

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

**CA182/2023
[2023] NZCA 416**

BETWEEN CO (PHILIPPINES)
Applicant

AND IMMIGRATION AND PROTECTION
TRIBUNAL
First Respondent

REFUGEE AND PROTECTION OFFICER
Second Respondent

Court: Goddard and Wylie JJ

Counsel: A Williams for Appellant
I M G Clarke for Second Respondent

Judgment: 1 September 2023 at 2.30 pm
(On the papers)

JUDGMENT OF THE COURT

- A The application for leave to file judicial review proceedings challenging a decision of the Immigration and Protection Tribunal is declined.**
- B The applicant must pay costs to the second respondent for a standard appeal on a band A basis with usual disbursements.**
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REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] On 29 March 2023, Harvey J, in the High Court at Auckland, declined the applicant's (CO's) application for leave to file an application for judicial review seeking to challenge a decision of the first respondent, the Immigration and Protection Tribunal (IPT).¹

[2] CO now applies to this Court for leave to file the judicial review proceedings in the High Court, pursuant to s 249(3) of the Immigration Act 2009 (the Act). The application is opposed by the second respondent, the Refugee and Protection Officer. The IPT abides the decision of the Court.

CO's status in New Zealand

[3] CO is a citizen of the Philippines. He has been living in New Zealand since December 2007. He was granted a work visa in February 2008 and he applied for residency in 2010. His application for residence was declined, because Immigration New Zealand was concerned that police clearance certificates and a degree provided by CO in support of his application were false. In March 2011 a further application by CO for a work visa was declined as well and, in September of that year, he was issued with a deportation liability notice. He did not however leave the country.

[4] In March 2017 CO applied for refugee and protected person status. He claimed that he was at risk of persecution if he returned to the Philippines. The application was declined by the Refugee Status Unit. CO appealed to the IPT. His appeal was declined.² The IPT found that CO had given a partially credible account but did not accept that CO was under any ongoing risk some ten years after his departure from the Philippines in 2007.³ Subsequently both the High Court⁴ and this Court⁵ declined to grant leave to CO to appeal the IPT's decision.

¹ *CO Philippines v Immigration and Protection Tribunal* [2023] NZHC 654 [High Court decision].

² *BC (Philippines)* [2018] NZIPT 801243.

³ At [36] and [68].

⁴ *BC Philippines v Immigration and Protection Tribunal* [2018] NZHC 2722.

⁵ *BC Philippines v Immigration and Protection Tribunal* [2019] NZCA 180.

[5] CO made a second application for refugee and protected person status in May 2019. Again, CO claimed he was at risk of persecution. Again, his application was declined by the Refugee Status Unit and, on appeal, by the IPT.⁶ It rejected as being either not plausible or credible CO's various claims about the risk of persecution he said he faced.⁷ It rejected CO's claim that there was an ongoing risk to his safety.⁸

[6] The current proceedings began in November 2020 when CO lodged a third application for refugee and protected status. Again, CO claimed that he would be at risk of harm if he returns to the Philippines. This application was declined by the Refugee Status Unit on 18 November 2021. CO again appealed to the IPT. His appeal was dismissed on 13 September 2022.⁹ CO then sought leave from the High Court to bring judicial proceedings challenging the IPT's decision. As noted, his application for leave was declined by Harvey J.¹⁰ The application is now before this Court.

CO's claims

[7] The following is taken from the IPT's most recent decision.¹¹ It records CO's version of events. He did not resile from what he had told the IPT during the first and second appeals. His evidence at the third IPT hearing was centred on events said to have occurred after the second appeal hearing.

[8] CO was born in the mid-1960s in the Philippines. In 2002 he was acquitted on a charge of "frustrated murder" in connection with a shooting in 1997. The victim died as a result of his injuries several years later.

[9] In 2003 CO established a business in the Philippines. The business prospered and CO established a number of branches throughout the country. Some of the branches were in areas controlled by the Communist Party of the Philippines (CPP) and its armed wing, the New People's Army (NPA). In 2005 a cousin who had joined the NPA came to visit CO. The cousin told CO that he had been assigned to the area

⁶ *CG (Philippines)* [2020] NZIPT 801749.

⁷ At [100]–[106].

⁸ At [107].

⁹ *CO (Philippines)* [2022] NZIPT 801997 [IPT decision].

¹⁰ High Court decision, above n 1.

