NOTE: THE CONFIDENTIALITY OF THE NAME OR IDENTIFYING PARTICULARS OF THE APPELLANT AND OF HIS CLAIM OR STATUS MUST BE MAINTAINED PURSUANT TO S 151 OF THE IMMIGRATION ACT 2009. SEE http://www.legislation.govt.nz/act/public/2009/0051/latest/DLM1440836.html

NOTE: THIS TRANSCRIPT IS NOT A FORMAL RECORD OF THE ORAL HEARING. IT IS PUBLISHED WIHTOUT CHECK OR AMENDMENT AND MAY CONTAIN ERRORS IN TRANSCRIPTION.

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 104/2020
[2021] NZSC 11

BETWEEN **H**
Appellant

AND **MINISTER OF IMMIGRATION**
Respondent

Hearing: 20 July 2021

Coram: Winkelmann CJ
William Young J
Glazebrook J
O'Regan J
Arnold J

Appearances: R E Harrison QC and M Lee for the Appellant
R A Kirkness and E G R Dowse for the Respondent

CIVIL APPEAL

MR HARRISON QC:
Your Honours, I appear with my learned friend, Mr Lee, for the appellant.

WINKELMANN CJ:
Tēnā kōrua.

MR KIRKNESS:
E ngā Kaiwhakawā, tēnā koutou, ko Kirkness ahau. Kei kōnei māua ko Dowse mō te Karauna.

WINKELMANN CJ:
Tēnā kōrua.

MR KIRKNESS:
Excuse me, Ma'am, just one matter of housekeeping I've discuss with my friend before we get started.

On the 5th of July the Crown Law Office filed a memorandum with the Court advising that a revised version of the instruction that is under challenge here had been certified. A copy of that instruction has been provided to the Court and the Crown has done so at the outset so that my friend has an opportunity to address any relevance he sees in that to his case.

WINKELMANN CJ:
Is this the same, no change from the one that you filed with your memorandum?

MR KIRKNESS:
I think the offer was made with the memorandum and not taken up, Ma'am, and so this is the actual document, and the memorandum describes the fairly minimal substantive changes made.

WINKELMANN CJ:
Yes.

MR KIRKNESS:
They are, in essence, that the language proposed by the Court of Appeal to do with was "minimal or remote" has become, "was or is minimal or remote", and the second adjustment is that the requirement of "beyond doubt" has been removed again in the light of Court of Appeal comments. And so those amendments were drawn to my friend's attention by the Crown Law Office on the 6th of May, they then went through on the 25th of June, and the memorandum to this Court was the 5th of July. The other changes to the document are simply a merger, as I understand it, of what was previously two instructions into one. So previously A5.30 dealt with residence and A5.50 dealt with temporary entry, but they were mirror image instructions, and now those have been rationalised into a single instruction, as you can see from the heading "Normally ineligible for residence or temporary entry class visa", to the A5.50 instruction is now merged into this A5.30.

WINKELMANN CJ:
Thank you, Mr Kirkness.

MR KIRKNESS:
Thank you, Ma'am.

WINKELMANN CJ:
Mr Harrison.

MR HARRISON QC:
Your Honour. I have provided an outline of oral argument and there are some handouts. Two of them are hard copies of A5.30 – sorry, I'll wait until these are distributed, your Honour. Yes, so there's the outline, there are for those who like to have a readily accessible hard copy of a key document copies of A5.30, the "challenged instruction" as I will call it, and A5.25, which provides a very useful point of contrast because it's mentioned, if only because it's

mentioned in the Crown submissions but, I would submit, not the key part. I've provided an extract from the Vienna Convention on Treaties and the Hathaway extract is of the original edition, which is what the Court of Appeal refers to in its judgment. There is a material change in the key passage that the Court of Appeal referred to which I thought I would just draw to attention by that means.

So, going to my outline, as I have argued, one needs to assess the validity of the challenged instruction overall in relation to both its overall wording and overall effect. The analysis of the three pleaded, and indeed separately challenged, aspects of its wording in my full submissions is useful as an analytical tool but it is no substitute for standing back and evaluating the overall meaning and cumulative effect but both, in my submission, both Justice Davison and, in turn, the Court of Appeal, really failed to do this, despite my urging. So I invite consideration of the challenged instruction against the three litmus-test grounds of judicial review in those three respects: statutory context, the Manual, and a broader human rights humanitarian context. And I'll just touch on how that – I argue that works.

It's a mistake to focus on the challenged instruction as if it exists in isolation and is the only means which the Act and the Manual have of addressing the perceived problem that's identified of association with a human rights abuser government, et cetera. It's not. There is a spectrum of ineligibility, if you like, starting at the very top, under the Act itself with those people who are banned outright. I deal with this in some detail in my written submissions and I am not going to go through all that, but just in this introductory stage I want to take your Honours to sections 15 and 16 of the Act which are at tab A of the bundle, starting at page 44.

So if we've got section 15, certain convicted or deported persons are simply not eligible at all, and you've got (1)(a), convicted of an offence which you've been sentenced to, five years or more, I'll omit the alternatives; (b) in the last 10 years sentenced to 12 months or more; prohibition on entry, (c); (d) removed or deported from New Zealand, or (f) another country. Then 16

adds to that, and this is particularly important when we look at the Court of Appeal's reliance, justification of the challenged instruction as needed to deal with threats to security.

So 16(1)(a), again it's an outright prohibition, if the Minister has reason to believe likely to commit an imprisonable offence, is or likely to be a threat or risk to security, ditto public order, ditto the public interest or terrorist entity.

So the Act already provides for outright exclusion of people who are risks, and the Manual mirrors those outright exclusions.

Now when we come to the challenged instruction and A5.25, they are both at a level below outright exclusion. Each instruction begins: "Applicants will not normally be granted," or a variant on that. So these are the not-normally-granted people, and A5.25 is contrary to the view of the Court of Appeal, a marked contrast to the challenged instruction in the way it approaches things, and my argument isn't just a simplistic one that because the two approaches differ the challenged instruction is necessarily unreasonable or invalid, but 5.25 does deal with comparable categories and in a way that is markedly different.

So 5.25, persons convicted of any offence against immigration laws, if you've got convictions for drugs, dishonesty, sex offences or convicted of an imprisonable offence, offence involving violence (g), and dangerous driving or drink-driving. And so the "convicted" categories (a)-(h), obviously convictions speak to the personal character of the applicant and so they're quite naturally in there.

Over the page, (j), at any time in a public speech or comments, et cetera, argues racist views, or uses language encouraging hostility, et cetera. (k), has been or is a member of or adhered to an organisation or group of people which has race-based objectives, if you like. So these two, (j) and (k), refer to personal conduct on the part of the individual applicant himself or herself.

So how are those categories dealt with? First of all we begin with the note at the middle: "Note: When considering whether or not an applicant has committed an act that comes under" certain categories, including (i) and (j) and (k), immigration officer should establish the issue whether or not on a balance of probabilities, then the Action under A5.25.1(a) "must not automatically decline on character grounds". So it's by contrast with, I argue, the challenged instruction, it's not an automatic out, but by comparison with the A5.30.1(b) "minimal or remote" eye of the needle, (b) of A5.25.1 says: "Immigration officer must consider the surrounding circumstances of the application to decide whether they are compelling enough to justify waiving the good character requirement." Circumstances include seriousness of the offence and, (iv) to (vii), how long ago, family circumstances, tie to New Zealand and potential contribution. And then for (j) and (k) you've got to look at how long ago the views were expressed or the group was belonged to, whether the views are still held and, (h) with the views. So there's a quite detailed consideration that is focused on the actual rather than the deemed acts and words of the applicant, the applicant's wider family and other circumstances, the other side of the ledger, can the applicant as well as otherwise satisfying the general good character standard, can the applicant make a contribution to New Zealand? So it's very much a balancing and weighing the good against the bad and looking at the bad in context, in particular its historical context. So that is a marked and, I would submit, a very marked contrast with the way the challenged instruction works.

Now turning to that – and I have an advanced interpretation of it in the written submissions and I'm not going to duplicate what I say there when I get to the core written submissions. But just looking at it, 5.30(a), the basic rule is you don't get residence where you would "pose a risk to New Zealand's international reputation", unless under A5.30.1. So the test under (a) is not a test of or even an inquiry into the applicant's character. Character is irrelevant, it's whether granting the visa, whoever the applicant is, whatever he or she has done or not done or believes, would pose a risk to New Zealand's international reputation. Then you've got (b), "in particular but not exclusively", what I call the "deeming provision", and you're deemed to pose

that risk which isn't, as I argue, isn't a test of character, if you have a specified association. So if (a) is not a test of character then (b), deeming someone to satisfy that non-test of character, is equally not a test of character. So it's simply not concerned with personal character at all, and (c), perhaps stating the obvious, shows that (a) is wider than (b), that is to say there are other ways in which you could pose a risk to New Zealand's international reputation than the "association" or "membership" under (b).

O'REGAN J:

Why is you say it has to be a test of an individual's character?

MR HARRISON QC:

Because that was the way it was formulated. That was the policy that was put to the Minister and certified that it was to be a test of character and it is a test of character because, (a), well, for one thing it appears in the character section of the Manual and it's referred to as a character ground in A5.30.1(a), decline on character grounds, and (d), this aspect of the character requirements. Now your Honour may be coming to a point that arose at the leave hearing, and rightly – it was raised by your Honour, the Chief Justice – because addressing character is not the only basis on which a rule, a residence rule, can be made by the Minister under section 22. Does that mean my argument has to be rejected? My submission is "no", and I can deal with this right now if you like and –

O'REGAN J:

I'm happy for you to deal with it later. That was my focus. I was just looking at the – when I was reading for the case, looking at the section, it didn't seem to marry up with the sort of rigidity of the need for it to be about character. But if you deal with it later, I won't interrupt your argument.

MR HARRISON QC:

Yes, yes, I will, thank you. So the…

WINKELMANN CJ:

And when you do, Mr Harrison, could you also make clear has it been contentious as to whether it is in fact a character test, because having read the Crown's submissions I am still a little bit confused as to whether they consider it to be a character test.

MR HARRISON QC:

Yes, well, as the Court of Appeal judgment notes at some point I think it's been conceded all along that it is a character test and certainly both the Courts below treated it as such. If they're now saying something different, well, I'll leave that up to my learned friend. But as my full submissions I trust make very plain, the policy formulation documentation shows that it was definitely being promulgated as a test of character and it expressly says that it is and it's in that portion of the Manual and residence instructions.

So back to the challenged instruction. So what you've got is an instruction which overall, but with a little bit of a dedicated deeming aspect, poses a test of an applicant who poses a risk to New Zealand's international reputation, and for what it's worth, it may not be, I wondered about who might fall outside of (b), the deeming provision, but nonetheless be able to be considered under (a) plus (c), a risk to New Zealand's international reputation for any other reason, and I suppose if you had a conviction-free, membership-free, private academic holocaust denier, someone the likes of David Irving, wanting to come to New Zealand, with an international reputation that meant his visit would attract attention, he might be someone who would pose a risk to New Zealand's international reputation. But the immigration officer under (a) would need to address that squarely. What is problematical about Mr Irving in terms of his beliefs and what he might say if here and would granting him – it wouldn't be residence, it'd be entry, of course, but the provisions are parallel and now identical – would that, the immigration officer have to decide, pose a risk to New Zealand's international reputation, and that would be decided for better or worse.

Now I mention that because one of the justifications for 5.30(b), the deeming provision, is that it's too hard for an individual immigration officer to address such a big question as posing a risk to New Zealand's international reputation, so we simply deem it to be even if it isn't true, and here it isn't true because he's a recognised refugee and he's got the benefit of an anonymity and in any event no one has seriously suggested that giving residence to a long-term, recognised refugee is something that is inherently damaging to our international reputation.

WINKELMANN CJ:
And he's here anyway.

MR HARRISON QC:
Yes, yes, quite. Well, I mean that's a part of – part of my complaint is that a test that might almost pass muster to deny people entry should not be used to address the question of residence for people who may have a long-term and perfectly legitimate presence here.

So these are some of the problems with the provision and then going back to my outline I deal with the human rights –

GLAZEBROOK J:
If I could just check on the deeming provision, you say it's too hard for an officer. Isn't another aspect of it that it's difficult for – that the information as to the level of involvement is with the person applying and not with the immigration officer?

MR HARRISON QC:
Well…

GLAZEBROOK J:
Just in terms of another justification for a deeming provision, not –

MR HARRISON QC:
I'm not suggesting that the problem about inquiring into risk to international reputation is a justification for (b). It's what has been put forward by the respondent as a justification. But the question of information in the possession of the applicant isn't limited to this scenario. It arises almost at every turn of the immigration process. I mean if you go back to (j) and (k) of A5.25, the question whether someone who turns up here or applies for residence has in another country, by definition they will have come from somewhere else, previously expressed racist views or belonged to a racist organisation, those likewise are entirely within the knowledge of the applicant and may well not easily be ascertainable by the immigration officer, yet under that provision the immigration officer has to apply a balance of probabilities assessment. The deeming is both lazy, unnecessary and an overreaching, in my submission.

So the other aspect is – I've dealt with (3) of my outline. My para 4. I accept that, although I don't accept it as a character test, I accept that if you grant residence to someone who has known bad character rather than deemed lack of good character may, emphasising *may*, pose a risk to international reputation, but surely that depends on the individual case, and it doesn't follow that a presumed absence of good character by reason of some past association is likely to pose that risk. And the reasoning therefore, my para 6, excludes applicants for residence who would otherwise qualify in terms of their positive and demonstrated good character. So no matter how saintly you now are or, indeed, have in other respects been, the fact that you worked for an abusive government qualifies you, no matter how lowly your position and how far away you were from the abusive activities themselves under this deeming provision. So we submit that that is both unreasonable and neither rational nor fair and it is inherently or systemically unfair, which is for the Court to decide, and I'll come to those submissions.

So I've dealt with para 7, the statutory context. I make the point at para 8 – and perhaps this touches on what your Honour Justice O'Regan raised – the reply submissions distort the appellant's argument, which is is that character,

in terms of section 22, does mean actual personal character? That expression does. But we're not arguing that all rules made under section 22 must relate to personal character. We accept that rules may relate to past or present circumstances of a person as distinct from character – I'll come to this – but the point is that having formulated it at policy level and expressed it as a test of character in the instruction, it's on that basis that legality, rationality, et cetera must be assessed and judged, and at 9 I note that the challenged instructions aimed at applicants for New Zealand residence rather than entry visas. So it rules out what would otherwise be the prima facie entitlement of individuals who are already lawfully present and who, in all other respects, qualify for residence and otherwise of good character, and it does so in relation to settled, long-term refugees such as the appellant, and in truth it's a test more likely to cause damage to New Zealand's international reputation than to prevent it, particularly in relation to refugees.

So I note then, finally, the respondent's submissions place much greater emphasis than previously on arguing that the challenged instruction should, if necessary, be read down to save it from invalidity perhaps the writing on the wall has been seen and that is partly why we have an amended and, indeed, watered down, slightly watered down, instruction which was handed up this morning.

Now my response to that reading-down argument is that it's simply not possible to read down critical wording such as "an association with, membership of, or involvement with any government, regime, group or agency" so as to confine the over-breadth of that expression, for example, to the applicant's personal involvement in the offending conduct itself. My point of course being that neither 5.30(a) nor .1(b) using that expression address the applicant's personal involvement in the crimes against humanity and so on. So there's no, at no point does the challenged instruction even permit, let alone contemplate, looking at this applicant and saying: "To what extent were you involved in these abuses? Were you directly involved, were you complicit in terms of tests such as the *Tamil X v Refugee Status Appeals Authority* [2009] NZCA 488, [2010] 2 NZLR 73 case where you can be a party but not

directly involved because of you're, for example, your command relationship to what was going on, nowhere is this addressed. So it's not possible to read down that expression – going back to the submissions – nor is it possible to read down the very stringent language of expressions such as "minimal" or "remote". And I did think, preparing this, that we hadn't really focused much on each of those expressions and, as I say in the footnote, "minimal" is defined, for example, in the *Shorter Oxford English Dictionary* as being extremely minute in size, that is, the least possible. So to be required to satisfy the immigration officer beyond doubt that your association, the nature and extent of your association with the organisation, was minimal, being the association and not your conduct said to involve abuses, is –

WILLIAM YOUNG J:
But can't it be read down as *relevantly* involved with the organisation, can't one read in the word "relevantly"?

MR HARRISON QC:
Well, in the first round of this case that went to the High Court in a case called *AB v Chief Executive of the Department of Labour* [2011] 3 NZLR 60 (HC), which is at tab 2 of the bundle, I attempted to argue for reading down in various respects and got "rebuffed", shall I say, with respect, in a judgment that we accepted, and it's not been suggested down to this point that you could gloss the provision in that way. But my point in any event is that "minimal" sets a very high bar in terms of looking at, for example, long-term service in a government such as the Chinese Government or an organisation within the government which is involved in human rights abuses.

WINKELMANN CJ:
And this is, some of these organisations will be enormous –

MR HARRISON QC:
Yes.

WINKELMANN CJ:

– and largely fine, on occasion, but partially problematic?

MR HARRISON QC:

Yes, yes. But it's the nature and extent of the, say, "the association, membership or involvement". So if it was the nature and extent of the involvement then you might read it down, but you've got all three.

WILLIAM YOUNG J:

You'd have to read in the word "relevant", "extent of the *relevant* association, membership or involvement".

