appeals together".

[28] As well as requiring both appeals to be lodged together, s 203(2) provides that:

> (2) Where practicable, the Tribunal must consider both appeals together, but—
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> (a) must first consider the appeal on the facts; and
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> (b) may dispense with its consideration of the humanitarian appeal if the appellant's appeal on the facts is successful.

[29] The Tribunal in this case heard the appeals separately in the sequence mandated by s 203(2)(a) and, as mentioned, it issued separate decisions, one on 21 June 2022 and the other on 8 December 2022. Obviously, because the Tribunal dismissed the facts appeal, it had been necessary for it to go on to consider the humanitarian appeal.

[30] In seeking to challenge the facts and humanitarian decisions on appeal in the High Court, Mr Sroubek was required to comply with s 245 of the Act. Section 245 limits the scope of any such appeal to points of law and also requires leave to be obtained first.

[31] Crucially for present purposes, s 245(2) states that:

> (2) An application to the High Court under this section for leave to appeal must be made—
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> (a) not later than 28 days after the date on which the decision of the Tribunal to which the appeal relates was notified to the party appealing; or
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> (b) within such further time as the High Court may allow on application made before the expiry of that 28-day period.

[32] The effect of the provision is that a would-be appellant must apply for leave to appeal no later than 28 days after the Tribunal decision is notified or within any extension of time granted by the High Court provided the application for the extension is made before the expiry of the 28-day time limit. It is common ground that the time limits are jurisdictional and so do not permit of any latitude. Thus, once the 28-day time period has expired, and neither an application for leave nor an application for an extension of time has been filed, then the ability to appeal to the High Court is lost.[13]

[33] In this case, Mr Sroubek's application for leave to appeal was filed in the High Court well after 28 days of being notified of the facts decision, but within 28 days after notification of the humanitarian decision.

[34] That prompted the Minister to argue that the proposed appeal relating to the facts decision was out of time. The argument advanced by Mr Sroubek in the High Court, and again in this Court, is that both appeals are in time because time only started to run under s 245 once both the facts and humanitarian decisions had been notified.

[35] The Judge, however, ruled that under s 245 time starts to run from the date each determination or decision was notified.[14]

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13 This is well established. See, for example, *Bhawsar v Chief Executive of the Ministry of Business, Innovation and Employment* [2022] NZCA 60 at [4]–[7]; *Singh (Harpal) v Chief Executive of the Ministry of Business, Innovation and Employment* [2016] NZHC 2337, [2017] NZAR 722 at [44]; and *X v Immigration and Protection Tribunal* [2014] NZHC 1647 at [6].

14 Judgment under appeal, above n 1, at [30].

Arguments on appeal

[36] Mr Keith on behalf of Mr Sroubek candidly acknowledged that the Judge's reading of s 245 was "absolutely true to the statutory language". However, he submitted that the word "decision" was capable of being read in a broad, practical way so as to avoid creating the situation whereby an applicant is required to file High Court proceedings before the Tribunal proceedings are concluded and then seek to adjourn one of the proceedings or advance both in parallel. Such an outcome was, he argued, inconsistent with the policy of the Act, the primacy it affords the Tribunal and its emphasis on efficiency. Inconsistent too, in his submission, with the Supreme Court's emphasis in *H* on the need to avoid duplication.[15]

[37] Developing this central contention of impracticality, Mr Keith identified the complications that can arise if a duplicative parallel High Court proceeding is, as he put it, "dropp[ed] … into the middle" of a combined facts/humanitarian Tribunal proceeding while the Tribunal is still seized of the humanitarian appeal and under an obligation to expedite matters.[16]

[38] If the option is taken of staying the High Court application and the Tribunal proceeds to decide the humanitarian appeal, then if the Tribunal allows the appeal, that will bring an end to the proceeding and the deportation will be stopped. This would mean the work and the cost involved in preparing the High Court application and obtaining the stay has been a wasted effort.

[39] If it is the Tribunal proceedings that are stayed and the High Court grants leave and hears the appeal, success for the appellant in the High Court will not necessarily mean finality. It could involve a remission of the facts hearing to the Tribunal, with the humanitarian appeal remaining in limbo and the spectre of another round of High Court proceedings regarding the second facts hearing if the remission is unsuccessful. If the High Court proceeding results in the facts appeal being dismissed or the remission to the Tribunal on the facts appeal is unsuccessful, then the humanitarian appeal recommences.

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15 See *H (SC 52/2018) v Refugee and Protection Officer*, above n 2, at [63].
16 Immigration Act, s 222(1).

[40] In Mr Keith's submission, these complications stand in stark contrast to the orderly and streamlined process afforded by his interpretation of s 245 whereby it is not until both the Tribunal appeals are concluded that the application for leave to appeal to the High Court should be filed.

