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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-330

BETWEEN	"Z" Plaintiff
AND	ATTORNEY GENERAL OF NEW ZEALAND Defendant

Hearing: 8 March 2007

Appearances: I C Bassett and R P McLeod for Plaintiff
I C Carter and K M Howard for Crown

Judgment: 30 March 2007 at 3:30pm

JUDGMENT OF ANDREWS J

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*In accordance with r540(4) I direct that the Registrar endorse this judgment with the delivery time of **3:30pm** on **30 March 2007**.*

…….
Deputy/Registrar

Date: ……..

Solicitors: McLeod & Associates, PO Box 105-215 Auckland
Crown Law Office, PO Box 2858 Wellington
Counsel: I C Bassett, PO Box 105-315 Auckland

Introduction

[1] The plaintiff seeks an interim order by way of declaration that a determination not be made as to cancellation of his refugee status, pending further order of the Court.

Background

[2] The plaintiff is a Rwandan national who arrived in New Zealand [Text deleted to prevent identification, pursuant to s 129T Immigration Act 1987] as a "quota" refugee. [Text deleted to prevent identification, pursuant to s 129T Immigration Act 1987].

[3] On 18 September 2006 a Refugee Status Officer (RSO) of the Refugee Status Branch of the Department of Labour (RSB), caused a Notice to be served on the plaintiff (the Notice). The Notice advised the plaintiff that, for the reasons set out therein, the RSB was to consider cancellation of the plaintiff's refugee status in New Zealand, under ss 129L(l)(a)-(c) of the Immigration Act 1987. The grounds for cancellation set out in the Notice were:

> (a) The decision to recognise you as a refugee may have been improperly made by reason that the matters dealt with in Articles 1D, 1E, and 1F of the Convention (which relate to the exclusion of a person from the protection offered by the Convention) may not have been properly considered for any reason, including by reason of fraud, forgery, false or misleading representation, or concealment of any relevant information.
>
> (b) The Refugee convention may have ceased to apply to you in terms of Article 1C of the Convention;

[4] The grounds were expanded on in the Notice and may be paraphrased as being that neither the plaintiff nor [Text deleted to prevent identification, pursuant to s 129T Immigration Act 1987] had disclosed, when seeking recognition as refugees by the UNHCR, that:

> a) The plaintiff had been implicated in genocide and other crimes against humanity arising from the 1994 genocide in Rwanda;

b) The plaintiff was an elected member of the *Mouvement Revolutionaire et National pour le Developpment* (MRND) at Prefectorial committee and national levels;

c) The plaintiff was a co-creator of the *Interahamwe* in Rwanda; and

d) The plaintiff had otherwise actively participated in the 1994 genocide in Rwanda.

[5] Also annexed to the Notice was a copy of a document that appears on its face to be an international warrant for the plaintiff's arrest, issued by the Deputy Prosecutor General of the Republic of Rwanda, on charges of genocide and crimes against humanity.

[6] The Notice also stated that the plaintiff had been classified as a "Category 1 Genocide Suspect". Category "1" is said to apply to:

> a) Persons whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity;
>
> b) Persons who acted in positions of authority at the national, Prefectorial, Communal, Sector or Cell level, or in a political party, the army, religious organizations or in a militia and who perpetrated or fostered such crimes;
>
> c) Notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed;
>
> d) Persons who committed acts of sexual torture or violence.

[7] Along with the Notice, the plaintiff was served with a number of files said to contain the evidence relevant to the possible loss of refugee status. One of these files had been provided to the RSB by the International Criminal Tribunal for Rwanda (ICTR) and the plaintiff was required to sign an undertaking that that file not be used, duplicated or disclosed to any person except his legal representative, who was also required to sign an undertaking on the same terms.

[8] The Notice advised the plaintiff of his rights, including within 20 working days of service of the Notice to provide written submissions and to request an interview with the RSO concerning the cancellation determination.

[9] The plaintiff consulted solicitors who wrote to the RSB on 22 September 2006 advising of their instructions. They requested that the deadline for the plaintiff to provide written submissions and/or request an interview be extended. An extension was granted to 15 December 2006. The Court was later advised that the RSO's determination would not in fact be made until 27 February 2007, then that it was to be delivered on 16 March 2007. I record at this point that the hearing of the plaintiff's application for interim orders proceeded on the basis that, notwithstanding that the deadline had not been extended beyond 15 December 2006, the plaintiff would have the opportunity to decide whether to exercise his right to present evidence and submissions, and/or request an interview, before the RSO makes a determination as to cancellation.

