**IN THE HIGH COURT OF NEW ZEALAND** **M1881-AS01**
**AUCKLAND REGISTRY**

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|---|---|
| **BETWEEN** | **REFUGEE COUNCIL OF NEW ZEALAND INC & THE HUMAN RIGHTS FOUNDATION OF AOTEAROA NEW ZEALAND INCORPORATED** |
| | **First Plaintiffs** |
| **A N D** | **"D"** |
| | **Second plaintiff** |
| **A N D** | **THE ATTORNEY-GENERAL** |
| | **Defendant** |
| **Hearing** | **18 June 2002** |
| **Counsel** | **R E Harrison QC and D Manning for Plaintiffs**<br>**H Aikman Deputy Solicitor-General and**<br>**A Puata for Defendant** |
| **Judgment** | **27 June 2002** |

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**SUPPLEMENTARY JUDGMENT OF BARAGWANATH J**

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## Appendices

**Supplementary judgment**

[121] This supplementary judgment is to be read together with the interim judgment of 31 May 2002 and continues its numbering.

**Confirmation of interim judgment**

[122] Having now heard argument on the topic of conditional release under s128A which in the interim judgment was dealt with ex parte (paragraphs [4-8] and [29-33]), I confirm the position there taken, with the following modifications.

[123] First, for reasons contained in a revised oral judgment of 4 June 2002 on the Crown's application for stay of the interim judgment, paragraph [2] of the interim judgment has been amended to limit the representation order to the ambit of the interim relief granted in paragraph [5]. While for the present the limited representation order remains in force, it is likely that the statutory amendments referred to in paragraph [137] have removed the need for it. So at paragraph [214] I reserve leave to the Crown to apply to revisit it.

[124] Secondly, the judgment of 4 June further recorded in relation to the considerations to be applied by the District Court on an application under s128A(4) (paragraphs [7] and [29]-[33] of the interim judgment) that absence of evidence of identification may be of the very greatest importance to a decision to decline the application. That would be the case where the applicant satisfied the criteria for risk of offending or of absconding that would render it contrary to the public interest for bail to be granted. The Crown's concern as to the identity of those coming into the country without adequate means of identification is appropriate. Accordingly I record my recognition, which is no more than echoing what Parliament has said in s128B(1)(b) (Appendix 9), that the absence of papers is a significant factor for the District Court judiciary to take into account on applications for conditional release. But that must always be balanced against the consideration noted at paragraph [39]

of the interim judgment, that in some cases use of false papers may be unavoidable for a bona fide refugee.

[125] Thirdly, I am persuaded by the argument proposed by Ms Manning and adopted by Mr Harrison QC that paragraph [30] of the interim judgment, expressing the necessity test by which the Crown's discretionary powers of detention of refugees are to be constrained, requires expansion. I remain of the view that "necessary" in Article 31.2 means the minimum required, on the facts as they appear to the immigration officer:

1) to allow the Refugee Status Branch to be able to perform their functions

2) to avoid real risk of criminal offending

3) to avoid real risk of absconding.

[126] But it is to be emphasised that the Refugee Status Branch is required by s129D "to act in a manner that is consistent with New Zealand's obligations under the Refugee Convention". It would therefore be unusual that detention, which by Article 31.2 must be limited to what is "necessary", could be "necessary" to facilitate the work of the Refugee Status Branch.

[127] In his *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (1953, reprinted 1997) Nehemiah Robinson stated (page 131):

> The Convention does not specify for what purpose the restrictions are necessary. The Ad Hoc Committee had in mind restrictions required to cover considerations of security or special circumstances, such as a great and sudden influx of refugees or any other reason which might necessitate restriction on the movement of refugees. It will depend on the specific nature of the refugee and the conditions prevailing in the country whether the restrictions may consist of confinement in a camp or imprisonment.

[128] Atle Grahl-Madsen in *The Status of Refugees in International Law* Volume II 1972 said:

> …a Contracting State is obliged not to apply other than necessary restrictions to the movements of the refugees covered by the provisions of [paragraph 2]…the drafters of the Conventions were

> agreed that [Article 31.1] does not prohibit detention for the purpose of investigation. It may undoubtedly be deemed necessary for the authorities to check the identity of a person whose entry or presence is unauthorized and who claims to be a refugee, and to investigate into the details of the story he tells. For this purpose it may - just may - also be necessary to detain him.
>
> But according to Article 31(2), detention may not be resorted to just for the convenience of the authorities. Such a measure must, in order to be legal, really be deemed necessary, for example because the police fear that the person will disappear if not detained…or that he may destroy or falsify evidence, or that he may undertake activities contrary to the national security.
>
> It does not suffice that detention is considered convenient for the police or immigration authorities. Under the terms of Article 31(2), the authorities have to accept inconvenience, so long as it does not prevent them from carrying out their work in a satisfactory manner…

[129] In his *Commentary on the Refugee Convention 1951* prepared in 1962-3, and republished in 1997 by the Division of International Protection of the United Nations High Commissioner for Refugees with a foreword by its then Director Dennis McNamara, a New Zealander, Professor Grahl-Madsen observed (page 181):

> …the measures applied must not go beyond what is necessary in the particular situation facing the authorities.

[130] While the standard text Goodwin-Gill *The Refugee in International Law* (2nd ed 1996) refers (page 246) to discussion by the 1951 Conference of Plenipotentiaries of detention "for a few days" to verify identity, such detention is not permitted by the text of the Convention unless as a matter of fact it is justified by the necessity test. As to that, Goodwin-Gill states (page 248):

> Apart from the few days for investigation, it may be argued that the drafters of the 1951 Convention intended that further detention would need to be justified as necessary under Article 31(2)…

(It is unnecessary to discuss the exception under of Article 9 which refers to war or other grave and exceptional circumstances.)

[131] The argument offered by Professor Goodwin-Gill, and the opinions of the other writers, support the necessity test proposed in the interim judgment.

**Onus of proof**

[132] The topic of onus of proof was mentioned but not elaborated in argument on 18 June.

[133] There can be no doubt that the legal onus of establishing refugee status entitlement lies upon the claimant: *Butler v Attorney-General* [1999] NZAR 205 (CA); *Chieu v Canada (Minister of Citizenship and Immigration)* (2002) 208 DLR (4th) 107, 125, 133-4.

[134] That follows from Article 31.1, requiring claimants to "show good cause for their illegal entry or presence", and from ss129G(3) and 129P(1) of the Immigration Act which impose on the claimant, both initially before a refugee status officer and later on appeal to the Refugee Status Appeal Authority "the responsibility to establish the claim". It is the subject of an erudite decision of the Refugee Status Appeals Authority *Refugee Appeal No 72668/01* delivered by RGP Haines QC and GJX McCoy QC on 5 April 2002 which, drawing on the long experience of both members, demonstrates the need for robust systems to deal with fraudulent claims to refugee status.

[135] Given that the Convention is to be construed as an international treaty not only by common law judges but by judges in the civil law world, guidance may be had from the maxim *ei incumbit probatio qui dicit non qui negat* (the onus of proof lies on the party who asserts, not the one who denies) which is common to both systems and underlies the decisions cited in paragraph [133]. See *Broom's Legal Maxims* (10th ed 204) and *Adages du Droit Français* (4 ème éd) 193. But care must be taken not to confuse the legal onus of establishing refugee status with the evidentiary - what does the evidence establish at this point? The principle of *Armory v Delamirie* (1722) Strange 505, 93 ER 664 - parties must adduce evidence of matters within their knowledge - may require a *sans papiers* to justify his presence; there are other circumstances where the claimant's lack of resources and the Crown's access to them - perhaps as to the likely security risk from persons from a particular area - may place it in a better position to secure the evidence.

[136] Whether the New Zealand courts should follow the Authority in applying *Karanakaran v Home Secretary* [2000] 3 All ER 449, which rejects the conventional onus of proof approach in favour of one of evaluation, of the kind seen in *Wellington Club v Carson & Wellington City* [1972] NZLR 698, was not argued. Nor was the application of the distinction between legal and evidentiary burdens, discussed by Lords Denning and Bridge in (1945) 61 LQR 379 and (1949) 12 MLR 273.

