IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2017-485-032
[2017] NZHC 746

UNDER	the Judicature Amendment Act 1972 and Part 30 of the High Court Rules
IN THE MATTER OF	an application for judicial review of the suspension and cancellation of passport
BETWEEN	A Applicant
AND	MINISTER OF INTERNAL AFFAIRS Respondent

Hearing: 11 April 2017

Counsel: Applicant in person
A L Martin and K G Stone for respondent

Judgment: 13 April 2017

Reissued: 24 April 2017 in anonymised form (see [92] - [97] below)

RESERVED JUDGMENT OF DOBSON J
[Interlocutory challenges to application of ss 29AA-29AC and protocol pursuant to s 29AC of the Passports Act 1992]

Contents

Background to the proceedings ..... [1]
Importance of the issue ..... [6]
The statutory provisions ..... [12]
Sections 29AA to 29AC do not apply to the proceeding? ..... [19]
NZBORA consistent approach to interpretation ..... [40]
Challenge to the protocol ..... [47]
Anticipatory breach of the protocol ..... [61]
Discovery sought of classified security information ..... [67]
The future of Ms A's appeal ..... [86]
Timetabling ..... [89]
Anonymising the applicant's identity ..... [92]

Background to the proceedings

[1] In early May 2016, the respondent (the Minister) suspended the applicant's (Ms A's) passport, and shortly thereafter gave her notice of its cancellation. In June 2016, Ms A commenced an appeal against the suspension and cancellation of her passport relying on the right to bring such an appeal under s 28 of the Passports Act 1992 (the Act). In September 2016 an amended notice of appeal was filed. Thereafter Ms A dispensed with the services of counsel who had been acting for her up until then.

[2] On 24 January 2017, Ms A, acting on her own behalf, filed an application for judicial review of the Minister's decisions. On 16 February 2017, she filed an amended statement of claim in her application for judicial review.

[3] Despite cautions against pursuing the course she had indicated, she has thereafter elected to pursue the application for judicial review, but not the appeal.

[4] By way of an interlocutory application in the judicial review, Ms A has sought a number of declarations to challenge the lawfulness of the reliance by the Minister on the provisions in ss 29AA to 29AC of the Act, and the application of a protocol recently agreed between the Chief Justice and the Attorney-General to apply to proceedings under these sections.

[5] This interim relief was initially sought by way of a without notice interlocutory application filed on 8 March 2017. I directed that if the relief was to be pursued, it had to be done on a notified basis. Subsequent to service on the Minister, a notice of opposition was filed. Both sides fully summarised their position on the legal issues arising in a number of exchanges of memoranda and, at Ms A's request, I heard the parties by way of telephone conference on 11 April 2017.

Importance of the issue

[6] Sections 29AA to 29AC of the Act provide for the Minister to characterise information relied on in making certain decisions, including those to suspend or cancel a passport, as classified security information. If characterised as such, the

provisions permit the Minister to present that information to the Court on a unilateral basis, and to withhold all the classified security information from disclosure to an appellant/applicant. The application of those sections therefore affects fundamentally the manner in which any challenge to the cancellation of a passport on national security grounds is to be argued before the Court.

[7] At the outset of the telephone conference, I raised with Ms A whether she was satisfied that the issues involved could be adequately argued by way of telephone conference, and offered to adjourn the matter for an in-person hearing.

[8] A recurring theme in the documents filed by Ms A is her concern at delays in a substantive resolution of her challenge to the cancellation of her New Zealand passport. She cited that as a reason for wishing the interlocutory applications to be determined promptly. The substantive judicial review application has been set down for 1 June 2017.

[9] So far as the broader significance of the issues was concerned, she argued that my decision on her application would not have general application because the provisions in issue were superseded by the recent passing of the Intelligence and Security Act 2017.

[10] Ms A confirmed that she attended the telephone conference from her residence in Melbourne, Australia. She said that she had not been helped by any lawyer preparing her submissions, but did have present with her, as a McKenzie Friend, her brother Mr A, who had also attended in her absence at the first call of the judicial review on 13 February 2017.

[11] The submissions were of a high quality for a non-legally qualified litigant, and were equivalent to the standard likely to be produced by a practitioner specialising in this area of the law. With the benefit of a full exchange of arguments in writing prior to the telephone conference, and having heard from Ms A and Mr Martin, I accepted that it was appropriate to determine her applications on the basis of all material then available to me. There is an obvious timing imperative in providing my decision.

The statutory provisions

[12] Sections 29AA to 29AC were inserted into the Act in 2005 to apply to appeals from various types of decisions made by the Minister under provisions in the Act, including decisions to cancel a New Zealand passport. The full text of the sections is appended at the end of this judgment. Where the Minister makes such decisions in reliance on what the Minister characterises as classified security information,[1] s 29AB provides for appeals to be conducted on the basis that the Court is provided with the classified security information relied on. This information is to be conveyed in the absence of the appellant, any counsel representing the appellant and members of the public.