[10] The plaintiff says that he wishes to reply to the Notice and rejects the allegations in it. He has, he says, spent many hours preparing a draft statement, which is some 80 pages long. He has identified at least 50 witnesses from whom he wishes to call evidence. Forty of these live outside Rwanda while 10 still live in Rwanda.

[11] However, he believes that he and those witnesses will be at severe risk if their identity is disclosed to the current regime in Rwanda. The lives of those witnesses presently living in Rwanda would be endangered: he believes they would very likely be killed or seriously harmed by agents of the current regime. He also believes that the lives of witnesses currently living outside Rwanda would be endangered, as the regime could "easily create false genocide allegations against many of those witnesses".

[12] Further, he believes that if any of the witnesses whose evidence he wishes to provide to the RSB were to be killed or threatened, or targeted by the Rwandan government in any other way, then he would lose any prospect he might have had of a fair criminal trial at some time in the future. It is also the case that, unless he can

assure witnesses that they may do so confidentially, that is without fear of disclosure, then they are unlikely to assist him.

[13] The plaintiff is also concerned that if he provides his own statement of defence to the Notice, and if details from it are disclosed to the Rwandan government, this too may damage any prospect he might have had of a fair criminal trial at some time in the future in Rwanda or elsewhere. I note the possibility that the plaintiff's trial could be conducted in New Zealand, under the International Crimes and International Criminal Court Act 2000.

[14] Accordingly, the plaintiff is concerned as to the confidentiality of any submissions or evidence presented to the RSO in response to the Notice.

[15] By a letter dated 8 December 2006 the plaintiff's solicitors advised the RSB as follows:

> … **RE: [Z] – DoB [date of birth]**
>
> Our client is in the process of preparing a statement in response to your Notice of Intended Determination, mindful of your extended deadline of 15 December. He is also in the process of securing witnesses to rebut the various allegations contained in your Notice.
>
> Before our client is prepared to file the statement and to advise you of intended witnesses, he requires an undertaking from the Refugee Status Branch that this case will, as a matter of law, be kept by the Branch in confidence. Section 129T of the Immigration Act 1987 ("the Act") entitles [Z] to present the particulars of his defence to your allegations in confidence. He cannot and will not present any particulars unless and until a categorical assurance is provided by the Refugee Status Branch that these will be kept absolutely confidential and will not be released outside of the refugee process, particularly in any anticipated extradition procedures or prosecution (whether in or outside New Zealand).
>
> You will no doubt be aware of the recent High Court decision of Baragwanath J in *X v Refugee Status Appeals Authority and Anor* HC AK CIV-2006-404-2650 [14 July 2006], in which the High Court considered precisely the same dilemma regarding confidentiality undertakings and section 129T in a refugee matter raising issues not dissimilar to the issues arising in the present case. At para [69] of a declaratory judgement, His Honour ruled that the evidence which the refugee appellant in that case intended to provide to the Refugee Status Appeals Authority could not be disclosed to any agency for the purpose of any extradition or criminal proceedings.

Accordingly, we seek a formal written undertaking from you and a senior officer within the Refugee Status Branch that –

1. the particulars of [Z's] defence to the allegations contained in your Notice will be kept confidential to the Refugee Status Branch;

2. the particulars of [Z's] defence to the allegations contained in your Notice will not, at any time (whether now or in the future) be disclosed to the government of Rwanda;

3. the particular of [Z's] defence to the allegations contained in your Notice will not, at any time (whether now or in the future) be disclosed to any New Zealand officials involved in any extradition or prosecution procedures.

If the undertakings above can be provided, [Z] will be prepared to provide particulars of his defence to your Notice.

Could you please advise whether you will give the undertakings we request. If they are not to be provided, please give reasons why and advise what you therefore intend to do about the upcoming deadline for receipt of [Z's] particulars. You may be aware that the decision of Baragwanath J in *X v Refugee Status Appeals Authority* is now being appealed to the Court of Appeal and that a fixture for the hearing of the appeal has been set down for next July, 2007. It may be appropriate to adjourn [Z's] matter pending the decision of the Court of Appeal (and most likely the Supreme Court) in that matter.

We await your response and would be grateful if this could be provided promptly.

Yours faithfully

…

[16] The RSO responded by letter dated 13 December 2006 as follows:

[Z]

I refer to your letter dated 8 December 2006 and respond as follows:

1. The Refugee Status Branch ("RSB") will not provide the undertakings that you seek.

2. The RSB will abide by what the law requires. Currently, that would involve complying with the Baragwanath decision in *X v RSAA.* However, that decision may change as a result of the appeal and/or any relevant statutory amendments.

3. It is for [Z] to decide what material he wishes to provide to me having considered the implications of current law and any possible changes to it.

