ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-4462
[2014] NZHC 1647

UNDER	The Judicature Amendment Act 1972
IN THE MATTER	of a decision made by the Immigration and Protection Tribunal pursuant to Section 198(1) of the Immigration Act 2009
IN THE MATTER	of an application for Judicial Review
BETWEEN	X Plaintiff
AND	THE IMMIGRATION AND PROTECTION TRIBUNAL First Defendant
	MINISTER OF IMMIGRATION Second Defendant

Hearing: 19 May 2014

Counsel: D Mansouri-Rad for plaintiff
MG Coleman for second defendant

Judgment: 14 July 2014

JUDGMENT OF FAIRE J

This judgment was delivered by me on 14 July 2014 at 4:45pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: Mansouri Law Office, Auckland
Crown Law Office, Wellington

The application

[1] The plaintiff applies for leave to judicially review a decision of the Immigration and Protection Tribunal delivered on 16 September 2013.

[2] The Tribunal dismissed the plaintiff's appeal from a decision of a Refugee and Protection Officer declining to grant him refugee status and/or protected person status.

Amendment of the application

[3] Mr Mansouri-Rad sought leave to amend the application by adding an additional request, namely, leave to appeal to the High Court on a question of law pursuant to s 245 of the Immigration Act 2009 in respect of the decision of the Immigration and Protection Tribunal, dated 16 September 2013. Because counsel were not in a position to address the court's jurisdiction to grant the amendment, and in particular whether it was still open for an application for leave to appeal to the High Court to be made having regard to the provisions of s 245(2) of the Immigration Act 2009, I set a timetable for the filing and service of memoranda dealing with that issue. That called for the filing of memoranda in support, opposition and reply which were then completed by 17 June 2014.

[4] Accordingly, I deal with the amendment application.

[5] Section 245(2) prescribes that every appeal to the High Court on a point of law must be brought 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 within such further time as the High Court allows on an application made before the expiry of that 28 day period. Section 386(3) provides that where a person is to be notified of a decision the notification must be given in writing by personal service or registered post or by service on the person's lawyer or agent in accordance with s 386(4). Section 386(4) provides:

> If a lawyer or agent represents that he or she is authorised to accept service of any notice or document on behalf of any person, it is sufficient service to deliver the notice or document to the lawyer or agent if he or she signs a

> memorandum stating that he or she accepts service of the notice or document on behalf of the person.

[6] The 28-day time limit in s 245(2) is mandatory. There is no jurisdiction to allow further time in which to bring an application for leave to appeal. This interpretation is mandated by the clear wording of s 245. It consistent with the scheme and purpose of the Immigration Act 2009. Accordingly, unless the application for amendment is made within the 28-day period specified in s 245(2) there is no jurisdiction to grant an amendment.

[7] In this case, the applicant's lawyer completed the "Representative Information" section on the applicant's notice of appeal to the Immigration and Protection Tribunal. He ticked the box next to the statement "I will accept service of notice, communications, and other documents on behalf of the appellant" and signed the form on 10 December 2012. Ms Anne Pereira, case manager for the Immigration and Protection Tribunal, deposes that when the decision of the Tribunal was completed on 16 September 2013, it was given to her for delivery to the parties. She prepared to send the decision by courier, but telephoned Mr Mansouri-Rad and asked whether he wished to pick it up in person instead. Mr Mansouri-Rad came in that day and picked up the decision.

[8] In *Cao v Immigration and Protection Tribunal*, the Court held:[1]

> Section 386(3) and cl 17(5) of sch 2 required the Tribunal to notify the appellant of the decision in one of three relevant ways defined in s 386(3): personal service, registered post, or service on a lawyer or agent (who then signs a memorandum accepting service). There is no evidence any of these were done. Mr Cao simply received a copy of the decision from his lawyer, who had not signed such a memorandum, on 11 November 2013. It follows that he could have appealed within time on 29 November 2013, when he filed the present application.

