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

[2021] NZSC Trans 2
SC 104/2020

BETWEEN **H**
Applicant

AND **THE MINISTER OF IMMIGRATION**
Respondent

Hearing: 12 March 2021

Coram: Winkelmann CJ
Glazebrook J
Williams J

Appearances: R E Harrison QC for the Applicant
R A Kirkness and E G R Dowse for the Respondent

ORAL LEAVE HEARING

MR HARRISON QC:

If your Honours please, I appear for the applicant.

WINKELMANN CJ:

Tēnā koe.

MR KIRKNESS:

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

WINKELMANN CJ:

Tēnā kōrua. Mr Harrison.

MR HARRISON QC:

Your Honours, I have in the hands of the registrar a slim bundle of what I call relevant documents. These include the statement of claim which has come under slight attack in the Crown's submissions, for convenience copies of a couple of the immigration instructions, including what I will call the challenged instruction, and a couple of authorities that I just want to refer the Court to, if that's in order.

WINKELMANN CJ:

Yes.

MR HARRISON QC:

Obviously, I will have to move at a fair clip and I will take –

WINKELMANN CJ:

It's a leave hearing so it's not the full argument. It's simply because we found it hard to see what the true issues were when we read the parties' submissions and thought they might centre on the Refugee Convention but were not sure.

MR HARRISON QC:

No, by no means entirely and I hope to develop that issue, and perhaps I can do that at the outset by taking your Honours to the statement of claim which is at tab 3.

WINKELMANN CJ:

Yes, so we did obtain a copy of the statement of claim and have read it.

MR HARRISON QC:

Okay. Well, the position then is that the statement of claim sets out what I will call the challenged instruction. It summarises what it purports to do and its meaning in paragraphs 11 to 13, and in each of 11, 12 and 13 it identifies a particular effect of the challenged instruction which is – and I want to emphasise this because of the misunderstanding that emerges from the Crown's submissions – each of these three alternative effects is challenged on illegality grounds as such but is equally a statement of how in the three key respects the challenged immigration operates to raise a hurdle for the applicant for residence which, when you view all three hurdles cumulatively, becomes an insurmountable obstacle.

WINKELMANN CJ:

For the applicant?

MR HARRISON QC:

For the applicant for residence.

WINKELMANN CJ:

Not all applicants, just…

MR HARRISON QC:

No, no, just one who comes within A5.30(b) especially. That's the one, "applicants are considered to pose a risk", which I call the deeming provision. So then at paragraph 14 the –

GLAZEBROOK J:

Can I just – that's paragraphs 11 to 13 and the three set out, is that…

MR HARRISON QC:

Yes, that's right.

GLAZEBROOK J:

And so it's both – and if I understood – sorry, I'm just catching up – if I understood you to say each of them is challenged on illegality and then cumulatively if they come in with all of those three it would be insurmountable?

MR HARRISON QC:

Yes, and so it has to be looked at as a cumulative effect as well. And then in paragraph 14 is the base pleading as to the invalidity of the challenged instruction and over the page, page 11 of the paginated volume, I identify each of the aspects and 14.1 you've got the illegality issues at point 1.2. You've got arbitrary and unreasonable or disproportionate at point 3 and another arbitrary and unreasonable, and each of those is "and/or unfair". And then at point 5 there's the Refugee Convention point, and then in turn the other effects I earlier identified are similarly pleaded on illegality, unreasonableness, unfairness grounds in the alternative, and –

WILLIAMS J:

I just want to get my head around your three items because they seem to be the key.

WINKELMANN CJ:

Four.

MR HARRISON QC:

Yes.

WILLIAMS J:

So New Zealand's reputation is not a character issue, not a personal character issue?

MR HARRISON QC:

Yes.

WILLIAMS J:

The deeming is illegal?

MR HARRISON QC:

Yes.

WILLIAMS J:

And the standard of proof is unlawful?

MR HARRISON QC:

Yes, and cumulatively when you put them all together.

WILLIAMS J:

And cumulatively, of course, yes.

MR HARRISON QC:

But the point about character is this. The challenged instruction itself expressly states that it is a test of character. If we go to it at tab 1, we can see that –

WINKELMANN CJ:

Just before you go on to that, the discretion to create policy created by section 22 of the Immigration Act 2009 is very broadly stated.

MR HARRISON QC:

Yes.

WINKELMANN CJ:

So is it necessarily fatal to the policy if it's not truly properly characterised as a character test but rather taking into account New Zealand's national interest because of reputation?

MR HARRISON QC:

Yes, it is because it is formulated – it was proposed to the Minister and is expressly formulated as a character test. So if you choose to exercise your statutory power on a particular basis and that is a flawed basis, your exercise of power is flawed, I would argue. But I'm not putting all my eggs in the character basket either but I did –

WINKELMANN CJ:

Okay, because the genesis of it seems to be and understood to be character in the broadest sense. It was a concern about the impact on New Zealand's international reputation, wasn't it?

MR HARRISON QC:

Yes, that's part of the reasoning of the Court of Appeal and I'd like to tackle that head-on later.

WINKELMANN CJ:

Yes.

MR HARRISON QC:

But what I'm just wanting to point out is if we're at tab 1 of my volume, that's the challenged instruction, you can see that in A5.30.1(a) it refers to declining "on character grounds", and also in (d) of that subprovision it refers to "this aspect of the character requirements". So both the policy development history, which you don't have but is mentioned in the Court of Appeal judgment, and the challenged instruction itself, make it plain that this is a character requirement.

Now, and again I'll come to this in a little more detail shortly, but my submission around character in terms of vires, if you like, and referring back to the powers under the Act, is twofold. One, when you look at the way character is identified in the provisions of the Act that deal with character, it means personal, good or bad character. That's point one. Secondly and alternatively, in any event, if it's a broader concept than that, it still means actual extended meaning character, not a character which is deemed contrary to fact to be imposed. So the power to create these rules under the character rubric at least is a power to do so with a view to excluding or permitting entry of people based on their actual character.

WINKELMANN CJ:

Not to create a sort of *Alice in Wonderland* world where things are said to be true that are not true?

MR HARRISON QC:

Yes, and here, as I say in my –

WILLIAMS J:

There's a difficulty with that though, sorry to butt in, but there's a difficulty with that that the Crown points out which how would anybody know? It's not as if they advertise the gross human rights abuses that are deemed to have occurred. I think there's no difficulty between the parties on that, and nor is the applicant here going to say: "Well, there were these but I wasn't involved in it because I made the tea."

WINKELMANN CJ:

They have already been satisfied that he wasn't involved because he's got refugee status.

