NOTE: THE CONFIDENTIALITY OF THE NAME OR IDENTIFYING PARTICULARS OF THE APPELLANT 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

I TE KŌTI PĪRA O AOTEAROA

CA580/2017
[2018] NZCA 188

BETWEEN	H (CA580/2017) Appellant
AND	REFUGEE AND PROTECTION OFFICER Respondent

Hearing:	8 February 2018
Court:	Cooper, Brown, and Clifford JJ
Counsel:	F M Joychild QC and D Mansouri-Rad for Appellant I C Carter and J A Cassie for Respondent
Judgment:	11 June 2018 at 1.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] The appellant, Mr H, is applying for refugee and protected person status under the Immigration Act 2009 (the Act). In circumstances to which we return, a refugee and protection officer (RPO) declined that application without interviewing Mr H. Mr H filed an application seeking leave to judicially review that decision. Mr H also

filed an appeal in the Immigration and Protection Tribunal (the Tribunal) against the RPO's decision.

[2] The RPO applied to the High Court to have Mr H's judicial review application dismissed for want of jurisdiction. The High Court granted that application.[1] Mr H now appeals against that decision.

[3] The question we must answer is whether a preliminary decision by an RPO to decline an adjournment of an interview and to proceed without hearing from the claimant can be judicially reviewed without resort to the statutory appeal process.

The key statutory provisions

[4] Answering that question depends on the proper interpretation of s 249 of the Act. In general terms, s 249 defers judicial review of decisions under the Act, otherwise available under (previously) the Judicature Amendment Act 1972 and (now) the Judicial Review Procedure Act 2016, until appeal rights under the Act itself have been exhausted.

[5] The key provisions are as follows:

> **247 Special provisions relating to judicial review**
>
> (1) Any review proceedings in respect of a statutory power of decision arising out of or under this Act must be commenced not later than 28 days after the date on which the person concerned is notified of the decision, unless—
>
> (a) the High Court decides that, by reason of special circumstances, further time should be allowed; or
>
> (b) leave is required, under section 249(3), before proceedings may be commenced (in which case section 249(4) applies).
>
> …
>
> **249 Restriction on judicial review of matters within Tribunal's jurisdiction**
>
> (1) No review proceedings may be brought in any court in respect of a decision where the decision (or the effect of the decision) may be subject to an appeal to the Tribunal under this Act unless an appeal is

[1] *H v Refugee and Protection Officer* [2017] NZHC 2160, [2017] NZAR 1518.

made and the Tribunal issues final determinations on all aspects of the appeal.

(2) No review proceedings may be brought in any court in respect of any matter before the Tribunal unless the Tribunal has issued final determinations in respect of the matter.

(3) Review proceedings may then only be brought in respect of a decision or matter described in subsection (1) or (2) if the High Court has granted leave to bring the proceedings or, if the High Court has refused to do so, the Court of Appeal has granted leave.

(4) An application to the High Court for leave to bring review proceedings must be made—

(a) not later than 28 days after the date on which the Tribunal's determination in respect of the decision or matter to which the review proceedings relate is notified to the person bringing the proceedings; or

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

(5) A decision by the Court of Appeal to refuse leave to bring review proceedings in the High Court is final.

(6) In determining whether to grant leave for the purposes of this section, the court to which the application for leave is made must have regard to—

(a) whether review proceedings would involve issues that could not be adequately dealt with in an appeal against the final determination of the Tribunal; and

(b) if paragraph (a) applies, whether those issues are, by reason of their general or public importance or for any other reason, issues that ought to be submitted to the High Court for review.

(7) A court that grants leave under subsection (3) to bring review proceedings must state the issue or issues to be determined in the proceedings.

(8) Nothing in this section limits any other provision of this Act that affects or restricts the ability to bring review proceedings.

