Immigration and Protection Tribunal

Power of the judge *vis-a-vis* new facts that happened after examination of the claim by the administrative authority

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Introductory background

[1] The purpose of this paper is to outline New Zealand's legislative and common law framework regarding asylum law procedures. Significant focus is placed on the context of judges' powers in the introduction of new facts, particularly after the administrative authority has examined the claim.

[2] As a result, this paper commences by addressing the recent structural changes within New Zealand's legal system in regard to immigration and refugee law. It then provides a brief outline of the approach taken by New Zealand's refugee status decision-making bodies, before turning to deal with the consideration of subsequent claims as a means of introducing new facts that happened after the examination of the claim. Lastly, the paper sets out the legislative and common law framework for refugee status appeals at the higher courts in relation to judicial consideration of new facts.

[3] As of 29 November 2010, the Removal Review Authority, the Residence Review Board, the Deportation Review Tribunal and the Refugee Status Appeals Authority (the Authority), were merged into one appellate body, namely the Immigration and Protection Tribunal.[1] These structural changes are governed by the Immigration Act 2009.[2]

[4] In *AC (Syria)*[3] the Tribunal noted that having been established over two decades ago, the Authority was New Zealand's specialist body dealing with matters arising out of the Refugee Convention and it had an established international reputation as an expert tribunal in the field of refugee law. The Tribunal therefore concluded that the Authority's jurisprudence, while not binding on the Tribunal, is of high persuasive value and unless the circumstances of the case or developments within the wider body of international refugee law requires further examination of the Authority's jurisprudence, "the Authority should be regarded as

[1] Immigration and Protection Tribunal (8 July 2011) http://justice.govt.nz/tribunals/immigration-protection-tribunal/about-the-tribunal.
[2] Immigration Act 2009 (NZ).
[3] [2011] NZIPT 800035.

settling the particular issue arising in respect of claims for recognition as a refugee under the Act" (See paragraph [97]).

[5] In light of the above finding, this paper will cite decisions of the Authority with the purpose of providing a more detailed background of well-established principles which have now been applied by the Tribunal.

The Tribunal and *de novo* hearings

[6] In accordance with the Immigration Act 2009, the Tribunal considers the matter *de novo* when hearing an appeal against a decision of the Refugee Status Branch (RSB – New Zealand's first instance refugee status decision-making body). This is the case for

- Determining an appeal against a decision declining to accept for consideration a claim in light of an international arrangement or agreement (section 196(1)(a));
- Determining an appeal against a decision declining to accept for consideration certain claims for recognition as refugee (section 197(1)(a)); and
- Determining an appeal against declining of a claim for recognition, cancellation of recognition, or cessation of recognition (section 198(1)(a)).

[7] To the same effect, paragraph 17.1 of the Tribunal's Practice Note 2/2010 (Refugee and Protection)[4] provides that "all refugee or protection appeals before the Tribunal proceed by way of hearing *de novo*, and all issues of law, credibility and fact are at large, except that the Tribunal may rely on any finding of credibility or fact by it or any of its predecessor appeal bodies in any previous appeal or matter involving the appellant or affected person..."

[8] This principle was discussed by the Authority, as previously constituted, in *Refugee Appeal No 2254/94 Re SS:*[5]

> "[68] Appeals proceed by way of a hearing *de novo*. There is no burden on an appellant to establish that the decision of the Refugee Status Section is wrong. All issues of law, fact and credibility are at large. The appellant is interviewed once more and where necessary an independent interpreter is provided....
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> [70] For present purposes two features of the procedures need to be emphasised:
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> (b) The appeal proceeds by way of a hearing de novo and the appellant is interviewed by the Authority which reaches its own independent conclusion as to whether the individual is a refugee. In this respect, the procedures are unique and manifest a high degree of fairness. This is entirely appropriate given the difficult

[4] Immigration and Protection Practice Note 2/2010 (Refugee and Protection) (29 November 2010).
[5] (21 September 1994).

> and complex issues of credibility, fact and law which fall for consideration and also given the potentially life-threatening consequences of a mistaken decline of refugee status".

