Attorney-General v X and Z

Court of Appeal, Wellington [2007] NZCA 388
17-18 July 2007; 5 September 2007
William Young P, Chambers and Ellen France JJ

Confidentiality - confidentiality under the Refugee Convention - whether confidentiality implicit

Confidentiality - use of refugee evidence in other proceedings - confidentiality of evidence given by refugee claimant

Exclusion - serious reasons for considering - refugee claimant correctly found to be excluded but may not have committed war crimes or crimes against humanity - Refugee Convention Article 1F(a)

Immigration Act 1987 - confidentiality - use of refugee evidence in other proceedings - confidentiality of evidence given by refugee claimant - Immigration Act 1987, s 129T

X and Z were from Rwanda. X was seeking refugee status in New Zealand. Z, a UNHCR resettlement refugee, was resisting the proposed cancellation of his refugee status. Each was alleged by the Rwandan government to have been guilty of genocide and crimes against humanity committed in Rwanda in 1994. They were most unlikely to be tried before the International Criminal Tribunal for Rwanda as that Tribunal was seeking to conclude all trials by 2008. Any outstanding prosecutions were then to proceed in the national courts. But they faced the real possibility of either trial in New Zealand (under the International Crimes and International Court Act 2000) or extradition to Rwanda.

Section 129T(1) of the Immigration Act 1987 imposed confidentiality obligations on those who dealt with claims for refugee status. But those obligations were subject to exemptions provided for in s 129T(3). Of particular relevance to the case was s 129T(3)(b) which stated that subs (1) did not prevent disclosure "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".

X and Z were concerned that information which they put forward in support of their claims for refugee status might be disclosed to public servants who were considering their possible prosecution or extradition. In the High Court X obtained orders which prevented information about his claim for refugee status being provided to public servants who were considering the possibility of extradition or prosecution. Z obtained an interim order from the High Court which, in effect, prevented continuation of the proceedings involving him until resolution of the appeal involving X. The Attorney-General appealed to the Court of Appeal. The appeals raised a single issue: Did s 129T(3)(b) permit disclosure of information to public servants whose functions in relation to X and Z were associated with their possible extradition to Rwanda or trial in New Zealand.

Held (Per William Young P and Chambers J (Ellen France J dissenting)):

1 Section 129T(3)(b) of the Immigration Act 1987 did not permit those subject to a duty of confidence under s 129T of the Immigration Act 1987 to disclose such matters that are confidential in relation to X under s 129T(1) to any person for the purpose of:

(a) The possible extradition of X to Rwanda; or

(b) The possible prosecution of X in New Zealand under the International Crimes and International Court Act 2000 (see para [52]).

2 In relation to Z the order made in the High Court was no longer required and it was to be set aside.

Held (Per France J dissenting):

3 The question whether s 129T(3)(b) of the Immigration Act 1987 permits disclosure to public servants whose functions in relation to X and Z are associated with their possible extradition to Rwanda or trial in New Zealand turns on whether disclosure is required to enable the public servant to carry out his or her functions in relation to X and Z. The word "require" in this context has its ordinary dictionary meaning of "need" or "necessary". Whether the necessity test is met is a factual question. It is not possible or appropriate at this stage to exclude the possibility that disclosure for extradition or prosecution purposes will be necessary in relation to X or Z. It is also premature to preclude the possibility that disclosure may be permissible for these purposes under s 129T(3)(f) (see para [57]).

4 There may be cases where, on the facts, disclosure is not necessary for extradition or prosecution purposes. But there is nothing on a reading of s 129T to warrant the imposition of a limitation to prevent disclosure to those in the extradition or prosecution areas. Nor is there anything in the Refugee Convention or in state practice that warrants reading the section in the way favoured by the majority (see paras [64] & [65]).

5 The majority point to the need for candour. That is obviously a consideration underlying the notion of confidentiality although it is not the principle consideration. However, it cannot be correct that under the guise of confidentiality a claimant who acknowledged he or she was in fact a war criminal should be protected from the disclosure of that fact to the relevant New Zealand official where the admission was the only likely source of that information. A balancing is required to give appropriate regard to the interests of the claimant and the refugee status process but also to give adequate recognition to New Zealand's other international obligations such as those arising under the Geneva Conventions or those relating to the Rome Statute of the International Criminal Court (see para [66]).

6 Further, aside from any concern about the effects of release of information, there are already consequences adverse to the refugee claimant if he or she is untruthful to the authorities determining the claim. For example, s 129L(1)(b) provides that a refugee status officer may decide to cease to recognise a person as a refugee if the recognition given by the officer was procured by fraud or other similar matters. In addition, supplying information that the claimant knows is false or misleading is an offence in terms of s 142(1)(c) punishable by imprisonment or a fine or both. In that sense, the process is designed to ensure that the claimant tells the truth. If telling the truth leads to the denial of refugee status, the claimant may have to leave New Zealand. As such, the fact that the information could be used to determine whether to extradite or prosecute the claimant once the status has been declined does not materially alter the incentive to be candid (see para [67]).

7 In addition, the context in which these sorts of issues will generally arise is that the claimant's refugee status has been declined. Where Article 1F is applicable, the individual is no longer entitled to protection under the Refugee Convention. However, while the protection afforded under s 129T continues to apply, the legitimate considerations relating to the integrity of the refugee status system can no longer be said to have any great bearing on the matter. Obligations to pass on information may arise in the Article 1F situation (see paras [68], [69] & [70]).

8 The principal concerns of confidentiality provisions are the safety of the claimant and other persons as well as the obvious concern to ensure that by claiming refugee status the claimant does not become a refugee *sur place*. This underlying purpose leads to the view taken by the Refugee Status Appeals Authority that the duty of confidentiality under s 129T is not "all encompassing". Rather, the principal focus is on protecting the identity of the claimant as a refugee. The "particulars" are relevant primarily in the context of the concern that their release would identify the claimant as a claimant. On its face, s 129T does not purport to make confidential everything the claimant disclosures (see paras [72], [73] & [74]).

9 Section 129T(1) requires the specified persons to keep confidential the identity of X and Z as claimants and associated identifying particulars. This obligation of confidentiality does not prevent disclosure to those involved in determining X and Zs' claims such as Crown and defence counsel. Nor does it prevent disclosure to those whose functions mean they need to know about the claims. Plainly, disclosure to those not in a government department is contemplated. If there is no safety issue, there is no need to maintain confidentiality in the narrower sense envisaged by s 129T(1) (see paras [75] & [76]).