MR HARRISON QC:

Well, I wondered whether I might face this kind of dialogue and I decided that if I did, not conceding it by any means, I would simply make the point, well, given that no one below has interpreted the –

WILLIAM YOUNG J:

It doesn't normally seem to stop us.

MR HARRISON QC:

No, no.

WILLIAM YOUNG J:

I can say with some chagrin.

MR HARRISON QC:

Nor, with respect, your Honour, should it. I'm not for a moment – I'm thinking I'm old and hairy enough to cope with that.

But the point I was going to make no one has interpreted or applied (b) in that way, so there would have to be legal error in the decision-making below.

WILLIAM YOUNG J:

Maybe there has been. I mean it’s just that, I mean I think you’ve given the example – sorry, it’s been a while since I’ve read it – of, say, an Australian serviceman applying to – well, he probably wouldn't need permanent residence because he’s got it anyway – but someone who’d served in the Australian Army. Now to make sense of this here wouldn't you have to look at relevant involvement in relation to at least war crimes in Afghanistan rather than “I was a driver in Canberra”?

MR HARRISON QC:

Well, what the relevant involvement interpretation does is in fact say what this instruction requires us to look at is personal involvement in the human rights abuses. So we gloss over the notion that all that is needed is an association membership or involvement in the organisation itself and we look instead, because it’s relevant, we look at what the applicant has or –

WILLIAM YOUNG J:

What did or knew or engaged generally or supported.

MR HARRISON QC:

Yes, well, we’re coming back to – that would be an interpretation that effectively looked at the applicant’s complicity in the underlying human rights abuses, and that’s really what I argued before Justice Simon France originally.

WILLIAM YOUNG J:

That was the other article, wasn’t it? That was the…

WINKELMANN CJ:

Early decision.

MR HARRISON QC:

No, it’s the same. It’s got a different number but it’s precisely the same…

WILLIAM YOUNG J:

Sorry, I thought I read A5.25 but it's A5.26, sorry. So a precursor.

MR HARRISON QC:

Tab 2 A B. It was called A5.26 but it's identical to this one.

WINKELMANN CJ:

Can I ask you, Mr Harrison, where would that leave you, because you've challenged the policy, and where would it leave your client?

MR HARRISON QC:

Yes, well, that's a point I tried to make a moment ago. Were you to read down the challenged instruction substantially in that significant way in order to preserve its validity then the decision-making below should be quashed because it would have proceeded on an error of law, namely a misinterpretation of the policy. So we should go back to – we should have our application reconsidered in terms of the challenged instruction as reinterpreted by this Court.

WINKELMANN CJ:

Is there any reason why you can't make a fresh application?

MR HARRISON QC:

No, there isn't.

O'REGAN J:

That's not before us, is it? The decision in relation to your client is not an issue in this case? This is a case about the instruction and its validity?

MR HARRISON QC:

Well, that's not entirely so. As I point out in para 2 of my main written submissions, we've got a second pleaded claim that challenges the refusal of the most recent application. So we do – there is a judicial review challenge to the decision based on the challenge to the instruction. If the instruction falls

away, then the decision based on it falls away. So there is a framework to address that individual decision. Of course, I'm simply responding rather than urging this route to decision –

WINKELMANN CJ:

Yes. No, it's very helpful, thank you, because we're trying to understand what the consequences procedurally would be of that route.

ARNOLD J:

Can I just – following up on Justice Young's question and your illustration of the Australian situation. It can't be right, can it, that simply because somebody in an organisation commits a war crime that the organisation would fit within A5.30(b)? In other words there's got to be – when it talks about "government, regime, group or agency" advocating or committing war crimes, it's talking about an entity participating in this sort of activity and the fact that somebody from an army did commit a war crime is not going to fall within the scope of (b), is it?

MR HARRISON QC:

Well, yes, and no. There needs to be a collective responsibility rather than a rogue commission by say one or two officers. But the expression is very wide. It's "any government, regime, group or agency" so that, if you take the Australian example, if the Australian government was engaged in such abuses, and some might say they are in certain parts of the Pacific, that's one thing. But if it's the SAS that's been systematically doing it then that's a group or agency within the Government and that would be sufficient. So if you're an ex-Australian SAS soldier then you must be at least as deserving of inclusion under (b) than the appellant, as the appellant was.

ARNOLD J:

So the group in that case would be the SAS and not the Army or the…

MR HARRISON QC:

Yes, just as the group or agency was the **[redacted]** for the appellant. I mean, because the **[redacted]** here, I want to make it plain, as your Honours will be aware, that he denied and his denial was accepted that he ever personally participated in any abuses by **[redacted]**. But because he was a long-term employee of that agency, which is huge and **[redacted]**, it’s never been seriously disputed that he had an association or membership with the **[redacted]** as an agency that does engage in human rights abuses in **[redacted]**.

WINKELMANN CJ:

He also participated in activities which facilitated possible breaches of human rights in a sort of a background investigative way.

MR HARRISON QC:

Well, I wouldn't go that far, with respect, your Honour, but it’s all there in the record.

WINKELMANN CJ:

Yes.

MR HARRISON QC:

We’ve never challenged the findings of the Refugee Status Appeals Authority, which has provided the factual basis for everything going forward.

Now, I need to –

WILLIAM YOUNG J:

Just before you go, the challenge to the decision is premised on the instruction being invalid, I think?

MR HARRISON QC:

As pleaded, it is, yes. But if instead the instruction was read down so as to demonstrate legal error –

WILLIAM YOUNG J:

You'd want to amend that?

MR HARRISON QC:

Yes, I'd want to amend that and all that I'd be seeking is a invalidity and remission back for reconsideration. But given – I might just go to the new instruction now, I was going to do it at some stage and now is as good a time as any, because I was addressing in my summary the reading down of "minimal or remote". Now if your Honour has this instruction we've got – page 4 at the bottom is where it's changed.

Now one of the changes is to (c), "the nature and extent of the association", et cetera, "was or is minimal or remote", and then "remote" in (c) "includes but is not limited to the passage of time since the applicant's association with the relevant government", et cetera, "ended". Now given that the Court of Appeal interpreted the existing portion of the instruction as meaning "was minimal or is remote", with which I don't quarrel, but this change seems to have the instruction read "was or is minimal or was or is remote" – I don't know if we have common ground on that – which is, or even if it simply means "was or is minimal", it's a very strange solution. Because if you take someone who did have a significant role in a rights-abusing organisation so that his involvement, his original involvement, was not minimal, who then comes to New Zealand and is applying for residence **[redacted]** years later and he says: "Even though I was donkey-deep in it back then, I have cut every single tie to the organisation, my involvement is not only now minimal, it's non-existent," to change "was minimal" to "is minimal" is certainly helpful to my client but something with perhaps unintended consequences.

WINKELMANN CJ:

Yes, it would have to be more nuanced. You couldn't have – time wouldn't erase very serious involvement.

MR HARRISON QC:

Well, if it means "was or is minimal" then time does.

WINKELMANN CJ:

But it shouldn't, it’s a matter of rationality.

MR HARRISON QC:

Yes, no, it shouldn't rationally do so. Which suggests of course that, you know, the instruction is unworkable, even if you – it’s the sow’s ear that this does not make turn into a silk pursue, in my submission. In any event –

WINKELMANN CJ:

Mr Harrison, just because I’ve raised that factual issue, just to clarify what I meant, in the 2007 decision of the Refugee Status Appeals Authority it says: “The refugee status officer concluded that because the appellant monitored and later supervised others who monitored political and religious dissidents he had substantially assisted in or facilitated the widespread repression,” of such people. But in another decision, I think of the Immigration Protection Tribunal, they find he was not party to in any way a breach of human rights.

MR HARRISON QC:

Yes, all right, thank you, your Honour.

Now I just want to go to the written submissions and I’m going to try and make much quicker progress. So I set out in the earlier part of the submissions the background, he’s been here now nearly **[redacted]** years, a continuous presence in New Zealand, there is no suggestion he has behaved other than lawfully, he has in fact established himself very well financially. Page 3, paragraph 9, I list in a series of bullet points the things he is prevented from doing and enjoying by reason of the repeated refusal of residence and advance the proposition, as has previously been affirmed, that he remains in immigration limbo. And I note in paragraph 10 that it’s never been suggested that granting him residence would in fact somehow pose a risk to New Zealand’s international reputation. So we have an instruction that deems him both to pose that risk and to fail to qualify as of good character, despite the contrary being in fact the case.

So, page 5, I look at the, mention the Court of Appeal judgment and the point about considering things overall. Page 6, the analysis of the Immigration Act, para 19, I do lay emphasis on section 3, the purposes, and just a quick turn to those, they are at tab 1, page 23 to 24. There are three aspects to this. Section 3(1), purpose "to manage immigration in a way that balances national interest as determined by the Crown and the rights of individuals", and the rights of individuals are not balanced or in any way addressed by this provision because of the way it operates, in particular its deeming effect. Then subsection (2), "Act establishes an immigration system that," (b), provides for the "development of immigration instructions to meet objectives determined by the Minister", et cetera, and (g), supports "the settlement of migrants, refugees and protected persons". So again, the progress to full residence of a recognised refugee is part of the purposes of the Act.

Section 22 is the provision that empowers the making of immigration instructions. It starts off under subsection (1) by saying that the Minister "may" certify immigration instructions relating to "(a) residence class visas", that's all we need to know there. Subsection (5): "The kinds of matters that may constitute immigration instructions for the purposes of this Act are," (a) "any general or specific objectives", (b) "any rules or criteria for determining the eligibility of a person", "being rules or criteria relating to the circumstances of that person" or a third party, (c) any indicators, attributes "that may or must be taken into account in assessing eligibility", and then we go on to subsection (6). But just noting subsection (5), leaving aside third party circumstances in (b), the inquiry is into the actual circumstances and the actual eligibility, in a personal sense, of the applicant. That's to say it's not deemed status or deemed responsibility, it's that person's actual circumstances and, as I argue in the submissions, that person's actual personal character rather than a character he doesn't in fact have but is thrust upon him. Subsection (6): "Without limiting subsection (5), any rules or criteria relating to eligibility," "may include matters relating to (ii) character" and so on. So that's, the broader scheme is set out in the submissions but those are the key provisions.

I note in para 23 that the respondent accepts that this is a test of character provision and I cite the judgment references, Justice Arnold. I argue, from para 25 on, that "character" has got a well-established meaning, as meaning personal character, and then I go through the scheme of the Act to support that in an analysis that continues on over to the end of page 9. And I stress again that I'm not saying that every instruction that deals with eligibility for residence, for example, for a visa has to be focused on character, that is not the argument. It can be focused on past conduct such as criminal offending, present circumstances, or relevant third party circumstances. But if you are going to focus on character, promulgate a test which is a test of character, then the Act's provisions support my argument that it has to be personal character rather than a deemed character which the individual does not in fact possess. And if you look at rationality or fairness, equally it's unfair and an inappropriate way of failing to take into account the individual's rights to deem it bad character or deem absence of good character contrary to the truth. So that's in essence the analysis of the scheme of the Act.

Page 10 I go on to look at the provisions of the Operational Manual.

Para 37 I refer to the section that deals with fairness and natural justice. I don't need to take you to that. These provisions, of course, are in the case on appeal, volume 3, and the page numbers are footnoted and referenced, and if there's any that your Honours want me to take you to then I will. But I address the general character requirements, para 38. A5. You've got to be of good character and not pose a potential security risk. You've got categories, "not considered to be of good character" which is a category in between "not normally considered" where we are and "excluded". So A5.15 is a kind of intermediate category in that scale. So the point is that the Manual as well as the Act addresses character and, indeed, circumstances in a variety of ways. There are any number of other provisions in the Manual in particular that address character and create hurdles which the applicant, quite properly, has to overcome or satisfy to be of good character.

So then at para 43 I get to the challenged instruction and I make some observations on its wording.

44, it's mandatory to determine applications to which A5.30 applies under 30.1 one way or another, and I make the submission at para 44 over the page, in effect and certainly in practice what this means is that once the applicant is perceived as posing a mere risk, as against actual threat, to New Zealand's international reputation, or deemed to be, his or her current personal circumstances and actual personal character are irrelevant. Now I'm going to take the opportunity now…

WINKELMANN CJ:
And that's really your key submission, isn't it? That's your key submission isn't it, really?

MR HARRISON QC:
It's a key submission. Yes, I mean if I'm wrong on that and somehow the good side of the scale can be – or there's a scale and you can put the good on one side of it…

WINKELMANN CJ:
Well, can I ask you this, because it's said against you that it's not actually irrelevant because the Minister can take it into account.

MR HARRISON QC:
The Minister?

WINKELMANN CJ:
There's escape routes. There's the narrow escape route which you say is no escape route at all and then there is the ability to refer the matter to the Minister.

MR HARRISON QC:

Well, that's the statute – the statutory scheme is that the Minister can always in his or her absolute discretion depart from residence instructions. That's one. Then the other aspect of it is if you are declined in terms of the instruction and you go to the IPT, if the IPT concludes that you've got special circumstances then it can go to the Minister. But my submission is that these are all post hoc hedged about and less than perfect solutions to having a general instruction which is fair and compliant and rational. So it's not – it can't mitigate an otherwise illegal, unfair or irrational instruction such as we have here, in my submission, that you've got a chance of pursuing an appeal to the IPT which has a chance of concluding you've got special circumstances, referring to the Minister and you have a chance of the Minister in his or her discretion making an exception to what we say is an invalid policy. It hasn't worked for this appellant. He's been down that road and through that mill several times. But what I wanted to deal with just in terms of my submission –

WINKELMANN CJ:

So to put it another way, the fact the Minister can at his or her discretion fix this problem, act, and take into account particular character, doesn't fix the irrationality or unfairness of the policy?

MR HARRISON QC:

Yes.

WINKELMANN CJ:

Can't fix it?

MR HARRISON QC:

Yes. Yes, and why not preserve the Minister's discretionary power for those cases which have legitimately reached the Minister, having been decided in accordance with a valid instruction? But I wanted to deal with this interpretation issue about the challenged instruction as a whole because in the respondent's submission – I think I need to front-foot this really – at

para 47 there is this argument about my submissions. "The Appellant suggests that the direction to disregard the 'surrounding circumstances of the application' in" that part of the provision "means that actual personal character is irrelevant," and that's an error that's argued. That particular part of the instruction "does not direct the immigration officer to ignore the appellant's actual character", and so on and there's – so it seems to be being suggested that the applicant's personal character can be brought to bear under the challenged instruction. Now my response to that is that even if you read down A5.30.1(a) by saying no, surrounding circumstances of an application, including family circumstances, isn't a reference to personal character, even if you do that, you haven't contradicted my argument which is that in any event under the challenged instruction such personal character and personal circumstances are simply excluded as irrelevant. You cannot, to put it another way, if you are deemed to pose the risk under (b), the first (b), the only way your application can be determined by reason of (d) is pursuant to A5.30.1 and then under (b) of that if you're an A5.30(b) person, a deemed risk, then you only get to be dealt with very much as a matter of discretion, "may consider" and "may grant", if you can get through the minimal or remote involvement, et cetera, eye of the needle. So the entire scheme of the challenged instruction is inherently directed away from personal good character. There is no way of reading this instruction in a way that says: "All right, yes, I may qualify under the deeming provision, I may not satisfy 3.1(b) because I can't show minimal or remote, but look what a good guy I am. I'm a saint in other respects, therefore I'm not caught by A5.3(a)."

WINKELMANN CJ:

Is another way of putting your submission that actually the point about disregarding surrounding circumstances of the application, it actually reinforces your interpretation that this is not directing the decision-maker to the personal character of the person, it's actively, the whole policy is directing them away.

MR HARRISON QC:

Yes, and if you read –

WINKELMANN CJ:
Not away, but towards something that's not personal character.

MR HARRISON QC:
If you read it in the entire context of A5 dealing with character, it's obvious that these are each discrete character tests that you must satisfy. So you've got to satisfy basic good character and not be a risk to security, that's another provision. You've got to have done that, he has, there's no suggestion otherwise, you've got to be no convictions, et cetera, then you've got to satisfy this. So I stand by the submission that under this provision current personal circumstances and actual personal character are irrelevant and consideration of them is effectively excluded.

So the other points in the submission are obviously, in terms of 46 and 47, a very wide net, in other words over-breadth. I illustrate by reference to the appellant and also the Australian Defence Force example, and I don't need to go further into that. So without – I rely on all these arguments but I'm not going to take your Honours through them laboriously unless your Honours have any questions at any point.

I go on at page 14 to look at the history and policy development, I set that out and summarise it with footnoted references to the material. At 59 I submit that there are three conclusions to be drawn from the material. None of these appears to be challenged by the respondent.

The first, then, para 59, is that the dominant concern and objective of the new policy was to create barriers to entry to New Zealand of undesirable individuals not then by law excluded. The postulated concern could have been proportionately met by imposing any additional restrictions only on entry visas, thus not on residence or other permits for those already here. Secondly, new policy was being – we've covered this, there are amendments to character requirements. Thirdly, the policy development process completely failed, and fails, to consider the particular position and interests of two groups: one, those already lawfully settled here under some form of

temporary permit or visa wanting to progress to permanent residence and, secondly, within that group, the position and rights of recognised refugees, in particular under the benefit of Article 34 of the Refugee Convention. So it fails in terms of the section 3(1) fundamental object of the Act to weigh in the balance relevant and important rights of individuals.

