IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-003375
[2015] NZHC 2380

BETWEEN	K Plaintiff
AND	ATTORNEY-GENERAL Defendant

Hearing:	10 August 2015
Appearances:	G M Illingworth QC & G Ghahraman for the Plaintiff J Foster, T Westaway & C J Pendleton for the Crown
Judgment:	30 September 2015

JUDGMENT OF NATION J

The issues in summary

[1] These are judicial review proceedings. Mr K is asking this Court to overturn a decision of a Refugee Protection Officer refusing to keep information provided by Mr K's witnesses confidential to the officer and a limited number of people within the Refugee Status Branch. He is also seeking a declaration or order to effectively bring an end to the current enquiry because of delay.

Background

[2] These events began when the Immigration Act 1987 was current, the immigration issues were dealt with within the Department of Labour and Mr K's situation was being dealt with by a refugee status officer.

[3] On 29 November 2009, the Immigration Act 2009 came into effect.[1] Mr K's status has been the subject of an inquiry by a Refugee Protection Officer (RPO) who operates within the Refugee Status Branch (RSB) which is part of the Ministry of Business, Innovation and Employment (MBIE).

[4] In this judgment, references to the RPO and RSB should, when appropriate, be taken as references to the immigration refugee status officer and offices dealing with Mr K's situation under the 1987 Act and when this was within the Department of Labour.

[5] […]

[6] […]

[7] […]

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[11] […][2]

[12] […]

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[16] […][3]

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1 Immigration Act 2009, s 2(1) with exceptions listed at s 2(2)-(5).
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[17] […]

[18] […][4]

[19] […]

[20] […]

The pleadings as to confidentiality

[21] Mr K claims the RSB's refusal means he cannot effectively answer the allegations that have been made against him in the RSB proceedings. He complains that the refusal, as contained in a letter from the RSB of 5 December 2014, constituted the exercise of a statutory power and was:

- unreasonable;
- a breach of natural justice;
- contrary to the New Zealand Bill of Rights Act 1990 (NZBORA);
- based on errors of law; and
- based on irrelevant considerations.

[22] Mr K asks the Court to set the RSB's decision aside and for the Court to remit the case back to the RSB with such directions as the Court deems fit. He also asks the Court to exercise its inherent power to make such orders as might be necessary to protect the confidentiality of Mr K's witnesses if the Court found the RSB should have taken the measures which Mr K wanted to protect his witnesses.

[23] The RSB acknowledges it has corresponded with Mr K and his lawyers as claimed. It has not pleaded to matters of law as alleged in the statement of claim but says it offered to put in place various administrative and procedural protection measures over and above the protection afforded by s 151 of the 2009 Act in an attempt to provide a fair solution for Mr K.

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[24] By way of affirmative defence, the defendant pleads that, if there had been an error or errors of law in any of the respects alleged by Mr K, the Court should exercise its discretion against granting relief and dismiss the application on the following grounds:

(a) The application for judicial review is of a preliminary interlocutory decision and is premature.

(b) Any error of law by the RSB in its preliminary decision, to the extent there is a sufficient nexus with the outcome in the RSB's final determination, may be corrected on appeal to the IPT where there is a completely *de novo* inquiry before legally trained, specialist tribunal members and where the plaintiff may apply for witness protection orders in respect of his witnesses' statements.

Correspondence

[25] […]

[26] […]

[27] […]

[28] […]

[29] Against the background of that correspondence, I find Mr K's lawyers said they needed to put forward information and statements obtained from witnesses for Mr K to fairly present his case to the RPO but for them to do so:

(a) they required an undertaking from the RPO that disclosure of the witness statements would initially be restricted to:

- the RPO determining the matter;
- the Manager, Legal Services;
- the Manager of the RSB;

- the Adviser (immigration proceedings) at MBIE; and
- any counsel instructed by MBIE in relation to Mr K;

(b) they required an undertaking that the identity, whereabouts or evidence of Mr K's witnesses would not be disclosed, directly or indirectly, to Rwandan authorities or to any other person, Government department, agency or entity without notice to Mr K's counsel with information as to why the disclosure was necessary and would not endanger the safety of the witnesses or their families. Any recipient would also have to undertake not to disclose the information received "to any person, government or agency" and, in particular, not to make such disclosure, directly or indirectly, to the Rwandan authorities; and

(c) the RSB should give these undertakings in advance of the RPO receiving the specific information provided by these witnesses, or specific information that had been obtained as to why such particular measures were needed for their protection.

[30] I find the response of the RPO was:

(a) The only limitations he should be legally subject to, in terms of disclosure, should be those in s 151 Immigration Act 2009.

(b) Disclosure of the statements within the RSB should not be limited to the officers referred to by Mr K's lawyers.

(c) In exercising his functions, the RPO would advise Mr K in advance of any intention to provide the statements beyond MBIE and its lawyers, explain why he was planning to do so and allow time for Mr K to respond before proceeding.