¹¹ IPT decision, above n 9, at [9]–[28], and [35]–[50].

and that he had been commanded by a superior within the NPA to demand that CO pay a “revolutionary tax” because his business was operating in areas where the NPA was active and in control. Concerned for his own and his family safety, CO reluctantly agreed to pay the tax.

[10] In October 2006, CO’s lawyer counselled CO that he should reduce his exposure to the NPA by closing his business operations in various areas where the NPA was active. It was hoped that, by this means, CO would no longer be obliged to pay the revolutionary tax. CO reluctantly accepted this advice and, from early 2007, he began winding down his business operations in areas controlled by the NPA.

[11] Before this process had been completed, CO was telephoned by his cousin who told him that some of his associates wanted to meet CO to discuss his support for the NPA. CO agreed and some weeks later he was telephoned by representatives of the CPP and NPA and a meeting was arranged. CO told his lawyer about the meeting and the lawyer agreed to attend. At the meeting, CO was told that the CPP and NPA representatives wanted him to join the Party. They gave CO a document to look at which contained a pledge of allegiance and required that he follow the Party’s rules and regulations. CO refused to join. He said that he was not ready to join any political party in the Philippines.

[12] A few days later, CO received a call from an associate involved with the NPA, asking him to pay a further instalment of revolutionary tax. CO explained to the caller that he was no longer able to pay the tax, because he had closed a number of the branches of his business. A little later, CO received a telephone call from his cousin, who told him that CO and his lawyer were going to be tried for treason by an NPA Court in absentia. The cousin urged CO to leave the Philippines. The cousin said he could not protect CO from his associates and that CO should avoid places where the NPA was active.

[13] CO contacted his lawyer, who told him he would call people who would be able to help him. CO’s wife was scared, and she and CO went into hiding. Shortly thereafter, CO received from an employee a package which had been sent to his office containing two bullets with two black ribbons on which had been written the words

“to [CO] from the NPA” and “to [CO’s lawyer] from the NPA”. CO again contacted his lawyer. The lawyer told CO that he had received some death threats as well, but again insisted that he would take care of things. However approximately a week later, the lawyer was murdered. Shortly thereafter, CO came to New Zealand.

[14] Notwithstanding the passage of time since these events, CO claims to still be at risk of suffering serious harm in the Philippines at the hands of the NPA. He also claims to be at risk of serious harm from unknown assailants who he says are seeking retribution against him, possibly in connection with his acquittal on the charge of frustrated murder in 2002.

[15] In the course of the third appeal to the IPT, CO affirmed the accounts that he had given in the prior appeals, and he presented new evidence regarding events said to have occurred after the second appeal. He said that:

- a) in late October 2020 he was told by a sister living in the Philippines that two armed men had visited his family home looking for him. His sister advised them that they should contact the caretaker. CO called the caretaker. The caretaker confirmed that two men had asked if CO was there. The caretaker told them that CO had not been around for a long time. The two men then forced their way into the house looking for CO. They threatened the caretaker and told him that they would kill him if he was lying about CO’s whereabouts. CO said that he had had no further contact with the caretaker, but that he had asked his lawyer to make enquiries with the local police. CO said that it was rumoured in the neighbourhood that the family of the young man who was murdered were behind the visits; and
- b) a sling bag containing a mobile phone, a homemade .38 calibre handgun, seven .38 calibre bullets and a photograph with CO’s name and family home address on it had been found near the family home.

[16] CO asserted that, in light of these events, it was plausible that the CPP and NPA were still interested in him (although he acknowledged that he was unsure whether

they still had the capacity to harm him). Alternatively, CO asserted that the events he claimed had occurred were linked to the family of the murder victim.

The IPT's decision

[17] The IPT considered that the primary issues in CO's appeal were whether CO's claims were credible and if so whether his fears were well founded.¹² It recounted the two earlier refugee claims made by CO and considered whether or not CO's account was credible. It found that core parts of his claims were not.¹³ It considered that the timing of the new evidence was highly coincidental.¹⁴ The visit by the two armed men was said to have occurred just weeks after the IPT had declined CO's second appeal. The finding of the sling bag occurred two weeks after the Refugee Status Unit declined CO's third claim to refugee and protected status. It queried whether the sling bag could have been abandoned by the armed men said to have visited CO's family home and whether the writing on the back of the photograph would have been readable 13 months later, given seasonal rains in the Philippines.¹⁵ It considered that this evidence was implausible. Further the IPT did not accept CO's evidence about rumours in the neighbourhood.¹⁶

[18] Considering CO's claim in the round, the IPT found that CO's account was not truthful.¹⁷ It acknowledged that there is armed conflict occurring in the Philippines, that revolutionary taxes are imposed, and that there are issues with targeted killings, but it found no reason to depart from the position taken in the earlier appeal hearings that CO is not at risk of serious harm from the NPA, the CPP, or the family of the murder victim.¹⁸ It considered that there was no breach of CO's rights under the International Covenant on Civil and Political Rights nor the Convention against Torture and that CO has no well-founded fear of persecution.¹⁹ It was therefore

¹² IPT decision, above n 9, at [2].