[13] In 2014, the government promoted certain amendments to the Act which it treated as temporary provisions. It was intended that the matters covered in the temporary provisions would be part of a review of legislation addressing intelligence and security matters, and would be made permanent in a new legislative initiative that has now been enacted in the Intelligence and Security Act 2017.[2]

[14] The Passports Amendment Act 2014 introduced those temporary provisions as sch 2 to the Act. Section 45(1) of the Act specified that the temporary provisions would apply during the period beginning on 12 December 2014 and ending at the close of 31 March 2017.

[15] The temporary provisions included, in cl 8, that ss 29AA to 29AC would also apply to applications for judicial review and other proceedings that challenged a decision made under the Act that involved matters of security.

[16] The exercises of statutory power challenged in Ms A's application for judicial review relied on provisions that were also contained within the temporary provisions of sch 2 to the Act. Under cl 7 of sch 2, the Minister suspended Ms A's passport on 2 May 2016. Then on 5 May 2016, by notice served on Ms A in Australia where she resides, the Minister cancelled her passport pursuant to cl 2(2) of sch 2.

---

1 A defined expression in s 29AA(5) of the Act.

2 Enacted 28 March 2017 to have effect from 1 April 2017.

[17] On 22 September 2016, the Minister gave notice that ss 29AA to 29AC applied to Ms A's proceeding.

[18] On 17 January 2017, the Chief Justice and the Attorney-General signed their agreement to a protocol, which is provided for under s 29AC. It contains practices and procedures that may be necessary to implement the one-sided provision of classified security information to the Judge deciding the case, and to protect all such information from any inadvertent disclosures.

Sections 29AA to 29AC do not apply to the proceeding?

[19] Ms A argued that cl 8 of sch 2 to the Act was not effective to extend the application of ss 29AA to 29AC to her judicial review, either at the time she made the present interlocutory application (originally filed on 8 March 2017) or after sch 2 to the Act ceased to have effect on 1 April 2017.

[20] Ms A argued that ss 29AA to 29AC were to be interpreted as an interdependent set of provisions, with each section depending on the others for their application. The provisions in s 29AB for proceedings involving classified security information could only apply to the proceedings to which s 29AA applied. The scope of proceedings specified in s 29AA does not include judicial review. Arguably, the scope of proceedings in s 29AA could not be extended by provisions elsewhere because s 29AB(5) stipulates that "This section applies despite any enactment or rule of law to the contrary". On Ms A's approach, that prevented a provision in sch 2 to the Act from applying so as to expand the category of proceedings coming within s 29AA.

[21] Further, Ms A treated the purported extension of the category of proceedings to which ss 29AA to 29AC would apply as contradicting s 29AB. She submitted that when s 29AB(5) was interpreted in light of the interdependent provisions in ss 29AA-AC, it excluded the prospect of any extension of the type of proceedings to which ss 29AA to 29AC would apply. Once such inconsistency or contradiction was recognised, the original ss 29AA to 29AC should be treated as the dominant provisions because the relevant provisions in sch 2 were expressly labelled as

temporary and their purpose was specified as being to "supplement" the provisions set out in the body of the Act.[3]

[22] This analysis is misconceived. The natural meaning of cl 8 of sch 2 is that ss 29AA to 29AC are to apply to a wider category of Court proceedings than those specified in s 29AA. The broader category, as might reasonably be expected of the legislature, includes proceedings by way of judicial review. The extension of the types of proceeding to which the sections will apply in no way conflicts with the provision in s 29AB(5) that gives primacy to the requirement for unilateral disclosure of classified security information over any enactment or rule of law to the contrary. The procedure is an exceptional one, fundamentally inconsistent with basic common law principles for the provision of fair hearings and statutory recognition of those principles such as in the New Zealand Bill of Rights Act 1990 (NZBORA). Parliament's stipulation of the primacy of s 29AB when legislating for such an exceptional procedure is not inconsistent with the legislature later expanding the types of proceeding to which that process is to apply.

[23] Nor is there any justification for reading down cl 8 because it appears in provisions that are labelled temporary and are intended to supplement the previously existing scope of the Act. Whilst in force, the temporary provisions must be applied on their correctly interpreted terms. Indeed, as Mr Martin pointed out, the temporary provisions are required to be given a measure of preference because s 45(4) provides:

> If a temporary provision duplicates, modifies, supplements, or is inconsistent with a provision in the body of this Act, the temporary provision prevails.

[24] I am therefore satisfied that cl 8 of sch 2 operates to extend ss 29AA to 29AC to applications for judicial review.

[25] Ms A advanced additional arguments that, even if cl 8 was effective to extend the application of ss 29AA to 29AC to judicial review proceedings, that status ended "at the close of 31 March 2017" when temporary provisions in sch 2 ceased to have effect.

---

[3] Passports Act 1992, s 45(2)(g).

[26] There were two aspects to this argument. First, Ms A argued that "at the close of 31 March 2017" meant 5 pm on that day. Although she could not cite any authority that the expression "at the close of" was to be interpreted as meaning at the end of a conventional working day, she invited analogy with timing requirements in the High Court Rules for the filing of documents, which provide that the end of a period in which documents may be filed is to be at the end of the working day within which the Registry would be open to receive documents.

[27] Ms A submitted orally that the legislature should be taken to have intended a break between the temporary provisions ceasing to have effect, and the coming into effect of the replacement provisions.