(d) The RPO would also ensure anyone receiving the information was aware of its confidential nature and of the responsibilities the recipient had in terms of respecting its confidentiality under s 151.

(e) The RPO did not consider he had the power, in terms of s 151, to limit the extent to which the information he received would be available to other New Zealand government officials, including the Minister of Immigration and his delegates, the Police, Crown Law, the Attorney General and the Ministry of Foreign Affairs and Trade, having regard to s 151(2), particularly once a decision as to cancellation had been made.

(f) Section 151 was not to be interpreted as simply permitting the disclosure of information obtained to another government department. It was to be interpreted and applied on the basis that it required disclosure, if requested for legitimate purposes.

(g) Where any individual or agency (to whom s 151 permitted disclosure) requested information, the RSB should be able to deal with such request in the particular circumstances so that its discretion to do so should not be limited through any binding confidentiality agreement prior to receiving the information.

[31] The decision of the RSB which I am asked to review is set out in the letter of 5 December 2014. It stated:

> The Ministry of Business, Innovation and Employment ("the Ministry") has carefully considered your proposals for the handling of evidence from witnesses who wish for certain defined confidentiality measures to be attached to that evidence. The Ministry remains of the view that it would be unlawful to bind itself in the manner you seek and that it is unable to offer more than the measures outlined in our previous correspondence, consistent with section 151 of the Immigration Act. We remain open to that arrangement.

Other evidence

[32] In judicial review proceedings, the Court is normally asked to review the decision that has been made against the record of the process and the evidence or information through which the decision was made.[5] The correspondence referred to above was part of that information. It was made available to the Court through the affidavits of the RPO, Mr Young, and Mr McLeod.

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5 *CD v Immigration and Protection Tribunal* [2015] NZCA 379 at [22].

[33] Somewhat unusually, the Court has, without objection from either side, been presented with a significant amount of further information, no doubt with the belief that this Court needs to be fully informed as to the context in which particular issues have to be decided.

[34] […]

[35] […] [Mr McLeod] referred to what he described as Rwanda's appalling human rights record and in particular its treatment of defence witnesses, and provided the Court with information from various international agencies as to this.[6]

[36] […]

[…]

[37] […]

[38] […]

[39] […]

[…]

[40] […]

[41] […]

[42] […]

[43] Ms Manning stated her evidence was in reply to that of the RPO, Mr Young. She is a barrister in practice in Auckland. She referred to her 16 years' experience in the field of refugee law and her experience in representing hundreds of asylum

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6 Human Rights Watch "Law and Reality: Progress in Judicial Reform in Rwanda" (Human Rights Watch, New York, 2008). Amnesty International "Safer to Stay Silent" (Amnesty International Publication 2010); Redress "Testifying to Genocide: Victim and Witness Protection in Rwanda" (Redress, London, 2010); *Prosecutor v Kanyarukiga (Judgment)* ICTR Appeals Chamber ICTR-2002-78-R11 bis, 30 October 2008 at [26].

seekers in New Zealand in their refugee applications to the RSB and in appeals to the Tribunal. She referred to her association with refugee communities in Auckland.

[44] Ms Manning's evidence and involvement as counsel, in particular cases which she referred to, demonstrates her commitment to obtaining the protection of refugee status for her clients who wish to remain in New Zealand because of their fear of persecution in their home country. She did not, however, purport to give evidence to this Court as an expert and did not acknowledge in her affidavit that she was aware and was giving evidence in accordance with the Code of Conduct, pursuant to r 9.43(2) High Court Rules.

[45] It is not necessary to traverse or summarise all the points Ms Manning was making in her evidence but I have noted:

i. It is common for witnesses from or connected with the home country of a refugee to be genuinely afraid that, if they provide relevant evidence to New Zealand authorities in support of the refugee, they or their families may be subject to persecution in their own country.

ii. It is thus common for such potential witnesses to want assurances of absolute confidentiality in relation to any information they do provide.

iii. It is the view of a number of advocates for such refugees and those wishing to rely on such witness statements that:

> The integrity of the refugee determination process in New Zealand hinges on refugee claimants being able to provide full information to the RSB and the Tribunal about their claim and their fears of return to their home country, in a safe and protective environment.

iv. It is her opinion that RSB policies, even if they were in accordance with the Act, would not address the concerns of witnesses in Rwanda who were afraid of information they provided ever being disclosed to Rwandan authorities.

v. She considered claimants seeking asylum were being misled by MBIE publications as to the extent to which information such claimants might provide would be confidential. This was particularly so when such a document published in June 2015 stated for the benefit of asylum claimants "the information you provide during the asylum process will not be disclosed to the authorities in your home country without your permission".

vi. It is her opinion that, before refugee claimants and their witnesses could be expected to provide confidential refugee information, it should be "a condition precedent that they are given express guarantees about the confidentiality attached to that information – including any clearly delineated limits on the confidentiality which attaches to the information".