Our view

[41] We acknowledge the practical difficulties raised by Mr Keith and we also acknowledge that efficiency is a key objective under the Act. Section 222(1), for example, imposes an express obligation on the Tribunal to "determine an appeal or matter with all reasonable speed", while s 223 requires the Chair of the Tribunal to make such directions as are necessary to ensure that appeals and matters are heard "in an orderly and expeditious manner". Mr Keith is also right to emphasise the primacy of the Tribunal. It is a specialist body with very broad and flexible powers that involve both inquisitorial and adversarial processes.[17]

[42] However, those considerations as indicators of Parliament's intentions regarding the scope of s 245 must, in our view, yield to the clear language of the section and the following points.

[43] Throughout the Act, facts appeals and humanitarian appeals are treated as distinct proceedings. Different sections regulate the respective rights to appeal as well as the basis on which the Tribunal must decide the appeal. Facts appeals, as their name suggests, are about the factual basis for liability for deportation. Humanitarian appeals are about whether the effects of deportation will create humanitarian circumstances of an exceptional nature.

[44] It is correct, as already noted, that when a person is entitled to bring both types of appeal, he or she must file them together and where practicable the appeals must be considered together. But the provision which imposes that requirement (s 203) contains no suggestion of any consolidation or joinder of the appeals which it would be reasonable to expect were they intended to be a single proceeding. In fact, on the contrary, the section refers to both "appeals" plural. So too do other sections such as

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[17] See *Minister of Immigration v Wu* [2019] NZCA 237, [2019] NZAR 1217 at [25].

ss 222(2), 223(3)(b) and 235. These sections regulate such matters as the order in which appeals are to be heard, the ability for them to be determined together by the same member of the Tribunal, and the Tribunal's ability to issue a single decision in cases where more than one appeal is heard together.

[45] To interpret the several references to "appeals" plural as meaning "appeal" singular in circumstances where the Act creates distinct rights of appeal in different sections and about different subject matter is, in our view, problematic. The fact the two types of appeal raise different issues also means that arguments based on duplication are not justified.

[46] A further consideration is the very existence of s 203. As Mr Mortimer-Wang for the Minister pointed out, if the one appeal, one decision interpretation were correct, there would be no need for provisions saying they may be heard together, or in a certain order.[18]

[47] As regards inefficiency and impracticalities, while we acknowledge they exist under the High Court interpretation, we also consider there are benefits in having each separate proceeding continue moving through the system promptly and that the concerns are overstated. The reality is that the High Court has the necessary tools to minimise disruption such as its ability to stay or adjourn a proceeding.[19] Those tools also include, of course, the ability to grant an extension of time to file an application for leave under s 245(2)(b). Under Mr Sroubek's interpretation, that provision is left with little work to do.

[48] In terms of practicalities and efficiency, the interpretation he advocates is also not without its own problems. It would result in delay — possibly very substantial delay — before errors in the facts decision can be rectified.

[49] Finally, we note that the High Court's interpretation appears to be consistent with the Tribunal's practices. Thus, for example, in this case when Mr Sroubek was notified of its facts determination, the Tribunal advised him of his right to lodge an

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18 Immigration Act, ss 223(3)(b) and 222(2).

19 The same point was made by the Judge: judgment under appeal, above n 1, at [31].

application for leave to appeal to the High Court within 28 days. Of course, the Tribunal's practices are not determinative. Their practices may be based on the wrong interpretation of the statutory processes, but they are nonetheless practices of long standing which have not resulted in legislative intervention to amend the Act.

[50] For all these reasons, we conclude that the High Court's interpretation of s 245 is correct. For the purposes of the time limits imposed by s 245(2), facts appeals and humanitarian appeals in the Tribunal are two separate appeals. Mr Sroubek was required to file his application for leave to appeal to the High Court against the Tribunal's facts determination within 28 days of 21 June 2022. His failure to do so means the application is time-barred.

Issue 2: Was the correct statutory pathway governing Mr Sroubek's judicial review proceeding s 247 or s 249?

[51] Both s 247 and s 249 of the Act apply to judicial review proceedings regarding a statutory power of decision under the Act. Section 247 confers the right to bring judicial review proceedings within a specified time limit but without any leave requirement. Section 249 confers what can be described as a conditional right to bring judicial review after going through the Tribunal.

[52] The question is which of the two sections governs Mr Sroubek's judicial review proceedings against the Minister. We begin our discussion by setting out the wording of both sections and the legislative history of s 249 before turning to explain why it matters which section applies in the circumstances of this case and what the authorities say.

Sections 247 and 249

[53] Section 247 states:

> **247 Special provisions relating to judicial review**
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> (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).

(2) *[Repealed]*

(3) In this section, **statutory power of decision** has the same meaning as in section 4 of the Judicial Review Procedure Act 2016.

(4) Nothing in this section limits the time for bringing review proceedings challenging the vires of any regulations made under this Act.

[54] As will be seen, s 247 confers the right to bring a judicial review proceeding in respect of a statutory power of decision under the Act within 28 days. There is no leave requirement unless the judicial review proceeding in question is caught by s 249.

[55] Section 249 states:

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.