¹³ At [57].

¹⁴ At [60].

¹⁵ At [71].

¹⁶ At [63].

¹⁷ At [72].

¹⁸ At [73].

¹⁹ At [89], [95] and [98] citing International Covenant on Civil and Political Rights 99 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); and 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).

unnecessary for it to address whether there was a convention reason to support CO's claim to refugee and protected persons status.²⁰ It found that CO could not be recognised as a refugee under s 129(1) of the Act, nor as a protected person under ss 130 or 131 of the Act.²¹ Accordingly, CO's appeal was dismissed.

The High Court decision

[19] After reviewing the factual and legal background, the Judge turned to assess CO's application. He noted that CO is seeking to rely on an alleged failure by the IPT to take into account in its decision a newspaper article which was produced to it.²² The Judge noted that it was argued that this alleged failure amounted to an error of both fact and law. He disagreed, noting as follows:

- a) the IPT did refer to the article in its decision;²³
- b) in any event the IPT did not need to refer in its decision to every piece of evidence filed;²⁴ and
- c) the IPT was entitled to determine the weight to be given to the evidence and was entitled to give it little weight given issues as to its provenance.²⁵

[20] The Judge also agreed with a submission made by the Refugee and Protection Officer that the article could not affect the reasons the IPT gave for dismissing CO's appeal.²⁶ He observed that the article did not advance CO's position. The Judge concluded that there was no bona fide or serious argument raised by CO's application and that therefore there was no seriously arguable ground of review.²⁷ He also considered that the issues raised were not matters of general or public importance, or that for any other reason, the IPT's decision should be submitted to the High Court for

²⁰ IPT decision, above n 9, at [90].

²¹ At [100].

²² High Court decision, above n 1, at [69].

²³ At [70].

²⁴ At [71].

²⁵ At [72].

²⁶ At [72].

²⁷ At [73].

review. Accordingly, he declined to grant CO leave to file judicial review proceedings in response to the IPT's decision.²⁸

CO's application for leave to appeal

[21] CO, in his application for leave filed with this Court, argued that the IPT erred in failing to take into account "country information" which he said identified a relevant risk of persecution. He also said that the IPT's decision was unreasonable, given the failure to take this information into account. He asserted that the IPT's error is of general and public importance, as it relates to the correct methodology to be applied when assessing credibility and that the IPT's error went to the assessment of the risk to his life.

Submissions

[22] In submissions filed in this Court, Mr Williams, on behalf of CO, submitted that leave to file judicial review proceedings should be granted for the following reasons:

- a) the proposed judicial review proceeding involves a question of law;
- b) the question is of general and public importance;
- c) the IPT overlooked "crucial evidence", namely the newspaper article which, amongst other things, referred to the finding of the sling bag, gun, bullets and photo of a man;
- d) the IPT erred, when it stated that a written statement signed by two witnesses, FF and EE, was dated 26 February 2021, when it was in fact dated December 2021; and
- e) the IPT accordingly relied on incorrect facts in determining CO's appeal.

²⁸ At [76].

[23] It was accepted that it is not appropriate in judicial review proceedings to challenge the weight given to evidence, but it was submitted that the issue was rather whether the IPT got the facts wrong. It was argued that the alleged errors advanced CO's case and corroborated his account.

[24] The Refugee and Protection Officer opposed the application, arguing that:

- a) the alleged errors should not justify leave to bring judicial review proceedings. The alleged errors are case specific and do not advance issues of general and public importance; and
- b) there is no seriously arguable ground of review. Any inaccuracy in the IPT's description of the article was explicable and of no material significance.

Analysis

[25] Relevantly, s 249 of the Act provides as follows:

249 Restriction on judicial review of matters within Tribunal's jurisdiction

...

- (2) No review proceedings may be brought in any court in respect of any matter before the Tribunal unless the Tribunal has issued final determinations in respect of the matter.
- (3) Review proceedings may then only be brought in respect of a decision or matter described in subsection (1) or (2) if the High Court has granted leave to bring the proceedings or, if the High Court has refused to do so, the Court of Appeal has granted leave.