[9] Further, the Authority noted in *Refugee Appeal No 75574*[6] that "unless the individual is given an opportunity to establish, *de novo*, that he or she satisfies Article 1 of the Refugee Convention, a State party which cancels refugee status is potentially at risk of breaching Article 33 of the Convention" (See paragraph [87]).

The Tribunal and "on the facts" determinations

[10] Paragraph 17.2 of the Tribunal's Practice Note 2/2010[7] sets out that the Tribunal "will make a decision on the *facts as found at the date of determination* of the appeal" (*Emphasis added*). This rule is of significance to the topic on hand, as it indicates that a judicial member can take into account new information as long as it is filed before the date of the actual determination of the case. Paragraph 29.1 of the Practice Note 2/2010 provides that "no evidence may be filed following the oral hearing except by leave of the Tribunal. Leave may be sought only in exceptional circumstances for the filing of new evidence prior to the date of the Tribunal's decision..."

[11] This principle was also discussed at the High Court in *Malkit Singh v Attorney-General & Anor.*[8] Justice Randerson emphasised that:

> "[a] All appeals before the Authority are conducted by way of hearing *de novo* and all issues of law, fact and credibility are at large.
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> [b] The Authority makes a decision on the facts as they stand as at the date of determination of the appeal and is not confined to the facts as they stood (or as they were presented) at the first instance hearing before the RSB".

[12] It is noted that the members of the Tribunal at times make post-hearing information requests to the Refugee Research and Information Branch. This practice takes place in spite of section 226(1) of the 2009 Act, which states that it is the responsibility of the appellant to establish his or her claim and the appellant "must ensure that all information, evidence, and submissions that he or she wishes to have considered... are provided to the Tribunal before it makes its decision on the appeal or matter". It should also be pointed out that in carrying out its role, the proceedings of the Tribunal may be, "as the Tribunal thinks fit – (a) of an inquisitorial nature; or (b) of an adversarial nature; or (c) of both an inquisitorial and an adversarial nature" (See section 218(2) of the 2009 Act).

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[6] (29 April 2009).
[7] Immigration and Protection Practice Note 2/2010 (Refugee and Protection).
[8] [2000] NZAR 125.

[13] It is therefore apparent that although the Tribunal is not expressly obliged to do so by domestic legislation, it sometimes seeks out new information following the examination of facts at a hearing, in order to make a determination that is declaratory in nature and is based on the most recent circumstances to which the appellant would be exposed to. This emphasis on the currency of information, as evident in the Tribunal's Practice Note and the approach of its members, reflects the nature of refugee law determinations at large. Conditions in the appellant's country of origin are commonly in flux and accordingly, it is necessary that the decision-maker continues to consider newly acquired information. The Tribunal's willingness to make inquiries also gives recognition that, in ensuring that New Zealand does not breach its international convention obligations, there may, at times, need to be some element of shared responsibility in the decision-making process.

The RSB and the Tribunal: subsequent hearings

[14] Once a determination has been made, the only way by which new facts can be introduced to the RSB or the Tribunal is by filing a subsequent claim. More specifically, section 140(1)(a) of the 2009 Act provides that a refugee and protection officer (at the RSB) must not consider a subsequent claim for recognition as a refugee unless the officer is satisfied that there has been a "significant change in circumstances material to the claim since the previous claim was determined...". Specific limitations are contained within section 140(1)(b), which provides that the subsequent claim cannot be brought about by the claimant "acting otherwise than in good faith" and "for a purpose of creating grounds for recognition under section 120". Further, section 140(3) stipulates that a refugee and protection officer "may refuse to consider a subsequent claim for recognition... if the officer is satisfied that the claim is (a) manifestly unfounded or clearly abusive; or (b) repeats a previous claim".

[15] As to the prescribed procedure in regard to subsequent claims, section 141(2) states that "a claimant may not challenge any finding of credibility or fact made by a refugee and protection officer... or the Tribunal... in relation to a previous claim by the claimant, and the refugee and protection officer determining the subsequent claim may rely on those findings". Similarly, the Tribunal is subject to the same limitations on subsequent claims as per section 200 of the 2009 Act.

