IN THE SUPREME COURT OF NEW ZEALAND

SC 69/2007
[2008] NZSC 48

BETWEEN	ATTORNEY-GENERAL Appellant
AND	X First Respondent
AND	REFUGEE STATUS APPEALS AUTHORITY Second Respondent

Hearing: 17 April 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: D B Collins QC Solicitor-General, I C Carter and B J Keith for Appellant
G M Illingworth QC, C M Curtis and D A Manning for First Respondent
No appearance for Second Respondent

Judgment: 20 June 2008

JUDGMENT OF THE COURT

A The appeal is allowed.

B The orders made in the Courts below are set aside and the application for judicial review is dismissed without costs.

REASONS

(Given by Wilson J)

Introduction

[1] The appellant, the Attorney-General, appeals by leave on the question of:

> [W]hether s 129T(3)(b) of the Immigration Act 1987 permits those who are subject to a duty of confidence under s 129T of that Act to disclose matters that are confidential in relation to the first respondent to any officer or employee of a Government department or other Crown agency for the purpose of the possible extradition of the first respondent to Rwanda or for the possible prosecution of the first respondent in New Zealand under the International Crimes and International Criminal Court Act 2000.

[2] At the commencement of the hearing, this Court renewed by consent the orders of the Courts below suppressing publication of the name of the First Respondent and of any particulars that might lead to his identification, and prohibiting search of the Court file without the leave of the Court.

[3] The answer to the question before the Court turns on the interpretation of s 129T, which reads as follows:

> **129T Confidentiality to be maintained**
>
> (1) Subject to this section, confidentiality as to the identity of the claimant or other person whose status is being considered under this Part, and as to the particulars of their case, must at all times, both during and subsequent to the determination of the claim or other matter, be maintained by refugee status officers, the Authority, other persons involved in the administration of this Act, and persons to whom particulars are disclosed under subsection (3)(a) or (b).
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> (2) Compliance with subsection (1) may in an appropriate case require confidentiality as to the very fact or existence of a claim or case, if disclosure of its fact or existence would tend to identify the person concerned, or be likely to endanger any person.
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> (3) Subsection (1) does not apply to prevent the disclosure of particulars—
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> (a) To a person necessarily involved in determining the relevant claim or matters; or
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> (b) To an officer or employee of a Government department or other Crown agency whose functions in relation to the claimant or other person require knowledge of those particulars; or
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> (c) To the United Nations High Commissioner for Refugees or a representative of the High Commissioner; or

(d) In dealings with other countries for the purpose of determining the matters specified in section 129L(d) and (e) (whether at first instance or on any appeal); or

(e) To the extent that the particulars are published in a manner that is unlikely to allow identification of the person concerned, whether in a published decision of the Authority under clause 12 of Schedule 3C or otherwise; or

(f) If there is no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure in the particular circumstances of the case.

(4) Nor does subsection (1) apply to prevent the disclosure of particulars in relation to a particular claimant or other person to the extent that the claimant or person has, whether expressly or impliedly by their words or actions, waived his or her right to confidentiality under this section.

(5) A person who without reasonable excuse contravenes subsection (1), and any person who without reasonable excuse publishes information released in contravention of subsection (1), commits an offence.

[4] The first respondent, who is referred to as "X" to protect his anonymity, appealed to the second respondent, the Refugee Status Appeals Authority, against a decision of a Refugee Status Officer declining his application for refugee status. The Authority refused applications made to it by X for confidentiality to attach to the evidence, and for an adjournment until proceedings for extradition of X to Rwanda or criminal proceedings in New Zealand founded on his alleged actions in Rwanda,[1] were finalised.[2]

[5] X brought proceedings in the High Court seeking judicial review of the decision of the Authority refusing his applications.[3] Baragwanath J granted relief in the form of a declaration. He held that s 129T, and the Convention Relating to the Status of Refugees,[4] afforded X an assurance of absolute confidentiality of all evidence filed in his appeal to the Authority. Any disclosure under s 129T(3)(b)

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1 Such a prosecution in New Zealand is possible under the provisions of the International Crimes and International Criminal Court Act 2000.

2 As the body whose decision is subject to review, the second respondent followed the appropriate course of advising by memorandum that it would abide the decision of the Court and would not be represented at the hearing – see the judgment of the Court of Appeal in *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 at pp 695–6.

