NOTE: THE CONFIDENTIALITY OF THE NAME AND IDENTIFYING PARTICULARS OF THE APPELLANT AND OF HIS CLAIM OR STATUS MUST BE MAINTAINED PURSUANT TO S 151 OF THE IMMIGRATION ACT 2009.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA626/2015
[2016] NZCA 416

BETWEEN	K (CA626/2015) Appellant
AND	THE ATTORNEY-GENERAL Respondent

Hearing:	30 June 2016
Court:	Ellen France P, Wild and Miller JJ
Counsel:	G M Illingworth QC and G Ghahraman for Appellant I C Carter, T P Westaway and C J Pendleton for Respondent
Judgment:	21 September 2016 at 12.30 pm

JUDGMENT OF THE COURT
(PUBLIC VERSION)

A The application to adduce fresh evidence is declined.

B The appeal is dismissed.

C Judgment to be suppressed except in relation to those parts as will appear in a redacted version.

REASONS OF THE COURT

(Given by Miller J)

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Introduction

[1] The Refugee Status Branch[1] (RSB) is considering whether to cancel K's recognition as a refugee, on the ground that he procured it by giving false or misleading information. It has learned that he is accused of crimes against humanity — participation in the 1994 Rwandan genocide — and if so, he must have failed to disclose his past when he was granted refugee status in 1996.

[2] The RSB has obtained much information from various sources. It includes the evidence of witnesses who attest to K's leadership role in numerous killings. This information has been disclosed to K, who denies any involvement and accuses the Rwandan government of persecution. He wants to tender statements from witnesses who are said to exonerate him.

[3] Some of K's witnesses are said to fear retribution from the Rwandan government. In order to secure their statements K's solicitor, [whom we will call X], promised that neither their identities nor anything they have to say will be disclosed to the Rwandan government. This was to offer a degree of protection exceeding that

[1] A branch of Immigration New Zealand, which is administered by the Ministry of Business, Innovation and Employment (MBIE).

required by the Immigration Act 2009: the Act obliges officials to hold information about refugee claims and status in confidence but subject to exceptions that would permit disclosure to other agencies, including authorities in the country of origin, where that might aid the determination and can be done without putting the claimant or any other person at risk. So [X] asked that the RSB give a series of undertakings that would deliver the witnesses the additional protection he had promised them. The RSB refused.

[4] K asked the High Court to force the RSB to give or at least reconsider the undertakings, without success.[2] He now brings this appeal.

Statutory context

[5] The argument is first and foremost a question of construction of the Act,[3] and in particular, s 151. The obligation to hold information about refugees in confidence is found in subs (1):

> **151 Confidentiality to be maintained in respect of claimants, refugees, and protected persons**
>
> (1) Confidentiality as to the fact that a person is a claimant, a refugee, or a protected person, and as to the particulars relating to the person's claim or status, must at all times during and subsequent to the determination of the claim or other matter be maintained by all persons and, in a particular case, may require confidentiality to be maintained as to the very fact or existence of a claim or case, if disclosure of its fact or existence would—
>
> (a) tend to identify the person concerned; or
>
> (b) be likely to endanger the safety of any person.

[6] Exceptions are listed in subs (2):

> (2) Despite subsection (1), the fact of a claim or particulars relating to a claim may be disclosed—
>
> (a) for the purposes of determining the claim or matter, administering this Act, or determining any obligations,

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2 *K v Attorney-General* [2015] NZHC 2380 [High Court judgment].

3 The Immigration Act 1987 was in force when refugee status was granted, and subsequently when an investigation into the appellant began, but the 2009 Act governs the process of revocation and possible deportation: see *AW (Iran)* [2012] NZIPT 800193 (Minute of the Tribunal).

requirements, or entitlements of the claimant or other person concerned under any other enactment; or

(b) for the purposes of the maintenance of the law, including for the prevention, investigation, and detection of offences in New Zealand or elsewhere; or

(c) to the United Nations High Commissioner for Refugees (or a representative of the High Commissioner); or

(d) if the particulars relating to a claim are published in a manner that is unlikely to allow identification of the person concerned (whether in a published decision of the Tribunal under clause 19 of Schedule 2 or otherwise); or

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

[7] The first of these exceptions is elaborated upon in subs (5):

(5) To avoid doubt,—

(a) a refugee and protection officer may disclose information under subsection (2)(a) when carrying out his or her functions under section 136(2) or 149(1)(c) or (g):

(b) the chief executive may disclose information under subsection (2)(a) when collecting information on behalf of the Tribunal under section 229:

(c) the Tribunal may disclose information under subsection (2)(a) when carrying out its functions under section 228 or clause 10(1)(b) and (c) of Schedule 2:

(d) for the purposes of determining a claim, or cancelling the recognition of, or ceasing to recognise, a person as a refugee or a protected person, information may be disclosed under subsection (2)(a).

[8] Section 151 appears under the subheading "Miscellaneous matters" at the end of pt 5 of the Act, which governs refugee and protection status determinations. Part 5 authorises refugee and protection officers (RPOs) to make certain decisions; they include whether to recognise a person as a refugee under the Convention Relating to the Status of Refugees (the Convention),[4] whether to recognise a person as a protected person under the Convention against Torture and Other Cruel,

[4] Immigration Act 2009, s 137(1)(a), cross-referencing the definition of refugee in the United Nations Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), art 1A.

