

IN THE MATTER of a Civil Appeal

BETWEEN **THE ATTORNEY-GENERAL**

Appellant

AND **X**

First Respondent

AND **REFUGEE STATUS APPEAL
AUTHORITY**

Second Respondent

Hearing 17 April 2008

Court Elias CJ
Blanchard J
Tipping J
McGrath J
Wilson J

Counsel D B Collins QC, I Carter and B Keith for Appellant
G M Illingworth QC, C Curtis and D Manning for First Respondent

CIVIL APPEAL

10.05am

Collins If the Court pleases Mr Carter and Mr Keith appear with me for the appellant.

Elias CJ Thank you Mr Solicitor, Mr Carter, Mr Keith.

Illingworth If the Court pleases Ms Curtis and Ms Manning appear with me for the first respondent.

Elias CJ Thank you Mr Illingworth, Ms Curtis, Ms Manning.

Elias CJ Mr Solicitor.

Collins Thank you very much your Honours. One minor housekeeping matter from the outset. Mr Illingworth and I are agreed that the suppression orders made in the Court of Appeal and in the High Court should continue in this Court.

Elias CJ Were they determined, are they, I haven't looked at the form of the orders. Where do we find those?

Collins The most convenient place is on the outside page of the appellant's submissions that seek a suppression of the name of the first respondent and any particulars that might lead to his identification and prohibiting search of the Court file without leave of the Court.

Elias CJ Right, those need to be renewed by this Court.

Collins Indeed.

Elias CJ Thank you, alright. Well there will be orders in the same terms made by the Court.

Collins Thank you very much your Honour.

It will be apparent to your Honours that the Crown urges this Court to interpret section 129T(3)(b) of the Immigration Act as permitting disclosure of particulars revealed and refugee status proceedings to New Zealand Government Departments and Crown Agency officials, when disclosure of such particulars is required to enable those officials to carry out their functions and it is the Crown that urges this Court that such disclosure not be limited to officials engaged in the disposal of a refugee claim or matters incident or consequential to the refugee claim, as held by the majority of the Court of Appeal in para [51] of its judgment.

The interpretation of section 129T(3)(b) urged by the Crown would permit disclosure of particulars revealed in a refugee proceeding to New Zealand Government officials involved in and investigating and determining a request for extradition involving allegations of crimes against humanity, or investigating and deciding whether or not to prosecute in New Zealand the applicant for crimes against humanity.

Elias CJ On your argument, do you not need to go even further and say that it's for any purposes? You're limiting it to the purposes for which disclosure is proposed to be made here, but would it also, would your argument also entail the view that if, for example, information was disclosed which was relevant to ACC or to benefits or something like that, that it could be disclosed under this provision.

Collins Yes, and I, in just a few moments going to come on to some of the consequences which flow from the interpretation that are favoured by the second respondent in this case.

Elias CJ Yes.

Collins And, you are correct your Honour, the interpretation which the Crown asks this Court to place on section 129T(3)(b) could potentially have wider consequences than just immigration, extradition or prosecution issues.

Blanchard J What's the position of the person to whom such a disclosure is made. They presumably under subsection (1) are bound by confidentiality.

Collins Correct your Honour, and it's an offence for them to breach that confidentiality.

Blanchard J So therefore, assuming you're right to this point, the only way in which there could be use involving further disclosure would be if (3)(f) applies.

Collins Correct your Honour.

Blanchard J I hadn't quite understood that from your submissions.

Collins Yes, I'm sorry Sir. That was a point I was about to try and emphasise, that it was common ground in the Court of Appeal that the consequences of the interpretation favoured by the Crown are that particulars revealed in refugee proceedings, in this case to New Zealand Government officials, for the purposes of investigation of allegations of crimes against humanity wouldn't be able to be revealed to officials in Rwanda or used to prosecute the applicant or any other person in New Zealand, unless the protection set out in section 129T(3)(f) were able to be satisfied. That is to say that there was no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure.

Tipping J That doesn't come through at all clearly from the judgments in the Court of Appeal.

Collins I think in the judgment of the Court of Appeal it does record that that was common ground.

Tipping J Does it, well I must have

Collins Just in one paragraph.

Tipping J Well the place of that in the interpretation exercise, perhaps I should say more accurate, doesn't seem to have registered very strongly in the Court of Appeal, would that be a fair comment.

Collins I think that that is very very fair Sir, and I would say that the reason why it doesn't feature strongly is because there has been an unfortunate conflation of a series of concepts and principles with the result that section 129T(3)(b) has been construed very unfortunately and very unnecessarily extremely narrowly.

Elias CJ That (f)?

Collins That (b)

Elias CJ Oh (b) has.

Collins Has been interpreted far too narrowly.

Blanchard J You're saying the real control is under (f).

Collins It is, that is one of actually many safety nets that exist in a case such as this. And I was proposing a little later in my submissions to actually take the Court to all the numerous safety nets that do exist in a case such as this.

Tipping J Is it fair to suggest Mr Solicitor that from this section 129T as a whole, one can see there's a very sharp link between confidentiality and endangerment.

Collins Indeed, yes. Now, the interpretation which I have just urged upon your Honours, does actually fit very comfortably

Elias CJ I'm sorry, before you go further, is that sharp link also to be found in the Convention.

Collins What is to be found in the Convention is the balance that is struck between the admission of persons into asylum protection, who are deserving of protection, and the obligation of parties States to prosecute those who have alleged to have committed crimes against humanity and who are excluded from the protections of the Convention.

Elias CJ I see. I should just flag with you that I haven't looked at the Convention and so to the extent that it is necessary for your argument I would be grateful if later you could take us to anything that helps.

Collins I was certainly intending to do so your Honour.

Elias CJ Thank you.

Collins Just before I leave the point that your Honours have so appropriately raised with me, it is interesting to note that the interpretation which I have just urged upon your Honours, actually coincides with the final sentence in para [51] of the Court of Appeal's judgment, where they recognise, in the very last sentence, para [51] your Honour, in the very last sentence they recognise that section 129(3)(f) can be conceivably invoked for extradition and prosecution purposes.

Elias CJ Well that's not what you are putting to us, it's not that it could conceivably be invoked but that it is, in all cases, the controlling purpose.

Collins Exactly. I've said they coincide.

Elias CJ Yes.

Collins They complement each other I think your Honour. Now can I deal with the point that your Honour the Chief Justice raised with me right from the outset, and that is to just ask the Court to contemplate for a moment some of the consequences which flow from X's approach to the way in which section 129T(3)(b) should be interpreted. And I will give three examples that are not related to either extradition or the prosecution of persons alleged to have committed crimes against humanity.

The first concerns instances where a person arrives in New Zealand, seeks refugee status and, during the course of the inquiries by the refugee officials, it becomes apparent that the applicant has been exposed to notifiable diseases which are highly contagious and that person doesn't want to seek medical attention or to seek to have his condition referred to public health officials. In that circumstance, it would be most unpalatable if the refugee people, the officials in the refugee office, were unable to bring to public health officials potentially very important and serious information of a public health risk that could conceivably be being created by a refugee's reluctance to notify health authorities of his or her status.

The second example that I would like to ask the Court to dwell upon, concerns the circumstances in which a refugee arrives, a person seeking refugee status arrives in New Zealand with their family and during the course of investigations information comes to light which suggests that the

children of the applicant might be at serious risk of physical harm. It would be most unpalatable and, in my respectful submissions, totally unnecessary for those officials not to be able to refer such matters to Child Youth and Family Service, or to another appropriate Government agency.

And the third example

Blanchard J Wouldn't that be able to be done under (f)?

Collins Well not on the basis of the interpretation that is being put forward by X. X says the only people who can receive any information and are bound to hold it tightly and not disclose it to anyone are those in (b), who are interpreted on his basis, on his analysis, to be the only people associated with the consideration and disposal

Blanchard J That (f) operates independently of (b) and says subsection (1) doesn't apply to prevent disclosure of particulars if there's no serious possibility that the safety of the claimant or any other person would be endangered, and it wouldn't be in either of those circumstances.

Collins I agree, but he doesn't get to (f) because he says (b) provides the bar to that.

Tipping J But (f) is a free wheeling exception, irrespective of the width or narrowness of the (b) class isn't it?

Collins I agree, but his interpretation requires (b) to be construed in the way in which it's being construed, without being able to invoke (f). And another instance that I invite the Court to reflect on concerns information coming to light which might involve information about people trafficking, which ought to be able to be referred to New Zealand police for proper investigation and international inquiries to be able to be made.

Now

Tipping J But if, one of the things which seems to weight with me, at least at first blush, was that if the (b) class, if I can call them that, the (b) people, are subject to the same obligations of confidentiality, wherein lies the harm to the refugee, in the construction that is opposed. Because, if they, however wide that class is, they have to remain retain confidence and can only get out of it, as you say, through (f).

Collins That's right.

Tipping J In which case there is no serious possibility of harm

Collins Exactly your Honour.

Tipping J To the applicant.

Collins Exactly.

Tipping J I just don't quite understand why this huge battle is being waged, because (f) is free wheeling.

Collins Yes.

Tipping J You can do it anyway. You can tell anyone you like, as I read it, if there's no serious possibility of harm.

Collins Well at the moment we can't because in the nature of the orders that have been made.

Tipping J Ah well, yeah yeah. But forget all the orders below.

Elias CJ Well not the Refugee

Collins Authority.

Elias CJ Authority. It's quite striking isn't it, that the Courts have differed from such an experienced Authority.

Collins Indeed your Honour.

Tipping J Say you want to give to WINZ or to ACC, as has been suggested, you give it to them, they have to keep confidence about it so there's not much they can do with it, say for their own internal purposes, and they can pass it on if there's no likelihood of such harm, but you could have done that directly.

Collins Yes

Blanchard J I suppose the only difference would be who makes the call under (f). If it's restricted the call is made by the Immigration people, necessarily because no-one else knows. They may not be the appropriate person in some circumstances to make the call about safety, possibly, I don't know.

Collins It's almost a reverse of the refugee mindset argument that appealed to the majority in the Court of Appeal.

Tipping J But I think I too am a bit troubled by my brother's point that the Immigration people may be in a fair position to make a call about safety but how would WINZ be?

Collins Well

Tipping J If WINZ is the body who has to be satisfied that there is no serious possibility so as to escape the mantle of confidentiality.

Collins But we take WINZ or police or any of those other agencies, they are in the business of making those assessments about public safety and the safety of individuals on a far too frequent a basis.

Elias CJ Do the police come within Government Department or other Crown Agency?

Collins They are a Government Department under the Public Finance Act your Honour. They are also a Government Department under the Ombudsman Act and Privacy Act.

Elias CJ This is really, it's really the escape of information to the police which I can see widens things out enormously, because if it's under para (b) to a Government Department or Crown Agency which has functions in relation to the claimant, I'm not sure that the police strike me as coming within that, whereas Health of course and some of the other examples you have given us do, and they wouldn't for the purposes of their functions be asked to make the sort of judgment call in para (f).

Collins Well for a start your Honour, I would have to urge upon you to accept that the police are a Government Department, both statutorily and in normal ordinary usage of their language, Government Department or Government Agency. And that they are very much in the business of making assessments on risk. It's unfortunately, as I've said earlier, their bread and butter.

Blanchard J Crown Law presumably comes within those expressions.

Collins Yes

Blanchard J But a Crown Solicitor wouldn't.

Collins Potentially, although there is an argument which I can raise in relation to the role of a Crown Solicitor.

Elias CJ Well they may well be persons necessarily involved in determining the relevant claim or matter.

Collins Yes. Yes. And where we have leapt to is the consequences which flow once those Government Departments or Agencies are seized of the information and then discharge their functions in making decisions. It's at that point, if we get to the extraordinary situation of say prosecution in New Zealand, that the Courts of course would be exercising it's superintendatory role in ensuring that their trial rights are observed and any concerns about legislative breaches could be addressed at that juncture.

Elias CJ It's really, I mean that the problem it seems to me arises because this is at that intersection of refugee status and extradition.

Collins And that is perhaps a very convenient point then your Honour for me to just emphasise the protections and safeguards that exist in ensuring that the intersection, as you have so rightly described it, do not result in the efficacy of the asylum process being undermined by extradition or vice versa.

Elias CJ What's that, sorry, I'm probably not sufficiently up with the legislative scheme, but what's the impediment if it's a sequential determination in terms of that intersection.

Collins Now the principal impediment is that as the law has been interpreted at the moment, is that information acquired during the refugee process could never be used by those determining whether or not extradition is appropriate in this instance.

Elias CJ But if you are outside the refugee protection, presumably that doesn't continue.

Collins Oh it does, any information

Elias CJ I see, after

Collins Acquired in the refugee process would, on the interpretation that has been favoured so far, be sealed, never be able to be used. But it doesn't

Elias CJ And which is the provision, I know there's the thing about before or after or whatever, which provision, section is that, which requires secrecy forever even if you are not within the protection

Blanchard J T(1).

Tipping J During and subsequent.

Elias CJ Ah yes.

Collins Your Honours, can I just perhaps give an indication, of course I was anticipating a series of questions and I have no difficulty with that whatsoever. I had proposed to deal with some of the factual background which hasn't come through in the Court of Appeal judgment. I had then proposed to deal with some of the issues that your Honour, the Chief Justice, in particular has been raising with me, which require an understanding of the intersection of asylum or with extradition and domestic prosecution of persons alleged to have committed crimes against humanity. I was then going to deal with a very brief reference to New Zealand's international obligations so that those are truly understood. And then focus on the true meaning of section 129T(3), deal with the criticisms that I have about my friend's interpretation of that section and then deal with some of the issues arise from the Court of Appeal's interpretation of section 129T(3). That was the format I was proposing to follow.

Elias CJ Yes don't think we are trying to deflect you from pursuing that. It's really just trying to highlight where you are going so that we know what to listen for particularly carefully, Mr Solicitor. Um before you do that though, what's the, did you say that section 129T(1) has been interpreted to require secrecy to be maintained even though the refugee is outside the terms of the Convention or is

Collins That's my interpretation and I think it's clear on the face of the language your Honour.

Elias CJ There's no actual authority determining that.

Collins Not that I'm aware of your Honour. And it's the interpretation of the word "claimant" that's important, your Honour. But I'll just see if there's any authority on that point but I'm not aware of any.

Tipping J But it's part of the claim process to determine whether the person is outside the Convention.

Collins Indeed.

Tipping J Isn't it. So you could hardly sever it off.

Blanchard J It also specifically relates to the period subsequent to the determination of the claim without any indication that the result of the claim has any bearing on that.

- Elias CJ I understand that, but I just wondered if, this is one of those statutes where the Convention is scheduled to the statute.
- Collins Indeed.
- Elias CJ So the interpretation really needs to draw very closely on the scope of the Convention and I would not, without looking carefully at the terms of the Convention, and notwithstanding the apparent clarity of the language in subsection (1), I would want to consider further whether that interpretation is a necessary one.
- Collins Alright, thank you very much for that indication your Honour. I will address that when I come onto dealing with the terms of the Convention.
- Elias CJ Thank you.
- Collins I appreciate that your Honours have had the opportunity to go through the factual background to this case but it might be of some assistance if I just briefly remind the Court that X arrived at Auckland International Airport on the 8th of April 2004, and presented with a false Canadian passport. After he was found to have a false Canadian passport, he claimed refugee status. And after he claimed refugee status he was conditionally released but that was invoked in early August of 2004, following receipt of the international arrest warrant that had been issued in Rwanda in July 2003. And in the meantime the Refugee Status officers had commenced their inquiries and that comprised four days of interviews. During the course of that inquiry New Zealand police received notice from the Rwanda Government that a request might be made to extradite X to Rwanda.
- The Rwandan Government's allegations are summarised in an email from the Rwandan authorities which can be found in Volume 3, page 527 of the case.
- Blanchard J How is this relevant to statutory interpretation?
- Collins Well your Honour, what I wanted to do was to lay the factual background and then consider both the statute and the Convention in light of the circumstances as they have been presented in the Courts below.
- Elias CJ What's the status of this email, because no request for extradition has ever been received.
- Collins Correct, it merely sets out the allegations and that's it.
- McGrath J The page number again was?