[137] I mention these issues as potentially important both to claimants and to NZIS officers in decision-making under s128(5). Some may arise at the next stage of D's claim.

**The Immigration Amendment Act 2002**

[138] On 17 June 2002 the Governor-General gave the Royal Assent to the Immigration Act 2002, the material parts of which came into force the next day. Section 9 amending s128 and s10 inserting new sections 128AA to 128D are attached as Appendix 7. Since all counsel agreed that they do not affect the three main issues requiring determination I say little more about them than that they now provide for conditional release from detention of a person detained under s128.

[139] The Crown acknowledged that the legislation cannot be construed as retroactive but submitted that it could be used in support of its argument as to the construction of s128 in its previous form. I do not accept such submission, which I regard as inconsistent with the Crown's acknowledgement, as with s7 of the Interpretation Act 1999:

> Acts do not have retrospective effect.

**Introduction to supplementary judgment: resolution of the dilemma**

[140] The interim judgment raised an apparent dilemma. Either s128 of the Immigration Act (see Appendix 1 to interim judgment) does apply to refugee status claimants, as the Crown contends, with the result that by subsection (15) they are

ineligible for bail, in apparent breach of Article 31.2 of the Refugee Convention; or s128 has no application to such claimants and there is no effective machinery to deal with those who may present a risk to the security of New Zealand under the shield of a false claim to refugee status.

[141] The further argument confirms the difficulty of the dilemma which this judgment must resolve.

[142] For the reasons that follow I have decided, after reflection, not to accept the plaintiffs' first argument:

> 1) that s128 has no application to refugee status claimants.

I do however accept their second and third arguments:

> 2) that the detention power under s128(5) is to be construed as a true discretion, which must be exercised so as to:
>
> > have regard to the provisions of… Part [VIA dealing with Refugee Determinations] and of the Refugee Convention
>
> as required by s129X(2); and
>
> 3) that the Operational Instruction of 19 September 2001 (see Appendix 3 to the interim judgment) fails to comply with such provisions and is unlawful.

**(1) The first issue: whether s128 applies to refugee status claimants**

[143] The plaintiffs' argument, that the summary "turn around" provisions of s128, with its stringent provisions for detention pending departure from New Zealand on the first available craft can have no application to refugee status applicants, is summarised at paragraph [21] of the interim judgment.

[144] The plaintiffs' argument receives support from the judgment of Chilwell J in *Benipal v Ministers of Foreign Affairs and Immigration* (ibid).

[145] In that case the plaintiff had been detained under provisions of the Immigration Act 1964:

> **14 Temporary permits may be granted to visitors**
>
> (1A) Where an application for a temporary permit is refused, the person concerned may be detained by any member of the police pending that person's departure from New Zealand on the first available ship or aircraft.
>
> …
>
> **14A Detention of persons awaiting departure from New Zealand**
>
> (1) Notwithstanding anything in s14(1A) of this Act where a person to whom that subsection applies used to be detained for more than 24 hours, a member of the police shall apply to the Registrar (or, in his absence, the Deputy Registrar) of a District Court for a warrant authorising the detention of that person in a prison, and the Registrar (or Deputy Registrar) shall issue such a warrant in the form set out in the Third Schedule to this Act.
>
> (2) Every such warrant shall authorise the Superintendent of the prison to detain the person named in it until he is required by a member of the Police to deliver up that person in accordance with subsection (4) of this section.
>
> (3) Every person detained in a prison pursuant to a warrant issued under the section shall be treated for the purposes of the Penal Institutions Act 1954 as if he were an inmate awaiting trial.
>
> (4) As soon as a ship or aircraft becomes available to take the person from New Zealand, a member of the police shall require the superintendent, in writing, to deliver the person into the custody of the member, who shall escort the person or arrange for him to be escorted to the seaport or airport and ensure that the person is placed on the ship or aircraft and detained there until the ship or aircraft leaves New Zealand.
>
> (5) If, for any reason, that ship or aircraft is delayed in New Zealand for more than 24 hours, the person shall be returned to the custody of the superintendent of the prison, and for that purpose the warrant originally issued pursuant to subsection (1) of this section shall be deemed still to be of full force and effect…

[146] At page 13 of the judgment Chilwell J stated:

> I find as facts that Mr Benipal, having landed in New Zealand, passed from Auckland International Airport otherwise than on a ship or

> aircraft bound for another country; i.e. he passed from the airport and travelled several kilometres in a police car to Auckland city, he was taken into New Zealand in custody not for the purposes of detention but for the purpose of being prosecuted for an offence under s16(1)(c). The facts are indisputable. The question is the legal effect of taking him away from the airport to prosecute him in the District Court at Auckland for an offence against New Zealand Municipal Law.

[147] The section referred to by the Judge reads:

> **16 Offence to obtain permit by false representation**
>
> (1) Every person commits an offence against this Act who, for the purpose of obtaining any permit under this act… - …
>
> > (c) utters, produces, or makes use of any document knowing that it is not genuine…

[148] After an extensive review of the authorities and principles Chilwell J held at page 43:

> [The detective sergeant] decided to detain Mr Benipal for the purpose of prosecution, not for the purpose of placing him on the first available ship or aircraft… When the decision was made not to prosecute, he was instructed to implement s14A and apply for a warrant. The purpose for which he took Mr Benipal into custody had gone. Yet he kept him in custody at the police station… liberty is too serious a matter for the authority for deprivation of liberty to be left to speculation. If the period of custody during the morning of 16 May was pursuant to s14(1A), there was no evidence from [the detective sergeant] that he had exercised a discretion to detain in terms of the section…

The Judge held that it was unsafe to determine that the application for the warrant was made on a basis which could be upheld by the Court.

[149] Mr Harrison and Ms Manning argued that similar reasoning should be applied in the present case to D, and indeed to the other refugee status claimants detained following the Operational Instruction of 19 September 2001.

[150] They submitted:

- that such persons do not fall within s128(5), which it is convenient to repeat:

> …any person to whom the section applies may be detained by any member of the police and placed in custody pending that person's departure from New Zealand on the first available craft.

- that while such persons fall within the literal language of subsection (1):

  > This section applies to every person… who –
  >
  > (a) arrives in New Zealand from another country; and
  >
  > (b) is not exempt under this Act from the requirement to hold a permit; and
  >
  > (c)…
  >
  > (ii) is refused a permit;
  >
  > …

  detention of a refugee status claimant cannot be:

  > pending that person's departure from New Zealand on the first available craft

  because s129X(1) provides:

  > No person who has been recognised as a refugee in New Zealand or is a refugee status claimant may be removed or deported from New Zealand under this Act, unless the provisions of article 32.1 or article 32.2 of the Refugee Convention allow their removal or deportation.

- they cannot be "placed in custody pending… departure… on the first available craft…" when the statute prevents their removal possibly altogether and certainly until processes to determine their status which may take some weeks, have been completed.

[151] They add that the statute cannot possibly mean that refugee status claimants should fall within the section, subsection (15) prohibits the grant of bail, and unnecessary detention of any refugee would put New Zealand in breach of Article 31.2 of the Refugee Convention:

> **Refugees unlawfully in the country of refugee**
>
> …

> (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary…

[152] That may be contrasted with the Immigration Act's ample provision for bail in other circumstances, including cases presenting potential security risks, discussed at paragraph [58] of the interim judgment.

[153] Their argument draws strength from the fact that the 1987 Act made no provision for refugees; which permits the argument that since s128 was not amended when other changes were made by the Immigration Amendment Act 1999 to cater for refugees and refugee status claimants, it is to be construed as it was prior to the amendments, and should leave refugees and refugee status claimants outside its ambit.

[154] It is notable that by s128(3), s128 ceases to apply to any person - explicit reference is made to stowaways - on the expiration of 72 hours after the time when the craft on which the person was travelling berths, lands, or otherwise arrives in New Zealand, unless that person is sooner detained under s128. That is a strong pointer to its summary nature.

[155] A second is subsection (5), already cited.

