MA v Attorney-General

High Court Auckland CIV 2006-404-1371
21 and 22 May 2007; 21 September 2007
Priestley J

Cancellation of refugee status - confidentiality - use of documents seized by Police - Immigration Act 1987, s 129T

Confidentiality - cancellation of refugee status - use of documents seized by Police - Immigration Act 1987, s 129T

Immigration Act - confidentiality - application of s 129T to documents seized by Police - Immigration Act 1987, s 129T

Privilege - immigration advisers - whether covered by litigation privilege

The plaintiff, a citizen of Afghanistan, arrived in New Zealand in 1995 and was successful in obtaining recognition as a refugee. He was consequently issued with a residence permit and later obtained New Zealand citizenship. In March 2000, as part of an investigation into people smuggling, illegal immigration and immigration fraud, the plaintiff's home was searched by the Police and a number of documents seized. Some of those documents were inconsistent with the story the plaintiff had given when he claimed refugee status and suggested that his refugee claim was false or based on misleading information or misrepresentations. Those documents were passed to the Refugee Status Branch of the New Zealand Immigration Service.

On 16 January 2006 the plaintiff was served with notice advising that an inquiry would be made by a refugee status officer as to whether the plaintiff's refugee status should be cancelled. The plaintiff brought an application for declarations and a permanent injunction restraining the use by the refugee status officer of the documents seized by the Police and of the transcript of his interview by the Police.

The applications failed. The headnote which follows reports the refugee-related issues only.

Held:

1. The reasons why confidentiality attached to a refugee claim were obvious. The international law obligations imposed by the Refugee Convention were to provide a safe haven to those who have fled from, or are unable to return to a country because of a well-founded fear of persecution on stipulated Convention grounds. The identity and circumstances of some high profile claimants will enter the public domain. Some claimants will voluntarily release their names and details of their claim. But in the vast majority of claims anonymity and confidentiality are preserved. Refugee Status Appeals Authority cases in New Zealand are reported by number only because regardless of whether the refugee claim is successful or unsuccessful, a repressive regime could take retributive action against a returning unsuccessful refugee claimant, or against the family, friends, and associates of a successful claimant. This policy has a statutory basis in s 129T of the Immigration Act 1987 (see paras [57], [58] & [59]).

2. The primacy accorded to confidentiality by s 129T, particularly subs (1) and (2) ought not provide a pretext for frustrating or avoiding legitimate steps which New Zealand may wish to take to uphold the integrity of its refugee system. It is vital that the right to protection that a bona fide refugee is entitled to claim in New Zealand, both under the Convention and the Act, are not subjected to abuse. A perusal of published Refugee Status Appeals Authority decisions over the years makes it clear that large numbers of refugee claimants rely on fabricated stories, forged documents, and, in some cases, claims produced by unscrupulous agents in accordance with templates. By enacting s 129L(1)(b) and (c) Parliament has

recognised that claims which have succeeded on grounds subsequently established to be procured by fraud, forgery, false, or misleading representation, or concealment, can be reversed. In short, the overarching policy of confidentiality is for the protection of bona fide claimants, their families, and their associates from ongoing persecution in their country of origin. It is not a policy designed to assist people whose refugee claims are fabricated or false. Nor is it sensible to suggest that the provisions of s 129T should impede or trump the efforts of relevant New Zealand agencies to ensure refugee claims are not exploited by terrorists, perpetrators of genocide, war criminals, or people who simply wish to by-pass immigration policy and procedures. It would be a nonsense to suggest that confidentiality obligations should in some way impede the flow of information to a refugee status officer or to the Refugee Status Branch whose statutory functions include not only the determination of refugee claims but also revisiting them in situations where Parliament has specifically authorised a reassessment of claims where refugee status has flowed from false or misleading statements, forgery and fraud. The stipulated process is very different from the initial determination of a refugee claim. The process is designed to revisit a grant of refugee status for different reasons, which include the integrity of the refugee system (see paras [65], [66], [67] & [68]).

3. Litigation privilege should not be extended to an immigration adviser. Any protection that may legitimately be needed for a document prepared for or by an immigration adviser is found in s 129T of the Immigration Act 1987 (see para [74]).

4. The policy reasons behind the confidentiality which attaches to refugee claims did not prevent the seizure of documents prepared and assembled for the original refugee claim nor did the policy of confidentiality attaching to refugee claims prevent the Police from handing across to the Refugee Status Branch the plaintiff's documents which had come into existence some years earlier when he made his claim (see paras [75] & [76]).

5. The integrity of New Zealand's refugee determination system and the clear public interest in ensuring that fraudulent claims can be revisted far outweighed the confidentiality which might have attached to the plaintiff's Police interviews (see para [91]).

Observations:

1. A credible refugee determination system is totally dependent on the Refugee Status Branch receiving accurate information as to why a claimant considers he or she falls inside the ambit of the Refugee Convention (see para [105]).

2. Because refugee status is declaratory, not constitutive, it is a truism that a person who is wrongly recognised as a refugee because of false or misleading information, concealment, fraud or forgery (s 129L(1)(b)) was never a refugee. The country giving safe haven is fully entitled to investigate the situation. It would be wrong to fetter such an investigation (see para [106]).

3. Refugee law and determination procedures are benign, and tilted very much in favour of a claimant. There is no onus. The thresholds are low. The substantive rules will recognise that many genuine refugees flee their countries at short notice and are unable to bring with them supporting materials and documentation of the type that discovery exercises in civil litigation may unearth. But the very simplicity of refugee determination procedures regrettably exposes them to abuse (see para [107]).

4. The background to the search of the plaintiff's home, the legitimate interest that the Police had in him, and the nature of the documents found in his home, which arguably were at variance with his 1995 refugee application amply justified, and in the public interest, a s 129L inquiry. To cut such an investigation off at the pass would be wrong and, from a policy stand point, harmful (see para [108]).

Application for declarations and injunction dismissed

Cases mentioned in Judgment

Attorney-General v X & Anor [2007] NZCA 388 (CA)
B v Auckland District Law Society [2004] 1 NZLR 326 (PC)
Butler v Attorney-General & Anor [1999] NZAR 205 (CA)
Three Rivers District Council v Governor and Company of the Bank of England [2005] 1 AC 610 (HL)
X v Refugee Status Appeals Authority [2006] 2 NZAR 535

Counsel

RJ Hooker for the plaintiff
DG Johnstone and MA Woolford for the first defendant

PRIESTLEY J

The issue

[1] A man who says he is escaping political persecution comes to New Zealand in 1995. He applies, successfully, for refugee status. Five years later his home is searched by the police. Documents are seized. The documents are inconsistent with the story the man told when he claimed refugee status. They suggest, perhaps, his refugee claim was false or based on misleading information or misrepresentations. Can a refugee officer use those documents when deciding under s 129L(1)(b) of the Immigration Act 1987 whether the man's refugee claim was properly made?