Now I then go on to deal with the judicial review challenge, some law, that I don't need to take your Honours to but nonetheless rely on. 64, I am fairly and squarely invoking the previous authorities, there are many of them of course footnoted in footnote 68, that "statements of government policy", policies, may not unlawfully, unfairly or unreasonably fetter the exercise of those statutory discretions. In particular, they cannot "set a threshold so high it constitutes an unacceptable limit on the exercise of the discretion". Judicial review may, of an exercise of power, may be based on its effect or "consequences".

Now I rely within the footnote 68 authorities the quoted "set a threshold so high" passage is from the *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176, [2013] NZAR 1409 case, which is at tab 5 of the bundle, and I rely on paragraphs 118 to 126 of that authority. The passage cited from *Criminal Bar Association* was cited again by the Court of Appeal in *Financial Services Complaints Ltd v Chief Ombudsman* [2018] NZCA 27, [2018] 2 NZLR 884, an argument over the use of the name "Ombudsman". That's at tab 6, and *Criminal Bar Association* was as followed at paragraphs 59 to 60 of that authority. So the proposition has respectable appellate backing and of –

WINKELMANN CJ:
So can you articulate for us how you say this is fettering our discretion and whose discretion? Is it the – because if it's directed at character, is that your point, if you could just perhaps articulate it in concrete terms?

MR HARRISON QC:

The argument is, harks back to my analysis of the statutory regime which is in essence that unless you are outright excluded from eligibility for a visa, whether it's entry or residence, by, I think they were sections 5 and 6 that I took you to, unless there's an outright exclusion then the regime envisages that the decision-making in relation to the grant of a visa will be discretionary, discretionary but subject to residence instructions in the case of residence applications. So if the statutory regime other than for those outrighted excluded is the decision whether or not to grant a visa is discretionary and the residence instruction as the statute permits governs that in more detail. For the residence instruction to set a threshold so high that it's an unacceptable limit is a blanket limit on the discretion.

WINKELMANN CJ:

Is this not just a reformulation of your irrationality argument, which often is the case, of course?

MR HARRISON QC:

Yes, yes, well, it –

WINKELMANN CJ:

And doesn't fit as well really?

MR HARRISON QC:

Well, *Criminal Bar Association* formulates it both as an illegality test and an unreasonableness test. So the threshold must – if it's unacceptably high, the threshold, so that it, in effect, is a prohibition or near prohibition, that can be categorised as illegality but it's also properly to be regarded as irrationality and for good measure I've thrown in the notion that it can be characterised as systemic unfairness as well.

WINKELMANN CJ:

Are we going on to that next?

MR HARRISON QC:
We're going on to that very shortly, yes.

So in any event, the – I was just going to mention the *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 4 All ER 903 case and I won't take your Honours to it, but that's obviously at Supreme Court level. That's a similar line of authority.

So 66, systemic challenge, I note a couple of authorities on the point in footnote 71 but I'll take you –

WINKELMANN CJ:
Yes, so I think we've all looked at those and the point that's made against you in that regard is that they're concerned with procedural unfairness, procedural unfairness, those authorities?

MR HARRISON QC:
This is a point I'm just coming to because it's the way the argument is met in the respondent's submissions. Can I just take your Honours to tab 19? We're at the top of page 18 and looking at *R (FB (Afghanistan)) v Secretary of State for the Home Department (Equality and Human Rights Commission intervening)* [2020] EWCA Civ 1338, [2021] 2 WLR 839. So this is a very recent English Court of Appeal decision. I'll just spend a minute or two on it, if I may, because it will help me to respond to your Honour, the Chief Justice's question. So if your Honours have that at the headnote stage. So you've got a procedure for basically expedited removal of someone who is liable to be removed. As the headnote says at E, you are served with a notice confirming liability for removal and short period is set of no risk of removal followed by a "removal window" where you can be removed without notice. The challenge to the policy is set out at F, "contrary to the requirement in the statutory scheme" as to the content of the notice, it needed better content in effect, and (ii) "alternatively it breached the common law right of access to justice because under the policy many unappealable decisions adverse to the person" were made in the removal window.

So the first argument was rejected, we can see headnote (1). The notice itself was merely an aspect of procedural fairness – you see down the bottom at H – and on analysis the content of the notice met the duty of procedural fairness so that the notice itself wasn't open to challenge. The headnote (2), over the page: "But, allowing the appeals, it was well established that the common law right of access to justice conferred a fundamental right to effective access to justice in real-world conditions, including the right to be afforded sufficient time to take and act on legal advice," and only Parliament could remove that. So you looked at whether the policy unlawfully restricted the right of access to justice and, down below in D "the policy incorporated an unacceptable risk of interference with the right of access to justice by exposing a category of irregular migrants to the risk of removal" without any proper opportunity to challenge.

Now, I'll come back to that in a minute, I just want to take your Honours to Lord Justice Hickinbottom at paragraphs 120 to 121, that's at page 875 of the report. So in my submissions I have quoted the first part of para 120 and then there's reference to Lord Justice Sedley and the *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [2005] 1 WLR 2219 case. At E I've quoted "there is a conceptual difference", then 121: "Where it is contended that a scheme is in itself unfair, the correct approach was described by Lord Justice Sedley: 'We accept that no system can be risk-free. But the risk of unfairness must be reduced to an acceptable minimum. Potential unfairness is susceptible to one of two forms of control which the law provides. One is access retrospectively to judicial review if due process has been violated. The other, of which this case is put forward as an example, is appropriate relief following judicial intervention to obviate an advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself."

Now the respondent's submissions attempt to relegate this principle to cases of – and it's my expression – "mere procedural breach", but my submission is that the principle is wider, it's not concerned with just a facially fair step-by-

step process, and it goes further to look at the substance, which is what *FB (Afghanistan)* ultimately did, in my submission, and in any event –

WINKELMANN CJ:

So if we look at *R (MK) v Secretary of State for the Home Department* [2019] EWHC 3573 (Admin), [2020] 4 WLR 37 which sets out a part of Lord Justice Hickinbottom's – another part of the passage, at page 14. So that's at tab 21.

MR HARRISON QC:

Sorry, I'm not hearing, your Honour, just –

WINKELMANN CJ:

Sorry, tab 21. I just was interested in that part from Lord Justice Hickinbottom's judgment that you quoted. So I looked at *R (MK) v Home Secretary* which I think is at tab 21, is it, on page 14?

MR HARRISON QC:

Yes.

WINKELMANN CJ:

And it starts there. "Most cases of alleged procedural unfairness by a public body are brought by an individual who considers and asserts that, had that body acted fairly, a decision it had made affecting that individual would or might have been different. However, the courts have recognised that a scheme may be inherently unfair if the system it promotes itself gives rise to an unacceptable risk of procedural unfairness."

MR HARRISON QC:

Yes.

WINKELMANN CJ:

So it seems to me when I look at these cases that you've referred to that they do all deal with procedural unfairness rather than substantive unfairness.

MR HARRISON QC:

Well, I would argue that it's really – there's no hard and fast dichotomy between procedural unfairness and substantive unfairness when you look at the content of a policy that excludes rights. You can say, well, the right that it excludes is purely procedural or you could say that the overall effect on the applicant, here in the challenged instructions, goes so far as to be substantive. I'm not putting all my eggs in one substantive basket here. Even if you read this line as cases only involved with "procedural unfairness", which I'm not conceding, when Lord Justice Hickinbottom refers to unfairness in a public law sense he is not merely talking about ticking the boxes in terms of the classic step-by-step notice, hearing, opportunity to respond, whatever, of breach of natural justice. It's a broader, more unitary concept. To put it another way, it depends on what you mean by "procedure". I would argue that natural justice, backed, of course, by section 27(1) of the Bill of Rights, extends to be being heard on the merits of one's individual case and the decision-maker deciding on the merits of one's individual case, not being deemed out of the running or made the subject of unfair reverse burdens whether of proof or persuasion. So if you look at this provision, does it even deliver on "procedural fairness" in natural justice terms? My submission is it does not viewed as a whole.

WINKELMANN CJ:

It's procedurally unfair because it doesn't allow you to address the critical issue?

MR HARRISON QC:

Yes, you're not being heard on whether in fact you pose a risk to New Zealand's international reputation. You're not being heard on whether you are in fact not of good character.

WINKELMANN CJ:

I mean I can see your argument but it might just be an unnecessary way of formulating what is again essentially an argument about irrationality.

MR HARRISON QC:
It could all be plonked under the irrationality inquiry. It could be. I accept that and – but equally it is properly characterised as systemically unfair, in my submission. Now –

WINKELMANN CJ:
Can we take morning adjournment at this point?

MR HARRISON QC:
That's just what I was about to suggest, your Honour. We've reached the middle of page 18 and I should be able to make good progress through the next section of the submissions.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.46 AM

WINKELMANN CJ:
Mr Harrison.

MR HARRISON QC:
So if your Honours please, I am at page 18, the point where I identify the series of specific challenges to the overall challenged instruction, and this is a more detailed development of arguments that we've already been discussing so that I rely on everything that's said but I don't propose to take your Honours right through it.

The argument under this heading is that the test postulated by the challenged instruction is not a test of character, as I argued earlier. That in turn is dependent on, again, the argument which I advanced that it was formulated as a character test and on its face is a character test, so that if this particular policy is formulated in reliance on the ability under section 22 to prescribe qualifications or disqualifications as to character, then it fails to do so and is invalid on illegality grounds as a consequence.

WILLIAM YOUNG J:

Mr Harrison, why can't it be in relation to character if it deals with only one facet of character?

MR HARRISON QC:

It doesn't, it doesn't even deal with only one facet of character.

WILLIAM YOUNG J:

Well, might it not be a facet of character that one has been associated with a killer-type of organisation?

MR HARRISON QC:

The test overall that is postulated is "pose a risk to New Zealand's international reputation", (b), the deeming provision identifies the issue your Honour has just met, but the test is broader because of (c), you can be considered to pose a risk to international, New Zealand's international reputation for some other reason, to paraphrase. Therefore the test is primarily one of not normally getting a visa if you pose a risk to New Zealand's international reputation. So overall and fundamentally that is what the purported test addresses.

WILLIAM YOUNG J:

But isn't that because of your character?

MR HARRISON QC:

No.

WILLIAM YOUNG J:

Why else would one pose a threat to New Zealand's international reputation? The only example given is association with a particular type of organisation but…

MR HARRISON QC:

No, it's not the only example, this is my whole point. (b) of A.30 is not exhaustive –

WILLIAM YOUNG J:

No, I agree it's not exhaustive, I said "the only example given", the only exemplification of it an association, involvement of a particular type of association.

MR HARRISON QC:

If you took (b) and, I would argue, removed its deeming aspect, and you stuck (b) in A5.25 as another ground, I'd have no problem with the proposition.

WILLIAM YOUNG J:

All right, well, that's probably the point I was going to. I mean, I would quite like to have a go at re-drafting this, but it's not really my role, I suppose.

MR HARRISON QC:

Well, your role, with respect, includes saying that this is so badly drafted that it cannot stand…

WILLIAM YOUNG J:

Well, I agree that it's very badly drafted.

MR HARRISON QC:

So that if it's so badly drafted that it doesn't pass a test of rationality or legality, for vagueness or over-breadth or whatever, then you don't have to go so far as to re-draft but you can strike down.

WILLIAM YOUNG J:

Yes, I understand that.

MR HARRISON QC:

But the point is that that is what, on a fair reading of the instructions overall, that is what the test is directed to, posing a risk to New Zealand's international

reputation, and you could pose a risk to New Zealand's international reputation on grounds other than involvement in a government, et cetera, that commits human rights abuses. You could pose a risk simply by reason of the inflammatory nature of the views you have, I suggested a Holocaust denier, these days it might even be a pandemic denier, who is so controversial, even of otherwise completely blameless good character, that admitting him or her could be seen as posing that risk. So it's not – and the other aspect of it is if it said: "Well, do you posedd a risk to international reputation and can we balance against that your other positive side, your good character?" If good character wasn't excluded and it was a balancing in the scales issue then I'd agree with your Honour that it could be better arguable that it was a test of character. It's because good character is excluded and the focus is only on international reputation that that argument in my submission cannot stand. So I've set out my arguments about that and obviously they're there in detail and we've exchanged them.

I just want to deal – and I'm really jumping ahead to the top of page 22, confident your Honours will accept my assurance that I'm relying on all this but not needing to go through it – and I want to just deal with a kind of postscript point which I'd been pondering about and I think it's more or less come up today. If I'm right that this is a test that has been purportedly been introduced as a test of character and it isn't a test of personal actual character therefore can't be sustained under the character empowerment part of section 22, is it an answer to that argument to say: "Well, it could have been certified for some other reason"? Is it an answer to that line of argument to say: "Well, section 22 is very wide and the Minister's power to certify is broader than character," which it plainly is? So, for example, if you go to section 22 at tab A, page 48, we're back into section 22, you've got subsection (5), immigration instructions for the purposes of (a), (b), (c). All right, so is that an answer to my argument, to which I submit "no". The test is whether the exercise of power here to certify is vitiated by material error of law. To conclude that one is certifying a test of character, which is permitted, when one is certifying something that doesn't so qualify, is a material error of law.

What is the effect of a conclusion that there has been –

ARNOLD J:
Can I just interrupt a moment? I may be wrong but I have a memory of authority of the Cooke Court of Appeal involving the exercise of a power in circumstances where it was described as one thing and the Court thought that was misdescription and in fact – but there was in fact power in the statute to do it. It was just they had not mislabelled it. They'd used the incorrect label. They thought they were exercising it but there was another provision which enabled them to do precisely what was done, and I may be wrong but I thought the Court said that was okay.

MR HARRISON QC:
Well, I've got several responses to that and it really is part of the argument that I was advancing.

GLAZEBROOK J:
Perhaps if you could just make sure you're speaking into the microphone otherwise it doesn't necessarily get picked up.

MR HARRISON QC:
Yes, I've got various responses, I suppose. At the pragmatic level, to approach this case in that way one would first have to identify the alternative source of power within the statute, be satisfied that the Minister would or might have exercised that source of power and have exercised it in the same terms as the challenged instruction.

ARNOLD J:
But here the section would be the same. In other words, if you're wrong about the circumstances referred to in section 22(5) or whatever it is as being only the personal circumstances and excluding considerations such as membership of organisations which commit human rights abuses, if that is a legitimate consideration even though the term "character" may not be the best

way of describing it, the alternative source of power would be exactly the same. It’s just the way it’s described.

MR HARRISON QC:
It’s not as simple as saying, for example, there’s a power of public taking of this land under section 1 of that Act and the same public taking could have been taken under section 2. The Minister recited section 1 but there’s a comparable power under section 2, therefore we don’t intervene, which is the sort of case your Honour was postulating from the Cooke era. This is a case where, on my argument, even if you move from character to circumstances it’s still – and I’m looking, for example, at subsection (5)(b) – it’s still the individual’s own circumstances rather than some kind of deemed circumstance, so that if you hypothetically postulated the Minister properly advised proceeding under a non-character approach, you wouldn't by any means necessarily end up with the policy worded as it is, which is in terms of deemed character. So it’s not a simple transaction: “We took this land under this section, well, equally we can take this land,” the product is different.

The other thing I wanted to say about the material error of law is that – and I’m afraid –

WINKELMANN CJ:
Well, I mean, just before you move on, Mr Harrison, so what might be said against you is that what this is about – and I don’t know that this is what the Crown says against you – but what this is about is international reputation, it’s open to the Minister to say: “Well, look, association with this organisation damages our reputation, we’re not really interested in what your personal involvement was in abuses of human rights, it’s simply the fact you were associated in a non-minimal way with this organisation. That damages our reputation.”

MR HARRISON QC:

Well, it’s actually, I think the necessary gloss on the challenged instruction has to be that: “It’s not you that damages our reputation, you the applicant, it’s the grant of residence to the applicant that is postulated as damaging.”

WINKELMANN CJ:

Yes.

MR HARRISON QC:

So that the inquiry has to be is granting residence or entry to this particular applicant, here a refugee, going to be damaging? Now if you postulate that as a permitted inquiry, not via character but under some other provision of section 22, you have to get a differently worded test.

WINKELMANN CJ:

And a different inquiry.

MR HARRISON QC:

And a different enquiry, yes.

I was just going to go back to this material error of law, I was pondering this last night and this is terrible name dropping because I don’t have – my name – I don’t have the paper with me. I recall that on the former Chief Justice’s retirement conference I delivered a paper and I looked at this material error of law and the next question is if you’ve got a material error of law is the onus on the applicant for review to show that the result would have been different if the error hadn't been committed or do we assume that it might have been different, assuming in favour of the applicant, as one does with breach of natural justice, and in the paper I did cite a couple of decisions of this Court that seemed to support the former proposition that, like natural justice, you don’t assume that the outcome would be the same if a completely different set of advice or legal considerations had been applied by the decision-maker at the time.

So that, plus the line of authority your Honour has mentioned, I can't be more helpful than that. But if it turns out that the decision of the Court is dependent on that issue, it might even be a case to call for further submissions directed to that issue, because at the moment I would submit the Court is insufficiently informed as to those principles of law. Anyway, that's all I want to say on that.

I go on at page 22 to deal with the deeming effect and I argue that it's completely inappropriate in this area, given that Act focuses on actual character, actual personal circumstances, be it of the applicant or of a third party, actual eligibility to deem something to be the case which isn't the case, as is true here, is unacceptable. So that's the challenge.

I also take issue, at page 23, with the Court of Appeal judgment's reasoning and I can go through that but I won't unless called upon. The reasoning, with respect, is flawed where it comes to arguing that the deeming effect is innocuous because overall personal circumstances and character are not ignored because other aspects of the Manual of A5 address it. Well, that's not an answer if the challenged instruction overrides and clinches the character issue, precludes reliance on the otherwise good character under the remaining provisions of the Manual as it does here.

