IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2017-404-1211
[2017] NZHC 2160

UNDER	the Judicature Amendment Act 1972
IN THE MATTER	of a decision made by a Refugee and Protection Officer pursuant to section 149(4) of the Immigration Act 2009
BETWEEN	H Applicant
AND	REFUGEE AND PROTECTION OFFICER Respondent

Hearing: 6 September 2017

Appearances: D Mansouri-Rad for the Applicant
J Cassie for the Respondent

Judgment: 7 September 2017

JUDGMENT OF GORDON J

This judgment was delivered by me
on 7 September 2017 at 3.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Mansouri Law Office, Auckland
Crown Law, Wellington

Introduction

[1] On 13 March 2017, H filed an application for refugee and protected person status under the Immigration Act 2009 (the Act). As part of the consideration of his claim, H was scheduled to attend an interview with a Refugee and Protection Officer (RPO) on 10 May 2017. However, H fell ill on 9 May 2017. The RPO refused to accept his medical certificate and proceeded to determine H's claim without an interview (the challenged decisions). H's application for refugee and protected person status was ultimately declined (the final decision).

[2] H has filed an interlocutory application seeking leave to judicially review[1] the challenged decisions on the grounds that the challenged decisions were unreasonable and unfair. H has also filed an appeal against the final decision in the Immigration and Protection Tribunal under s 194(c) of the Act.

[3] The respondent has subsequently filed an application to dismiss the proceeding for want of jurisdiction. He acknowledges that H has genuine grounds for complaint in respect of the challenged decisions. However, the respondent says that s 249(1) of the Act prevents H from filing an application for judicial review in respect of the challenged decisions, until H's appeal has been determined.

Judicial review of an RPO's decision

[4] There are two provisions in the Act which apply to judicial review proceedings in respect of an RPO's decision.

[5] Section 247 of the Act provides:

> **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—

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[1] The application and proceeding were incorrectly entituled under the Judicature Amendment Act 1972. It should have been the Judicial Review Procedure Act 2016. I determine the matter under the latter Act.

(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.

[6] H contends that the challenged decisions were made under a statutory power of decision under the Act and accordingly are amenable to judicial review under s 247.

[7] Section 249 of the Act then provides:

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

[8] The respondent submits that the challenged decisions fall within the scope of s 249(1). Accordingly, the respondent submits, this Court lacks jurisdiction to hear the application for judicial review, until such time as H's appeal has been determined.

Issue

[9] The primary issue for this Court to determine is whether H's application for judicial review is strictly limited to a review of the challenged decisions, therefore falling within s 247 of the Act; or whether his application is in substance a challenge to the final decision of the RPO rejecting H's claim for refugee and protected person status, therefore falling within s 249(1) of the Act.

Discussion

[10] Mr Mansouri-Rad, who appears for H, submits that the Tribunal's jurisdiction is limited to the final outcome only, whereas H's challenge in the judicial review proceeding is to the respondent's purported exercise of power under s 149. The RPO's powers under s 149 are not within the Tribunal's jurisdiction and therefore the judicial review does not fall within s 249 but rather s 247.

[11] The respondent submits that the challenged decisions were made in the course of determining H's claim and as such, cannot be divorced from the final

decision of the RPO. The respondent cites the Supreme Court decision in *Tannadyce Investments Ltd v Commissioner of Inland Revenue*, in which a majority of the Court held that:[2]

> … a challenge to the legality of the process which led up to the making of the disputable decision … directly puts in issue the disputable decision. Hence the challenge to that decision or its antecedents must follow the statutory procedure.

[12] I agree that the application for judicial review in the present case is, in substance, a challenge to the legality of the process which led up to the making of the final decision. The application for judicial review states that the challenged decisions were unreasonable and/or made in breach of a legitimate expectation. However, H's complaint could equally be framed as a challenge to the final decision on the basis that there was a breach of natural justice and/or legitimate expectation.

[13] Further, if H were successful in his application to review the challenged decisions, then any order for relief would necessarily include an order quashing the final decision. This supports the respondent's submission that the challenged decisions cannot be divorced from the decision to decline the claim.