General Overview

[2] The plaintiff, now aged in his late 40s, was born in Afghanistan. He arrived in New Zealand in 1995 and successfully obtained refugee status. He thus became entitled to permanent residence in New Zealand and subsequently became a New Zealand citizen.

[3] In March 2000 the police searched his home. His home was searched a second time the next month. The search was part of an operation involving the New Zealand Police, New Zealand Customs, the New Zealand Immigration Service, the New Zealand Security Intelligence Service, and various foreign agencies including Australian law enforcement bodies. The operation had been triggered by a number of concerns about possible people smuggling, illegal immigration, and immigration fraud. The involvement of the New Zealand Security Intelligence Service points to national security concerns.

[4] A number of documents were seized by the police during their searches, particularly the first. One document, (not relevant to refugee status), was a 1970s road map of Sydney marking what appeared to be an anti-surveillance route across the city, with other markings pointing to and underlining a nuclear reactor at Lucas Heights.

[5] The seized documents fall into two relevant categories. The first comprises documents relating to the plaintiff's 1995 refugee claim, including copies of his application, his interviews, and materials flowing to and from his immigration agent. The second category are documents, some of which came into being after 1995, which appear inconsistent with the narrative the plaintiff advanced when he applied for refugee status or which may point to falsehoods in that narrative.

[6] In the wake of the 2000 searches the plaintiff was interviewed by the police in the course of a criminal investigation. Between 2000 and 2002 the seized documents and the transcripts of the plaintiff's interviews were analysed by a senior police officer. At some stage in 2002 the documents, transcripts, and the police analysis was passed on to the Refugee Status Branch (RSB) of the New Zealand Immigration Service.

[7] On 16 January 2006 the plaintiff was personally served with a Notice of Intended Determination concerning Loss of Refugee Status. The Notice was prepared by the second defendant who abides by this Court's decision. Service of the Notice triggers the provisions of s 129L of the Immigration Act 1987. The Notice comprises eight pages. It discloses interview transcripts between the plaintiff and the police, and documents which were seized in the March 2000 search.

[8] Section 129L(1)(b) provides:

129L Additional functions of refugee status officers

(1) In addition to their function of determining claims for refugee status, refugee status officers also have the following functions:

…

(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:

Under s 129N(2)(b) the Refugee Status Appeals Authority (RSAA), has power to decide whether a person has ceased to be a refugee on this ground. The second defendant has the function (s 129L(1)(f)) of placing the issue before the Authority.

[9] For reasons which are patently obvious, this proceeding is an attempt to cut off any such determination, by the second defendant, at the pass. Alleging eight causes of action (one of which was not pursued), the plaintiff seeks various declarations designed to ensure that the second defendant cannot consider or use the materials handed over to the Immigration Service by the police.

Background

[10] This section of my judgment sets out the background facts as I find them. They are essentially uncontested. I do not intend to make findings about the basis on which the plaintiff's refugee claim in 1995 succeeded. Nor do I intend to describe the documents seized during the searches. Nor do I want to make findings, or indeed outline evidence which must eventually be considered by a refugee officer under a s 129L(1)(b) determination, or subsequently by the RSAA.

[11] Lest an inquiring eyebrow be raised at a possible inconsistency between this approach and the map mentioned in [4], it was mentioned simply to signal the complicated context of the 2000 operation and possibly the *realpolitik* of the subsequent handling of the plaintiff's situation.

[12] What is required from this Court at this stage of what I suspect is a lengthy journey, is a decision on whether the plaintiff's attempt to prevent a determination of the basis of the grant of refugee status ([9]) can succeed.

[13] The plaintiff, then aged 37, arrived in New Zealand on 1 July 1995. He made a spontaneous claim for refugee status at Auckland International Airport. Four days later he engaged what at that time was a well known and reputable agency, Refugee and Migrant Services (RMS), to assist him with his refugee claim. With RMS's help he completed a standard Refugee Status application form. That form was then lodged with the Refugee Status Section by RMS together with an application for a work permit and an authority under the Official Information Act 1982.

[14] The Refugee Status Section provided certain information under the Official Information Act, none of which was relevant to the substance of the refugee claim.

[15] On 8 December 1995 the plaintiff was interviewed by a refugee officer. He was assisted at that interview by an RMS representative. Five days later the officer provided RMS with a summary of the plaintiff's claim. Further comment and submissions were invited. These were made later that month.

[16] On 29 February 1996 the Refugee Status Section decided to recognise the plaintiff as a refugee in terms of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.

[17] A fortnight later the plaintiff successfully applied to the Minister of Immigration for a residence permit which, in accordance with standard practice, was granted. In 1997 the plaintiff successfully obtained a grant of New Zealand citizenship.

[18] On 11 March 2000 the police obtained a search warrant for a search of the plaintiff's residence in Mt Albert. The defendants, despite careful inquiries and searching, have not found the documentation that led to the issue of this warrant. Nor has it been possible to find its original.

[19] On this issue I am faced with a possible conflict of evidence. The plaintiff deposed that on 13 March 2000 the police gave him a copy of the search warrant which had been obtained from the Court. But says he never saw its original. His affidavit refers to facts admitted by the defendant that a copy of the warrant (which the plaintiff retained in his possession) was shown to a Deputy Registrar at the Wellington District Court who extensively searched the Court's records. The Registrar was unable to find a copy of the search warrant application or the evidence filed in support.

[20] The plaintiff, without any supporting evidence, states he does not believe any application for a search warrant was made by the police at the Wellington District Court, nor does he believe a warrant was properly issued.

[21] Mr C M Turley, who retired from the police in 2006 with the rank of Senior Sergeant, deposed that search warrants led to the seizure of property. He says various items were seized from the plaintiff's house "under the search warrant that was executed on 13 March 2000". No further evidence was led from Mr Turley at the hearing on the warrant matter, nor was he cross-examined on it.

