REFUGEE STATUS APPEALS AUTHORITY RSAA Application 129T-2009-01
NEW ZEALAND RSAA Application 129T-2009-02

AT AUCKLAND

IN THE MATTER OF	**REFUGEE APPEAL NO. 76299**
AND	
IN THE MATTER OF	**REFUGEE APPEAL NO. 76297**

Before:	A Mackey (Chair) RPG Haines QC (Member)
Counsel for the appellant in *Refugee Appeal No. 76299*:	J Sutton
Counsel for the appellant in *Refugee Appeal No. 76297*:	D Mansouri-Rad
Appearing for the appellant in *Refugee Appeal No. 76204*:	G Illingworth QC
Appearing for the Department of Labour:	T Thompson
Date of hearing:	26 June 2009
Date of decision:	17 July 2009

DECISION OF THE AUTHORITY DELIVERED BY RPG HAINES QC

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INTRODUCTION

[1] On 16 February 2009 a differently constituted panel of the Authority delivered its decision in *Refugee Appeal No. 76204* in which it recognised TD as a refugee (the "*TD* decision"). In circumstances shortly to be explained, that decision received wide publicity. The reasons for the Authority's decision were not, however, made public at that time. The Authority's decision was initially notified only to TD and the Department of Labour, each being provided with a copy of the decision. Determination whether the decision was to be published to a wider audience was postponed until the three month judicial review period mandated by s 146A(1) of the Immigration Act 1987 had expired. Such publication is anticipated by s 129T(3)(e) and Schedule 3C, clause 12 of the Act. Publication is also permitted by s 129T(3)(f) and (4)).

[2] On 16 April 2009, inside the three month period, Mr Sutton filed an application seeking release of the *TD* decision on the grounds that media reports of the decision strongly suggested that it would have direct relevance to an appeal by a client of his and which is presently awaiting hearing by the Authority (Appeal 76299). The refugee claim in that case is based on *sur place* activities, including a conversion from

Islam to Christianity.

[3] On 26 May 2009 Mr Mansouri-Rad filed a similar application on behalf of a client who also has an undetermined appeal before the Authority (Appeal 76297). In that appeal the claim to refugee status is based (inter alia) on the ground that the particular appellant took part in protest activity in support of TD's refugee claim. It was submitted that given the similarities in the cases and the need to treat like cases alike, the *TD* decision should be published or made available to counsel.

[4] The issue before the Authority is whether it should publish the *TD* decision under one or more of the statutory provisions referred to.

THE CIRCUMSTANCES OF *REFUGEE APPEAL NO. 76204*

[5] The decision of the Authority in the *TD* case is 167 paragraphs in length and no useful purpose would be served by attempting a detailed summary. The brief sketch which follows is only an outline of some of the findings in *TD* relevant to the two applications presently before the Authority.

[6] TD, an Iranian national, lodged a refugee claim in May 2002. That claim, and its two subsequent incarnations, were based on a contention that TD had become a refugee *sur place* by virtue of his alleged conversion in South Korea from Islam to Christianity. After the first claim to refugee status was unsuccessful at first instance, he appealed to this Authority. That appeal was dismissed on 16 June 2004 because the first panel of the Authority concluded that it could not accept any of TD's evidence relevant to the core of his claim.

[7] On 7 December 2005 TD was served with a removal order and taken into custody. Almost immediately a second refugee application was lodged. That application was based on the same circumstances asserted in the first refugee claim but supported by

court documents, purportedly originating in Iran, establishing that TD had been convicted in that country as an apostate and sentenced to death. In addition, it was claimed that relatives had threatened to kill TD for having renounced Islam. Following a decline at first instance a second panel of the Authority heard the appeal on 10 August 2006. In a decision given on 20 December 2006 the Authority concluded that the Iranian documents were not genuine, that TD had not given truthful evidence as to the claimed circumstances in which he had learned of the alleged death sentence, that his claim that relatives had threatened to kill him was false evidence and that his claims about his Christian faith could not be relied upon.

