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

CA150/2018
[2018] NZCA 258

BETWEEN	WK Appellant
AND	REFUGEE AND PROTECTION OFFICER Respondent

Hearing:	17 May 2018
Court:	Asher, Venning and Mander JJ
Counsel:	R S Pidgeon for Appellant S Jerebine and M Majeed for Respondent
Judgment:	17 July 2018 at 3 pm

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is declined.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Mander J)

[1] The appellant, WK, is a Turkish national who has made successive claims for refugee and protected person status in New Zealand. After having considered three prior claims, a Refugee and Protection Officer (the RPO) refused to consider WK's

fourth claim on the basis it repeated earlier claims and was otherwise manifestly unfounded and clearly abusive.[1]

[2] WK's application for judicial review of the RPO's decision was dismissed by Woodhouse J.[2] He now appeals the High Court's decision.

Applicable legal principles

[3] Before turning to the grounds upon which WK brings his appeal, it is necessary to first set out aspects of the relevant statutory framework and refugee law.

[4] Part 5 of the Immigration Act 2009 (the Act) regulates the process by which claims for refugee and protection status are to be determined. It provides the statutory means by which this country gives effect to its international obligations as set out in a number of instruments.[3]

[5] Section 129 defines who may be recognised in New Zealand as a refugee:

> **129 Recognition as refugee**
>
> (1) A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.
>
> (2) A person who has been recognised as a refugee under subsection (1) cannot be deported from New Zealand except in the circumstances set out in section 164(3).

[6] Article 1A(2) of the United Nations Convention Relating to the Status of Refugees (the Refugee Convention) provides that a refugee is a person who:

> … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former

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1 Immigration Act 2009, s 140(3).

2 *WK v Refugee and Protection Officer* [2018] NZHC 514.

3 Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987); and International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

[7] The approach to be taken to whether a person is a refugee is a matter of settled law. The issue turns on whether objectively there is a real chance of the claimant being persecuted if returned to the country of his or her nationality for reasons of race, religion, nationality, or membership of a particular social group or political opinion.[4] The concept of "being persecuted" equates to sustained or systemic violation of core human rights, demonstrative of a failure of state protection.[5] It means the infliction of serious harm, coupled with the absence of state protection.[6] Such a risk of persecution must be "well-founded" in the sense of there being a real as opposed to a remote or speculative chance of it occurring; the standard is entirely objective.[7]

[8] Subject to the limitations imposed by s 140 of the Act, successive claims can be made for refugee and protection status. That provision provides:

> **140 Limitation on subsequent claims**
>
> (1) A refugee and protection officer must not consider a subsequent claim for recognition as a refugee or a protected person unless the officer is satisfied—
>
> (a) that there has been a significant change in circumstances material to the claim since the previous claim was determined; and
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> (b) the change in 1 or more of the circumstances was not brought about by the claimant—
>
> (i) acting otherwise than in good faith; and
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> (ii) for a purpose of creating grounds for recognition under any of sections 129 to 131.
>
> (2) For the purposes of determining the matter in subsection (1), the refugee and protection officer must not treat the actions of any other person in relation to the claim or the claimant as a mitigating factor.
>
> (3) A refugee and protection officer may refuse to consider a subsequent claim for recognition as a refugee or a protected person if the officer is satisfied that the claim—

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4 *Teitiota v Chief Executive of Ministry of Business, Innovation and Employment* [2014] NZCA 173, [2014] NZAR 688 at [14] and [21].

5 At [15].

6 *BV v Immigration and Protection Tribunal* [2014] NZHC 283, [2014] NZAR 415 at [7].

7 *Teitiota v Chief Executive of Ministry of Business, Innovation and Employment*, above n 4, at [15].

(a) is manifestly unfounded or clearly abusive; or

(b) repeats any claim previously made (including a subsequent claim).

[9] An RPO has no jurisdiction to consider a subsequent claim unless there has been a significant change in circumstances material to the claim since the previous claim was determined. Subsection (3) provides a RPO with the discretion to refuse to consider a subsequent claim if satisfied it is manifestly unfounded, clearly abusive, or repeats previous claims. Whereas there is a right of appeal to the Immigration and Protection Tribunal (the Tribunal) against an RPO's finding that he or she is without jurisdiction under s 140(1), there is no general right of appeal against a refusal to consider a subsequent claim under s 140(3).[8]

[10] Also relevant to the present appeal is s 141(2) of the Act which entitles an RPO to rely on earlier findings by the Tribunal:

141 Procedure on subsequent claims

...