[22] The copy of the warrant, which the plaintiff says he retained, is cast in broad terms. It is issued under s 198 of the Summary Proceedings Act 1957. The plaintiff's address is specified. Thirty-six scheduled items are listed, believed to be relevant to the offences. They include passports, stamps, identity papers, certificates, qualifications, correspondence, photographs, statements, letters, financial exchange transactions, family albums, handwriting samples, airline tickets, boarding passes, diaries, telephone numbers, invoices, visa permits, itineraries of cell phone memory data, and a miscellany of items one might legitimately expect to find in the possession of a person involved in immigration fraud or the production of false immigration documents.

[23] The list of alleged crimes is also long. Two are faultily described. But the genus is crimes associated with immigration fraud or people smuggling, such as forgery, uttering a forged document, money laundering, and making false or misleading statements.

[24] I am satisfied, on the evidence, that a search warrant was validly issued in the Wellington District Court on 11 March 2000 and that its original was shown to the plaintiff when his home was searched two days later. Although the absence of the original warrant gives rise to a possible legal issue, which I shall explore later, I am further satisfied that the search of the plaintiff's home on 13 March 2000 was not a warrantless search.

[25] On 19 April 2000 a further warrant to search the plaintiff's home was obtained by the police from the Waitakere District Court. A supporting application was sworn by Detective Sergeant Turley. The application refers to the previous search and opined the interior of the building resembled a military post or a military office. It refers to various items found, including the Sydney map, and certain admissions allegedly made by the plaintiff.

[26] The warrant's application was based on reasonable grounds to suspect the serious charges of conspiracy to commit sabotage, conspiracy to commit arson, and conspiracy to commit murder. The warrant authorises a search for hidden electronic equipment and documents, hidden explosives or residues, ammunition, firearms, code books, and computer disks.

[27] The warrant was executed that day. It appears, however, that the documents relevant to this proceeding were all seized during the earlier search. Possibly some extra documents were seized but nothing hangs on that.

[28] The plaintiff was interviewed by Mr Turley. A number of police job sheets resulted. A lengthy interview took place on 19 April 2000 occupying 4½ hours tape time. It was subsequently transcribed, running to 118 pages.

[29] In December 2000 a charge was brought indictably against the plaintiff in the Auckland District Court under the now repealed s 229A of the Crimes Act 1961. An indictable charge under that provision was laid in January 2001. The charge related specifically to the plaintiff's application for refugee status, alleging that on 5 July 1995, with intent to defraud, he used his application for refugee status to obtain a benefit. On 3 May 2001 the plaintiff was committed for trial following a depositions hearing. For reasons not apparent from the evidence, the Crown decided not to proceed with the prosecution. No evidence was offered with the result that on 5 November 2001 the plaintiff was discharged under s 347 of the Crimes Act.

[30] Police analysis and investigations continued. Mr Turley, in evidence, told me that the plaintiff was only one of a larger group of people whose joint activities were being investigated by the inter-agency group ([3]). Events in the United States on 11 September 2001 necessitated further reviews and gave extra impetus to the group's activities. As a result, Mr Turley produced an analysis, comprising 63 pages in all, being job sheets dated 11 February 2002.

[31] At some stage in 2002 the police gave to the second defendant the documents that had been seized from the plaintiff's home, together with a transcript of Mr Turley's 19 April 2000 interview with the plaintiff and the February 2002 job sheets.

[32] Mr Turley candidly admitted in evidence that a fair summary of his assessment of the plaintiff's situation was that the plaintiff had been involved in a number of crimes in New Zealand and had also been involved in people smuggling with a possible security dimension. But the joint approach to dealing with the plaintiff was felt to be revoking his refugee status rather than prosecuting him.

[33] The eventual product of this approach was the Notice [7] served on the plaintiff on 16 January 2006. That document contains what can only be regarded as a preliminary position statement pending a hearing under s 129L. Under the heading "conclusion of evidence" the Notice states:

You were granted refugee status in New Zealand on the grounds that you had a well-founded fear of persecution by the Mujhaideen in Afghanistan due to your political background. Given the above evidence [a reference to various documents the second first defendant had considered] it would appear that the basis of your refugee claim as presented to the RSB was false. You were neither a member of the Najibulliah Government's [the overthrown communist regime] security militia nor does it appear that you ever feared persecution by the

Mujhaideen. Accordingly, the evidence listed above indicates that the RSB decision to recognise you as a refugee may have been improperly made.

[34] Thirty-one of the seized documents are listed. The first 14 date from 1 July 1995 to 12 March 1996 and are all documents relating to the plaintiff's arrival, his claim of refugee status, and related applications and interviews. The remaining 17 documents include the transcript of the 19 April 2000 police interview; three Afghani or Pakistani driving licences; a copy of the plaintiff's curriculum vitae; ten letters to the plaintiff from various people; a family tree; and a 1994 executive diary.

[35] Other documents in the second defendant's possession, but not listed in the Notice, include Mr Turley's 11 February 2002 job sheets.

Discussion

[36] The plaintiff seeks ten pleaded forms of relief. Eight are declarations. Two are permanent injunctions. The sought injunctions are to restrain the second defendant from using the documents or transcript received from the police and restrain him from proceeding to review the plaintiff's refugee status.

[37] There is force in Mr Johnstone's submission (and Mr Hooker did not tackle it in his reply), that ss 17(1)(a) and 17(2) of the Crown Proceedings Act 1950 prohibit a court from granting an injunction against the Crown or any officer of the Crown in civil proceedings.

[38] I tend to the view that Refugee Status officers exercise various statutory functions and powers under the Immigration Act (particularly ss 129G, H, and L). In some situations s 7 of the Judicature Amendment Act 1972 would overcome any difficulty in obtaining an injunction against the Crown or Crown officers. However, this proceeding does not lend itself to being treated as judicial review. Rather than decide the issue I intend, instead, to treat the eight prayers for declarations as being afoot. The substantive effect, were declarations to be granted, would not differ.

[39] The seven causes of action the plaintiff advanced fall neatly into three categories.

(i) The March 2000 search and seizures were invalid, it being alleged the search was without authority; or there was insufficient evidence to support the issue of a search warrant; or the warrant was invalid, being too broad and non-specific; or the warrant did not authorise the seizure of confidential or privileged documents; and in any event the search was unreasonable.

(ii) The provision of documents to the second defendant by the police was, for obvious reasons, unlawful.

(iii) The second defendant has breached natural justice by issuing its s 129L notice without disclosing to the plaintiff his possession of police job sheets.