[9] As service had not been completed, the 28 day time limit was yet to run in that case.

[10] In my view s 386(4) applies in this case. The appellant's lawyer's signature on the "representative information" section on the notice of appeal to the

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1 *Cao v Immigration and Protection Tribunal* [2014] NZHC 259.

Immigration Protection Tribunal is a memorandum for the purposes of the subsection and in respect of the Tribunal's decision. It provides that the lawyer will accept service on behalf of the appellant as I have referred to in [6] hereof.

[11] It is not clear from the report in *Cao v Immigration and Protection Tribunal* whether the lawyer had signed a memorandum accepting future service, unlike in this case. Certainly, this issue was not discussed in the judgment. Accordingly, that case provides no assistance to the facts in this case.

[12] By way of comment I add that the position can be compared with that which relates to service on a solicitor pursuant to r 6.18 of the High Court Rules. The High Court Rules have an added requirement, namely that the solicitor must sign on a copy of the document a notice accepting service of it. That is not a requirement of s 386(4). The justification for a provision that provides for service on a solicitor was subject of comment in *McDonald v Simmonds*.[2]

[13] I conclude that as notification of the decision was served on the applicant via his lawyer on 16 September, he is out of time to file an application for leave to appeal the decision. The Court has no jurisdiction to extend the statutory time period of 28 days under s 245 as application was not made to amend within the 28 day time limit.

[14] The applicant made an alternative submission that his application for leave to review be treated as an application for leave to appeal, so that it would be within time.

[15] The statutory wording is clear and has created a "specific regime".[3] Two discrete applications are required. The application for leave is an application for leave to bring review proceedings. It is not an application for leave to appeal. I reject this submission.

[16] I accept the submissions of the second respondent that it has not waived its right to rely on the time limit, as the statutory time limit is not solely for the benefit

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2 *McDonald v Simmonds* (1994) 8 PRNZ 12 (HC) at [16].

3 *Allada v Immigration and Protection Tribunal New Zealand* [2014] NZHC 953 at [20].

of the second respondent and is therefore incapable of being waived on public policy grounds.[4]

[17] It follows that I may only deal with the application as an application for leave to bring review proceedings only.

Background

[18] The plaintiff is a citizen of Iran. At the time of the Tribunal hearing he was aged 18 years. He is now aged 19. He is the older of two sons. His father worked as a consultant for a manufacturing company and his mother is a housewife. The family are only nominally Muslim. His position is described in the Tribunal's decision as follows:[5]

> The appellant eschews Islam, which he regards as "stupid" and he suffered a range of punishments at school for failing to comply with Islamic direction, including being made to sit on a chair in a corridor all day on one occasion and having his hair roughly cut on another.

[19] They do not practise. The plaintiff is a non-believer of Islam. It is common ground that the plaintiff is opposed to the operation of Iran's military forces. He is a conscientious objector.

[20] In 2001 his maternal grandparents immigrated to New Zealand. They were granted permanent residency. In July 2004, the plaintiff and his mother visited the plaintiff's maternal grandparents in New Zealand and stayed with them for several months.

[21] In mid-2009, the plaintiff's family, with the plaintiff, came to New Zealand on visitors' visas. The plaintiff remained here. The rest of the family returned to Iran later that year. The plaintiff enrolled in a high school in New Zealand in February 2010. Both the plaintiff and his parents hoped that the plaintiff would be able to attend a university in New Zealand. Because of his un-Islamic views it was unlikely that he would be able to attend a state university in Iran.

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4 *Armstrong v Accident Compensation Corporation* HC Auckland CIV-2011-485-0860, 5 September 2011; *Attorney-General v Howard* [2010] NZCA 58, [2011] 1 NZLR 58.

5 *CP (Iran)* [2013] NZIPT 800,452 at [5].

