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

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	**9-10 May 2002**
Counsel	**R E Harrison QC and D Manning for Plaintiffs** **A S Butler, A Puata and B Keith for Defendant**
Interim judgment	**31 May 2002**

INTERIM JUDGMENT OF BARAGWANATH J

Solicitors
Ryken & Associates, Fax 356 7372, Auckland
Crown Solicitor, Fax 336 7629, Auckland and
Crown Law Office, Fax 04 473 3482 Wellington

Counsel
R E Harrison QC , Fax 358 0814, Auckland

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Appendices

Interim judgment: claimants entitled to apply for bail

[1] The Refugee Council of New Zealand Incorporated and the Human Rights Foundation of Aotearoa New Zealand Incorporated, together with a former refugee "D", challenge a Crown policy introduced on 19 September 2001 of detaining most of those who are claimants for refugee status during all or part of the period while their claim is pending.

[2] The plaintiffs sue and alternatively seek leave to sue on behalf of all refugee status claimants who from 19 September 2001 to 9 May 2002 have been detained by the New Zealand Immigration Service. I am satisfied that there are no proper grounds to decline such leave, which is granted.

[3] The case presents legal issues of difficulty, some of which are dealt with in this interim judgment; others are deferred to final judgment. But I should say immediately that I consider that the refugee status claimants referred to in paragraph [2] are currently entitled to apply to a District Court Judge for bail.

[4] That is because, in my view, the issue of the present proceedings has entitled such refugee status claimants to rely on s128A of the Immigration Act which confers jurisdiction on Judges of the District Court to consider the grant to them of bail; something prohibited by s128(15) which on the Crown submission has authorised their detention to date. Because s128A was not advanced by the plaintiffs, natural justice requires that the Crown be heard before a final decision as to its application can be given. So this decision is issued as an interim judgment, following the course adopted by Megarry J in *Re Montagu's Settlement Trusts* [1987] Ch 264 at 273.

[5] Since the fact that the Crown has not been heard on the point prevents a final determination, it is necessary for me to consider how the interests of justice are best served pending further argument. I consider that the balance of convenience supports access to bail as an interim measure. The effect of this interim judgment, subject to revisiting in the final judgment, is that such refugee status claimants may

now make application to the District Court Judge for bail which may be granted if the conditions of s128A(4) are satisfied by the person detained. If for any reason that decision is successfully challenged, the conditions of bail will permit the present status quo to be restored.

[6] Upon such application it will be the duty of the immigration officer, in considering the exercise of his or her functions under s128A(6) and (7), which deal with agreement as to the terms of bail, to comply with s129X(2) and thus have regard to the provisions of the 1951 Refugee Convention, discussed in this judgment. They include Article 31.2. That Article requires that the restrictions on movement be no more than "necessary".

[7] "Necessary" in this context 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.
>
> The economic interest of retaining the right to compel a carrier to remove a "turn-around" arrival without charge to the Crown cannot justify the continued detention of one who would otherwise have been set at liberty.

[8] While difficulty or delay in securing identity information is relevant to the proper exercise of discretion it is not decisive of it. The current policy of detention:

> Where the identity …of a refugee status claimant cannot be established [and there do not] appear particular reasons for allowing them to enter the community unrestricted.
>
> Operational Instruction (Appendix 3)

reverses the approach required by Article 31.2, which requires liberty except to the extent that necessity requires otherwise, and cannot be sustained.

The pleaded grounds of claim

[9] The first ground of claim is that s128 of the Immigration Act 1987, under which the challenged detentions were made from 19 September 2001 to the date of hearing, has no application to refugee status claimants; so that such detentions were and are unlawful and in breach of the New Zealand Bill of Rights Act 1990. The second ground of claim is that the new policy infringes the necessity test of Article 31.2 of the Refugee Convention which must be taken into account by immigration officers exercising authority under the Immigration Act, so they are in breach both of the Convention and of New Zealand law. Declaratory relief is sought on each ground. The Crown submits that the detention conforms both with the Convention and with the legislation.

[10] While the first ground of claim was fully argued, for reasons later discussed I consider that the claimants represented by the plaintiffs should have the opportunity of considering whether the problems presented by s128 are better dealt with by the Court or by Parliament.

[11] As to the second ground, the issue of compliance of the Crown's policy with the Convention arising on the second ground was fully debated, so I do not require further assistance on that. Subject to the Crown's right to be heard before final judgment as to the application of s128A, I am satisfied that the government policy that is the subject of the second ground of claim infringes Article 31.2.

Introduction

[12] New Zealand is a party to the 1951 Refugee Convention Relating to the Status of Refugees which provides:

> **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… 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…
>
> (underlining added)

[13] The following provisions of the Immigration Act are of particular importance, ss129X(2):

> (2) 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 this Part and of the Refugee Convention.

and 129D:

> **129D Refugee Convention to apply**
>
> (1) In carrying out their functions under this Part, refugee status officers and the Refugee Status Appeals Authority are to act in a manner that is consistent with New Zealand's obligations under the Refugee Convention.

[14] The material parts of the legislation appear in Appendix 1; those of the Refugee Convention in Schedule 6.

[15] The Immigration Act thereby imports the Refugee Convention to a certain degree into the domestic law of New Zealand which it is the Court's duty to declare and enforce. While it is the function of the Crown, not of the courts, to determine who shall and who shall not be permitted to enter New Zealand, judicial review of the Crown's dealing with refugees and refugee status claimants within New Zealand is clearly contemplated by s128A of the Immigration Act which permits the grant of bail to such persons if they have challenged their detention by application for judicial review.

[16] So while the Crown submits there is a short answer to the plaintiffs' claim under s128 – that by subsection (15) of that section there is no power to bail refugee status claimants who have been detained under that section and have not been given a permit to enter New Zealand (so there can be no judicial review of whether their

detention conforms with s129X(2)), by s128(A) the bringing of proceedings for review removes such jurisdictional bar.

[17] During the period October 1999 to 18 September 2001, of the 595 persons claiming refugee status on arrival in New Zealand only 29, less than 5%, had been detained in custody. Following the change in policy, during the period 19 September 2001 to 31 January 2002, of the 221 persons claiming refugee status 208 or 94% were detained.

[18] The plaintiffs argue that the policy of detaining such a high percentage of refugee status claimants is clear evidence of breach both of Article 31.2 and of New Zealand domestic law. The Crown replies that the change in policy is justified by: (1) an increase in people smuggling; (2) the recognition of increased risk following the events of 11 September 2001; (3) and the availability, as an alternative to detention in a penal institution, of the Mangere Accommodation Centre which now allows refugee detention to be performed in congenial conditions. That last removed the constraints to which the Crown had previously been subject by reason of inadequate facilities, so that, for humanitarian reasons, persons who in terms of the necessity test should have been detained were not. It was, and remains, necessary to detain them to verify their identity; to guard against crime; to protect the right to secure removal at the expense of the carrier as provided by the Chicago Convention and s125 of the Immigration Act which implements it; and to prevent them from absconding and so avoiding removal in the event of failure of their application. The plaintiffs retort that detention without bail is not *necessary* (as Article 31.2 requires) for any of these purposes, except in the most unusual circumstances, and that any form of unnecessary detention, however congenial, both infringes that Article and is unlawful.

[19] The decision of the full Court of Appeal in *Attorney-General v E* [2000] 3 NZLR 257 was confined to what it described as "the narrow issue which had been argued in this Court" (page 271 paragraph [49]), namely whether an immigration officer is under an obligation to apply a presumption in favour of the grant of temporary permits to refugee status claimants pending determination of their claims in the absence of special factors making detention necessary (page 259 paragraph

[5]). The first ground of claim argued in this case is one that was not squarely raised in *Attorney-General v E*, namely whether such a claimant, who if declined a permit is unlawfully in New Zealand, falls outside s128 of the Immigration Act 1987 which provides summarily for detention in custody:

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

[20] The Crown's argument, accepted by Anderson J in this Court in *F v Superintendent of Mt Eden Prison* [1999] NZAR 420, is that the wide introductory language of s128 is to be read literally:

> (1) *This section applies to every person*… who –
>
> (a) Arrives in New Zealand from another country; and
>
> …
>
> (c) … (ii) Is refused a permit;…

It urges that there is imperative need to keep control of entrants until their identity and origin are known.

