LESSONS FROM THE COURTS 2024

LEGALWISE IMMIGRATION SUMMIT – MARCH 2024

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INTRODUCTION

For this survey of immigration-related activity in the Courts, I chose to focus on decisionmaking by the superior Courts only – that is, the High Court, Court of Appeal and Supreme Court. I further restricted the lens to decisions made from March 2023 to the present. Even using these constraints produced some 53 cases, so that immigration remains a fertile area of judicial lawmaking. As it happens, only one case made to our highest Court.[1]

From this corpus I have selected those that appeared to have some broader significance than their own facts. Thus, for instance, many of the challenges to Immigration & Protection Tribunal decisions failed to secure leave to appeal to the High Court, but this was because they sought to challenge the merits of the first-instance decision or could not meet the "general or public importance" threshold.[2]

Notable in this exercise was the number of appeals or reviews involving determinations of refugee and protection status. Similarly, there were relatively frequent appeals to the High Court and beyond against the District Court's refusal to grant a discharge without conviction for criminal offending.

1. APPEAL AND REVIEW - ŠROUBEK

Karel Šroubek has traversed many aspects of the New Zealand immigration system, not all of which are mentioned here. He came to New Zealand in 2003 using the identity of Jan Antolik, and obtained Residence under that identity in 2008. After an investigation, he was found guilty of having used a false passport and supplying false information. However, in December 2011 he was discharged without conviction upon the basis of his account that he had used the false identity to flee for his life after having witnessed a killing in Prague.

He was convicted in June 2016 of importing a significant quantity of MDMA, and sentenced to five and a half years' prison. A pre-deportation process was initiated as he was caught by ss 156(1)(b) and 161(1)(c) Immigration Act 2009 for use of a false identity and his MDMA conviction respectively. However, on 19 September 2018 he secured cancellation of liability under s 172 of the Act and a direction by the then-Minister, Iain Lees-Galloway, that he be granted Residence in his true identity, subject to him obtaining a new passport.

The matter became politicised, and before the Resident Visa could be issued the Minister determined that Mr Šroubek was again liable for deportation, this time under s 155 of the Act in that his original 2008 Resident Visa was granted as the result of an administrative error. This was because Mr Šroubek had also been convicted in Prague in 2002 of offences which,

[1] *Truong v R* [2023] NZSC 119,
[2] Immigration Act 2009, s 245(3)

at the time he was granted Residence in 2008, would have rendered him ineligible for any visa per s 7 Immigration Act 1987 then in force, which is the equivalent of s 15 of the current Act. He was served a Deportation Liability Notice dated 27 November 2018, and appealed both on the facts and on humanitarian grounds.

The facts appeal rested on several heads, including the legitimacy of the second DLN purportedly issued "on other grounds" to the first when the information relied upon for it was already before the Minister in September 2018. It was declined on 21 June 2022, and includes an interesting discussion of the meaning of "administrative error" in s 155 of the Act.[3] The humanitarian appeal was also refused on 8 December 2022.[4]

Within 28 days of the humanitarian appeal decision – that is, at the end of 2022 - Mr Šroubek filed both an application for review of the Minister's decision to issue the DLN in November 2018, and an appeal against both of the deportation appeal decisions. In a decision made in September 2023, Fitzgerald J determined the following:[5]

- The application for leave to appeal the IPT facts decision was out of time. It should have been filed within 28 days of the decision of 21 June 2022 being notified to the appellant per s 245 of the Act:

  > [30] . . . The Facts Appeal Decision was a separate decision made by the Tribunal on Mr Sroubek's facts appeal. The Tribunal's decision was notified to Mr Sroubek (via his then counsel) on 21 June 2022. The 28 days started to run from that date. The later Humanitarian Appeal Decision was not the Tribunal's "decision" on Mr Sroubek's facts appeal. Mr Sroubek's application for leave to appeal against the Facts Appeal Decision was accordingly filed out of time.

  That is, the facts and humanitarian appeals are treated as discrete proceedings, rather than a combined appeal. This is to be contrasted from the requirement that both types of appeal must be filed together according to s 203(1) of the Act.

- The review application was also out of time because it should have been filed within 28 days of service of the DLN per s 247 of the Act – that is, in December 2018.

The second point requires some unpacking. Counsel for Mr Šroubek had argued that s 249(1) prevented a review application being filed until after the IPT had disposed of both appeals arising out of the service of the DLN:

> 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.

