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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA39/2023
[2023] NZCA 372

BETWEEN	BE (NIGERIA) Applicant
AND	REFUGEE AND PROTECTION OFFICER First Respondent
	IMMIGRATION AND PROTECTION TRIBUNAL Second Respondent

Court:	Courtney and Mallon JJ
Counsel:	S R G Judd, D A Manning and S Lamain for Applicant M Deligiannis and S M Perera for First Respondent No appearance for Second Respondent (abides)
Judgment: (On the papers)	16 August 2023 at 11.30 am

JUDGMENT OF THE COURT

A The application for leave to adduce the evidence of Dr Iwilade is granted.

B The application for leave to appeal to the High Court is granted.

C Leave is granted on the following question:

> **Did the Tribunal err in its approach to risk assessment and, as a result, did it improperly exclude material information from consideration?**

D The application for leave to commence judicial review proceedings in the High Court is declined.

E There is no order as to costs.

REASONS OF THE COURT

(Given by Mallon J)

Introduction

[1] BE is a Nigerian national and New Zealand resident. He was served with a deportation liability notice following his convictions arising from his involvement in a substantial methamphetamine importation.[1] His claims for refugee or protected person status were rejected by a Refugee and Protection Officer and his subsequent appeals were dismissed by the Immigration and Protection Tribunal.[2] His applications to the High Court for leave to appeal, to bring a judicial review proceeding, and to adduce further evidence were declined by that Court.[3] He now applies to this Court for leave to appeal to the High Court and to bring a judicial review proceeding.[4] He also seeks leave to adduce further evidence in support of those applications.

Background

[2] BE travelled to Australia in 2007 on a temporary visa. Shortly after arriving in that country he married a New Zealand citizen and they later had a child together. BE was granted New Zealand residence in February 2011 on the basis of this marriage. In December 2011, BE, his wife and their child travelled to New Zealand. His wife and child returned to Australia soon afterwards. BE could not return with them because he had overstayed in Australia and was barred from re-entry. BE has remained in New Zealand since then.

[3] BE became involved in a failed attempt to import substantial quantities of methamphetamine into this country. His role was to collect a bag which would contain

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1 Immigration Act 2009, s 161(1)(a)(iii).
2 *Re AR (Nigeria)* [2019] NZIPT 801379; and *Re BE (Nigeria)* [2022] NZIPT 801929.
3 *BE (Nigeria) v Refugee and Protection Officer* [2022] NZHC 3371 [High Court judgment].
4 Immigration Act, ss 245(1) and 249(3).

the drugs from a person arriving at Auckland Airport. He was recruited for this role by a Nigerian drug syndicate at the last minute as a replacement for someone else. The person with the bag was intercepted by New Zealand Customs on arrival. He agreed to assist the police by cooperating with a controlled delivery. Not knowing this, BE arranged for someone to collect the bag and hide it near the airport. When BE returned with others to the hiding place the bag with the drugs had been removed by the police.

[4] BE and the others were charged in relation to the failed importation and stood trial in the High Court. BE's defence was that he did not know the bag contained drugs. He was convicted on importation and possession for supply charges. On 18 June 2015 he was sentenced to 15 years and 10 months' imprisonment. Conviction and sentence appeals to this Court were dismissed. Leave to appeal to the Supreme Court was declined.

First Tribunal hearing

[5] Immigration New Zealand served BE with the deportation liability notice on 20 December 2017. BE claimed refugee or protected status on the basis that, if he is sent back to Nigeria, he will be killed by members of a Nigerian organised criminal group. An appeal from the rejection of that claim by a Refugee and Protection Officer was dismissed by the Tribunal in a decision given on 21 January 2019.[5]

[6] In dismissing the appeal, the Tribunal accepted that initially there had been a falling-out between BE and other members of the drug syndicate. It also accepted that some members of the drug syndicate believed BE had retained the drugs and that BE had been sent threatening texts prior to his trial with his co-offenders, who included members of the drug syndicate.[6]

[7] However, the Tribunal concluded that after the trial there was no ongoing risk to BE. This was because the co-offenders at the trial would have become aware that the drugs had been intercepted by New Zealand Customs and that it was another