[156] A third is subsection (12):

> If, for any reason, the craft ceases to be available to take the person from New Zealand or is, or is likely to be, delayed in New Zealand for more than 24 hours, or if for any other reason the person is unable to leave New Zealand at the expected time, the person shall be returned to the custody from which the person was taken, and for that purpose the warrant of commitment shall be deemed still to be of full force and effect.

[157] A fourth is subsection (15):

> A person who is detained under this section shall not be granted bail but may, where section 128A of this Act applies in relation to the person, be released on conditions in accordance with that section.

[158] There can be no doubt that the prime concept is captured by the label "turn-around provision" which was used in argument.

[159] Hence the plaintiffs' strong contention that the only detention permitted by s128(5) is for the purpose of securing that person's departure on the first available craft. Subsequent detention is unlawful. And since by s129X(1) removal is unlawful before determination of the refugee status claim, it is an abuse of language to say that someone detained pending disposal of the claim is still detained "pending that person's departure on the first available craft". In truth the whole topic of departure is held in suspense pending the determination; the detention is rather for the purpose of preventing crime or absconding until that has occurred. The courts view jealously any claim to detain for which no clear authority exists. None exists here. And so the Court must declare the purported detention under s128 to be unlawful.

[160] There is great force in the plaintiffs' submission.

[161] I have already rejected the Crown's submission that last week's amendment can bear on the antecedent construction of s128 - even though it is plain that the authors of the amendment have assumed that s128 applies to refugee status claimants. This is made clear by the new s128AA(2), which provides: "This subsection applies to… *a refugee status claimant… who… is placed in custody under section 128(5)*" (ss 128AA-128AD are set out in full in Appendix 7). (There is an obvious drafting error in the reference to "this subsection", which must be construed as "section" to have any effect.) But it is settled by the highest authority that legislative error does not alter the law. In *West Midland Baptist Association v Birmingham Corporation* [1970] AC 874 at 898 per Lord Reid:

> These provisions show that Parliament (or the draftsman) must have thought that the law was that compensation was assessable on the basis of value as at the date of the notice to treat. But the mere fact that that an enactment shows that Parliament must have thought that the law was one thing does not preclude the courts from deciding that the law was in fact something different. That has been stated in a number of cases including *Inland Revenue Commissioners v Dowdall, O'Mahoney & Co Ltd* [1952] AC 401.

[162] So I am not relieved of my task by last week's amendment.

[163] Ms Aikman and Ms Puata submitted that I should follow the decision of Anderson J in *F v Superintendent of Mt Eden Prison* [1999] NZAR 420 to the contrary: that so long as the underlying purpose of departure remains, "the first available craft" means the first craft available after the processes that the claimant has instigated have been completed and the claim has failed.

[164] It is tempting to follow that decision of a very senior judge as a matter of judicial comity. But I have had the benefit of much fuller argument and must form my own view.

[165] Section 128(5) is clearly designed to facilitate the immediate removal of aliens from New Zealand. Were it not for the consequences of such construction, one would not hesitate to say that it cannot apply to those who may not be required to leave on what on any normal use of language is "the first available craft" - which would allow for such contingencies as the need to recover from illness or hold-up caused by an aviation strike.

[166] But here the consequences are concerning. The difficulty with such construction is that, unless one accepts the plaintiffs' submission referred to in paragraph [171] below, it would permit not only genuine refugees but fraudsters, criminals and simply those who are not entitled to refugee status to escape detention for a period of 42 days (see next paragraph).

[167] Section 126(1)(a) imposes on every person who arrives in New Zealand the responsibility to present himself or herself to an immigration officer and to surrender to that officer a duly completed arrival card in an approved form; s126(1)(b) requires production of a passport (compare Simon Brown LJ at paragraph [39] of the interim judgment). By s45(1), from the moment that a person is in New Zealand unlawfully until that person leaves New Zealand he or she has an obligation to leave New Zealand unless subsequently granted a permit. By s53 a person unlawfully in New Zealand may be the subject of a removal order and is liable to be removed from New Zealand. That section is subject to s129X, subsection (1) of which prohibits the

removal or deportation of a refugee status claimant. Section 54(1) empowers the chief executive or any designated immigration officer to make a removal order. By s55, such an order authorises the police to take the person named in the order into custody and to proceed to execute the order. By s59(1) a member of the police may arrest without warrant a person on whom a removal order has been served and detain that person for the purpose of executing the order by placing the person on a craft that is leaving New Zealand. Section 53(1)(a)(i) however imposes liability for removal only if the person:

> Has been unlawfully in New Zealand -… for a period of 42 consecutive days…

[168] It follows that, if s128 does not apply, a bogus claimant for refugee status, unless detained under s128B, will be at large for a sufficient period to engage in whatever anti-social conduct is the reason for entry. All that is needed is the cry "Open Sesame" in the form "I claim refugee status" which such people would soon learn in the unlikely event that they did not know it already.

[169] Yet to make s128 apply it is necessary to read subsection (5) as saying:

> …any person to whom this section applies may be detained by any member of the Police and placed in custody pending that person's departure from New Zealand on the first available craft [<u>provided that in the case of a refugee status claimant the period of detention may continue until determination of the application</u>]

[170] So the question is whether the Court should read in the underlined words to bring about a result that avoids real risk to New Zealand security.

[171] The plaintiffs did not contend for such construction, arguing that s128B, not s128, applies to such claimants. But their contention also requires statutory distortion. It means ignoring the all inclusive language of s128(1) "this section applies to every person…". They invite the Court to read it as "every person *except those who claim refugee status*".

[172] The plaintiffs submit that refugee status claimants can and should be dealt with under s128B (Appendix 9). By subsection (1):

> This section applies to every person who arrives in New Zealand from another country… where –
>
> > (a) an immigration officer or any member of the police has reason to suspect that the person may be a person to whom s7(1) of this act applies; or
> >
> > (b) the person has no appropriate documentation for immigration purposes, or any such documentation held by the person appears to be false, –
>
> And a decision as to whether or not to grant that person a permit… has not been made because the person's status under s7(1) of this Act cannot be immediately ascertained.

[173] Section 7 (Appendix 9) is directed at persons who are not eligible for exemption or permit by reason of previous offending, who are deportees from New Zealand or any other country, or who the Minister has reason to believe have engaged in terrorism or like conduct.

[174] The position of refugee status claimants would not however be assisted by the application of s128B: by subs (5)(a)(ii) even if it is determined that the person is not one to whom s7(1) applies, the person, unless granted a permit, is liable to be dealt with under s128. The plaintiffs' argument for s128B enters a blind canyon.

[175] What is more, someone dealt with under s128B is not eligible, as is one detained under s128, to apply for bail (s128B(12)), even if proceedings for judicial review are brought under s128A (Appendix 9). So such person is worse off than one dealt with under s128.

[176] While it would be possible to construe the legislation as the plaintiffs contend, so that refugee status claimants could be detained only under s128B, for the reasons given in paragraphs [173-4] there is no practical advantage for them in such course. Nor is Article 31.2 is complied with.

[177] It was for that reason that in the interim judgment I gave preliminary consideration to whether, if s128 has no application to refugee status claimants, any other provisions of the Act would adequately safeguard the public interest in detaining false claimants. For the reasons given in paragraphs [166-7] it is plain that

they do not. So I turn to consider the argument, beyond the literal, that s128 does apply.

[178] By the 1999 reform Parliament has legislated extensively, with the obvious purpose of creating a legislative regime that deals fairly and effectively with refugee status claimants, as it had been invited by the Court of Appeal, especially in *Butler*.

[179] It had to deal with competing public interests of the first importance. One is to give due effect to the Refugee Convention of which the preamble and certain other provisions, together with parts of the 1967 Protocol, are attached as Appendix 8. The other is to protect New Zealand from unlawful incursion. Both are expressed in the introduction:

> **An Act to –**
>
> > **(a) Improve the effectiveness of the removal regime for persons unlawfully in New Zealand by streamlining the procedures involved…**
> >
> > **(b) Create a statutory framework for determining refugee status under the Refugee Convention…**

[180] It is the Court's function on construction to try to reconcile and achieve both purposes. I am satisfied that can be done quite readily by reading ss128 and 129X together in the manner suggested in paragraph [169].