What was critical for the High Court was the content of the challenge which would be the subject of the review. If this was something which the IPT could not consider, then s 249 did not and could not impede the review application. In a facts appeal from a s 155 DLN, the IPT is restricted to being " satisfied . . . that the resident visa . . . was not granted as a result of an administrative error . . ." – that is, that the administrative error did not exist. The primary grounds of review advanced by Mr Šroubek, on the other hand, were that:[6]

> [illegality] . . . the Minister could not lawfully exercise the power under s 155(1)(a) of the Act given he had already exercised that power in cancelling Mr Sroubek's liability for deportation.

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[3] *Re Sroubek* [2022] NZIPT 600569 (21 June 2022)
[4] *Re Sroubek* [2022] NZIPT 600569A (8 December 2022)
[5] *Sroubek v Minister of Immigration* [2023] NZHC 2717
[6] Ibid at [32]

and

> the Minister took into account irrelevant considerations (material said to be 'new', but which was either not new or was irrelevant), and in making his November 2018 decision, the Minister did so for the purpose of addressing public criticism of his September 2018 decision.

As these were not issues open to the IPT to examine, the applicant was not entitled to await the outcome of the IPT appeals before filing review proceedings. Fitzgerald J went on to say:[7]

> . . . what will be relevant, as was implicit in Palmer J's adoption of the concept of a "hopeless" appeal, is an assessment of the appropriate forum in which the particular challenge can and therefore ought to be made. This would be based on a jurisdictional assessment.

The reference to Justice Palmer is to the issue raised in *Li* of someone having to pursue a humanitarian appeal, which appears to have little chance of success, before filing the review application which they really wanted to make.[8]

The High Court in *Šroubek* saw no intrinsic difficulty with having to file a review application alongside an appeal or appeals to the IPT, on the basis that the Court would no doubt agree to adjourn the review while the appeals were decided. If an inferior tribunal could deliver relief in the meantime, then this would in most cases obviate the need for the Court to engage with the review proceedings.

The upshot of this decision for litigators is that it is all the more critical to measure the potential grounds of challenge to the issuance of a DLN – or any other reviewable decision – to see whether or not aspects of them fall outside the scope of the IPT's jurisdiction. As Fitzgerald J acknowledged, some cases may involve more of a "mixed bag" of grounds than others. Ultimately, the safer course would be to file the review application right away and then seek a stay of proceedings, rather than discovering later that judicial review had been lost through the passage of time.

2. OTHER CHALLENGES TO IMMIGRATION DECISIONS

Not that many applications for leave to appeal IPT decisions featured in the last year's Court traffic. The difficult test for obtaining leave set out in *Taafi* is a discouragement in itself.[9] A common problem is that what is claimed to be an error of law is found by the Court to amount to a merits challenge. And then there is the additional need to identify a "matter of general or public importance" per s 245 of the Act.

An exception was Mr Mohebbi. He is from Iran and gained Residence in 2010. He was convicted of two sets of offences of importing methamphetamine, and sentenced to 10 years' imprisonment. His humanitarian appeal against s 161 deportation was declined. On application to the High Court, only one of the six grounds advanced was successful, but this was enough for the High Court to grant leave to appeal:[10]

> In my view, it is seriously arguable that in light of the mental health issues experienced by Mr Mohebbi and, in particular, his daughter (accepted as "serious"), the prospects of those mental health issues arising again were Mr Mohebbi to be deported fall well outside the normal run of circumstances. In particular, and bearing in mind the very long period of time that Mr Mohebbi has been in New Zealand, it is seriously arguable that these

[7] Ibid at [59]
[8] *Li v Chief Executive of MBIE* [2017] NZHC 2977, [2018] NZAR 265
[9] *Taafi v Minister of Immigration* [2013] NZAR 1037 (HC) at [19]
[10] *Mohebbi v Minister of Immigration* [2023] NZHC 2854 at [88]

> consequences extend beyond the normal emotional turmoil and distress experienced by the person to be deported and/or their New Zealand based children.

Perhaps the most interesting aspect of the decision is that, while the Court did not see it as tenable to suggest that the case raised an issue of general or public importance, the very serious impacts on Mr Mohebbi and his daughter of deportation would "involve individual injustice to such an extent that the Court cannot countenance the Tribunal's decision standing" if the substantive appeal found the IPT to have been in error. This fell within the ambit of "for any other reason" under s 245(3) of the Act.

