

From *Zaoui* to Today: a Review of Recent Developments in New Zealand's Refugee and Protected Persons Law

By Justice Susan Glazebrook¹

I thought I would start this talk with the aftermath of the case of *Attorney-General v Zaoui* (*Zaoui*),² which I talked about when I last joined you in 2010. Mr Zaoui's case is an apt starting point because it was one of the catalysts for the new classified information scheme that was alluded to by Professor Saul³ in his talk.

Mr Zaoui was a professor at the University of Algiers who had stood for Parliament for the Islamic Salvation Front in Algeria in 1991. The elections were cancelled and he was forced to flee the country. After a spell in a number of countries, including Burkina Faso,⁴ he arrived in New Zealand at the end of 2002.⁵ He was put in prison as a security risk and, initially at least, in solitary confinement. Mr Zaoui was originally denied refugee status but this status was later granted on appeal. A security risk certificate⁶ was then issued, which

¹ Judge of the Supreme Court of New Zealand. Paper prepared for the International Association of Refugee Law Judges Regional Conference on 23 March 2013 in Sydney. I am grateful to my clerk, Claire Brighton, for her invaluable assistance with this paper. In particular, she is responsible for the statistics in this paper.

² *Attorney-General v Zaoui* (No 2) [2005] NZSC 38, [2006] 1 NZLR 289 [*Zaoui* (SC)].

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⁴ While still under home detention in Belgium where he had been convicted of offences associated with participation in a criminal or terrorist organisation, Mr Zaoui travelled to Switzerland to apply for asylum there. Switzerland dismissed his application, amongst other reasons because of his ongoing political activities and deported him and his family to Burkina Faso. During his time in Burkina Faso, Mr Zaoui learnt that a total of six life sentences had been entered against him *in absentia* in Algeria since his departure: *Refugee Appeal No 74540*, Refugee Status Appeals Authority, 1 August 2003 at [3]–[4].

⁵ Some difficulty arose in relation to comments made by Mr Zaoui at the border. It was alleged that he had confessed to a customs officer on arrival that he was a member of the Groupe Islamique Armé, a terrorist group originating from Algeria. The Refugee Status Appeals Authority (Authority) assessed the evidence of the officers involved and that given by Mr Zaoui and concluded that there had been no admission, Mr Zaoui had been misheard: *Refugee Appeal No 74540*, above n 4, at [947]–[953].

⁶ Under the Immigration Act 1987 (repealed), s 114D. Subject to appeal and discretion on the part of the Minister of Immigration (Minister), the issuing of a certificate by the Director of Security would result in that person being removed or deported from New Zealand: ss 72 and 114K. The grounds for issuing a certificate included where there is evidence that: an individual has engaged in, claimed responsibility for, or likely to engage in, terrorist activity; an individual is a member of or adheres to any organisation or

could have led to his removal from New Zealand. Thus began a long and tortuous passage through the courts.⁷ Eventually in September 2007, some four years after his arrival in New Zealand⁸ and following a change of director of the Security Intelligence Service, the security risk certificate was removed under a compromise deal.⁹ Mr Zaoui did not stay in prison for the whole time that his case was before the courts, however, as he was granted bail directly by the Supreme Court.¹⁰

The human interest aftermath to that story is that, soon after the compromise deal, Mr Zaoui was joined in New Zealand by his wife and four sons. The family first moved to Palmerston

group of people that has engaged in, or has claimed responsibility for, an act of terrorism; an individual is likely to constitute a danger to the security or public order of New Zealand: Immigration Act 1987, s 7(1)(e), (f), (g)(i), and (h). A person who was issued with a security risk certificate had a right to appeal against the issue of the certificate to the Inspector-General: s 114H. An appellant was not, however, permitted access to the classified security information that formed the evidential basis of the certificate issued against him or her: s 114H(2)(b).

⁷ In late 2003, the High Court allowed Mr Zaoui's application for judicial review of the Inspector-General's decision. The High Court held that the Inspector-General was required to have regard to international human rights instruments and jurisprudence in making his decision. Importantly, the Court further held that Mr Zaoui, and others in his situation, were entitled to a summary of the allegations that formed the basis of the conclusion that they posed a security risk: *Zaoui v Attorney General* [2004] 2 NZLR 339 (HC) [*Zaoui* (HC)]. On appeal, the Court of Appeal held that the criteria for issuing a certificate will only be met where there are objectively reasonable grounds based on credible evidence that a person constitutes a danger to New Zealand of such seriousness that it justifies sending that person back to persecution. There must be real connection between the person and prospective current danger and appreciable alleviation of that danger achievable through their deportation: *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 (CA). On appeal, the Supreme Court slightly varied the test set out by the Court of Appeal. It held that a person must be considered to pose a serious threat to security of New Zealand, that the threat must be based on objectively reasonable grounds, and that the threatened harm must be substantial. The Court made it clear that, in deciding whether to uphold a certificate, the Inspector-General was not to determine whether such a person was also subject to a threat which might prevent their removal from New Zealand. It was for the Minister and the Executive Council to make such an assessment. Here Mr Zaoui could not be deported if it would result in his being in danger of being arbitrarily deprived of life or of being subjected to torture or cruel, inhuman or degrading treatment or punishment: *Zaoui* (SC), above n 2. In addition to the review proceedings relating to the security certificate, Mr Zaoui brought judicial review proceedings in relation to the Inspector-General's decision not to recuse himself from Mr Zaoui's case. The Inspector-General had made a number of comments in media interviews that Mr Zaoui argued demonstrated bias. The High Court agreed, and held on 31 March 2004, that there was evidence of apparent bias on the part of the Inspector-General and that, accordingly, he should have stood down: *Zaoui v Greig* HC Auckland CIV-2004-404-317, 31 March 2004. The Inspector-General immediately resigned and was replaced by another retired judge of the High Court.