Collins

527. It sets out a series of allegations, namely that police clearance certificates were obtained unlawfully, that in April of 1994 it is alleged X organised and supervised genocide in a province in Rwanda, that during a public rally in a town that is named in the email, it's alleged X called upon the population to exterminate Tutsi people. It is alleged that on several occasions he met with Hutu political leaders during which he participated in preparing and organising moves under which genocide would be executed. It is also alleged that at one particular meeting he congratulated the population of a particularly named area for killing many Tutsi and that he called upon the people of another named province to act in the same way. It is alleged that a meeting with the then Hutu Prime Minister, Mr Kambanda, he took to the floor and demanded distribution of arms to the population so as to easily supervise the erection of road blocks that claimed thousands of Tutsi people in that particular province. It is alleged that he was the mastermind of the killing of more than a thousand Tutsi university students at a named university and states his relationship with that university. And it is alleged that many witnesses interviewed confirmed to having seen and followed speeches of X inciting the population of a named area to exterminate Tutsi people. It is also alleged that on several occasions he was seen supervising the killings in two named districts and that he was a member of a Hutu extremist group and that he had the support of the then Prime Minister in organising and supervising genocide in a named province.

Now I instantly accept that this email only lists allegations, some by far from all of the allegations have been partially, and I emphasise only partially, supported in six witness statements supplied by the Ministry of Justice in Rwanda. And I also accept that X ardently denies the allegations and that his most comprehensive denial is contained in the affidavit he swore in November 2005 when applying for conditional release.

The decision of the Refugee Status officers dealing with X's claims can be found in the second volume of the case on appeal under Tab 38. It is a 55 page decision. The Refugee Status officers concluded that there were a number of inconsistencies in X's explanations.

Elias CJ

Which volume?

Collins

That's volume 2, tab 38 your Honour.

Nine specific findings, adverse to X's credibility, are summarised on page 355 of the case on appeal. And I won't take your Honours, I won't read those out, they are there and summarised in very succinct form.

The Refugee Status officer concluded that X had not established a well founded fear of persecution which is a pre-condition to entitlement under

the Convention. X then appealed to the Refugee Status Appeal Authority. And despite endeavouring to deal with X's appeal promptly, the position, 11 months after the appeal had been filed, was as recorded by the Authority in Minute 6 found under tab 26 of Volume 1, para 9 was that X had consistently resisted the bringing of the appeal on for hearing. In that paragraph the Authority records that the appellant had declined fixtures for October 2005, November 2005, May 2006 and that during that period the Authority had issued no fewer than five Minutes for the purpose of ensuring that the appeal was ready for hearing. It records that disappointingly the appellant, applicant, has complied with very few of the Authority's clear and explicit directions, and that there is a limit as to how far the Authority in the face of that history can sensibly manage the case to a point where it could be set down for hearing.

Tipping J What tab did you say that had, Mr Solicitor.

Collins That's under tab 26 your Honour.

Tipping J I sadly don't have a tab 26 but it doesn't matter.

Collins It's the very last document in Volume 1 your Honour.

Tipping J I stop at the Convention.

Elias CJ Have you got the right volume.

Collins Your can't have the right volume then Sir.

Elias CJ No here.

Tipping J Oh.

Collins You are looking at the authorities I think Sir.

Tipping J Volume 1.

Collins Volume 1 of case on appeal.

Tipping J That's a simple explanation for my difficulty. I have it thank you.

Collins And it's the very last document in that volume and what I had just drawn the Court's attention to was paragraph 9 your Honour.

Tipping J Thank you.

Collins In April of 2006 X filed an application with the Authority in which he sought an indefinite adjournment of the Refugee Status appeal. Six days after hearing that application the Authority delivered its decision, which your Honours will have seen under tab 5. The Authority rejected X's application for an indefinite adjournment, ruled that contrary to X's claims there had been no unlawful disclosure of information before the Authority to any third party, held that an extradition proceedings, it wasn't necessary for extradition proceedings to proceed the Refugee Status Appeal Authority's hearings, and that consistent with the jurisprudence of the United Kingdom and Australia the general rule was that both sets of proceedings should proceed in parallel, and held that section 129T does not cloak refugee claims with absolute confidentiality.

Soon thereafter X was granted conditional release. He brought his application for judicial review and Justice Baragwanath allowed his application for judicial review in July 2006. In doing so his Honour concluded that section 129(3)(b) is confined to Crown officers and employees whose functions in relation to a claimant are related only to the due disposal of his claim to refugee status and doesn't extend to officers or employees whose functions in relation to the claimant relate to other purposes such as extradition or prosecution.

There was the Crown's appeal and I know your Honours will have studied that very very closely. Can I just identify the following key points because they are matters that I intend to return to a little later.

Elias CJ Is this the notice of appeal that you are referring to.

Collins No, I'm referring now to the judgment of the Court of Appeal.

Elias CJ Yes.

Collins The majority recognised, suggested I'm sorry, in both paragraphs [26] and [47] that the correct interpretation of s 129T which closely balanced, recognised that counsel for X acknowledged that the interpretation favoured by Justice Baragwanath was not required under the Convention or by associated states practice, that is recorded in para [43] of the Court of Appeal judgment. The Court of Appeal reasoned that it didn't seem very likely Parliament intended to distinguish between Refugee Status officers, the Authority and other persons involved in the administration of the Act, and persons identified in subparagraph (b). It called this, and this was the Court of Appeal's words, the belts and braces approach. The majority rationalised that the risks associated with the decision-making process under (f) are best managed by limiting access to Refugee Status particulars under (b) to those with, and I quote from the Court of Appeal, an appropriate refugee status mindset. That's set out in [48](c).

McGrath J I've noticed particularly that the paragraphs you have been referring to are [26], [43] and [48](c), is that right?

Collins And the belts and braces argument was [48](b). Agreed, the Court of Appeal agreed, in [49](a), that the

Elias CJ What do they mean by belt and braces, you mean that it's cumulative on all the other provisions.

Collins I interpret them to be saying that you don't need to try and give effect to all of the language employed by statute, by Parliament, because some words are superfluous and they are intentionally superfluous.

Elias CJ I see, yes.

Tipping J I understood them to mean more specifically that because (a) covers almost all the ground (b) is only there as a kind of possible catch-all.

Collins And the criticism I would instantly raise with that is what the Court is really doing is choosing not to try and give effect to the language of (b) because they don't think that it is necessary to do so.

Tipping J Because if you're necessarily involved in the claim, you'd be covered by (a).

Collins Precisely.

Tipping J And, if the construction of (b) is that you must necessarily be involved in the claim, in effect, you're just doubling up. I understand, that seems to me to be the belts and braces, that they're doing the same thing by two methods, one by the belt and one by the braces.

Collins That's what they are saying Sir, but the reality is that the consequence of that is that you, if you use a belts and braces analogy, you are actually inviting an ignoring of (b) because it is unnecessary.

Tipping J The trousers are already held up.

Collins Yes, and so under that philosophy of statutory interpretation you can conveniently forget what Parliament has said in the subparagraph because you don't want to give effect to it.

The next philosophy that the Court of Appeal adopted in its method of statutory interpretation in this case was to say look at the order of subsection (3) and the six sub sub-paragraphs through to (f) and said that

(b), on the Crown's analysis, would seem somewhat out of place. I call that legislative symmetry, it's not words that the Court of Appeal used that I'll come on to deal with that proposition a little later.

The Court of Appeal thought that the Crown's argument about the meaning of the word "required" in (b) was too wide. And ultimately concluded that (b) only permitted disclosure to public servants whose functions in relation to the claimant involved the due disposal of the claim to refugee status or matters incidental or consequential to the disposal. And that is to be found in para [51].

Wilson J That's really tantamount to giving no effect at all to (b).

Collins Yes. And that's a point that I propose to come onto a little later when actually analysing in more detail what the Court of Appeal. I have just summarised their position.

Now can I just move to a different but related topic and that is to make very clear New Zealand's response to Rwanda's failure to date to make a valid request to extradite X. As your Honour the Chief Justice noted to date no request complying with New Zealand's Extradition Act has been received from Rwanda. On two occasions Crown counsel from the Crown Law Office have travelled with the New Zealand police to Rwanda to provide that country with technical assistance on requirements of New Zealand's Extradition Act, and a third trip is scheduled to commence on the 9th of May this year. And that trip has two objectives. To provide further technical assistance to the Rwandan Government in understanding the requirements of New Zealand's Extradition Act, and to assist New Zealand to determine if it is feasible to prosecute X in the event that no valid extradition request is received. Or, if it is decided following any extradition request, that X cannot be extradited to Rwanda.

Elias CJ Now this you're giving us by way of background.

Collins Yes I am.

Elias CJ Is it, it's nothing that actually affects the argument is it.

Collins It addresses some points that are set out in my friend's submissions about what has happened and what is likely to happen, and I think I need to make that very very clear and to do so very very candidly so that there is no room for misunderstanding.

Elias CJ But if it comes down to a question of statutory interpretation, while the illustrations may be helpful in working out what was meant, this more

recent history about what is ongoing at the moment in relation to extradition is not going to help us on that.

Collins The help they are doing, I hope your Honour will gather from it, is an understanding of New Zealand's international obligations which is something which I do need to emphasise and explain and it is for that reason that I've given that factual material to the Court.

McGrath J Do I take it that delay is not an issue, in the matters before us today. Delay on the part of the Government.

Collins Of Rwanda.

McGrath J Of New Zealand?

Collins Delay is a matter that will obviously be a factor that might ultimately be taken into account but can I address that point your Honour.

McGrath J I notice it was an issue in the bail proceeding, for example.

Elias CJ There was in the judicial review proceedings originally two wasn't it. But it hasn't gained traction in the Courts, and it's not before us.

Collins No, not at the moment.

Blanchard J All that's before us is that there is a question of statutory interpretation as I understand it.

Collins Yes, and to interpret the statute one needs to understand the Convention and New Zealand's international obligations and how we are discharging those obligations. I want to emphasise that it is impossible to predict whether or not there will ever be a request to extradite X or whether there will ever be sufficient evidence to meet New Zealand's threshold requirements for extradition. Nothing has in fact changed since the Authority noted in its decision that there was and I quote "substantial doubt about whether or not Rwanda will request extradition of X" and the Authority correctly noted that it is highly speculative as to whether or not anything that X might say before the Authority could ever possibly be used in any extradition application.

Furthermore, there are a number of very practical challenges that would need to be addressed before there could be any possibility of X being prosecuted in this country for crimes committed against humanity when he was in Rwanda. The practical challenges would be very obvious to members of this Court. The evidence would have to be located in Rwanda, somehow that evidence would have to be put together in a way in

which it could be adduced in a New Zealand court. And, absent a request for extradition, the prospects of a prosecution in New Zealand would have to be assessed against that background of those very serious challenges.

Now I wanted to emphasise the protections that exist in a case such as this by reference to New Zealand's extradition law, other Convention protections, and to then move onto the requirements of the Convention. If X should ever be the subject of an application for extradition from Rwanda, section 7 of the Extradition Act would come into play. And that sets out seven mandatory restrictions on the surrender of anyone who is the subject of an application for extradition.

They include, in subsection (b), and this can be found in the supplementary bundle of authorities which has been made available to the Court, under tab 1, the protections which are set out, I particularly draw the Court's attention to the protections set out in subpara (b) and (c).

Elias CJ Sorry which section.

Collins 7(b). Mandatory restrictions on surrender and I'm emphasising (b) and (c). There is a further relevant consideration in 8(1) which is discretionary but would require consideration to be given as to whether or not extradition would result in a prosecution that was unjust. There are protections set out in section 32(b) which requires the Minister not to authorise extradition and if he believes there are substantial grounds for believing that X would be in danger of being subject to torture, and there's also section 60 which requires the exercise of further Ministerial judgment as to whether or not extradition should take place. It was of some importance I think that the Authority appreciated all of these protections and actually specifically refers to all of them in its decision.

But there are other protections as well. As this Court noted in *Zaoui No 2*, even if refugee protection is denied persons at risk of death or torture enjoy the protections set out in sections 8 and 9 of our Bill of Rights Act and her Honour Justice France also noted that exclusion under the Convention doesn't automatically result in a person being removed. She drew attention to the Court of Appeal's judgment in *S*, where it was said that New Zealand's obligations under, for example, the Convention Against Torture, may result in that person not being removed from New Zealand, even if excluded from asylum status.

McGrath J At para, in Justice France's judgment?

Collins 68.

McGrath J Thank you.

- Collins And similar points have been made by international authorities on, who have looked at the interface between asylum law and extradition law. And can I just bring your Honours' attention to the following authorities. Professors Hathaway and Harvey, writing in the Cornell International Law Journal, under tab 15 of the volume of authorities, starting at page 314, going through to page 316, where the
- Tipping J What is the essential thesis that this material supports Mr Solicitor?
- Collins Is that even those who are excluded from refugee status still have a number of safeguards and protections, particularly under the Convention Against Torture, Cruel and Unusual Punishment and, in New Zealand's case, under the New Zealand Bill of Rights Act.
- Tipping J In other words, even if you are excluded you stay do you?
- Collins You can stay.
- Tipping J You can stay and then what
- Collins If you meet the evidential requirements of those Conventions, and the New Zealand Bill of Rights Act. And Professor Gilbert makes the same, that's Professor Gilbert from Essex University, makes the same point in his article which is under tab 14 at page 475.
- Elias CJ That would be subsequent proceedings conceivably which might end up the sort of litigation that they had in Canada about extraditing people to places where they would face capital punishment.
- Collins Exactly your Honour. Yes.
- So the point that I'm trying to convey is that, that even those who might be excluded under the Convention and not acquire refugee status are not necessarily going to be excluded or sent from New Zealand if other protections, such as those under the Convention Against Torture, Bill of Rights entitlements, particularly rights under 8 and 9 of the New Zealand Bill of Rights Act, can be invoked to assist them to stay.
- Tipping J Is this, you are referring to this as a lead in to the proposition that it's not necessary and therefore wasn't intended to have this restricted approach to (b).
- Collins Precisely. Yes, and the final point of the argument that leads into that point your Honour concerns an examination of the Convention itself and what its objectives and requirements are. It's common ground that

New Zealand became a party to the Convention in 1960 and part 6(a) of course specifically incorporates the Convention into New Zealand domestic law.

McGrath J So am I right in saying that this Court in *Zaoui* was making the same point in relation to a confirmed refugee, and you are saying it's more generally available.

Collins Indeed it is. In *Zaoui* of course the argument related to whether or not there could *refoulement* under Article 33 of the Convention. The point that I am making is that those who are not admitted into refugee status nevertheless have a number of protections to prevent *refoulement*.

McGrath J Thank you.

Collins The Convention strikes a balance between those who are protected, sorry, strikes a balance of protecting those who are deserving of asylum status and excluding those who are not deserving of that protection. Thus the general inclusionary provision found in art 1A(2) which is to be found in schedule 6 of the schedule to the Immigration Act which has been made available to you, provides protections to those who hold a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion who are outside of the country of their nationality and who are unable or unwilling, owing to such fear, to return to that country. That's the general inclusionary provision.

Elias CJ I'm sorry where are we meant to be looking now? In the big volume, not the amendments.

Collins It's in the big volume Your Honour.

Elias CJ Thank you for providing it for us. It's been very helpful to have it.

Collins If you go to schedule 6 page 306, the general inclusionary provision is found in art 1A(2).

General exclusionary provisions are found in arts 1D, E and F. But today we only need to focus upon F. And that's found at p 308 of the statute. And F excludes those not deserving of protection and applies to, amongst others, those who are believed to have committed a crime against humanity as defined in the international instruments relating to such crimes.

These instruments include the 1951 Convention on the prevention and punishment of Genocide and the Rome Statute of the International

Criminal Court. That Statute is adopted as part of New Zealand's domestic law by the International Crimes and International Criminal Court Act of 2000 and it's s 9 of that statute which affirms that genocide is an offence.

Elias CJ Sorry which statute? Have we got this in our um.

Collins Yes, we don't have that one.

Elias CJ No that's alright, it's the international?

Collins International Crimes and International Criminal Court Act 2000. And it's section 9 of that Act which affirms that genocide is an offence of universal jurisdiction.

The Authority in its carefully reasoned decision, recognised the balance struck by the Convention and in particular I draw Your Honours' attentions to paragraphs 58, 59 and 60 of the Authority's decision in which the Authority very carefully points out the balance that the Convention tries to strike and indeed does strike between those deserving of the status of being a refugee and those who should be excluded.

And Her Honour Justice France at para [66] of her judgment also specifically drew attention to the balancing that is achieved by the Convention and the obligation that exists to achieve that same balance in Part 6A of the Immigration Act.

The approach taken by the Authority and by Her Honour Justice France is fully supported by the words of the Convention and by the way in which the Convention has been interpreted by international authorities. I drew Your Honours' attention to the article by Professors Hathaway and Harvey a few moments ago and that's under tab 15.