I now deal with these three categories.

Search and Seizure

[40] Mr Hooker's first attack was on the existence or the validity of the warrant. He claimed (although I have made a contrary factual finding (at [24]) the plaintiff was never shown the warrant. He further claims that the warrant was never issued. Relying on *R v Halford* (2000) 6 HRNZ 241 (CA), counsel submits that there is an onus on the defendants to satisfy the Court that a warrant was obtained. An identical onus rests on the defendants to establish there was sufficient evidence to issue a warrant in the first place.

[41] In *R v Halford* the Court of Appeal was concerned with the validity of a warrantless search of a farm building in which a large amount of cannabis was discovered. The police officer was on rural land, which he had entered without authority, to assist in a search for stolen sheep. The passage below, on which Mr Hooker relies, must be seen in that context.

[20] The onus of proving both the lawfulness and reasonableness of the actions of the police falls on the Crown. Those questions have to be considered at successive stages of their activities leading to the discovery of the cannabis; namely when they found nobody apparently at home at the house and when Constable Tuffley looked through the hole and opened the door of the shed.

[42] But the Court of Appeal authority of *R v Poelman* (2004) 21 CRNZ 69 suggests the onus falls the other way:

[13] … It is important to remember that a warrant issued by a judicial officer, unless perhaps on its face patently invalid, is treated as valid and effective in law unless and until set aside: see *Grayson* [[1997] 1 NZLR 399 (CA)] at 409. It is for the proponent of invalidity to carry the burden of proving such invalidity, regardless of the form of the proceeding in which the challenge is mounted.

[43] Not cited to me was the Court of Appeal judgment of *R v Thompson* [2001] 1 NZLR 129. The Full Bench of the Court of Appeal was there concerned with an affidavit supporting the issue of a search warrant being lost before it was disclosed to defence counsel. Just under a year elapsed from the time the warrant was issued to the time the District Court Registrar advised he had been unable to find the application. The police officer who had obtained the warrant endeavoured to reconstitute the content of the missing affidavit from memory. The Court of Appeal issued a single judgment which included these comments:

[51] But the mere absence of the original record should not necessarily of itself entail the drastic penalty of invalidity. That would frustrate the important public interest that the police should not be unduly impeded in the investigation and prosecution of offending and that the value of the search warrant as a legitimate weapon in society's fight against crime should not be unduly impaired (*Attorney-General of Nova Scotia v MacIntyre* (1982) 65 CCC (2d) 129 (SCC)). In principle, and reflecting relevant policy considerations, where the original document is lost or unavailable secondary evidence may be given in the usual way and it will be for the Court considering the challenge to the issue of the warrant to assess the weight to be given to that evidence. That was the course adopted in the District Court in the Canadian cases of *R v Askov* (1987) 60 CR (3d) 261 and *R v Dean* (1988) 4 WCB (2d) 182 cited in Fontana, *The Law of Search and Seizure in Canada* (4th ed, 1997) at p 205. A cautious approach to the secondary evidence should, however, be taken, recognising the possibility that the absence of the original record may hinder the accused in the exercise of a right pertaining to the defence of a criminal prosecution.

[52] That conclusion reflects the purpose underlying s 204 that a process should not be held invalid by reason of any omission (here, to preserve the original against the possibility of a challenge at some unspecified future time to that process), unless the Court is satisfied there has been a miscarriage of justice. On the contrary, there could be a miscarriage of justice if the presumption of validity of the search warrant could be swept aside and available secondary evidence ignored where the original documentation which led to its issue has been lost and where, on the Judge's finding, as here, there is no question of deliberate destruction of the affidavit or any evidence of impropriety on the part of the Crown such as to constitute an abuse of process. If the Court is able to be satisfied by the Crown that reliable secondary evidence is available, it also seems impossible to argue that the search under the warrant could then be characterised by reason of the loss of the original record as an "unreasonable search and seizure" or that s 24 or s 25 of the Bill of Rights had been infringed.

[44] It is hard to see how the failure to find the materials which led to the issue of the March 2000 warrant can lead to a miscarriage of justice. I am satisfied, on the evidence of a wide ranging inter-agency investigation of people smuggling and immigration fraud, that a warrant

was indeed issued by the Wellington District Court on 11 March 2000 authorising a search of the plaintiff's home. I am also prepared to infer that valid grounds to obtain a warrant existed. Although, unlike the situation in *Thompson*, there is no evidence in a reconstituted affidavit, I consider the policy reasons articulated by the Court of Appeal in that case are equally applicable here. There is a presumption of validity which I do not consider should be swept aside because, seven years later, the relevant court file cannot be found.

[45] Mr Johnstone drew to my attention the decision of *Marsh & Woller v Police* (HC AK AP73/97, Tompkins J) as authority for the proposition that the maxim *omnia praesumuntur rite esse acta* applies to search warrants. That proposition is that there is a prima facie presumption of the regularity of the acts of public officers until the contrary is proved. Specifically, Tompkins J referred to *R v Paul & Ors* CA1705/05 11 August 1995, in which the warrants at issue could not be found. In that case, no basis was put before the Court for challenging the warrant. The absence of the warrant was not enough because, as Eichelbaum CJ stated at 6 of *Paul*:

In the absences of any foundation for a contrary conclusion the maxim *omnia praesumuntur rite esse acta* applies.

[46] There are also issues of commonsense and previous opportunity in play. The indictable offence, with which the plaintiff was charged in 2000/2001, related to his allegedly false refugee application. The same seized documents would have been relevant. The same solicitors were acting for him then as are now. There is unchallenged evidence from Mr Turley that on 4 September 2000 Vallant Hooker and Partners sought an inventory of all property seized during the two searches of the plaintiff's home. Additionally the return of items was sought. Mr Turley deposed that a full copy of seized documents was provided in October 2000. Vallant Hooker and Partners wrote to Sergeant Turley on 19 October 2000 thanking him for providing copies of all documents seized.

[47] Whether the plaintiff and his advisors, in 2000, turned their minds to the issue of the validity of the warrant and the supporting affidavit is a matter on which there is no evidence. It would be surprising if they had not. I have a firm view that the interests of justice are not served by allowing Mr Hooker's submissions, raised seven years later, to succeed. The warrant existed. Its validity must be presumed. There is, in the circumstances I have outlined, no prejudice to the plaintiff.

[48] Similar considerations apply to the plaintiff's submissions that the search warrant was too broad and non-specific and that the search was carried out in an unreasonable manner.