[14] The respondent also refers to a passage from the minority judgment in *Tannadyce*, where Elias CJ and McGrath J cited "an Australian leading text on judicial review" as follows:[3]

> If there is an appeal on the merits by way of *de novo* hearing, to a person who is unlikely to be influenced by what occurred at first instance, the appeal may be able to provide all that procedural fairness requires. If so, it is a far superior remedy for breach of natural justice than judicial review, since it will not only redress the initial unfairness more effectively and quickly than judicial review can, but also, replace the initial decision with a fresh decision on the merits. This provides a strong justification for courts allowing such appeals to cure defects and requiring those complaining of breach of natural justice to exercise their rights of appeal instead of seeking judicial review.

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2 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [59].

3 At [6], citing Mark Aronson, Bruce Dyer and Matthew Groves *Judicial Review of Administrative Action* (4th ed, Lawbook Company, Pyrmont, 2009) at 496 (citations omitted).

[15] This passage is relevant to the present case, where H has a right of appeal to the Tribunal. Under s 198(1) of the Act, the Tribunal will be required to determine H's application de novo. It is entitled to seek information from any source.[4] It will have the ability to hear H's evidence and to determine his claim afresh. I was told from the bar that the Tribunal will be conducting an oral hearing in this case. It is entirely possible, therefore, that the errors alleged by H in respect of the challenged decisions can be remedied on appeal, without recourse to judicial review.

[16] For these reasons, I consider that s 249(1) applies in this case to prevent H from bringing judicial review proceedings in respect of the challenged decisions, until such time as his appeal has been heard and determined in the Tribunal. That interpretation is consistent with the appeal provisions in the Act, which provide that appeals should be heard and determined in an orderly and expeditious manner.[5] It is also consistent with the policy considerations underpinning s 249 generally. In a recent High Court decision *RM v Immigration and Protection Tribunal*, Palmer J noted:[6]

> [40] … The Ministry of Justice's advice to the Attorney-General that the clause appeared consistent with the right to judicial review was based on a similar understanding of its purpose: "to remove the incentive to take review proceedings instead of using the normal appeal process".
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> [41] The High Court has recognised that s 249 reflects a deliberate intention by Parliament to restrict the availability of judicial review, as indicated by its title. The Court of Appeal has, briefly, expressed a similar view. And that must be correct. And there are good reasons why, in an immigration context, judicial review proceedings can be a problem for immigration authorities. Judicial review can be a means by which even those with hopeless claims can try to slow down decision-making in order to delay the inevitable order that deports them. And there is little incentive on the deportable not to do that.

[17] Those comments were made in the context of an application for leave to bring judicial review proceedings under s 249(3). However, they are equally relevant in the context of the present case.

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4 Immigration Act 2009, s 228(1).
5 Sections 222 and 223.
6 *RM v Immigration and Protection Tribunal* [2016] NZHC 735 (footnotes omitted).

[18] I do not overlook the submission made by Mr Mansouri-Rad that there was an abuse of power which should be amenable to judicial review. This submission is based on a statement by the RPO in the final decision that:

> 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.
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> (emphasis added)

[19] Mr Mansouri-Rad submits that this extract shows the RPO failed to consider the information, evidence and submissions provided by H as required under s 136 of the Act, in a clear abuse of his powers under s 149(4). He points to two paragraphs in *Tannadyce* where, in his submission, the minority cited with approval decisions which held that judicial review would always be available in cases where there had been an abuse of power.[7] I am not persuaded that those paragraphs can be interpreted in the way H contends. However, that is a moot point. Section 249(1) does not prevent H from bringing judicial proceedings in respect of the challenged decisions. It is not a privative clause.[8]

[20] If H wishes to bring fresh proceedings following the determination of his appeal, he will be able to file an application for leave to do so. His right to judicial review is not ousted, but merely delayed. For the reasons set out at [16] above, I am satisfied that these are reasonable limits on the right to justice under s 27 of the New Zealand Bill of Rights Act 1990 that can be demonstrably justified in a free and democratic society.[9]

Conclusion

[21] The application for judicial review is dismissed on the ground that this Court lacks jurisdiction to hear the proceeding, until such time as H's appeal has been determined by the Tribunal. For completeness the application by H for leave to bring the proceeding is also dismissed.

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7 *Tannadyce*, above n 2, at [12] and [14].
8 See discussion in *Liu v Immigration New Zealand* [2014] NZHC 195 at [17]-[20].
9 New Zealand Bill of Rights Act 1990, s 5.

[22] The respondent did not seek an award of costs. Accordingly, I order that costs are to lie where they fall.

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Gordon J