[21] The plaintiffs submit that the summary "turnaround" provisions of s128, with its stringent provisions:

> (5) …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.
>
> …
>
> (15) A person who is detained under this section shall not be granted bail.

cannot have any application to them. They point to the history of the section, a predecessor of which was construed adversely to the Crown in *Benipal v Ministers of Foreign Affairs and Immigration and Others* A Nos 878/83 993/83 and 1016/83 16 December 1985; the imperative language of Article 31.2 prohibiting unnecessary restrictions to the movements of refugees unlawfully in (here New Zealand); the fact that subsection (15) prohibits the grant of bail to those who fall within s128; the fact

that elsewhere in the Act bail is made available even to criminals, to those who present security risk, and to those ordered to be deported; and the well-settled principles of public law and statutory interpretation which presume that New Zealand legislation conforms with our Bill of Rights, and with our international treaty obligations.

[22] The plaintiffs submit in the alternative second ground of claim that the manner in which the Crown exercises its responsibilities under the Act is unlawful, in failing to give due weight to Article 31.2.

The first ground of claim

[23] The competing submissions on the first ground of claim focus on two public interests, each of an importance which is difficult to overstate. One is that the Crown ordinarily has the constitutional authority to determine who shall be permitted to enter New Zealand and is responsible for maintaining the security of the state and the safety of its citizens. International law recognises the basic right of the government of a state to decide what foreigners should be admitted to membership of it: *Attorney-General for Canada v Cain* [1906] AC 542 at 546. At common law that was a high prerogative power; under New Zealand domestic law the prerogative power remains fundamental to the immigration regime of which the Immigration Act forms part. It is emphasised by a series of provisions (including ss 8-10, 12(4), 13B and 18D) which record the Crown's authority to determine who shall be admitted to New Zealand. The need for any state to protect its borders, and the central importance of the prerogative power in doing so, is brought into stark relief by the events of September 11. The Crown contends that as a matter of New Zealand domestic law the expansive language of s128 of the Immigration Act permits detention of refugee status claimants pending determination of their status.

[24] The other is the self-denying ordinance of what is formally called the 1951 Convention Relating to the Status of Refugees, amended by the 1967 Protocol Relating to the Status of Refugees, by which States Parties, including New Zealand, undertook not to exercise their own authority inconsistently with its terms. It is defined by s2(1) of the Act as the "Refugee Convention" and now appears as the

Sixth Schedule. It requires the faithful performance by New Zealand of our obligations under the Convention which gives expression to articles of the Universal Declaration of Human Rights to which also New Zealand is party:

> *Article* 1: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."
>
> …
>
> *Article* 14: (1) Everyone has the right to seek and enjoy in other countries asylum from persecution...

It receives emphasis from the statistics provided by the United Nations High Commissioner for Refugees at last year's San Remo conference - that there are currently some 22 million refugees, a greater figure even than the statistics of the immediate post-war period that gave rise to the Universal Declaration of Human Rights. The plaintiffs contend that the history and purpose of s128, viewed against the backdrop of the Convention and in the light of the 1999 amendment to the Act which introduced specific provisions relating to claimants for refugee status section, show that s128 can have no application to them.

[25] If, as I provisionally consider, s128A applies and the plaintiffs succeed on their second ground of claim in their challenge to executive policy under which bail is denied, it becomes necessary to consider whether the first issue as to the construction of s128 should also be determined. Parliament already has that issue under consideration in the Transnational Organised Crime Bill at present before the House. I invite counsel's submissions whether, given that the claimants will have access to bail, that issue should be dealt with not by this Court but by Parliament, since that is what in other contexts is called the forum of convenience: the decision maker which can deal with the issue most effectively and authoritatively.

[26] If dealt with by the Court, it must select one of two options, each of which would have unacceptable practical results. The Crown submission requires a decision that New Zealand's legislation is fundamentally in breach of our international obligations under Article 31.2. The plaintiffs' arguments present a different problem: they would allow 42 days liberty to any rogue who, on arriving in

New Zealand makes claim to refugee status: see s53 (paragraph [63] below). Each option would require the Court to distort the language used by Parliament: the Crown's argument means that "detain… in custody pending… departure from New Zealand on the first available craft" can entail indefinite detention – in one recent case the detention without right to bail lasted for 18 weeks; the plaintiffs' argument requires a conclusion that "every person…who arrives in New Zealand" does not mean "every person" at all.

The second ground of claim

[27] The plaintiffs' challenge to executive policy under their second ground of claim relies upon undisputed principles of public law. It requires an appraisal of what responsibilities are cast upon the Crown following the 1999 amendment which introduced Part VIA; and of how those responsibilities are being performed.

[28] The Court of Appeal having made the determination summarised in paragraph [8] above, there is no jurisdiction in this Court at the outset of a claim to refugee status to require immigration officers to pay greater regard to the Convention than occurs now; to do so would require such a narrow distinction of the decision as to defy it. The plaintiffs did not contend otherwise. While deferring final judgment on the point, I consider that there may be difficulty in the plaintiffs' thoughtful submission that there is a further opportunity for the injection of discretion to bring in the Article 31.1 policy at the next stage when, under subsection (5) of s128 "any person to whom this section applies *may be detained* by any member of the Police…". There is evident force in the Crown's submission that if s128 does apply to refugee status claimants, the Police are duly carrying out a function of implementing policy of the NZIS officer as the expert immigration authority. On that construction of s128 it may be contended that the inevitable result of refusal of the immigration officer's refusal of a permit is Police detention and placement in custody under subsection (7). Equally, what appears to be the settled practice of Registrars to issue warrants under subsection (7) and of the District Court Judges to extend warrants under subsection (13B) may be unavoidable, given the policy of subsection (15) that "a person who is detained under this section shall not be granted bail." That is of course a very powerful argument supporting the plaintiffs' claim

that s128 has no application at all to refugee status claimants. But if the section does apply to them, subsection (15) must be given effect.

[29] But upon filing an application for review the statutory bar to bail disappears. Once that has occurred the immigration officer who is required (s128A(6) and (7)) to exercise discretion in relation to the terms of consent to bail conditions must, in doing so, comply with s129X(2) and thus have regard to Article 31.2. That Article requires that the restrictions on movement be no more than "necessary". Breach of that duty may be challenged on judicial review.

[30] "Necessary" in this context in my opinion 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.

I do not consider that the economic interest of retaining the right to compel a carrier to remove a "turn-around" arrival without charge to the Crown could by itself justify the continued detention of one who would otherwise have been set at liberty. The principle stated by the Privy Council in *Tan Te Man v Tai A Chau Detention Centre* [1997] AC 97, 111 is of general application:

> ….the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention…

[31] While difficulty or delay in securing identity information is relevant to the proper exercise of discretion it is not decisive of it. The current policy of detention:

> Where the identity …of a refugee status claimant cannot be established [and there do not] appear particular reasons for allowing them to enter the community unrestricted.
>
> Operational Instruction (Appendix 3)

reverses the approach required by Article 31.2, which requires liberty except to the extent that necessity requires otherwise. It also infringes the principle of the

common law applied in *Reg v Home Secretary, Ex p Simms* [2000] 2 AC 115, that fundamental human rights (there the right of access to a professional journalist to discuss a prisoner's own case) are not to be withheld. It is unnecessary to consider separately sections 21 and 22 of the Bill of Rights which prohibit unreasonable seizure of the person and arbitrary detention.

[32] I would myself express the principle as that interference with liberty is to be restricted to the minimum consistent with the attainment of the legitimate purposes for which detention is permitted, recorded in paragraphs [30-31].

[33] That is the approach to be adopted both by immigration officers in exercising their functions under s128A (included in Appendix 1), including those under subsections (6)(a) and (b) and (7)(b), and by District Court Judges acting under subsections (3) and (4).

Perspective

[34] In *Minister of Foreign Affairs v Benipal* [1998] 2 NZLR 222 at 228, following a review of overseas authorities Cooke P, for the full Court of Appeal, observed:

> …it would seem from the cases, including the present one, that administrative authorities in various jurisdictions have tended at times to take a narrower approach than Courts in considering whether applicants may qualify as refugees under the Convention. Governments commit the nation to obligations; occasionally it falls to Courts to see that the commitment has been carried out in accordance with the true interpretation of the convention.

A similar comment may be made as to the detention of claimants for refugee status.