In their article at page 263 they explained the impetus for article 1F of the Convention as arising from the Universal Declaration of Human Rights and the requirement of that declaration that asylum not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. So that's the genesis of art 1F.

Wilson J Presumably Mr Solicitor that balance of which you speak would have seemed particularly acute in the post-war years in which the Convention was being developed.

Collins Indeed Your Honour, indeed. The same professors, at page 260 of that article, again emphasise that the Convention only grants refugee status to

persons adjudged inherently worthy of protection as measured by reference to external standards of international or extraditable criminality.

Professor Gilbert makes exactly the same point in his article at p 429 and that's under tab 14.

Tipping J Is the point of these people who don't deserve protection that it is anticipated that steps may be taken against them for reasons they don't deserve protection and hence if you restrictively construe paragraph (b) you're inhibiting that process.

Collins Precisely, yes. And that's the only reason why I'm taking Your Honours through this.

Tipping J I just wanted to make sure I was following the relevance of it.

Collins Yes, yes. That is precisely the interpretation that needs to be placed on s 129T. And the third authority, and nothing I'm saying is contradicted by any authority or any person who's written on this subject, but I found Michael Nyinah of the Office of the Human Rights Commissioner for Refugees article particularly instructive as well and that's under tab 13. And at pages 296 and 297 he draws attention to the fact that it's implicit that if persons who have persecuted others or perpetrated serious crimes could receive refugee protection alongside their victims, the image of the institution of asylum would be impugned.

He also notes that the recognition of refugee status is a special humanitarian privilege and that the respect accorded to the unique status of being a refugee partially depends on that status being reserved for vulnerable victims of persecution, not hardened criminals or persons guilty of serious transgressions.

Now the final point I wanted to make before getting into the language of s 129T is that a contextual analysis of both the Convention and the statute isn't complete without reference to New Zealand's obligation to take what steps it practically can to prosecute those alleged to have committed grave international crimes against humanity absent the extradition of such persons. And again I don't believe that there would be any issue taken with that proposition.

That practice has entailed states parties to the Convention and to other Conventions such as the Convention Against Genocide referring persons found to be excluded to refugee status for investigation and possible prosecution domestically.

And the instances of that are set out in paras 52 through to 55 of the Crown's written submissions.

I now want to deal with the actual language of s 129T(3)(a) and (b). And already members of the Court have made what I would submit is the very obvious point that persons referred to in (a) or (b) must be a different category from those involved in the administration of the Act. If that were not so, or if the legislative intention was to restrict disclosure only to persons having a refugee determination function, there would have been no need for (b) at all.

Wilson J And quite apart from that, don't the final words of subs (1) make that clear.

Collins Yes. Yes. And it follows that (b) persons are not persons involved in the administration of the Act, and not making determinations under Part 6A. They comprise Government or Crown agency officers or employees with some function that is not an act or Part 6A refugee function and who aren't involved in a particular refugee claim. And it is important I think to note that Parliament has chosen to use very broad language. It's referred to a Crown agency.

And perhaps the most comprehensive definition of a Crown agency is set out in the first schedule of the Crown Entities Act and I've made a copy of that available in the supplementary bundle of Authority's.

Elias CJ Do you say that that's the definition intended here.

Collins I say it doesn't matter if that is the definition intended or any other definition is intended, but it's a convenient definition to look at. The concept of the Crown agencies is so wide.

Elias CJ Well it's a small "a" isn't it. So it's anyone exercising powers as the agent of the.

Collins Government.

Elias CJ Of the Government for the purposes of, in relation to the claimant.

Collins In relation to their functions and purposes.

Elias CJ Yes and it's their functions, yes I fully accept that.

Collins Yes. And the very broad use of the language, agency with a capital "a" or small "a" doesn't really matter.

Elias CJ Mm.

Collins You're dealing with the full spectrum of possible Government officials.

McGrath J Whereabouts in the materials should I be looking at for the Crown Entities Act definition.

Collins It's in the supplementary volume of Authority's I think Your Honour.

McGrath J Is it number 2.

Collins Tab 2.

Elias CJ That may well be a much too restricted meaning because it's for entirely different purposes.

McGrath J Yes.

Collins I agree. But the point I'm really making Your Honour is in Government departments and Crown agencies, it's impossible to think of anyone who's left out of that definition.

Elias CJ I hope we are.

Collins You are, you are expressly excluded.

McGrath J It doesn't have Crown solicitors there does it.

Collins No it doesn't have Crown solicitors.

Tipping J Does it exclude the Chief Justice *nominatum* does it?

Elias CJ I'm sorry, what was the answer to that.

Collins It does not include Crown solicitors.

Elias CJ Does not include, yes.

Collins Does not list Crown solicitors.

McGrath J Well it's not a definition, it's a list that you're referring to.

Collins Yes indeed.

- McGrath J So really, apart from you could say a lot of people get into it, but do you really rely on it at all. I don't see how, I mean you're really just wanting the general meaning of those ordinary words to be applied to it.
- Collins Yes.
- McGrath J That's your point isn't it.
- Collins The point that I'm trying to convey is that Parliament has chosen a very wide phrase when it refers to Government departments and crown agencies.
- Tipping J Doesn't it really mean anyone acting on behalf of the Government or the Crown.
- Collins Yes. And it's not restricted to persons that are simply dealing with the determination of a refugee claim.
- Tipping J But the Court of Appeal have in effect read into the concept of functions a limitation in terms of functions under this Act which of course is quite inconsistent, as my brother Wilson has point out, with the dichotomy at the end of subs (1).
- Collins Yes indeed, yes.
- Tipping J Well arguably so anyway.
- Collins Well, that is the very point that I have been trying to make Your Honour.
- Subs (1) assumes that persons involved in the administration of the Act are entitled to refugee information and they are therefore made subject to the confidentiality obligation in (1). However, police for example and others exercising public functions who might be involved, for example, in the investigation of whether or not somebody should be extradited or prosecuted, are clearly able to be covered under 129T(3)(b). The narrow interpretation of s 129T(3)(b) reached by the Court of Appeal cannot be reconciled with the distinct categories created by s 129T(1)(3)(a) and (3)(b).
- Elias CJ And 1.
- Collins And 1. Yes. And the next point I wanted to make, and it's made in the written submissions, is that the overly restrictive interpretation of the word require favoured by the Court of Appeal is also very very problematic. It was I thought very succinctly addressed by Her Honour Justice France in her judgment at para [47] where she recognised that it's entirely possible

for the person who had committed a crime against humanity might only come to the knowledge of any New Zealand authority through the refugee process. And in such a case it would be highly unpalatable if that information were not able to be used because of an overly restrictive application of the word require in subpara (b).

Tipping J Well I wonder Mr Solicitor if you take a very narrow view of require, then there are all sorts of questions of degree that come in. How desperately is it to be required before it is to be required if you like.

Collins Yes. Well.

Elias CJ You're not into that though here really are you. Because it's not, it can't really be suggested that the connection is tenuous here.

Collins No it's not tenuous.

Elias CJ No.

Tipping J But as a matter of interpretation of the word require, the question is does it mean necessarily require or would be helpful to or.

Elias CJ Need.

Tipping J Need. Well need has the same potential difficulty in it if you construe it restrictively. Where are you going to draw some sort of conceptual line.

Collins That line, yes.

Elias CJ Well it can't be gratuitous can it.

Tipping J No.

Collins No.

Elias CJ It just can't be gossip that they might like to have.

Collins Precisely.

Tipping J But it's got to be bona fide of legitimate use I would have thought.

Collins It's got to be of legitimate use. It's bona fides have to be able to assessed.

Elias CJ In respect of that agency's functions.

Collins Yes.

Elias CJ So it's a sort of a *Padfield* connection.

Collins Yes. And the final point I wanted to make about the interpretation of 129T of course focuses upon F. And with respect that illustrates the essential character of the confidentiality provision in s 129T and demonstrates that 129T doesn't afford blanket confidentiality to disclosures of the kind that this appeal is concerned with. Plainly F contemplates the disclosure of particulars if such disclosure wouldn't create a serious possibility of endangering the personal physical safety of the claimant or another person.

Elias CJ Well that could quite readily be the total answer in terms of compulsory health treatment or something like that within New Zealand. It probably isn't a total answer in terms of the use in extradition proceedings.

Collins Well unfortunately it's not the total answer in the way in which the Court of Appeal interpreted 129T(3)(b).

Elias CJ No I understand that. But the point that I'm making is that really for your purposes it does seem to me that it is necessary to interpret subs (3)(b) as you contend for.

Collins Yes.

Elias CJ That you can't simply say it's okay because confidentiality has to be maintained more generally.

Collins Yes.

Tipping J Say the police get it under (b) Mr Solicitor.

Collins Yes.

Tipping J They being subject to the same duty of confidentiality, they presumably can't, and I know I'm going back a bit to where we were quite close to the start, but they presumably can't use it or disclose it rather, that's a fundamental distinction, they can't, they may be able to use it without breaching confidentiality but they can't use it in the sense of disclosing it unless they can satisfy F.

Collins Precisely. And if there were any issue about whether or not the threshold of F were met in a particular instance, one would anticipate the police would confer with other New Zealand officials such as immigration officials.

Tipping J Well they'd be subject to judicial review wouldn't they. Admittedly that may not be the whole answer because of the relatively limited character. But what control is there over any person who makes that call.

Collins If it's the wrong call, they actually commit an offence under the Immigration Act because they are using information unlawfully.

Tipping J Yes.

Collins There is judicial review. Ultimately, and probably the best protection, is the use to which that information is able to be made. You would expect a New Zealand Court exercising its supervision over any prosecution in New Zealand or in considering the merits of an extradition to take into account whether or not information has been obtained unlawfully.

McGrath J Before you got to that point you'd expect competent Government agencies to have very strong manuals and other practices in place to cover these situations.

Collins I was rather hoping Your Honour was about to say you would expect them to be seeking competent legal advice.

McGrath J Well that too.

Elias CJ But you've described to us how officers, I think it was of the police was it, are going to go over.

Collins Yes. And a Crown Law person, and a Crown counsel. But they clearly cannot at this point make any disclosure of any information that's been obtained in the refugee process.

Tipping J Unless satisfied of F.

Blanchard J Well they don't have the information.

Collins We don't have, there's no information to be given.

Tipping J You haven't got it.

Collins Yes.

Tipping J At the moment. Yes, but say you did have it.

Collins Yes.

Tipping J And you were talking to them.

Collins Mm.

Tipping J You'd have to keep it confidential unless you were satisfied that F applied.

Collins Correct, yes. Now can I deal.

Elias CJ You really would want to see that there were some pretty good safeguards of the sort that Justice McGrath was talking about in place.

Collins Indeed. And the best safeguard to avoid any inadvertent breach of the section is the fact that it's a very senior Crown counsel who is involved very much in the direct management of all aspects of this case between New Zealand and Rwanda.

Tipping J I'm not worried about this case, I'm worried about the generality of it Mr Solicitor.

Collins Right.

Tipping J And I think perhaps that what was in the Chief Justice's, you know if this is going to work properly.

Collins Yes.

Tipping J And it all turns on F.

Collins Yes.

Tipping J There's got to be something very good.

Collins Yes.

Tipping J To make sure that people know what they're supposed to be doing.

Collins And that can be ensured Your Honour through very very clear directions in the form of manuals or other policies that immigration.

McGrath J The courts have seen that sort of material in relation to the Immigration Division, Department of Labour.

Collins Yes.

McGrath J That sort of material has, in previous refugee cases, been produced. I'm thinking in particular of the one the Refugee Council of New Zealand brought. But the extent to which agencies other than the Immigration

Department do that I don't know but it seems to me you have to have something of that kind. You can't rely on warning bells going off in the mind of every police officer who happens to come into contact with these matters.

Collins Right.

Elias CJ Well I'm wondering whether there isn't some natural justice requirement that needs to be thought of here. I mean there is a total prohibition on disclosure. One would have thought that the person affected is affected in his rights and the natural justice provisions of the Bill of Rights Act may kick in.

Tipping J A right to be heard as to whether there is a serious possibility, or the precise language.

Elias CJ What information is proposed to be released.

Collins Yes.

Elias CJ So that there is an opportunity to be heard.

Collins Yes. I wouldn't want the outcome of the case to hinge on that.

Elias CJ And you wouldn't want us to be describing some architecture.

Collins Yes. And can I just simply, one small warning bell, disclosure and giving people the right to be heard before information is used in an investigatory phase is highly problematic.

Elias CJ Well it depends if you take seriously the requirement of confidentiality and you say that that confers a right.

Collins Yes.

Elias CJ Or interest.

Collins And a balance is clearly going to have to be struck. I mean you would not want, for example, to go to a suspect and say, look we now have acquired information that you may have committed X, Y and Z, I'm sorry I shouldn't have used the word "X", you may have committed certain offences in a particular country. Before we go off and tell that country and alert all the possible witnesses, would you like to have this information and have every opportunity you can to do whatever you can to frustrate the investigatory process.

- Blanchard J How is this problem handled in other jurisdictions.
- Collins I have asked for a summary of what's been happening with the Rwandan cases and I am told that New Zealand is one of nine countries that are dealing with Rwandan nationals in terms of considering whether or not to extradite or to prosecute domestically. New Zealand appears to be the only country that this issue has arisen in where it has been seriously suggested that information obtained in a refugee environment cannot be used for the purposes of considering applications for extradition and or prosecution. And indeed, and this goes to the states' practice aspect of the application of the Convention, there are some countries which have specifically legislated to permit the disclosure of refugee information to prosecuting authorities. The point that I make Your Honour is that, and my friend accepted in the Court of Appeal, and I assume he continues to accept, that states' practice under the Convention certainly doesn't require a prohibition on the disclosure of refugee information for the purposes of extradition and or prosecution.
- Elias CJ What about the fact that, I haven't looked at s 129L(d) and (e), but there is a specific provision relating to disclosure in dealings with other countries.
- Collins Yes.
- Elias CJ I mean does that.
- Collins I don't think it impacts ultimately.
- Elias CJ It doesn't impact but the fact that the legislature has made provision for disclosure in dealings with other countries may suggest that use in other ways is not envisaged.
- Collins Yes I understand what Your Honour is saying. But the use of that information is certainly contemplated under the Convention through the exclusion of persons not entitled to refugee status and, in accordance with New Zealand's international obligation, to consider whether or not it is at all possible to prosecute domestically those who are not granted refugee status and or who are not extradited.
- Elias CJ Yes there's a specific provision for disclosure to the UN High Commissioner for Refugees.
- Collins Indeed.
- Elias CJ Which would take you a long way in checking whether people are suitably within the Convention and doesn't inhibit the UN High Commissioner for

Refugees using the information. And you say that s 129L(d) and (e) don't have any application here.

Collins I don't think they assist in the interpretation of s 129T. But can I just reflect on that for a few moments Your Honour.

Elias CJ Yes.

Tipping J There's a bit of a patchwork here, it's not wholly conveniently or logically arranged, this part of the Act. I seem to remember someone might have said something similar in the Court of Appeal. They don't seem to have disciplined the mind to, as it were, collect things in some logical framework.

Collins Yes.

Tipping J So I would be hesitant to see the fact that one part of it's been dealt with over here is necessarily very helpful as to why another part of it's dealt with over here. But I too was wondering about the Chief Justice's point. I must confess, that having made specific provision and cross referenced it here, what bearing does that have on this particular issue.

Elias CJ And indeed s 129L(f)(iii) does seem to envisage precisely the sort of inquiries here doesn't it, as to whether you come within art 1F of the Convention.

Collins Yes, yes.

Elias CJ So there is a power to make inquiries under subs (3) of s 129T of other countries.

Collins Yes.

Elias CJ And then relating to the question of refugee status. It's just that it doesn't apply to extradition.

Collins Correct. Or prosecution domestically.

Elias CJ Well might that not suggest that extradition really needs to follow this process. I know you've said that in other countries it's been held that these are parallel processes. But they're not really dealing with our statute.

Collins Well the problem with that approach Your Honour is that if information emerges during a refugee status proceeding that ought legitimately be able to be taken into account by officials considering an application for

examination, that opportunity ought not to be lost by one preceding the other in the way in which you are suggesting.

Elias CJ Well that really does depend upon how you interpreted s 129T(1) and the confidentiality provision which I would have thought, interpreted purposively, might not prevent disclosure of information once a refugee is outside the terms of the Convention.