⁸ In June 2006, after the Supreme Court decision, the review of Mr Zaoui's security certificate was delayed to allow counsel time to prepare. The review did not formally begin until July 2007. Two months later the certificate was revoked.

⁹ New Zealand Security Intelligence Service "Statement By Director of Security Concerning Mr Ahmed Zaoui" (press release, 13 September 2007).

¹⁰ *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC).

North where he opened a Middle Eastern food caravan. They now operate a restaurant in a food court in Auckland.¹¹

Part of the legislative aftermath of Mr Zaoui's case was the codification of how classified information is to be handled in immigration and refugee cases. In brief, classified information can be used in any decision-making situation that concerns either security or criminal conduct.¹² The person involved is entitled to be given a summary of the relevant classified information, to the extent this does not compromise security or the sources.¹³ The limitations on what can be contained in such a summary have given rise to concerns that the process may be in breach of natural justice.¹⁴ This, it has been argued, is especially concerning in refugee and protected person status claims.¹⁵

A person who is subject to a decision involving classified information is also entitled to representation by a special advocate who has access to the classified information.¹⁶ Once an advocate has seen the information, however, he or she is only permitted to communicate with his or her client in writing through the court or through the new Immigration and Protection Tribunal (The Tribunal). The Tribunal was set up under the Immigration Act 2009 (I will speak a bit more about the Tribunal later). Again, the advocate's communication with his or her client will only be permitted if it does not prejudice the interests that led to its classification in the first place.¹⁷ These restrictions place obvious limits on the role of the advocate as he or she is unable to take instructions specific to the information and has no

¹¹ "Zaoui to launch fast food caravan in Palmerston North" *The Otago Daily Times* (online ed, 4 May 2010); and Amy Maas "Jailed Refugee Now on the Grill" (5 April 2012) <www.stuff.co.nz>.

¹² Immigration Act 2009, s 33. The Immigration Bill 2007, cl 30, also included decisions regarding matters that "may have a significant impact on New Zealand's international reputation". This was removed before enactment.

¹³ Immigration Act 2009, s 38. This right was first upheld by the High Court in *Zaoui* (HC), above n 7, at [105]–[106]. Mr Zaoui's later appeals to the Court of Appeal and Supreme Court did not relate to this point.

¹⁴ Douglas Tennent *Immigration and Refugee Law* (LexisNexisNZ Ltd, Wellington, 2010) at 303; and Human Rights Commission "Submission to the Transport and Industrial Relations Committee on the Immigration Bill 2007" at [8.1]–[8.3].

¹⁵ Human Right Commission, above n 14, at [8.3]; and Office of the United Nations High Commissioner for Refugees "Review of New Zealand's Immigration Act 1987: Submission on the Review of New Zealand's Immigration Act 1987" (July 2006) at [21].

¹⁶ Immigration Act 2009, s 263.

¹⁷ Immigration Act 2009, s 267.

independent means of checking its accuracy.

The Tribunal has a role in reviewing the classified information and deciding whether it is correctly classified and also whether the summary provided to the person involved is accurate. This is by means of a separate closed hearing.¹⁸ There has been an attempt in the legislation to limit appeal rights in relation to these classified information matters.¹⁹ The idea has been to try and facilitate quick decision-making and avoid the long delays that occurred in Mr Zaoui's case.²⁰ I am not aware of any case since *Zaoui* where classified information has been at issue.

The classified information sections are not the only provisions in the Immigration Act 2009 that are relevant to the *Zaoui* case.²¹ One of the grounds on which the Director of Security had issued Mr Zaoui's security certificate was the Belgian courts' repeated decisions to decline refugee status to Mr Zaoui.²² There has been some uncertainty at the international level regarding whether a state is obliged under the United Nations Convention Relating to the Status of Refugees 1951 (Refugee Convention) to grant refugee status to a person who has had the opportunity to apply for refugee status in another country.²³ The 2009 Act,

¹⁸ Immigration Act 2009, ss 241–243. Following this initial hearing, hearings will be partly open and partly closed. When classified information is being presented, the individual concerned is not permitted to attend, though their special advocate will attend on their behalf. They can attend only those parts of the proceeding where classified evidence is not being presented: s 244.

¹⁹ Immigration Act 2009, s 262 states that no appeal or review proceedings may be brought in respect of the use of classified information except as provided in the Act. Further, no appeal to the High Court or review proceeding can be brought in relation to any proceeding involving classified information until the Immigration and Protection Tribunal (Tribunal) has issued its final determination on the matter.

²⁰ The aim of streamlining the appeals process was identified by the then Minister of Immigration, Hon David Cunliffe, in the first reading of the Immigration Bill: (16 August 2007) 641 NZPD 11231. However, in the main, the comments made regarding the need to avoid appeal delays by Mr Cunliffe and others during the debates were focused on preventing persons who ought rightly to be deported from delaying this through unmeritorious appeals.