Observations (per William Young P and Chambers J):

1 A conclusion that a particular claimant is within the Article 1F(a) exclusion is not, in itself, a finding that that person has committed relevant crimes. Such a finding can only properly be made in criminal proceedings. As well the language of Article 1F talks not of conclusive findings but rather "serious reasons for considering" that the claimant has committed relevant crimes. So a claimant who is correctly found to be within the Article 1F(a) exclusion may very well not have committed war crimes or crimes against humanity. As well, there is the ever present risk of human error on the part of those who determine claims (see para [35(b)]).

2 This means that a claimant might be unsuccessful in a claim to refugee status despite having a well-founded fear of persecution on relevant grounds and not having committed war crimes or crimes against humanity (see para [35(c)]).

Appeal by Attorney-General against the judgment in favour of X dismissed. Appeal by Attorney-General against the judgment in favour of Z allowed.

Cases mentioned in the Judgment

Excom Conclusion No. 91
S v Refugee Status Appeals Authority [1998] 2 NZLR 291 (CA)
UNHCR *guidelines on application of the exclusion clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*

Counsel

I C Carter and M G Coleman for Appellant in both appeals
G M Illingworth QC and C M Curtis for Respondent X
I C Bassett and R P McLeod for Respondent Z

Judgment of the Court

A The appeal by the Attorney-General against the judgment in favour of X is dismissed. As the judgment of Baragwanath J was not sealed, we think it right to make a declaration as follows:

> **Section 129T(3)(b) the Immigration Act 1987 does not permit those subject to a duty of confidence under s 129T of the Immigration Act 1987 to disclose such matters that are confidential in relation to X under s 129T(1) to any person for the purpose of:**
>
> **(a) The possible extradition of X to Rwanda; or**
>
> **(b) The possible prosecution of X in New Zealand under the International Crimes and International Court Act 2000.**

B The appeal by the Attorney-General against the order made by Andrews J in favour of Z is allowed, but only because the order she made is no longer required. That order is set aside.

C An order is made:

(a) suppressing the names of X and Z and particulars that might lead to their identification; and

(b) prohibiting search of this Court's files without leave of a Judge of this Court.

D Costs are reserved.

REASONS

William Young P and Chambers J [1]
Ellen France J (Dissenting) [56]

WILLIAM YOUNG P AND CHAMBERS J
(Given by William Young P)

Overview of the case

[1] X and Z are from Rwanda. X is seeking refugee status in New Zealand. Z, who already has refugee status, is resisting the proposed cancellation of that status. Each is alleged by the Rwandan government to have been guilty of genocide and crimes against humanity committed in Rwanda in 1994. They are most unlikely to be tried before the International Criminal Tribunal for Rwanda as that tribunal is seeking to conclude all trials by 2008. Any outstanding prosecutions are then to proceed in the national courts. But they both face the real possibility of either trial in New Zealand (under the International Crimes and International Court Act 2000) or extradition to Rwanda.

[2] Section 129T(1) of the Immigration Act 1987 imposes confidentiality obligations on those who deal with claims for refugee status. But these obligations are subject to exemptions which are provided for in s 129T(3). Of particular relevance to this case is s 129T(3)(b) which is in these terms:

> (3) Subsection (1) does not apply to prevent the disclosure ...
>
> > (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; ...

For ease of reference we will use the phrase "public servant" in lieu of the statutory expression "officer or employee of a Government department or other Crown agency".

[3] X and Z are concerned that information which they put forward in support of their claims for refugee status might be disclosed ot public servants who are considering their possible prosecution or extradition. This concern is genuine enough as the position adopted by the Attorney-General is that disclosure and use of that information for those purposes is perfectly appropriate.

[4] X has obtained orders in the High Court from Baragwanath J which prevent information about his claim for refugee status being provided to public servants who are considering the possibility of extradition or prosecution. The Attorney-General appeals against that judgment. Z has obtained an interim order from Andrews J which, in effect, prevents continuation of the proceedings involving him until resolution of the appeal involving X. Again the Attorney-General appeals.

[5] As will become apparent, the two appeals raise a single issue: Does s 129T(3)(b) permit disclosure of information to public servants whose functions in relation to X and Z are

associated with their possible extradition to Rwanda or trial in New Zealand? But before we address this question directly it is necessary to explain both the background to the two appeals and the statutory context of s 129T(3)(b).

The background to the two appeals

The context

[6] The allegations of genocide and crimes against humanity against X and Z are relevant to their entitlements to refugee status for two reasons: first, a desire to avoid a legitimate prosecution will not usually amount to a well-founded fear of persecution on relevant grounds (which is a precondition to entitlement to refugee status under the 1951 Convention Relating to the Status of Refugees); and, secondly, because of the potential application of art 1F(a) of that Convention which provides:

> The provisions of this Convention shall not apply to any person with respect to whom t here are serious reasons for considering that:
>
> (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; ... .

X's case

[7] X's application for refugee status has been declined by a refugee status officer. This was not specifically on the art 1F ground but rather because, in the view of the refugee status officer, X did not establish a well-founded fear of persecution on relevant grounds. His appeal is pending before the Refugee Status Appeal Authority ("the Authority") and the issue which has given rise to the present appeal arose in connection with the proceedings before the Authority.

[8] X did not wish to put forward his response to the allegations against him without an unconditional undertaking as to confidentiality. His primary concern was the possibility that information he provided might be used against him should the Government of Rwanda commence extradition proceedings. He also sought an adjournment of the proceedings before the Authority until decisions have been made as to extradition. The Authority declined to require such an undertaking as it considered that s 129% spoke for itself and that the Authority could not sensibly require the Crown to undertake to comply with its statutory duties. The Authority also refused to adjourn the proceedings as requested.

[9] In subsequent review proceedings, Baragwanath J found in X's favour. He concluded that s 129T(3)(b) contemplates disclosure only for purposes associated with a claimant's entitlement to refugee status and not for other purposes. Baragwanath J also approached the case on broader grounds which he resolved in favour of X. Although we heard some argument about these broader grounds, Mr Illingworth QC, who appeared for X, was, in the end, content to resist the appeal on the basis that the Judge was right in his interpretation of s 129T(3)(b).