[35] The starting point is the perspective in which the Convention and the Immigration Act are to be viewed. In *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 at 305 Lord Lloyd of Berwick observed in relation to the Convention:

> …inevitably the final text will have been the product of a long period of negotiation and compromise. One cannot expect to find the same

> precision of language as one does in an Act of Parliament drafted by parliamentary counsel… it follows that one is more likely to arrive at the true construction… by seeking a meaning which makes sense in the light of the Convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach. But having said that, the starting point must be the language itself.

See also the Vienna Convention on the Law of Treaties, reproduced and discussed in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 252-6 per McHugh J and the decision of Judge Zekia in *Golder v United Kingdom* (1975) 1 EHRR 524 there cited, emphasising an ordered yet holistic approach to construction of the Refugee Convention.

[36] In *Commissioner of Inland Revenue v JPF Energy Inc* [1990] 3 NZLR 536 at 540 Richardson and Hardie Boys JJ considered that article 31 of the Vienna Convention conforms with the standard New Zealand approach to interpretation:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in the light of its object and purpose.

[37] In *Saloman v Commissioners of Customs & Excise* [1967] 2 QB 116 143 Diplock LJ said:

> If the terms of the legislation are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations.

The Court of Appeal expressed itself similarly in *New Zealand Airline Pilots Association Inc v Attorney-General* [1997] 3 NZLR 267 at 289.

[38] As to the Immigration Act, I adopt the observations of the Court of Appeal in relation to another international treaty: *Te Waka Hi Ika o Te Arawa v The Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 at 297:

> …in applying the principles of the Treaty [of Waitangi] to legislation, it is necessary to interpret the statutory provisions in a broad, unquibbling and practical manner. This Court should not ascribe to

> Parliament an intention to act inconsistently with the principles of the Treaty which is a living instrument.

[39] In the closely related context of the interface between the criminal law of possession of false documents and their use by refugees, in *R v Uxbridge Magistrates' Court Ex p Adimi* [2001] QB 667 Simon Brown LJ observed:

> The problems facing refugees in their quest for asylum need little emphasis. Prominent amongst them is the difficulty of gaining access to a friendly shore. Escapes from persecution have long been characterised by subterfuge and false papers. As was stated in a memorandum from the Secretary-General of the United Nations in 1950:
>
> > "A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge."
> >
> > Thus it was that article 31.1 found its way into the Convention and Protocol relating to the Status of Refugees (1951) and (1967) ("the Convention")
> >
> > …
> >
> > The need for article 31 has not diminished. Quite the contrary. Although under the Convention subscribing states must give sanctuary to any refugee who seeks asylum (subject only to removal to a safe third country), they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it. The combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refugee without false documents. Just when, in these circumstances, will article 31 protect them? The precise ambit of the impunity lies at the heart of these challenges. Each of these three applicants has fled from persecution in his home country. Each has been prosecuted for travelling to, or attempting to travel from, the United Kingdom on false papers. Each now claims to have been wrongly denied the protection conferred by article 31.

Having cited Lord Lloyd's dictum in *Adan v Home Secretary* Simon Brown LJ continued:

> What, then, was the broad purpose sought to be achieved by article 31? Self-evidently it was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law.

…

> That article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt. Nor is it disputed that article 31's protection can apply equally to those using false documents as to those (characteristically the refugees of earlier times) who enter a country clandestinely.

[40] Simon Brown LJ further observed:

> …The almost inevitable outcome of any asylum claim will be either (a) the grant of refugee status (or, if there are compelling reasons other than fear of Convention persecution for not removing the applicant, exceptional leave to remain), or (b) a rejection of the claim, whether substantively or by a refusal to entertain it on safe third country grounds… followed routinely by removal. If sanctuary is to be granted, it seems somewhat unwelcoming first to imprison the refugee. If, however, it is to be refused, is it not best simply to remove them without delay…

[41] In that case the Court of Appeal allowed applications for judicial review of decisions to prosecute such persons for breach of the criminal law for possessing and using false documents, refraining from granting express relief but inviting the Home Secretary to initiate appropriate Government action to deal with the problem.

[42] The importance of these considerations is that although the Convention is half a century old, its significance and place within our legal system are not matters in which, with certain notable exceptions, there is great depth of expertise in New Zealand. There is some parallel with the Treaty of Waitangi jurisprudence where the Courts have had to work their way carefully to an understanding of unfamiliar concepts. Here as there it is essential to give full weight both to the language of the treaty and to the concepts underlying it, without being blinkered by existing preconceptions. The judgment of Chilwell J in *Benipal v Ministers of Foreign Affairs and Immigration and Others*, adopting the arguments of RGP Haines of counsel (now QC), established a wholesale failure by the New Zealand Crown to understand and give effect to New Zealand's obligations under the Refugee Convention. In *D v Minister of Immigration* [1991] 2 NZLR 673 at 676 the Court of Appeal recorded that under the then legislation there were a number of entrants to New Zealand for whom security clearance was not available and who might face

summary removal ("refoulement") notwithstanding that they might ultimately turn out to have a good claim to refugee status and to face persecution in their home country. Such conclusion entailed clear breach by New Zealand of article 33 of the Convention which provides that (save in cases where he is a danger to the security or to the community of the country) no contracting state should expel or return a refugee to the frontiers of territories where that person's life or freedom would be threatened on relevant grounds. In order for New Zealand to take itself out of breach of Article 33 it was necessary for Parliament to legislate for non-refoulement, as it did by, inter alia, s129X (introduced by the Immigration Amendment Act 1999), which commences:

> **129X Prohibition on removal or deportation of refugee or refugee status claimant**
>
> (1) 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 33.2 of the Refugee Convention allow the removal or deportation.
>
> …

[43] A similar concern is advanced by the plaintiffs here. They say that if the Crown submission is right, the legislation would justify the present practice of detaining without bail up to 96% of spontaneous refugee status claimants who are refused a permit; the legislation cannot be so construed. The Crown respond that the practical problem is met by the Court of Appeal's emphasis in *Attorney-General v E* at page 271 paragraph [48] that:

> ss128 and 128A both provide significant safeguards against undue or unjustified continued detention by expressly bringing consideration of that under the auspices of the District Court.

[44] That evidence and the Crown's in reply are considered at paragraphs [92-98] below.

[45] It is fundamental to the Convention that refugee status is not conferred by any decision of the New Zealand authorities; their task is to determine whether or not at the time of the determination such status, conferred by New Zealand's accession

to the Convention, already exists as a matter of fact and of right. Inevitably there will be charlatans among those who present themselves as refugee status claimants. But one who ultimately makes out the claim to refugee status is seen, even though in retrospect, as falling within the language of the Convention. The protection of such people, as well as the elimination of charlatans, is a major consideration.

[46] The purpose of the Convention appears from parts of its preamble and its definition of "refugee":

> *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.
>
> …
>
> *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) …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… is unable or, owing to such fear, is unwilling to return to it.

[47] The prohibition in article 31(2) of unnecessary restriction of refugees' movements is at the core of the present case. In its Conclusion 44 (XXXVII) 1986 on the Detention of Refugees and Asylum Seekers, the Executive Committee of the United Nations High Commissioner's Programme:

> (a) *Noted* with deep concern that large numbers of refugees and asylum seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation;
>
> (b) *Expressed* the opinion that in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order;
>
> (c) *Recognised* the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum seekers from unjustified or unduly prolonged detention;
>
> (d) *Stressed* the importance for national legislation and/or administrative practice to make the necessary distinction between the situation of refugees and asylum seekers, and that of other aliens;
>
> (e) *Recommended* that detention measures taken in respect of refugees and asylum seekers should be subject to judicial or administrative review…

The authority of the Executive Committee was recognised by the Court of Appeal in *Attorney-General v E* [2000] 3 NZLR 257 at 269 para [38] (majority); [94] (Thomas J).

[48] The Executive Committee's "Detention of Asylum-Seekers and Refugees: the Framework, the Problem and Recommended Practice" of June 1999 is conveniently accessible in the dissenting judgment of Thomas J in *Attorney-General v E*. It emphasises:

> [99] …

> "In view of the provisions of Article 31 of the 1951 Convention relating to the Status of Refugees and the fact that the majority of asylum-seekers have not committed crimes – and indeed they are not suspected of having done so – their detention raises significant concern, both in relation to the fundamental right to liberty, and because of the standards and quality of treatment to which they are subjected."

> [100] … "Detention has been a recurring protection problem for the Office." Numerous reports are referred to in which the attention of the Executive Committee has been directed to the use of detention, despite the Executive Committee recommendations discouraging recourse to detention. "…reports", it is said, "chronicled a failure on the part of States to make the necessary distinction between asylum-seekers on the one hand, and illegal migrants on the other . . .".

