

Confidentiality under s 129T of the Immigration Act

Lisa Yarwood, the University of Exeter

asks whether the Supreme Court followed its own rulings

In June, the Supreme Court overruled a majority decision of the Court of Appeal confirming the findings in the High Court and reinstating the judgment of the Refugee Status Appeals Authority (*Attorney-General v X* [2008] 2 NZLR 579). It held that s 129T of the Immigration Act 1987 attaches confidentiality to information used in the determination of refugee status with limited disclosure permitted when investigating the possibility of criminal prosecution under the International Crimes and International Criminal Court Act 2000 (ICC Act) or potential extradition for those alleged criminal acts or omissions. The author concedes the decision of the Supreme Court is doctrinally sound. This article argues that where the Court is open to criticism is in the failure to acknowledge its own guidance in *Attorney-General v Zaoui* [2005] 1 NZLR 577 relating to determinations with the potential to result in deportation of an individual, or, in this case, extradition. Section 129T will tolerate disclosure only where the consequences do not undermine the statutorily imposed, and judicially acknowledged (*Zaoui* (SC), paras [90], [91]), imperative to “affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights” (New Zealand Bill of Rights Act 1990 (NZBORA), Preamble).

HISTORY OF THE APPEAL

X brought an unsuccessful appeal to the Refugee Status Appeals Authority against a decision declining refugee status; the grounds for which are unknown and not relevant to issues on which the contentious appeal arose. The Appeals Authority, at the same time, declined applications for confidentiality to attach to evidence used during the status determination, and for an adjournment pending resolution of proceedings for extradition to Rwanda or criminal proceedings in New Zealand founded on the alleged actions.

On an application for judicial review, the High Court granted declaratory relief, holding that s 129T and the Convention Relating to the Status of Refugees afforded absolute confidentiality of all evidence in an appeal to the Authority. Any disclosure under s 129T(3) was solely to be used to determine a claim for refugee status ([2006] NZAR 533). Subsidiary purposes, including extradition or criminal prosecution in Rwanda or New Zealand, are excluded.

In the Court of Appeal the majority held that while “closely balanced”, this interpretation of s 129T was correct ([2007] NZCA 388). Disclosure under s 129T(3)(b) was restricted to functions “incidental to or consequential upon” determination of refugee claims, prohibiting disclosure to public servants working on extradition or prosecution. Dissenting, Ellen France J held “there is nothing on a reading of

s 129T to warrant imposition of a limitation to prevent disclosure to those in the extradition or prosecution areas” and that there was nothing “in the Convention or in state practice that warrants reading the section in the way favoured by the majority”. The Attorney-General obtained leave to appeal to the Supreme Court.

THE SUPREME COURT

The Supreme Court was required to determine “whether s 129T(3)(b)... permits those who are subject to a duty of confidence ... to disclose matters that are confidential ... for the purpose of the possible extradition of the first respondent to Rwanda or for the possible prosecution of the first respondent in New Zealand?” (para [1]) Disagreeing with the lower courts, it concluded that s 129T does not “restrict disclosure to officials engaged in the determination of refugee status” and permits disclosure “to other officials for the purposes of extradition or prosecution” (paras [7] and [16]).

In finding that

s 129T, properly construed, permits information about the application ... for refugee status to be disclosed to officials who require that information to consider his possible extradition for a crime of a type described in art 1F(a) or prosecution under the ICC Act (para [16])

the Court relied on:

- a plain meaning interpretation of s 129T (para [8]);
- the statutory context which established that limiting disclosure to “those engaged in an official capacity in determining refugee status” would undermine parliamentary intent (para [9]);
- the primary rationale of s 129T to protect individuals from serious risk to safety did not limit disclosure on the facts (para [10]); and
- the proposition that in the circumstances the applicable instruments under international legal framework did not give rise to a presumption against disclosure (para [15]).