4. The RSB does not intend to adjourn the cancellation proceedings currently in train pending any final outcome of the *X v RSAA* case. Accordingly, the deadline of 15 December 2006 to submit any material remains.

I look forward to hearing from you.

Yours faithfully

…

[17] A letter from the RSO to the plaintiff's solicitors, dated 20 December 2006, records that in a telephone conversation on 19 December 2006 the plaintiff's solicitors confirmed to the RSO that, in the circumstances of the undertakings not being given, he would not be supplying any information as to the plaintiff's defence, and that witness statements, in particular, could not be provided to the RSB without a guarantee of confidentiality.

Plaintiff's proceeding

[18] On 25 January 2007 the plaintiff filed a proceeding seeking judicial review of the "decision" conveyed in the RSO's letter of 13 December 2006, which is set out above. It is alleged that the "decision" was:

a) Unreasonable;

b) Contrary to the provisions of the New Zealand Bill of Rights Act 1990 (in being a breach of natural justice);

c) Had been made taking into account irrelevant considerations; and

d) Had been made failing to take into account relevant considerations.

[19] The allegations were further particularised at paragraph 3.3 of the statement of claim as follows:

3.3 In particular, in respect of the confidentiality issue:

3.3.1 The decision of the Refugee Status Branch means (in effect) that -

(i) The Refugee Status Branch will abide in the interim by the ruling of the High Court in *X v Refugee Status Appeals Authority and Attorney General*[1] as to the interpretation of section 129T of the Immigration Act 1987 regarding confidentiality, in relation to the determination of the said Notice, whilst at the same time attempting to overturn *X v Refugee Status Appeals Authority and Attorney General* on appeal in the Court of Appeal, due to be heard in or about July 2007.

(ii) By refusing to extend the time within which the plaintiff may provide particulars of his defence, the decision of the Refugee Status Branch forces the plaintiff to elect whether to present the particulars of his defence to the said Notice –

(aa) When the future conduct of the Refugee Status Branch as to whether it will keep confidential those particulars of defence is uncertain;

(bb) When providing particulars of the plaintiff's defence may prejudice the plaintiff's right to a fair trial and defence of the charges against him in Rwanda, if the strict interpretation of the confidentiality provisions of s 129T as held in *X v Refugee Status Appeals Authority and Attorney General* is overturned by the New Zealand Court of Appeal.

3.3.2 The Refugee Status Branch failed to consider properly or give due weight to the purported existence of serious criminal charges against the plaintiff in Rwanda.

3.3.3 The Refugee Status Branch failed to consider properly or give due weight to the fact that an international arrest warrant has purportedly been issued by the government of Rwanda.

3.3.4 The Refugee Status Branch failed to consider properly and give due weight to the plaintiff's right to a fair trial in Rwanda.

3.3.5 The plaintiff will have to make the unfair choice between providing the Refugee Status Branch with the particulars of his defence to the allegations made against him (in circumstances where such disclosure is likely to prejudice his defence to those allegations) or declining to disclose his defence (in circumstances where his prospects of success in opposing the Notice would be prejudiced).

[20] The plaintiff's application for interim relief was dated 14 February 2007 and sought:

[1] Reported at [2006] NZAR 533

> 1. An interim order by way of declaration that the Defendant (sued in respect of the Crown and in particular the Department of Labour, Immigration New Zealand and the Refugee Status Branch of Immigration New Zealand) and in particular the responsible Refugee Status Branch officer ought not make any determination of the Notice of Intended Determination of Cancellation of Refugee Status in respect of the plaintiff, until further order to the Court; …

[21] The specified grounds referred to were:

a) Baragwanath J's judgment in *X v RSAA*, as to the interpretation of s 129T;

b) The Crown appeal against that judgment;

c) The "unfair election" the plaintiff would be required to make as to whether to provide particulars of his defence to the Notice, if he were required to respond to the Notice before the proper interpretation of s 129T is finally determined; and

d) The necessity of an interim order to preserve the position of the plaintiff.

[22] An amended statement of claim was filed on 28 February 2007. An allegation was added that the "decision" was in breach of natural justice. Also, a further prayer for relief was added, effectively seeking a declaration as to the correct interpretation of s 129T of the Immigration Act 1987.

[23] Timetable orders have been made in the proceeding. The defendant has filed a statement of defence to the amended statement of claim. Both parties are to file and serve lists of documents by 21 April 2007, and a further judicial conference is to be set down on a date to be fixed, but not before 4 May 2007.