> ". . . detention of asylum seekers and refugees should normally be avoided; if found to be necessary, it may be resorted to only on grounds prescribed by law and only for specific and limited purposes."

> [101] ". . . the limited accepted bases on which the detention of refugees or asylum-seekers may be justified, namely: to verify identity; to determine the elements of the claim; to deal with cases where refugees have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order."

It concludes:

> "(a) Governments should ensure that detention of asylum-seekers is resorted to only for reasons recognized as legitimate, consistent with international standards and only when other measures will not suffice; detention should be for the shortest possible period;
>
> (b) The detaining authorities must assess a compelling need to detain that is based on the personal history of each asylum-seeker;
>
> . . .
>
> (e) Alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention."

[49] It follows that the clear words of Article 33.2 mean precisely what they say. So if s128 does apply to refugees, its prohibition of bail even where detention is unnecessary places New Zealand in clear breach of our international obligations. I

echo Simon Brown LJ's remark: it is an unhappy way for New Zealand to deal not only with such potential criminals as may come to New Zealand as claimants for refugee status rather than on a tourist visa, giving their false story before they leave rather than after they arrived; but also with the 92% of those whose claims have been processed under the new regime (146 of 159; 49 yet to be dealt with) who have been granted refugee status.

[50] Yet to control suspected criminals, including terrorists, the Crown must be permitted to impose the restrictions required by the necessity test (paragraph [30] above).

[51] The application of the rule of law requires the Courts to give effect to plaintiffs' legal rights, of which perhaps the most important after freedom from torture is not to be wrongly detained. But is also essential to maintain public confidence in the law and its application. Sometimes that can be best achieved by exercise of discretion in such a way as to give Parliament the opportunity to intervene. Examples are *Fitzgerald v Muldoon* [1976] 2 NZLR 615, where Sir Richard Wild CJ having made a declaration as sought by the plaintiffs, declined to issue an injunction, observing that "There can be little doubt that legislation will be enacted… In that situation… the law and the authority of Parliament will be vindicated by the making of the declaration…, and the appropriate course is to adjourn all other matters in issue for six months from this date"; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 647 where the Court of Appeal made declarations and gave directions for the preparation of a scheme of safeguards and later, following the introduction of legislation discharged the directions although reserving leave to apply (later utilised in *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142); and *Coburn v Human Rights Commission* [1994] 3 NZLR 323, where Thorp J made an unprecedented prospective determination, considering at 358 that "the breadth of the questions requiring determination, and their size and complexity, all point towards their determination by legislation rather than by judicial decision", rather than making a decision that "would smack of usurpation by the Court of the role of the legislature, and have the character of judicial legislation rather than interpretation."

[52] Here I think it desirable before pronouncing final judgment to give the claimants, represented by the plaintiffs, the opportunity to consider whether the best method of resolution may be to invite Parliament rather than the Court to deal with the problem.

[53] With that background I turn to the legislation.

The Interpretation Act

[54] The Interpretation Act 1999 provides:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

[55] The starting point is therefore the text but the indications that may be considered are not confined to those provided in the enactment. Those of outstanding importance are the New Zealand Bill of Rights Act 1990 and the principle of legality.

The Bill of Rights.

[56] The Bill of Rights affirms (s2) the rights and freedoms which it contains. It applies to acts done by the legislature, the executive and the judicial branches of government. By s6 it directs that:

> Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

By ss 21-2 it provides:

> **21. Unreasonable…seizure** – Everyone has the right to be secure against unreasonable …seizure…of the person…
>
> **22. Liberty of the person**- Everyone has the right not to be arbitrarily arrested or detained.

The Crown accepts that the Bill of Rights applies to those who are unlawfully in New Zealand. Its position is that the detention is neither unreasonable, arbitrary, nor illegal.

The principle of legality

[57] In interpreting statutes the Courts are also governed by the "principle of legality" expressed by Sir Rupert Cross in his text *Statutory Interpretation* and adopted by Lord Steyn in *Reg v Home Secretary, Ex p Pierson* [1998] AC 539, 588:

> Statutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules… Long standing principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament…These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction, and they may be described as 'presumptions of general application'… These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by a statutory text.

The Immigration Act

[58] I pass to the Immigration Act. It is common ground that insofar as they can be applied to refugees, Parts I and II do so apply. Each contains reference to refugee status claimants (ss35(1A) and 53(2)(b); s54(6)). It was not suggested that Part III (deportation of persons threatening national security and suspected terrorists), Part IV (deportation of criminal offenders) and Part IVA (special procedures in cases involving security concerns) do not apply to refugees. It is notable that bail may be granted to those falling within Part III (s79 (2)(b)(ii)); it is not mandatory to detain those falling within Part IV (s98(1) and by ss 99 and 101 bail may be granted; while in cases falling within Part IVA where others whose security risk status has been confirmed by the Minister is to have any visa or permit cancelled or revoked and to be ordered to be removed or deported, refugee status claimants receive the benefit of s114K(4)(c):

the chief executive must ensure that-

…

In the case of a person who is protected from removal by section 129X, the person is released from custody and is given the appropriate temporary permit

[59] It is striking that in this last mentioned case a refugee status claimant who is a certified security risk is not only protected from removal or deportation but is also to be released from custody and indeed is to be given an appropriate temporary permit. There could be no clearer pointer to a parliamentary reluctance to imprison claimants for refugee status – even if, as in this case, they are a security risk. The plaintiffs can argue with force – if persons presenting clear dangers to the community are to be treated with such consideration, how can s128 be construed as applying to the ordinary run of refugee status claimants?

[60] The plaintiffs argue in essence that Part VI (arrivals and departures) has no application to claimants for refugee status whose position is dealt with predominantly in Part VIA introduced by the Immigration Amendment Act 1999 as well as by the general Parts I and II. The Crown contends that Part VI is equally to be construed as of general application.

[61] Part I (exemptions of visas and permits) is headed "Basic Rules" and includes:

4 Requirement to hold permit, or exemption, to be in New Zealand

(1) A person who is not a New Zealand citizen may be in New Zealand only if that person is—

(a) The holder of a permit granted under this Act;

…

(2) Any person who is in New Zealand in contravention of subsection (1) of this section is deemed for the purposes of this Act to be in New Zealand unlawfully.

…

[62] It is unnecessary to examine the function of issuing permits considered in *E*.

[63] Part II is headed "Persons in New Zealand Unlawfully" and includes the following provisions:

> **45 Obligation of persons unlawfully in New Zealand to leave New Zealand**
>
> (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.
>
> …

Liability for removal

> **53 Liability for removal**
>
> (1) A person unlawfully in New Zealand may be the subject of a removal order, and is liable to be removed from New Zealand under this Part, if—
>
> (a) The person… has been unlawfully in New Zealand—
>
> (i) For a period of 42 consecutive days; or
>
> …
>
> (2) This section is subject to—
>
> …
>
> (b) Section 129X (which relates to refugee status claimants).

[64] By s60(6) a person who having been served with a removal order then makes a refugee status claim may not be bailed unless there are exceptional circumstances: s60(6). It is necessarily to be implied that there is no such impediment in relation to those who make their claim before being served with a removal order. The concept of bailing those subject to removal orders is material to the Crown's submission that no such power exists in relation to other non-permitted claimants. The provision for imprisonment, but with authority to grant bail pertaining in relation to removal orders, is presumably to avoid injustice by excessive detention. The absence of the equivalent bail power in s128 is a pointer to its being of summary character and

overridden without undue difficulty where inconsistent with a context – here that of those who are subject to Part VIA and who enjoy the protection of ss129X(2) and 129D (paragraph [13] above) and with the presumptions of the common law and of the Bill of Rights.

[65] It is to be further noted that in cases falling within Part IVA "**Special Procedures In Cases Involving Security Concerns"** [New Zealand Security Intelligence Service], by s114C **Relevant Security Criteria** subsection (1)(d)(iii) and (e)(iii), there is contemplated the case of a refugee status claimant who is in New Zealand unlawfully (having no permit or exemption). The system for removal from New Zealand is that of deportation. That is another pointer of assistance to the plaintiffs' argument on s128: if the summary turnaround provisions of s128 necessarily keep refugee status claimants in detention, why not refer to them?

[66] Then follows the crucial Part VI of which the material parts are reproduced in Appendix 1.