[181] A literal reading of "on the first available craft" would mean the next aircraft leaving the country en route to the relevant destination. That is undoubtedly what is contemplated in the case of those who are not refugee status claimants and whom it is reasonable to keep in detention without bail as subsection (15) contemplates.

[182] To stretch s128 to apply to someone whose status must be the subject of relatively lengthy inquiry entails an element of distortion, a point which is understandably at the forefront of the plaintiffs' argument. But it is in my opinion met in the manner I have suggested.

[183] Justification for doing so is to be found in the history of the legislation, which casts light on its true construction. In 1991, before the enactment of s129X in 1999,

the Court of Appeal in *D v Minister of Immigration* [1991] 2 NZLR 673 had held that a refugee status claimant fell within the then form of s128 and must be expelled from New Zealand under that "turn around" provision within 28 days: no power then existed to hold him for longer. Such result entailed clear breach of New Zealand's obligation not to send back, *refouler*, a man whose claim to be entitled to refugee status had not been determined. There was a prompt legislative response, giving power to extend the duration of the warrant, reflected in the present form of s128(9)(c), (13), (14) and (15) and also s128A and 128B (Appendix 1 to interim judgment and Appendix 9 to this judgment). That decision might be seen as Court of Appeal authority on the present point. But since the report does not suggest that the non-application of s128 was argued it does not bind this Court: *Re Hetherington* [1990] Ch 1, 10 per Sir Nicolas Browne-Wilkinson V-C.

[184] The 1999 amendment act introduced the new part VIA, including s129X. I have reproduced the introduction at paragraph [179].

[185] Section 129A provides:

> **129A Object of this Part**
>
> The object of this Part is to provide a statutory foundation for the system by which New Zealand ensures it meets ist obligations under the Refugee Convention

[186] The task of the Court is to interpret s128 not in isolation but as part of an entire legislative package, including Part VIA. It is to be construed as a seamless whole, unfettered by the state of the law prior to the amendment.

[187] An example of such process of construction is *Edgewater Motel Ltd v Commissioner of Inland Revenue* (CP432-IM01, Auckland Registry, 28 May 2002), where it was held that a provision of the Goods and Services Act was to be read not in isolation from but as subject to general legislation which expressed the dominant legislative policy. I there adopted Lord Steyn's statement of principle in *R v Home Secretary, ex parte Pierson* [1998] AC 539, 589:

> Ultimately, common law and statute law coalesce in one legal system

and observed that it applies with equal force to different statutes within that system: it is the responsibility of the Court on construction to consider how such statutes are to be reconciled.

[188] In the case of a single amended statute the point applies with stronger force.

[189] In those circumstances I can see no good policy reason to refrain from construing s128(5) together with s129X(1), thus arriving at the result proposed in paragraph [169] above. Provided subsection (5) is construed in accordance with paragraphs [190-207] below, both public interests are met. *Benipal* can be distinguished. It was decided under legislation that used the criminal law to deal with immigration; a concept largely abandoned by the 1987 legislation. That decision has in my view been overtaken by the major legislative changes that have occurred in the past 38 years. The former notion that re-enactment of an expression in an Act that had received a judicial interpretation entails a deemed endorsement of it now has little weight. See Burrows *Statute Law in New Zealand* (2nd ed 1999) pages 216-7, which confines the notion to the operation of the doctrine of precedent where the language and context of the provisions remains the same. But that is not this case. The Crown succeeds on the first issue.

**(2) The second issue: construction of the detention power under s128(5)**

[190] But for the reasons that follow I am satisfied that the plaintiffs must succeed on the second – the detention function under s128(5) is to be construed as requiring the exercise by an immigration officer of a true discretion so as to:

> have regard to the provisions of… Part VIA (dealing with Refugee Determinations) and the Refugee Convention

as required by s129X(2).

[191] I have found it necessary to go back to first principles. While the relevant perspective and principles are outlined at paragraphs [34-57] of the interim judgment it is desirable to elaborate a little.

[192] Under the Westminster system it is the duty of the Courts to give effect to legislation enacted by Parliament which comprises the Sovereign in right of New Zealand and the House of Representatives. The function of construing and applying the legislation is the task of the Courts. In performing it they apply settled conventions. The starting point as required by s5 of the Interpretation Act (paragraph [54]) is the text of the statute (paragraph [55]). The indications that may be considered are not confined to those provided in the enactment and extend (paragraph [57]) to longstanding principles of constitutional and administrative law.

[193] One of those is the recognition that some international obligations are so manifestly important that they must be taken into account in decision making: see *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266 (Court of Appeal).

[194] By s129X(2) of the Immigration Act, which it is convenient to repeat, Parliament has legislated that principle into our domestic law:

> In carrying out their functions under this Act in relation to a refugee or refugee status claimant, immigration officers must have regard to the provisions of [Part VIA] and of the Refugee Convention.

[195] New Zealand's accession on 30 June 1960 to the 1951 *Convention Relating to the Status of Refugees* was not the result of some foreign imposition that New Zealanders and their Courts should view with scepticism and apply with reluctance. It was the exercise of authority on the world stage by a newly sovereign state, one of the victorious allies determined to play its part in dealing with the consequences of the past.

[196] That position was confirmed when on 6 August 1973 we acceded to the *Protocol Relating to the Status of Refugees* of 31 January 1967.

[197] New Zealand has recently become a member of the Executive Committee of the UNHCR (United Nations High Commissioner for Refugees) Programme.

[198] On 12-13 December 2001 representatives of 129 states, including New Zealand, met at Geneva and adopted an unprecedented Declaration reaffirming

the Convention's centrality to the international refugee protection regime. It included the commitment

> To providing, within the framework of international solidarity and burden-sharing, better refugee protection through comprehensive strategies…

[199] Neither the New Zealand Executive nor the Courts may avoid giving proper weight to Parliament's 1999 directive expressed in s129X(2).

[200] That precept is of vital importance when one comes to construe s128(5).

[201] On such approach that *power* of detention is, in my opinion, to be construed as imposing on the Executive a *duty* to exercise a measured discretion in its use, by complying with s129X(2). While the physical detention is by member of the police, their role is to be construed within our constitutional conventions. Although the use of the passive "may be detained by any member of the police and placed in custody" contains no explicit reference to the New Zealand Immigration Service, it is that service which has both the statutory and delegated prerogative authority to grant or withhold residence permits, and the responsibility in performing its functions to comply with s129X(2). That is exercised in the present context by providing advice to the Police, who in turn will exercise their discretion as to whether, when and how to detain. While the detention is expressed to be "*by* any member of the police" the police will inevitably exercise their authority in the light of advice by the NZIS. That reality has been recognised explicitly by Parliament in last week's amendment to s128(5) which now reads:

> (5) Subject to subsection (7), on the request of an immigration officer to a member of the police, any person to whom this section applies must be detained by a member of the police and placed in custody pending that person's departure from New Zealand on the first available craft.

[202] I have decided that the pre-amendment form of s128(5) is to be read in its application to a refugee status claimant as providing:

> Subject to subsection (7) of this section, any person to whom this section applies may be detained by any member of the Police and placed in custody pending that person's departure from New Zealand

> on the first available craft [only if and so long as the necessity test of Article 31.2 is satisfied, being a matter to which the immigration officer exercising discretion to request such detention is required by s129X(2) to have regard]

[203] I have held that there is no sufficient reason to deprive s128(1) of its full effect as applying "to every person…", including refugee status claimants, falling within its literal language. But there must be no detention of anyone whom it is unnecessary to detain in accordance with the principles stated in the interim judgment as clarified in paragraph [126] of this judgment. Moreover, as Ms Aikman put it in argument, the s128(5) discretion is not exercised once and for all but is "iterative": if the decision is to detain, that decision must be kept under constant review with the necessity test continuously re-applied as evidence emerges.