So I then look at the bottom of page 23 and over at the satisfaction beyond doubt requirement. I'll save any further submissions on that aspect until I then reply to the respondent's submissions.

Page 23, I attempt to draw it all together. This is my assessed cumulative effect argument.

At para 99 I talk of deemed bad character and the respondent quarrels with that. If it's preferred, it's a deemed absence of good character. Disqualifying, nonetheless.

So the next issue is, at page 26, failure to have regard to the position and rights of recognised refugees. So I plan to spend a minute or two on

developing this argument. As I've previously noted, this is my para 102. Policy development related to initial entry into New Zealand of "undesirable individuals", so keeping them out. That could have been dealt with by addressing only entry visas and it's quite plain that a big gap in the policy development and the consideration at all times after that has been to give separate consideration to the rights and legitimate expectations of those already lawfully here and seeking to progress to New Zealand residence – sorry, recognised refugees in particular. And that approach, top of page 27, doesn't reflect what the Act requires, in particular in terms of its objects which I have previously touched upon, both those in section 3 and, as I note in the latter part of para 103, those of Part 5, making dedicated provision for refugee and protected status determinations.

So my submission is that taking these matters into account, para 104, at the very least was a mandatory, relevant consideration, indeed ought to have been delivered on in the case of recognised refugees under the Convention.

And at my para 105 I make the point that recognised refugees are a special case here because they will already have had to satisfy the inclusion and exclusion tests and even if those are not 100% on all fours with the considerations raised by the challenged instruction, there is a sufficient overlap of what a recognised refugee will have had to go through satisfying the two tests to put them in a special position.

Now at 106 and following I summarise what the Courts below did. Justice Davison considered in effect that because the position of recognised refugees was separately addressed elsewhere in the Manual, that proved that the Manual overall took into account their situation.

And then, secondly, para 109, the idea, the question whether the Minister in formulating the instructions did take the relevant consideration into account could be dealt with by a conclusion that it was reasonable to assume that the Minister had done so, and as, this is my para 109, the Court of Appeal adopts a similar "reasonable inference" to reach that conclusion approach, and the

Court of Appeal's approach is to rely on indirect evidence that the original certifying Minister had previously served as an Associate Minister of Immigration, must have been aware of it, the rights of refugees, and other unrelated briefing material pre-dating the specific occasion on which the policy was formulated and the instruction originally certified referred to refugees. My submission, obviously, is that is a completely inadequate basis for any inference that the admittedly mandatory consideration was taken into account. So that's what I deal with at paragraphs 110 and 111.

But there's another dimension to this, and here I'm going to, if I may, address hopefully all I need to say about, or much of what I need to say about, this issue in terms of the effect of the interpretation that's applied to Article 34 of the Refugee Convention by the Court of Appeal. This is at para 64 which is at page 101.0096, volume 1 of the case. The Court of Appeal says: "Looking at the overall scheme created for the determination of RCV applications it cannot fairly be said that A5.30 was implemented without consideration of the rights of refugees and New Zealand's Convention obligations. Nor can it be said" that it's inconsistent with those obligations. "Article 34 requires States Parties to facilitate the assimilation and naturalisation of refugees 'as far as possible'." And here is what I emphasise and will seek to quarrel with. "The obligation is procedural rather than substantive. States Parties are not obliged to grant residence or citizenship to refugees but must ensure that refugees are able to access whatever opportunities for naturalisation may exist under the host State's domestic laws." Other instructions establish that refugees are eligible, but like all other applicants, they are subject to character requirements, including the challenged instruction. And the citation is the First Edition of Hathaway, *Rights of Refugees Under International Law* at page 990.

Now the argument is taken up along somewhat similar lines in the respondent's submissions from paragraph 73 on, so that the basic proposition, I suppose, is that Article 34 does not impose an absolute duty. It's a soft rather than a hard obligation. Therefore, given that it's severely qualified, there can't really be any complaint that it hasn't been delivered on, even in the face of the challenged article. Now that and in particular the Court

of Appeal's proposition that the obligation is procedural rather than substantive is, in my submission, an over-simplification. Now it's accepted that Article 34 is qualified by language such as "as far as possible". I'm just looking for something here… But it's in two parts. It's at the top of page 10 in my submissions apart from anything else. Part 1: "The Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees." Part 2: "They shall in particular make every effort to expedite naturalisation proceedings" and reduce costs as far as possible. Now the bare words of that provision are not solely procedural, in my submission, and to be brought into play is the language of the Vienna Convention on the meaning of treaties. The respondent's submissions at paragraph 74, page 25, refer to one aspect of the Vienna Convention but not the most significant one, as I will develop. The reference to Article 34 being "interpreted in good faith", et cetera, is a reference to Article 31 of the Vienna Convention, subclause 1 of which more or less says that a treaty shall be interpreted in good faith. But if we're going to call upon the Vienna Convention then also relevant is Article 26, headed "Pacta Sunt Servanda". "Every treaty in force is binding on the parties to it and must be performed by them in good faith."

So against that background, coming to what the commentators say about Article 34, I'd like to take your Honours to Hathaway which the Crown have provided as a leading authority, and Hathaway is at volume 2 of the joint bundle of authorities, tab 48. Now as I mentioned, the Court of Appeal cites the earlier edition at page 990 and that is provided. It's the last page of the extract that's provided and that says – you need to really go back over the other page – starting – sorry, apologies to be going around in circles a little bit but if we go to 988 Hathaway refers to Grahl-Madsen. It's a mistake to view Article 34 as completely without force. Grahl-Madsen: "It goes without saying that a State must judge for itself whether it is 'possible' for it to naturalise a particular individual or any number of refugees. On the other hand, the decision must be taken in good faith. If, for example, a Contracting State outright fails to allow any refugee to be assimilated or naturalised, and is not able to show" any other ground for unwillingness, the other contracting parties may have a ground for complaint. "This seems a very sensible formulation.

Despite the minimalist nature of the duties it sets, Article 34 is breached where a state party simply does not allow refugees to secure its citizenship, and refuses to provide a cogent explanation for that inaccessibility. Because a state '*shall* facilitate *as far as possible* the assimilation and naturalisation of refugees [emphasis added],' it is incumbent upon state parties, at the very least, to provide a good faith justification for the formal or de facto exclusion of refugees from naturalisation." So I rely on that proposition, incumbent, at the very least, to provide a good faith justification.

O'REGAN J:
This is talking about – Mr Harrison –

MR HARRISON QC:
And then at the bottom it says Article 34 has real legal force in at least extreme cases such as these where refugees are effectively barred without sound reasons from accessing the usual process to acquire citizenship.

Now over the page it's only this page that the Court of Appeal cites, and I won't take your Honours right through it but that's the passage relied on.

Now the comparable passage that I have been referring your Honours to in the First Edition occurs at tab 48 from page 1219 on. You'll see the Grahl-Madsen quote that I began with, and then if we go to the middle of page 1220 where you've got "beyond such egregious examples", that's the passage at the top of page 990 that the Court of Appeal appears to be citing. Now the language has changed to: "Beyond such egregious examples" erecting an insurmountable barrier "the main situation in which a state's duty to 'facilitate' naturalisation will be breached is where it engages in retrogression – making naturalisation *more difficult* for refugees – without a sound justification." So the commentary has moved on a little bit but, more importantly, the discussion in Hathaway as from page 1206 on really does need to be read as a whole.

Top of page 1209, it's noted under Article 34 that as against simple local integration, which is another word for assimilation, enfranchisement through citizenship is a true solution because it brings refugee status to an end. It describes the benefits for the refugee. Bottom of the page: "By granting the refugee the right to participate in the public life of the state –"

WINKELMANN CJ:
Sorry Mr Harrison, what page are you on?

MR HARRISON QC:
Page 1209, tab 48, half way down, just before the footnoting. "By granting the refugee the right to participate in the public life of the state, naturalisation eliminates the most profound group and gap in the rights otherwise available to refugees, since full political rights are not guaranteed to refugees under the Convention, nor even under the principles of international human rights law."

Down the bottom of the text: "Access to citizenship through naturalisation is addressed by Article 34, a provision without precedent in international law. It is predicated on a recognition that a refugee required to remain outside his or her home country should at some point benefit from a series of privileges, including political rights. This special duty recognises that refugees have, by definition, been fundamentally excluded from their home political community and have an especially strong claim to membership in a new national community. Article 34, however, is not framed as a strong obligation."

WINKELMANN CJ:
That passage you took us to at 1220 is that addressing discriminatory retrogressions where it's made more difficult for the refugee?

MR HARRISON QC:
Yes if it's more difficult for a refugee to obtain refugee status than for non-refugee that's a specific issue there. My point is really that the Court of Appeal's reliance on a now out of date passage really didn't support its

conclusion that the obligation under Article 34 is procedural rather than substantive and there's more to it.

WINKELMANN CJ:

I read ahead to page 1221 of tab 48.

MR HARRISON QC:

Yes.

WINKELMANN CJ:

And which makes a point that Article 34 broke new ground by committing governments to access opportunities but I think also somewhere it said something about it’s not just a negative thing, it’s a positive thing.

MR HARRISON QC:

Yes.

WINKELMANN CJ:

Oh it concludes: “It’s not limited to directing contracting states not to do bad, but positively directs them to do good.: its underlying premise is about providing asylum, sharing the burdens amongst states, and seeking just and durable solutions”, so it’s notion you're making of positively doing good.

MR HARRISON QC:

And implementing in good faith. Admittedly it’s not an absolute obligation, call it a qualified obligation if you want, but nonetheless it ought to be approached in good faith and the erection of the kind of arbitrary barriers or arguably, even arguably arbitrary barriers that the challenged instruction did, in relation to refugees, I argue was a breach of our obligations under Article 34 but my fallback position –

O’REGAN J:

Just before you go to your fallback position, the Hathaway quote seems to be dealing with generic rules, saying refugees as a rule will not be allowed to be

naturalised, whereas here you are talking about a very specific rule about a refugee who comes within a very small subset, ie one who has worked for a human rights abusing organisation. Isn't that a different thing, having a rule for a very tiny minority of refugees, as opposed to a generic rule?

MR HARRISON QC:
Well I don't accept that it's a very tiny minority. We don't have any information on that but the question of whether a refugee who qualifies as under the inclusion enquiry, having – the occasions in which a refugee who qualifies under the inclusion criterion also has their case case addressed under 1F, exclusion, is definitely not infrequent. These cases do arise quite regularly and so –

O'REGAN J:
I don't think that's really addressing the point I'm making though. What I'm saying is that the extracts you've taken us to are talking about having generic rules that don't allow refugees to proceed to residence and citizenship, and what you're – you're using that in aid of a submission that you can't have a rule dealing with a refugee that has particular characteristics, and I don't just see that what Hathaway is addressing is the same as the point you're trying to make in relation to a very small subset of refugees.

MR HARRISON QC:
Well, I query whether it's a very small subset because –

O'REGAN J:
Well, it doesn't matter, even if it's a big subset, it's a subset.

MR HARRISON QC:
Yes.

O'REGAN J:
It's not a generic rule.

MR HARRISON QC:

And if you introduce without consideration of the position of recognised refugees a rule that is capable of providing an absolute or at least a very long-term obstacle to their progressing to naturalisation, you are not complying with Article 34. Article 34 isn't simply a rule against retrogression. It's broader than that and that is why I've taken your Honours through the Hathaway issue but –

WINKELMANN CJ:

Can I just ask you this though, Mr Harrison? What does it add to your other arguments because if this policy, if we don't accept this policy is unreasonable, that it's unfair, that it's outside the scope of the legislation, then it's an okay rule and it would fall within what Hathaway would allow. There would be a good reason to refuse the visa. So do you say that there is some higher standard or higher test applied?

MR HARRISON QC:

Well, I think I'll try and answer that by making the point that, with no disrespect, I was about to make when Justice O'Regan interrupted me, which is that whether or not one can say that the challenged instruction on its face is breached by or inconsistent with the Article, it is plain that, it's accepted that the position of recognised refugees was a mandatory relevant consideration for the Minister and thus, call it a fall-back argument if you want, my position is that on the evidence the certifying Minister failed to have regard to that mandatory relevant consideration. Broadly and generically the position of recognised refugees, some of whom will have gone through the Article 1A/1F inclusion/exclusion exercise and have nowhere to go, they can't return to their home country, and so my final point then is that –

WINKELMANN CJ:

So your point is that we need not – we simply assume that it would have made a difference where – it's not on you to prove it would have made a difference?

MR HARRISON QC:
Yes, it –

WINKELMANN CJ:
Same point as you made in relation to the…

MR HARRISON QC:
Yes, if there's been a failure to have regard. And as to the way the Court of Appeal and Justice Davison dealt with the failure to have regard point by inferring that it must have been had regard to, I cite a relevant authority to the contrary in my footnote 104. First of all, your Honour, Justice O'Regan's first instance decision in *Yuen Kwok Fung v Superintendent, Auckland Central Remand Prison* [2002] NZAR 49 (HC) which is at tab 38 where there was a very, if I may say so, with respect, robust dismissal of the proposition that it could be inferred that the Minister in that case had taken the mandatory relevant consideration into account, your Honour required a whole lot more than that in the passages that I've cited. Likewise Justice Gwyn in *Zhang v Minister of Immigration* [2020] NZHC 568 at tab 40 and to be added to those citations in the course of preparation, one can also refer to *Rajan v Minister of Immigration* [1996] 3 NZLR 543 (CA), if your Honours would add this in at footnote 104. *Rajan* at tab 25, Court of Appeal decision page 549 to 550, tab 25 at the very bottom, this was whether the Minister had had regard to the interests of the child and the family. Crown counsel contended the submission to the Minister, that's to say what the Minister was given for his decision, showed he had regard to the interests of the family and the child, as required. We do not think that the facts support that submission, rather the references are no more than incidental ones made in the course of the narrative about a key issue which was a dishonest obtaining of a permit. The Minister's brief affidavit helps confirm this consideration of the matter was limited to other grounds.

So here there is not even an incidental reference to the position of refugees and Article 34, nothing, absolutely nothing at any point nor has the Minister made an affidavit which it was open to him, to say that he had taken these

matters into consideration. So my submission, the reasoning approach of Justice Davison in the Court of Appeal on this particular question falls to be rejected. Now finally, there is the issue of relief.

ARNOLD J:

Just before you leave Article 34, can I just clarify something? Instruction C5.15.5(b) does your argument about Article 34 have any implications for that?

MR HARRISON QC:

Sorry what page of the –

ARNOLD J:

It's in the instructions, it's C5.15.5(b).

MR HARRISON QC:

And what page of the case?

ARNOLD J:

I'm not sure if it's in the case but you can get the wording of it from the judgment of Justice France, under tab 2 of the bundle at page 64 of the report at the top. All I'm wondering is, given the submission you've made about Article 34, does it impact on that instruction?

MR HARRISON QC:

Sorry again, would you just help me with that.

WINKELMANN CJ:

Sorry what paragraph of the Justice's France –

ARNOLD J:

Paragraph 17. So it's under tab 2, paragraph 17 and it's got a different number at that time but it's now the number that I gave.

MR HARRISON QC:

I think we're looking at volume 3, page 302.0266. Sorry now I've got it your Honour, could I just have the question again? So could I have the question again please your Honour?

ARNOLD J:

Well, your argument about Article 34 and the obligations it imposes on a country receiving a recognised refugee, is that – what impact does that argument or implication, what impact does that argument have on (b)? Is (b) consistent with what you say Article 34 means?

MR HARRISON QC:

Well, I suppose what I'm really submitting is that if we take C5.15 and what it allows and provides for in respect of refugee status people in particular, it is giving with the one hand but the challenged Article, challenged instruction, is taking away with the other. That is the problem.

C5.15 would be a perfectly good attempt, I say off the cuff, at covering our obligations under the Refugee Convention, but the challenged Article takes away what these provisions give, not across the board but in respect of those refugees who fall within its clutches.

ARNOLD J:

Well, just to be clear then, you accept that C5.15.5(b) is an entirely legitimate provision, instruction, in terms of Article 34, so we just get back to what the Chief Justice raised with you that the real issue here is the earlier arguments. But if in fact a refugee cannot meet character and security requirements, it is legitimate to refuse residence. Do you accept that?

MR HARRISON QC:

Well, in terms of Article 34 we might be able to say that on the merits had the certifying Minister given consideration to what I submit and what appears to be conceded is a mandatory relevant consideration, namely the position of refugees and, in particular, our obligations. So that's my response.

ARNOLD J:
All right, thank you.

MR HARRISON QC:
Conclusions and submissions as to relief. Really I suppose the only point I need to address under this heading is my submission that if the challenged instruction is struck down, as I submit, then there should be a declaration as per my paragraph 115 that the applicant was and is entitled to a residence visa. And my submission is that this is on all fours with *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA) where a declaration to that effect was given because both the delay that the applicant's review there had suffered and because there was no known reason why not.

So those are my submissions unless I can be of any further assistance.

WINKELMANN CJ:
Thank you, Mr Harrison.

MR KIRKNESS:
I just wanted to check with the Court, Ma'am, whether that might be a convenient time to break for lunch or whether I should…

WINKELMANN CJ:
Well, we've got 15 minutes. Do you think you could make a start, Mr Kirkness?