²¹ Other changes relevant to refugee and protected person claimants that were brought in by the Immigration Act 2009 include the creation of the new protected person status: ss 130 and 131 (see discussion below); changes to how bad faith on the part of the claimant or third parties affects the determination of refugee status: s 134(1), (3) and (4); and the removal of the right to appeal to the Immigration and Protection Tribunal a decision made by an officer that a subsequent claim for refugee status is to be refused on the basis that it is “manifestly unfounded or clearly abusive” or “repeats a previous claim”: ss 195(1)(b) and 140(3)(a) and (b).

²² The grounds are reproduced in the High Court's decision: *Zaoui* (HC), above n 7, at [38].

²³ James C Hathaway *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge, 2005) at 293–296 and 322–335; and Guy S Goodwin-Gill and Jane McAdam *The Refugee in International Law* (3rd ed Oxford University Press, New York, 2007) at 151.

however, now expressly states that a refugee and protection officer may decline to accept a claim for refugee status where, in light of any international arrangement or agreement, the claimant may have lodged, or had the opportunity to lodge, a claim for refugee status or protection in another country.²⁴

I said that I would come back to the new Tribunal. Well, not so new now as it has been operating for over two years. The Tribunal was set up under the 2009 Act as a super tribunal to replace the four previous bodies.²⁵ It deals with all immigration, refugee and the new protected person matters.²⁶ This latter class refers to persons who would otherwise not qualify for entry into New Zealand under any established head but who would face torture or cruel or inhuman treatment if returned to their countries of origin.²⁷

The super tribunal idea was quite controversial, in particular in relation to refugee determinations where there was concern that the tribunal amalgamation would result in the loss of specialist expertise and country research capacity in the refugee area.²⁸ My

²⁴ Immigration Act 2009, s 134(2).

²⁵ These were: the Removal Review Authority, which dealt with appeals from removal decisions; the Deportation Review Tribunal, which dealt with appeals from deportation orders; the Refugee Status Appeals Authority, which dealt with appeals regarding refugee status; and the Residence Review Board, which dealt with residence based appeals.

²⁶ The new Tribunal's procedures are aimed at streamlining the appeal process. There are more stringent time limits, certain appeals can be heard together and, in some circumstances, appeals can be decided on the papers.

²⁷ Under the previous Immigration Act 1987, individuals could only claim protection under the Convention Relating to the Status of Refugees 1951 (Refugee Convention). The Immigration Act 2009 now requires protection officers determining applications to recognise persons who qualify as "protected persons" under either the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) or International Covenant of Political and Civil Rights (ICCPR). The availability of protected person status will be relevant where persons are unable to obtain refugee status. This may arise where an applicant faces serious persecution on a ground that is not listed in the Refugee Convention (for example, see *AC (Russia)* [2012] NZIPT 800151, where the applicant had been subjected to violence and threats for refusing to pay bribes to regulatory agencies. The Tribunal held that the applicant had a well-founded fear of persecution, but this was not based on one of the convention grounds. The applicant was granted protected person status.); where an applicant is excluded from refugee status under one of the exceptions set out in art 1F of the Refugee Convention; or where the applicant is found to pose a risk to national security or to the community, thus warranting expulsion.

²⁸ The Department of Labour (now the Ministry of Business, Innovation and Employment) noted that concerns were expressed in submissions made to the Bill about the potential for losing the expertise of the Refugee Status Appeals Authority and failing to recognise the special legal issues associated with refugee cases. Most of those who opposed the proposal considered that there should continue to be a separate refugee tribunal: *Immigration Act Review: Summary of Submissions November 2006* (Department of Labour, November 2006) at 12.

impression (and I stand to be corrected) is that the retention of expertise and research capacity has been preserved through internal processes in two ways. First, the allocation of tribunal members to sit in refugee matters (and usually there is a sole tribunal member per case) takes into account their experience and training in the field. Secondly, there is a system of peer review, where all decisions are reviewed by another member for consistency purposes.²⁹

Some of the other concerns that have been expressed with the procedures of the new Tribunal related to the special advocate regime³⁰ and also with the measures taken to expedite the appeal pathways and processes. The risk is that these measures will lead to injustices, which are not justified by the legitimate aim of reducing the gaming of the system.³¹

In terms of the work of the new Tribunal, there have been 205 cases decided since its inception in the refugee and protected person area. Most of the appeals heard by the Tribunal in its first seven months were inherited from the four previous appeal bodies. All appeals lodged before 29 November 2009 were decided under the substantive provisions of the Immigration Act 1987.³² In its first annual report, the Tribunal recorded that 43 per cent (or 27 of the 62 decisions that were made during the period reviewed) of appeals heard by the Tribunal were allowed.³³ This figure was taken only from those cases heard in the first seven months of the Tribunal's operation. A manual calculation of the Tribunal's decisions to date

²⁹ Judge Hastings *Immigration and Protection Tribunal First Annual Report 2010/2011* (November 2011) at 22 [Tribunal First Annual Report].

³⁰ John Ip "Al Rawi, Tariq, and the Future of Closed Material Procedures and Special Advocates" (2012) 75 MLR 606; John Ip "The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill" [2009] 2 NZ L Rev 207; John Ip "The Rise and Spread of the Special Advocate" [2008] PL 717; and Lani Inverarity "Immigration Bill 2007: Special Advocates and the Right to be Heard" (2009) 40 VUWLR 471 at 482–506. See also the concerns noted in relation to similar advocate programmes overseas in: *Secretary of State for the Home Department v M* [2004] EWCA Civ 324, [2004] HRLR 22 at [13] and [16]; and *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738 (HL) at [18] per Lord Bingham.

