IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-743

UNDER	Section 59 of the Legal Services Act 2000
IN THE MATTER OF	two decisions by the Legal Aid Review Panel, 85/05 and 86/05
BETWEEN	LEGAL SERVICES AGENCY Appellant
AND	JAFAR HOSSEINI AND AHMAD ALI ESMAEYLI First Respondent
AND	SIMON LAURENT, PRINCIPAL OF LAURENT LAW Second Respondent

Appearances: G D S Taylor for the Appellant
S Laurent for the Respondents

Judgment: 21 February 2006 at 3.00pm

JUDGMENT OF PRIESTLEY J

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The Parties

[1] Grants of legal aid and the administration of New Zealand's legal aid scheme are governed by the Legal Services Act 2000 ("the Act").

[2] Central to the administration of legal aid is a statutory body established by s91, the Legal Services Agency ("the Agency"). The Agency's primary function (s92(a)) is;

> (a) to administer schemes in as consistent, accountable, inexpensive, and efficient a manner as is consistent with the purpose of this Act.

[3] As is frequently the case with administrative bodies, decisions of the Agency can be reviewed. For that purpose s62 establishes the Legal Aid Review Panel ("the Review Panel").

[4] s54 stipulates the grounds on which a legally aided person, an applicant for legal aid, or a legal aid provider may challenge a decision of the Agency.

> **54 Grounds for review**
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> (1) An aided person or an applicant for legal aid may apply to the Review Panel for a review of a decision of the Agency referred to in subsection (2) on the grounds that the decision is—
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> (a) manifestly unreasonable; or
>
> (b) wrong in law.
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> (2) The decisions that may be reviewed are decisions that affect the applicant for review and that relate to any 1 or more of the following:
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> (a) an application for legal aid:
>
> (b) any conditions imposed under section 15 or section 42 on a grant of legal aid:
>
> (c) any amount payable by an aided person, whether as contribution or repayment, under a grant of legal aid:
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> (d) the identity of any listed provider in a grant of legal aid:
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> (e) the maximum grant under a grant of legal aid:
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> (f) the withdrawal of, or amendment to, a grant of legal aid:

(g) the enforcement of any condition imposed under section 15 or section 42 on a grant of legal aid:

(h) any changes to, or dealings with, a charge on property arising out of a grant of legal aid:

(i) an application under section 41.

(3) A listed provider or former listed provider may apply to the Review Panel for a review of a decision relating to the amount payable by the Agency to that provider, on the grounds that the decision is—

(a) manifestly unreasonable; or

(b) wrong in law.

(4) In this section, decision includes a failure or refusal to make a decision.

[5] On such a review a Review Panel, (which in terms of s55A constitutes a "team" assigned for review purposes by the Review Panel's convenor), may, under s57(2) confirm, modify, or reverse the Agency's decision. The Review Panel may also, instead of determining a review, exercise its power under s58(1) to direct the Agency to reconsider its decision.

[6] Section 59 permits the Agency or an applicant to appeal a Review Panel's decision to the High Court on a question of law.

Background

[7] The first respondents are Iranian Nationals. They were brothers-in-law. The second respondent was at all material times their counsel.

[8] Having arrived in New Zealand in September 2002 and March 2003 respectively, the first respondents applied for refugee status relying on Article 1(A)(2) of the Refugee Convention. They claimed they were unable to return to Iran because of a well founded fear of being persecuted on Convention grounds. Their two refugee claims were processed in the normal way. Refugee status was declined by the New Zealand Immigration Service. The first respondents exercised their right of appeal to the Refugee Status Appeals Authority. The Authority released two decisions on 30 September 2003 dismissing the appeals.

[9] The first respondents then initiated judicial review proceedings in the High Court challenging the Authority's decisions.

[10] It is the entitlement of the first respondents to legal aid which lies at the heart of this appeal. Not once, but twice, the Review Panel took the view that the Agency was wrong to have declined a grant of legal aid to fund the High Court judicial review proceedings. Instead of accepting the Review Panel's determinations the Agency asserts it was right and the Panel was wrong. Hence this appeal.

[11] The first respondents' judicial review applications were heard in the High Court at Auckland before Harrison J on 4 February 2004. A reserved judgment was issued on 16 March 2004 dismissing the applications. At the heart of the judicial review applications was the propriety of the Refugee Status Appeals Authority's conclusion that the factual narrative on which the two claimants relied was not credible and/or implausible.

[12] It is unnecessary to refer to the detail of either the Refugee Status Appeals Authority's decisions or the judgment of Harrison J. It is sufficient, however, to observe that in the High Court, important, and certainly tenable issues were raised by the second respondent as counsel, dealing with the interface between adverse credibility findings and administrative law principles. Clearly Harrison J did not consider the appeal to be futile as is apparent from the following passages of his judgment.

