IMMIGRATION AND PROTECTION TRIBUNAL

PRACTICE NOTE 2/2019

(REFUGEE AND PROTECTION)

31 October 2019

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PREAMBLE

PRELIMINARY MATTERS

PREPARING FOR THE HEARING

THE HEARING

AFTER THE HEARING

PREAMBLE

This Practice Note is issued pursuant to section 220(2)(a) of the Immigration Act 2009 ("the Act"). It is effective for all refugee and protection appeals and matters and for humanitarian appeals lodged simultaneously by refugee and protection appellants pursuant to section 194(6) or section 195(7). Such humanitarian appeals are also subject to Practice Note 4/2019 (Deportation – non-resident).

The following information on the practice and procedure adopted by the Immigration and Protection Tribunal ("the Tribunal") is designed to provide guidance to members of the legal profession, immigration advisers and those appearing in person before the Tribunal. The Tribunal expects compliance with the procedures set out.

The practice and procedure of the Tribunal is subject to the Act and Regulations made under it – (section 220(2)(a)). References in this Practice Note to Regulations are to the Immigration and Protection Tribunal Regulations 2010. References to the Schedule are to Schedule 2 of the Act, "Provisions Relating to Tribunal".

In this Practice Note:

- "**appellant**" means the appellant, applicant or affected person, as relevant;
- "**chief executive**" means the chief executive of the Ministry of Business, Innovation and Employment;
- "**claim**" means a claim to be recognised as a refugee or protected person;
- "**fraud or the like**" means fraud, forgery, false or misleading representation, or concealment of relevant information;
- "**humanitarian appeal**" means an appeal on humanitarian grounds against deportation liability;
- "**member**" means "members" where appropriate;
- "**Ministry**" means the Ministry of Business Innovation and Employment;
- "**Refugee Status Unit**" includes the Unit's former name "Refugee Status Branch"
- "**resident**" means a residence class visa holder;
- "**respondent**" means the Minister of Immigration, Ministry of Business, Innovation and Employment, Immigration New Zealand, an immigration officer or a refugee and protection officer, as appropriate to the context.

1. COMMENCEMENT

[1.1] This Practice Note takes effect from 31 October 2019 and replaces Practice Note 2/2018 (16 May 2018), which is repealed from that date.

[1.2] Notwithstanding the above provisions, in respect of transitional appeals subject to either of sections 448 or 449 of the Act (including those subject to the Immigration and Protection Tribunal (Transitional Provisions) Regulations 2010), Practice Note 1/2008 (12 September 2008) of the Refugee Status Appeals Authority will continue to apply, except to the extent that the Act or Regulations provide otherwise.

PRELIMINARY MATTERS

2. JURISDICTION

[2.1] The Tribunal is an independent, specialist judicial body established under section 217 of the Act.

[2.2] The functions of the Tribunal, in relation to refugee and protection appeals, are to determine appeals against decisions:

(a) in relation to recognition as a refugee or protected person;

(b) to cease to recognise a person as a refugee or protected person;

(c) to cancel the recognition of a person as a refugee or protected person.

[2.3] More specifically, the functions of the Tribunal are:

(a) To determine any appeal against a decision by a refugee and protection officer:

(i) to decline a claim to be recognised as a refugee or protected person – (sections 194(1)(c) and 217(2)(a)(ii));

(ii) to decline to accept for consideration a claim on the grounds that, in light of an international arrangement or agreement, the person may have lodged (or had the opportunity to lodge) a claim for refugee status or protection in another country – (sections 194(1)(a) and 217(2)(a)(ii));

(iii) to decline to accept for consideration a claim on the grounds that one or more of the circumstances relating to the claim were brought about by the appellant acting otherwise than in good faith and for a purpose of creating grounds for recognition as a refugee or protected person – (sections 194(1)(b) and 217(2)(a)(ii));

(iv) to decline a subsequent claim – (sections 195(2) and 217(2)(a)(ii));

(v) to refuse to consider a subsequent claim on the grounds that:

(1) there has not been a significant change in circumstances since the previous claim was determined;

(2) the change in one or more circumstances was brought about by the person not acting in good faith and was for a purpose of creating grounds for recognition as a refugee – (sections 195(1)(a) and 217(2)(a)(ii)); or

(3) it is manifestly unfounded or clearly abusive or repeats a previous claim (but only where the most recent previous claim was declined under Part 6A of the Immigration Act 1987) – (sections 195(1)(b) and 217(2)(a)(ii));

(vi) to cease to recognise a person as a refugee or protected person because either:

(1) the Refugee Convention has ceased to apply to the person in terms of Article 1C; or

(2) there are no longer substantial grounds for believing that he or she, if deported, would be in danger of (as relevant) being subjected to torture or to arbitrary deprivation of life or cruel treatment - (sections 194(1)(d) and 217(2)(a)(iii));

(vii) to cancel recognition of a New Zealand citizen as a refugee or protected person because either:

(1) recognition may have been procured by fraud or the like;

(2) the person has been convicted of an offence where it is established that he or she acquired recognition as a refugee or a protected person by fraud or the like; or

(3) the matters dealt with in Articles 1D, 1E and 1F of the Refugee Convention may not have been able to be properly considered for any reason (including fraud or the like); and the person is found not to be a refugee or protected person. – (sections 194(1)(e) and 217(2)(a)(iv)).