Inhuman or Degrading Treatment or Punishment (CAT) or the International Covenant on Civil and Political Rights (ICCPR),[5] whether to accept a claim for consideration,[6] whether to seek information from any source when determining a claim,[7] whether to cease to recognise a person as a refugee when grounds for that status no longer apply,[8] and, relevantly in K's case, whether to cancel refugee recognition on the ground that "recognition may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information".[9]

[9] The process is administrative and inquisitorial rather than judicial and adversarial. A cancellation determination follows a two-step inquiry: the RPO first decides whether refugee status was improperly procured; and, if so, the RPO decides whether at the date of the determination the person is still a refugee.[10] The second branch of this test will necessarily require the RPO to decide whether the person meets the statutory definition, namely that he or she has a well-founded fear of persecution in his or her country of nationality or habitual residence. This process recognises that a person who procured recognition by fraud but is not excluded under art 1F of the Refugee Convention may still be able to advance a claim to refugee status if there remains a well-founded fear of persecution in his or her country of nationality.

[10] Deportation does not follow automatically on cancellation of refugee status.[11] It requires either that extradition proceedings be taken or that a deportation liability notice (DLN) be served on the person.[12] Such notice is a usual but not inevitable consequence of losing refugee status. There is an issue about whether a DLN is a prerequisite to the person's right of appeal to the Immigration and Protection Tribunal (the Tribunal) under s 146(2),[13] but we need not determine it here. The

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5 Immigration Act, s 137(1)(b) and (c), cross-referencing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) [CAT] and the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) [ICCPR].

6 Section 134.

7 Section 136(2).

8 Section 143.

9 Section 146.

10 *BQ (Iran)* [2012] NZIPT 800165 at [7].

11 *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291 (CA) at 300.

12 Deportation by service of a DLN is undertaken under s 162 of the Immigration Act.

13 See the decision in *AJ (Pakistan)* [2012] NZIPT 800193.

material point for our purposes is that one way or another, K would not actually be deported without judicial proceedings in which he might seek relief "on the facts and on humanitarian grounds".[14] Those grounds include any risk of persecution should he be returned to Rwanda. We return to this topic at [43] below.

[11] The Act provides in s 148 that when making a determination to cancel recognition under s 146, certain provisions of pt 5 apply "as if the matter being considered were a claim and the person concerned were a claimant". Those provisions are ss 135, 136(3), 138(4)(a), (b) and (d), 138(5) and 149. The last of them, s 149, is one of the miscellaneous provisions. It provides inter alia that a refugee and protection officer may seek information from any source and may require the person to attend an interview and supply information; if the person does not comply the determination may be made without the information or interview:

> **149 Powers of refugee and protection officers**
>
> (1) In carrying out his or her functions under this Part in relation to a claimant or to a person whose recognition as a refugee or a protected person is being investigated, a refugee and protection officer may—
>
> (a) require the person to supply such information, and within such times, as the officer reasonably requires:
>
> (b) require the person to produce such documents in the person's possession or within the person's ability to obtain as the officer requires:
>
> (c) inform the person that any other person may be required to produce or disclose relevant documents or information relating to the person, and require the other person to produce or disclose, as the case may be, any relevant documents or information relating to the person:
>
> (d) if the officer has good cause to suspect that a person other than the person concerned has in his or her or its possession or control any document of the person concerned (including any passport or travel document), in the prescribed manner request that other person to produce that document:
>
> (e) require the person to allow biometric information to be collected from him or her:

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[14] Section 162(2)(b). The right of appeal on the facts applies only to someone who has not been convicted of an offence where it is established that he or she acquired refugee status by fraud, forgery, false or misleading representation, or concealment of relevant information. The appellant has not been charged with or convicted of such an offence.

(f) require the person to attend an interview:

(g) seek information from any source:

(h) determine the claim or matter on the basis of the information, evidence, and submissions provided by the person.

…

(4) Where a person who is required to attend an interview fails to attend at the appointed time and place, the refugee and protection officer may determine the claim or matter without conducting the interview.

[12] We observe that s 151 is not one of the sections that is expressly said in s 148 to apply to cancellation determinations. However, s 151(5)(d) permits disclosure of information under s 151(2)(a) "for the purposes of … cancelling the recognition of … a person as a refugee". And s 151(5) declares for the avoidance of doubt that a refugee and protection officer may disclose information under s 151(2)(a) when performing his or her functions under s 149(1)(g), which authorises the officer to obtain information from any source. Section 149 is one of the sections specified in s 148.

The appellant's request for irrevocable undertakings of confidentiality

[13] The factual and procedural background is extensive. We need not rehearse it, partly because some of the detail appears to have been directed at a claim, realistically not pursued on appeal, that the determination should be stayed for delay. We confine our discussion to material that bears on the decisions we must make.

[14] Briefly, K and [redacted] are Rwandan nationals who were recognised as refugees by the United Nations High Commissioner for Refugees (UNHCR) and granted refugee status in New Zealand. He was granted resident status in New Zealand on 13 March 1996 and currently holds a permanent residence visa.

[15] [K has been identified as an alleged perpetrator] of the 1994 genocide in Rwanda. In June 2006 a Department of Labour representative went on a joint mission to Rwanda with representatives from the New Zealand police and the Ministry of Foreign Affairs and Trade. The mission conducted an investigation [redacted] relating to K. [Redacted] His name also appeared in evidence in genocide

trials in the United Nations International Criminal Tribunal for Rwanda in Tanzania. Witness statements and transcripts were obtained from these trials. Officials also consulted a French academic specialising in the Rwandan genocide.

[16] The allegations against K now include, by way of example, claims that he [was involved with] the Interahamwe, a paramilitary group, when specific massacres or murders of named victims took place at particular places. [Redacted]. There are numerous such incidents. He denies involvement and says he is being persecuted by the Rwandan government, which has procured witnesses to make allegations against him.

[17] These grave allegations inevitably led the RSB to revisit K's refugee status, on the basis that he may have committed crimes against humanity (including genocide), serious non-political crimes or acts contrary to the purposes and principles of the United Nations. That would exclude him from refugee status under art 1F of the Convention. The procedure followed is that an RPO serves a "notice of intended determination concerning loss of refugee status" on the person, who has 20 working days in which to respond and request an interview. After the interview the RPO prepares a report, which is copied to the person, and following final written submissions a decision is made.