Background

[6] Mr H is a Pakistani national. He left Pakistan in October 2015 and travelled to New Zealand via stops in Fiji and Samoa. In March 2017, he made a claim for refugee status in New Zealand, on the basis he is at risk of being killed by the Taliban if he returns to Pakistan. Section 135 of the Act provides that it is the responsibility of claimants to establish their claim for recognition. Claimants must therefore ensure

that before an RPO determines their claim they have provided all information, evidence and submissions that they wish to have considered.[2]

[7] Where such a claim is made, an RPO must first determine whether to accept the claim for consideration. If the RPO does accept the claim, as he did in Mr H's case, s 136 of the Act stipulates how that claim is to be determined:

> **136 How refugee and protection officer to determine claim**
>
> (1) For the purpose of determining a claim, a refugee and protection officer must determine the matters set out in section 137.
>
> (2) In doing so, the refugee and protection officer may seek information from any source, but is not obliged to seek any information, evidence, or submissions further to that provided by the claimant.
>
> (3) The refugee and protection officer may determine the procedures that will be followed on the claim, subject to—
>
> (a) this Part; and
>
> (b) any regulations made for the purposes of this Part; and
>
> (c) any general instructions given by the chief executive.
>
> (4) To avoid doubt, the refugee and protection officer may determine the claim on the basis only of the information, evidence, and submissions provided by the claimant concerned.

[8] Section 149 of the Act provides RPOs with a number of specific powers to assist in the discharge of their statutory functions. Under subs (1)(f), an RPO may require an applicant to attend an interview. Consistent with the Refugee Status Branch's standard practices, the RPO scheduled an interview with Mr H for 10 May 2017. In the letter scheduling the interview the following text appeared:

> **It is very important that you attend this interview.** If you are unable to attend because of illness and disability, please notify the [Refugee Status Branch] Interpreter Coordinator immediately. You must also supply a medical certificate from a registered medical practitioner no later than **4.00 pm** on the day of your scheduled interview. To be acceptable, the medical certificate must specify:
>
> 1. The date you were examined;
>
> 2. Your illness or disability;

---

2 Immigration Act 2009, s 135(2).

3. The expected duration of the illness and disability;

4. The reason, in the opinion of the medical practitioner, why you are unable to attend the interview; and

5. The medical practitioner's opinion as to when you will be fit and able to attend an interview.

> If the [Refugee Status Branch] determines that the medical certificate meets the above criteria, the interview may be rescheduled. If you fail to attend your interview, the [Refugee Status Branch] will be unable to make any findings of fact or credibility. Your claim will be determined on the basis of all information available to the [Refugee Status Branch].

[9] That advice reflects s 149(4) of the Act, which provides:

> Where a person who is required to attend an interview fails to attend at the appointed time and place, the refugee and protection officer may determine the claim or matter without conducting the interview.

[10] On 9 May 2017, Mr H developed stress-related diarrhoea and a headache. He saw a GP, who provided him with a medical certificate saying he was unfit for one week from 9 May 2017. Mr H's lawyer contacted the RPO the next day, advising of Mr H's inability to attend the interview due to illness.

[11] Mr H's lawyer emailed a copy of that medical certificate to the RPO later in the day. The RPO replied that the medical certificate could not be printed, as it was in the wrong format. There was also a possible issue, because it did not satisfy the requirements for cancelling an interview. The RPO advised he would discuss the matter with his manager the next day.

[12] On 12 May 2017, the RPO issued his decision, declining Mr H's application for refugee and protected person status. In that decision, the RPO first recorded the circumstances in which Mr H had failed to attend his scheduled interview. The RPO concluded that, as the medical certificate and accompanying documentation did not meet the relevant criteria, s 149(4) of the Act applied. The RPO then reasoned:

> Having considered all the information available to the [Refugee Status Branch] regarding Mr [H]'s claim to refugee and protection status and in his absence, no findings of credibility or fact can be made. As such, it cannot be determined whether Mr [H] is a refugee within the meaning of Article 1A(2) of the 1951 Convention relating to the Status of Refugees ("the Convention"), as amended by the 1967 Protocol. Nor can it be determined whether there are substantial grounds for believing that Mr [H] would be in danger of being

> subjected to torture as defined in Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"), or arbitrary deprivation of life or cruel treatment per Articles 6 and 7 of the International Covenant on Civil and Political Rights ("ICCPR")
>
> …
>
> For these reasons Mr [H] is not recognised as a refugee within the meaning of the Convention. Refugee status is declined.

[13] Four days later, Mr H's lawyer contacted the Refugee Status Branch, complaining that to decline Mr H's claim on a mere technicality relating to the form of medical certificate was unfair and unacceptable. The Refugee Status Branch accepted that communication as a formal complaint.