(4) An application to the High Court for leave to bring review proceedings must be made—

(a) not later than 28 days after the date on which the Tribunal's determination in respect of the decision or matter to which the review proceedings relate is notified to the person bringing the proceedings; or

(b) within such further time as the High Court may allow on application made before the expiry of that 28-day period.

(5) A decision by the Court of Appeal to refuse leave to bring review proceedings in the High Court is final.

(6) In determining whether to grant leave for the purposes of this section, the court to which the application for leave is made must have regard to—

(a) whether review proceedings would involve issues that could not be adequately dealt with in an appeal against the final determination of the Tribunal; and

(b) if paragraph (a) applies, whether those issues 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.

(7) A court that grants leave under subsection (3) to bring review proceedings must state the issue or issues to be determined in the proceedings.

(8) Nothing in this section limits any other provision of this Act that affects or restricts the ability to bring review proceedings.

[56] The general effect of s 249 is that if the review proceedings are caught by subs (1) or (2), they cannot be brought until the Tribunal processes are completed and, even then, leave must first be obtained. Further, in deciding whether to grant leave, the court hearing the leave application is required to consider whether the issues involved could be adequately dealt with through the appeal process instead, and whether they are of general or public importance.

[57] The focus of this case is, of course, on the scope of the prohibition contained in subs (1) and (2). At this juncture, it is sufficient to note that subs (1) is expressed to be about "decision[s]" while subs (2) is about "matter[s]". The term "matter" is defined in s 183 as meaning an application to the Tribunal by a refugee and protection officer (RPO) under ss 144 or 147 to the Tribunal and an application made by a Minister under s 212(2). Although this definition does not apply if the context requires otherwise, it does provide a possible explanation for the existence of two subsections differentiating between "decision" and "matter" as well as Parliament's use of the word "or" in the phrase "decision or matter" in subss (3) and (4)(a). The word "matter" is not, however, consistently used throughout the section as something distinct from decision. The word "matters" as it appears in the title, for example, is clearly intended to encompass both decisions and the first instance applications specified in the definition section.

[58] As originally enacted, s 249 made no mention of "matters", although the word "matter" was still included as a defined term in s 183.[20] Section 249 only referenced "decision", and consisted of just two subsections. It was also couched in more restrictive terms than the current iteration in that it contained a blanket prohibition on judicial review proceedings if the decision in question, or the effect of it, was appealable to the Tribunal. According to the relevant select committee report, the provision was designed to "ensure that repeat or duplicate avenues of review and appeal in relation to the same matter were avoided".[21]

[59] In 2013, s 249 was amended by replacing the two subsections with wording very close in substance to the current provision.[22] Amongst other things, this meant the imposition of a leave requirement for judicial review proceedings subject to s 249. This change appears to have been prompted by a practice that had developed of challenging unfavourable Tribunal decisions by judicial review rather than by an appeal in the High Court because the latter was subject to obtaining leave, whereas the former was not.[23] Generally, according to the explanatory note to the Immigration Amendment Bill 2012 — which later became the Immigration Amendment Act 2013 — the aim of the 2013 amendments was to streamline review proceedings that related to any matters coming before the Tribunal.[24]

[60] Further amendments to s 249 were made in 2015 with the introduction of the 28-day time period for leave applications and a change to the title of the section.[25] The previous title which had read "[r]estriction on review" was replaced with "[r]estriction on judicial review of matters within Tribunal's jurisdiction". As noted by both parties in this case, none of the legislative materials shed any light on the reason for the title change.

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20 The definition has remained unchanged.
21 Immigration Bill 2007 (132-2) (select committee report) at 21.
22 Immigration Amendment Act 2013, s 10.
23 See *Songmia v Minister of Immigration* [2013] NZHC 3233 at [12].
24 Immigration Amendment Bill 2012 (16-1) (explanatory note) at 1.
25 Immigration Amendment Act 2015, s 63.

Why it matters whether s 249 or s 247 applies in this case

[61] The effect of s 249 when it applies is that a person dissatisfied with a decision made under the Act must first appeal to the Tribunal and only commence judicial review proceedings after the Tribunal has determined the appeal. Even then, as mentioned, judicial review proceedings governed by s 249 are only by leave and the application for leave must be filed within 28 days of being notified of the Tribunal's appeal decision.

[62] Mr Sroubek filed his application for leave to bring judicial review proceedings against the Minister under s 249 in January 2023. He did so in the belief that s 249 of the Act precluded him from bringing judicial review proceedings any earlier, but required him to wait until after all proceedings in the Tribunal had concluded. At the time Mr Sroubek filed his application for leave to bring judicial review proceedings, it was less than 28 days since the humanitarian decision was delivered.

[63] Fitzgerald J, however, held that the s 249 restrictions on filing judicial review proceedings only applied if the matters sought to be raised in the judicial review were within the Tribunal's jurisdiction.[26] In the case of Mr Sroubek's judicial review proceedings, some of the matters raised were outside the jurisdiction of the Tribunal.[27] As a result, the correct provision was, the Judge held, not s 249, but rather s 247.[28]

[64] As mentioned, in contrast to the position under s 249, judicial review proceedings governed by s 247 may be filed as of right. That is to say, there is no leave requirement, provided the proceedings are commenced in time. The primary time requirement is that the proceeding must be filed no later than 28 days after the date on which the person concerned is notified of the decision they want to challenge on review. The 28-day time period may be extended at the discretion of the High Court so long as the extension of time is itself sought within the 28-day period.