MR KIRKNESS:
Very well, thank you. The first housekeeping matter was already addressed at the beginning of the hearing today which was the newly certified version of the instruction. In terms of other housekeeping matters, my friend referred to *Tamil X* during the course of his submissions. The Court has in the bundle of authorities the Court of Appeal decision in that case at tab 27, volume 2, however I just wanted to give the Court the citation to Supreme Court case

that my friend and I are both very familiar from 2009, which is the leading case in this jurisdiction on the application of the exclusion grounds in the Refugee Convention, it's *Attorney-General (Minister of Immigration) v Tamil X* SC 107/2009; [2010] NZSC 107; [2011] 1 NZLR 721. It's just in case it's confusing that the Court of Appeal version is the only version in the bundle of authorities.

The other matter of housekeeping is to hand out a decision, if I can just ask my colleague to do that, of the Immigration Protection Tribunal and with apologies in advance, this decision is heavily redacted. I'll just explain what the Court is receiving, this is a decision of the Immigration Protection Tribunal involving the challenged instruction. The citation is *AB (X category)* [2020] NZIPT 205654. As I said it is heavily redacted, however in the light of some of the questions that the Court posed to my friend and my friend's responses on the possibility of interpreting this instruction in a different manner, this decision which came out before the Court of Appeal judgment was issued on 29 October 2020 - the Court of Appeal decision was 13 November - this decision was after the High Court decision and goes into the way in which the IPT considered the instruction should be interpreted as at that time and includes some references to Australian case law and the focus primarily here is on the front end of the instruction which is the factual predicate, the association or the involvement and membership of, that's what this, in my submission, is useful for and we can come back to that perhaps during the course of submissions when we are looking at the wording of the challenged instruction but what the submission will be is that it is possible in fact to interpret those words in a way that allows for lawful application of this instruction.

By way of a brief roadmap of the points that I would like to cover, really I think the starting point is the statutory provision, the empowering provision, section 22 and its scope and related to that obviously also, as addressed in our submissions, the proper approach that should be taken to a policy document such as the operational manual and the proper interpretation of the policy which I think is where the Chief Justice and I left the leave hearing with a suggestion that there may be the ability to interpret this instruction in a way

that ensured lawful application which wasn't helpful for the leave aspect of this case Ma'am but hopefully has a bit more resonance at the substantive stage that we are now at, as your Honour pointed out to me at the time.

So that would be the first of the issues and that really gets into what the Crown has called issue 2 in its written submissions and then from that flows into the individual issues that have been raised with the instruction because in my submission the interpretation of the instruction is at the centre of this case and the way it should be decided.

Then to the extent this Court has any questions in relation to the allegation of systemic unfairness, as my friend characterises it, I intend to address that issue, albeit briefly, and also the issue of unreasonableness, and finally the terms of the Refugee Convention and the manner in which that has been argued.

There is a preliminary point that I wish to make which is that the nature of the case that has been brought here is important. The issue came up today that the transcript will make it clear that it is an ongoing issue because throughout my friend's submissions, I mean no criticism by this, but there was a tendency to refer to things that the applicant had in fact done, positions that he had in fact been placed in, in respect to questions from the Court and what that is confusing is the challenge that is here at issue which is a challenge to the validity of the instruction and its actual application which was not challenged, at least not beyond the IPT stage as well as the special circumstances to the Minister but the determination of the Minister was also not challenged. Those were choices that were made by the applicant and his counsel team.

WINKELMANN CJ:

Nevertheless I understand Mr Harrison simply referring those matters to us because they actually bring life to the issue in terms of the interpretation and application of this instruction.

MR KIRKNESS:

Very good Ma'am. That is exactly how they should be used, however there is a risk and the submission I am making is simply that there is a real risk here that we stray into considering the actual application where in fact the case has been deliberately brought in a manner that focusses on the instruction in general and that point is an important to keep in mind, in particular because the nature of the evidence that has been advanced in support of the case appears to be the type of evidence one might expect to find in the challenge to the application of the instruction, rather to an instruction as a whole.

To the extent it's useful, in addition to the IPT decision that I have provided to the Court and for the same purposes that the Chief Justice just referred to, there are three cases involving two individuals that you have in your record that deal with the challenged instruction or its predecessor, the first of those, as my friend referred to on several occasions is the decision of his Honour Justice Simon France in the High Court in *AB v Chief Executive of the Department of Labour,* that's at tab 2 in the bundle of authorities. The second of those *CF v Attorney-General (No 2)* [2016] NZHC 3159, [2017] NZAR 152 which I am just trying to find for the Court. Sorry I'm just advised by my friend that *CF* is not in the bundle but we have copies. So if that would be useful we can hand those up because I think it does, as the Chief Justice said, bring life to the way in which these decisions are being made and to that extent provides a useful example.

And the third is again the same individual as *AB*, the applicant in this case but that is *H* and that is the series of decisions that relate to Mr H himself and his second residence application, albeit with a different anonymisation to the earlier High Court decision.

WINKELMANN CJ:

Probably would be helpful if the same letter was applied, wouldn't it?

MR KIRKNESS:

That may be a convenient thing to address Ma'am I agree. So the starting point is section 22 in my submission of the Immigration Act which is the empowering provision. This is dealing with my friend's claim about ultra vires and section 22, as my friend went through earlier, is a very broad provision and it's subsection (5) which there's no dispute that's the key subsection here. It refers to the kinds of matters that may constitute immigration instructions for the purposes of the Immigration Act and it includes "rules or criteria for determining," and we would emphasise these words, "the eligibility of a person for the grant of a visa of any class or type, or for entry permission, being rules or criteria relating to," and again we emphasise the words, "the circumstances of that person or of any other person (a third party) whose circumstances are relevant to the person's eligibility," and at the heart of the disagreement between my friend and the submissions that the Crown advances is a different view about the meaning of the word "character". To the point that the Chief Justice raised, the submission is made that A5.30 is a character-related instruction. The difficulty, in my submission, is that my friend uses "character" in a different sense to the one that the Crown says applies both to the Act and separately to the Operational Manual. And that sense is in the sense of personal qualities or personal characteristics when, as the Court of Appeal found in respect of both the Act and the Operational Manual, "character" is used in a broader sense than that, and that is consistent, in my submission, with the reference to circumstances. The circumstances of an individual include a broad range or imply a broad approach to the types of rules or criteria for determining eligibility and to read these down as my friend seeks to do by an implicit requirement that it refers to personal qualities is simply inconsistent with the text of that statutory provision.

WINKELMANN CJ:

Apart from the use of the word "character", because "character" is normally understood to mean personal characteristics.

MR KIRKNESS:
Well, I think this raises part of the problem which is that we're using "character" in different documents, so clearly from the perspective of the policy, when, as my friend repeatedly relies on, the position for the Crown is that the instruction was formulated as one of the character instructions, the relevant term or the relevant meaning of "character" is the meaning of "character" that comes from the Operational Manual.

GLAZEBROOK J:
Can you just perhaps go a step back? You say "character" is being used in a different sense. Can you just given me a one-liner on what that character is?

MR KIRKNESS:
The sense the Crown –

GLAZEBROOK J:
What you say the character is because – and perhaps if I just fill in slightly. You say it includes personal characteristics and circumstances. Are you saying that circumstances is broader than related to the particular individual, and the reason I ask that is that if you say you come from North Korea, obviously you've been – in North Korea they don't care about human rights therefore – and it would be – but really nothing to do with the person at all apart from the fact that they come from North Korea.

MR KIRKNESS:
So…

GLAZEBROOK J:
So it – because I think what Mr Harrison is saying is that this wasn't related to this particular person because it wasn't looking at gross human rights breaches in relation to this particular person and therefore it was either ultra vires or irrational.

MR KIRKNESS:
Thank you for the question, your Honour. If I may, could I address that in the context of the instruction itself as opposed to the statutory provision because the submission that Mr Harrison was making as I understand it was in relation to the meaning in the instruction and at the moment – and I will get there – but at the moment what I was focusing on is just the breadth of section 22.

GLAZEBROOK J:
Yes, but I think he said section 22 dealt with character in a broader sense, that's what I'd understood you to say, than Mr Harrison was actually putting it to us as being the definition of character, or if I misunderstood what you were saying then –

MR KIRKNESS:
Mr Harrison was putting it to you that what is meant here is personal qualities of the individual, that was the submission that he made and that's rejected. What this says is the circumstances and that is a broader concept than personal qualities, that's the Crown's submission.

GLAZEBROOK J:
But still character is what you're saying?

MR KIRKNESS:
That includes character but is not limited to character. Circumstances is potentially broader, as subsection 6 makes clear, without limiting subsection 5, the rules or criteria relating to eligibility may include matters relating to health and character et cetera and so when Immigration New Zealand is formulating for the Minister's certification the instruction itself, they are intending to bring themselves within section 22(5) by establishing a rule or criteria for determining the eligibility of a person and when they talk about character in that instruction or the character instructions, it is clear that what is meant in the operational manual, as I intend to come to, is a broader concept of character than simply personal qualities. So that's the second part of the Crown submission. It's not accepted that the Act has this implicit

requirement of limiting character, as my friend says in his written submissions, disqualifying conduct as linked to personal qualities only.

WINKELMANN CJ:
Isn't that a little bit incoherent though? I mean well it may be confused because you’ve confused me now. Why would you say it’s about character when you have to give the word a non-dictionary sense to make it work? If you're talking about something else –

MR KIRKNESS:
Well perhaps if I may refer to the Court of Appeal’s –

WINKELMANN CJ:
Because when we talk about character it’s normally something that bears upon the person and their characteristics.

MR KIRKNESS:
Perhaps if I can refer to the Court of Appeal’s discussion of this issue which is dealt with here at paragraph 31 and following of the Court of Appeal judgment and the Court of Appeal there talk about the scheme of section A5 of the manual which is about risk and goes through the analogy that the Court of Appeal considered persuasive with A5.25 and concludes at the end of paragraph 31: “Viewed in this way it cannot be said that persons who fall to be considered under A5.30 have already cleared the good character test, they have merely satisfied some tests.” At 32 then: “We do not accept that the phrase: ‘where an applicant would pose a risk to New Zealand’s international reputation’ precludes A5.30 being a character test.”

GLAZEBROOK J:
I'm not actually sure where you're reading from sorry.

MR KIRKNESS:
Sorry, paragraph 32 of the Court of Appeal judgment which you have at 101.0086 of the case.

GLAZEBROOK J:

No that’s fine, I've got it.

MR KIRKNESS:

And so what the Court of Appeal is here considering is its view of the way character is used both in the Act and in the instructions and the Court of Appeal says: “In the context of the Act character traits are relevant because of their potential effect on New Zealand society risk. Some risks are obvious, others less so.” And then it goes through a series of examples, concluding with the: “And likewise a person with a history of association with an agency involved in human rights abuses undermines New Zealand’s ability to conduct itself internationally as it would wish. Once it is accepted, as it must be, that the association with an organisation speaks to character, it must also be accepted that A5.30 is a character test. The fact that the relevant risk associated with that aspect of the character is explicitly stated at the outset does not detract from the fact the test is one of character.” And that position is accepted as, you will have seen in our written submissions where we quote that at paragraph 50.

WINKELMANN CJ:

For my part I find that quite confusing but anyway that’s an appropriate point to take the lunch adjournment I think.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.16 PM

WINKELMANN CJ:

So Mr Kirkness you were just explaining to us the sense in which character is used in 5.30 I think.

MR KIRKNESS:

Well perhaps before I do that, I can just conclude with my comment on section 22 Ma’am which is simply that as the text makes clear, that is a very

broad empowering provision. So the point I wanted to make was a responsive one really which at paragraph 72 of my friend's submissions, he makes the point that the statutory scheme has an implicit requirement that disqualifying character and deeds be personal to the applicant and as we deal with in paragraphs 44 and 45 of our written submissions, we don't accept that that is implicit in the statutory scheme and at footnote 57, there are a number of examples of ways in which disqualifying conduct is not so linked. So that was the respondents point and it's in the written submissions.

In terms of the actual instruction, before we turn to A5.30, the point that we wish to make in respect of how to approach the instruction is that the decision in *Patel v Chief Executive of the Department of Labour* [1997] NZAR 264 (CA) provides useful guidance for this Court. *Patel* you will find in volume 1, tab 15 of the bundle of authorities. It's a unanimous decision of the Court of Appeal, reasons given by his Honour Justice Thomas and the issue there was the residence policy of the government in the context of an application on humanitarian grounds and a requirement that the supporting documentation would require conclusive proof that a solution to the humanitarian circumstances cannot be found in the applicant's home country. That was the context for the decision. It was an appeal from a decision of Justice Baragwanath in the High Court, who had construed the instruction as valid and in considering at page 271 of the reported version of the judgment, in considering the difficulties raised by the wording of the policy at the time, the Court set out the following general observations: "Notwithstanding these difficulties, however, we believe that the rule is capable of a reasonable construction. A policy document such as the one in issue is not to be construed with the strictness which might be regarded as appropriate to the interpretation of a statute or statutory instrument. It is a working document." And goes to say: "It must be construed sensibly, according to the purpose of the policy and the nature meaning of the language in the context in which is employed, that is as part of a comprehensive and coherent scheme of immigration in the country."

That position, as expressed there is, in the Crown's submission, a helpful statement of the proper way in which to interpret the policy document before this Court. We made that point at paragraph 39 of our submissions. The statement that I have just read out remains influential in immigration cases in this jurisdiction. As an indication only at footnote 47 of our written submissions the Crown has set out a number of decisions of lower Courts where *Patel* has been cited and endorsed.

GLAZEBROOK J:

Isn't the principle rather that you interpret the policy document in a way that does fit with the purpose? It doesn't say that you strain to find, that you always try and find a document valid. It just says you interpret it so that it is valid if that's possible. Is that not the principle?

MR KIRKNESS:

Yes, Ma'am, I would accept that what is being said here is that you interpret it, "it" being the policy, to be valid if that is possible. I absolutely accept that. That's the limit that I think is at issue in this case which is, as I have already said, in my submission, interpretation is at the heart of this case but there comes a limit beyond which the Court cannot be interpreting the document any more and that would then be one where you would have the legal limit to what interpretation can do. That said, the submission that the Crown makes is that you don't reach that point in this case.

GLAZEBROOK J:

Well, I understand that and presumably at some stage you're going to make some comment on the interpretation that Justice Young put to Mr Harrison.

MR KIRKNESS:

Yes, I think there were two interpretations that I thought were relevant. One was his Honour, Justice Young's, point about the nexus as I understood it and the second was his Honour, Justice Arnold's, point, both of which deal with different aspects of the front end –

GLAZEBROOK J:

Remind me what you think Justice Arnold said, sorry.

MR KIRKNESS:

So as I understood Justice Arnold's point, he was concerned or interested in, and his Honour will obviously correct me on this, he was interested in the way in which you would determine whether an organisation or agency was an organisation that satisfied what is required.

GLAZEBROOK J:

Yes, yes.

MR KIRKNESS:

And so there's two parts to that. One is the linkage which I think is his Honour, Justice Young's, point and the second is the follower from that.

GLAZEBROOK J:

Well, here that second one isn't actually in contention, is it, in terms of what the assumptions are that we've been asked to deal with?

WINKELMANN CJ:

Can I just take you back to your earlier submission which I'm still, I must say, struggling to understand? Do you accept that A5.30 is a character test?

MR KIRKNESS:

Yes.

WINKELMANN CJ:

And do you say that because of the particular scheme of the legislation "character" has a particular meaning in this case? It's a special dictionary meaning of "character"?

MR KIRKNESS:

I think "character" is used in the Operational Manual in a broader sense than just personal qualities. So, for example, in A5 you have a reference there to

security, national security. So the character instructions there are focusing on a broader…

WINKELMANN CJ:
Well, it's talking about the person though, isn't it? I mean they're not just a national security risk because they exist.

MR KIRKNESS:
So we accept that, Ma'am –

WINKELMANN CJ:
It's the characteristics of the person.

MR KIRKNESS:
We absolutely accept that. We would say that, as the Court of Appeal said, the external – there are some external characteristics that also speak to character.

WINKELMANN CJ:
But they're not – they are in some sense something the person is responsible for, so you wouldn't say because they are the child of someone who has bad attributes they are per se a person of bad character. I'm just trying to get what's the point of is. I mean if you're accepting it's a character test then a character test must surely have a particular meaning which must relate to the person.

MR KIRKNESS:
Absolutely, Ma'am. The point is simply that, as I understand my friend's submission, character is limited to the personal, and I think my friend means internal characteristics of an individual, that is on reading A5 it appears that the Manual deals with "character" in a slightly broader sense to also include situations where there are external circumstances that speak to character. But at the end the point your Honour put to me at the start is the position we

take, the Crown takes, which is that this is in fact a character test and that that's the question.

WILLIAM YOUNG J:
But are you interpreting character in section 22 or are you interpreting character in the instructions?

MR KIRKNESS:
So character, in section 22 the key wording in my submission is section 22(5), the circumstances.

WILLIAM YOUNG J:
That's inclusive.

MR KIRKNESS:
Inclusive because all INZ has ever said is that it is formulating a character instruction for the purposes of the operational manual that is included there.

O'REGAN J:
But isn't the rule really just saying if you've worked for an abusive organisation we're not going to let you into the country unless you can show it was minimal or remote? I mean the reason for that may be New Zealand's reputation but that's just a reason isn't it? Is there really a suggestion that there would be any other reason to let in, that somebody who had that record would be allowed into New Zealand because it didn't affect our reputation?