(b) To determine any application made by a refugee and protection officer in relation to:

(i) the cessation of recognition of a person as a refugee, where that recognition was originally determined by the Tribunal or by the Refugee Status Appeals Authority on the grounds that either the Refugee Convention has ceased to apply to the person in terms of Article 1C, or there are no longer substantial grounds for believing that the person, if deported, would be in danger of (as relevant) being subjected to torture or to arbitrary deprivation of life or cruel treatment – (sections 144 and 217(2)(b)(i));

(ii) the cancellation of recognition of a New Zealand citizen as a refugee or protected person, where that recognition was originally determined by the Tribunal or by the Refugee Status Appeals Authority on the grounds that either:

(1) recognition may have been procured by fraud or the like;

(2) the person has been convicted of an offence where it is established that the person acquired recognition as a refugee or a protected person by fraud or the like; or

(3) the matters dealt with in Articles 1D, 1E and 1F of the Refugee Convention may not have been able to be properly considered for any reason (including fraud, forgery, false or misleading representation, or concealment of relevant information); and

(4) the Tribunal determines that the person is not a refugee or protected person – (sections 147 and 217(2)(b)(ii)).

(c) To deal with certain transitional matters arising from the repeal of the Immigration Act 1987 – (section 217(2)(c)).

3. NOTICE OF APPEAL

[3.1] In the case of a person in detention under Part 9 of the Act, an appeal must be brought within five working days after the date on which the person is notified of the decision to which the appeal relates – (section 194(2)(a)).

[3.2] In any other case, an appeal must be brought within 10 working days after the date on which the person is notified of the decision to which the appeal relates – (section 194(2)(b)).

[3.3] Where extrinsic evidence establishes when notice was actually given of the Refugee Status Unit decision (or other document), time for appeal runs from that date – see *Rao v Minister of Immigration* [2015] NZHC 2669. Where notice was given:

(a) by registered letter or courier, the time for appeal runs from delivery of the Refugee Status Unit decision to the person's contact address;

(b) by email, the time for appeal runs from delivery of the Refugee Status Unit decision to the recipient's server – see *LJ (Skilled Migrant)* [2018] NZIPT 204512.

If there is no extrinsic evidence of delivery, it is deemed to have been received by the appellant 7 days after the date on which it was sent (where it was sent by registered letter or courier) or 3 days after the date on which it was sent (where it was sent by email) – (section 386A(4)).

[3.4] A notice of appeal must be physically received by the Tribunal within the relevant time limit. It is not sufficient to have put it in the post or to have given it to a courier by that date.

[3.5] The Tribunal may extend the time for lodging a refugee and protection appeal if satisfied that special circumstances warrant an extension – (section 194(3)). See further at [4.1]–[4.4] below.

[3.6] The notice of appeal should be on the approved form – (section 381; regulation 4(1)(a)). The form is available from the Tribunal and from the Tribunal's website at www.justice.govt.nz/tribunals/IPT. The notice must be completed in English and be signed by the appellant. It must be filed in the office of the Tribunal in Auckland (either in person or by courier) at:

Specialist Courts and Tribunals Centre
Level 1
41 Federal Street
Auckland 1010 (Monday to Friday between 9am–4.30pm)

or be sent by post to:

Immigration and Protection Tribunal
DX EX 11086
Auckland 1010
New Zealand

or:

Fax: (09) 914-5263 (the original hard copy must follow).

[3.7] Given the statutory requirement in section 151 of the Act for confidentiality as to a claimant's identity and claim, and the insecurity of email and the like, the Tribunal does **not** normally permit the use of email, dropbox facilities or other electronic forms of communication in the course of refugee and protection appeals, including the lodgement of an appeal by any such method (except in emergency). The Tribunal will not refuse to receive communications made in violation of this direction but, given the objective of compliance with section 151 and the protection of appellants and others, it expects the highest level of compliance. Issues of convenience will not suffice. In any event, two hard copies of all documents are required to be filed.

4. APPLICATIONS FOR LEAVE TO APPEAL OUT OF TIME

[4.1] Where an appeal is received out of time, that fact will be communicated to the person. If the person wishes to seek leave to appeal out of time he or she must, within five working days of being notified that the appeal is out of time, file an application for leave to appeal out of time.

[4.2] The application for leave to appeal out of time must be supported by a cogent explanation of the reasons why the time limit was not complied with and the special circumstances relied upon. The application should also include a copy of the Refugee Status Unit decision appealed against and the reasons why it is considered that he/she has a bona fide claim to refugee status or protection.

[4.3] Applications for leave to appeal out of time may be decided by the Tribunal on the papers or by setting the application down for an oral hearing. Where the matter is set down, the Tribunal will usually hear the application for leave and then, if appropriate, proceed immediately with the hearing of the appeal itself. Intending appellants and their representatives must therefore be ready to proceed with the hearing of the full appeal immediately after the hearing of the leave application.

[4.4] Where a refugee and protection appeal is lodged out of time, and the Tribunal exercises its discretion under section 194(3) (or section 195(4)) to extend time for lodgement of the refugee and protection appeal, an accompanying humanitarian appeal will be accepted only where:

(a) the person has a future liability for deportation (for example, because the person is lawfully in New Zealand at the date of lodgement); or

(b) if the person has a current liability for deportation, the accompanying humanitarian appeal form is filed within the period of time stipulated in the relevant section of the Act relating to the underlying deportation liability.

See *AU (Afghanistan) (Ruling on jurisdiction to hear appeal)* [2017] NZIPT 502815.

5. DEPORTATION APPEAL ON HUMANITARIAN GROUNDS

[5.1] This section must be read in conjunction with Practice Note 1/2019 (Deportation – Resident) and Practice Note 4/2019 (Deportation – Non-resident), which also relate to deportation appeals.

[5.2] Every person who lodges a refugee and protection appeal may, if entitled, also lodge a humanitarian appeal at the same time, on the approved form – (sections 194(6) and 195(7)).

[5.3] A refugee and protection appellant is entitled to lodge a humanitarian appeal if he or she:

(a) is liable for deportation and is entitled to a humanitarian appeal in respect of that liability; or

(b) would be entitled to a humanitarian appeal if he or she became liable for deportation – (section 194(5)).