[24] The plaintiff's application for interim relief was heard on 8 March 2007. On 9 March the plaintiff filed an application for leave to file further evidence in support of the application. [Text deleted pursuant to Order made by the High Court on 26 March 2007].

[25] The plaintiff's application to adduce post-hearing evidence was dealt with in telephone conferences on 9 and 13 March 2007. In my Minute issued on 9 March 2007 I noted that the defendant did not oppose the application, but did not concede the relevance and admissibility of that evidence. Orders were also made prohibiting publication of the application, evidence and submissions. Further orders prohibiting publication were made in my Minute issued on 13 March 2007.

[26] As recorded earlier, the plaintiff has been advised that the defendant intends to the make a cancellation determination on 16 March 2007, regardless of the substantive proceedings for judicial review, unless the plaintiff is granted the interim relief he seeks.

Statutory scheme: Cancellation of refugee status

[27] Refugee status is governed by Part 6A of the Immigration Act 1987. The starting point is s 129A, which provides that the object of Part 6A is to "provide a statutory basis for the system by which New Zealand ensures it meets its obligations under the United Nations Convention Relating to the Status of Refugees" (the Refugee Convention).

[28] Section 129C provides, as relevant to this proceeding, that:

> …
>
> (2) Every question as to whether a person in New Zealand should continue to be recognised as a refugee in New Zealand under the Refugee Convention is to be determined in accordance with this Part.

[29] Section 129E(1) provides that every claim to be recognised as a refugee in New Zealand (which pursuant to s 129C(2) includes the question whether a person should continue to be so recognised) is to be determined by a RSO. RSO's powers are set out in ss 129G and 129H. These include the powers to seek information from any source (s 129G(6)(a)), to determine their own procedures on a claim (s 129G(7)), and to require a claimant to supply information (s 129H(1)(a)) and produce documents (s 129H(1)(b)). I note that the power to determine procedure

under s 129G(7) is expressly subject to Part 6A, any regulations made under Part 6A, and to "the requirements of fairness".

[30] It is relevant to note at this point obligations imposed on claimants, in particular s 129G(3):

> A claimant must as soon as is possible endeavour to provide to an officer all information relevant to his or her claim, including –
>
> (a) A statement of grounds for the claim. …

and s 129G(5):

> It is the responsibility of the claimant to establish the claim, and the claimant must ensure that all information, evidence, and submissions that the claimant wishes to have considered in support of the claim are provided to the Refugee Status officer before the officer makes a determination on the claim.

[31] Finally, in relation to the claims process, s129H(5) should be noted:

> Where a claimant who is required to attend an interview fails to attend at the appointed time and place, the officer may determine the claim without conducting the interview.

[32] Cancellation is covered by ss 129L(1)(a)-(c):

> (1) In addition to their function of determining claims for refugee status, refugee status officers also have the following functions:
>
> (a) Determining whether the Refugee Convention has ceased to apply to a person who has previously been recognised as a refugee by a refugee status officer (but not by the Refugee Status Appeals Authority) in terms of Article 1C of the Convention:
>
> (b) Determining whether a decision to recognise a person as a refugee was properly made, in any case where it appears that the recognition given by a refugee status officer (but not by the Authority) may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information, and determining to cease to recognise the person as a refugee in such a case if appropriate:
>
> (c) Determining whether a person already recognised as a refugee should subsequently be excluded from the protection of the Convention, in any case where the matters dealt with in Articles 1D, 1E, and 1F of the Convention may not have been able to be properly considered by a refugee status officer (but not by the Authority) for any reason, including by reason of fraud, forgery, false or misleading representation, or concealment of relevant information:

…

[33] Section 129M provides that when carrying out any function under s 129L a RSO must take all reasonable steps to notify the person concerned in the prescribed manner of the matter that is being considered (s 129M(a)) and (as relevant to this proceeding) that ss 129G and 129H apply as if the matter being considered were a claim for refugee status and the person concerned were a refugee claimant.

[34] Sections 129N to 129Q provide for appeals to the Refugee Status Appeals Authority (RSAA). Section 129O(2) gives a right of appeal to the RSAA following a RSO's decision to cancel refugee status under s 129L(a)-(c).

[35] Section 129T has already been referred to. It is headed "Confidentiality to be maintained", and provides that confidentiality is to be maintained as to the identity of a claimant, or other person whose status is being considered, and as to the particulars of their case (s 129T(1)). Compliance may require confidentiality as to the very fact or existence of a case (s 129T(2)). Section 129T(3) sets out certain instances where s 129T(1) does not prevent disclosure. Section 129T was the focus of the judgment in *X v RSAA*.