MR KIRKNESS:
No Sir, I think I would accept that. The only aspect of a formulation I would query is that I think what is happening in this instruction is that the link that must be established, so the factual finding or the satisfaction or judgment made by the INZ officer in A5.30(b) for example, that a person has had the particular type of association with the particular group that commits atrocities, that is taken to speak to character, as in it isolates one aspect of a person's character which is that –

O'REGAN J:

Well take the 5.25, the paragraph about having been racially discriminatory, that doesn't say we're not going to let you into New Zealand because if you're racially discriminatory because that will affect our international reputation, it says we won't let you in because we don't want people like that and isn't that really just the same here, that we're just saying if you've been in one of these organisations we don't want you in New Zealand? I'm just not sure why this rule goes into the reason for the rule whereas the other ones just state the criteria and you're either in or you're out.

MR KIRKNESS:

Well I think the Court of Appeal addressed that expressly that there's real no difference between that. That I think was the analogy that Court of Appeal was –

O'REGAN J:

Well it's contested though, isn't it?

MR KIRKNESS:

It's contested but that is my reading of the Court of Appeal decision is precisely that, what they explained in the passage I read out was the way in which that relationship works and sometimes it's implicit, sometimes it's explicit. Here it's made explicit but that doesn't mean that it isn't the same logic that's a different concern that's animating A5.25, at least as I understand the Court of Appeal's reasons on that. So I think I missed a question from Justice Glazebrook earlier.

GLAZEBROOK J:

No I don't think so, I was just saying that because we're told to act on the assumption that this is such an organisation, Justice Arnold's question doesn't arise in this case.

MR KIRKNESS:

In my submission, and I may have misunderstood Justice Arnold's question, I think it does arise because what the consideration slash, as my friend characterises it, deeming effect is doing is it's only taking effect in relation to the risk element. It's not taking effect in relation to establishing to the satisfaction of the INZ officer that a person must have had an association with membership of or involvement with any government, regime, group or agency that has advocated or committed war crimes. So it is still necessary for the INZ officer to come to the view that the particular regime is one that can be taken to have committed war crimes, crimes against humanity and to other gross human rights abuses. That's a necessary assessment that has been made before the deeming effect.

GLAZEBROOK J:

I just thought we'd been told to accept that that was the case in this case. Nobody's saying it's not an organisation of that character.

MR KIRKNESS:

In terms of the application to the individual who's –

GLAZEBROOK J:

To this particular case.

MR KIRKNESS:

So in terms of construing the instruction in the abstract which relates to the validity concern, then I think it is relevant. In terms of **[redacted]** and whether it was an organisation that had done such things, that has I think been accepted throughout.

GLAZEBROOK J:

But we're not going to make a comment on it if it's already accepted, is what I was saying. We're not going to say there's a test for this or this is the test when it's accepted.

MR KIRKNESS:

It's accepted in the context of the particular individual who has brought this claim, not in respect of the decision as it applied to him. It's accepted, as I understand it, or has been throughout the immigration history by that individual that he accepts that **[redacted]** and **[redacted]** is an organisation that comes within A5.30. To that extent it offers an example for us in considering the way in which the instruction works.

WINKELMANN CJ:

Yes, I think we're all struggling on all of this because it's strangely worded.

MR KIRKNESS:

I accept that the wording is less than ideal. However, in my submission, you can interpret this in a manner that ensures it stays within the bounds of lawfulness.

WINKELMANN CJ:

Well, yes.

MR KIRKNESS:

The confusion that I understood was coming up just before was not to do with the wording of the instruction. It was to do with the way the claim's been brought which is that you had a challenge to the validity of the instruction in general terms but then you also have one example of how that instruction is applied, or two examples, in *AB* and *H*, the cases, where it was accepted in those cases – sorry, in *AB* it was accepted where the application was at issue that **[redacted]** did commit these types of atrocities.

WINKELMANN CJ:

All right. It might help, my understanding certainly if you articulate what you think is the interpretation that needs to be brought to make it lawful because I'm not – at the moment I'm not understanding you to say that you see any particular problem with it because of the special meaning of "character" you say is being given.

MR KIRKNESS:

So the concern that I think there is on the face of the instruction is that it's not clearly worded and potentially it's too broad, and so that's the concern that I accept. However, it can be interpreted so that it does not apply as broadly and Justice Young's suggestion would be one way of doing that. The case that we, the IPT decision that the Crown handed up is an example of that type of interpretation and here the focus is on A5.30(b), association, membership or involvement, and in particular if the Court has a copy of that decision in front of it at paragraph 130…

WINKELMANN CJ:

That's the…

O'REGAN J:

Is this *CB* you're talking about?

MR KIRKNESS:

It's the IPT [2020] NZIPT 205654.

O'REGAN J:

Yes. So what paragraph again?

MR KIRKNESS:

130, Sir. This is the IPT speaking about the association element.

WINKELMANN CJ:

So which case are we talking about? *CF* or not?

MR KIRKNESS:

No, this is the case that was handed up, the redacted case. It's called *AB (X category)*.

WINKELMANN CJ:

Got it, yes, okay, thanks.

MR KIRKNESS:

A decision –

GLAZEBROOK J:

What paragraph are you at?

MR KIRKNESS:

130. Please let me know when you have that. And this case was an example of the way in which this instruction is being applied in practice by the IPT.

WINKELMANN CJ:

What paragraph were you at, sorry?

MR KIRKNESS:

130. So what 130 sets out here is the arguments made by the respective counsel and then at 131 you have the Tribunal's view where the Tribunal says that the correct interpret interpretation of A5.30 lies between those two different positions asserted in 130, and the Tribunal says an association caught by A5.30(b) must be sufficient to give rise to concerns regarding the applicant's character. It is no answer to say that any association is sufficient merely because an applicant can be saved by A5.31(b). The association must be sufficient to enable the decision maker to conclude that there is a rational connection between it and the applicant's character."

WINKELMANN CJ:

You see this is why I haven't really understood a lot of your earlier submissions because you are effectively accepting the character for it to be read, to be a lawful instruction it has to allow of the personal attributes, their personal connection to the wrongdoing that is linked to the association.

MR KIRKNESS:

So I apologise for any confusion but my submission of course, the point has always been made by the Crown that a person's association with type of

organisation does speak to character, that's always been a key part of the submission.

WINKELMANN CJ:
Yes but you're saying it's not just association, it's actually association which means that it somehow bears upon their character. That is what this has been said at 130 isn't it?

MR KIRKNESS:
The point is that the Tribunal here is engaging with the fact that association and involvement for that matter are words that can have a range of meanings and it is saying that an overly broad meaning should not be adopted and it is putting forward what it considers to be an appropriate way of applying this particular instruction.

WINKELMANN CJ:
So do you accept what they say at the second to last sentence: "In other words only associations which call into question character should be caught by A5.30(b)"?

MR KIRKNESS:
That is a possible interpretation of this instruction that could be adopted, yes.

WINKELMANN CJ:
But it's not an interpretation that's ever been argued for is it, I mean it's not been –

MR KIRKNESS:
So I think there's three slightly different interpretations if this one is included that have been discussed in the judgments below in this case. The High Court come very close to this position in talking about the way in which the association can be seen to or involvement can be seen to speak to a person's connection in adoption of the practices of the organisation in question. The Court of Appeal took a different view and that's not consistent with what's set

out here. The Court of Appeal's view was that you take a very broad approach to the meaning at the front end and A5.30 of the association type link but then rely on the minimal or remote language to ameliorate the effect of that. That was the Court of Appeal's disagreement as I understand it with the High Court approach, although both came to the same conclusion that the instruction was valid. This is a slight nuance, although in my submission close to I think what his Honour Justice Young was suggesting which is saying that there should be some nexus between the way in which you view the association and an individual's character.

WINKELMANN CJ:
And that's quite different to the Court of Appeal who just said well look the fact you're a member can speak to your character without any kind of evidence and therefore that would mean that you'd have to sort of distance yourself from membership as opposed to from relevant participant.

MR KIRKNESS:
Absolutely and in the Crown's submissions the position that is advanced is also different from the approach that the Court of Appeal took in terms of how it reads these words, the written submissions, albeit that the Crown does agree with the Court of Appeal's conclusion.

GLAZEBROOK J:
Okay well how do you read the words, this makes this as a fourth interpretation?

MR KIRKNESS:
I'm sorry Ma'am?

GLAZEBROOK J:
Well what is the Crown putting forward? So yet another interpretation, we're onto number four now aren't we?

WINKELMANN CJ:

But if it is another interpretation Mr Kirkness just go ahead and say it.

GLAZEBROOK J:

He says there was.

MR KIRKNESS:

Well I'm not sure I can be criticised for –

WINKELMANN CJ:

No you are not being criticised.

MR KIRKNESS:

Well I'm not sure I can be criticised for other people's interpretations of the instructions. The position is simply you can interpret this lawfully and should seek to do so, that's the overarching submission. I personally think that the suggestion made by his Honour Justice Young makes some sense, that there should be some relevance. I think there needs to be a nexus between the association or the involvement and the concern that is underlying this policy. Now if this is read too broadly, such as it covers any link –

WINKELMANN CJ:

It's a nexus between the nature of the – the problematic nature of the association isn't it and the involvement?

MR KIRKNESS:

Precisely and just to be clear –

WILLIAM YOUNG J:

But if you might be just knowing of it, joining – knowing of the association, you join it, knowing what the association is, you join it.

WINKELMANN CJ:

You voluntarily join it.

WILLIAM YOUNG J:
Yes.

MR KIRKNESS:
So I think that's an element that comes through in the decision making that we see in respect of Mr H. So for example one of the factors that the specialist tribunals considered important was that Mr H did in fact know of the human rights abuses that the **[redacted]** and **[redacted]** were perpetrating and he accepted that and so in practice the way this has been applied –

GLAZEBROOK J:
Did he accept the gross human rights abuses or war crimes or merely human rights abuses?

MR KIRKNESS:
I'm not sure he accepted in precisely those terms Ma'am but certainly –

GLAZEBROOK J:
Because it's quite specialist what it said with these organisations isn't it?

MR KIRKNESS:
Quite, well perhaps we can look at the reference to knowledge. So in the case on appeal, I'm at 301.0074 which is the –

WINKELMANN CJ:
What year is that decision?

MR KIRKNESS:
It's the 2010 IPT decision, RRB sorry at the time, decision.

ARNOLD J:
What tab is it? Which volume is that in?

MR KIRKNESS:
That's volume 2 of the case on appeal at case page or the decision starts –

O'REGAN J:
Just tell me what the tab is.

MR KIRKNESS:
I'm sorry Sir I don't have tabs in my version of the case on appeal but the first page of it is 301.0047 and the reference to or one of the references to knowledge is at paragraph 118 of that decision at 301.0074 and they're referring back to an earlier finding: "The Board has already found that the appellant knew that the officers within the **[redacted]** were committing human rights abuses. While denying personal involvement, the appellant candidly disclosed to a refugee officer that: 'sometimes suspects would not be given anything to eat, sometimes they'd be beaten. That's quite normal by the **[redacted]**'." And then goes on to say that: "They would not be treated as humans during the period I worked for **[redacted]**." That's from interview notes.

WINKELMANN CJ:
He also goes on to – they also go on to discuss how he felt he could not leave. That's at 119.

MR KIRKNESS:
That's the appellant's position, that's correct.

WINKELMANN CJ:
Yes.

GLAZEBROOK J:
Actually allegations of torture generally is rife still in the criminal justice system, especially among the police, not merely this organisation but I don't know that makes a difference and some issue with different definitions of torture depending upon –

MR KIRKNESS:

So I'm not relying Ma'am, to answer your question more directly, I'm not suggesting that the appellant said that he was aware of war crimes, as that term is understood legally, or serious crimes against humanity, but there was an acknowledgement that the appellant was aware of human rights abuses during his time.

GLAZEBROOK J:

And torture is fairly a gross human rights abuse.

MR KIRKNESS:

Well there's an analysis earlier in the same decision starting at paragraph 79 about the human rights record of the state and the role of **[redacted]** within that. The reason I think this is important is because the decision that's been made here was never in respect of just a connection to the state alone, it's always been focussing in on the link on **[redacted]** and so you can see the immigration officer in the decision which precedes this which you have at –

WINKELMANN CJ:

But in any case, as you say we're not really dealing with the decision here, we're dealing with the policy.

MR KIRKNESS:

It's helpful though Ma'am in my submission to illustrate that the policy is not being applied in the broad sense that on one interpretation it could be.

WINKELMANN CJ:

Well it's hard for us to say that because we don't really have very good evidence on that, do we? We've got decisions from people who just narrate what people have said but we don't have the evidence in front of us about it.

MR KIRKNESS:

No, there's no direct evidence. That's correct.

WINKELMANN CJ:

And certainly the Crown seems to have argued that this policy had quite a different meaning to what we're now considering from you, I think because certainly that's what the – well, unless the Court of Appeal has come to a different view than what was argued for it.

MR KIRKNESS:

I'm not sure this issue was canvassed in detail. Certainly the position was taken that *Patel* was the proper approach to take and implicit within that is that a reasonable construction should be or fair construction should be given if possible to allow the instruction to be preserved as valid. That was the approach taken in both the High Court and Court of Appeal in *Patel*, excepting with the caveat that obviously there are limits to that, as I acknowledged to Justice Glazebrook, and so that's the space, I think, that that is key here.

WINKELMANN CJ:

So you – so in – before the Court of Appeal you accepted that there was, that there should be some sort of nexus between the problematic nature of the association and the involvement of the person?

MR KIRKNESS:

The issue did not come up to the extent it has before this Court.

WINKELMANN CJ:

It's really exactly what was being argued in the Court of Appeal, though, and the Court of Appeal effectively dealt with the point.

MR KIRKNESS:

Well, there's a difference of view between the High Court and the Court of Appeal on that point, which is that the High Court position, and certainly the position argued in the written submissions here, endorses that view, was focusing on the relevance of the fact that a person who has established or in respect of whom it is the INZ officer is satisfied that they have this connection, it has adopted the logic and/or provided support to an organisation that

commits war crimes, serious group – crimes against humanity and gross human rights abuses. That was the High Court position but that was broadened by the Court of Appeal. I do not recall, Ma'am, was that that precise issue was the subject of argument.

WINKELMANN CJ:

It might be that it's been a subtle argument because I must say I didn't understand your position when I read your submissions, and I was ringed around and was perplexed by what seemed to be a contrast between 3.2 on your first page which says…

MR KIRKNESS:

So the relevant part of the written submissions, Ma'am, on page 17 of the written submissions at paragraph 51, starting with "furthermore". It says there: "The inquiry under A5.30," this is after discussing what the –

GLAZEBROOK J:

Can you just wait a moment, please?

MR KIRKNESS:

Sorry, Ma'am.

WINKELMANN CJ:

Page 17?

MR KIRKNESS:

Page 17, paragraph 51, immediately after the acknowledgement of the Court of Appeal position.

GLAZEBROOK J:

I must admit I actually didn't understand from your submissions that you were saying anything other than any association, apart from minimal, effectively speaks to a person's character and therefore the – without any need to read anything down or read anything in.

MR KIRKNESS:
Certainly that –

GLAZEBROOK J:
But is that wrong? Which is why I asked you what the fourth interpretation was that we haven't yet had, because if there is something else then we want to be able to consider it.

MR KIRKNESS:
So the position of written submissions is clear. We say here at paragraph 52 that by virtue of the association, membership or involvement with an organisation an individual can be considered to have aligned themselves with the philosophies and practices to some degree at least, irrespective of their particular roles and responsibilities. Thus, where a person was involved with an organisation, that requires an assessment of the extent to which that person has taken steps to align themselves with the organisation and its values. The footnote, 69, then deals with the meaning of "association" and the fact that that should be read together with the other requirements and membership involvement. The acknowledgement there is that this can be read as excluding an involuntary membership. "Membership", in my submission, implies a voluntary decision to join a group.

WINKELMANN CJ:
Yes I think the problem has arisen because of the focus early on in your submissions about the special – that character doesn't necessarily mean person attributes but really you are accepting there aren't you, that it is really the nature of their involvement, tells you something about the person's character.

MR KIRKNESS:
Yes and I think your Honour put that point directly to me and I agreed with it. I accept that the way in which I sought to deal with some of my friend's arguments may have caused some confusion here but the position is, is as it's set out there.

GLAZEBROOK J:

Well I still read that as saying if you join an organisation that's like that then you are assumed to accept it and therefore come within it. Now I can understand that if you have gross human rights abuse organisation and of course, you know, it wouldn't be called that but you understand them and it's only reason is, but when you're looking at something as diffuse as a government or a police force or in this case **[redacted]**, it's relatively difficult to say you joined **[redacted]** or the police force in order to be associated with torture for instance.

MR KIRKNESS:

Well I think that's not a position that we've suggested quite in those terms. The particular facts of Mr H's case are that he was for **[redacted]** years a member of the **[redacted]** of the **[redacted]** and in particular the **[redacted]** which is found to have perpetrated these types of abuses and the distinction that, as I understand Mr H drew, was between two different teams within that branch of which he was the acting team leader, at least for some time, of one of those teams that was focussing on **[redacted]** and that was his main focus, although he did, as her Honour the Chief Justice alluded to, also get involved in and supervise the conduct of other members of the junior team. I think that's all in the 2010 –

GLAZEBROOK J:

It doesn't really help me. I want to get what the principle is, so that talking about him in particular doesn't really assist. I know we keep sliding into it because it's an example but –

MR KIRKNESS:

But it is a good example Ma'am because it gives a concrete example when we're dealing with an abstract challenge to the instruction of when it has in fact been applied and the submission I was making earlier was one of the interesting things that you see here is that the instruction has not and has never been applied on a possible interpretation but not one we would support, could be to say simply by reason of being in any way associated with the

government, therefore you qualify. It's a more granular assessment that is in fact undertaken and in my submission that's useful as an example of the way in which immigration officers are in fact applying this instruction.