Collins Can I have a reflection on that over the morning adjournment.

Elias CJ I acknowledge that that's not what a first reading of the statute would suggest but this is such a contextual area.

Collins Yes.

Elias CJ Anyway, perhaps we could take the adjournment now for 15 minutes thank you.

Collins Thank you very much Your Honour.

Court adjourns 11.31 am

Court resumes 11.48 am

Elias CJ Yes Mr Solicitor.

Collins Thank you very much your Honours. As I understood there were two aspects to the questions that your Honour the Chief Justice put to me just before the morning adjournment. The first element, as I understood it, related to whether or not confidentiality continues, post determination of the refugee status application. And there are two answers to that question your Honour. One, the interpretation that the Crown places upon the language of section 129Q(1) and the clear reference therein to the ongoing obligation of confidentiality. And the second is an authority that I would draw the Court's attention to. It's the approach taken by the United Nations High Commissioner for Refugees, described in a publication which His Honour Justice Baragwanath took? and is found at page 103 of the case on appeal, volume 1, 103 where His Honour quoted a section from the background note on the application of exclusion clauses under article 1F of the 1951 Convention published in the International Journal of Refugee Law. At page 103 on the case on appeal you will see Justice Baragwanath quoted two paragraphs from that publication. It is the second of those paragraphs, paragraph 104 which I think neatly encapsulates the principle of continuous confidentiality.

Now the second question that your Honour the Chief Justice put to me concerned the statutory ability for New Zealand refugee officials to be able

to confer with some international entities. And the important point which sight not be lost of is that the only people who you can specifically confer with under those legislative provisions are entities that have already granted refugee status to an applicant. So the narrow and specific purpose of those provisions is to assist the New Zealand authorities in their determination of refugee status, not the wider objective that the Crown would urge this Court to accept is contained within section 129T(3)(b) to enable New Zealand to fulfil its wider international obligations and to give true effect to the balance in the Convention.

Now I indicated before the morning adjournment that there were only two other parts to my submissions that I wanted to focus upon, and the first concerns my analysis of my friend's submissions and I wish to do that so that he has every opportunity to be able to address them when he gets to his feet, and then I wanted to spend a few minutes dealing with some aspects of the Court of Appeal's judgment and in particular focus on submissions that address where, in the Crown's respectful submission, the majority of the Court of Appeal erred.

There are about seven or eight points which I wish to make about my friend's submissions. The first is that he asserts at various points, for example para 10.5, that the Crown's interpretation would render recipients of information under 3(b) free to pass on information to another Government. Well I've emphasised the point that it was common ground in the Court of Appeal and remains the Crown's position that it is essential for questions for determination under 3(b) to be made and then decisions made under (f) before there could be any transmission or release of information to an authority in Rwanda.

In paras 2.4, 4.2 and 11.2, my friend asserts the protection principle which he says underpins Part 6A of the Immigration Act. And the Crown's submission is that there is no "protection principle". There is undoubtedly a qualified duty of confidentiality that is consistent with the purposes of the Convention and state's practices. Confidentiality is directed at ensuring the personal physical safety of the claimant and others but there is no protection principle as asserted. The so-called "protection principle" seeks to fuse the protective objections of the Convention with the fairness objectives of the Convention and also the objectives of the Convention to ensure that those undeserving of protection do not receive it.

My friend also seeks to invoke the right to life and the right against torture, found in sections 8 and 9, and it's accepted by the Crown that X couldn't be removed from New Zealand if there was a real risk of torture or execution in Rwanda. I refer to *Zaoui* for that.

Elias CJ

Including legal execution.

Collins Including legal execution. Can I say that I am informed that in fact Rwanda has abolished the death penalty. A number of countries sought that before there was any consideration given to extradition. The claims under sections 8 and 9 would undoubtedly be engaged if X were the subject of extradition or refoulement but, as he's not facing extradition or removal, his rights under 8 and 9 aren't engaged in this case at this time.

My friend submits, in paras 12.3 and 12.4, that the Convention doesn't prescribe confidentiality and so section 129T is the product of the legislative being free to find its own solution. Well the Convention, the Crown's response is that whilst the Convention does not expressly address confidentiality, confidentiality is undoubtedly the accepted practice of state's parties. The limits on confidentiality are accepted practice by state's parties and confidentiality cannot be invoked in isolation from the Convention.

In paras 2.5 and 2.7 my friend asserts

Elias CJ Does the, just remind me, in terms of use of practice of the state's parties, is that part of the Vienna Convention or how, what's the rule, perhaps come back to it.

Collins Oh right yes it's part of the interpretative rules of the Vienna Convention.

Elias CJ Yes.

Collins In paras 2.5 and 2.7 X asserts confidentiality in the refugee process as being comprehensive and he invokes aspects of the refugee documentation in support of this contention and the Crown's response is that any reliance that X has placed on confidentiality provisions of that documentation doesn't create some form of legitimate expectation. As the documentation in itself clearly specifies

Elias CJ There's no finding of that.

Collins No, no but it's my friend's argument.

Elias CJ Yes.

Collins The documentation in itself actually says that the information provided by X can be shared with other New Zealand Government agencies and at most any such expectation if one did exist could only entitle X to be heard as to why the information could not be used.

Elias CJ What documentation are you referring to?

- Collins This is some of the documentation that he signed when he arrived that started off the refugee process.
- Elias CJ Do we need to look at that?
- Collins In my submission no I don't think you do but I'm just addressing the points because my friend has done so.
- Elias CJ Can you give us the reference to it.
- Collins Yes. My friend's paras 2.5 and 2.7. But, in any event, ultimately this Court is dealing with a question of interpretation and any so-called expectations that he may have had, that X may have had, can't operate contrary to law.

My friend continues to place reliance on the assertions that were made in both the High Court and the Court of Appeal, that X is at risk of obtaining a fair trial. I make the very obvious point that he sought leave to appeal this point to this Court. Leave was expressly declined, principally as it was realised by this Court that such issues were premature and raised on a speculative and abstract basis. And, in particular, the factual assertions made by X haven't been determined and shouldn't be considered by this Court. Comments that he makes about the nature of the Rwandan Court system are, I am advised, incorrect. If, and it's a big if, X were extradited then he could only possibly face trial in Rwanda before that country's High Court. And a number of protections have been built into the Rwandan judicial system to accommodate the expectations and requirements of western countries.

Similarly the question as to whether or not witnesses could be placed at risk is highly fact-dependent and at this point there is simply no evidence beyond broad assertions made by my friend's client of witness tampering. What's more it is only X who's aware of who his witnesses are and what evidence that may give and why they might not give it. And to make assessments about whether or not there is any fairness involved in any of those issues is inviting this Court to make very abstract assessments in the absence of any evidence whatsoever.

X, through my friend, also asserts that disclosure of his evidence would amount to disclosure of his defence and so risk an unfair trial and again the obvious point is that this Court was asked to consider this issue in the leave application that was made by X. Leave was declined. In any event, the privilege against self-incrimination is not engaged in this case. While it may be in X's best interests to put forward his best case for refugee status, he's not under compulsion to do so. More specifically the role of

Article 1F of the Convention in both denying the protection and permitting prosecution of persons suspected of crimes against humanity clearly demonstrates that it can't follow the person is ineligible for protection can kind to have been compelled by the protection system of the Convention itself.

Those were the key errors that I wish to identify in my friend's submissions.

In the last part of my submissions I want to address the errors in the Court of Appeal's judgment as submitted by the Crown. The first concerns the belt and braces argument found in [48](b) and the point has already been made by a number of your Honours that that belt and braces argument effectively renders subparagraph (b) redundant. The belt and braces argument or proposition put forward by the Court of Appeal does not attempt to explain why subparagraph (b) refers to a very broad range of Government officials and doesn't actually explain why (b) is mentioned at all, because all who are covered by (b) would be covered by (a) on the basis of the Court of Appeal's approach.

The second point I wish to make concerns the so-called refugee mindset philosophy of the majority's judgment, found in para [48](c) of the judgment. The approach taken by the majority and its conclusion that risks associated with the decision-making process under (f) are best managed by limiting access to refugee status particulars to persons under (b) to those with a "appropriate refugee mindset", raises a number of difficulties. It assumes that the factual assessment under (f) must be improperly influenced by the nature of the public function being exercised by the decision-maker, and that's a proposition that the Crown would reject.

Elias CJ I'm sorry, say that again.

Collins Well it assumes that those non refugee officials involved in the decision-making process would be influenced by factors that they should not be influenced by. And that's

Tipping J I don't know what an appropriate refugee mindset is anyway.

Collins Well that in itself is perhaps the most unattractive aspect of the concept that is being forward.

Elias CJ Well is it perhaps really an argument that the other officials will be dealing under the, will be exercising functions conferred under other statutes or bases for their authority, and they are not exercising powers under this legislation.

Collins That is correct your Honour. But they are acquiring information under this legislation, if the Crown's interpretation of (b) is correct.

Elias CJ Well are you saying that they would have to disclose in conformity with the policies of this legislation.

Collins Disclose to whom your Honour.

Elias CJ Well to whoever they feel obliged to disclose information for the purpose of their own functions.

Collins Only if they were satisfied that (f) criteria permitted the disclosure. And, in reaching that decision, I would anticipate, and indeed I would have no objection to your Honours stating very clearly in a judgment, that you would expect such officials to be at the very least conferring with the immigration and refugee officials as to whether or not there is a risk or a serious risk of physical harm to an applicant or another person under (f).

Elias CJ Well I just really wonder whether that's to go, whether, I was responding really to the criticism of the Court of Appeal, because they may have used a shorthand but it doesn't sound to me as though you really take issue with what they were driving at, except that they say it will not apply. You're saying officials who are exercising powers of disclosure for the purpose of their function will have to be mindful of the obligations under subparagraph (f).

Collins Yes, I'd go further and say more than mindful, that they are going to have to ensure

Elias CJ They have to abide by it.

Blanchard J Make it an offence if they don't.

Collins And I think I'm being correct in saying that in order to ensure that there is no inadvertent breach of (f) one would expect other Government officials to be conferring with refugee status officials to make sure that there was no possible inadvertent breach of (f) by any disclosure.

Blanchard J It would be extraordinary if they didn't confer.

Collins It would be very very unwise for them not to.

Elias CJ Yes just to be quite clear about this, you're objection to what the Court of Appeal has done is not their description of unnecessary refugee mindset

but simply you say that comes in because other officials will also be under the obligation in subparagraph (f).

- Collins Yes yes I think. Now one aspect of the Court of Appeal's judgment which obviously was attracted to them as a result of my friend's submission was the proposition that somehow (b) is, the people in (b) are out of place in a series of subsections focussed on the resolution of claims to refugee status. I call this the legislative symmetry point, that's my language, and I think that fairly describes what the Court of Appeal was thinking. Indeed I don't for one moment believe that there is actually much merit in that proposition. When one looks at the categories in subsection (3) we see that subparagraphs (a) and (b) deal with persons in New Zealand who need to have access to particulars so that their public functions can be properly carried out. (c) and (d) refer to officials in Governments outside of New Zealand and the Office of the United Nations High Commissioner for Refugees. (e) deals with disclosure in an anonymised form and part of a report or decision, and (f) is that broad catch-all provision which, as recognised by the majority in the Court of Appeal, can conceivably be invoked for purposes including extradition prosecution. The more logical approach
- Elias CJ It is not really a catch-all provision though, it's a catch-all out.
- Collins A catch-all out.
- Wilson J What would be an example of someone who came within 3(a) but did not come within the first part of subsection (1), if I can put it that way.
- Collins I can't think of any group.
- Wilson J Possibly a witness or someone who wasn't officially involved in the administration of the
- Collins A witness or typist maybe.
- Elias CJ Interpreter.
- Wilson J Interpreter yes.
- Collins I was also thinking of a typist but I'm not too sure
- Tipping J I think part of the problem with (a) is the word "necessarily" as a limiting factor. I'm not saying that necessarily, it takes one very far.
- Elias CJ It isn't necessarily.

Tipping J Because someone can be gratuitously involved if you like but again we get back to matters of degree but that's just a thought I had Mr Solicitor. It's not a very easily worked concept, someone necessarily involved. A witness for example, are they necessarily involved. I suppose you would have to say they are if someone thought fit to call them. But they could be completely you know no help at all. I think it's more of a conceptual thing rather than focussing on individual contributions if you like to the exercise.

Collins Yes yes. Sorry I was just dealing with the, with my so-called symmetry point and really if there were to be any groupings you would say (a) and (b) deal with people within New Zealand subject to strict confidentiality requirements discharging their functions, (c) and (d) with entities out of New Zealand who are trusted to deal appropriately with confidential information, and thirdly disclosure in circumstances where the safety of the claimant or any other person won't be endangered which deals with (e) and (f).

I've already addressed your Honours about the use of the very restrictive language of the Court of Appeal's, when looking at the word "require" in 3(b). The point that needs to be made that an assessment is, when information is required to discharge a function is very much a fact-specific exercise and that there are many many instances where you will know until you've got the information whether in fact you do require it to discharge your functions.

The final point I wanted to make was that the majority were also influenced by this suggestion that somehow the interpretation being advanced by the Crown didn't encourage candour. The majority appeared to be influenced by the thought that the refugee status proceedings require candour on the part of an applicant, and that somehow such candour might be compromised if officials not associated with determining the refugee proceedings can access that information. In my respectful submission Justice France correctly disposed of that notion in her judgment, pointing out that applicants for refugee status already face serious consequences if they are dishonest, fraudulent in any way, and that indeed inquiries need to be made to determine the veracity of statements and the evidence proffered by those who seek asylum. She dealt with that in para [67] of her judgment.

And furthermore, even though the majority considered it to be an open question as to whether candour warranted outright confidentiality, the limits of confidentiality are determined by practice in accordance with the Convention and the complimentary obligations found under international instruments. The notion that people may not be candour and frank because they could be investigated or given the careful limits to protection under

the Convention that candour must take precedence over possible prosecution of grave international crimes is, in my respectful submission, an inherently unattractive and unworthy position.

Can I say in conclusion that countries such as the United Kingdom, Canada and several western European countries are all having to decide whether or not they should extradite persons back to Rwanda or whether or not they should prosecute persons in their own countries, alleged to have committed serious crimes against humanity. All of those countries honour the Convention. They all honour the international instruments which place humanitarian restrictions on refoulement of those who aren't granted asylum. All of those countries have very advanced guarantees to fair trial yet, to be best of my knowledge, in no other country has it been suggested that refugee processes must be conducted in a sealed environment with strict prohibitions against the use of particulars obtained in refugee proceedings being used by Government officials to determine applications for extradition and/or to decide whether or not domestic prosecutions should take place. There is no need for New Zealand to be out of line with the rest of the world on this issue. The Convention doesn't require the interpretation of section 129T urged by X. The state's practice doesn't require the interpretation of section 129T urged by X. And section 129T itself should be interpreted in a way that is not overly restrictive and in the way which only X has argued for.

Those were the submissions I was proposing to make the Court. If I can assist you in any other way at this juncture I will do my best to do so.

Elias CJ No thank you Mr Solicitor. Mr Illingworth.

Illingworth If the Court pleases, my learned friend has made it clear that it is common ground that the Crown cannot use, disclose a refugee claim information in extradition provisions or in New Zealand criminal proceedings under the 2000 statute unless exception if applies in 129T(3). So what we are debating here is simply the question of how far information can be distributed between public officials under exception (b). Now in approaching that issue it's my submission that the starting point is to look at section 129A which is at the very beginning of Part 6A, which of course deals with refugee determinations. What that section says is that the object of this Part is to provide a statutory basis for the system by which New Zealand ensures it meets its obligations under the refugee convention and I emphasis the word "obligations". The word "obligations" is important because under the Convention there are some things that are obligatory and there are other things that are not prescribed.

The way in which confidentiality is protected is one of the things that is not prescribed under the Convention. That is left to the state's parties to

determine for themselves. Contrary to my learned friend's position, it is not accepted that there is a uniform state practice in relation to confidentiality that would answer the question as to how our country should determine that issue.

Tipping J If there is nothing in the Convention about confidentiality there's no obligation under the Convention as to confidentiality.

Illingworth That's correct Sir.

Tipping J So 129(a) doesn't really bite?

Illingworth And that is my whole point, that 129(a) is

Tipping J I don't see how that carries you anywhere.

Illingworth Where it leads to is this your Honour. That when we get to 129T that is part of the New Zealand Government dealing with a non-obligatory issue that New Zealand is free to deal with in its own way. It is not something that is controlled by international law or state practice.

