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Appeals to the Immigration and Protection Tribunal

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1. Scope of Seminar

It was apparent when first reviewing the Immigration Act 2009 ("the Act") that the system of appeals created by it, although having its roots in the jurisdiction of the various tribunals empowered by the 1987 Act, is complex and prescribes various pathways for potential appellants. Immigration practitioners need to be familiar with all of them because this knowledge informs the options which must be presented to clients. Some features of the new regime – for instance, applications for non-refugee protection and the need to file concurrent humanitarian appeals in some situations – are new or could be overlooked to the detriment of the client.

It was felt to the useful to sketch out the jurisdiction of the Immigration and Protection Tribunal ("the IPT" or "the Tribunal") to hear appeals in respect of residence, refugee and protection matters, and liability for deportation. An attempt will be made here to demonstrate the alternatives which the legislation provides for, including the use of visual representations to assist understanding. We will eschew discussion of the classified information provisions which apply to all appeal processes, partly because these will probably not form the staple diet of immigration appeal work, and also because these were discussed in a recent seminar given by the chair of the RSAA.[1]

The material assumes some familiarity with the tests to be applied in deciding immigration appeals. A detailed examination of those tests will not be attempted here. For more rigorous discussion of the development of the present case law and definitions you are recommended to various previous Law Society seminars and *Immigration and Refugee Law* by Doug Tennent (LexisNexis, 2010).

All section references relate to the Act unless otherwise specified. "First instance" means the forum in which the decision was made from which an appeal arises, whether under the 1987 or 2009 Act. "Appeal" can refer to decisions by the IPT or by one of the previous appellate bodies.

2. Formation of the IPT

The IPT is created by s 217 2009 Act. Its functions, described at s 217(2), encompass the work of the four current immigration tribunals – the Refugee Status Appeals Authority (RSAA), the Residence Review Board (RRB), the Removal Review Authority (RRA) and the Deportation Review Tribunal (DRT). These four are collectively referred to as "appeals bodies" (Interpretation, s 4). A notable new feature is that the Chair of the IPT must be a District Court

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[1] Mackey, A, *Understanding the Classified Information Provisions of the 2009 Act*, (LexisNexis Immigration Conference 2010, PowerPoint presentation)

Judge; and in cases involving classified information all members of the IPT must be DC Judges nominated for the task (s 240(2) 2009 Act).

The IPT is to be administered by the Ministry of Justice rather than the Department of Labour (DoL currently manages the RSAA, the RRB and the RRA). In spite of the fact that the cost of establishing the IPT under Justice would be some 10% greater than keeping it within DoL, Cabinet deemed there to be greater value in the perceived independence of the Tribunal from the Government department whose decisions it was tasked to consider.[2]

The Chair of the Tribunal was recently appointed and elevated to the Bench in the person of Bill Hastings DCJ. The other members of the IPT have also now been named, many of them bringing many years of experience at the former appeals bodies to their new tasks.[3]

A salient feature of the IPT appeals system is the attempt to restrict appellants to a single forum for their appeal, rather than to have multiple opportunities to file successive appeals before various tribunals – for instance, refugee claim followed by removal appeal. This is the source of much of the complexity in the new system. In particular, practitioners must watch out for the need to file humanitarian appeals concurrent with their appeal against a decline of refugee or protection status, for instance.

3. Jurisdictional Overview

Part 7 of the Act gathers together most provisions relating to the IPT's functions. For navigation purposes the Part may be subdivided as follows:

- ss 187 – 216: types of appeal and outcome of appeals;
- ss 217 – 224: IPT empowering provisions;
- ss 225 – 244: IPT procedure, including the handling of classified information;
- ss 245 – 251: appeals from and reviews of IPT decisions (and other decisions made under the Act);
- ss 252 – 271: procedures required in proceedings (before the IPT or the Courts) involving classified information, and the use of special advocates.

It will be seen that the classes of appeals available is described before the IPT itself is introduced.

The IPT's authority extends over three broad classes of matter, which are to be found in the sections quoted below, and demonstrated in Figure 1:

1. Residence (s 187): mainly from the decline of Residence applications but also incorporating causes such as cancellation of entry permission. This was previously the responsibility of the RRB;
2. Refugee and Protection (ss 194 – 195): including cessation and cancellation of recognition of refugee or protected person status. Refugee matters were previously the responsibility of the RSAA, but protection claims represent an entirely new field;

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[2] Cabinet Paper: *Location of the Immigration and Protection Tribunal* (2008) http://www.dol.govt.nz/PDFs/tribunal-location.pdf

[3] For the full list of appointees seeADLSi *Law News* Issue 40 (29 October 2010), 2

3. Deportation: although most persons liable for deportation may appeal on humanitarian grounds (s 206), the class of people who can appeal on the facts (s 201) is more limited. This was previously the responsibility of the RRA and DRT. What used to be liability for removal under the 1987 Act is now referred to as liability for deportation.

The overall jurisdiction is set out at s 217 of the Act. Note that apart from considering appeals by individuals affected by immigration decisions, the Tribunal will hear applications by a refugee and protection officer ("RPO") to cease or cancel recognition of refugees or protected persons. The Minister may also apply for a determination whether someone has failed to meet conditions imposed by the IPT for the suspension of their liability for removal (s 212(2)).

Section 221 provides that normally all appeals will be considered by one Tribunal member. More than one member may be appointed by the Chair of the IPT in "exceptional circumstances." It is unlikely that this restriction will be applied as stiffly as it is in the context of, say, removal appeals. The same test appears in s 129N(6) of the 1987 Act for the RSAA, but in reality a fair number of refugee appeals have been heard by a panel of two or three members.