[46] In response to the affidavit of Ms Manning, the Manager of the RSB, Mr Ellis, swore an affidavit of 6 August 2015. In his affidavit he responded to what he saw as Ms Manning's opinion that the RSB did not take seriously its obligations of confidentiality, as set out in s 151. His evidence was that the RSB is most conscious of its confidentiality obligations under the Act, takes these obligations seriously and has in place procedures to ensure those obligations are recognised and implemented by its officers. Insofar as is relevant to the current proceedings, he has confirmed the RSB proceeds on the basis:

(a) Section 151(2)(a) expressly permits an RPO to make inquiries in relation to a refugee claimant for the purposes of determining the claim or matter.

(b) The Act does not require an RPO to seek the consent of a refugee claimant in carrying out such an inquiry and the RPO has broad powers of inquiry mandated by s 136(2) of the Act. While acknowledging the UNHCR's 2005 advisory opinion on the rules of confidentiality regarding asylum information, the RSB proceeds on the basis of New Zealand law as per the Act or the case law of the Tribunal.

(c) The Act does not require an RPO to consult with a claimant before conducting any enquiries. They proceed on the basis that the decision maker must be able to test the facts so long as it is safe to do so.

[47] The information provided with these affidavits indicates that, in genocide-related proceedings against Rwandans, Courts and reputable non-government agencies have recognised a residual risk of unlawful interference with witnesses which may lead to prosecutions being based on false evidence or defendants being unable to call witnesses whom they need in their defence.

[48] There have been instances where Courts in other jurisdictions have "refused to decline or revoke refugee status" or to permit extradition back to Rwanda because of the risk the refugee would not receive a fair trial in Rwanda, in part because of the difficulty the refugee would face in obtaining evidence from witnesses or because of the risk that prosecution witnesses would be forced or otherwise induced to give false evidence against them.

[49] The United Kingdom Supreme Court also recognised the real risk that witnesses would be interfered with by Rwandan authorities in *W (Algeria) v Secretary of State*.[7]

[50] The International Criminal Tribunal for Rwanda (ICTR), for similar reasons, has refused to transfer accused for trial in Rwanda.[8]

[51] There have also been occasions in other jurisdictions where Courts have, over more recent years, been willing to allow refugees suspected of genocide to be tried in Rwanda and, in making those decisions, have not considered the threat to witnesses as sufficiently serious to prevent such a trial taking place.[9]

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7 *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8, [2012] WLR 610 at [19].

8 *U (Rwanda)* [2015] NZIPT 80003 at [809]-[828]; *Prosecutor v Kanyarukiga*, above n 6.

9 *Ahorugeze v Sweden* (37075/09) Section V, ECHR 27 October 2011; *Mugesera v Canada (Minister of Citizenship and Immigration)* [2012] FC 32; *Prosecutor v Jean-Claude Iyamuremye* (UTL-I-2013037376) Extradition Chamber, District Court of the Hague 30 December 2013; *Prosecutor v Jean-Baptiste Mugimba* (UTL-14/428) Extradition Chamber, District Court of the Hague, 11 July 2014; *Director of Public Prosecutions v T* (105/2013) First Division, Supreme Court of Denmark 6 November 2013.

[52] In *Prosecutor v Uwinkindi*, the ICTR was prepared to accept, on the basis of affidavits from counsel, that witnesses did have genuine fears over giving evidence for an alleged genocidaire.[10] The ICTR recognised that there was potential for such witnesses to be interfered with in Rwanda but considered the risks associated with this were not sufficient to avoid the accused being tried in Rwanda. However, the ICTR noted that any such trial would take place under the auspices of the ICTR with measures available to it in ensuring protection for relevant witnesses.

[53] […][11]

[54] […][12]

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[55] […][13]

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[…][14] [15] [16]

[57] […][17]

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[58] […]

[59] […]

[60] […]

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[10] *Prosecutor v Uwinkindi (Judgment)* ICTR Referral Chamber ICTR-2001-75-R11 bis, 28 June 2011 at [90].

[11] […]

[12] […]

[13] […]

[14] […]

[15] […]

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[17] […]

[61] […]

[62] […]

[…]

[63] […][18]

[…][19] [20]

[64] […]

[…]

Discussion

[65] It is against all that background that the plaintiff asks this Court to review the RSB's decision to refuse confidentiality for Mr K's witness statements.

[66] Counsel for the plaintiff and Ms Manning in her affidavit have drawn the Court's attention to the way the Convention requires confidentiality and the way international human rights law guarantees rights to privacy and protection of individuals from arbitrary or unlawful interference. These principles are discussed in a UNHCR advisory opinion on the rules of confidentiality regarding asylum information dated 31 March 2005. The opinion stated:[21]

> General principles governing confidentiality require that the sharing of information with an external party should not jeopardise the safety of the individual concerned or lead to the violation of his or her human rights.
>
> …
>
> The right to privacy and its confidentiality requirements are especially important for an asylum-seeker, whose claim inherently supposes a fear of persecution by the authorities of the country of origin and whose situation can be jeopardised if protection of information is not ensured.