Tipping J I see, yes alright.

Illingworth It's a stand-alone, so 129T

Elias CJ It's statutory interpretation.

Illingworth It's pure statutory interpretation.

Elias CJ Domestic.

Illingworth Domestic. And although of course 129T is viewed contextually and Part 6A as a whole provides the dominant context, it is not a helpful thing to do to look at the Convention or state practice on that issue because they don't provide the answers to how section 129T is to be interpreted. 129T deals with a problem, as I'll come to in a moment.

McGrath J Does this really mean you do not claim any reliance on the Convention in relation to your argument. Is that what you are saying.

Illingworth Not at all Sir, because the purposes of the Convention are the purposes of Part 6A and of course one of the purposes is the protection of refugees and refugee claimants and that is something upon which I place great emphasis. Because that is linked to the whole reason for having confidentiality which I'll come to in just a moment. So the Convention is part of the context and it's a vital part of the context. But it is not

dominant in the sense that there are obligations and the Convention should tell us how to interpret this particular section.

McGrath J Well it is not specific but I think a good way of putting it, it's contextual and it's protective, and you rely on it to that extent.

Illingworth To that extent yes Sir. Now the Court of Appeal referred to this point by incorporating in their judgment part of Justice Baragwanath's judgment, and this is to be found in tab 6 of Volume 1 of the case on appeal at page 57. Now the Court said, the majority said the reasons of Justice Baragwanath answering this question in favour of X were as follows, and there is reference to the background note to which my learned friend referred earlier, and the italicised passages are the important ones in line with established principles, information on asylum seekers including the very fact that they have made an asylum application should not be shared with the country of origin as this may place such persons, their families, friends or associates at risk, and then [104] the principle, even in such situations the existence of the asylum application should still remain confidential and [104] the principle of confidentiality continues in principle to apply even when a final determination of exclusion has been made. This is necessary to preserve the integrity of the asylum system. Information given on the basis of confidentiality must remain protected.

What we have in this field is a true dilemma which our Parliament must have faced when this section 129T was enacted. The dilemma is this, if we go back to 1951 when the refugee convention was put in place, as his Honour Justice Wilson pointed out earlier, this is directly against the background of the events of World War II. We have absolutely the horrific events where people were subjected to the most gross acts of inhumanity and as a result of that situation the states recognised that there was a need for a safe haven to be provided for refugees on a more structured basis than had been given before. And so we have the refugee convention being entered into.

We also have at the same time the recognition that certain individuals are responsible for carrying out horrendous acts of crimes against humanity, war crimes and so on. And so that issue is also on the table. The question is how do we deal with the situation where people have to be sorted out, whether sheep have to be separated from the goats. The true refugees have to be given the safe haven but at the same time those who have committed serious crimes against humanity cannot be given a shield of impunity. That dilemma is referred to in the Crown's submissions as well.

So what does our Parliament do. It has to make a decision about how to treat refugees when they come to our shores in a way that provides them with a safe haven and in a way which provides them with an assurance that

they can tell their story. People who may have been subjected to incredible pressures and human rights abuses; people who may be extremely fearful; people who may not trust our authorities and it is accepted as an adjunct to the convention responsibilities that an atmosphere of assurance, an atmosphere of safety must be provided and able for refugee claimants to be able to tell their story in a way that is appropriate to the function that is being carried out. But, at the same time, among those people there may be others who are in fact guilty of crimes against humanity and who cannot be given a shield of impunity. So it's that dilemma that our Parliament faces.

How to answer that problem. Do we confer confidentiality in broader terms with only very limited exceptions and thereby place the emphasis on the protection and safety of those who may turn out to be genuine claimants or do we have exceptions to the confidentiality principle, that really are so broad that any assurance of confidentiality that is given to a claimant is meaningless because it is not really something that they can be assured about in light of the extent of the exceptions.

Tipping J Under this formula the confidentiality net is actually thrown quite wide because both the para (a) and the para (b) people are within it.

Illingworth That is the point that I'm leading up to your Honour, that Parliament has chosen to cast the boundaries of confidentiality in a wide way and to have very limited exceptions.

Tipping J But how does that trench on the width of the para (b) class?

Illingworth Because, if the purpose of the legislature is to err on the side of protecting claimants, whether they turn out to be within the scope of the convention or not, then we need to read these exceptions in the light of that legislative purpose. So what I'm seeing is that Parliament has made a policy decision to err on the side of protecting people rather than on doing it the other way.

Elias CJ I take it from the fact that nobody has referred us to any Parliamentary materials means that there isn't anything that throws any light on this.

Illingworth We certainly don't have anything that we can put before you. I don't know whether my friends have done that.

Elias CJ No I imagine it has been checked, yes.

Tipping J I am not sure I am following the logic of your argument. If the width of the confidentiality shield is wide, isn't that a point in favour of a liberal

approach to (b) rather than a narrow approach to (b). Your argument is the reverse but you are going to have to develop this for my benefit.

Illingworth Certainly I accept that challenge Sir. The first question is what was Parliament really trying to do. Was it giving emphasis to the safety principle, the protection principle, the idea of providing a safe haven in circumstances of confidentiality. If the answer to that is yes, and in my submission all the statutory indicia point in that direction. We can come to the question of how wide are the exceptions. Are these exceptions intended to be broad.

Tipping J But they are not exceptions to the confidentiality principle because the people within the class are subject to the confidentiality principle.

Illingworth Yes but the point is that the wider the class of confidants that you create the more risk there is of leakage.

Tipping J Ah, well I understand that point. That's your point, it's the increased risk of abuse, either deliberate or inadvertent.

McGrath J Mr Illingworth it seems to me just at the moment that you speak of what was the emphasis Parliament put on which of the two values that you very helpfully outlined for us. It seems to be at the moment really, it's not so much a matter of emphasis that the legislation really strikes, really accommodates both values without trying to emphasise one more than the other.

Illingworth I accept that up to a point Sir, and I was about to come onto the impunity issue. What I say is that the statute doesn't create impunity for the war criminal or the person who has committed a crime against humanity, it doesn't do that at all. It leaves open the possibility of a person being prosecuted in the normal way. It leaves open the possibility of inquiries being made about a person. It simply imposes restrictions in quite a narrow area and it is vital in order to understand the statutory scheme properly to appreciate the breadth of the area, the cone of silence if you like, that descends. It is vital to appreciate that that is quite a narrow area and that takes us back to of course subsection (1).

Now I'm just going to be stating the obvious here but we go back to subsection (1) and we see that the things that are protected, the confidential information are first the identity of the claimant or other person whose status is being considered, and the particulars of their claim. So it's their identity and their claim that are the confidential information. So if we have, for example, someone coming into the country making a refugee status claim it is determined that they have Aids, that they are a public risk or that they have abused their children or done something of

that sort. Those are not confidential issues. They are not part of the area of confidentiality that is affected by section 129T. The more important point is that there is no shield of impunity granted to the claimant merely by reason of subsection (1) of 129T. That is not its purpose and it is not part of what it does. We do not say that 129T provides some sort of shield for the war criminal or shield for the person who has been involved in a crime against humanity. On the contrary, we say those people are subject to all the normal principles of prosecution and extradition in the normal way. The only thing that cannot be used is what they put forward in their claim.

McGrath J So are you saying that the examples that the Solicitor-General gave us in relation to disclosure to CYPFs, disclosure to Health Authorities, they are just not in point because the duty of confidentiality does not extend to those situations.

Illingworth Exactly your Honour.

Tipping J It is putting a huge weight on the concept of particulars of their case as to precisely what the ambit of that is.

Elias CJ Of their claim.

Tipping J No of their case, case not claim.

Illingworth Well the alternative is, if we come before the Court and we ask for an expansive interpretation of that phrase, we could rightly be accused of asking that this section be treated as a shield of impunity for someone who has done things that are dreadfully wrong.

Blanchard J But their case whatever they choose to put up.

Elias CJ But it is the case for the claim to refugee status, that is the point you are making.

Tipping J So anything that is in favour is protected but anything that is adverse is not protected.

Illingworth No, I am not saying that your Honour. The position is that, as in this case, there are accusations that Article 1F applies and part of the case will be dealing with that issue. So what the claimant says in support of his case, the particulars of his case, is confidential information and to that extent it can't be used against him. Now that is understandable from a legislative point of view, looking at what Parliament was trying to do at this time because, in my submission, Parliament was erring on the side of protection

and safety for the claimant rather than exposing or being unable to give the claimant an assurance of safety and confidentiality.

Tipping J Was this weight that you are now putting on the phrase “particulars of their case” given in the same way in the Court of Appeal?

Illingworth I suspect that I am emphasising it now a little more than was done earlier but our position on this hasn’t changed at all your Honour.

Tipping J I just don’t recall any discussion in the Court of Appeal, in the judgments I mean, on this dimension of your case. That is the only reason I am referring to it.

Illingworth Well I don’t have any doubt that the majority understood the position that we were adopting and that their approach is premised on the basis that the area of protection that we are seeking is a limited one. It is not an unlimited area of protection.

Elias CJ Well except as you say it brings in the exclusion consideration. And that is going to be very relevant, all of the particulars relating to that will be very relevant, to any extradition consideration.

Illingworth That is undoubtedly so and I will come to those exemptions shortly. But what I am driving at the moment is if we are going to approach 129T as a piece of domestic legislation which is not governed or controlled by the convention, and we look at Parliament was intending as we can from all of the indicia before within and surrounding the section itself, and we say clearly the issue is protection from endangerment, protection of vulnerable people who are coming to our shores making a claim in the context of this convention, then we give effect both to subsection (1) and to the exceptions in subsection (3) accordingly.

Tipping J Are you saying that particulars of their case is in itself a limiting factor.

Illingworth Yes.

Wilson J So on that argument would a refugee status officer be free to disclose publicly material provided by the claimant on the basis that it didn’t form part of the particulars of their case.

Illingworth No your Honour. The information that is put forward by the claimant in support of the claim constitutes the particulars of that person’s case.

Wilson J All information provided by the claimant.

Illingworth All information provided by the claimant. Now that maybe a reasonably broad tranche of information but it is completely different from saying that a cone of silence descends over the whole process and that everything in the process is controlled by the confidentiality principle.

Tipping J But I come back to the good is protected the bad isn't. I mean are people going to have to say well when he was answering questions from the refugee officer some how or other some of that, if it supports his case, is covered by confidence and, if it doesn't support his case, it isn't.

Illingworth No Sir.

Tipping J Well I have real difficulty with this.

Blanchard J Well I am having difficulty understanding the argument. It just seems to go around in a circle.

Illingworth Well all I am trying to do at this stage Sir is to identify the purpose of the legislature and I say that the purpose

Blanchard J But that is all pretty obvious from the words, the particulars of their case. For a while I thought you were trying to narrow that right down. Now you have broadened it right out again. So where are we going.

Illingworth No what I am saying Sir is that Parliament starts off by looking at an issue that is not governed by the Convention.

Blanchard J Yes I understand all that.

Illingworth Right. It then faces the dilemma do we expand the scope of confidentiality or do we make it subject to exceptions and if we do how broad are those exceptions. In my submission all the indicia show that the exceptions are intended to be limited but in looking at that issue

Blanchard J Well they are as broad as his case or as limited as his case, it depends on what is put up as the case.

Illingworth Exactly. But it is his case only and his identification details that are subject to the confidentiality claim. That is not a shield of impunity.

Blanchard J Well no-one has ever suggested it was wider than that.

Tipping J What is the boundary of the particulars of his case.

Elias CJ Is it the grounds for believing that he is at risk of persecution, it is the convention grounds.

Illingworth Yes, it is everything that he puts forward in support of that, including his witness evidence and so on. That is his case. That does not mean that Parliament is treating this person as immune from prosecution for what he may or may not have done. Parliament is simply

Elias CJ But no-one is suggesting that.

Blanchard J That is a straw man.

Illingworth Well it may.

Elias CJ They are just suggesting you can't use the information obtained through this process.

Illingworth Exactly. All I am trying to do is to emphasise that there is an area of ring-fenced information which is relatively limited in its scope which cannot be used against that person in the future.

Tipping J It is the crucial, it is the information we are talking about. You are trying, it seems to me, to narrow the ambit in a way which I am not sure I am fully grasping. You say I don't mind you are disclosing the bits that help me.

Illingworth No Sir I am not.

Tipping J It is the other way round. I want you not to be able to disclose what helps me but you can disclose anything that comes up that doesn't help me.

Illingworth No Sir, I am not advancing that argument. What I am saying is that just because we have section 129T and just because it is interpreted in the way that I submit, does not confer any immunity on someone for things that they may have done and which can be separately proved.

Blanchard J That is pretty obvious.

Illingworth It may be obvious.

Elias CJ But your point is that the examples given by the Solicitor-General are not caught.

Blanchard J I think we rather shot those down in flames anyway.

Illingworth Well Sir I am just trying to pour some fuel on the lingering fire.

Blanchard J They are already dead.

Elias CJ While you are looking at these sort of rather infelicitous drafting things, it had occurred to me that actually this argument had occurred to me but I also wondered whether subsection (3) subsection (1) does not apply to prevent the disclosure of particulars. The reference to particulars does that include identity? I suppose it must but there is a distinction drawn in section 129T(1) between identity and as to the particulars of their case.

Blanchard J But then identification is referred to in (e).

Elias CJ Yes that is right.

Blanchard J So we would have to cover it.

Elias CJ Although that is particulars which might be likely to allow identification. So it does seem to me to be maintaining a distinction between those two things, that identity seems to be the subject of much higher protection than particulars of the case.

Illingworth Yes on the basis that under 3(e) things can be published in the discretion of the RSAA who are going to be very mindful of whether or not what they publish is going to be able to be linked back to the claimant. So the idea, in my submission, is that as long as it completely anonymised particulars of what may have happened in a case that nobody else knows about is not a problem.

Elias CJ It may not really read like that. What it may mean is that the officials acting under the Immigration Act can't shop someone who makes an application for refugee status but if another Government Department is dealing with that person they may supply information about them.

Tipping J The word "particulars" is not used as a term of art is it, because it is matched by the word "information" which the Chief Justice has just used in subsection (5).

Illingworth Yes there are a lot of curious things.

Tipping J Information about the case. That is really what it means. And as to any information about their case is really what particulars of the case means doesn't it? It is not used in the sense that you or I might use the word "particulars" Mr Illingworth?

Illingworth No I am asking you for particulars of your claim. No it's not. It's a lay person's approach to the term.

- Blanchard J I mean it would be a bit strange anyway if you went to the United Nations High Commissioner for Refugees and said we have got this very interesting particulars of case we are going to tell you about but we won't identify the person because we can't.
- Elias CJ Yes well that is why I said that it isn't very well drafted. I hope that doesn't hurt someone's feelings.
- Illingworth Yes I agree with that your Honour and that is why the majority in the Court of Appeal eventually concluded that drawing inferences from the scheme of the section was a bit of a dodgy thing to do. I can illustrate that by looking at 3(a). 3(a) is a person necessarily involved in determining the relevant claim or matters. Now if we go back to subsection (1) we see that there are four classes. Refugee status officers, the Authority, other persons involved in the administration of the Act, and persons to whom particulars are disclosed under 3(a) or (b). The question is are they discrete and separate categories or can there be an overlap. In other words, is it designed just to make sure that we have covered everybody. When we have a provision that is self-evidently designed to define the scope of confidentiality, the idea that these categories have to be separate and discrete is not all that attractive in my submission. What the Court of Appeal have done in the end is to say well when you look at subsection (1) and then look at (a) and (b) you are not necessarily dealing with separate and discrete categories, you are dealing with something that is designed to cover an unknown situation in the future where there can be a bit of an overlap and it is not necessary to interpret subsection (1) or subsection 3(a) and (b) in a way that results in a complete separation of classes.
- Tipping J When I first read this section Mr Illingworth and before I turned over the page, I thought aha this confidentiality applies to people who are involved in administering these claims in the broadest of sense, because it doesn't say necessarily involved there, and it also applies to other people to whom this information may come. Isn't that the crucial dichotomy which is rather clumsily picked up in (a) and (b)?
- Illingworth Well my approach to it, as I have said out in the submissions your Honour, is to say that subsection (1) is answering some questions. First of all, and this is my 5.4 at page 12 of my submissions, it is answering the question what information must be treated as confidential. Whether it has done that very effectively is
- Tipping J Undoubtedly that is the first step.
- Illingworth That is the first step. Secondly, to whom does the confidentiality obligation apply. Now it is giving four broad categories of people who

may get confidential information in the course of their job, and it is saying you must keep this information confidential.