Z's case

[10] Z faces proceedings before a refugee status officer as to whether his status as a refugee should be cancelled. The refugee status officer indicated that she would comply with the judgment of Baragwanath J providing it is not set aside on appeal. She was not prepared to defer the cancellation process until determination of the appeal against that judgment.

[11] Z did not regard that as satisfactory as he could not know for certain that information he might provide to the refugee status officer would remain confidential; this was because he did not know whether the judgment of Baragwanath J would be upheld.

[12] Andrews J subsequently granted interim relief to prevent the refugee status officer carrying on with the cancellation process, pending further order of the Court.

[13] Because we heard X's and Z's cases together, and are deciding them in a single judgment, Z has now obtained all that he could realistically expect under the interim order made by Andrews J. In effect, our decision on the appeal involving X renders the other case moot (at least in respect of the interim order which has been obtained).

Other arguments

[14] As is apparent from what we have said, there were a number of arguments presented in relation to the case involving X which, in the end, were not persisted with. Z has also sought to challenge the process before the refugee status officer on grounds of bias. Some affidavit evidence relevant to this was adduced in the High Court. However, Mr Bassett, for Z, did not seek to make anything of the bias argument in this Court and we will therefore not address it.

[15] In each case there is scope for doubt as to the appropriateness of the procedure adopted in the High Court. In the case of X, it is difficult to identify any error of law which the Authority made in refusing to adjourn the proceedings. In the case of Z, the decision taken by the refugee status officer would appear to be impeccable: that she would comply with the law as declared by the High Court but subject to any later authoritative restatement of the law by this Court. In both cases, therefore, there are substantial grounds for contending that the decisions identified by X and Z as the subjects of their applications for review were not susceptible to review.

[16] That said, there is undoubtedly a genuine *lis* between the parties as to what use can be made of material produced in support of a claim for refugee status and we think it right to address that issue directly.

The statutory context of s 129T(3)(b)

The language of the section

[17] Section 129T in in these terms:

> **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)*.
>
> (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.
>
> (3) *Subsection (1) does not apply to prevent the disclosure of particulars--*
>
> *(a) To a person necessarily involved in determining the relevant claim or matters; or*
>
> *(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

(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.*

(Emphasis added)

To make this more concrete, X is a "claimant" for present purposes and Z is within the words "other person". For ease of reference we will treat each as a claimant. We have italicised the words in the section that are primarily relevant to the issue which we must determine.

Section 129T(3)(f)

[18] Even on the broadest view of s 129T(3)(b), the relevant information cannot be used externally (ie given to the Rwandan authorities or deployed in a prosecution in New Zealand) unless s 129T(3)(f) is satisfied. This much was common ground between the parties.

[19] In the course of argument another potential use of s 129T(3)(f) was discussed. Disclosure to a public servant by itself would not give rise to a "serious possibility that the safety of the claimant or any other person would be endangered". On this basis it was suggested that s 129%(3)(f) might provide an alternative basis for disclosure to public servants who are addressing possible prosecution or extradition for X and Z.

[20] It is apparent from some of the material which we have read that the trustworthy nature of a particular proposed recipient of information is sometimes seen as sufficient to engage s 129T(3)(f). But in the course of the hearing before us, Mr Illingworth made the telling point that under s 129T(1), those who receive information under s 129T(3)(f) - as opposed to those who are within s 129T(3)(a) and (b) - are not under any continuing obligation of confidence. This, said Mr Illingworth, implies that a decision to invoke s 129T(3)(f) requires a conclusion that general dissemination of the relevant information can be effected safely. We recognise that on-going confidentiality conditions are not imposed on the United Nations High Commissioner for Refugees or other countries to whom disclosure is provided for under s 129T(3)(c) and (d). It may be that the absence of confidentiality obligations for s 129T(3)(c) and (d) recipients is associated with their trustworthy character, but it is equally likely that ongoing confidence obligations were not imposed given the impossibility of enforcing them against such recipients. For this reason the absence of ongoing confidentiality obligations on s 129T(3)(c) and (d) recipients is not inconsistent with the point made by Mr Illingworth.

[21] In the result, we do not see s 129T(3)(f) as providing a basis for disclosure for extradition and prosecution purposes unless unlimited disclosure of that information would be safe.

Other relevant provisions of the Immigration Act

[22] It is also necessary to refer to ss 129G, 129H, 129L and 129P. Each of these sections contemplate the possibility that those dealing with refugee status claims may make inquiries of, or deal with, third parties. Such third parties may or may not be public servants. Depending on their nature, such an inquiry might be difficult to make effectively without disclosure of the underlying reason and thus might have the potential to involve disclosure of the identity of the claimant and some particulars of the case.

[23] It is open to question whether these sections should be treated as adding a gloss to s 129T or whether s 129T controls the manner in which requests by third parties must be couched. If the latter approach is correct, this might have the effect of limiting the ability of those who make refugee status decisions to ascertain the facts. On the other hand, if the former approach is correct, there is a gap in the confidentiality regime provided by s 129T as it does not apply to third parties (at least if they are not public servants) to whom disclosure might be made as part of information gathering exercises on the part of a refugee status officer or the Authority.

The necessity for other disclosures

[24] In the course of argument, counsel, and particularly Mr Carter, drew to our attention other statutes the administration of which might require some knowledge of, or awareness about, successful or unsuccessful refugee status claims. He mentioned the Extradition Act 1999 and the Citizenship Act 1977. He also suggested that public servants dealing with issues such as housing, benefits or health services, might have a legitimate need to know about refugee status claims. Broadly, the proposition that he advanced was that public servants administering such statues might properly be regarded as being within s 129T(3)(b). This was in support of his general contention that disclosure under that subsection may be for purposes other than the assessment of refugee status claims.

[25] The countervailing consideration, urged on us by counsel for Z and X, is that in these particular contexts it will be the refugee (or claimant for refugee status) who can be expected to make the relevant disclosures.

[26] As will become apparent, we regard s 129T as quite a difficult section to interpret and we are inclined to think that the other statutory examples discussed in argument are too far off the point to throw much light on its true meaning.

Does s 129T(3)(b) permit disclosure of information to any public servant whose functions in relation to X and Z are associated with their possible extradition to Rwanda or trial in New Zealand?