[28] That is not a sustainable interpretation. In this legislative context, I am satisfied that "at the close of 31 March" means at midnight on that day, so that the repeal of the temporary provisions coincides precisely with the coming into effect of the replacement provisions.

[29] The second aspect of this argument was that the way the provisions were expressed meant that the usual provisions about the on-going effect of repeal provisions were not to apply. On their introduction, s 45(6) specified that the temporary provisions "are repealed on 1 April 2017". Ms A argued that because the provisions were acknowledged as temporary before they came into effect, and the end of the period in which they were to have effect was stipulated before their commencement, then Parliament should be treated as recognising that the temporary provisions would cease to have any effect at the end of the period for which they were introduced.

[30] Ms A characterised this as more than a simple repeal of the provisions, which meant that ss 17 and 18 of the Interpretation Act 1999 would not apply to them.

[31] Section 17 of the Interpretation Act relevantly provides:

> **17 Effect of repeal generally**
>
> (1) The repeal of an enactment does not affect—

(a) the validity, invalidity, effect, or consequences of anything done or suffered:

(b) an existing right, interest, title, immunity, or duty:

…

[32] Section 18 provides:

> **18 Effect of repeal on enforcement of existing rights**
>
> (1) The repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity, or duty.
>
> (2) A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing or completing the proceedings that relate to the existing right, interest, title, immunity, or duty.

[33] I accept Mr Martin's submission that there is no basis for excluding the application of these sections in the Interpretation Act to the temporary provisions. Any such exclusion of the usual rules of interpretation would certainly be unintended. The Government's intention was to replace the temporary provisions in a part of what is now the Intelligence and Security Act 2017. The explanatory note to the Intelligence and Security Bill, which preceded enactment, stated that it was intended to continue the temporary provisions without interruption and, as a matter of timing, that has been achieved.

[34] The Minister's entitlement to claim that relevant information constitutes classified security information in such a proceeding is a right for the purposes of s 17(1)(b) of the Interpretation Act, and therefore persists until the completion of the proceedings by application of s 18(1). It follows that the extension of ss 29AA to 29AC to this judicial review will continue until its completion.

[35] In Ms A's last document filed before the telephone conference, on 6 April 2017, she added a related argument about the scope of the provisions in ss 29AA to 29AC. The additional point was that the definition of classified security information in s 29AA was confined to information that provided grounds for a belief that the person concerned is a danger to the security of New Zealand. Although the 2014 additions in sch 2 (including the clauses of that schedule relied on by the Minister in

Ms A's case) expanded the grounds for cancelling a passport to cases in which the person was believed to be a danger to the security of a country other than New Zealand,[4] that extension had not been applied to the scope of how classified security information was defined in s 29AA.

[36] Ms A's argument focused on the first paragraph of the definition of classified security information in s 29AA(5)(a)(i). However, it did not acknowledge the separate category of information defined in subs (5)(a)(ii), which includes information giving grounds for a belief that cancellation of a New Zealand passport will "prevent or effectively impede the ability of the person to carry out or facilitate the action or matter concerned".

[37] In the absence of the expanded provisions introduced in 2014, the "action or matter concerned" would be confined to those of the types contemplated in the sections of the Act cited in subs (5)(a)(i).[5]

[38] It is clear that instead of expanding the range of sections cited in subs (5)(a)(i), the legislature has relied on the scope of s 45 as introduced in 2014 to expand the scope of "action or matter concerned" to include grounds where there is a perceived concern for the security of another country.

[39] Section 45(5)(b) requires the existing provisions in the Act to be treated as a cross-reference to corresponding replacement provisions. Clause 2 of sch 2 is a replacement for s 8A, so that the reference in the definition of classified security information in s 29AA(5)(a)(i) is expanded to refer to actions or matters of the kind referred to in cl 2 of sch 2. The outcome is that the definition of classified security information will extend to information affording grounds for a belief that cancellation of Ms A's passport will impede her ability to facilitate actions of the type specified in cl 2(2) of sch 2, namely where she represents a danger to the security of a country other than New Zealand for one or more of the specified reasons.

---

4 Schedule 2, cl 2(2) of the Act.

5 Sections 4A(1)(a), 8A(1)(a), 20A(1)(a), 25A(1)(a), 27B(1)(a) and 27E(1)(a).

NZBORA consistent approach to interpretation

[40] Although Ms A generally criticised ss 29AA to 29AC for being inconsistent with the rights recognised under NZBORA, she did not argue that the Court was obliged to adopt the interpretation most consistent with the rights in NZBORA in interpreting the scope of the statutory provisions she challenged. I have nonetheless reviewed the arguments presented in light of that potential influence on the interpretations to be adopted.