Tipping J I see it as limiting two broad categories. Those involved with administering the Act and others, who we don't know who they are yet, until we turn over the page.

Wilson J That has got to be right hasn't it, the use of the word "and" in the penultimate line of one rather than "including" has to be given weight doesn't it?

Illingworth Well in my submission Sir the word "and" doesn't determine whether these classes are separate classes that can't overlap. It may be or it may not be. In my submission, when you link up subsection (1) with subsection (3), a person necessarily involved in determining the relevant claim or matters clearly comes within the term refugee status officers.

Wilson J Does that necessarily follow. We would have got the witness or interpreter example we touched on earlier.

Illingworth No I accept that there can be people outside these other classes but some of the people are within the classes. So there is clearly an overlap. It is not a situation where they are discrete categories. If you go back to (1), refugee status officers may be in 3(a), the Authority may be in 3(a) and other persons involved in the administration of the Act may be in 3(a). So they can all potentially be included in any of those categories. I think that is the point that the Court of Appeal were picking up in, that is a belt and braces approach, it is not a situation where these are mutually exclusive categories where you have to look at it on the basis that there is a logic there that inextricably leads you to the conclusion that people in 3(a) or (b) are outside the scope of those other categories.

Wilson J I still have the problem with that word "and" and persons to whom particulars are disclosed under subsection 3(a) or (b).

Illingworth I can see your Honour's problem but there is an even greater problem if you go down to the subsection (3)(a) and try to figure out how could that subsection have been formulated on the basis that people in that category are outside the scope of the others referred to in subsection (1).

Tipping J There is a logical problem because (3)(a) are unnecessarily within the first lot. It's only a (3)(b) that logically is a different class.

Blanchard J Well I am not sure about that. An interpreter, for example, how does an interpreter get into

Illingworth I accept that Sir, I accept that there are people

Blanchard J And witnesses.

Illingworth There are people in (3)(a) who could fall outside those other sections but the ones who are primarily going to be in (3)(a) are already in at least one of the other sections.

Blanchard J But (3)(a) is clearly intended to pick up the people who are not within subsection (1) but will necessarily have to be involved in the determination.

Illingworth Well I accept that that is one way of looking at it Sir.

Blanchard J Well it is the ordinary language. I must say I read this section before reading any of the submissions and it all seemed to fall out quite nicely. One can then overload it with subtleties but I am on the side of the drafter here, I don't think this is too bad.

Tipping J Is it the (3)(a) person, when you are looking at the end part of subsection (1), is it the (3)(a) person necessarily comprehended in other persons involved in the administration of the Act.

Illingworth Well that is my point Sir, you can go

Blanchard J I don't think so. They are not administering the Act.

Illingworth They don't have to be administering the Act, they have to be involved in the administration of the Act.

Tipping J So there's a distinction

Elias CJ There is an overlap, which is what you have been saying.

Illingworth That's what I have been saying.

Tipping J Administering isn't involved in determining the relevant claim. I suppose that is right strictly. But I, more importantly, I see the dichotomy in (1) as being those within the fold by some means or other and those outside the fold, the fold of what you might call refugee, immediate refugee work.

Elias CJ I don't think it matters does it?

Illingworth Well it does because if the Court of Appeal are right then (3)(b) is confined to people who are inside the fold and that is the point Justice Tipping is putting to me.

Tipping J That is what is worrying me and I am very interested to hear what you are saying about it. But it just seems to me that there are two folds here;

Elias CJ The sheep and the goats.

Tipping J The sheep and the goats. If you are sheep, (a) is the sheep and (b) is the goats.

Illingworth Well that is, in my submission,

Collins I object because that makes us the goats.

Illingworth I don't object to that.

Tipping J I seem to have a talent for causing the Chief Justice some grief.

Elias CJ Well I have just taken a mouthful of water.

Tipping J Putting it firmly on the table, that is what you have to deal with in my mind, at the simplest possible level.

Illingworth Well what I am submitting Sir is that the fact that you have overlapping categories means that you can't draw inferences about the exceptions from subsection (1). Subsection (1) is not drafted in the most felicitous fashion. The Court of Appeal accepted that, they recognised that and they said essentially because you have got overlapping categories or potentially overlapping categories you can't start drawing inferences from the fact that one person might be in this category, therefore someone in the (3)(a) or (b) must be outside that category. That's not the purpose of subsection (1). Subsection (1) is simply to define the range of persons who are bound by confidentiality. To go beyond that and to start drawing inferences from subsection (1) is dangerous and won't lead you to the right result. What you should

Elias CJ Subsection (3) though really it's an empowering provision, it permits disclosure. So it actually does serve a different purpose.

Blanchard J It extends the range.

Elias CJ Yes.

Blanchard J Quite clearly.

Illingworth Yes it does extend the range.

Elias CJ But you are not arguing against that because you have accepted that the person who has TB, the particulars of that can be communicated to the Health Authorities.

Illingworth That is why I emphasised the limitation on the scope of the confidential information under subsection (1), that was simply to deal with the argument that my learned friend was putting forward. What I am saying is that in order to determine the extension of the range, as his Honour Justice Blanchard just said, the extension of the range, you look at subsection (3), you don't get to rely too heavily on subsection (1) and the drawing of inferences from it because, as the Court of Appeal said, there are overlaps, it's a belt and braces approach, and it's not going to help us. What will help us is to look at the overall purpose of the legislature as expressed in the section as a whole, and to give emphasis to that, and then look at any ambiguities that there may be in these subparagraphs in section 129T(3) in the light of that object and purpose of the legislature.

Now I say that the object of the legislature is clear. It is protection from endangerment, it is to create that safe haven approach and that it would be completely wrong in those circumstances to give a broad liberal approach to exceptions from a general principle of confidentiality. That is not the right way to approach the exceptions. On the contrary if Parliament laying down a general rule of confidentiality for protective purposes, then the exceptions should be given a relatively limited interpretation and should not be interpreted so as to undermine the whole purpose and the evident purpose of the section read as a whole.

Tipping J And it is the risk, I think this is a key point, it is the risk. I say no more, you know what I mean.

Illingworth Yes and I think in the dialogue with my learned friend this morning the position was reached where you can say well under (b) you can interpret that liberally so as to enable a whole range of people. If you read the word "functions" broadly, if you read the word "require" broadly, and you take a broad interpretation of Government Department and Crown Agency, then the pool of confidants, people who are legitimate recipients of the confidential information, is widened. It is inevitable logic, in my submission. You are widening the pool of lawful recipients.

Wilson J So how do you say (3)(b) should be interpreted?

Illingworth By interpreting the phrase "functions in relation to the claimant" as meaning "functions in relation to the claimant in his or her capacity as a claimant". In other words, "claimant" is there to represent that person as a refugee claimant and also interpreting the words "require knowledge" in a fairly restrictive way. That is how the Court of Appeal gets to its result

and Justice Baragwanath and, in my submission, that is the appropriate course of action.

Elias CJ I want to put to you Mr Illingworth that it is not belt and braces, it is not overlap, there are different functions served by subsections (1) and (3). Subsection (1) imposes the obligation of confidentiality. Subsection (3) provides exceptions but if you are within (a) and (b) you are bound yourself by the general confidentiality provision. If you are the UN High Commissioner or other countries and so on, you are away free. There is no purported imposition of confidentiality or, if there is no serious possibility that the safety of the claimant would be endangered, then you are outside too. So I don't actually see this as such a badly drafted section at all.

Illingworth What your Honour has said is almost exactly what I think I was trying to say in my submissions as my main argument.

Elias CJ I think that is probably right.

Illingworth I have not used the term "belt and braces" and I have not referred to the overlap issue. I am simply responding to what my learned friend says on that point.

Elias CJ Yes and then it is part of your argument that this is a narrow requirement of confidentiality because it is taken back to subsection (1) but also it is narrow because if it isn't information in respect of which there is a serious possibility of the safety being compromised then again you are right out.

Illingworth That is right. That is exactly my position.

Elias CJ So it is only in the area of risk that the confidentiality applies. And serious.

Illingworth Serious risk. Yes. It is a suitable place.

Elias CJ Yes we will take the adjournment now.

Court adjourns for lunch 12:59 pm

Court resumes 2:17 pm

Elias CJ Thank you. Yes Mr Illingworth.

Illingworth If the Court pleases, I will now just go through, I am not going to speak to my submissions, I am simply going to touch on a couple of points on the way through. Page 7 at 3.71, I have referred to country reports which show that the system in Rwanda is extremely rudimentary. I am just alerting the Court to the fact that the country report that was before the

other Courts is in tab 1 of the respondent's first bundle and the relevant entries are between pages 3 and 7. My learned friend referred to the fact that if X was extradited back to Rwanda who would have to face trial in front of the High Court there. I am not sure of the basis for that. Certainly the country report indicates that there is a very informal system in Rwanda which comprises what I think are called gacaca courts, that are run by unqualified people and do deal with a wide range of genocide allegations.

- Blanchard J I was just going to ask, this is the United States Government publication. So it is not a United Nations report.
- Illingworth It is not your Honour but I have got no reason to think that is anything other than a reasonable objective report.
- Blanchard J Well there have been complaints about some of their reports on New Zealand not being accurate.
- Illingworth I understand Sir that they are still used quite routinely by the RSAA itself. I am not suggesting that everything in it is necessarily accurate but it does give a picture of a system of justice that is utterly unlike.
- McGrath J Which page in particular was it that you were
- Illingworth Well Sir it starts at page 4 under the heading of Arrest and Detention, at the top of page 5, the two main paragraphs at the top of page 5, and then there is reference in e. to denial of fair public trial, and further down the page trial procedures. Then on page 6, the top paragraph and the bottom five paragraphs, and possibly a little bit of page 7 under the heading Political Prisoners and Detainees. I am not pressing the point. We are here on a statutory interpretation issue, not to inquire into what is happening in Rwanda, but it's just part of the background.
- Illingworth 3.76, we refer to the fact that requiring X to disclose evidence about involvement he may have had in the events in question would be inconsistent with the principle that no-one should be forced to become his own accuser. It is perfectly true, as Mr Solicitor said, that entering into a refugee status claim is a voluntary step. But at the same time it is, I submit, important to recognise that refugee claimants can be in very desperate circumstances and may well have no alternative but to plead for their position to be recognised. If they do they are then required, they are told, as I have noted at the beginning of my submissions, that they are required to answer questions but there is also a statutory offence provision which comes into play under section 142. And at 142(1)(c) without reasonable excuse produces or surrenders any document or supplies any information to an immigration officer or visa officer or refugee status officer knowing that is false or misleading in any material respect.

- Elias CJ Well that is not a power of compulsion though is it? I am not sure how you say that the privilege against self-incrimination is engaged.
- Illingworth No ah.
- McGrath J (b) perhaps.
- Illingworth It is a combination of the provisions of 142 plus what the individuals are told. They are routinely told, and I may have to come back on the reference to this, but they are routinely told that they must put forward everything that is important to their claim and if they put forward anything that is false or misleading they can be punished for it. All I am saying it is a situation in which there is an element of coercion or maybe an element of coercion involved.
- McGrath J Section 142(1)(b) is probably a more appropriate provision for you to refer to.
- Illingworth Yes Sir but that is, the reason I didn't refer to that, is because that is too an immigration officer not a refugee status branch officer and (c) is the one that has got the reference to the refugee status officer. I don't place great emphasis on it but I simply draw attention to the fact that it is not exactly the same situation as someone who is asked to answer questions by the police and there is no element of punishment or coercion involved. It is not a major point in the overall scheme of things I accept.
- Wilson J Is there is any significance in the different wording of paragraphs (b) and (c) of 142(1)? And in the fact that (b) seems to be directed to responding to a request for information, doesn't extent to a refugee officer.
- Illingworth That is quite correct your Honour. I accept that that is right. It does place less responsibility, it is a lower standard of responsibility on the part of the recipient under (c). Now at my 3.12 we refer to the fact that the RSAA seems to have assumed that X's purpose was to avoid having his evidence subjected to verification by independent inquiry. That is not correct. We accept that the refugee status branch have the power under specific provisions in Part 6A to make inquiries and to seek information about the claim and can do that without any significant problems, so long as they comply with the specific requirements of section 129T subsection (1). That is one of the reasons why I was trying to draw attention earlier on to the fairly narrow scope of the zone of confidentiality. Justice Ellen France refers to the specific provisions in question in her judgment. We accept that she is right about the inquiries that can be made but we don't accept that that means there is any inference to be drawn in terms of 129T.

Just following on from that, in my submissions at 3.14, we say at the narrowest the crucial question is whether under section 129T it will be permissible (and if so, and in what circumstances) for Government officials to disclose or use evidence given by X or his witnesses during the refugee status appeal. Now the focus has changed a little during the course of the hearing because, as the Solicitor has said, he is not contending for disclosure of the material other than through (3)(f) but we do say that it is still an extremely important issue as to how widely the information can be distributed within the zone of Government officials and Crown Agencies which, as I understand it, my friend wants the information to be allowed to go to without significant restriction. The reason I say that is because

Elias CJ It is not confidentiality for its own sake. So it is only confidentiality where there is a serious possibility of harm or whatever the word is.

Illingworth Exactly I accept that fully your Honour and the rationale for it is in my next two paragraphs. We refer to one incident where a Government official deliberately leaked information about X and I think two other refugee claimants, and the Crown had to take special action to ensure that that did not get into the public domain when there was a serious prospect of that happening. We mention that only as an illustration of the importance of ensuring that the circle of confidants is not increased unnecessarily because, as we say at the end of 3.16, the greater the circle of confidants the greater the risk of leakage and that is the point I was debating with Justice Tipping earlier.

Now in my section 4 we deal, as I have described it, the protection principle. My learned friend objects to that. It is a form of shorthand only but it is an important principle in substance and I want to take the Court to some references.

In the Attorney-General's bundle of authorities, it's the big bundle, I would ask the Court to turn to tab 13. This is an article by Michael Kingsley Nyinah and I want to pick up some references made in the course of this paper. At page 298 first main paragraph, "It would seem appropriate to consider Article 1F as a component of the network of norms which seek to sanction serious violations, inasmuch as denying the cover of refugee protection to a suspect potentially exposes him to prosecutorial investigation and action. This is not to say, however, that the exclusion clauses are intended to perform a penal function in the sense of directly initiating or instigating legal proceedings against the excluded individual. Such a function was clearly not envisaged by the drafters, and refugee status determination procedures obviously lack the capacity to perform the role of criminal process. Moreover, a penal function would ultimately threaten or destroy the confidence which asylum-seekers should have in asylum procedures if the system of international protection is to function

effectively. For these reasons, an approach to exclusion which emphasises its punitive angle is improper.”

And then on page 299 first main paragraph.

Elias CJ Can you translate that for the purposes of this case. What are drawing from this?

Illingworth That the fact that there is an exclusion under the refugee convention for people who have committed crimes against humanity does not convert into a principle that the states parties to the convention are by the convention involved in an obligation to perform a penal obligation.

Elias CJ Who would argue that though really.

Illingworth Well what the Crown is arguing is that the fact that we have Article 1F implies an obligation for the New Zealand Government to do certain things which effectively are of a penal character.

Elias CJ I hadn't understood them to be putting it like that.

Blanchard J Isn't that based on the international [inaudible] Act

Tipping J I thought we had an obligation, internationally and under that Act, if we are seized of cases to deal with them. If you can never get seized of a case because of this veil of secrecy that your client is contending for, it seems to be rather counter-intuitive to me.

Illingworth Well Sir the response is that the convention was never designed for the purpose of exposing people to penal consequences. What it was doing was ensuring that the protection for refugees was not extended improperly to people who had been involved in those kinds of practices.

Blanchard J Quite so but the international obligation to at least consider doing something about bringing offenders who have committed genocide etc to justice, exists independently of that and is now in New Zealand domestic law.

Illingworth I accept that Sir and I deal with that separately. What we are saying is that the convention does not itself provide for that response.

Tipping J But shouldn't the drafting of the crucial section or the interpretation of it bear in mind that possibility.

Illingworth Yes Sir. I have conceded that point in my written submissions that it is a factor to be taken into account that at international law we may have an

obligation under the *aut dedere aut judicare* principle. I will come to that in a moment. My point at present, and this Article supports it, that the convention itself does not impose any such obligation.

Tipping J With great respect I think you're best approach, at least from my point of view, is to focus on why this section should not be given the meaning that is contended for by the Crown if the convention is neutral we shall say.