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21 UN High Commissioner for Refugees *Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information* (31 March 2005) at [3]-[4].

[67] Further:[22]

> … the State that receives and assesses an asylum request must refrain from sharing any information with the authorities of the country of origin and indeed from informing the authorities in the country of origin that a national has presented an asylum claim.

[68] Consistent with that advice, the advisory opinion stated that the authorities "must therefore seek in advance the written consent of asylum-seekers to check their personal data in the country of origin".[23]

[69] Although recognising the need for confidentiality in dealing with refugee issues, the advisory opinion did not contemplate that such an obligation of confidentiality should be absolute. Hence, the opinion stated:[24]

> It would be against the spirit of the 1951 Convention to share personal data or any other information relating to asylum-seekers with the authorities of the country of origin *until a final rejection of the asylum claim*.

[70] The advisory opinion also recognised that information may have to be disclosed and may require country of origin inquiries where there is suspicion that an asylum seeker has used forged documents to support his or her application. Because "access to accurate and reliable information is an essential condition for identifying who is, and who is not, in need of international protection". The opinion noted "[recourse] to information sources in the country of origin can therefore, in appropriate circumstances, be a useful means of helping to establish the facts of a claim for refugee status".[25]

[71] Inherently, such inquiries could require disclosure, in New Zealand's situation, beyond the RSB.

[72] The Court of Appeal, in *Attorney General v X*, also pointed out that there are a number of jurisdictions where domestic law permits refugee status to be shared with prosecuting authorities in appropriate circumstances.[26] Ellen France J noted

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22 At [5].
23 At [8].
24 At [4] (emphasis added).
25 At [19] and [22].
26 *Attorney-General v X*, above n 3, at [36]-[38].

this possibility of contact with the country of origin is acknowledged in the Convention itself.[27]

[73] The Supreme Court confirmed that s 129T of the 1987 Act (the precursor to s 151 of the 2009 Act), as an exception to the general requirement that confidentiality be maintained, permits disclosure of information produced in relation to an application for refugee status to officials who require the information to consider the applicant's possible extradition for specified crimes.[28] Wilson J noted that New Zealand's ability to give effect to the Convention would be prejudiced if s 129T were interpreted so as to exclude disclosure for officers considering extradition or prosecution.[29]

Natural justice and NZBORA

[74] Mr K claims the RSB's refusal to provide the guarantees of confidentiality he seeks is unlawful because it does not meet the requirements of natural justice. He argues this should be an essential element of the process by which the RSB determines whether or not to cancel Mr K's refugee status.

[75] I accept the RSB's process does have to meet the requirements of natural justice.

[76] There is a useful and succinct summary of administrative law principles to be applied in the immigration/refugee context in Fisher J's statement of four basic propositions in *Khalon v Attorney-General*:[30]

> (a) The authority performs a function which requires it to observe natural justice in general.
>
> (b) It is a fundamental requirement of natural justice that a party be given a reasonable opportunity to present his or her case with knowledge of the case which he or she has to meet.
>
> (c) The way in which that fundamental requirement is implemented will depend upon the context including the nature of the function which

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27 At [71].
28 *Attorney-General v X*, above n 3, at [16].
29 At [15].
30 *Khalon v Attorney-General* [1996] 1 NZLR 458 (HC) at 463 (citations omitted).

> the decision maker is called upon to perform … and the circumstances of the particular case which has come before that decision maker.
>
> (d) In refugee cases only the highest standards of fairness will suffice since questions of life, personal safety and liberty are at stake.

[77] In an immigration context, the Court of Appeal has stated:[31]

> Fairness must be observed in the exercise of discretionary powers. Fairness does give rise to a right to be heard, the only limitation to the extent of that right being what is reasonable in the particular circumstances having regard to the purposes which the Immigration Act seeks to advance and its provisions for safe-guarding the rights and interests of persons seeking to enter, return to or remain in New Zealand.

[78] Just what natural justice may require is to be determined having regard to the particular circumstances of the case and the legislation under which the statutory powers are being exercised.

[79] In *Daganayasi v Minister of Immigration*, Cooke J stated:[32]

> The requirements of natural justice vary with the power which is exercised in the circumstances. In their broadest sense, they are not limited to occasions which might be labelled judicial or quasi-judicial. Their applicability and extent depend either on what is to be inferred or presumed in interpreting the particular Act or on judicial supplementation of the Act when this is necessary to achieve justice without frustrating the apparent purpose of the legislation.

[80] The RSB's obligations, in terms of both meeting the requirements of natural justice and providing for confidentiality of information it receives and its rights to pass that information on to others, are determined to a significant extent by s 151 and the way the Supreme Court has interpreted such legislation in *Attorney-General v X*.

[81] I do not accept the submission made for Mr K that, with the enactment of the Immigration Act 2009, s 151 is not applicable to Mr K's situation or that it is to be interpreted and applied in a way different from what the Supreme Court considered to be appropriate with regard to the former provision (s 129T) in *Attorney-General v X*. This submission made at the hearing before me was in contrast to the way in

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31 *Chen v Minister of Immigration* [1992] NZAR 261 (CA) at 267.
32 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141.

which Mr K's advisers sought to advance their case in correspondence and discussions when seeking undertakings as to confidentiality from the RSB.