(2) In a subsequent claim, a claimant may not challenge any finding of credibility or fact made by a refugee and protection officer (or by a refugee status officer under the former Act) or the Tribunal (or by the Refugee Status Appeals Authority under the former Act) in relation to a previous claim by the claimant, and the refugee and protection officer determining the subsequent claim may rely on those findings.

Background

[11] WK has made a series of claims for refugee and protected persons status in New Zealand. These need to be reviewed in some detail before dealing with his fourth claim which is the subject of this appeal.

First claim

[12] After arriving in New Zealand on 24 April 2011, WK lodged his first claim on 9 January 2012. WK had converted to Christianity in 2001. He feared he would be killed or seriously harmed by his Muslim relatives and persecuted by ultra-nationalists

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8 Immigration Act, s 195(1)(a) and (b).

and state agents if he returned to Turkey. The RPO accepted that WK had faced pressure from his family, experienced harassment when in the army, and possible discrimination from the police following his conversion to Christianity. However, the risk of harm to WK was considered to be "speculative or remote". His fear of persecution was held not to be well-founded.

[13] On appeal from that finding, the Tribunal found some aspects of WK's claim were not credible. It considered that while there was a risk WK could face employment discrimination, it did not reach the threshold of "persecution". The Tribunal dismissed his appeal on 19 July 2013.[9]

Second claim

[14] WK lodged a second claim on 8 October 2013, approximately 12 weeks after delivery of the Tribunal's decision on the first claim. WK claimed a fear of returning to Turkey because he wanted to be a Christian pastor and had posted comments on Facebook criticising Turkish nationalism and the Turkish government. He claimed his mother had told him he was wanted by Turkish police for questioning and possible detainment.

[15] On 14 February 2014, the RPO declined the claim. He found there were new elements to WK's original claim, but it was not accepted there was a credible link between WK's Facebook comments and the visits by Turkish police. The RPO found a large number of people were making similar posts and that the limited number of prosecutions for that activity and for blasphemy suggested WK did not face a risk of harm from his online comments.

[16] Before the Tribunal on appeal, WK raised an additional ground based on his conversion to the Church of Christ of the Latter Day Saints in October 2013. He claimed he had a well-founded fear of being persecuted in Turkey because of his Mormon faith and his political dissent.

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9 *AE (Turkey)* [2013] NZIPT 800344 [*First Tribunal decision*].

[17] After reviewing extensive material regarding the treatment of religious and political viewpoints in Turkey, the Tribunal dismissed his appeal on 14 January 2016.[10] The Tribunal held there was only a speculative and remote possibility that WK would face serious harm as a consequence of his online criticism, and it was unable to conclude he would face persecution because of his religious practices.

[18] WK also claimed alcohol abuse and related mental health issues along with his conversion to Mormonism as constituting exceptional humanitarian circumstances that would make it unjust or unduly harsh for him to be deported to Turkey.[11] The Tribunal held that neither WK's personal circumstances nor his membership of the Mormon Church reached the threshold for exceptional circumstances of a humanitarian nature.[12]

Third Claim

[19] After the Tribunal dismissed his appeal on 14 January 2016, WK lodged a third claim on 1 April of that year. In written submissions filed on WK's behalf by his legal counsel, it was recognised that WK would need to satisfy the RPO that he was not repeating an earlier claim and that the RPO had jurisdiction to hear this subsequent claim.[13] WK's third claim was based on his fear of returning to Turkey because of his sexuality, his political opinions, and his opposition to the Turkish government. WK claimed this risk of harm had increased following an attempted coup d'état in Turkey.

[20] The RPO found there had been no significant change in circumstances material to WK's claim. After reviewing material sourced from the media and non-governmental organisations such as Amnesty International and Human Rights Watch, the officer observed that, while the attempted coup might itself constitute a significant change in circumstances, no clear evidence had been provided indicating that event was material to WK's claim. The RPO observed:

> [WK's] evidence at interview was that he held firm pro-communist or anarchist political views and he would engage with leftist and pro-Kurdish political parties if he returned to Turkey. [WK] had provided evidence in his

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10 *AN (Turkey)* [2016] NZIPT 800664 [*Second Tribunal decision*].
11 Immigration Act, ss 194(5) and (6), and 207.
12 *WK* [2016] NZIPT 501784.
13 Immigration Act, s 140(1).