It is interesting to note that although the IPT is generally unfettered in its ability to choose in what order to hear matters scheduled before it (s 222), it "must give priority" to cases involving classified information. No such mandatory directive exists in respect of appellants in custody, clearly reflecting the philosophy behind the Act's drafting that perceived national security is more important than the rights of immigration detainees to have their status resolved expeditiously. In reality the RSAA – which has up till now has made the majority of decisions about those in detention – has been diligent to set down and decide cases for such appellants. Hopefully the IPT will exercise the same concern even though it is not compelled to do so by the Act.

Both the Immigration and Protection Tribunal Regulations 2010 and the accompanying Transitional Regulations have been passed. As these mainly address the "housekeeping" of the IPT they will not be discussed in detail here. There is however a serious issue in that the Regulations indicate that refugee and protection appellants who are also entitled to a concurrent humanitarian appeal under s 206 of the Act must pay the humanitarian appeal fee. The regulations infer that refugee/protection claimants do not pay a fee. However, any attendant humanitarian appeal would be treated as if brought under s 206 for a person liable for deportation, for which a fee is payable (Reg 15(1)(b)). The writer argues that this runs counter to the intent of the refugee and protection regime to provide access to justice to vulnerable claimants. Furthermore, many such claimants who are, for instance, in New Zealand unlawfully will have little or no financial means and would be forced to eschew the appeal right. By the operation of s 206(3) they would not be able to file a later humanitarian appeal if their claim was declined.

Oral Hearings

Under the 1987 Act residence and removal appeals were determined on the papers, while only the RSAA and DRT conducted *viva voce* hearings as a matter of course. This arrangement is largely carried over into the IPT procedure. Note however that s 233(3) allows the IPT to provide an oral hearing in respect of any other deportation scenario. This means that the Tribunal could elect to see appellants facing what we currently know as removal for being unlawfully in New Zealand.

This election is at the IPT's absolute discretion. This term is defined at s 11 of the Act and is familiar to us from s 35A applications and Ministerial special directions. It would be difficult, but not impossible, to review a decision whether or not to see such an appellant or to make it a

ground of appeal to the High Court or Court of Appeal (ss 245 – 246). The implications of "absolute discretion" have been mentioned in a previous paper by the writer.[4]

Hearings before the IPT may be inquisitorial, adversarial or a mixture of both approaches, at the Tribunal's discretion (s 218(2). Doug Tennent postulates the potential that such a choice could be reviewable in the right circumstances owing to the nature of the particular case before the IPT.[5] Normally one might interpret such terms as applying to cases involving a hearing. However, the Act imposes no such limitation. We could perhaps see situations where, for example, the IPT invites the Department of Labour to make submissions on a residence appeal, which represents a departure from the current state of affairs. Section 227 provides that the Minister of Immigration, the DoL or a refugee and protection officer are deemed to be a party to the proceedings where their decision is being appealed. No analogous provision existed in the 1987 Act.

4. Residence Appeals

The context of the IPT's jurisdiction to consider residence matters is somewhat familiar but contains some variations partly occasioned by the new visa and entry permission system and the ability to use classified information in visa decisionmaking. Government Residence Policy is now called "residence instructions". The grounds of appeal remain the same (s 187(4)):

1. That the decision was not correct in respect of residence instructions applicable at the time of application; or
2. That special circumstances warrant an exception to be made to residence instructions.

Despite the use of the subjunctive "or" the RRB has deemed both grounds to be available to all appellants. In the case of an approval under special circumstances, note that the IPT may only recommend the grant of residence to the Minister. Like s 18E of the 1987 Act, the Minister is not obliged to order the grant of residence, and need not give reasons for refusing to do so (s 190)6)).

Section 187(1) and (2) of the Act delineates who may appeal from "decisions concerning" residence visas – that is, including a decision other than a straight residence application decline. One can appeal against:

- a standard residence visa decision by an immigration officer;
- cancellation of a resident visa for a person outside New Zealand if their circumstances have changed so that they no longer qualify under the residence instructions applicable when they applied. This is a new feature of the Act and would argue in favour of a person using their visa to enter New Zealand as fast as possible; and
- a refusal to grant entry permission upon arrival at the border. This can happen to a resident visa holder outside New Zealand who tries to enter for the first time. The effect of s 108 is that entry permission can be refused if the person does not satisfy the residence instructions at the time of entry. Also note s 190(2)(b) - if the IPT has directed the grant of residence owing to incorrect application of residence instructions or because new information has come to light which the appellant could not get at the time of decline, an entry permission

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[4] Laurent, S, *A Roadmap for the Immigration Act 2009* (August 2010)

[5] Tennent, D, *Immigration and Refugee Law* (2010, LexisNexis), 291

may still be refused if the person does not satisfy whatever residence instructions were effective both at the time of their original application *and* at the time that they try to enter. That is, if INZ discovers further information which shows that the person is in breach of residence instructions, that person could be turned around at the airport. They cannot get a temporary visa to remain and appeal, unlike those who might be refused entry for not having supplied all the documents which INZ requires (s 190(3)).

One may not appeal against:

- a refusal to grant a residence visa or entry permission to a person excluded by ss 15 – 16 (what used to be known as "section 7 people" under the 1987 Act);
- a refusal "or failure" to issue an invitation to apply ("ITA") – e.g., under Skilled Migrant instructions);
- decline of residence of a person issued an ITA because they provided false information or concealed information in their Expression of Interest, or didn't advise of a change in circumstances after the ITA was issued. This replicates s 34G of the 1987 Act;
- lapsing of a residence application or an Expression of Interest, recalling the infamous s 6 Immigration Amendment Act 2003; and
- revocation of an ITA pursuant to s 94(5). The decision to revoke is a matter of discretion (s 95(2) but is not a matter of absolute discretion, so that the reasons for the revocation can be impugned.