[82] Mr Illingworth argued that s 151(1) does not apply to the evidence of Mr K's witnesses because it has not yet been tendered to the RSB. The information is thus prospective only.

[83] Section 151(1) requires confidentiality as to the fact that a particular person is a claimant, refugee or protected person, "and as to the particulars relating to the person's claim or status".

[84] The issue on Mr K's claim is whether or not the RSB should be required to keep confidential the witnesses' statements once it had received them. The issue is thus not about confidentiality as to information which is prospective only.

[85] Secondly, Mr Illingworth submitted that statements obtained from witnesses opposing the potential cancellation of refugee status cannot be considered part of "the particulars relating to" that refugee's "claim or status" so as to engage the application of s 151. He argued that s 151 cannot apply to a witness statement relating to a cancellation enquiry where an individual already holds refugee status. I do not agree with that submission.

[86] Section 151(1) deals with confidentiality concerning a person who is "a claimant, a refugee, or a protected person". Section 151(1) thus can potentially provide for confidentiality in relation to someone who already has the status of a refugee. Next it provides for confidentiality "as to the particulars relating to the person's claim or status". The reference to status indicates s 151(1) may apply in respect of a person who already has refugee status.

[87] The section then refers to confidentiality having to be maintained "at all times during and subsequent to the determination of the claim or other matter". Section 151 thus deals not just with information that is received in connection with a claim for refugee status. The express reference to "other matter" provides for s

151(1) to apply when the RSB has given notice that it is considering cancellation of refugee status.

[88] In *Attorney-General v X*, the Supreme Court held "particulars" of the "case" of an applicant for refugee status as used in s 129T(1) of the Immigration Act 1987 should be construed as including not only the application as such but also any other information produced in support of it.[33] Section 151(1) provides for confidentiality "as to the particulars relating to the person's claim or status" but also states the obligations as to confidentiality "may require confidentiality to be maintained as to the very fact or existence of a claim or case".

[89] The term "particulars", as used in s 151(1) must be interpreted in the same way as the Supreme Court decided was appropriate in *Attorney-General v X*. The term "particulars" will thus include information provided by Mr K to the RSB in opposing the potential cancellation of his refugee status.

[90] Mr Illingworth argued that s 151 should not apply in the context of a cancellation inquiry because s 148 did not state that s 151 would apply to such proceedings. He suggested that was significant when s 148(b) stated:

> (b) sections 135, 136(3), 138(4)(a), (b), and (d), 138(5), and 149 apply, with any necessary modifications, as if the matter being considered were a claim and the person concerned were a claimant.

[91] Mr Illingworth referred to guidance provided by the Supreme Court that text and purpose are the key drivers of statutory interpretation. The Supreme Court has said that, in determining purpose, the Court must have regard to both the immediate and the general legislative context.[34]

[92] Mr Illingworth submitted that, if Parliament intended s 151 to apply in cancellation or cessation proceedings, it would have included s 151 in the list mentioned in s 148(b). He submitted the sole purpose of s 148 was to provide for

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33 *Attorney-General v X*, above n 3, at [13].

34 *Commerce Commission v Fonterra Cooperative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

the application of specific *standards* across refugee determination, cancellation and cessation.

[93] Mr Illingworth submitted that his submission as to the significance of s 148 was consistent with the wording of s 151(2). That subsection permits disclosure in certain circumstances of "the fact of a claim or particulars relating to a claim". There is the same wording in section 151(4).

[94] I reject his submission that this indicates Parliament intended that neither s 151(1) nor s 151(2) would apply to particulars or information obtained in an enquiry as to whether refugee status should be cancelled.

[95] Section 151(2) expressly references back to s 151(1). In my view it must have been intended to be referring to particulars relating to a person's "claim or status" and to "the determination of the claim or other matter". That is confirmed by s 151(5) which expressly authorises disclosure by an RPO when carrying out his functions under ss 136(2) or 149(1)(c) or (g). Those subsections refer to steps that may be taken by an RPO when carrying out his functions in relation to a claimant or "to a person whose recognition as a refugee or a protected person is being investigated". Section 151(5)(d) also states that, to avoid doubt, an RPO may disclose information under s 151(2)(a) when carrying out his functions for the purpose of determining the possible cancellation of recognition of a person as a refugee or a protected person.

[96] In *Attorney-General v X*, the Supreme Court commented that s 129T in the Immigration Act 1987 addressed both the use of information provided by an applicant for refugee status and the disclosure in limited and controlled circumstances of that information.[35] The same can be said of s 151.

[97] I agree with the submission made by Ms Foster, for the RSB, that s 148(b) provides for certain sections dealing with procedural matters to apply. Section 151 is, along with other sections under the heading "Miscellaneous matters", clearly intended to be of general application in the administration of the Act.

