IMMIGRATION AND PROTECTION TRIBUNAL

PRACTICE NOTE 1/2019

(DEPORTATION – RESIDENT)

(including any appeal by a non-citizen previously recognised as a refugee or a protected person, whose recognition has been cancelled under section 146)

31 October 2019

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PREAMBLE

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PREAMBLE

This Practice Note is issued pursuant to section 220(2)(a) of the Immigration Act 2009 ("the Act"). It is effective for all appeals against deportation liability by:

(a) residents;

(b) non-citizens who were previously recognised as refugees or protected persons, whose recognition has been cancelled under section 146. Such persons may not, in fact, be residents, but this Practice Note is extended to include them because (unlike other non-residents) they are entitled to an oral hearing.

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;
- "**fraud or the like**" means fraudulent, forged, false, or misleading, or any relevant information was concealed;
- "**member**" means "members" where appropriate;
- "**resident"** means a residence class visa holder;
- "**respondent**" means the Minister of Immigration, Ministry of Business, Innovation and Employment, Immigration New Zealand or an immigration officer, as appropriate to the context.

1. COMMENCEMENT

[1.1] This Practice Note takes effect from 31 October 2019 and replaces Practice Note 1/2018 (16 May 2018), which is repealed from that date.

[1.2] In respect of transitional appeals subject to either of sections 446 or 447 of the Act (including appeals subject to the Immigration and Protection Tribunal (Transitional Provisions) Regulations 2010), Practice Note 1/2008 (10 December 2008) of the Deportation Review Tribunal 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 deportation, are:

(a) to determine appeals against liability for deportation – (section 217(2)(a)(v));

(b) to determine applications made by the Minister under section 212(2) as to whether a person has failed to meet his or her conditions of suspension of liability for deportation – (section 217(2)(b)(iii));

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

[2.3] The Act sets out different categories of residents who may appeal against liability for deportation:

(a) a resident whose visa is granted in error may appeal on the facts and on humanitarian grounds – (section 155).

(b) a resident holding a visa under a false identity – (section 156)

- may appeal on humanitarian grounds, if convicted of an offence where the person's identity is established, and it is different to the identity under which they hold a visa; or
- may appeal on the facts and on humanitarian grounds, if the Minister determined that the person holds a visa under a false identity.

(c) a resident whose residence was procured by fraud or the like – (section 158(1))

- may appeal on humanitarian grounds if convicted of an offence where it is established that the person's residence class visa or entry permission was procured through fraud or the like; or
- may appeal on humanitarian grounds if convicted of an offence where it is established that the person's (or any other person's) application for a visa on the basis of which a residence class visa was granted was procured through fraud or the like; or
- may appeal on the facts and on humanitarian grounds, if a resident and the Minister determines that the person's residence class visa or entry permission was procured through fraud or the like.
- may appeal on the facts and on humanitarian grounds, if a resident and the Minister determines that the person's (or any other person's) application for a visa on the basis of which a residence class visa was granted was procured through fraud or the like.

(d) a former citizen deprived of citizenship on the ground of fraud or the like – (section 158(2))

- may appeal on humanitarian grounds only.

(e) a resident whose visa conditions are breached or have not been met – (section 159)

– may appeal on the facts and on humanitarian grounds.

(f) a resident (for five years or less) in respect of whom new information as to character becomes available – (section 160)

– may appeal on the facts and on humanitarian grounds.

(g) a resident convicted of certain criminal offences – (section 161)

– may appeal on humanitarian grounds only; and

– (if a refugee or a protected person) may appeal against any decision of a refugee and protection officer that he or she may be deported.

(h) a person previously recognised as a refugee or protected person whose recognition is cancelled – (section 162)

– may appeal on humanitarian grounds if the person is not a citizen and is convicted of an offence where it is established that the person acquired recognition as a refugee or a protected person through fraud or the like; or

– may appeal on the facts and on humanitarian grounds in any other case.