The Regulations

[67] The Immigration (Refugee Processing) Regulations 1999 provide for the written confirmation of claims to refugee status; for requests by refugee status officers for information from the claimant; and for the application of principles of natural justice to the procedures.

The Manual

[68] Section 13A of the Immigration Act requires that Government policy for visas and permits be published. Accordingly the New Zealand Immigration Service Manual was published. Material provisions are appended as Appendix 2.

The facts

The Operational Instruction

[69] An NZIS Operational Instruction of 19 September 2001, which does not in law have the character of subordinate legislation, was issued by the General Manager, implementing new policy regarding the detention of refuge status claimants. It was submitted on that date to the Minister for noting under cover of a paper outlining its features. The Instruction is attached as Appendix 3.

The Minister's evidence

[70] The Minister of Immigration, the Hon Lianne Dalziel, had taken office shortly after the Court of Appeal's decision in *Attorney-General v E*. She discerned serious problems in the way in which refugee status claimants were dealt with in New Zealand.

[71] She was advised that there were concerns about identity, security and other topics. NZIS were obliged either to grant such claimants a temporary permit or to arrange for their detention in penal institutions. She considered that detention in such conditions was acceptable only where there were serious concerns about a claimant. She later learned of the Crown's legal position (that in cases under s128 following refusal of a permit bail could not be granted unless the claimant had made application for judicial review under s128A). She was informed of a recent marked increase of arrivals in New Zealand of refugee status claimants who did not possess travel documents or whose documents were questionable. She learned of the prospect of arrivals of very large groups of refugee status claimants, particularly by ship.

[72] As a result of these concerns it was decided that the Mangere centre, already in use for the reception and resettlement of refugees under United Nations High Commissioner for Refugees (UNHCR) quota, should be developed as an alternative to detention in a penal institution for any refugee status claimants presenting security, identity or other concerns for whom a penal institution detention was not

appropriate. In August 2001 these processes were accelerated in response to the New Zealand Government's decision to receive a large number of the refugee status claimants who had been rescued near Christmas Island by the MV *Tampa* (see *Victoria Council for Civil Liberties v Minister for Immigration and Cultural Affairs* [2002] 1 LRC 189 (Federal Court of Australia)). The Minister was of the view that any claimant subject to detention should be accommodated at the Mangere centre rather than imprisoned. Since these claimants had already been subjected to significant publicity she instructed her officials to ensure that there was adequate security at the Mangere centre to protect their privacy as well as their safe custody.

[73] There followed soon afterwards the terrorist events of September 11 2001 which raised substantial concerns over security both nationally and internationally. She asked the General Manager of the New Zealand Immigration Service to review New Zealand security measures in relation to border controls and immigration, including the approach to refugee status claimants. She wished to be able to ensure the public of New Zealand, and other governments with whom New Zealand was co-operating, that the identity of all entrants to New Zealand was known and that security and other relevant concerns had been resolved before they were granted entry. There followed the NZIS report of 19 September 2001 together with the Operational Instruction of that date. She copied it to the Prime Minister in accordance with the Government's co-ordinated security measures. She considered that the Operational Instruction addressed the concerns she had raised in respect of spontaneous refugee status claimants (those making claims to refugee status upon arrival at the border), namely that security concerns be given due emphasis, and that detention in penal institutions be used only in cases giving rise to serious concerns and that provision be made for claimants arriving in large groups.

[74] She was later informed that the Operational Instruction had been provided to and considered by the UNHCR. Questions were raised by the UNHCR representative in New Zealand; following NZIS's response the UNHCR has raised no further objection. Its Regional Office's Newsletter 1/2002 noted without comment the Government's policy in relation to refugee status claimants following September 11 and attached a accompanying discussion paper which, while critical of the treatment of claimants in Australia, had no criticism of the New Zealand regime.

[75] The Minister stated that the Government's refugee and border control policy continues to develop in the light of recent national and international developments. In particular the Government has recently introduced the Trans-National Organised Crime Bill, containing stringent controls on organised illegal transfer and exploitation of migrants, in order to allow New Zealand to ratify the United Nations Convention against Trans-National Organised Crime and its two protocols (the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women And Children). The conventions and protocols seek to address a world-wide increase in commercial smuggling and exploitation of migrants. Clause 25 of the Bill includes an amendment to the Immigration Act. It will, if enacted, provide additional flexibility in dealing appropriately with persons claiming refugee status at the border upon arrival, in the light of their personal circumstances and identity, security, repatriation and other concerns. In particular the proposed amendment provides that, where appropriate, those detained under s128 may be released by a District Court Judge subject to conditions, including reporting and residence at a specified address.

Evidence of officials

[76] Mr Lockhart, Chief Operating Officer of NZIS, described the Service's operation of s128 and compared the Operational Instruction with previous policy directions advised that factors leading to change of policy were first increased awareness of the concern about people smuggling. He said:

> 13. The first change was made on the basis that people smuggling was recognised as an increasing area of concern and that an additional requirement of criminal offending was not necessary…
>
> 14. The second, and more substantial change, was made in recognition of the increased risk to national security from trans-border movements following the terrorist events of 11 September 2001 and particularly, of the Government's view that refugee status claimants in respect of whom there were identification concerns should not, in the absence of contrary factors, be allowed to enter New Zealand without restriction. The change followed a telephone conversation I had with the Minister of Immigration shortly after 11 September 2001, in which she asked that border security arrangements be reviewed.

…

> 16. The differences between [an earlier instruction] and the October 1999 Operational Instruction reflect a number of developments but the key distinction is the availability from September 2001 of the Mangere centre as approved premises for detention under s128, including children and young persons, and, as a consequence, the amelioration of humanitarian concerns that had previously outweighed other factors relevant to detention.
>
> 17. In that regard, it should be noted that penal institution detention is regarded as a last resort message by the [UNHCR]. Although, following the decision of the Court of Appeal in *Attorney-General v E*… the guidelines on detention of asylum seekers… issued by the UNHCR are not binding international obligations, NZIS regards the *guidelines* as a helpful expression of UNHCR views.

[77] The relevant portions of the UNHCR guidelines, dated February 1999, are attached as Appendix 4.

[78] Mr Lockhart stated that:

> …NZIS has noted the preference expressed by UNHCR to develop alternatives to penal institutions as a means of restricting movement of refugee status claimants in accordance with article 31(2) of the Convention. NZIS has explored the distinction made by the *Guidelines* between detention and other restrictions on freedom of movement, such as the provision for "open centres" in Guideline 4, in considering the development of less restrictive facilities such as the Mangere Centre. The Mangere Centre has been inspected by officials of UNHCR, who have raised no concerns.

[79] He advised that the number of refugee status claimants detained since the adoption of the current Operational Instruction has been affected by the decision of the Government in August 2001 to receive the 131 *Tampa* claimants. They represented an instant increase of one-third in the number of persons claiming refugee status upon arriving in New Zealand and without having been assessed previously by NZIS or UNHCR for that year, from 287 to 418.

[80] It was expected from the limited information available in advance in respect of the *Tampa* claimants that they were very likely to have characteristics listed by the 19 September 2001 Operational Instruction as potentially justifying detention at the

Mangere Centre, notably that they had sought to arrive as members of a group and that many if not all were understood not to hold or to have destroyed their travel documents. Planning and, particularly, logistical and budgetary arrangements for the reception of the *Tampa* claimants were thus made on the basis of that expectation. In particular, the decision required early completion of the development of the Mangere Centre. The Minister had indicated in her regular meetings with officials during the planning phase that she preferred that any *Tampa* claimants subject to detention be held at the Mangere Centre, rather than in penal institutions, to the extent that that was possible. The Minister also sought assurances that adequate measures had been taken to ensure the security, safety and privacy of any detainees from the *Tampa* group.

[81] Mr Lockhart deposed that both before and after 19 September 2001 the detention of all those held under s28 has been subject to periodic review. Such review involves balancing a number of competing factors such as:

> 1. The length of detention to date, as longer periods of detention could be justified only be correspondingly serious public interest considerations;
>
> 2. Whether the detainee's identity had been established to the satisfaction of the NZIS; and
>
> 3. Where spontaneous refugee status claimants are concerned, the apparent strength of the detainee's refugee status claim, both because unsuccessful refugee status claimants are likely to be at a greater risk of absconding if released and because factors such as the assessment of credibility by the Refugee Status Branch is also relevant to the continuing decision to detain a claimant;
>
> 4. Whether the detainee remained within the turn-around provisions of the Immigration Act and the obligations of airlines under the Annex 9 to the Convention on International Civil Aviation and the Memorandum of Understanding between the airlines and NZIS… as the need to turn-around becomes less of a factor the longer that a person remains in detention.