INTERNATIONAL LEGAL FRAMEWORK

X conceded that the earlier High Court interpretation was not consistent with either the Refugee Convention or state practice (para [15]). Article 1F of the Convention displaces protection in favour of “any person with respect to whom there are serious reasons for considering that ... he has committed a crime against peace, a war crime, or a crime against humanity” discounting any obligation on the state to maintain confidentiality. The obligation on states to extradite or prosecute provided further justification for the court

to construe s 129T in favour of maintaining art 1F and although it missed the opportunity to invoke the Vienna Convention, to which New Zealand is party, the Court's interpretation would have satisfied the good faith principle found therein (art 31).

Explicit reference to state obligations under the international framework is compatible with the Court's earlier approach in *Zaoui*. In accordance with its consideration of the specific and generally applicable international responsibilities, the Supreme Court was likewise required in *A-G v X* to expand its analysis beyond the Refugee Convention. The Refugee Convention is of limited application when the applicant was not granted refugee status.

Serious reasons for considering ...

The Court believed that "the Authority acted correctly in attempting to resolve the application of X for refugee status prior to the resolution of any question of extradition or prosecution" (para [17]). This investigation led the Authority to decline refugee status so that at the time of the appeal to the Supreme Court X was designated a "without status" asylum seeker. The deficit in protection for asylum seekers that do not satisfy the definitional threshold of the Convention is well known and not canvassed here; except to note that the resulting framework of protection available to such individuals equates to the state's domestic assumption of obligations under general principles of international, primarily human rights, law.

The Supreme Court expressed concern that "the ability of this country to give effect to art 1F(a) [of the Refugee Convention] would be prejudiced if s 129T(3)(b) were interpreted so as to exclude disclosure to officers and employees considering extradition or prosecution" (para [16]), yet in light of the non-applicability of the Convention given the non-attribution of refugee status, this was not a priority for the Court at this time. Before review of the broader framework of relevant international obligations, consideration of state obligations under the Refugee Convention where an individual was granted refugee status and seeks to rely upon s 129T is appropriate.

Refolement is possible under the Convention when "serious reasons" exist to show the individual committed one of the crimes listed. In the current circumstances, disclosure was sought for information relating to "possible extradition or prosecution [a]s sought for war crimes" (Media Release: 20 June 2008). Section 25(c) of NZBORA provides that "everyone who is charged with an offence has ... the right to be presumed innocent until proved guilty according to law". Without evidence to the contrary the person is presumed innocent. Establishing "serious reasons" places a heavy burden on the party alleging the crimes (in this case the state) to provide evidence, without the assistance of an unwilling suspect who is equally protected from self-incrimination. The "primary rationale" for s 129T is to protect from a serious risk to safety (para [10]). It should not be a tool to dislodge the state's obligation to protect the individual given the potential for harm if extradited to Rwanda. To permit this would render the primary rationale of s 129T farcical.

Substantial grounds

While the Refugee Convention is only partially relevant in the overall discussion, its articulation in art 33 of the prohibition on refolement in light of serious risk to individuals is relevant. Although the Supreme Court doubted its preemp-

tory status in *Zaoui*, many commentators consider the prohibition on refolement to be a jus cogens, or at the least customary, norm of international law prohibiting the return of individuals to a state in which they face serious risk of harm. Provision in instruments such as the Convention against Torture and European Convention of Human Rights extends its applicability to all asylum seekers.

In *Zaoui* the Court referred to international protections in the International Covenant on Civil and Political Rights (ICCPR) and jurisprudence including *Soering v UK* ((1989) 11 EHRR 439 (ECHR), paras [90], [91]) to hold that, independently of the discretion under art 1F of the Refugee Convention, where "there are substantial grounds for believing that, as a result of the deportation, the person would be in danger of being arbitrarily deprived of life or of being subjected to torture or to cruel, inhuman or degrading treatment or punishment" return could not be ordered (*Zaoui*, para [93]). The state is "obliged to act in conformity with New Zealand's obligations under arts 6(1) and 7 of the ICCPR and art 3 of the Convention against Torture" (*Zaoui*, para [76]), which cumulatively require the protection of all individuals under its control, regardless of their refugee status.