[5.4] The humanitarian appeal must assert any grounds the person has for considering that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be deported from New Zealand and that it would not in all the circumstances be contrary to the public interest to allow the person to remain – (section 207).

[5.5] Where a person lodges such a humanitarian appeal, the Tribunal will consider the refugee and protection appeal first. Where the refugee and protection appeal is successful, the humanitarian appeal will be dispensed with. Where the refugee and protection appeal is unsuccessful, the Tribunal will then proceed to consider the humanitarian appeal – (sections 194(6) and 195(7)). The humanitarian appeal may be considered by the same member of the Tribunal or it may be considered by a different member. Allocation of appeals to members is a matter of the Chair's discretion – (section 220(2)(c)).

[5.6] In the case of a resident or permanent resident, the person is entitled to an oral hearing for the humanitarian appeal. If the person is not a resident or permanent resident, the humanitarian appeal will normally be decided on the papers. The Tribunal has an absolute discretion to provide an oral hearing in the case of any deportation appeal by a non-resident and an oral hearing may not be applied for – (sections 11 and 233(2)).

[5.7] In the case of a humanitarian appeal under section 194(6) or section 195(7), the Tribunal asks that all submissions and evidence be lodged within 21 days of the lodgement of the appeal. This is in order that:

(a) the Tribunal is fully informed when considering its absolute discretion whether or not to provide an oral hearing; and

(b) the Tribunal is able to consider and determine the appeal at the earliest opportunity – (section 223(1)).

The Tribunal will still accept and consider submissions and evidence lodged after the 21 days, if received before it makes its decision.

[5.8] If the person does not lodge a humanitarian appeal at the same time as lodging a refugee and protection appeal, he or she is not entitled to a humanitarian appeal whether the liability currently exists or may arise in the future – (sections 194(7) and 195(8)). If, however, the appeal arises from a fresh ground of deportation liability, a further appeal against deportation liability may be lodged – see *DZ (Sri Lanka) (Decision on jurisdiction)* [2017] NZIPT 502646, 502661 and 502900.

[5.9] If the person withdraws his or her refugee and protection appeal before it is determined:

(a) If eligibility to lodge a humanitarian appeal arose under section 194(5)(a) or section 195(6)(a), the Tribunal will continue to have jurisdiction to consider the humanitarian appeal, because the person was, at the time of lodgement, entitled to lodge an appeal against deportation liability under some other provision of the Act.

(b) If eligibility to lodge a humanitarian appeal arose under section 194(5)(b) or section 195(6)(b), the Tribunal will have no jurisdiction to consider the humanitarian appeal but he or she will be entitled to lodge a deportation appeal at that later time, in the normal manner and subject to the relevant statutory requirements – see *AN (Sri Lanka)* [2012] NZIPT 500590 (in respect of first appeals) and *AJ (South Africa)* [2012] NZIPT 500298(M) (in respect of subsequent appeals).

[5.10] A person who was not eligible to lodge a humanitarian appeal under section 194(6) or section 195(7) is sometimes given a temporary visa at a later date by Immigration New Zealand. That late-acquired lawful status does not then give rise to a right to lodge a humanitarian appeal under section 194(6) or section 195(7) – see *AD (Pakistan)* [2011] NZIPT 500644 *(Minute No 1)*. The right to later lodge a humanitarian appeal under section 154, after becoming unlawfully in New Zealand, is not affected.

[5.11] A person who has already had a humanitarian appeal under section 194(6) or section 195(7) determined (or who was eligible to lodge such an appeal, but did not), may lodge a further humanitarian appeal only if the eligibility to do so arises from a fresh or different instance of deportation liability – see *DZ (Sri Lanka*) [2017] NZIPT 502646, 502661 and 502900.

Examples:[1]

Lawful →				Unlawful →				
Refugee and Hum 1 lodged (eligible because lawful)	Refugee declined	Hum 1 declined			Hum 2 lodged			No jurisdiction to accept Hum 2

Lawful →				Unlawful →				
Refugee lodged (eligible because lawful but did not lodge a Hum)	Refugee declined				Hum lodged			No jurisdiction to accept Hum

Unlawful →								
Refugee and Hum 1 lodged (eligible because became unlawful within 42 days)	Refugee declined	Hum 1 declined			Hum 2 lodged			No jurisdiction to accept Hum 2

Unlawful →								
Refugee lodged (eligible because within 42 days but did not lodge a Hum)	Refugee declined				Hum lodged			No jurisdiction to accept Hum

Unlawful →								
Refugee lodged (not eligible to lodge Hum as became unlawful more than 42 days ago)	Refugee declined				Hum lodged			No jurisdiction to accept Hum

Unlawful →				Lawful →				
Refugee lodged (not eligible to lodge Hum as became unlawful more than 42 days ago)	Refugee declined			Temp visa granted	Hum lodged			No jurisdiction to accept Hum <u>at this time</u> *- AD (Pakistan)*

Unlawful →				Lawful →		Unlawful →		
Refugee lodged (not eligible to lodge Hum as became unlawful more than 42 days ago)	Refugee declined			Temp visa granted		Hum lodged		Jurisdiction to accept Hum (if within 42 days of becoming unlawful) *- AD (Pakistan)*

Lawful →				Unlawful→	Lawful →	Unlawful →		
Refugee and Hum 1 lodged (eligible because lawful)	Refugee declined	Hum 1 declined			Temp visa granted	Hum 2 lodged		Jurisdiction to accept Hum 2 (if within 42 days of becoming unlawful again) *– DZ (Sri Lanka)*

Unlawful →					Lawful →	Unlawful →		
Refugee and Hum 1 lodged (eligible because became unlawful within 42 days)	Refugee declined	Hum 1 declined			Temp visa granted	Hum 2 lodged		Jurisdiction to accept Hum 2 (if within 42 days of becoming unlawful again) *– DZ (Sri Lanka)*

6. REPRESENTATION

[6.1] An appellant may represent themselves or be represented by a lawyer or licensed immigration adviser or person exempt from licensing under the Immigration

[1] In this table, "temp visa" means "temporary visa" "refugee" means refugee and protection appeal" and "Hum" means "humanitarian appeal against deportation liability".