Illingworth That is the only point I am trying to make at the moment, the convention is neutral on that point. I do want to take the Court through just some of these key points because they are the substratum of jurisprudence that applies in this area. I don't intend to dwell at length on them Sir but if I can come back to

Tipping J I don't want to take you off at all but just singing for myself, if something is neutral it is not as if the Solicitor-General really relied on this. I think you are sort of setting up a straw man and then knocking it over.

Illingworth No Sir in the Crown's written submissions there is some reliance on the fact that Article 1F is there and should assist the Court in interpreting 129T. I am simply going through and showing that it is neutral on that point. If we have got to the point of acceptance on that issue then fine.

Tipping J Well yes no I think you had better proceed as you see fit. I don't want to mislead you Mr Illingworth.

Illingworth At page 299 first main paragraph "Given that the 1951 Convention established a regime of international protection for persons rendered vulnerable and victimised by persecution, its core purpose is to ensure that the physical security, legal protection needs and human dignity of refugees receive the necessary attention of the international community. Its object is to protect those who are identified as being in need. An approach centred around the objects and purposes of the 1951 Convention places the exclusion clauses in their proper perspective, and ensures an appropriate balance between the exemptive rationales of exclusion and the broader humanitarian aims of refugee protection."

And then, at the bottom of the page, "Given their exceptional character and the potentially grave consequences of their application, the application of Article 1F exclusion must be attended by the utmost respect for standards of fairness and natural justice. An important means of meeting these standards is to examine exclusion issues in tandem with questions relating to inclusion. Inclusion and exclusion are integral parts of a refugee claim, and both should be duly considered as part of a comprehensive examination of all relevant facts. As the request for asylum is the central premise for the applicant's presence in the exclusion procedure, natural

justice demands that he or she be given a full opportunity and every available facility to explain the grounds of the refugee claim.” Then I don’t have to refer to that next passage.

Then at the top of page 304 second line “The exclusion clauses are situated within a humanitarian legal framework whose central objective is the protection of persons victimised by persecution or the threat thereof. An appropriately balanced and just approach to exclusion requires that this core purpose be constantly kept in mind, so that the penal or exemptive effect of exclusion should not be given undue pre-eminence. In an environment which is unenthusiastic towards or hostile to asylum, sight is too easily lost of the balance required for a correct approach to exclusion.”

And similar sentiments are expressed at the bottom of page 315 in concluding remarks.

If I could then ask the Court to go to tab 14. At page 427 and 428 there is reference to the House of Lords case, Lord Steyn in *R v Secretary of State for the Home Department, ex part Adan*, where his Lordship makes the point that the state practice can’t be used as a means of interpreting the treaty. In principle therefore there can be only one true meaning of a treaty, that a footnote. Back into the body just above that, reference to the *travaux préparatoires* show “that the exclusion clause is sought to achieve these two aims. The first recognises that refugee status has to be protected from abuse by prohibiting its grant to undeserving cases. Due to serious transgressions committed prior to entry, the applicant is not deserving of protection as a refugee – there is an intrinsic link ‘between ideas of humanity, equity and the concept of refugee’. The second aim of the drafters was to ensure that those who had committed grave crimes in the Second World War or other serious non-political crimes, or who were guilty of acts contrary to the purposes and principles of the United Nations, did not escape prosecution. Nevertheless, given that Article 1F represents a limitation on a humanitarian provision, it needs to be interpreted restrictively.”

Tipping J Does this mean any more than you are not setting out to look for a war criminal, that if you think you might have found one, you shouldn’t be inhibited from making use of that information.

Illingworth Well in my submission Sir these quotations indicate very clearly that the importance of protection and refuge are the dominant humanitarian consideration and that issues of confidentiality are, as I submitted this morning, a matter for the individual domestic law of the state. That is what our legislature has done in 129T and the convention itself is neutral on the issue. It doesn’t help. State practice doesn’t assist on the issue.

State practices vary and, in any event, as we have just seen, state practice can't help you to interpret the Treaty itself.

Tipping J So you disagree with what I have just put to you.

Illingworth Yes I do Sir because I say that we simply come back.

Tipping J You should never be able to use what you just happened to find, as opposed you are not directly looking for it but if you happen to find it you are not allowed to use it?

Illingworth You are not allowed to use it because section 129T does not allow an exception in that situation. Now there are also some references on state practice which are helpful and I will just give one. It is at tab 14 back in the Gilbert material at page 427. I'm sorry that's the one I have already dealt with.

Now coming onto the issue of either prosecute or extradite, I have accepted that there are at least some circumstances in which New Zealand has that obligation. I have probably made a concession that is too broad on that topic. In my 13.2, I have referred to *Pinochet*. *Pinochet* is in our bundle under tab 2. It is clear that in some circumstances states can have that kind of obligation but it is not at all clear as to the extent of the obligation at international law, it is a developing area and this is referred to in the Fitzpatrick paper at tab 17, particularly at page 280 and 285, the practice varies, it is a developing principle and, at page 286, it has a complex relationship with international crimes. So this is a tricky difficult and developing area and it is not one in respect of which it is easy to draw inferences as I have said. In my submission it is not a situation where it can clearly be said that Parliament must have had this obligation in mind and that inferences can be drawn concerning the correct interpretation of 129T because of that international law obligation.

Now if I can just go back to my para 10.9, the position I think we reached this morning was that the Crown is contending that although refugee claim information can't be disclosed other than under exception (f) it can get to Crown agents of all varieties, of a wide range of varieties under (b) including, for example, a prosecutor. The point I am making in this area of my submissions is that 129T(3)(b) permits disclosure only if the proper discharge of the function of the officer concerned requires knowledge of the confidential information. I have said it is difficult to see how that condition could be met in relation to a proposed use of confidential information for the purposes of extradition proceedings or an international law prosecution. That is because, even assuming that the prosecutor was correctly classified as an officer or employee of a Crown Agency, which wouldn't apply in the case of independent counsel, how could it be said

that knowledge of the confidential information was required in order to carry out the function.

And, over the page, if the prosecutor was bound to maintain the confidentiality of the information under 129T(1) as we know is the case, the information would be of no use in the prosecution so it wouldn't be required information.

- Blanchard J Well it might be in use indirectly.
- Illingworth Yes but if we are looking for the true intent and purpose of the legislature as expressed in para (b), then in my submission Sir that is quite remote. It is unlikely to be what Parliament intended when that provision was enacted.
- Tipping J But what if it was a piece of jigsaw that lead you to be able to put the jigsaw together and you could then present your prosecution without use of that specific piece.
- Illingworth Well in my submission Sir it is unlikely that Parliament had that scenario in mind when (b) was enacted and if we go back to (b) the officer must have functions in relation to the claimant or other person which require knowledge of those particulars. Now in my submission it is a stretch to say that Parliament would have had that scenario in mind when that paragraph was included in that subsection.
- McGrath J You can draw an analogy can't you with that provision in the Serious Fraud Office legislation where compulsory interviews provide information which then can be used but can't be directly used. So if Parliament had in mind in the Serious Fraud Office Act, why mightn't it not have had it in mind here?
- Illingworth I'm sorry Sir you are saying that if it had in mind in the SFO Act why couldn't it have had it in mind here. Well in my submission Sir Parliament clearly did have it in mind in the Serious Fraud Office Act because it has said so, it has made that clear and it is perfectly obvious in the Serious Fraud Office Act what limitations apply to that kind of information and how it can be used and the exceptions that apply to it. It was done in a very specific way there. If that is what Parliament was trying to do in this particular exemption it has done it in a very indirect way.
- McGrath J Well Parliament is dealing far more generally in terms of concepts here than it was in the Serious Fraud Office Act but it is certainly applying confidentiality and it seems to me that the provision can be fitted into that situation.

- Illingworth I accept that it could be fitted into that situation Sir but because of the lack of specificity and because of the nature of what is being suggested in my submission that is unlikely to be what Parliament was really intending when that exemption was formulated.
- McGrath J Its use could be controlled, for example at a trial, a Judge would just not allow any direct use because the confidentiality of the case has precluded it.
- Illingworth I accept that Sir but the purpose of this section is to ensure that the cat doesn't get out of the bag in the first place. It is intended to confine the range of recipients of information not to control information after it has been disclosed. It is primarily designed to control disclosure of information.
- Tipping J What do you say the word "require" means?
- Illingworth Well in the exchange that took place earlier Her Honour the Chief Justice referred to the need to know in order to fulfil the function and I would gratefully adopt that formulation. It must be necessary to perform the function of the officer to whom the disclosure is being made. That officer must need to know the information in order to perform the function. Anything else than that is not a requirement. Required doesn't mean that the information might be useful to the person. It must be something that is required for the person to perform the function in the sense of the real need.
- Elias CJ I am not sure that I would accept that Mr Illingworth. Um need to know, I was using not in a qualitative sense but in terms of relevance, and relevance may prove, it may prove to be unnecessary for the information to have been provided but it is still relevant to the function being performed. It is a proper purpose provision perhaps.
- Illingworth Yes I accept that and it may be I have stated it too narrowly.
- Elias CJ That is why I was referring to Padfield.
- Illingworth Well I recall the reference to Padfield and I accept that this is a very helpful approach. If it is part of the proper function of the officer to have access to this kind of information and it is needed in order for that function to be able to be fulfilled, then I would say the information is required.
- Elias CJ Well then apply that to the police, the function of the police, in investigating in crime, including under our international obligations or I don't know who does do extraditions, oh the police do extraditions or for the purposes of complying with an extradition treaty.

Illingworth Well in my submission the concept of a police officer requiring knowledge of those particulars is a difficult one. You can say that it is within the scope of the officer's proper functions to know everything about the offence in question. But in my submission that is too tenuous a link with the function in order to be within the meaning of this word. In my submission it is a higher standard than that.

Blanchard J Mr Illingworth there is a huge practical problem if we were to accept your argument. How on earth does the person within the immigration know what is required by the police without a dialogue with a police officer to find out what they need to know.

Illingworth Well in my submission Sir the person who is being asked to disclose the information or is considering disclosing the information would have to have a proper basis for concluding that whoever it's being disclosed to

Blanchard J But how do they get that proper basis without a dialogue with let us say the police.

Illingworth I don't have any difficulty with there being a dialogue with the police to disclose whether or not the recipient or the proposed recipient has a requirement to know the information. I accept that it could be a difficult

Blanchard J I think it is an impossible situation to create.

Illingworth Sir the difficulty with saying that is that that's what the legislature has laid down.

Blanchard J No it isn't, not necessarily, we are interpreting. In interpreting one has to look at whether one will create a foolish result. So one has to think about possible scenarios and in the scenario that I am trying to outline to you it seems to me it is just impossible.

Illingworth Well I follow the logic in terms of interpretation. My rejoinder to that Sir is that if we end up in a situation where the test for disclosure under (b) is diluted to a point where there is quite a liberal regime for the disclosure of information

Blanchard J Subject to confidentiality.

Illingworth Still subject to confidentiality but the problem is that we get someone in the WINZ office, someone in the CYPF's office.

- Elias CJ But I thought you had conceded that those people could have access to that information, the Health people for example. That is why I am asking you about the police because where is
- Illingworth No I think we have missed the beat in terms of what I was accepting your Honour. What I am accepting is that information can be given to the Public Health Authorities or any other Authorities if it is outside the scope of subsection (1) and that is why I was dealing with the scope of subsection (1) this morning. The Aids example, the person who is creating a public health risk, the fact that that person has Aids is not a part of their refugee claim, it is not covered by the confidentiality provision in subsection (1). It is outside the scope and that is why it can be disclosed. But information that is within the scope of subsection (1) doesn't get treated on the basis that it can be liberally communicated. That is dealt with subject to the restrictive approach that the legislature has laid down in subsection (1).
- Tipping J Can I put directly to you Mr Illingworth the proposition that the most sensible interpretation and as well I would have thought arguably within the internment of requires is relevant to the performance of the function. Because that has an objective connotation which you wouldn't necessarily have to engage in a dialogue; you might but probably not. Otherwise you are in fact creating a circle, you don't know until after you have disclosed it if you like. What requirement or not there might be for it. And I think Justice Ellen France was a little bit troubled by this circle if you like.
- Illingworth I certainly agree with his Honour Justice Blanchard that there are difficulties in working out what is required without
- Tipping J Well what's wrong with relevant to. I mean that creates a control and, if it is relevant to, I would have thought that is what they were getting out.
- Illingworth Well I guess the only reason I am pausing to reflect on that Sir, is that there can be degrees of relevance and the nexus
- Elias CJ There's degrees of everything and that is why you are into Padfield.
- Illingworth Yes yes I agree with the reference to Padfield with respect and I am happy to accept that it has got to be something which relates to the proper function of the officer on that side of the equation. I also accept that a sufficient degree of relevance to that function
- Tipping J Sufficiently relevant
- Illingworth Sufficiently relevant yes.

- Tipping J I am not sure you are creating more problems for yourself by saying sufficiently relevant.
- Elias CJ I think you are creating an awful lot of problems for yourself because if you pin everything on subsection (1) you do it in terms of a classification of the information on which there is going to be all sorts of arguments about whether it really is information which is a particular of the case for refugee status or not. I would have thought that you have got a much safer system if you are controlling the people to whom information can legitimately go by reference to whether it is necessary viz reasonably relevant to their functions. That seems to hang together perfectly well.
- Illingworth All I am doing in relation to subsection (1) is saying that Parliament has identified what kind of information is confidential. Now in having a
- Elias CJ Particulars of their case is hardly really identifying information is it?
- Illingworth Well it is not doing it very well I accept and there are obviously grey areas at the edges but what we are
- Tipping J I thought you would be batting for as wide as possible connotation of subsection (1) so that you get everything confidential subject to the exceptions. I am a bit mystified about this wish to confine subsection (1).
- Illingworth Well what we are saying is that we are not trying to put, it goes back to the very fundamental task that Parliament was addressing when section 129T was enacted.
- Tipping J But if your man says, well we won't personalise it, say a refugee claimant says to the officer "oh by the way I am a well known war criminal", on your way that wouldn't be within the particulars of his claim because it would be inimical to his claim or his case.
- Illingworth No I wouldn't say that Sir, I am not trying to narrow the position down to such a narrow class. I still contend for a reasonably broad and liberal interpretation of the particulars of the claim but by the same token I am not trying to over-extend that category to cover all manner of things that have got nothing to do with the refugee claim itself. And the reason I was doing that was because otherwise we get into the area that the Solicitor was contending for this morning, which is all manner of things that are needed to go to other Departments wouldn't be able to go and we don't want to get caught into that position. We simply want the area of confidentiality that Parliament has laid down to be accepted, not stretched beyond its limits but neither should it be diminished down to something that is not valuable.

Tipping J I understand but I find it difficult. Don't let me encourage you to repeat yourself Mr Illingworth. I am just reflecting on the difficulties of the inter-relationship, if you like, of that consideration with the others.

Illingworth The majority in the Court of Appeal acknowledged that there were difficulties in the interpretation of this section. They said it was a finely balanced issue. The minority Judge, Justice Ellen France, took an approach which was different from them. It's a finely balanced exercise and my primary submission is that the principle of protecting the safety of individuals was the dominant consideration in Parliament's mind when section 129T was enacted and that the

Tipping J So construe it with that dominant primary principle in mind. Don't read the words any more widely than is, in other words, if you get into any degree of inconsistency with that principle, hold back.

Illingworth That is right, that is my primary submission Sir. I accept that there are some problems to be confronted whichever way we go with the interpretation but the guiding principle must be what was Parliament intending to achieve and then follow that purpose and objective and that is what I am trying to do.

I don't think I can add much to what I have said so far except to come back to this point. Justice Blanchard referred earlier to avoiding a result that is an absurd one or one that is impractical, except that that is a very important principle in the interpretation of this section. But what we need to look at in my submission is the fact that if we have a wide range of recipients of confidential information then equally we run into some serious practical difficulties. We have no mechanism for determining whether (f) applies and so it is going to be up to the individual recipient, whoever that may be, to make a decision. They may or may not read a manual if there happens to be one on the subject and so far we don't know of any manual. They may or may not take legal advice on the point. They may or may not communicate with the refugee status branch to see what the overall context of the situation is. And we then have the natural justice issue, that was discussed earlier this morning. Clearly the disclosure of information which might affect the safety of an individual under section 129T is something that adversely affects that person's rights and interests, that could trigger section 27(1) of the Bill of Rights and the natural justice situation. The more recipients you have who are authorised to receive information, the more practical problems you are going to have. Whereas the advantage, the huge advantage, in my submission, of the approach taken by Justice Baragwanath and the Court of Appeal is that those problems are largely avoided because the only people who are going to have the task of considering disclosure under (f) will be people who have an understanding of what the refugee situation is all about. They will

be people who are aware of the significance of disclosure, who are aware of the context and who are aware of their responsibilities under this subsection, including the criminal offence provisions of subsection (5). So in my submission there is a choice to be made. It's a finely balanced issue. The fundamental principle is to achieve the objectives of the legislature and the objectives of the legislature in my submission are clearly to ensure the safety of individuals as the paramount principle in this area.