[14] The Refugee Status Branch responded to that complaint two days later. In that letter, a branch manager concluded:

> Given the above [description of events], I acknowledge that there are genuine grounds for complaint and in the circumstance, we would consider granting your client another interview.
>
> However the Act does not permit a decision of an RPO to be re-opened once made. Section 138(3) Immigration Act 2009 states this very clearly.[3] I realise that this does not assist your client nor resolve the above, but unfortunately, having notified the decision to him, the [Refugee Status Branch] is unable to now retract or annul its decision.
>
> I have spoken to the RPO who acknowledges that the decision was, in the circumstances, harsh. …
>
> This letter and your correspondence regarding the complaint will be on your client's file should Mr [H] wish to appeal the decision.

[15] Mr H subsequently filed his application for judicial review of, and his appeal against, the RPO's decision. He framed his application for judicial review as a challenge to the RPO's decision to reject his medical certificate as being unreasonable and unfair.

---

[3] Section 138(3) provides that the decision of the RPO is final, unless overturned by the Tribunal on appeal.

The High Court decision

[16] The RPO applied for Mr H's judicial review application to be dismissed for want of jurisdiction in reliance on s 249(1) of the Act. That section provides:

> (1) No review proceedings may be brought in any court in respect of a decision where the decision (or the effect of the decision) may be subject to an appeal to the Tribunal under this Act unless an appeal is made and the Tribunal issues final determinations on all aspects of the appeal.

[17] In granting that application, the High Court rejected Mr H's arguments that:

(a) the decision he was seeking to review (the decision of the RPO to reject his medical certificate) was the exercise of a statutory power of decision-making that was distinct from the RPO's decision to decline his claim; and that accordingly

(b) it was not a decision which could be appealed to the Tribunal, and his rights of judicial review were not affected by s 249 (but, rather, they were recognised by s 247).

[18] Rather, the Judge accepted the RPO's submission that the decision, in effect determining that Mr H had failed to attend his interview, could not be divorced from the RPO's final decision on Mr H's application. The Judge accepted the RPO's submission that those circumstances were akin to those commented on by the Supreme Court in *Tannadyce Investments Ltd v Commissioner of Inland Revenue*, where the majority found that:[4]

> … a challenge to the legality of the process which led up to the making of the disputable decision … directly puts in issue the disputable decision. Hence the challenge to that decision or its antecedence must follow the statutory procedure.

[19] Here, Mr H's intended judicial review challenge directly puts in issue the RPO's decision to decline his application. Accordingly, it came within the ambit

---

4 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [59].

of s 249. After all, if Mr H succeeded in his judicial review application any order for relief would necessarily include an order quashing the final decision.

[20] The Judge referred to authority to the effect that a *de novo* hearing, as would be Mr H's appeal to the Tribunal, was a superior remedy for breach of natural justice than judicial review.[5] She also noted comments in a recent High Court decision, *RM v Immigration and Protection Tribunal*, recognising Parliament's very clear intent reflected in the scheme of the Act, to restrict the availability of judicial review proceedings in the immigration context.[6] The Judge noted that s 249 was not a privative clause: it did not preclude judicial review.[7] There would be nothing to stop Mr H reviewing the RPO's admittedly "harsh" decision once his appeal had been determined.[8] Thus, this was not a situation where any abuse of power or unreasonableness represented by that decision would go unchallenged.

[21] For all those reasons, the Judge also concluded that s 249 represented a reasonable limitation on the rights to justice affirmed under s 27 of the New Zealand Bill of Rights Act 1990 (the NZBORA), one demonstrably justifiable in a free and democratic society.[9]

Appeal

[22] On appeal, Ms Joychild QC for Mr H argued that what she characterised as the High Court's "literal" construction of the word "decision" in ss 138(3) and 249(1) could not be correct. Given the scheme and purpose of the Act, reference to the word "decision" in those provisions was necessarily a decision made in conformity with the Act. That is, after a consideration of the information and submissions provided by the claimant. Thus, Ms Joychild shifted the focus of Mr H's challenge away from the RPO's decision to proceed to determine the claim without conducting an interview, to the decision he had made on the claim itself. As regards conformity with the Act, Ms Joychild argued that, properly interpreted, s 149(4) gave an RPO a discretion to determine a claim without conducting an interview, where the person who had been

---

5 At [6].
6 *RM v Immigration and Protection Tribunal* [2016] NZHC 735 at [41].
7 *H v Refugee and Protection Officer*, above n 1, at [19].
8 At [19].
9 At [20].

required to attend that interview had failed to do so *without reasonable excuse*. Here, Mr H had a reasonable explanation for his failure to attend the interview. The medical certificate, whatever criticism might have been made of its form, established that. The Refugee Status Branch had recognised the RPO's decision as being harsh.