[16] The Tribunal's Practice Note 2/2010[9] reiterates the Tribunal's statutory power to decline a subsequent claim or refuse to consider a subsequent claim due to the lack of significance of the change in the circumstances, lack of good faith, or the claim being manifestly unfounded, clearly abusive or repetitive of a previous claim (See paragraph 1.3 of the Practice Note 2/2010).

[9] Immigration and Protection Practice Note 2/2010 (Refugee and Protection).

[17] A brief series of decisions by the Authority point to the reasons behind the new statutory provisions under the 2009 Act. The Authority's original approach was first discussed in Refugee *Appeal No 2254/94 Re SS.*[10] In justifying the filing of a second claim once a final determination of the first claim had already been made, the Authority stated:

> "[84]... whether a fear of persecution is well-founded at any particular point in time depends on an assessment of risk in the country of origin. That assessment must necessarily focus on the attitude of the agent of persecution. As the attitude of the agent of persecution changes, so will the strength or weakness of the claimant's case. These changes are unquestionably:
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> "... circumstances in the claimant's home country ...."
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> ...
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> [87] Put another way, suppose a case where an individual has been politically active and escapes from the country of origin in the belief (mistakenly held) that state agents are about to descend with malevolent intent. On the first refugee application it transpires that not only are the state agents unaware of the claimant's activities, there is also no real chance of them becoming aware in the future. However, shortly before the claimant is removed from New Zealand, the authorities in the country of origin discover the nature and extent of the claimant's dissident activities and now unquestionably intend persecuting her upon return. If a second application for refugee status is then lodged, the claim is identical except that whereas on the first application there was no real chance of persecution at the hands of the state, now there is. The Authority cannot see how the paragraphs of the Terms of Reference under discussion can be so interpreted as to exclude from consideration changes in the attitude of the agent of persecution in the country of origin. The only available conclusion is that such a change constitutes a "significantly different ground" to the original claim".

[18] The Authority in *Refugee Appeal No 75139*[11] found that its interpretation of the Terms of Reference in *Refugee Appeal No 2245/94 Re SS* was naive and did not appreciate the potential for abuse which took place shortly afterwards:

> "[19] ... on delivery of the decision in Refugee Appeal No. 2245/94 Re SS on 28 October 1994, almost immediately the refugee determination system became the victim of abuse by the repeat submission of utterly meritless refugee claims. At one point some 63% of all new appeals received by the Authority were second or third appeals".

[19] It was also pointed out that the interpretation in *Refugee Appeal No 2245/94 Re SS* could not be maintained in the face of the new statutory provisions inserted by the Immigration Amendment Act 1999 and the Authority could therefore only hear and determine (on the merits) a second or subsequent appeal if narrow statutory criteria were satisfied:

[10] (21 September 1994).
[11] (18 November 2004).

> "[53]... (a) A refugee claim (including a *sur place* claim) may be submitted to a refugee status officer. A negative decision may be appealed to the Authority.
> (b) The decision of the Authority is final once notified to the claimant (s 129Q(5)). There is no jurisdiction to rehear an appeal after a full initial hearing: Refugee Appeal No. 71864/00 (2 June 2000).
> (c) Second and subsequent refugee claims can only be lodged if the intending claimant can establish that since the earlier determination circumstances in his or her home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim (ss 129J(1) and 129O(1)).
> (d) A second or subsequent appeal to the Authority may be against the refusal by a refugee status officer to consider the second or subsequent claim or (where the claim is considered) against the rejection of the claim on the merits (s 129O(1)).
> (e) In any such subsequent claim the claimant may not challenge any finding of credibility or fact made in relation to the previous claim unless the refugee status officer or the Authority determines otherwise (ss 129J(2) and 129P(9)). The discretion under these provisions is only enlivened once the jurisdictional bar has been crossed.
> (f) The Authority may dispense with an interview of the appellant if that person has been interviewed by a refugee status officer in the course of determining the second refugee application and the Authority considers that the appeal is prima facie manifestly unfounded or clearly abusive (s 129P(5))".