MR HARRISON QC:

Yes, I mean that –

WILLIAMS J:

Well, how could they have been satisfied?

MR HARRISON QC:

That's an argument that is equally applicable to other kinds of character, including whether you've been previously convicted or you're a security risk or whatever. If someone arrives here, say, on a visitor's visa and doesn't disclose who they are, what their background is, problem. Should we make this category, which is simply based on risk to New Zealand's international reputation, not New Zealand security, I want to make that plain, should we make this a special category?

Now that takes me to something I was wanting to refer to a little later. Compare, and this is directly in answer to your Honour, Justice Williams, compare A5.25 at tab 2 which the Court of Appeal says is on all fours with the challenged instruction. It's not. The methodology for pre-existing, previously existing A5.25 is this, starting at the top, not normally be granted without a character waiver. If you have been, and then you've got a series of "convicteds" down there, and then there's another category which is basically withholding information or false information, and then over the page, (j) and (k) are somewhat broadly analogous to the challenged instruction. You've got (j) which is basically publicly making racist comments, if you like, and (k), being, or having been, a member of an organisation or group which espouses racist principles, if you like. So those are both personal conduct, not deemed conduct. Then under the note there: "When considering whether or not an applicant has committed an act that comes under," and that includes (j) and (k), "an immigration officer should establish whether, on the balance probabilities, it is more likely than not" that the act was committed. So instead of deeming and then putting the reverse onus of proof or persuasion, call it what you like, that the challenged instruction does, this is how it's approached here, and then under "Action" down below –

WINKELMANN CJ:

It is comparable though, isn't it, because it what you're disproving membership of the groups?

MR HARRISON QC:

It's comparable but my point is that in terms of the process it's markedly different.

WINKELMANN CJ:

(k) is comparable though?

MR HARRISON QC:

Yes. This is my point. The categories of activity or belief or speech which are struck at are quite comparable to our deeming provision of previous association. But this provision doesn't deem you and it doesn't say that unless you are minimal or remote, which you have to prove, you're out. Instead it's the immigration officer that has to be satisfied on a balance of probabilities no deeming, and then under "Action" down below you don't automatically decline, (b) you consider the surrounding circumstances, including a whole pile of mitigation over the page.

WINKELMANN CJ:

That's a critical point, isn't it, because (k) is actually quite similar in that its membership gives you the problem. So if your –

MR HARRISON QC:

Yes.

WINKELMANN CJ:

But then the mitigating things.

MR HARRISON QC:

Then over the page you have (b) and (c) which allow consideration of the applicant's now personality and now personal circumstances and I argue that

our challenged instruction doesn't do that. It simply says you're deemed to be the threat even if you're not and then you've got to prove and argue your way out of it against a standard of minimal or remote.

WINKELMANN CJ:

And you say that's unreasonable, arbitrary, because people who come from countries that have these kind of organisations are often themselves the subject of compulsion and have to join organisations?

MR HARRISON QC:

Yes, and it's unreasonable and unfair, I will come to add, because, as the Court of Appeal acknowledged, the primary test under A30(b) is very wide because it is only if you have, and there's tautology in the expression, so I'll just say if you have an association with a group that does these bad things or involvement with it, that's enough to trigger the deeming, but you may not have personally done any of these things and if the group is, for example **[redacted]** and even if you are relatively low level, like my client, and you've been cleared of actual complicity or involvement by the Refugee Status Appeal Authority, you're still caught. So it's over-broad to begin with and then the hurdles that are erected cumulatively turn this into a test which is not character.

WILLIAMS J:

I haven't seen the Refugee Status Appeal Authority, Review Authority, whatever it's called, decision, but that finding is based on facts positively put forward by your client?

MR HARRISON QC:

Yes.

WILLIAMS J:

And what were those?

GLAZEBROOK J:
Well, I think we're going –

WINKELMANN CJ:
Yes, so we're going off a little bit far.

WILLIAMS J:
No, but I – yes, but it's not – the point in the question is while your argument might be theoretically appropriate is there evidence that it would make a difference in this case?

MR HARRISON QC:
Yes, because –

WILLIAMS J:
In other words, you say the instructions don't give your client an opportunity to say, I made the tea, right?

MR HARRISON QC:
Yes.

WILLIAMS J:
And that really depends – in theory that's quite a good argument except what's the evidence that he made the tea?

MR HARRISON QC:
He did.

WILLIAMS J:
And then we can see whether it actually bites.

MR HARRISON QC:
The Refugee – I mean obviously we're not arguing the appeal so we don't have everything.

WINKELMANN CJ:

So we're going around but – yes.

MR HARRISON QC:

The Appeal Authority decision looked at both inclusion under Article 1A, "Do you have a well-founded fear of persecution if returned," yes, and exclusion under 1F, have you actually committed any of the bad things that get you excluded, and found that he hadn't. He was low level. He wasn't involved in any of the persecutory acts.

WILLIAMS J:

Yes, yes. Right, and this was based on his own evidence, was it?

MR HARRISON QC:

Based on his own evidence and corroborated in some respects but that's the case.

WINKELMANN CJ:

But that's not at issue, is it? No one's putting at issue that he actually was involved, so…

MR HARRISON QC:

No. So this indeed is the point I make early on in the submissions. He's deemed to pose a risk to New Zealand's international reputation. I think (a) means if granted, the grant to him of residence would pose a risk. So that's deemed to be the case when in fact, and it's been held at an earlier stage, granting him residence would not in fact pose him a risk. Secondly, he's by that means kind of deemed to fail a character test wherein in fact his character, as from when he arrived in New Zealand **[redacted]** years ago and other than immigration unlawful presence, is not in doubt. It's good character. So you've got someone who would not otherwise fail any character test under the Act or the rules.

WINKELMANN CJ:

Okay, so I think we've got that. Better move on because you've only got half an hour but…

MR HARRISON QC:

Yes. So now that –

GLAZEBROOK J:

Just one point, though, that I think the sort of organisations they're talking about here are the sort of organisations like QAnon, for example, or organisations like ISIS, and I'm taking extreme examples, that in fact belonging to the association or association ipso facto shows that you have racist or other views. It's not looking at an organisation, and I take the CIA for an example, that the CIA in the past has been associated with major breaches of human rights recently, accused of having been complicit in torture in Guatemala in the '70s. Well, does membership of the CIA therefore stop you getting a character because – and your argument is that yes, it does, because of the deeming provision and because some members of the CIA may have been involved in – and the same with the Security :Bureau. Is that the…

MR HARRISON QC:

Yes, that –

GLAZEBROOK J:

That's the argument, that it's too broad to say if an organisation, possibly even a bad wing of an organisation, is involved in any of those things then you're just deemed to fail the character test?