[2.4] The grounds for allowing an appeal on the facts are set out in section 202. In summary, the appellant must establish on the balance of probabilities, that the act or omission on which deportation liability is asserted did not occur (NB: Where the act or omission is asserted to be fraud or the like, intent is not an ingredient – see *Pal v Minister of Immigration* [2013] NZHC 2070).

[2.5] The grounds for allowing a humanitarian appeal are set out in section 207. In summary, the Tribunal must allow an appeal where it is satisfied that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand, and it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand – (section 207(1)).

[2.6] A person who is entitled to and wishes to appeal both on the facts and on humanitarian grounds must lodge both appeals together within the relevant time limits. The Tribunal will consider both appeals together, with the appeal on the facts considered first, unless it is not practicable to do so – (section 203).

[2.7] In determining whether deportation would be unjust or unduly harsh and whether it would be contrary to the public interest, to deport a person liable for deportation under section 161 (a residence class visa holder convicted of a criminal offence), the Tribunal must have regard to any submissions of a victim – (sections 207(2), 208; see [7] below).

[2.8] There are special processes where a current or former refugee or protected person is liable for deportation under sections 161 and 162 – (sections 204 and 205). In brief, the Tribunal must, in addition to considering any appeal on the facts or on humanitarian grounds, determine whether the person is currently a refugee or a protected person.

[2.9] In determining any deportation (resident) appeal, the Tribunal may order:

(a) that the appeal is allowed;

(b) that the appeal is allowed, and an immigration officer is to take such steps as it considers necessary to give effect to its decision – (section 209);

(c) that the appeal is allowed, and order that the appellant's liability for deportation be suspended for a period not exceeding five years, subject to such conditions as it determines – (section 212(1));

(d) that the appeal be declined;

(e) that the appeal be declined but the period of any prohibition on entry to New Zealand be reduced or removed altogether – (section 215);

(f) that the appeal be declined but, where it is considered necessary to allow the person to get their affairs in order, that the deportation of the appellant be delayed for a period not exceeding 12 months, or that a temporary entry class visa be granted for a period not exceeding 12 months – (section 216);

(g) the imposition of any condition on the grant of a resident visa that it thinks fit – (section 210(3));

(h) the reactivation of a person's liability for deportation by causing an immigration officer to serve a deportation liability notice – (section 212(3));

(i) certain matters in respect of a person whose liability for deportation has been suspended by the Minister and who has appealed to the Tribunal – (section 214).

[2.10] The procedures of the Tribunal are as it sees fit, subject to the Act and Regulations – (section 222(4)). The proceedings of the Tribunal in any particular case may be, as the Tribunal thinks fit, of an inquisitorial, adversarial or mixed nature – (section 218).

3. NOTICE OF APPEAL

[3.1] Where extrinsic evidence establishes when a deportation liability notice was served, 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 Immigration New Zealand decision to the person's contact address;

(b) by email, the time for appeal runs from delivery of the Immigration New Zealand 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 3 days after the date on which it was sent (if sent by email), or 7 days after the date on which it was sent (if sent by registered letter or courier to an address in New Zealand), or 14 days after the date on which it was sent (if sent by registered letter or courier to an address outside New Zealand) – (section 386A(4) and (5)).

[3.2] The notice of appeal must be on one of the approved forms – (section 381, regulations 4(1)(a) and 8(1)(a)). The form may be obtained from the Tribunal and downloaded from www.justice.govt.nz/tribunals/IPT. It must be completed in English, signed by the appellant and accompanied by any prescribed fee – (regulations 4(1) and 15). The Tribunal has no ability to accept an appeal without payment of the prescribed fee. The notice of appeal must be filed in the office of the Tribunal in Auckland (in person or by courier) at:

Specialist Courts and Tribunals Centre
Level 1, Chorus House
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).

or:

Email: IPT@justice.govt.nz (the original hard copy must follow).

[3.3] A notice of appeal should, if possible, be accompanied by a copy of all or any of the following, to the extent they are applicable – (regulation 4(2)):

(a) the decision appealed against;

(b) the deportation liability notice; and

(c) the pages of the appellant's passport showing the biographical details and photograph, and any expired or unexpired visa.