[204] It is true that such construction can be said to require what Bennion *Statutory Interpretation (3rd edition)* page 355 calls a "strained construction", which is other than the clear grammatical meaning. While bound to seek and apply the meaning of the statute as expressed by Parliament, for which the starting point is the text of the statute, the judges nowadays treat with caution the well known strictures addressed by Lord Simonds to Denning LJ in *Magor and St Mellons v Newport Corporation* [1951] 2 All ER 839, 841:

> [T]he notion that the court must proceed to fill in the gaps [is] a naked use of legislative function under the thin disguise of interpretation… If a gap is disclosed, the remedy lies in an amending Act.

As cases such as *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) demonstrate, New Zealand courts will rather, within the limits of Bennion's criteria for "strained construction", take into account Lord Denning's approach:

> Wherever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not

> provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defeat appears a judge cannot simply fold his hands and blame and draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature.
>
> *Seaford Court Estates v Asher* [1949] 2 All ER 155, 164.

[205] Among the reasons which may justify or positively require the strained construction of an enactment are consequences of a literal interpretation inconsistent with other provisions of the statute or otherwise so undesirable that Parliament cannot have intended them.

[206] As was argued in *Savril Contractors Limited v Bank of New Zealand* (CP92/00, Hamilton Registry, 8 May 2002):

> [14] … the function of the Court on construction is neither to usurp Parliament's unchallengeable authority to make our laws, nor to pretend to seek the will-o'-the-wisp of a "parliamentary intention" where the reason for the debate on construction is the very absence of a sufficiently clear expression of parliamentary will. In the latter case, starting with s 5 [of the Interpretation Act], it must decide what construction will best conform with the settled precepts by which the Courts determine the meaning of statutory language.
>
> …
>
> [17] Because the starting point is the statutory text, the Court will where possible adopt the literal meaning of an enactment, namely the grammatical meaning – see Bennion *Statutory Interpretation* (3rd edition page 354). But in some circumstances it is legitimate for the Court to depart from the literal meaning…. Bennion observes:
>
> > There are broadly four reasons which may justify (and in some cases positively require) the strained construction of an enactment – (a) a repugnance between the words of an enactment and those of some other enactment; (b) consequences of a literal construction so undesirable that Parliament cannot have intended them; (c) an error in the text which plainly

> falsifies Parliament's intention; (d) the passage of time since the enactment was originally drafted.

[18] Bennion employs the metaphor of a parliamentary intention, which is however no more helpful than that of a company's intention. In the latter case the metaphor has been unpacked. In *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (Privy Council) Lord Hoffmann stated at pages 11-12:

> A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person but there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called "the rules of attribution".
>
> …
>
> But a reference to a company "as such" might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no ding an sich; only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as the act of the company.

[19] The judgment whether a literal or a strained construction is to be selected depends not solely on the black letter of Parliament's language but also upon the other considerations of public policy which it is the duty of the Court to consider.

[20] In accordance with Professor Joseph's approach, Bennion's references to "Parliament's intentions" could be substituted by a reference to [the words of the statute and to] the judge made precepts. Professor Joseph argues that the courts do not simply deduce meaning from the words Parliament uses; they also attribute meaning to such words. The courts do this, he argues, against a background of societal norms and values that influence the meaning of the statutory words used (see *Constitutional and Administrative Law in New Zealand* (2nd ed), Wellington, Brookers, 2001, pp 506-507 and Joseph, *"The demise of Ultra Vires – Judicial Review in the New Zealand Courts"* [2001] PL 354 at 368).

[207] Here the only way to avoid defeating one or other of the important purposes of the legislation is to adopt the construction proposed in paragraph [201]. I accordingly do so.

**(3) The third issue: the validity of the Operational Instruction of 19 September 2001**

[208] The plaintiffs also succeed on their third argument – that the Operational Instruction of 19 September 2001 (Appendix 5 to interim judgment) fails to comply with such provisions and is unlawful.

[209] Despite Ms Aikman's careful argument to the contrary, I construe that Operational Instruction as dealing solely with the form of detention – either in a penal institution or at the Mangere Centre. It fails to present for prior consideration the crucial third option which Article 31.2 requires to be adopted where possible in terms of the necessity test discussed at paragraphs [30-32] of the interim judgment, modified as stated in paragraph [126] above.

[210] The Operational Instruction is therefore fundamentally defective.

**Relief**

[211] The plaintiffs are entitled to a declaration that the Operational Instruction of 19 September 2001 is unlawful.

[212] The next question is whether the second plaintiff D or any of the claimants whom the first plaintiffs have proposed they should represent should be accorded more specific consequential relief at this stage.

[213] I am satisfied that the individual circumstances of each claimant make it impracticable to grant a general representation order. Any claimant who wishes to seek such relief must make an individual application.

[214] And, by reason of the recent amendment to s128 which came into force last week, the position of claimants who seek conditional release from detention is now protected. I do not at this stage discharge the interim declaration, which has been a necessary platform for applications under s128A, but leave is reserved to the Crown to revisit the point if it is so minded.

[215] As regards D, the Deputy Solicitor-General's argument, which I accept, is that he fell within s7(d)(v), having on his own admission been deported from Korea, so that he was not entitled to exemption or to a residence permit.

[216] It does not however follow that his detention under s128(5) was therefore either lawful or not causative of any loss. For the reasons earlier given there was in his case breach by the Crown of s128(5) because of application of the policy expressed in the Operational Instruction of 19 September 2001, which I have held to be unlawful. There has been no analysis in the evidence of how he would have been treated had s128(5) been applied according to law.

[217] What was the consequence of the breach and whether there should be compensation for it, and if so for what sum, are matters more appropriately left for determination at a later stage of these proceedings.

[218] I record the Crown's submission that D's claim and any others' may be defeated by reason of breach of the condition of Article 31.1 "coming directly from a territory where their life or freedom was threatened"; and also the plaintiffs' response based on *R v Uxbridge Magistrates' Court, ex p Adimi* [2002] 1 QB 667 at 678, which cites the leading authorities, of which the nub is that

> …any merely short term stopover en route to [an]intended sanctuary cannot forfeit the protection of the article…

To similar effect is *R v Marzouk* (1994) 19 Imm LR (3d) 63, a decision of Dohm J in the British Columbia Supreme Court recently reported.

[219] Leave is reserved to the parties to apply to argue this as a preliminary issue before the next stage of D's claim.

**Conclusion**

[220] Subject to the modifications mentioned in paragraphs [123-6] the interim judgment of 31 May 2002 is confirmed and the three major outstanding issues are resolved in terms of this judgment.

[221] Leave is reserved to all parties to apply for further directions. Costs are reserved.

Signed on 27 June 2002 at 11.30 am.

_____

W D Baragwanath J

**Appendix 7**

**9 Detention and departure of persons refused permits, etc**

(1) Section 128(3) of the principal Act is amended by omitting the words "the craft on which that person was travelling berths, lands, or otherwise arrives in New Zealand", and substituting the words "that person first reports or presents to an immigration officer after arriving in New Zealand from another country".

(2) Section 128 of the principal Act is amended by repealing subsection (5), and substituting the following subsection:

"(5) Subject to subsection (7), on the request of an immigration officer to a member of the police, any person to whom this section applies must be detained by a member of the police and placed in custody pending that person's departure from New Zealand on the first available craft."

(3) Section 128(9) of the principal Act is amended by repealing paragraph (c), and substituting the following paragraph:

"(c) the expiry of the period for which detention is then authorised by the warrant (as determined having regard to any extension or further extension of the warrant granted under subsection (13B) of this section, and to subsection (16) of this section, and, where appropriate, to-

"(i) section 128AA(12); and

"(ii) subsections (2)(a) and (12) of section 128A), -".

(4) Section 128(13) of the principal Act is amended by omitting the words "authorised by the warrant under subsection (9)(c)", and substituting the words "then authorised by the warrant (as determined having regard to the matters referred to in subsection (9)(c))".

(5) Section 128 of the principal Act is amended by repealing subsection (15), and substituting the following subsections:

"(15) A person who is detained under this section must not be granted bail, but may be released under section 128AA or section 128A.

"(16) The period for which detention is authorised by a warrant of commitment issued under subsection (7) must be reckoned exclusive of any period commencing on the date on which the person to whom the warrant relates escapes from lawful custody and ending 72 hours after the date on which the person is again taken into custody under this Act."