[8] Following the dismissal of his second refugee claim, TD remained in custody. During this period he continued to refuse to sign documents required by the Iranian Embassy in Wellington before they would issue a travel document to facilitate his removal to Iran. In July 2007 TD began a hunger strike which lasted 53 days. This action attracted considerable publicity. In addition, he gave one of his supporters a copy of the purported death sentence document and asked that person to make the document widely known. This request was carried out, attracting even more publicity to the case. Both at Auckland Hospital when receiving treatment during his hunger strike and on the occasion of his release from custody at the District Court North Shore on 3 September 2007, TD gave emotionally charged interviews to television media about his case. For example, in a television item broadcast in August 2007 on the eve of his discharge from hospital and return to prison, TD was pictured sitting in a wheelchair in an obviously weakened state. Speaking in English (and emotionally) he made reference to the death penalty sentence and to the fact that family members wished to kill him for having renounced Islam. He also stated his intention to refuse food until he was allowed to stay in New Zealand. He made no reference to the findings of the second panel of the Authority that the court documents were not genuine and that the evidence of risk of harm from family members was not credible. Indeed TD concealed from his supporters and from the media the contents of the first

and second decisions of the Authority and the adverse credibility findings which they contained.

[9] Through his deception TD attracted the support of (inter alia) the vicar and parishioners of an Auckland church, the Anglican Archbishop of New Zealand and the Social Justice Commissioner of the Anglican Church, a Member of Parliament, his supervisor at work, his workmates and a group of protesters who staged demonstrations outside Auckland Central Remand Prison.

[10] The government of the day eventually agreed to release TD from prison on his giving an undertaking that he would abandon his hunger strike. On his release from prison TD lodged a third refugee claim which, while repeating the earlier two unsuccessful claims, rested on the assertion that his hunger strike had resulted in wide publicity being given to his claim and in particular, his claim that he had renounced Islam and converted to Christianity. Irrespective of whether he had in truth converted to Christianity, it was contended that he would now be at risk on return to Iran either because the authorities there believed he was a Christian convert (even if that belief was mistaken) or because they wished to punish him for making claims of apostasy. In this third claim it was conceded by Mr Illingworth that the Iranian court documents were false documents.

[11] As had the first and second panels before it, the third panel of the Authority made strong adverse credibility findings against TD, as can be seen from the following paragraph:

> **[121]** So that our findings cannot be mistaken, the essential points are:
>
> (a) The appellant's purported conversion to Christianity is not a genuine act of faith, but a means to an end, namely to secure residence in New Zealand.
>
> (b) The evidence as to the claimed attendance at the Seoul Migrant Mission Church and the appellant's claimed baptism there is rejected.
>
> (c) The appellant has knowingly deployed false documents in support of his claimed conversion to Christianity, namely the South Korean certificates of identification

and certificates of baptism and the Iranian documents purporting to show that he has been sentenced to death for apostasy.

(d) The appellant has not converted to Christianity, but has played the role of a convert. He has assumed an identity of convenience. There is no underlying spiritual content to the role being played.

(e) The untruths told by the appellant, the false documents he has produced and his general lack of candour in dealing even with those who are his strongest supporters, is evidence of the underlying utilitarian nature of his "belief" and the absence of a true commitment to his new proclaimed faith.

[12] The Authority concluded that TD had manipulated publicity to create a risk of being persecuted which had not until then been present. Ordinarily, his claim to refugee status would have failed on that ground. However, the Authority found that publicity given to his case had been driven simultaneously by other actors whose good faith was not in question. The Authority determined that the actions taken by TD's supporters on the false information provided by him had contributed substantially to the risk of harm in Iran and on those special facts found their actions to be sufficient to disengage the bad faith disqualification which would otherwise have attached to the appellant's actions. See *Refugee Appeal No. 76204* at paras [136] to [140]. The Authority went on to find that on the country information then available, it was difficult to say one way or the other whether the risk of harm to TD on return to Iran reached the well-founded standard. Applying the benefit of the doubt the Authority concluded, by the narrowest of margins, that the well-founded test had been satisfied. See para [159] of the decision.

[13] This necessarily incomplete and overly broad synopsis of TD's three refugee claims will bring into focus the reasons why the Authority's decision is a significant one.