MR HARRISON QC:

Yes, it's arbitrarily and unreasonable and unfairly over-broad. But I'm having to just scratch the surface of my argument because if you look at the Act and the rest of the immigration instructions, there's provisions for lists of banned organisations. So I mean if you're a member of ISIS you're just – you're out.

GLAZEBROOK J:

I was using those as an example just to say that that was the type of organisation that maybe just ipso facto is right. You're saying this is not right in this particular case?

MR HARRISON QC:

Yes, but it –

WINKELMANN CJ:

Can I ask you, Mr Harrison, you say that there's a ground of review which is that the policy is unfair?

MR HARRISON QC:

Yes.

WINKELMANN CJ:

I'm not familiar with that ground of review.

MR HARRISON QC:

I'll come to that in a just moment. I was just going to respond –

WINKELMANN CJ:

Well, I'm anxious that we not delve too deeply. I think we've got your point about this. It's the *Alice in Wonderland* point, that it deems you to be of bad character when as a matter of fact you are not of bad character and there is no way for you to come out of this world, parallel universe.

MR HARRISON QC:

Yes, and the ministerial power to make an instruction that addresses character does not include a deemed character. It has to focus on actual character, and there are a whole host of other provisions that address character so we shouldn't look at this in isolation and say: "Gosh, this is all we've got to protect us." It isn't. That's a crucial part of my argument. Now the part of –

WINKELMANN CJ:

Because at the end of it all I'm going to ask you, because we're going to go through unfairness and then we'll go through the refugee point which I think is an important point, but at the end of it all I'm going to ask you is it not in fact the case that this policy is wide enough for it to be applied in a reasonable way and is it not in fact the case this policy should have been applied in a way which is consistent with the Refugee Convention, so it's actually the decision-making which is flawed? So that's at the end.

MR HARRISON QC:

Yes, all right. I'll deal with this issue of the fairness challenge which, with the greatest respect, in my view the Crown misunderstands. The fairness principle, and this is one of the reasons why this case raises a question of public or general importance, the fairness principle I am relying on, which is systemic unfairness, does not appear to have been the subject of consideration that I've found in New Zealand and the case at tab 4 of my bundle is, so far as I'm aware, the most recent Court of Appeal decision. It's a long judgment and I have only supplied an extract from the lead judgment of Lord Justice Hickinbottom, and I do that because if we go to pages 52 to 53 of the printout, top right-hand corner, para 120, you can see a kind of definition of system challenge to a policy, and His Lordship says: "Although systemic unfairness may be illustrated by what has happened in individual cases, such a challenge does not focus upon the consequences of unlawfulness for a particular individual or group as do most judicial reviews, but rather upon the administrative scheme itself and the risk of unfairness in a public law sense arising from that scheme as a scheme," and then down the bottom, "There is a conceptual difference between something inherent in a system which gives…an unacceptable risk of unfairness," and any number of individually aberrant decisions, and then 121, Lord Justice Sedley I rely on as well.

So that sets the scene. That's the kind of argument. Now the Crown response to that is to say, well, the scheme overall, the whole thing, is fine because it contains dedicated provision for the grant of residence to refugees and dedicated provision dealing with character overall, to which I say that's

not the issue because the challenged immigration overrides all that fairness, if you like, in all other parts of the scheme so that a recognised refugee, for example, or other long – applicant for residence, automatically fails at the challenged instruction hurdle, and that and what that challenged instruction contains is what I wish to argue is systemically unfair but equally the other way of putting it is that it's unreasonable and arbitrary.

So that's – how are we doing? I had better get on to the issue of the refugee considerations. Now that takes –

WINKELMANN CJ:
So can I just say, can I? I understand your point to be that he's been given refugee status. He's passed the proviso to refugee status that you can't have it if you're personally involved in abusive human rights, et cetera. The Court of Appeal was wrong – the refugee status comes with an obligation to facilitate, is it, not citizenship…

MR HARRISON QC:
Assimilation. Page 7 of my submissions has the provision.

WINKELMANN CJ:
Yes. Assimilation, and the Court of Appeal was wrong to treat that as a procedural right. It's a substantive obligation rather. The obligation to facilitate his assimilation is a substantive obligation, and this policy is inconsistent with that obligation. It cuts across the whole scheme of the Refugee Convention because it allows you to be deemed to be of bad character whereas the Refugee Convention treats bad character as personal involvement and abuse of human rights.

MR HARRISON QC:
Well, not merely the Refugee Convention, the Act as a whole. That's a fair summary, your Honour, and if we can go to page 7 of my written submissions, subject to this point, in my submission the argument and the challenge does not depend on interpretation of Article 34 of the Refugee Convention which is

there set out, which is to say it doesn't turn on whether it's a substantive or a purely procedural obligation, "shall as far as possible facilitate", et cetera. My point is the classic judicial review point that the position of refugees, recognised refugees, was a mandatory relevant consideration for the Minister when certifying this particular instruction, not only the position but specifically their rights under Article 34.

The Court, as I say at para 26, the Court of Appeal implicitly appears to accept that those were mandatory relevant considerations. What they then say is that the Minister can be regarded as having taken them into account, which is one of the points I quarrel with, and this is my argument at page 7, that simply, this is my para 28 – so what happened was, in terms of the way the Court of Appeal reasoned it, they say – well, 57 of the Court of Appeal judgment, they appear to accept my submission, which is undoubtedly correct, that the policy development material provided to the Minister when developing this instruction did not address, this was in 2005, did not address the position of refugees and indeed was focused on the position of those seeking to enter New Zealand rather than those already resident, and this is something that the Crown's submissions themselves accept at para 11 where they say about the development of this particular challenged instruction in 2005, its "purpose was to limit the risk of individuals gaining entry to New Zealand who are or have been associated", et cetera. So that's the focus on gaining entry and that policy development material at no time considered critically for present purposes the situation of recognised refugees who would already be here, but the policy, as we can see from this case, definitely applies to them.

So the question is therefore whether in this case the Minister failed to take into account those relevant considerations, and here's the point. It definitely wasn't taken into account at the time on the basis of either the policy development material put before the Minister or any reasoning or affidavit of the Minister. What the Crown says and what the Court of Appeal accepts, and this is really from para 61 of the Court of Appeal judgment on, nothing specific in the briefing papers but a witness says that the certifying Minister

had previously been an associate member and would necessarily have been aware of issues regarding asylum seekers and refugees.