> previous claims that he was active on Facebook and an online website using a pseudonym. This aspect of [WK's] claim must itself be contextualised against the fact that [WK] has provided no evidence of previous engagement in political parties or organisations. Also, given his stated anti-social disposition, it also seems highly unlikely that he would actively engage in any political organisation.
>
> While it is accepted that [WK] holds genuine political views in opposition to the government, and put these forward as an element in his basis of claim, it has previously been found by the Tribunal that these views would not put him at risk of serious harm in Turkey. Section 141(2) of the Immigration Act 2009 entitles the RPO to rely on these findings.
>
> While it is acknowledged that the internal situation is not without its challenges, previously cited country information does not indicate that [WK] belongs to any of the main groups identified in the current purge of suspected Gulenist sympathisers; [WK] has not provided any evidence that he has had any association with the judiciary, teaching, media, or been active in the armed services since 2005. It is noted that [WK] is without a profile in Turkey.
>
> (Footnotes omitted.)

[21] On appeal, the Tribunal accepted that the RPO did not have jurisdiction to consider WK's third claim.[14] There had not been any significant change in circumstances material to WK's claim since his previous one. However, it was accepted that new information WK presented to the Tribunal was materially different to that earlier provided to the RPO. This included a claim of risk arising from his online activity, and in particular online statements made by WK against the Turkish government and against Islam on a blog "Anti-Islam Turkey" and on Twitter, in which he had made derogatory remarks about the Turkish President, Islam and the Turkish police. In relation to this new claim, evidence was also received of the Turkish government's responses to anti-government and anti-Islam statements on social media.

[22] Having accepted this information did constitute a significant change in circumstances material to WK's claim since the determination of his previous claim, the Tribunal proceeded to make a further substantive assessment of WK's claim for refugee and protected persons status. Of relevance to the decision the subject of this appeal, WK's association in Turkey with an American pastor and his blogging and Twitter activity were assessed.

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14 *WK (Turkey)* [2017] NZIPT 801067 [*Third Tribunal decision*].

[23] The Tribunal concluded the aspect of WK's claim relating to the pastor was without foundation. There was nothing before it to establish that persons such as WK, who had only a "low-level" association with the pastor and who ceased attending his church some fourteen years previously, would be of any interest to the Turkish authorities, nor that a former association with the pastor would give rise to any investigation of him. There was no country information before the Tribunal to establish that persons with a limited, historical connection with the pastor were being investigated, let alone arrested or detained. WK's claims were described as entirely speculative and gave rise to no real chance of serious harm.

[24] As a result of a detailed review of material relating to restrictions of freedom of expression in Turkey since the July 2016 attempted coup, the Tribunal noted that more than 10,000 Turks had been investigated in respect of their social media use, of whom 1,656 had been arrested. Despite these numbers, there were few reports of convictions arising as a result of social media postings. The Tribunal observed that several cases had been documented where people had been given suspended sentences for expressing various forms of online dissent. The evidence before the Tribunal was that WK had no followers on Twitter and that between 14 and 32 people had read posts he had made on a blog. In any event, the country information indicated that rather than large scale arrests and prosecutions, the Turkish government was largely combating dissent on social media by blocking websites. There was no information establishing that Turkish citizens returning to their country were screened regarding their use of social media.

[25] The Tribunal concluded that WK's social media activity did not give rise to a well-founded fear of persecution, and that there was no real chance of him being investigated or arrested by the authorities as a result of his online activity. Even if investigated or arrested, the Tribunal did not consider the potential consequences that would follow would constitute serious harm. In summary, the Tribunal held:[15]

> The appellant has a profile on social media that could at best be described as minimal. Given the statistics referred to above concerning the number of arrests and prosecutions for social media activity, the chance of the appellant being investigated or arrested by authorities as a result of his social media postings insulting President Erdogan and Islam does not rise to the level of a

[15] At [91].

> real chance. Even should this occur, the Tribunal does not consider the consequences that would follow constitute serious harm. As noted earlier, the Tribunal is aware of two recent convictions for insulting President Erdogan on social media (apart from a third one which was associated with the promotion of a terrorist organisation). Both of these convictions resulted in suspended sentences.

[26] WK's third claim was declined by the Tribunal on 27 February 2017 and he was issued with a Deportation Liability Notice on 6 March.

Refusal to consider a fourth claim

[27] On 21 March 2017, WK made a fourth claim which was again based on WK's online activities.[16] In support of this further claim, WK provided information regarding his online activities since the third Tribunal decision, namely:

(a) His popularity on social media had increased with there having been, by the time of his fourth claim, 864 views of his blog, of which 105 were from Turkey.

(b) People had sworn at him on Twitter and he had received an abusive message.

(c) A former acquaintance of WK had allegedly emailed the Turkish police to inform them of WK's social media activities. WK was copied into the email.

[28] Additionally, WK challenged the earlier (third) Tribunal decision, claiming it had failed to appreciate the extent of his political profile and underestimated the risk he would face if he returned to Turkey.

[29] In response to this fourth claim, the RPO, being satisfied the claim was clearly abusive, manifestly unfounded and repeated previous claims, exercised his discretion under s 140(3) of the Act and refused to consider it.