Advisers Licensing Act 2007 either at their own expense or, if they qualify, on legal aid (clause 13, Schedule 2). A minor (a person who is under 18 years of age and who is not married or in a civil union) must be represented by a responsible adult – (section 375) – see also [9.4] below.

[6.2] Appellants who have applied for legal aid but whose applications have not been granted, stand in the same position as all other persons before the Tribunal. A hearing will not be delayed solely on the ground that a legal aid application has not been determined.

7. INFORMATION AND EVIDENCE

[7.1] In the case of a refugee and protection appeal, the Tribunal may receive as evidence any document, information or matter that in its opinion may assist it, whether or not it would be admissible in a court of law – (clause 8(1), Schedule 2). Subject to this, the Evidence Act 2006 applies as if the Tribunal was a court – (clause 8(2), Schedule 2).

[7.2] Unless the Tribunal advises otherwise, two copies of all documents and other evidence must be filed (three copies if the matter is to be heard by two members, and so forth). Where the original of any document is available, the Tribunal expects it to be submitted with the copies.

7A. INFORMATION AND EVIDENCE SUBMITTED BY THE APPELLANT

[7A.1] It is the responsibility of an appellant to establish his or her case or claim and to ensure that all evidence and submissions are provided to the Tribunal before it makes its decision – (section 226(1)). Documentary evidence should be provided in an indexed, tabulated bundle. A further indexed, tabulated bundle should be provided for any country information. Relevant passages should be highlighted. All documents should be single–sided.

[7A.2] Where a party seeks to adduce evidence by telephone, or other audio or audio-visual link, any toll or other charges must be borne by the party calling the witness. At its own premises, the Tribunal will normally provide a telephone able to be heard by all in the hearing room. Any toll or other charges may be met by the appellant providing a calling card pre-charged with sufficient funds to enable the evidence to be taken in one sitting. Other proposed methods of meeting the cost should be discussed with the case manager at the earliest opportunity.

[7A.3] All witnesses (including those giving evidence by telephone, or other audio or audio-visual link) are required to provide a written brief of evidence in advance of the hearing in accordance with paragraph [13] of this Practice Note. If giving evidence at a distance, the witness is expected to be in a position to confirm:

(a) their identity;

(b) they are alone (or that all others present are identified);

(c) they have no other telephone, or other audio or audio-visual link operating; and

(d) they are not receiving advice or assistance from any other person or source.

[7A.4] Where an appellant seeks to adduce evidence from a witness by audio, or audio-visual link, the Tribunal is able to provide a Virtual Meeting Room to which computer or smart phone users can connect. Appellants wishing to access this facility must provide adequate notice and make the necessary arrangements with the case manager.

[7A.5] Where an appellant seeks to adduce evidence in electronic format (ie, video clips, websites etc), he/she is expected to advise the case manager in advance of the intention to do so and to bring a personal laptop or computer to the hearing. If the media is to be viewed on the Internet, then the appellant may provide their own Internet access (whether by satellite link or via a mobile telephone 'hotspot' or by other means) or may use the Ministry of Justice wifi (JUST_VISIT), the weekly password for which will be available at the Tribunal's reception. The appellant's laptop or computer can be linked to a monitor (supplied by the Tribunal) so that both the appellant and the member can view the evidence. Where there is any doubt as to the compatibility of the appellant's equipment, he/she is expected to resolve this with the case manager before the day of the hearing, so as to avoid delays.

[7A.6] In all cases, appellants are expected to provide copies of electronic records (these may be provided on a flash drive, CD or DVD) for the Tribunal's file. Information in electronic format should not be submitted without first ascertaining whether the Tribunal is able to view or read such material.

[7A.7] Where an appellant intends to adduce evidence of an 'expert report' nature (including reports by psychiatrists, psychologists or medical practitioners) regard should be had to the time it takes to produce such reports. Appellants are expected to

take steps to obtain such reports well in advance of the hearing, so that they are completed in good time. Appellants should **not** wait until receiving notice of the hearing date because time may then be insufficient.

7B. INFORMATION AND EVIDENCE GATHERED BY THE TRIBUNAL

[7B.1] The Tribunal may seek information from any source, but it is not obliged to do so, and it may determine the appeal or matter on the basis of the information provided – (section 228).

[7B.2] The Tribunal, or any person authorised by it, may:

(a) inspect any papers, documents, records, or things; and

(b) require any person to produce any documents or things in that person's possession or control and allow copies to be made; and

(c) require a person to provide, in an approved form, any information specified and copies of any documents – (clause 10, Schedule 2).

[7B.3] To assist it to determine an appeal or matter, the Tribunal may require the appellant to allow biometric information to be collected from him or her – (section 232).

7C. INFORMATION AND EVIDENCE SUBMITTED BY THE RESPONDENT

[7C.1] The respondent may, in the time allowed by the Tribunal, lodge evidence and submissions – (section 226(3)).

[7C.2] Where a refugee and protection appeal is lodged, the chief executive must, in the time allowed by the Tribunal, lodge with the Tribunal any relevant files – (section 226(2)(b)). The relevant files include the file of the Refugee Status Unit and any relevant temporary visa file and/or residence file, and (where they are disclosable) records and electronic notes held by the respondent concerning the appellant. If the Tribunal requires other files or documents, including those held in the name of other family members, it will seek such files or documents, pursuant to [7C.4] below.

[7C.3] The Registry of the Tribunal will normally provide a copy of the file of the Refugee Status Unit and any other relevant file to the appellant as soon as it is received.