[65] Mr Sroubek was notified of the Minister's adverse deportation decision on 19 September 2018. He neither filed his judicial review proceedings within 28 days

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26 Judgment under appeal, above n 1, at [59]–[61].
27 At [63].
28 At [67] and [69].

of 19 September 2019, and nor did he within that 28-day period seek an extension of time for filing. Indeed, it was over three years after notification of the Minister's decision before he filed the proceedings.

[66] That does not necessarily mean that all is lost, even if s 247 was his correct pathway. That is because (unlike the section at the heart of Issue 1), s 247 confers a residual discretion on the High Court to allow an application for an extension of time to be filed outside the 28 days if satisfied of the existence of "special circumstances". However, it may be more difficult to satisfy the special circumstances test under s 247 than it is to satisfy the leave criteria under s 249 which is why Mr Sroubek would prefer to be under s 249 than s 247.

The caselaw prior to H

[67] As Ms Earl, counsel for the Minister, candidly acknowledged, prior to the 2019 Supreme Court decision in *H*, the Minister would have considered that the process adopted by Mr Sroubek was correct and that s 249 was the applicable section. The Minister's view pre-2019 was that the s 247 judicial review pathway was only available to those who had no right of appeal to the Tribunal.

[68] That was certainly the approach endorsed by Fogarty J in *Liu v Immigration New Zealand*.[29] In that case, Ms Liu issued judicial review proceedings challenging a decision that she was liable to deportation. The Crown applied to strike out the proceeding on the grounds that the decision or the effect of it (using the wording in s 249) was one in respect of which a humanitarian appeal could have been filed. Therefore, because Ms Liu had not filed an appeal with the Tribunal, she was prohibited from commencing a judicial review proceeding under s 249(1). Ms Liu argued that her complaint was about Immigration New Zealand's decision-making process and that a humanitarian appeal would be fruitless. She contended that in those circumstances, given the nature of her challenge to the decision-making, she was permitted to bring a judicial review proceeding directly pursuant to s 247 and was not required to wait for a hopeless humanitarian appeal to be completed.

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[29] *Liu v Immigration New Zealand* [2014] NZHC 195.

[69] Fogarty J disagreed and struck out the judicial review proceedings. In coming to that conclusion, the Judge held as follows:

(a) Section 249 was not a privative clause (meaning a clause purporting to exclude judicial review of an executive decision) and, therefore, hostile judicial interpretation was not warranted. Rather, it simply deferred judicial review until a statutory appeal/review had taken place.[30]

(b) It was not for the Court to assess the efficiency of such a process because that was a matter of political judgment.[31]

(c) Section 249 should not be interpreted so that a personal judgement as to the prospects of success in the Tribunal would determine whether a person could bypass the Tribunal and proceed to judicial review. That would undermine the clear policy and purpose of s 249 and was contrary to the text.[32]

(d) Ms Liu could have filed a pro forma appeal and enabled the Tribunal to issue a final determination and so clear the way to judicial review.[33]

[70] *Liu* was decided in 2014. In a subsequent High Court decision *Li v Chief Executive of the Ministry of Business, Innovation and Employment*,[34] Palmer J took a different view.

[71] The circumstances in *Li* were that the only Tribunal appeal available to the Li family was a humanitarian appeal. A facts appeal was not available due to the fact that Mr Li was an interim work visa holder and so without standing under the Act to bring such an appeal. The Li family duly lodged a humanitarian appeal in the belief that their challenge to underlying liability for deportation could be resolved via that route.

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30 At [17] and [23].
31 At [20].
32 At [21].
33 At [22].
34 *Li v Chief Executive of the Ministry of Business, Innovation and Employment* [2017] NZHC 2977, [2018] NZAR 265.

[72] The Tribunal dismissed the humanitarian appeal because it did not consider the family met the relevant statutory test and because it did not have jurisdiction on a humanitarian appeal to address the arguments raised by the family regarding the validity of the underlying liability for deportation.

[73] The family then sought leave to bring an appeal in the High Court against the Tribunal's ruling on its jurisdiction. That application was declined on the grounds the proposed appeal was not seriously arguable.

[74] The family also applied for leave under s 249(1) to bring a judicial review claim. Palmer J held they did not need leave but could file judicial review proceedings as of right under s 247.[35] In his view, s 249(1) did not apply to their case because the decision in question (a decision about underlying liability for deportation) was not subject to an appeal to the Tribunal within the meaning of s 249(1) given that the only available appeal was a humanitarian appeal.[36] The Judge acknowledged that a humanitarian appeal could be taken, and had in fact been taken, but it was "hopeless" as a means of challenging the validity of the underlying deportation.[37] The Judge went on to say:[38]

> Parliament cannot have intended to restrict the applicants' right to judicial review under s 27(2) of the [New Zealand Bill of Rights Act 1990] by requiring them to first take a hopeless appeal. Section 6 of [that Act], the principle of legality and common sense militate strongly against such an interpretation of s 249(1) [of the Act].