Elias CJ Mr Illingworth I am just thinking about the practical effect. I think I am with you in considering that the some of the examples that the Solicitor-General gave us are not problematic because one can't see how there is any possibility of danger in the use of that information. I really wonder whether it is possible for the police to use information obtained for the purposes of extradition at all until the question of refugee status is determined and there has been a consideration of whether the regime to which it is suggested that the former applicant might be returned will be safe, in which case you are under (f) anyway. Because as a matter of practicality it must be almost impossible to be clear that there is no possibility of safety being compromised, not only of course to the claimant for refugee status but to any person. Is this really such a huge practical issue because it is really only in terms of the investigatory authorities and the use that they might make of this material in relation to a prosecution or an extradition that you are concerned it seems to me.

Illingworth That is the concern. The concern is that X and other people in his position have to make a choice, they have to make an election. Are they going to put forward their whole case to the refugee status branch and if necessary to the Refugee Status Appeal Authority and, if they do so, will evidence that they give be used against them in circumstances where they know there is a very high prospect of an extradition proceeding followed by a trial back in their home country or a prosecution in this country. They have to decide whether to put forward that information or not. Now in order to be able to make that decision they need to know whether this information is going to be kept confidential or not and they need to have some pretty clear idea of the circumstances in which information can be disclosed.

Elias CJ But they know it has to be maintained in confidence unless there is a reasonable possibility of compromising their safety or the safety of others. Isn't there a natural sequencing that is going to have to take effect here and, after all, none of this takes place in a dark room. It's on a world stage with international agencies looking on.

Illingworth Well no it's not a world stage your Honour because the fact that the person is here and is a refugee is one of the very things that is kept confidential

under 129T. It actually is a confidential, the whole process is confidential.

Elias CJ And that can't be disclosed while there is a possibility of his safety being compromised or any other person's safety being compromised.

Illingworth And as your Honour just said it is very difficult to meet that test. It is not an easy test to meet. It can be met in some situations. I can give you an example. There was a prosecution recently of someone who had made a completely false statement to a refugee status branch officer and because the statement was completely false it couldn't possibly have caused any safety issue to arise if it was disclosed and so that material could be disclosed. So there are some situations in which that can occur. We are not concerned about (f) in this particular case. That is not what the case is about. The question is what is the extent of disclosure that is permitting under (b) and in my submission (b) should not be read expansively for the reasons Justice Tipping indicated just a few minutes ago, as a reflection of my submission. I am not suggesting that you are adopting those Sir.

Tipping J Well I don't know, I've still got to think about it.

Illingworth The point is that the more extensively you interpret subsection (b) the more risk there is that information will be disclosed.

Elias CJ Well it can only be disclosed to agents of the Crown where it is relevant to their functions under our system. And subject to subparagraph (f).

Illingworth Well if we come back to the facts of this case. The Solicitor told the Court this morning that there have been already two trips to Rwanda by officers of Crown Law (I think is his position) and that someone is going again on the 9th of May. That person is going to Rwanda for the purpose of assisting the Government there to put together an extradition case. Now the question is could that person, if the appeal had been heard, could that be person be armed with knowledge of the refugee claim.

Elias CJ Well I find it hard to believe that that person could disclose anything at present.

Illingworth No the person goes over there and, for example, wants to brief the witnesses for a prosecution in New Zealand under our statute. That information can be used to brief the witnesses; it may not be disclosed but it can be

Elias CJ Well that is what I am raising with you, as a practical issue, how anyone could, until the position in Rwanda has been investigated and until the question of refugee status has been dealt with, how effectively any officer

could disclose information. It just seems to me that they just wouldn't be able to come within subsection (f).

Illingworth No that is not the point with respect your Honour what I am saying is that the person the Crown Law solicitor who goes to Rwanda can be given information, on the Crown's argument, can have access to the refugee file, can look at the defence that has been put forward in relation to the allegation under Article 1F, can help to prepare the case, can brief all the witnesses with that knowledge in mind, and has a huge advantage because the

Elias CJ But may not disclose

Illingworth May not disclose but may use.

Blanchard J What is wrong with that?

Illingworth Well in my submission Sir it means that the person who is applying for refugee status is on the horns of a dilemma. They cannot advance their claim with the assurance of knowing that this information will not be used in a prosecution of them. They don't have that assurance. In this case X was given an express assurance that information would not be used, would not be disclosed to third parties without his consent. So the Department themselves have interpreted 129T in that way. But now the situation is being turned into something extremely different.

Blanchard J Well that may be a basis for a challenge at a later time on a different basis depending on how things work out but I don't find it a very powerful argument in relation to interpretation.

Illingworth Well in my submission it is a powerful argument in terms of interpretation Sir because that cannot be the result that Parliament intended when section 129 was enacted. The reason it can't be right is because the whole purpose of 129T was to create a climate of confidentiality and assurance that the person can safely put forward all they have to say, all they need to say about their refugee claim, without a fear of adverse consequences and that interpretation

Elias CJ Well that is not right, it is not adverse consequences, it is that there is no serious possibility that disclosure would endanger the safety of the claimant or any person. You are not saying that safety means vulnerability according to legitimate New Zealand Court process are you?

Illingworth No but what I am saying is that the safety policy which underpins 129T is not the only thing that Parliament was seeking to achieve. It was wanting

to ensure that the person could speak openly and freely without fear of adverse consequences as

- Elias CJ Though without fear that his safety would be endangered or the safety of others he might be implicating.
- Illingworth Well in my submission that is limiting the statutory policy too much and in my submission there is a fair trial issue as well.
- Blanchard J Well yes but that point, assuming it is valid, can be taken at a later stage.
- Tipping J If your client has been misled as to the scope of the law, as my brother says, that is something which may reflect downstream but it can't affect, my experience is that officials draft forms usually without much appreciation of the law.
- Illingworth Well I am not trying to use that in a backward flip sort of way to turn this into a breach of legitimate expectation type claim, that is not what I am saying.
- Blanchard J Not yet.
- Illingworth What I am saying is that the Department have themselves interpreted 129T on the basis that they need to be able to give an assurance
- Tipping J I don't care what the Department's interpretation is. Our responsibility is to get the interpretation right.
- Illingworth Yes I accept that but what I am saying is that their interpretation is right because what Parliament was trying to do was to create a climate of confidence where the person can be given an assurance that they can speak freely.
- Tipping J You are perfectly entitled to submit they have it right but I am not going to say that that is because the way they saw it.
- Elias CJ You are really requiring us to read subparagraph (b) as saying that disclosure can be made to any Crown agency which needs the information for its functions apart from the police or some other prosecutorial body within New Zealand.
- Illingworth No what I am asking the Court to do is to recognise that Parliament was trying to create an atmosphere of confidentiality and assurance to enable the refugee claimant to speak freely. Interpreted on that basis, what the Court of Appeal have done and what Justice Baragwanath did in his judgment was correct, because the functions of the officer in relation to the

claimant as meaning in relation to the claimant as a refugee claimant. In other words, in neither Court was the scope of (b) extended as far as the Crown want to extend it, for the very good reason that it undermines the purpose of creating the climate of confidentiality that enables officers to say we assure you that you can speak freely to us and you don't have to fear the consequences.

Tipping J I think your best point is that the primary purpose is confidentiality. When in doubt construe it restrictively. Isn't that it, in a nutshell?

Illingworth Yes it is Parliament intended a limited scope of disclosure not an unlimited one.

Tipping J The question is how much doubt one has about the proper means.

Illingworth Yes I accept that Sir.

Elias CJ Thank you Mr Illingworth. Yes Mr Solicitor.

Collins Thank you very much your Honours. In my respectful submission the correct interpretation of section 129T is not actually finely balanced at all, that if one looks at the true purpose of 129T and gives full effect to the language of the section, then the result contended for by the Crown is actually the only result that can ultimately be achieved. And that result also has the distinct advantage of not creating absurdities. And I say that an absurdity is ultimately created by the approach put forward by Mr Illingworth because it can simply not have been Parliament's intention that, when it created section 129T, that it did so believing that persons could arrive in this country, claim refugee status and in the course of doing so reveal information that suggests they may have committed gross crimes against humanity and that information can never be used in any way whatsoever; it can never be investigated; it can never be evaluated; it simply has to be kept permanently silent by officers of the refugee department who are, according to my friend's analysis, bound by section 129T never to reveal that information to New Zealand officials with a legitimate interest in receiving and evaluating that information.

Now if it seriously thought that Parliament contemplated that scenario when section 129T was enacted then, with respect, it is an argument that doesn't withstand careful and reflective consideration. And the point is underscored when one thinks about both the convention and the purpose of the Act. The convention, as my friend acknowledges, doesn't focus upon confidentiality. But the convention does strike that balance between giving special humanitarian refugee status to those deserving of it and providing a method of identifying and excluding those who have committed crimes against humanity. The Act does provide express and

limited confidentiality but those limits do not cut across the purpose of the convention, which would be cut across if persons who acknowledged or provided information that indicated that they had committed crimes against humanity could do so in the secure knowledge that only in New Zealand that information could never be investigated or used by officials with a legitimate interest in knowing it.

Elias CJ Well it is not really it seems to me about whether, it is about when, the information can be disclosed. I mean I know there is the argument about who it is disclosed but on the assumption that you get past that hurdle it still can't be disclosed where there is a possibility of risk of danger.

Collins Absolutely and I have not tried to argue otherwise your Honour.

Tipping J There is a very important distinction here isn't there between use and disclosure.

Collins There is.

Tipping J You said that about 10.10am and I've kept that very firmly in mind.

Collins Yes and I just need to pick up my friend on that very point because I think he might have blurred the two a few moments ago when he said an officer from the Crown Law Office is going to Rwanda to help them prepare extradition. No, that's not true. That person is going to Rwanda to ensure they understand what New Zealand's extradition requirements are. And it is a big difference. And to acquire sufficient information for New Zealand to be able to make a decision, absent requests for extradition or no extradition, whether or not it would ever be feasible for New Zealand to prosecute domestically.

Now my friend argues, and I think I am correct in saying that this is an argument that he has put forward today for the first time, is that the disclosure of the information, or cannot be disclosed, because the information in question are particulars and that those particulars relate only to the claim for refugee status. Now the advantage is that the Crown's position is actually far more protective of refugee claimants than even the position that my friend is putting forward, because what the Crown is saying is that this information is disclosed to certain officials, it is subject to confidentiality, very strict confidentiality, and can under no circumstances be disclosed unless the 3(f) threshold is met.

There is a very practical difficulty I think with my friend's analysis and that is trying to dissect from information that is provided in a refugee environment, information that is strictly only relevant to a determination of a refugee status, and other information which is necessarily intertwined

into that exercise. So, for example, and I don't want to challenge the argument that has apparently already been shot down in flames and is dead in the ashes, but if the information comes out that a person who has gone through a particular infected area in say continental Africa and that information is only being brought forward in a refugee status hearing, how do you dissect that, now hold on he's told us that he has been in a particular area which we know is rife with a particular disease, it is contagious, how do we siphon that out and dissect it and say well somehow that is not part of the refugee status information. It places an extraordinary onus on those who are having to make this judgment calls.

Tipping J It is easier to allow it under (a) or (b) than it is to decide whether it is caught by (1).

Tipping J I think that is your point.

Collins Yes indeed.

Tipping J You have endless arguments about whether it is caught by (1) if you take this rather restrictive view whereas if you take the more liberal view of (1) then, where it should be able to be disclosed subject to confidentiality, there is no argument about it.

Collins Exactly yes. That is why I say I am not certain if my friend has fully understood the approach which the Crown was taking is actually probably a lot more helpful to refugee claimants than perhaps he appreciates. So in summary the advantages that I would put forward to the Crown's approach is that it gives full effect to the convention, it puts New Zealand on exactly the same footing as states that we like to compare ourselves with and, most importantly, it permits this Court to give full effect to all of the language of section 129T.

My friend has made passing comment about a leak to the media which was most unfortunate but in interpreting section 129T this Court actually needs to focus on the principles of interpretation and not bear in mind the possibility that sometimes some people, for whatever motives or purposes, take it upon themselves to act illegally. Can never interpret statutes on the basis that everyone is always going to comply with the law.

Elias CJ It is worrying though because the stakes are so very high in many cases.

Collins Which is one of the reasons why at the moment my office was alerted to this. We took extraordinary steps to get that information back.

Tipping J Can we properly write into any reasons something about trying to make sure or to reduce the risk of accidental breach. If penalties isn't going to

stop deliberate leaks, accidental leaks, is there anything that the Crown would accept as an appropriate safeguard, if you like.

Collins I think the only thing you can do your Honour is really reinforce the magnitude of the stakes her Honour the Chief Justice has just stressed, the absolute necessity to preserve the integrity of the asylum process as well as the extradition and prosecution systems. And that no-one should be in any way taking any steps which might compromise those systems, let alone the safety of an individual.

Tipping J And the responsibility perhaps of an official, who is contemplating adopting (f), to be careful and perhaps take full and wide advice. Would that be unwelcome to the Crown?

Collins Not at all your Honour.

Blanchard J But that exchange causes me to ask what is in the Bill before Parliament by way of equivalent to 129T and I am not for a moment thinking that we might use that as a mean of interpretation but it would be interesting to see how the particular that you have just been discussing with Justice Tipping might be being addressed.

Collins Can I just pause for one second. My understanding is that the provision is almost the same, word for word the same.

Elias CJ Presumably there are regulation making powers here. I mean one would have thought that some process for vetting information that is to be disclosed might be prudent.

Collins I am not too sure if that would be done by way of regulation. There may be some practical ways in which the Crown can vet information but I couldn't imagine I couldn't actually see how it could be done by regulation.

Elias CJ I was thinking really of putting a claimant on notice that there was proposed to be disclosure beyond the people identified in the section. I am sure that is not the sort of thing that we would want to raise with any specificity but it doesn't answer all concerns because of course one of the concerns of responsible officers must be those who are named in information obtained from a refugee claimant.

Collins Can I just pause a second before responding to that. One of the difficulties with this case of course is trying to anticipate what evidence there might be and what scenarios might unfold and the best precautions that I suppose this Court can seize upon are the fact that Parliament has made it a criminal offence to make disclosures in breach of section 129T.

Tipping J It is not the deliberate people I think we should be focusing on. It is putting in place mechanisms to make it the least possibly likely that people will do it inadvertently if you like or unthinkingly. Or make too casual an appreciation of the paragraph (f) issue.

Collins Well I think a strongly worded judgment from this Court, which could be then distributed throughout the state sector so that anyone involved in cases involving claimants for refugee status would know that the Supreme Court was extremely concerned as would be the Crown of anyone who acted in an inadvertently, cavalier or most importantly in a deliberately obstructive way.

McGrath J But these things, if it is just left on that, these things do get a bit forgotten as time goes by. I mean to my mind there really is no substitute for properly specifying procedures in manuals for anyone and any Department or Crown Agency, however that was to be interpreted, to have the process before them. The Department of Labour does instruct with great specificity how refugee officers are to operate in many situations and actually quotes sections from Court of Appeal and probably now Supreme Court judgments. And that I suspect in the end is how the only way these matters are going to be properly controlled with any reliance on the fact it will be just a strong five years hence or it may be soon after a judgment is issued.

Collins Well a direction or an observation to that effect would be warmly received by my office your Honour and I would do all I could to ensure that it was properly disseminated. Whilst the stakes are particularly high for the individuals concerned, the stakes are also high for the New Zealand Government. We certainly don't want to blemish our international reputation and we certainly don't want to imperil any prosecution if by any chance one should ever emerge in this country.

Unless I can assist your Honour further, those were the only submissions I wanted to say in response.

Elias CJ No thank you very much Mr Solicitor, Mr Illingworth, counsel. Thank you for the excellence of the submissions we have heard today. Court will adjourn.

Court adjourns 3:38 pm