[23] Moreover, Ms Joychild submitted, the terms of the RPO's decision showed he had not assessed Mr H's claim at all: he had in effect taken it off the table because Mr H had not attended his interview. In making that submission Ms Joychild pointed to the RPO's reasoning that, as no findings of credibility or fact could be made because Mr H had failed to attend his interview, it could not be determined whether he was a refugee or not.

[24] Ms Joychild emphasised the practical mischief that would occur if the RPO's decision was not reviewable. Mr H missed the opportunity of having his credibility assessed first by the RPO in the interview and secondly by the Tribunal on appeal. The assessment of credibility was, in the context of applications for refugee and protected person status, central to the decision. That loss of opportunity could not be cured by the Tribunal's *de novo* appeal hearing. That was a substantive reason why review was appropriate, notwithstanding that Ms Joychild accepted the scheme of the Act in this area — including as amended in recent years — being to streamline the immigration application and appeal processes, including through the operation of s 149.

[25] Mr Carter for the RPO adopted the submissions made for the RPO in the High Court, and supported the Judge's reasoning. In doing so, Mr Carter emphasised the overall scheme and purpose of the Act in this area, as acknowledged by Ms Joychild. The purpose of pt 7 of the Act, in which s 249 appears, is to provide comprehensively for a system of appeal and review in respect of decision-making under the Act. As part of that system, the Act ensures that persons in Mr H's position receive a *de novo* appeal. The Tribunal would be as well placed as the RPO would have been to assess credibility. It was well-established that where a *do novo* appeal right was available, exercise of that appeal right would normally cure any breach of natural justice or fairness and remove any continuing prejudice to the complaining

party in the original process.[10] If Mr H's judicial review application proceeded as matters currently stood, part of the Court's consideration would be whether or not relief should be declined on the basis that the pending *de novo* appeal to the Tribunal would cure any breach of natural justice in the RPO's decision. That is, it was a general principle that in some circumstances a court asked to exercise powers of judicial review might properly defer to the explicit statutory remedy.

[26] Finally, it could not be assumed that having an applicant's credibility assessed on two occasions would necessarily be a benefit. Rather, any inconsistencies in evidence between the interview with the RPO and the hearing before the Tribunal could count against Mr H.

Analysis

[27] The terms of s 249(1) of the Act direct us to the question of whether the review proceedings Mr H would bring are "in respect of a decision where the decision (or the effect of the decision) may be subject to an appeal to the Tribunal under this Act …".

[28] It is necessary to address that question in the context of the scheme and purpose of the Act as it applies to decision-making by RPOs and the rights of appeal and review (including to the Tribunal) that then arise. The enactment of the Act, and the way in which it has been subsequently amended, show Parliament's clear intent to streamline the procedures for the determination of applications under the Act, including by creating a carefully designed appellate pathway and, in s 249, by postponing the opportunity for judicial review.

[29] The essential features of decision-making by an RPO, once a claim for consideration as a refugee or a protected person is accepted for consideration, are that:

(a) The claimant has the responsibility to establish his or her claim (s 135(1)).

---

[10] Citing *Singh v Attorney-General* [2000] NZAR 136 (CA); and *R v Accused (CA78/88)* [1988] 2 NZLR 385 (CA) at 387.

(b) The claimant must ensure that, before the RPO makes a determination on his or her claim, all material that the claimant would wish to have considered has been provided to the RPO (s 135(2)).

(c) An RPO may seek further information from any source, but is not obliged to do so (s 136(2)).

(d) The RPO may determine the claim on the basis only of the information, evidence, and submissions provided by the claimant concerned (s 136(4)).

[30] The s 149(1)(f) power to require an applicant to attend an interview supplements the provisions of s 136(2). The terms of s 136(2), and of s 136(4), make it clear that an RPO is not required to interview a claimant.

[31] Section 194 provides a right of appeal to the Tribunal against a decision by an RPO declining a person's claim for recognition as a refugee or protected person. Pursuant to s 198, the Tribunal must determine the matter *de novo*. The appellant therefore has the opportunity to re-present his or her case afresh. Like an RPO, the Tribunal is not required to seek any information, evidence or submissions further to those provided by the appellant (s 198(5)).