3 *X v Refugee Status Appeals Authority* (High Court, Auckland, CIV 2006-404-2650, 14 July 2006, Baragwanath J).

4 (1951) 189 UNTS 150.

could only be for the purpose of determining the claim for refugee status and not for any other purposes, including extradition or criminal prosecution in Rwanda or New Zealand.[5] Alternatively, disclosure of the evidence of X beyond the Authority would prejudice any criminal trial and would if necessary be restrained by the High Court.[6]

[6] The Attorney-General appealed.[7] In the Court of Appeal, counsel for X accepted that Baragwanath J's interpretation of s 129T "was not required under the Convention or by associated state practice".[8] However, the majority of the Court (William Young P and Chambers J) held that, while the point was "closely balanced",[9] the approach of Baragwanath J to s 129T was broadly correct.[10] It is proper, the majority held, to restrict the scope of the disclosure permitted by s 129T(3)(b) to those functions that are "incidental to or consequential upon" the determination of claims to refugee status; disclosure is therefore not permitted to "public servants"[11] working in the areas of extradition or prosecution. In dissent, Ellen France J held that "there is nothing on a reading of s 129T to warrant imposition of a limitation to prevent disclosure to those in the extradition or prosecution areas" and, likewise, there is nothing "in the Convention or in state practice that warrants reading the section in the way favoured by the majority".[12]

Interpretation of s 129T

[7] This appeal presents a stark choice between two approaches to the interpretation of s 129T: does the section restrict disclosure to officials engaged in the determination of refugee status, as Baragwanath J and the majority of the Court of Appeal held, or is disclosure also permitted to other officials for the purposes of extradition or prosecution, as the Authority and Ellen France J concluded?

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5 At para [28].
6 At paras [42], [55] and [66].
7 [2007] NZCA 388.
8 At para [43].
9 At para [47].
10 At para [51].
11 The Court of Appeal used this term for ease of reference in lieu of the statutory expression "officer or employee of a Government department or other Crown agency".
12 At paras [64] and [65], respectively.

[8] The plain wording of the section supports the latter interpretation. All persons involved in the determination of refugee status will, in terms of s 129T(1), be "refugee status officers", "the Authority", or "other persons involved in the administration of this Act". The following word "and" necessarily implies that the subsequent reference to "persons to whom particulars are disclosed under subs (3)(a) or (b)" is to persons who are not involved in an official capacity in refugee status determination.

[9] That conclusion is supported by the wording of paragraphs (a) and (b) of subs (3). Paragraph (3)(a) permits disclosure to those, such as interpreters or witnesses, who are necessarily involved in determining the claims or matters to which subs (1) applies, but whose involvement is not in an official capacity. Paragraph (b) then permits disclosure to additional Government officials, beyond those specifically mentioned in s 129T(1), whose functions require disclosure. To interpret those words as referring only to officials engaged in the determination of refugee status would be to read them down unnecessarily and unjustifiably. It would also mean that Parliament had, for no apparent reason and within the same section, used very different wording to refer to the same category of person – those engaged in an official capacity in determining refugee status.

[10] It is significant that s 129T(3)(f) makes it clear that the confidentiality obligation imposed by s 129T(1) does not apply if there is no serious possibility that disclosure would endanger the safety of the claimant or any other person. This exception demonstrates the primary rationale for the confidentiality obligation.

[11] Section 129T(5) forms an important part of the scheme of the section by making it an offence to contravene, without reasonable excuse, the obligation of confidentiality imposed by s 129T(1). Those to whom information is disclosed under any of the categories set out in s 129(3) are subject to s 129T(5). They therefore must not themselves disclose the information unless they do so in conformity with one or more of the paragraphs of s 129T(3) or confidentiality has been waived under s 129T(4). Unless one of the paragraphs applies or confidentiality is waived, persons to whom disclosure is made under paragraph (b) may not themselves make a disclosure.

[12] As a matter of statutory interpretation, s 129T(3)(b) therefore permits disclosure to those referred to in that paragraph for the purpose of their considering the extradition or prosecution of the first respondent. Four supplementary questions do however arise:

- what constitutes the "particulars" to which reference is made in subss (1), (3) and (4)?

- to what departments and agencies does s 129T(3)(b) apply?

- for the purpose of that paragraph, what is the test for determining whether knowledge is "required"?

- are the provisions of the Convention relevant to the application of the section?

We now address these questions.