Significance of *Refugee Appeal No. 76204*

[14] There are at least five reasons why the *TD* decision is of general significance:

(a) It illustrates how a *sur place* claim to refugee status can be manufactured by the deployment of false evidence and the manipulation of media publicity to create a risk of being persecuted which had not until then been present.

(b) The facts provide a particular illustration of the Authority's jurisprudence set out in *Refugee Appeal No. 2254/94 Re HB* (21 September 1994) at pp 35-61 and in particular the need for the third category identified by Grahl-Madsen (actions undertaken for the sole purpose of creating a pretext for invoking fear of perseuction) to be determined on a case-by-case basis.

(c) The decision addresses legal issues relevant to the assessment of credibility in refugee claims. See paras [53] to [56] of the decision.

(d) The decision also addresses the role of expert evidence in the assessment of credibility (paras [57] to [59]).

(e) The assessment of country conditions in Iran relating to Christian converts.

[15] Jurisprudentially speaking, the Authority is of the view that the decision is a significant one and that it is hardly surprising that within the space of four months of the decision being given, at least two other appellants before the Authority have sought access to the full decision. The Authority cannot accept the submission made on behalf of TD that the facts and attendant credibility findings are of no relevance or assistance to other refugee claimants. The case-by-case determination of the third category identified by Grahl-Madsen alone requires publication of the full facts and credibility assessment in the *TD* decision.

CONFIDENTIALITY AND REFUGEE CLAIMS

[16] As a general principle a claim to be recognised as a refugee in New Zealand and the information provided in support of that claim should be kept confidential. This principle is expressly recognised by s 129T of the Act which, in subs (1) stipulates that subject to the other provisions of the section, confidentiality as to the identity of the claimant and as to the particulars of their case must at all times be maintained. See further *Attorney-General v X* [2008] 2 NZLR 579 (NZSC) at para [18]. However, the Immigration Act does not cloak refugee claims with absolute confidentiality. Rather, it strikes a balance between competing interests including the need for the Authority to publish its decisions. It also stipulates the circumstances in which the confidentiality obligation does not apply. The two applications now before the Authority have as their focus two of the exceptions, namely waiver and the absence of a serious possibility of endangerment.

[17] Section 129T provides:

> **129T. Confidentiality to be maintained—**
>
> (1) Subject to this section, confidentiality as to the identity of the claimant or other person whose status is being considered under this Part, and as to the particulars of their case, must at all times, both during and subsequent to the determination of the claim or other matter, be maintained by refugee status officers, the Authority, other persons involved in the administration of this Act, and persons to whom particulars are disclosed under subsection (3)(a) or (b).
>
> (2) Compliance with subsection (1) may in an appropriate case require confidentiality as to the very fact or existence of a claim or case, if disclosure of its fact or existence would tend to identify the person concerned, or be likely to endanger any person.
>
> (3) Subsection (1) does not apply to prevent the disclosure of particulars—
>
> (a) To a person necessarily involved in determining the relevant claim or matters; or
>
> (b) To an officer or employee of a Government department or other Crown agency whose functions in relation to the claimant or other person require knowledge of those particulars; or
>
> (c) To the United Nations High Commissioner for Refugees or a representative of the High Commissioner; or

(d) In dealings with other countries for the purpose of determining the matters specified in section 129L(d) and (e) (whether at first instance or on any appeal); or

(e) To the extent that the particulars are published in a manner that is unlikely to allow identification of the person concerned, whether in a published decision of the Authority under clause 12 of Schedule 3C or otherwise; or

(f) If there is no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure in the particular circumstances of the case.

(4) Nor does subsection (1) apply to prevent the disclosure of particulars in relation to a particular claimant or other person to the extent that the claimant or person has, whether expressly or impliedly by their words or actions, waived his or her right to confidentiality under this section.

(5) A person who without reasonable excuse contravenes subsection (1), and any person who without reasonable excuse publishes information released in contravention of subsection (1), commits an offence.

[18] Before the exceptions in s 129T(3)(f) and (4) are addressed it is necessary to first examine the duty of the Authority to publish its decisions.