[41] A statutory provision that material and potentially decisive evidence in a court proceeding is to be presented to the Court and considered in the absence of the party adversely affected is as flagrant a breach of the fundamental right recognised in s 27 of NZBORA as could be contemplated. There is therefore a compelling case for applying an interpretation consistent with NZBORA to limit provisions that conflict with that right, unless the limitation on the right is a reasonable one prescribed by law that can be demonstrably justified in a free and democratic society.[6]

[42] It appears that no report pursuant to s 7 of NZBORA on inconsistencies between the provisions in the 2014 amendments and NZBORA was presented to Parliament by the Attorney-General. It is possible that the advice to the Attorney-General was to the effect that no report to Parliament was required because the limits on NZBORA rights could be demonstrably justified as reasonable. No such advice was published regarding the 2014 amendments, but advice to that effect regarding the Intelligence and Security Bill is available online.[7]

[43] The Law Commission has taken a different view and in a 2015 report observed that the extent of national security concerns did not justify the inclusion of closed court procedures under the Act that would apply automatically.[8]

[44] I have not yet received any classified security information that was relevant to the Minister's decision in Ms A's case. There may arguably be grounds for

---

6 New Zealand Bill of Rights Act 1990, s 5.

7 Advice concerning 2016 and 2017 Bills is available on the Ministry of Justice website "Advice on consistency of Bills with the Bill of Rights Act" www.justice.govt.nz.

8 Law Commission: *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* (NZLC R135, 2015) at [7.49].

questioning the extent of national security concerns in cases where no issue of New Zealand's own national security arises. In those cases, including the present one, a potentially less compelling concern is likely to arise that disclosure of the information held will compromise the processes for investigation or availability of reciprocal exchange of information with security services in other countries. I anticipate that the Minister would argue that extending the definition of classified security information was demonstrably justified because it forms part of provisions that reflect New Zealand's important commitment to anti terrorism measures that are reciprocated by other like-minded nations. It is unnecessary to decide this point, which would in any event require a fully contested argument that I did not hear.

[45] Moreover, if the Minister was unable to make out that s 29AB as applied to information affecting the national security of other countries was indeed demonstrably justified, then the question would be whether the interpretation of potential inconsistencies identified by Ms A could be influenced by an approach consistent with NZBORA to alter the interpretation that otherwise applies.

[46] I am satisfied that no such different interpretation could be achieved. The legislative intention in enacting these provisions is clear. Any interpretation that would benefit Ms A would require reading down s 29AA(5)(a)(ii) in such a way that would frustrate that intention contrary to the correct NZBORA approach.[9] I am satisfied that that intention has been accurately reflected in the provisions and that there can be no exception for Ms A's case that could justify the exclusion of the procedure under s 29AB.

Challenge to the protocol

[47] Ms A mounted a separate challenge to the lawfulness of the protocol, seeking declarations that the circumstances in which the protocol was agreed were in breach of s 29AC of the Act, and that the Minister was responsible for that non-compliance.

[48] Ms A calculated that the protocol was signed some 11 years and nine months after s 29AC came into force. She argued that that period of delay was substantially

[9] *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [61] per Blanchard J.

beyond the period that might qualify as being "as soon as practicable" after the commencement of s 29AC. She also argued that the protocol was only considered and agreed because of the commencement of her proceedings, which she characterised as a negligent breach of the obligation for the protocol to be agreed and available.

[49] Mr Martin defended the length of time that has been taken and the context in which the protocol came to be completed. He cited recent observations of the Court of Appeal to the effect that a stipulation such as "as soon as practicable after the commencement of this section" is to be interpreted in accordance with the legislative text, purpose and context.[10] That observation was made in the different context of consultation about the length of a "runway end safety area". Here, Mr Martin argued that there was no imperative to agree a protocol until it became necessary, so that "as soon as practicable" was to be assessed in light of the need for a protocol. Therefore no criticism could be warranted of the process for agreeing the protocol only after Ms A's proceedings triggered the necessity for such arrangements, which were then settled reasonably promptly.

[50] I do not accept Mr Martin's argument that failing to address such a protocol until it became necessary because of a specific case adequately discharges the statutory obligation for it to be agreed as soon as practicable after the commencement of the section. When referring to what "may be necessary" in s 29AC(1), the concept of necessity links general practices and procedures that are likely to arise in proceedings that come under s 29AB to the formal requirements of that section.

[51] The terms of s 29AC(1) did not reasonably allow those who would advance proposals for a protocol to the Chief Justice and the Attorney-General to await the filing of relevant proceedings to which s 29AB would apply, before turning their minds to the general practices and procedures which should apply. The statutory purpose and context contemplated that the protocol was to be agreed as an adjunct to

---

[10] *New Zealand Airline Pilots' Association Industrial Union of Workers Inc v Director of Civil Aviation* [2017] NZCA 27 at [51].

the procedure provided for in s 29AB of the Act which ought therefore to have been in place in the event that proceedings arose in which it would be required.

[52] A consideration of the content of the protocol that is now available bears that out. There is nothing in the protocol which could be said to be specific to the circumstances of Ms A's proceeding. To the contrary, the provisions are generically expressed and focus on the need to maintain strict confidentiality of classified security information as narrowly as possible beyond the security agency holding that information as is necessary to achieve the purpose of s 29AB.

[53] The obligation on the Chief Justice and the Attorney-General under s 29AC(1) to produce a protocol as soon as practicable after the commencement of the section is coupled with the additional obligation to revise it from time to time. The obligation to keep the procedural provisions current, no doubt including the need to reflect changes in technology affecting the gathering and retention of information, supports the interpretation that the timing obligation did not allow those required to agree the protocol to defer settling its terms until a specific proceeding to which the sections apply had arisen.