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[16] Allegations that an interpreter had gossiped about his case to Turkish refugees in New Zealand and a concern that he would be identified by the publication of the first and second Tribunal decisions on the Tribunal's website were not pursued before the High Court. They are without foundation.

[30] The RPO was satisfied that WK's continued assertion that his online activities would bring him to the attention of the Turkish authorities repeated the "claims previously made" regarding his fear of harm. Furthermore, the RPO was satisfied this part of WK's claim was "manifestly unfounded". In reaching that decision, the RPO relied upon previous findings by the Tribunal that WK's profile on social media was minimal and that there was no real chance of him being investigated or arrested; even if this should occur, the consequences would not constitute serious harm.

[31] In relation to the additional information provided in WK's fourth claim, the RPO considered the number of views of WK's blog was still relatively small, so the finding there was no real chance of investigation or arrest continued to apply. In relation to WK's statement that the Turkish police had been informed of his online activities, the RPO observed that the Tribunal had found that any investigation of WK would not result in serious harm.

[32] The RPO considered that WK's fourth claim was "clearly abusive" being a tactic to forestall his deportation. It was noted the claim had been lodged less than a month after the Tribunal had declined WK's third claim, at which point he had become liable for deportation.

Judicial review of the RPO's decision

[33] On WK's application for review, Woodhouse J found the RPO's decision that the claim was clearly abusive was reasonably open to him, and that the officer had not erred in holding WK's fourth claim repeated earlier claims. In particular, he found that the risk of harm to WK because of his statements on social media constituted a repetition of WK's second and third claims.[17]

[34] Woodhouse J declined to admit further information that was not before the RPO about the number of views WK's blog had received and other material forwarded after the hearing of the review application. WK also sought to support his application for review by arguing the arrest and charging of the pastor constituted a new event. Woodhouse J noted that information now being relied upon had not been placed before

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17 *WK v Refugee and Protection Officer*, above n 2, at [67].

the RPO, but that, in any event, the conclusions contained in the Tribunal's third decision, that the pastor's arrest did not support WK's claim, were not open to challenge. There is no complaint on the present appeal regarding that finding.

[35] The Judge held the RPO was also entitled to conclude that WK's fear of harm arising from his online activity was manifestly unfounded. It was noted the RPO had come to that conclusion because of the Tribunal's findings in its third decision that the risk of WK being investigated or arrested did not rise to the level of a real chance and that, even if such an event occurred, the Tribunal did not consider the consequences that would follow would constitute serious harm.[18]

[36] In light of these conclusions, Woodhouse J held there was no basis to find the RPO's refusal to consider WK's claim was unreasonable.

The appeal

[37] In support of WK's challenge to the dismissal of his judicial review application, Mr Pidgeon on behalf of WK identified three main grounds of appeal. They are as follows:

(a) The High Court failed to correctly interpret s 140(3) in accordance with New Zealand's international obligations, and in particular art 33 of the Refugee Convention (the principle of non-refoulement).

(b) Had s 140(3) been correctly interpreted, WK's fourth claim could not have been found to have been manifestly unfounded, clearly abusive, or to be a repeat of a previous claim. In support of that ground three factual changes were relied upon:

(i) increased third party views of WK's social media blog;

(ii) changes to the country information relating to Turkey which increased the likelihood of his persecution; and

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18 At [72].

(iii) the recent email from his former acquaintance to the Turkish police informing of his statements on social media.

(c) The High Court erred in refusing to allow further evidence to be introduced in support of WK's judicial review application.

[38] On the present appeal, WK also sought leave to adduce further country information.

The application of the principle of non-refoulement

The argument

[39] In support of WK's appeal, Mr Pidgeon placed considerable reliance on art 33(1) of the Refugee Convention (the principle of non-refoulement) which provides as follows:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

[40] Mr Pidgeon submitted that s 140(3) is required to be read in a manner which is consistent with art 33(1), and that any subsequent claim would necessarily have to be assessed against the likelihood of refoulement. Mr Pidgeon argued that "limitations" placed on the consideration of a claim of the type provided in s 140(3) were potentially inconsistent with the principle of non-refoulement with which New Zealand is obliged to adhere under the Refugee Convention. Accordingly, the "most anxious scrutiny" must be afforded to a claim falling for determination under s 140 of the Act, and subs (3) should be applied "with caution and not zeal", and only exercised "sparingly".[19]

[41] Mr Pidgeon was critical of the approach taken by Woodhouse J because, in his submission, the Judge failed to take into account New Zealand's international obligations when interpreting s 140(3) and making his decision.