> [33] It follows from my rejection of each of Mr Laurent's grounds of challenge that O's appeal must fail. I add that one ground for the RSAA's decision was its finding of material inconsistencies between his evidence given at the appeal hearing and on two previous occasions; once in a lengthy and detailed statement lodged with the RSB and later during an interview with the RSB officer.
>
> [34] This conclusion may have been sufficient on its own to justify the RSAA's decision. Unfortunately it left the finding in a vacuum. The Authority did not attempt to use the finding, as it would have been entitled, as a discrete basis for concluding that O was not a credible or reliable witness. Of itself, such a finding would have provided a proper ground for dismissing the appeal. Instead the Authority treated the inconsistency as supporting the different ground of implausibility of account (para 134). I have treated the finding in that way.
>
> …

> [55] Again, though, as in O's decision, the Authority did not treat the inconsistencies, as it was entitled, as a foundation for concluding that L was not a credible witness whose evidence justified rejection on this ground alone. Plainly the RSAA had a proper basis for taking this step. Its failure to differentiate the effect of this adverse character finding from a discrete inferential finding of implausibility of L's account is confusing. I can only assume that the Authority was meaning to make an adverse character finding unrelated to the separate question of the inherent implausibility of O's story. It appears as though the Authority was meaning to say that it did not believe his evidence. If that is the case, it would spell an immediate and absolute end to this challenge. However, in case my assumption is wrong, I must consider the other grounds of Mr Laurent's challenge.
>
> …
>
> [62] As with O's appeal, Mr Laurent mounted a sustained attack upon the RSAA's decision. He submitted that the sheer scale of implausibilities found by the Authority was evidence that it fundamentally applied itself to the facts. He submitted that it indicated a predisposition to find a means to disbelieve and ultimately decline the appeals. However, Mr Laurent disclaimed any suggestion of bias. In this respect he was wise.
>
> [63] I am not satisfied that any of the RSAA's findings of implausibility of L's account were not reasonably open to it or that it was guilty of demonstrable errors of fact. To the contrary, I am satisfied that the Authority acted logically in drawing adverse inferences from L's account. It follows that I dismiss L's application also. By agreement between the parties there is to be no order as to costs.
>
> [64] I wish to express my appreciation to both counsel for their skill and industry in arguing these applications.

[13] In the wake of Harrison J's judgment the first respondents were removed from New Zealand. They thus have no direct interest in the outcome of this proceeding. Despite a clear direction (infra para [19]) from the Review Panel that the second respondent's fee should be covered by a legal aid grant, the Agency has chosen to ignore that direction, has failed to pay Mr Laurent's fee, and has instead mounted this appeal.

Relevant decisions

[14] The Agency initially declined the first respondents' application for legal aid on 28 January 2004. The respondents, as they were entitled to under s29, asked the Agency to reconsider its decision. This the Agency did and in a decision dated 14 April 2004 declined legal aid.

[15] From that decision the respondents appealed to the Review Panel. A team of two members Ms L L Heah and Ms D Patchett, both of whom are experienced lawyers, reviewed the Agency's decision. They issued a careful and comprehensive decision comprising 11 pages and 57 paragraphs on 3 September 2004. Pursuant to its powers under s58(1) the Review Panel directed the Agency to reconsider.

> [57] The Panel accordingly directs the Agency reconsider its decision to decline aid to the Applicants taking into account the matters referred to in this decision but in particular the following:
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> (a) The particular sub-sections in s9 that it seeks to rely on – that is whether it is s 9(3) and/or s 9(4)(d)(I);
>
> (b) If it seeks to rely on s9(3) then it must adopt the test set out in *Gummer* (supra) (see paragraphs 44 and 45 above);
>
> (c) In applying *Gummer* (supra), the Agency is to consider whether it can be reasonably argued that the Statements of Claim – as elaborated and supported by counsel's Memorandum – disclose no reasonable cause of action. In that regard, the Agency is to take into account that:
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> - the Statements of Claim were based on well recognised grounds of judicial review – unreasonableness, errors of law and mistake of fact. The facts in support of these grounds of review were clearly and sufficiently set out.
> - there were in fact no striking out applications.
> - interim orders had been granted by the High Court.
> - there is nothing in the High Court Judgment of 16 March 2004 to suggest that the applicants' cases were entirely or substantially without merit.
>
> (d) If it seeks to rely on s 9(4)(d)(i), then it must apply the test in *Timmins* (supra) (see paragraphs 46 and 47 above). It is to assess the sufficiency of prospects of success against the benefits to the Applicants and the costs of the judicial review proceedings.
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> (e) In considering the benefits of the judicial review proceedings to the Applicants, the Agency is to have regard to the Applicants' belief that their safety is at risk of serious harm should they return to Iran and the matters raised by the Provider in paragraph 51 above.

[16] By that stage, of course, the proceedings in respect of which legal aid had been sought had already been determined by Harrison J in the High Court. In my judgment, however, nothing hangs on that.

[17] The Agency duly reconsidered the matter. The result of its reconsideration was conveyed to the respondents' counsel by letter on 7 October 2005.