[22] In December 2010, the plaintiff returned to Iran to visit his parents. The plaintiff returned to New Zealand in January 2011 to resume school. In March 2012 the plaintiff's mother lodged a resident's application with Immigration New Zealand. The application is still pending. Apparently, it is unlikely to be determined within the next several years.

[23] In June 2012, the plaintiff's father told him that his parents could no longer afford to pay his school fees. That position apparently coincided with the United Nations Security Council's banking sanctions against Iran, which had a dramatic effect on that country's currency.

[24] As a result of his parents' inability to pay his school fees, the plaintiff faced the prospect of having to leave New Zealand and return to Iran. Without school admission he is no longer eligible to hold a student visa.

[25] The plaintiff applied for refugee and/or protected person status on 26 July 2012. The plaintiff said he was opposed to performing compulsory military service. He said that he particularly objected to being assigned to the Islamic Revolutionary Guard Corps, also known as the Pasdaran or "the Sepah", the Basij and the Islamic Republican Police Force, also known as the Law Enforcement Forces (LEF) or the Entezami forces. The regular army is the Artesh. As already recorded, he does not believe in Islam. Islam is Iran's official religion where the plaintiff is regarded as a Muslim. In Iran he is denied the right to renounce Islam. He says that due to his lack of belief in Islam, he would have no opportunity to enter tertiary education in Iran as he does not perform Islamic observances and could not pass a compulsory university entrance Islamic test. That position has to be contrasted with his progress in a New Zealand high school, where he has performed well. He says that having lived in New Zealand since the age of 14, it would be difficult for him to adjust to life in Iran.

[26] The plaintiff's claim was declined by a Refugee and Protection Officer on 23 November 2012. It should be noted that the Refugee and Protection Officer accepted the plaintiff's evidence as credible in its entirety. The plaintiff lodged an

appeal to the Immigration and Protection Tribunal. His appeal was heard on 10 June 2013. A decision dismissing his appeal was issued on 16 September 2013.

Statutory basis for application

[27] The application for judicial review is brought under ss 247, 248, 249, 250 and 251 of the Immigration Act 2009. For the purpose of this application, the main inquiry requires a consideration of s 249. Section 249 provides:

> **249 Restriction on review**
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> (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.
>
> (1A) 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.
>
> (1B) Review proceedings may then only be brought in respect of a decision or matter described in subsection (1) or (1A) 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.
>
> (1C) 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.
>
> (2) Nothing in this section limits any other provision of this Act that affects or restricts the ability to bring review proceedings

[28] The current s 249 came into force on 19 June 2013. I adopt the summary of the background to the amendment and the interrelationship between an appeal to the High Court on a point of law from a decision of the Immigration Tribunal and the

judicial review of such a decision, which was summarised by Gilbert J in *Songmia v Minister of Immigration* as follows:[6]

> [12] Prior to the enactment of the current s 249, … leave was required for an appeal but not for judicial review. Issues that could have been dealt with by way of appeal were sometimes addressed in applications for judicial review to avoid the need for leave. This anomaly has been corrected by requiring leave for any application for judicial review as well as for appeals.
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> [13] Appeal rights to the Court of Appeal also differ depending on whether the matter is dealt with in the High Court by way of appeal or judicial review. An appeal to the Court of Appeal can be brought as of right from a decision on judicial review but leave is required if the matter has been dealt with by way of appeal. To address this issue, s 249(1C)(a) provides that where the issues can be dealt with adequately in an appeal, this is the appropriate route. The criteria for leave are otherwise the same; leave cannot be given for an appeal or for judicial review unless the issues sought to be raised are of general or public importance or for some other reason should be submitted to the Court for review.

[29] The last sentence refers to the criteria applicable for appeals contained in s 245(3) and for judicial review, s 249(1C)(b).