The approach of the Refugee Status Appeal Authority in the X case

[27] The approach of the Authority was that s 129T spoke for itself and that it was not appropriate to require the Crown to give an undertaking to comply with statutory duties.

The approach in the High Court

[28] The reasons of Baragwanath J for answering this question in favour of X were as follows.

> [18] The approach of the United Nations High Commissioner for Refugees is described in "Background Note on the application of the Exclusion Clauses: Article 1F of the 1951 Convention relation to the Status of Refugees" (2003) 15 International Journal of Refugee Law 502. That note deals with the background to the Convention and the purpose of the exclusion. It also deals with procedural issues in determining Article 1F (Part III). Confidentiality of asylum claims is specifically addressed:

> 103. Consideration of the exclusion clauses may lead to the sharing of data about a particular asylum application with other States, for example, to gather intelligence on an individual's suspected terrorist activities. *In line with established principles, information on asylum-seekers, including the very fact that they have made an asylum application, should not be shared with the country of origin as this may place such persons, their families, friends or associates at risk.* In exceptional circumstances, where national security interests are at stake, contact with the country of origin may be justified. For example, this may be the only method by which to obtain concrete evidence about an individual's previous and potentially ongoing terrorist activities. *Even in such situations, the existence of the asylum application should still remain confidential*.
>
> 104. *The principle of confidentiality continues in principle to apply even when a final determination of exclusion has been made. This is necessary to preserve the integrity of the asylum system -- information given on the basis of confidentiality must remain protected.*
>
> (Emphasis added)

[19] Turning to the New Zealand Act, the object of Part 6A is to provide at statutory basis for the system by which New Zealand ensures it meets its obligations under the Refugee Convention (s 129A). As Article 1A(2) of the Convention makes clear, the very definition of "refugee" is of one who for relevant reasons has:

> ... well-founded fear of being persecuted ... and is unable or, owing to such fear, is unwilling to avail himself of the protection of [the] country [of his or her nationality].

[20] The purpose of the Convention and of Part 6A is to afford protection to the claimant and others. For that purpose the rule of confidentiality is stated in s 129T(1). The importance of that rule is underlined by s 129T(2), requiring confidentiality as to the very fact or existence of a claim or case where disclosure would tend to identify the claimant or be likely to endanger any person. The exceptions to the rule in ss (3) are to be read in that context.

[21] Each sub-clause of ss (3) other than subclause (b) clearly confines disclosure to the determination of the refugee status claim ((a) and (c)-(d)); or to cases where there is unlikely to be identification ((e)); or to cases where there is no serious possibility that anyone would be endangered by the disclosure ((f)).

[22] Read in this context sub-clause (b) cannot be given the wide reading for which the Crown contends.

[23] It might at first sight be thought that such construction would be consistent with the public policy that criminal offenders should be brought to justice. But the problem with such argument derives from the very character of the refugee phenomenon. The website of the United Nations High Commissioner for Refugees records that there are some 19.2 million people "of concern" to that office world-wide. Each bona fide refugee has been subjected by a state to a well-founded fear of persecution. The Convention and Part 6A are to read in that light. It is usually impossible until after a status hearing to know whether the claimant is one of the nearly 20 million, or a charlatan. A claimant has under s 129G(5) the responsibility to establish his claim and to ensure that all relevant information, evidence and submissions are provided to the decision-maker. An innocent claimant would be put in an impossible position if, immediately he made disclosure, such materials were provided to one of the states prepared to engage in or to permit persecution.

...

[26] Mr Carter did not argue that it could be assumed that the current conditions in Rwanda could present no risk to X. His submission was:

> a) section 129X of the Immigration Act prohibits removal of a refugee status claimant "under this Act";
>
> b) section 7 of the Extradition Act 1999 prohibits surrender to another state of a person whose surrender is actually sought for the purpose of prosecuting or punishing him, or who on surrender may be prejudiced at trial or restricted in his personal liberty, on account of his ethnic origin;
>
> c) section 30 requires the Minister of Justice to decline to determine that surrender should take place if a s 7 prohibition applies or if there are substantial grounds for believing that the person would be in danger of torture or that he might be sentenced to death; there being no extradition treaty between New Zealand and Rwanda;
>
> d) section 60 requires the exercise of a further ministerial judgment whether extradition should take place;
>
> e) it follows that there is no need to construe s 129T so as to prohibit disclosure of particulars of the defence to the prosecution authorities; there are ample safeguards to prevent abuse.

[27] While Mr Carter did not advance the submission, some might think that if in the end the Authority were to decline X's application for refugee status because it considered that there are serious reasons for considering that X is guilty of genocide, the evidence before the Authority should at that point be made available to the prosecution authorities. But that is not the course adopted in the analogous sphere of evidence on the voir dire to challenge the admissibility of an alleged confession. Nor is it the law of Australia.

[28] Subsection (2) provides the plainest evidence of Parliament's policy to afford complete protection of a claimant against risk of danger to any person. I am of the clear opinion that, read in the light of the other provisions of s 129T, Part 6A and the factual matrix of the profound international problem of state persecution of refugees, subclause (b) of ss (3) is confined to Crown officers and employees whose "functions in relation to the claimant" *relate to the due disposal of his claim to refugee status* and *does* not extend to officers and employees whose "functions in relation to the claimant" *are for other purposes, such as extradition or prosecution*.

[29] It follows that X is entitled to a declaration generally to the effect of para [28] and that he can proceed to lodge his evidence and submissions with the Authority confident that it may use them only for the purpose of determining his application. I did not receive submissions as to the precise form of the declaration sought and there will be leave to apply for further directions.

(Emphasis in original, footnotes omitted)

We note in passing that the judgment of Baragwanath J was never sealed.

How much does it matter?

[29] It is clear that X and Z deny the allegations against them. So at first sight it might seem unlikely that information which they supply in support of those denials might be to their later

forensic or other prejudice. But a moment's reflection shows that there is potential for such prejudice to occur.

[30] The narrative of events given by a claimant to those dealing with a claim for refugee status might conceivably involve the claimant asserting presence in the particular place where the relevant crimes were committed. As well, against a background of civil war and widespread unrest, political and personal associations which the claimant may put forward as relevant to an asserted well-founded fear of persecution might later be useful in a prosecution as linking him or her to those who were involved in genocide or crimes against humanity. Therefore, in advancing a claim for refugee status, a claimant may make assertions which turn out later to be in the nature of admissions.