[18] In K's case this process has taken a very long time. Notice was given on 18 September 2006, and time for compliance was extended by agreement. K has been interviewed. [X] reviewed information disclosed to him by the RSB, and [redacted]. He states that numerous people [redacted] wanted to give evidence for K but were not prepared to do so because of fears of "recrimination" from the Rwandan authorities. He explains that the majority of the 19 witnesses [redacted] would do so only on the condition that their evidence would be kept completely confidential. Just three witnesses did not insist on it. [Redacted].

[19] [X] also says that a number of witnesses living outside Rwanda have expressed fears for their safety, or that of relatives still in Rwanda, and insisted upon assurances that their evidence will not be disclosed to the Rwandan government. One witness travelled to New Zealand and provided [X] with a detailed written

statement in support of the appellant, but stipulated that he would not tender the statement or appear to give evidence unless given an express assurance by the RSB that his statement, its contents, his identity as a witness and any other identifying particulars would be kept strictly confidential and would not be disclosed to the Rwandan government.

[20] There has been a good deal of correspondence between [X] and the RSB about confidentiality for those of K's witnesses who seek it. He required a written undertaking, made before the RSB received the statements, that:

(a) disclosure would initially be limited to a very narrow group of four persons comprising the RPO, the Manager, Legal Services, the manager of the RSB, and any counsel briefed for K's case;

(b) the RSB would consider, having regard to detailed submissions which would accompany the statements, whether certain specified additional protection mechanisms were warranted; and

(c) if such mechanisms were warranted they would be implemented. If not, the statements would be returned.

[21] The additional protection measures required further undertakings that:

(a) disclosure would be limited to the same officials;

(b) none of the evidence and no identifying details of the witnesses would be disclosed to any other person, except that disclosure might be made to another "person, government department, agency or entity" if:

(i) notice of intention to disclose had been given to K's counsel in advance, accompanied by reasons why disclosure was necessary and would not likely endanger the safety of witnesses or their family members, and K's counsel had been given an adequate opportunity to be heard; and

(ii) ten working days' notice would be given to K's counsel before disclosure took place; and

(iii) disclosure would not be made without securing in writing from the recipient:

1. an undertaking that they had read the RSB undertakings and "will not disclose in any form, directly or indirectly, the identity, present whereabouts or evidence, (including all supporting material) of the protected witnesses to any other person, government or agency — and in particular will not make such disclosure, directly or indirectly, to the Rwandan authorities"; and

2. an acknowledgement that any breach of the undertaking would be an offence under s 354 of the Act, punishable by up to three months' imprisonment and a fine not exceeding $10,000.

[22] The meaning of the proposed undertakings is not entirely clear. We interpret them, consistent with the argument before us and [X's] assurances to the witnesses, to mean that the RSB would be permanently precluded from direct or indirect disclosure of any of the evidence to Rwandan authorities under any circumstances, even if that might be done on a basis that did not put anyone at risk or even if circumstances changed so that protection was no longer needed. So far as disclosure to other persons, government departments, agencies and entities is concerned, the RSB could not disclose at its discretion under s 151(2), but the process requirements might trigger a review by a court, presumably on judicial review sought by K in response to a notice of intention to disclose. The undertakings also presume that disclosure would be an offence under s 354.

[23] In subsequent negotiations with the RSB, K's counsel maintained that these "clear and lasting guarantees of confidentiality" were necessary if K was to exercise

his "right to gather evidence and submit all witness statements provided in furthering his defence case".

[24] The RSB refused to give these undertakings. It advanced a number of objections:

(a) It believed that under s 151(2) it must make disclosure to other New Zealand government agencies and officials as appropriate, so that those agencies and officials might perform their own statutory functions. In correspondence, K's counsel accurately summarised the RSB's position in this way:

> "… the RSB interprets s 151(2) as requiring information to be shared with specified individuals or agencies in every case without the possibility of tailored frameworks".

(b) It insisted that any agreement must be capable of review and amendment.

(c) It pointed out that other officials within the Ministry of Business, Innovation and Employment (MBIE), such as those within its Country Research Branch, might need to see the information.

(d) It suggested that any defined measures should be limited to the fact that a given person was a witness and the information in their witness statement. It pointed out that the undertakings were unworkable insofar as they protected any mention of a witness; information about the person might be public already, for instance.

(e) It noted that under s 151(6) confidentiality can be waived and stated that this must continue to apply to any defined measures.

(f) It emphasised that any defined measures would not bind the Tribunal or any court in New Zealand.

[25] The RSB recognised that some witnesses may fear for their safety, whether or not such fear is objectively justified. It was willing to undertake that no person in MBIE would disclose the fact that a witness had provided a statement or the content of any such statement. But s 151(2) would continue to apply and it required, rather than permitted, disclosure to other agencies where requested for authorised purposes. However, the RSB would advise K in advance of a proposed disclosure to any other person, government department, agency or entity. It would also ensure that anyone receiving the information was aware of its confidential nature, and their obligations under s 151, and any defined measures agreed to. The RSB also noted that:

> … any confidentiality measures that would hamper or prevent the RPO from verifying information may have a negative effect on the weight that can be attached to them when the final determination is made.

[26] The parties pursued agreement, but it proved impossible. The RSB maintained in a letter of 5 December 2014 that it would be unlawful to bind itself in the manner required by K. That letter is the subject of the application for review.

The parties' current positions

[27] Nation J held, contrary to the RSB's contention, that s 151 is permissive:[15]

> 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.