[7C.4] The Tribunal may require the chief executive to seek and provide information, but no party may request the Tribunal to exercise this power – (section 229).

8. SPECIAL NEEDS OF APPELLANTS

[8.1] The Tribunal endeavours to accommodate the special needs of appellants or witnesses, such as those with a disability, and expects to be assisted by advance notice of any such needs.

9. FAMILY APPEALS AND CHILDREN

[9.1] A notice of appeal must relate to one person only – (regulation 5(1)).

[9.2] Where two or more members of the same family lodge refugee and protection appeals, the Tribunal will hear all of the appeals together, unless it is not practicable to do so or there is some other compelling reason not to do so.

[9.3] Where multiple family members have appeals pending or where representatives represent appellants whose proceedings are based on the same or substantially similar grounds, they should advise the Tribunal as early as possible of any objections they may have to the appeals being heard together.

[9.4] Where proceedings before the Tribunal relate to a minor (being a person under 18 years of age who is not married or in a civil union), the minor's interests are normally to be represented by one of the minor’s parents and the parent is the responsible adult for the minor for the purposes of the proceedings – (section 375(1)). In the absence of a parent (including where a parent cannot perform the role because of a conflict of interest), the Tribunal will nominate a responsible adult – (section 375(3)). Before doing so, the Tribunal will, where practicable, consult the minor and adult relatives of the minor known to the Tribunal.

[9.5] For the rules relating to the inclusion of spouses, partners and/or dependent children in a humanitarian appeal under section 194(5) or section 195(6), see section 9 of Practice Note 4/2019.

10. CONTACT ADDRESS

[10.1] The appellant, affected person or applicant must provide the Tribunal with a contact address and an address for service – (sections 225(2)(a), 387 and 387A). For the definition of a contact address, see section 387A. **The contact address must be**

a postal address (not a Post Office box) and/or an electronic address (ie, an email address). If the person's contact address is an electronic address, the person is taken to have agreed to receive all notices and documents at that address – (section 387A(5)).

[10.2] The appellant, affected person or applicant may substitute a different contact address at any time, by giving notice in writing to the Tribunal – (section 387A(6)).

[10.3] The appellant, affected person or applicant must notify the Tribunal in a timely manner, of a change in either of those addresses – (section 225(2)(b)).

[10.4] If a person is in custody or is required to reside at a particular address, the person's contact address is the postal address of the place where the person is detained or required to reside – (section 387A(4)).

[10.5] Any notice or other document required to be served must comply with the provisions of sections 386 to 387A, as relevant – (section 387B). This is unless any other sections of the Act or any regulations provide for specific situations or circumstances that deal with the manner of service or giving of notices – (section 387B).

[10.6] A summons to a witness must be served by personal service at least 24 hours before the attendance of the witness – (clause 12, Schedule 2).

[10.7] Any documents relating to proceedings may be served outside New Zealand by leave of the Tribunal and in accordance with the regulations – (clause 14, Schedule 2 and regulation 10).

[10.8] A matter lodged with the Tribunal by the Minister of Immigration must be served by or on behalf of the Minister of Immigration on the affected person either personally or by sending by registered post to the person's address for service, which may or may not be the last known address notified to the Tribunal, in accordance with section 386(3) – (sections 386A(2) and 387, and regulation 8(3)).

11. WITHDRAWAL OF APPEAL OR MATTER

[11.1] An appellant or applicant may at any time withdraw an appeal or matter (including any concurrent humanitarian appeal) – (section 238). That notice should be in writing and signed. The filing fee in respect of any humanitarian appeal will not be refunded.

[11.2] If the appellant leaves New Zealand before a determination is made, any appeal (including any concurrent humanitarian appeal) is deemed to be withdrawn – (section 239(1)(b) and (c)).

PREPARING FOR THE HEARING

12. ORAL HEARING

[12.1] Subject to [12.2] below, the Tribunal must provide an oral hearing for any refugee and protection appeal or matter, unless the person was interviewed by a refugee and protection officer (or failed to take the opportunity of an interview) at first instance and the Tribunal considers the appeal or matter is *prima facie* manifestly unfounded or clearly abusive, or relates to a subsequent claim – (section 233(3)).

[12.2] The Tribunal has an absolute discretion whether or not to offer an oral hearing in the case of an appeal that relates to a subsequent claim – (section 233(4)).

[12.3] The Tribunal may determine any refugee and protection appeal on the papers if the person fails, without reasonable excuse, to attend a notified hearing – (section 234(1)).

[12.4] The respondent (whether the Minister, the chief executive, or a refugee and protection officer) is a party to every appeal – (section 227). While it is the practice of the respondent not to appear at most refugee and protection appeals, and to abide the decision of the Tribunal thereon, it is open to the respondent to appear at any appeal if it deems it appropriate. Appellants and counsel should anticipate this possibility. The directions herein assume that the respondent intends to appear. In cases where the respondent does not appear, the directions should be read as modified accordingly.

13. TIME FOR FILING EVIDENCE

[13.1] Subject to any ruling by the Tribunal:

(a) The original plus one copy of all evidence (accompanied by an accurate translation if necessary), including statements by the appellant and all witnesses, which the appellant or the respondent wishes to produce are to be filed with the Tribunal at least 14 days before the hearing date (with a copy to the other party). All statements shall include the declaration set out at [25.1] below.

(b) Two copies of any submissions are to be filed at least three clear working days before the hearing (with a copy to any other party). Such submissions should not include evidence which must be tendered earlier as per (a) above.

(c) Evidence not filed by either party within these timeframes will only be accepted with the leave of the Tribunal – (see also [29.1] concerning evidence sought to be filed following an oral hearing).