The position in the most recent IPT decision goes further than that and requires a rational connection. I don't want to get Justice Young's formulation wrong but as I understood it, it was that there must be a relevant link between the individual in question and the conduct that is concerning and with respect that is a useful way of looking at how you might establish the nexus requirement which I accept there are a number of different ways in which that has been suggested.

WINKELMANN CJ:

So in the case you referred us to, at paragraph 131, they don't accept necessarily, they don't accept the submission that was made at 130. This is the *AB* case that you handed up, the decision of the Immigration Protection Tribunal and at paragraph 131 they speak of one of 5.30(b) and they say: "The association must be sufficient to enable the decision maker to conclude that there is a rational connection between it and the applicant's character." And that seemed to apply at the deeming stage, so before you're deemed, this 5.30 applies to you. The association must be sufficient –

MR KIRKNESS:

Before the so-called deeming stage Ma'am because this is what you need to establish in order for the particular association to be considered a risk to New Zealand's international reputation. It's part of the so-called deeming stage that seems to be elided quite frequently in my friend's argument.

WINKELMANN CJ:

No but what I'm asking you is do you accept this: "The Tribunal's view is the correct interpretation of 5.30 lies between the two views expressed. It is no answer to say that any association is sufficient merely because an applicant can be saved by 5.31(b). The association must be sufficient to enable the

decision-maker to conclude that there is a rational connection between it and the applicant's character."

MR KIRKNESS:
Yes, I would accept that. I'm not sure that it provides a particularly complete test. I think there are ways to make that, the concern there, clearer or express it better but certainly that link –

WINKELMANN CJ:
But it's a breakthrough, however, from – Mr Harrison I'm sure would regard it as a breakthrough because it does bring the test squarely into considering the applicant and what their association means for the applicant's character.

MR KIRKNESS:
Yes, but I've accepted that point, Ma'am, when it was put to me this time. I've accepted that point. I'm just saying I can see that this particular test is driving at a concern around the – I characterise it as a nexus. Justice Young's point, as I understood it, also related to that nexus-type concern. They are variants of a similar concern and I think there are ways of formulating it that will ensure that this is applied in a way that's lawful.

WINKELMANN CJ:
So you accept the vibe of 131.

MR KIRKNESS:
Yes.

WINKELMANN CJ:
But you're just saying that's not necessarily a helpful test. And I think they there discuss how you can't give a simple test because different facts will give rise to different considerations.

MR KIRKNESS:

Quite. I think that's a fair point, Ma'am, yes. Nonetheless, it is, as your Honour has pointed out, a development to focus on the nexus between the individual and the character of the individual, that that express focus is something that is read into A5.30(b), and in my submission, as a matter of principle, entirely proper for this Court, for example, to read in that type of nexus, albeit it's not bound by this decision by the IPT.

WINKELMANN CJ:

If we did read it in, what would that mean for Mr Harrison's client?

MR KIRKNESS:

So in my submission it would mean that the instruction would be lawful and valid and that would have implications because of the way in which the claim has been brought because the particular application to Mr Harrison's client has only been put in issue as a consequence of a finding of invalidity in the statement of claim. However, the practical solution to this would be for Mr Harrison's client to resubmit an application for residence which I think is in fact what the Court of Appeal suggested or at least implicitly suggested was done. But what should not happen is that because of a concern about Mr Harrison's client, however unfortunate his position may be, that we throw out the entire instruction wholesale.

WINKELMANN CJ:

Although it would be nice if it was rewritten so it said what it meant in terms of the policy making.

MR KIRKNESS:

Quite so, but the Court of Appeal felt comfortable indicating where it considered the wording should be improved and the Crown responded to that in the new formulated instruction or sought to respond to that and made amendments, precisely as happened in *Patel* a number of years ago. Once again, initial concerns were raised by the Courts, there was a response to a different part of residence policy, it was improved accordingly because

otherwise you would get a difficulty where you had a – the wording of the instruction would need to be read together with the judgment and it becomes simpler, in my submission, to simply address it and so that's what we see happening historically.

GLAZEBROOK J:
Can I just ask you, I can see, and especially because there's an absolute right to refuse entry to people, once they're here they do become subject to, especially if they're refugees, to the Refugee Convention but also once they're here to our Bill of Rights and to various other international human rights instruments, including possibly some labour rights, et cetera.

MR KIRKNESS:
Yes.

GLAZEBROOK J:
But it does seem to me that I can understand the Crown's position in terms of entry and without having to have the pain of going around and saying well is there a nexus, show me there's not a nexus et cetera. If you're talking about people who come and say: "Here I was a member of **[redacted]**, I'd like to come and have a holiday in New Zealand or I'd like to come and get a work visa in New Zealand." So my concern possibly, in terms of looking at this in this context, is that you might in fact be adding qualifications that are not at all needed when you're looking at pure entry visas and do you have something to say on that, because a lot of those entry visas are done on that sort of initial and of course non-reviewable.

MR KIRKNESS:
So with respect Ma'am I don't have much to say on that because the focus here both in terms of the instruction that has been certified by the Minister and also the way in which this case has been argued has be on an instruction that related to a decision about or decisions relating to residence class visas. So it's always been premised on that basis.

GLAZEBROOK J:

No but the legislative history would suggest that it was actually premised on the basis I'm talking about. So then if we say well it's interpreted this way, does that actually have ramifications for what happens when people are trying to enter.

MR KIRKNESS:

Just for clarity's sake Ma'am, because I'm not sure I understand, I just want to check one point, by legislative history are we talking about the policy development history that went into the policy formulation or are we talking about the Act? I just want to make sure I know which documents we're looking to.

GLAZEBROOK J:

Well it was just Mr Harrison's submission was this only started as entry provisions and it was probably even appropriate in terms of entry and it isn't appropriate when it's expanded.

WINKELMANN CJ:

So what Justice Glazebrook's point is I think Mr Kirkness that if we adopt an interpretation which focusses on 5.30(b) as opposed to 5.30.1(b), you may be giving away quite a sensible procedural method because in fact that assumption might be a very good operation of presumptively people who have been members of problematic organisations should have to make the case themselves that their association is such that it doesn't really bear on their character, as opposed to this 5.30 only applying once the immigration officers have decided, that point. So it's the presumptive nature of 5.30(b) which might be of assistance to Immigration.

WILLIAM YOUNG J:

Because isn't this just a residence visa, it's not an entry visa?

GLAZEBROOK J:

I thought it applied more generally but it doesn't?

MR KIRKNESS:
That was my point, sorry if I was unclear when I was responding earlier, my point was that the case has always been premised on this is a –

GLAZEBROOK J:
No I understand that.

WINKELMANN CJ:
All right but still the point still applies though, doesn't it, because it's just an operational thing. It's presumptively convenient that you just proceed on the basis that it's problematic that you're a member of an association.

MR KIRKNESS:
As I understood Dr Harrison's point, it was that the purpose of this policy as developed was to deal with entry, that was the focus of the policy development and he was relying on documents from May 2005 and principally what in our written submissions we called the first policy paper. I don't think that is a sustainable position if you read all the policy papers because a few weeks later the second policy paper is produced and that precisely deals with a decision to have that same concern reflected in both temporary entry and residence class visas.

WINKELMANN CJ:
Yes but the point that both Justice Glazebrook and I are raising is solicitous of you, which is that if the test is – if we focus on 5.30(b) rather than 5.31(b), you may be giving away something which is administratively very convenient and there are good policies reasons for which is a presumption effectively that you are a person of bad character, you've been a member of the association and that it's over to you to show that the nature of your involvement was no problematic as opposed to if we put the interpretation, as was done in *AB*, into 5.30B, then it is for Immigration to, well the officers to form the view, do the work and work out whether the – it's as to where the onus lies.

WILLIAM YOUNG J:

Is there a rule corresponding to A5.30 in relation to entry permission?

MR KIRKNESS:

A5.50.

WILLIAM YOUNG J:

Sorry?

MR KIRKNESS:

A5.50.

WILLIAM YOUNG J:

A5.50.

MR KIRKNESS:

Yes, which is in the case – let me find it for you.

GLAZEBROOK J:

Do we have that?

WINKELMANN CJ:

But if it's of no concern to you, Mr Kirkness, we're not worried.

GLAZEBROOK J:

It was really just to make sure that we were not going to have an interpretation that put in jeopardy some other aspects that might not actually be very convenient for the immigration authorities.

MR KIRKNESS:

Quite understood, Ma'am. I think the focus of the Crown's submission has throughout been on the way in which the residence class visa issue should be dealt with. However, A5.50 which is at 302.0239 mirrors A5.30 with the exception here at least of A5.50(b).

GLAZEBROOK J:

Sorry, whereabouts was that again?

MR KIRKNESS:

Sorry, it's 302.0239 of the case on appeal.

GLAZEBROOK J:

It's sort of half way through something we've got.

MR KIRKNESS:

The reason for that is if you trace the policy history through, and this was the point I was making in response to my friend's argument, there was a clear decision by the time of the second policy paper in late May that there would be two instructions that would be formulated, one dealing with temporary entry, one dealing with residence. 302.0239.

WILLIAM YOUNG J:

The wording is pretty close to A5.30.

MR KIRKNESS:

Yes, Sir. The only difference, other than reflecting consequential changes to deal with a different visa class, would be that A5.30, A5.50(b), sorry, Sir, A5.50.1(b). So on that basis at least I'm not sure that there is a concern but that's not something that's been raised previously so – the focus has always –

GLAZEBROOK J:

Well, it was really – if the Crown isn't worried about it and we interpret it this way then my – then so be it. Immigration officers at the border will have to do the same thing.

MR KIRKNESS:

Arguably they already do, Ma'am, because precisely the same wording is in here, the association link.

GLAZEBROOK J:

Well, except I'm not sure they are doing it. I think they probably do have a blanket policy and I can understand it, on the wording.

MR KIRKNESS:

I don't have any –

GLAZEBROOK J:

So on the wording I can totally understand that you could say – and mostly it won't be problematical because if you do have, you know, organisation that breaches human rights and then if you joined that organisation then quite clearly it relates to character. It's only where you have these more diffuse organisations I think that the difficulty arises or is likely to arise.

MR KIRKNESS:

So that's understood, Ma'am, and I think one of the aspects of the instruction that I think does need to be considered is precisely the where you do have a diffuse organisation this will obviously depend on the particular facts that come up, as they come up, but the link between the individual and that organisation is obviously the part of the organisation that commits the human rights abuses is clearly relevant and should properly be the focus of the application of the instruction, otherwise, to take some of the points that your Honour put to me in the leave hearing, you do get application that is arguably too broad. I'd accept that.

GLAZEBROOK J:

So really the problem seems to me in these diffuse organisations and especially probably semi-official diffuse organisations which are organs of the state which have a number of functions, because mostly it'll be fairly simple because it will be a particular organisation that it's only raison d'être is in fact to do that.

MR KIRKNESS:

So if the raison d'être's to do that then you might start finding yourself inching towards some of the territory covered in *Tamil X* at a certain stage, but yes, I take your Honour's point that there certainly is that complexity but I think also it should be addressed, in my submission, through a focus on the link between the individual and the particular part, and that is in fact what in a – that is underlined in the submission that I was making in relation to the way this instruction was applied to Mr H. The focus was on the **[redacted]** and **[redacted]** specifically because of the link there as opposed to just he was at that state or part of that state's apparatus and therefore that wasn't the approach taken at any stage. So unless there are any questions on these issues, is it convenient if I turn to procedural unfairness?

WINKELMANN CJ:

Yes.

MR KIRKNESS:

So on procedural unfairness, I didn't have much to add to the written submission in the light of what was covered today. I would like to simply note the decision of Lord Justice Sedley, or maybe there's a prior point which is to the extent that the ground is characterised as a ground relating to procedural unfairness, systemic unfairness and that is a procedural concern, there's no suggestion that that is an improper ground for intervention by a court. So those authorities aren't challenged in that sense. However, in my submission it is clear that the focus is on procedural unfairness both from the nature of the schemes that are at issue in those cases but also looking at tab 23 of the bundle of authorities which is Lord Justice Sedley's decision for the Court in the *Refugee Legal Centre* case and in particular under the subheading "the standard", at paragraph 8. Lord Justice Sedley concludes with the sentence: "In other words there has to be in asylum procedures", which were at issue here, "as in many other procedures an irreducible minimum of due process." So this case, as the other ones that the Chief Justice referred my friend to, makes it clear that the focus is on those procedural type concerns and I would simply note in addition to that, that the passage that the Chief Justice took my

friend to by Lord Justice Higginbottom was written I think, by my calculation, a year before the decision in *FB* which referred to in the public law sense and it's unlikely that Lord Justice Higginbottom changed his views in that period of time. He was concerned with procedural fairness in 2018 and likewise when he wrote the *FB* decision. Is it convenient to turn to the Refugee Convention at this stage?

WINKELMANN CJ:
Yes.

MR KIRKNESS:
So on this, again this is possibly a point where the Crown submissions depart slightly from the approach taken in the Courts below and so partly that is because, as the position has been throughout, the Crown takes the view that New Zealand has signed up to the obligation Article 34. I accept my friend's point that this is not a procedural obligation, that's not in my view a helpful way to characterise it. Article 34 has then or the Crown has sought to give effect to Article 34 deliberately in the operational manual. And so the proper question in my submission for this Court is whether it has in fact done so and so that's the point we make in our written submissions.

The point at paragraph 74 is that there is only one true meaning of an international convention and the Crown cites obviously Article 31. Article 32 may be relevant as well for the record. It is accepted that both Article 31 and Article 26, the pacta sunt servanda principle that my friend referred to, those are accepted as being principles of customary international law, there's no dispute about that, that's widely acknowledged by commentators and international courts and tribunals.

However, in the present case the key issue is you have an operational manual that expressly says it is seeking to give effect to obligations under the Refugee Convention, it seeks to do that and in fact does do so and in my submission the relevant instructions to consider, let me just turn those up –

GLAZEBROOK J:

The Chief Justice put to Mr Harrison that all Article 34 does is to say that you have the same ability as anybody else to get residency, et cetera, and that if in fact the instruction was valid and properly applied there could be no complaint. There seemed to be another point to say that the Refugee Convention had to be specifically considered, but if all you're doing is saying: "I'm considering it because I have to do exactly the same that I'd do for anybody else," there doesn't seem any point in that or no additional protection.

MR KIRKNESS:

The point we make in our written submissions which I think is related to your Honour's point is that mandatory relevant considerations as a tool is precisely that. It applies in particular circumstances to address a particular concern. That isn't a concern that arises in the certification of the instruction here, a general instruction that applies to both refugees and non-refugees and not to all refugees, and so the actual question that should be asked, in the Crown's submission, given the way in which the Operational Manual is set out, is does this Operational Manual in fact achieve what the Crown says it is seeking to do in the Operational Manual? To graft onto that some sort of mandatory relevant considerations argument creates an element of artificiality. For example, you'd really just be leaving it all for relief.

And so that was the point that we sought to convey in the written submissions. I think that's the lines of the concern your Honour's expressing. One point to make is that it's not quite the same for a refugee in my understanding of the position in the Manual as any other person because certain concessions, and they aren't major ones, are made for refugees to take into account their particular circumstances. That's the "facilitate" part. So, for example, in S3.15 there is the ability to have certain requirements waived, like fees, and there's also there the ability to have certain evidence introduced by statutory declaration to take into account the fact that refugees may find that element difficult. But the key instructions, in my submission, are C1, objective, which is found at 302.0265, and this is the reason why the Crown's submission is

that the proper question in this case is "does this in fact comply" which is, it states there expressly, that the objective of New Zealand's refugee instructions is to provide a basis for the system by which New Zealand determines to whom it has obligations under the 1951 Convention, and then it goes on in C15 to say precisely that claimants who are recognised – in C5.15.1, claimants who are recognised as having refugee protection status may apply for residence on the basis of that recognition. And so that's the key recognition attempt to put a recognised refugee into the framework for seeking residence. There are some exceptions there that aren't relevant to the present case. C5.15.5 which is the one that his Honour, Justice Arnold, referred to is obviously relevant because in (b) it says: "If it is not appropriate to grant residence to a person recognised as a refugee because they do not meet character or security requirements, officers must take into account," clearly, "the principle of 'non-refoulement'" which is obviously accepted and in good case law in New Zealand as well. That instruction is not challenged and has not been challenged at any point, and what that does is, in our submission, the Crown's submission, aligns with the international commentary on how you should interpret the obligation in Article 34, the duty in Article 34, because it is allowing a refugee to seek, with those very minor exceptions to facilitate the position, residence on the same basis as any other person seeking residence, which is subject to certain health and character requirements.

WINKELMANN CJ:
So you say the mandatory consideration argument is a misdirection?