[28] However, he held that the RSB did not err in this case. It could not fairly be required to give a guarantee of continuing confidentiality as to particular witness statements when it had not seen for itself how the statement was obtained, and from whom, the nature and extent of the witness's concerns about security, and what the witness has to say about the matters in issue.[16]

[29] Mr Carter did not challenge the Judge's conclusion that s 151 is permissive. He accepted that the RSB may provide confidentiality safeguards to the extent that they are consistent with s 151. However, he submitted that the Crown cannot be bound by undertakings to a procedure that would interfere with its statutory or public

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15 High Court judgment, above n 2, at [108].
16 At [101].

duties, or where there is a satisfactory reason not to implement the procedure. An assessment must be made in any given case when the RSB is considering disclosure. That assessment will include to whom and for what purpose disclosure is to be made and whether the recipient must be warned about the requirements of s 151. To require an undertaking that would limit its ability to disclose information would be to fetter the RSB's discretion unlawfully.[17]

[30] Mr Carter submitted that the particular undertakings sought would limit the RSB's discretion because they limit disclosure of any kind or for any purpose and prevent disclosure regardless of circumstances, including the reason for the disclosure, the nature of the information to be disclosed, and the possible absence of any real risk. He emphasised the permanence of the undertakings, noting that the Tribunal made witness protection orders in another case but held that it would be neither desirable nor practical to make them irrevocable.[18] He argued that the undertakings would relinquish control to the claimant, contrary to the language and policy of the legislation: the onus is on the claimant (including in cancellation cases), and the RSB is empowered to verify claims for fraud and seek independent evidence from any source that it thinks appropriate.

[31] In this case, Mr Carter specified, the RSB wants to be able to make inquiries of Rwandan authorities if thought appropriate. Such inquiries will protect the identity of witnesses. Generally, the RSB does not think that the subjective fears of witnesses are warranted. In the past witnesses have had reason to fear retribution from the Rwandan government, but that is no longer true. Counsel cited recent instances in which a number of jurisdictions have returned claimants to Rwanda to face trial.[19]

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17 *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at [48]; *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176, [2013] NZAR 1409 at [118]; and GDS Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [15.68] and [15.75]–[15.77].

18 *X* [2013] NZIPT 800003 at [75].

19 *Ahorugeze v Sweden* (2012) 55 EHRR 2 (ECHR); *Mugesera v Minister of Citizenship and Immigration* 2012 FC 32; *Prosecutor v Iyumuremye* DC the Hague, UTL-I-2013037376, 20 December 2013; *Prosecutor v Mugimba* DC The Hague UTL-14/428, 11 July 2014; *Director of Public Prosecutions v T* SC Denmark 105/2013, 6 November 2013. See also *R (B) v Westminster Magistrates' Court* [2014] UKSC 59, [2015] AC 1195 at [33].

[32] Mr Illingworth QC did not accept that s 151 applies at all to a cancellation case. As will be seen, that is the first issue we must decide. But if s 151 does apply, he submitted, natural justice requires a high standard of fairness in immigration cases,[20] and specifically, it includes a right to contradict the opposing case.[21] He submitted that the appellant "simply cannot present his defence in the absence of reasonable confidentiality arrangements". He accepted that the RSB might consider whether the risk to the witness was a matter of substance or mere perception, and further that if it could not investigate adequately the evidence might be discounted. However, he urged us to take into account what is said to be the notorious unfairness of the Rwandan system of justice towards accuseds and witnesses, submitting that it weighed "toward a greater need for fairness in the RSB's processes", and he noted that in a previous case confidential information given to the RSB had been disclosed to Rwandan authorities.[22]

The issues

[33] The appeal raises the following issues:

(a) whether s 151 of the Immigration Act 2009 applies to refugee cancellation cases;

(b) how does s 151 regulate disclosure—

(i) what does s 151(2) mean by "particulars relating to" a claim;

(ii) whether safety precludes disclosure to the country of origin;

(iii) whether an RPO may take measures to protect the safety of witnesses when making disclosure under s 151(2);

(c) whether the RSB's refusal to agree to the undertakings of confidentiality breached K's right to natural justice;

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20 *Khalon v Attorney-General* [1996] 1 NZLR 458 (HC).

21 *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [12]–[13]. We note this was in the context of a civil claim for damages in tort and breach of statutory duty.

22 *X* [2015] NZIPT 800003.

(d) whether the RSB's refusal to agree to the undertakings of confidentiality was unreasonable; and

(e) whether Nation J was required to consider the law of equity and duty of confidence and, if so, whether this had any material impact on the outcome of the application for judicial review.

[34] In an affidavit filed in this Court, [X] sought to update the state of the parties' disagreement. Leave was required, but Mr Carter had no objection to its admission. Essentially, [X] again asked the RSB to give the undertakings and the RSB declined, taking the view that the High Court had vindicated its stance. The parties' positions following the High Court decision were explained in argument and we did not understand counsel to say that the new evidence changed anything. In the circumstances, we decline to receive the affidavit.

[35] We turn to the issues.

Does s 151 apply to cancellation determinations under s 146?

[36] This is the first question on appeal. If s 151 applies it limits the appellant's opportunity to insist on undertakings as to confidentiality; that is so because the legislation specifically authorises an RPO to disclose information to other officials for the purposes listed in s 151(2).

[37] Nation J held that s 151 does apply:[23]

> [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

[23] High Court judgment, above n 2.

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.[24] 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.

…

[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.[25] 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.

[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.[26] 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

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24 *Attorney-General v X* [2008] NZSC 48, [2008] 2 NZLR 579 at [13].

25 At [17].

26 Immigration Act, s 151(1)(b).

> disclosed to or discussed with authorities in a refugee's country of origin if that is necessary for the investigation of a potential crime.[27]
>
> (footnotes in original)

[38] On appeal, Mr Illingworth submitted that s 151 does not purport to apply to information provided for a cancellation inquiry. On its face, it applies to claims to recognition only. He emphasised that s 148 does not specify that s 151 applies to cancellation, which he characterised as a discrete and significantly different exercise from an initial refugee assessment process.