[36] Determinations involving cancellation of refugee status are also governed by the Immigration (Refugee Processing) Regulations 1999. Regulation 11 relates to notice. Regulation 12 relates to procedure. It provides as follows:

> (1) A person to whom a Notice regarding the possible loss of refugee status is given is entitled to be interviewed and to make written representations in relation to the matter.
>
> (2) Before making any decision involving loss of refugee status, the relevant officer must take into account any representations (including any personal interview), documents, or other evidence produced by the person in respect of whom the loss of refugee status is proposed.
>
> (3) In no case may a decision on the matter specified in the Notice be made sooner than 20 working days after the date on which the Notice is received by the person.

[37] Regulation 13 relates to notification of the RSO's decision.

[38] The effect of the statute and regulations is that the plaintiff, having been notified of the RSO's intention to make a cancellation determination under s129L, is entitled to request an interview with and present written submissions to the RSO. However, if no interview is requested, and/or no written submissions provided, the RSO is entitled to make the determination. Accordingly, if the plaintiff does not request an interview and/or provide written submissions (and he has done neither as yet), then unless the interim order is granted, the RSO will issue a determination. In the absence of any evidence or submissions from the plaintiff, it is likely, if not inevitable, that that determination will be to cancel the plaintiff's refugee status.

[39] The plaintiff would then have a right to appeal to the RSAA. An appeal is a full *de novo* hearing. The plaintiff would have the opportunity to be heard, and to present evidence and submissions. However, it is again the responsibility of an appellant to establish the claim (s129P(1)) and the RSAA may determine the appeal without interview if the person affected fails, without reasonable excuse, to attend a notified interview (s 129P(6)).

Interim relief in the context of immigration cases

[40] Under s 8 of the Judicature Amendment Act 1972 the Court may make an interim order by way of declaration if it is necessary to do so for the purpose of preserving the position of the applicant.

[41] The threshold is the necessity to preserve the applicant's position, and this must be satisfied before any discretionary factors are taken into account. In *Carlton & United Breweries v Minister of Customs*[2] Cooke J (as he then was) said:

> … In general the Court must be satisfied that the order sought is necessary to preserve the position of the applicant for interim relief – which must mean reasonably necessary. If that condition is satisfied … the Court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weaknesses of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief.

[2] *Carlton & United Breweries v Minister of Customs* [1986] 1 NZLR 423, 430

[42] In *Esekielu v Attorney-General*[3] Hammond J considered the principles which should be applied by a Court when considering an application for an interim order under s 8, in the context of an immigration case. His Honour said:

> It seems to me therefore, that whilst the individual applicant should not be required to demonstrate a very strong probability of success on the merits, the kind of matters that that individual must establish in support of a claim to interlocutory relief must be more than a showing that the question is not merely trivial. I would have thought both that there must be a real contest between the parties, and that the applicant has a reasonable chance of succeeding in that contest.
>
> …
>
> Apart from the issue of the likelihood of the plaintiff succeeding on the merits, there will be questions about whether usual procedures were followed; whether there has been undue delay, whether there have been holdings out or expectations of some kind created in the plaintiff which might give rise in equity and good conscience to some kind of estoppel; the conduct of the plaintiffs themselves and their forthrightness in dealing with the authorities on immigration questions; their punctiliousness and due observance of the procedures involved in these matters; and doubtless other factors.
>
> …

[43] Hammond J's approach was summarised by Heath J in *Zakshevsky v Minister of Immigration*[4] at [15] as follows:

> The general approach to s 8 of the Judicature Amendment Act 1972 (as set out in *Carlton and United Breweries Limited v Minister of Customs* [1986] 1 NZLR 423 (CA)) must be tailored to meet the exigencies arising in immigration cases such as this.

Is interim relief necessary to preserve Z's position?

[44] What is the plaintiff's present position? He has been served with the Notice. He has a right to request an interview and present evidence and submissions but has not done so. At present, pursuant to the judgment in *X v RSAA*, if he presents evidence and submissions to the RSO in response to the Notice, there could be no disclosure to anyone outside the strict confines of the cancellation determination.

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[3] *Esekielu v Attorney-General* (1993) 6 PRNZ 309, 312-314
[4] *Zakshevsky v Minister of Immigration* HC AK M669-02, 11 June 2002

[45] However, the "present position" must also take note of the Crown's appeal in *X v RSAA*. The Crown is arguing for a wider interpretation of s 129T. It is evident from the Notice of Appeal (made available to me by Mr Carter) that the Crown is specifically seeking the ability to disclose information for the purposes of extradition and/or prosecution. The Notice of Appeal also evidences the Crown's clear intention to share information received. So the plaintiff's present position is one of uncertainty as to the confidentiality of any evidence and submissions presented to the RSO.