[31] As well, there can be no doubt that anyone required to make a decision whether to prosecute (or support the extradition of) a suspected offender would be very interested in any detailed narrative of the relevant events previously given by that suspected offender. At the very least, such a narrative would have the forensic consequences of limiting the room for manoeuvre of the suspected offender at trial and providing a framework for cross-examination.

[32] We should also record the submission of counsel for X and Z that witnesses identified by them might be interfered with (presumably by the present Government of Rwanda) and thus not be available should the claimant later be prosecuted.

[33] The need to satisfy s 129T(3)(f) provides something of a "long stop" against the risk of illegitimate prejudice. If disclosure is made to a public servant under s 129T(3)(b), that public servant is subject to a continuing requirement of confidentiality and release to third parties, including other public servants, is only possible if the s 129T(3)(f) test can be satisfied. For practical purposes, this consideration largely addresses the concern identified in [32] above. Further, if X and/or Z are later extradited to Rwanda or prosecuted in New Zealand, then it might be thought that potential prejudice to them of the kind identified in [30] and [31] is legitimate. It is certainly not obvious that X or Z should be able to abandon, without forensic consequences, explanations given in support of their claims for refugee status. Arguments along these lines were implicit, and sometimes explicit, in much of what counsel for the Attorney-General submitted to us.

[34] Extradition (or indeed prosecution in New Zealand) are unlikely outcomes for X and Z unless they are found to be within the art 1F(a) exclusion. Counsel for the Attorney-General argued that if art 1F(a) does apply, it would be entirely in accord with public policy for all relevant information to be made available to prosecution agencies whether here or in Rwanda.

[35] Although we recognise that this consideration is relevant to the ultimate issue we must determine, we do not see it as being of controlling importance. In our view, it requires assessment in light of a number of countervailing considerations:

> (a) Section 129T(1) does not distinguish between successful and unsuccessful claims to refugee status. Nor is the success or otherwise of an application explicitly made relevant to the application of any of the exemptions provided for in s 129T(3). So confidentiality applies to information supplied irrespective of whether the claim to refugee status is successful. As well, s 129T(1) makes it clear that confidentiality continues to apply after the determination of a claim.
>
> (b) A conclusion that a particular claimant is within the art 1F(a) exclusion is not, in itself, a finding that that person has committed relevant crimes. Such a finding can only properly be made in criminal proceedings. As well the language of art 1F talks not of conclusive findings but rather "serious reasons for considering" that the claimant has committed relevant crimes. So a claimant who is correctly found to be within the art 1F(a) exclusion may very well not have committed war crimes or crimes against

humanity. As well, there is the ever present risk of human error on the part of those who determine claims.

(c) This means that a claimant might be unsuccessful in a claim to refugee status despite having a well-founded fear of persecution on relevant grounds and not having committed war crimes or crimes against humanity.

(d) The corollary of these considerations is that a finding against a claimant on the art 1F(a) exclusion is not necessarily inconsistent with the continuing relevance of factors which favour confidentiality.

(e) It is important to recognise the situation as it might appear to a claimant for refugee status. Such a claimant may not be entirely confident that the claim will be successful (understandably, as most claims are not). A sense on the part of a claimant that what is said in support of the claim may later be used for other purposes and against the interests of the claimant is a disincentive to candour. Such a claimant may not easily distinguish between the release of information to New Zealand public servants for purposes associated with their possible extradition or prosecution and the more general use and dissemination of the information. It is not too difficult to envisage claimants, in that situation, seeking to hedge their bets in terms of what they disclose. Because refugee status claims are often determined on the basis of credibility assessments, considerable care should be taken to avoid anything which might discourage claimant candour.

Confidentiality under the Convention

[36] The Convention does not make specific provision for confidentiality. But it is widely recognised that confidentiality is implicit in the process. That is apparent from [18] of the judgment of Baragwanath J. However, it is also fair to note that there is scope for debate as to the appropriate limits of such confidentiality. Indeed, Mr Carter made extensive and helpful submissions on this aspect of the case.

[37] Mr Carter referred us to the pronouncements of the UNHCR Executive Committee as stated in its *Conclusions Adopted by the Executive Committee on the International Protection of Refugees No. 91 (LII)* A/56/12/Add.1(2001) that it:

(f) Recognises the confidential nature of personal data and the need to continue to protect confidentiality; also recognises that the appropriate sharing of some personal data in line with data protection principles can assist states to combat fraud, to address irregular movements of refugees and asylum-seekers, and to identify those not entitled to international protection under the 1951 Convention and/or 1967 Protocol.

[38] There are jurisdictions whose domestic law permits refugee status information to be shared with prosecuting authorities in appropriate circumstances. In Denmark, s 45c of the Aliens (Consolidation) Act 2005 allows information to be passed to the public prosecutor "for the purpose of the prosecutor's decision whether to charge the alien with crimes committed in Denmark or abroad". Similar provisions can be found in South Africa. Regulation 6(3)(d) of the Refugee Regulations 2000 allows disclosure to a government official or employee who has "need to examine the information in connection with ... any investigation concerning any criminal or civil matter". In the United Kingdom, any information held by the Secretary of State in connection with the exercise of functions under the Immigration Acts may be supplied to a chief police officer for police purposes: Immigration and Asylum Act 1999, s 21(2)(a).

[39] While the legislation referred makes information sharing with prosecution authorities possible, we are aware of at least one jurisdiction that has gone somewhat further. In the Netherlands the State Secretary for Justice has actively pursued a policy of disclosure when the claimant falls into one of the art 1F exceptions.

[40] For completeness we note that section 336F of the Migration Act 1958 (Cth) provides for disclosure to specified police forces and foreign countries. At least in this respect Baragwanath J was incorrect to assert that the Act limited disclosure of refugee information for refugee purposes.

Argument for the Attorney-General

[41] Mr Carter for the Attorney-General noted that state practice in relation to the Convention was consistent with the interpretation he was advancing and in particular he submitted that there was nothing in either the Convention or associated state practice which dictated the interpretation which Baragwanath J favoured. He also, as we have indicated, contended that in this case disclosure may well be in the public interest.

