IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2017-485-000032
[2018] NZHC 1328

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 a passport
BETWEEN	A Applicant
AND	MINISTER OF INTERNAL AFFAIRS Respondent

Hearing: 2 May 2018

Counsel: AL Martin and KG Stone for respondent
BJR Keith, Special Advocate

Judgment: 7 June 2018

RESERVED JUDGMENT OF DOBSON J

Contents

Introduction

[1] This proceeding is an application for judicial review challenging the lawfulness of decisions by the Minister of Internal Affairs to suspend, and then cancel, the applicant's New Zealand passport.

[2] In responding to the claim, Crown Law has given notice that the case involves classified security information (CSI) as defined in s 29AA of the Passports Act 1992 (the Act).[1]

[3] In proceedings involving CSI, the Act provided a procedure by which the CSI would be conveyed to the Court. The procedure precluded any CSI being conveyed to the person challenging the cancellation of the passport (the affected person) or lawyers acting for that person.

[4] In April 2017, I dealt with a range of arguments advanced by the applicant that the closed court procedure which excluded her from access to CSI should not apply to

---

1 The provisions relevant to this proceeding have subsequently been amended. Section 29AA now contains a slightly modified definition of CSI and the provisions enabling the Minister to suspend, cancel, refuse to issue or refuse to renew a passport are now found in ss 27GA and 27GE. To the extent that there are differences in drafting between those provisions, they are not relevant to the arguments discussed in this judgment.

her judicial review proceeding. I held that the closed court procedure would apply to the proceeding, to the extent the Court was satisfied that it was desirable for the protection of the CSI.[2] The applicant lodged an appeal against my decision, but it was subsequently deemed to be abandoned.

[5] Since my April 2017 judgment, I have appointed special advocates to assist the Court by advancing any arguments they consider might avail the applicant in challenging the Minister's decision. I have also supervised a timetable for me and the special advocates to be given access to all documents certified by the head of the security agency to contain CSI.[3]

[6] The special advocates and I were given access to all the documents claimed to contain CSI on 28 February 2018. Counsel for the Minister provided a summary of reasons why CSI status was claimed for the documents and I adjourned that hearing to enable me, and separately the special advocates, to consider the detail of the documents in issue.

[7] After an initial assessment of the documents, the special advocates requested time to undertake more detailed analysis, and to prepare arguments challenging the claim to CSI status in respect of some of the relevant documents. I directed Crown counsel to liaise with the special advocates to clarify matters that might arise in assessing the documents.

[8] A number of relatively fundamental differences have arisen over the nature of obligations involved. These range from the responsibilities of the officers preparing a recommendation for the Minister to suspend or cancel a passport, through to any obligations imputed to the Minister in confining the extent of information for which CSI status is claimed, the standard required to justify CSI status and the nature of the Court's task in testing the claimed justifications.

---

2 *A v Minister of Internal Affairs* [2017] NZHC 746, [2017] 3 NZLR 247.

3 The special advocates appointed were FMR Cooke QC and BJR Keith. Mr Cooke ceased involvement on the announcement of his appointment as a Judge of this Court and the issues dealt with in this judgment were the subject of submissions prepared and presented by Mr Keith.

[9] These issues have been considered in respect of analogous procedures by senior appellate courts in the United Kingdom and Canada, but have not thus far been addressed in New Zealand. Rulings are now required to deal with the matters raised by the special advocate, and to provide guidance in other cases. Further, it is appropriate to explain to the applicant, in as much detail as possible, the scope of arguments necessarily heard in her absence.

[10] I deal with the issues in this judgment in generic terms without reference to the arguments arising from the documents in issue in this proceeding, which would otherwise preclude the general publication of this judgment. Mr Keith canvassed what he perceived to be a full range of contingencies and it should not be assumed that any of the particular issues arise in considering the documents in this case.

The statutory process

[11] Section 29AA of the Act contains the following definition of CSI:[4]

> **29AA Proceedings where national security involved**
>
> …
>
> (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

[4] As it applied at the relevant time.

(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.

[12] Under s 29AB(1), if the Crown is proposing to present CSI in a relevant proceeding and the Attorney-General requests the Court to receive CSI in the absence

of the affected person (as well as anyone acting on behalf of that person and members of the public), the Court must do so if it is satisfied that it is desirable for the protection of the CSI. Where that procedure is used, the following provision also applies:

> **29AB Proceedings involving classified security information**
>
> …
>
> (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.

[13] The Court's role is not to vet the reasonableness of the grounds for the head of the security agency to certify that the information qualifies as CSI. Certification of any information as CSI reflects the view of the head of the relevant agency, as provided in s 29AA(5)(c). The Court's task is to be satisfied that receiving and considering the CSI in the absence of the affected person and anyone acting for them is desirable for the protection of all or part of the CSI. The Court is also tasked with approving a summary of the CSI.

