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

IN THE COURT OF APPEAL OF NEW ZEALAND

CA642/2015
[2016] NZCA 320

BETWEEN	D (CA642/2015) Appellant
AND	IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND First Respondent
	THE CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Second Respondent

Hearing:	15 June 2016
Court:	Miller, Lang and Peters JJ
Counsel:	R S Pidgeon for Appellant K G Stephen and S R Leslie for Respondents
Judgment:	7 July 2016 at 2.15 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Peters J)

[1] The appellant, D, appeals against a decision of Gilbert J, in which the Judge:[1]

[1] *D v Immigration and Protection Tribunal* [2015] NZHC 2458, [2015] NZAR 1940.

(a) dismissed D's application for an extension of time in which to seek leave to commence an application for judicial review; and

(b) dismissed an application for judicial review (the proceeding) that D had already filed, on the ground that the Court had no jurisdiction to hear it.

Background

[2] In September 2013, D applied for refugee status. Her application was dismissed and she appealed to the first respondent, the Immigration and Protection Tribunal (IPT). The IPT dismissed D's appeal in a decision dated 11 May 2015 (IPT decision).[2]

[3] On 9 June 2015 D filed the proceeding, the documents filed comprising a notice of proceeding, statement of claim and affidavit in support.

[4] Before filing the proceeding, however, provisions of the Immigration Act 2009 (the Act) required D:

(a) to obtain the leave of the High Court to commence the proceeding;[3] and

(b) to apply for that leave, or for an extension of time in which to seek leave, within 28 days of notification of the IPT decision (28-day period). D's 28-day period expired on 10 June 2015.[4]

[5] D did not seek leave as required.[5] That led the second respondent, the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) to make an application to the Court to dismiss the proceeding and that, in turn, led D to apply for what her legal advisers referred to in their application as "out of time"

---

2 *EI (Fiji)* [2015] NZIPT 800657.
3 Immigration Act 2009, s 249(3).
4 Section 249(4).
5 We note that counsel for D on appeal was not her legal adviser at the time the proceeding was commenced.

leave to bring the proceeding. In particular, counsel for D contended that the Court could and should exercise its powers pursuant to r 1.9 of the High Court Rules to amend D's statement of claim or the affidavit filed in support, so as to construct (for want of a better word) an application for leave.

[6] Gilbert J held that the Court did not have power to extend the 28-day period, that neither D's statement of claim nor the affidavit could be construed as an application for leave; and that the Court did not have power under r 1.9 to amend either document as sought by D.

Issues on appeal

[7] Counsel agree that the issues on appeal are:

> 1.1 (Bearing in mind the area of law, the relevant international conventions and the statutory purpose of the Immigration Act 2009), do the documents filed with the High Court on 12 May 2015, (notwithstanding the absence of the interlocutory application for leave to bring a judicial review) when viewed cumulatively; provide a sufficient base so that either:
>
> > 1.1.1 r 1.9 of the High Court Rules could be used to amend the documents to conform to the time and form requirements of s 249 of the Immigration Act; or
> >
> > 1.1.2 If the answer to 1.1.1 is no, r 1.6 of the High Court Rules and/or the Court's inherent jurisdiction be used to amend the documents to conform to the time and form requirements of s 249 of the Immigration Act?

Discussion

[8] A party dissatisfied with a "final determination" of the IPT, such as the IPT decision, may appeal to the High Court on a point of law of general or public importance and/or may commence "review proceedings", that is apply to the High Court for judicial review.[6] However, since 2015, the Act has required such a party first to obtain leave to bring the appeal or judicial review proceeding, and to seek such leave, or an extension of time in which to do so, within the 28-day period.[7]

---

6 D has not sought to pursue an appeal.

7 Immigration Act, ss 245, 247 and 249.

[9] The relevant provisions in the judicial review context are ss 247 and 249 of the Act:

> **247 Special provisions relating to judicial review**
>
> (1) Any review proceedings … 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**
>
> ...
>
> (3) Review proceedings may … only be brought … 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 … 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.
>
> ...
>
> (6) In determining whether to grant leave for the purposes of this section, the court … 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.
>
> …

[10] It is common ground that the effect of ss 247(1)(b) and 249(3) and (4) was to require D to seek leave, or an extension of time, within the 28-day period.

[11] The Act does not prescribe the form such an application must take. Given that, and the nature of the legislation, we consider it open to D to submit, as her counsel did, that documents filed within the 28-day period constitute the required application for leave under s 249(4)(a).

[12] But whatever the form of the document or documents relied upon, at the very least they must provide a basis on which the Court may determine the matters in s 249(6) and (7). D's documents do not do so. And nor, when we asked, was counsel for D able to identify an "issue that could not be adequately dealt with in an appeal" and, if there were such an issue, tell us why it would be important (in the stipulated sense) to submit it to the High Court for review.

[13] We therefore agree with the Judge's conclusion that, even on the most generous view of it, none of the documents in the present case may be regarded as the required application for leave to commence an application for judicial review.

[14] Counsel for D referred to the difficulties that often arise for those practising in this field, with an appellant or applicant (whose English may be limited or non-existent) instructing counsel only shortly before the 28-day period expires, meaning that counsel may not have sufficient time to formulate grounds on which to apply for leave. In such circumstances counsel may, of course, make an application for an extension of time in which to seek leave.[8]

[15] Rules 1.6 and 1.9 are referred to in the agreed issues on appeal. We do not consider these assist D. They provide:

---

[8] Immigration Act, s 249(4)(b).

1.6 Cases not provided for

(1) If any case arises for which no form of procedure is prescribed by any Act or rules or regulations or by these rules, the court must dispose of the case as nearly as may be practicable in accordance with the provisions of these rules affecting any similar case.

(2) If there are no such rules, it must be disposed of in the manner that the court thinks is best calculated to promote the objective of these rules (*see* rule 1.2).

1.9 Amendment of defects and errors

(1) The court may, before, at, or after the trial of any proceeding, amend any defects and errors in the pleadings or procedure in the proceeding, whether or not there is anything in writing to amend, and whether or not the defect or error is that of the party (if any) applying to amend.

(2) The court may, at any stage of a proceeding, make, either on its own initiative or on the application of a party to the proceedings, any amendments to any pleading or the procedure in the proceeding that are necessary for determining the real controversy between the parties.

...

[16] We do not consider r 1.6 is relevant and, in any event, as we have said the Court should not refuse an application for leave on the grounds of form.

[17] As for r 1.9, and as Gilbert J said, the omission in this case is not a defect or error in the pleadings or procedure, and nor is counsel seeking an amendment to pleadings or procedure that the Court has power to make. The Court does not have power to apply a rule or to exercise inherent jurisdiction to circumvent the requirements of legislation, and that is essentially what is proposed.

[18] It follows that the answer to the questions posed on appeal is no. The appeal is dismissed.

[19] The appellant is legally aided so there is accordingly no order for costs.

Solicitors:
Patel Nand Legal, Auckland for Appellant
Crown Law Office, Wellington for Respondents