[75] We pause here to interpolate that counsel in this case disagree as to whether by "hopeless" the Judge meant jurisdictionally hopeless or devoid of substantive merit.

[76] Given the conflict between the *Li* and *Liu* decisions, the Crown sought and obtained leave in May 2018 to appeal Palmer J's ruling in this Court.[39]

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35 At [2] and [27]–[28].
36 At [26].
37 At [27].
38 At [27].
39 See *Li v Chief Executive, Ministry of Business, Innovation and Employment (No 2)* [2018] NZHC 1171, [2018] NZAR 1134.

[77] But the appeal to this Court was never pursued. Before it could be heard, the Supreme Court had delivered its decision in *H*. As indicated, that decision caused the Minister to change his position on the interaction of ss 247 and 249. Instead of contending that the s 247 pathway was only available if there was no right of appeal to the Tribunal, his new position is that s 247 also applies in cases such as the present one, notwithstanding the existence of an as yet undetermined appeal proceeding in the Tribunal.

[78] For his part, Mr Keith acknowledges that *H* enlarged what had previously been understood as the limited scope of s 247, thereby reducing the s 249 restrictions on bringing judicial review. However, he says the decision has no bearing on this case because the circumstances are different. This is disputed by the Minister who contends that what *H* says about ss 247 and 249 cannot be artificially confined to its facts.

[79] During the course of the argument, it became apparent to us that resolution of Issue 2 very much turns on whether the reasoning in *H* is equally applicable to this case.

The decision in H

[80] H had made a claim for recognition as a refugee under the Act. He failed to attend a scheduled interview with the RPO due to being unwell. Although H's lawyer had provided a medical certificate, the RPO proceeded to determine the refugee claim and decline it without ever hearing from H. Under the Act, a decision of the RPO is final unless overturned by the Tribunal on appeal.[40] The Tribunal has no power to order the RPO to reconsider,[41] but the appeal from such a decision to the Tribunal involves what is called a process de novo. That means the Tribunal looks at the issue of refugee status afresh and undertakes its own assessment of the claim after conducting a full hearing where evidence is called.

[81] H issued judicial review proceedings in the High Court against the RPO's decision alleging a breach of natural justice. Out of caution, H also filed an appeal to

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40 Immigration Act, s 138(3).
41 Section 198(3).

the Tribunal. The Crown applied to strike out the judicial review proceeding on the ground that because H had a right of appeal to the Tribunal, s 249(1) of the Act applied. The High Court agreed and held the High Court had no jurisdiction to hear a judicial review claim until the appeal to the Tribunal had been determined.[42]

[82] H appealed to this Court. The Court identified a clear intent on the part of Parliament to streamline the procedures for determination of judicial review applications under the Act, including by creating a carefully designated appellate pathway and by postponing the opportunity for judicial review.[43] The RPO's decision to proceed without an interview fell within the scope of an appeal against a decision to decline to recognise H as a refugee and H could make the argument before the Tribunal that he was seeking to make in judicial review.[44] Any breach of natural justice would be cured.[45]

[83] On a further appeal, the Supreme Court disagreed with that analysis. It held that H was not precluded by s 249(1) from commencing judicial review proceedings and that the High Court was not precluded from dealing with his application and granting a remedy if it determined in its discretion that it should do so.[46]

[84] In arriving at this conclusion, the Supreme Court stated that the statutory process had derailed and that H had been deprived of his right to a first instance determination, contrary to the statute.[47] A de novo appeal process could not remedy that deprivation. In its view, the only effective remedy to restore H to the position he should have been in was an order requiring the RPO to conduct the process lawfully.[48] That could only be achieved through a judicial review proceeding and, if such a proceeding were deferred until after an unsuccessful appeal to the Tribunal, it would preclude judicial review of the RPO's decision in practical terms.[49] That was because the focus of a post-appeal judicial review would inevitably be on the Tribunal's

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42 *H v Refugee and Protection Officer* [2017] NZHC 2160, [2017] NZAR 1518 at [21].
43 *H v Refugee and Protection Officer* [2018] NZCA 188 at [28].
44 At [51]–[52].
45 At [53]–[56].
46 *H (SC 52/2018) v Refugee and Protection Officer*, above n 2, at [88].
47 At [64].
48 At [74].
49 At [59].

decision.[50] Leave under s 249(3) was unlikely to be granted and, even if it was, it would be unlikely to result in the High Court remitting it back to the RPO.[51] It followed that s 249 was in these circumstances effectively operating as a privative clause,[52] the interpretation of which the Courts have traditionally approached with caution and anxious consideration.[53]