The Crown's approach to CSI

[14] The Crown's approach to dealing with CSI gives primacy to maintaining its secrecy. It was important to Mr Martin's analysis that the Crown retains control over the CSI in all circumstances. Whilst the Court may not be satisfied as to the desirability of withholding the information from the affected person for the protection of the CSI, that does not compel disclosure. In that event, the Crown can elect to withdraw so much of the information as is not accepted by the Court as validly withheld from the affected person. The Crown would then defend the challenged

decision without reliance on those components of the CSI. The provision, as it applied at the time, was in sch 2, cl 8(2) to the Act, in the following terms:[5]

> **8 Proceedings where national security involved**
>
> …
>
> (2) With respect to section 29AA, if a decision, which may be made at any time, is made to withdraw any classified security information,—
>
> (a) the classified security information—
>
> (i) must be kept confidential and must not be disclosed by the court; and
>
> (ii) must be returned to the relevant agency; and
>
> (b) the court must continue to make the decision or determine the proceedings—
>
> (i) without regard to that classified security information; and
>
> (ii) in the case of an appeal or a review of proceedings, as if that information had not been available in making the decision subject to the appeal or review.

[15] The provision in s 29AB(2) for the Court to approve a summary of the CSI is treated by the Crown as ameliorating, to whatever extent is possible, the imperative to withhold the CSI. However, protection of the CSI remains because the summary cannot contain any information which would involve disclosure likely to prejudice the interests defined in s 29AA(6) and (7) as set out at [11] above.

[16] On this construction of the statutory provisions, Mr Martin submitted that Parliament has clearly satisfied itself that the limits on disclosure of information relevant to a decision in such cases are justified. This arguably strikes the appropriate balance between maintenance of the right to a fair hearing for those involved, and the need to maintain the secrecy of CSI. Mr Martin emphasised that this balance is a matter for Parliament, citing acknowledgement of this by Lord Phillips for the House of Lords in litigation involving a similar procedure in *Secretary of State for the Home Department v AF (No 3)*:[6]

---

5 A provision to the same effect is now found in s 29AB(4A) of the Act.

6 *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269.

> [63] There are, however, strong policy considerations that support a rule that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him. …
>
> [64] The best way of producing a fair trial is to ensure that a party to it has the fullest information of both the allegations that are made against him and the evidence relied upon in support of those allegations. Where the evidence is documentary, he should have access to the documents. Where the evidence consists of oral testimony, then he should be entitled to cross-examine the witnesses who give that testimony, whose identities should be disclosed. Both our criminal and our civil procedures set out to achieve these aims. In some circumstances, however, they run into conflict with other aspects of the public interest, and this is particularly the case where national security is involved. How that conflict is to be resolved is a matter for Parliament and for government, subject to the law laid down by Parliament. …

[17] Because Parliament has prescribed the procedure that is to apply in clear terms, Mr Martin submitted there is no prospect of reading down those provisions in any search for greater procedural fairness to individual litigants. Parliament's intention that the process should adhere only to the steps in s 29AB is indicated by subs (5), which states it is to apply "despite any enactment or rule of law to the contrary".

[18] Mr Martin submitted that the lack of any ambiguity as to how the process was to apply excluded the prospect of interpretations favouring rights contained in the New Zealand Bill of Rights Act 1990 (NZBORA). Section 27 of that Act acknowledges the right of every person to the observance of the principles of natural justice, and s 6 provides that where an act can be given a meaning consistent with such rights, that meaning is to be preferred. Arguably, there were no alternative interpretations available for the relevant Passports Act provisions that would lead to a more rights-friendly process being adopted.

[19] Mr Martin cited the limitation on resort to s 6 of NZBORA recognised by the Supreme Court in *R v Hansen*.[7] That litigation challenged a reversal of onus provision in the Misuse of Drugs Act 1975. Consistently with other judgments, Tipping J observed:[8]

> I myself have previously emphasised that the finding of alternative meanings under s 6 must follow a legitimate process of construction; s 6 must not be used as a concealed legislative tool. The Courts may interpret but must not legislate. A corollary of the latter proposition is that s 6 cannot be used to give

---

7 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

8 At [156] (citations omitted).

> a meaning to an enactment which is clearly contrary to the meaning which Parliament understood its words to convey.

[20] Within the statutory process provided for, the requirements necessary to fulfil natural justice obligations will be specific to each case and, as always, the extent of natural justice obligations depends on context. As the Supreme Court observed in *Dotcom v United States of America*:[9]

> The content of the right to natural justice, however, is always contextual. The question is what form of procedure is necessary to achieve justice without frustrating the apparent purpose of the legislation.

[21] Mr Martin submitted it is arguably relevant in such cases that the threshold for the head of the relevant agency to certify CSI status to any information is a relatively low one. For example, under s 29AA(6)(a) the threshold is where disclosure "might" lead to the identification of sources or modes of information-gathering. Under s 29AA(7), the disclosure need only "be likely to prejudice" the various national interests specified.

[22] Further, without diminishing the importance of the right to maintain a passport, such challenges arise in civil proceedings where there is no issue of detention or criminal charges against the person involved. Arguably, the consequences of loss of the right to a passport are also less serious than loss of citizenship or residence. The affected person's interests can be advanced by involving special advocates. Mr Martin submitted the combined effect of all these features was arguably sufficient to justify Parliament having struck the balance as it did between maintenance of secrecy of the CSI and maintenance of the rights to the appropriate extent of natural justice protections for the affected person.