At the subsequent appeal, the Minister accepted that the specific combination of key facts was, on balance, outside the normal run of circumstances one might see in deportation cases generally. The parties agreed to quash the original IPT decision and remit the matter back to the IPT for rehearing.[11] At the time of writing, the writer is unaware whether the Tribunal has heard the matter.

Sasaki involves a somewhat rare judicial review challenge to the refusal of the "good reasons review" (GRR) arising out of a DLN issued under s 157 of the Act, in this case for breach of the conditions of Mr Sasaki's employment-based Work Visa. While his visa required him to work as a Head Chef, INZ determined that he was really acting as a manager. Mr Sasaki argued that INZ erred because the Head Chef role includes managerial responsibilities, and also claimed that he was not given an opportunity to comment before the GRR was decided.

The Court found that the Compliance officer's assessment that Mr Sasaki worked as a manager was open to him. Of more interest is Whata J's approach to whether the Court would entertain a review of a s 157 DLN:[12]

> But the availability of relief by way of judicial review for breach of natural justice will depend on context. In this case there is a purpose-built procedure for challenging flawed DLN decisions prescribed by s 157 of the Act in the form of the GRR process. While judicial review of a DLN decision is not expressly precluded by the statutory scheme, the GRR process was triggered in this case. Any prior breach of natural justice was capable of being addressed in that review process, and the key points of concern were also put to the reviewing Officer who found that there was sufficient evidence to issue the DLN. It does not accord with this statutory scheme to entertain, on these facts, review of the DLN on breach of natural justice grounds where, as here, those grounds were ventilated through that GRR process.

In short, as the GRR acts as a *de facto* right of review of a decision to issue a DLN, the Court was not prepared to effectively grant a second right of review. With respect, this overlooks the point that a review on a question of administrative law by a Court is literally superior to that of an INZ officer who does not hold a judicial warrant; and the Court is, by definition, more independent than an official of the same organisation that made the original decision to issue the DLN.

3. REFUGEE CASES

A number of decisions relating to refugee and protection status appeals appeared during the year, including a couple of potentially broader importance. First, here are a few in passing:

- Becroft J determined that the IPT committed a seriously arguable error of law when it relied upon the appellant's ability to bribe his way out of prison as his way of

[11] *Mohebbi v Minister of Immigration* [2023] NZHC 3453 (30 November 2023)
[12] *Sasaki v Chief Executive of MBIE* [2023] NZHC 539 at [49]

avoiding cruel treatment: "The Tribunal appears to have been wrong and in error to rely on a claimant's ability to act illegally to avoid ill treatment . . ."[13]

- Calling in aid the Court of Appeal's observation in *Wu*,[14] the High Court in *AV v RPO* found that the scheme of asylum determination did not require the IPT to put every observation it makes and every reservation it holds to an appellant before making its decision.[15]

- The climate change case of *AW (Kiribati)* reiterated the Court of Appeal's view expressed in *Teitiota* that the prospects of succeeding with a claim for refugee status based on the effects of climate change on people in Kiribati, or another country similarly affected by climate change, are not strong.[16] However, the High Court again referred to observations in *Teitiota* and said that:[17]

> [62] . . . it might be that, in addition to the environmental issues a person faces, there are other factors which, in combination with those environmental issues, amount to persecution on grounds described in art 1A of the Convention; being race, religion, nationality, membership of a particular social group or political opinion.

Unfortunately, AW could not pray anything else in aid to assist their case.

The well-established approach in refugee and protection claims, both before the Refugee Status Unit and the IPT on appeal, is a two-stage process in which the decisionmaker first evaluates proof of the facts being advanced in support of the claim, followed by an assessment of whether there is a real chance of risk. The first stage also involves an assessment of credibility, and often results in whole aspects of a claim being discarded as implausible or simply untrue before assessing the risk of persecution based on what is left over.

This was challenged in *BE (Nigeria)* by *inter alia* citing the UK decision of *Karanakaran* made back in 2000. The British High Court found that, when determining whether there was a serious possibility of persecution for a Convention reason, all material considerations should be taken into account *cumulatively*, unless there was no serious possibility that the facts were as contended for by the applicant. More colourfully, it said that:[18]

> . . . how [convention questions] are approached and evaluated should henceforward be regarded not as an assault course on which hurdles of varying heights are encountered by the asylum seeker with the decision-maker acting as umpire, nor as a forum in which the improbable is magically endowed with the status of certainty, but as a unitary process of evaluation of evidential material of many kinds and qualities against the convention's criteria of eligibility for asylum."