[13] Section 129T(1) refers to the "particulars" of the "case" of an applicant for refugee status. Section 129T(3) and (4) authorise the disclosure of those particulars in specified circumstances. The term "particulars" should in this context be construed as including not only the application as such but also any other information produced in support of it. If the term were limited to the conventional Court meaning of pleadings,[13] the protection which s 129T is plainly intended to provide would be severely limited.

[14] Section 129T(3)(b) imposes two conditions which must be satisfied before disclosure is permitted under that paragraph. First, disclosure must be to an officer or employee of a Government department or other Crown agency. Secondly, the functions of that officer or employee must "require" disclosure. The natural meaning of "Government department" in this context can be taken from the definition of "Department" in s 2 of the State Sector Act 1988, which covers "any Department specified in Schedule 1" to that Act. Similarly, the definition of "Crown

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[13] As in r 185 of the High Court Rules.

agency" in s 7 of the Crown Entities Act 2004, namely an agency listed in Part 1 of Schedule 1 to that Act, provides a helpful guide to the meaning of that expression albeit in subsequent legislation.[14] Knowledge is "required" for the purpose of s 129T(3)(b) if that information is relevant, in the sense of being rationally linked, to the function which is being performed. Information in support of an application for refugee status will never be relevant to the exercise of the functions of most departments or agencies.

[15] As noted above,[15] counsel for X acknowledged that the interpretation of s 129T adopted by Baragwanath J was not required by the Convention Relating to the Status of Refugees, or by associated State practice. That was a proper acknowledgement. In fact, the provisions of the Convention positively support the competing interpretation. The Convention is given recognition by s 129D of the Act, and is appended to it as Schedule 6. Article 1F of the Convention provides that:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
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> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

In a Convention negotiated in the years following the Second World War, this provision was intended to ensure that war criminals could not escape extradition and prosecution by claiming refugee status. That principle remains relevant, as does the associated maxim *aut dedere aut judicare*,[16] which imposes an obligation to extradite or prosecute. The ability of this country to give effect to Article 1F(a) would be prejudiced if s 129T(3)(b) were interpreted so as to exclude disclosure to officers and employees considering extradition or prosecution.

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[14] The definition of "Crown entity" in s 2 of the Public Finance Act 1989 was the most relevant reference in legislation in force in 1999, when s 129T was enacted.

[15] At para [6].

[16] Literally, "either surrender or submit to justice". As Jennings and Watts state in *Oppenheim's International Law* (9th ed, 1996), p 953: "Several multilateral treaties … have adopted the practice of obliging parties either to extradite persons found on their territory but wanted for trial… by another party, or to try such persons themselves. This principle of *aut dedere aut judicare* has, for example, been adopted in [named treaties]".

Result

[16] Section 129T, properly construed, permits information about the application of X for refugee status to be disclosed to officials who require that information to consider his possible extradition for a crime of a type described in Article 1F(a) or prosecution under the International Crimes and International Criminal Court Act. It follows that the judicial review proceedings which X brought against the Authority and the Attorney-General must fail, with judgment for both those respondents. Neither seeks costs.

Comment

[17] Section 129T addresses both the use of information provided by an applicant for refugee status and the disclosure, in limited and controlled circumstances, of that information. As a general practice, it will be preferable to determine the application before addressing possible disclosure because the outcome of the application may well inform the question of disclosure. In the present case, the Authority acted correctly in attempting to resolve the application of X for refugee status prior to the resolution of any question of extradition or prosecution. In the event of prosecution, any issues which may arise out of the application should be addressed by the High Court as and when they arise.

[18] The outcome of the present appeal should not be seen as in any way detracting from the importance of treating in strict confidence any information provided in support of an application. The purpose of s 129T is made clear by its heading: *Confidentiality to be maintained.* It is entirely understandable that statutory confidentiality should attach to the information, much of it likely to be of a personal and sensitive nature, which an applicant provides. The right to confidentiality should be modified only to the extent strictly necessary to give effect to the limited disclosure which s 129T permits.

[19] It may be sensible for the Department of Labour, which administers the Immigration Act, to consider the development and adoption of a Code of Practice which could be published. Such code could lay out the circumstances in which information may be disclosed under any of the categories of s 129T(3), or under s 129T(4). It could usefully remind recipients that they will commit an offence under s 129T(5) if they themselves release the information contrary to the terms of the section.

Solicitors:
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