[39] We agree with Nation J, and essentially for the same reasons. In particular, s 151(5) provides expressly that information may be disclosed under s 151(2)(a) for the purposes of cancelling a person's recognition as a refugee. This can only mean that particulars relating to a claim or cancellation may be disclosed for the purpose of making a determination under s 146. Section 151(5) also provides that an RPO may disclose information when seeking information from any source under s 149(g), which section applies expressly to cancellation under s 148.

How does s 151 regulate disclosure?

What does s 151(2) mean by "particulars relating to" a claim?

[40] The next question is whether s 151 extends to the witness statements the confidentiality of which the appellant wants to protect. This turns on the meaning of the phrase "particulars relating to the person's claim or status" in s 151(1).

[41] *Attorney-General v X* concerned an applicant for refugee status, and the question was whether s 129T(3)(b) of the Immigration Act 1987, which corresponded closely to s 151,[28] permitted refugee status officers to disclose information to other state officials for the purpose of possible extradition to Rwanda for the crime of genocide, or for his prosecution under the International Crimes and

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27 *Attorney-General v X*, above n 24, at [15]–[16].

28 Section 129T(3)(b) of the Immigration Act 1987 read "Subsection (1) does not apply to prevent disclosure of particulars … 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 …".

International Criminal Court Act 2000.[29] The Supreme Court treated the question as one of statutory interpretation, concluding that the legislation permitted disclosure to such officials for those purposes. The Court held that "particulars" in that section included the application and any information produced in support of it:

> [13] Section 129T(1) refers to the "particulars" of the "case" of an applicant for refugee status. Section 129T(3) and (4) authorise the disclosure of those particulars in specified circumstances. The term "particulars" should in this context be construed as including not only the application as such but also any other information produced in support of it. If the term were limited to the conventional court meaning of pleadings, the protection which s 129T is plainly intended to provide would be severely limited.
>
> (footnote omitted)

[42] Mr Illingworth submitted that *Attorney-General v X* is not authority that "particulars" extends to witness statements tendered for cancellation purposes. We disagree. The Supreme Court held that "particulars" included information produced in support of an application, as opposed to information in the nature of pleadings. The Court recognised that such information may be necessary if officials are to investigate possible extradition or prosecution for genocide, war crimes and crimes against humanity. We do not accept that the 2009 Act should be interpreted differently; on the contrary, the same principle of necessity applies, and it is apparent that following the judgment in *Attorney-General v X* the legislature chose to use "particulars" in the same way.[30] The term in both s 151(1) and (2) must be taken to include information provided in connection with a cancellation determination, consistent with the breadth of protection afforded under s 151(1) to "particulars relating to the person's claim or status".

Does safety preclude disclosure to the country of origin?

[43] We observe that in *Attorney-General v X* the Supreme Court held that the primary rationale of s 129T of the 1987 Act was protecting the safety of the applicant and others, but the Court did not find that disclosure could be made only where

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29 *Attorney-General v X*, above n 24.

30 Immigration Bill 2007 (132-3) (Select Committee report) at 18–19.

safety had been secured.[31] This approach has engendered some criticism, the gist of which is that the Court paid insufficient attention to international law obligations and its own decision in *Attorney-General v Zaoui*.[32] We make several brief points about this:

(a) It is correct that UNHCR guidelines contemplate that except where national security is in issue contact should not be made with the country of origin.[33]

(b) However, the Refugee Convention leaves it to each contracting state to determine how they will give effect to the Convention, allowing them to establish procedures that each considers most appropriate having regard to their particular constitutional and administrative structure.[34]

(c) As a factual matter it cannot be the case that inquiries of people or institutions in every country of origin always place the safety of an applicant (or others) at risk, whatever the circumstances.

(d) As we explain below, disclosure may benefit a genuine refugee claimant in that it might allow an RPO to validate a claim that might otherwise fail.

(e) As the Supreme Court recognised, New Zealand has accordingly adopted an approach that confers on an RPO discretion to make inquiries, and, as we go on to explain, an RPO has power to limit disclosure or place conditions on disclosure to minimise safety risks.

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31 *Attorney-General v X*, above n 24, at [10]. We note that the Tribunal has treated safety as a precondition to disclosure, for example in *X*, above n 17, at [56].

32 Lisa Yarwood "Confidentiality under s 129T of the Immigration Act" [2008] NZLJ 380, citing *Attorney-General v Zaoui* [2005] NZSC 38, [2006] 1 NZLR 289; and Treasa Dunworth "Public International Law" [2008] NZ L Rev 725 at 736.

33 UN High Commissioner for Refugees *UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information* 31 March 2005 at [11]; and, in the context of the application of art 1F, UN High Commissioner for Refugees *Addressing Security Concerns Without Undermining Refugee Protection — UNHCR's Perspective* Rev 2 (17 December 2015) at [17].

34 See generally the United Nations Handbook on Procedures and Criteria for Determining Refugee Status HCR/1P/4/Eng/REV.3 (1992) at [189].

(f) Finally, as we noted above, expulsion does not follow inexorably upon loss of refugee status.[35] An extradition or deportation process must be followed, which provide rights of appeal.[36] The Convention against Torture precludes extradition or return to a state where there are substantial grounds for believing the person would be in danger of torture, and the ICCPR obliges New Zealand to protect individuals from arbitrary deprivation of life, torture and cruel, inhuman or degrading treatment or punishment.[37]

We accept that, as Mr Illingworth submitted, loss of refugee status may have local consequences for K; for example, he would lose the ability to re-enter New Zealand should he leave the country for any reason, and we are prepared to assume for purposes of argument that he may face loss of rights to work or to receive state support. He would also lose the support of the UNHCR.[38] But these are not consequences that put his safety at risk, and they are not relevant considerations under s 151.