> The Agency has received the Legal Aid Review Panel decision in the above matter. In accordance with the direction to reconsider the decision to decline aid, the Agency advises as follows.
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> Following the numbering in para 57 of the decision:
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> a. The Agency should have relied on s9(4)(e) Legal Services Act 2000. The judicial review proceedings are more akin to an appeal than an original decision. If, however, it is wrong and judicial review proceedings are original proceedings, then it relies on s9(4)(d)(i).
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> b. Not applicable.
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> c. The Agency was correct in not accepting that there were prospects of success sufficient to justify a grant of aid. The High Court dismissed the application for judicial review.
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> The test in *Gummer* is not what is alleged in a statement of claim. The test is whether there were any prospects of success. Clearly there were not because the application was unsuccessful.
>
> d. The test in *Timmins* is one of reasonableness. That is a difficult test to apply when credibility is at issued as it was in this case. Where credibility is in issue a reasonable person would take that into account in determining prospects of success. The Agency has taken the applicants (sic) problems of credibility into account in assessing prospects of success, as insufficient to justify a grant of aid.
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> e. The Agency has taken account of the applicant's (sic) fears of returning to Iran in the same way as did the High Court. The (sic) do not affect its assessment that there were never any prospects of success for this application.
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> For these reasons aid is refused for the judicial review proceedings.

[18] In short the Agency appears to be of the view that the judicial review proceeding had no prospect of success and that legal aid should be declined for that reason.

[19] From that second decision of the Agency the first respondents appealed. The Review Panel's decision (the Panel comprising Mr D J Maze, Ms D Patchett and Ms L Heah) was dated 14 December 2004. It is from that decision the Agency appealed to the High Court. It is helpful to set out in full the relevant part of the Review Panel's decision which, this time, reversed the Agency's decision and granted legal aid.

The Issues

[9] The issue before the Panel is whether the Agency's decision to refuse legal aid in light of the decision in LARP 344/04 is either manifestly unreasonable or wrong in law.

The Law

[10] A decision is "manifestly unreasonable" if it is shown "clearly and unmistakably" that the Agency's decision went beyond what was reasonable or was irrational or logically flawed" (*Legal Services Agency v Fainu* 19/11/02 Randerson J HC Auckland AP68/02).

[11] A decision may be wrong in law for a variety of reasons. It may be wrong in law, for example, if it derives from an inaccurate application or interpretation of a statute, or is wrong in principle. It may be wrong in law if a decision-maker has failed to take into account some relevant matter or takes into account some irrelevant matter, or if the decision depends on findings which are unsupported by the evidence (*Legal Services Agency v Fainu* (supra)).

[12] In *Legal Services Agency v A and O* (22/5/03 Hansen J High Court Christchurch CIV 2003/409/597 & 598) said at paragraph 11 that manifestly unreasonable meant "something different from what is "wrong in law"", and would be made out "where it is shown, clearly and unmistakably, that the decision made by the Agency went beyond what was reasonable, or was irrational or logically flawed". His Honour also said that "manifestly unreasonable" required "not only that the decision be found to be unreasonable but that LARP forms the view that the decision is so clearly unreasonable that the intervention of the Panel is called for". His Honour added that, "the determination of what is "manifestly unreasonable" is to be made objectively by the members of LARP, applying their judgment to the matter in accordance with the principles stated," and that it was "not for LARP to substitute its view of what the decision should have been for that of the Agency".

Discussion

Is s 9(4)(e) of the Legal Services Act 2000 (the Act) applicable?

[13] The Agency claims that judicial review proceedings are in the nature of an appeal rather than original proceedings and as such it should have relied on s 9(4)(e) of the Act in the first place.

[14] The Panel is of the view that judicial review proceedings are original proceedings, not appeals in terms of s9(4)(e). This is because:

1. There is no right of appeal from a decision of the RSAA – the only revenue of redress is judicial review – *U & V v Refugee Status Appeals Authority and the Attorney-General*, CIV-2003-404-002530, Auckland Registry, 30 September 2003 (at para 13);

2. Section 7(k) of the Act refers to the processing of any claim for refugee status (including proceedings on any appeal in relation to

such a claim). By inference, such proceedings on appeal must be to the RSAA.

3. Section 7)(l) of the Act refers to judicial review proceedings in respect of matters to which paragraph (k) applies

4. A distinction is therefore drawn in s7 of the Act between appeals and judicial review in respect of immigration matters.

5. Therefore in s9 of the Act the same distinction should be followed in that judicial review proceedings are original proceedings covered by s9(4)(d)(i) and not appeals in terms of s9(4)(e).

Has the Agency correctly stated and applied the test in respect of s9(3) of the Act?

[15] The Agency's letter of 7 October 2004 is difficult to comprehend in parts. On one hand it specifically eschews s9(3) (in paragraph a and b) and yet refers to the test in *Gummer* (supra) as though somehow s9(3) was applicable. In referring to the test in *Gummer* (supra), it appears to suggest that this test was whether there were any prospects of success and "clearly there were not because the application was unsuccessful" (paragraph d).