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[19] *AO (Afghanistan)* [2015] NZIPT 800797 at [30], citing *AG (Sri Lanka)* [2011] NZIPT 800092 at [9].

Decision

[42] We do not consider Mr Pidgeon's submission is sustainable. As observed by Woodhouse J, the function of s 140 is to give effect to New Zealand's obligation to permit sur place claims under the Refugee Convention, namely claims based on circumstances or events that have occurred after the claimant has left their country of origin. By allowing successive or "subsequent" claims in relation to events and circumstances that have arisen after the claimant has left their homeland, the Act gives effect to this country's obligations under the Refugee Convention and the overarching obligation of non-refoulement.

[43] Inherent in the application of s 140 to a subsequent claim is the assessment of any new risk identified by the claimant in that subsequent claim. This may include a change in circumstances in the refugee's country of origin, an intensification of pre-existing factors that increase the risk of persecution, or where an individual's conduct has heightened their risk of persecution. As was submitted by Ms Jerebine on behalf of the RPO, s 140(1) allows sur place claims to be considered (subject to a good faith test), while s 140(3) prevents an ongoing cycle of repeated, groundless claims. There is no statutory limit on the number of claims a person can make, nor any time limitation on when a claim can be made.

[44] We accept consideration of New Zealand's international obligations may be relevant to the exercise of a domestic statutory power.[20] However, s 140 was drafted for the very purpose of ensuring New Zealand meets its obligations under the Refugee Convention, including the principle of non-refoulement. It is the means by which a proper balance can be achieved to guard against the risk of refoulement and prevent abuse of the system. So long as the subsequent claim is not repetitive, manifestly unfounded or clearly abusive, and there has been a significant change in circumstances material to the person's claim for refugee or protected person's status since a previous claim, s 140 will not prevent that subsequent claim from being considered.

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[20] *Attorney-General v Zaoui* [2005] NZSC 38, [2006] 1 NZLR 289.

[45] Mr Pidgeon's repeated references to the principle of non-refoulement in relation to each aspect of his argument do not advance WK's appeal. Whether there has been compliance with art 33(1) of the Refugee Convention turns on whether s 140(3) has been correctly applied by the RPO in refusing to consider WK's fourth claim. New Zealand's international obligations, and in particular that of art 33 of the Refugee Convention, are incorporated with the plain meaning of the words of s 140. No further gloss is required.

The interpretation and application of s 140(3)

Repetition of claim

[46] Section 140(3)(b) confers a discretion on a RPO to refuse to consider a subsequent claim that "repeats any claim previously made". In *AR v Refugee and Protection Officer*, Edwards J held that s 140(3)(b) requires a comparison to be made between the first claim and the subsequent claim to see whether it is *essentially the same claim*.[21] The parties accept that this formulation, which was adopted by Woodhouse J, correctly reflects the test to be applied. We also accept it represents the correct approach.

[47] Mr Pidgeon submitted that what is "essentially the same" is to be judged by whether the risk of refoulement remains essentially the same as the previous claim. We do not consider that adds anything to the statutory test. If there has been a previous determination in respect of an earlier claim of there being no real risk of persecution, a subsequent claim that restates the same basis for refugee and protection status, and relies on the same material circumstances, will inevitably result in "essentially the same" risk of refoulement.

[48] WK, in support of his fourth claim, relied upon an increased number of "hits" on his social media blog, an email he had received demonstrating he had been reported to the Turkish police, and a change to the country information relating to Turkey. Mr Pidgeon submitted that these developments constituted a change in the "intensity" of the risk faced by WK should he be returned to Turkey. Mr Pidgeon was particularly

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21 *AR v Refugee and Protection Officer* [2016] NZHC 2916 at [50].

critical of the RPO's treatment of the evidence of WK having been reported to the Turkish police.

[49] We, like Woodhouse J, do not consider the RPO made any reviewable error in his assessment of this information when he concluded that WK's fourth claim essentially repeated his previous claim. The primary basis for WK's fourth claim was that he was at risk of harm from the Turkish authorities because of his anti-Islam comments on his blog and, in particular, the derogatory online statements he had made about the Turkish President and Islam. However, the Tribunal had previously rejected WK's claim of being at risk of harm from his "Anti-Islam Turkey" blog and the statements he had made on Twitter regarding the Turkish President, Islam and the Turkish police.