MR KIRKNESS:
Yes, I think the Court of Appeal made a useful point here around the overall context of the decision-making because if you look at the decision-making in respect of Mr H his status as a refugee was in fact taken into account by the IPT as part of the special circumstances limb of the decision in respect of his position and that was then given to the Minister to consider and the Minister then had a discretion to determine whether or not to accept it but clearly the Minister would have had to, in the application of the instruction, consider at

that point in the decision making process the position of Mr H as a refugee. There aren't reasons for that decision which may or may not be problematic and one of the things that the Crown has done throughout is note the way in which the High Court has been approaching this issue in cases such as *Matua v Minister of Immigration* [2018] NZHC 2078 and *Zhang v Minister of Immigration [2020] NZHC 568* which precisely focusses in on what that discretion exercise in section 190(5) of the Immigration Act, the implications of that discretion and the extent to which it needs to be exercised consistently with international obligations and so what you see there is clearly refugee status is in fact being taken into account as part of the overall decision making but in the Crown's submission it's not something that should be taken into account at the certification level of a general instruction, at least not in the sense that's contended for.

WINKELMANN CJ:
Is another way of looking at this as to relief because even if you accepted Mr Harrison's argument that it's a mandatory relevant consideration when you look at the thing overall, it complies in any case if the policy is valid or if it's read, as you say, and if struck down on the other grounds, well then it's an argument that falls away possibly.

MR KIRKNESS:
Yes Ma'am that exposes an aspect of the artificiality of seeking to use that particular tool here. The other element of artificiality would be the refugee status of the individual is being taken into account and has been taken into account in the examples we have, so again it becomes artificial to try and superimpose that at that particular stage in the decision making process and as I said I think that element of the Court of Appeal's analysis useful.

There is some confusion that I should flag in the precise exercise of the power that is being considered in the Court of Appeal decision. Clearly A5.30 was certified at a later date than A5.26, the predecessor instruction. Simply for the point of clarity the relevant date would be that date at which point the entire manual was updated but it would create some problems with my friend's

argument that a Minister could not be taken to have considered something which was certified together with instructions dealing precisely with the situation. We don't rely on that, I simply flag it because it's slightly confused in the Court of Appeal's decision. Unless there are any questions on relief I don't have any further submissions Ma'am.

WINKELMANN CJ:
Thank you Mr Kirkness and thank you for the very responsible attitude you've taken in your submissions.

MR HARRISON QC:
If your Honours please, my head is still spinning a little bit from the attempt to interpret the challenged instruction in various ways. I'll just try and approach that debate for what it's worth and see what I can say that adds value, if anything.

The exchanges that I noted started with Justice O'Regan putting to my learned friend that basically what the instruction meant was that if you worked for an abusive organisation, you won't be let into the country. With respect the issue is not being let into the country, it's being granted residence which I've argued throughout is a quite different issue, nor with respect is it won't be because the instruction addresses a category below won't be, including won't be granted residence where there is leeway contemplated, it will not normally be granted.

Now beyond that, there has been a far greater focus in this Court on whether the instruction can, in certain respects, be read down and the focus has been on reading down the connection between the applicant and the entity, to use a neutral term, mainly by way of association between the two, to suggest that not any association whatsoever is sufficient but it has to be a relevant association and I have found illuminating the discussion in the case that was handed up at paragraph 131, where it is put in a slightly different way to say that there should be a rational connection between the association and the

appellant's character, not adopting that interpretation but it points up another view.

Now the problem though with all of this is, with respect your Honour Justice Glazebrook has put your finger on it, the problem is what about a diffuse organisation and the reason why it is a problem is that the instruction doesn't actually ever use the word *organisation*. My learned friend's submissions use *organisation* as a convenient shorthand but what the instruction refers to is any government, regime, group or agency. Now that's part of the overbreadth of all this. In effect membership or involvement in any government that's involved in abuses is sufficient. So it catches the civil servant in effect no matter how lowly or no matter how high up but it does so in an indiscriminating fashion. Even if you are lowly and you work for a government, that is sufficient.

WINKELMANN CJ:
But couldn't you interpret in a similar fashion just as the Tribunal did at 131? So it's membership in a rationally connected way, it's involvement which is in a rationally connected way that bears upon your character.

MR HARRISON QC:
Yes well I mean thats attractive in its way but the overall breadth of the expression" "Any government, regime, group or agency", makes the rational connection enquiry very difficult and you end up watering down the wording so that really the association that has to be rationally connected comes to mean the particular association between this particular applicant and the entity in question. So you're then saying it's not just he was a member, it's rather that his membership was a particular kind of association with the entity that rationally reflects on his character and ultimately you end up then saying what I'm looking at is the particular role that the individual played in the particular entity that is said to have committed gross abuses, et cetera. Now if the – that's doing a considerable amount of violence to the language on a scale far beyond –

GLAZEBROOK J:

Is there something wrong with that, because isn't that really what you're arguing should be a policy? Leave aside whether it can be interpreted that way.

MR HARRISON QC:

Well…

GLAZEBROOK J:

But I may have…

MR HARRISON QC:

I suppose on behalf of my client it would have to be – I mean it goes back to when I argued *AB* and I tried to get everything watered down at that stage to this sort of level, and my poor client has fought all these years and was bound by the *AB* interpretation as I saw it, so he couldn't really argue against the *AB* interpretation, at least till he gets here. There should be consequences in terms of relief from costs if your Honours were to go down that track. He should – if your Honours proprio motu adopt a much more beneficial and benign interpretation which runs counter to what the Crown has argued throughout is the correct meaning then my client has wasted a lot of time and money for the case to go full circle and I just…

WINKELMANN CJ:

So did, was, your client faced costs in that case before Justice France?

MR HARRISON QC:

I beg your –

WINKELMANN CJ:

A costs order was made against him, was it, in *A*?

MR HARRISON QC:

A costs order's been made at every turn against him, in this litigation and indeed in the earlier litigation. But even – I'm not going to depart from the ground I occupy because I would add this, that even if there was the reading down, the type of reading down that we are debating, the other features of A5.30 that I have identified, the deeming and the arbitrariness of the hurdle raised by minimal or remote together with the reverse onus, are sufficient to be invalidating on arbitrariness grounds, I submit. So I would submit that my argument that the way the challenged instruction is framed overall in such marked contrast to A5.25, its over-breadth and its unnecessary stringency to deal with this problem, remains invalidating. I hope I have sufficiently made the position clear there.

My learned friend began his argument at one point by submitting that the only thing that was excluded by way of the concept of association was involuntary membership and we now seem to be a long way from that.

So that's what I want to submit about the oral argument we've heard this afternoon. I'm just going to look at a couple of matters in the written submissions.

ARNOLD J:

Before you leave this point, the reference to government in A5.30.1(b) you treat as the governing party and all the elements of the government, all the agencies, is that right? So all the civil servants and so on.

MR HARRISON QC:

Well, I mean it's exceptionally vague as an expression but you've got "government or regime". It could mean the state, it could mean the government that's in power in parliament or it could mean the executive or all of them and I interpreted that by the time you've read "government", along with "regime", it probably means all of them. So it's very broad.

ARNOLD J:

Well it seemed to me the association with regime might mean the government was read in the narrower sense, that is the political parties doing the governing and then the agencies of the state, if they're involved, are caught by the notion of the word “agency”. Because *regime* refers basically to the governing bit. I don't think you would call the New Zealand government a regime would you, but it’s the political coalition is the government.

MR HARRISON QC:

Well this is the problem, at every turn one gropes with the inexact language of the challenged instruction and it’s overbreadth.

ARNOLD J:

All right, well anyway this didn’t seem to me self-evident that government actually means the entire apparatus of government, including all the agencies and so on.

MR HARRISON QC:

Quite possibly but necessarily including state servants.

WINKELMANN CJ:

Well maybe not. Anyway.

MR HARRISON QC:

So just dealing with these written submissions, at paragraph 10 there is the submission about our case being based on a misreading of the Act. I attempted to correct that proposition in my earlier submissions. We don't argue that circumstances can't be the subject of an instruction, we argue if A5.30 is a test of character or purports to be, then that means personal qualities which are not what it addresses.

The *Patel* case is referred to at page 13, and I note that when my learned friend was citing *Patel* your Honour Justice Glazebrook suggested that the interpretation also needs to be by reference back to the statutory language

and policy which of course is a fairly classic formulation. Your Honours are reminded that at paragraph 29 of the Court of Appeal judgment, there's a reference to the submission I made based on another Court of Appeal decision in *Chamberlain v Minister of Health* [2018] NZCA 8, [2018] 2 NZLR 771 which is more along those lines and I argued before the Court of Appeal that the *Chamberlain* approach to policy interpretation now really ought to be seen as having superseded the more tolerant *Patel* approach, so I just mention that.

WINKELMANN CJ:
This is in the Court of Appeal on this case sorry?

MR HARRISON QC:
Yes, sorry, the Court of Appeal judgment in this case at paragraph 29 refers to *Chamberlain*, an earlier Court of Appeal judgment and cites a passage. It's at page 101.0084, sorry paragraph 28. So that's just on the interpretation issue as a counterbalance to what I submit is an unnecessarily heavy reliance on *Patel*.

At page 14, at the top of my learned friend's submissions, there's a reference to a United States Federal Court body of law which my learned friend hasn't taken your Honour to. All I want to say is that that, in my submission, is no possible assistance, involving as it does constitutional review of state legislation. I also respectfully quarrel with his paragraph 42, the proposition that the Court should exercise a high degree of restraint before striking down government policy. The reason being given is that it's a matter of executive discretion to decide who is permitted to remain within the country and that's said to be a well-established principle which we are attempting to oppose. That's not the case. This isn't a question of who is permitted to remain within the country or enter. It's a question of who gets residence, being a person who is already entitled to remain in the country and cannot be removed as a recognised refugee. So –

WINKELMANN CJ:

Well, in Mr H's case but it would apply to other people, wouldn't it? That would be correct in terms of other people.

MR HARRISON QC:

Well, the policy constraint is on the fixing of policy to decide who enters and who is required to leave. That's kind of the border fortress notion of the Executive's entitlement at law. This isn't such a case. It doesn't concern entry and it doesn't concern any requirement to leave. That's the only point I'm making. So there's no reason for a hands-off approach to judicial review.

At several points in the submissions my learned friend talks of A5.30(b) applying when an immigration officer determines that there's a relevant association, membership, et cetera. I may be quibbling here but under A5.3(b) it's not expressed in terms of an immigration officer making a determination. That is by contrast with 5.30.1(b) where the immigration officer has a role. Under (b) in A5.30 it's what used to be called, maybe still is called, a jurisdictional fact whether the applicant poses the risk. In this case it doesn't matter because we have conceded the point under (b). But when we get to 5.30.1(b), that provision is discretionary in a number of respects as well as requiring minimal or remote standard to be applied.

O'REGAN J:

What paragraph of the Crown's submission are you referring to there?

MR HARRISON QC:

Beg your pardon, Sir?

O'REGAN J:

What paragraph of the respondent's submission were you referring to there?

MR HARRISON QC:

I was commenting particularly on paragraph 57 where it says that the deeming effect only takes effect after the immigration officer has determined these

matters. I'm making the point that that is not actually the way A5.30(b) operates or is worded.

WINKELMANN CJ:
Is that a very significant point because someone surely has to determine it, that the jurisdictional fact exists?

MR HARRISON QC:
Yes, if it's a jurisdictional fact, it has to exist certainly but it's not a discretionary assessment by an immigration officer at that point.

WINKELMANN CJ:
And would you say that goes against reading all these words and qualifications into A5.30(b)?

MR HARRISON QC:
Well it makes it difficult to read them in, certainly, as does the fact that the wording is aligned both for residence applications and for entry applications and under the new version of course, they're one in the same, they're incorporated in the same document. So if you do liberalise the wording along the lines of Justice Young's approach for example, you're liberalising it for both entry and residence decision making and the problem or potential problem that that may or may not cause, just underlines my complaint that entry and residence should not have been lumped together at a policy formulation level, the way they were. I think I'm very nearly finished, just give me a moment.

At paragraph 63, this is a section that he didn't take your Honours to, he argues that 30.1(b) does not impose a burden or onus of proof and the reason he gives is citing authority concepts such as burdens or standards of proof are inapt but that isn't an answer. The proposition that those concepts are inapt supports the appellant's complaint that they shouldn't have been used, rather than disproving that equally describing the process as inquisitorial as paragraph 63 does, does not mean that there is no burden or onus if that is

what is indeed prescribed by A5.30.1(b) which it plainly is. So the proposition that that provision doesn't impose either a burden or standard of proof simply flies in the face of the language used. Whether it applies a standard of proof as against a burden or onus of proof or a standard of satisfaction on the part of the officer or both, is something we could debate. Arguably it imposes both in terms of the language used which is very strong and in my submission the Court of Appeal erred in its approach of really simply disregarding the language and saying no it can't be done.

I've dealt with the systemic unfairness submissions which appear at page 23. I just want to take issue with paragraph 69 where it's suggested that there's nothing inherently unfair about the procedure, at least in part, because as it says at the bottom the Act confers on applicants a right of appeal to the IPT. It's said at the top of page 24 that the right of appeal is on the grounds that the relevant decision was not correct. That's not quite what section 187(4)(a) of the Act says. That's at page 157 of the printout. Subsection (4) says that the first ground of appeal is "the relevant decision was not correct in terms of the residence instructions applicable at the time the relevant application for the visa was made". So you're stuck with the resident instructions as they stand and the only question is whether there was correctness in terms of the resident instructions.

As a slight aside, I was interested to see in the case of *AB* that was tendered, the latest decision, that the Member of the Tribunal rejected a submission that he, I think it's he, could not review the decision below on the merits. So review on the merits occurred but not in our latest decision where the Tribunal Member at page 302.0316, paragraphs 56 to 57, held that review was on the basis that of a reasonableness assessment of the decision below.

So the proposition that all is fair because you have a right of appeal which takes the instruction as it is and just looks at the correctness of the decision in terms of that instruction is an insufficient corrective, in my submission, if the instruction in question itself is unfair or irrational.

WINKELMANN CJ:
Just thinking, it's quite interesting how the Immigration Tribunal in *AB* came to the conclusion it did in face of the – when confronted by the decisions of Justice France in *AB* and of Justice Moore in *CF*.

MR HARRISON QC:
It was a fairly brave conclusion, flew against the High Court decisions which were analysed earlier.

So then finally the issue of relief and I just want to mention paragraph 82 of my learned's submissions, the suggestion that the Court could sever unlawful parts of the instruction without quashing the whole. In my submission that's just not workable here.

And the only other point is about *Fiordland Venison*. The point is taken in 83 that in *Fiordland Venison* the Minister was under a duty to grant the licence. The reference to – the discussion in the judgments in *Fiordland Venison*, the lead judgment of Justice Cooke, related to whether mandamus should issue and that is why there was a focus at one point on the question of whether the Minister was under a duty because only if there was a duty could he be subject to mandamus. But ultimately there was a declaration ordered and it did not, in my submission, turn on the absence or presence of a duty imposed on the relevant decision maker. Those are my submissions.

WINKELMANN CJ:
Mr Harrison, would you just mind if I ask Mr Kirkness what he says about your point regarding the unfairness for your client were we to adopt an interpretation of that provision which has been obviously effectively opposed for quite some time and your client has been the person who's been pursuing it, apart from the one client in the *AB* case?

MR HARRISON QC:
Well I suppose the starting point would have to be that although the appeal as framed might have to be dismissed, it is being dismissed on a ground that

would have sustained his challenge to the earlier decision making at all stages, including in the High Court and Court of Appeal because ex hypothesi, he would've been entitled to a successful judicial review on the grounds of error of law being misinterpretation of the instruction, so that there should at least be cost consequences in terms of a reversal of the cost outcomes in the courts below and there should be no consequences in this court for the dismissal of his appeal.

Tempting as it is to push that any further, I'm not sure that I can, and given that the instruction has now been amended, there is probably not a lot of point to be urging that a relief by way of quashing any decision below should be granted and remitted because if it were remitted, if the application were remitted and revived the decision maker would have to decide it in terms of the residence instruction as it stood when the application was made and that, I think it's common ground, that residence instruction is less helpful to my client than the one that's now come into force. So there's very little point in remitting it when his preferable course would be just to make a fresh application under the new instruction. So thinking it through, probably the best I can argue for would be the cost consequences in the courts below should –

WINKELMANN CJ:
In this proceeding?

MR HARRISON QC:
Yes in this proceeding, should not be adverse to him.

WINKELMANN CJ:
And I might just hear Mr Kirkness on that because we didn't discuss that issue of costs and it is a slightly complex one in this case.

MR HARRISON QC:
Yes, yes. Thank your Honours.

MR KIRKNESS:
So Ma'am, to the point about costs, there may be reasons why that approach would make sense but it would turn on the outcome and so the reason I say that is that I do not think that the particular arguments, as I recall them, made by my friend in *AB* are ones that are now being considered by this Court and the other related point is –

WINKELMANN CJ:
No well Mr Harrison is not asking to go back a whole separate set of proceedings, just this proceeding.

MR KIRKNESS:
The only slight caveat for this proceeding is the manner in which this claim was brought which is to focus on the validity of the instruction and challenge that, not to seek other avenues available to the applicant, whether that be to the High Court on a question of law against the IPT decision that was made or judicial review of the ministerial decision as we've seen in *Matua* and *Zhang*, so I think there's an element of choice there about the particular approach to be taken but in theory, at least, should this Court adopt an approach that would have been more beneficial to Mr Harrison's client, then that's not something that in principle the Crown would resist and relatedly, on the point of a fresh application, my understanding, subject to correction, is that the Crown's position is that that could be made with a waiver of the applicable fee.

WINKELMANN CJ:
Thank you. Thank you, Mr Kirkness, thank you both counsel for your very helpful submissions today. We will take some time to consider our decision. We will now retire.

COURT ADJOURNS: 4.00 PM