And then 62, other material the year before plus the fact that the instructions overall have dedicated provisions dealing with refugees. So the reasoning in 63: "Thirdly, when certifying A5.30 the Minister must be taken to have appreciated…" Now the issue here, and it's also an issue of general or public important, is is that enough? Now on page 7 in footnote 17 I cite Justice Gwyn's decision in *Zhang v Minister of Immigration* [2020] NZHC 568 to contrary effect, and I've also come up with two other authorities which are at 5 and 6 of my bundle, *Yuen Kwok-Fung v Superintendent of Auckland Central Remand Prison* [2002] NZAR 49 (HC) but getting the pronunciation, is a decision of Justice O'Regan when in the High Court, and I want to refer your Honours – I won't take you to the paragraphs – but if you look at –

GLAZEBROOK J:
Can I just take you back? Because I just want to check the argument here. The Refugee Convention – well, actually let's leave that aside – arguably the Refugee Convention doesn't force you to provide residence to people, it however says you just, the main obligation is that you can't send someone back to persecution, and there's arguments about how far, further it goes. But if somebody is of bad character but nevertheless a refugee and the exclusions from refugee status are relatively stringent, so probably a couple of convictions wouldn't necessarily get you into those exclusions, you would still be a refugee, because, naturally because of the non-refoulement they have to be relatively stringent because otherwise you're sending someone back to persecution. So the argument can't be that you can't have a character requirement for refugees for residence, can it, it can't go that far?

MR HARRISON QC:
No, no, and it doesn't.

GLAZEBROOK J:

So it's really very much the same argument as the one before, that the very thing that has actually been looked at in the refugee status decision, ie non-involvement, is being used, is being deemed contrary to fact to stop residence.

MR HARRISON QC:

Well, if the latter argument you've just articulated, your Honour, is true, it applies a fortiori to refugees. But equally, even if it's not true, my point is that refugees are in a special position under international law, and for them to remain, as the expression has been used in my client "in immigration limbo" for decades at a time, year to year a temporary visa –

GLAZEBROOK J:

So there should be exemptions for refugees or there – because should they be subject to the character requirements is the question, and are you saying they shouldn't be subject to them, that there should be exemptions for them? What is the argument of…

MR HARRISON QC:

Well, the argument in a nutshell, we're not actually designing what should apply, we're complaining that their position was not taken into account as a relevant consideration. So in a sense I don't have to answer that question, but –

GLAZEBROOK J:

Well, you have to really say why it's a relevant consideration, I would have thought, and then what would actually…

MR HARRISON QC:

Fair – point taken.

GLAZEBROOK J:

So when it is a relevant consideration how is it going to be taken into account. We're obviously not designing the system…

MR HARRISON QC:

Yes.

GLAZEBROOK J:

But there has to be something in principle that would then occur.

MR HARRISON QC:

Well, then, all of the other character requirements, other than the challenged instruction, do and should apply to a recognised refugee who applies for residence. So he or she can be knocked out on all those other character grounds, no problem. I'd even go so far as to say if the challenged instruction was redesigned along the lines of A5.25 I took your Honours through, I'd have a much more difficult argument.

WINKELMANN CJ:

Well, this is the point I want to take – well, two things, Mr Harrison. So this argument must also feed into your earlier argument about this being an unreasonably policy. It's not just the Minister certifying it, you would also say that its impact on refugees adds to its unreasonableness and unfairness?

MR HARRISON QC:

Yes.

WINKELMANN CJ:

All right, and the second point is is it not possible to read this policy in a way which avoids this irrationality, unfairness and failure to take into account the Refuge Convention by giving it an appropriate interpretation which allows the words "remote" – I mean, isn't such an interpretation in fact obliged by the official's remote and – what is it? The words, where are they?

MR HARRISON QC:

"Minimal or remote".

WINKELMANN CJ:

"Minimal and remote", which would say that someone who wasn't involved in the offending conduct, their involvement was in fact minimal or – so you could give it an interpretation which is compliant. In fact, you might say you have to interpret it in light of New Zealand's international obligations.

MR HARRISON QC:

Well, with respect, that's a matter for a substantive appeal but equally in this case my client and I have been battling, knocking our heads against the interpretation of this particular instruction for a long time. Many moons ago Justice Simon France declined to interpret this provision in a way that was consistent with the applicant's status as a refugee and the fact that he passed through the Article 1F gate in – sorry, I just want to look for it. I know I've taken more time.

If we look at what the Court of Appeal said about the very words your Honour has put to me at paragraph 42 on of the Court of Appeal decision, I argued that the words of 30(b) are too vague and uncertain. The Judge, Justice Davison, had interpreted those words as set out at 43 and the Court of Appeal at 44 said: "We do not agree with that reasoning." The words of (b), we're talking about (b), "do not connote any particular degree of involvement, whether substantial or minor (other than…*de minimis*); degree is left to the discretion under A5.30.1(b)." So you're caught by the "deeming" regardless of degree and then you've got to haul yourself out of that.

WINKELMANN CJ:

Does your appeal put it at issue, the meaning of those words?

MR HARRISON QC:

Well, the interpretation of the provision overall is going to feature in an appeal if leave is granted, that's for sure, but it's a bit difficult to argue it all out in what is now much more than half an hour.

WINKELMANN CJ:

Yes, minus 10 minutes.

MR HARRISON QC:

Yes. So I think I wanted to go back to this. Yes, I was just going to give the page references for *Yuen Kwok-Fung*, sorry, the paragraph references of Justice O'Regan's judgment if your Honours want to note them, in particular 33, 42, 45, 47 and 49.

WILLIAMS J:

You'll have to give me those again, thanks.

MR HARRISON QC:

33, 42, 45, 47, 49, and his Honour was quite robust. He, with respect, the briefing paper to the Minister actually addressed the issue which the Minister was said not to have taken into consideration and even though it was in the briefing paper his Honour was driven to conclude the Minister hadn't taken it into account. Here it was not even in the briefing paper, so how can you possibly infer, as the Court of Appeal did and as Justice Davison did, that it was taken into account?

So that's my submission, and my apologies for taking the extra time, but unless your Honours have anything else, that's it.

WINKELMANN CJ:

Thank you. Mr Kirkness.

MR KIRKNESS:

Thank you, Ma'am. The Court has my written submissions and I don't propose to go through those unless there are specific points that the Court wishes to discuss. I do have one or two comments that I would make in response to what we've just hear from my learned friend, but equally I'm very happy to be interrupted and simply answer questions that may have arisen for the Court. So I will make those points, unless there are already issues that I should be addressing you on more directly rather than going down my own list.