³¹ Tennent, above n 14, at 437. In its report on the Immigration Bill 2007, the Transport and Industrial Relations Committee noted that many submitters were concerned about what they perceived to be a loss of existing appeal rights under the Bill. The Committee's response was that the Bill would not exclude the right of access to relevant appeals. It would, however, ensure that repeat or duplicate avenues of review and appeal in relation to the same matter were avoided: Transport and Industrial Relations Committee *Report on the Immigration Bill 2007* (21 July 2008) at 21.

³² Tribunal First Annual Report, above n 29, at 2. See also Immigration Act 2009, ss 425 and 426 read with the commencement date as set out in s 2.

³³ Tribunal First Annual Report, above n 29, at 11.

shows that this figure has since dropped slightly with 86 of the 205 decisions made to date being allowed (or 42 per cent).³⁴ This percentage poses a stark contrast to the average of 22 per cent of appeals allowed by the Refugee Status Appeals Authority (Authority) in its final years.³⁵ The Tribunal also reported that the average time taken from the date of an appeal being lodged to a decision being released was 196 days.³⁶ This can be compared with the average time of 8.5 months, or roughly 225 days, taken from lodging to decision by the previous Authority.³⁷

The country most represented in the number of appeals lodged with the new Tribunal is Iran.³⁸ This continues a trend that began in the Authority in roughly the year 2000.³⁹ While Iranian nationals predictably also lead the statistics with the most number of appeals allowed by country,⁴⁰ they do not have the highest percentage of appeals allowed. Of the 10 countries that have had more than five appeals heard, the nationality with the highest rate of success is Afghanistan (100 per cent), followed by Egypt (86 per cent), Pakistan (67 per cent), and then Sri Lanka and Iran (each with 54 per cent).⁴¹ It will be interesting to see how these figures

³⁴ The Ministry of Justice provides a case search database on its website. It does not take into account instances where more than one individual's claim has been determined in the same decision. The database does not appear to be entirely accurate, but does give a generally reliable indication of decision statistics. See <www.justice.govt.nz> under "Tribunals" tab.

³⁵ These statistics are taken from a table supplied by RefNZ Statistics which sources its figures from the Department of Labour: RefNZ Statistics <www.refugee.org.nz/stats.htm> at Table 13. Updated by reference to: Labour and Immigration Research Centre *International Migration Outlook — New Zealand 2010/11: OECD Continuous Reporting System on Migration* (Department of Labour, 2011). Complete statistics for the 2010/2011 financial year were not available at the time of writing.

³⁶ Tribunal First Annual Report, above n 29, at 10.

³⁷ This figure did not take into account the Tribunal's backlog: *Immigration Act Review: Discussion Document* (Department of Labour, April 2006) see Table 11 at 106.

³⁸ To date, the nationalities with the highest number of appeals to the Tribunal are: Iran 42; Fiji 34; Sri Lanka 13; China 15; Pakistan 9. The other nationalities from which appeals have been made are: South Africa 7; Egypt 7; Zimbabwe 6; Iraq 6; Afghanistan 5; Bangladesh 4; Syria 4; Jordan 3; Russia 3; Saudi Arabia 2; Turkey 2; Chile 2; Somalia 2; Kiribati 2; Malaysia 2; Bahrain 2; Chad 1; Brazil 1; Angola 1; Singapore 1; Congo 1; Czech Republic 1; Hungary 1; India 1; Israel 1; Uganda 1; Vanuatu 1; Tunisia 1; Lebanon 1; Mexico 1; Mongolia 1; Myanmar 1; Nepal 1; Nigeria 1. This data was manually calculated from cases listed on the New Zealand Ministry of Justice database, above n 34.

³⁹ RefNZ Statistics, above n 35, at Table 29.

⁴⁰ To date, the nationalities with the most appeals allowed are: Iran 23; China 8; Sri Lanka 7; Egypt 6; Pakistan 6. This data was manually calculated from cases listed on the New Zealand Ministry of Justice database, above n 34.

⁴¹ The success rates of the other nationalities with over five applications were: China (53 per cent); Iraq (50 per cent); Zimbabwe (30 per cent); Fiji (15 per cent); and South Africa (13 per cent). This data was manually calculated from cases listed on the New Zealand Ministry of Justice database, above n 34.

develop in the future.

Political opinion is by far the most common ground on which appeals have been allowed.⁴² Over the last two years that the Authority operated, it allowed 39 appeals on the grounds of political opinion: one on the grounds of nationality; 22 on the grounds of membership of a particular social group; 18 on the grounds of race; and 15 on the grounds of religion.⁴³ Since its inception in late 2010, the Tribunal has allowed 23 appeals on the grounds of political opinion; zero on the grounds of nationality; 15 the grounds of membership of a particular social group; eight on the grounds of race; and 13 on the grounds of religion.⁴⁴

Just to put the statistics in context, at the first stage of refugee decision-making within the Immigration Service, from the 2007/2008 to the 2012/2013 year, there was an average of 285 refugee claimants per year (not including the 750 quota refugees⁴⁵). The Refugee Status Branch in the Immigration Service rejected about 70 per cent of those applications,⁴⁶ apart

⁴² It should be noted that these figures only represent appeal decisions. They do not include the cases where refugee status has been granted initially by a refugee and protection officers. Further, no analysis is provided of cases where the appeal was not allowed because very few of these cases refer to a specific ground (for example, only 34 out of 170 cases in the last two years of the Authority mentioned the Refugee Convention grounds allegedly at issue).