[46] If, in light of that uncertainty, the plaintiff were to decide against presenting evidence and submissions, it is likely that the cancellation determination will be made. It is correct that, as Mr Carter submitted for the defendant, the plaintiff will then have a right to appeal to the RSAA. However, s 129T also applies to the appeal, so he will then be placed in exactly the same position of having to decide whether to present evidence and submissions. He will be faced with the same uncertainty as to the confidentiality of any evidence and submissions.

[47] In this respect the plaintiff's position differs from that of the plaintiff in *Malkit Singh v Attorney-General and Anor*[5] where it was held that, despite there being an arguable case in on the plaintiff's substantive claim, interim relief was refused because it was not necessary to preserve the plaintiff's position. This was because the plaintiff had the opportunity to present his case, in its entirety, to the RSAA. In the present case, if the interpretation of s 129T is not finally determined before any RSAA hearing (which appears to be possible), the plaintiff will again have to decide whether to present evidence and submissions, without any certainty as to confidentiality.

[48] I therefore conclude that interim relief is necessary to preserve the plaintiff's position. It is now necessary to consider all the circumstances in order to determine whether interim relief should be granted.

Is there a "real contest" between the parties?

[49] I turn to consider whether there is a "real contest" between the parties, and

[5] [2000] NZAR 125, affirmed on appeal: [2000] NZAR 136

whether the plaintiff has a reasonable chance of succeeding in that contest. To do this it is necessary to consider the plaintiff's claims that the RSO's decision was unreasonable, contrary to natural justice, or irregular in the considerations taken into account. It is also necessary to consider the plaintiff's claim for a declaration as to the interpretation of s 129T.

The RSO's decision

[50] There is a dispute as to whether there has been the exercise of a statutory power of decision that may be subject to judicial review. Counsel for the defendant contends that the "decision" is the refusal of the RSO to give the undertakings as to confidentiality sought by the plaintiff's solicitors. It was then argued that there is no statutory power of decision to give such undertakings, so there has been no reviewable exercise of a statutory power of decision. Mr Carter relied on the decision of Cooper J in *M v RSAA* [6].

[51] Mr Bassett for the plaintiff contended that the "decision" under review is the RSO's refusal to postpone the cancellation determination pending the outcome of the appeal in *X v RSAA*. He submitted that there is clear authority that interlocutory and preliminary decisions can be reviewed[7], and that s 4(1) of the Judicature Amendment Act expressly refers to judicial review of "proposed" exercises of statutory power. He distinguished *M v RSAA* on its facts, on the basis that the decision sought to be reviewed in that case did not affect the applicant's rights. He submitted that, in Z's case, the RSO's decision not to postpone the determination very clearly affected his rights.

[52] It is not necessary at this interim stage to decide which of the two characterisations of the "decision" would prevail in the substantive hearing. It suffices to note that there is a real contest, and that the plaintiff appears to have a reasonable prospect of succeeding in his argument that the "decision" under review

[6] *M v RSAA* HC AK CRI 2006-404-001046, 28 August 2006
[7] Relying on *Zaoui v Attorney-General* [2004] 2 NZLR at 360-361 and *Zaoui v Attorney-General No 2* [2005] 1 NZLR 690 at 697, 720, 738

is the decision not to postpone the cancellation determination, and that it was one that affected the plaintiff's rights.

Breach of natural justice

Election whether to present evidence and submissions

[53] Mr Bassett submitted that Z had strong grounds for claiming a breach of natural justice: that the refusal to postpone the cancellation determination had the effect of denying Z the right to present submissions and evidence in response to the Notice. He submitted that this was in breach of s 27 of the New Zealand Bill of Rights Act 1990, and that the RSB is required to observe a high level of natural justice and fairness, as questions of life, liberty and personal safety are at stake[8]. As has already been noted, s129G(7) is expressly subject to the requirements of fairness.

[54] Plainly, as Mr Carter submitted, the decision not to postpone does not, in and of itself, deny Z his "right to be heard", by way of the opportunity of an interview with the RSO and presenting submissions and evidence in response to the Notice. Z has had that right ever since the Notice was served on him. The date of the cancellation determination has been deferred to give him the opportunity to request an interview and present submissions and evidence. He has elected not to do so.

[55] It may also be, as Mr Carter submitted, that the provisions of ss 129G(5) (claimant's responsibility to establish claim) and 129H(5) (claims may be determined without an interview if the claimant fails to appear at an interview) arguably do not support an argument that the determination process may be "frozen".