[82] It may be presumed that the review was to determine whether a residence permit should be granted, having previously been withheld.

[83] In December 2001 Mr Lockhart issued the Operational Instruction formalising the informal policy of reviewing continued detention (Appendix 5). Mr Lockhart stated:

> The 19 December Instruction reflected the existing practice. In particular, I note that the instruction directed that particular attention be directed towards the identity of a claimant and that consideration of releasing him or her from detention be given where, once identity had been established, there were no longer any outstanding concerns. As the Operational Instruction indicates, the continued detention of those spontaneous refugee status claimants who had been detained pursuant to section 128 is to be reviewed, ideally in the third week of detention.
>
> Three weeks is generally the minimum period in which a claimant may be interviewed and information obtained. It should be noted that it is inherently difficult to establish the identity of refugee status claimants because seeking information from claimants' countries of origin would compromise the confidentiality of their claims and potentially expose unsuccessful claimants or claimants' family members to risk. Accordingly, identity often has to be established indirectly and with particular care.
>
> It should also be emphasised that there can be instances where security or other concerns remain despite a person's identity having been established or other initial concerns addressed. For example, the identity of a claimant may be established but it may have in that time become apparent that the basis of his or her claim arises from involvement in terrorist activities. In such a case, even though identity has been established, such additional security concerns would warrant continued detention under section 128.

[84] Mr Curtis, a service manager in the refugee quota branch, is in charge of the Mangere centre. He produced the Mangere accommodation manual, a comprehensive document almost an inch thick. Relevant provisions are contained at pages 7-11, 22-3, 29, 71, 73 and 74, attached as Appendix 6.

[85] The manual makes plain that those at the Mangere Centre are detained. But the policy that it be operated as an "open centre" with ample provisions for leave (p7) suggest that a determined criminal or absconder would have little difficulty in escaping. While the Mangere regime no doubt complies with the requirement of s128(15) that bail should be prohibited to those who fall within that section, its use cannot be said to satisfy the necessity test recounted in paragraph [30] above. And

while convenient it cannot be said to be necessary to allow the refugee status branch to perform their functions. While no doubt in certain cases it or the more restrictive conditions of penal detentions may be "necessary" to prevent a refugee status from escaping with a view to committing crime or absconding, there is no evidence to establish that such regime is necessary for all or even a great number.

[86] Ms Hodgins is an immigration officer in the Border and Investigations Branch stationed at Auckland International Airport. Confirming that New Zealand experience is similar to the English described by Simon Brown LJ, she stated that it is very rare for spontaneous refugee status claimants to arrive with any genuine immigration or identity documentation at all.

[87] As an officer of the NZIS Ms Hodgins was in law required to comply with s129X(2) (paragraph [13] above. But it would be unreal to suggest that she could do otherwise than comply with the directions contained in NZIS Operational Instruction of 19 September 2001; no criticism could possibly be directed at her for performing what she was instructed was her duty.

[88] She recounted that by s4(1) of the Immigration Act D, who was not a New Zealand citizen, required a permit to enter New Zealand. She was required to consider whether he should be granted a temporary permit which would permit him to enter New Zealand lawfully. If no permit is issued admission can be refused and the passenger will not be permitted to leave the customs controlled area of the airport.

[89] She drew the Court's attention to the 1944 Convention on International Civil Aviation known as the Chicago Convention. Section 125 of the Immigration Act imposes on the person in charge of an aircraft the responsibility for ensuring that all persons boarding the craft in another country have appropriate documentation for immigration purposes, including a passport and, where required, a visa. The carrier is required to provide passage from New Zealand at the carrier's cost of anyone who was on board the aircraft when it arrived in New Zealand not being the holder of a visa and being neither exempt from the requirement to hold a permit or being granted a permit on or before arrival in New Zealand. A carrier is also responsible in respect

of such person to pay all costs incurred by the Crown in detaining and maintaining that person pending that person's departure from New Zealand [refer to submissions]. She stated:

> 18. …the obligation to remove a spontaneous refugee status claimants remains with the airline until the moment that person is legally admitted for entry into the state. If a permit has been granted, the airline is relieved of that obligation from the moment the permit is issued, irrespective of the ultimate determination of the refugee status claim. Similarly if refugee status is granted that affects entry and the turnaround obligation ends.
>
> 19. However, if a spontaneous refugee status claimant has not been admitted to New Zealand, i.e. no permit was issued, the airline will still be responsible in accordance with the Chicago Convention and s125 of the Act for removal of that person if their claim is ultimately declined.

[90] She recorded the practice adopted with spontaneous refugee status claims, which was applied in D's case:

> 24. Border and Investigations Branch immigration officers do not process claims for refugee status. That is a matter entirely for the Refugee Status Branch ("RSB"). When confronted at the border with a spontaneous refugee status claimants, it is not my function to take the claim or to determine its merits. However, I am required to notify the RSB so that a RSB case officer can come out to the airport and take the claim. RSB officers are on duty call and usually arrive at the airport within an hour of contact.
>
> 25. However, information that a spontaneous refugee status claimant gives to the RSB case officer in the course of taking his or her claim may have some bearing on my decision to grant or decline a temporary permit. For example, if the RSB case officer discovers, in the course of taking the claim, that the claimant is a person prohibited from holding a permit under s 7 of the Act that would clearly affect my decision. Equally, if the refugee status claimant produces appropriate documentation in the course of taking the claim, that too would affect my decision.
>
> 26. That is why the final decision to grant or refuse a temporary permit to a spontaneous refugee status claimant is not made until after the claim has been taken and the RSB case officer has disclosed any further relevant considerations to be taken into account.

27. The RSB claim process may also elicit information relevant to the terms of detention under s 128 of the Act if a permit is refused. In particular, if a spontaneous refugee status claimant advises the RSB case officer that he or she is or was a member of a terrorist organisation or has previously committed a violent offence, detention in a penal institution would ordinarily be appropriate.

Detention under s 128

28. In practical terms, refusal to grant a permit results in detention under s 128 of the Act because s 129X of the Act precludes immediate turn around. The only possible alternative to s 128 detention is to let the spontaneous refugee status claimant enter into New Zealand without a permit. The effect of such an action would be threefold:

    28.1 He or she would be unlawfully in New Zealand

    28.2 The Chicago Convention would no longer apply; and

    28.3 Part II of the Act would apply.

29. Therefore, if I decide to refuse a permit, I must then decide whether to request the detention of the spontaneous refugee status claimant and the terms of that detention. In doing so, I have regard to the Operational Instruction of 19 September 2001 ("The Operational Instruction").

…

[91] Ms Hodgins was rostered on duty at the airport on 21 October 2001 when the second plaintiff D arrived at 8.25 am on an incoming flight. On arrival he announced that he wished to claim refugee status. It was granted to him on 20 November 2001; in the interim he was detained. He did not have a permit to enter New Zealand and was not exempted from the requirement to hold one. She declined to issue D with a permit to enter New Zealand. She was responsible for his detention pursuant to s128(5). She also applied for a warrant to detain him at the Mangere Accommodation Centre. When on 20 November 2001 the Refugee Status Branch notified the Border and Investigations Branch that D's claim to refugee status had been granted she notified Mr Curtis and these solicitors that he had been granted refugee status and must be released from custody. That then occurred.

[92] Ms Hodgins had taken D's particulars on an Arrival Interview Form. Since his language was Farsi the interview was conducted through an interpreter. He gave an account that he had used a false Iranian passport to escape from Iran and travel to Thailand, from where he came in stages to New Zealand on the false passport of another state. He spoke of being tortured in Iran and being liable to death as a Christian convert who promoted that religion. He said:

> I came here to seek [asylum] not to be kept in prison. If I wanted to stay in a prison I would stay in Iran, but in Iran they wd kill me if I stay. I am here to get help.

Ms Hodgins recorded on the NZZIS form:

> - under the heading "My preliminary assessment of the situation is:"
>
> "No appropriate documentation for immigration purposes nor any I.D. docs. Claimant has used fraudulent documents in order to mislead NZIS officials"
>
> - under the heading "The reasons for this assessment are"
>
> "no I.D. documents
>
> ID cannot be ascertained to satisfaction of NZIS are not to be detained in penal institution.
>
> No valid travel/ID document. There may be delay or difficulty in obtaining these documents in the event the claim is declined."