[16] If the Agency is purporting to have relied on s9(3) of the Act– as it subsequently did in submissions to the Panel – then it had incorrectly stated the test in *Gummer* (supra) and failed to take into account the matters in paragraph 57(c) of the Panel's decision in LARP 344/04.

[17] As stated by Williams J in *Gummer* (supra), the test in respect of s9(3) of the Act (then s34(1) of the Legal Services Act 1991) is whether the claim is so "unmeritorious as to be unlikely to survive striking out applications" (at paragraph 14). It was in light of that test that the Panel in LARP 344/04 directed the Agency to take into account the matters in paragraph 57(c) of its decision. Clearly the Agency did not take these matters into account; not only has the Agency ignored them but it has also erroneously and simplistically equated the fact of the unsuccessful outcome of the judicial review proceedings with there being no reasonable grounds for taking the proceedings in terms of s9(3) of the Act. The fact that the proceedings were ultimately unsuccessful is only one of a number of relevant factors that the Agency ought to have taken into account in considering s9(3) of the Act.

[18] The Panel therefore finds that the Agency was wrong in law in not applying the correct test in respect of s9(3) of the Act and in failing to take into account the matters in paragraph 57(c) in LARP 344/04. The Panel further finds that had the Agency applied the right test and taken into account those matters, then it would have accepted that the Applicants had shown that there were reasonable grounds for taking the judicial review proceedings in terms of s9(3) of the Act.

Has the Agency correctly stated and applied the test in respect of s9(4)(d)(i) of the Act?

[19] In purporting to apply the test in *Timmins* (supra), it is also clear - from the Agency's letter of 7 October 2004 and its submissions to the Panel

- that the Agency entirely or largely focused on the prospects of success. Its view was that there were no prospects of success as the judicial review proceedings sought to challenge credibility findings which were not amenable to judicial review.

[20] In paragraph e. of the Agency's letter of 7 October 2004, it claims that it has taken into account the Applicant's fears of returning to Iran but stated that this did not affect its assessment that there were never any prospects of success. In the preceding paragraph (paragraph d) it appears to suggest that a "reasonable person" would determine that the prospects of success were insufficient if credibility were at issue.

[21] It is apparent that in focusing entirely or largely on the prospects of success, the Agency failed to undertake a balancing exercise in terms of weighing the likely benefits against the likely costs – contrary to the direction to do so in terms of paragraph 57(d) and (e) in LARP 344/04.

[22] It is worthwhile again to bear in mind what was held by Wild J in *Timmins* (supra):

> "[33] … The assessment invited by the words in s 9(4)(d)(i) sufficient to justify the grant of aid", involves weighing the likely benefits against the likely costs.
>
> [34] Because assessing "prospects of success" may involve assessing non-pecuniary benefits, the assessment for a particular plaintiff or claimant can obviously be difficult.
>
> [35] … The question might be framed thus: What, if any, legal action would the applicant (assuming that they were a reasonable individual) take in the circumstances if paying their own legal costs?"

[23] As in its previous decision declining aid, the Agency has again asked itself the wrong question. Instead of asking itself the question in paragraph [35] of *Timmins* (supra), the Agency asked itself "Will the applicant win?"

[24] In this case the Applicants believed – rightly or wrongly - that their lives and that of their wives were at risk if they returned to Iran. Notwithstanding the RSAA's finding that there was not a real chance that they would be persecuted if they returned to Iran, the fact remains that they believed that they would be – and this belief is supported by a number of factual matters that were either accepted by the RSAA or not specifically rejected by it – see paragraphs 12, 13, 14, 15, 19, 20 and 21 of LARP 344/04. The benefits from the desired outcome of the judicial review proceedings – that is, being able to remain in New Zealand if the proceedings were successful– in these circumstances, must therefore be highly significant relative to the likely costs of the proceedings. The grant sought by the Provider in this instance was $8,515.00 for each Applicant although of course this may not be the amount that will actually be approved (if aid is granted) given that the two sets of proceedings were identical in many respects.

[25] The Panel therefore finds that the Agency was wrong in law in focusing entirely or largely on the prospects of success and failing to weigh

the likely benefits against the likely costs in accordance with the *Timmins* (supra) test.

[26] Given that the Applicants have met the threshold test in s9(3) of the Act – that there were reasonable grounds for taking the judicial review proceedings – the Panel finds that had the Agency in considering s9(4)(d)(i) of the Act correctly applied the test in *Timmins* (supra) then it would have granted aid.

Was the Agency correct in law in its view that the judicial review proceedings had no prospects of success?

[27] In both its letter of 7 October 2004 and submissions to the Panel the Agency appears to suggest that no reasonable person would issue judicial proceedings in these circumstances, given that the proceedings involved a challenge to credibility findings which are not amenable to judicial review.