So just a quick point on exclusion and the Refugee Convention, more by way of a preliminary point than anything. It's useful just to turn up the language itself of the exclusion provision in Article 1F, in my submission, because what it shows you is that the exercise in the inquiry there is quite different to the one that is being undertaken in the policy that we're looking at, and there – it's at schedule 1 to the Immigration Act – and Article 1F there says that: "The provisions of this convention shall not apply to any person with respect to whom there are serious reasons for considering," and then it gives the list (a) to (c) of the instances, and those are acts of *commission*, so committing a crime against peace or a war crime, a crime against humanity, committing a serious non-political crime, and being guilty of that is "contrary to the purposes and principles of the United Nations", and that relates then to a consideration of whether a person has under international law the *status* of a refugee. So, in other words, although normally a person may have the status of a refugee because they could, for instance, satisfy the inclusion grounds, what this says is that the community of nations, the states parties to this Convention, do not accept, even where someone would otherwise satisfy what is necessary to be a refugee, that they are going to let such people have the benefits of the Refugee Convention. And that, in my submission, is the point that was made in *AB v Chief Executive of the Department of Labour* [2011] 3 NZLR 60 (HC), which is the decision by his Honour Justice Simon France, back in 2010, I believe, that is quite a different inquiry from the one that is being undertaken when you're looking at the application of the policy in A5.30. That's just a

preliminary point to situate us with the two different inquiries. This doesn't answer whether someone is a good or a bad person.

WINKELMANN CJ:
Which doesn't answer?

MR KIRKNESS:
The Article 1F exclusion. What it tells you is whether or not someone has or is excluded from being a refugee, and the reasons for exclusion tell you that the person, there'd be serious reasons for considering that a person had committed a crime against humanity or a war crime.

GLAZEBROOK J:
It's the difficulty with saying they were good people despite having done that. So it does say quite a lot about character.

MR KIRKNESS:
It says quite a lot, but my point would be – it's not saying the person has good character.

WILLIAMS J:
Not everything.

GLAZEBROOK J:
I think the point you're making was the one I made to Mr Harrison, isn't it, that they actually are very narrow grounds of exclusion and for very serious conduct.

MR KIRKNESS:
Exactly so. The second preliminary point I wanted to just touch on just to clarify the way in which the Crown has been interpreting this instruction, at least in the two rounds that we've had to date. In A5.30 – I'm now in my friend's bundle looking at the, under tab 1, the instruction that he gave you – when we look at (b), which is the one that is in focus, there is there in our

submission a clear implication for character through the factual predicate that's necessary for this to apply. That factual predicate is an association, to use my friend's abbreviation, with a regime or group or agency that has advocated for – and then it lists these: war crimes, crimes against humanity, and other gross human rights abuses. Now –

WINKELMANN CJ:

So do you accept, well, do you say it's not irrational for a test to operate to deem someone to be a bad character whereas in fact they may not be a bad character notwithstanding their membership because there are numerous regimes, numerous organisations, where people may be members but one could not look at their circumstance and say that indicates their bad character?

MR KIRKNESS:

So two points by way of response. The first is all we're saying here is that we consider that it does speak to a person's character that a person has had an association with this type of group or agency.

WINKELMANN CJ:

Who's "we" saying that?

MR KIRKNESS:

The Crown. My apologies. The Crown considers that it does speak to a person's character. So the interpretation –

GLAZEBROOK J:

So if you come from North Korea and you work in the government in North Korea which – then you automatically come within that?

WINKELMANN CJ:

That's the point I'm making.

GLAZEBROOK J:

Or you're a member of – there's recently been war crimes findings in respect of their equivalent of the SAS in Australia. So if you're a member of the SAS you automatically are of bad character, even though you weren't in Afghanistan, weren't anywhere near the war crimes that were committed and they were not committed with any…

WINKELMANN CJ:

State sanction?

WILLIAMS J:

Or you were a typist in Guantanamo Bay.

WINKELMANN CJ:

That's minimal.

MR KIRKNESS:

So if you're a typist in Guantanamo Bay then presumably what would –

WINKELMANN CJ:

We're not letting you off so lightly with a typist.

MR KIRKNESS:

So I'm still on the question from Justice Glazebrook?

WINKELMANN CJ:

Let's just stick with North Korea. So this is the notion that there's rationally no voluntary nature to membership of being a North Korean government employee or whatever.

MR KIRKNESS:

So understood. The second that I had been wanting to make on this I think goes to that which is if we step back and look at the way in which this scheme under the Act has been designed, there are three different levels of decision-making that you can broadly see under the statute. The first is the

immigration officer level which is the person who processes the up-front application and applies the instruction and must apply a residence instruction. The second is on appeal, the Tribunal, the IPT, but there's also in addition to that a further funnelling of potential matters to the Minister him or herself, and so what you have there is within the scheme that's been designed, well, there are two levels you have, what are essentially release pressure release valves if you will. One is within the instruction itself. You have the one we've been talking about which is the minimal or remote standard but the second one is at the end of the process, if you have circumstances, particular to your position that suggest that you should not have the instructions applied to you, then that goes to the Minister, and so when my friend quotes *Zhang* –

GLAZEBROOK J:

Well, I don't think that washes, does it, because the Minister doesn't want to be involved with 5,000 different decisions and doesn't get involved in them and actually quite rightly doesn't get involved with them.

WINKELMANN CJ:

It sounds like you're making a case that this is an unfair policy that the Minister has to be able to fix.

MR KIRKNESS:

No, Ma'am, I'm not trying to make that point. The point I'm making is that this policy takes effect within a broader context and there are different steps within that where there are ways of ensuring that its effect is ameliorated in the event that there is something that's too harsh.

GLAZEBROOK J:

I don't think that's the effect. Well, I don't think the Tribunal sees itself as ameliorating too harsh. It sees itself as applying these instructions because that's what they are under the Act, and interpreting them. It doesn't say: "Well, look, you know, you've got a conviction for murder but actually I think you're quite a nice person so I don't think that should apply to you."

MR KIRKNESS:

No, but what the Tribunal does say is I consider that the decision by the immigration officer was correct. However, there are special circumstances here that justify a recommendation that the Minister consider this as an exception to instructions, and that allows the process to work with the Minister then is required to consider it.

WINKELMANN CJ:

Can you give us the statutory reference for those?

MR KIRKNESS:

It's 187 is the Tribunal's. 190 is the Ministerial. I think it's subsection (5). Let me just bring that up.

GLAZEBROOK J:

So what is it? It's of what, we're talking about?

WILLIAMS J:

Immigration Act.