PUBLICATION OF DECISIONS

[19] The Authority is under a mandatory statutory duty to give reasons for any decision, to notify the refugee claimant of that decision and to provide him or her with a copy of the decision. The decision of the Authority is final once notified to the claimant. See s 129Q(3), (4) and (5):

129Q Decisions of Authority

(1) ...

(2) ...

(3) A decision of the Authority must be given in writing, and include reasons both for the decision and for any minority view.

(4) The Authority must notify the appellant or other affected person of its decision, and provide a copy of the decision.

(5) A decision of the Authority is final once notified to the appellant or other affected person.

[20] The present applications before the Authority have as their focus not the giving of reasons for a refugee status decision in relation to a particular refugee claimant, but the publication of those reasons to a wider audience, particularly **other** refugee claimants and their representatives.

[21] The applications find support in Part 6A of the Act itself in that the confidentiality obligation in s 129T(1) is expressly made "subject to" statutory exceptions which include:

(a) Publication of decisions by the Authority in a form sufficiently redacted so as to make it unlikely that the particular refugee claimant will be identified (s 129T(3)(e)).

(b) Circumstances where there is no serious possibility of the safety of any person being endangered by publication (s 129T(3)(f)).

(c) Cases where the particular claimant has expressly or impliedly waived his or her right to confidentiality (s 129T(4)).

Each of these exceptions will be separately addressed.

Publication - statutory requirements

[22] Section 129T(3)(e) stipulates that the statutory obligation to maintain confidentiality of the identity of the claimant and as to particulars of his or her case does not apply "to the extent that the particulars are published in a manner that is unlikely to allow identification of the person concerned". Schedule 3C, clause 12 additionally provides:

> **12 Publication of decisions for research purposes**
>
> Any publication for research purposes by the Authority of a decision made by it, other than publication to persons involved in the matter or in the administration of Part 6A, must be edited in such a way as to remove the name of the appellant or other affected person, and any particulars likely to lead to the identification of the appellant or person.

[23] The combined effect of these provisions is that there is an assumption that decisions will normally be published, albeit in a redacted form. Responsibility for the implementation of the Refugee Convention rests primarily with States party. Those States must ensure that refugee claimants, their representatives and those working in the refugee status determination process are aware of "refugee law". The promotion and dissemination of refugee law is an integral part of the international protection of refugees. The statutory provisions relating to publication of decisions are clearly within the spirit of the Convention. See also by analogy *ExCom Conclusion No. 51: Promotion and Dissemination of Refugee Law* (1988).

Publication - rule of law requirements

[24] Underpinning the statutory provisions are three important principles, all of them fundamental aspects of the rule of law.

[25] First is the principle of accountability which is referred to in the last two paragraphs of the rationale for requiring reasons set out in *Singh v Chief Executive Officer, Department of Labour* [1999] NZAR 258, 262 (CA):

> Before we consider the particular alleged failure to give reasons, there is value in recalling the rationale for requiring reasons.
>
> They include:
>
> (1) The discipline on the decision maker itself: it is commonplace that preliminary views can be changed when the process of thinking through the reasons and writing them down is undertaken.

(2) Assurance to those affected that their evidence and arguments have been assessed in accordance with the law, a matter relating to the next two points.

(3) Assistance to those affected in deciding whether to challenge the decision, for instance by appeal, review or other complaint mechanism - since the statement of reasons may satisfy them that they have no real prospect of a successful challenge.

(4) If a review is mounted, assistance to the parties, counsel and deciders engaged in the review.

(5) The establishment, where appropriate, of a body of precedent or at least of guidance, governing or affecting the exercise of the particular power.

(6) Assurance to the wider public of the legitimacy, openness and accessibility of the exercise of the power - an aspect of accountability.

[26] Refugee claimants are entitled to know how the Authority determines refugee status and in particular how it interprets the Refugee Convention. The application of the Convention to specific fact and country circumstances is also of critical importance to claimants.

[27] Second is the principle of equal treatment, both in the formal sense of ensuring legal certainty and predictability and in the sense of substantive equality, namely that persons similarly situated will be treated equally. The two senses of equality are explained in Woolf, Jowell & Le Sueur, *De Smith's Judicial Review* (6th ed, 2007) at paras [11.062] & [11.063]:

There are two senses of equality: formal equality and substantive equality.