⁴³ These figures reflect the number of decisions issued by the Tribunal. They do not take into account instances where a decision addresses more than one individual claim (for example, where a family makes a joint application). This data was manually calculated from cases listed on the Ministry of Justice database, above n 34.

⁴⁴ This data was manually calculated from cases listed on the Ministry of Justice database, above n 34.

⁴⁵ New Zealand has not been consistent in meeting this 750 quota, however. Between 2005 and 2011, 327 positions were not filled. This has been criticised, especially by Amnesty International. The Government has defended its position, however, noting that New Zealand's agreement with the United Nations High Commissioner for Refugees allows the 750 quota to go as low as 675 or as high as 825. Over the last two years, figures have been affected by the Christchurch earthquakes. See *Immigration New Zealand Refugee Quota Branch Statistics* (The Refugee and Protection Unit, March 2013) <www.immigration.govt.nz>. The Government has since adopted a three year rolling quota whereby the 750 annual quota will be met over a three year period. In July 2013, the New Zealand Government reaffirmed its quota commitment. Immigration Minister Michael Woodhouse has said that 40 per cent of the 750 places are to be allocated to refugees from the Asia-Pacific region, and 40 per cent to refugees from the rest of the world – namely Africa, the Middle East, and the Americas. The remaining 20 per cent – 150 places – will be allocated to refugees resettled in New Zealand as part of an agreement with Australia from 1 July 2014, which forms part of a regional approach to irregular migration: Michael Woodhouse “Govt confirms commitment to Refugee Quota” (press release, 1 July 2013). The deal between New Zealand and Australia that New Zealand will accept 150 refugees per year from Australia's offshore detention centres has been criticized: Amnesty International “Refugee deal takes New Zealand down the wrong path” (press release, 9 February 2013).

⁴⁶ In the 2007/2008 financial year, of the 277 claims decided by the Refugee Status Branch (Branch), 196 were declined. In the 2008/2009 financial year, of the 242 claims decided by the Branch, 170 were

from in the year 2010/2011 where 86.5 per cent of the applications received were declined.⁴⁷

As further context, in 2004, New Zealand introduced an Advance Passenger Processing scheme, which requires international airline carriers to pre-screen passengers before they depart for New Zealand.⁴⁸ Before the introduction of the scheme, an average of 239 people who arrived at New Zealand airports each year indicated an intention to apply for refugee status.⁴⁹ Following the 2004 changes, this average dropped to 51 people.⁵⁰

New Zealand's geographical position means that it is significantly more isolated than Australia and does not have the same problem of boat arrivals that Australia experiences.⁵¹ The Government has, however, recently enacted legislation that permits groups of 30 or more asylum seekers to be detained for a "practical and administratively workable amount of time".⁵²

declined. In the 2009/2010 financial year, of the 335 claims decided by the Branch, 244 were declined. In the 2010/2011 financial year, of the 289 claims decided by the Branch, 250 were declined. In the 2011/2012 financial year, of the 363 claims decided by the Branch, 244 were declined. See Immigration New Zealand *Refugee Status Branch Statistics* (The Refugee and Protection Unit, March 2012) <www.immigration.govt.nz> [Immigration NZ Statistics] at 2.

⁴⁷ This rise in the proportion of claims declined may be, in part, attributable to a marked increase in claims made by Fijian nationals starting from the 2009/2010 financial year. Indeed, claims more than doubled from 23 made in 2008/2009 to 57 in 2009/2010. This increase in claims was not met by a proportionate increase in the number of claims allowed for Fiji nationals, with, for example, fewer than five claims allowed in the 2010/2011 year. There were no other marked changes to the claims made by the most represented nationalities: Immigration NZ Statistics, above n 46, at 3 and 5.

⁴⁸ The scheme was first enacted by s 125AA of the Immigration Act 1987, which was inserted on 2 July 2004, by s 4 of the Immigration Amendment Act 2004. This provision is now reproduced in the Immigration Act 2009, s 96.

⁴⁹ Average calculated over period from 1991 to 2004: RefNZ Statistics, above n 35, at Table 1.

⁵⁰ Average calculated over period from 2004 to 2010: RefNZ Statistics, above n 35, at Table 1. Statistics for the 2011 and 2012 years were not available at the time of writing.

⁵¹ An increasing number of refugee claimants have been arriving in Australia by boat. The number of refugee claimants that arrived by boat over the last four years were: 7379 in 2011–2012; 5174 in 2010–2011; 4579 in 2009–2010; 668 in 2008–2009: *Asylum Trends – Australia: 2011–2012 Annual Publication* (Australian Department of Immigration and Citizenship, 2012) at 25.