[28] The Agency's claim that credibility findings are not susceptible to judicial review is not only contrary to its earlier concession in this regard (see paragraph 32 of LARP 344/04) but also contrary to law. The Agency is also wrong in law in stating that the only basis for judicial review of findings of fact is if there is no evidence to support them.

[29] In the judgment that followed these judicial review proceedings – *O & L v Refugee Status Appeals Authority & The Attorney-Genera*l (16 March 2004, Harrison J, High Court Auckland, CIV-2003-404-5724/5725) – Harrison J set out a number of relevant principles applicable to judicial review of RSAA decisions (at paragraph [4]):

> "b) The High Court will only interfere with a credibility finding made by a specialist tribunal on the ground of unreasonableness if it is proven to be perverse, capricious or without any factual basis (this last category may also constitute an error of law)
>
> c) A tribunal's discrete finding of implausibility may be more vulnerable to challenge but not if it is reasoned and based upon the orthodox judicial decision making process of drawing inferences available from proven facts by applying logic, common sense and experience;
>
> d) A conclusion based upon a detailed examination of irrelevant or peripheral issues is unsatisfactory, as is one which obviously fails to make an allowance, where appropriate, for the applicant's cultural background and previous social experiences."

[30] Much of the RSAA's findings of facts under challenge in these judicial review proceedings involved implausibility findings. The legal principles cited above were applicable to and relied upon by the Applicants in these proceedings – as is evident from the Statements of Claim and Memorandum filed in support.

[31] Although the outcome of the judicial review proceedings is relevant to assessing the prospects of success, the fact that the judicial review application was unsuccessful in the end does not mean in itself that there

were never any prospects of success or that the prospects of success were insufficient to justify a grant of aid.

Decision

[32] For the reasons set out above, the Agency's decision to decline legal aid for the judicial review proceedings is therefore reversed. Legal aid is granted with the amount to be determined by the Agency.

Discussion

[20] It is important not to lose sight of the social policy that lies behind the Act. It is to ensure that personal financial constraints do not disadvantage people appearing before criminal courts or seeking access to civil courts. The s3(a) purpose of the Act is patently clear.

> 3(a) providing a legal aid scheme that assists people who have insufficient means to pay for legal services to nonetheless have access to them;

[21] The threshold of "insufficient means" is ultimately a matter of government policy. Thresholds are stipulated which are, of necessity, arbitrary.

[22] It is significant, that in terms of s9(1) an applicant for legal aid whose disposable income does not exceed the prescribed amount *must* be granted legal aid for civil proceedings.

[23] Counterbalancing the s9(1) statutory obligation to grant civil legal aid the Agency has a countervailing obligation to refuse legal aid under s9(3).

> 9(3) The Agency must refuse to grant legal aid if the applicant has not shown that he or she has reasonable grounds for taking or defending the proceedings or being a party to the proceedings.

[24] The Agency also has a statutory *discretion* to refuse legal aid in the circumstances stipulated in s9(4).

> (4) The Agency may also refuse legal aid to an applicant in any of the following circumstances:
>
> > (a) the Agency is unable to obtain full information concerning the applicant's financial affairs, because of the default or failure of the applicant:

> (b) if, in the opinion of the Agency, the amount of the contribution that the applicant is likely to be required to make is greater than the likely cost of the proceedings for which aid is sought:
>
> (c) the applicant is not resident in New Zealand, and the Agency considers that the proceedings might reasonably be brought in a jurisdiction other than New Zealand:
>
> (d) in the case of original proceedings,—
>
> (i) the applicant's prospects of success are not sufficient to justify the grant of aid; or
>
> (ii) the grant is not justified, having regard to the nature of the proceedings and the applicant's interest in them (financial or otherwise), in relation to the likely cost of the proceedings; or
>
> (iii) for any other cause it appears unreasonable or undesirable that the applicant should receive aid in the particular circumstances of the case:
>
> (e) in the case of an appeal (whether or not in respect of proceedings in which the applicant has received legal aid), the Agency considers that for any reason the grant of aid or further aid is not justified.

[25] Against that statutory framework it is difficult to see how any serious criticism can attach to the Review Panel's (as opposed to the Agency's) decision. The Review Panel's 3 September 2004 decision first directed the Agency to clarify whether it relied on a s9(3), s9(4)(d)(i), or both declining legal aid.

[26] The Agency's 7 October reconsideration stipulated that it "should have relied" on s9(4)(e). That, with respect, is an untenable proposition given that no appeals lie from decisions of the Refugee Status Appeals Authority. The only redress, confirmed by explicit provisions of ss129Q(3) and 146A of the Immigration Act 1957, is a judicial review application.

[27] The review panel's second direction was to stipulate, that if the Agency sought to invoke its statutory obligation under s9(3), then it must adopt the high threshold test adopted by Williams J in *Gummer v Legal Services Board* (High Court Auckland, AP 38/SW00, 17 July 2000) that the claim was so unmeritorious as to be unlikely to survive a strike-out application. The Agency's 7 October decision states that the *Gummer* test is not applicable.