14. POWER TO ISSUE A SUMMONS

[14.1] The Tribunal may, either of its own motion or on application, issue in writing a summons requiring any person to attend and to give evidence, and to produce any relevant papers, documents, records or things in that person's possession or control – (clause 11, Schedule 2).

[14.2] A witness appearing before the Tribunal under a summons is entitled to be paid witnesses' fees, allowances and expenses in accordance with the scales prescribed by regulations under the Summary Proceedings Act 1957 – (clause 16(1), Schedule 2). The relevant regulations are the Witnesses and Interpreters Fees Regulations 1974. The person requiring the attendance must pay or tender the fees, allowances and expenses at the time the summons is served, or at some other reasonable time before the hearing – (clause 16(2), Schedule 2).

[14.3] An application for the issue of a witness summons must be in writing and, unless the Tribunal otherwise directs, be filed no less than 21 days before the hearing date, supported by submissions as to the nature of the evidence intended to be given, its relevance, and any communications with the intended witness, including the grounds of any refusal to attend. The Tribunal must also be provided with the full name, residential and work address, and other relevant details of the person sought to be summoned. Where it is intended that the witness produce any papers, documents, records or things in his or her possession or control, full particulars must also be given.

[14.4] As the Tribunal is under a duty to act fairly, it may, in appropriate cases, direct that the intended witness be heard on the application for the witness summons.

[14.5] The Tribunal has a duty to prevent the abuse of its own processes, therefore it will refuse to issue or will set aside a summons where it is satisfied that it is proper to do so. Without limiting the circumstances, the Tribunal will do so where the

evidence does not establish that the intended witness is able to give any relevant or probative evidence; where there has been an abuse of process; where the summons was irregularly obtained or issued; where the summons was taken out for a collateral motive or is oppressive.

15. PRE-HEARING CONFERENCE – TIMETABLING

[15.1] Approximately four weeks before the appeal hearing, the Tribunal will convene a conference (usually by telephone) with the parties and/or counsel. The purpose of the conference is to make timetabling directions, address any special needs of the parties and generally ensure that the hearing will proceed without adjournment or delay.

[15.2] In the case of an urgent hearing for persons in custody, the Tribunal may abridge the time between the conference and the hearing, or dispense with the conference altogether.

[15.3] Subject to any ruling by the member:

(a) Any evidence which the appellant (or other party) wishes to produce on the appeal (including statements by the appellant and all witnesses) is to be filed with the Tribunal (2 copies) at least 14 days before the hearing date (with a copy to any other party).

(b) The statement of the appellant should update the Tribunal on any relevant changes in their circumstances since the Refugee Status Unit decision.

(c) Opening submissions (which must be in English or accompanied by an accurate translation) are to be filed (2 copies) at least 3 clear working days before the hearing (with a copy to any other party). Such submissions should not include evidence which must be tendered earlier as per (a) above.

(d) Evidence not filed by either party within this timeframe will only be accepted with the leave of the Tribunal – (see [29.1] below, concerning evidence sought to be filed following the oral hearing).

16. ADJOURNMENTS

[16.1] The granting of an adjournment of a fixed hearing is a matter involving the exercise of the Tribunal's discretion. An adjournment will not be granted without strong and cogently presented grounds. An adjournment will not be granted pending the outcome of a legal aid application – (see [6.2] above).

[16.2] The request for an adjournment, which should be made as early as possible, must be given in writing to the Tribunal, along with the earliest possible suggested alternative fixture date. It should also be copied to any other party who has given notice of intention to appear.

[16.3] A medical certificate presented as the basis for an adjournment request must be from a registered medical practitioner and specify the following:

(a) the date the appellant or witness was examined;

(b) the illness or disability;

(c) the expected duration of the illness or disability;

(d) the reason why, in the opinion of the medical practitioner, the person is unable to attend the scheduled hearing; and

(e) the medical practitioner’s professional opinion as to when the person will be fit to attend a hearing.

17. OFFICIAL INFORMATION ACT AND PRIVACY ACT REQUESTS

[17.1] In relation to its judicial functions the Tribunal is not subject to the provisions of:

(a) the Official Information Act 1982 – (section 2(6)(b) of that Act); or

(b) the Privacy Act 1993 – (section 2(1)(b)(viii) of that Act).

THE HEARING

18. SITTING HOURS

[18.1] The sitting hours of the Tribunal at its own premises will normally start at either 9am, 9.30am or 10am and conclude at approximately 5pm, subject to

adjustment by the member. The lunch break will normally occur at 12pm, 12.30pm or 1pm, accordingly. Breaks of 15-20 minutes will be taken at approximately 11am or 11.30am and 3pm or 3.30pm to allow appropriate rest for witnesses and interpreters. The variable start time will depend on the number and type of hearings on the day, in the interests of promoting confidentiality. The Notice of Hearing will provide final confirmation of the start time.

[18.2] The start times are to be strictly adhered to. Counsel and appellants are expected to arrive at least 15 minutes prior to the hearing and to be in the hearing room, ready to start, at the prescribed times. Any lack of adherence to the timetable risks compromising confidentiality.

19. HEARING *DE NOVO*

[19.1] All refugee and protection appeals before the Tribunal (whether by oral hearing or on the papers) proceed by way of hearing *de novo*, and all issues of law, credibility and fact are at large, except that the Tribunal may rely on any finding of credibility or fact by it or any of its predecessor appeal bodies in any previous appeal or matter involving the appellant – (section 231) and on any conviction relied upon by a refugee and protection officer pursuant to section 145(b)(ii) or section 147(2)(ii).

[19.2] The Tribunal will make a decision on the facts as found at the date of determination of the appeal. It is not appropriate for appellants or counsel to seek assurances or undertakings during the course of the hearing as to whether any part of the evidence is accepted and no conduct or assertion on the part of the member should be taken as negating the general premise that all issues remain at large until all of the evidence has been heard and considered.