In addition, no decision by the Minister not to grant residence may be appealed to the IPT unless classified information was used to make the decision. As a result, if the IPT recommends grant of residence to the Minister and the Minister declines to grant the visa, then the affected person cannot normally appeal that decision to the IPT and must start a fresh application.

The IPT's powers to determine residence appeals at s 188(1)(a) – (f) mirror s 18D(1)(a) – (f) of the 1987 Act and will not be rehearsed here. Other procedural matters in respect of residence appeal determination are similarly unexceptional.

5. Refugee and Protection Appeals

The Act distinguishes between recognition as a refugee under the UN Convention Relating to the Status of Refugees, and recognition as a "protected person" under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT). As will be discussed elsewhere in this seminar, claims to be a refugee or protected person are both determined by a refugee and protection officer ("RPO"). In this paper "protection" is distinguished from "refugee status".

The IPT hears appeals from those claims, as well as applications from RPOs to cease to recognise or to cancel refugee and protection status (s 217(2)(b)). Bear in mind that "claim" under the Act specifically refers to an application for refugee or protection status, and not to cessation or cancellation proceedings.

The rights of appeal against most decisions concerning refugee/protection status are set out at s 194 of the Act. Appeals in respect of subsequent claims for recognition are separately treated under s 195, reflecting the particular pathway for such matters. Sections 196 – 200 describe how the IPT determines the different types of appeal arising under this part of the jurisdiction. Section 198(1) is particularly significant as it represents the method of determination of ordinary

claims for recognition, and such variants as subsequent claims default to this position once the IPT is satisfied that there are no issues of bad faith, manifest unfoundedness etc..

The criteria for applications for refugee and/or protection status are dealt with in detail in Peter Moses' paper forming part of this seminar. Here we will pick up on specific aspects of the appeal process which are novel or present complexity.

Concurrent Humanitarian Appeals

Refugee and protection appellants who are liable for deportation for whatever reason – e.g., being unlawfully in New Zealand or deemed to have acquired residence or citizenship by fraud – have a right to a humanitarian appeal against deportation under s 206. It is vital to keep in mind that they must file the humanitarian appeal at the same time as the refugee/protection appeal (s 194(6). Less obvious but perhaps even more important is that, according to s 194(5), any refugee/protection appellant who may become liable for deportation in the future must also file their humanitarian appeal with the refugee/protection appeal as well – even if they are not liable for deportation at the time. So, for instance, a person on a temporary visa under s 150 (analogous to s 129U in the 1987 Act) will lose that visa if their refugee/protection appeal is declined, and thus only become liable for deportation after the IPT has dismissed their Convention case.

If their refugee/protection matter succeeds on its own merits then the IPT can dispense with the humanitarian case. However, if they do not file the humanitarian appeal simultaneously they cannot later file such an appeal at all. This prohibition is underscored by both s 194(7) and s 206(3)(a).

Peter Moses has pointed out that many spontaneous claimants could lose such a right simply through the mechanism of the Act. If they are refused a visa at the border they are deemed to be unlawful from the date of arrival. Section 154(2) provides that they are only entitled to a humanitarian appeal for 42 days. However, if their first instance claim has not been determined within that time frame they lose the entitlement before they can even file the appeal. Furthermore, they cannot later institute a humanitarian appeal because of s 194(7) and s 206(3)(a).

Protection Appeals

A claimant at first instance for refugee status only, or a claimant for protection status only, will have their claim considered under all three of the criteria for UN Convention protection – the Refugee Convention, Articles 6 and 7 of the ICCPR and Article 3 of the CAT (s 137). It is important to note that, according to s 137(5)(b), a RPO must determine whether to recognise the person under all 3 of these Conventions, even if the claim was lodged under one or two of them. This means that the RPO's decision must explicitly address eligibility under all three instruments.

As a corollary, a claimant who is recognised under, say, the CAT only but not recognised under the Refugee Convention or the ICCPR may appeal against those refusals to recognise them to the IPT (s 194(1)(c)). This may well be worth doing in at least some circumstances. For instance, it would be valuable for a person recognised only as a refugee to get recognition under the ICCPR or the CAT. Owing to a change in circumstances in the home country, New Zealand could choose to cease to recognise their refugee status because their nexus to a Convention ground (e.g. a political opinion adverse to the ruling regime) has evaporated. Nevertheless, conditions in that country might still be bad enough that being forced to return there would expose them to the risk of "cruel treatment".

As with determination of a claim by a RPO, the IPT must determine any refugee or protection claim in the following order (s 198(1)(b)):

A. Refugee Convention

B. Convention Against Torture

C. ICCPR

Doug Tennent argues[6] that one justification for this order of determination is that, because the evidential threshold for refugee recognition (often termed the "real chance" test) is lower than that for ICCPR or CAT recognition ("substantial grounds for believing . . .") people whose situation best accords with refugee protection should be accorded that more focused status, rather than simply acquiring protection for membership of a wider class of persons subject to more general risks. This could also explain the primacy of the CAT over the ICCPR, as the risk of torture is more specific than that of a general threat of arbitrary deprivation of life or cruel treatment for whatever reason.

Refusal to Consider

The Act introduces what has sometimes been called a two-stage enquiry at first instance, whereby a RPO may refuse to accept a claim for consideration even before making substantive findings about the claim. According to s 134 (see Figure 2) a RPO:

- may refuse to accept a claim where the person might have claimed refugee/protection status in another country which has a reciprocal agreement in respect of such claimants. No such agreements with New Zealand yet exist, but they would likely be modeled on the EU "safe third country" protocols;
- must refuse to accept a claim where the officer is "satisfied" that an aspect of the claim was manufactured by the claimant for the purposes of making the claim (the "bad faith" provision).