[28] It then goes on in paragraph (d) of its decision to conflate the *Gummer* test with the *Timmins* test. What the Review Panel said in paras 15-18 of its decision (supra) strikes me as a correct analysis, quite apart from which, if the Agency decided *Gummer* was inapplicable it was clearly wrong to turn to the issue of "reasonable grounds" under another guise.

[29] The Agency's 7 October decision, despite asserting that it was going to rely on s9(4)(e), seems in large measure instead to justify the outcome on s9(4)(d)(i) grounds. Its justification for concluding that the judicial review application had insufficient prospects of success to justify the grant of legal aid was stated as being:

a) The respondents' credibility problems, resulted in an assessment that the prospect of success was insufficient.

b) The respondents' fears of returning to Iran had been considered in similar vein to the consideration given to those fears by the High Court, but did not alter the assessment that the proceeding "never" had any prospect of success.

[30] Section 9(4)(d)(i) of the Act has been subjected to judicial scrutiny by Wild J in *Timmins v Legal Aid Review Panel* [2004] 1 NZLR 708. Wild J considered the words "prospects of success" and helpfully suggested a pragmatic yardstick, all the while accepting that each particular case was different.

> [33] "Prospects of success", in my view, refers to the prospects of achieving a successful outcome. Those prospects need to be assessed in a pragmatic way and, somewhat obviously, in the circumstances of the particular case. After all, no two cases are the same. The assessment invited by the words in s 9(4)(d)(i), "sufficient to justify the grant of aid", involves weighing the likely benefits against the likely costs. Whilst the benefits in some cases will be measurable mainly, and perhaps even wholly, in dollar terms, in other situations that will not be so. Examples might include obtaining an injunction restraining the destruction of an area of native bush, or the closing of a road or access track or some other facility, or a judgment upholding the reputation of a person or a product (even if unaccompanied by significant damages), or vindicating some important point of principle.
>
> [34] Because assessing "prospects of success" may involve assessing non–pecuniary benefits, the assessment for a particular plaintiff or claimant can obviously be difficult.

> [35] I agree with Mr Taylor's suggestion that inquiring what a person funding him or herself would do may be helpful. The question might be framed thus: What, if any, legal action would the applicant (assuming they were a reasonable individual) take in the circumstances if paying their own legal costs?
>
> [36] If the applicant is on the receiving end of a proceeding or claim (that is, is a defendant or respondent), the assessment of "prospects of success" takes on a different complexion. The concept of achieving a successful outcome remains intact. The question can still be posed in the same terms: What, if any, legal action would the applicant (as a reasonable individual) take in the circumstances if paying the costs of their own defence? But, as opposed to maximising the benefits or "takeout", the issue becomes one of minimising the damage or loss. In colloquial language the question becomes: How best can I get out of this? The psychological benefits of resolving the claim (for example, an end to the stress, worry and distraction of being sued), and resolving it sooner rather than later, need to be factored in.

[31] These comments are, with respect, helpful. They provide a convenient but by no means inflexible measure to assist in the critical balancing exercise between an applicant's prospects of success in litigation, and whether or not to exercise adversely to an applicant the s9(4) discretion to refuse legal aid, in situations where there is otherwise a mandatory obligation (s9(1)) to grant it. That discretionary exercise, of course, must be carried out against the overarching s3(a) purpose. It must also be carried out with an appropriate regard for the context of the litigation in which an application may be embroiled.

[32] The balancing exercise required here would have to factor in, not financial or proprietal considerations but instead a realisation that, although faced with adverse credibility findings by the Refugee Status Appeals Authority, the first respondents would, in terms of refugee jurisprudence, be faced with a real chance of persecution on their return to Iran if the Authority had got it wrong.

[33] Against that background and indeed the factors which must inform the exercise of a s9(4)(d)(i) discretion, on any analysis, the Agency's weighing of the situation was facile, inadequate, and wrong. In contrast, the Review Panel's assessment of the situation in paras 19-31 of its decision (supra) strike me as being correct. But for the fact that Mr Taylor has made submissions to the contrary, it would be unnecessary to expand this judgment any further. In fairness, Mr Taylor's submissions must be addressed.

[34] Counsel's first point is that the Review Panel misinterpreted *Gummer v Legal Services Board* (supra); that in fact Williams J had been considering not only the predecessor of s9(3) but also s9(4)(d)(i) issues. In counsel's submission the Review Panel had taken a "snippet" of Williams J's judgment and misdirected itself.