[54] I therefore accept Ms A's criticism that the protocol was not agreed as soon as practicable after the commencement of s 29AC. However, what impact, if any, should that finding have on the application of the protocol to Ms A's proceedings?

[55] Ms A argued that she has been materially prejudiced by the delay in the protocol becoming available, and that breach of s 29AC in failing to have the protocol available as soon as practicable after commencement of the section is a breach for which the Minister must accept responsibility.

[56] I pressed Ms A to identify the forms of prejudice that have arisen because of the delay in the protocol being agreed. I do not accept that her proceeding has been materially delayed by the non-availability of the protocol. The original and amended statements of claim in her judicial review make extensive allegations of delays by the counsel she had retained to represent her. As Mr Martin pointed out, a joint memorandum of counsel dated 22 September 2016 filed in Ms A's appeal recorded

her consent (via her then counsel) to a period of a further two months for the protocol to be finalised. At any time since then, had Ms A made specific complaint about the absence of a protocol, arrangements could well have been made to progress an expedited protocol more promptly. No such course was pursued. Ms A has not alleged any specific respects in which the course she has charted for her proceeding has been adversely affected by the time it took to produce the protocol. Indeed, the terms of the protocol have not had any practical impact on her proceedings so far.

[57] Implicitly, the ultimate relief Ms A sought in challenging the timing of the availability of the protocol would be an order that the Minister is not entitled to invoke the protocol in dealing with classified security information in this proceeding. That would not be an apt consequence for a finding that it has not been produced as soon as reasonably practicable and, in any event, such an outcome could not enable Ms A to avoid the procedure provided for in s 29AB.

[58] Ms A argued the delayed production of the protocol should be attributed to the Minister on the basis that he is the Minister responsible for administration of the Act, and that one aspect of administering the Act was to ensure that s 29AC was complied with in a timely manner. In the literal sense, she is correct that the Minister can be attributed with ultimate responsibility for the administration of a statute which is the responsibility of his or her Ministry or Department. Ms A did not suggest any criticism of the involvement of the Chief Justice or the Attorney-General, and that stance is appropriate. As the head of the judiciary and the principal law officer respectively, they would be dependent on personnel within the Executive to advance work on the draft content of a protocol for consideration and, if appropriate, discussion between them leading ultimately to their agreement on its final terms.

[59] Mr Martin submitted that there was no utility in this aspect of the declarations Ms A applied for. He submitted that general responsibility for administering the Act does not make the Minister responsible for carrying out every single provision in it. The protocol is now available in appropriate terms, and because no prejudice to Ms A arises out of the timing of it being agreed, the Court ought not to make any formal declaration when it could have no practical consequence.

[60] I agree. There has been an administrative failure in delaying the creation of the protocol. It is not a matter that could translate into relief of any utility for Ms A. That is especially so as the failure has not prejudiced her.

Anticipatory breach of the protocol

[61] Ms A's first filing was a notice of appeal on 2 June 2016. That notice included reference to reliance on classified security information by the Minister. There was a measure of uncertainty as to the future of that appeal, and whether it would be repleaded. On 22 September 2016, Crown Law advised the Court on behalf of the Minister that the proceedings did involve classified security information.

[62] Ms A argued that the period between the filing of her original appeal and the provision of the notice on 22 September 2016 amounted to a breach of what is now cl 3 of the protocol. That requires:

> **Pre-hearing procedure**
>
> 3. As soon as reasonably practicable after the filing and service of any proceeding that involves classified security information, the Crown Law Office will notify the Registrar of the relevant court that the proceeding involves classified security information.

[63] Mr Martin pointed out that soon after the original appeal was filed, counsel then acting for Ms A indicated that there would be an amended notice of appeal filed, and that did not occur until 16 September 2016. Until that point, Mr Martin claimed that it was uncertain as to whether, and if so in what form, the appeal would proceed. Notification that the appeal involved classified security information was provided to the Court within a week of the amended notice of appeal being filed.

[64] Mr Martin also made the point that it was abundantly clear to all involved that the Minister's decisions to suspend and cancel Ms A's passport involved assessment of classified security information, so that the Minister's reliance on ss 29AA to 29AC would be readily apparent to anyone who considered what the appeal was likely to involve. Accordingly, no prejudice was caused by the so-called delay in formal confirmation of that status to the Court.

[65] The converse of Mr Martin's last point is that it was unnecessary to afford Crown Law any lengthy period to assess the instructions they were being given on behalf of the Minister, before recognising and advising the Court that it was a case involving classified security information. I agree with Ms A that it is inadequate for Crown Law to assume that it will be apparent to the Registry that the proceeding would involve classified security information. Despite that, I agree with Mr Martin that Ms A cannot make out any prejudice arising from the period of some four months between the original filing of her appeal and the formal notification. Mr Martin did not take the point that there could be no breach of a specific obligation in the protocol that was not agreed for some four months after the step was taken. A requirement for notifying the Court that any proceeding was one that would involve classified security information as soon as reasonably practicable was a predictable requirement, although it was not confirmed until the protocol was agreed in January 2017.

[66] In the circumstances of this case, I would not consider any material criticism is warranted of the period between the original filing and notification in September 2016. Certainly, Ms A cannot point to material prejudice as arising from that period of delay.