[93] She explored at pages 4 and 5 of the interview form the grounds on which a person may be declined a permit on the grounds of falling within s7. D had recorded that he had been previously imprisoned or detained; that he had previously been removed or deported from a country; and that he had previously been investigated or was under investigation for an offence. But the reasons for those answers appeared to relate to religious persecution which, if correct, would not engage s7 or require detention in a penal institution if the permit were declined. The focus there was on criminal offences recognised in New Zealand and potential danger to the New Zealand public.

[94] That note constituted her reasons for a preliminary assessment that a permit should be refused.

[95] There followed a three hour interview with a refugee status officer. That did not give rise to any facts that might lead Ms Hodgins to change her preliminary assessment. She accordingly directed that D be detained and placed in custody by a police officer (s128(5)) and made application for a warrant for his commitment authorising his detention for a period not exceeding 28 days (s128(7)). She described the procedures:

> 55. Once D had been informed of the decision to refuse him a permit and detain him, he was delivered into Police custody for detention without warrant in accordance with s 128(5) of the Act. In practical terms, this involved writing to the Police and taking D over to the airport Police station. Attached to that letter were the standard forms (both completed by me):
>
> 55.1 *"Persons Seeking Refugee Status at Auckland Airport"*, which form relates to fingerprinting in the event that a spontaneous refugee status claimant is turned around; and
>
> 55.2 *"NZ Immigration: NZ Police – Checklist"*.

[96] Her conclusion was expressed in a formal note as follows:

> Permit assessment
>
> 1. Following an initial interview it has been determined that the applicant has no appropriate documentation for immigration purposes, nor does he have identity documents. This person's identity has not been ascertained to my satisfaction.
>
> 2. The claimant has no valid travel or identity documents and there may be delay or difficulty in obtaining those documents in the event that his claim to refugee status is declined.
>
> 3. The claimant has used fraudulent documents in order to mislead NZIS officials.
>
> 4. While determining whether or not to exercise powers under section 128(5), I have been required to have regard to the provisions and the intent of the 1951 Convention to the status of Refugees and I accept that detention of persons who seek asylum should occur only when necessary.

> 5. The humanitarian aspects of the applicant's case have been considered and in all the circumstances, I do not consider that there are circumstances of such an exceptional humanitarian nature that warrant the grant of a permit in this instance.
>
> 5. In considering the public interest, I must consider the integrity of New Zealand's immigration laws and policies balanced against New Zealand's international obligations.
>
> 6. I am also required to have regard to the interests of the State in determining who should reside within its borders and the right to regulate and control entry.
>
> In making a decision I have considered the claimant's individual circumstances and New Zealand's international obligations. In all the circumstances however, I do not consider that the grant of a permit is warranted in this instance.
>
> Given the information obtained from the interview with the claimants and information already known, and an assessment of the risk, in all circumstances I do not consider that detention in a Penal institution is appropriate for the claimant. Residence in the Mangere Accommodation Centre is the only proper course of action for this claimant.
>
> Decision:
>
> Permit refused, & Warrant of Commitment sought for residence at the Mangere Accommodation Centre.

[97] There was no suggestion in her note or evidence that there were grounds for fearing criminal offending or clear risk of absconding that might have brought D within s7 of the Immigration Act or qualified him for detention in a penal institution in terms of the Operational Instruction (Appendix 3). The decisive factors appear to have been:

> …the applicant has no appropriate documentation for immigration purposes, nor does he have identity documents. This person's identity has not been ascertained to my satisfaction.
>
> 2. The claimant has no valid travel or identity documents and there may be delay or difficulty in obtaining those documents in the event that his claim to refugee status is declined.
>
> 3. The claimant has used fraudulent documents in order to mislead NZIS officials.

This is the situation to which Simon Brown LJ drew attention in *Adimi*.

The plaintiffs' evidence

[98] The evidence of D illustrates the burdens and adverse effects of even the most benign form of detention. While the grant of a permit has made moot for present purposes his challenge to the legality of his previous detention, the evidence of his distress at not being at liberty is a useful curb on any notion that detention, if benign, does not matter. I accept the Crown's evidence in response, that he was treated with sensitivity. But that does not meet the plaintiffs' fundamental point that any form of detention, unless necessary, is illegitimate.

The practice in the District Courts

[99] In the Crown's submissions filed and served prior to the hearing Crown counsel relied heavily on the passage from *Attorney-General v E* reproduced at paragraph [42] above. The plaintiffs tendered at the hearing affidavits to challenge that conclusion. The Crown objected to their admission on the grounds that there had been no opportunity to reply. I took the view that the evidence was sufficiently important to warrant admission on terms that the Crown should have reasonable opportunity to reply.

[100] The plaintiffs' evidence included that of Ms McHardy a member of a voluntary group "justice for asylum seekers" which works with detained asylum seekers. She deposed:

> 4. In my experience, all of the asylum seekers who are aware of the need for identity documents have tried to obtain them. However, some refugee claimants come from countries which do not have proper telephone systems so it is impossible for them to obtain identity documents. Some come from countries where they do not have identity documents or because of their refugee circumstances cannot approach their government or their family for identity documents.
>
> 5. For the refugee claimants who have provided identity documents, none detained under the Immigration Act have been released with the following exceptions. These are:
>
> i. An Iranian man who had come to New Zealand with his passport and it seems was mistakenly detained.

ii. Three Iranian men from the same family were released right at the beginning when the New Zealand Immigration Service were detaining refugee claimants at the Mangere Centre. They had family members in New Zealand.

iii. Successful refugee claimants.

6. However, except for the above, no other refugee claimant has been released, even when they provide identity documents. In my observation, it does not seem possible for refugee claimants to get released unless they get refugee status and providing identity documents makes no difference.

7. It is extremely stressful for refugee claimants to be detained, both in Mt Eden Prison and the Mangere Centre. They find it difficult to find experienced lawyers in the refugee area and to obtain evidence from their home country in support of their refugee claim and/or their identity. They feel as though they are treated like criminals and find it humiliating to go to the District Court to get their Warrants of Commitments extended.

8. Detention restricts refugee claimants ability to present their refugee claims as they are so stressed out and it also affects their access to legal representation. They do not understand what they need to do or what information they must provide to get released. The lawyers who are providing identity documents are very frustrated because they do not know what documents will satisfy the New Zealand Immigration Service to release their clients. My observation is that it is not possible for refugee claimants to be released unless they get refugee status and that detention is extremely traumatic for the refugee claimants and it affects their ability to present their cases.

[101] Ms MacLennan, a barrister practising in south Auckland, described an invariable practice over some 20 applications by the Crown for extension of warrants of commitment issued under s128(7). In each case the District Court Judges have followed the decision of Judge Moore in *New Zealand Immigration Department v Cindy Adu* (District Court Otahuhu 13 October 1999), that s128(13B) which states: "…the Judge may, if satisfied that the person is a person to whom this section applies, extend or further extend the warrant" is to be construed not as conferring a discretion but as imposing an obligation to extend the warrant. The evidence is confirmed by reference to the oral judgment of Judge Moore and the oral judgment of Judge McElrea District Court Manukau MA 229/01 17 October 2001.

[102] Mr McLeod is a barrister and solicitor and a specialist in refugee law. He deposed that on 5 November 2001 he attended a meeting with NZIS. Mr Lockhart advised him that NZIS did not wish to use s128B of the Immigration Act 1987 to detain people and preferred s128 as it was a lesser evidential standard. That evidence is consistent with the answer to interrogatory that s128B has not been used. He said that in his experience nearly all refugee claimants who arrive at the border and claim refugee status do not have passports as they have travelled on false passports or been advised by their agent to destroy their passport. Since the 19 September Operational Instruction all refugee claimants who arrive at the border without a genuine passport are being detained. He expressed the opinion that the NZIS was refusing to release detained refugee claimants even when they provided identity documents. Mr McLeod deposes that there is no legal aid available for counsel to attend these hearings. He said:

> In virtually all of the cases I have witnessed, individual applications take 1-2 minutes to be considered by the DCJs… to my knowledge, only once has a DCJ refused to extend the warrant on application for extension. This was because the claimant had just had a baby and was in hospital and was not present in the court. For this reason the DCJ refused to extend the warrant.
>
> …
>
> In my view, and the view of all counsel I have spoken with who practice in this area, it is futile to ask the District Court to refuse to extend the warrant of commitment. Refugee claimants are effectively detained until the New Zealand Immigration Service decides to issue them with a permit and that decision rests with a senior New Zealand Immigration Service official. From my own observations and from the discussions of professional colleagues, the seven day review in my opinion is a "rubber stamping" exercise and offers no procedural protection to detain refugee claimants.