Formal equality requires officials to apply or enforce the law consistently and even-handedly, without bias. Dicey considered consistency of this kind to be fundamental to his notion of the rule of law: "With us, every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification". This kind of consistency was fundamental to Dicey primarily because of its value in furthering the central feature for him of the rule of law, namely, legal certainty and predictability. Consistent application of the law also, however, possesses another value in its own right - that of ensuring that all persons similarly situated will be treated equally by those who apply the law. It is this notion of the equal (rather than the certain or predictable) application of the law which is the central aim of formal equality.

[28] For application of this principle in the context of refugee claims see *Bambagu Manzeke v Secretary of State for the Home Department* [1997] Imm AR 524, 529 (CA). Reference should also be made to the discussion of the topic by Baragwanath J in *Patel v Chief Executive of the Department of Labour* [1997] 1 NZLR 102 at 111 line 36.

[29] Third is the principle that the Authority observe the rules of fairness. This is not only an obligation imposed by well-established common law, it is also a right explicitly recognised by s 27(1) of the New Zealand Bill of Rights of Act 1990. The principle was applied by the Supreme Court of Ireland in *Opesyitan v Refugee Appeals Tribunal* [2006] IESC 53 (26 July 2006) where a successful challenge was made to the refusal by the Irish Refugee Appeals Tribunal to publish its decisions to anyone other than the particular refugee claimant:

> ... it would have been assumed, in my view, that fair procedures would have required access to and reference to previous decisions in an appropriate case in the interests of consistency in the treatment and application of the law. But the jurisprudential basis for the obligation to provide such reasonable access is not the new subsection but the general constitutional requirement of fair procedures.

[30] While the three identified principles may overlap to a degree, it is as well to acknowledge that as the "final" decision-maker in respect of claims to be recognised as a refugee in New Zealand, the Authority has a duty to facilitate access to its jurisprudence. See, for example, *Naidu v Minister of Immigration* (High Court Auckland, M1661-SW99, 23 March 2000, Rodney Hansen J) at para [91]. That jurisprudence will include a multitude of issues ranging from credibility assessment to interpretation of the Refugee Convention and the application of that Convention to specific fact and country circumstances.

[31] There are therefore compelling reasons for the Authority to publish its decisions where, in terms of s 129T(3)(e), a redacted decision can be published in a manner that

is unlikely to allow identification of the person concerned.

[32] In the present case it was common ground that given the publicity TD's three refugee claims and appeals to this Authority have received, redaction of his decision is not realistically possible. In these circumstances we turn to consider the application of the other exceptions to the confidentiality rule, namely s 129T(3)(f) and (4). These provisions will be addressed in reverse order.

EXPRESS OR IMPLIED WAIVER

[33] Section 129T(4) provides that the statutory obligation of confidentiality does not apply to prevent the disclosure of particulars in relation to a particular claimant to the extent that he or she has, whether expressly or impliedly by his or her words or actions, waived his or her right to confidentiality under s 129T.

[34] The panel hearing the third refugee appeal received substantial evidence relating to the publicity deliberately courted by TD in the pursuit of his refugee claim. It is not intended to recite that evidence here. It is sufficient to reproduce paragraphs [94] and [101]:

> **[94]** We begin by noting that the appellant has deployed the claimed death sentence to good effect and it has attracted wide publicity to his case. The death sentence was mentioned to Mr Keane, his work supervisor, and the appellant has made no secret of the fact that as a convert to Christianity he faces death in Iran. It was the evidence of Revd Sperring that the appellant asked him to make it known that he (the appellant) was under sentence of death and he gave Revd Sperring a copy of the Iranian document dated 5 March 2005 evidencing that sentence. The Revd Sperring said that he believed the document to be true and he made specific reference to the death sentence in an affidavit he swore on 7 June 2007 in support of an application in the District Court at North Shore that the appellant be released on conditions. In addition (and more publicly) Revd Sperring gave wide dissemination to the death sentence document in the television interview produced in evidence. In this interview the point made by Revd Sperring was that it was unjust for the appellant to be detained in prison pending his removal to Iran when, as a Christian convert, he faced execution in Iran by judicial sentence of death. The document purporting to be the death sentence was displayed by Revd Sperring for viewers of the programme to see.