Discovery sought of classified security information

[67] Ms A also challenged the Minister's entitlement to withhold discovery of classified security information. As a matter of form, her interlocutory application sought a further declaration that classified security information would be discoverable by the Minister under normal discovery terms, as would otherwise be required under the provisions of the Evidence Act 2006, the Crown Proceedings Act 1950 and the High Court Rules. The second aspect of this declaration she sought was that no evidence could be submitted to the Court on behalf of the Minister in her absence.

[68] Ms A argued that if the Court permitted the withholding of the classified security information and then received such information as evidence in her absence, doing so would defeat the principles of the laws of evidence, the objectives of the

High Court Rules and the principles of natural justice. It would also preclude the effective determination of the proceeding and set a negative precedent.

[69] Ms A relied on s 6 of the Evidence Act, the purposes of which include the provision of rules of evidence that recognise the importance of the rights affirmed by NZBORA and promoting fairness to parties and witnesses. Arguably, the procedure for disclosure of relevant classified security information to the Court in her absence would be a fundamental breach of important rights recognised in NZBORA and would therefore be inconsistent with the purposes of the Evidence Act.

[70] Ms A also relied on s 8 of the Evidence Act, which contains the general provision requiring a judge to exclude evidence if its probative value would be outweighed by the risk that its inclusion would have an unfairly prejudicial effect on the proceeding.

[71] Ms A also cited rr 9.1(1) and (2) of the High Court Rules, which require the Court and parties to litigation to pursue just, speedy and inexpensive determination of the proceeding, and that briefs of evidence and common bundles need to be commensurate with the goal of keeping the cost of proceedings proportionate to the subject matter.

[72] Further, she cited s 27(1) of the Crown Proceedings Act, which recognises that the Crown may be required to provide discovery as if the Crown was a private litigant of full age and capacity. That provision is subject to the Crown invoking any rule of law which authorises or requires the withholding of any document where disclosure would be injurious to the public interest.

[73] In a more general way, Ms A also argued that withholding from her the classified security information that the Minister might put to the Court was contrary to the right to justice under s 27 of NZBORA and to the right for every person to bring civil proceedings against the Crown and to have those proceedings heard in the same way as civil proceedings between individuals.

[74] Ms A supplemented reliance on NZBORA by citing core principles of natural justice that render it an anathema for any judicial officer to make a determination on the basis of information provided by one party and not shared with, or capable of challenge by, the other. Ms A cited the observation of Lord Kerr in the United Kingdom Supreme Court decision in *Al Rawi v Security Service*:[11]

> To be truly valuable, evidence must be capable of withstanding challenge … Evidence which has been insulated from challenge may positively mislead.

[75] The essence of Ms A's argument was that the Court could not effectively determine the proceeding on the basis apparently intended on behalf of the Minister because it would be impossible for the Court to test the evidence comprised in classified security information without affording her an opportunity to challenge it. In all usual contexts, these submissions would carry the day.

[76] However, the exceptional procedure provided for in ss 29AA to 29AC comprise a deliberate and confined exception to all of the usual protections for fair hearings that Ms A has raised. The statutory procedure recognises the priority to be attributed to protection of the secrecy of classified security information if it is deserving of that characterisation. Parliament's intention that the procedure should override all other provisions is apparent from s 29AB(5).

[77] Mr Martin sought to downplay the extent to which the procedure provided for in s 29AB was an exception to the usual mode of full and mutual disclosure of relevant information. He suggested that the provisions of ss 69 and 70 of the Evidence Act, and recognition in r 8.28 of the High Court Rules relating to the withholding of privileged documents from inspection, provide limited analogies.

[78] Section 69 of the Evidence Act deals with confidential communications and the provision of confidential information in circumstances where harm or prejudice might follow from disclosure of the source, and where non-disclosure may be sanctioned if the public interest in preventing harm to the provider of information or others outweighs the public interest in disclosure of the matter in the proceeding.

---

[11] *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [93].

Section 70 of the Evidence Act recognises a discretion to authorise the non-disclosure of communications or information relating to matters of state.

[79] Although the consequences of withholding disclosure are not addressed explicitly in those sections, the general expectation is that the finder of fact in the proceeding (typically a jury in a criminal proceeding) would not be provided with the information that is withheld.

[80] A similar position pertains with the recognition of privilege and confidentiality in r 8.28 of the High Court Rules. If the party holding the information wishes its content to be taken into account in the proceeding, then the general expectation is that the claim to privilege or confidentiality would have to be waived.

[81] Those provisions are therefore not a relevant analogy for the procedure provided in s 29AB where the Minister invites the Court to take into account information relied on in the decision made adverse to the appellant/applicant, without affording that other party any opportunity to challenge or comment on the accuracy or relevance of that adverse information.

[82] Mr Martin also suggested that the dramatic extent of departure from the usual rules for conduct of litigation was ameliorated by the Court's ability to vet the justification for claiming that relevant non-disclosed information constituted classified security information. He submitted that the appropriate procedure was for the Judge to assess the classified security information and that the Judge could refuse to treat it as such if the Judge was not satisfied it was necessary in order to protect the content of that information. That safeguard was treated as protecting the interests of justice when proceedings were dealt with under s 29AB.