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5 *Re AR (Nigeria)*, above n 2.
6 At [47].

person (not BE) who had cooperated with the police. Additionally, BE's defence at trial did not seriously implicate anybody else.[7]

[8] Further, the Tribunal did not accept that BE's elder brother who lived in Nigeria had experienced any retribution or threats following the trial as had been claimed.[8] BE's claim relied on the evidence of BE's younger brother, who gave evidence to the Tribunal via telephone from Nigeria. The younger brother said that the elder brother had been on the run for three years because the drug syndicate wanted to harm him in revenge for BE having caused the drugs to be seized.[9] This evidence was regarded by the Tribunal as implausible for reasons it explained.[10]

[9] The Tribunal went on to assess BE's claim to refugee status. This required the Tribunal to assess whether there was a real chance of BE being persecuted if he returned to Nigeria. The Tribunal accepted that Nigeria was experiencing a prevalence of drug syndicates, whose activities had a global impact. The Tribunal also accepted the common use of violence by drug gangs in Nigeria and that state protection was severely compromised in that country due to government inefficiency and corruption.[11] However, the Tribunal considered there were no objective grounds for believing that BE was at risk of serious harm on this basis. This was because there was "simply no reason for members of the syndicate to harbour ill-feeling against [BE]" following the trial.[12] Further, given the period of time that would elapse before BE was eventually released, it was "no more than speculative" that any antipathy towards him in Nigeria would still exist by then.[13]

[10] This conclusion meant that BE was not a refugee under the Refugee Convention.[14] It also meant there was no basis for BE's claim to be a protected person

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7 At [49]–[51].
8 At [52].
9 At [34].
10 At [52]–[58].
11 At [67]–[68] and [70].
12 At [70].
13 At [73].
14 At [76]. Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954).

under the Convention Against Torture or the International Covenant on Civil and Political Rights (ICCPR).[15] BE's appeal was therefore dismissed by the Tribunal.

Second Tribunal hearing

[11] BE went on to make a second claim for refugee or protected person status. The Tribunal's decision on the appeal from the dismissal of this second claim was given on 30 May 2022.[16] One of the issues was the correct approach to assessing the evidence when determining whether to recognise BE as a refugee under the Refugee Convention or as a protected person under the Convention Against Torture or the ICCPR.

[12] BE contended that New Zealand decision makers approached their task by first assessing the credibility of the evidence and making findings on the relevant facts before proceeding to assess the risk to the claimant. BE contended this approach was misconceived. Relying on the decision of the Court of Appeal of England and Wales in *Karanakaran v Secretary of State for the Home Department*, BE contended that a "single stage approach" was the appropriate one.[17] That approach involved all evidence capable of being given some weight being brought forward into the risk assessment. This was to be contrasted with an approach that examined the evidence and accepted or rejected it as true on the balance of probabilities. The Tribunal explained that it considered its approach was a single-stage assessment, consistent with *Karanakaran*.[18]

[13] At the first Tribunal hearing, one of the factors going to the implausibility of the account of the older brother having to go into hiding was that the older brother had not given evidence.[19] At the second hearing, the Tribunal heard evidence by video-link from BE's older brother as well as from BE and his younger brother. The older brother gave an account of sustained threats and harassment from the drug syndicate and an

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15 At [81] and [84]. 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).

16 *Re BE (Nigeria)*, above n 2.

17 *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 (CA).

18 *Re BE (Nigeria)*, above n 2, at [40]–[46].

19 *Re AR (Nigeria)*, above n 2, at [56].

incident in 2019 when he was kidnapped for three days, culminating in his foot being deliberately punctured with a metal object. This injury was intended to be a reminder to get the drug money to the syndicate. The elder brother, who before then had moved around within Nigeria, said he had moved to another country to stay safe.