⁵² Immigration Amendment Act 2013, s 11 amending s 307 of the Immigration Act 2009. An immigration officer must first apply for a warrant to detain any arrivals under s 317A. The purpose of the amendment was to deter people-smugglers and asylum seekers from making the highly risky journey to New Zealand by boat. The Act was also aimed at facilitating the effective and efficient management of a mass arrival, should one occur: Hon Michael Woodhouse (Minister of Immigration) (16 April 2013) 698 NZPD 9392. For the previous position on detention, see *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA) at [12], [19] and [46] per Blanchard, Tipping and Anderson JJ; [93], [96] and [102] per McGrath J; and [192] and [241] per Glazebrook J. See Tennent, above n 14, at 222–227; and Charlotte Frater "Detention of Refugees in New Zealand law: Striking a Balance Between Refugee Rights and

I now turn to the work of the higher courts in the refugee area. Since *Zaoui*, there have been only 26 cases found by my clerk, which had some relationship to refugee matters and some of those she found were quite tenuous connections.

I have picked out a couple of the more interesting cases to discuss today. The first is the Supreme Court case of *Attorney-General v Tamil X*,⁵³ which concerned the operation of art 1F(a) and (b) of the Refugee Convention.⁵⁴

Mr X had worked as a chief engineer on a vessel owned by the Tamil Tigers.⁵⁵ The vessel in question transported legitimate goods but had also, at times, been used to smuggle arms, ammunition and explosives into Sri Lanka and it had carried senior Tamil Tiger members on its last voyage before it was sunk intentionally during a confrontation with the Indian Navy which occurred in international waters. Mr X and other members of the crew were prosecuted in the Indian courts. Initially they were acquitted but they were convicted after an appeal to the Supreme Court of India. The Supreme Court found that Mr X was a party to the intentional destruction by fire of a vessel carrying explosives, which endangered lives of those on board and members of navy and coastguard vessels nearby.

Mr X and his wife and children arrived in NZ on visitors' visas in 2001 and filed applications for refugee status recognition. In those proceedings, Mr X denied that he had knowledge of his fellow crew members' backgrounds or the purpose of vessel.

The Authority did not accept Mr X's claims of ignorance and concluded that he had willingly participated in an attempt to smuggle arms and explosives into Sri Lanka. His decision to take on the position of Chief Engineer on the last voyage evidenced his dedication to the Tamil Tiger's objects and methods and had directly assisted them. The Authority also held that the sinking of the vessel was not committed for a political purpose, but rather to prevent

National Security" (2003) 34 VUWLR 665.

⁵³ *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721 [*Tamil X*].

⁵⁴ Article 1F(a) and (b) of the Refugee Convention set out grounds on which refugee status can be refused, specifically where a claimant has committed specified serious criminal acts. Under the Immigration Act 1987, which was applicable at the time, decision-makers are required to act in a manner that is consistent with New Zealand's obligations under the Convention: ss 129A and 129D. The nature of refugee decision-making is discussed by the Supreme Court in *Tamil X*, above n 53, at [32] and following.

⁵⁵ The facts and background are set out in *Tamil X*, above n 53, at [2]–[11].

the seizure of the vessel and its cargo by the Indian Government. The Authority therefore dismissed Mr X's application on the basis that he was excluded from refugee status under art 1F(a) and (b) of the Refugee Convention.

The High Court had dismissed Mr X's application for judicial review of the Authority's decision. Mr X appealed to the Court of Appeal which allowed the appeal and from there it went to the Supreme Court.

In the Supreme Court,⁵⁶ there was an attempt to challenge the findings of fact made by the Authority. The Supreme Court was, however, satisfied that the findings made were within the Authority's powers and that evidence was available to support its conclusions. So the case in the Supreme Court proceeded on the basis of the findings of the Authority.⁵⁷

The Court first turned to the standard of persuasion required under art 1F. It adopted the approach of Sedley LJ as approved by the United Kingdom Supreme Court, that something more than suspicion was needed but otherwise the words "serious reasons to consider" meant what they said.⁵⁸

Turning to the first ground for appeal, the Court stated that the meaning of "crime against humanity" under art 1F(a) of the Refugee Convention must be ascertained by reference to the definitions contained in international instruments that provided for those crimes, including the Rome Statute of the International Criminal Court (Rome Statute).⁵⁹ On the evidence before the Authority, it was clear that the Tamil Tigers had committed acts that constituted crimes against humanity.⁶⁰

The issue then was whether Mr X was complicit in those crimes. It was common ground that

⁵⁶ For a discussion of the Supreme Court case see: Lisa Yarwood "The return of *Tamil X*" [2010] NZLJ 369. For a comparison between the Court of Appeal decision in Mr X's case and the position in the United Kingdom, see Lisa Yarwood "The status of *Tamil X* in 2010" [2010] NZLJ 150; and Ella Watt "International Criminal Law and New Zealand Refugee Status Determinations: A Case Note on *Attorney-General v Tamil X*" (2012) 43 VUWLR 235. See also Treasa Dunworth "International Humanitarian Law And International Criminal Law" (2009) 7 NZYIL 321 at 323.

⁵⁷ At [43].

⁵⁸ At [39].

⁵⁹ At [47].

⁶⁰ At [49].

nothing had been done that was sufficient to constitute an attempt to commit a crime against humanity. In looking at the question of complicity, the Court referred to the tests set out in a decision of the United Kingdom Supreme Court that post-dated the Court of Appeal judgment in Mr X's case. In particular, the New Zealand Supreme Court referred to the test in *R (JS (Sri Lanka)) v Secretary of State for the Home Department*, as set by Lord Brown:⁶¹

There [must be] serious reasons for considering [an individual] voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose.