MR KIRKNESS:

So in the Immigration Act, section 187 is the right of appeal and that includes the grounds. Determination is in 188, and then if you follow through there's also a procedure where the Tribunal makes a recommendation. So that's in 190(5) where the Tribunal makes a recommendation under section 188(1)(f) and –

GLAZEBROOK J:

But surely you're actually looking in those circumstances at things that ought to be an exception in the sense that normally the policy should apply fairly but in certain cases it's recognised that it can't apply fairly? But it can't be just a general ability to say the policy doesn't apply, surely, because the policy should have its exceptions in it itself.

MR KIRKNESS:

Which it does, Ma'am.

GLAZEBROOK J:

And then it's only where you actually land up with something that is so out of the box and so individual that the Minister should be bothering, or be bothered.

MR KIRKNESS:

So as I submitted earlier, there is within the policy an exception that ameliorates the effect of the deeming provision. There is also this broader end position where you can end up with the Minister. So there are two different places.

GLAZEBROOK J:

So what's the one, the trivial or otherwise? Is that your exception out?

MR KIRKNESS:

The minimal or remote. So if you look at the – at the end of it itself and the way that as I understand this works is that should you be caught by (b), under (d) applications to which this policy applies must be determined in accordance with A5.30.1.

GLAZEBROOK J:

Well, he has to be satisfied beyond doubt, which is a very high standard, that it was minimal or remote.

MR KIRKNESS:

Yes, that's the –

GLAZEBROOK J:

Well, if you actually are a member of something it's hard to see how it's remote or minimal. I can see the involvement might be minimal. The association might be minimal.

MR KIRKNESS:

I think what's been looked at is the nature and extent of the association, not the fact of association. The fact of the association is what makes (b) bite in the first instance.

WINKELMANN CJ:

Well, it's not the nature and – is it the nature and extent?

MR KIRKNESS:

That's –

WINKELMANN CJ:

Well, nature and extent but only to do with the association with the body, not to do with involvement in war crimes, et cetera.

MR KIRKNESS:

Well, the body would have to have been established as one that had committed those acts. This is a broader –

WINKELMANN CJ:

We know that.

GLAZEBROOK J:

Well, like the SAS in Australia has committed so we understand such acts of war crime and so have the US Army at various stages, if you're looking at some of the thing in Vietnam.

MR KIRKNESS:

So there could be any number of organisations that would be caught by (b).

GLAZEBROOK J:

Well, isn't that Mr Harrison's point?

WINKELMANN CJ:

But this is too narrow an escape valve is Mr Harrison's point. The escape valve isn't well directed to what it's purporting to regulate and it's too narrow, so it's just essentially arbitrary as to its application, unfair, irrational.

MR KIRKNESS:

So we would say it falls well short of – the Crown would say that falls well short of that characterisation and part of that would be the point that your Honour made earlier about the way in which this policy, as with anything else, would need to be interpreted consistently with the Crown's international obligations, for instance. That's not something that we would contest. But there's nothing arbitrary about a policy or unreasonable, in my submission, where what you had was a real policy concern that arose as a result of some individuals coming into this country where it was, and this is what the policy documents show you is that these were individuals were linked to the Saddam Hussein regime. The concern that the New Zealand officials had as a result of that was that there was no way to have that caught within the current character requirements and so this policy was formulated or this requirement was formulated to add to the existing coverage of the instructions and it was intended, for the practical reasons that his Honour, Justice Williams, mentioned, presumably to cover broadly because of the difficulties with establishing the factual position, people that had this association but also to allow someone to be – an ameliorating effect where if someone was a tea-person or simply at a concentration camp and sweeping the hallways, that would be where the minimal remote issue would –

GLAZEBROOK J:

How do you prove beyond doubt something like that?

MR KIRKNESS:

Well, in this context it would be that an immigration officer had to be satisfied in an evaluative sense beyond doubt and in my submission that would mean had to be sure.

WILLIAMS J:
Yes, well, how could you be?

GLAZEBROOK J:
It's just a very high standard.

WILLIAMS J:
It's impossible.

MR KIRKNESS:
Sure, on the evidence before him or her.

WILLIAMS J:
I have to say it reads to me like this has been an over-correction to a seasonal event. The idea seems sound but the words seem to have over-corrected a little, don't you think, and that's tying the agency in knots it needn't be tied into or up in, particularly given this situation where this guy has been through a filter. He's here and he's been through the refugee filter and these instructions don't appear to take that circumstance into account, either on their words or in respect of the particular decision that was being made.

MR KIRKNESS:
The instruction applies generally.

WILLIAMS J:
Of course.

MR KIRKNESS:
So refugees would also be caught by the instruction once they have gone through, as the refugee instructions specifically provide. They send a refugee to the character requirements.

WILLIAMS J:

Yes, Mr Harrison said this was really designed for people outside trying to get in, hadn't really thought of a situation where you had people inside trying to get regularised status.

MR KIRKNESS:

Given that it relates to residence I suspect it was in the contemplation there were people within jurisdiction seeking to become residents. So I think that probably may have been the early policy documents and it evolved from there, but clearly because of the way it was then implemented, both at the entry level a few instructions later but also here at the residence level, I think it was intended to cover that situation.

To your Honour's point, the section 22 power is, as the Chief Justice said, a very broad one. In my submission there's no reason to read this instruction as falling outside of the scope of that particular power. As the Court of Appeal has already done, maybe you need to indicate where the lawful parameters of the application of this instruction are, and that was done by the Court of Appeal to clarify the issue of remoteness because of a concern about the wording here suggesting the possibility of remoteness freezing a person in time. Now the Court of Appeal looked at the decisions that had been made, the way this had been applied, and said that clearly it isn't being applied that way and to clarify this what we need to do is make clear that it is/was minimal or is remote so that remoteness is assessed as at the point in time the decision-maker is considering it and a person isn't caught by the fact that – well, the remoteness assessment is not taking place as if remoteness is in 1970, for example. So that is an attempt by the Court of Appeal to indicate to officials where the lawful parameters of this instruction are, but whether it comes within the power to make such an instruction in section 22, in my submission it falls within that. It's not ultra vires, that power.

WINKELMANN CJ:

Okay, well, there's ultra vires but Mr Harrison also raises irrationality, arbitrariness and unfairness. I think arbitrariness is –

GLAZEBROOK J:

Systemic unfairness.