...

- (6) In determining whether to grant leave for the purposes of this section, the court to which the application for leave is made must have regard to—
 - (a) whether review proceedings would involve issues that could not be adequately dealt with in an appeal against the final determination of the Tribunal; and
 - (b) if paragraph (a) applies, whether those issues are, by reason of their general or public importance or for any other reason, issues that ought to be submitted to the High Court for review.

[26] The IPT has issued a final determination in respect of CO's appeal against the decision of the Refugee Status Unit. CO seeks leave to bring judicial review proceedings in relation to the IPT's decision.

[27] First, we note that CO could have brought an appeal against that decision, with leave, pursuant to s 245(1) of the Act. No application has been made for leave to appeal. The RPO does not however oppose the application for leave to bring judicial review proceedings on this ground, in light of an agreement reached "to regularise the procedure in the High Court". We doubt that any such agreement can relieve this Court of the need to address the mandatory consideration identified in s 249(6)(a). But as will become apparent, we need not determine that issue.

[28] Second, none of the issues raised by CO in relation to the IPT's consideration of the evidence before it amounts to a seriously arguable ground of review.

[29] The submissions filed for CO refer to a newspaper article in a Philippines' publication — The Northwest Sun — and to a related statement made by witnesses. It is common ground that the IPT had before it:

- a) a newspaper article in Filipino said to be from 27 January to 2 February 2022 edition of the Northwest Sun;
- b) an English translation of that article from Multilingual Translation Services dated 26 February 2022;
- c) a two-page document in Tagalog dated December 2021 signed by two witnesses, FF and EE; and
- d) the first page of the previous document and an English translation of paragraphs one to eight of that document from Multilingual Translation Services also dated 26 February 2022.

[30] The IPT recorded that it received written submissions, including a copy of the written statement and an English translation of that statement and what it referred to

as a “bundle of country information”.²⁹ It heard evidence from one of the witnesses who had prepared the witness statement — EE. It dealt with the evidence in some detail. It also considered the country information which had been provided, although it did not specifically refer to the newspaper article.

[31] The IPT did not attribute the correct date to the witness statement of FF. The date recorded by the IPT in its decision was the date of the English translation of the statement and not the date of the statement itself. This however is of no moment and does not of itself suggest that leave should be granted to bring judicial review proceedings.

[32] A copy of the newspaper article and of the translation has been made available to us. It refers to the murder of a local Mayor and records that the suspect has been arrested. It then goes on to note that a sling bag had been found by a tricycle driver who had informed the authorities. It records what the police found when they opened the sling bag and that there was a photo in it, with a name and address on it. It says that when the authorities went to the address to verify the identity of the person shown in the photo, they were told by the housekeeper that the person had been living in the United States for more than eight years.

[33] It is not seriously arguable that the absence of a specific reference to the newspaper article in the IPT decision amounts to a reviewable error. The IPT was dealing with a broader issue — the credibility of CO’s version of events overall. It had a substantial quantity of material before it on which to make its assessment, including the newspaper article and translation. It was entitled to consider the earlier rulings it had made.³⁰ It did not need to refer in its decision to every piece of evidence that was filed.

[34] The article was of limited relevance to the claims made by CO: in particular, it did not link the bag to CO and some of the information in the article was contrary to CO’s assertion that he was the man in the photograph found in the bag. As noted, the article suggested that the person in the photograph had been living in the United States.

²⁹ IPT decision, above n 9, at [51].

³⁰ Immigration Act 2009, s 231(1)(a).

The article did not confirm any link between whoever dropped the bag and CO, nor between CO and the parties he claims to fear.

[35] Third, none of the issues raised by CO are of general and public importance. The alleged errors, even if made out, are specific to CO. They have no wider import. Nor is there any other reason apparent to us or advanced by CO, that suggests that the IPT's decision should be brought before the High Court by way of judicial review.

[36] Accordingly, even putting to one side the fact that the issues raised would more suitably be addressed by way of appeal than in judicial review proceedings, it is not appropriate to grant CO leave to commence judicial review proceedings in respect of the IPT's decision.

Result

[37] The application for leave to file judicial proceedings challenging the decision of the Immigration and Protection Tribunal is declined.

[38] The applicant must pay costs to the second respondent for a standard appeal on a band A basis with usual disbursements.

Solicitors:
Crown Law Office, Wellington for Respondents