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35 *Attorney-General v X*, above n 3, at [17].

[98] Consistent with that, information can be disclosed to others only if there is no serious possibility that the safety of the subject person or any other person would be endangered by the disclosure of the information.[36] Subject to that, information received can be disclosed for the purposes set out in s 151(2), including to the Police or Crown Law. Anyone receiving the information will be under the same obligations as to confidentiality as the RSB. There is no statutory prohibition against the information being disclosed to or discussed with authorities in a refugee's country of origin if that is necessary for the investigation of a potential crime. [37]

[99] The RSB is not obliged to notify the person affected or to obtain that person's consent where it considers such further disclosure is required.

[100] With due regard to the way s 151 impacts on the RSB's obligation to meet the requirements of natural justice, I find the RSB's refusal to provide the undertakings sought as to confidentiality was not unlawful by reason of breaching the requirements of natural justice.

[101] Putting to one side the provisions of s 151, I do not consider the requirements of natural justice could fairly obligate the RSB to give a guarantee of continuing confidentiality as to particular witness statements in circumstances where it has not seen for itself in relation to each statement:

(a) how that statement was obtained;

(b) who it was from;

(c) the nature and extent of the witness's concerns as to the risks the witness might face if there is further disclosure; and

(d) what the witness has to say about the matters which are at issue.

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36 Immigration Act 2009, s 151(1)(b).

37 *Attorney-General v X*, above n 3, at [15]-[16].

[102] The requirements of natural justice should enable the RSB to investigate the truthfulness of statements which it has been asked to take into account in making the determination required, to the extent it considers this is necessary or possible.

[103] I would thus not set aside the RSB's decision of 5 December 2014 on the basis it failed to meet the requirements of natural justice or because it was contrary to the NZBORA.[38]

Error of law and irrelevant considerations

[104] I consider there was one way in which the RSB's decision was based on an error of law and thus an irrelevant consideration. At [31](e) above, I referred to my finding that the RPO did not consider he had the power in terms of s 151 to limit the extent to which the information he received would be available to other government departments. I also referred at [31](f) to the RSB interpreting s 151 as not just permitting the disclosure of information to another government department but requiring such disclosure if requested for authorised purposes. Those findings are consistent with the reason the RSB gave for declining to give the undertaking sought from it in their letter of 5 December 2014. In an email of 20 August 2014 to Mr K's lawyer, the RSB wrote:

> The RSB is bound by the requirements of section 151 Immigration Act 2009 and cannot agree to not disclose information to other NZ government officials for the purposes of those people carrying out their statutory functions as per section 151(2).

[105] In a letter of 29 September 2014, the RSB wrote:

> As you are aware, the RSB is bound by section 151 and unlike the Tribunal, does not have the power to make a witness protection order (WPO). The RSB cannot contract out of section 151, which it appears you are asking it to do – by effectively providing assurances which prevent other government agencies from seeing information provided in the claim process when they have a statutory role and function which allows them to access the information.

[106] The parties' respective positions were discussed at a meeting between counsel and the RSB on 17 October 2014. Mr McLeod followed up that meeting with a

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[38] New Zealand Bill of Rights Act 1990, s 27(1).

letter of 21 October 2014 recording the positions which the parties had adopted. There appears to have been no dispute as to the accuracy of that record.

[107] Mr McLeod's letter and report referred to the RSB reiterating its position that any binding undertaking not to share confidential witness statements or to share them in a restricted manner with agencies to whom s 151 applied, was outside its powers. The RSB contended that s 151(2) was not merely "permissive" but required the RSB to share information with those agencies or persons to whom s 151 applied. The letter also referred to the RSB seeing "the exercise of the discretion provided by s 151(2) as being able to be exercised freely each time a request to share information with another agency or individual arises". The RSB saw that interpretation as precluding it from providing any binding confidentiality framework with respect to witness information in any given case.

[108] I agree with the submission for Mr K that s 151 is a permissive section. It does not and would not prevent the RSB giving an undertaking or deciding in some other way to deal with information it received so as to limit the exercise of its powers to disclose information to others.

[109] This is consistent with the particular offers which the RSB made to Mr K and his lawyers in proposing that they would give Mr K and his lawyers notice of their intention to disclose information to any third party before actually doing so.

[110] […]

[111] On this basis, I could potentially set aside the decision made by the RSB as contained in their letter of 5 December 2014 and remit the matter back to the RSB for further consideration. Whether or not I do so is a matter for the exercise of my discretion.

Unreasonableness

[112] The remaining ground on which Mr K seeks review is that the decision made by the RSB in refusing to provide the guarantees as to confidentiality was

unreasonable. I do not consider the RSB's decision can be successfully challenged on that basis.

[113] The RSB was entitled to take the position that the only limitations it should be under in terms of disclosure should be those in s 151 Immigration Act. The RSB had shown it was mindful of its confidentiality obligations, including its obligation not to do anything which would endanger Mr K or other persons, in advising that it did not intend to make information available to Rwandan authorities and in agreeing to give Mr K and his advisers advance notice of its intention to disclose this information beyond MBIE and its lawyers, giving time to Mr K to respond (and, by inference, to take whatever steps it considered might be appropriate to restrain such disclosure if thought appropriate).