The Supreme Court endorsed this approach.⁶² Applying this to the facts, the Court concluded that, by applying his expertise in a pivotal role for the voyage, Mr X was making a significant contribution to the Tamil Tigers' activities. He knew of the crimes against humanity that were being committed by that organisation and must have foreseen the likelihood that the arms, if delivered, would be used by the Tamil Tigers to commit future offences. His assistance, albeit in advance of operations, would further that purpose. The Court said that it did not matter on a test based on joint criminal enterprise principles that the actual cargo might have been used for legitimate military operations. It was sufficient that Mr X took the risk that the armaments would be used to commit a crime against humanity. The Court said that the Authority was entitled to hold that this established the necessary elements of Mr X's personal responsibility as part of a joint criminal enterprise under arts 25 and 30 of the Rome Statute.⁶³

This did not, however, mean that Mr X had actually committed crimes against humanity.⁶⁴ This had to be established on the facts and the difficulty lay in identifying the criminal acts of the Tamil Tigers in which his conduct made him complicit. The Supreme Court noted that the last voyage did not result in the actual use of weapons concerned, let alone in any proscribed use.⁶⁵ There was no evidence to show that the support given by Mr X to the Tamil

⁶¹ *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15, [2011] 1 AC at [38] [*R v Secretary of State*].

⁶² At [70].

⁶³ At [71].

⁶⁴ At [72].

⁶⁵ This was because the boat was sunk: at [73].

Tigers operations during the last voyage supported the commission of any completed crimes against humanity. The Court also considered that there was no sufficient evidence to support a view that there were serious reasons to believe that Mr X had provided support to the Tamil Tigers prior to the last voyage.⁶⁶

The Court observed that it is inherent in the notion of criminal complicity that liability arises only once a primary criminal act has been committed, with which the accomplice has become associated by reason of his or her conduct. Liability under s 25 of the Rome Statute requires the commission or attempted commission of an actual crime. There was no general conspiracy equivalence. Mr X was therefore not disqualified from being a refugee by virtue of art 1F(a) of the Refugee Convention.⁶⁷

Turning to the second ground of appeal: whether any serious non-political crimes were committed so as to exclude Mr X from refugee status under art 1F(b) of the Refugee Convention. The Court stated that in excluding from refugee status those who have committed a serious non-political crime, art 1F(b) reflects two Convention purposes: to ensure that those who commit serious non-political crimes do not avoid legitimate prosecution by obtaining refugee status; and to protect the security of states where such persons seek refuge by providing an exception from the state's obligations under the Convention in respect of persons with a propensity to commit serious non-political crimes.⁶⁸

The Supreme Court held that Mr X's motivation in becoming involved in the Tamil Tigers' activities was plainly to give his support to that organisation's political objectives. The sinking of the vessel was an act of destruction aimed at preventing seizure by Indian authorities unsympathetic to the Tamil Tigers. The connection between Mr X's criminal

⁶⁶ At [78].

⁶⁷ At [79]–[80]. This may arguably be a narrower approach than that taken in the Canadian authorities cited by the Court. See, for example, *Bazargan v Canada (Minister of Employment and Immigration)* (1996) 205 NR 282 (FCA) at [11]; *Sumaida v Canada (Minister of Citizenship and Immigration)* (2000) 183 DLR (4th) 713 (FCA) at [25]–[35]; and *Minister of Citizenship and Immigration v Mugesera* 2005 SCC 40, [2005] 2 SCR 100 at [173] and [176]. See also the more recent Supreme Court of Canada decision, *Ezokola v Canada (Citizenship and Immigration)* 2013 SCC 40, where the Court held that art 1F(a) will apply where a person has made a significant contribution to the criminal purpose of a group: see at [67], [77] and [87]–[88]. The Supreme Court's approach is arguably nearer to that taken in the United Kingdom, see *R v Secretary of State*, above n 61, at [38].

⁶⁸ At [82].

actions and the political purposes he sought to serve was sufficient to result in those crimes being considered to be of a political nature. They were therefore not non-political crimes. It was not necessary for the Court, having come to this conclusion, to determine whether Mr X could be implicated in the destruction of the ship.⁶⁹

The Supreme Court therefore concluded that Mr X was not disqualified from being a refugee under art 1F(a) nor 1F(b) of the Refugee Convention. His application for recognition of refugee status was remitted to the Authority for consideration.⁷⁰

The second case I will mention is the Court of Appeal case of *Chief Executive of the Department of Labour v Yadegary*,⁷¹ where the Court considered the issue of indefinite detention for immigration purposes.⁷² Mr Yadegary was an unlawful immigrant from Iran.⁷³ He had destroyed his passport and, as Iran refused to accept repatriation of its nationals without a passport, he could not be deported. Mr Yadegary could have ended his detention in New Zealand by applying for a replacement Iranian passport, which would have resulted in him being immediately deported, but he persistently refused to do so.

Mr Yadegary was accordingly detained by a warrant of commitment made under s 60 of the Immigration Act 1987.⁷⁴ After two years' detention, the District Court granted an application for an extension of the warrant under s 60(4). In a judicial review of that decision, the High Court held that there were "exceptional circumstances" warranting his release on bail for the purposes of s 60(6). The Chief Executive appealed against that decision.

Section 60(6) stipulates that, when considering the making of a further warrant of commitment, except where there were "exceptional circumstances", a court cannot order the release of person detained under s 60 if the reason that the person is unable to leave

⁶⁹ At [97]–[98].