[42] He further maintained that the text of s 129T supported the Crown interpretation. His arguments focused very much on the practical application of s 129T. Mr Carter's contention was broadly that the interpretation favoured by Baragwanath J involved awkwardness in relation to the interconnections between subss (1), (3)(a) and (3)(b). The argument as to this was detailed and reasonably dense. It is easiest for us to pick up the highlights when we express our own views on the section.

Arguments for X and Z

[43] Mr Illingworth accepted that the interpretation favoured by Baragwanath J was not required under the Convention or by associated state practice. But he maintained that s 129T, when read sensibly and in context, did bear the meaning attributed to it by the Judge.

[44] Again the arguments advanced were reasonable dense and it is easiest to address them in our evaluation.

Evaluation

[45] As is apparent from what we have said, a good deal of the argument focused closely on the words of the section.

[46] Favouring the argument for the Attorney-General (the appellant) are a number of considerations:

> (a) On the approach favoured by Baragwanath J, s 129T(3)(b) covers much the same ground as s 129T(3)(a). If s 129T(3)(b) has the narrow meaning attributed to it by the Judge, it is not altogether easy to think of a public servant "whose functions in relation to [a] claimant ... [requires] knowledge of ... particulars" associated with the claim to refugee status (and is thus within s 129T(3)(b)) who would not also be a "a person necessarily involved in determining the relevant claim" (and thus also within s 129T(3)(a)).
>
> (b) Section 129T(1) defines those who are subject to confidentiality as "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)". This particular form of words contemplates that public servants within s 129T(3)(b) are not necessarily going to be involved "in the administration of the Act" and this points away from the conclusion reached by Baragwanath J.
>
> (c) Disclosure of information to public servants who are themselves subject to confidentiality is most unlikely to prejudice the safety of any person.
>
> (d) The extent of the confidentiality which the judgment of Baragwanath J provides for goes beyond what is required under the Convention and associated state practice and

might well have the practical effect of limiting the ability of the New Zealand or Rwandan authorities to prosecute successfully for what may well be extremely serious offending.

[47] While we recognise the force of these considerations and, indeed, that the issue is closely balanced, we have reached the view that the approach taken by Baragwanath J is broadly correct. Our reasons for this conclusion now follow.

[48] We start by observing that the relevant legislative scheme is not entirely coherent.

(a) We have noted already that the statute does not expressly provide whether or not the information gathering powers under ss 129G, 129H, 129L and 129P are to be exercised in a way which is subject to s 129T.

(b) It does not seem very likely that the legislature intended to distinguish in a discrete sense between the first three categories identified in s 129T(1) (ie "refugee status officers, the Authority, [and] other persons involved in the administration of this Act") and "persons to whom particulars are disclosed under subsection (3)(a) or (b)"). For instance, disclosure by a person "involved in the administration of the Act" to a refugee status officer who is to determine an application would be within s 129T(3)(a) and (b). In such an instance, the refugee status officer and as a recipient under both s 129T(3)(a) and (b). We see s 129T(1) as having been drafted on a belt and braces basis with the intention of casting the confidentiality net as far as possible. In that context arguments based on "doubling up" or surplusage of words seem to us to be of less moment than usual.

(c) The section does not provide a formal decision making process for the invocation of s 129T(3)(f). We also note that the confidentiality obligation is enforced by the creation of the offences provided for under s 129T(5). These considerations suggest a legislative expectation that decisions as to release under s 129T(3)(f) must be made by those who hold the information. Providing those who have the relevant information are imbued with the appropriate refugee status mind-set, associated risks might be thought to be manageable. But if information could be released under s 129T(3)(b) to someone engaged in the extradition or prosecution of the claimant, such a person might bring a rather different approach to bear. Against that background, the primary purpose of s 129T (which is the preservation of confidentiality) is best preserved by limiting the exceptions.

[49] There are two particular features of the section which support the argument for X and Z advanced by Mr Illingworth:

(a) On his argument, the order of the list of exceptions is reasonably logical. Section 129T(3)(a) addresses disclosure to those who are directly involved in the key decision making processes. Section 129T(3)(b) provides an overlapping category which may extend to public servants who are on the periphery of that process. Section 129T(3)(c) - dealing with disclosure to the United Nations High Commissioner for Refugees - is still broadly associated with issues which are part and parcel of the resolution of claims for refugee status. Section 129T(3)(d) is also focused on addressing claims for refugee status. On the other hand, if the Attorney-General's argument is right and s 129T(3)(b) is intended to provide for disclosure for purposes associated with the claimant's possible extradition or prosecution, it seems to be rather out of order, as it is very much in the middle of a series of subsections focused on the resolution of claims to refugee status. This is very much the point made by Baragwanath J at [21] of his judgment.

(b) The very limited language of s 129T(3)(b) is not a good fit for the Attorney-General's argument. The subsection permits disclosure of information to a public servant "whose functions in relation to the claimant or other person require knowledge of" that information. We agree with Mr Carter that the word "require" has a number of

> shades of meaning. But in the context of a statutory provision addressing confidentiality, it seems to us sensible to construe it literally. Public servants addressing possible extradition or prosecution of a claimant do not "require" information associated with that person's claim to refugee status because they can perform their relevant functions without the information.

[50] The overall impression we are left with is that s 129T was set up to facilitate the operation of a system to assess claims for refugee status. Under the legislative scheme, confidentiality is required save to the extent that disclosure is made for the purposes of that system - subs 129%(3)(a), (b), (c) and (d) - or can be safely made - subs 129%(3)(e) and (f). Although this approach we favour is not mandated by the Convention or associated state practice, there are legitimate considerations associated with the integrity of the refugee status system (see [34] above) which support a broad approach to confidentiality. So overall, we prefer the interpretation of s 129(3)(b) which Mr Illingworth advanced to that put forward by Mr Carter.

[51] We indicated earlier that we agreed broadly with the approach taken by Baragwanath J. It will be recalled that he was of the opinion that disclosure under s 129T(3)(b) was confined to "Crown officers and employees whose 'functions in relation to the claimant' *relate to the due disposal of his claim to refugee status* ... ." We would prefer to treat s 129T(3)(b) as permitting disclosure to public servants whose functions in relation to the claimant involve the due disposal of the claim to refugee status or matters incidental to or consequential upon that disposal; this to catch for instance disclosure to police officers who may have responsibilities in relation to a particular claimant. As well, we recognise that conceivably s 129T(3)(f) may (perhaps in the future) be able to be invoked and if that is so there could be no objection to the general release of information for any purpose, including prosecution or extradition.