[3.4] A deportation (resident) appeal must be brought within the period specified in the Act. The periods specified are:

Type of appeal	Appeal on the facts, within	Appeal on humanitarian grounds, within
Where a visa was granted due to an **administrative error**. sections 201(1)(a)(b), 206(1)(c), and 155.	28 days	28 days
Where the person held a visa under a **false identity**. Note: if appealing on both grounds, the appeal must be lodged within 28 days after service of the Deportation Liability Notice. sections 201(1)(a)(b), 206(1)(c), and 156.	28 days	42 days after becoming unlawful
Where the person obtained a residence class visa or entry permission through **fraud, forgery, false or misleading representation, or concealment of relevant information**. sections 201(1)(a)(b), 206(1)(c), and 158(1).	28 days	28 days
Where a former New Zealand citizen was **deprived of New Zealand citizenship** under section 17 of the Citizenship Act 1977 because it was obtained by fraud, false representation, or wilful concealment of relevant information. sections 206(1)(c) and 158(2).	N/A	28 days
Where the person **did not meet or materially breached the conditions of a visa**. sections 201(1)(a), 206(1)(c), and 159.	28 days	28 days
Where **new information relating to character** became available, and the person would not have been eligible for the visa if it had been available at the time the visa was granted. sections 201(1)(a)(b), 206(1)(c), and 160.	28 days	28 days
Where the person has been **convicted of a criminal offence**. sections 206(1)(c) and 161.	N/A	28 days
Where **recognition as a refugee or protected person was cancelled** and the person **has not been convicted** of an offence establishing that such recognition was procured by fraud or the like. sections 162(1), 162(2)(b), 201(1)(c), 206(1)(d).	28 days	28 days
Where **recognition as a refugee or protected person was cancelled** and the person **has been convicted** of an offence establishing that such recognition was procured by fraud or the like. sections 162(1), 162(2)(a), and 206(1)(d).	N/A	28 days

4. REPRESENTATION

[4.1] Any party or person involved in proceedings may represent themselves or be represented by a lawyer or licensed immigration adviser or person exempt from licensing under the Immigration Advisers Licensing Act 2007, either at their own expense or, if they qualify, on legal aid – (clause 13, Schedule 2). An appellant who is 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).

[4.2] 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.

5. SPECIAL NEEDS OF APPELLANTS

[5.1] 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.

6. FAMILY APPEALS AND CHILDREN

[6.1] Where more than one member of a family has been served with a deportation liability notice, separate appeals must be lodged by each member of the family.

[6.2] In the case of a dependent child who has been served with a deportation liability notice, if the child's liability for deportation is linked or connected to that of a parent appellant and arises from the same facts or circumstances as those of the parent appellant then only one filing fee is payable for that parent and the dependent child or children.

[6.3] A deportation (resident) appeal may **not** include the appellant's spouse or partner or any children who are not dependent children as defined by section 4 of the Act. Those persons must file separate appeals and a separate fee is required for each such appeal – (regulation 7(1)).

[6.4] Where two or more members of the same family lodge deportation (resident) 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.

[6.5] 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.

[6.6] 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 to be represented by the minor's parent 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.

7. VICTIMS' SUBMISSIONS

[7.1] In determining a deportation (resident) appeal on humanitarian grounds in respect of a person liable for deportation under section 161 (criminal offending), the Tribunal must have regard to any written submissions to the Tribunal or the Minister of Immigration by a victim (as defined in section 208(7)) of the offence from which the liability for deportation arose – (sections 207(2) and 208(1)). With the leave of the Tribunal, the victim may make oral submissions at the hearing – (section 208(2)).

[7.2] Any victim wishing to lodge a written submission should do so by forwarding two copies to the Tribunal not later than 14 days prior to the hearing date. That time limit may be varied by the Tribunal on application.

[7.3] The Tribunal will notify the appellant and the respondent of the receipt of any written submission from a victim.

[7.4] On request, the Tribunal will provide the appellant's representative with a copy of any written submission by a victim and the representative (or the Tribunal) must show the same to the appellant, if requested, but the appellant is not entitled to retain a copy – (section 208(3) and (4)).