The question the Supreme Court should have considered was whether the serious reasons that justified disclosure for the purpose of satisfying New Zealand's obligation to prosecute or extradite gave rise to substantial grounds that the individual would be at risk of harm. If we presume that New Zealand would uphold its domestic and international undertakings to maintain the individual's human rights if prosecuted pursuant to the ICC Act, the remaining consideration is whether the same protection is assured following extradition to Rwanda.

PROSECUTION OR EXTRADITION?

As the international ad hoc Tribunal for Rwanda comes to a close, the need to transfer suspects to alternative jurisdictions for trial is contemplated (UN Doc S/2006/358 21). The UK, Netherlands, France and Canada have all initiated proceedings against alleged génocidaires resident in their countries. In this case, the closure of the Tribunal excludes the UN Court as an option. Given that it is not the Tribunal seeking extradition, the assumption is that the individual is alleged to be a low-level perpetrator, and therefore not to be tried by an international court. If New Zealand is unwilling to prosecute the person it must determine whether extradition to Rwanda is in accordance with the international imperative to extradite or prosecute (Amnesty International Report AFR 47/013/2007 (AI Report 07)) and with New Zealand's obligations to the person.

No extradition treaty exists between New Zealand and Rwanda and the requests made by the Rwandan government rely on sovereign reciprocity and respect between nations, rather than a legal obligation (AI Report 07). Even where a treaty relationship underlies a request for extradition, international law recognises that fulfilment is subject to the maintenance of fundamental human rights protections. In *Soering v UK* the European Court of Human Rights held that it would be a violation of art 3 of the European Convention to extradite a person to the US in a capital punishment case, owing to the harsh conditions on death row and the uncertain timescale within which the sentence would be executed. The Court considered parties to the European Convention may not extradite persons where a significant risk of torture or inhumane treatment exists. *Soering* was referred to by the

Supreme Court as it confirmed the Crown “is obliged to act in conformity with New Zealand’s obligations under arts 6(1) and 7 of the ICCPR and art 3 of the Convention against Torture” (*Zaoui*, para [76]). It considered the combined weight of ss 8 and 9 of the NZBORA and the guarantees afforded under the Convention against Torture and the ICCPR do not permit deportation where a risk of inhuman treatment exists (*Zaoui*, paras [90], [91]).

Rwanda has ratified neither the Torture Convention nor its Optional Protocol and only abolished the death penalty in 2007. Amnesty International has expressed concern as to potential risks faced by individuals on extradition back to Rwanda. It considers:

suspects must not be transferred to Rwandan courts for trial until it is demonstrated that trials will comply with international standards of justice ... national courts of states that have been requested to extradite persons to Rwanda should immediately start national proceedings exercising universal jurisdiction ... or extradite these persons to states able and willing to do so in fair trials without the death penalty, torture or ill-treatment or other human rights violations (AI Report 07).

Reports of torture have come to the attention of human rights organisations (eg Human Rights Watch: “Rwanda: Hundreds Illegally Detained in Former Warehouse” 14 May 2006), and courts in other jurisdictions (*United States v Karake* (US District Court, DC District) Crim No 02-0256 (ESH) (2006) p 149). A 2006 US State Department Report expressed concern at reports of widespread torture for interrogation purposes. Unless satisfied the weight of this evidence does not amount to “substantial grounds” establishing a risk of torture or inhuman treatment, the New Zealand government cannot condone extradition.

The Supreme Court was persuaded in *Zaoui* that “the right to natural justice affirmed in s 27 of the NZBORA and found in provisions of the ICCPR and elsewhere would provide procedural protection” (*Zaoui*, para [92]). The second limb of inquiry thus required before sanctioning extradition is whether transfer of X and trial in the Rwandan courts has the potential to breach the right to justice and specifically ss 23 and 25 of the NZBORA, as the domestic incorporation of those protections found within the ICCPR.