[20] The Authority last engaged in a more in-depth analysis on this topic in *Refugee Appeal No 76192*.[12] It was noted here that the only "gloss" that the Authority would add to the terms of Refugee Appeal No *75139* was that:

> "[28]... refugee status officers, and the Authority, should, when comparing claim with claim in subsequent applications for refugee status, ensure that the totality of each claim is considered in the round and that there is not a selective approach, to only parts of the claim, adopted".

[21] The Tribunal, in its recent decision of *AG (Sri Lanka)*,[13] considered the acceptance of subsequent claims under the Immigration Act 2009. In paragraph [6] the Tribunal pointed out that "the 2009 Act differs from the Immigration Act 1987... in some ways". Firstly, the statutory test under section 140(1) of the 2009 Act is bifurcated:

> "[8]... The first limb directs attention to the circumstance itself and its relationship to the first or prior claim. If the circumstances do not meet the criteria in section 140(1)(a) they cannot be relied on to establish jurisdiction. If these criteria are met, the circumstances, *prima facie*, constitute a qualifying circumstance for the purpose of establishing jurisdiction. However, in such instances, the second limb must then be addressed. The second limb under section 140(1)(b) is concerned with the background to the circumstance itself and how it came to be."

[12] (13 January 2009).
[13] [2011] NZIPT 800092.

[22] The second difference between the old[14] and the new Act is set out in paragraph [10] of the decision. It was emphasised that the test under section 140(1) of the 2009 Act is different from that set out in the 1987 Act. In particular, it was noted that under the 1987 Act, the claimant had to show that, "since the determination of the first refugee claim, circumstances in his or her home country had changed to such an extent that the further claim was based on significantly different grounds". The Tribunal went on to explain that under the new legislation, the claimant is required to "establish that, since determination of the prior claim, there has been no significant change in circumstances material to the claim". There is therefore "no express requirement under the 2009 Act that the change of circumstances be in the claimant's home country". The Tribunal concluded this part of its analysis by stating that "provided the change in circumstances is (a) significant; and (b) post-dates the determination of the previous claim; and (c) is material to the claim, the change in circumstances is capable of being relied on to establish the first limb..." (See paragraph [10].

[23] Lastly, the Tribunal in *AG (Sri Lanka)* stressed that section 200 of the 2009 Act "makes it clear that the jurisdictional threshold must be established both at first instance *and* before the Tribunal", therefore removing the ambiguity under the 1987 Act and giving "legislative form to the jurisprudence of the [Authority] in *Refugee Appeal No 75139*... at [40]-[43]" (See paragraphs [11]-[12]).

The High Court, the Court of Appeal and the Supreme Court: judicial review

[24] Where any party to an appeal to the Tribunal is dissatisfied with any determination of the Tribunal in the proceedings as being erroneous in point of law, that party may, with the leave of the High Court, appeal to the High Court on that question of law (See section 245(1) of the 2009 Act). In addition, judicial review is still available as with any other administrative or quasi-judicial decision-making body. The High Court therefore must consider the issue on appeal or judicial review and may either "(a) confirm the decision in respect of which the appeal has been brought; or (b) remit the matter to the Tribunal with the opinion of the High Court, together with any directions as to how the matter should be dealt with; or (c) make such other orders in relation to the matter as it thinks fit" (See section 245(4) of the 2009 Act).

[25] Likewise, any party who is "dissatisfied with any determination of the High Court in the proceedings as being erroneous in point of law may, with the leave of that court... appeal to the Court of Appeal" (See section 246(1) of the 2009 Act). Beyond that appeal, parties can apply for leave to appeal to the Supreme Court.

[26] It is apparent from the wording in section 245(4)(b) of the 2009 Act that when the High Court remits the matter back to the Tribunal, it limits the Tribunal to making a reconsideration of the claim based on their particular directions. However, the obligation to

[14] Immigration Act 1987 (NZ).

make a decision "on the facts as found at the date of the determination of the appeal" remains crucial,[15] given the declaratory nature of refugee recognition.