[30] As with appeals, the introduction by Parliament of a leave requirement indicates a deliberate intention to limit the scope of judicial review from immigration decisions.[7]

[31] The requirement that issues justifying a judicial review are those which, by reason of their general or public importance or for any other reasons, ought to be submitted to the High Court by definition narrow the grounds that justify the granting of leave. I adopt the statement of principle in *LMN v Immigration and Protection Tribunal New Zealand:*[8]

> The grounds for granting leave are narrow. In short, the applicant must show that his application raises a question in law of general or public importance, or which for any other reason should be submitted to this Court for its decision. Thus, factual errors or legal errors that are no more than a misapplication of existing legal principle to the particular facts of the case will not qualify. The effect of s 245 is to grant the Tribunal authority to

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6 *Songmia v Minister of Immigration* [2013] NZHC 3233 at [12] and [13].

7 *Nabou v Minister of Immigration* [2012] NZHC 3365, [2013] NZAR 155 at [6]; *Guo v Immigration and Protection Tribunal* [2014] NZHC 804 at [52].

8 *LMN v Immigration and Protection Tribunal New Zealand* [2013] NZHC 2077 at [2].

> misapply settled law to the facts of a case before it. Only if the legal errors have a wider significance that extends beyond the applicant will the Court have jurisdiction to grant leave to appeal. The key issue for determination, therefore, is whether the applicant has identified legal errors on the part of the Tribunal that extend beyond the individual case. Consideration also needs to be given to whether the applicant falls into the remaining category of providing "any other reason" for his appeal to be submitted to this Court for determination.

[32] While Duffy J was discussing s 245(3), the language used is the same as that in s 249(1C)(b) and her Honour's comments are equally applicable to that subsection, once the gateway of s 249(1C)(a) is passed.

[33] In *Minister of Immigration v Jooste* the Court of Appeal noted that the test is similar to that applying to second appeals to the Court of Appeal under s 67 of the Judicature Act 1908.[9] The Court referred to the Court's earlier decision in *Waller v Hider.*[10] There, the Court, considering s 67 of the Judicature Act 1908, observed:

> Upon a second appeal this Court is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below. It is not every alleged error of law that is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled upon by a Court.
>
> When the disputed matter is entirely or largely a question of fact the task of the applicant under s 67 is harder.

[34] The remaining category "any other reason" has likewise been the subject of consideration. I adopt the comment of Kós J in *Taafi v Minister of Immigration* where he said:[11]

> … it would only be in exceptional circumstances, involving individual injustice to such an extent that the Court simply could not countenance the first instance decision standing, that this alternative requirement will be met.

[35] Mr Mansouri-Rad referred to a number of authorities and submitted that the Court was justified in carefully examining the Immigration and Protection Tribunal decision having regard to the fact that it is given in a refugee context and with concern to ensure high standards of fairness.

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9 *Minister of Immigration v Jooste* [2014] NZCA 23 at [5].
10 *Waller v Hider* [1998] 1 NZLR 412 (CA) at 2.
11 *Taafi v Minister of Immigration* [2013] NZAR 1037 (HC) at [109]c).

[36] To the extent that such a submission suggests an inquiry beyond that which I have referred to in the previous paragraphs, I reject the submission because it clearly runs counter to the current provisions of s 249 and the clear directive given to the court in s 249(1C). What is required is a consideration of the decision under review as a whole, bearing in mind, as the Court of Appeal has said:[12]

> Its decisions are necessarily value judgments based on applying the statutory criteria to the relevant facts. In some cases, the Tribunal may be unable to say much more than having completed that evaluation exercise it has reached a decision.

[37] The court's function is thus to correct jurisdictional, procedural and other errors of law that are properly the subject of review.[13]

The process

[38] It is important, when considering reviews and appeals from decisions of the Refugee Status Officer and the Immigration and Protection Tribunal, that the process is understood.

[39] Section 129(1) of the Act provides that a person must be recognised as a refugee if he or she is a refugee within the meaning of the Refugee Convention. Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

[40] The Tribunal set out what the principal issues are, namely:[14]

> (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
>
> (b) If the answer is yes, is there a Convention reason for that persecution?