[14] For reasons which it traversed, the Tribunal did not accept that the evidence of the older brother's harassment, kidnapping and mistreatment was credible. In relation to the injury to the foot in particular, the Tribunal accepted the elder brother had sustained such an injury. It was supported by photographs, a medical certificate and evidence from a Nigerian lawyer who observed the wound. However, under the heading "[f]anciful assertion of origin of injury to foot", the Tribunal said:

> [64] … Quite why, of all the harms that the drug syndicate could inflict on him to motivate him to get the syndicate its money, Schoolboy [the alleged "thug" for the drug syndicate] would choose to injure him in the unusual way of a puncture wound to the sole of one foot, is difficult to fathom. Even allowing for a degree of irrationality and unpredictability, this strikes the Tribunal as far-fetched. The location and nature of the injury suggest that it is far more likely to have been caused by [the elder brother] stepping on something sharp by accident. When considered alongside the other credibility issues, the Tribunal is satisfied this injury was sustained in other circumstances than is claimed.

[15] The Tribunal agreed with the view of the first Tribunal panel that, although the drug syndicate may have thought that BE was involved in the drugs being seized by the police, the trial would have made it very clear that this was not the case.[20] It did, however, accept that in 2018 BE's younger brother was visited by an unknown person and moved from his former residence as a precautionary measure, but noted that he had not encountered any problems since then.[21]

[16] The Tribunal went on to find that that BE was not entitled to refugee status as there was no credible evidence that he remained a person of interest to the drug syndicate.[22] The same conclusion applied to BE's claim under the Convention Against Torture and the ICCPR.[23]

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20 *Re BE (Nigeria)*, above n 2, at [74].
21 At [68] and [74].
22 At [76].
23 At [79] and [81].

Proposed evidence of Dr Iwilade

[17] In support of his applications to the High Court for leave to appeal and for leave to commence review proceedings, BE also applied for leave to adduce the evidence of Dr Akin Iwilade. He is a social scientist and is presently a lecturer in African Studies at the University of Edinburgh. His research projects have included research on the role of violent gangs and death practices in Nigeria and the role of gangs in Lagos.

[18] His proposed evidence includes the following:

> What is key to determining the likelihood of a person being targeted by the group is therefore not necessarily the passage of time, but factors such as whether the key aggrieved individuals remain active in the group, whether the group retains a viable structure through which they could plan an attack and whether the target person is considered an ongoing threat or source of disrespect.

[19] Dr Iwilade expresses the view that it is reasonable to expect that, at the very least, BE will be viewed as an inept participant in the importation attempt and will likely receive some blame regardless of BE's evidence at trial. That is simply because he did not complete his role successfully. Simply failing to deliver is enough to mark him out for blame for the significant loss experienced by the syndicate. If he is blamed, it is plausible that he will be at risk upon his return to Nigeria if he is unable to make up for the lost drugs.

[20] Dr Iwilade also addresses the reasons why the Tribunal rejected the elder brother's evidence. He does not regard the elder brother's claim of being recognised and attacked at a busy Lagos intersection as implausible as such attacks in broad daylight are not uncommon. He also discusses the type of violence Nigerian gangs inflict and regards a wound inflicted to the foot as "neither unusual nor implausible".

[21] Lastly, he expresses the view that the ability of these groups to track a person across Nigeria is limited, meaning the chances of discovery can be significantly decreased by relocation to a different part of Nigeria. If BE is unable to relocate then, in Dr Iwilade's view, it is plausible that the gang would be able to easily locate and harm him should it choose to do so.

High Court decision

[22] The two issues on which leave was sought to appeal or judicially review the Tribunal's decision were:[24]

(a) whether the Tribunal erred in conducting a two-stage inquiry into the facts and the refugee claim, rather than a single-stage one involving an overall risk assessment (as described in *Karanakaran v Secretary of State for the Home Department*), and whether, as a result, it improperly excluded material information from consideration;[25] and

(b) whether the Tribunal erred in its assessment of the evidence by taking into account irrelevant considerations, failing to take into account relevant considerations, acting unreasonably, basing its decision on mistaken facts and/or wrongly relying on its own opinion as to how a Nigerian drug syndicate might behave.