**10 New sections 128AA to 128AD inserted**

The principal Act is amended by inserting, after section 128, the following sections:

"128AA **Detained person may be conditionally released from detention in certain cases**

"(1) This subsection applies to a person who is not a refugee status claimant (within the meaning of section 129B(1)) and-

"(a) is placed in custody under section 128(5); or

"(b) is the subject of a warrant of commitment issued under section 128(7).

"(2) This subsection applies to-

"(a) a refugee status claimant (within the meaning of section 129B(1)) who-

"(i) is placed in custody under section 128(5): or

"(ii) is the subject of a warrant of commitment issued under section 128(7):

"(b) a person who is the subject of an application under section 128(13)(a) for the extension or further extension of a warrant of commitment issued under section 128(7).

"(3) An immigration officer may apply to a District Court Judge for an order that a person to whom subsection (1) applies be conditionally released from custody.

"(4) An immigration officer or the person concerned may apply to a District Court Judge for an order that a person to whom subsection (2) applies be conditionally released from custody.

"(5) An application under subsection (3) or subsection (4) must be made on oath, and state why section 128 applies to the person to whom it relates.

"(6) On an application under subsection (3) or subsection (4), the Judge may make an order for the person's conditional release.

"(7) The order must state-

"(a) either a day on which it expires or an event upon the occurrence of which it expires; and

"(b) a location at which the person to whom it relates must give himself or herself up when it expires.

"(8) If the Judge does not make an order for the person's conditional release,-

"(a) in the case of an application made in respect of a person who is not already subject to a warrant of commitment issued under section 128(7), the Judge must issue a warrant of commitment authorising the person's detention for a period not exceeding 28 days in a penal institution or some other premises approved for the purpose by the Judge:

"(b) in the case of an application made in respect of a person who is the subject of an application under section 128(13)(a) for the extension or further extension of a warrant of commitment issued under section 128(7), the Judge may extend or further extend the warrant of commitment concerned-

"(i) for any period the Judge thinks necessary in the circumstances to allow all the persons in the group concerned to be properly dealt with, if the person detained under the warrant is a member of a group of people-

"(A) all of whom arrived in New Zealand on the same ship or aircraft; and

"(B) all or most of whom are people to whom section 128 applies; and

"(ii) for a further period not exceeding 7 days if the person detained under the warrant is not a member of such a group.

"(9) A warrant of commitment issued under subsection (8)(a) must be treated as a warrant of commitment issued under section 128(7).

"(10) On the day or (as the case may be) the occurrence of the event stated in it, an order under subsection (6) for a person's conditional release expires, and the person must deliver himself or herself up to an immigration officer at the location stated in it.

"(11) If a person delivers himself or herself up to an immigration officer under subsection (10),-

"(a) in the case of a person to whom subsection (1) or subsection (2) applied by virtue of his or her being placed in custody under section 128(5), if not released,-

"(i) the person must be treated as a person to whom section 128(5) continues to apply; and

"(ii) if the person is to be detained for m ore than 48 hours after delivering himself or herself up, an application must be made in accordance with section 128(7):

"(b) in any other case, if not released, the person must again be taken into custody, and may be detained in custody under section 128 pending the person's departure from New Zealand on the first available craft.

"(12) The period for which detention is authorised by a warrant of commitment issued under section 128(7) must be reckoned exclusive of any period commencing on the date on which the person to whom the warrant relates is released pursuant to an order under subsection (6), and ending on the earlier of the following:

"(a) the expiration of 72 hours after the date on which the person is again taken into custody under this Act:

"(b) the extension or further extension of the warrant under section 128(13B).

"(13) If a permit is granted under this Act to a person to whom an order under subsection (6) relates,-

"(a) the order is cancelled; and

"(b) Part II applies to the person; and

"(c) section 128 and this section cease to apply to the person.

"128AB **Conditions**

"(1) An order under section 128AA(6)-

"(a) must be made subject to the condition that the released person-

"(i) must reside at a specified address; and

"(ii) must report to an office of the Department of Labour or to a police station at specified times and intervals, and in a specified manner:

"(b) if the released person is a refugee status claimant under Part VIA, must be made subject to a condition relating to attendance at any interview under that Part by a refugee status officer or the Refugee Status Appeal Authority:

"(c) may be made subject to any other conditions the Judge thinks fit to impose in the circumstances.

"(2) The conditions imposed on a released person under subsection (1)-

"(a) must be notified in writing to the person before his or her release; and

"(b) take effect on his or her release.

"(3) An immigration officer and the release person-

"(a) may agree to vary a condition imposed under paragraph (a) or paragraph (b) of subsection (1); and

"(b) if the order containing it so provides, or with the consent of a District Court Judge, may agree to vary a condition imposed under subsection (1)(c).

"(4) A variation of a condition-

"(a) takes effect immediately; but

"(b) must be reduced to writing, and notified to the released person, as soon as practicable.

"128AC **Breach of condition or failure to deliver oneself up to immigration officer**

"(1) This subsection applies to a person who has been released under section 128AA-

"(a) after the person breaches a condition imposed under section 128AB:

"(b) at any time between the time the person fails to deliver himself or herself up to an immigration officer as required by section 128AA(10) and the time (if any) when the person is granted a permit under this Act.

"(2) If subsection (1) applies, the person is liable to be arrested by any member of the police, without warrant, and placed in custody.

"(3) If arrested and placed in custody, the person must as soon as possible be brought again before a District Court Judge; and subject to subsection (4),-

"(a) in the case of a person to whom subsection (1) or subsection (2) of section 128AA applied by virtue of his or her being placed in custody under section 128(5), the Judge must decide whether to issue a warrant of commitment authorising his or her detention for a period not exceeding 28 days in a penal institution or some other premises approved for the purpose by the Judge, or again make an order for the person's conditional release under section 128AA:

"(b) in any other case, the Judge must decide whether to order that the person must again be taken into custody, or again make an order for the person's conditional release under section 128AA.

"(4) If a person brought before a District Court Judge under subsection (3) has breached a condition imposed under paragraph (a) or paragraph (b) of section 128AB(1), the Judge must (as the case may be) issue a warrant of commitment or make an order that the person must again be taken into custody, unless the Judge is satisfied that the person had a reasonable excuse for breaching the condition.

"(5) A warrant under subsection (3)(a) must be treated as if it has been issued pursuant to section 128(7).

"(6) If an order is made under subsection (3)(b) that a person must again be taken into custody, the person may be detained in custody under section 128 pending the person's departure from New Zealand on the first available craft.

"(7) If a person is released under section 128AA, whether or not he or she breaches a condition imposed under section 128AB or fails to deliver himself or herself up to an immigration officer as required by section 128AA(10),-

"(a) the person must continue to be treated as a person to whom section 128 applies who is being detained under that section; and

"(b) nothing in Part II applies to that person.

128AD **Cancellation of order for conditional release**

"(1) An immigration officer may make an application to a District Court Judge for an order cancelling an order under section 128AA(6).

"(2) An immigration officer may make an application to a District Court Judge for an order cancelling an order under section 128AA(6).

"(3) The District Court Judge may make or refuse to make an order, as he or she thinks fit.

"(4) If the District Court Judge makes an order,-

"(a) the person is liable to be arrested by any member of the police, without warrant, and placed in custody; and

"(b) if the person is arrested and placed in custody,-

"(i) in the case of a person to whom subsection (1) or subsection (2) of section 128AA applied by virtue of his or her being placed in custody under section 128(5),-

"(A) the person must be treated as a person to whom section 128(5) continues to apply; and

"(B) if that person is to be detained for more than 48 hours after delivering himself or herself up, an application must be made in accordance with section 128(7):

"(ii) in any other case, the person must again be taken into custody, and may be detained in custody under section 128 pending the person's departure from New Zealand on the first available craft."

**Appendix 8**

# CONVENTION RELATING TO THE STATUS OF REFUGEES

Done at Geneva on 28 July 1951

Entry into force: 22 April 1954, in accordance with Article 43

Text: United Nations Treaty Series No. 2545, Vol. 189, p.137

## PREAMBLE

*The High Contracting Parties*

*Considering* that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

*Considering* that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms.