[49] Mr Hooker relied on *R v Baptista* (2005) 21 CRNZ 479. That Court of Appeal decision is authority for the proposition that, because a search of private property constitutes a substantial invasion of privacy, a search that does not comply with the requirements of s 198 of the Summary Proceedings Act 1957 will be unlawful and *prima facie* unreasonable. Central to the Court's decision was the discovery of an "18 plus card" which had been admittedly used to purchase pseudoephedrine based products.

[50] The Court of Appeal considered the warrant was, in a number of respects, too widely cast. It included such matters as financial documents, personal business correspondence, computer hardware and also permitting a search of aircraft, ships, and carriages for what was essentially a search for precursor substances and paraphernalia relating to methamphetamine manufacture.

[51] In *R v Williams* (2007) 23 CRNZ 1 (CA) the Court of Appeal stressed the need for a search warrant to be relevantly focused.

[212] The application must also be limited to the places where the items are expected to be found (see *R v Chapman* 4/11/02, CA241/02 and *Baptista*) and the things the application

alleges will be found must be sufficiently defined. The search must be more than a fishing expedition with nothing in particular in mind – see *Sanders* at p 461; p 21.

[52] Certainly the terms of the March 2000 warrant were widely cast ([22]). Mr Hooker submitted there was no information as to what offences were occurring or how. He further pointed out that some of the listed offences such as "personation", "acknowledging instrument in false name" and "money laundering" were unknown offences. (Personation is in fact a corrupt practice under s 215 of the Electoral Act 1993).

[53] As in *Baptista* the widely cast warrant refers to aircraft, ships, and carriages, which were not likely objects of a search in residential Mt Albert. However, given the evidence that there was an investigation of alleged offending involving people smuggling, immigration fraud, and provision of false travel and identity documents, I consider neither the breadth of the specified items in the warrant's schedule nor length of the recital of the alleged offences result in the warrant being invalid. Nor do I consider, given the type of offending which the police and associated agencies were investigating, do I consider that the 11 March 2000 warrant can fairly be described as a fishing expedition or mindless.

[54] On the claim that the search was executed in unreasonable fashion and in breach of the plaintiff's rights there have been neither evidence nor submissions.

[55] For these reasons, in my judgment the first category of the plaintiff's causes of action must fail.

Privilege, Confidentiality, and Illegality

[56] The second category of the plaintiff's claims raises interesting issues. Mr Hooker's submissions can be reduced to broad propositions:

a) For sound policy reasons refugee claims are cloaked by confidentiality which extends to all related documents, including documents relating to the preparation and process of a claim by an immigration agent (in this case RMS).

b) Handing over seized documents, interview transcripts, and analysis by the police to RSB was an unauthorised and unlawful police action.

[57] The reasons why confidentiality attaches to a refugee claim are obvious. The international law obligations imposed by the Convention are to provide a safe haven to those who have fled from, or are unable to return to a country because of a well founded fear of persecution on stipulated Convention grounds.

[58] The identity and circumstances of some high profile claimants will enter the public domain. Some claimants will voluntarily release their names and details of their claim, (*Butler v Attorney-General & Anor* [1999] NZAR 205 (CA) is an example). But in the vast majority of claims anonymity and confidentiality are preserved. Reported refugee cases in Britain refer only to the country of origin. (See *Practice Note (Anonymisation Cases in the Court of Appeal)* [2006] EWCA CIV 1359). RSAA cases in New Zealand are reported by number only. Why? Because, regardless of whether the refugee claim is successful or unsuccessful, a repressive regime can take retributive action against a returning unsuccessful refugee claimant, or against the family, friends, and associates of a successful claimant.

[59] This policy has a statutory basis in s 129T which provides:

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 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 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.

[60] The forms used to apply for refugee status are headed “In Confidence” with the same words emblazoned at the foot of each page.

[61] The declaration, which every claimant signs, contains an authorisation for the Immigration Service “… to make any enquiries it deems necessary in respect of the information provided on this form and to share this information with other government agencies”. The ambit of that authority is problematic, as is the exemption contained in s 129T(3)(b).

[62] Baragwanath J in *X v Refugee Status Appeals Authority* [2006] 2 NZAR 535 regarded s 129T(1) as being dominant. His interpretation was upheld by the majority in the Court of Appeal when his judgment was appealed (*Attorney-General v X & Anor* [2007] NZCA 388). The majority (at [48]) did not regard the legislative scheme of s 129T as entirely coherent. Pertinently, the Court noted that the obligation of confidentiality was reinforced by the offence sanctions stipulated in s 129T(5).

[63] The Court then turned to the clear exception to confidentiality obligations (which as a matter of statutory interpretation would override the s 129T(1) obligation) provided by subs (3)(f). The confidentiality obligation will not prevent disclosure of particulars in the absence of a “serious possibility that the safety of the claimant or any other person would be endangered” by that disclosure.

[64] At [48](c) the Court of Appeal considered that although there is no formal process which applied to s 129T(3)(f), there was nonetheless a "legislative expectation" that decisions relating to release under ss (3)(f) must be made by people privy to the information.

[48](c) …Providing (sic) 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.

[65] The primacy accorded to confidentiality by s 129T, particularly subs (1) and (2) ought not, in my judgment, provide a pretext for frustrating or avoiding legitimate steps which New Zealand may wish to take to uphold the integrity of its refugee system. Mr Hooker is totally correct that when he observes that RSB has been separated, and deliberately so, from the wider functions of the New Zealand Immigration Service (ss 129E and 129W). It is vital, however, that the right to protection that a bona fide refugee is entitled to claim in New Zealand, both under the Convention and the Act, are not subjected to abuse.

[66] A perusal of published RSAA decisions over the years makes it clear that large numbers of refugee claimants rely on fabricated stories, forged documents, and, in some cases, claims produced by unscrupulous agents in accordance with templates. By enacting s 129L(1)(b) and (c) Parliament has recognised that claims which have succeeded on grounds subsequently established to be procured by fraud, forgery, false, or misleading representation, or concealment, can be reversed.

[67] In short, the overarching policy of confidentiality is for the protection of bona fide claimants, their families, and their associates from ongoing persecution in their country of origin. It is not a policy designed to assist people whose refugee claims are fabricated or false. Nor is it sensible to suggest that the provisions of s 129T should impede or trump the efforts of relevant New Zealand agencies to ensure refugee claims are not exploited by terrorists, perpetrators of genocide, war criminals, or people who simply wish to by-pass immigration policy and procedures.