[35] Dealing with s34(1) and s34(3) of the now repealed Legal Services Act 1991, (which provisions are not substantially different from s9(3) and s9(4) of the Act) Williams J had this to say:

> …the test under s 34(1) is more stringent than that under s 34(3): the former mandatorily requires applications to be declined unless applicants show "reasonable grounds" for bringing or defending proceedings whilst that under s 34 (3)(e)(i) gives a discretion to decline aid if the "prospects of success are not sufficient" to justify a grant from the public purse. Applications which fail the s 34(1) test must therefore necessarily fail the s 34(3) test. So, in one sense, the s 34(3) test could be regarded as subsumed in that under s 34(1). The test under s 34(1) is similar to that under RR 186(a) and 477(a). By way of analogy, it would appear that the Legislation debars the expenditure of public money in supporting claims or defences which are so unmeritorious as to be unlikely to survive striking-out applications whilst the test under s 34(3) is less strict and requires those charged with the granting of aid in relation to claims brought or defended on reasonable grounds to exercise their discretion in assessing whether the prospects of success are sufficient to commit public money to them.

[36] I do not consider that the Review Panel has misdirected itself in its assessment of the relevance of *Gummer* and s9(3). The s9(3) and s9(4)(1) tests are discrete. Different criteria apply to each.

[37] Mr Taylor's second submission was that the Review Panel had in effect ignored or read down the statutory criterion of "prospects of success" contained in s9(4)(d)(i) in its analysis of *Timmins v Legal Aid Review Panel.* In counsel's submission, in a situation where both the Agency's grants officer and senior grants officer, although not expressly addressing s9(4)(d)(i), had concluded that the judicial review proceeding had no reasonable chance of success, the Review Panel had wrongly substituted its own judgment for that of the Agency and in particular had "seized on" some dicta of Wild J to exclude the concept of "prospect of success" from s9(4)(d)(i) .

[38] I disagree. For the reasons I have stated, particularly in the context of a judicial review application seeking to attack an adverse finding to an asylum seeker, the Agency's analysis was patently insufficient. Such insufficiency clearly constitutes a decision which is manifestly unreasonable and/or wrong in law for the purposes of s54(3). (See generally *Legal Services Agency v Rossiter* (2005) 17 PRNZ 815). I reject the suggestion that the Review Panel has misunderstood or ignored the centrality of "prospects of success" s9(4)(d)(i), nor has it distorted the approach mandated by *Timmins*.

[39] Counsel's third submission was that the Review Panel, in paras 27-31 of its decision (supra – dealing with "prospects of success") had oversimplified or indeed ignored the legal obligation cast on the Agency to assess independently the prospects of the respondents succeeding through judicial review proceedings by an attack on adverse credibility findings.

[40] In support of this submission Mr Taylor relied on a judgment of Chisholm J, *Legal Services Agency v K* (CIV 2004-404-002675, Christchurch, 5 November 2004), in which His Honour rightly observed that a decision of the Agency relying on s9(4)(d)(i) inevitably involved some assessment of the merits of a case "albeit at a relatively superficial level". I agree, but a merits assessment is but one of the factors in the balancing exercise required before the statutory discretion can be adversely exercised. I do not consider that the paragraphs of the Review Panel's decision of which Mr Taylor complains have trivialised or misstated the issues involved.

[41] Counsel's fourth submission was that the Review Panel had misunderstood the thrust of Article 1A(2) of the Refugee Convention in para 24 of its decision and had wrongly concluded that a well founded fear of persecution was a subjective rather than an objective test.

[42] Even if this submission had merit, it is clear from the structure of the Review Panel's decision that para [24] is not determinative of the outcome. In my judgment counsel's submission is semantic only. Of course the subjective beliefs of an asylum seeker cannot possibly be determinative of the outcome. The fear of persecution must be well founded. In para [24] the Review Panel was doing no more than

pointing out the first respondents' subjective beliefs had some factual basis of support. A full analysis of the factual matrix was conducted by Harrison J in his determination of the judicial review proceedings.

[43] I accept that the first respondents faced formidable difficulties in establishing, for the purposes of judicial review proceedings, that the Refugee Status Appeals Authority decision was wrong. That, however, is not the same as an assessment that the proceeding was totally hopeless. At the heart of s9(4)(d)(i) lies the balancing exercise to which I have already referred. As a matter of law, it was incumbent on the Agency to advance a much more detailed analysis if it wished to decline legal aid on the statutory basis that, in the context of a refugee claim, the first respondents' prospects of success were so slim that the grant of legal aid was not justified. Such an analysis was absent.

[44] The final submission advanced by Mr Taylor is an important one. It relates to the status of the second respondent to seek a review of the Agency's decision under s54 in the name of the first respondents.

[45] The review application which led to the Review Panel's 14 December 2004 decision was signed by Mr Laurent and dated 8 October 2004. At that stage, of course, the proceedings had been determined and the first respondents had been removed from New Zealand.

[46] Section 54(1) confers a statutory right to apply for review of a decision of the Agency on an aided person or an applicant for legal aid. The statutory grounds are that the Agency's decision was manifestly unreasonable or wrong in law.