[50] Mr Pidgeon sought to rely upon the increased number of third party views of WK's social media blog and his Twitter account. We consider the RPO was entitled to conclude that the change in the number of views was overall insignificant and did not realistically change WK's risk of investigation or arrest, which the Tribunal had previously assessed as not rising to the "level of a real chance".[22]

[51] The RPO did take into account the email sent to the Turkish police. The RPO noted the Tribunal had in its third decision considered the consequences should WK be investigated, and that, by reference to recent convictions, where suspended sentences had been imposed for insulting the Turkish President on social media, such a consequence would not constitute serious harm. We accept the submission for the RPO that WK's complaint effectively amounts to a criticism of the weight afforded by the RPO to the email to the Turkish police and the increased views of his blog. We do not consider the RPO's weighing of that material could be considered to be unreasonable in the *Wednesbury* administrative law sense. In that regard, we note that

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22 *Third Tribunal decision*, above n 14, at [91].

this Court has held that *Wednesbury* remains the governing test of unreasonableness in an immigration context.[23]

[52] We consider the conclusions reached by the RPO were reasonably available to him. It follows from those findings, based as they were on the earlier conclusions of the Tribunal, that the material provided in support of the fourth claim did not essentially disclose any different or, importantly, any greater risk of persecution should WK be returned to Turkey than his previous claim. It therefore essentially repeated that earlier claim.

Manifestly unfounded

[53] Mr Pidgeon submitted the test for "manifestly unfounded" in s 140(3)(a) was high. Again, by reference to the principle of non-refoulement, he suggested a number of formulae in amplification of the words used in the section. These included that it must be shown the claim is "bound to fail", or has "no realistic prospect of success", and that a claim can only be found to be manifestly unfounded where there is no reasonable risk of refoulement "whatsoever".

[54] Mr Pidgeon submitted that guidance could be drawn from the interpretation of s 94 of the United Kingdom's Nationality, Immigration and Asylum Act 2002 which employs the similar wording of "clearly unfounded". A claim which is considered to be "clearly unfounded" will attract a certificate precluding any appeal before an applicant can be expelled to that person's country of origin. The House of Lords has opined in relation to s 94 that "[i]f any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded".[24]

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[23] *BV v Immigration and Protection Tribunal*, above n 6, at [20]; *Puli'uvea v Removal Review Authority* (1996) 14 FRNZ 322 (CA) at 334; *Huang v Minister of Immigration* [2008] NZCA 377, [2009] 2 NZLR 700; *Singh v Minister of immigration* [2011] NZCA 532 at [33]–[36]; *Zhang v Associate Minister of Immigration* [2016] NZCA 361, [2016] NZAR 1222 at [25]–[39]; *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA) at [35]; *Singh v Chief Executive of Ministry of Business, Innovation and Employment* [2015] NZCA 592, [2016] NZAR 93; and *Kaur v Minister of Immigration* [2018] NZHC 1049. There is some conflicting High Court authority, including in the refugee context, suggesting greater intensity of review: *Wolf v Minister of Immigration* [2004] NZAR 414 (HC) at [47]; *A v Chief Executive of the Department of Labour* HC Auckland CIV-2004-404-6314, 19 October 2005 at [30]; *MPR v Refugee Status Appeals Authority* [2012] NZHC 567 at [14]; and *T v Immigration and Protection Tribunal* [2012] NZHC 1871 at [22].

[24] *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6, [2009] 1 WLR 348 at [23] per Lord Phillips.

[55] The English Court of Appeal also emphasised the "very high threshold" that was required to be met before a claim could be characterised as "manifestly unfounded" in relation to s 72(2)(a) of the Immigration and Asylum Act 1999 (now repealed):[25]

> The Secretary of State cannot lawfully issue such a certificate unless the claim is *bound* to fail … It is not sufficient that he considers that the claim is likely to fail on appeal, or even that it is very likely to fail. Moreover, as the House of Lords explained in *Yogathas*, the Court will subject the decision of the Secretary of State to "the most anxious scrutiny".

[56] Care is required before drawing on the interpretation of the words of a statute from a different jurisdiction. However, we consider a standard whereby an officer must be sure that a claim will fail, which appears to be the approach taken by the English courts, is well within the terms of the statutory test of being "manifestly unfounded". We consider "manifestly unfounded" denotes a high standard, something which is self-evident from the particulars on which the claim relies, and is unfounded or untenable.[26]

[57] Woodhouse J held the RPO was entitled to rely on the findings contained in the Tribunal's third decision that the risk of WK being investigated or arrested did not rise to the level of a real chance and that, even if this did occur, the potential consequences would not constitute serious harm. We consider that Woodhouse J was correct in his conclusion. In that regard, we note the RPO's findings that the number of views on WK's blog remained relatively small and that the Tribunal had previously considered the possibility of WK coming to the attention of the authorities. To the extent that risk may have heightened, it was immaterial in light of the previous determination by the Tribunal that any investigation or arrest in relation to WK's online activities would not result in serious harm. Because we are satisfied these conclusions were reasonably available to the RPO, it follows that he made no reviewable error.