Result

[52] The appeal by the Attorney-General against the judgment in favour of X is dismissed. As the judgment of Baragwanath J was not sealed, we think it right to make a declaration as follows:

> Section 129T(3)(b) the Immigration Act 1987 does not permit those subject to a duty of confidence under s 129T of the Immigration Act 1987 to disclose such matters that are confidential in relation to X under s 129T(1) to any person for the purpose of:
>
> (a) The possible extradition of X to Rwanda; or
>
> (b) The possible prosecution of X in New Zealand under the International Crimes and International Court Act 2000.

[53] The appeal of the Attorney-General against the order made by Andrews J in favour of Z is allowed but only because the order she made is no longer required. That order is set aside. We make it clear, however, that Z should be regarded as having been successful in these proceedings. This could be relevant for cost purposes.

[54] We have made, by consent, a suppression order with respect to proceedings in this court: see order C. We record that there remain in place various suppression orders with respect to the proceedings in the High Court.

[55] Costs are reserved.

ELLEN FRANCE J

[56] The question posed on the appeal is whether s 129T(3)(b) of the Immigration Act 1987 permits disclosure to public servants whose functions in relation to X and Z are associated with their possible extradition to Rwanda or trial in New Zealand.

[57] In my view, the answer to that question turns on whether disclosure is required to enable the public servant to carry out his or her functions in relation to X and Z. The word "required" in this context has its ordinary dictionary meaning of "need" or "necessary" (Little, Fowler and Coulson *The Shorter Oxford English Dictionary on Historical Principles* (3ed 1984) at 1803). Whether the necessity test is met is a factual question. It is not possible or appropriate at this stage to exclude the possibility that disclosure for extradition or prosecution purposes will be necessary in relation to X or Z. It is also premature to preclude the possibility that disclosure may be permissible for these purposes under s 129T(3)(f).

[58] I have adopted the term "public servant" used by the majority although I note that the term used in s 129T(3)(b) is broader because it also encompasses officers and employees of Crown agencies.

[59] The approach of the majority, like that of Baragwanath J, requires a reading into s 129T of a limitation on disclosure because the public servant works in the area of extradition or prosecution. Baragwanath J would go further and say that the disclosure must be limited to functions relating to disposal of the refugee status claim.

[60] The Immigration Act does envisage the making of inquiries and the provision of further information in relation to the disposal of a refugee claim. For example, s 129H(1)(d) states that if a refugee status officer has good cause to suspect that a person other than the refugee claimant has in his or her possession or control any document of the claimant (including any passport or travel document), the officer may, in the prescribed manner, request the person to produce the document. The prescribed form is set out in the Schedule to the Immigration (Refugee Processing) Regulations 1999. The form provides for the officer to record that he or she has good cause to suspect the recipient is in possession or control of a document relating to the "name of claimant" who has claimed refugee status. In contrast to the position where disclosure is made under s 129T(3)(b), it is not at all clear that the persons to whom the form may be sent will be under any obligation of confidentiality in terms of s 129T.

[61] It is plain, however, that there must also be some disclosure authorised by s 129T(3)(b) which relates to those whose functions are not concerned with the "due disposal" of the claim to refugee status. This point is made by the Authority in declining X's applications for indefinite adjournment of the hearing of his appeal until all extradition matters have been determined and for an order for complete confidentiality in respect of his evidence: RSAA AK Refugee Appeal No. 75647 13 April 2006. The Authority discusses the matter at [62] by reference to the turnaround provisions in s 128 and the conditional release sections including s 128AA and says:

> [62] Additionally, the provisions of Part 6A of the Act are to be read alongside the balance of the Act and in particular the turnaround provisions in s 128 and the conditional release sections, of which s 128AA is central. The New Zealand authorities must be able to make enquiries, for example, as to the identity of persons arriving in New Zealand, the authenticity of the travel documents produced by them and into the various disqualifying features listed by s 7 of the Act and which are directly engaged in the airport situation by s 128B. In addition the existence of an international arrest warrant is clearly relevant to flight risk when a court is determining custodial status under the Act. Similarly where a refugee claimant applies for conditional release and produces police clearance certificates, it is difficult to understand why the Immigration Service should be precluded from making enquiries into the authenticity of those certificates. In addition, as in the present case, where an individual presents himself at Auckland International Airport as a ... citizen [of ...] travelling on a ... passport [from that other country], he or she cannot complain if the New Zealand authorities make enquiries of their counterparts in [the other country] as to whether the travel document is genuine and as to whether the individual is indeed a ... citizen [of that other country].

[62] The point is also illustrated by reference to s 128B. That section provides for the detention of persons arriving in New Zealand in certain circumstances. One of those circumstances is where an immigration officer or any member of the police has reason to

suspect that the person may be a person to whom s 7(1) applies. Persons to whom s 7(1) applies include, for example, a person who the Minister of Immigration has reason to believe has engaged in an act of terrorism in New Zealand (s 7(1)(e)(i)) or is a member of an organisation which has criminal objectives and whose presence here would be a threat to the public interest. Such a person can be detained until, amongst other matters a determination is made that he or she is not a person to whom s 7(1) applies (s 128B(3)). Obviously, inquiries will have to be made about these persons in order to determine whether or not their detention is to continue. It is of course quite possible that a person in this situation may also claim refugee status. (See the discussion on the applicability of ss 128 and 128B to refugee status claimants in *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA)).

[63] Mr Carter pointed to difficulties for social welfare, passports and other officials in undertaking their functions without access to the information in question. (The Immigration Act does make some provision for the disclosure of immigration information to the Ministry of Social Development, s 141A.) The response of both counsel for the respondents was that these difficulties could be met by waiver or provision of the information from X or Z. That approach does not however appear to sit easily with the obligatory nature of the language in art 28 of the Convention Relating to the Status of Refugees (1951) 189 UNTS 137, for example, which provides that contracting states "shall" issue travel documents to refugees lawfully in their territory for the purpose of travel except in the specified circumstances.

[64] I accept there may be cases where, on the facts, disclosure is not necessary for extradition or prosecution purposes. But there is nothing on the reading of s 129T to warrant the imposition of a limitation to prevent disclosure to those in the extradition or prosecution areas.

[65] Nor is there anything in the Convention or in state practice that warrants reading the section in the way favoured by the majority.