[83] Mr Martin's point was that the Court effectively has a power of veto over the Minister's characterisation of information, but cannot force disclosure. The consequence of the Court rejecting the Minister's claim that certain information was correctly characterised as classified security information was that it could thereafter be excluded from the information available to justify the Minister's decision.

[84] The whole of our common law tradition, as bolstered by the rights and protections recognised by NZBORA, render the procedure under s 29AB an anathema to the fundamental concepts of fairness. However, the reality is that Parliament has recognised the justification for the use of that procedure in defined circumstances. As I discussed with Ms A during argument, New Zealand's constitutional arrangements do not include any scope for the courts to strike down lawfully enacted statutory measures on the grounds of their inconsistency with the rights recognised in NZBORA. The task of the courts is to apply statutory provisions consistently with the interpretation of such provisions as discerned by the courts.

[85] Accordingly, Ms A cannot make out grounds for a declaration requiring disclosure of the information that is currently characterised on behalf of the Minister as classified security information.

The future of Ms A's appeal

[86] One of Ms A's arguments for the non-application of s 29AA to 29AC was that the 2014 amendments were not effective to extend the application of those provisions to proceedings brought by way of application for judicial review. I have rejected those arguments.

[87] In the course of the hearing, I invited Ms A to reconsider the future of her appeal. If a reason for not pursuing it was to enable her to make the argument she did to avoid the application of ss 29AA to 29AC, then I do not consider it too late for her to revisit her intention to pursue the appeal.

[88] I pointed out to Ms A that there is authority for the proposition that where an applicant for judicial review has rights of appeal against the decision in question, and has not exhausted those appeal rights, then that circumstance may be a factor taken into account against exercise of the discretion to grant relief in judicial review.[12] I indicated to Ms A that I would permit her a limited period in which to reconsider

---

[12] *Wardle v Attorney-General* [1987] 1 NZLR 296 (CA) at 300; *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [15] and [59]; *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA) at [31].

whether she wished to pursue her appeal as well as, or instead of, the judicial review, and now direct that she is to make that election by ***26 April 2017***.

Timetabling

[89] Mr Martin proposed timetabling directions to have the proceeding ready for substantive argument on 1 June 2017.

[90] Ms A was not prepared to agree to the proposed timetabling steps during the course of the telephone conference and asked for time to reflect on it. I pointed out that if any further pre trial initiatives were taken, or greater lengths of time were required to have the case prepared then the 1 June 2017 fixture would be in jeopardy and there could be no assurance that an alternative date within, say the next two months would be available. I direct that she is to raise any suggested variations to Mr Martin's proposals with him, and either agree on a varied timetable or file a memorandum requesting alternative timetabling provisions, again by ***26 April 2017***.

[91] Given the nature of the proceedings, I reserve all issues of costs arising out of the matters dealt with in this judgment.

Dobson J

Anonymising the applicant's identity

[92] Given the various respects in which the answers to Ms A's interlocutory challenges affected preparation of the rest of her proceedings, I considered it important to issue my judgment prior to the court's Easter vacation. The judgment was only ready for release as the court vacation began and I was unavailable from shortly after its release.

[93] Very shortly after release of the judgment to the parties, Ms A was informally in contact with the registrar requesting that her name be suppressed. The reason she advanced for not previously making such a request was that she was unaware that

my decision on her various interlocutory challenges would be released in a judgment.

[94] Subsequently on 21 April 2017, Ms A made a more formal request for her name to be suppressed. She cited harassment and threatening behaviour by news outlets and others in the community and that she fears for her safety and her ability to continue in her employment.

[95] The registry has referred the request to Crown Law and the respondent does not take a position on the applicant's request.

[96] Given the applicant's circumstances, I would have anonymised my judgment, had she made a reasoned application prior to delivery of the judgment. The only reason to assess the request differently now is that there will inevitably be reduced utility in anonymising judgments in the proceedings given the period in which the judgment, as issued, has been available.

[97] However in the circumstances of this case I do not consider that is sufficient reason to decline Ms A's request and I have accordingly anonymised the judgment and reissued it at the first opportunity after the court's Easter vacation. Henceforth, all references to the proceedings should refer to the applicant only as Ms A.

Solicitors:
Crown Law, Wellington for respondent

Copy to:
Ms A

Appendix A

29AA Special provisions for proceedings where national security involved

(1) This section applies to the following proceedings:

(a) any application to the High Court by the Minister under section 4A(3), section 8A(3), section 20A(3), section 25A(3), section 27B(3), or section 27E(3) for an order extending the period during which a person is not entitled to obtain a New Zealand travel document, and any appeal under section 29(1A) against such an order:

(b) any appeal under section 28 or section 29 relating to a decision of the Minister under any of sections 4A, 8A, 20A, 25A, 27B, and 27E to refuse to issue a New Zealand passport or refugee travel document, or to cancel or retain a New Zealand travel document:

(c) any appeal under section 28 or section 29 relating to a decision of the Minister to refuse to issue a certificate of identity under section 16 or an emergency travel document under section 23, where the Minister certifies that the refusal was based on a belief on reasonable grounds that—

(i) the person was a danger to the security of New Zealand because the person intended to engage in or facilitate an action or matter of a kind described in section 4A(1)(a); and

(ii) the danger to the security of New Zealand could not be effectively averted by other means; and

(iii) the refusal to issue the certificate of identity or emergency travel document would prevent or effectively impede the ability of the person to carry out the intended action.