Citing *Karanakaran* again, the New Zealand High Court pointed to the difficulty with the two-stage approach being that:[19]

> If the assessment is only on the facts established as more likely than not to have occurred, then that removes much of the benefit of uncertainty that the applicant has in the determination of refugee status.

The Court granted leave to appeal per s 245 of the Act, at least in part because it deemed that clarity was needed about whether or not the IPT's approach was consistent with

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[13] *AM (Pakistan) v Immigration and Protection Tribunal* [2023] NZHC 3871 at [11]
[14] *Minister of Immigration v Wu* [2019] NZAR 1217 at [53]
[15] *AV v Refugee and Protection Officer* [2023] NZHC 3535
[16] *Teitiota v Chief Executive of MBIE* [2014] NZCA 173, [2014] NZAR 688
[17] *AW (Kiribati) v Refugee and Protection Officer* [2023] NZHC 1806
[18] *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 (CA) at 479 - 480
[19] *BE (Nigeria) v Refugee and Protection Officer* [2023] NZCA 372 (16 August 2023) at [34]

Karanakaran. The Tribunal has apparently amended the standard wording being used in its decisions. Counsel for BE confirms that the substantive hearing is set for April 2024.

Another proceeding of potentially broad significance is *AP (Chile)*. It was not disputed that AP did not have a refugee claim, as his fear arose from being targeted by violent drug gangs. Instead, the case turned on the meaning of "degrading treatment" in a complementary protection claim.[20] The High Court's review of AP's IPT decision led it to the view that the Tribunal had adopted its earlier finding that AP did not face "serious harm" in the refugee context and applied it without modification to the "degrading treatment" question:[21]

> [43] . . . in the way the case developed, the Tribunal has inadvertently made its factual assessment against an incorrect legal test. Although the statutory test is set out in the decision, there is no engagement with the meaning of "degrading treatment" under the ICCPR and how this might differ from the real chance of serious harm test which dominates its previous discussion. Inevitably, therefore, the question arises whether application of the two tests may have been inadvertently conflated when it is at least seriously arguable that the treatment which the Tribunal accepted had occurred in Chile, may satisfy one test but not the other.

Leave to appeal was granted, although Counsel advises that the substantive proceeding is still a few months away.

4. S 106 DISCHARGES - IMMIGRATION CONSEQUENCES

As mentioned above, a number of appeals have been taken from the decline by the Court of first instance to grant a discharge without conviction for criminal conduct. An appeal must be allowed if (*inter alia*) a miscarriage of justice has occurred. This in turn is defined as:

> any error, irregularity, or occurrence in or in relation to or affecting the trial that—
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> (a) has created a real risk that the outcome of the trial was affected; or
>
> (b) has resulted in an unfair trial or a trial that was a nullity.

It is only in exceptional circumstances that an appeal against conviction will succeed if the appellant has pleaded guilty,[22] which of course is a prerequisite for an application for discharge.

These cases involve a number of shifting variables:

- the seriousness of the offending;
- which is balanced against the severity and likelihood of the immigration outcomes;
- whether the accused is a Resident or on a temporary visa – a Resident may be less likely to secure a discharge because the "pre-DLN" process operated by INZ Resolutions means that deportation is not inevitable.

A survey of the state of the law on discharges for Residents is found in *Mohammed v R*. Mr Mohammed was convicted of three counts of indecent assault. The Court of Appeal found that his liability for deportation was a consequence of his offending and not of being convicted. In the course of this it said:[23]

> [59] In the cases of *Anufe v R* and *Zhu v R* this Court considered the issue of a deportation liability notice under s 161 of the Immigration Act as a consequence of conviction. In *Anufe* this Court noted that the conviction triggered Mr Anufe's liability to deportation

[20] International Covenant on Civil and Political Rights, Art. 7, imported into s 131 Immigration Act 2009
[21] *AP (Chile) v Refugee and Protection Officer* [2023] NZHC 2424 at [43]
[22] *Nanda v Police* [2023] NZHC 415 at [11]
[23] *Mohammed v R* [2023] NZCA 119 at [59] – [60]