Grounds for questioning reliance on CSI status

[23] Apprehending the need for general guidance in determining how the Court is to be satisfied of the desirability of protecting CSI by receiving it on an ex parte basis, Mr Keith helpfully presented a range of arguments in general terms as to the approach that should be adopted. The scope of the arguments and examples he gave were not

---

9 *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [120] (citations omitted).

related to arguments he then raised specifically in reference to the present case. The former can usefully be measured against the stance proposed for the Crown in general terms without relating any of them to any matters that might require redaction. The matters Mr Keith canvassed can be summarised as follows.

(i) Sceptical approach

[24] Mr Keith submitted that claims by the Crown to withhold information are to be tested on a stringent and sceptical basis. The Court ought to expect an element of "over-claiming" as to the prejudice that might follow. By analogy with the Court of Appeal decision on public interest immunity in *Choudry v Attorney-General*, the Court cannot "be beguiled by the mantra of national security into abdicating its role".[10] In that case, the concern for abdication was in respect of the Court's role in the balancing exercise between the public interest in a fair procedure and the claimed basis for the Crown being immune from a usual disclosure obligation. A similar caution in that case was expressed in the concurring judgment of Thomas J who observed:[11]

> … it is also realistically appreciated that the certificate is initially prepared by officers of the Service who, by virtue of the very nature of their work and their own conscientious performance of their task, may be overzealous in their perception of the secrecy which is required.

(ii) Who may claim CSI status and obligations to seek consent to disclose

[25] Mr Keith submitted that the concept of information being "held" by the security agency in s 29AA(5)(b) is appropriately given a narrow interpretation so as to exclude information that the security agency has access to but which it did not create or originally obtain. This would exclude information and documents obtained from other agencies because, on Mr Keith's analysis, it would be for the entity that originally procured the information to make the assessment of whether there were security concerns that justified it being withheld.

[26] Further, where the claim to withhold is for information derived from other sources, it should not be assumed the provider will refuse its disclosure in such proceedings. Arguably, the Crown should positively report, in respect of individual

---

10 *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA) at 594.
11 At 598.

documents or groups of documents, that requests have been made of the source for permission to disclose them in the proceedings, and confirmation as to whether there has been refusal to provide that permission.

(iii) Propositions counting against recognition as CSI

[27] Mr Keith posed a range of general propositions that he suggested the Court should assess as counting against acceptance of claimed CSI status. None of the general propositions, nor the examples given in respect of them, ought to be taken as applying in this case. If such propositions were made out, then it could hardly be desirable to withhold the information from the affected person, to protect the information.

[28] First, if the information has been sourced, by whatever means, from the affected person, then that information should not be withheld from him or her.

[29] Second, where the security agency relied on interception or surveillance warrants to obtain information and those warrants have expired, there cannot be any sensitivity as to such warrants being the source of information relied on. Mr Keith suggested this would particularly be so if there was no on-going monitoring of the affected person. He submitted that, where information relevant to any court proceedings has been obtained pursuant to a warrant, the general practice is that the resort to a warrant will be disclosed. This can lead, in some contexts, to an issue over the justification for issuing the warrant in the first place. Even if a challenge to the grounds for issue of a warrant did not arise in proceedings under the Act, the expectation that there would be disclosure of resort to a warrant would increase the onus on a security agency to justify any withholding of the fact that a warrant had been used in any particular case.

[30] Third, where sources of information are derived from publicly known information-sharing arrangements between security agencies, both within New Zealand and internationally, then disclosures that would suggest a security agency has obtained information by calling on such co-operation cannot be a matter that compromises those sources so as to trigger a valid concern under s 29AA(7).

[31] Fourth, if any aspects of the information are in the public domain, then irrespective of the state of awareness attributed to the person affected, the availability of that information independently means that it should not be withheld.

[32] Fifth, Mr Keith submitted that the Court ought also to test whether information the Crown claims as CSI was relevant to the decision or decisions in issue. If the information was not relevant, but the Crown now wishes to rely on it, then it would not come within the CSI definition.

(iv) Duty of utmost good faith

[33] One antecedent issue on which I heard argument was the nature of the obligation on those providing the Minister with a report recommending the suspension or cancellation of a passport. Mr Keith submitted that in defending any such proceeding, the Crown is in a privileged position. It holds all the information, and seeks to defend the Minister's decision in court proceedings by withholding the components of the information for which CSI status is claimed. Those circumstances arguably trigger an obligation of utmost good faith to provide full disclosure to the Court when the opposing party is not in a position to have access to all the information and therefore test its adequacy and reasonableness.

[34] Mr Keith went further in oral submissions and submitted that those responsible for preparing the report also owe a duty of utmost good faith to the affected person to ensure that all known relevant material is presented to the Minister in a balanced way. The obligation arises so the Minister is informed of all matters – both those that justify the recommendation and those which are potentially inconsistent with it.

[35] On Mr Keith's analysis, such an obligation was relevant to the scope of disclosure obligations that arise when the Minister's decision made in reliance on such a report is challenged on appeal or by way of judicial review. A person challenging a cancellation decision needs to be adequately informed to assess whether criticism can be advanced of a lack of balance in the information provided to the Minister and on which the Minister relied.