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12 *Minister of Immigration v Zhang* [2013] NZCA 487, [2014] NZAR 88 at [31].
13 *BV v Immigration and Protection Tribunal* [2014] NZAR 415 (HC) at [18].
14 *CP (Iran)* above, n 5 at [25].

The Tribunal set out the accepted definition of being persecuted which, I understand, is not disputed in this case as:[15]

> … the sustained or systemic violation of core human rights, demonstrative of a failure of state protection … Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection.

Again, the Tribunal added, and I understand this is not disputed:[16]

> In determining what is meant by "well-founded" in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective.

[41] Mr Mansouri-Rad, in his submission to the Tribunal, confirmed that the applicant's appeal does not invoke the Convention against Torture or the cruel, inhumane or degrading treatment or punishment ground under the ICCPR in exclusion to the Refugee Convention.

[42] That process, and the obligations of the parties, was summarised by the Supreme Court where the Court observed that New Zealand has enacted legislation that provides for an administrative process as the manner in which this country meets its convention obligations.[17] The Court then described the process and obligations of the parties as follows:[18]

> [35] … The initial determination of refugee status is made by a refugee status officer who is a government official designated to undertake that role. A person whose claim is declined may appeal to the Authority. The Authority is an independent specialist body with inquisitorial powers. It may "seek information from any source" or request the chief executive of the Department of Labour to seek and provide it with relevant information. Although it is not a commission of inquiry, it has the powers of one under the Commissions of Inquiry Act 1908 and may make such inquiries and obtain such reports as it considers necessary. In doing so it will consider and may build on information obtained by the refugee status officer at the earlier stage. The Authority is not bound by any rules of evidence but may inform itself in such manner as it thinks fit. At both levels

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15 At [26].
16 At [27].
17 *Attorney-General v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721.
18 At [35] – [37].

> these decision-makers must act in a manner that is consistent with New Zealand's obligations under the Convention.
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> [36] The inquisitorial nature of the process is further reflected in the language of the statutory provisions concerning the procedure on appeal. It is "the responsibility of an appellant to establish the claim" before the Authority. As the Court of Appeal pointed out in *Jiao v Refugee Status Appeals Authority*, Parliament has avoided the common law terms "onus" or "burden" by using "responsibility". Likewise it has used "establish" instead of "prove".
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> [37] There are special reasons for the legislature to prefer an inquisitorial process for refugee status determinations. There are particular problems in obtaining evidence on the crucial questions and determining its reliability…. In this context, inferences have to be drawn both as to the credibility of the claimant concerning matters of fact and in the evaluation required to decide if a claimant is entitled to protection as a refugee under Convention provisions.
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> **[Citations omitted]**

[43] The applicant's responsibility to establish the claim is a statutory obligation imposed by s 226(1) of the Act. Section 198(5) of the Act provides that the Tribunal is not required to seek any information, evidence or submissions further to those provided by the appellant.

Grounds for the review

[44] I consider the first question. The parties recognised that a two-stage process should be followed. They filed a joint memorandum on 20 November 2013 which was considered by Cooper J and approved. That called for the determination of the application for leave as an interlocutory matter and preliminary to the substantive review application itself. He envisaged that if the application for leave was successful a case management conference would then be scheduled in accordance with r 7.1AA(5) and s 10 of the Judicature Amendment Act. Rule 7.14(1)(b) requires the Registrar to make arrangements for a case management conference to be held on the first available date that is 15 working days after the date on which leave was granted. Accordingly, I proceed on the basis that I am only determining the application for leave.

[45] The grounds set out in the applicant's interlocutory application assert that the Tribunal's decision:

(a) Contained mistakes of fact;

(b) Was unreasonable;

(c) Failed to take into account relevant considerations; and

(d) Was unfair.