[32] The scheme for appeals to the Tribunal is similar to that for applications to an RPO:

(a) It is the appellant's responsibility to ensure that all material the appellant wishes the Tribunal to consider is provided to the Tribunal (s 226(1)).

(b) The Tribunal is, subject to agreement with the chief executive, to give the chief executive notice of an appeal and the information provided by the appellant. The chief executive must, in the time allowed by the Tribunal for the purpose, lodge with the Tribunal any file relevant to the appeal or matter that is held by the Refugee Status Branch.

The minister, chief executive or an RPO may also, in the time allowed by the Tribunal, lodge with the Tribunal any other information as he or she thinks fit (ss 226(2) and (3)).

(c) The Tribunal may seek information from any source but is not required to do so (s 228(1) and (2)).

(d) The Tribunal may require the chief executive to seek and provide information relevant to the appeal and the chief executive must comply, to the extent practical, with such a requirement (s 229(1)).

(e) The Tribunal must disclose to the appellant, and give the appellant an opportunity to rebut or comment on, any information the Tribunal receives from any person other than the appellant that is or may be prejudicial to the appellant which the Tribunal intends to take into account in determining the appeal (s 230(1)).

[33] In that scheme, and in the context of this appeal, s 233 is of some importance. It provides:

> **233 When Tribunal must or may provide oral hearing**
>
> (1) The Tribunal must provide an oral hearing in the case of an appeal against liability for deportation by a resident or permanent resident.
>
> (2) The Tribunal may, in its absolute discretion, provide an oral hearing in any other appeal against liability for deportation.
>
> (3) The Tribunal must provide an oral hearing in the case of an appellant or affected person currently or previously recognised as a refugee or a protected person, or a claimant for such recognition, unless—
>
> (a) the person was interviewed by a refugee and protection officer (or a refugee status officer under the former Act) in the course of determining the relevant issue at first instance or, having been given an opportunity to be interviewed, failed to take that opportunity; and
>
> (b) the Tribunal considers that the appeal or other contention of the person—
>
> (i) is prima facie manifestly unfounded or clearly abusive; or

(ii) relates to a subsequent claim for refugee or protection status.

(4) The Tribunal may, in its absolute discretion, provide an oral hearing in the case of an appeal that relates to a subsequent claim for refugee or protection status.

[34] Section 233(3) applies in the case of Mr H's appeal, because he is a claimant for recognition as a refugee. So, subject to the exception created by paras (a) and (b), the Tribunal must provide him an oral hearing.

[35] Section 245 provides for appeals on points of law to the High Court with the leave of that Court or this Court. In turn, s 246 provides a further right of appeal, again with leave, to this Court from any determination of the High Court on appeal to it.

[36] Section 249 works by both deferring judicial review pending exhaustion of appeal remedies and, once that has occurred, requiring any application to be made promptly and with leave.

[37] In determining any such leave application, the court is again directed to consider the relationship between review at that stage, and the appeal rights that exist. Regard must be had to whether the issues an applicant would raise are ones of general or public importance.

[38] It is within that overall context that the application of s 249 in this case must be determined.

[39] As already noted, in the High Court the focus was on the RPO's decision under s 149(4). In this Court, the focus was more on the RPO's decision in determining Mr H's claim under s 137, albeit on the basis that, because Mr H had not attended his interview no assessment of his credibility could be made.

[40] Ms Joychild's argument was that that decision could not be seen to be a decision to which s 249 applied. We do not accept that proposition.

[41] We acknowledge that the way the RPO worded his decision, namely that because no findings of credibility or fact could be made "it cannot be determined whether Mr H is a refugee", opened the door to that submission:

(a) First, s 129(1) of the Act provides that a person must be recognised as a refugee in accordance with the Act if he or she is a refugee within the meaning of the Refugee Convention. Refugee status is not granted, but recognised.

(b) Section 136 requires an RPO to determine a number of specific matters set out in s 137 for the purpose of determining a claim. Those matters are twofold:

(i) again, whether to recognise the claimant as a refugee on the grounds set out in s 129; and

(ii) whether the claimant has the protection of another country or has been recognised as a refugee by another country and can be received back and protected there without risk of being returned to a country where he or she would be at risk of circumstances that would give rise to grounds for his or her recognition as a refugee or protected person in New Zealand.

[42] The phraseology "cannot be determined" is a little at odds with the statutory requirement that a person must be recognised as a refugee if they are a refugee. Moreover, here the RPO simply did not make the determination required by s 137(4), albeit that there may be little purpose in that determination if the RPO has determined that a person is not a refugee.