[23] On the first question, Wylie J accepted that the correct approach to refugee status determination was a question of law or issue of general public importance.[26] However, he was not persuaded that the issue was seriously arguable. This was because the Judge considered that:

(a) The Tribunal had in effect applied *Karanakaran* albeit without the labels used in that case. It had found, in effect, that the elder brother's evidence fell into the fourth category described in that case — that is, evidence to which it could attach no credence to at all. It had done so by reference to internal inconsistencies and inherent implausibility, and there was nothing objectionable about this.[27]

(b) It was not seriously arguable that there was a difference in approach between the relevant New Zealand cases and *Karanakaran*, and the

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24 High Court judgment, above n 3, at [25].
25 *Karanakaran v Secretary of State for the Home Department*, above n 17.
26 At [39].
27 At [40(a)] and [42].

New Zealand courts had cautioned against prescription as to approach and the use of labels. Even if there was a difference in approach, this Court had noted in *BV v Immigration and Protection Tribunal* that it could not possibly be said that the Tribunal had erred in law by following a different analytical path.[28]

(c) The ultimate question in deciding whether to grant leave was whether the question of law "ought to be" submitted to the Court for consideration. The Judge was not persuaded that a different approach would lead to a different outcome for BE.[29]

[24] The Judge considered the second question did not raise a question of law. Rather it sought to challenge the Tribunal's factual assessment of the elder brother's evidence as to how the injury to his foot occurred and its view that the drug syndicate would no longer be interested in BE given the passage of time.[30] The Judge considered it would have been preferable if the Tribunal had not speculated as to the cause of the elder brother's injury, but this was simply one of several observations which caused the Tribunal to doubt the credibility of the elder brother's injury.[31] In any event, the Tribunal's factual finding was that, as a result of the trial, the drug syndicate would no longer have viewed BE as involved in the seizure of the drugs. BE could not show that it was seriously arguable that this factual finding was incorrect.[32]

[25] Leave to appeal was therefore declined. Leave to bring judicial review proceedings was also declined. That leave would have been declined in any event because the issues BE sought to raise would have been ones able to be dealt with adequately in an appeal.[33] Leave to adduce Dr Iwilade's evidence was also declined. The Judge viewed that evidence as neither fresh nor cogent. It was generalised evidence and did not undermine the Tribunal's finding that the drug syndicate would

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28 At [40(c)–(d)]. *BV v Immigration and Protection Tribunal* [2014] NZCA 594, [2015] NZAR 139 at [14].
29 At [40(e)].
30 At [43]–[44].
31 At [44]–[45].
32 At [44].
33 At [47].

have understood, as a result of the trial, that BE was not involved in the seizure of the drugs.[34]

Leave sought of this Court

[26] Leave is sought in this Court to commence proceedings (an appeal and an application for judicial review) in the High Court. The questions on which leave is sought remain in essence those considered and rejected in the High Court.[35] Leave is also sought to adduce the evidence of Dr Iwilade.

Leave to adduce Dr Iwilade's evidence

[27] To be admitted in support of applications under ss 245 and 249 of the Immigration Act 2009, further evidence should be fresh (in that it could not, with due diligence, have been produced at first instance), credible (that is, reasonably capable of belief) and cogent (likely to have an important influence on the result).[36]

[28] We grant leave to adduce Dr Iwilade's evidence in support of BE's applications. While it could have been adduced earlier and so is not fresh, it responds directly to views expressed by the Tribunal, that were based on the Tribunal's own assessment of plausibility and not on evidence of what actually may occur in Nigeria, in rejecting the evidence of BE and his elder brother. We consider the evidence is cogent in that it adds some support for the arguments that BE wishes to advance on the appeal. The evidence, provided by an independent expert, is also clearly credible. We consider it is in the interests of justice to grant leave in these circumstances.

Leave to appeal

[29] A person dissatisfied with the Tribunal's determination may, with the leave of the High Court, or, if the High Court refuses leave, with the leave of this Court, appeal to the High Court on a question of law.[37] In determining whether to grant leave,

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34 At [51]–[52].

35 See [22] above. The only notable change to the proposed questions of law is the simplification of the second question, which is now: "whether the Tribunal erred in its assessment of BE's evidence by wrongly relying on its own opinion as to how a Nigerian drug syndicate might behave."