...

> **[101]** Before leaving this issue it is necessary to make the point that the appellant cannot plead the confidentiality provisions of s 129T of the Act as the reason for not disclosing the decisions of the first and second panels to his supporters. He asked Revd Sperring to give wide publicity to the death sentence and he has, without heed to confidentiality issues, spoken to many individuals about his refugee claim and disclosed the basis on which it is advanced. He has spoken twice on national television, the first during his "fast" when he was admitted to Auckland Hospital and the second when he was released from custody from the District Court at North Shore. **There has been an implied, if not an express, waiver of confidentiality in terms of s 129T(4)**. He cannot plead the statutory provision as a defence to the withholding of the first two decisions of this Authority from his support group. Nor can the provisions of s 129T excuse his marked lack of candour in propounding his claims without permitting access to the objective analysis of those claims. Given the terms of s 129T(4), there is no basis whatever for the suggestion by counsel that the then Minister of Immigration, Hon David Cunliffe, was in breach of the confidentiality obligation. On one view he (the Minister) would have been justified in making public the first two decisions of the Authority under s 129T(4) which permits such disclosure where a refugee claimant has expressly or impliedly waived his or her right to confidentiality. [Emphasis added]

[35] It is to be noted that in para [101] the Authority made an express finding that TD had impliedly, if not expressly, waived the confidentiality which would otherwise have attached to his claim.

[36] The publicity courted by TD prior to his being recognised as a refugee continued post-recognition. On the day the Authority's decision was released (16 February 2009) the appellant and Mr Illingworth gave a media conference. Other media reports in evidence before the Authority show that TD also gave other interviews. So too did Mr Illingworth on his behalf. In an article by Jim Kayes published in *The Dominion Post* on 17 February 2009 at p A3, Mr Illingworth is reported as saying:

> Because of the publicity that was created as a result of the fast that [TD] went on, it is absolutely inevitable that the Iranian authorities will know about [TD]'s position. They will know that he has claimed to be a Christian, they will know that he has claimed to renounce Islam and they will know that they have been criticised.

[37] It is the view of the Authority that in this post-decision publicity TD provided further evidence of his express or implied waiver of his right to confidentiality under s 129T. He made no secret of his identity, his nationality, that he was a refugee

claimant, the basis of his refugee claim and the outcome. Out of self-interest, however, he has been careful not to disclose the adverse credibility findings made by each of the three panels of the Authority which have heard his appeal.

[38] In this regard Mr Illingworth submitted that while TD had waived confidentiality in relation to his identity, the fact that he is a refugee claimant, the basis of his claim and the outcome, he had not waived his right to confidentiality in relation to what Mr Illingworth described as "the middle part" of the decision comprising paragraphs [12] to [128] inclusive of the Authority's decision. These paragraphs contain the following headings:

[39] What the submission amounts to is that TD has not waived confidentiality in relation to the adverse credibility findings and that before any "particulars" relating to these findings can be disclosed under the waiver provisions in s 129T(4), it must be shown that there has been a waiver which can be attached to the relevant "particular" proposed to be disclosed.

[40] As to this submission:

(a) A refugee claimant who puts his refugee claim into the public arena by disclosing in some detail the basis of his claim, significant aspects of the evidence and the outcome must impliedly waive also the findings of fact and credibility made on those claims and on that evidence. This much is the necessary corollary of the statutory provisions which stipulate that waiver can occur "impliedly by ... words or actions...."