⁷⁰ At [101].

⁷¹ *Chief Executive of Department of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 495 [*Yadegary*].

⁷² For the Australian position regarding detention see: *Al-Kateb v Godwin* [2004] HCA 37, [2004] 219 CLR 562; and *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46.

⁷³ The facts and background set out by Baragwanath J in *Yadegary*, above n 71, at [10]–[16].

⁷⁴ This is now dealt with under s 316 of the Immigration Act 2009. This provision differs slightly in the criteria on which an order can be made. Additional grounds include where the person will not, or is unlikely to, supply satisfactory evidence of his or her identity, or the Minister has not made, or is not likely to make, a decision as to whether to certify that the person constitutes a threat or risk to security.

New Zealand is the result of some action or inaction by that person that occurred after they were served with the removal order. Section 60(6) was enacted in response to a decision of the High Court, which ordered the release of two Iranian overstayers who, like Mr Yadegary, refused to apply for passports. It removed the three month limit on warrant extensions for persons falling within the subsection.⁷⁵

In a decision where each of the three judges wrote separately, a majority⁷⁶ of the Court of Appeal upheld the High Court decision and found that the length of time Mr Yadegary had been held in prison constituted exceptional circumstances for the purposes of s 60(6).

Baragwanath J stated that when considering an application for a new warrant of commitment, a judge should reconsider the criteria for the initial granting of a warrant, including the concepts of “unreasonable period” and “public interest” in s 60(3) of the Act. A judge must therefore reconsider whether, should an extension be granted, detention was likely to be for an unreasonable period of time and whether it was in the public interest to continue detention.⁷⁷ In this case, the Judge considered that continued detention was not reasonable. It was not contributing to his removal and could therefore only be for purposes other than seeking to remove the respondent from New Zealand.⁷⁸ Detention therefore exceeded the power conferred under s 60(6). This warranted the respondents’ release on bail.⁷⁹

O’Regan P and William Young J both disagreed with Baragwanath J as to the relevance of s 60(3).⁸⁰ They considered that the enactment of s 60(6) made it clear that Parliament intended the “exceptional circumstances” test to guide decisions concerning persons falling within s 60(6). It would be inconsistent with this intention to continue to apply the s 60(3) considerations to such persons.⁸¹

⁷⁵ *Mohebbi v Minister of Immigration* [2003] NZAR 685 (HC). The amendment removed the three month limit in the case of persons whose own conduct is a reason for their inability to leave New Zealand (s 60(6)); Immigration Amendment Act (No 2) 2003, s 16(3).

⁷⁶ Comprising O’Regan and Baragwanath JJ, William Young P dissenting.

⁷⁷ At [31], [71] and [89] per Baragwanath J.

⁷⁸ At [129] per Baragwanath J.

⁷⁹ At [132] per Baragwanath J.

⁸⁰ At [189] per O’Regan J and [226] per William Young P.

⁸¹ At [189] per O’Regan J and [226] per William Young P.

While O'Regan J disagreed with Baragwanath J's reference to s 60(3), he agreed with his overall conclusion. Ongoing detention was unlikely to coerce Mr Yadegary into action and any alternative means of deportation was a distant possibility at best. While persons were not to be granted *de facto* residence simply by enduring three months' detention, s 60(6) was never intended to permit indefinite detention. Parliament left it for the courts to determine where the line between three months' detention and indefinite detention ought to be drawn. This was reflected in the term "exceptional circumstances". The line had been reached and the length of detention constituted exceptional circumstances warranting release.⁸²

William Young P dissented. While the Judge accepted that the length of detention could be an exceptional circumstance, it was not in this case. The Judge expressed concern that, should the High Court's judgment be upheld, others in Mr Yadegary's situation will be reasonably confident that, absent a change in policy by the Iranian government, he or she will gain *de facto* residency rights if he or she were prepared to spend around two years in prison. In the Judge's view, the only factor associated with Mr Yadegary's case which might be exceptional was the length of his detention.⁸³

I finish by mentioning a Court of Appeal case, *X v R*,⁸⁴ which concerned whether a genuine belief in a right to refugee status constitutes a "reasonable excuse" for the offence of possessing a false passport. The person at issue in this case was a Syrian national. He and his family had arrived in New Zealand on false Belgian passports claiming they were tourists. The false passports were detected by airport security. When Mr X was interviewed by an Immigration Officer he claimed he and his family were asylum seekers. His application for refugee status was rejected but the family were granted residence permits. Following this, Mr X was tried and convicted on two counts of possessing a false passport.

The trial Judge in Mr X's case had suggested to the jury that, as Mr X's claim for refugee status had been rejected, he could no longer be treated as a refugee claimant and that, accordingly, the "reasonable excuse" could not apply. The Court of Appeal held that this

⁸² At [192]–[202] per O'Regan J.

⁸³ At [263]–[264] per William Young P.

⁸⁴ *X v R* [2010] NZCA 522.

approach was wrong in law. It held that a person with a genuine belief in his or her status as a refugee could be considered to have “reasonable excuse” to present a false passport. Whether such a person’s belief is genuine is a question of fact.

So, while there have not been many cases in the higher courts in New Zealand, we do seem to have some interesting issues arise. I have also very much appreciated the opportunity to hear about the developments in refugee law in Australia and internationally here today. It is always very valuable to share experiences and it can only enrich the jurisprudence of both jurisdictions. I look forward to our next exchange.