36 *CD (CA27/2015) v Immigration and Protection Tribunal* [2015] NZCA 379 at [23]–[24]; and *Hai v Minister of Immigration* [2019] NZCA 55 at [24]–[25].

37 Immigration Act 2009, s 245(1).

the Court must have regard to whether the question of law is one that by reason of its general or public importance, or for any other reason, ought to be submitted to the High Court for its decision.[38]

[30] There is no doubt that the first question on which BE seeks leave is a question of law. The issues are whether it is of general importance and whether it ought to be submitted to the High Court.

[31] The first respondent says that the general approach to assessing credibility in the context of determining refugee status is well-settled by appellate authority in New Zealand.[39] It says the Tribunal's approach was consistent with that authority and it is not seriously arguable that the Tribunal erred in its approach. It further says that the New Zealand approach is not inconsistent with *Karanakaran*.

[32] BE says the New Zealand appellate authorities, with the exception of *DY (Pakistan) v Refugee and Protection Officer*,[40] did not address a challenge to the underlying premise of a two-staged analysis where the Tribunal first determines the facts and then determines whether there is a real chance of persecution on the basis of those facts. He says that *Karanakaran* requires a single-stage inquiry and that the two-staged approach leads to exclusion of relevant evidence in the assessment of whether there is a real chance of persecution.

[33] The single-stage inquiry as it is put in the judgment of Sedley LJ in *Karanakaran* is as follows:[41]

> … how [convention questions] are approached and evaluated should henceforward be regarded not as an assault course on which hurdles of varying heights are encountered by the asylum seeker with the decision-maker acting as umpire, nor as a forum in which the improbable is magically endowed with the status of certainty, but as a unitary process of evaluation of evidential material of many kinds and qualities against the convention's criteria of eligibility for asylum.

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38 Section 245(3).

39 Referring to *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721; *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647; and *BV v Immigration and Protection Tribunal*, above n 28.

40 *DY (Pakistan) v Refugee and Protection Officer* [2021] NZCA 522.

41 *Karanakaran v Secretary of State for the Home Department*, above n 17, at 479–480. See also Brooke LJ at 459, 461 and 465.

[34] This was to be contrasted with an approach where at the first stage the Tribunal determines proof of present and past facts followed by a second stage involving the assessment of risk.[42] The one-stage approach enables the assessment of risk only on the ultimate evaluation of the case when all the evidence and the varying degrees of belief or disbelief are being assessed.[43] If the assessment is only on the facts established as more likely than not to have occurred, then that removes much of the benefit of uncertainty that the applicant has in the determination of refugee status.[44]

[35] In *DY (Pakistan)* leave was sought to appeal on essentially the same question of law as that for which leave is sought by BE.[45] This Court accepted that the applicant had "possibly identified an arguable question of law of general importance".[46] It declined leave, however, because the ultimate question was whether the question of law "ought to be submitted to the High Court".[47] It considered that this requirement was not met in DY's case because it was not satisfied that a different approach would have led to a different outcome.[48]

[36] In this case, BE contends that the Tribunal's approach led it to exclude relevant information from the risk assessment at the second stage. He says that the Tribunal aggregated a number of discrete concerns to reach a cumulative finding that the evidence regarding BE's elder brother as a whole should be rejected. It then proceeded to consider whether there was a real chance of the appellant being persecuted if he was returned to Nigeria. Added to this, and which is the basis for the second proposed question, BE says the Tribunal rejected BE's evidence and that of his elder brother based on its own opinion as to the likely behaviour of a Nigerian drug syndicate where there was no evidential foundation for doing so.

[37] BE says the first example of this is the Tribunal's rejection of BE's account that the drug syndicate maintained a grudge against him. Its view that the syndicate would not maintain a grudge following the events at the trial was elevated not just to

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42 At 459.
43 At 459.
44 At 459.
45 *DY (Pakistan) v Refugee and Protection Officer*, above n 40, at [4(a)].
46 At [23].
47 At [23].
48 At [23].

giving rise to scepticism of BE's account but to a positive assertion that the syndicate was not interested in him. Further, BE says that the Tribunal did not address the possibility that BE's co-offenders attributed blame to BE when speaking to their superiors in order to deflect their own responsibility, nor the possibility that the syndicate would take an ill-view of those who cooperated with the police regardless of the impact of that on the proceedings.