[43] Ms Joychild's submission in effect asks us to categorise the RPO's decision to decline Mr H's application as a nullity, and thus outside the ambit of s 249. In *Anisminic v Foreign Compensation Commission* their Lordships determined the applicability of the relevant statutory privative provision on the basis that if the decision-maker had committed a material error of law it would have exceeded its

jurisdiction.[11] That approach was followed in New Zealand in *Bulk Gas Users Group v Attorney-General*.[12] There, the Court of Appeal held that if the Secretary of Energy had misconstrued legislation setting out the procedures to be followed prior to the exercise of certain statutory powers, then he would have committed an error of law that took him outside jurisdiction and therefore beyond the protection of the privative provision in question.[13] More recently, and with the implementation of general rights to appeal questions of law, the courts have moved away from that approach. As Josh Pemberton notes, ultimately the ability to challenge decisions through statutory appeal routes has rendered review less important.[14] Thus, provisions that restricted review, but also provided appeal rights, were regarded as posing less of a threat to the judiciary concerned with supervising administrative decision-making.[15] Accordingly, privative provisions were more likely to be given literal effect.[16] Today, the effect of such a provision depends not just on the sort of error in question, but on the availability and appropriateness of alternative mechanisms for challenging the decision in question.

[44] Nullity-based reasoning was rejected by this Court in *Love v Porirua City Council*,[17] where this Court adopted the reasoning of their Lordships in *Calvin v Carr*.[18]

[45] Here, s 135 places the responsibility on the claimant to ensure all relevant material is provided to an RPO. The RPO records in his decision the he had considered all the material made available to him. In our view, the RPO's decision is properly understood as saying Mr H had not established his claim for recognition. That decision, irrespective of any possible challenge by reference to s 149(4), is effective on its terms until successfully appealed or reviewed. Any judicial review challenge to that decision falls within the scope of s 249. Such a judicial review challenge is, therefore, postponed by the operation of that section until Mr H's appeal against that

---

11 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
12 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).
13 At 139.
14 Josh Pemberton "The Judicial Approach to Privative Provisions in New Zealand" [2015] NZ Law Rev 617 at 631.
15 At 631.
16 At 634.
17 *Love v Porirua City Council* [1984] 2 NZLR 308 (CA) at 311.
18 *Calvin v Carr* [1980] AC 574 (PC) at 589.

decision has been determined. Obviously, if Mr H succeeds in that appeal, there will be little or no point in pursuing judicial review.

[46] Having reached that conclusion, we need to consider Mr H's appeal on the basis of the way in which he framed his judicial review application and argued the matter in the High Court. The focus of the review application was on the RPO's decision pursuant to s 149(4) to determine Mr H's claim without conducting an interview.

[47] On one approach, it can be argued that s 249 does not apply to judicial review of a decision under s 149(4):

(a) Section 249 postpones review proceedings in respect of a decision "where the decision (or the effect of the decision) may be subject to an appeal to the Tribunal" under the Act "unless an appeal is made and the Tribunal issues final determination on all aspects of the appeal".

(b) It is clear here that an RPO's decision under s 149(4) is not subject to an appeal under the Act (there being no so such right provided by the Act).

(c) Neither, it can be said, is the effect of such a decision. The effect of a s 149(4) decision is that the RPO goes ahead and determines a claim without conducting an interview. By definition, the RPO having made that decision could then accept or decline the claim.

[48] That is to give the words in s 249 their plain meaning. But the meaning of a statutory provision must be determined in the context of the relevant scheme and purpose. In effect, the High Court determined that, given the overall scheme and purpose of the Act, the RPO's decision to determine the claim without conducting the interview should be regarded as integral to his decision to decline the claim.

[49] In doing so, Gordon J applied the principle expressed in *Tannadyce* in the following way:[19]

> [12] I agree that the application for judicial review in the present case is, in substance, a challenge to the legality of the process which led up to the making of the final decision. The application for judicial review states that the challenged decisions were unreasonable and/or made in breach of a legitimate expectation. However, H's complaint could equally be framed as a challenge to the final decision on the basis that there was a breach of natural justice and/or legitimate expectation.
>
> [13] Further, if H were successful in his application to review the challenged decisions, then any order for relief would necessarily include an order quashing the final decision. This supports the respondent's submission that the challenged decisions cannot be divorced from the decision to decline the claim.