[56] However, it must be questionable whether the plaintiff can be said to have a "true" election (that is, informed by full knowledge of all of the circumstances surrounding the election) when he has no certainty as to the interpretation of the confidentiality requirements of s 129T.

[8] Relying on *Khalon v Attorney-General* [1996] 458 at 463

[57] Baragwanath J held in *X v RSAA* that s 129T protected the absolute confidentiality of a refugee claim. Information provided to the RSB may be disclosed only to those people having a function in the determination of Z's status as a refugee. The information could not be disclosed to any Crown officer or employee whose functions in relation to him were for other purposes, such as extradition or prosecution.[9]

[58] However, *X v RSAA* is the subject of a Crown appeal to the Court of Appeal. I was advised during the hearing that the appeal is to be heard in late July 2007. If the judgment were to be overturned on appeal, any evidence or information given to the RSO may be able to be disclosed for the purposes of extradition or prosecution. In the event that Z elected to present evidence to the RSO, he would not be able to retract that evidence were the Crown to succeed on appeal. Once the interpretation of s 129T has been settled, Z will be able to make a true election whether to present evidence and submissions. At present Z does not have certainty as to possible future disclosure of information and evidence he presents to the RSO.

[59] In my view there is a "real contest" between the parties on the issue whether the refusal to postpone the cancellation determination will result in a breach of natural justice, by effectively depriving the plaintiff of his right to be heard.

Right to fair trial prejudiced

[60] Mr Carter challenged the plaintiff's submission that his right to a fair trial on the charges of genocide and crimes against humanity would be prejudiced if he were to provide information and evidence to the RSO, even if the judgment in *X v RSAA* were to be overturned. He pointed to evidence that judicial institutions in Rwanda were being rebuilt, and fair trial procedures implemented, as the ICTR proceeds to transfer hearings of cases from Tanzania (where cases are presently heard) to Rwanda.[10] He submitted that as the plaintiff is listed as a "Category 1" suspect, he

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[9] See fn 1, at [28]

[10] For example: "Rwandan Tribunal Under Pressure to Wind Up", Institute for War & Peace Reporting, 22 January 2007; ICTR Newsletter, December 2006-January 2007; Report of the President of the ICTR to the United Nations Security Council, S/2006/951, 8 December 2006; ICTR Fact Sheet No 9, "Witnesses and Victims Support Section"

would not be tried in the *gacaca* (community) courts where many of the fair trial concerns have arisen. He also referred to witness protection available through the ICTR.

[61] In response, Mr Bassett referred to the ICTR's own concerns as to the maintenance of confidentiality, shown by requiring the plaintiff, and his solicitors and counsel, to sign confidentiality undertakings in respect of material provided by the ICTR. He also referred to an Amnesty International report[11], to support his contention that there are real questions concerning the possibility of his obtaining a fair trial in Rwanda, and the safety of witnesses.

[62] The charges apparently brought against the plaintiff are, without doubt, extremely serious. He has the right to a fair trial, and that right should not be imperilled. In *X v RSAA*[12] Baragwanath J said:

> I am satisfied that the right to a fair ultimate trial is absolute and that New Zealand law will not permit conduct in this country which will imperil such right, whether the trial is to take place here or elsewhere.

[63] I conclude that there is a "real contest" as to the possibility that disclosure of the plaintiff's evidence and submissions in defence of the Notice would put in peril the plaintiff's right to a fair trial.

[64] Accordingly, I am satisfied that the plaintiff has a reasonable prospect of succeeding in his substantive claim for judicial review on the grounds of breach of natural justice.

Unreasonableness/Irregularity

[65] The plaintiff also claims that the decision of the RSO not to postpone the cancellation determination was unreasonable, was made by taking into account irrelevant considerations, and made by failing to take into account relevant considerations. Essentially, this argument raised matters already canvassed, in

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[11] "Rwanda : Gacaca: A question of justice", Amnesty International, AFR 47/007/2002, 17 December 2002

[12] See fn 1, at [42]

particular the issue of the "unfair election" as to whether to give evidence and submissions in relation to the cancellation determination, and the seriousness of the charges laid against the plaintiff.

Declaration

[66] As noted earlier, in his amended statement of claim filed on 28 February 2007, the plaintiff included an additional prayer for relief, seeking a declaration as to the correct interpretation of s 129T. This relies on the judgment in *X v RSAA*. There is clearly a "real contest" between the parties as to the interpretation of s 129T. Given the factual similarities between the plaintiff's case and that of *X*, it would have to be said that it is reasonably possible that the plaintiff may succeed in the interpretation for which he contends.