[85] The Supreme Court judgment does not refer to either *Li* or *Liu*. It does, however, refer to a decision of this Court in *Singh v Attorney-General*.[54] In *Singh* the appellant, unlike H, had been given an RPO interview but contended that, in breach of natural justice, he had not been allowed sufficient time to prepare for it and provide further information. He filed an appeal in what was the then appeal body,[55] as well as a judicial review proceeding in the High Court. This Court held that a de novo appeal in the appeal body was capable of curing any breach of natural justice that may have occurred in the initial decision-making process and struck out the judicial review proceeding.[56]

[86] While deliberately abstaining from expressing any view about whether *Singh* was correctly decided,[57] the Supreme Court in *H* held that it was, in any event, distinguishable. That was because in H's case there had been in effect no first instance process at all, whereas in *Singh* a substantive merits assessment had taken place, albeit an allegedly defective one.[58]

[87] The Supreme Court also distinguished its own earlier decision of *Tannadyce Investments Ltd v Commissioner of Inland Revenue* where the Court had held that judicial review of tax assessments was excluded unless the taxpayer was able to show

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50 At [60].
51 At [60]–[61].
52 The term "privative clause" is used to describe a statutory provision which purports to oust or limit the court's judicial review jurisdiction. See *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133.
53 *H (SC 52/2018) v Refugee and Protection Officer*, above n 2, at [62]–[63].
54 *Singh v Attorney-General* [2000] NZAR 136 (CA).
55 The Refugee Status Appeals Authority.
56 *Singh v Attorney-General*, above n 54, at 141–142.
57 *H (SC 52/2018) v Refugee and Protection Officer*, above n 2, at [81], n 60.
58 At [83].

it was not practicable to invoke the statutory challenge procedure under the Tax Administration Act 1994.[59] In distinguishing *Tannadyce*, the Court observed:[60]

> [87] … The reasoning of the majority in that case rested on the premise that Parliament had created [in 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. … In the present case, the Act envisages an initial decision by a [RPO] 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.

[88] We are only aware of one other decision (that is, other than the present case) where the High Court has had occasion to consider the application of *H*. That decision is *AA* (*Zimbabwe*) *v Immigration and Protection Tribunal*.[61]

[89] The relevant facts of that case were that in a second round of applications for refugee status, the applications were declined by an RPO. The applicants filed appeals against the RPO decision in the Tribunal. The day after filing those appeals, they also filed an application in the High Court for leave to bring a judicial review proceeding in relation to the RPO decision. The grounds of the proposed judicial review centred on an alleged failure by the RPO to give any weight to certain evidence.

[90] The respondents contended that s 249(1) precluded the application for a judicial review of the RPO decision because that decision was still subject to an appeal to the Tribunal. For their part, the applicants resisted this argument and relied on the decision in *H*.

[91] Palmer J, however, held the situation was not comparable to *H*. He considered that unlike *H*, it was not a situation where Parliament's intent to prevent duplicative proceedings conflicted with the ability of the Court to supervise the exercise of public power.[62] That was because the argument sought to be raised on judicial review was capable of being addressed by the Tribunal on its merits in the appeal proceedings.[63]

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59 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [61] per Blanchard, Tipping and Gault JJ.
60 *H (SC 52/2018) v Refugee and Protection Officer*, above n 2.
61 *AA (Zimbabwe) v Immigration and Protection Tribunal* [2019] NZHC 1890, [2020] NZAR 46.
62 At [10].
63 At [10].

Section 249(1), therefore, applied. The Judge accordingly adjourned the application for leave to bring judicial review until such time as the Tribunal had formally determined the appeal.[64] At that point, the application could then be considered under s 249(3) in the context of the Tribunal's decision.

The application of H *to this case*

[92] It will be recalled that Mr Sroubek's facts appeal in the Tribunal centred on the issue of whether or not his resident visa had been granted as a result of an administrative error. It will also be recalled that in order to determine that issue, the Tribunal was required to consider the meaning to be accorded various words in the relevant statutory provisions such as "the holder" and "administrative error".

[93] However, significantly for present purposes, the Tribunal also found that a further argument of whether it was open to the Minister to rely on the administrative error route to deportation after having earlier cancelled the liability for deportation raised issues of irrelevant considerations, bad faith, improper purpose and breaches of natural justice.[65] Those matters were outside the Tribunal's appeal jurisdiction and were for judicial review in the High Court.[66]

[94] Similarly, in its humanitarian decision, the Tribunal pointed out that its jurisdiction did not extend to a consideration of the lawfulness of procedural matters that occurred prior to the deportation liability notice. Consideration of the propriety and/or unfairness of the Minister's decision was the sole purview of the High Court. The appeal, the Tribunal said, was not an avenue for judicial review by stealth.[67]

[95] It is common ground that the Tribunal's view of the scope of its jurisdiction was correct, being consistent with the High Court decision in *Wang v Minister of Immigration*.[68] In *Wang* the High Court commented that a challenge to the Minister's