*Considering* that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement.

*Considering* that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.

*Expressing* the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States.

*Noting* that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner.

*Have agreed as follows:*

## CHAPTER 1

## GENERAL PROVISIONS

### Article 1

### Definition of the term “Refugee”

A. For the purposes of the present Convention, the term “refugee” shall apply to any person who:

…

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of

his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country: or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

…

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

*(a)* he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

*(b)* he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

*(c)* he has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 2

General obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3

Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

…

Article 9

Provisional measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

…

Article 16

Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

…

Article 23

Public relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

…

Article 26

Freedom of movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

…

Article 31

Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

…

Article 33

Prohibition of expulsion or return (“refoulement”)

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

…

PROTOCOL RELATING TO THE STATUS OF REFUGEES OF

31 JANUARY 1967

Entry into force: 4 October 1967, in accordance with Article VIII

Text: United Nations Treaty Series No. 8791, Vol. 606, p. 267

*The States Parties to the present Protocol*,

*Considering* that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

*Considering* that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

*Considering* that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

*Have agreed* as follows:

## Article I

### General provision

1. The State Parties to the present Protocol undertake to apply Articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term “refugee” shall, except as regards the application of paragraph 3 of this Article, mean any person within the definition of Article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951 and …” and the words “… as a result of such events”, in Article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with Article 1 B (1) *(a)* of the Convention, shall, unless extended under Article 1 B (2) thereof, apply also under the present Protocol.

## Appendix 9

### 7 Certain persons not eligible for exemption or permit

(1) Subject to subsection (3) of this section, no exemption shall apply, and no permit shall be granted, to any person—

(a) Who, at any time (whether before or after the commencement of this Act), has been convicted of any offence for which that person has been sentenced to imprisonment for a term of 5 years or more, or for an indeterminate period capable of running for 5 years or more; or

(b) Who, at any time within the preceding 10 years (whether before or after the commencement of this Act), has been convicted of any offence for which that person has been sentenced to imprisonment for a term of 12 months or more, or for an indeterminate period capable of running for 12 months or more; or

(c) Against whom a removal order is in force; or

(d) Who has been deported—

(i) From New Zealand, at any time, under this Act; or

…

(iii) From New Zealand at any time, pursuant to an order for deportation made under section 22 of the Immigration Act 1964; or

(iv) From New Zealand, at any time (whether before or after the commencement of this Act), pursuant to any other enactment, except section 158 of the Shipping and Seamen Act 1952 (as repealed by section 151(1) of this Act); or

(v) From any other country, at any time (whether before or after the commencement of this Act); or

(e) Who the Minister has reason to believe—

(i) Has engaged in, or claimed responsibility for, an act of terrorism in New Zealand; or

(ii) Is a member of or adheres to any organisation or group of people that has engaged in, or has claimed responsibility for, an act of terrorism in New Zealand; or

(f) Who the Minister has reason to believe—

(i) Has engaged in, or claimed responsibility for, an act of terrorism outside New Zealand; or

(ii) Is a member of or adheres to any organisation or group of people that has engaged in, or has claimed responsibility for, an act of terrorism outside New Zealand—

and whose presence in New Zealand would, for that reason or for any other reason, constitute, in the opinion of the Minister, a threat to public safety; or

(g) Who the Minister has reason to believe is likely—

(i) To engage in, or facilitate the commission of, any act of terrorism; or

(ii) To commit an offence against the Crimes Act 1961 or the Misuse of Drugs Act 1975

(h) Who the Minister has reason to believe, in light of any international circumstances, is likely to constitute a danger to the security or public order of New Zealand; or

(i) Who the Minister has reason to believe is a member of or adheres to any organisation or group of people which has criminal objectives or which has

engaged in criminal activities, and whose presence in New Zealand would, for that reason or any other reason, constitute, in the opinion of the Minister, a threat to the public interest or public order.

(2) Paragraphs (a) and (b) of subsection (1) of this section apply—

(a) Whether the sentence is of immediate effect or is deferred or is suspended in whole or in part:

(b) Where a person has been convicted of 2 or more offences on the same occasion or in the same proceedings, and any sentences of imprisonment imposed in respect of those offences are cumulative, as if the offender had been convicted of a single offence and sentenced for that offence to the total of the cumulative sentences:

(c) Where a person has been convicted of 2 or more offences, and a single sentence has been imposed in respect of those offences, as if that sentence had been imposed in respect of a conviction for a single offence.

(3) Notwithstanding subsection (1) of this section,—

(a) A permit may be granted to any person—

(i) Who is entitled to a permit under section 18 of this Act; or

(ii) In accordance with a special direction; or

(iia) If it is granted for the sole purpose of enabling that person—

(A) To be in New Zealand for the purposes of giving or providing evidence or assistance pursuant to a request made pursuant to section 12 of the Mutual Assistance in Criminal Matters Act 1992; or

(B) To be transported through New Zealand pursuant to section 42 of that Act; or

(iii) If it is granted for the sole purpose of enabling that person to return to New Zealand to face any charge in New Zealand or to serve any sentence imposed on that person in New Zealand; and

(b) Any exemption under section 11(1)(a) of this Act and any exemption granted in accordance with a special direction shall apply notwithstanding that the person is a person to whom subsection (1) of this section applies.

(4) Nothing in subsection (3) of this section gives any person a right to apply for any type of permit or for a special direction, and where any person purports to apply for a permit or a special direction under this section—

(a) The Minister or appropriate immigration officer is under no obligation to consider the application; and

(b) Whether the application is considered or not,—

(i) The Minister or officer is not obliged to give reasons for any decision relating to the application, other than the reason that this subsection applies; and

(ii) Section 36 of this Act and section 23 of the Official Information Act 1982 shall not apply in respect of the application.

…

**128A Procedure under section 128 if review proceedings, etc., brought**

(1) For the purposes of this section, the term review proceedings includes any proceedings on an application for a writ of habeas corpus.

(2) If review proceedings are brought by a person detained under section 128 of this Act in respect of that detention or any decision made under that section,—

(a) The period for which detention is authorised under the warrant (as extended or further extended under section 128(13B), where appropriate) is to be reckoned exclusive of—

(i) Any period during which the review proceedings are in existence (which period includes both the date of commencement and the date of completion of the proceedings); and

(ii) Any period for which the person, having failed to deliver himself or herself up in accordance with subsection (5) of this section, is at large following the completion of the review proceedings; and]

(b) Where the person is neither delivered up to a member of the Police under section 128(11) nor released under section 128(13)(a) before the expiry of the period for which detention is authorised by the warrant of commitment (as extended or further extended under section 128(13B), where appropriate),—]

(i) The person shall be brought before a District Court Judge by an immigration officer or a member of the Police, and the Judge shall consider the question of that person's continued custody under the warrant; and

(ii) Thereafter, while the person remains in custody, the person shall be brought before a District Court Judge at intervals of not more than 7 days for further consideration of that question.

(3) Where the person is brought before a District Court Judge under subsection (2)(b) of this section, the Judge shall, subject to subsection (4) of this section, extend the warrant of commitment for—

(a) A period of 7 days; or

(b) Where the final duration of the review proceedings is known, such shorter period as will ensure that the person is not detained under the warrant for a period which exceeds in total the sum of—

(i) 28 days; and

(ii) Any further number of days for which the warrant was extended or further extended under section 128(13B); and

(iii) The period of duration of the review proceedings.

(4) Notwithstanding subsection (3) of this section, the District Court Judge may, if—

(a) The review proceedings have not been completed at the time the person is brought before the Judge; and

(b) The Judge is satisfied that the review proceedings are not likely to be completed within the next 7 days; and

(c) The person detained under the warrant satisfies the Judge that he or she is not likely to abscond, or to breach any condition imposed under subsection (6) of this section,—

order the release of the person upon the conditions specified in subsection (6) of this section.

(5) Any such order for release shall expire on the date on which the review proceedings are completed, and the person shall on that date deliver himself or herself up to an immigration officer at such location as is specified for that purpose in the order, whereupon, depending on the result of the review proceedings, either—

(a) The person shall again be taken into custody and may be retained in custody under section 128(5) of this Act pending the person's departure from New Zealand on the first available craft; or

(b) The person shall be released.