[46] The applicant's statement of claim breaks the grounds for relief into two areas, namely issues relating to military service and matters outside military service. Those grounds are specifically identified in paragraph 15 and are then particularised in the subsequent paragraphs of the statement of claim.

[47] I deal first with the issue relating to military service. Mr Mansouri-Rad was critical of the Tribunal's finding on the possibility of the applicant being conscripted to serve in one of Iran's military and security forces which are involved in human right violations against the civilian population.

[48] In particular, the applicant alleges that the Tribunal failed to take into account relevant considerations as it failed to consider evidence that assignment of conscripts among the three military forces was random; and it failed to adequately consider the applicant's fear that he might be assigned to the LEF for his military service. The applicant claims that as a result of failing to consider evidence that assignment was random, the Tribunal made the unreasonable finding that assignment was not random. Additionally, he submits that the Tribunal's determination that the applicant being required to declare himself as Muslim and act as a Muslim did not constitute serious harm, was unreasonable. The applicant also claims that the Tribunal made a mistake of fact in finding that Entezami forces do not draw from the pool of military conscripts.

[49] As to matters outside military service, the applicant alleges that the Tribunal failed to take into account relevant considerations being the applicant's predicament in relation to his lack of religious beliefs (outside of military service); and the plaintiff's predicament in relation to his prohibition from attending university in Iran

due to his lack of religious beliefs. Additionally, the applicant claims that the Tribunal's decision to dismiss his appeal was unfair.

Discussion

[50] The alleged failures to consider relevant considerations, if made out, would amount to an error of law by the Tribunal in applying the test for whether the applicant has a well founded fear of persecution, which could be dealt with on appeal. The applicant's complaint that the Tribunal failed to consider evidence that assignment of conscripts was not random is an allegation of mistake of fact, or an error of law, that could have been raised on appeal. The alleged mistake of fact in finding that Entezami forces do not draw from the pool of military conscripts could also be raised on appeal. The allegations that the Tribunal made findings without evidential foundation (such as in assuming that to avoid harm the applicant would declare himself Muslim) are capable of being dealt with on appeal as this amounts to an error of law. It is only when no appeal route is open or the matter could not be adequately dealt with on appeal, that such an allegation should be dealt with by judicial review, given the clear wording of s 249(1C)(a).

[51] Even though I have found that it is not open to the applicant to now appeal due to the statutory time limit, the fact that these matters could have been dealt with on appeal is a factor that I must have regard to.[19]

[52] As I have found that these issues could be adequately dealt with on appeal, the "central question"[20] is whether the issues the applicant attempts to raise are of general or public importance or for any other reason the High Court should hear the judicial review. In considering this:[21]

> …the Court must consider whether the importance of the issues outweighs the cost and delay of bringing the judicial review. If the application has "little or no prospect of success" it follows that the issues are of limited general or public importance, and this points towards not granting leave.

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19 *Allada v Immigration and Protection Tribunal New Zealand*, above n 3, at [48].
20 *Allada v Immigration and Protection Tribunal New Zealand*.
21 At [36].

[53] A difficulty in carrying out this exercise is that the parties have asked for the leave application to be determined separately from the substantive review. This means that I must assess whether the grounds of review raise issues of public or general importance without engaging in the merits of the substantive review. This exercise is difficult given the test for public importance requires a determination of "whether the applicant has identified legal errors on the part of the Tribunal that extend beyond the individual case."[22] This seems to suggest that before granting leave I need to be satisfied, not only that the Tribunal made legal errors, but that those errors raise issues of some public importance. The approach that I intend to adopt is to assess whether the alleged errors of law are "seriously arguable",[23] and then determine whether they raise issues of public importance. Therefore nothing that I say should be interpreted as suggesting that a particular ground of review might have merit in a substantive sense.

[54] I will consider each of the grounds of review separately to consider whether they meet the high threshold of being both seriously arguable and of public importance. The applicant says that each of the issues is of general or public importance.