[36] Mr Martin rejected the notion that officers with responsibility for researching and preparing reports on a recommendation to the Minister to suspend or cancel a passport owe any such duty to the affected person. He submitted that their task is to apply all known information in forming a recommendation on whether suspension or cancellation is appropriate in a particular case. He accepted that a failure to have regard to any relevant information (particularly information favouring the position of the affected person) would leave a Minister's decision vulnerable to challenge on grounds that it was not reasonably made, or that it was made without regard to relevant material. However, he submitted such vulnerability was not sufficient to give rise to a duty imputed by the Court to those acting administratively in reporting to the Minister.

[37] Mr Keith relied on the decision of the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Harkat*,[12] which involved a constitutional challenge to a statutory procedure for judicial review of ministerial decisions to declare a person inadmissible to Canada. As with the present procedure, the relevant Canadian statute provides that, for national security reasons, parts of the record that were available to ministers should be withheld from the affected person. In deciding whether the relevant statutory scheme was constitutional, the Supreme Court had to determine how far the principle of full disclosure in an open court can be qualified in order to address the threat posed by non-citizens who may be involved in terrorism.[13]

[38] The Canadian process involves two designated ministers deciding whether the evidence gives them reasonable grounds to declare a non-citizen "inadmissible" to Canada. Any such declaration is referred to the Federal Court for review of its reasonableness. If the certificate is found by a Federal Court judge to be reasonable, the non-citizen becomes subject to removal from Canada. After an earlier version was found unconstitutional, the process was amended to provide for the involvement of special advocates who would be entitled to access the whole of the record compiled by the decision-making ministers, on strictly confidential terms. Those terms precluded the special advocates from raising any matters arising from the record with the person who was the subject of the decision.

---

12 *Canada (Citizenship and Immigration) v Harkat* 2014 SCC 37, [2014] 2 SCR 33.
13 At [3].

[39] In challenging the adequacy of research undertaken by the ministers, special advocates submitted that the ministers' obligations of utmost good faith extended to making extensive enquiries of security services in other countries. The Supreme Court accepted that duties of candour and utmost good faith apply when a party relies upon evidence in ex parte proceedings.

Analysis

[40] I accept Mr Martin's submission that Parliament has deliberately provided a process where protection of the confidentiality of information, essentially in the interests of national security, is to prevail over the rights of affected litigants to usual standards of fair procedure. Parliament has done so in unambiguous terms and there is no opportunity to invoke s 6 of NZBORA to read down the constraints on disclosure of relevant information.

[41] Having assessed Mr Keith's propositions in light of the statutory purpose and terms of ss 29AA and 29AB, and having reflected on the variety of circumstances in which security agencies may seek to claim CSI status for information relevant to such proceedings, I am not persuaded that any of the restrictions he proposed could be justified as having general application in unqualified terms. However, a number of them are likely to be useful in testing the desirability of withholding CSI for its protection, depending on the circumstances in individual cases.

[42] The Court's task in assessing the desirability of protecting CSI is different to that arising in claims to withhold otherwise discoverable documents on the ground of public interest immunity. In that context, the Court is empowered to overrule a claim by the Crown to withhold relevant documents so that the Crown's perception of the need to invoke public interest immunity is not determinative.

[43] Here, the statutory process leaves the Crown in control of information for which the head of a security agency claims CSI status. The ability to withhold such information is subject to the limited obligation to provide disclosure to the Court and any special advocate involved. However, if the Court does not accept the desirability of withholding the CSI for its protection, the Crown can then withdraw such

documents. The consequence would then be that the Crown has to defend the challenged decision without relying on the withdrawn information.

Duty of utmost good faith

[44] I deal first with any antecedent obligation arising in the administrative task of completing a recommendation for the Minister. I do not consider it either necessary or appropriate to impose a duty of utmost good faith owed to the affected person by the officers responsible for compiling a report and recommendation for the Minister. The focus of the responsibilities of such officers is to carry out their assessments competently, taking into account all relevant information that can reasonably be obtained. That requires a balanced conclusion that takes into account any information inconsistent with the outcome proposed.[14] Justiciable errors may be found if the officers fail to competently and reasonably assess all information. Such criticisms can be argued to support an appeal or judicial review, without the lapse in standard constituting a breach of a duty of utmost good faith.

[45] In any event, I am not satisfied that the Canadian jurisprudence relied on by Mr Keith supports the more expansive form of duty for which he contended. The references to duties of utmost good faith and candour that appeared in earlier decisions considered by the Canadian Supreme Court in *Harkat* focused on the nature of judicial proceedings under specific legislation.[15] Litigation challenging decisions made under such legislative schemes were conducted before the Court on an ex parte basis in the sense that the affected person and his or her counsel were not present. A 2009 Canadian Federal Court decision in *Re Almrei*,[16] which was considered in *Harkat*, set out the context in which duties of utmost good faith would be implied. The decision in *Re Almrei* considered the position of a party who was before the Court on an ex parte basis:

> [500] The duties of utmost good faith and candour imply that the party relying upon the presentation of *ex parte* evidence will conduct a thorough review of the information in its possession and make representations based on all of the information including that which is unfavourable to their case.

---

14 Compare *Canada (Citizenship and Immigration) v Harkat*, above n 12, at [100]–[103].

15 For example, the Immigration and Refugee Protection Act SC 2001 c 27, s 83(1); and the Privacy Act RSC 1985 c p-21, s 46.