[68] The clear policy of s 129T, and the Court of Appeal's stress on the "refugee status mind-set" demonstrate in a graphic way the flaw in the plaintiff's submissions. The confidentiality obligation restricts, for the reasons I have outlined, the flow of confidential information beyond those people entrusted with the preparation and determination of a refugee claim. But it would be a nonsense to suggest that confidentiality obligations should in some way impede the flow of information to a refugee status officer or to RSB whose statutory functions include not only the determination of refugee claims but also revisiting them in situations where Parliament has specifically authorised a reassessment of claims where refugee status has flowed from false or misleading statements, forgery and fraud. The stipulated process here is very different from the initial determination of a refugee claim. The process is designed to revisit a grant of refugee status for different reasons, which include the integrity of the refugee system.

[69] Returning now to counsel's submissions, Mr Hooker referred to the first set of documents seized by the police in March 2000 and subsequently analysed (numbers 1-14 in the notice, [34] supra). In his submission those documents, because they were confidential and/or privileged, should not have been seized and certainly should not have been analysed and compared with the second set of documents (numbers 15-31 [34] supra). Not only were these documents protected by the confidentiality which attaches to refugee claims, but in addition they were all sourced from the plaintiff's 1995 agent, RMS. Privilege akin to litigation privilege should extend to RMS. Refugee claimants are often scared. They are legitimately suspicious of governments and authority. It is thus vital to ensure documents prepared by, and communications with a body such as RMS, are protected by privilege, in the same way that protection is afforded by legal advice privilege and litigation privilege.

[70] In that regard Mr Hooker referred to a number of authorities including *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC) and the House of Lords decision of *Three Rivers District Council v Governor and Company of the Bank of England* [2005] 1 AC 610.

[71] In *B v Auckland District Law Society* the Privy Council restated the reason for legal professional privilege. It was described as a fundamental condition on which the administration of justice as a whole rested. It continued after the occasion for the privilege passed, unless waived.

[72] Similar principles are discernible in the House of Lords decision *Three Rivers District Council*. In particular Lord Carswell and Lord Scott at [42] and [114] observed there was no valid reason why litigation privilege should not extend to work being done by a lawyer preparing a case for inquiry or another tribunal rather than for a court.

[73] Mr Hooker sought to draw an analogy between representatives in refugee proceedings and representative agents before the European Court of Human Rights and the International Court of Justice with respect to litigation privilege. His submission was that in both courts all parties were able to be represented by agents, not necessarily counsel, in respect of whom litigation privilege applied. I assume, though it is not necessarily specifically spelled out in the submissions, that by analogy immigration advisors in refugee cases should also be covered by litigation privilege. This analogy dos not alter the issues or my conclusions.

[74] I am not prepared to extend the protection of privilege to an immigration advisor. In this case the purported protection of privilege is only claimed in respect of seized documents which had been forwarded to the plaintiff by RMS presumably in 1995/1996. Any protection that may legitimately be needed for a document prepared for or by an immigration advisor is, in my judgment, found in s 129T.

[75] I thus reject the submission the first category of 14 documents could not be seized by the police because they were privileged. Nor, given the ambit of the search warrant which was designed *inter alia* to search and seize in the immigration fraud area, do I consider the policy reasons behind the confidentiality which attaches to refugee claims prevent those documents from being seized. A submission that s 129T, designed as it is to prevent the outward flow of information beyond those involved in refugee determinations, can prevent the police passing documents they obtained during a lawful search to RSB is unreal. The 14 documents in the first category, in any event, would already have been in RSB's possession as a result of its assessment of the plaintiff's claim in 1995/1996.

[76] Nor do I consider the policy of confidentiality attaching to refugee claims prevents the police from handing across to RSB the plaintiff's documents which had come into existence some years earlier when he made his claim. Had the documents been forwarded by the police to the media or to authorities in Afghanistan then the breach of s 129T would be patent. This is not what occurred here.

Unlawful Police Action

[77] I now turn to the plaintiff's submission that it was unlawful for the police to forward the second category of documents which they had seized from the plaintiff's house. These did not comprise part of his refugee claim but arguably cast doubt on its veracity. In addition to those documents the police handed to the second defendant the transcript of the plaintiff's April 2000 interview and Mr Turley's analytical job sheets.

[78] Mr Hooker's submission on this aspect rests on two broad propositions. The first is that it is impermissible for the police to analyse and contrast the two categories of document because the first category is cloaked by confidentiality. The function of the police in the 2000-2002 period had nothing to do with determination of the plaintiff's refugee claim. Thus, the purpose to which they were putting the documents was caught by s 129T.

[79] This submission is but an extension of counsel's confidentiality submission which I have examined in the previous section of this judgment. The underlying purpose of s 129T is to protect, by confidentiality, information gathered by officers and others involved in the refugee determination process. The police, during the 2000-2002 period, were not involved in refugee determination at all. Thus, s 129T does not prohibit the police from analysing the documents which they found in the plaintiff's home in the way that they did.

[80] The second proposition is that, as a matter of law, the information obtained by police officers must be held in strictest secrecy and in accordance with reg 7 of the Police Regulations 1992 (SR1992/14) which provides:

7. Secrecy

(1) Subject to subclause (2) of this regulation, every member shall observe the strictest secrecy in relation to Police buisness and any information coming into the member's possession by virtue of his or her office.

(2) Members shall release information only to the extent of satisfying –

(a) The provisions of any Act; and
(b) General instructions; and
(c) The authority of the Commissioner; and
(d) The extent necessary to do his or her duty.

[81] In counsel's submission this regulation requires the police to hold the documents they seized, Mr Turley's analysis, and the transcript of the interview in confidence. The documents by themselves, particularly the second category of documents, being letters, drivers licences, and a curriculum vitae, are not intrinsically criminal and by themselves are incapable of leading to any adverse conclusions. Similarly the 19 April 2000 interview was an interview intended solely for the purposes of a criminal prosecution. Neither the plaintiff nor the police could have contemplated the interview being used for any other purpose. Thus, supplying its transcript to RSB was unlawful. Similarly, Mr Turley's analysis of the documents involved him considering and contrasting documents which were both privileged (a submission I have already rejected), and confidential.