May an RPO take measures to protect the safety of witnesses when making disclosures under s 151(2)?

[44] The general question is whether an RPO may place limits on disclosures made for the purposes of s 151(2) when thought appropriate to protect the safety of the claimant or witnesses. Undertakings are one way of policing such limits. K's claim that the RSB's refusal to give undertakings breaches his right to natural justice rests on the propositions that they are not only possible under the legislation but also necessary. That requires that we examine the legislation to ascertain whether, and if so in what circumstances, such undertakings might be given.

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35 *S v Refugee Status Appeals Authority*, above n 11, at 300.

36 Immigration Act, s 162; and, in this case, s 60 of the Extradition Act 1999. See above at [10].

37 CAT, art 3.1 and ICCPR, arts 6 and 7. In *Attorney-General v Zaoui*, above n 32, at [93] the Supreme Court found that the decision to deport should not be made where the authorities are satisfied that there are substantial grounds for believing that, as a result of deportation, the person would be in danger of such treatment. The Immigration Act provides a 'protected persons' mechanism to deal with people who fall outside the scope of the Convention but cannot be expelled from New Zealand because of the dangers they face: ss 130–131.

38 Jennifer Bond "Excluding Justice: The Dangerous Intersection between Refugee Claims, Criminal Law, and 'Guilty' Asylum Seekers" (2012) 12 Int J Refugee L 37 at 42.

[45] We begin by observing that when determining a claim an RPO must consider the matters listed in s 137, which include whether there are serious reasons for considering that, among other things, the person has committed a crime against humanity. This standard requires more than mere suspicion, but courts have declined to elaborate further.[39] The RPO may seek information "from any source" but is under no obligation to do so; he or she may determine the claim on the basis of such information, evidence and submissions as the person supplies.[40] These provisions apply equally to cancellation cases.

[46] The authorities establish that it is inapt to speak of an onus; the process is inquisitorial and the RPO is inquiring not into the claimant's individual accountability but into his or her entitlement to refugee status under the Convention.[41] Decisions are often made by measuring credibility against publicly available information.[42] To frame decisions in credibility terms is to recognise that allegations of serious state wrongdoing against a person may be given little or no weight if they cannot be verified in some way. This is as true of cancellation determinations as it is of claims, meaning that, contrary to Mr Illingworth's submission, the RPO in K's case is not a prosecutor and does not confront a burden of proof.

[47] In practice the RSB does seek to verify claims.[43] Verification is difficult, because the information supplied by the claimant is often incomplete or selective, reliable evidence is sometimes lacking, and inquiries may place people at risk. A balance must be struck, in which safety concerns advanced by the claimant may limit the RPO's capacity to verify his or her claim.

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39 *Attorney-General v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721 at [39] in the context of the use of "serious reasons for considering" a person has committed war crimes in art 1F of the Convention.

40 Immigration Act, ss 136(2) and 149(1)(g) and (h). There is no onus of proof, only a responsibility to establish the claim: *Attorney-General v Tamil X*, above n 39, at [39]; and *Refugee Appeal No 75574* RSAA 75574, 29 April 2009 at [31] in which it was said "whether there is … an onus or burden depends … on the context but caution must be exercised so as not to conflate the duty to produce evidence with a duty to discharge a legal burden of proof".

41 *Attorney-General v Tamil X*, above n 39, at [39].

42 At [37], citing *Refugee Appeal No 72668/01* [2002] NZAR 649 (RSAA) at [45].

43 See generally the United Nations Handbook, above n 34, at [196]; and Doug Tennent *Immigration and Refugee Law* (2nd ed, LexisNexis, Wellington, 2014) at 367.

[48] That brings us to s 151(2), which authorises disclosure for any of the purposes listed in that subsection. It is not in dispute that these extend to verification of a refugee claim, and we have held that the section applies also to cancellation. We observe that, contrary to Mr Illingworth's submission, s 151(5) does not limit the purposes for which disclosure by an RPO is permitted under subs (2) to those specified in subs (2)(a); rather, it is there only to spell out that disclosure is permitted in those circumstances. It follows that in K's case disclosure might relevantly be made for maintenance of the law (subs (2)(b)) and to the UNHCR (subs (2)(c)).

[49] We agree with Nation J that s 151(2) is permissive rather than obligatory in nature. It recognises that notwithstanding the confidentiality obligation in subs (1), disclosure may be necessary or appropriate for the purposes specified in (relevantly) subs (2)(a), (b), and (c), but it does not insist upon disclosure upon request in any such case; rather, it contemplates that an RPO will decide whether or not to disclose. One of the purposes for which disclosure may be made is that of verifying the claimant's claim.

[50] The objective of the confidentiality obligation imposed by s 151(1) is to give effect to the Convention's requirement that refugees be afforded protection by contracting states.[44] That being so, the decision to disclose under subs (2) must be informed not only by the purpose that disclosure will serve in the particular case but also by any risk that disclosure will identify the claimant or be likely to endanger the safety of any person.

[51] When deciding whether and how to disclose information supplied by the claimant, the RPO should be willing to consider reasonable measures that reduce the risk that disclosure will identify the person or place the safety of anyone at risk. We reject Mr Carter's submission that such measures are impermissible to the extent that they limit an RPO's opportunity to verify claims. The power to adopt protection measures is implicit in the legislation. An analogy may be drawn with s 151(3), which allows publication in some cases; under that provision the decision to disclose may be informed by "any protection mechanisms" that are available to manage risk.

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[44] As we noted above, the Supreme Court has held that the primary rationale of s 151 is the safety of the claimant and any other person: *Attorney-General v X*, above n 24, at [10].