[7.5] Notwithstanding the above, the Tribunal may withhold part or all of a submission if, in its opinion, it is necessary to do so to protect the physical safety or security of the victim. Any withheld submission will not be relied upon by the Tribunal – (section 208(5) and (6)).

[7.6] Any victim wishing to appear in person to make an oral submission at the hearing should notify the Tribunal not later than 14 days prior to the hearing date, advising:

(a) the reason why he or she wishes to appear in person and make submissions orally, whether any evidence is intended to be given and the nature of that evidence;

(b) an estimate of how much time will be needed in order to make the oral submission (including giving any evidence); and

(c) whether the oral and any written submissions and evidence should be received in private (see [21] below).

The Tribunal will advise the victim promptly whether or not leave to make an oral submission is granted.

[7.7] No victim making any submission, whether in writing or orally, is subject to cross-examination by any party. Any victim who gives evidence as a witness may be questioned by the Tribunal and, with the leave of the Tribunal, cross-examined by any party.

[7.8] Any victim who makes a submission to the Tribunal is entitled to receive a copy of the Tribunal's decision but is required to provide a contact address to the Tribunal in advance, for that purpose. The contact address will be kept confidential by the Tribunal.

8. CONTACT ADDRESS

[8.1] 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)).

[8.2] 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)).

[8.3] 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)).

[8.4] 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)).

[8.5] 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).

[8.6] 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).

[8.7] 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).

9. OFFICIAL INFORMATION ACT AND PRIVACY ACT REQUESTS

[9.1] 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).

[9.2] Where an appellant wishes to obtain access to documents in relation to a deportation (resident) appeal after the decision has been delivered, such a request is appropriately made to the Ministry of Business, Innovation and Employment. Copies of all documents which were before the Tribunal should be on the Ministry's file.

PREPARING FOR THE HEARING

10. SUBMISSIONS

[10.1] The appellant (or representative) may make submissions in writing. Submissions and any evidence may accompany the appeal form, or be lodged prior to the hearing (see [14] below for timetabling directions in advance of the hearing).

[10.2] Two copies of all submissions and accompanying documents must be filed. Copies must also be sent to counsel for the Minister of Immigration and to any other party.

[10.3] The Minister of Immigration, as respondent, may also make submissions and provide any evidence as the Minister sees fit. Copies must be sent to the appellant or representative and to any other party.

[10.4] The Tribunal does not require parties to provide copies of its own decisions or New Zealand court authorities on established jurisprudence. It does require two copies of foreign court decisions and New Zealand court authorities on novel points of law.

11. INFORMATION AND EVIDENCE

[11.1] In the case of a deportation (resident) 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 certain exceptions, the Evidence Act 2006 applies if the Tribunal was a court – (clause 8(2), Schedule 2).

[11.2] Except in the case of the records of any government agency, where the original of any document is available the Tribunal expects it to be submitted with the copies.

[11.3] All statements must be signed and dated. Information in electronic format should not be submitted without first ascertaining whether the Tribunal is able to view or read such material.

11A. INFORMATION AND EVIDENCE SUBMITTED BY THE APPELLANT

[11A.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.

[11A.2] In any appeal involving a prisoner or former prisoner, the appellant shall obtain and submit the following reports from the Department of Corrections and/or the Parole Board:

(a) all psychological, psychiatric, counselling and criminogenic reports;

(b) all Parole Board determinations.

These documents must be filed at least 14 days before the hearing (with a copy to the respondent).

[11A.3] 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 will 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.

[11A.4] 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.

11B. INFORMATION AND EVIDENCE GATHERED BY THE TRIBUNAL

[11B.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).

[11B.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).

[11B.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).

11C. INFORMATION AND EVIDENCE SUBMITTED BY THE MINISTER OF IMMIGRATION

[11C.1] Where an 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 prepared for the Minister of Immigration 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 [11C.4].

[11C.2] The respondent may also, in the time allowed by the Tribunal, lodge with the Tribunal any other evidence or submissions – (section 226(3)).