16 *Re Almrei* 2009 FC 1263, [2011] 1 FCR 163.

That decision criticised an approach in which ministers had presented a document to plead their case without presenting contradictory information that was in their possession.

[46] The context in which that practice was criticised is not appropriately applied to impose obligations of good faith owed to the affected person by officers acting in an entirely administrative capacity in preparing a report and recommendation for the Minister. The relevant equivalent is the obligation of utmost good faith on a party to Court proceedings, who asks for material to be received on an ex parte basis, to make full disclosure of all information that is relevant to dealing with the issue in that way.

[47] Rejection of Mr Keith's contention that a duty of utmost good faith arises does not derogate materially from his proposition that a person who has been the subject of a suspension or cancellation decision has a legitimate interest in all of the information available to those who prepared the report and recommendation for the Minister. That reflects a conventional approach to the scope of relevance in such a proceeding. The procedure contemplates that full disclosure will be made to a special advocate whose roles include consideration of the person's interests. Possible arguments that the Minister was not fully informed, or that the report unreasonably rejected or downplayed additional information that may have counted against a decision to suspend or cancel the passport, cannot be advanced unless access is provided to all the information available to those officers, and not a subset of such information that they elected to give to the Minister.

[48] As well as claiming an entitlement to disclosure of all the material available to the officers responsible for the recommendation to the Minister, Mr Keith urged a narrow interpretation of the possible scope of CSI, so as to exclude information that was not relevant to the Minister when making the decision under challenge. However, asserting this breadth of disclosure obligation on the Minister cannot enable an applicant to circumvent the scope of a proper claim to CSI status. The grounds for withholding documents from discovery by relying on the tests in s 29AA(6) and (7) will apply to all documents that are otherwise discoverable because of their relevance to the issues in the proceeding.

[49] Mr Martin suggested in oral argument that the scope of relevant documents in some judicial review contexts would be more confined than in an appeal. This distinction was likely to arise because the issues on judicial review could only encompass the lawfulness and reasonableness of the Minister's decision at the time it was made. Without necessarily conceding that such a scope would include documents relevant to the person's status that were known to those making the recommendation but not included within the information given to the Minister, Mr Martin submitted that information acquired since the Minister's decision could not be relevant to a judicial review analysis of it.

[50] That distinction between the scope of issues in judicial review and an appeal may become relevant in some cases, but is not sufficient to influence general guidelines on the task of the Court in dealing with the issues raised under s 29AB of the Act. The scope of issues in such cases can be expected to include an assessment of whether there were reasonable grounds for the challenged decision. There are likely to be cases in which the Court would take into account relevant information that has only subsequently become available, or which could have been put to the Minister but was not. Once relevance is made out, then the assessment of whether CSI status justifies withholding the information for its protection will likely be dominated by the extent to which the Court is satisfied that s 29AA(6) and (7) considerations are present.

A rigorous test

[51] A stringent and sceptical approach to reviewing the justification for CSI status is warranted in such cases. It is consistent with the approach adopted in the United Kingdom, Canada and Australia.[17] The analysis should not proceed from a position of deference to the opinions expressed on the need to maintain secrecy. The United Kingdom experience includes a case in the Court of Appeal of England and Wales, where the Crown cited grave reasons of national security to maintain secrecy and it

---

[17] See for example *Secretary of State for the Home Department v AF (No 3)*, above n 6, at [83]–[84] per Lord Hope; *Mohamed v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 158, [2011] QB 218; *Canada (Citizenship and Immigration) v Harkat*, above n 12, at [63] and [64]; and *Holloway v Commonwealth* [2016] VSC 317.

was later revealed that the same information was publicly disclosed in the United States.[18]

[52] However, the standard to be applied creates a low threshold for accepting the Crown's position. The Court need only be satisfied that it is desirable (that is, less than necessary) to concur with the withholding of CSI for its protection.

[53] Affidavits from security officers explaining the reasons why secrecy should be maintained ought to adequately explain the grounds for concern at the risks arising from disclosure. Bearing in mind that such affidavits are strictly confidential to the Court and any special advocates involved, sufficient detail ought to be provided for the limited audience reading such affidavits to form their own views on the need for maintaining secrecy.

Who may claim CSI status and obligation to seek consent to disclose

[54] I do not accept Mr Keith's proposition that CSI status can only be claimed by the agency that originally procured a document or information. The significance and sensitivity of the same item may be different in the hands of different agencies and it would frustrate the purpose of s 29AA(6) and (7) if a distinction was maintained so that only the agency that acquired information could make a claim for CSI status.

[55] Mr Keith proposed that an agency claiming CSI status for information obtained from other sources should be obliged to explicitly ask whether those sources would consent to its release. Certainly, if the circumstances of acquisition of information give rise to any reasonable prospect that the source may consent, then an expectation arises that the request for such consent would be made before the agency asserted CSI status to protect that source. However, I am not satisfied that a uniform obligation of that breadth is warranted. For example, security agencies will have standing arrangements with at least some other organisations with which they share confidential information. Those arrangements likely include obligations on each recipient to take all practicable steps to prevent dissemination, and likely have exceptions to those obligations for confidential disclosures to government ministers. Requiring the

---

[18] *Mohamed v Secretary of State for Foreign and Commonwealth Affairs (No 2)*, above n 17.

security agency to make requests for consent where such standing arrangements exist could not be warranted.