(6) Any order for release made under subsection (4) of this section shall be subject to the following terms and conditions:

(a) The person shall reside at such address as is specified in the order, or such other address as may be agreed between an immigration officer and the person under subsection (7) of this section:

(b) The person shall report daily to an office of the Department of Labour or a Police station at such time and in such manner as the Judge may specify, or at such other intervals or times or in such other manner as may be agreed between an immigration officer and the person under subsection (7) of this section:

(c) The person shall comply with such other conditions as the Judge thinks fit to impose.

(7) Any condition imposed—

(a) By paragraph (a) or paragraph (b) of subsection (6) of this section; or

(b) By the Judge under paragraph (c) of that subsection, if the Judge authorises the variation of any such condition by consent between an immigration officer and the person released,—

may be varied by consent between an immigration officer and the person released, and the condition shall take effect as so varied.

(8) Any conditions imposed on a person released under subsection (4) of this section shall be notified in writing to the person upon the person's release and shall take effect immediately.

(9) Any variation of a condition pursuant to subsection (7) of this section shall take effect when the variation is agreed between the immigration officer and the person, and shall be reduced to writing and notified to the person as soon as practicable thereafter.

(10) A breach of any condition imposed or varied under this section nullifies the order for release, and thereafter—

(a) The person is liable to be arrested by any member of the Police without warrant and placed in custody; and

(b) Where the person is so arrested and placed in custody the person shall as soon as possible be brought again before a District Court Judge under subsection (2)(b) of this section; and

(c) Where the condition breached was a condition imposed by or under paragraph (a) or paragraph (b) of subsection (6) of this section, subsection (4)

of this section shall no longer apply to allow the release of the person unless the District Court Judge is satisfied that the person had a reasonable excuse for breaching the condition.

(10A)If a person fails to deliver himself or herself up in accordance with subsection (5) on the date of completion of the review proceedings,—

(a) The person is liable to be arrested by any member of the Police without warrant and placed in custody; and

(b) If so arrested and placed in custody, the person must as soon as possible be brought again before a District Court Judge under subsection (2)(b) so that the Judge may determine whether the person should be detained pursuant to the warrant issued under section 128, or released.

(11) Where a person is released under subsection (4) of this section, and whether or not the person complies with the conditions of the release or absconds during the currency of the order for release or fails to deliver himself or herself up on the expiry of the order,—

(a) The person shall be deemed for the purposes of the provisions of this Act still to be a person to whom section 128 of this Act applies, and to be detained under that section; and

(b) Nothing in Part 2 of this Act shall apply in respect of the person.

(12) Where a person released under subsection (4) of this section fails to deliver himself or herself up to an immigration officer on the expiry of the order for release, [the period for which detention is authorised by the warrant of commitment issued under section 128(7) (as extended or further extended under section 128(13B), where appropriate)] shall be reckoned exclusive of—

(a) Any period referred to in subsection (2)(a) of this section during which review proceedings are in existence; and

(b) Any period commencing on the date of expiry of the order for release and ending on the date on which the person is again taken into custody under this Act.

**128B Detention of persons whose eligibility for permit is not immediately ascertainable**

(1) This section applies to every person who arrives in New Zealand from another country (not being a person who is exempt under section 11 or section 12 of this Act from the requirement to hold a permit) where—

(a) An immigration officer or any member of the Police has reason to suspect that the person may be a person to whom section 7(1) of this Act applies; or

(b) The person has no appropriate documentation for immigration purposes, or any such documentation held by the person appears to be false,—

and a decision as to whether or not to grant that person a permit [or, in the case where the person holds a pre-cleared permit, as to whether or not to revoke that permit,] has not been made because the person's status under section 7(1) of this Act cannot be immediately ascertained.

(2) Any person to whom this section applies [(including any such person who holds a pre-cleared permit)] shall be deemed for the purposes of this Act to be in

New Zealand unlawfully, but, for so long as this section applies to that person, that person is not liable to be dealt with under any of the provisions of Part 2 of this Act.

(3) Any person to whom this section applies may be detained by any member of the Police and placed in custody in accordance with this section while a determination is made as to whether or not section 7(1) of this Act applies to that person.

(4) Every such determination shall be made by the Minister acting on the advice of the Commissioner of Police, or of such other adviser as the Minister thinks appropriate in the circumstances of the case.

(5) This section shall continue to apply to any person until—

(a) A determination is made that the person is not a person to whom section 7(1) applies, in which case an immediate determination must be made as to whether or not to grant the person a permit, and either—

(i) The person must be released immediately, if the person is granted a permit or already holds a pre-cleared permit; or

(ii) If no permit is granted to the person, and the person does not already hold a pre-cleared permit, the person is liable to be dealt with under section 128; or

(b) A determination is made that the person is a person to whom section 7(1) of this Act applies, in which case the person may from the time of that determination be treated as a person to whom section 128 of this Act applies and may be retained in custody under subsection (5) of that section pending the person's departure from New Zealand on the first available craft; or

(c) The person requests removal from New Zealand, in which case the person may be treated as a person to whom section 128 of this Act applies and may be retained in custody under subsection (5) of that section pending the person's departure from New Zealand on the first available craft.

(6) Where a person to whom this section applies is detained by any member of the Police and placed in custody the following provisions shall apply:

(a) The Minister shall take all practicable steps to determine, as speedily as may be possible in the circumstances, whether or not the person is a person to whom section 7(1) of this Act applies:

(b) Where the Minister considers that there may be reasonable grounds for believing that the person is a person to whom section 7(1) of this Act applies, the Minister shall give that person an opportunity to comment on or rebut those grounds:

(c) A member of the Police or an immigration officer shall, not later than 48 hours after the person is taken into custody, apply to a District Court Judge for a warrant of commitment in the prescribed form authorising the detention in custody of that person for a period of 28 days in the first instance pending a determination as to whether or not the person is a person to whom section 7(1) of this Act applies.

(7) Every person who is placed in custody under subsection (3) or subsection (6)(c) of this section and is to be detained overnight shall be detained—

(a) In the case of an unmarried person who is under 17 years of age, in—

(i) Any residence (within the meaning of section 2 of the Children, Young Persons, and Their Families Act 1989) or other premises under the control of, or approved by, the [chief executive of the department for the time being responsible for the administration of the Children, Young Persons, and Their Families Act 1989]; or

(ii) Any other premises agreed to by the parent or guardian of that person and an immigration officer; or

(b) In any other case, in—

(i) Any premises approved by the Secretary of Labour; or

(ii) A Police station; or

(iii) At the direction of a Judge, in a penal institution.

(8) Where a person is detained under this section in a penal institution that person shall be treated, for the purposes of the Penal Institutions Act 1954, as if he or she were an inmate awaiting trial.

(9) A warrant of commitment issued under subsection (6)(c) of this section shall authorise the superintendent of the penal institution or the person in charge of the other premises to detain the person named in it until—

(a) The expiry of 28 days from the date of the issue of the warrant, or the expiry of such further period for which the warrant may be extended under subsection (10) of this section; or

(b) The person ceases to be a person to whom this section applies pursuant to subsection (5) of this section.

(10) Where a person detained in custody pursuant to a warrant of commitment issued under subsection (6)(c) of this section is not, before the end of the 28-day period specified in that subsection, either released and given a permit or treated as a person to whom section 128 of this Act applies,—

(a) The person shall again be brought before a District Court Judge by an immigration officer or a member of the Police, and the Judge shall consider the question of that person's continued custody under the warrant; and

(b) Thereafter, while the person remains in custody, the person shall be brought before a District Court Judge at intervals of not more than 7 days for further consideration of that question.

(11) Where a person is brought before a District Court Judge under subsection (10) of this section, the Judge shall extend the warrant if the Judge is satisfied the person is still a person to whom this section applies.

(11A) If a person to whom this section applied is subsequently treated as a person to whom section 128 applies, that section applies as if any warrant of commitment issued under subsection (6)(c) of this section were a warrant of commitment issued under section 128(7).

(12) No person detained pursuant to this section shall be granted bail.