[103] The evidence of another refugee status claimant was of being detained at the Mangere detention centre on 10 January 2002 and being taken to court on four occasions until he was granted a work permit and released on 26 February 2002. He said:

> "3. On each occasion, my name was called and I was brought before the Judge… the Immigration Service lawyer would tell the Judge that there was not yet a decision in my case. The Judge would then say that I would be detained for a further 7 days.

> 4. I do not want my detention to continue, my no one ever asked me if I wanted to say something to the Judge or if I wanted to be released.
>
> 5. Each time I went to court, I was before the Judge for a few minutes only."

[104] On 24 May 2002 the Crown filed an affidavit by Mr M A Woolford, a barrister and solicitor of high standing who is a partner of the Crown Solicitor. His characteristically helpful and candid account of the process of applications for extension of warrants of commitment essentially confirms both the plaintiffs' evidence and what is to be expected, given the high calibre of the members of the District Court bench. To the extent that s128 permits the Judges will keep a tight rein on extensions, declining in two cases to grant a three month extension and insisting that the extensions be for only seven days. The Judges have expressed interest in the place of detention, clearly preferring the use of the Mangere Accommodation Centre in suitable cases to the Auckland Central Remand Prison.

[105] But plainly they approach their task on the basis that they have no capacity to do other than make a seven day remand in detention. The expression with reasons of an immigration officer's belief that detention is still justified will lead to a decision that the Judge is prevented by subsection (15), to consider bail. While I do not propose in this judgment to determine the s128 point, the evidence of a practice of detention is compelling.

[106] The Crown response to the challenge to its changed detention policy is that, in the case of all those refugee status claimants who are declined a temporary permit and are detained under s128, there is doubt about their identity because they have no papers or have false papers and it is "necessary" in terms of article 31.2 to detain them while appropriate inquiries are made.

[107] Such argument proves too much. The same logic would apply to the very same claimants once they have applied for judicial review; yet once application for review has been filed they can apply for bail under s128A, just like those who present clear danger to the community as suspected terrorists and those who have been made the subject of a removal order and those whose cases involve security

concerns (paragraphs [64-5] above). If it is "unnecessary" invariably to detain such people, a fortiori that must be the case with refugee status claimants of whom a good percentage will later secure resident permits. The presumption that New Zealand will comply with article 31.2 adds further weight to the argument. The fact that the Crown has introduced the amendment to permit bail in such cases empties the argument for automatic detention of any force. It simply does not follow that just because some refugee status claimants should be detained, therefore all must be. So their invariable automatic detention cannot be "necessary".

[108] The benign conditions at Mangere are not calculated to impede terrorism or other crime or to prevent flight. Unless there is risk of flight there is no prospect of unreasonable interference with the due performance of the work of the Refugee Status Branch, which by s129D(1) must be performed in compliance with the Convention, including Article 31.2. Yet these were the only arguments for necessity which the Crown advanced. There was no evidence that the previous pattern of detention of only 5% had resulted in any problem of criminal conduct or flight by the 95%; nor any basis for a submission that the inquiries as to refugee status could not be performed if the refugee status claimants were bailed rather than in detention.

[109] It may be noted that in *Fernandez-Roque v Smith* 567 F.Supp 1115 (1983) Shoob J in the United States District Court Atlanta Division observed:

> Once an excludable alien's detention can no longer be justified merely as a means to his exclusion, *i.e.*, once detention is no longer justifiable simply on the basis of excludability, then a legitimate expectation arises that the detention will end unless some new justification for continuing the detention is established. The basis for this expectation is simply the fundamental principle inherent in our constitutional system that all persons are entitled to their liberty absent some legally sufficient reason for detaining them. An alien's excludability provides such a reason so long as the detention reasonably serves as an aid to the alien's exclusion. After this initial period of time, however, the individual's basic entitlement to liberty once again comes to the fore. Thus, even though the government is authorized to detain excludable aliens indefinitely where immediate exclusion is impracticable, the excludability determination itself provides the essential predicate for the exercise of this authority only for an initial, temporary period of time. Thereafter, a liberty interest arises on behalf of the alien detainee requiring that the continued exercise of the detention power be justified on the basis of a

> procedurally adequate finding that the detainee, if released, is likely to abscond, to pose a risk to the national security, or to pose a serious and significant threat to persons or property within the United States.

Although New Zealand conditions and perhaps attitudes are very different from those of the USA two decades ago, it may be noted that the only relevant grounds for detention stated are those which were identified in argument in the present case.

[110] While the Bail Act 2000 has no application to refugee cases its very carefully drafted scheme, dealing with suspected and convicted criminals, would prevent the detention of the overwhelming majority of refugee status claimants. Mr Butler argued that there is a sharp distinction between such claimants about whom little may be known for certain other than their apparent race and age, might include serious criminals or terrorists. But the Mangere response is no answer to that class of person, who should be detained in a maximum security prison. The essential point in my view is that the fact of limited or no documentation of the claimant's background is a factor to be taken into account on an individual appraisal of each. Where claimants' characteristics, such as sex, age, language and appearance bring them within a category of real risk in the light of whatever information is possessed by NZIS, to impose whatever may be the minimum restrictions necessary in the circumstances to protect the public and prevent real risk of absconding or of practical inability to process claims methodically is essential. In some cases detention in prison will continue to be necessary. It follows that in considering bail under s128A and, it is to be hoped, under an amended s128, save to the extent that NZIS possesses specialist knowledge, to which a court will naturally give weight in considering an application for bail, the Court's function is not greatly different from that currently performed regularly by the judiciary in other contexts.

[111] The necessity test should be, but under the current regime is not, applied meticulously. The exceptions to the current wholesale policy of detention are insignificant; what the law calls *de minimis*. Detention is essentially undiscriminatory. If as I provisionally consider s128A applies, such policy not only infringes Article 31.2 but falls outside the legitimate range of executive discretion available in terms of the *Wednesbury* and proportionality tests that engage judicial

review: see *McLenna v Bracknell Forest BC* [2002] HRLR 303 at 334-5. It probably also infringes the Bill of Rights.

Options for relief

[112] The present interim judgment identifies several issues, including the application of s128A, that require further consideration. Counsel agreed that it should not extend to questions of relief. It may be that, with the benefit of the sustained and able arguments presented on each side and the opportunity to consider this judgment, the need for further recourse to the Court will be unnecessary. The fact that there is a resource available at Mangere will in any event be of benefit (1) where there is proper justification for detention on an application of the necessity test; and possibly (2) in conditions not involving detention if that can be achieved with the consent of the claimant.

[113] If not, there are various options to consider and I should appreciate counsel's help on the practicalities, having regard not least to the limitations on legal aid.

[114] One may be to give final judgment that the procedures of s128A are available and to direct that they be given effect in accordance with the principles stated in this judgment. It may be doubted whether it would be possible, in the final judgment, to bring future refugee status claimants within its ambit so that they may utilise s128A without filing further proceedings. New Zealand practice does not permit judicial oversight of the kind seen in the US bussing schedules that followed *Brown v Board of Education of Topeka* 347 US 483 (1954); 349 US 294 (1955): see *Thames Valley EPB v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641 at 648. So during the interim period while Parliament is considering the Bill it might be necessary to consider how, if legal aid is not available, systematic recourse to s128A may be achieved.

[115] A second is to declare that Part VIA and s128 have no application. I have proposed that the claimants be consulted as to that.

[116] That for which the Crown contends is that s128 applies and subsection (15) prohibits bail.

[117] Other matters for consideration could include requests to the Registrar for waiver of filing fees; costs; perhaps the use of s99A of the Judicature Act 1908 to appoint counsel to assist the Court through the process of dealing with these important matters. All these require further consideration.

[118] I invite the plaintiffs and the Crown to confer and let me have as soon as possible memoranda, or if possible a joint memorandum, with timetable proposals.

[119] I reserve to the parties leave to apply and await counsel's submissions.

[120] Costs are reserved.

Signed at noon on 31 May 2002

W. D. Baragwanath J