[56] In addition, there may be circumstances in which the security agency wishes to assert secrecy over the fact that it has obtained information from other sources, irrespective of whether the source would permit disclosure. The fact that a source of information does not oppose disclosure might make it harder to make out the necessary prejudice under s 29AA(7). However, provided that the ground for claiming CSI status is accurately identified and appropriately justified, in such cases the presence or absence of consent from the agency that originally provided the information may not be determinative.

Information sourced from the affected person

[57] Mr Keith's proposition that if information is obtained from the affected person it cannot be withheld from them is superficially appealing. If the affected person has, say, said to a terrorist organisation that he or she is capable of making a particular type of bomb, then that person should surely know that the Minister learnt of it and took it into account in deciding to cancel their passport.

[58] The qualification to that proposition for which Mr Martin argued strongly was that disclosing the security agency's awareness of such a statement may, depending on circumstances, reveal to the affected person the surveillance capacity of the agency or others sharing information with it. It may reveal monitoring of conversations or communications in which the statement is alleged to have been made, or the agency's access to reports from someone hearing or reading the communication. That knowledge might alert the person to the nature and range of resources available to the security agency. The result of such disclosures might therefore compromise the utility of future use of such sources of information.

[59] It follows that a blanket rule rejecting the need to protect CSI where the information is derived from the person in question is not appropriate. However, the fact that such communications are being held against the person will generally be important to preparation of a rebuttal to the case against the person, so the agency

claiming CSI status should explain in adequate detail how the risk of disclosure of sources or methodologies arises, and the extent of that risk.

Information publicly available

[60] Mr Keith's next suggested restriction on claims to CSI status was that it should not be protected if the information was publicly available. Again, the proposition is superficially attractive. The fact that a security agency is aware of, and considers relevant, some item or items of information that are in the public domain could not prejudice covert sources of information or methods of obtaining information.

[61] However, there is likely to be a range of circumstances in which the attribution of relevance to publicly available information may afford insight for the affected person into other information which has been covertly acquired, and for which CSI status is properly claimed. For instance, covertly acquired information about a person may include their use of a code name for a terrorist organisation and, before completion of discovery in proceedings brought by that person, a television documentary refers to the use by the terrorist organisation of that code name. The fact that the connection between the organisation and the code name was public knowledge may not prevent a security agency claiming CSI status for its knowledge of the code name, where attributing relevance to the code name could alert the person to the agency's awareness that he or she used the code name.

[62] As with other grounds for testing the need for protection of CSI suggested by Mr Keith, and applying a rigorous test, the fact that information is publicly known will generally increase the onus on a security agency to justify claims that its disclosure gives rise to the likelihood of the forms of prejudice listed in s 29AA(7). Where the security agency is aware that a piece of information to which it attributes CSI status is in the public domain, the Court can reasonably expect an acknowledgement that it is now in the public domain and an adequate explanation as to why the information still deserves protection.

Reliance on warrants and information sharing arrangements

[63] Generally, by the time persons who have had their passport suspended or cancelled come to challenge such a decision by way of appeal or application for judicial review, they can be expected to know of the security agency's capacity to obtain warrants to conduct surveillance and intercept communications. Certainly, those who retain counsel will likely learn of such sources of information about them in the course of dialogue with counsel. It follows that, in general, the security agency will need to make out specific matters bearing on the circumstances in which a warrant was used, or the risk of revealing the technologies used in obtaining the information, before the likelihood of the forms of prejudice listed in s 29AA(7) would arise.

[64] I do not accept Mr Keith's absolute proposition that if information has been obtained in reliance on a warrant that has expired, the fact of resort to a warrant could not justify a claim to withhold the CSI for its protection. The proposition would not be sustainable even where the affected person was no longer the subject of surveillance. However, nor can the Crown expect acceptance in every case of its proposition that disclosure of resort to a warrant for obtaining information about the affected person gives rise to the likelihood of the forms of prejudice in s 29AA(7). Numerous context-specific factors about reliance on a warrant in any given case are likely to be relevant to whether the defined forms of likely prejudice should be recognised as making out the desirability of protection.

[65] An assumption may well be warranted in some cases that persons whose passports have been suspended or cancelled under these provisions will be aware in general terms that memoranda of understanding or similar arrangements exist between security agencies in New Zealand and other New Zealand entities, as well as with the equivalent security agencies in other countries.

[66] That general level of public awareness of such information-sharing arrangements is likely to reduce (but does not entirely remove) the prospect that information which would reveal that confidential information had been obtained by using such information-sharing arrangements is desirably protected because it gives rise to the forms of prejudice specified in s 29AA(7). As with the other propositions

suggested by Mr Keith, the circumstances in which a security agency accessed information by relying on an information-sharing arrangement could involve incidental disclosure of matters that inform the affected person of other matters that would otherwise remain secret and would prejudice one or more of the interests identified in s 29AA(7).

[67] There may be cases in which a special advocate can persuasively argue that more is required to justify a claim to such forms of prejudice than the mere fact of disclosure that the security agency has obtained the information pursuant to such an information-sharing arrangement. The existence of an arrangement which is a matter of public record would provide support for such an argument.