(2) In hearing an appeal to which this section applies, the court must determine whether—

(a) the information that led to the decision is credible, having regard to its source or sources; and

(b) the information reasonably supports a finding that—

(i) the person concerned is a danger to the security of New Zealand because the person intends to engage in, or facilitate, an action or matter of a kind referred to in sections 4A(1)(a), 8A(1)(a), 20A(1)(a), 25A(1)(a), 27B(1)(a), and 27E(1)(a); and

(ii) the refusal to issue the New Zealand travel document concerned, or to cancel or retain the New Zealand travel document, will prevent or

effectively impede the ability of the person to carry out or facilitate the action or matter concerned; and

(iii) the danger to the security of New Zealand cannot be effectively averted by other means.

(3) Where the appeal relates to a matter within the discretion of the Minister, the court may substitute its own discretion for that of the Minister.

(4) If information presented or proposed to be presented in proceedings to which this section applies includes classified security information, then section 29AB applies.

(5) In this section and sections 29AB and 29AC, classified security information means information—

(a) relevant to whether there are or may be grounds for believing that—

(i) the person concerned is a danger to the security of New Zealand because the person intends to engage in or facilitate, an action or matter of a kind referred to in sections 4A(1)(a), 8A(1)(a), 20A(1)(a), 25A(1)(a), 27B(1)(a), and 27E(1)(a); or

(ii) a refusal to issue the New Zealand travel document concerned, or to cancel or retain the New Zealand travel document concerned, will prevent or effectively impede the ability of the person to carry out or facilitate the action or matter concerned; or

(iii) the danger to the security of New Zealand cannot be effectively averted by other means; and

(b) held by an intelligence and security agency (as defined in section 4(1) of the Terrorism Suppression Act 2002) or by the New Zealand Police; and

(c) that the head of the specified agency, or the New Zealand Police, certifies in writing cannot be disclosed except to the extent provided in section 29AB because, in the opinion of the head of the specified agency,—

(i) the information is information of a kind specified in subsection (6); and

(ii) disclosure of the information would be disclosure of a kind specified in subsection (7).

(6) Information falls within subsection (5)(c)(i) if it—

(a) might lead to the identification of, or provide details of, the source of the information, the nature, content, or scope of the information, or the nature or type of the assistance or operational methods available to the agency or the Police; or

(b) is about particular operations that have been undertaken, or are being or are proposed to be undertaken, in pursuance of any of the functions of the agency or the Police; or

(c) has been provided to the agency or the Police by the Government of another country or by an agency of a Government of another country or by an international organisation, and is information that cannot be disclosed by the agency or the Police because the Government or agency or organisation by which the information has been provided will not consent to the disclosure.

(7) Disclosure of information falls within subsection (5)(c)(ii) if the disclosure would be likely—

(a) to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or

(b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the Government of another country or any agency of such a Government, or by any international organisation; or

(c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or

(d) to endanger the safety of any person.

29AB Proceedings involving classified security information

(1) If information presented or proposed to be presented by the Crown in any proceedings to which section 29AA applies includes classified security information, the court must, on a request for the purpose by the Attorney-General and if satisfied that it is desirable to do so for the protection of (either all or part of) the classified security information, receive or hear (the part or all of) the classified security information in the absence of—

(a) the person in respect of whom the decision concerned was made; and

(b) all barristers or solicitors (if any) representing that person; and

(c) members of the public.

(2) Without limiting subsection (1),—

(a) the court must approve a summary of the information of the kind referred to in section 29AA(5) that is presented by the Attorney-General except to the extent that a summary of any particular part of the information would itself involve disclosure that would be likely to prejudice the interests referred to in section 29AA(6) or (7); and

(b) on being approved by the court (with or without amendments directed by the court in accordance with paragraph (a)), a copy of the statement must be given to the person concerned.

(3) The court—

(a) may give any directions and make any orders that the court thinks appropriate in the circumstances of the case:

(b) must determine the application or appeal on the basis of information available to the court, whether or not that information has been disclosed to or responded to by all parties to the proceedings.

(4) Nothing in this section limits section 27 of the Crown Proceedings Act 1950 or any rule of law that authorises or requires the withholding of a document or the refusal to answer a question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.

(5) This section applies despite any enactment or rule of law to the contrary.

29AC Ancillary general practices and procedures to protect classified security information

(1) Any general practices and procedures that may be necessary to implement the procedures specified in section 29AB and to ensure that classified security information is protected in all proceedings to which that section relates must be agreed between the Chief Justice and the Attorney-General as soon as practicable after the commencement of this section, and revised from time to time.

(2) Without limiting the generality of subsection (1), general practices and procedures may be agreed under that subsection on the following matters:

(a) measures relating to the physical protection of the information during all proceedings to which section 29AB relates:

(b) the manner in which the information may be provided to the court:

(c) measures to preserve the integrity of the information until any appeals are withdrawn or finally determined.