Section 23 provides that persons being detained must be treated with “humanity and with respect for the inherent dignity of the person” by ensuring rights associated with detention are ensured, while s 25 establishes the minimum standards in criminal procedure being “the right to a fair and public hearing by an independent and impartial court”. To give effect to the rights encompassed by ss 23 and 25 the court requires assurance that criticisms levelled internationally at the Rwandan justice system do not give rise to concern of a risk to the prisoner if extradited.

The Rwandan justice system adopts a tiered approach involving both formal trials and gacaca grass roots courts. Issues associated with community justice do not require consideration here, for if the Rwandan government considers the alleged actions of X justify an extradition request then the allegations are unlikely to be those levelled at loosely organised militia groups. This does not pre-empt the need to address doubts raised as to the fairness of the formalised Rwandan court structure.

The media release that accompanied the judgment of the Supreme Court referred to investigation of allegations against

X for “war crimes”. Significant overlap exists between crimes against humanity and war crimes. The distinguishing feature is that war crimes are committed in the context of armed conflict. The implication in a formal request by the Rwandan government for assistance; the reference to war crimes rather than crimes against humanity or criminal charges generally; and the international pursuit of X despite the number of prisoners still awaiting trial in Rwanda cumulatively suggests extradition is sought for crimes allegedly perpetrated as a soldier during the 1994 genocide.

Article 138 of Rwandan Organic Law No 14/2006 OF 22/03/2006 designates it as “the Military Tribunal [that] tries in the first instance all offences committed by all Military personnel irrespective of their rank”. The deportee is therefore likely to be brought before a Military Tribunal whose processes it will be even harder for the New Zealand government to be assured will amount to a fair trial, given the insular nature of military tribunals. The inherent lack of transparency associated with military tribunals is exacerbated in the Rwandan context given that questions linger as to impartiality due to the failure to bring any member of the ruling Rwandan Patriotic Front (RPF) party to trial for alleged atrocities during the genocide.

Speculation arises as to what formal charges X would face before a military tribunal. While the inference drawn above is that extradition is for war crimes, the definitional strictures of such a charge remains unclear. Rwanda is not party to the Rome Statute for the ICC so is not bound to substantively adopt the expression of the crimes therein. Furthermore reference cannot be had to the Statute of the International Criminal Tribunal for Rwanda (ICTR) as it does not specifically include war crimes. Without clarification of the criminal charges likely to be faced it is difficult to determine whether the evidence against X establishes a prima facie case, let alone a “serious” one.

Finally, there is the potential for detention conditions in Rwanda to amount to a breach of s 23 of the NZBORA. Firstly, the failure to bring many inmates to trial for alleged crimes arising from the genocide 14 years ago gives rise to a significant concern as to delay. The imperative in maintaining procedural safeguards is not one the Rwandan government appears to prioritise; as is apparent by its early refusal to cooperate with the ICTR where findings of an unacceptable delay led to charges against a defendant being dismissed (and reinstated on appeal). Secondly, recent investigation into detention conditions by Amnesty International reported incidents of excessive violence and torture toward prisoners extradited back to Rwanda, as well as cramped and overcrowded prisons (AI Report 07).

Should “serious reasons” exist for believing that an individual committed crimes giving rise to an imperative of prosecute or extradite, a balance must be drawn where “substantial grounds” for suggesting extradition would result in a breach of those rights of the individual, states are obliged to protect under international law. Any interpretation of the confidentiality protection under s 129T cannot allow disclosure, the consequence of, which leads to extradition to a state where the asylum seeker would be subject to treatment that would undermine New Zealand’s arguably more onerous international obligations to protect fundamental human rights incorporated under the NZBORA and recognised by the Courts in *Zaoui* as paramount. The Supreme Court must be careful to follow its own findings. □