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25 *R (on the application of Razgar) v Secretary of State for the Home Department* [2003] EWCA Civ 840, [2003] INLR 543 at [111], aff'd *R v Secretary of State for the Home Department ex parte Razgar* [2004] UKHL 27, [2004] 2 AC 368.

26 See *AO (Afghanistan)*, above n 17, at [31].

Clearly abusive

[58] Woodhouse J considered it preferable in approaching the issue of whether WK's fourth claim was "clearly abusive" to take "[a]ll relevant factors" into account, rather than to define that term by reference "to a set of circumstances" or "synonyms".[27] The Judge accepted that a "clearly abusive" claim could include one that is lodged to prolong the appeal or deportation process, but that the circumstances in which a clearly abusive claim may arise were not exhaustive.[28]

[59] Mr Pidgeon submitted that Woodhouse J erred in finding that it was reasonably open to the RPO to conclude that WK's fourth claim was "clearly abusive" based on its timing and apparent objective of avoiding deportation. He submitted that notwithstanding the motives of the claimant, if the claim gave rise to a chance of refoulement the presence of other motives could not render the claim "clearly abusive". Mr Pidgeon submitted that only where the statutory system has been misused can an abuse clearly arise, and that cannot be the case if the claim genuinely gives rise to the risk of refoulement.

[60] The RPO concluded that WK's fourth claim was "clearly abusive". That finding rested on the history of WK's claims and the timing of his fourth claim. The Tribunal's third decision was issued on 27 February 2017. WK was issued with a deportation liability notice on 6 March, and he became liable for deportation on 13 March. WK lodged his fourth claim two days later, on 15 March. The RPO found the timing of WK's fourth claim, "in the context of [WK's] immigration history", which included three previous claims and findings by the Tribunal of him having provided false evidence, was for the purpose of forestalling the deportation process.

[61] We consider that such a conclusion would not have been available to the RPO unless, as Woodhouse J observed, "[a]ll relevant factors" had been taken into account.[29] In the circumstances of the present case, the relevant factors would necessarily include the particulars of the subsequent claim. The effect of the RPO's

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27 *WK v Refugee and Protection Officer*, above n 2, at [57].

28 At [57]. Doug Tennent, Katy Armstrong and Peter Moses *Immigration and Refugee Law* (3rd ed, Lexis Nexis, Wellington, 2017) at 394.

29 *WK v Refugee and Protection Officer*, above n 2, at [57].

assessment was that WK's fourth claim based on his social media activities did not give rise to any essentially different risk of refoulement. It follows in those circumstances that, even on the test contended for by Mr Pidgeon, the RPO was permitted to draw an adverse inference from the timing of WK's fourth claim to conclude it was clearly abusive. This is particularly so when set against the history of his previous claims and the unmeritorious nature of WK's subsequent claim. In the circumstances, we, like Woodhouse J, consider that the RPO's finding was reasonably available to him.

Refusal to admit further evidence before the High Court

[62] Mr Pidgeon submitted that Woodhouse J erred by not allowing WK to adduce further evidence, both at and following the hearing of his judicial review application. WK sought to introduce information that had not been before the RPO regarding the number of views on his blog, and following the hearing forwarded further information and submissions to the Court which he requested be taken into account.

[63] Woodhouse J refused to take this new information into account. The Judge considered his task was to assess whether the RPO had made any reviewable error.[30] Because it could not be an error for a decision-maker to fail to take into account evidence that was not before it, the evidence was irrelevant to the application before him. Woodhouse J observed that an application for judicial review generally proceeds on the basis of evidence available to the decision-maker at the time the decision was made.[31]

[64] Mr Pidgeon acknowledged that judicial review will generally proceed on the basis of evidence available to the decision-maker. However, he submitted that in proceedings where an individual's human rights were at stake and New Zealand's international obligations in issue, in particular with regards to the principle of non-refoulement, a different approach was required.

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30 At [68].
31 At [68].

[65] Orthodox principles apply to an application for judicial review of a decision by either the Tribunal or the RPO.[32] The refugee context does not change the approach. The High Court's function is to correct jurisdictional, procedural, and other errors of law.[33] The Court should be mindful of the refugee context and ensure high standards of fairness were followed by the decision-maker, but the same rules and principles are to apply.