[82] Regulation 7 has been examined, but in another context, by Harrison J in *Stepping Stones Nursery Ltd v Attorney General* [2002] 3 NZLR 414. The relevant portion of his judgment is thus helpful:

[33] In my judgment reg 7 delineates the boundaries of the police right to release to a third party information obtained in the course of performing official duties. The regulation reads as an absolute prohibition against releasing any such information unless for the purpose of satisfying one of the four specified exceptions. While the adjective "strictest" may be superfluous, in context it serves to reinforce the precise nature of the obligation to observe secrecy. Thus the public interest defence, recognised by the common law, is unavailable to the police, on these facts at least. My view appears to be supported by authority.

[83] Harrison J relied on a number of English authorities including *Marcel v Commissioner of Police of the Metropolis* [1991] 1 All ER 845; [1992] 1 All ER 72 (on appeal); and *R v Chief Constable of the North Wales Police, ex p AB* [1997] 4 All ER 691.

[84] *Stepping Stones Nursery Ltd* involved volunteered information by a police officer to a trade competitor about propagated plants he had found in a nursery during the execution of a search warrant in an unsuccessful endeavour to recover stolen bud-wood. The police had been put on notice that any information they gained during the search was confidential. Argument before Harrison J also raised the issue of whether confidence could be breached in the public interest. Harrison J summarised the law thus:

[45] I am satisfied that the police could only establish a public interest defence to a claim for breach of confidence in extreme circumstances, where the information disclosed is of a nature destructive to or placing at real risk public welfare or safety, and disclosure is necessary to protect the public; even then disclosure must be limited to one who has "a proper interest" in receiving the information, such as to another public body in order to enable it to perform its duty or, exceptionally, to the press (*Initial Services Ltd v Putterill* [1967] 3 All ER 145 (CA) per Lord Denning MR at p 148; *R v Chief Constable of the North Wales Police*). In this context, in my judgment, the only public interests which might require disclosure by the police are the prevention of crime or a threat to national security. Unless pitched at the high level of "misdeeds of a serious nature and importance to the country", the public interest test will operate to override the countervailing public interest in protecting individual rights (*Beloff v Pressdram Ltd* [1973] 1 All ER 241 per Ungoed–Thomas J at p 260). An example of the truly public nature of the information which might justify the defence is found in the proposed disclosure of information, in breach of a confidential obligation, about transactions designed to avoid or circumvent New Zealand tax laws or to enable foreign companies and a major bank to avoid statutory obligations (*European Pacific Banking Corporation v Fourth Estate Publications Ltd* [1993] 1 NZLR 559 per Henry J at p 564).

[85] The English Court of Appeal judgment *Woolgar v Chief Constable of the Sussex Police* [1999] 3 All ER 604 involved a police interview of a registered nurse in the wake of the death of a patient in her care. No charges where brought against the nurse but the police referred the matter to the regulatory body of the nursing profession. Normal police practice was to seek an interviewee's authority to disclose such statements but Ms Woolgar declined to do this. She sought an injunction to restrain the police from disclosing the contents of the interview which was dismissed. She appealed.

[86] Kennedy LJ formulated the issue at 607-608 thus:

(6) *The issue*

Undoubtedly when someone is arrested and interviewed by the police what he or she says is confidential. Plainly it may be used in the course of a criminal trial if charges are brought arising out of that investigation, but if it is not so used the person interviewed is entitled to believe that, generally speaking, his or her confidence will be respected. If authority be required for that proposition, it can be found in *Taylor v Serious Fraud Office* [1998] 4 All ER 801, [1998] 3 WLR 1040 but, as all of the authorities cited to us indicate, there are exceptional circumstances which justify the disclosure by the police, otherwise than in the course of a criminal trial, of what has been said by a suspect during the course of an interview, in circumstances where the suspect, or former suspect, does not consent to such disclosure. The question which arises in this case is whether, if the regulatory body of the profession to which the suspect belongs is investigating serious allegations and makes a formal request to the police for disclosure of what was said in interview, the public interest in the proper working of the regulatory body is or may be such as to justify disclosure of the material sought. If the answer to that question is in the affirmative how, as a matter of procedure, should contentious issues in relation to disclosure be resolved?

[87] The Court of Appeal considered that a balance had to be struck between competing public interests. The primary decision as to disclosure should be made, not by the court, but by the police who had custody of the relevant material. The Court also considered that where the police came into possession of confidential material, which in their view should be considered by a professional or regulatory body (in the interests of public health or safety), they were free to disclose that information even if there had been no request for it (at 615 per Kennedy LJ).

[88] *Woolgar* was considered by Harrison J in *Stepping Stones Nursery Ltd*. As he rightly observed it did not assist. A trade competitor can hardly fall into the same category as a regulatory body. But the analogy with the police and RSB in this case is powerful.

[89] Consistent with the *Woolgar* approach is the more recent English Court of Appeal decision *Frankson v Home Office* [2003] 1 WLR 1952. That case involved statements made to the police by prison officers under caution who were suspected of assaulting prison inmates. The prison inmates subsequently brought civil actions against the Home Office arising out of the alleged assaults. The prison officers contested whether their statements could be disclosed by the police to the complainants.

[90] Although accepting that statements made to the police were usually made in the expectation that confidence would be maintained unless waived, the Court of Appeal was of the clear view that the expectation of confidence could be outweighed by "some greater public interest" (at 1967-68, per Scott Barker LJ). At first instance the Judge had been satisfied disclosure of the statements was necessary to dispose fairly of the civil claim. That approach was upheld by the Court of Appeal.

[91] Again, for reasons traversed in the previous section of this judgment, I consider that the integrity of New Zealand's refugee determination system and the clear public interest in ensuring that fraudulent claims can be revisited far outweigh the confidentiality which might have attached to the plaintiff's police interviews.

[92] There is uncontested evidence from Mr Turley that both the police and New Zealand Immigration Service during 2000-2002 co-operated in a wide ranging investigation with international dimensions involving immigration fraud and people smuggling. Mr Turley went so far as to agree (NOE 17 L1-8) that during the course of that operation the police were permitted to look at the files of refugee claimants or were given copies of material from those files. There is no evidence that this applied to the plaintiff's refugee file. Even if there were, the position would be covered by s 129T(3)(f).

[93] Neither RSB nor the Immigration Service have statutory power to compel the police to pass on information which may have immigration interest. Nor, importantly, can the police initiate any Immigration Act procedure to revisit a grant of refugee status. The position is analogous to that in *Woolgar* where the police had no power to initiate an inquiry into nursing practices.