[11C.3] Prior to the hearing, the respondent is to provide the Tribunal with an updated record from the New Zealand Police of the appellant's criminal convictions (if any), together with such record as it may have of any convictions in other countries.

[11C.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).

12. HEARINGS TO BE ORAL

[12.1] The Tribunal must provide an oral hearing for an appeal against liability for deportation brought by a resident or permanent resident – (section 233(1)).

13. PERSONS SERVING PRISON SENTENCE

[13.1] An oral hearing for a person who is serving a sentence of imprisonment must be heard and determined as close as is practicable to the date of the person's parole eligibility date or (in the case of a person serving a short-term sentence) statutory release date – (section 236(1)).

14. PRE-HEARING CONFERENCE – TIMETABLING

[14.1] Approximately four weeks before the appeal hearing, the Tribunal will convene a conference (usually by telephone) with the parties and/or their representatives. 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.

[14.2] In the case of an urgent hearing caused by the need for compliance with section 236 (the timing of hearings for persons in custody), the Tribunal may abridge the time between the conference and the hearing, or dispense with the conference altogether.

[14.3] 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 at least 14 days before the hearing date (with a copy to any other party appearing).

(b) The statement of the appellant should provide full details of all immediate family members (partner, children, parents, siblings), state whether the person is resident in New Zealand or elsewhere and identify their current immigration status. It should also describe any relevant health issues of the appellant or immediate family members.

(c) Opening submissions by both parties (which must be in English or accompanied by an accurate translation) are to be filed at least three clear working days before the hearing (with a copy to the 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).

15. POWER TO ISSUE A SUMMONS

[15.1] 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).

[15.2] 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).

[15.3] 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.

[15.4] 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.

[15.5] 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 it is not established that the intended witness is able to give relevant and 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.

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 cogent grounds. An adjournment will not be granted pending the outcome of a legal aid application (see [4.2] above).

[16.2] A 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 must also be copied to the other party.

[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 practitioner, the person is unable to attend the scheduled hearing; and

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

17. WITHDRAWAL OF APPEAL

[17.1] An appellant or applicant may at any time withdraw an appeal – (section 238). Notice of withdrawal should be in writing and signed. The filing fee will not be refunded.

[17.2] If the appellant leaves New Zealand before a determination is made, any appeal in respect of deportation liability may be deemed to be withdrawn, depending on the grounds for deportation liability – (section 239(1)). Appellants are strongly recommended to obtain legal advice before leaving the country while liable for deportation.

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 deportation (resident) appeals before the Tribunal proceed by way of hearing *de novo*, and all issues of law, credibility and fact relevant to the Tribunal's statutory test 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).

[19.2] The Tribunal will make a decision on the facts as they stand 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. HEARINGS INFORMAL

[20.1] 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.

21. HEARINGS OPEN TO PUBLIC

[21.1] Appeal hearings are normally open to the public, unless the Tribunal determines otherwise, either of its own volition or on application by any party, in relation to the whole or any part of a hearing – (clause 18, Schedule 2). An appeal brought by a refugee or protected person (or claimant, or person formerly recognised as such) must be conducted in private – (clause 18(3), Schedule 2).

[21.2] Because hearings can involve the disclosure of personal information, no recording is to be made of the hearing in any form, except that accredited members of the press, who have made their presence known to the Registrar before the commencement of the hearing, may make written notes and may, if permitted, make film or video recording in accordance with [21.4] below.

[21.3] No use of electronic media or communication is permitted in the course of a hearing, save that mobile telephones may be used to send and receive text messages, so long as the telephone is switched to 'silent' and does not otherwise disrupt proceedings.

[21.4] No filming or video recording is to be made by any person, except that accredited members of the press may be granted leave to film or make a video recording of all or part of a hearing, in accordance with the *Media Guide for Reporting the Courts and Tribunals* (Edition 4.1, September 2019), published by the Ministry of Justice. The Tribunal applies the principles set out in respect of the District Court's summary jurisdiction, except that all applications for media coverage will be determined on the papers. The *Media Guide* is available at www.justice.govt.nz/about/news-and-media.