[68] The fifth of Mr Keith's propositions to confine the scope of documents for which CSI status could be claimed was that all such documents had to have been relevant to the decision or decisions being challenged. His proposition was that if the Crown wished to justify the decision on the content of documents that were not taken into account, then they were going beyond the decision-making process and could not justify a claim to withhold such new documents from the affected person.

[69] However, the definition of CSI in s 29AA(5) includes information relevant to whether there are or may be grounds for believing that the affected person is a danger to the security of New Zealand (or another jurisdiction). The scope of the statutory definition is wider than the constraint Mr Keith proposed and there is no justification for reading down the breadth of that statutory definition.

Supervision of the unclassified summary

[70] A common feature of equivalent closed court procedures in other jurisdictions is the requirement for the Court to supervise the content of a summary of the withheld information, which is to be provided to the person affected by the decision. Mr Keith submitted that, to the extent any withholding of information is warranted, the summary provided to the affected person must be as detailed as possible, and must be adequate to enable the person not only to deny the grounds relied on but also to enable a rebuttal

to them to be advanced.[19] Mr Keith submitted that the absolute minimum would be to require the summary to not be so confined as to risk misleading the person regarding the grounds that had been relied on in the decision against him or her.

[71] This approach has consistently been adopted in the United Kingdom and European jurisdictions in decisions that were made before the New Zealand provisions were originally enacted in 2005 and their material modification in late 2014. Mr Keith drew attention to advice from the Ministry of Justice to the Attorney-General on the introduction of the 2014 provisions. That advice noted that the requirement for a summary would provide the person with an adequate opportunity and ability to gain access to relevant material to ensure that the person had a reasonable opportunity to challenge the material. This was seen as providing in part for the affected person's rights to natural justice.

[72] The United Kingdom decisions distinguish the extent of the obligations depending on the severity of the adverse consequences for the person affected. At the least serious end of the spectrum, withholding sensitive detail from a summary can more easily be justified where the person affected is challenging the withdrawal of a security clearance required for restricted categories of employment.[20] A higher test is required if the person affected is being deprived of the right to a passport,[21] and even higher expectations of disclosure arise if the issue affects the person's liberty.[22]

[73] The United Kingdom and European jurisprudence refers consistently to the need for such summaries to provide the gist or essence of the case against the affected person. Mr Keith submitted that provision of sufficient information to rebut, and not just to deny, the Crown case had to be the bare minimum of any summary the Court could approve. In contrast, Mr Martin accepted that the objective was generally aspirational but, depending on circumstances, the Court may have to recognise it

---

19 *A v United Kingdom* [2009] ECHR 301, (2009) 49 EHRR 29 (Grand Chamber) at [220]; *Secretary of State for the Home Department v AF (No 3)*, above n 6, at [59] and [65] per Lord Phillips, [82] per Lord Hope and [96] per Lord Scott; and *Secretary of State for the Home Department v Abu Rideh* [2008] EWHC 1993 at [21] and [40], cited with approval in *Secretary of State for the Home Department v AF (No 3)*, above n 6, at [54] per Lord Phillips.

20 *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452 at [81].

21 *MR v Secretary of State for the Home Department* [2016] EWHC 1622.

22 *Secretary of State for the Home Department v AF (No 3)*, above n 6, at [57] per Lord Phillips and [80] per Lord Hope.

simply could not be achieved if in doing so the content of the summary involved disclosure of information that was likely to prejudice the interests recognised in s 29AA(6) and (7).

[74] Mr Martin disputed that there is any requirement in s 29AB(2) that the summary be "adequate" by reference to any standard. On the terms of that section, the only requirement is the negative one that the content of the summary not provide disclosure that would be likely to prejudice the interests referred to in s 29AA(6) or (7). He also disputed that because the function of the summary was to act as a substitute for the usual scope of disclosure that would otherwise occur in civil proceedings, it was somehow to be measured against an implied minimum standard for discovery to which a litigant would otherwise be entitled.

[75] However, I do treat the process contemplated by the Act as having the purpose of providing a summary of the CSI that does substitute for disclosure of otherwise discoverable documents. Section 29AB(2)(b) contemplates the Court having the power to direct amendments to the content of the summary proposed by the Crown. This aspect of the process does not subvert the Crown's ultimate control over the withholding of what has been certified as CSI. If the Crown does not agree with the amendments to the summary proposed by the Court, the Crown has an opportunity to consider removing from the CSI the information which triggers the Court's requirement for amendment. A re-drafting process might then be required, with the Crown maintaining the adequacy of a lower level of disclosure in the summary on the basis that it would disavow reliance on the parts of the CSI that the Court considered justified its proposed amendments.

[76] Cancellation of a passport involves deprivation of a relatively important right. In ranking the relative importance of providing the gist of the case to enable a rebuttal, it cannot rank as highly as the importance where loss of liberty is involved. However, omission of any matters necessary to reasonably understand the gist of the case against an affected person can only be justified if the Crown makes out the likelihood, to a convincing standard, of one or more of the forms of prejudice in issue. In balancing what is otherwise a process contrary to basic principles of natural justice, the Court should be firm in requiring content of the summary that affords the reasonable gist

whilst not falling foul of the likelihood of forms of prejudice specified in s 29AA(6) and (7). In this aspect of the analysis, it is the Court's view of what is likely to cause requisite prejudice, not the Crown's.