(b) Where an individual (such as TD) discloses the basis of his refugee claim, releases into the public a significant (false) document and also makes much of the ultimate recognition of refugee status, he must impliedly waive confidentiality in relation to the findings of credibility and of fact. It cannot have been intended that a selective waiver of this kind could be allowed to perpetuate the very deceit which ultimately led to the recognition of refugee status. See for example para [107] of the decision:

> We are of the view that his highly selective deployment of elements of his claim to engender support for his case is itself a reflection of his overall failure to deal with refugee status officers, the Authority and the Minister of Immigration with the candour that applications of this kind require and which, were he truly the devout Christian he claims to be, he would have manifested in any event. His withholding from Revd Sperring of the concession as to the falsity of the Iranian death sentence documents is indicative of the point.

(c) The argument that there must be a waiver which can be attached to a "particular" requires a waiver so clear and precise that only an express waiver would likely meet the claimed requirements. This would amend subs (4) by either removing the implied waiver provision or by reducing it to rare application, if not to surplusage.

(d) In any event, the Authority does not accept that s 129T(4) is to be read in the way argued for TD. The waiver relates not to "particulars", but to the "right to confidentiality under this section". Once express or implied waiver to that right has been established, particulars can be published whether or not the waiver can be attached to or related to the "particular".

[41] In the Authority's view the facts are clear. TD has, by his words or actions, expressly or impliedly waived his right to confidentiality of the whole of the *TD* decision delivered on 16 February 2009.

THE "SAFETY ENDANGERED" GROUND

[42] Section 129T(3)(f) provides that the statutory obligation of confidentiality does not apply if there is no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure of the particular circumstances of the case.

[43] TD has a mother and siblings living in Iran. Although he claimed that his mother had been questioned by the Iranian authorities about his (TD's) whereabouts and activities and while he also claimed that a brother had been arrested and questioned in the mistaken belief that he was TD, none of this evidence has been accepted by any of the three panels of the Authority which have heard his case.

[44] At no time has TD claimed that the extensive publicity received by his case in New Zealand has led to any relative or any other person in Iran being questioned, detained, harassed or otherwise ill-treated as a consequence. Additionally, at the hearing of the present application on 26 June 2009 no evidence was produced to show a serious possibility that the safety of any person in Iran would be endangered by the publication of the decision in *Refugee Appeal No. 76204*. General reference was made to the current political crisis in Iran consequent on the controversial outcome of the recent elections. But there is nothing in this to suggest that any member of TD's family or any person known to him might be at risk should the Authority's decision be published.

[45] Turning now to the situation in New Zealand, TD similarly produced no evidence in the context of the current application to show a serious possibility that his safety or that of any other person would be endangered by the disclosure of the Authority's decision of 16 February 2009. Given the very extensive publicity his case has received both before and after that date, the absence of such evidence is compelling.

[46] In submission Mr Illingworth did refer the Authority to evidence given at the third appeal hearing to the effect that during TD's period in prison he was allegedly "hassled" by other Muslim prisoners and that they would bang on his cell door. On one or more occasions his bed was said to have been urinated on. A fellow Iranian prisoner allegedly threatened that should he (TD) return to Iran "something would happen". The third panel was also told that at TD's workplace he was originally in a work group comprising Muslims but he was later transferred to a non-Muslim team as it was thought that he would "fit in better".

[47] None of this evidence, whether taken singly or in combination, comes close to establishing a serious possibility that TD's safety in New Zealand would be endangered by the publication of the Authority's decision. Rather, the very absence of incidents both before his detention in prison and after his release provides powerful

support for the inference that publication of TD's decision will not endanger his safety in terms of the statutory provision. Such incidents as were experienced by him were within the confines of a prison environment and in any event, it is to be noted that the incidents did not rise beyond the level of minor harassment.

[48] Additionally, there is no reason to believe that TD will not be able to access effective protection from the New Zealand Police.

[49] It follows that there is no serious possibility that the safety of TD or any other person would be endangered by the disclosure of the Authority's reasons for decision.

CONCLUSION ON PUBLICATION

[50] Both the waiver and the "no serious possibility of endangerment" exceptions to the confidentiality obligation apply to the *TD* decision. Ordinarily, this would lead to a direction by the Authority that the decision of 16 February 2009 may be released in unredacted form.

[51] However, no useful purpose would be served by singling out TD as the only appellant whose name is published on the Authority's website. In the interests of uniformity his name should be redacted from the decision although, for the reasons given earlier, it may not be difficult for a diligent or knowledgeable searcher to identify the redacted decision as relating to TD. But the consequential disclosure of his identity will not, in the circumstances, be a breach of s 129T(1).