WINKELMANN CJ:

Systemic unfairness, and I think we've covered that in our discussion with you but one thing we haven't covered is the Court of Appeal as – Mr Harrison has given a reasonably plausible account that the Court of Appeal perhaps has been a bit easy on the Minister in relation to just assuming that the Minister has considered this issue when there really is nothing to indicate that the Minister has, and I have in my mind that there is public law authority to the effect that where it's a very significant obligation, international obligation in play, the Courts require some evidence that it has been taken into account. They've just assumed it and, in fact, assumed it in the face of a policy which doesn't seem, on its face, to be – it gives no ground.

MR KIRKNESS:

So I apprehend there are a couple of points to address there. One is the Court of Appeal's approach which assumes a level of knowledge on the Minister's part and…

WINKELMANN CJ:

And consideration.

MR KIRKNESS:

And consideration, and that, in the Crown's submission, is a justifiable position to take, particularly in light of the authority of *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA). The Minister, because of the nature of the decision-making, it is completely legitimate to assume that the Minister has had access to and the benefit of the knowledge of his or her Department and that can be –

WINKELMANN CJ:

Well, evidence from the briefing suggests that the Department didn't have it in their minds.

MR KIRKNESS:

So the Crown's point has always been that it must have been in the minds of both the Minister and the officials because this is an instruction that is part of a broader document and –

WINKELMANN CJ:

That might mean that it was in their minds generally but not when they turned their minds to this policy.

MR KIRKNESS:

So in our submission it is a reasonable interference that we already have specific instructions dealing precisely with the position of refugees and those instructions do in fact satisfy New Zealand's international obligations under Article 34 of the Refugee Convention. It is a reasonable inference in those circumstances that the Minister and the officials who clearly would have been aware of New Zealand's obligations, clearly would have been aware of the content of the very operation manual that they were amending –

GLAZEBROOK J:

Well, what does the operation manual do? Doesn't the operation manual just deal with – I'm sorry, I didn't go and look at it but I thought that section just deals with our obligations under the Convention. It doesn't deal with residence.

MR KIRKNESS:

The section relating to refugees? So the section relating to refugees, Ma'am, indicates that a refugee is entitled to seek residence but says that that entitlement is subject to the character requirements that are in A5 which is the section broadly that includes this particular instruction.

GLAZEBROOK J:

Well, which is obviously the case.

MR KIRKNESS:

So the entitlement –

GLAZEBROOK J:

Although – and I think Mr – because I was trying to understand from Mr Harrison where he said there should be another view of that in terms of character requirements but I don't think he's saying that. He's saying that there certainly shouldn't be something that deems you not to have character in a way that's already been decided you do, ie, that you're not excluded.

MR KIRKNESS:

That's as I understood the point. In fact, I understood my learned friend to go a bit further than that and say that he accepts that all of the different character requirements are fine except for –

GLAZEBROOK J:

Yes, he did say that when I asked him, yes.

MR KIRKNESS:

– except for the one that he says catches his client.

GLAZEBROOK J:

That effectively go against what's already been decided in terms of the Refugee Convention, as I understand the argument.

MR KIRKNESS:

So I think the submission we make, and this also goes to whether this is an issue of general public importance, is that New Zealand's obligations under the Refugee Convention here are satisfied and clearly satisfied by the instructions, the –

WINKELMANN CJ:

But they don't override this, so how can –

MR KIRKNESS:

They don't need to in the sense that the instructions allow a person who is a refugee to access and apply for residence which is what New Zealand has an obligation to do under Article 34. We cited for the interpretation of that Article in our leave submissions Professor Hathaway, who I am sure this Court will be familiar with. His explanation of the scope of Article 34 is one that we respectfully adopt and that indicates that by putting in place a system whereby a refugee is able to seek residence New Zealand discharges its obligation under Article 34 of the Refugee Convention.

WINKELMANN CJ:

Isn't there some suggestion though that their obligation extends to having to ensure that there aren't kind of catch-22 situations that refugees can be trapped in?

MR KIRKNESS:

So I'm not sure but just operating at the level of the hypothetical, Ma'am, I think if you did have a situation where a refugee was clearly caught in a catch-22…

GLAZEBROOK J:

But isn't the argument is that this person is in this situation, as I understand it?

MR KIRKNESS:

There's a tension there that I think the Chief Justice alluded to earlier between the challenge to the instruction and a concern around the decision-making in respect of my learned friend's client and the challenge here is to the instruction. I'm not sure that the instruction necessarily should be invalidated because of an impact on one individual.

GLAZEBROOK J:

Well, I would agree with that, of course, but I think the argument is that the instruction is so broad that a great number of refugees are going to be caught in this situation because you only have to have had a membership of a

government and, of course, many refugees did have membership of a government in this sense or in association with a government that had a lot to be desired. That's the reason they're refugees in the first place.

MR KIRKNESS:

It goes a bit further, Ma'am, in my submission, than "a lot to be desired". I mean "a lot to be desired" might be a fair characterisation of A5.25 but as the Court of Appeal said, these are much more serious concerns. War crimes, crimes against humanity, gross human rights violations. That is the reason for the distinction, at least according to the Court of Appeal, between A5.25 and A5.30. The other point to simply note is that A5.25 isn't directed at regimes or governments which are included in A5.30. But these are very, very serious.

GLAZEBROOK J:

But they're the very ones that are actually dealt with as exclusions under the Refugee Convention I think is Mr Harrison's point. So the very things that are dealt with here have already been excluded in the refugee determination in the first place in terms of direct involvement with those acts.

MR KIRKNESS:

And nothing here is cutting across an individual's status as a refugee.

WILLIAMS J:

A catch-22 is they can't improve their position in circumstances where but for the deeming provision they could have, because of the deeming provision and for no other reason it appears, given the facts as we know them.

MR KIRKNESS:

So, thank you, Sir, I think that's –

WINKELMANN CJ:

Well, the catch-22 is actually that he's got refugee status because he was a member of that organisation and he can't go back because it's an organisation in a state which condones breach of human rights, and he can't get residence

because he was a member of that organisation. So he's rendered stateless – well, not stateless, he's rendered – well, he is rendered stateless as far as – yes.

MR KIRKNESS:

So in response to both points because I think they relate to the same issue, I don't think this is a catch-22 at all. I think he has had two applications for residence declined on the basis of this instruction. The Court of Appeal, at least as I read it, gave a fairly clear indication that there may well come a time that remoteness is not something that he fails to satisfy and that was in –

GLAZEBROOK J:

So **[redacted]** years doesn't cut it?

MR KIRKNESS:

Well, a large period of that time he was in New Zealand not telling anyone that he was unlawfully here, having not told the Refugee Status Appeals Authority in his first application that he was a member of **[redacted]**. So **[redacted]** years is a generous reading of how we should take into account –

WILLIAMS J:

Well, **[redacted]** years then.