[66] The standard for the admission of additional evidence in judicial review proceedings is high. Because of the nature of judicial review, which is to assess the lawfulness of the decision-making process rather than the merits of the decision, the task of the reviewing court is to assess whether a decision was reasonably available to the maker on the basis of the evidence before them.[34] As this Court has held, additional evidence may only be permitted for particular circumscribed purposes:[35]

> The task of the reviewing court should be to assess whether, in light of the evidence before the decisionmaker at the time, the decision was one that a reasonable decision-maker could come to. The only use of the subsequent evidence should be to decide whether or not the material actually before the decision maker met that standard. Where a decision maker has made a defective inquiry, a court may find it necessary to refer to further evidence that would have been considered had a proper enquiry been made.

[67] That approach has also been followed in immigration cases. In *D v Immigration and Protection Tribunal*, it was held that:[36]

> [J]udicial review generally proceeds on the basis of the evidence available to the decision-maker at the time of the decision … The attempted introduction of material after the event, especially for the purpose of casting doubt on the substantive reasonableness of the decision in question, is generally inappropriate. Judicial review should not be seen as a further opportunity to present or supplement evidence.

[68] In the present case, the additional evidence sought to be adduced before the High Court related exclusively to developments that occurred after the RPO's

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32 See *BV v Immigration and Protection Tribunal,* above n 6, at [18]; *X v Refugee Status Appeals Authority* [2009] NZCA 488, [2010] 2 NZLR 73 at [6]; and *Attorney-General v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721 at [45].

33 *MN v Refugee Status Appeals Authority* HC Auckland CIV-2007-404-7932, 26 August 2008 at [4]; and *Attorney-General v Tamil X*, above n 25, at [45].

34 *Chief Executive Land Information New Zealand v Te Whanau O Rangiwhakaahu Hapu Charitable Trust* [2013] NZCA 33, [2013] NZAR 539 at [117].

35 At [117] (footnotes omitted).

36 *D v Immigration and Protection Tribunal* [2014] NZHC 3017 at [24] (footnotes omitted).

decision. It did not demonstrate a significant change in circumstances material to the previous claim. Nor has it been established how the information would have altered the reasonableness of the conclusions reached by the RPO.

[69] In the circumstances of the present case, we do not consider there was a proper basis upon which the High Court could have allowed further evidence to be adduced.[37] We do not therefore consider Woodhouse J erred in declining to consider the further information on the hearing of the review application.

The application to introduce evidence on the present appeal

[70] WK also sought to have admitted for the purposes of his appeal an affidavit attaching further country information, although Mr Pidgeon accepted that WK's appeal does not turn on this additional material. For substantially the same reasons why we do not consider Woodhouse J erred in declining to receive further information, we also refuse leave to admit this new evidence.

[71] In any event, we do not consider the updated country information is cogent to the issues we have earlier addressed. Furthermore, we do not consider it establishes any significant change in circumstances material to WK's fourth claim insofar as s 140(1) of the Act may still be considered as being in play.

[72] Both the Tribunal and subsequently the RPO were aware, in February and May 2017 respectively, that insulting either the President of Turkey or Islam constituted a crime punishable by imprisonment. WK's claim is based upon the perceived risk he faces should he return to Turkey arising from the inflammatory views he has expressed online. However, the new evidence does not address that question. The material is focussed on the risk to those promoting legitimate discourse such as journalists or human rights activists.

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[37] *CD (CA27/2015) v Immigration and Protection Tribunal* [2015] NZCA 379, [2015] NZAR 1494 at [37].

[73] As was observed in *AL v Immigration and Protection Tribunal*, in relation to country information which had not been before the Tribunal:[38]

> Unprocessed generic information about a particular country will be of little weight if it is not directed to the specific circumstances of the parties under consideration, and unless in terms of date and quality it is demonstrated that it warrants consideration.

[74] We do not consider the information sought to be admitted on the appeal advances the information already known as it relates to WK's circumstances, including the fact that it is a crime to insult the President. Furthermore, the information is not relevant to WK's claim, based as it was on him having made derogatory and abusive remarks about the Turkish President, and Islam in general.

[75] There is nothing in the proposed new evidence which would have potentially affected the approach of the Tribunal in its third decision, or the conclusions of the RPO that WK's claim is repetitive, or manifestly unfounded. Any change of circumstances that may be able to be taken from this new country information impacts upon journalists and other persons seeking to factually report events and engage in constructive political discourse, rather than those who are primarily involved in expressing derogatory speech using social media. The potential ramifications from such conduct remain unchanged from the time the Tribunal, in February 2017, assessed WK's position and when the RPO made his decision to exercise his discretion under s 140(3) of the Act in May of that year. Accordingly, WK's application to admit further evidence is declined.

Result

[76] The application for leave to adduce further evidence is declined.

[77] The appeal is dismissed.

Solicitors:
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[38] *AL v Immigration and Protection Tribunal* [2014] NZHC 1810, [2014] NZAR 1079 at [42] (footnote omitted).