NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME OF APPELLANT OR IDENTIFYING PARTICULARS REMAINS IN FORCE

IN THE COURT OF APPEAL OF NEW ZEALAND

CA565/2007
[2009] NZCA 490

BETWEEN	M A Appellant
AND	THE ATTORNEY GENERAL First Respondent
AND	A REFUGEE STATUS OFFICER Second Respondent

Hearing:	14 May 2009
Court:	O'Regan, Arnold and Baragwanath JJ
Counsel:	R J Hooker for Appellant I C Carter and E J Watt for First Respondent Second Respondent abides decision of the Court
Judgment:	20 October 2009 at 2.30pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B We will receive memoranda as to costs.

REASONS OF THE COURT

(Given by Baragwanath J)

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[1] On his arrival in New Zealand in 1995, the appellant claimed and was granted recognition of status as a refugee. Five years later when his home was searched by Police they found documents inconsistent with the account he gave when claiming refugee status. In the High Court, Priestley J held that a refugee status officer was entitled to use those documents when determining whether the recognition decision was properly made and whether to withdraw the appellant's recognition as a refugee. That decision is challenged on appeal.

Legal context

[2] Refugee status is conferred not by New Zealand law but by the Convention Relating to the Status of Refugees (1951) 189 UNTS 150, as modified by the 1967 protocol (the Refugee Convention), to which New Zealand has acceded. New Zealand domestic law, expressed in the Immigration Act 1987, contains procedures for recognising status under the Refugee Convention as a refugee and for withdrawing such recognition. The process of recognition is by an applicant's claim under s 129G to refugee status and the determination of that status under s 129F by a refugee status officer. It is likewise the function of a refugee status officer under s 129L to determine whether the recognition decision was properly made and, if not, to determine to cease the recognition. It will be apparent that the determination

finding a person is a refugee, carried out under s 129F, is purely declaratory of that person's position at international law.

Factual context

[3] The appellant was born in Afghanistan. Upon his arrival in New Zealand, he claimed to satisfy the definition of refugee in art 1A(2) of the Refugee Convention: that:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [he was] outside the country of his nationality and … unable or, owing to such fear, … unwilling to avail himself of the protection of that country…

[4] He supported the application with a circumstantial account of the facts said to justify the claim which was then accepted by a refugee status officer.

[5] On each of 13 March and 19 April 2000 the Police performed a search, claimed to be under two separate warrants, of his home. The operation involved as well the New Zealand Immigration Service, the New Zealand Security Intelligence Service and various foreign agencies including Australian law enforcement personnel.

[6] Among documents seized were:

(a) a road map of Sydney marking an apparent anti-surveillance route across the city and as well the nuclear reactor at Lucas Heights;

(b) papers relevant to the 1995 claim to refugee status;

(c) others, some coming into existence after 1995, which appeared inconsistent with the account given by the appellant when making the refugee status claim.

[7] On the day of each search the appellant was interviewed. The second interview was recorded on video. Following analysis by the Police of the documents and the transcripts of interview, an information was laid against the appellant under

s 229A of the Crimes Act 1961, alleging use of his application for refugee status with intent to defraud. He was committed for trial. Difficulties of proof and concern at public disquiet about the case following the events of 11 September 2001 led the Crown to elect to offer no evidence and on 5 November 2001 the appellant was discharged under s 347 of the Crimes Act.

[8] The Police then passed the documents, transcripts of interview and analysis to the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS).

[9] The appellant's claim for refugee status had asserted a well-grounded fear of persecution by the Mujahideen, the Afghan resistance army. On 16 January 2006 the appellant was served by the second respondent with a notice of intended determination of revocation of refugee status which challenged the truth of that claim. It recited the documents found in the search and the grounds of the NZIS assessment that the appellant's statements to the RSB may have been false. They included:

(a) a CV stating a very different employment history from that asserted to the RSB;

(b) letters inconsistent with his claim to have been married and that his wife and children had been killed;

(c) an Afghan driving licence issued in Kabul after the date the appellant had said he left that city;

(d) a letter inconsistent with his claim to have been hiding from the Mujahideen for four years;

(e) a Pakistani driving licence issued in Peshawar which contradicted his claim that he had never lived there and could not do so because it was a base for Mujahideen; whereas he had claimed that he was wanted by the Mujahideen for being a supporter of the former president.

The notice stated:

> You were granted refugee status in New Zealand, on the grounds that you had a well-founded fear of persecution by the Mujahideen in Afghanistan, due to your political background. Given the above evidence, it would appear that the basis of your refugee claim as presented to the RSB was false. You were neither a member of the Najibullah government's security militia, nor does it appear you ever feared persecution by the Mujahideen.
>
> Accordingly, the evidence listed above indicates that the RSB decision to recognise you as a refugee may have been improperly made.

[10] That notice triggered the present claim against the present respondents asserting, insofar as of present relevance, that:

(a) the Police had no valid warrant to search the appellant's home on 13 March 2000;

(b) the papers seized by the police, which included documents provided to the appellant by a refugee advisor, were protected by litigation privilege and their seizure was unlawful;

(c) in passing the seized papers and the transcripts of interview on to NZIS the police acted unlawfully.

It sought declaratory and injunctive relief.

The decision of the High Court

[11] Although the original warrant and any court file containing the documentation leading to its issue were missing, on the unchallenged evidence of a former senior sergeant of police Priestley J rejected the appellant's claim that no such documents existed. The Judge rejected the claim to privilege. He further rejected the challenge to the police conduct in handing the documents to NZIS. And he found there was no breach of natural justice. He therefore dismissed the proceeding.

Issues on appeal

[12] The parties agreed that the issues are now:

First Issue – The Search of the Appellant's Home

2. Was the High Court correct to find that the District Court in Wellington had on the 11th of March 2000 issued to the Police a search warrant?

   2.1 Was the Judge correct to hold that a "presumption of validity exists"?

   2.2 Where the Police had conducted a search of the Appellant's home and seized documents, is the onus on the Appellant to establish on the balance of probabilities that the Police did not have a warrant?

Second Issue – Litigation Privilege

3. Did the common law of litigation privilege apply to the communications between the Appellant and Refugee Migrant Services (RMS) where the RMS is advising and representing the refugee in his claim for refugee status with the result that the communications may not be searched under a search warrant?

4. Is litigation privilege restricted to those categories set out in the Evidence Act 2006?

Third Issue

5. Were the actions of the Police in handing documents seized from the Appellant's house to NZIS lawful?

   5.1 Was the disclosure in breach of s 199 of the Summary Proceedings Act 1957?

   5.2 Was the disclosure authorised by Principle 11 of the Privacy Act 1993?

   5.3 If the answer to 5.2 is no, is a defence of public interest (on iniquity) available in these circumstances?

Issue 1: the search warrant

[13] The appellant deposed that on 13 March 2000 the Police went to his home and gave him a copy of the search warrant they said they had obtained from the Court on 11 March. He said he had never seen the original and that a Deputy Registrar of the Wellington District Court had made a thorough search for

the original of the application and any supporting evidence but had been unable to locate such documents. He believed that no application was made and no warrant issued.

[14] The Crown formally admitted that it did not have in its possession a duly signed search warrant and that an extensive search of the Wellington District Court files did not locate the search warrant application or evidence.

[15] Former Senior Sergeant Turley filed an affidavit stating:

> I sought and obtained a number of search warrants…

A photocopy of the initial warrant was produced to the Court. He said further:

> I confirm that I provided the documents seized under the search warrants on 11 [sic] March 2000 and 19 April 2000, as well as the video interview transcript, to NZIS.

[16] Mr Turley deposed to obtaining the warrant and vouched for what occurred during the search. He was the witness who could have responded to questions about whether a warrant existed and if so what was its provenance. Because an invalid warrant may not be executed, it was necessarily implicit in his evidence that the warrant which was executed was valid. But he was not called for cross-examination.

[17] We agree with Priestley J that, having declined to challenge the officer, Mr Hooker cannot now be permitted to argue either that there was no warrant or that it had not been issued by a Registrar. The Judge was quite right to hold that in such circumstances a presumption of validity exists: *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA). No question of onus of proof arises.

[18] We add that the statement of claim pleads that a search was undertaken under the 11 March 2000 warrant, and even quotes it. That is admitted in the statement of defence. Mr Hooker responded to this point by submitting that the relevant paragraphs of the statement of claim relate only to the second cause of action and not the first. But even in relation to the first cause of action the pleading asserts that the police produced to the appellant a document purporting to be a copy of a search

warrant issued in Wellington on 11 March 2000. The statement of defence admits that the police executed a search warrant at the appellant's home.

Issue 2: Litigation privilege

[19] The appellant claimed privilege for documents seized during the search. They included a statement, which he said was prepared for the purpose of his claim for refugee status. It contained on each page a statement that the information was provided:

> **IN CONFIDENCE**.

The Refugee Status Section form contained the statement:

> **Confidentiality**. We want to assure you that everything you say will be kept confidential. Nothing will be released to a third party without your prior permission and consent.

The appellant filed an affidavit of Ms Laurent, former Regional Co-ordinator of a non-governmental organisation called the "Refugee Status Office of the Refugee Status and Migrant Service Auckland". Her practice was to assist claimants and to arrange for them to see lawyers, who would assist them in presenting their claims for refugee status. She described herself as "part of the confidentiality which applied" to preparation of a statement for presentation to the lawyer.

[20] It is necessary to distinguish between the two sub-heads of legal professional privilege. It is not clear from the appellant's submissions the head under which he claimed privilege. In *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 at [105] (HL) Lord Carswell said:

> the cases establish that, so far from legal advice privilege being an outgrowth and extension of litigation privilege, legal professional privilege is a single integral privilege, whose sub-heads are legal advice privilege and litigation privilege, and that it is litigation privilege which is restricted to proceedings in a court of law

Legal advice privilege attaches to information which passes between a lawyer and client for the purpose of giving and receiving legal advice. It is available only in relation to legal advice given by a lawyer, for the reasons given by the

Law Commission in its report *Evidence Volume 1: Reform of the Law* (NZLC R55 1999) at [252]-[254] and by the Chief Justice in *Auckland District Law Society v B* [2002] 1 NZLR 721 at [1] (CA), upheld by the Privy Council on appeal in *B v Auckland District Law Society* [2004] 1 NZLR 326. Since the point is not essential to our decision it is unnecessary to develop it. We are prepared to assume, without deciding, that such intermediary involvement so constituted Ms Laurent as the appellant's agent to communicate with his legal advisor as was sufficient to attract legal advice privilege for the statement.

[21] Litigation privilege on the other hand attaches to communications between a client or the client's lawyer and a third party for the purposes of litigation, actual or anticipated (see Thanki *The Law of Privilege* (2006) at [1.08] for a discussion of the differences between the two sub-heads of legal professional privilege). Since none of the seized material was prepared in anticipation of litigation, litigation privilege cannot apply.

[22] The appellant's primary argument on what appeared to be a legal advice privilege point was based on the common law because the search occurred in 2000, before the Evidence Act 2006 came into force on 1 August 2007. But the common law affords no protection if the defence of iniquity is made out. It was stated by McMullin J in *Attorney General for United Kingdom v Wellington Newspapers* [1988] 1 NZLR 129 at 178 (CA):

> Iniquity is not limited to the proposed … commission of crimes or civil wrongs. It extends to crimes, frauds and misdeeds, committed as well as in contemplation…

[23] In *Woolgar v Chief Constable of the Sussex Police* [1999] 3 All ER 604 and *Frankson v Home Office* [2003] 1 WLR 1952 the English Court of Appeal held that the expectation of confidence that attaches to police interviews may be outweighed by a higher public interest. The Supreme Court in *Attorney-General v X* [2008] 2 NZLR 579 held that New Zealand's ability to give effect to the Refugee Convention would be compromised if the Immigration Act were interpreted as preventing disclosure to officials considering extradition or prosecution. That decision applies *a fortiori* in an iniquity case.

[24] The appellant's position, whether litigation or legal advice privilege is claimed, is no better if the case is considered under the Evidence Act, the relevant sections of which state:

> **54 Privilege for communications with legal advisers**
>
> (1) A person who obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was—
>
> (a) intended to be confidential; and
>
> (b) made in the course of and for the purpose of—
>
> (i) the person obtaining professional legal services from the legal adviser; or
> (ii) the legal adviser giving such services to the person.
>
> …
>
> **56 Privilege for preparatory materials for proceedings**
>
> (1) Subsection (2) applies to a communication or information only if the communication or information is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the "proceeding").
>
> (2) A person (the "party") who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of—
>
> (a) a communication between the party and any other person:
>
> (b) a communication between the party's legal adviser and any other person:
>
> (c) information compiled or prepared by the party or the party's legal adviser:

[25] Section 7 of the Interpretation Act 1999 states that an enactment does not have retrospective effect. Nothing in the Evidence Act suggests that ss 54 and 56 would operate retrospectively. While procedural rights may more easily be held to be altered retrospectively we prefer the approach that entitlement to legal privilege is a substantive entitlement to which such approach does not apply: see Burrows and Carter *Statute Law in New Zealand* (4ed 2009) at 594-596. Insofar as there was any advantage to the appellant under the common law, ss 54 and 56 would not be construed as having retroactive effect to remove it.

[26] But the Law Commission did not suggest that it was proposing to change rather than codify the common law. The iniquity exception applies to each. The Evidence Act states:

> **67 Powers of Judge to disallow privilege**
>
> (1) A Judge must disallow a claim of privilege conferred by ... sections... [54 and 56] in respect of a communication or information if satisfied there is a prima facie case that the communication was made or received, or the information was compiled or prepared, for a dishonest purpose or to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence.

[27] There was raised the interesting question whether this Court should adopt the conclusion of the Supreme Court of Canada that litigation privilege is ephemeral and terminates with the conclusion of the case: see *Blank v Canada* [2006] 2 SCR 319. But we do not reach the stage of considering it. That is because of the iniquity exception**.**

[28] Insofar as the appellant included false information in the statement made to Ms Laurent, and the statement was made for the dishonest purpose of obtaining refugee status by deceit, any privilege is excluded by both the common law and the plain language of s 67(1). Insofar as materials taken under the warrant embraced documents not prepared for that purpose we see no basis for any claim to litigation privilege.

Issue (3): Were the Police actions in passing on the information to the second respondent unlawful?

[29] The issue concerns the extent of the police authority to use copies of original documents obtained under warrant for purposes other than those for which the warrant was obtained. No complaint is made about the actual seized documents which the Crown says were returned to the appellant. The issue concerns the copies made by the police and the interview. We consider them in turn.

The documents

[30] Mr Turley provided to NZIS copies of the documents obtained under search warrants and also the transcript of his video interview of the appellant. His investigation had shown that in his view the appellant had lied in his application form and acquired refugee status by fraud. Mr Turley was aware that NZIS could take steps to cancel refugee status and said his reason was to enable NZIS to take whatever action it deemed appropriate in relation to the appellant's refugee status.

Section 199 of the Summary Proceedings Act 1957 states:

> **Disposal of things seized**
>
> (1) Where any constable seizes any thing under section 198 of this Act, it shall be retained under the custody of a constable, except while it is being used in evidence or is in the custody of any Court, until it is disposed of under this section.
>
> …
>
> (3) … the following provisions shall apply:
>
> > (a) In any proceedings for an offence relating to the thing, the Court may order, either at the trial or hearing or on a subsequent application, that the thing be delivered to the person appearing to the Court to be entitled to it, or that it be otherwise disposed of in such manner as the Court thinks fit:
> >
> > (b) *Any constable may at any time*, unless an order has been made under paragraph (a) of this subsection, *return the thing to the person from whom it was seized, or apply to a District Court Judge for an order as to its disposal*; and on any such application the District Court Judge may make any order that a Court may make under paragraph (a) of this subsection:
> >
> > (c) If proceedings for an offence relating to the thing are not brought within a period of 3 months after the date of the seizure, any person claiming to be entitled to the thing may, after the expiration of that period, apply to a District Court Judge for an order that it be delivered to him; and on any such application the District Court Judge may adjourn the application, on such terms as he thinks fit, for proceedings to be brought, or may make any order that a Court may make under paragraph (a) of this subsection.
>
> (4) Where any person is convicted in any proceedings for an offence relating to any thing to which this section applies, and any order is made under this section, the operation of the order shall be suspended—

(a) In any case until the expiration of the time prescribed by this Act or, as the case may require, the time prescribed by the Crimes Act 1961 for the filing of notice of appeal or of an application for leave to appeal; and

(b) Where notice of appeal is filed within the time so prescribed, until the determination of the appeal; and

(c) Where application for leave to appeal is filed within the time so prescribed, until the application is determined and, where leave to appeal is granted, until the determination of the appeal.

(5) Where the operation of any such order is suspended until the determination of the appeal, the Court determining the appeal may by order annul or vary the order made under this section; and that order, if annulled, shall not take effect, and, if varied, shall take effect as so varied.

(6) In this section the term Court includes the High Court.

[31] The section provides what is to happen to the things seized. With certain exceptions irrelevant to the present case, things seized are to be retained by a constable except while being used in evidence or in the custody of a court until either returned to the person from whom they were seized or disposed of by court order. In its 2007 report *Search and Surveillance Powers* (NZLC R97 2007) the Law Commission has proposed more specific statutory directions concerning the things seized. It recommended at [13.39]-[13.40]:

> No obligation to apply to the court should arise unless a request for return has been made to and declined by the agency. It would be unduly onerous on enforcement agencies to require an application in the absence of a request, since the item's value may be such that the person has no interest in having it returned.
>
> Nor should there be a requirement to seek a court order in respect of things other than the original item seized. For example, a court order should not be required for clones of computer hard drives, photographs taken, or video or audio recordings made by the enforcement agency.

[32] We accept the Crown's submission that the section is concerned only with the actual documents seized. That includes both original documents and any copy documents which were themselves taken under warrant. It does not deal with copies of what had been seized.

[33] That topic was also discussed by the Law Commission at [13.71]-[13.74]:

Retention of copy by enforcement agency

An enforcement officer will often copy or photograph items seized under a search power. Often the copy will be used for working purposes. In some cases, such as a complex fraud investigation, a significant amount of documentation may be scanned or otherwise stored electronically. Where the original seized item is retained for investigative or evidential purposes, it is returned by the enforcement officer or disposed of by way of court order once the investigation has concluded. Photocopies of documents, photographs, or electronically stored images of seized items are routinely retained, however, even after the original has been returned or disposed of.

In our view, an enforcement agency should be permitted to keep and file copies of items seized under a search power after the investigation has concluded. The property interests of the person from whom the original item was seized are satisfied with its return or other disposition and it is reasonable for the enforcement agency to retain, and ultimately to archive, a copy as part of the official record of the investigation. Occasionally, access to the retained copy may be needed for other investigations by the enforcement agency or in some cases for appeals, subsequent official inquiries, or applications for the exercise of the prerogative of mercy. While it is possible that personal privacy interests may be implicated in some cases, overall the retention of a copy of seized objects by the enforcement agency is justified by the broader law enforcement and justice interests.

To the extent that privacy interests do arise, we consider that they are sufficiently protected by the recommendation later in this report that it should be an offence for a law enforcement officer to disclose information acquired through the exercise of a search power, otherwise than in the performance of his or her duty.

Statutory provision authorising an enforcement agency to retain a copy or photograph of any item seized under a search power is not generally made in overseas jurisdictions, though we note that such a provision is contained in the Canadian criminal code in respect of documents. To avoid doubt, we recommend a provision be enacted authorising an enforcement agency to retain a copy, replication or photograph of any seized item.

[34] The Crown advances the following practical considerations that:

In reality, multiple copies of documents seized under a search warrant will often be made and distributed in the course of a criminal investigation and in the lead up to any trial. Copies of documents will often be made and:

(1) sent to external experts for forensic examination;

(2) shared internally within the Police and the relevant Crown Solicitor's Office;

(3) provided to counsel and other parties to meet the requirements of criminal disclosure;

(4) supplied as part of interagency cooperation to other government agencies with a proper interest arising under the legislation administered by them;

(5) if used as an exhibit in criminal proceedings may be made available to the media;

(6) if used as an exhibit in criminal proceedings will likely be stored permanently on the Court file;

(7) retained and provided to the relevant agencies (for example the Crown Law Office) in the event of any appeal.

The appellant's claim to privacy

[35] Although the appellant has not made a complaint under the Privacy Act 1993, he submits that retention by the police of copies of letters and a diary, as well as drivers licences which have a lower sensitivity, infringes his rights to privacy. These he submits are protected by reg 7 of the Police Regulations 1992, which states:

> **7 Secrecy**
>
> (1) Subject to subclause (2) of this regulation, every member shall observe the strictest secrecy in relation to Police business and any information coming into the member's possession by virtue of his or her office.
>
> (2) Members shall release information only to the extent of satisfying–
>
> (a) The provisions of any Act; and
>
> (b) General instructions; and
>
> (c) The authority of the Commissioner; and
>
> (d) The extent necessary to do his or her duty.

[36] Also of relevance are the Privacy Act and the equitable doctrine of breach of confidence.

Regulation 7

[37] The starting point is the nature of the "duty" of the Police under Regulation 7. The Oath to be taken by a constable under s 37 of the Police Act 1958 included the undertaking:

> that I will see and cause Her Majesty's peace to be kept and preserved; that I will prevent to the best of my power all offences against the peace; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law.

Its current form under s 22 of the Policing Act 2008 is:

> I will, to the best of my power, keep the peace and prevent offences against the peace, and will, to the best of my skill and knowledge, perform all the duties of the office of constable according to law…

Section 9 of the Policing Act now states:

> **Functions of Police**
>
> The functions of the Police include—
> (a) keeping the peace:
> (b) maintaining public safety:
> (c) law enforcement:
> (d) crime prevention:
> (e) community support and reassurance:
> (f) national security:
> (g) participation in policing activities outside New Zealand:
> (h) emergency management.

[38] The function of law enforcement, now explicit, has always been implicit in the role of the Police. In *R v Commissioner of Police of the Metropolis, ex parte Blackburn (No1)* [1968] 2 QB 118 at 147 (CA) Salmon LJ said:

> In my judgment the police owe the public a clear legal duty to enforce the law.

Edmund Davies LJ said at 148-149:

> The law enforcement officers of this country certainly owe a legal duty to the public to perform those functions which are the raison d'être of their existence

[39] The law enforcement function of the Police has also been recognised in *R v Ngan* [2008] 2 NZLR 48 at [31] (SC); *Gough v Chief Constable of the West Midlands Police* [2004] EWCA Civ 260 at [35]; *Hill v Chief Constable of West Yorkshire* [1988] QB 60 (CA), upheld by the House of Lords: [1989] AC 53; *R v Decorte* [2005] 1 SCR 133; *Putnam v Alberta* [1981] 2 SCR 267; *Westwood v Lightly* (1984) 2 FCR 41 (FCA). There can be no doubt that it was embraced in their "duty" in terms of regulation 7 under the 1958 Act as under the 2008 Act. Enforcement of the Immigration Act falls squarely within that authority.

[40] Further, in *R(A) v Chief Constable of C* [2004] 1 WLR 461 (HC), complaints related to sexual offending were made to the Police in counties B and C about A, a school teacher. No charges were laid. A applied for and was offered a job in a county D. The Police in county C passed the information on to the county D Police, who subsequently passed it on to the education authority in that county. As a result, A's job offer was withdrawn. A sought judicial review of the decision of the Police in counties C and D to pass on the information. Turner J declined the application. He held that the Police actions had not breached either of the United Kingdom Data Protection Acts. Nor did a breach of a government circular on confidential information entail irrationality. Turner J acknowledged that (at [43]):

> On a simple basis, there is an obvious need to keep non-conviction material in the hands of as few people as practicable in a well administered society.

He held that (at [39]):

> There is no doubt as to the existence of the power, indeed it may more properly be described as a duty, as between one police force and another, to disclose sensitive information as the result of a child access vetting enquiry.

As to the disclosure to the education authority, he said (at [41]):

> What then of the position of the D constabulary when the information was passed by them to the local education authority? There cannot be the slightest doubt that the local education authority had a lawful interest and a "pressing" need to receive the information which was in the possession of the county police since it was or could be important as affecting the decision which it was required to make. In one sense, the local education authority was the body best qualified to decide what, if anything, it would make of the information with which it was being provided.

[41] In the present case, the passing of the information obtained as a result of the search to those responsible for the administration of the refugee status system was in accordance with the law enforcement function of the Police. That being the case, the Police were required to release the information in carrying out their duty of law enforcement. So the exception to the reg 7(1) secrecy requirement set out in reg 7(2)(d) applied.

[42] The Crown submitted that the disclosure of the information to the second respondent is permitted under reg 7(2)(a) because disclosure is permitted under the

exceptions to the Privacy Principles stated in the Privacy Act. The Privacy Principles include:

> *Principle 9 Agency not to keep personal information for longer than necessary*
>
> An agency that holds personal information shall not keep that information for longer than is required for the purposes for which the information may lawfully be used.
>
> *Principle 10 Limits on use of personal information*
>
> An agency that holds personal information that was obtained in connection with one purpose shall not use the information for any other purpose unless the agency believes, on reasonable grounds,—
>
> …
>
> (c) That non-compliance is necessary—
>
> (i) To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences;…
>
> *Principle 11 Limits on disclosure of personal information*
>
> An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—
>
> …
>
> (e) That non-compliance is necessary—
>
> (i) To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences;…

Plainly the Privacy Principles are not absolute and are subject to limits. We accept the Crown's submission on this point that the disclosure of the information by the Police to the second respondent was permitted by Principle 11(e)(i).

Breach of confidence

[43] Equity will restrain the disclosure of information where to do so would be a breach of confidence. The test is that set out by Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47 (Ch D):

(a) The information must "have the necessary quality of confidence about it";

(b) The information must have been "imparted in circumstances importing an obligation of confidence";

(c) There must be an "unauthorised use of that information", or a threat thereof to the detriment of the person imparting it.

The Crown submits that the information at issue does not "have the necessary quality of confidence about it". Although this is undoubtedly true of information such as the drivers licences, that is not necessarily the case with all the information. The letters, for example, may contain confidential information. As to the second element, information seized under a search warrant may have been "imparted in circumstances importing an obligation of confidence": *Stepping Stones Nursery v Attorney-General* [2002] 3 NZLR 414 (HC). It is likely also that unauthorised use could operate to the appellant's detriment. But it is unnecessary for us to consider the test in detail. The public interest defence or "iniquity rule" allows disclosure of the information to the second respondent: *Westpac Banking Corporation v John Fairfax Group Pty Ltd* (1991) 19 IPR 513 (NSWSC); see *Woolgar v Chief Constable* [1999] 3 All ER 604 (CA) discussing of the circumstances in which disclosure to another government body or public authority will be permitted. There is an overriding public interest in the enforcement of the law and the maintenance of the integrity of New Zealand's refugee status system.

The interview

[44] *In Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277 the Supreme Court considered and rejected an argument similar to that of the appellant concerning the use to which a law enforcement interview can be put.

[45] We reject the present argument for similar reasons.

Conclusion

[46] The various arguments in support of the appellant's contention all founder on the basic point that the Police used the material in their possession for the proper purpose of discharging their function of upholding the law.

[47] The appeal fails and is dismissed. Since we are unaware of the appellant's legal aid status we will receive memoranda as to costs.

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