[50] Although not referred to in the High Court decision, s 233(3) of the Act provides strong support for that conclusion.

[51] The Tribunal, we understand, generally holds oral hearings. But if whether it was going to do so here — and, in that way, provide Mr H with the opportunity to have his credibility assessed — became an issue, the Tribunal would be directed to s 233(3)(a)). Mr H would, no doubt, make the very argument he seeks to make in his judicial review proceedings. That is, he did not "fail to take" the opportunity for an interview. Rather, there were valid health reasons which prevented him from doing so.

[52] In our view, this confirms that the effect of the s 149(4) decision does fall within the scope of his appeal, and that s 249 applies accordingly.

[53] Ms Joychild would point, nevertheless, to Mr H's loss of an opportunity to have his credibility assessed twice. As the Crown submitted, however, a similar argument was addressed by this Court in *Singh*.[20] *Singh* was concerned with the two-tier refugee decision-making process under the Immigration Act 1987. It applied the principle that a *de novo* appeal to the second tier Refugee Status Appeals Authority was capable of curing any breach of natural justice in the first-tier decision of the Refugee Status Branch. The importance of credibility assessment at both tiers of

---

19 *H v Refugee and Protection Officer*, above n 1.
20 *Singh*, above n 10.

the refugee determination process was recognised, but was found to make no difference to the application of the principle.

[54] The Court reasoned:

> [15] The contention inherent in the first three stated grounds that it is not open to deny the opportunity for review by the courts of a process even where the process will be repeated by an expert and independent tribunal, is contrary to authority as cited by Randerson J and to common sense. The preferable approach is that of overall consideration as recognised by Tipping J in *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, 436:
>
> > To my mind, the correct approach is this. This Court should first identify the error, or errors, which are said to vitiate the first instance decision. The second step is to examine what effect the appeal has had on the error, or errors, found at the first stage. If the appeal has in substance removed the prejudice which would otherwise have resulted to the complaining party, the Court should exercise its discretion against relief, because overall no continuing prejudice from what went wrong at first instance can be shown. Where, as here, there has been review by way of a rehearing, which is said to have cured any earlier problems, I would put the onus on the applicant for judicial review to demonstrate continuing prejudice. It is only if there is continuing prejudice that the first instance error, or errors, have continuing relevance. …

[55] Addressing the lost opportunity argument, the Court said:

> [17] Mr Hooker, although accepting that there will be circumstances in which a subsequent de novo hearing can be regarded as overtaking breaches of natural justice, contended for a compartmentalised approach to the two stages of consideration of applications for refugee status. We do not accept such an approach is called for. The whole scheme of the legislation indicates the adoption of a process designed to ensure overall the fair consideration of applications in accordance with international obligations. There is nothing in the legislation indicating any need to regard the process before the Refugee Status Branch as requiring special consideration separate from the scheme as a whole.

[56] Those remarks apply equally to the current scheme of the Act, if not with even more force.

[57] Finally, this Court in *Singh* also addressed the s 27 NZBORA argument.

> [18] We see nothing in s 27 of the [NZBORA] that requires any different approach. In practical terms the appellant will suffer no prejudice. Nothing Mr Hooker was able to submit to us gave us concern that the Authority will be unfairly influenced on issues of credibility, particularly since, as the Judge

> pointed out, the appellant will be able to refer to the view expressed by the Judge that arguably there was a denial of natural justice by the Immigration Service. There is also assurance to be drawn from the recent decision of the Authority referred to us by Mr Woolford in which in somewhat similar circumstances the Authority plainly reached its own view on credibility in favour of the appellant: see *Refugee Appeal No 71684/99*, 29 October 1999.

[58] For our part, we have no reason to doubt that the Tribunal will thoroughly and independently review all the circumstances of Mr H's appeal, including the fact he was not interviewed by the RPO and the circumstances in which that occurred, before making its decision. If Mr H is dissatisfied with the Tribunal's processes, he may apply to review them. If he considers the Tribunal has erred in law, he may seek leave to appeal.

[59] We are therefore satisfied that the High Court was right to dismiss, as deferred by s 249, the judicial review Mr H seeks whilst his appeal remains undetermined.

Result

[60] The appeal is dismissed.

[61] Mr H is legally aided and the respondent did not seek costs. We therefore make no order for costs.

Solicitors:
Mansouri Law Office, Auckland for Appellant
Crown Law Office, Wellington for Respondent