[94] However, the second defendant has a number of powers and functions set out in ss 129H and 129L, including the power to determine whether a decision to grant refugee status has been improperly procured.

[95] In my judgment, neither the confidentiality of the first category of documents nor the provisions of reg 7 bar the police from the action they took in this case. To the extent that ss 129L(1)(b) and (c) can confer on a refugee status officer the power to revisit a grant of refugee status, I consider that a transfer of information from the police to the second defendant would arguably fall inside the exemption provided by reg 7(2)(a) and certainly inside the exemption provided by reg 7(2)(d). And again s 129T(3)(f) covers the situation. As a refugee the plaintiff's safety was not endangered.

[96] It is, in my judgment, an untenable proposition, and contrary to the public interest, that reg 7 is an insuperable barrier to the police handing over information and the fruits of investigations to other enforcement agencies for their consideration. Were the police, during the course of their investigations, to come across or lawfully seize documents that pointed to a revenue fraud, breaches of the Customs and Excise Act 1996, or breaches of the professional codes of various professions, it is proper that they hand over the products of their investigations to the relevant authorities. Given the policy concerns identified earlier ([67]), the integrity of New Zealand's refugee determination system requires matters of concern which may come to the attention of the police to be examined by RSB, which has been specifically set up by Parliament with that and other functions.

[97] The policy behind the public interest defence to breaching confidentiality has some relevance. It would be surprising if reg 7 were to be construed in such a way as to hobble

New Zealand's primary law enforcement agency in protecting the public interest in the refugee and other spheres. Dealing with the public interest defence, McMullin J in *Attorney General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (CA), at 178 said:

It is well settled that no person is permitted to divulge to the world information which he has received in confidence unless he has just cause for doing so: *Gartside v Outram* (1856) 26 LJ Ch 113. Whatever the source or derivation of this principle (as to which see Gareth Jones, (1970) 86 LQR 463) the obligation depends on the broad rule of equity that he who receives information in confidence shall not take unfair advantage of it. One of the recognised exceptions to the rule is the quaintly called defence of "iniquity" which is now more appropriately described as a defence of public interest: *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39. "The true doctrine is, that there is no confidence as to the disclosure of iniquity": Wood V-C in *Gartside v Outram* (1856) 26 LJ Ch 113, 114. Iniquity is not limited to the proposed or contemplated commission of crimes or civil wrongs. It extends to crimes, frauds and misdeeds, committed as well as in contemplation, and to disclosures of things done in breach of national security, provided always, and this is essential, that the disclosure of them is in the public interest.

[98] I have no difficulty with the concept that detection of fraudulent refugee claims is in the public interest.

Natural Justice

[99] Mr Hooker submitted that the failure of the second defendant to reveal Mr Turley's 11 February 2002 job sheets was a breach of natural justice and of the plaintiff's s 27 right under the New Zealand Bill of Rights Act 1990. The job sheets were highly prejudicial to the plaintiff and had already been considered by a Refugee Status officer.

[100] There is no direct evidence on this topic. But it would be surprising if Mr Turley's job sheets had not been given some consideration by the second defendant during the three years since they were handed across. Ms G A Smythe, the current manager of RSB, deposed in her 10 May 2007 affidavit:

The job sheets were originally withheld as they were marked "restricted" by the NZ police and were considered internal government documents. They were also considered to be opinion rather than statements of fact. There were additional matters that were not related to the possible cancellation of Refugee status and could not be relied upon for that purpose. The document only summarised what was contained in the exhibits and the RSB released the actual relevant documents to the possible cancellation proceedings.

[101] Given that the job sheets have now been disclosed, and given further Ms Smythe's evidence, I do not consider there has been any denial of natural justice. The January 2006 Notice is really no more than an opening shot. On its face the Notice invites comment from the plaintiff. That comment has yet to be provided. Whether or not the second defendant takes the next step under s 129L(1)(f)(ii) of applying to the RSAA for cessation of refugee status remains to be seen.

[102] Had hypothetically the RSAA considered or relied on the job sheets without disclosing them to the plaintiff then the s 27 right would certainly have been breached. That is not, however, the situation here.

Conclusion

[103] There is force in Mr Johnstone's submission that a grant of Refugee Status under the Immigration Act is declaratory. The world's foremost authority on refugee law, Professor Hathaway, put it thus (*The Rights of Refugees under International Law* (Cambridge 2005) 11.):

As a fundamental principle, the acquisition of refugee rights under international law is not based on formal status recognition by a state or agency, but rather follows simply and automatically from the fact of substantive satisfaction of the refugee definition. As the UNHCR has affirmed:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee, but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee.

[104] There is a similar comment in Goodwin-Gill *The Refugee in International Law* (2ed 1996) at 32:

In principle, a person becomes a refugee at the moment when he or she satisfies the definition, so that determination of status is declaratory, rather than constitutive …

[105] A credible refugee determination system is totally dependent on RSB receiving accurate information as to why a claimant considers he or she falls inside the ambit of the Convention.

[106] It is a truism that a person who is wrongly recognised as a refugee because of false or misleading information, concealment, fraud or forgery (s 129L(1)(b)) was never a refugee. The country giving safe haven is fully entitled to investigate the situation. It would be wrong to fetter such an investigation for the reasons advanced by the plaintiff's counsel.

[107] Refugee law and determination procedures are benign, and tilted very much in favour of a claimant. There is no onus. The thresholds are low. The substantive rules well recognise that many genuine refugees flee their countries at short notice and are unable to bring with them supporting materials and documentation of the type that discovery exercises in civil litigation may unearth. But the very simplicity of refugee determination procedures regrettably exposes them to abuse.

[108] The background to the 13 March 2000 search of the plaintiff's home, the legitimate interest that the police had in him, and the nature of the documents found in his home, which arguably were at variance with his 1995 refugee application, amply justify, and in the public interest, a s 129L inquiry. To cut such an investigation off at the pass would be wrong and, from a policy standpoint, harmful. I decline to do so.

Result

[109] For the reasons set out in the previous section of my judgment I conclude that the plaintiff's seven causes of action fail. Accordingly the proceeding is dismissed.

Costs

[110] At an earlier stage this year the plaintiff was applying for legal aid. I am uncertain whether or not he has obtained a grant. Costs are therefore reserved. If the defendants wish to seek costs they should file a memorandum. I am happy to deal with costs, if it is an issue, on the basis of memoranda in chambers unless one of the parties seeks a hearing.

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