[55] In relation to the alleged failure to consider the evidence that assignment of conscripts into the different military forces was random, the plaintiff submits that because the Tribunal has followed its decision in this case, this issue is of public importance. The Tribunal has dismissed two other appeals, applying the finding of fact that was made in this case (that assignment was not random). Counsel accepts that the issue of "random" assignment of conscripts is a matter of "fact" and the Immigration and Protection Tribunal is entitled to change its findings based on its view of country information at any time. However, counsel submits if those findings affect other refugee claimants, a finding of general importance can be made.

[56] The finding that assignment was not random was based on a 2011 report, a 1998 report and a 1999 report, and the material submitted by the applicant (a 2011 article). It was a finding that was open to the Tribunal. The affidavit of the

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22 *LMN v Immigration and Protection Tribunal New Zealand*, above n 8 at [2].
23 See for instance *Minister of Immigration v Jooste* [2014] NZCA 23.

applicant's uncle, which deposed that in 1989 assignment was random based on his own personal experience, does not alter this. That evidence is much older than the evidence considered by the Tribunal. The allegation that the Tribunal's finding that assignment was not random was unreasonable has little prospect of success and it follows that the issue is of little public or general importance. The fact that the Tribunal has applied this finding in other cases does not make the issue of public or general importance.

[57] The plaintiff further submits that the interpretation of the law in the Tribunal's decision was flawed and that this flawed interpretation has been applied in other cases. The plaintiff argues that the Tribunal set a precedent that a refugee claimant can be expected to lie, give false evidence to the authorities and pretend to be Muslim in order to avoid persecution. Furthermore, the plaintiff submits that the Tribunal incorrectly justified this requirement to lie on the basis that the breach was not at the "core" of the right. The plaintiff relies on *RT (Zimbabwe) v Secretary of State for the Home Department*, a decision of the UK Supreme Court, to support the submission that the Tribunal's approach to requiring a refugee to lie amounts to an error of law.[24] I will first consider the general public importance of this question and then whether it is seriously arguable in this case.

[58] There are several factors that persuade me that the suggested errors in the Tribunal's approach raise issues of public or general importance. The first is that the plaintiff has submitted that the Tribunal's decision in this case has been applied in several other cases. While, I do not consider that the application of the factual finding that conscription is not random in other cases was sufficiently serious to raise an issue of public importance, I do consider that the precedent value of the legal approach in this case could raise an issue of public importance.

[59] This is particularly given that this area of law appears to be a subject of some general importance. The approach to be taken when a refugee could take action to avoid persecution by being discreet or lying has been addressed in two relatively

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[24] *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38.

recent decisions of the United Kingdom Supreme Court.[25] In the opening paragraph of the Supreme Court's judgment in *RT (Zimbabwe)* the Court describes the question as one of "general importance". Furthermore, The High Court of Australia has recently granted special leave on the issue what steps a refugee can be expected to take to avoid persecution.[26] These factors indicate that this area is one of general and public importance.

[60] However, before granting leave to review, I must be satisfied that there is in fact a seriously arguable case that the Tribunal's legal approach was wrong. It cannot be enough that the area of law is of general importance. This requires a more detailed analysis of the Tribunal's decision and the previous authority on how to approach situations where a refugee might lie to avoid persecution.

The Tribunal's Approach

[61] The Tribunal accepted that in order to avoid adverse consequences during his military service the plaintiff would be required to record his religion as Islam and periodically attend Islamic instruction.[27]

[62] It further accepted that in general it was no answer to a risk of being persecuted that a person could avoid such persecution if they were discreet. However, the Tribunal emphasised that the question was whether in requiring the plaintiff to act discreetly, the plaintiff was being required to forego the exercise of a fundamental right, or just the exercise of a right at the margins of the protected right?[28]

[63] The Tribunal found that the breaches of the right that would occur would be when the plaintiff was required to assert that he was Muslim, and when he was required to attend religious instruction during his compulsory military service. The Tribunal found that such instances were fleeting, transient and inconsequential and

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25 *RT (Zimbabwe) v Secretary of State for the Home Department*, above n 24; and *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596..