The claimant can appeal under s 194(1)(a) or (b) respectively, and the IPT's determination of these appeals is governed by ss 196 and 197 respectively. If the IPT upholds the appeal then the matter goes back to a RPO who must consider the claim under s 137 (i.e., they cannot repeat the refusal to consider cycle).

If on the other hand the claim fails at appeal, and the claimant has filed a concurrent humanitarian appeal, the IPT must then move on to assessing that aspect of the appeal.

Subsequent Claims

. . . for refugee or protection status can only succeed if "there has been a significant change in circumstances material to the claim since the previous claim was determined." This is derived from the existing test for subsequent refugee claims, but has lost the requirement that the change had occurred "in the claimant's home country" (s 129J of the 1987 Act).

There is a similar feel to how refusals to consider first claims are dealt with, which is why a representation of the processes is set out also at Figure 2. Handling of subsequent claims by a RPO is governed by s 140. The rights of appeal are set out at s 195, and the IPT's procedure on determining subsequent claims is found at s 200. A RPO assessing such a claim at first instance:

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[6] Tennent supra at n 5, 263

- (s 140(1)) must refuse to consider it if the RPO finds that the claimant acted in bad faith in making the claim (redolent of s 134(3) referred to above). In that case one may appeal under s 195(1)(a) in all cases. Before moving to assess the claim itself the IPT must decide whether there has been a sufficient change of circumstances and whether the appellant tried to manufacture the claim (s 200(1));
- (s 140(3)) may refuse to consider the claim if "satisfied" that the claim was manifestly unfounded or abusive; or if it merely repeats the grounds of a previous claim (sometimes paraphrased as an "MU claim"). In the case one may appeal under s 195(1)(b) but only if one's first claim (i.e., prior to the subsequent claim) was determined under the 1987 Act. Before moving to assess the claim itself the IPT must first assess whether this is a MU claim.

If on the other hand the RPO agreed to consider the claim as usual right from the outset, then if it is declined the IPT must assess it under s 198(1) as if it had not been a subsequent claim. That is, once a RPO has determined that there had been a material change of circumstances, the IPT does not appear to have jurisdiction to reopen that enquiry, but merely to proceed to determine the substantive issue of risk of persecution, death or mistreatment.

Cessation

This is a decision that the grounds upon which a person claimed refugee or protection status no longer apply. This could be because of a change of personal circumstances or of circumstances in the home country, or because a refugee has taken up the protection of their country again. New Zealand has hardly, if ever, applied Article 1C of the Refugee Convention to take away refugee status.

Cessation starts with a RPO making a determination – the IPT has no jurisdiction to initiate either cessation or cancellation enquiries. The applicable mechanism depends on where recognition was awarded in the first place. If this happened at first instance then an RPO may determine cessation (s 143). A right of appeal arises under s 194(1)(d). On the other hand, if recognition was acquired on appeal then the RPO must apply directly to the IPT for a determination (s 144).

No concurrent humanitarian appeal may be made by someone facing cessation of refugee or protected status. This is no doubt because if the appellant fails in their appeal they do not become liable for deportation. No fault is attached to the claimant for ceasing to be recognised – unlike the case of cancellation.

Cancellation

. . . of refugee or protection status arises where it is determined that either (s 145(b)):

- the original approval "may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information"; or
- the person has been convicted of having thus procured that status; or
- a proper assessment of whether the person should have been excluded from refugee status may not have been possible "for any reason" including fraud etc..

Significant resources of the Department of Labour have been devoted over the last few years to uncovering falsely acquired claims. It is predicted that attempts to cancel refugee and protection status will continue apace, which makes it important for practitioners to understand this field.

Once again, cancellation can only be initiated by a RPO. However, unlike cessation the process to be followed depends on whether the "affected person" is a citizen or a non-citizen. See Figures 3 and 4.

For citizens whose claim first succeeded at appeal, the RPO must apply directly to the IPT for a determination (s 147). For citizens approved at first instance the RPO may confirm cancellation (s 145), which then invokes a right of appeal per s 194(1)(e). In either case, no humanitarian appeal is available because even if the person loses their status they still retain citizenship. However, once refugee or protection status is cancelled that is only the start of the story because it is then likely that Internal Affairs would initiate deprivation of citizenship under s 17 Citizenship Act 1977, by arguing that citizenship was indirectly procured through fraud, misrepresentation or "willful concealment of relevant information". Internal Affairs faces a theoretical problem in that they would have to rely on the finding that refugee/protection status "*may have been* procured" to run to a determination that it "*was* procured". To the writer's knowledge there is no case law on this topic.

Having lost citizenship the person reacquires a residence visa (not a permanent residence visa) under s 75 of the Act; but they are now liable for deportation under s 158(2)(a). The appeal rights attaching to this status are referred to later in this paper.

For non-citizens (who may be residents or temporary visa holders) the route is much more direct. Whether their refugee or protection status was acquired at first instance or appeal, this may be cancelled by a RPO per s 146 for the same reasons as enumerated above from s 145(b). This grants them the right of appeal against the cancellation decision under s 194(1)(e), and at the same time makes them liable for deportation under s 162. If the person was convicted of an offence for acquiring their status by fraud etc. they may only appeal on humanitarian grounds (s 206). The rationale is presumably that a Court has already found as a fact that their status was unjustly acquired and the IPT may not relitigate the matter. In any other case they can appeal both on humanitarian grounds and on the facts (s 201).

When considering an appeal under s 194(e) against cancellation, the IPT goes through a two-stage enquiry similar to that before the RSAA at present (s 198(2)):

- assess *de novo* whether refugee/protection status may have been procured by fraud etc., or whether fraud etc. may have hampered assessment of whether a refugee should have been excluded from recognition. This assessment is not available if the person was already convicted of having fraudulently obtained their status, because the IPT may not relitigate the decision of a superior Court; then
- assess whether the person now is entitled to protection under the Refugee Convention, the CAT or the ICCPR (in that order); and whether they should be excluded from protection for having committed war crimes etc..