[114] It was also reasonable for the RSB not to enter into any arrangement which would prevent it from making any request for disclosure to an individual or agency to whom s 151 permitted disclosure in the particular circumstances of that request.

[115] Having regard to s 151(2), it was not unreasonable of the RSB to make it clear that information, subject to such notification, may have to be disclosed to other agencies, including the Minister of Immigration and his delegates, the Police, Crown Law, the Attorney-General and the Ministry of Foreign Affairs and Trade, particularly so if a decision were to be made that Mr K's refugee status should be cancelled. If New Zealand has to meet its treaty obligations by assisting in the prosecution of Mr K (which may ultimately not be the case), it would be proper and reasonable for the RSB to make available to prosecuting authorities the information it has received which may be relevant to Mr K's defence or other evidence which has been given by prosecution witnesses in the same way as it would be necessary and appropriate to disclose to those authorities the information which it has received directly from Mr K.

[116] I also consider it was reasonable of the RSB not to provide absolute undertakings as to confidentiality before they had received the specific information and statements which Mr K and his advisers wished to keep confidential.

[117] In connection with the submissions as to unreasonableness, counsel for Mr K argued that the RSB had unreasonably refused to give an undertaking that, if the RSB did decide to cancel Mr K's refugee status, it would follow this up with a deportation liability notice (DLN).[39] Mr K sought such an undertaking because he would have the right to appeal the RSB's determination to the authorities only if and when he was served with a DLN. The RSB refused to give such an undertaking because it did not wish to fetter the discretion which the Minister or his delegate might exercise with regard to any request that might be made to the Minister to permit Mr K to stay in New Zealand.

[118] In correspondence and in submissions for the RSB before me, it was indicated that deportation is the likely consequence of any cancellation of Mr K's refugee status. It was submitted the Court should proceed on the basis that, if Mr K objects to the ultimate determination that is made by the RSB with regard to cancellation, it is likely that he would have rights of appeal to the authorities.

[119] Given the complexities of this case, I do not consider it was unreasonable of the RSB to refuse to give the undertaking with regard to deportation which has been sought by Mr K.

Exercise of the discretion

[120] I have found the RSB was in error in thinking it could not, pursuant to an undertaking, limit the power it has to disclose what would otherwise be confidential information to third parties pursuant to s 151(2). I do not however consider this is a case where I should set aside the RSB's ultimate decision and require it to reconsider how it deals with the request. I exercise my discretion in this way because:

(a) the decision it ultimately reached was one it was lawfully entitled to reach having regard to s 151 and the judgment of the Supreme Court in *Attorney-General v X*;

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[39] Immigration Act 2009, ss 146(2) and 162(20.

(b) the decision which the RSB ultimately reached was not unreasonable for the reasons already stated;

(c) given the way in which the RSB was willing to deal with information it received, there would be an opportunity for Mr K and his advisers to take further legal steps to prevent disclosure if there is a real risk that such disclosure could be in breach of the RSB's statutory obligations under s 151; and

(d) if Mr K chooses not to put the statements obtained from witnesses before the RSB because of the RSB's refusal to provide the undertakings Mr K seeks, it is most unlikely that he will have lost the opportunity to have that information considered if the RSB decides to cancel his refugee status or appropriate Ministers or their delegates make decisions as to whether or not Mr K is deported to Rwanda or whether he faces charges either within or outside New Zealand.

[121] The likelihood is that he would have served on him a DLN and that he would ultimately have a right of appeal to the Immigration and Protection Tribunal. That independent body has its own powers and jurisdiction to receive and deal with witnesses in a way that could ensure they have the protection which they seek if the Tribunal considers that necessary. Although it is possible the Minister or his delegates might decide not to serve a DLN on Mr K, any decision made in the exercise of statutory powers which could unreasonably or unlawfully impact on Mr K's situation would be amenable to challenge by way of further judicial review.

[122] I should be able to rely on Mr McLeod, as an officer of the Court, not misleading me in any material way as to the information he has provided with regard to the fears expressed by witnesses and the need for confidentiality. Nevertheless, the fact remains that the Court is being asked to make significant rulings as to the extent to which information from these witnesses may or must be used under New Zealand legislation. That request is being made without the Court knowing, even in a general but edited way, what particular witnesses have to say about matters at issue and the basis for the fears each has expressed.

[123] Accordingly, the applicant is not entitled to the relief he seeks by reason of the way the RPO and RSB interpreted their obligations under s 151(2).