Overall assessment of plaintiff's substantive claim

[67] I am satisfied that there is a "real contest" between the parties in relation to the plaintiff's substantive claim for judicial review and, further, that the plaintiff has a reasonable chance of succeeding in that contest.

Other factors

[68] There are other factors that are relevant when considering whether to grant interim relief.

Has the plaintiff delayed?

[69] In my view, it cannot be said that the plaintiff has delayed unduly (if at all) in bringing his proceeding for judicial review. Further, Mr Bassett assured the Court that it is hoped that interlocutory steps will be completed in a very short time – he indicated his intention that the plaintiff's discovery will be completed in advance of the date presently set. Further, on the grounds that Z's case raises identical issues to those in *X v RSAA*, he has applied for an order to transfer the proceeding to the Court of Appeal, so that both cases may be heard in tandem.

Expected duration

[70] There was mention, at the hearing, of the possibility that the interpretation of s 129T may eventually be taken to the Supreme Court. It is therefore possible that an interim order may be in place for an extended period of time. That is a factor to be taken into account.

Public interest

[71] Mr Carter, for the defendant, submitted that a grant of interim relief in this case would have a significant impact on the administration of the refugee status cancellation process by "effectively freezing, for a potentially very lengthy period, the determination of a refugee cancellation". He further submitted that "many other applicants, not necessarily Rwandan, will very likely line up wanting the same indulgence".

[72] Mr Carter referred to the decision of the Court of Appeal in *Ziao Qiong Huang & Ors v Minister of Immigration & Anor*[13]. That case concerned applications for stay of removal orders against the applicants (who had been unlawfully in New Zealand for some years) who were the parents of children born in New Zealand. In dismissing an appeal against a refusal to grant interim relief, the Court took particular cognisance of the very protracted history of the applicants' cases, the very clear High Court finding against the applicants' judicial review application (which confirmed a decision given a year earlier on a similar application), the applicants' failure to pursue an appeal against the earlier decision, and (at [18](d)):

> The significant impact on the administration of the immigration policy of New Zealand if all illegal immigrants with New Zealand citizen children were effectively entitled to have removal processes stayed pending the hearing of the *Ding and Qiu* appeals.

[73] It is clear that the present case is far removed from that of *Xiao Qiong Huang*. First, there has been no "protracted history". Second, the "public interest" factor referred to in the extract set out at [18](d) of the judgment is tied to the "class"

[13] *Xiao Qiong Huang & Ors v Minister of Immigration & Anor* CA 236/06, 18 December 2006

of "illegal immigrants with New Zealand citizen children". In the present case, the "class" is that of Rwandan nationals subject to allegations of genocide and crimes against humanity. It was made clear at the hearing that there are only three persons in that class.

[74] Accordingly, I cannot conclude that the public interest of the administration of the refugee cancellation process militates against granting interim relief in the present case.

[75] As recorded above, it is acknowledged that Z is charged with very serious crimes. New Zealand should not stand in the way of his being tried on those crimes. But this does not mean that proper processes of law ought not to be followed in the meantime, to ensure a fair trial, when that is held.

Overall interests of justice

[76] In this context, it is also relevant to note that pursuant to a direction given by Baragwanath J in *X v RSAA*[14] X is not required to file evidence and submissions, pending determination of the appeal. I was advised at the hearing that X's proceeding, which is before the RSAA, is stayed. X will therefore be able to elect whether to present evidence and submissions to the RSAA on the basis of certainty as to the interpretation of s 129T.

[77] It is in the interests of justice that there be consistency in the treatment of people who are in the same circumstances. X applied for refugee status in New Zealand and has appealed to the RSAA against refusal to grant it. Z was granted refugee status outside New Zealand and now faces cancellation. In my view, notwithstanding that the consideration of their status has been arrived at by different routes, the plaintiff and X are in broadly the same position, and they should receive consistent treatment. In particular, the present plaintiff should not be placed in a worse position than X.

[14] See fn 1, at [30]

[78] I conclude that if the interim relief he seeks were not granted, then the plaintiff would be placed in a worse interim position. He would have to elect whether to present submissions and evidence in relation to cancellation of his refugee status in a state of uncertainty as to the confidentiality of the information he may present. It is not in the interests of justice that he be prevented from making that election on the basis of certainty, as X will be able to.

[79] Weighing up all the above factors to be considered in the exercise of my discretion, I am satisfied that it is appropriate, in this case, that interim relief be granted.

Relief

[80] Accordingly, there will be an interim order by way of declaration in the terms sought by the plaintiff, until further order of the Court.

[81] The plaintiff sought costs. In my view, it is appropriate that costs be reserved, pending the outcome of the plaintiff's substantive proceeding for judicial review.

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Andrews J