APPEAL NO. 76299 - WITHDRAWAL OF APPLICATION

[52] By notice dated 4 June 2009 Mr Sutton advised that his client withdrew the application in *Appeal No. 76299* on the basis that Mr Sutton and Mr Illingworth had come to a private arrangement whereby Mr Sutton would be provided (by Mr

Illingworth) with a copy of the *TD* decision, on the following terms:

(a) The copy would not contain paragraphs [12] to [128].

(b) The copy was to be used only for the purposes of Mr Sutton's appeal to the Authority and on completion the copy was to be returned to Mr Illingworth.

(c) The copy could not be shown to anyone, including Mr Sutton's client.

(d) On receipt of the copy Mr Sutton's client would withdraw the application for disclosure of the decision.

[53] The Authority does not, in the circumstances, accept that it is open to Mr Sutton's client to unilaterally withdraw the application after engaging the Authority's processes. The Authority necessarily controls its own procedure (Schedule 3C, clause 8) and leave is required before an application of this nature can be withdrawn.

[54] This is not a case where, for private purposes, Mr Sutton has approached counsel for a refugee claimant to obtain a copy of an unredacted and therefore confidential decision of the Authority. To the contrary, the *TD* decision has been sought from the Authority by way of formal application in the context of Mr Sutton's representation of an unrelated refugee claimant whose case is presently before the Authority. The Authority has an independent responsibility to Mr Sutton's client to consider whether a copy of the *TD* decision is to be released and if so, whether it is to be in redacted or unredacted form. Furthermore the Authority has an interest and duty beyond that of Mr Sutton's client, namely to consider publication in terms of s 129T(3)(e) and Schedule 3C, clause 8, or release in terms of s 129T(3)(f) or (4). Private arrangements between TD and other refugee claimants cannot be allowed to usurp these independent responsibilities and functions of the Authority.

[55] The terms of the agreement between Mr Sutton and Mr Illingworth are highly restrictive. They would preclude Mr Sutton and the Authority from accessing the discussion in *TD* of the legal issues surrounding credibility (paras [53] to [56]) and the discussion of the role of expert evidence in the assessment of credibility (paras [57] to [59]). But above all, the discussion of the good faith principle would be decontextualised from the facts and findings.

[56] It offends basic precepts of the rule of law that a refugee claimant should have to negotiate with other claimants to gain access to the Authority's decisions. For the reasons given, the statutory provisions assume that the decisions will normally be published, albeit in a redacted form. Although the statutory provisions do not expressly say so, taken in conjunction with well-established principles of the common law, they establish a duty on the Authority to publish its decisions, a duty which is subject to the express terms of s 129T. Just as in some circumstances those provisions require confidentiality as to the very fact or existence of a claim (s 129T(2)), so too do they specify exceptions to the confidentiality duty.

[57] As a public statutory body performing statutory functions, the Authority must be vigilant to ensure that it discharges its public obligations. Those obligations cannot be qualified or overridden by private arrangements concerning access to its own decisions.

[58] The Authority accordingly declines leave for Mr Sutton's client to withdraw the application. Anticipating this ruling Mr Sutton's fallback position was to press for full disclosure of the *TD* decision. The ruling may well be academic in the sense that the application by Mr Mansouri-Rad has not been withdrawn and the Authority's independent functions and obligations require it to rule on the publication issue in any event. Nevertheless the proposed "private" arrangement raises an issue of principle

which is best addressed rather than ignored.

DIRECTIONS

[59] The Authority directs:

(a) That the *TD* decision be released to Mr Sutton and Mr Mansouri-Rad but redacted to the extent that TD's name is removed wheresoever it might be found in the decision.

(b) That the *TD* decision be published on the Authority's website, but redacted to the extent that TD's name is removed wheresoever it might be found in the decision.

(c) That such publication on the Authority's website not take place earlier than seven days from the date of this decision.

"Rodger Haines"

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Rodger Haines QC

Deputy Chairperson