22. INTERPRETERS

[22.1] 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 time of receiving notice of a hearing, 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.

[22.2] 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.

[22.3] An interpreter will be required to take an oath or affirmation, prior to commencing his or her duties.

23. OATHS AND AFFIRMATIONS

[23.1] 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]
>
> ……"

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

24. HEARINGS PRIMARILY INQUISITORIAL

[24.1] Hearings before the Tribunal will, unless otherwise directed by the member, be conducted in a mixed inquisitorial and adversarial manner, in the order set out at [25] below – (section 218(2)).

25. PROCEDURE AT HEARING

[25.1] Subject to the direction of the member, and the needs of the particular hearing, 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 is called first, followed by the appellant's witnesses, and will be questioned in the following order:

(i) identity of the person and veracity of the person's statement to be established by counsel for the appellant (and counsel may lead any evidence which could not have been included in the person's statement);

(ii) the Tribunal to ask questions;

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

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

(d) Opening submissions for the respondent.

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

(f) Closing submissions for the respondent.

(g) Closing submissions for the appellant.

[25.2] 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.

[25.3] 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).

26. PERSONS IN CUSTODY – SECURITY

[26.1] Where an appellant is serving a term of imprisonment 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.

[26.2] 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, an affected person 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.

[26.3] 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 [22.1], in the course of the interpreter's duties; and

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

27. HEARING RECORD

[27.1] All oral hearings will be recorded by the Tribunal. A written transcript will not be routinely produced.

28. FAILURE TO APPEAR

[28.1] The Tribunal may determine an appeal or matter without an oral hearing if the appellant fails without reasonable excuse to attend a hearing – (section 234(1)).

AFTER THE HEARING

29. POST-HEARING EVIDENCE

[29.1] No evidence may be filed following an oral hearing except by leave of the Tribunal. Leave may be sought for the filing of new evidence at any time prior to the date of the Tribunal's decision. A copy of the request should be sent to the other party.

30. ENQUIRIES ABOUT DELIVERY OF DECISION

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

[30.2] 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.

[30.3] 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.

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

31. THE RECORDING OF THE HEARING

[31.1] A recording of the hearing 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.

[31.2] 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.

32. DECISIONS

[32.1] A deportation (resident) appeal is normally decided by one member of the Tribunal, unless the Chair directs otherwise because of exceptional circumstances – (section 221).

[32.2] 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).

[32.3] 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 representative (if any) and to the other party – (clause 17(5), Schedule 2).

[32.4] Notice of a decision on a deportation (resident) appeal may be given by courier (sections 4 and 386A) or, where the person has designated an electronic address as his or her contact address, by email – (section 387A). It will be sent to a lawyer or agent where the lawyer or agent has signed a memorandum stating that he or she accepts service of the notice or document on behalf of the person – (section 386A(2)(b)). Where the decision is sent:

(a) by registered letter or courier, notice is given on delivery of the decision to the person's contact address;

(b) by email, notice is given on delivery of the decision to the recipient's server – see *LJ (Skilled Migrant)* [2018] NZIPT 204512.

[32.5] Decisions of the Tribunal are normally publicly available, unless the Tribunal determines otherwise, either of its own volition or on application by any party, in relation to the whole or any part of a decision and the Tribunal may make an order prohibiting the publication of the same – (clause 18(4), Schedule 2). In such circumstances, a research copy of the Tribunal's decision (with the prohibited part deleted) will be published instead of the full version of the decision released to the parties.

33. RETURN OF EVIDENCE

[33.1] Any person who has provided original documents to the Tribunal in the course of the appeal will have them returned with or after the decision. Original documents on the Immigration New Zealand file will be returned with the file to Immigration New Zealand and appellants should direct any requests for their return to that body.

34. APPEAL TO HIGH COURT AND APPLICATIONS FOR JUDICAL REVIEW

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

[34.2] Where extrinsic evidence establishes when notice was 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 (as to when notice is given, see [32.4] above). 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, or 14 days where the address for service is outside New Zealand – (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 – (section 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