[38] BE says the second example is the Tribunal's rejection of BE's elder brother's account of the injury to his foot. BE says the Tribunal's opinion that it was unlikely that a drug syndicate would inflict an injury on the foot of the elder brother was contrary to the evidence of BE and the elder brother and inconsistent with public information regarding the behaviour of drug syndicates.[49] It is further rebutted by the expert evidence sought to be adduced from Dr Iwilade. BE also refers to the United Kingdom Home Office's guidance to refugee decision makers not to construct their own theories of how an applicant or others ought to have behaved and not to assess their behaviour against what would be plausible in the United Kingdom.[50]

[39] As this is an application for leave we do not engage in detail with these submissions. We are satisfied, however, that the correct approach to the risk assessment, and in particular whether a two-stage or a single-stage inquiry is appropriate, is a question of law of general importance.

[40] We are also satisfied that this question of law is one that ought to be considered by the High Court, for the following reasons:

(a) First, it is apparent from the submissions made to the Tribunal for its second decision that both parties differed from the Tribunal's own assessment as to whether the Tribunal's approach was consistent with

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49 Referring to United Nations High Commissioner for Refugees *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* (March 2010).

50 Citing James A Sweeney "Credibility, Proof and Refugee Law" (2009) 21 IJRL 700 at 705, where the author discussed the United Kingdom Asylum Policy Instruction which was current at the time the article was published. See also the current UK guideline: Home Office *Assessing credibility and refugee status in asylum claims lodged on or after 28 June 2022* (June 2023) at 51–52, stating: "You must not base implausibility findings solely on your own assumptions, conjecture, or speculative ideas of what ought to have happened, what you might think someone genuinely fleeing for their life should have done, how you think a person would have behaved, or how you think a third party would have acted in the circumstances."

Karanakaran.[51] This suggests it is not clear that the Tribunal's approach is consistent with *Karanakaran* and that further clarity from the Court may be helpful.

(b) Secondly, BE has analysed the Tribunal's decisions since the date of the second decision and found that the Tribunal has altered the wording of how it approaches its task. BE acknowledges that this may be the Tribunal simply clarifying its existing position but considers the change reinforces the need for clarity from the Court.

(c) Thirdly, BE has given examples of evidence he says ought to have been part of the risk assessment but was excluded by the approach taken by the Tribunal. BE has supported those examples with expert evidence. It is not for us to engage with those examples in detail. However, we consider that they may provide a context against which the Court can assess the question of law BE raises.

[41] The proposed first question of law considered in the High Court includes whether the Tribunal's approach led to an error in excluding from the risk assessment evidence that should have been included in that assessment. Phrased in that way, the first question will in effect incorporate the proposed second question of law. That is because the first question will include whether evidence about the risk faced by BE because he was part of a failed drug importation arranged by a Nigerian drug syndicate was wrongly excluded because of the way the Tribunal approached its task. We consider the first question of law can incorporate the relevant issues and that leave should not be granted in respect of the second question.

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[51] *Re BE (Nigeria)*, above n 2, at [40], where the Tribunal said that "contrary to the submissions of the parties, the model taken in New Zealand refugee status determination is, in reality, already a single assessment along the lines of that suggested in *Karanakaran*."

Leave to commence review proceedings

[42] We decline leave to commence judicial review proceedings. It is apparent from the application for leave that the matters it wishes to raise through review proceedings are captured by an appeal.[52]

Result

[43] The application for leave to adduce the evidence of Dr Iwilade is granted.

[44] The application for leave to appeal to the High Court is granted.

[45] Leave is granted on the following question:

> Did the Tribunal err in its approach to risk assessment, and, as a result, did it improperly exclude material information from consideration?

[46] The application for leave to commence judicial review proceedings in the High Court is declined.

[47] There is no order as to costs.

Solicitors:
McLeod & Associates, Auckland for Applicant
Crown Law Office | Te Tari Ture o te Karauna, Wellington for First Respondent

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[52] Immigration Act, s 249(6)(a).