Deference

[27] Many High Court, Court of Appeal and Supreme Court decisions have stressed that the Courts should give deference to the expertise of the specialist Tribunal. For instance, Justice McGrath in *Attorney-General (Minister of Immigration) v Tamil X & Anor*[16] stated that there was no basis for any departure from the approach of the Authority in regard to its fact finding (See paragraph [43]). His Honour further noted that in the absence of a right of appeal, it is not the role of a court in a judicial review proceeding to undertake a "broad reappraisal of the factual findings of the Tribunal". The Supreme Court was therefore "satisfied that the Authority's factual findings were within its powers in that evidence was available to support its factual conclusions..." (See paragraph [45]).

[28] However, this well-established principle in New Zealand has been arguably compromised in two recent decisions. In the High Court's decision of *Isak v Refugee Status Appeals Authority*,[17] the issue of the impact of a document which was never brought to the attention of the Authority decision-maker was addressed. Justice Asher emphasised that the letter could "well have affected the outcome of the plaintiff's appeal by corroborating his claim to be a member of the Ogaden clan" and there was "a real possibility that if the Authority had had [the] letter before it and had accepted as a consequence that the appellant was a member of the clan, it would have upheld his refugee status" (See paragraph [37]). Looking at the process as a whole, His Honour found that there was a material error and stressed that:

> "in an application for review of a decision which is likely to lead to the compulsory return of a resident to an ungoverned state where there is no rule of law and a risk to life, the court should require a high level of procedural fairness... and be very willing to provide a remedy..."

The High Court thus remitted the matter and ordered the Authority to take into account the document in question.

[29] Similarly, the Court of Appeal in *Tamil X v Refugee Status Appeals Authority*[18] went beyond the usual scope of judicial review. Justice Hammond allowed an appeal against a decision of the Authority, finding that the particular case fell "well below the mark for an adverse art 1F determination". The case was thus remitted to the Authority on the inclusion

[15] Immigration and Protection Practice Note 2/2010 (Refugee and Protection).
[16] [2010] NZSC 107.
[17] [2010] NZAR 535.
[18] [2009] NZCA 488.

clause only and the Court of Appeal found that the appellant was not excluded under article 1F of the Refugee Convention.

[30] The decision in *Tamil X v Refugee Status Appeals Authority* was appealed by the Authority at the Supreme Court.[19] The appeal was dismissed and the application for recognition of refugee status was remitted to the Authority for consideration in accordance with the Court of Appeal's order.

[31] In this way, the Supreme Court impliedly agreed with the Court of Appeal's order that the Authority shall only reconsider one element, namely that of whether the respondent is a refugee under the inclusion clause of the Refugee Convention (article 1A(2)). The issue of whether the respondent was excluded under the Convention was already settled by the Court of Appeal and in turn, the Supreme Court, which prevented the Authority from revisiting this element of the matter.[20] This decision is of some concern to the Tribunal as it effectively limited the Authority's scope in its reconsideration of the case. On reconsideration, the Authority as previously constituted was concerned with the prospect of not being able to consider newly arising facts on the topic of exclusion.

Conclusion

[32] New Zealand's legislative framework enables judges to abide by the general principles of judicial review and/or appeals on material error of law. This in turn allows the courts to give deference to the expertise of the specialist Tribunal. However, recent trends do indicate the possibility of consideration of new facts after the initial examination. It should be noted here that the "extension" in *Isak v Refugee Status Appeals Authority* ensured that New Zealand did not breach its international convention obligations under the Refugee Convention. The *Tamil X* decisions, whilst possibly pragmatic, arguably do not sit well with decision-making in the refugee/protection context, where all the facts are being considered *de novo* on remittal. Inclusion and exclusion issues are part of the same overall assessment of refugee status.

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[19] *Attorney-General (Minister of Immigration) v Tamil X & Anor* [2010] NZSC 107.
[20] See *Refugee Appeal No 76600* (12 November 2010), where the appeal was allowed on remittal.