The Act does not specify that the second part of the determination is not necessary if cancellation is reversed. In reality, if the IPT finds in favour of the appellant in respect of cancellation, this would render the second assessment nugatory. However, an appellant who originally only had refugee status – and who retained it - could technically insist on the IPT determining his or her eligibility under the ICCPR and the CAT, as a form of insurance against possible future loss of refugee status (through cessation, for inistance).

It will be seen that people recognised as refugees under the old Act and who lose their status by cancellation could in fact acquire a more comprehensive form of recognition under the other Conventions.

6. Deportation Appeals

Liability for deportation arises in many different ways, which are set out at ss 154 – 163 of the Act. This includes what was known as liability for removal – i.e., being unlawfully in New Zealand (s 154). All people liable for deportation have some right of appeal except those whom the Minister determines to pose a "threat or risk to security" under s 163. That person faces summary removal unless the Governor-General revokes the Order in Council which ordered their deportation.

The key issue to be addressed when advising a client about appealing against deportation is whether they can appeal on both the facts and on humanitarian grounds, or on humanitarian grounds only. The options available are set out in Figure 5. What "on the facts" and "humanitarian grounds" mean will be addressed below.

The next distinguishing feature is the right to an oral hearing. Holders of residence class visas may have an oral hearing as of right, carrying over the current jurisdiction of the DRT. People who have a concurrent claim about refugee or protection status will usually be accorded a hearing for that assessment, so that they too will have their humanitarian appeal considered *viva voce*.

Appeal on the Facts

Section 202 sets out the standard of proof to be met to succeed on deportation appeals where appeals on the facts can be run. In almost all cases the IPT must be "satisfied, on the balance of probabilities" that the circumstance triggering deportation does not exist.

This formula appears to have sprung from the requirement in s 105(1) of the 1987 Act that the DRT be "satisfied" that it would be unjust or unduly harsh to deport. The balance of probabilities qualification was no doubt inserted to resolve the problem of onus of proof traversed in *Faavae* where Anderson J ruled that:

- the term "satisfied" was deliberately inserted to avoid the introduction of any concepts of burden of proof either for or against the appellant, or different standards of proof; and
- the balance of probabilities, being the civil standard, was appropriate.[7]

The insertion of the "balance of probabilities" qualification is fortunate in order to caution the IPT against viewing the need to be satisfied as a "significant obligation" as recently stated by the Supreme Court in the resource management field,[8] and thus falling back into the trap identified in *Faavae* of starting with the presumption that someone facing deportation should be deported.

Interestingly, the wording changes in the case of deportation arising out of cancellation of refugee/protection status to require that the IPT is "not satisfied" that, for instance, recognition "may not have been procured . . ." The use of the double negative in fact reduces the burden of proof placed on the appellant. Otherwise, the appellant could only succeed if the Tribunal was satisfied that refugee/protection status "may not have been procured" by fraud etc.. This would in many cases impose a standard of proof disproportionate to that available to an RPO in seeking to cancel their status in the first place.

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[7] *Faavae v Minister of Immigration* [1996] 2 NZLR 243

[8] *Westfield New Zelaand Ltd v North Shore City Council* [2005] 2 NZLR 597

Appeal on Humanitarian Grounds

The test for succeeding in a humanitarian appeal imports the well-known formula that:

- there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and
- it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

Again, the IPT must be "satisfied" as to these matters, a qualification that was not present in the s 47(3) test for humanitarian appeals to the RRA. On the other hand, appeals to the DRT in the light of criminal offending did not have to cross the "exceptional circumstances" threshold, which used to be characterized as requiring a situation that was "abnormal" or "rare". Doug Tennent points out that a deportee who is a Resident may be able to point to a number of factors such as the settlement of their family in New Zealand, the effect of separation and so on which might more readily be found to be exceptional than in the case of someone unlawfully in New Zealand.[9] Even though the Supreme Court in *Ye* has more recently characterized "exceptional circumstances" as "truly the exception rather than the rule"[10] rather than meaning "abnormal" or "rare", the writer suggests that from now on Residents facing deportation will find it even harder to succeed on such appeals than they did before.

7. Appeal from and Review of IPT Decisions

All IPT decisions may be appealed to the High Court under s 245 for being "erroneous in point of law". This term may be familiar to those who practise in judicial review circles but it is worth reciting a summary of what "point of law" means:

> This Court will interfere with the decisions of the Tribunal only if it considers that the Tribunal.
>
> - applied a wrong legal test, or
> - came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
> - took into account matters which it should not have taken into account, or
> - failed to take into account matters which it should have taken into account.
>
> . . . Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise.
>
> . . . Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief.[11]

However, in a dramatic departure from the 1987 Act, one must first obtain leave to appeal from the High Court. If leave is denied then s 246 allows one to apply for leave to the Court of Appeal. In order to grant leave either Court must establish if the appeal raises issues of "general or public importance" or "for any other reason" such that the appeal should be brought. The writer has concern that leave may often be refused because the appellant cannot demonstrate any public interest aspect in their case. The latter catch-all provision of "for any other reason" may allow flexibility for the Court to hear the matter, in what otherwise appears to be a major curtailment of the appeal right.

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[9] Tennent supra at n 5, 391 - 395

[10] *Ye & Ors v Minister of Immigration* [2009] NZSC 76 at [34]

[11] *Countdown Properties (Northland) Ltd v Dunedin City Council* (1994) NZRMA 145 at 153

What the new Act takes with one hand, it gives with the other. Recent case law indicates that under the 1987 Act it was unwise to eschew the statutory right of appeal against a decision of the RRB in favour of going straight to review – even though an appeal on a question of law from the RRB may in fact largely equate to grounds for review. This is because of the prohibition on review proceedings against residence appeal decisions under s 10(3) of the 1987 Act.[12] On the other hand, it was always possible (and advisable) to file concurrent appeal and review proceedings against RRA and DRT decisions. Section 247 of the 2009 Act implies that all IPT decisions may be reviewable, and provides that any such concurrent appeal and review must be brought at the same time.

In reality, filing the appeal and review would be necessary because the deadline for filing a High Court appeal under s 245 is 28 days from the date of notification of the IPT decision, which is the same period available for filing a review. Note the drastic reduction from the 3-month time limit for filing review proceedings under s 146A of the 1987 Act. Practitioners considering appeal or review must act even more swiftly than usual in order to exercise such rights on behalf of their clients.

Because of the "general or public importance" limitation placed on s 245 – 246 appeals, simultaneous judicial review applications should be *de rigeur* in all cases. Unlike the old proviso that the decision on any High Court appeal from a DRT decision was final (s 117 of the 1987 Act), there is no restriction on appealing against a High Court or Court of Appeal decision under the new Act except those imposed by Court procedure. Still, judicial review offers an unfettered ability to attack IPT decisions that disclose a procedural defect.

Having said this, privative clauses at s 187(8) prevents judicial review of decisions:

- to decline residence to an applicant outside New Zealand (s 187(8)(a);
- cancellation of a residence visa before the person first arrives in New Zealand (s 187(8)(b); and
- refusal or failure to issue an ITA (s 191(2).

8. Transitional Provisions

. . . specific to the IPT are found at ss 446 – 449 of the Act. The burden of these provisions is that people who have a right of appeal to, or have not had their appeal determined by, one of the former appeal bodies, the IPT must exercise the jurisdiction of the applicable appeal body to determine their case as if the old Act still applied. The exception is refugee appellants who have a right of appeal to the RSAA at 29 November 2010 or have not yet had their appeal determined. Because of the introduction of complementary protection under the ICCPR and the CAT, the IPT must assess those refugee appeals as both refugee and protection appeals. This is done in order to remove the opportunity to commence a separate protection application and appeal if the IPT declines the appeal.

The Act also seeks, by way of a catch-all in the shape of s 453, to prevent anyone making further appeals under the 2009 Act which were already litigated, or could have been litigated, under the 1987 Act.

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[12] *Phan v Minister of Immigration* [2010] NZAR 607

Figure 1

Types of IPT Appeals

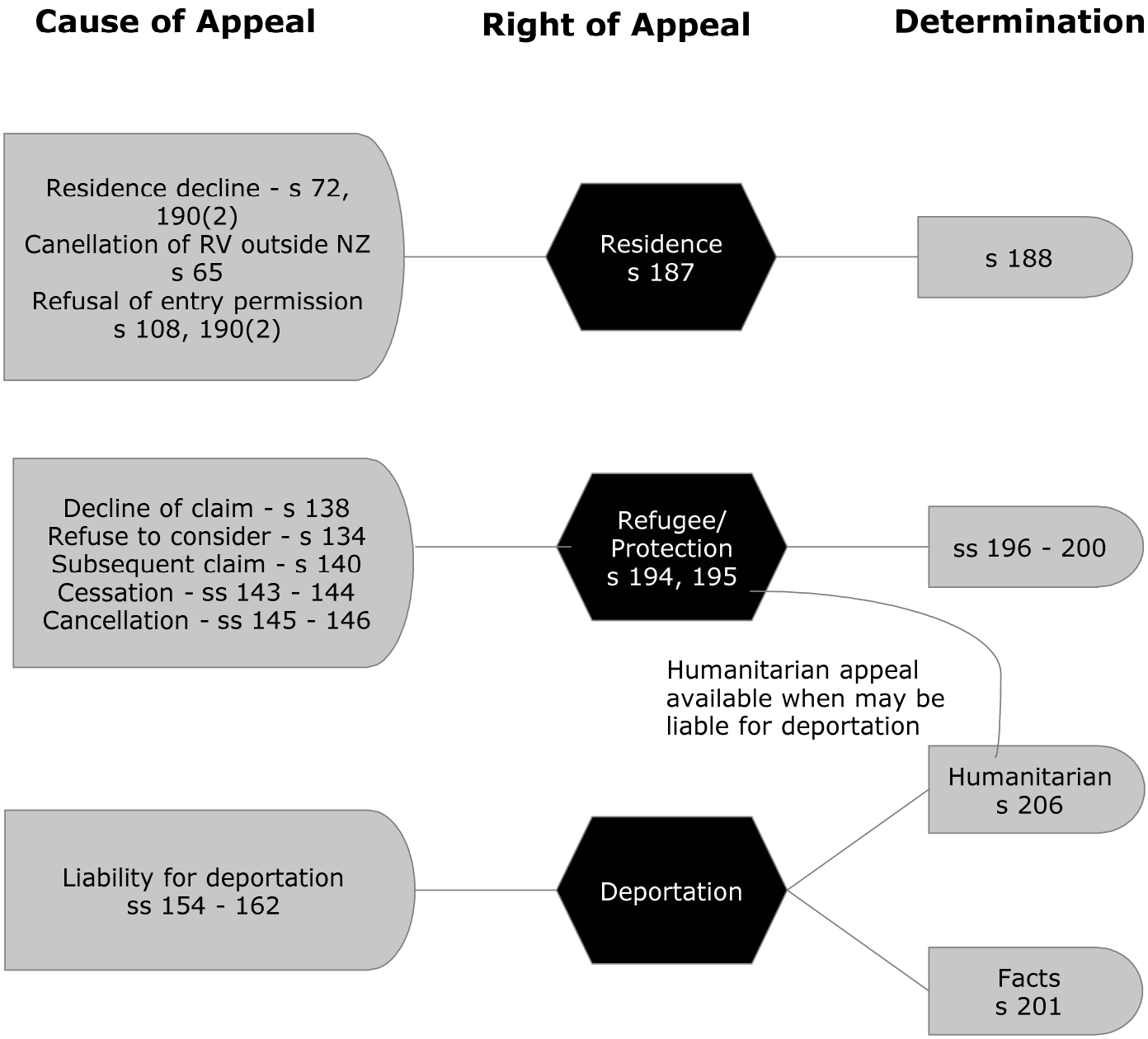
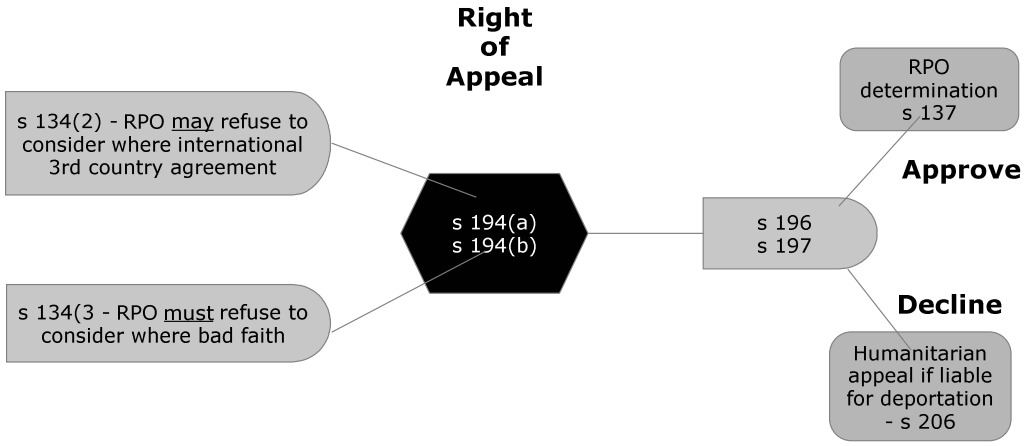


Figure 2

Refugee/Protection - Refusal to Consider Claims



Refusal to Consider Subsequent Claims

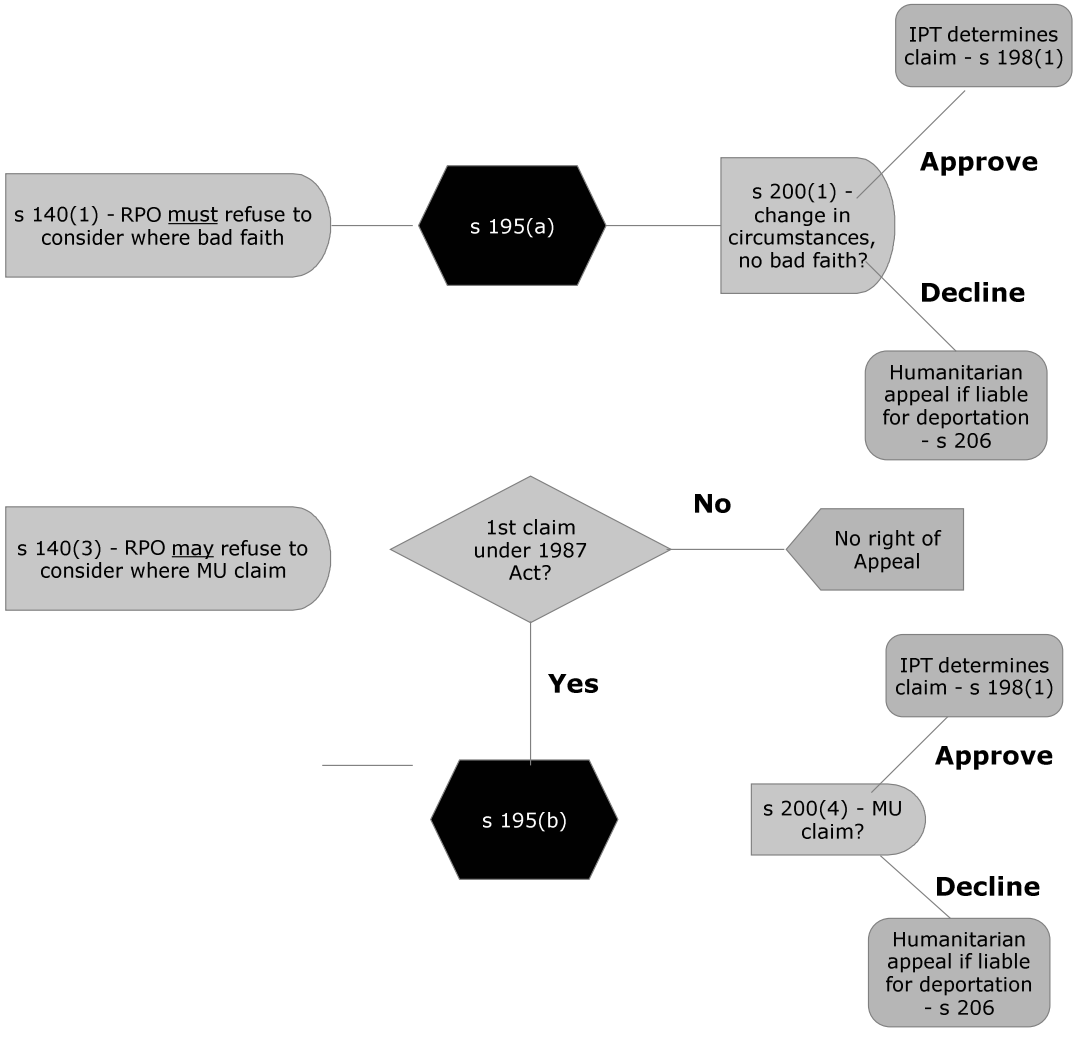


Figure 3

Refugee/Protection - Cancellation for Citizen

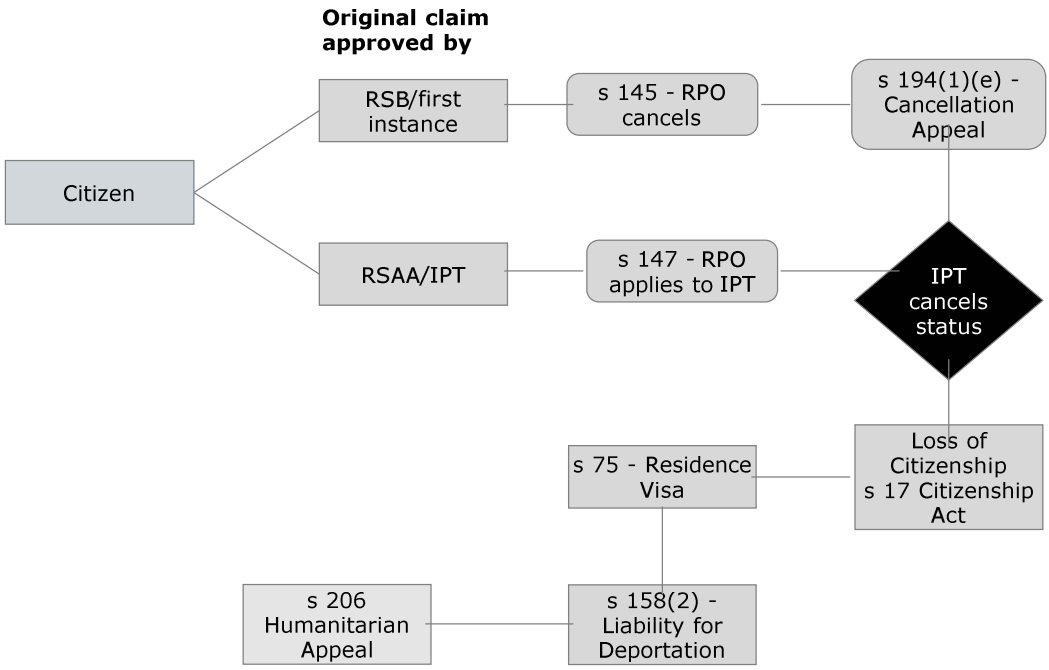


Figure 4

Refugee/Protection - Cancellation for Non-Citizen

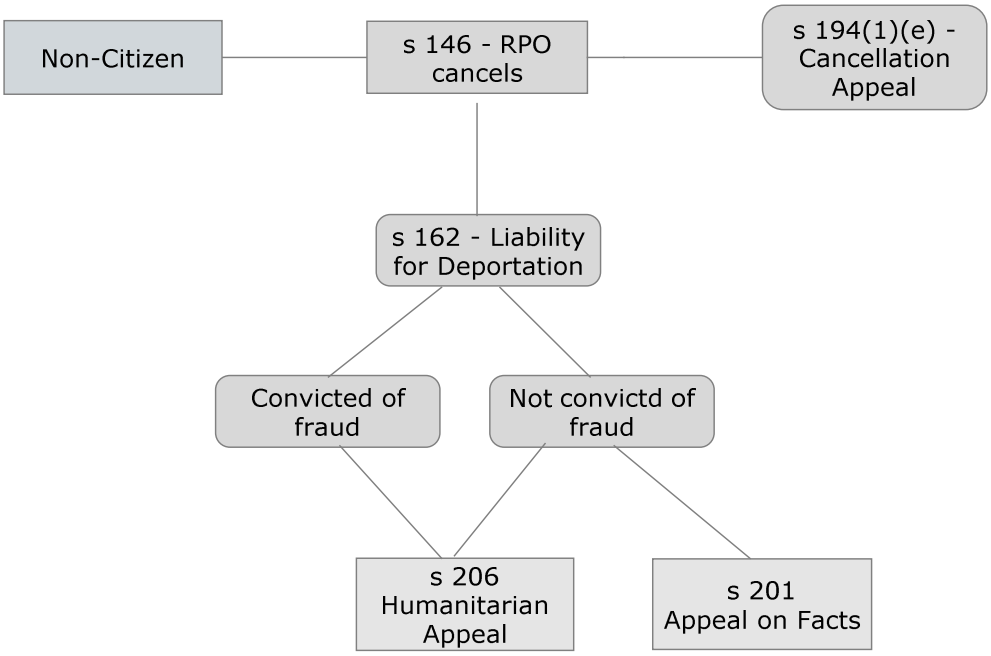


Figure 5 - Deportation Appeal Rights				
Section	**Subs**	**Liability for Deportation**	**Appeal on Facts**	**Humanit.**
154		Unlawfully in New Zealand		☺
155		Visa granted in error	☺	☺
156		Visa held under false identity		
	(1)(a)	- identity different to that shown on visa		☺
	(1)(b)	- Minister determines false identity	☺	☺
157		Temporary visa holder - for cause		☺
158		Residence visa holder - fraud		
	(1)(a)	- convicted for getting visa by fraud		☺
	(1)(b)	- Minister determines visa got by fraud	☺	☺
	(2)	- Citizenship revoked for fraud		☺
159		Residence visa condition breached (if not permanent resident)	☺	☺
160		Residence visa - new character information	☺	☺
161		Residence visa - convicted of offence		☺
162		Refugee or protection status cancelled for non-citizen		
	(2)(a)	- convicted of getting recognition by fraud etc.		☺
	(2)(b)	- may have procured status by fraud etc.	☺	☺
163		Persons threatening security	**X**	**X**