Delay

[124] I accept that, in the context of the exercise of statutory powers affecting the rights and interests of individuals, there will be an obligation on the decision maker to provide due process and to act reasonably and, as part of that, to avoid undue delay.[40]

[125] Delay has also been recognised as a specific ground for judicial review by the Court of Appeal.[41]

[126] Delay is, of itself, not normally sufficient to constitute a breach of the principles of natural justice. Without more, delay will not provide a sufficient basis for establishing unreasonableness or lack of due process in the exercise of a statutory power affecting an individual's rights or status.[42]

[127] By analogy with the way delay has been considered in the context of criminal proceedings, delay will justify a stay of proceedings, firstly, only if it is undue in the sense of "unjustifiable".[43]

[128] For delay to involve a breach of the principles of natural justice, it must have caused prejudice to the person who is seeking to rely on it.[44]

[129] Again, analogy with criminal proceedings, despite delay, the policy considerations for permitting the process to continue will be of more weight the more serious the conduct the Court is concerned with.[45]

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40 *Horton v Attorney-General* CA43/97, 3 December 1997; *In Re Otago Clerical Workers Award Z v Complaints Assessment Committee* [2006] NZAR 146 (HC).
41 *FB Duvall Limited v Commissioner of Inland Revenue* (2006) 22 NZTC 18,866 (CA) at [32].
42 *Daniels v Chief Executive of the Department of Work and Income* [2002] NZAR 615 (HC).
43 *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750.
44 *R v O* [1999] 1 NZLR 347 at [350].
45 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [31].

[130] I do not consider that, on the basis of its inherent jurisdiction or through the Court's jurisdiction on judicial review proceedings under the Judicature Act, it would be appropriate for me to effectively stay the RSB's inquiry to prevent an RPO from determining whether Mr K's refugee status should be cancelled.

[131] The inquiry which the RSB has embarked on has serious consequences for all concerned, not just Mr K but also for the New Zealand Government and the United Nations in terms of maintaining the integrity of the legislation and international conventions which provide protection for those who genuinely require refugee status. […]

[132] While such delays that have occurred may be making it more difficult for Mr K to obtain or provide evidence in his defence, the delay is not necessarily all to his detriment. It appears from the information which was provided to me that, despite continuing concerns about human rights abuses, the situation in Rwanda has become more stable. The ICTR has recognised that the difficulties for defendants in facing criminal proceedings are less now than they were some years ago.

[133] It is inherent in the inquiries which the RSB has to make and the difficulties of obtaining relevant information that there will be significant delays and time taken in reaching a final determination.

[134] Undoubtedly, that baseline of inevitable delay has been increased through the proceedings which Mr K has brought to clarify the obligations which the RSB has with regard to confidentiality and the provision of information to him. He has had some limited success with the steps he has taken but such benefits as he has obtained from the demands that have been advanced on his behalf have to be balanced against the delays that have resulted from the choice he made to pursue those demands. It is ironic that one of the complaints made on his behalf relates to the claimed prejudice caused by the addition of substantive allegations and evidence to the case to answer. One of his complaints, which was the subject of earlier judicial review proceedings which he took to the Court of Appeal, was that he had not been provided with sufficient information and the initial basis on which he was given notice of potential cancellation was insufficiently particularised.

[135] Significant delays have occurred in connection with the undertakings Mr K has sought as to confidentiality leading to the current proceedings. I have found Mr K is seeking to impose on the RSB obligations as to confidentiality which are more extensive than it is required to meet in terms of New Zealand legislation. He cannot reasonably complain of the delay that has resulted from his pursuing demands in this regard.

[136] […]

[137] A stay of the inquiry because of delay would have to be based on the requirements of natural justice. It would be wrong for me to bring the present inquiry being made by the RSB to an end when neither Mr K nor the RSB have put before me the detailed information on which the RSB are relying. I do not have Mr K's full response to that information including the information the RSB obtained from him over 10 days of interviews.

[138] The current inquiry by the RPO may result in Mr K seeking to challenge decisions that might be made by the RPO, the Immigration and Protection Tribunal, a Minister with regard to deportation or some other agency such as Crown Law with regard to the prosecution of Mr K. It would be more appropriate for the effects of delay to be considered if and when the Court is required to review any such decision. On such occasion, the Court should have before it all the information that has been considered in reaching that decision. For that reason, I agree with the submission made for the RSB that the application to stay the inquiry by reason of delay is premature.

Conclusion

[139] For all the above reasons, the applicant's claim for the relief detailed in the statement of claim is denied.

Costs

[140] If the defendant is to seek an order for costs, a memorandum is to be filed by 23 October 2015. A memorandum for the applicant in response is to be filed by 13 November 2015. The memoranda are to be no longer than five pages.

Suppression

[141] The judgment, as set out above, is to be provided to the parties who will be bound by the obligations of confidentiality as set out in the Immigration Act. I propose to release on 9 October 2015 the judgment with redacted from it all information relating to Mr K personally and all reference to a decision of the IPT which would otherwise be confidential. All those parts of the judgment which are not in the redacted version will be permanently suppressed. A copy of the redacted version of this judgment is also being made available to the parties. If counsel for either party considers the orders for suppression should be more extensive than proposed, they should file a memorandum forthwith.

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