NOTE: THE CONFIDENTIALITY OF THE NAME OR IDENTIFYING PARTICULARS OF THE APPLICANT AND OF HIS CLAIM OR STATUS MUST BE MAINTAINED PURSUANT TO S 151 OF THE IMMIGRATION ACT 2009.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA500/2014
[2014] NZCA 585

BETWEEN	K Applicant
AND	IMMIGRATION AND PROTECTION TRIBUNAL First Respondent
AND	CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Second Respondent

Hearing:	25 November 2014
Court:	Randerson, Harrison and White JJ
Counsel:	Applicant in person D L Harris for First Respondent (appearance excused) A R Longdill and O M Klaassen for Second Respondent
Judgment:	2 December 2014 at 12.45 pm

JUDGMENT OF THE COURT

A The application for leave to commence proceedings is dismissed.

B The applicant is ordered to pay costs on a standard band A basis as for an application for leave to appeal together with usual disbursements.

REASONS OF THE COURT
(Given by Harrison J)

Introduction

[1] The applicant who we will call K seeks leave under s 249 of the Immigration Act 2009 to bring judicial review proceedings against a decision of the Immigration and Protection Tribunal (the Tribunal) given on 21 June 2013, dismissing his appeal against a decision of a refugee and protection officer declining to grant him refugee and protected person status.[1] On 1 August 2014 Asher J dismissed K's originating application for leave to review to the High Court.[2]

[2] In determining whether to grant K leave, we must have regard to two material factors: (1) whether review proceedings would involve issues that could not adequately be dealt with in an appeal against the Tribunal's final determination; and (2) whether those issues are, by reason of their general or public importance or for any other reason, issues which ought to be submitted to the High Court for review.[3]

[3] A preliminary question has arisen about whether K's application was brought within time. Section 247 of the Act provides that review proceedings must be commenced not later than 28 days after the date on which the person concerned is notified of the decision. However, the Act does not provide the time limit for filing applications to this Court for leave if the High Court has refused leave. Ms Longdill for the Crown submitted that a 20 day time limit applied.[4] K's application was filed on 12 September 2014, shortly outside the 20 day period. Ms Longdill submitted that he required an extension of time to pursue the application.

[4] The question of whether K requires a formal extension of time is moot and we are reluctant to determine it without the benefit of developed argument. However, it is unnecessary to consider the question further given our view, which we can express shortly, that his substantive application is without merit.

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1 *M v RSB* [2013] NZIPT 800339.
2 *K v Immigration and Protection Tribunal* [2014] NZHC 1800.
3 Immigration Act 2009, s 249(1C).
4 Court of Appeal (Civil) Rules 2005, rr 5(4) and 14.

Background

[5] K's application for refugee status in New Zealand has a long history. He arrived in New Zealand as a 33 year old citizen of Romania on 12 November 2008. Within a fortnight of his arrival here, an appellate court in Romania convicted and sentenced K to four years and two months imprisonment for his part in a fraudulent taxation transaction. His claim for refugee status in New Zealand was based on his contention that he was innocent of the crime for which he was convicted, that his conviction and sentence were part of a persecutory process implemented by Romanian politicians who profited from corruption and the pedalling of political influence, and that while in prison he would be at real risk of serious harm.

[6] In a comprehensive decision delivered on 23 April 2010, the Refugee Status Appeals Authority (the Authority) concluded that K had no real substantial basis for asserting that he faced a well founded risk of harm in Romania or that, in any event, he would be persecuted on the ground of expressing a political opinion if he returned to Romania.[5] Accordingly, K failed to satisfy the requirements of art 1(2) of the Refugee Convention and was not recognised as a refugee.

[7] In the course of its decision, which exhaustively reviewed the evidence and the relevant law, the Authority made a number of adverse credibility findings against K . It did not accept that he was a truthful or reliable witness, describing him as an opportunist who, contrary to his exculpatory protestations, was not innocent of the crimes for which he was convicted in Romania.[6] He was simply attempting to avoid serving a prison term in his home country. The Authority was satisfied that his account of events was inherently implausible and he could not be trusted to give truthful and unexaggerated evidence.[7]

[8] K applied to the High Court to judicially review the Authority's decision. He raised a number of grounds in support – in particular, that the Authority did not have any grounds to make adverse credibility findings against him; failed to give him the benefit of the doubt; erroneously found that his prosecution in Romania had been

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5 *Refugee Appeal No 76339* RSAA Auckland, 23 April 2010 at [82]–[85]; and Immigration Act 1987, s 129P(1).