[77] The Court's supervisory role involves being satisfied as to the desirability of protecting the CSI by withholding it from the affected person, and then approving a summary of the information thereby withheld. The provisions appear to contemplate that the first step is to be completed before considering the adequacy of a summary. If the Court is not satisfied of the desirability of protecting the CSI in particular documents, the Crown may, on reconsideration, either withdraw the documents from the proceeding or accept that such documents are not entitled to CSI status. If the latter, they would become part of the unclassified documents of which discovery would be provided to the person affected in the usual way. In that event, the summary of CSI need not address their content.

[78] However, there may be circumstances in which the two steps in this supervisory process are progressed together. The overriding interest is to inform the affected person as fully as can reasonably be achieved to enable an effective rebuttal to the case against him or her. The present proceeding has progressed substantially more slowly than is likely to be appropriate where the issue is deprivation of the entitlement to a New Zealand passport. The two steps should be in issue as soon as the Court and any special advocates have been given access to the documents for which CSI status is claimed. The adequacy of the summary to be provided to the affected person provides a focus for the extent to which the Court may question the desirability of protecting the CSI by withholding it. Where the gist of a document can be conveyed adequately in the summary, the Court may more readily be persuaded of the desirability of protecting the CSI itself, than it would in cases where the gist is not or cannot be conveyed in the summary.

[79] Judges are well used to determining both civil and criminal proceedings in circumstances where they have been exposed to evidence that is then ruled inadmissible. The analysis required is whether the party with an onus to discharge is able to do so in reliance on the properly admissible evidence before the Court.

Generally, counsel for all parties will be aware of the potential evidence and have had an opportunity to contest its inclusion in the case.

[80] In supervising closed court proceedings under the Act, cases may arise in which the Crown insists on withholding CSI and opposing any adequate indication of its content in the summary. In certain circumstances, the CSI may have been substantially important to the Minister in making her or his decision. Notwithstanding the experience of excluding inadmissible evidence, where that arises it may be appropriate for the Court to allocate a different judge to preside at the substantive proceeding from the judge who has managed the proceeding up to that stage, including ruling on the desirability of protecting the CSI and the terms of the summary. Particularly where the optimal procedure to comply with usual natural justice expectations is likely to be compromised, the administrative burden and extent of duplicated judicial resource that would be involved may be justified to assure an applicant that everything possible is done to facilitate a fair hearing. The issue will be one of the relative significance of CSI that the Crown insists remains secret to the grounds for the ministerial decision being challenged.

Summary

[81] The scope of discoverable documents in such proceedings will extend to all information available to the report-writers so that that extent of information may be assessed for criticisms of the competence or balance of the recommendation subsequently relied upon by the Minister. However, officers carrying out the administrative tasks in preparing a report for the Minister to recommend suspension or cancellation of a passport do not owe a duty of utmost good faith to the affected person.

[82] When assessing the scope of the claim advanced by the Crown for CSI status of documents to be protected, the Court will apply a rigorous test. However, none of the following propositions apply definitively to override the desirability of protecting CSI status:

(a) that the source of the information permits disclosure;

(b) that the information was sourced from the person concerned;

(c) that the information is otherwise publicly available;

(d) that the information was sourced by executing a warrant or warrants that have now expired;

(e) that the person concerned is no longer the subject of surveillance; and

(f) that the information was sourced in reliance on standing arrangements for information-sharing with other agencies within New Zealand or internationally, the existence of which is publicly known.

[83] Depending on the factual context, these considerations may nonetheless be relevant in assessing, on a case-by-case basis, whether it is desirable for their CSI status to be protected.

[84] In considering the summary of the information contained in the CSI to be provided to the affected person, the Court is to ensure to the greatest extent possible that the summary conveys the gist of the case against the person so as to enable that person to prepare a rebuttal to the case against him or her. The Court may propose amendments to the content of the summary presented by the Crown, but ultimately the Crown can prevail in settling the terms of the summary by electing to withdraw any items of CSI so as to obviate the need for inclusion in the summary of statements it considers give rise to the forms of prejudice listed in s 29AA(7). The Crown would then be unable to rely on the withdrawn CSI in the proceedings.

Delivery of this judgment

[85] The protocol for conduct of such proceedings provides that any judgment potentially containing CSI is to be released on a restricted basis to the relevant security agency, to afford a 48 hour period for consideration of its content and request to the Court to treat what is perceived to be CSI differently. I do not consider that the terms of this judgment include any CSI, but nonetheless I complied with this aspect of the

protocol and provided the judgment to the security agency on 1 June 2018. It is being issued without alteration.

[86] When the Court custodian gave counsel warning of the availability of the judgment, the special advocate initiated dialogue on refinements to the process for issue of judgments contemplated in the protocol. Counsel sensibly agreed that the initial distribution was to be to the security agency which would provide copies to Crown Law and the special advocate, and that I would afford an opportunity for counsel to comment in relation to any concerns raised. In the absence of any concerns raised by the security agency, there is no need to hear further from counsel.

Dobson J

Solicitors:
Crown Law, Wellington for respondent

Copy to:
The applicant
Special Advocate, BJR Keith, Wellington