20. GENDER ISSUES

[20.1] The appellant, counsel or representative should alert the Tribunal well in advance of the hearing to any specific gender-related factors so that appropriate arrangements can be made where possible.

[20.2] An interpreter of the appropriate gender will, where possible, be engaged where a claim involves allegations of sexual violence or abuse or similarly sensitive issues.

[20.3] When requested, the Tribunal will endeavour to ensure where possible that an appeal or matter is heard by a member of the same gender as the appellant or a panel of members comprising at least one of the same gender.

21. HEARINGS INFORMAL

[21.1] Tribunal hearings are procedurally informal. The Tribunal may be addressed as "Mr Chairman/Madam Chair and members of the Tribunal". Individual members may be addressed by name. Appellants, witnesses and representatives may remain seated during the taking of evidence and while addressing the Tribunal.

22. HEARINGS NOT OPEN TO PUBLIC

[22.1] Refugee and protection appeal hearings are not open to the public and must be conducted in private – (section 151 and clause 18(3), Schedule 2). No person other than the appellant (and any accompanying custody officers), his or her representative and the interpreter is entitled to be present at a hearing without the permission of the member, who will ascertain the views of the appellant before any decision is made.

[22.2] The obligation of confidentiality imposed by the Act extends to all persons attending a hearing and those involved in the administration of the Act.

23. OBSERVERS

[23.1] An appellant may, with the leave of the member, have a friend or relative attend the hearing in support. Such person will not, without leave, be allowed to take part in the proceedings.

[23.2] UNHCR is an ex officio member of the Tribunal and may sit as a member in any hearing – (section 219(1)(c)). However, even if not sitting as a member, a UNHCR representative may, with the leave of the Tribunal, attend to observe any hearing at any time.

[23.3] A refugee and protection officer or other officers of the Department of Labour who wish to observe a hearing may do so with the leave of the Tribunal. Such person will not, without leave, be allowed to take part in the proceedings.

[23.4] From time to time, other persons (for example, judges or tribunal members from similar overseas tribunals, staff undergoing training, law students) may be invited to observe a hearing. In these cases the appellant's consent will be sought

prior to the commencement of the hearing. Such persons will not be allowed to take part in the proceedings.

[23.5] In all cases, observers are bound by the obligation of confidentiality as per [22.2] above and will be required to give a written undertaking to that effect. The member may withdraw leave for an observer at any time.

24. INTERPRETERS

[24.1] Where needed, an independent interpreter will be provided for the hearing, at the cost of the Tribunal (regulation 14). Representatives and the parties must ensure that, at the pre-hearing conference, the Tribunal is advised of the interpreting needs of the appellant and any witnesses, including language, dialect and, where appropriate, gender. The Tribunal will endeavour to meet those needs.

[24.2] Appellants and witnesses shall not make direct or indirect contact with the interpreter at any time outside the hearing except with the consent of the member.

25. OATHS AND AFFIRMATIONS

[25.1] Whether the witness intends to give evidence in person or not, every statement is to be signed by the deponent and is to include the following statement:

> I acknowledge that this statement is intended to be adduced as evidence before the Immigration and Protection Tribunal, and on signing it I declare the truth of its contents.
>
> [signed]
> ……

[25.2] Parties and witnesses will be required to take an oath or make an affirmation, prior to giving oral evidence before the Tribunal.

[25.3] An interpreter will be required to take an oath or make an affirmation before commencing his or her duties.

26. HEARINGS PRIMARILY INQUISITORIAL

[26.1] Hearings before the Tribunal will, unless otherwise directed by the member, be conducted in an investigative or inquisitorial manner, in the order set out at [27.1] below – (section 218(2)).

27. PROCEDURE AT HEARING

[27.1] Subject to the direction of the member, all hearings will proceed as follows:

(a) Introduction by member.

(b) Opening submissions for the appellant.

(c) Unless the Tribunal decides to take evidence as read, the appellant to be called, followed by any witnesses, and questioned in the following order:

(i) the identity of the person and veracity of his or her statement to be established by counsel for the appellant;

(ii) the Tribunal to ask questions;

(iii) cross-examination by counsel for the respondent (if any);

(iv) re-examination by the counsel for the appellant.

(d) Opening submissions for the respondent (if any).

(e) The respondent's witnesses, if any, called to give evidence, and to be questioned in the same manner as the appellant's witnesses.

(f) Closing submissions for the respondent (if any).

(g) Closing submissions for the appellant.

[27.2] In the case of any application or matter brought by the respondent, the order of presentation of cases may be varied by the Tribunal, as appropriate.

[27.3] Unless the Tribunal decides otherwise, closing submissions are to be made orally at the conclusion of the hearing and counsel should be prepared for this. A direction that submissions may be put in writing will only be made where it is in the interests of fairness to do so.

[27.4] The Tribunal will not issue an immediate oral decision but will deliver a written decision with reasons as soon as practicable (clause 17(3), Schedule 2).

28. PERSONS IN CUSTODY – SECURITY

[28.1] Refugee and Protection hearings for persons in custody will normally be held in the District Court because of the security requirements.

[28.2] Where an appellant is serving a term of imprisonment or is in the custody of the Department of Corrections for any other reason at the time of hearing, his or her security, welfare and custody during the hearing (and in transit to and from it) are the responsibility of the Department of Corrections, not the Tribunal.

[28.3] Matters such as where the appellant sits and whether he or she is restrained (whether by handcuffs or otherwise) during a hearing are for the Department of Corrections prison officers to determine. The appellant or the Tribunal may request that an appellant sit in a particular place or that restraints be removed, but the decision is solely that of the prison officers.