Protection measures may improve the quality of determinations made under s 136 in two ways: they may allow the claimant to tender in support of the claim information or evidence that would not otherwise be available, and they may permit the RPO to make inquiries that otherwise would not be feasible. In this case both purposes are or may be engaged.

[52] Mr Illingworth invoked the judgment of the Supreme Court of the United Kingdom in *W (Algeria) v Secretary of State for the Home Department* for the proposition that a tribunal might make an ex parte and irreversible order for confidentiality where a witness would not give evidence unless his identity and evidence were permanently to remain confidential to the tribunal and the parties.[45] We observe that that case involved a witness who was willing to depose that the claimant would face torture should he be returned to Algeria. The question was whether on the claimant's ex parte application the Court should make a confidentiality order that would preclude the Secretary of State from making disclosure and inquiries. The Secretary of State's particular concern was that such restriction would cause collateral prejudice, in that she would be unable to respond to any terrorist threat that the evidence might reveal, which would also lead to an additional prejudice in the form of imperilled diplomatic relations. The Supreme Court considered but discounted this possibility as unlikely, and held that an ex parte order could be made as the lesser of two evils where a) the evidence was highly material if not dispositive and appeared capable of belief; and b) the court had no reason to doubt that the witness or others close to him would face reprisals if his identity and evidence were disclosed.[46]

[53] However, the Supreme Court made it clear that it was a question of balancing policy objectives of the legislation: on the one hand, denying a court the benefit of the witness' evidence on a risk of torture; and on the other, making an irrevocable order without notice to the opposing party. The Court recognised that such order would disadvantage the Secretary of State in responding to the evidence.[47] It held that the power to make such orders should be "most sparingly used" and stated that

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45 *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8, [2012] 2 AC 115.
46 At [19] and [34].
47 At [32].

before doing so a court should require the "very fullest disclosure" from the applicant of:[48]

> (a) [Witness] W's proposed evidence (namely a detailed final statement or proof of evidence depending upon whether it is proposed to adduce the evidence orally or in writing, and if the latter why in writing), (b) the particular circumstances in which W claims to fear reprisals, and (c) how [party] A and his legal advisers came to hear about W's proposed evidence and what if any steps they have taken to encourage him to give that evidence in the usual way subject to the usual steps generally taken to safeguard witnesses in these circumstances, namely by anonymity orders and hearings in private.

The Court added that the evidence might be shut out or discounted if it turned out that verification was feasible but no reasonable waiver could be obtained.

[54] This is a very different case, as counsel recognised, if only because the RPO is here both the decisionmaker and the party responsible for verifying the claim. We agree, though, that it is a question of striking a balance among policy considerations. In this case, those include protecting bona fide refugees and excluding persons who are disentitled to the Convention's protection.

[55] We qualify what we have just said by making several points about additional protection measures:

(a) The legislation assumes that the confidentiality obligation in s 151(1) should ordinarily suffice. That being so, the RPO may insist on prior disclosure of information needed to sustain the claim to additional protection. This may include, as the Court observed in *W (Algeria)*, the proposed evidence, the particular circumstances in which the claimant, witness or other person came to fear reprisal, how the claimant and his or her advisers came to hear about the information or evidence, and what steps were taken to encourage the informant to co-operate by relying on s 152(1) in the usual way.

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[48] *W (Algeria) v Secretary of State for the Home Department*, above n 45, at [19]–[20].

(b) Section 151(2) is a vitally important part of the legislative scheme, needed to give effect to s 136. It protects bona fide refugees by allowing the RSB to verify claims that may otherwise fail, and allows the state to identify those who are not refugees as defined in art 1A of the Convention or whose past conduct disentitles them to the Convention's protection under art 1F. The RPO may decide that disclosure for one of the purposes in s 151(2) is essential, or that the particular measures sought are not in fact warranted, or that they are no longer warranted, or that the proposed evidence is not sufficiently credible or important to justify restrictions on disclosure; and in any such case, additional protection measures may be refused even if the consequence is that the claimant cannot tender the information concerned.

(c) To facilitate this assessment, it is necessary that the RPO be able, if he or she thinks appropriate, to receive information on a provisional basis, under which the information will be returned and not taken into account in the determination if the claimant or witness insists on additional protection measures that the RPO is not prepared to implement. We acknowledge a risk that the RSB will learn of information that it cannot then share for law enforcement purposes, but there is also a countervailing risk in genuine cases that absent such process a claimant will be unable to advance relevant information. Without wishing to constrain the exercise of discretion, we observe that the RPO might refuse to accept information provisionally if he or she believes it will disclose public safety risks or offending unrelated to the refugee claim, or he or she might qualify an undertaking by specifying that disclosure may be made for law enforcement purposes should the information disclose evidence of likely future offending in any jurisdiction, as in the terrorism scenario that concerned the Home Secretary in *W (Algeria)*.

(d) Nothing in s 151 allows an RPO to give undertakings that will bind a court or tribunal called on to review the RPO's decision in deportation

or extradition appeals. A judicial body may decide for itself whether to make confidentiality orders and on what terms. We observe that the Tribunal sometimes makes confidentiality orders but it has refused to do so on an irrevocable or permanent basis, reasoning that if given an appropriate explanation those concerned should accept that a court is independent and has their safety at heart.[49]

(e) It follows that an RPO may not give irrevocable undertakings, although he or she may adopt a process, such as that suggested in this case in the event of disclosure to non-Rwandan authorities, under which the claimant is given an opportunity to seek judicial review before disclosure is made. This is to differ from *W (Algeria)* in the result, but in that case the irrevocable commitment was being made by a court, not by a party to the litigation.

(f) If the information or evidence is received subject to limitations on disclosure, those limitations may be taken into account when the determination is made. As we have said, claims may be rejected on credibility grounds where they cannot be verified and that is no less true when a protection measure inhibits verification.