[47] Section 54(3) confers on a listed provider or former listed provider (there being no dispute that Mr Laurent as counsel falls into this category) the right to apply for a review on the same statutory grounds "… of a decision relating to the amount payable by the Agency to the provider …."

[48] Mr Taylor's submission is the limited ground on which a legal provider can seek a review precludes Mr Laurent from lodging an appeal on behalf of the first

respondents. The challenge was to the Agency's refusal to grant legal aid, not to the quantum of a sum payable to the provider. Therefore, in counsel's submission, Mr Laurent had no standing to mount an appeal and the Review Panel should have declined jurisdiction.

[49] Amplifying that submission counsel stated that because the judicial review proceedings had been completed some nine months before the Agency's decision was reviewed by the Review Panel, the review could not impact on representation of the first respondents, nor could it impact on their pockets. Only the second respondent was adversely affected by the Agency's decision but, in terms of s54(3) Mr Laurent could not challenge on his own initiative the Agency's refusal to grant legal aid.

[50] In support of this submission Mr Taylor cited *Calder v Canterbury District Legal Aid Services Subcommittee* [1999] NZAR 155.

[51] What John Hansen J had before him in that case was an application for judicial review of a Legal Services subcommittee decision limiting counsel's fees and excluding other costs in respect of two criminal trials in which Ms Calder was ultimately acquitted of murder.

[52] In a judicial review context there were a number of issues before the Court, including delay. The two homicide trials had taken place between September 1995 and April 1996. The relevant legal aid decisions were made during 1995 with payments stretching to 1996. The judicial review proceedings were not commenced until July 1997.

[53] His Honour reviewed a number of English authorities and concluded, rightly in my respectful view, that the plaintiff Ms Calder had no personal interest in the claim by counsel and therefore no *locus standi*. His Honour, striking out relevant portions of the statement of claim stated (at 166):

> "Effectively, what is being said is that where it is a solicitor or counsel who is seeking a benefit from the judicial review, they are the people that should bring the review with any attendant litigation risk. There is simply no interest by the legally aided person in the application."

[54] Although there is a superficial similarity between this dictum and counsel's submission, I see the current situation as being totally different.

[55] The first respondents retained counsel to run their judicial review proceeding which challenged adverse decisions of the Refugee Status Appeals Authority. They sought a grant of legal aid for that purpose. As is frequently the case, the first respondents relied on the second respondent to complete and process their legal aid application.

[56] Their application was declined. After an unsuccessful reconsideration, an application to review the refusal of legal aid was made on 11 April 2004 (which Mr Taylor does not seem to challenge). The matter was referred back to the Agency for reconsideration which led to the Agency's 7 October 2004 decision and the subsequent second application to the Review Panel.

[57] The application for review dated 8 October 2004 is signed by Mr Laurent "for client". The application for review was not sought by Mr Laurent personally but by each of the two first respondents.

[58] In that situation I have no hesitation in concluding that the applications for review lodged by Mr Laurent on 8 October 2004 were in his capacity as the first respondents' counsel and pursuant to his ongoing retainer as counsel both in respect of the judicial review applications which were filed in October 2003, and in respect of his instructions to process the first respondents' legal aid application first submitted on 28 November 2003.

[59] This is not a situation in which Mr Laurent was personally seeking to review the quantum of legal aid under s54(3) in his capacity as a listed provider. Rather it is a situation where his general retainer as the first respondents' counsel led to him filing an application for review under s53(1) on their behalf.

[60] For these reasons, counsel's submission relating to the status of Mr Laurent and the jurisdiction of the Review Panel to entertain the appeal is rejected. The

situation is very different from counsel mounting a judicial review application in the High Court to *augment* a fee as was the case in *Calder*.

Result

[61] For the reasons I have stated I am satisfied the decision of the Legal Aid Review Panel dated 14 December 2004 is correct. It contains no errors of law. Accordingly the appeal pursuant to s59 of the Legal Services Act 2000 is dismissed.

Costs

[62] The respondents in my judgment are entitled to costs. Given that the Agency has not paid a cent of the legal aid costs of the $8,515 estimate sought in November 2003, despite the clear and correct decision of the Review Panel dated 14 December 2004, I currently am inclined to the view that the respondents' full costs on this appeal should be paid by the appellant rather than a lesser sum pursuant to the appropriate scale under the High Court Rules.

[63] I further note that in her judgment of 12 May 2005, Potter J, dealing with an application by the appellant to lodge this appeal out of time, ordered the appellant to pay 2B costs in any event on that application. Whether or not the appellant has complied with that order I know not.

[64] I thus direct that Mr Laurent, within 14 days, is to file and serve a memorandum specifying what costs he seeks and on what basis. The appellant is to reply (assuming the issue of costs cannot be resolved between counsel) within 14 days thereafter by memorandum. The Registrar is directed to refer all memoranda to me for final determination assuming that counsel are content for costs to be dealt with by me in chambers without a formal hearing.

……
Priestley J

Delivered at 3.00 pm on the 21st day of February 2006.