MR KIRKNESS:

[redacted] years and so –

WINKELMANN CJ:

You're starting to make a case that we're not really talking about catch-22 but we're talking about Kafka the trial.

MR KIRKNESS:

I assume –

MR HARRISON QC:

Groundhog Day.

WINKELMANN CJ:

Yes, Groundhog Day.

MR KIRKNESS:

I certainly wouldn't adopt either of those characterisations but I think it is relevant that this is not something that an individual is – it is not fair to characterise this as immigration limbo. Mr H, for example, if we use him as an example, and he would just be an example because we are talking about the instruction overall, Mr H could apply in three years' time for residence and at that point in time it might be determined that he, his relationship, his connection with **[redacted]** is sufficiently remote. Whether or not this Court thinks that the immigration officer was correct to find that **[redacted]** years, for example, was or was not too remote, I'm not sure that's –

WINKELMANN CJ:

Could I just stop you there? What interest is being protected by this?

MR KIRKNESS:

Sorry, just to be clear –

WILLIAMS J:

New Zealand's character as it turns out.

WINKELMANN CJ:

What interest is being protected by it because as a matter of fact he is not involved in any breaches of human rights, war crimes, et cetera, so what interest is being protected by making him spend this period of time? What interest?

MR KIRKNESS:

The interest that appears to be protected, well, the element of the national interest that appears to be protected here is New Zealand's international reputation.

WINKELMANN CJ:

But how can that be in play when he's not – if anyone should take it amiss, it can be – government can point to the fact that he was not personally involved.

GLAZEBROOK J:

And also how does New Zealand's international interest relate to his character?

MR KIRKNESS:

The fact that you, if I can just take those in turn, the fact that you do not yourself commit a war crime or crime against humanity hardly is exculpatory in terms of character. It's a broader assessment when you're looking at character. The fact that he was involved with this organisation for a very long period of time and rose to a management level does suggest some level of adoption or affiliation with the views and activities of this organisation which were not secret, and never have been. I accept the position around compulsion but there would need to be evidence of that. I'm not aware of any.

WINKELMANN CJ:

But this policy wouldn't allow for it.

MR KIRKNESS:

Again I think the policy is one part of a process which always allows for a special circumstance to be taken into account by the Minister, and that is precisely where we see the High Court judicial review decisions taking effect, which is in *Zhang*, and *Matua v Minister of Immigration* [2018] NZHC 2078, what was – the subject of those judicial review proceedings was the exercise by the Minister of the discretion. So in my submission the individuality or the particular peculiarity that may arise for an individual would be something that would most naturally be taken into account there if the "minimal" and "remote" wording had not already allowed the position to be addressed.

WILLIAMS J:

Or we could just get the wording right.

MR KIRKNESS:

I'm not sure it's this Court's job to get the wording right, Sir. I think it's the Crown's job –

WILLIAMS J:

I agree but –

MR KIRKNESS:

– within the parameters of what's lawful.

WILLIAMS J:

– the more exceptional cases are generated, and this appears to be a category rather than an individual exception, the more of those that are generated the more problematic the instruction is, and your answer is, well, come back in three years and you might be remote enough. But what's your measure for "remote"? How do you know whether you're remote enough?

MR KIRKNESS:

No, Sir, the –

WILLIAMS J:

That's Kafkaesque, I would have thought.

MR KIRKNESS:

So the answer that I give is not simply that anyone has to come back. The position I was repeating was the Court of Appeal's indication that in its view that was an available outcome here in the future but not one that was –

WILLIAMS J:

I know but how does this person know when to apply? There doesn't seem to be any guidance even – what does "remote" even mean in this circumstance? How many years does it have to take? There's no guidance in the instruction on these things yet it's for him apparently a critical entrance requirement.

MR KIRKNESS:

So I'm not sure that remoteness would be – so I think the inquiry that is likely to turn on the particular facts before the decision-maker, I think it would be difficult to have a clear line period of years.

WILLIAMS J:

I agree, but some guidance on what "remote" is meant to mean in this circumstance and why **[redacted]** years is not enough but **[redacted]** years might be? How would his lawyer advise him?

MR KIRKNESS:

So to be clear I don't think it is beyond the ability of this Court to give an indication as to what is required in order for an instruction like this to take effect properly and lawfully –

WINKELMANN CJ:

We'd have to give leave to do that.

MR KIRKNESS:

Well, I'm not sure that's right, Ma'am. I think there is the ability if there is a serious concern, but this isn't the right case to give leave, to indicate that concern.

WILLIAMS J:

The point is how would we know? You see, it's the problem. There's something inherently subjective about that particular word and the lack of sophistication in the instruction, I would have thought, that could be fixed, and more usefully for everybody in this process. That's my reflection on this.

MR KIRKNESS:

I'm not sure that it's –

WINKELMANN CJ:

That's probably just a reflection –

WILLIAMS J:

Yes.

WINKELMANN CJ:

– unless you have anything to… and so, Mr Kirkness, we've probably heard you on all the points, have we?

MR KIRKNESS:

I think so, Ma'am.

WINKELMANN CJ:

That was what we'd say, more of an observation than a question here. Okay, so thank you very much, Mr Kirkness. Mr Harrison, do you have anything by way of reply?

MR HARRISON QC:

Very briefly. Your Honour's question to my learned friend, what interest is being protected, of course, is the nub here. The answer in terms of the challenged instruction is A5.30(a) which I read as meaning that the grant of residence to the applicant would pose a risk to New Zealand's international reputation rather than the applicant, if granted, would himself pose that risk.

GLAZEBROOK J:

That's how I've read it too.

MR HARRISON QC:

So particularly with a recognised refugee, and this ties into the debate about the special position of refugees, ex hypothesi what we actually have is a decision to grant refugee status which suppresses detail and name and the idea that granting a recognised refugee residence would somehow pose a risk to New Zealand's international reputation when it's entirely consistent with the

Refugee Convention and the details wouldn't get out anyway. It seems to me to be very-fetched, with respect. So that's one point.

Obviously, we're dealing with this only at a leave standard and I submit that we have ended up where all grounds are arguable that I have advanced, with respect. Whether or not they succeed is another thing but they should be given the chance and quite plainly, given what is being challenged here, we have an issue of public or general importance. Those are my submissions.

WINKELMANN CJ:

Thank you, Mr Harrison. Thank you, counsel. Your submissions are very helpful for us and we'll take some time to consider the issue of leave and let you have our decision in due course.

COURT ADJOURNS: 11.19 AM