[66] The majority point to the need for candour. That is obviously a consideration underlying the notion of confidentiality although in my view it is not the principal consideration. (See the discussion in McAllister, "Refugees and Public Access to Immigration Hearings: A Clash of Constitutional Values" (1990) 2 IJRL 562 at 582.) However, it cannot be correct that under the guise of confidentiality a claimant who acknowledged he or she was in fact a war criminal should be protected from the disclosure of that fact to the relevant New Zealand official where the admission was the only likely source of that information. A balancing is required to give appropriate regard to the interests of the claimant and the refugee status process but also to give adequate recognition to New Zealand's other international obligations such as those arising under the Geneva Conventions or those relating to the Rome Statute of the International Criminal Court (1998) 2187 UNTS 90.

[67] Further, aside from any concern about the effects of release of information, there are already consequences adverse to the refugee claimant if he or she is untruthful to the authorities determining the claim. (For example, s 129L(1)(b) provides that a refugee status officer may decide to cease to recognise a person as a refugee if the recognition given by the officer was procured by fraud or other similar matters. In addition, supplying information that the claimant knows is false or misleading is an offence in terms of s 142(1)(c) punishable by imprisonment or a fine or both.) In that sense, the process is designed to ensure that the claimant tells the truth. If telling the truth leads to the denial of refugee status, the claimant may have to leave New Zealand. As such, the fact that information could be used to determine whether to extradite or prosecute the claimant once the status has been declined does not materially alter the incentive to be candid.

[68] In addition, the context in which these sorts of issues will generally arise is that the claimant's refugee status has been declined. Where art 1F is applicable, the individual is no longer entitled to protection under the Refugee Convention. Exclusion from the Refugee Convention does not mean automatic removal from New Zealand. As this Court said in *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291 at 300, New Zealand's obligations

under, for example, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984) 1465 UNTS 112 remain. However, while the protection afforded under s 129T continues to apply, the legitimate considerations relating to the integrity of the refugee status system can no longer be said to have any great bearing on the matter.

[69] Fitzpatrick, "The Post-Exclusion Phase: Extradition, Prosecution and Expulsion" (2000) 132 (Supplement 1) IJRL 272 at 278 observes that:

> For crimes encompassed within Article 1F(a), especially those grave crimes implicating the *aut dedere aut judicare* [extradite or prosecute] principle, the State excluding the asylum seeker arguably has an obligation to notify the State to whom he or she will be returned that there are 'serious reasons' to suspect him or her of such crimes. Even where no formal extradition takes place, this notification will help insure that a prosecution ensues.

[70] The notion that obligations to pass on information may arise in the art 1F situation is reflected in the legislative provisions allowing such disclosure in the Netherlands, Denmark, South Africa, the United Kingdom and Australia. In terms of the position in Australia the confidentiality provisions are qualified by the ability to disclose where that is necessary for the purposes of carrying into effect the provisions of the Migration Act 1958 (Cth): s 439(3)(c). Provisions such as s 336F of the Migration Act authorise disclosure to foreign countries for certain purposes in an art 1F type situation.

[71] The UNHCR itself acknowledges in the context of art 1F (UNHCR *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the status of Refugees* HCR/GIP/03/05 (2003)) that there is the possibility of contact with the country of origin. The guidelines state at [33]:

> At all times the **confidentiality** of the asylum application should be respected. In exceptional circumstances, contact with the country of origin may be justified on national security grounds, but even then the existence of the asylum application should not be disclosed.

[72] The principal concerns of such confidentiality provisions are the safety of the claimant and other persons as well as the obvious concern to ensure that by claiming refugee status the claimant does not become a refugee *sur place*. (That is a person who was not a refugee when he or she left the country of origin but who becomes a refugee at a subsequent date.)

[73] This underlying purpose leads, I believe, to the view taken by the Authority that the duty of confidentiality under s 129T is not "all encompassing": at [63]. Rather, the principal focus is on protecting the identity of the claimant as a refugee claimant. The "particulars" are relevant primarily in the context of the concern that their release would identify the claimant as a claimant. Hence, the Explanatory Note to the Immigration Amendment Bill 1998 at xvii said that s 129T:

> [R]equires confidentiality to be maintained as to the identity of a claimant or other person whose refugee status is being considered, except in the particular circumstances specified in *subsections (3) and (4)*.

[74] On its face then, s 129T does not purport to make confidential everything the claimant discloses, for example, to the Authority. The Authority put it this way in *X's* case (at [63]):

> In summary, there is no all encompassing duty of confidentiality so as to preclude the authorities in New Zealand from making **any** inquiry about an individual who, on arrival in New Zealand, seeks recognition as a refugee. There will be exceptional cases where, as anticipated by s 129T(2) there must be confidentiality as to the very fact or existence of the claim if disclosure of its fact or existence would tend to identify the person concerned, or be likely to endanger any person. But even in relation to this

exception, the confidentiality is as to the identity of the person **as a refugee claimant**, not as to the identity or particulars of an individual whose immigration status in New Zealand has yet to be determined; provided, however, that at all times s 129T(2) is not breached. On the evidence before us no such breach has occurred.

[75] Accordingly, as I see it, s 129T(1) requires the specified persons to keep confidential the identity of X and Z as claimants and associated identifying particulars. Section 129T(2) says that sometimes the need for confidentiality may extend to protecting the very fact that there is a claim for refugee status.

[76] This obligation of confidentiality does not prevent disclosure to those involved in determining X and Zs' claims such as Crown and defence counsel (s 129T(3)(a)). Nor does it prevent disclosure to those whose functions mean they need to know about the claims (s 129T(3)(b)). Plainly, disclosure to those not in a government department is contemplated. Finally, if there is no safety issue, there is no need to maintain confidentiality in the narrower sense envisaged by s 129T(1).

[77] This approach avoids the overlap between s 129T(3)(a) and (b) that is apparent on the analysis of the majority.

[78] For these reasons, I would allow the appeals. My analysis does not dispose of the other issues raised by Baragwanath J such as the potential effect on fair trial. However, given the outcome of the appeal I simply note in relation to those matters that I would accept the submissions on behalf of the Crown that a declaration of the type envisaged by the High Court would be premature.

[79] I add that I share the majority's view (at [15] above) that there is scope for doubt as to the appropriateness of the procedure adopted in the High Court in relation to both cases.

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