

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV-2007-485-1333**

UNDER the Immigration Act 1987

IN THE MATTER OF an appeal under section 115A of the  
Immigration Act 1987

BETWEEN AHMAD ZANZOUL  
Appellant

AND THE REMOVAL REVIEW AUTHORITY  
First Respondent

AND CHIEF EXECUTIVE, DEPARTMENT OF  
LABOUR  
Second Respondent

**CIV-2008-485-854**

AND UNDER the Immigration Act 1987, the Judicature  
Amendment Act 1972, the New Zealand  
Bill of Rights Act 1990, the International  
Covenant on Civil and Political Rights, the  
Legal Services Act 2000, Magna Carta and  
other imperial due process statutes, and the  
Common Law

IN THE MATTER OF an application for judicial review under  
section 146A of the Immigration Act 1987,  
and declarations

BETWEEN AHMAD ZANZOUL  
Applicant

AND CHIEF EXECUTIVE, DEPARTMENT OF  
LABOUR  
Respondent

UNDER the Judicature Amendment Act 1972, the New Zealand Bill of Rights Act 1990, the International Covenant on Civil and Political Rights, the Legal Services Act 2000, Magna Carta and other imperial due process statutes, and the Common Law

IN THE MATTER OF declarations in respect of human rights issues

BETWEEN AHMAD ZANZOUL  
Applicant

AND ATTORNEY-GENERAL  
Respondent

Hearing: 27, 28, 29, 30 April; 1 and 4 May 2009

Counsel: T Ellis, A Shaw and S M Ruthven for appellant  
P A McCarthy and C A Griffin for respondents

Judgment: 9 June 2009

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**RESERVED JUDGMENT OF DOBSON J**

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## Summary of issues and outcome

[1] The appellant (Mr Zanzoul), a Syrian national, entered New Zealand on a false passport on 12 March 2004. His application for refugee status was declined, and the Refugee Status Appeals Authority (RSAA) dismissed an appeal against that decision on 28 June 2005. Mr Zanzoul’s last temporary permit expired on 11 July 2005 and since then he has remained in New Zealand in circumstances that the Immigration Act 1987 (the Act) deems to be unlawful. Consequently, s 45 of the Act requires that he leave New Zealand.

[2] On 30 May 2007 the Removal Review Authority (RRA) dismissed an appeal against the requirement for Mr Zanzoul to be removed, and he initially appealed to this Court against the RRA’s decision. The jurisdiction of the RRA on appeals such as Mr Zanzoul’s involves the application of s 47(3) of the Act. That provides as follows:

### **47 Appeal against requirement to leave New Zealand**

...

(3) An appeal may be brought only on the grounds that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.

[3] The present appeal was pursued on diverse grounds. I have found two discrete arguments challenging the RRA decision to be made out. They relate first to non-disclosure to Mr Zanzoul of prejudicial material conveyed to the RRA (see paragraphs [78] to [98] below). Secondly, the RRA’s positive finding that allowing

Mr Zanzoul to remain would be contrary to New Zealand's public interests, when the terms of s 47(3) do not authorise such a finding (see paragraphs [164] to [168] below). Although I am not satisfied that the second error, in the circumstances of the appeal, would necessarily have warranted a direction for reconsideration on its own, such a direction is appropriate in relation to the first error and the case for it is strengthened by the second error. I therefore order that such a reconsideration should occur, on a *de novo* basis, so that all aspects of the decision, including those motivating unsuccessful arguments on a cross-appeal that is dismissed, will be open for fresh determination.

[4] Mr Zanzoul claims a fear of persecution if he is returned to Syria. I deal with this argument in paragraphs [99] to [121] below. This was advanced in a form not readily considered as a ground of appeal from the RRA. In his particular circumstances, it may constitute a ground to make a new claim for refugee status under s 129J of the Act. Clearly, if such an initiative is to be pursued, it should be exhausted before the fresh appeal before the RRA. However, in all such initiatives there is an onus on Mr Zanzoul to pursue matters promptly, and his failure to do so may see delay arise as a factor against him.

[5] I have heard argument on a plethora of other points sought to be invoked in Mr Zanzoul's name. This judgment is made significantly longer than it would otherwise be, because of the acknowledgement of at least the main points on the arguments put. In editing the judgment, I have excluded references to many subsidiary points that did not alter the weight or emphasis able to be given to the larger arguments that they were intended to support. I remain satisfied that I have considered everything.

[6] With respect to counsel, apparently heart-felt conviction in the rightness of propositions furthering the cause of human rights is no substitute for objective analysis of their potential impact under the Act. Nor do I accept the apparent necessity to exhaust remedies in New Zealand Courts as a pre-requisite to advancing claims in international fora as a justification for expanding the arguments beyond those that might realistically assist Mr Zanzoul. In dealing cursorily with some of the arguments towards the end of this judgment, I intend no disrespect to the lofty

ideals involved. My aim is to focus on what genuinely matters in dealing with Mr Zanzoul's inarguably serious situation. A priority must be to facilitate a final resolution of his position without adding unduly to what has already been a very protracted process.

### **Scope of the proceedings**

#### *Mr Zanzoul's appeal*

[7] Since filing the appeal, Mr Zanzoul filed two applications for judicial review against the Chief Executive of the Department of Labour and the Attorney-General. These applications seek to raise other deficiencies in the way the New Zealand Government has dealt with Mr Zanzoul.

[8] As advanced in a set of submissions filed in March 2008 and described as including amended grounds of appeal, nine grounds of appeal were foreshadowed on behalf of Mr Zanzoul. These included that the RRA:

- a) adopted the wrong approach to the test in s 47 of the Act;
- b) erred in law in making a positive finding that allowing Mr Zanzoul to remain in New Zealand would be contrary to the public interest in terms of that aspect of the test under s 47;
- c) erred in failing to have regard to the rights recognised by ss 8, 9 and 27 of the New Zealand Bill of Rights Act 1990 (BORA);
- d) erred in failing to undertake an assessment as to proportionality of consequences at common law;
- e) failed to disclose receipt of prejudicial information;
- f) erred in failing to have regard to considerations relevant to its s 47 deliberation;

- g) erred in failing to have regard to articles 17 and 23(1) of the International Covenant on Civil and Political Rights (ICCPR);
- h) erred in law when taking into account irrelevant factors and failed to take account of relevant factors; and
- i) failed to afford Mr Zanzoul a fair hearing contrary to s 27 of BORA and the common law.

*The Chief Executive's cross-appeal*

[9] Leave to file a notice of cross-appeal out of time had been granted by consent on 7 August 2007, in circumstances where Ms Curtis, counsel then acting for Mr Zanzoul, also agreed with the observation for the respondent to the appeal that an amended notice of appeal was required. That fact, plus a range of other circumstances, had delayed the filing of a notice of cross-appeal which, in accordance with (then in force) r 711, ought to have been filed and served by 2 August 2007. Memoranda of Counsel for the parties dated 3 August 2007 reflected the agreed course that the proceedings should take, including the filing of amended grounds of appeal and leave being granted for a cross-appeal to be filed out of time. The notice of cross-appeal was duly filed on 4 September 2007.

[10] Notwithstanding those circumstances in which the cross-appeal had been brought, Mr Ellis objected to the Court hearing the cross-appeal on the basis that there was no jurisdiction to do so. His argument rested on an interpretation of s 115A of the Act as bestowing on any party to an appeal before the RRA a right to bring an appeal to the High Court on a question of law. He argued that the absence in s 115A of any reference to a cross-appeal meant that, in circumstances where both parties were dissatisfied and considered errors of law had occurred, then both had to pursue such challenges by filing discrete appeals. Mr Ellis argued that he could not simply consent to a cross-appeal where the Court had no jurisdiction to entertain one, and that because the respondent's cross-appeal was not formulated as a discrete appeal on its own, it could not be heard.

[11] However, s 115A(5) of the Act contains an entirely conventional reference to all appeals under the section being dealt with “in accordance with the rules of Court”. The superseded r 711, under which leave to commence the cross-appeal out of time was granted, is now replicated in r 20.11 of the new High Court Rules. The opening part of that rule provides:

**20.11 Cross-appeal**

- (1) A respondent wishing to contend at the hearing of an appeal that the decision appealed against should be varied must—
  - (a) file a notice of cross-appeal in the registry of the court; and
  - (b) file a copy of the notice in the administrative office; and
  - (c) serve a copy of the notice on every other party directly affected by the cross-appeal.
- (2) A notice of cross-appeal must be filed no later than 2 working days before the case management conference relating to the appeal, except with the leave of the court.

[12] The provisions in Part 20 apply to a miscellaneous range of appeals to the High Court brought under all enactments other than three specified exceptions, not including the Act. Accordingly, those rules apply to the present appeal under the Act. The commentary in *McGechan on Procedure* at HR20.11.01 commences:

Where a notice of appeal has already been given, and one of the other parties also wishes to challenge aspects of the decision under appeal, it will be necessary for that party to file a notice of cross-appeal.

[13] Accordingly, the correct approach to the scope of s 115A is that once either party commences an appeal, challenges to the decision already under appeal that the opposing party intends to pursue are to be brought before the Court by way of cross-appeal. There are well-settled practices for dealing with competing contentions in this way. There would be obvious inefficiencies in requiring separate appeals to be pursued, were s 115A to be interpreted in the narrow way Mr Ellis contends for. I am satisfied that the Court does have jurisdiction to hear the competing contentions sought to be advanced on behalf of the respondent, by means of its cross-appeal, and accordingly dismiss that particular objection raised by Mr Ellis.

[14] I intend to deal with complementary arguments raised by the appeal and the cross-appeal together. The challenges raised on behalf of the respondent in the cross-appeal are:

- a) That the RRA misinterpreted the first limb of the s 47(3) test by treating separation from children, as recognised in Article 9 of the United Nations Convention on the Rights of the Child (the Convention), as sufficient of itself to constitute unduly harsh or unjust treatment;
- b) The RRA misinterpreted the first limb of the s 47(3) test by treating separation from Mr Zanzoul's children as going to a finding in his favour on the first limb of the test when the RRA did not find his separation from his children had had a damaging effect on them;
- c) The RRA erred by giving weight to issues of Mr Zanzoul's mental health when assessing them under the first limb of the s 47(3) test; and
- d) The RRA misinterpreted the s 47(3) test by considering humanitarian factors considered under the first limb again on the second limb.

[15] This was not the order as pleaded by the respondent, but is instead the logical sequence. Specifically, since they all refer to the same issue, I intend to deal with the first three grounds together.

[16] One matter that was not before the RRA was an argument raised in the appeal to the effect that various branches of the New Zealand Government have been responsible for publication via the internet of the outcome of criminal proceedings against Mr Zanzoul, which is then available to the Syrian authorities. Those reports include reference to claims by Mr Zanzoul of harassment and of the potential for his ill-treatment if returned to Syria. Having regard to the internationally recognised abuse of human rights in Syria, it was argued that publication of these reports leads to a reasonable fear on Mr Zanzoul's part of cruel and inhumane treatment should he

be forcibly returned to Syria. The point was first raised in a third set of submissions filed on 15 January 2009 on terms:

Given the nature of the appeal point now raised being that the NZ Government have now inadvertently caused a well founded fear of persecution or torture, any lateness of the appeal point will no doubt not be raised.

It was not.

### **Leave to argue judicial reviews**

[17] Both applications for judicial review subsequently filed on behalf of Mr Zanzoul were substantially outside the time limit imposed under s 146A of the Act which provides:

**146A Special provisions relating to judicial review of decisions under this Act**

- (1) Any review proceedings in respect of a statutory power of decision arising out of or under this Act must be commenced within 3 months after the date of the decision, unless the High Court decides that, by reason of special circumstances, further time should be allowed.

[18] The two judicial review applications were both filed on 24 April 2008. The first was against the Chief Executive of the Department of Labour in respect of the acts and omissions of the RRA. That application pleaded five grounds, leading to a single prayer for relief by way of a quashing of the RRA's decision, and a referral back to the RRA to reconsider a fresh appeal having regard to the matters raised in that application for judicial review. The causes of action may be summarised as follows:

- alleging failures to consider Mr Zanzoul's right to life in terms of s 8 of BORA, and a failure to give reasons in terms of s 27 of the BORA;
- alleging a failure to consider his right not to be subjected to disproportionately severe treatment in terms of s 9 of BORA;
- alleging a failure to undertake a proportionality analysis;

- alleging a failure to take into account Articles 17 (the right to family life) and 23(1) (protection of the family unit) of the ICCPR; and
- alleging failure to take into account Article 3 of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT).

[19] As analysed on behalf of the respondent, these grounds largely overlapped with grounds that were, by the hearing, also argued within the appeal. The fifth, referring to CAT, appears the only argument not invoked on the appeal.

[20] The second application for judicial review was brought against the Attorney-General, sued in respect of s 14(3) of the Crown Proceedings Act 1950 in relation to acts and omissions alleged against the New Zealand Government in respect of breaches of BORA, the common law and ICCPR. Causes of action were pleaded seeking declarations to the following effect:

- First, that s 4 of BORA is inconsistent with the provisions of ICCPR;
- Second, that the failure by the New Zealand Government to enact ICCPR is a lack of good faith or constitutes bad faith contrary to Article 2 of ICCPR and articles 26 and 27 of the Vienna Convention on the Law of Treaties (1969);
- Third, that the respondent is estopped from pleading that ICCPR is not a part of New Zealand domestic law;
- Fourth, that s 10(1)(a) of the Legal Services Act 2000 is inconsistent with s 27 of the BORA, articles 2, 14 and 26 of the ICCPR and Magna Carta and other due process statutes;
- Fifth, that prohibition of a grant of legal aid was a denial of access to the Court;

- Sixth and seventh, that the RSAA and RRA are not independent and impartial tribunals (in the course of parallel challenges to the terms of appointment and arrangements of administration that apply to them); and
- Eighth, that both the RSAA and RRA were not independent and impartial by virtue of the provision for members of both Authorities to sit concurrently on the other.

[21] Of these grounds, the respondent accepted that the first to fifth grounds in the second proceeding do not seek to challenge an exercise of a statutory power under the Act, and therefore do not require leave. That absence of exercise of a statutory power does give rise to a different jurisdictional problem to which I will return in due course. (See paragraph [236] below.)

[22] Dealing then with the fifth claim in the first, and the sixth to eighth causes of action in the second application for judicial review, the “special circumstances” required for leave need to be just that. The authorities place emphasis on the importance of the relatively short time limit that is imposed. The Court of Appeal observed in *Rajan v Minister of Immigration* [2004] NZAR 615:

[24] The term “special circumstances” is a commonly used phrase in the New Zealand statute book. It requires circumstances that are uncommon, not commonplace, out of the ordinary, abnormal — see *Cortez Investments Ltd v Olphert & Collins* [1984] 2 NZLR 434, in which this Court considered the meaning of special circumstances in the context of s 151 of the Law Practitioners Act 1972. Whether there are special circumstances justifying an extension of time must be assessed in the context of the legislation involved. The Immigration Act confers rights of appeal in respect of decisions relating to residence, revocation of residence, removal and deportation. However, strict time limits are placed on such appeals. The s 146A time limit for the filing of judicial review proceedings must be interpreted in that context. This means that the discretion to extend time should not be exercised too readily and very rarely if the delay is long. The Rajans’ application was filed one month late and thus would require an extension of one-third of the time limit. In the context of the Immigration Act this cannot necessarily be seen as a short delay.

[23] When initially proposed, the new s 146A provided for an even tighter time limit of 28 days. The report to the House on the Immigration Amendment Bill 1998 by the Social Services Committee commented:

The rationale for placing a restriction on the time limit for judicial review was to ensure that judicial review was not being used to delay immigration processes. It is, however, recognised that 28 days may restrict a person's ability to lodge judicial review proceedings, especially if the lodgement of judicial review may depend on the results of an Official Information Act request.

[24] As a consequence, the time limit was set at three months, but the rationale clearly remains, and is to be respected.

[25] In the present case, the judicial review proceedings were commenced seven months and 24 days out of time in relation to the RRA decision, and two years and 10 months out of time in respect of the RSAA decision.

[26] Submissions opposing the grant of leave cited numerous decisions considering the granting of leave. Those cases to an extent all depend on their own facts, but there is a consistent focus on the length of delay relative to the period of three months permitted for commencement of judicial review proceedings. For instance, in *Rajan* a one month delay, which required an extension of one third of the statutory time limit, was treated as 'not a short delay'. Generally, delays for greater than the period permitted (ie a further three months) tend to be characterised as 'long' or 'very long', tending to support a conclusion that leave should be declined. An observation by Allan J in *Kesonsung v Minister of Immigration* HC AK CIV-2006-404-1597 22 September 2006 that "...a long delay will ordinarily preclude the grant of leave in any circumstances" was coupled with the notion that where there has been a substantial period of delay relative to the three month period permitted for filing such proceedings, virtually no circumstances will be sufficiently "special" to warrant the grant of leave.

[27] In the present case, the impact of the addition of the judicial review proceedings to the appeal in terms of delaying a resolution can be seen in two ways. Mr Ellis claimed that Mr Zanzoul's counsel had worked sensibly to combine the issues, that the combined proceedings had been progressed reasonably promptly, and that there had been no attempt to prolong challenges brought on Mr Zanzoul's behalf such as by awaiting the outcome of the appeal before attempting judicial review.

[28] On the other hand, the appeal was commenced in June 2007, and would ordinarily have followed the appropriate track for appeals in the Wellington Registry, which leads to a hearing in substantially less than the 22 months it has taken to bring the combined proceedings on for hearing. Accordingly, for reasons including those I describe in the following paragraphs, the addition of the applications for judicial review have materially delayed the course that might reasonably have been expected for the appeal on its own.

[29] Mr Ellis applied for and was granted the appointment of a Full Court to hear the appeal, and then in April 2008 sought adjournment of the appeal on grounds including the intention to commence judicial review proceedings in relation to the lawfulness of the RRA's decision. The adjournment was granted, despite obvious concerns at delay. The Memorandum of Gendall and Clifford JJ recorded that further significant delay was not warranted.

[30] By July 2008, Mr Ellis had conveyed to the Court the view that the then allocated two day hearing would be insufficient, and that seven hearing days would be required. The Crown accepted that a two-day hearing would not be sufficient to deal with all the matters that had been raised. Logistical difficulties in being able to convene a Full Court for seven sitting days was part of the reason for reconsideration by the then Executive Judge, Wild J, of the appropriateness of allocating a Full Court to hear the proceedings. In a Minute issued on 5 August 2008, His Honour directed that the three sets of proceedings were to be heard together before a single Judge rather than by a Full Court.

[31] Subsequently, the matter has been heard before me. Ultimately, five sitting days were required to hear very full argument (the Court and Mr Ellis were both unable to continue with the hearing on the afternoon of Wednesday, 29 April 2009 and the hearing concluded towards the end of the morning of Monday, 4 May). In one sense therefore the existence of the judicial review proceedings has already materially delayed the determination that might otherwise have been expected of the appeal if considered on its own. On the other hand, that delay has now all been incurred and, in the circumstances that ensued, determination of the combined proceedings including the review causes of action for which leave is required should

only be delayed to a moderate extent beyond the period that would reasonably be required to determine the balance of the arguments, if the additional grounds are excluded.

[32] What is clearly relevant is the extent of the delay prior to commencement of the judicial review proceedings. In both applications, this was substantially longer than the period permitted for commencement of such proceedings: respectively 2.5 and 11 times longer than the time permitted.

[33] Mr Ellis relied on a number of factors as sufficiently “special circumstances” to warrant a grant of leave. Perhaps most emphasis was placed on the lack of availability of legal aid for persons in Mr Zanzoul’s position which, apart from being wrong and in breach of the rights claimed for him, was said to produce an “inequality of arms” that justifies much longer time being taken than the three months permitted by s 146A. In addition to that, Mr Ellis sought recognition of his standing as a “complete novice” in relation to immigration law, rendering him “unfamiliar with procedural niceties”. He acknowledged that some of the points sought to be argued had only occurred to him after considering the respondent’s submissions on the appeal. He also characterised some of his arguments as raising systemic problems of importance, and other arguments being of significant importance so that the public interest warranted the full gamut of the arguments being heard and determined by the Court. As they were developed, some of his arguments and those advanced by Mr Shaw amounted to pleas for greater recognition of precepts of human rights. Many of the declarations sought were using Mr Zanzoul’s predicament as a vehicle for challenges that counsel appeared enthusiastic to run on a much wider front.

[34] The relative inexperience of counsel in this area of law, or indeed mistakes as to the time limits or other errors by counsel, have not been recognised in this context as constituting a “special circumstances”. In any event, as was pointed out for the respondent, when the appeal was commenced, the solicitor previously acting as counsel was one highly experienced in immigration proceedings, who it can safely be assumed was thoroughly familiar with matters such as the time limit in s 146A.

[35] Nor is the “inequality of arms” a factor giving this case any “special circumstance”. The exclusion of persons unlawfully in New Zealand from an entitlement to legal aid under s 10(1)(a) of the Legal Services Act is a matter of legislative policy. It is illogical to recognise Parliament’s intention to confine judicial reviews in such cases to a period of three months from the relevant Tribunal decision, where persons in Mr Zanzoul’s position do not have access to legal aid, and then undermine that intention by treating the absence of legal aid as “special circumstances” justifying an extension of the strict time limit imposed by s 146A.

[36] I do not see the fact that many of the judicial review causes of action overlap with similar points in the appeal as a “special circumstances”. Mr Ellis was allowed liberal extensions to what had been pleaded in the appeal, and such commonality of content is not a situation to which the leave provision can apply in a positive way. If anything, this counts against a grant of leave. Duplication is to be avoided, and all matters properly raised as questions of law on which the RRA is alleged to have erred should be advanced within an appeal.

[37] Accordingly, before coming to any consideration of the merits, I am satisfied that the length of the delays, and the absence of a compelling, relevant explanation for them, mean that the periods of delay here disentitle the applicant to the leave needed under s 146A. Leave is accordingly declined. In practical terms, this only excludes the last of the grounds in the first application for judicial review (summarised in [18] above) because the arguments raised in the first four grounds were able to be grafted onto the grounds for appeal, when the latter were liberally construed. On the second application for judicial review, only the sixth to eighth grounds related to the exercise of statutory powers under the Act, so it is those that are excluded from that proceeding (see [19] and [20] above). (The last cause of action in the first, and the sixth to eighth causes of action in the second application for judicial review, are hereafter referred to as ‘the excluded claims’).

[38] There is an inefficiency inherent in hearing the essence of the argument before deciding whether the merits of it justify a grant of leave. Accordingly, the authorities tend to focus on the relative length of the delay and the strength of the reasons justifying the delay before embarking on even a preliminary assessment of

the potential merits: see eg *Jaing v Chief Executive Officer of the Department of Labour* HC AK CIV-2005-404-967 28 April 2005 Harrison J, and *Yu & Cha v Chief Executive, Department of Labour* HC AK CIV-2006-404-5702 13 November 2006, Winkelmann J, which followed the same approach as *Jaing*. Accordingly, the relative strength of the merits sought to be argued in an application for judicial review that is brought out of time should not automatically be considered when assessing a grant of leave, and only in a marginal case will the perceived strength of the merits tip the scales in favour of granting leave.

[39] I had anticipated from the terms of written submissions that counsel for the respondent would resist any argument on the additional matters raised by the judicial review proceedings before an entitlement to leave had been made out. However, at the hearing, Mr McCarthy conceded that it was not practicable in the particular circumstances of these proceedings to insist on that strict separation. Accordingly the respondent did not oppose Mr Ellis's wish to present arguments in a sequence that substantially intermingled the arguments relevant to the appeal, and the additional matters only relevant to the additional challenges raised in the applications for judicial review.

[40] Given that absence of opposition, I allowed Mr Ellis to develop his argument in his preferred way. This involved Messrs Ellis and Shaw speaking to the content of four sets of submissions running to some 231 pages, together with references to parts of three volumes of authorities filed before the hearing, and a further 37 references tendered in the course of the argument.

[41] I have therefore heard all that could possibly be put in support of all the issues. In the event that I am wrong to decline leave under s 146A without having regard to the merits, I am in a position to make a finding as to the prospects of any merit in the excluded claims adding weight to the special circumstances entitling Mr Zanzoul to leave notwithstanding the substantial periods of delay beyond the time limit. I am satisfied that there is no material prospect of merit in the excluded claims that would alter the evaluation of special circumstances for granting leave.

## **Factual background**

[42] In traversing the factual background, I have relied primarily on a summary of the substantial factual material available from files maintained by the New Zealand Immigration Service, as included in the submissions for the respondents. No challenge was raised to the accuracy of it.

[43] Mr Zanzoul is presently 44 years old. He was born in Syria and left that country in 1990 on a valid Syrian passport, entering Cyprus on a tourist visa. He overstayed that visa and worked illegally until being deported back to Syria in 1992. Shortly after that, he left Syria again and entered Turkey legally, but then illegally walked across the border into Greece and worked illegally in Greece until some time in 1994.

[44] Sometime prior to July 1994, Mr Zanzoul travelled to Denmark and procured a false Danish passport in the name of Janis Nikos Stavros. He discarded his valid Syrian passport at that time, and on 6 July 1994 illegally entered New Zealand, relying on the false Danish passport. Once in New Zealand, he applied for, and was issued, a visitor visa for a one month stay in Australia. He did that using the Danish passport and relied on the visa in the name of Stavros to enter Australia on 15 July 1994. He then obtained further visitor visas entitling him to stay in Australia until 15 May 1995. During this period he was working illegally as a tiler.

[45] On 15 May 1995, Mr Zanzoul, still using the name Stavros, applied for a protection visa in Australia. Still using the Stavros identity, he married an Australian citizen, Martha Theofanedes in August 1995. In November 1995, his application for a protection visa was rejected.

[46] In April 1996, the first of Mr and Mrs Zanzoul's children was born in Australia, registered as Yasmine Janis Stavros. In July 1996, Mr Zanzoul applied for a resident's visa on the basis of his marriage to an Australian citizen, and was granted a bridging visa. The application was still in the name of Stavros and was supported by false documentation.

[47] In July 1998, the second of the couple's children was born in Australia, again registered in the name of Stavros. In September 1998, the application for a resident's visa was refused on the ground that it could not be a valid application because Mr Zanzoul had previously been refused a protection visa.

[48] From September 1998 to October 2001, Mr Zanzoul pursued a number of attempts to obtain a resident's visa or a protection visa, remaining for some of the period lawfully pursuant to bridging visas. In October 1999 a third child was born, and in June 2001 new birth certificates issued for all three children, changing the family name to Zanzoul from Stavros. Various of his initiatives to obtain a visa were pursued to the appropriate Administrative Tribunals in Australia, and the course of those proceedings was also the subject of consideration by the Federal Court.

[49] On 27 October 2001, Mr Zanzoul, together with his wife and three children, left Australia and went to Syria.

[50] In March 2002, Mr Zanzoul made three trips to Lebanon from Syria, on each occasion promptly returning to Syria and using a valid Syrian passport. Then in April 2002, Mr Zanzoul and his family travelled to Bangkok, Thailand where he applied to the New Zealand Immigration Service for a visitor visa that would entitle him to travel to New Zealand. That application was declined as the Immigration Service was not satisfied that Mr Zanzoul was a genuine visitor. So the Zanzoul family left Thailand, returning to Syria. In May 2002, Mr Zanzoul made application in person at the Australian Embassy in Beirut for a permanent Australian resident visa, but that application was declined.

[51] In March 2003, Mr Zanzoul had a false Australian passport made in Lebanon, utilising his son's previous Australian passport issued in the name of Stavros, but switching his own photograph and substituting his own details for those of his son.

[52] In March 2004, Mr Zanzoul left Syria using a valid Syrian passport, and travelled to Bangkok with his son. There he obtained a one-way ticket to Auckland and checked in for the flight using his false Australian passport. On arrival in

Auckland, he presented his valid Syrian passport, claimed refugee status and surrendered the false Australian passport. His wife and two daughters had returned to Australia in April 2003, but they joined him in New Zealand the same day as he arrived in March 2004.

[53] On arrival in New Zealand, Mr Zanzoul was granted a visitor permit valid for four months, and shortly after his arrival was also issued with a work permit that was to expire after six months. He was interviewed in respect of his claim to refugee status in April 2004. Then he and his wife separated in August 2004. By the time Mr Zanzoul obtained an order from the Family Court preventing the removal of his children from New Zealand at the end of August 2004, Mrs Zanzoul and the children had already returned to Australia. Mr Zanzoul applied for a further work permit at the end of September 2004, but that was declined in early October 2004. Later in October 2004, he applied for a visitor permit pending the outcome of a Refugee Status Branch decision on his claim to refugee status. However, the refugee status application was declined at the end of October, and he subsequently appealed to the RSAA.

[54] In February 2005, Mr Zanzoul pursued an application in the Family Court of Australia seeking the return of his children, and orders to that effect were made in March 2005. It appears that Mrs Zanzoul and the children returned to New Zealand in May 2005, Mr Zanzoul having been granted a further temporary permit to be in New Zealand on 15 April 2005, and due to expire on 15 October 2005.

[55] The appeal before the RSAA was heard in early May and dismissed in June 2005. After a Family Court hearing in New Zealand in June 2005 resulted in interim orders concerning care of the children, Mr and Mrs Zanzoul resumed living together with all three children.

[56] However, in July 2005, the New Zealand Immigration Service revoked Mr Zanzoul's temporary permit, and in September 2005 Mr Zanzoul appealed against removal from New Zealand. In December 2005, he pleaded guilty to a charge of having a false passport. He was subsequently committed to the High Court for sentence on false passport charges, and he was sentenced in August 2006 to a

term of 15 months' imprisonment. In the meantime, Mrs Zanzoul applied for a custody order entitling her to relocate to Australia with the children, and that was granted on terms recognising Mr Zanzoul's right to have periodic access to the children. Mrs Zanzoul and the children returned to Australia in April 2006.

[57] In October 2006, Mr Zanzoul pursued an appeal against his conviction and sentence, but those appeals were dismissed in December 2006. He has subsequently pursued an application for leave to appeal the Court of Appeal decisions in the Supreme Court, but leave was declined. He was released from prison in March 2007 and the decision of the RRA, which had apparently been deferred pending his release, was delivered in May 2007, dismissing his appeal from the removal order.

### **Terms of RRA decision**

[58] The RRA treated Mr Zanzoul's appeal as motivated by his wish to remain in New Zealand to retain access to his children who resided in Australia. The prospects of access, at least until the children were adults, would be extremely remote if he was in Syria. The RRA reviewed the grounds relied on by the RSAA for confirming the decision that he not be accepted as a refugee. The RRA treated the primary basis for the appeal before it as Mr Zanzoul's right to remain in contact with his children, and the children's right to know him as their father.

[59] The RRA reviewed materials that could be seen as supportive of arrangements allowing him to have access to the children, addressing his skills as a tiler, plasterer and bricklayer, and various materials arising in proceedings in the New Zealand Family Court as well as various proceedings in Australia. The New Zealand Family Court proceedings had resulted in orders that the day-to-day care of the children was to be the exclusive responsibility of Mrs Zanzoul in Australia. Mr Zanzoul was to have contact with the children for at least one week during the April and September school holidays, and two weeks at Christmas, with the parents to contribute equally to the airfares of the children and Mrs Zanzoul as she would need to accompany the children on their visits to New Zealand. In addition, those orders provided for three telephone calls from the children to Mr Zanzoul every seven days, and allowed daily internet contact. A March 2006

assessment by counsel for the children had recorded the children's wish at that time to have unsupervised contact with their father, and recorded the opinion that they would be safe with him during such contact. The judgment noted the observation of the Family Court Judge that there was considerable evidence pointing to Mr Zanzoul placing intolerable pressure on the children.

[60] The statutory criteria under s 47(3) of the Act were set out at [2] above. The RRA purported to apply the approach to this section as described by the Court of Appeal in *Rajendra Patel v Removal Review Authority and anor* [2000] NZAR 200 where the Court commented in relation to the predecessor provision in substantially similar terms:

Section 63B appeals start from the premise that the appellants are in New Zealand unlawfully and are seeking an exemption. The stringent statutory wording, "exceptional circumstances of a humanitarian nature unjust or unduly harsh", using strong words imposes a stern test. In its natural usage, "exceptional circumstances" sets a high threshold necessarily involving questions of fact and degree. Associated in the test under the paragraph is that it be "unjust or unduly harsh" to remove on that account. It is a composite test and the whole picture is to be viewed, both circumstances and effects; and as part of that whole picture, the effects on others as well as the person removed may require consideration (*Nikoo v Removal Review Authority* [1994] NZAR 509, 519).

[61] The RRA treated the first limb of the statutory test (exceptional humanitarian circumstances sufficient to make it unjust or unduly harsh to remove him from New Zealand) as setting a "high threshold".

[62] The RRA considered aspirations of reuniting with his wife as being unlikely, but that the best interests of the children were a primary consideration for the RRA. There was a positive finding that it would be in the best interests of the children to have contact with their father, not just by telephone and email but also by physical direct contact. It was recognised that if Mr Zanzoul was removed that would effectively sever direct contact between him and his children which was not seen as being in the interests of either the children or Mr Zanzoul. It could not be said that the appellant was a bad father or a negative influence on his children.

[63] Mr Zanzoul's mental health was also considered in assessing humanitarian circumstances, in the following terms:

[62] There is another factor relevant to the appellant's humanitarian circumstances. There is evidence, not only from the appellant's many supporters but also medical evidence, that he has suffered stress and depression from separation with his children and anxiety about losing them if he is removed from New Zealand. He has symptoms of a major depressive illness and has been on sleeping and anti-depressive medication. This is a relevant though not determining factor.

[64] The RRA then concluded on humanitarian circumstances in the following terms:

[63] The Authority finds that the removal of the appellant from New Zealand amounts to exceptional circumstances of a humanitarian nature that would be unjust or unduly harsh for the children and for the appellant himself.

[65] The RRA then moved to the second limb of the test in s 47(3) describing its analysis on public interest in the following terms:

[64] The primary issue in this appeal is whether the appellant meets the second limb of the statutory test, namely whether he has established that it would not in all the circumstances be contrary to the public interest to allow him to remain in New Zealand.

[66] The RRA reflected on the relative seriousness of the criminal conviction, and the circumstances in which it had arisen. It noted that there was no need for Mr Zanzoul to have used a false passport given that he had a valid Syrian passport which he had used on numerous occasions. That circumstance was different from some successful claimants for refugee status who could not do otherwise than arrive in New Zealand in reliance on false documentation. The RRA also had regard to the extent of his admitted previous travel on false documents, and the prolonged use of his false identity as a Greek Cypriot using the surname of Stavros. This deception had persisted through the marriage of his wife and the registration of the birth of their three children over a period of years.

[67] The RRA also treated Mr Zanzoul's untruthful evidence to judicial bodies and the Family Court findings of domestic violence and harassment as factors, relevant to the public interest, in counting against Mr Zanzoul being permitted to remain. Although notionally recognising that there has been a breach of a Court order to pay \$250 per week towards the support of his family, the terms of the

RRA's judgment sensibly accept that he had had little realistic prospect of paying that support.

[68] Then the RRA reflected on the humanitarian circumstances that had been taken into account under the first limb, recognising them as favourable factors in the consideration of the public interest under the second limb of the section. The RRA's conclusion on the second limb was reflected in the following terms:

[105] The Authority has considered the effect of removal of him and the children but finds, in light of his criminal conviction, his propensity to lie to immigration and judicial officers in Australia and New Zealand, the use of fake passports and assumption of a false identity in Australia for a number of years, lying to his wife, his treatment of his wife (including at least one assault) and his oldest daughter and his breach of court orders, that it has not been established that it would not be contrary to the public interest to allow him to remain in New Zealand. Indeed, the Authority finds that it would be contrary to the public interest to allow him to remain in New Zealand.

### **Grounds argued**

[69] Attempting to synthesise the scope of all grounds raised on both the appeal and the cross-appeal invites their consideration in an order different from those pleaded and argued. The range of arguments can be distilled in the following way.

#### *Concerns as to process*

[70] First, process concerns as to the manner in which the appeal hearing was conducted. The primary argument on this challenge was the failure by the RRA to disclose receipt of prejudicial information. On the basis of that and other alleged deficiencies, it was argued that the RRA failed to afford a fair hearing to Mr Zanzoul, contrary to s 27 of BORA and the common law. This deals with grounds (e) and (i) of the appeal as summarised in paragraph [8] above.

#### *Errors of law in RRA's approach*

[71] A second group of arguments related to alleged errors of law in the approach of the RRA to the s 47(3) test.

[72] The respondent's cross-appeal included an argument that the RRA erred in what it considered might constitute unduly harsh or unjust treatment under the first limb of s 47(3), to the extent that separation from the children might be sufficient. Further, the respondent argued it was an error to rely on the consequences of separation from the children in the absence of any finding that the separation was damaging to the children. In addition, the respondent argued that the RRA erred in the relevance it attributed to humanitarian factors, when assessing the public interest on the second limb of the test under s 47(3).

[73] It was argued for Mr Zanzoul that the RRA adopted the wrong approach to the test in s 47(3) of the Act, and that it was an error of law to make a positive finding that allowing him to remain in New Zealand would be contrary to the public interest in terms of the test under the second limb of s 47(3). This raises grounds (a) and (b) of the appeal.

[74] It was also argued for Mr Zanzoul that an error of law arose on the RRA's rejection of uncontested evidence of the adverse mental health consequences, and also that the RRA erred in failing to give adequate reasons for that rejection. The complementary argument in the cross-appeal was to question the weight that might be given to issues going to Mr Zanzoul's mental health.

#### *Misconceived relevant and irrelevant considerations*

[75] Next, there was a series of arguments at the alleged failures of the RRA to have regard to relevant influences on its determination, in particular the provisions of ss 8, 9 and 27 of BORA, and articles 17 and 23(1) of ICCPR.

[76] Further, it was argued in the appeal that the RRA was obliged to undertake an assessment as to the proportionality of the consequences, but failed to do so.

[77] Finally, within the scope of appeal arguments, there were criticisms that the RRA had failed to have regard to relevant considerations such as that the RRA should have recognised and had regard to the positive contribution Mr Zanzoul could make to New Zealand in the future, and that there was no threat of future criminality

because all of his offending had been in respect of attempts to stay in New Zealand, and were in the past. Also, that the RRA had taken into account irrelevant factors such as a need to exclude Mr Zanzoul to uphold the integrity of the New Zealand immigration system.

## **Process**

### *Failure to disclose prejudicial information*

[78] This first head of challenge in the appeal was an alleged deficiency in the process adopted by the RRA because of its failure to disclose to Mr Zanzoul the receipt of information potentially prejudicial to him. On disclosure of the RRA's files to Mr Zanzoul's advisers after the present appeal had been lodged, the advisers discovered correspondence from an immigration officer, who had been having dealings with Mrs Zanzoul, to the Secretariat of the RRA enclosing a confidential statement made by Mrs Zanzoul to that Immigration Officer. It appears the essence of the communication was that Mrs Zanzoul was supporting her husband's appeal to the RRA under duress. The covering communication that has been disclosed warned that the information conveyed was highly confidential, and could not be discussed with Mr Zanzoul or his representatives.

[79] Ordinarily, knowledge on the part of the decision-maker of any information potentially prejudicial to a party to proceedings before it that is not shared with that party, will amount to a serious flaw of any minimum procedural requirements for a fair hearing. Basic tenets of natural justice require a party to know the case against him or her in sufficient detail to mount an answer, as well as affording an adequate opportunity to do that.

[80] However, s 50 of the Act somewhat confines that usual approach at common law to take account of the somewhat unusual circumstances in which appeals to the RRA might arise. Subsections (4) to (7) of s 50 provide as follows:

**50 Procedure in appeals**

...

- (4) In determining the appeal, the Authority—
- (a) May seek and receive such information as it thinks fit, and consider information from any source; but
  - (b) May not consider any information which relates to matters arising after the date the appeal was lodged unless it is satisfied that there are exceptional circumstances that justify the consideration of such matters.
- (5) The Authority must disclose to the appellant any material or information that the Authority proposes to take into account in determining the appeal if that material or information—
- (a) Is or may be prejudicial to the appellant; and
  - (b) Is material lodged with the Authority by the chief executive, or is information obtained by the Authority from a source other than the appellant.
- (6) The Authority must give the appellant an opportunity to rebut or comment on any material or information disclosed under subsection (5) within such reasonable time as the Authority specifies.
- (7) Subsections (5) and (6) do not require the Authority to disclose to the appellant any material or information whose disclosure would be likely to endanger the safety of any person, but the Authority must notify the appellant of the fact of any such non-disclosure.

[81] Subsections (5) and (6) reflect a basic requirement of natural justice in administrative law, as it applies to any information that the RRA proposes to take into account in determining an appeal, with the exception of the subset of such information provided for in subs (7). That limited exception recognises that where disclosure would be likely to endanger the safety of any person, the information itself need not be conveyed to the appellant. The RRA must nonetheless notify the appellant of the fact that the RRA has such information which it has decided not to disclose because of the likelihood of endangering the safety of any person. Before it comes within subs (7), the information must be information that the RRA proposes to take into account in determining the appeal.

[82] In defending the non-disclosure in this case, it was argued for the respondent, first, that there was no evidence that the information had been conveyed to the member of the RRA making the decision. Secondly, it was argued that the Court

could be satisfied the information was not taken into account in determining the appeal because of the existence of other information, which had been disclosed to Mr Zanzoul and which would justify the relevant passage in the decision of the RRA that might otherwise have depended on the non-disclosed information.

[83] As to the first of these points, I accept Mr Ellis's submission that it is impossible for the appellant to prove positively that the information was conveyed to the RRA member responsible for the decision, and that once a clear inference arises that it would have been available to the RRA member, the Court should draw the inference that it was considered, until that inference is refuted.

[84] On the second point, reliance was placed on two High Court decisions in which the Court analysed the non-disclosed information and was satisfied that the information had not ultimately been relevant to the RRA's decision, so that the statutory context did not require disclosure. In the first of these, *Faifai v Chief Executive of the Department of Labour* HC WN AP217/99 14 June 2000 Ronald Young J, the finding that the previous version of s 50(5) had not been breached was addressed in the following terms:

[52] Judges are normally reluctant to dismiss the significance of a failure to pass on to a party to administrative proceedings the existence of prejudicial information about that party on the basis that the decision-maker, explicitly or by implication, has asserted that the non-disclosed information was immaterial. But there is a statutory context in which the present case must be decided. If I were to allow the appeal on the basis urged on me by Mr Petris, it would, in effect, mean that the Removal Review Authority would be required to disclose to appellants all information which was potentially prejudicial irrespective of whether the Authority intended to rely on it. So, allowing the appeal on this basis would be tantamount to me repealing s 63D (5)(c) by judicial decree. It would also be inconsistent with the nature of the appeal contemplated by the statute which is required to be determined "with all reasonable speed". Requiring the Removal Review Authority to make available for comment information which it does not intend to take into account would cut across that obligation.

[85] On the facts in that case, the Judge was satisfied that the non-disclosed information had not been relied upon.

[86] A similar approach applied in *Jeong v Attorney-General* HC WN AP58/03 15 July 2003 Ellen France J. That case included the following reasoning:

[53] I have carefully considered this matter because the information in issue is potentially relevant and is potentially prejudicial. However, looking at s 50(5) in its context, it does confine the notion of disclosure. It is not enough that the information is prejudicial but it must also be information that the RRA proposes to take into account in determining the appeal. Accordingly, the section is more restricted than is contended for by the appellants. The appellants' interpretation would give no meaning to the word "propose" and nor to the requirement that the information be something to be taken into account "in determining" the appeal.

[54] In the end I agree with the respondent that, reading the decision as a whole, there is no focus or emphasis and so no taking into account of the relevant information. [...]

[87] The effect of those decisions is to treat s 50 as entitling the RRA to receive information from any source that is not necessarily required to be disclosed to the appellant. However, the obligation to disclose does arise if the RRA proposes to take the information into account. Usually that obligation can only be discharged by copying the information, except in circumstances where the RRA proposes to take into account information, the disclosure of which would endanger the safety of any person. In those circumstances, the limited disclosure required by subs (7) would apply, so that at least the appellant knows the character of the information, although not its source.

[88] Here, there was a credible basis for arguing that the RRA did not have to take into account the non-disclosed information, because the part of its judgment relevant to the non-disclosed information was justified by other material before the RRA.

[89] The most specific observation in the RRA's decision that refers to pressure Mr Zanzoul may have imposed on his wife is in the concluding sentence of paragraph [101] of the decision which stated:

The appellant, it must be remembered, has a history of lying to achieve his goal of permanent residence outside Syria and has sought to manipulate others, including the oldest child and no doubt his wife along the path to reaching that goal.

[90] Ms Griffin took me to a substantial number of items that were among the disclosed materials before the RRA, many of which she submitted were sufficient on their own, and certainly sufficient cumulatively, to justify the finding of manipulation of Mrs Zanzoul that is reflected in paragraph [101].

[91] Ms Griffin suggested that paragraph [51] of the RRA's decision is also relevant to an assessment of whether the RRA had regard to the non-disclosed information. That paragraph stated:

[51] While he apparently harbours the prospect of reuniting with his wife, that would seem most unlikely given the evidence before the Family Court and her residence in another country. There is no evidence before the Authority of any realistic prospect of reconciliation. According to counsel, the appellant's wife supports his residence here so he can have regular ongoing contact with the children, but there is no evidence of this from her and given the history of conflict between them, this contention is not accepted.

[92] One point arising from that part of the RRA reasoning is that, given its demonstration of good faith in scrupulously disclosing to Mr Zanzoul's advisers all the other material that was likely to be relied upon, the absence of acknowledgement of the non-disclosed material on this aspect of the reasoning supports an inference that indeed the RRA did not have regard to it. Arguably, if the RRA did have regard to it, it would have referred to the communication from Mrs Zanzoul in positive terms as evidence contradicting the submission on behalf of Mr Zanzoul that his wife supported his application to remain in New Zealand.

[93] Although I recognise that as a credible argument, I am not prepared to rely on the absence of explicit reference in paragraph [51] as establishing that the RRA positively did not have regard to the non-disclosed information.

[94] On the point that other evidence, disclosed and available to Mr Zanzoul, was more than sufficient to justify the finding in paragraph [101] of the RRA's decision, Ms Griffin pointed to the following.

- a) A review of the history of the relationship between Mr and Mrs Zanzoul in the decision of the Australian Administrative Appeals Tribunal dated 20 February 2004. That referred, among other things, to Mrs Zanzoul saying that Mr Zanzoul had told her that he was from Cyprus, that he spoke Greek to her parents when they first met, and that they accepted that he was a Greek Cypriot. Mrs Zanzoul was apparently at the time under the impression that Mr Zanzoul was in the process of obtaining permanent residence in Australia (paragraph

[25]). Further, Mr Zanzoul acknowledged that he did not tell Mrs Zanzoul his real name until after they were married, but said that it was before their first child was born in April 1996. That apparently did not bother Mrs Zanzoul but her parents were distressed when they found out (paragraph [29]). The Australian Tribunal found that Mrs Zanzoul was indeed aware of his true identity before their first child was born, and that she helped him invent names for the false Cypriot family whose details they included in his Australian visa application, in reliance on his status as her spouse (paragraphs [32], [55] and 56]). In finding it “a most serious case of immigration conduct and abuse of Australia’s migration system” (paragraph [61]), the Australian Tribunal emphasised the extent of deception as to his identity and his preparedness consistently and repeatedly to lie and manipulate “the system” to achieve that end.

- b) The second source of information suggested as justifying the paragraph [101] finding was the first decision delivered by the Family Court at Auckland on 7 March 2006. That determined an application by Mrs Zanzoul for permission to take their children to reside in Australia, and for orders defining the extent of contact the children were to have with Mr Zanzoul. Some of the background to their relationship was reviewed in terms consistent with the findings by the Australian Administrative Tribunal. The judgment records claims by Mrs Zanzoul that Mr Zanzoul had been violent and domineering, and that whilst she lived alone with the children, they were regularly exposed to conflict between her and Mr Zanzoul (paragraph [19]). The judgment reviewed a quantity of evidence about domestic violence, and violence shown by Mr Zanzoul towards their children, plus Mrs Zanzoul’s evidence that she feared Mr Zanzoul to an extent that she slept with a portable security alarm next to her. The Judge concluded that Mr Zanzoul was violent towards Mrs Zanzoul and that, contrary to an undertaking given to the Court, he was still abusing, harassing and intimidating her (paragraph [49]). The Judge was satisfied that while Mrs Zanzoul lived in New Zealand, she was likely

to be subjected “to ongoing pressure and threats from [Mr Zanzoul]” (paragraph [55]).

- c) A third source identified by Ms Griffin was a second Family Court decision delivered at Auckland by the same Judge on 16 March 2006. That dealt with the issue of whether the children would be safe in the unsupervised care of Mr Zanzoul which was required by virtue of the Judge’s finding that Mr Zanzoul was violent towards Mrs Zanzoul. The Judge found there to be intolerable pressure on Mrs Zanzoul and the children, attributable substantially to Mr Zanzoul’s proceedings in relation to his attempts to remain in New Zealand. The Judge found that there was evidence of continuing pressure by Mr Zanzoul on Mrs Zanzoul (paragraph [18]).
- d) Fourthly, Ms Griffin drew attention to a 10 March 2006 Memorandum to the Family Court from counsel appointed for the children. That reported Mrs Zanzoul as saying that Mr Zanzoul had persuaded her to return to assist with his immigration status, and her feeling “controlled and manipulated by Mr Zanzoul”. The report also acknowledged a denial by Mr Zanzoul that he had persuaded Mrs Zanzoul to return to assist with his immigration status.

[95] Ms Griffin’s submission was that all of these sources cumulatively were more than enough to warrant the finding in paragraph [101]. The difficulty I have with this submission is that none of these sources have a specific focus, or the contemporaneous relevance that would obviously be attributed to the recent and highly relevant communication from Mrs Zanzoul. Even if those earlier sources justified the finding, and might have focused the mind of the RRA in addressing the prospect of manipulation, they would be given a greater importance, and a tighter focus, by the additional impact of what was communicated from Mrs Zanzoul before the decision was made. With respect to the RRA, the statutory exceptions to the usual requirement for full and equal disclosure to both parties, which were created by s 50(5) to (7) of the Act, require a high standard of compliance to justify resort to the exception. In these circumstances, a relatively low threshold is appropriately applied

for Mr Zanzoul to make out the information as having been taken into account by the RRA in determining the appeal. I consider it more likely than not that some regard was had to the undisclosed information.

[96] Accordingly, I consider the factual context has this case falling on the opposite side of the line from *Faifai* and *Jeong*. The non-disclosed information was highly material to a matter traversed in the RRA's decision and, without some form of positive disclaimer that it had been disregarded, the other evidence available to the RRA and disclosed to Mr Zanzoul relevant to this topic would have been given a tighter focus and potentially greater relevance when the undisclosed information was added to it.

[97] I do appreciate the dilemma that this situation creates for the RRA. If it considers that there are genuine grounds to fear retribution by Mr Zanzoul if he discovered that Mrs Zanzoul had conveyed to Immigration Service staff on a confidential basis that she was being pressured to support his case, then it would be extremely difficult to give notice to Mr Zanzoul of the intention to rely on such information, without revealing the source and therefore destroying the confidence in which the information was conveyed in the first place. On the other hand, if the RRA decided it was unnecessary to have any regard to such information conveyed on a confidential basis, it would be sufficient to acknowledge that other information had been conveyed to the RRA which it was not in a position to either disclose or describe, leading the RRA to decide not to take that information into account in determining the appeal. In cases such as the present, that might still create some risk that a person in Mr Zanzoul's position would speculate on what such other information was, and react adversely on the basis of a suspicion. Generally, and in particular in this case, that risk can be managed and substantially reduced by the lack of specificity in an acknowledgement that the RRA has not taken undisclosed information into account. In the absence of such a disclaimer, the materiality and additional weight of such information that is clearly relevant to the outcome unfortunately leads to the prospect of the process being inadequate, relative to the requirements of natural justice as adopted in these cases by s 50 of the Act.

[98] Here, I consider the error sufficiently important to quash the RRA's decision, and direct reconsideration.

*Well-founded fear of persecution*

[99] Mr Ellis placed significant reliance on an argument that injustice was caused by requiring Mr Zanzoul's removal to Syria when he has a reasonable fear of persecution there. At the forefront of this was an unpleaded criticism that both the executive and judicial branches of the New Zealand Government have contributed to breaches of Mr Zanzoul's human rights. The executive was at fault due to the absence of formalised requirements for suppression of personal details in any criminal prosecution relating to immigration offences. The judicial branch was complicit by adjudicating on such cases, and not initiating suppression of his name. These constraints were argued to be necessary because of the risks inherent in publication for any would-be refugee or migrant who is critical of the regime in the country to which that person is likely to be returned.

[100] Mr Ellis contrasted the appropriate procedures in place in all processes under the Act that do provide for the suppression of the name and other details likely to identify a claimant for refugee status. Mr Ellis infers that those procedures are in place because of a sensible appreciation that, where an application fails, the circumstances of the attempt to attain residence in New Zealand may of themselves add to the risk that that person is exposed to when returned to the jurisdiction from which he or she has come.

[101] The Court proceedings, the outcome of which identify Mr Zanzoul, relate to his sentencing in the High Court at Auckland on 4 August 2006 to a term of 15 months' imprisonment for convictions on offences under the Act, and the decision of the Court of Appeal dismissing appeals against conviction and sentence on 6 December 2006. Since the RRA decision, Mr Zanzoul sought leave to appeal further to the Supreme Court on 22 April 2008. For the first time he made an application for name suppression which was dismissed by the Supreme Court on 9 May 2008. The Supreme Court went on to dismiss his application for leave on 10 June 2008. It was submitted that the outcome of all these Court proceedings is

available via simple internet search and thus Mr Zanzoul's involvement in them is widely available.

[102] Mr Ellis originally submitted that so long as there was a risk that someone attempting to remain in New Zealand as a refugee or migrant might forcibly be removed to another country, then a presumption that there was a prospect of ill-treatment on forcible return to another country was sufficient to impose an obligation on either or both of the executive and the judiciary to take positive steps to suppress the person's name or other identifying details in relation to their involvement in Court proceedings. Mr Ellis's proposition requires the rejection as inadequate of the usual entitlement to apply for suppression of name in criminal, or indeed civil, proceedings in the District Court and High Court.

[103] One of the propositions raised on behalf of the respondent against any such obligation was that there was no justification for an unqualified assumption that such protection was warranted in every case, and that it could never be warranted in light of the presumption of open justice that is well-established in New Zealand. In replying to this, I took Mr Ellis to qualify the expectation he contended for, to some presumptive recognition of an entitlement to name suppression. I was certainly not persuaded of any obligation that should be imputed either to the executive or the judiciary, to pre-emptively recognise a requirement to protect the identity of persons in the position of Mr Zanzoul, in relation to their involvement in Court proceedings in New Zealand. Fears of the risk of persecution in countries to which they may be returned is not so standard a feature of the circumstances of those appearing in New Zealand Courts on matters arising under the Act that some special statutory provision is required. Nor is there a basis for expecting the judiciary to take initiatives on name suppression.

[104] Persons in the position of Mr Zanzoul can be expected to appreciate the nature and extent of the risk they may be exposed to if the circumstances of their involvement in Court proceedings in New Zealand are published. The existing law affords adequate grounds for them to seek name suppression. Where justified, suppression is routinely granted. There is no justification for a requirement that would pass the initiative from the person immediately affected by publication, to

some form of pre-emptive recognition of risk as a generality, so as to create an obligation on the New Zealand Government in any guise.

[105] Accordingly, however it is framed, the criticism of an absence of institutional protection for Mr Zanzoul in relation to the publication of his involvement in Court proceedings in New Zealand cannot succeed.

[106] In the course of his argument, Mr Ellis made an oral application for suppression in these present proceedings of Mr Zanzoul's name, and any details leading to his identity. The Supreme Court has previously declined such an application, essentially on the well-settled basis that the Court will not order suppression where it would be futile because the matter is already in the public arena. That is the case here by virtue of the absence of suppression orders in relation to the High Court sentencing, and the appeal to the Court of Appeal.

[107] In the present circumstances, Mr Ellis argued that every additional reference to Mr Zanzoul's involvement in proceedings in New Zealand added incrementally to the risk of his position in New Zealand coming to the attention of the Syrian authorities. Unlike the usual situation where any first reference to a person's involvement in criminal proceedings "lets the cat out of the bag", in this case the Court should do what it could to repair the harm done by prior publication, by avoiding the prospect of any further references that might trigger disclosure of Mr Zanzoul's initiatives here by means of an internet search.

[108] It may be that one reason for pursuing such an application for suppression, as Mr Ellis did in the course of argument, was to reinforce the relative seriousness attributed to the risk of his plight becoming known to the Syrian authorities. This minimises the impact of arguments against Mr Ellis's imputation of an obligation on the executive and the judiciary to anticipate the prospect of such prejudice, and pre-emptively suppress his name, by demonstrating that Mr Ellis was now doing all he could to limit the "damage" perceived as arising.

[109] It appears that the first four results of an internet search via Google using the key word 'Zanzoul' refer to Mr Zanzoul's involvement in Court proceedings in

New Zealand. I am not persuaded that the notion of incremental levels of harm is a basis for distinguishing these circumstances from the usual approach adopted by the Courts, namely that suppression orders will not be made where it is futile to do so because the subject matter is already in the public domain.

[110] Accordingly, I am not prepared to make the suppression order requested by Mr Ellis in relation to the current proceedings.

[111] On the issue of the fear of persecution, that leaves the prospect of what would amount to a new ground of exceptional humanitarian circumstances, potentially sufficient to justify permitting Mr Zanzoul to remain in New Zealand, if his circumstances reflected in the extent of information revealed by an internet search now justify a well-founded fear that persecution would follow his removal to Syria.

[112] In reviewing the history of his concerns throughout his attempts to stay in Australia and New Zealand, it does appear that this point has gained prominence latterly. Although it was accepted by the RSAA that Mr Zanzoul was previously detained for a period of some 21 days by Syrian civil intelligence services, since that time he appears to have left and subsequently re-entered Syria on numerous occasions without attracting the attention of the authorities there. Immigration authorities in both Australia and New Zealand have tended to the view that he has overstated the extent of any risk that he might be subjected to persecution or ill treatment on return to Syria.

[113] In its February 2004 decision, the Australian Administrative Appeals Tribunal states that Mr Zanzoul:

...acknowledged that he is not and was not a refugee but he allowed the protection visa application to be made on his behalf. He lied when he claimed in the application that he would be "locked up in jail and tortured" if he had to return to Syria...Mr Zanzoul said he was scared of losing his wife and kids. He was prepared to lie to prevent this happening.

[114] Arguments for Mr Zanzoul before the RRA appear to be consistent with this statement, with a focus on his concern to retain physical contact with his children, and the harsh consequences of his not being able to do so if returned to Syria. That

decision, delivered on 30 May 2007, does not make anything of a fear on Mr Zanzoul's part of persecution or ill treatment if returned to Syria.

[115] It is appropriate to assume that the references to the Court proceedings on the internet became available to anyone searching that source relatively soon after they occurred. In that event, there were at least a small number of references that could be searched by the authorities in Syria at the time of the RRA decision. Mr Ellis suggested that the larger number of entries he claimed would now arise for anyone doing an internet search by reference to Mr Zanzoul's name increases the justification, in relative terms, for a fear on his part that such a search would be undertaken by the Syrian authorities on his forced removal into Syria. Further, that the circumstances of his attempts to resist being returned to Syria would attract ill-treatment at the hands of the Syrian authorities. Mr Ellis argued that assessment of such a fear is to be assessed, in part, subjectively by reflecting the particular circumstances of concern to Mr Zanzoul, and in part objectively by the context in which they arise.

[116] Mr Ellis submitted that there was more than adequate evidence to justify the claim to a reasonable fear of persecution, that the Court was equipped to analyse and recognise that fear, and that it constituted grounds on which the decision of the RRA could be reversed by this Court within the context of this appeal.

[117] In an affidavit affirmed in April 2008, and filed in the first of the judicial reviews, Mr Zanzoul states that the situation in Syria has changed considerably since June 2002, that Syria is a very cruel and frightening place for anyone who comes under the scrutiny of the authorities there, and that he believes that he would not get through the airport safely if he was returned to Syria.

[118] Mr McCarthy submitted for the respondent that the present appeal was not an appropriate forum in which to recognise a ground that was not before the RRA, as constituting a ground for reversing the outcome. He submitted that, to the extent that new circumstances had arisen which would constitute a ground for overturning the order for Mr Zanzoul's removal, this might constitute grounds for a direction for reconsideration of his position.

[119] I accept Mr McCarthy's point that refugee status officers are making assessments on claims such as Mr Zanzoul's all the time, that it is a relatively specialised skill, and that the appropriate course is not for me to substitute my opinion for that of the specialist body, but rather to recognise the entitlement of Mr Zanzoul to make a fresh application under s 129J of the Act. A more fundamental objection is that Mr Ellis was inviting fresh consideration of a ground not before the RRA at all, in reliance, at least in part, on material that was not before the RRA. That would constitute a complete merits review, not available to Mr Zanzoul in an appeal on questions of law.

[120] Mr Ellis was wary of pursuing a fresh application under s 129J of the Act, given the need to satisfy a refugee status officer that since the original determination on his claim to refugee status, circumstances in Mr Zanzoul's home country have changed to such an extent that a further claim is based on significantly different grounds to the previous claim. It would be a matter entirely for the Immigration Service, but the extent of information available via the internet in Syria as a result of the outcome of New Zealand Court proceedings being available via that medium might be seen as contributing to a change of circumstances "in Syria".

[121] I am accordingly not prepared to allow the appeal on terms that recognise Mr Zanzoul's entitlement to remain in New Zealand as a refugee, on account of the way in which his fear of persecution in Syria is now argued on his behalf by Mr Ellis. I confirm that I indicated during argument that I saw nothing improper or inappropriate in Mr Zanzoul promptly pursuing an application for further consideration of his claim to refugee status under s 129J of the Act. I also confirmed that such an application did not need to await the issue of this judgment. Logically, any such prospect should be exhausted before a rehearing of Mr Zanzoul's appeal to the RRA occurs.

### **RRA approach to s 47(3) flawed?**

[122] The terms of s 47(3) are set out in paragraph [2] above. In its decision, the RRA applied the section to determine that there were exceptional circumstances making it unduly harsh or unjust to remove Mr Zanzoul, but also that it was not

satisfied that it would not be contrary to the public interest to allow him to remain in New Zealand. Both Mr Zanzoul and the respondent challenged the RRA's approach to the section. I will deal with them in the order in which they arise on an analysis of the RRA's decision.

*Separation of appellant from children does not amount to exceptional circumstances*

[123] The first, third and fourth grounds of cross-appeal by the respondent refer to the RRA's consideration of the relationship between Mr Zanzoul and his children, and particularly disruption to that relationship, as constituting exceptional circumstances.

[124] First, the respondent argues that the mere fact that Mr Zanzoul would be separated from his children is insufficient to meet the first limb of the test in s 47(3). Mr Zanzoul's three children live in Australia with their mother. The Family Court granted Mr Zanzoul internet access to the children three times a week, and physical access four weeks a year when they visit New Zealand during their school holidays, accompanied by their mother.

[125] The RRA held that removal to Syria would prevent any direct contact between Mr Zanzoul and his children, because he is prevented from entering Australia, and Mrs Zanzoul will not allow them to enter Syria. The RRA's conclusion on this point is found at [61] of its decision:

[61] While the children live in a different country and do not appear to have had direct contact with the father for about a year and the contact ordered by the Family Court is modest, it will no doubt be meaningful to both the appellant and his children. That severing of direct contact would not be in the interests of the children or the appellant. Despite the Authority's grave misgivings as to the appellant's character (see later), it could not be said that the appellant is a bad father or a negative influence on his children. [...]

[126] It was this conclusion, and the RRA's view on Mr Zanzoul's mental health (which the respondent also cross-appeals) that led to the RRA finding that the first limb was satisfied. For completeness, however, it is important to note that the RRA made further findings as to the severing of contact when it considered humanitarian factors under the second limb:

[98] The direct physical contact now, while no doubt meaningful for him and the children, is limited. [...]

[99] The children's love for their father is accepted, but there is no evidence that the limited physical contact they have had with him during extended periods in the past or even now has had any damaging effect on the children, let alone led to any seriously adverse consequences.

[127] On this basis, the respondent characterises this situation as one where physical contact between Mr Zanzoul and his children would cease but there would be limited impact of this separation. The respondent argues that this situation is simply insufficient to warrant exceptional circumstances. The Court is restricted by the terms of s 115A of the Act to resolving questions of law. As Gendall J stated in *Ogosi v Minister of Immigration* HC WN CIV-2006-485-673 27 April 2007 (dealing with a decision of the Deportation Review Tribunal):

[22] Often, in appeals such as this, the challenge is to factual conclusions or findings, which are dressed up as points of law. The Court on appeal, must be wary, not to substitute its own views as to factual matters or the merits, as Parliament has entrusted that task to the expertise of a Tribunal well experienced in dealing with applications to set aside or to cancel deportation orders. If the Court is to interfere with the decision not to exercise a discretion, then an appellant must establish upon well recognised grounds that that is appropriate, given that the Court's powers are limited to appeals on questions of law. Questions of fact cannot be elevated to questions of law. This Court cannot revisit facts unless it can be properly contended that factual findings lack any probative evidence to the extent that an error of law has occurred; *Edwards v Bairstow* [1956] AC 14; [1955] 3 All ER 48.

[128] Gendall J then cited Wild J's judgment in *Mohamud and Ors v Minister of Immigration* HC WN AP21/98 5 October 1998 which helpfully described the concept of error of law at 5:

Quintessentially, error of law involves the application of an incorrect legal test or a wrong answer to a legal question upon unchallenged facts. Here, an obvious example would be a Tribunal misinterpreting or misapplying relevant provisions of the Immigration Act. Under the label "question of law" a limited incursion is now permitted into the factual area where either the Tribunal has:

1. Come to a conclusion without any evidence or upon evidence which could not reasonably support its conclusion, or
2. Failed to draw from unchallenged primary facts an inference favourable to the appellant, when such inference is the only one reasonably open.

What the Court must not do under the guise of a question of law is concern itself with whether the Tribunal was right or wrong in its conclusion, i.e. with the merits of the case. Further, the weight to be given to the assessment of relevant considerations is for the Tribunal alone and not for consideration by the Court as a point of law. [...]

[129] Thus the respondent is restricted in its submission to arguing that the evidence before the RRA (the children would be separated from Mr Zanzoul) cannot reasonably support the RRA's conclusion (that this amounted to exceptional circumstances).

[130] The respondent relies on inter alia, Hammond and Wilson JJ's judgment in *Ye v Minister of Immigration* [2008] NZCA 291 at [409]:

The short answer however is that – an inquiry having been embarked upon – the right question was simply never asked: was there anything about the current circumstances of these three New Zealand children, or one of them, that suggested Ms Ding should be allowed to stay in New Zealand? *One would have thought that (at least at this late stage of her case) the mere fact that these children would not henceforth have a present mother would not be sufficient*; sadly some children are separated from mothers by death and other human circumstances and yet show great resilience and wonderful development as human beings. [emphasis added]

[131] Moreover, O'Regan J stated for the Court of Appeal in *Minister of Immigration v Al Hosan* CA244/07 4 November 2008 at [72]:

[...] we see the position of the children as citizens of New Zealand as very important matters which must be treated as a primary consideration. But we do not see them as trump cards.

[132] *Ye* involved a 'humanitarian interview' that is mandated by Immigration Service policy when considering cancelling a removal order under s 58, and *Al Hosan* involved the revocation of a residence permit; they did not involve the application of s 47(3). However, they do provide an indication from the Court of Appeal that mere separation between children and one parent is potentially insufficient to amount to 'exceptional circumstances'.

[133] The most relevant proceedings to this case however is that in *Mwai v Removal Review Authority* [2000] NZAR 206. The appellant in that case faced removal from New Zealand and separation from his New Zealand partner and child.

The Court of Appeal summarised the reasoning process of the RRA under the first limb as follows at 212:

- becoming established in New Zealand or meeting requirements of permanent residence do not constitute exceptional circumstances of a humanitarian nature
- (perhaps) separation from one parent (but not the other) from a child does not qualify
- especially given the support the child has from her mother and her mother's extended family

[134] Accordingly in *Mwai*, the RRA was not satisfied that the appellant met the first limb. Whilst the Court did not express a view on whether this reasoning process was correct, the appellant's appeal on the broader question of the RRA's approach to s 63B (s 47) was dismissed. The respondent argues that this is tacit approval from the Court of Appeal that the separation of one parent, but not the other from a child is insufficient to meet the first limb of s 47(3).

[135] Setting a precedent as to categories of particular evidence before the RRA that either will or will not satisfy the first limb of s 47(3) is ill-advised: *Wilfred v Chief Executive of the Department of Labour* [2007] NZAR 237 (HC):

[70] In one case, a single humanitarian circumstance may be "exceptional"; in another case there may be a combination of circumstances which separately do not fit into that category, but when viewed cumulatively amount to exceptional circumstances of a humanitarian nature. There is no fixed absolute; circumstances are very nearly always susceptible to degrees. Accordingly, the Authority must decide each appeal on its merits, against the standard stated by Parliament, and upon all relevant circumstances.

[136] Gendall J in that case went on to cite the guidance provided by Hammond J in *Sale and Sale v Removal Review Authority* HC AK M1471/93 26 October 1993, which included that the categories of humanitarian response must never be closed.

[137] This specific ground of cross-appeal was framed as an error of law by arguing that the RRA erred in law by lowering the threshold for the first limb, which it must have done because the circumstances could not have met a higher threshold. However, this is simply obscuring the actual reason why the respondent is aggrieved:

it disagrees with the RRA's conclusions under the first limb. As stated above, that is not an issue that the Court can entertain under s 115A.

[138] To maintain its error of law argument, the respondent is thus forced to argue that separation of one parent from his or her child is *necessarily* insufficient to meet the first limb of the test. There must be some disconnect between the clear evidence before the RRA of the impending separation and the threshold in s 47(3).

[139] Such a disconnect does not exist; there is no reason why separation in this way will necessarily fail the first limb. Accepting the respondent's argument would create an unwarranted precedent: that regardless of the factual circumstances, separation of one parent but not the other from a child cannot meet the first limb of the s 47(3) test and the RRA will err in law should it find otherwise. This would wrongly constrain the RRA's discretion. To deal with the issue on a more case-specific basis, such as on terms that the circumstances of parent/children separation in this case could not constitute exceptional circumstances for the purposes of the first limb of s 47(3), would be to alter a factual finding. There is no scope to do so.

[140] Thus, the RRA was within its discretion when it held that Mr Zanzoul's separation from his children met the first limb of s 47(3); it did not err in law making such a conclusion. That does not mean, however, that the RRA will be bound by this finding on the reconsideration I have directed. All aspects of the appellant's situation will be open for review, on the circumstances as they then appear. This observation obviously applies equally to the two following points.

*Appellant's mental health does not amount to exceptional circumstances*

[141] This ground of cross-appeal refers to the comments of the RRA at [62] of its decision, cited at [63] above. The respondent argues that the state of mental health described in [62] of the RRA decision is not uncommon in the immigration context, and is not a factor that distinguishes Mr Zanzoul from a range of other cases.

[142] This can be simply dealt with. As discussed by Gendall J in *Wilfred*, individual circumstances, whilst unexceptional in and of themselves, can

cumulatively amount to exceptional circumstances. That is exactly the approach the RRA adopted here. Mr Zanzoul's mental health was a relevant, but not determinative, factor and when put in conjunction with the separation from his children, was found to constitute exceptional circumstances. There cannot be an error of law in the RRA's approach in this regard.

*Applicability of Article 9 United Nations Convention on the Rights of the Child*

[143] This ground of cross-appeal arises out of [58] of the RRA's decision:

[58] The Authority accepts it is required to have regard to the *Convention on the Rights of the Child*. The best interests of the children are a primary consideration for the Authority (Article 3.1). Furthermore children should not be separated from their parents, except where that is in their best interests (Article 9.1.)

[144] The respondent argues that the RRA's reliance on Article 9(1) of the Convention was in error. It bases this contention on comments by Glazebrook J in her judgment in *Ye v Minister of Immigration* [2008] NZCA 291:

[69] The appellants, in support of their argument, refer to art 9 of UNCROC which requires States to ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. However, art 9(4) expressly contemplates separation that may result from "detention, imprisonment, exile, deportation".

[70] Furthermore, as was set out at [141] of Baragwanath J's judgment, the Chairman of the UNCROC Working Group made it clear that art 9 was intended to apply to domestic disputes and not to immigration matters. Article 10 was intended to apply to separations involving different countries and relating to cases of family reunification. Article 10 does not, however, recognise the rights of parents and children to enter any country they wish and is not intended to affect the general right of States to establish and regulate their respective immigration laws in accordance with their international obligations [...]

[71] The Vienna Convention also permits supplementary means of interpretation to be used under art 32 such as decisions from other jurisdictions. In this regard, it is relevant that the *Puli'uvea* interpretation of the standard in UNCROC aligns with that in comparable jurisdictions. For example, the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 held that the decision-maker must consider children's best interests as an important factor and give them substantial weight. However, the Supreme Court recognised that this

did not mean that a child's best interests must always outweigh other considerations or that there will not be other reasons for denying a humanitarian and compassionate claim in the immigration context even when children's interests are given this consideration – see at [75] per L'Heureux-Dubé J for the majority (with Iacobucci and Cory JJ largely concurring). [...]

[145] The respondent argues that the RRA's misapplication of Article 9 in the immigration context is a material error because it could have altered its conclusion on the separation of Mr Zanzoul from his children as exceptional circumstances.

[146] With respect, the Court accepts Glazebrook J's helpful guidance on this issue: the RRA should not have regard to Article 9 of the Convention. It is irrelevant in the immigration context. However, this does not mean that the RRA committed an error of law by referring to it. The respondent acknowledged that it will only be a material error if it caused the RRA to adopt the wrong legal approach. Immediately following its comments about the Convention, the RRA stated that the child's best interests are not paramount, but instead a primary consideration. That is consistent with *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 (CA), and it is clear that this is the approach that the RRA followed, because the rest of its discussion is framed with this maxim as a reference point. It does not refer to a duty on the New Zealand Government to not separate Mr Zanzoul from his children, but rather that contact between Mr Zanzoul and his children would be in the latter's best interests.

[147] Although the RRA should not have made reference to Article 9, it did not materially affect its approach and therefore does not amount to an error of law. Accordingly, each of the three related grounds under this head of cross-appeal should be dismissed.

*First ground of appeal: RRA erred in approach to stringency of 'public interest test', and second ground of cross-appeal: RRA erred in attributing humanitarian factors in public interest test*

[148] It was argued for Mr Zanzoul that the RRA erred in its approach to the 'second limb' of s 47(3), namely, on its analysis as to whether it was not contrary to the public interest to allow the appellant to remain in New Zealand. Mr Zanzoul

argued that the same high standard should be applied to both limbs of the test and that the RRA erred in differentiating the standard for each limb.

[149] For the respondent, it was argued that the RRA erred in holding that it was required to have regard to all Mr Zanzoul's circumstances, including those favourable humanitarian factors identified in its examination of the first limb of the s 47 test, when assessing the public interest under the second limb. The respondent argued that this amounted to error because these factors had already been taken into account under the first limb; it was unnecessary and illegitimate to take them into account a second time. This is especially so when s 47 does not mandate the consideration of these factors but instead the more general concept of 'public interest'.

[150] The test for the 'first limb', namely exceptional circumstances that would make it unduly harsh or unjust for Mr Zanzoul to be removed from New Zealand, is a difficult one to meet. The Court of Appeal addressed the test in the predecessor of s 47(3) in the passage in *Patel* cited at [60] above.

[151] Analysis of s 63B applies equally to s 47: *H v Removal Review Authority* HC AK CIV-2007-404-3340 12 October 2007 Randerson J. Mr Ellis submitted that the 'high threshold' should apply to both the first and second limb on the basis of logic, and that it was an error of law not to do so. However, when I raised with him the inconsistency between that proposition and the terms in which the section is expressed, he was inclined to accept that the natural and ordinary meaning of the words in their context is against his proposition.

[152] The first part of s 47(3) creates as the sole ground on which an appeal may be brought that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand. The cases, including the citation above from *Patel*, confirm the impact of the natural and ordinary meaning of these words, namely that the onus requires the appellant to make out exceptional circumstances. Thereafter, the latter part of the section introduces a control or qualifying consideration that must also be evaluated, before the appeal could succeed. That second limb is to be taken as deliberately cast in the

negative, so that the RRA must be satisfied that it would not be contrary to the public interest to allow Mr Zanzoul to remain. That is a lesser burden than if the appellant had to establish it was positively in the public interest to allow him or her to remain, and the wording contemplates a balanced evaluation. There is nothing in the way these two limbs of the test are to be evaluated that would justify attributing to the second aspect the stringency of the test imposed under the first. Nor has such a need for consistency of approach been suggested in any of the cases on the section.

[153] The structure of s 63B as considered in *Patel* made explicit provision for the two limbs by way of separate paragraphs under subs (2). The interrelationship between these two limbs was discussed by the Court of Appeal in *Mwai* cited above, where the Court stated that it is not a two-step process, and as long as the RRA considers all the circumstances, an appeal can fail merely by recourse to what was then subs 63B(2)(b). At 212:

While we have indicated a general expectation that the Authority would ordinarily reach an express conclusion on the first matter, it is possible to contemplate a situation in which that issue would be very closely balanced and the public interest issues are overwhelmingly against the appellant. In such a case the Authority might prefer to express its decision solely in terms of the second matter. But if it does that, it must consider 'all the circumstances'.

[154] Those discrete limbs in s 63B(2)(a) and (b) were fused into one paragraph on the enactment of s 47(3) on 1 October 1999. The current proceedings appear to be the first to come before the Court on appeal where the RRA accepted the first limb of the test was met but the appellant failed on the second limb. It appears that all past appeals from the RRA involved decisions where either both or neither limbs were met, rather than only one or the other. Since the RRA here decided that the first but not the second limb had been met, the RRA's approach to the second limb comes into stark relief.

[155] Mr Ellis argued for the same high threshold involved in meeting the first limb also applying to the second, in part by resort to s 9 of BORA. He suggested that to remove someone from New Zealand when it would be unduly harsh or unjust (the first limb) would be to breach s 9 of BORA (ie the right not to be subjected to

disproportionately severe treatment or punishment) and therefore necessarily contrary to public interest.

[156] The logic of this submission relies on an interdependence between the first and second limb so that the factors governing each must be mutually contingent. However, the words of the section do not contemplate such mutuality. The prospect of such interdependence was considered by McGechan J in *Prasad v Chief Executive Department of Labour* [2000] NZAR 10 at 22-23:

[...] The test under s 63B(2)(a) is not simply “exceptional circumstances of a humanitarian nature”, although that sometimes is used as a shorthand expression. The test is “exceptional circumstances of a humanitarian nature” because of which “it would be unjust or unduly harsh” to remove or not reduce. There is this qualitative qualification. The circumstances must be such that “it would be unjust or unduly harsh to remove”; nothing less. How does one sensibly determine whether it would be “unjust” or “unduly harsh” to remove without some reference, on the other side of the ledger, to the public policy considerations which point to such removal? Any inhumane treatment can be unjust or unduly harsh in the abstract: one needs to be able to at least consider policy in the process of balancing up whether it is so to such a degree that an exception to policy should be applied, and removal foregone. As to s 63B(2)(b) “public interest” it is to be remembered that such is to operate as a deliberate control upon the humanitarian exception, intended to prevent unacceptable levels of public harm....I have little doubt that when Parliament required the Authority to be satisfied an exception would not be contrary to the “public interest” it expected the Authority to think in broad and protective terms. It is a comprehensive phrase. Certainly, it would encompass repercussions such as trade embargoes. I see no reason why it would not encompass precedents under s 63B(2)(a) which, needing to be applied consistently, could swamp or unduly strain New Zealand's immigration and social structures. The phrase “public interest” should not be artificially constrained. There seems every reason to think Parliament intended some appropriate attention would be paid, under that head, to the obvious ongoing need for legislative integrity, although not to such a degree as would stultify s 63B altogether.

Second, the general legislative intention underlying s 63B. It seems inherently unlikely that Parliament, having stated a clear policy and a humanitarian exception, expected that exception to be approached with blinkers on as though that policy did not exist. Parliament would have intended the humanitarian exception to be operative, but likewise would have expected underlying policy to be kept in mind and to operate where necessary as a proper restraint during the decision-making process. I have difficulty with the concept it is Parliament's will that Parliament's will be ignored.

[157] Two points arise from McGechan J's analysis of the s 63B(2) (and therefore s 47(3)) test. First, that the two limbs cannot be considered in independent vacuums.

The Judge saw a substantial degree of overlap, so there may be factors that are common to both limbs. The context in which the first limb is assessed is that the RRA will be dealing with a person who is categorised by the Act as unlawfully in New Zealand, and has in all other respects exhausted the avenues available under the Act to remain in New Zealand. In that context, the first limb invites a consideration of the personal consequences of expulsion for that person and those who would be closely affected by the removal from New Zealand. The starting position is that the person is required to be removed from New Zealand, but this is a last opportunity for reflecting on the extent of adverse consequences that will flow from that. For those dealing with these appeals, there will be a range of seriousness of those adverse consequences, particular to each appellant. They do not necessarily have to be tested against, or tempered by, some reflection of what is in the public interest which will reflect broader considerations.

[158] The second point from *Prasad* is that notwithstanding that each limb is not completely independent, this is not equivalent to saying that the limbs are interdependent or mutually contingent. The second limb was seen as relevant to the determination of the first limb and vice versa, but the success of an appellant under the first limb will not necessarily guarantee success under the second limb. This must be the case, because as McGechan J identifies, the second limb fulfils the objective of acting as a ‘deliberate control’ on the first limb. So, on Mr Ellis’s argument, if the second limb must always be met if the first limb is met, because to do otherwise would be in breach of s 9 of BORA, then s 9 would be applied to undermine this function of the second limb acting as a ‘deliberate control’.

[159] It follows that the RRA did not err in treating the second limb of the test as not being met simply because it should have been dictated by the outcome of the inquiry into the first limb. Moreover, as Mr McCarthy noted, there are two decisions of the Court of Appeal (*Chief Executive of the Department of Labour v Taito* [2006] NZAR 420 and *Puli’uvea*), both of which held that the removal of the appellants in those cases could not amount to a breach of s 9. As stated in *Puli’uvea* at 523, the threshold for s 9 is much higher than that of the first limb in s 47(3), and thus the removal of those who meet the first limb but fail the second will not necessarily breach section 9 as the appellant contends.

[160] The analysis in *Prasad* also demonstrates that if the two limbs were mutually contingent upon one another, then having the same ‘high threshold’ might be appropriate. However, although there may be factors that are relevant to the inquiries under both the first and second limbs, the limbs are sufficiently independent to have their own thresholds.

[161] Moreover, given that the language of each limb in s 47(3) is different, and the thresholds applied to each limb are derived from that language, then the thresholds for the first and second limbs will be different. Since the language in the second limb does not have the ‘stringent words’ that are present in the first limb, then the test on the threshold for the second limb must be seen as intentionally lower than the first. The first aspect of Mr Zanzoul’s first ground of appeal is simply negated by the plain meaning of s 47(3).

[162] This outcome reflects the purpose of s 47(3). The first limb represents the basis for a very narrow exception to an overall policy of removing persons who are unlawfully in New Zealand. The narrowness of the exception justifies the ‘high threshold’. However, the second limb does not form the basis for the exception. In fact, it qualifies the exception; it is a broad and protective measure designed to deliberately constrain the exception. Thus the purpose for the ‘high threshold’ applicable to the first limb does not apply to the second; there is no need for a narrow interpretation and therefore no need for a ‘high threshold’.

[163] Mr Zanzoul complains that the different thresholds means that there are different burdens of proof on the appellant and respondent and this amounts to unfairness. However, any such differences are a consequence of the policy behind the structure of the section. Any perceived unfairness could not justify an application of the section, inconsistent with its terms.

*Appellant’s second ground of appeal: A positive finding in the second limb*

[164] Mr Zanzoul argued that the RRA made a positive finding that Mr Zanzoul’s presence in New Zealand would be contrary to the public interest, when s 47(3) does not require the RRA nor authorise it to make such a positive finding. Rather, the

section requires the RRA to make a negative finding whether Mr Zanzoul remaining would not be contrary to the public interest.

[165] This ground of appeal rests on paragraph [105] of the RRA's decision:

[105] The Authority has considered the effect of removal on him and the children but finds, in light of his criminal conviction, his propensity to lie to immigration and judicial officers in Australia and New Zealand, the use of fake passports and assumption of a false identity in Australia for a number of years, lying to his wife, his treatment of his wife (including at least one assault) and his oldest daughter in breach of court orders, that it has not been established that it would not be contrary to the public interest to allow him to remain in New Zealand. *Indeed the Authority finds that it would be contrary to the public interest to allow him to remain in New Zealand.* [emphasis added]

[166] Mr Zanzoul relied upon *Faavae v Minister of Immigration* [1996] 2 NZLR 243 (HC) to argue that it is beyond the jurisdiction of the RRA to make such a positive finding. Anderson J stated at 249:

The penultimate sentence of the judgment deals laconically with the second limb of s 105(1), namely that concerned with whether it would not be contrary to the public interest to allow the appellant to remain in New Zealand, by way of a specific finding that it would not be in the public interest for the appellant to remain in New Zealand. This is not a question with which it is seized. *There is a conceptual difference, of course, between on the one hand finding or not finding that it would not be contrary to the public interest, and on the other hand coming to an affirmative view that it would not be in the public interest for an appellant to remain in New Zealand.* The latter finding beyond the scope of its jurisdiction could be very damaging to a person who is a legitimately unsuccessful appellant to the tribunal. Suppose, for example, that an unsuccessful appellant should wish to visit New Zealand at some time in the future and the question of a visitor's permit should arise. A tribunal finding, on record, that, affirmatively, it would not be in the public interest for the appellant to remain in New Zealand might well be conclusive of the issue whether even a short-term visitor's permit should be issued. Appellants do not go to the tribunal in order to defend themselves against an assumption that it would not be in the public interest for them to remain. [emphasis added]

[167] Anderson J was dealing with s 105 of the Act, which stated the same substantive test as s 47(3), but in the context of deportation. With great respect to the approach taken by Anderson J in *Faavae*, I cannot see the conceptual prospect of overstatement of the test on a finding adverse to an appellant as having material adverse consequences for such an appellant. Any person removed from New Zealand under the Act will thereafter face virtually insurmountable difficulties

in attempting to gain entry lawfully at any time in the future. Section 7 of the Act renders such persons not eligible for a permit and any subsequent consideration of such a person's plea to re-enter New Zealand would practically focus upon the fact of removal, rather than the fine detail of the reasoning by the RRA in any final attempt by that person to remain here on a previous occasion. Nonetheless, there is a difference between the negative and positive versions of the finding as instanced in *Faavae*, and in directing how persons seeking to remain in New Zealand are to be dealt with under the Act, Parliament must be taken to have cast the relevant test under the second limb of s 47(3) in negative terms for a deliberate reason. It therefore means that going beyond the test on the terms articulated by the Act would be to misapply it, and that should not occur.

[168] *Faavae* can be distinguished to the extent that the Deportation Tribunal made only the positive finding that Anderson J found to be ultra vires. In the present case, the RRA first made the appropriate negative finding. The RRA's subsequent positive finding amounted to a parting shot to emphasise its conviction on the negative finding. Thus, unlike *Faavae*, the RRA did fulfil its jurisdictional requirements. The difficulty is that it then proceeded to exceed its jurisdiction by making the positive finding. If this was the only error recognised, there would be scope for doubt as to whether it was sufficient to vitiate the RRA's decision. Given the extent of knowledge now held by the Immigration Service about Mr Zanzoul, it is difficult to accept that the last sentence in paragraph [105] would make a material difference in any subsequent dealings he might have with them. However, there is the prospect that the RRA decision might be available to authorities in other countries, and that this gratuitous observation could have an impact on his situation. In the reconsideration directed on other grounds, the RRA should confine itself to a consideration of the negative test.

*Respondent's second ground of cross-appeal: approach to second limb*

[169] The respondent argues that the RRA erred when it re-weighed or 'double-counted' humanitarian factors when looking to the second limb of the test in s 47(3). The RRA stated at [96]:

[96] In considering the public interest, the Authority is required to have regard to all the appellant's circumstances, including the favourable humanitarian factors identified in the earlier section of this assessment. Notably, the effect of his removal on his children and himself must be considered.

[170] Rodney Hansen J in *Garate v Chief Executive of Department of Labour* HC AK CIV-2004-485-102 30 November 2004 authoritatively stated the approach to humanitarian factors under the second limb in the following terms:

[41] Section 63B(2)(b) requires all circumstances to be looked at afresh through the prism of the public interest. For this purpose, it seems to me, the Authority is required to weigh those factors which would make it in the public interest for the appellant to remain against those which make it in the public interest that he leave. The former are likely to include (although will not be confined to) the exceptional circumstances of a humanitarian nature relied on under subpara (a), for it must be in the public interest that a family with established roots in this country should be permitted to stay, and to stay together, and that international conventions directed to those ends are respected. The latter circumstances will include the appellant's proven misconduct, evaluated in the way I have suggested, and measured by reference to the harm to the community which will ensue if he stays.

[171] This represented an acceptance of the Court of Appeal's approach in *Mwai* at 212:

We return to the terms of s 63B(2) and to the appellant's two submissions based on them. The first submission was that the Authority could not make a decision under para (b) of s 63B(2) unless it had first made a decision under para (a). (It would not of course have to make a decision under para (b) had it decided adversely to the appellant under para (a).) Supporting that submission is the difference in focus of the two paragraphs. The first is about humanitarian matters, relating especially to the appellant, but also to those who would be affected by his removal. The second is wider, relating to "all the circumstances" and to "the public interest". *The Authority's process of decision making, it may be expected, would move from the particular to the more general, especially since any humanitarian consideration arising under para (a) would appear also to fall within the scope of "all the circumstances" made relevant to the para (b) determination.* In the great majority of cases we would expect the RRA to make a decision under para (a) before proceeding, if the first decision favoured the appellant, to para (b). As explained later, the matters covered by para (a) must be considered when a decision is made under para (b) in any event. [emphasis added]

[172] The respondent invited the Court to depart from the approaches in *Mwai* and *Garate*, which it views as incorrect. It provided two reasons for this submission.

[173] First, the respondent argued that it is reasonable to conclude that the two-limb test meant Parliament intended the ‘public interest’ to be served by the removal of a person unlawfully in New Zealand, notwithstanding that the person may face exceptional humanitarian circumstances. The second limb therefore takes priority. The exception is that the person can remain if he could prove that it was not ‘contrary to the public interest’ for him to remain. If this is the case, Parliament arguably could not have intended to include consideration of public interest humanitarian factors in the second limb, for they have been reflected in the first limb.

[174] Secondly, the respondent argued that humanitarian factors do not fit into the definition of ‘public interest factors’, which are matters that affect New Zealand’s national interests generally.

[175] The respondent submitted that the Court of Appeal’s comments on the approach to the second limb were obiter dicta and that *Garate* is not binding on this Court. Further, that the Court should take a ‘principled’ approach to the second limb. Parliament intended the first and second limb to focus on private and public factors respectively, and that in the event of a conflict, the latter should prevail.

[176] The comments made earlier on the relationship between the first and second limbs are relevant: the limbs are neither interdependent and mutually contingent, nor are they entirely distinct. As McGechan J observed in *Prasad*, the second limb cannot be artificially constrained or blinkered; there is overlap between the two limbs. I am not persuaded there is any error in this and the respondent’s ‘principled’ approach does not appeal as better reflecting the statutory test. I prefer to follow the established precedents in *Mwai* and *Garate*.

[177] The respondent’s argument required ