ORDER PROHIBITING PUBLICATION OF DETAILS OF THE APPLICANT'S NAME OR ANY PARTICULARS WHICH MIGHT LEAD TO HIS IDENTIFICATION

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-003379

BETWEEN	J Plaintiff/Applicant
AND	REFUGEE STATUS APPEALS AUTHORITY, AUCKLAND First Defendant/First Respondent
AND	REFUGEE STATUS OFFICER Second Defendant/Second Respondent

Hearing: 12 August 2010

Appearances: C S Henry for Plaintiff/Applicant
M Downs for Second Defedant/Second Respondent

Judgment: 16 August 2010

JUDGMENT OF VENNING J
ON APPLICATION TO STRIKE INADMISSIBLE EVIDENCE

This judgment was delivered by me on 16 August 2010 at 11.00 am pursuant to Rule 11.5 of the High Court Rules.

Registrar / Deputy Registrar

Date…………

Solicitors: Witten-Hannah Howard, North Shore City
Copy to: C S Henry, Orewa
Crown Law, Wellington

[1] This application for judicial review is for hearing on 21 September 2010. The applicant seeks an order striking from the record parts of the written statement of Belinda Duffy, a witness who gave evidence in the hearing before the first defendant.

[2] The evidence in issue is contained at paragraphs 16 and 17 of Ms Duffy's statement of evidence (record, volume 6 pages 2104 and 2105).

[3] The particular paragraphs were discussed in the course of Ms Duffy's evidence (record, volume 4, pages 1162 – 1170).

[4] The challenged material falls into two categories: the last sentence of paragraph 16 and the first sentence of paragraph 17 (record, volume 6, page 2105). It is accepted by the second respondent that the two sentences were agreed to be deleted from Ms Duffy's written statement. This concession is noted (record, volume 4, pages 1166 and 1167).

[5] The second respondent does not seek to rely on that evidence.

[6] The second category of evidence is the first sentence of paragraph 16. In it Ms Duffy refers to overhearing the applicant making a particular statement to his then lawyer. Mr Henry submitted strongly the statement was privileged and was inadmissible.

[7] The substance of what Ms Duffy says she overheard is repeated in her evidence-in-chief where she describes that the applicant effectively told her the same thing (record, volume 4 at pp 1169, 1170). While Mr Henry accepted that evidence was admissible, he argued there was a significant difference between Ms Duffy saying she was told that by the applicant and her saying that she overheard the applicant telling his lawyer the same thing.

[8] In any event, nothing turns on the matter because Mr Downs was prepared to accept that the evidence of what Ms Duffy overheard the applicant say to his lawyer

was inadmissible and he confirmed the second respondent does not seek to rely upon that evidence.

[9] So both parties are agreed that the challenged aspects of Ms Duffy's evidence are inadmissible. The difference between them is whether, as Mr Henry submits, because the evidence did not form part of the material which the Authority was entitled to take into account, it should be struck from the formal record before this Court and should not be before the Judge hearing the review or, as Mr Downs submitted, the integrity of the record as a whole should be preserved, including those parts of the evidence that was ruled inadmissible.

[10] Mr Henry submitted it was important that justice not only be done but be seen to be done. He submitted that the applicant was entitled to be assured that there would not be any unconscious use of that inadmissible material by the presiding Judge.

[11] Mr Downs submitted that it would be wrong to affect the integrity of the record by deleting the passages or striking them from the record entirely. He noted in relation to paragraph 16 of Ms Duffy's evidence it would leave a sentence hanging and unexplained. He submitted that it was offensive to suggest that a High Court Judge would not be able to put the inadmissible evidence to one side and would somehow allow him or herself to be influenced by it.

[12] An aspect of the case is just what forms the record and the status of the record for the purposes of the application for judicial review. In *Collector of Customs v Graham*[1], an issue arose whether the notes of evidence and exhibits should be filed with the High Court. Eichelbaum CJ took a liberal approach to the scope of the record and held "the record" included the notes of evidence and exhibits presented at the previous proceeding.

[13] In my judgment, a similarly liberal approach supports the preservation of record that was before the Authority, even where it is accepted parts of it relate to inadmissible evidence. To do otherwise would be to engage in a cut and paste

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1 In *Collector of Customs v Graham* [1990] 1 NZLR 615.

exercise with the record. It would not necessarily stop at the inadmissible evidence. For instance aspects of the record also refer to the agreement the evidence is not to be read. On Mr Henry's argument that would go as well.

[14] In my view it is better to maintain the record intact, with the acknowledgement of the second respondent that aspects of Ms Duffy's witness statement are not admissible.

[15] In the context of this case, the applicant can have no rational or reasonable concern that a High Court Judge would be influenced, consciously or subconsciously, by the passages at paras 16 and 17 of Ms Duffy's evidence-in-chief when it is conceded they are inadmissible.

Result

[16] The application to strike the passages from the record is declined.

Timetable directions

[17] The one day fixture allocated for 21 September 2010 is confirmed.

[18] The time for the second defendant to file and serve any affidavits is extended to Friday 20 August 2010. In the event the second defendant elects not to file any affidavits then it will file and serve a memorandum confirming that by the same date, 20 August 2010.

[19] Any affidavits in reply on behalf of the plaintiff to be filed and served by 27 August 2010.

[20] The plaintiff's submissions and authorities are to be filed and served by Monday 30 August 2010.

[21] The second defendant's submissions/authorities are to be filed and served by 10 September 2010.

[22] I record that Mr Henry also sought leave to file and serve a further affidavit if information is obtained from Interpol. I decline to grant such general leave at this stage. If Mr Henry obtains that information prior to the hearing he will have to seek leave from the trial Judge for that further evidence to be read and considered.

Costs

[23] Costs on the application are fixed on a 2B basis to follow the outcome of the substantive hearing.

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Venning J