6 At [66].

7 At [70] and [72].

genuine; failed to give any or proper weight to evidence that he faced a well founded fear of persecution if he returned to Romania; and erroneously found that his conduct relating to the criminal charges did not amount to an expression of political opinion. In a decision delivered on 17 September 2010, Courtney J dismissed K's application.[8] His appeal to this Court, along with two others, was struck out on 23 March 2012.[9]

[9] In the meantime K had lodged a fresh claim for refugee status on 12 December 2011. Additionally, he applied for protected person status. A refugee and protection officer of the Refugee Status Branch declined to consider K's application for recognition as a refugee because it repeated a previous claim and separately found that he was not a protected person.[10]

[10] The Tribunal dismissed K's appeal from that decision on 21 June 2013.[11] Its decision was also very comprehensive. In addition to finding that K's application for refugee status was unfounded, the Tribunal placed weight upon the Authority's earlier adverse credibility findings against him. The Tribunal also found there was no basis for K's claim for protected person status. He would not be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.[12]

Decision

[11] K appeared to raise three arguments in support of his application for leave.

[12] First, K alleged that the Tribunal erred in failing to give appropriate weight to what was said to be new evidence before it but not before the Authority. He was referring to a decision given by the Refugee Review Tribunal of Australia issued on 12 July 2010 which accepted certain claims made by K's wife on an application for refugee status in that country. However, the Tribunal was not bound by a decision of an Australian tribunal. It is plain that the Tribunal took into account the Australian

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8 *M v Refugee Status Appeals Authority* HC Auckland CIV-2010-404-3298, 17 September 2010.
9 *M v Refugee Status Appeals Authority* [2012] NZCA 83.
10 Immigration Act 2009, s 140(3).
11 *M v RSB*, above n 1.
12 At [271].

decision, which had been issued a few months after the Authority's decision, but reached its own independent conclusion about the merits of K's application.[13]

[13] Second, K argued that the Tribunal erred in its approach to art 7 of the International Covenant on Civil and Political Rights (ICCPR). He referred to the Supreme Court's decision in *Taunoa v Attorney-General* to support a submission that, because there had been a violation of art 3 of the European Convention on Human Rights (ECHR), there was necessarily a violation of art 7 of ICCPR.[14] However, we agree with Ms Longdill that this was a question of law that could have been raised on an application to the High Court for leave to appeal on a question of law,[15] and that in any event the Tribunal did not err because a lower threshold is applied in ECHR cases than in ICCPR cases.[16] The Tribunal specifically recognised this distinction.[17] It follows that K would have been refused leave to appeal on that ground in any case.

[14] Third, K argued that the Tribunal erred in its evaluation of the legal criteria for recognition of him as a protected person under the Convention Against Torture. However, in common with Asher J,[18] we are satisfied that the Tribunal's approach was correct in law.[19] Moreover, its factual conclusion, based upon a full evidential inquiry, that there were no substantial grounds for believing that K would be in danger of being subjected to torture if he was deported, cannot be challenged in judicial review proceedings. In any event, if K intended to realistically challenge the Tribunal's legal approach he should have applied for leave to appeal. Again it is plain that he would have been unsuccessful.

Conclusion

[15] Accordingly, we agree with Asher J that K has failed to demonstrate any error of law by the Tribunal which might arguably give rise to a right of review of its

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13 At [93]–[100].
14 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.
15 Sections 245 and 249(1)(C)(a).
16 Compare *Taunoa*, above n 14, at [153]–[161] (description of ECHR threshold) with [162]–[170] (description and examples of higher ICCPR threshold).
17 At [195]–[200].
18 *K v Immigration and Protection Tribunal*, above n 2, at [17].
19 At [114]–[123].

decision. Also, K could not argue that the issues he seeks to raise on the judicial review could not be adequately considered on an appeal. Additionally, even if it could, those issues are not of any general or public importance and should not for that reason or any other reason be submitted to the High Court for judicial review.

[16] K's application is dismissed. He is ordered to pay costs on a standard band A basis on an application for leave together with usual disbursements.

Solicitors:
Meredith Connell, Auckland for Second Respondent