[56] In summary, undertakings might have been given to restrict the use that the RSB or any other agency might make of information supplied by the claimant. We do not accept that the legislation precludes such limits, but we do accept that irrevocable undertakings could not be given. We reject the RSB's general submissions that undertakings of any sort are an unlawful fetter on the discretionary power to disclose.

[57] It does not follow, however, that the RSB erred by failing to give the provisional undertakings requested in this case. Those were sought on the basis that the evidence would not be used absent irrevocable undertakings not to disclose directly or indirectly to the Rwandan government. We have held that an RPO may not give irrevocable undertakings that might have the effect of tying a court's hands.

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[49] *X*, above n 18, at [73]–[78].

That being so, it would have been futile to give the provisional undertakings requested.

Did the RSB's refusal to give the requested undertakings breach the appellant's right to natural justice?

[58] It is not in dispute that an RPO acting under s 146 is a public authority with power to make a determination of rights for the purposes of s 27 of the New Zealand Bill of Rights Act 1990, so that natural justice must be followed.

[59] Nor is it in dispute that the requirements of natural justice depend on the context and circumstances. In this case, as noted, a cancellation decision is made under s 146, on the ground that an RPO has determined that the recognition may have been procured by fraud, forgery, false or misleading information or concealment of information. The RPO must afford the claimant under s 149 the opportunity to provide information, evidence and submissions. It is necessarily implicit that the claimant must first be told why cancellation is being considered. In this case the RSB has disclosed to K a great deal of information about that, subject in some instances, as Mr Illingworth pointed out, to confidentiality undertakings.

[60] We accept that natural justice may require that the RPO consider giving provisional confidentiality undertakings, as noted at [55](a) and (c) above, where the claimant says they are necessary if relevant information is to be tendered in support of the claim.

[61] Because provisional undertakings were refused the RPO has not yet seen the information that K wants to tender. As noted, K proposed to accompany the witness statements with a witness-by-witness explanation of the need for additional protection. For these reasons we are not able to say whether undertakings of any sort ought to have been given. That remains to be seen.

[62] We have referred to [X]'s opinion that the witnesses are not prepared to give evidence if anything they have to say could be disclosed to Rwandan authorities. Having regard to what we have just said, we should observe that the possibility that undertakings could be given subject to review by a court was seemingly not

discussed with them, nor was the possibility that their concerns could be alleviated if details tending to identify them were kept confidential. [X] believes that no purpose would have been served. He found the witnesses frightened and reticent. We make no criticism of him for this. His opinion merits respect. However, the RPO need not accept it, if only because the witnesses were not told how legal processes can protect them and because there is evidence that such concerns are no longer justified.

[63] The provisional undertakings were refused, it seems, because the RSB took the view that it was beyond an RPO's power to give the irrevocable ones that would be required before the evidence could be used. We have found that the RSB was wrong insofar as it reasoned that undertakings are not permitted, but we have held that the irrevocable undertakings sought in relation to the Rwandan government could not be given. In the circumstances, we are not satisfied that K's right to natural justice was breached.

[64] We observe finally that undertakings may result in the RPO receiving information that would not otherwise be provided and which cannot be verified. Natural justice does not require that such information be accepted in the absence of verification. As noted earlier, s 151(2) is an important part of the legislation; it permits the verification without which claims may otherwise fail when measured against such country and other information as the RPO possesses. For this reason, we expect that it is in K's interests to persuade the witnesses to permit verification where that can be done in a manner that does not put their safety at risk.

Did the RSB act unreasonably by refusing to give the requested undertakings?

[65] We can deal with this ground of appeal shortly. Mr Illingworth argued that Nation J was wrong to find the decision reasonable, for the RPO refused to countenance limits and undertakings of any description. However, the application for review confronts the RPO's decision to refuse a particular set of undertakings and the RPO was justified, for the reasons given above, in refusing to contemplate irrevocable undertakings vis-à-vis the Rwandan government. Had the request for undertakings been kept within permissible bounds it might have been unreasonable, having regard to known information about past behaviour by the Rwandan

government, to refuse to examine the evidence and justifications against provisional undertakings to see whether additional protection measures were warranted. Contrary to Mr Illingworth's submission, we cannot say that it would have been unreasonable to refuse additional protection measures of some sort after considering that material alongside other information known to the RSB about conditions in Rwanda at the time.

Did the Judge err by refusing to entertain an equitable duty of confidence?

[66] Mr Illingworth submitted that the Judge erred by failing to consider a submission that because K's witnesses have supplied their statements in confidence and s 151 does not provide adequate protection, the RPO should exercise a discretion to suppress publication and the Court should be prepared to restrain any violation of such confidence.

[67] Insofar as any expectation of confidence on the part of a witness exceeds the RSB's obligations under s 151 it does not arise from anything in the legislation or anything done by the RSB. It is founded on a promise made to witnesses by K's agent, [X]. Further, the information has not in fact been given to the RSB — it is a "proposed confidant", to use Mr Illingworth's phrase — and the RSB has warned that it will not assume an obligation of confidence additional to that imposed by the legislation. The flaw in K's argument is that it assumes that when he promises confidence to a witness the RSB must receive the evidence on that basis, whether it wants to or not. In our view the RSB need not receive the information at all, if K is not able or willing to provide it on the terms contemplated by the legislation.

Decision

[68] The appeal is dismissed. The RPO was not wrong to refuse the particular set of limits on disclosure that K sought. However, we have held that in some circumstances an RPO may impose limits, protected by undertakings, on disclosures made under s 151(2). It is for K to decide whether to pursue limits and undertakings in light of this judgment; and if so, in what form.

[69] The judgment is to be provided to the parties, who will be bound by the obligations of confidentiality as set out in the Act. We make a further order that the judgment is to be suppressed except in relation to those parts as will appear in a redacted version.

[70] K is legally aided. There is no order as to costs.

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