> under s 161. The Court accepted that in some cases exposure to deportation liability can be regarded as a disproportionate consequence of conviction citing *Rakim v R*, *Bong v R*, *Jeon v Police*, and *Kumar v Police*. However in each of those cases, the offending was relatively minor. Mr Anufe's case for discharge rested on the proposition that the humanitarian consequences of deportation outweighed the gravity of his offending. The Court noted that in his case, the deportation notice had not yet issued but even if it did issue a right of appeal lay to the Tribunal on humanitarian grounds. Further, any risk of deportation was a consequence of the offending rather than the conviction and the immigration consequences were properly a matter for immigration authorities.
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> [60] In *Zhu* this Court noted that it was not always enough to show that, but for conviction, a given consequence would not happen. In every case causation is a question of substance and degree requiring judicial judgment. The Court accepted that liability for the issue of a deportation notice would be the product of a process in which the appellant's conduct, his circumstances, and his connection to New Zealand would be examined on the merits. Again, the Court did not accept that liability for deportation was a consequence of conviction, rather it was a consequence of the offending.

Being made liable for deportation outright results from the seriousness of the original offending when weighed by the Minister or a delegated decisionmaker, or by the IPT when applying the "unjust/unduly harsh" and "public interest" tests for humanitarian appeals.

Similarly, *Truong v R* was an out-of-time appeal by a Resident against conviction for cannabis cultivation. The existence of the pre-deportation process was seen as significant because it would enable Ms Truong to put her whole situation before the Minister for consideration. The Court of Appeal did not see deportation as an inevitable consequence of conviction.[24] The Supreme Court dismissed a subsequent application for leave to appeal, saying that the Court of Appeal's finding that an assessment of deportation liability was for the Minister of Immigration to make did not make for a miscarriage of justice.[25]

On the other hand, deportation liability arising as a consequence of conviction can suffice to get one home. Take for example *Singh v R* involving charges of assault on a person in a family relationship against a Resident. While the case was said to be "finely balanced", the Judge was persuaded in his favour firstly by the submission that the "real and appreciable risk of deportation distinguishes this case from others":[26]

> As a general rule, if the evidence before the court does not go beyond establishing that a conviction will expose the offender to the risk of deportation, the court will usually consider it best to let the INZ process take its course. This is on the basis that, if deportation results, it is likely to reflect the substantive offending or associated matters, rather than the entry of a conviction.

However, expert evidence set out the low likelihood of Mr Singh convincing a DDM to suspend deportation liability, so that there was a very tangible possibility that Mr Singh would be deported. Secondly, there was "the inevitable severing of the relationship between Mr Singh and his daughter, if he is deported . . ."

The low chance of a Resident getting deportation liability suspended or cancelled also led to a discharge in *Likiliki v Police*. Mr Likiliki, also a Resident along with his family through the Pacific Access Category, already had a drink driving conviction from 2019 when he incurred a charge of assault with intent to injure. While he was already liable for deportation because of the first offence, the Court concluded in reliance on an expert opinion that

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[24] *Truong v R* [2023] NZCA 97 at [52] – [55]
[25] *Truong* supra at n 1
[26] *Singh v R* [2023] NZCA 665 at [23]

conviction this time would accelerate deportation action; and that he was not only likely to fail the pre-DLN stage but would also have little chance in a humanitarian appeal.[27]

Something of an outlier is *Nanda v Police*.[28] Having been in New Zealand since 2008 and a Resident since 2014, he was convicted of assault on a child in the form of a slap that left a large bruise. A miscarriage of justice occurred because he was not advised by Counsel that he could seek a discharge, and it was never raised at the District Court. One influential point in his favour was that becoming liable for deportation would render him ineligible to sponsor family members for visas. The High Court judge observed that conviction rendered Mr Nanda liable for deportation for 10 years,[29] and that in proceeding to deportation "INZ does not potentially test his character in any way, as it could for a temporary visa holder."[30] It does not appear that the Judge took the pre-deportation process into account which does, of course, involve weighing the offending when deciding whether to suspend or cancel liability.

Finally, the case if *Bolea* is presently before the Supreme Court after traversing the High Court and Court of Appeal.[31] Whether the outcome will lay down principles of more general application is yet to be seen.

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[27] *Likiliki v Police* [2023] NZHC 1428 at [72] – [74]
[28] *Nanda v Police* [2023] NZHC 415
[29] Immigration Act 2009, s 167
[30] *Nanda* at [18]
[31] *Bolea v R* [2023] NZCA 39