[28.4] An appellant in custody is not to communicate with (or receive from or give any item to) any person while attending the hearing, including family, friends and witnesses, except for:

(a) members of the Tribunal;

(b) the registrar at the hearing;

(c) Department of Corrections prison officers;

(d) his or her representative;

(e) the interpreter engaged in accordance with [24.1], in the course of the interpreter's duties; and

(f) any other person with whom the Tribunal directs that the appellant may communicate.

AFTER THE HEARING

29. POST-HEARING EVIDENCE

[29.1] Appellants and counsel should come to all hearings ready to present all evidence to be relied upon. No evidence may be filed following the oral hearing except by leave of the Tribunal. A copy of the request should be sent to any other party who has appeared.

30. THE RECORDING OF THE HEARING

[30.1] The Tribunal makes and retains a recording of every oral hearing.

[30.2] The recording is made for the purpose of providing the member with the means to cross-check later what was said. As such, it forms part of the judicial functions of the Tribunal and is not subject to the Official Information Act 1982 or the Privacy Act 1993. Nevertheless, the Tribunal recognises that it may be the most accurate record of the evidence and may make a copy of the recording available on CD to:

(a) The representative for any party, on application supported by:

(i) cogent reasons which justify the provision of a copy (representatives are expected to take adequate notes during the hearing and a failure to do so will not normally constitute cogent reasons); and

(ii) an undertaking to keep the copy of the recording in their possession and not to release it in any form (whether by playing it or by providing the original or a copy thereof) to any person save for the party for whom they act (and/or other person previously authorised by the Tribunal in writing) to whom it may be played, and to use the recording only for the purpose for which it was sought in the application.

(b) The appellant in person, but the appellant will need to attend at the Tribunal's offices, where facilities will be made available to listen to the recording. An appellant in person will not be permitted to retain a copy of the recording and the CD must not be removed from the Tribunal's premises. No recording or copying of the CD is permitted.

(c) The High Court, Court of Appeal or Supreme Court, on request by the Court for its production.

[30.3] The Tribunal will not provide a written transcript to a party or representative. It will provide the High Court, Court of Appeal or Supreme Court with a written transcript of the recording, on request by the relevant Court. The time taken to prepare a transcript varies but can be expected to be not less than six weeks.

31 ENQUIRIES ABOUT DELIVERY OF DECISION

[31.1] From time to time, parties and other persons approach the Tribunal with an enquiry as to the likely date of delivery of a decision.

[31.2] All such requests must be in writing and must set out the appellant's name, the number of the appeal and a cogent reason why the advice is being sought. Only one such enquiry in relation to any appeal is permitted.

[31.3] The Tribunal, following consultation with the Member, will respond to the enquiry in writing and not by telephone. The response will be a "best estimate" only. The timing of delivery of the decision is at the discretion of the Member involved. No information as to outcome will be given.

[31.4] The response to an enquiry will, in all cases, be sent to all parties at the same time.

32. DECISIONS

[32.1] Where a decision of the Tribunal is made by more than one member but is not unanimous, the decision of the majority shall prevail – (clause 17(1), Schedule 2). If the members are evenly divided, the appeal or matter will be decided in favour of the appellant – (clause 17(2), Schedule 2).

[32.2] Every decision of the Tribunal must be given in writing and contain reasons – (clause 17(3), Schedule 2). A decision will be delivered to the appellant through his or her counsel or representative (if any) and to the other party – (clause 17(5), Schedule 2).

[32.3] Research copies of decisions of the Tribunal are normally made publicly available, unless the Tribunal determines otherwise. Research copies of decisions in relation to refugee and protection appeals are, however, edited to remove the name of the appellant and any particulars likely to lead to the identification of the appellant – (section 151 and clause 18(4), Schedule 2).

33. RETURN OF DOCUMENTS

[33.1] When the Tribunal has determined an appeal, any Refugee Status Unit file (and any Immigration New Zealand file) is returned to the Ministry. Any original documents which had been lodged with the Refugee Status Unit will accompany the

file. An appellant seeking the return of those documents should address such a request to the Ministry, not the Tribunal.

[33.2] Any original documents which were lodged with the Tribunal during the course of an appeal will remain on the Tribunal's file. An appellant seeking the return of those documents should address such a request to the Tribunal.

34. APPEAL TO HIGH COURT AND APPLICATIONS FOR JUDICIAL REVIEW

[34.1] A decision by the Tribunal is final, once delivered.

[34.2] Where extrinsic evidence establishes when notice was actually given of the Tribunal's decision (or other document), time for appeal runs from that date – see *Rao v Minister of Immigration* [2015] NZHC 2669. If there is no such extrinsic evidence, it is deemed to have been received by the appellant 7 days after the date on which it was sent by registered post or courier – (section 386A(4)).

[34.3] Where any party to an appeal is dissatisfied with the determination of the Tribunal as being erroneous in point of law, he or she may, with the leave of the High Court, appeal to the High Court on that question of law – (section 245(1)).

[34.4] An application to the High Court for leave to appeal must be brought:

(a) not later than 28 days after the date on which the decision of the Tribunal was notified to the party appealing; or

(b) within such further time as the High Court may allow on application made before the expiry of that 28-day period – (section 245(2)).

[34.5] Any application for judicial review of a decision of the Tribunal must be commenced not later than 28 days after the date on which the person concerned is notified of the decision, unless the High Court decides that, by reason of special circumstances, further time should be allowed or unless leave to commence proceedings is required – (sections 247(1) and 249(3) and (4)).

[34.6] Where a person both appeals against a decision of the Tribunal and brings review proceedings in respect of that same decision:

(a) the person must lodge both together; and

(b) the High Court must endeavour to hear both matters together, unless it considers it impracticable to do so – (section 249A).

[34.7] Neither the Tribunal nor its staff can give advice to appellants concerning any appeal to the High Court or application for judicial review. Self-represented appellants are advised to seek legal advice or assistance in that regard.

Judge P Spiller
Chair
Immigration and Protection Tribunal