26 *Minister of Immigration and Border Protection v SZSCA* [2014] HCATrans 111 (16 May 2014)

27 *CP (Iran)*, above n 5, at [58].

28 At [60]–[62].

therefore amounted only to breaches at the margins of his right to freedom of thought, conscience and religion.[29]

Previous Authority

[64] The plaintiff relies on *RT (Zimbabwe) v Secretary of State for the Home Department* for the proposition that an individual should not be expected to lie, give false evidence or pretend to be something that they are not to avoid persecution.[30] That case concerned several individuals applying for asylum in the United Kingdom on the basis that they faced persecution if they returned to Zimbabwe. This issue for the Supreme Court was whether the principle from *HJ (Iran) v Secretary of State for the Home Department* applied to individuals who were politically neutral.[31] *HJ (Iran)* confirmed that an applicant who would factually live discreetly in order to avoid persecution for being gay, has a legitimate claim for asylum. *RT (Zimbabwe)* held that this principle could apply to individuals who had no strong political belief, but who would be forced to lie and demonstrate allegiance to the ruling Zanu PF party in order to avoid being persecuted. The Supreme Court held that it was improper to focus on the strength of any political belief.[32] This meant that it was unnecessary to show that the individuals were strongly committed to political neutrality. It was enough that if they expressed their true political beliefs they would be persecuted. It was also irrelevant that the individuals would only need to lie when they were confronted by militia. Thus even though the lies would be required on a less frequent basis than a gay man being required to live his life discreetly, the lies required could still engage the principle.[33]

[65] The Tribunal recognised that it is no answer to a risk of being persecuted that an individual could avoid this persecution by living discreetly. However, I consider that some aspects of the Tribunal's approach differ from that of the Supreme Court. First, it treats the deception that the plaintiff would have to practice as the

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29 At [63]–[66].

30 *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38, [2013] 1 AC 152.

31 *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596.

32 *RT (Zimbabwe) v Secretary of State for the Home Department*, above n 30 at [41]–[45].

33 See the Secretary of State's argument at [24], this issue was not discussed in detail by their Lordships, but must have been implicitly rejected.

persecution.[34] Second, it approaches the marginal/core distinction on the basis of duration of persecution, rather than on the nature of the exercise of the right being circumscribed.[35]

[66] In my opinion, these two differences are sufficient to consider that the plaintiff has a seriously arguable case that the Tribunal made an error of law. The bounds of the requirement to lie and the core/marginal distinction are both areas of law that are constantly being developed. On the face of the Tribunal's decision there are some differences between its approach and that of the Supreme Court. I therefore consider that it is appropriate to grant leave to seek judicial review of the Tribunal's decision.

Outcome

[67] I have found that the applicant is out of time to file an application for leave to appeal, and his application for leave to bring review proceedings cannot be treated as an application for leave to appeal. In considering the application for leave to bring review proceedings, I have found that the issues could have been raised on appeal, but that they are of general or public importance. This means that leave is granted to bring review proceedings.

Decision

[68] I grant leave to the plaintiff to bring judicial review proceedings. The proceedings shall be listed in accordance with the minute of Cooper J of 20 November 2013 for case management conference purposes and, in particular for giving directions for the disposal of the application.

Costs

[69] I reserve costs. They can be determined on the outcome of the substantive application. For the assistance of the person determining that application, in my view this is a Category 2 proceeding. The interlocutory application has had the added complication that part of it required determination based on memoranda filed

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34 *CP (Iran)*, above n 5, at [66].
35 At [63].

by the parties. Whilst the applicant has been successful on the application for leave, the applicant was unsuccessful on the application for leave to appeal or, in the alternative, to amend the application to include an application for leave to appeal.

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JA Faire J