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64 At [11].
65 See facts appeal, above n 6, at [49]–[73].
66 At [73].
67 Humanitarian appeal, above n 9, at [225].
68 *Wang v Minister of Immigration* [2013] NZHC 2059.

determination on process errors such as bad faith, irrationality or ultra vires was beyond the Tribunal's jurisdiction.[69]

[96] That being so, this case was, as Mr Keith described it, a mixed bag case, meaning that some of the arguments which Mr Sroubek wishes to raise are outside the Tribunal's jurisdiction, but other arguments are within it. And, in Mr Keith's submission, the language of s 249 is to the effect that if there are some items in the bag that can be pursued before the Tribunal effectively, s 249(1) dictates a general rule as to the sequence that must be followed. The right of appeal in such circumstances is not an exercise in futility or totally ineffectual and, therefore, the appeal process must be exhausted first before judicial review proceedings can be issued.

[97] Mr Keith accepted that in *H* and *Li*, the protagonists, like Mr Sroubek, had a right of appeal to the Tribunal against the impugned decision. The critical point of distinction was that in both those cases the right was an empty one because the exercise of it was not capable of remedying the wrong. In *Li* the right was ineffectual because the appeal could never succeed and in *H* it was because the Supreme Court accepted that, absent judicial review, the denial of a first instance hearing was an irredeemable loss.

[98] In arguing that s 249 was the correct pathway in this case, Mr Keith relied on both the text of s 249 as well as issues of policy and practicality.

[99] As regards the text, he accepted that the title of s 249 "[r]estriction on judicial review of matters within Tribunal's jurisdiction" was arguably inconsistent with his interpretation but contended that little weight should attach to it given the absence of any explanation for that title in the legislative materials. Instead, in Mr Keith's submission, the key to interpreting the section was its use of the phrase "effect of the decision" as it appears in s 249(1). For ease of reference, we again set out the wording:

> 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.

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69 At [27].

[100] Applying those words to the circumstances of this case, Mr Keith contended that the "effect of the decision" was Mr Sroubek's liability to deportation. Had any of his highly arguable grounds of appeal within the Tribunal's jurisdiction been upheld, that would have resulted in the deportation being quashed. It would have brought the entire matter to an end. Therefore, in contrast to the situation in *H* where the denial of a first instance fact finding interview was an otherwise irredeemable loss, Mr Sroubek's appeals were capable of providing an effective remedy. In those circumstances, s 249 was properly viewed as a sequencing provision, not an ouster clause.

[101] As regards policy and the practicalities, Mr Keith reiterated the submissions he made in connection with Issue 1 about the imperatives under the Act being efficiency, timeliness and the primacy of the Tribunal. He argued that in contrast to the Minister's new interpretation of s 249, the interpretation advocated on behalf of Mr Sroubek results in a streamlined and efficient process which avoids the complication of duplicative proceedings. In particular, it also avoids the spectre of there being two sets of judicial review proceedings, one at the beginning under s 247, dealing with issues outside the Tribunal's jurisdiction, and the other under s 249, at the end of the appeals process addressing issues already dealt with on the appeal.

[102] Mr Keith further argued that the Minister's interpretation creates additional difficulties for litigants requiring them to "crystal ball" at a very early stage of the proceeding and make critical decisions about the correct pathway. He accepted that could be avoided by filing a pro forma judicial review proceeding at the same time as an appeal in the Tribunal but submitted that even a pro forma proceeding would be costly and it would still consume precious court resources for what might subsequently turn out to be a complete waste of effort and time.

Our view

[103] As Fitzgerald J indicated in the High Court, resolution of Issue 2 is not entirely straightforward.[70]

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[70] Judgment under appeal, above n 1, at [58].

[104] Each of the competing interpretations appears arguable on the wording of s 249, as is graphically demonstrated by the Minister's changed position. Further, each of the competing interpretations carries with it some practical and procedural complications.

[105] However, we have come to the view that the reasoning of the Supreme Court which led it to decide that s 249(1) was not a barrier to H commencing judicial review immediately under s 247 — that is, without having to wait for the completion of the appeal process — is equally applicable to this case.

[106] On our reading of *H*, the approach mandated by the Supreme Court is not to ask whether the appeal process can provide an effective remedy for Mr Sroubek against deportation, but whether it can provide an effective remedy in relation to the particular flaw or flaws in the process. To put it another way, correctly analysed, the Supreme Court's approach is remedy driven, not outcome driven. After all, the adverse effect of the challenged decision in *H* was to deny H refugee status, and that was an outcome that could be rectified on appeal. Yet, that was held not to be a barrier to judicial review taking place before completion of the appeal process because the appeal would be unable to deal with the judicial review ground.

[107] We accept there are factual distinctions between this case and *H*, as identified by Mr Keith. In particular, we acknowledge the Supreme Court's emphasis on H having suffered an irredeemable loss as a result of being denied a first interview. In Mr Sroubek's case the judicial review grounds, if successful, would likely require the Minister to start over again and so, in that sense, any failings in the Minister's original decision-making process will not cause irredeemable loss.

[108] However, that is to overlook the critical statements of general principle in the Supreme Court judgment. And, what the Court said was that s 249 must be given a construction that both recognises Parliament's intention to prevent duplicative proceedings, but which also preserves the Court's ability to supervise the exercise of public power and prevent injustice occurring when a statutory process fails.[71]

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71 *H (SC 52/2018) v Refugee and Protection Officer*, above n 2, at [63].

[109] Applying that statement of general principle to a "mixed bag" case, it is clearly *not* inconsistent with the purpose of preventing duplication to allow an application which the Tribunal cannot address to go to the forum which can address it. Logically, in such circumstances, the judicial review proceeding is more properly viewed as a parallel proceeding, not a duplicative one. As Ms Earl put it, it is simply a situation of sending the right matter to the right place.

[110] The second point is that the "ability of the Court to supervise the exercise of public power" must necessarily, in our view, be impeded if a person adversely affected by deficiencies in the exercise of public power is prevented — potentially for very long periods of time — from going to the courts to have those deficiencies ventilated and considered.[72] And, all in order to accommodate appeals that cannot actually determine what the impacted person wants determined. In such circumstances, following *H*, the better interpretation must be considered as the one that allows access to judicial review in order to prevent that injustice. Such an interpretation also gives better effect to s 27(2) of the New Zealand Bill of Rights Act 1990, a provision cited by the Supreme Court as reinforcing the constitutional importance of judicial review.[73]

[111] We are further reinforced in our understanding of *H* by the Supreme Court's treatment of its own previous decision in *Tannadyce*. As mentioned, that decision was distinguished in *H* on the ground that the appeal process in *Tannadyce* was sufficiently comprehensive to render judicial review unnecessary.[74] That is patently not the position in this case. We note too the Supreme Court's treatment of *Singh* which, like the present case, was a mixed bag case. It is reasonable to assume that if Mr Keith's interpretation were consistent with the reasoning in *H*, the Court would have had no hesitation in saying *Singh* was correctly decided. As it was, the Court was careful to state that it was expressing no view as to its correctness.[75]

[112] As for considerations of efficiency, timeliness and the primacy of the Tribunal, we are not persuaded that these dictate a different interpretation to that adopted in *H*. Mr Keith was able to identify inefficiencies arising from the Minister's interpretation,

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72 At [63].
73 At [63].
74 At [87].
75 At [81], n 60.

but requiring recourse to an appeal jurisdiction that is not going to deal with the matter the affected person really wants dealt with does not strike us as being redolent of efficiency either. And, while any interpretation should unquestionably take into account the important role of the Tribunal, it also has to take into account that Parliament chose to impose limits on the Tribunal's appeal jurisdiction.

[113] Finally, for completeness, we record that in interpreting s 249, we have considered whether the application of *H* to a mixed bag case emasculates the restrictions imposed by the section and leaves it with no work to do. That would be something that Parliament cannot be taken to have intended.

[114] We acknowledge that the effect of the interpretation we favour is that s 249 will only operate to restrict the filing of judicial review proceedings in so far as they relate to matters which are both within the Tribunal's jurisdiction and also amenable to judicial review. That is to say, only where there is an overlap. Whenever the ground of review is not something within the Tribunal's jurisdiction, then the affected person can file a proceeding under s 247.

[115] However, in our view, that will not leave s 249 with no work to do. Overlaps are a realistic possibility. Indeed, evidence of that has already been provided by the post-*H* case of *AA (Zimbabwe)*. There, it will be recalled, the Judge was satisfied that the substantive merits of a proposed judicial review ground could be determined by the Tribunal and therefore s 249(1) applied. Parliament's intent to prevent duplicative proceedings, it was said, did not conflict with the ability of the court to supervise the exercise of public power. Another example might be where it is alleged there has been a gross error of fact by the decision-maker which could be the subject of a judicial review, as well as an appeal ground.

[116] For all these reasons, we conclude that, correctly interpreted, s 249(1) did not prevent Mr Sroubek from bringing judicial review proceedings under s 247 when his grounds of judicial review were outside the Tribunal's jurisdiction. His correct course of action is therefore now to seek an extension of time under s 247.

[117] Both grounds of appeal to this Court having failed, Mr Sroubek's appeal is dismissed and the High Court decision upheld.

Costs

[118] The usual rule is that costs follow the event, meaning that the unsuccessful party must pay costs to the successful party.

[119] In the event Mr Sroubek's appeal was to be dismissed, the Minister sought costs against him. However, having regard to the public importance of the Act, and the pressing need to resolve the uncertainty surrounding aspects of its application (including, of course, the fact of the Minister's changed interpretation of s 249), we consider that this case involves a sufficiently strong public interest to displace the usual costs rule. We acknowledge there is also a personal benefit to Mr Sroubek, but that is often so in public interest cases and, of itself, is not automatically a disqualifying factor.

[120] In our view, the most just outcome is for costs to lie where they fall. We therefore make no award of costs.

Outcome

[121] The appeal is dismissed.

[122] We make no award of costs.

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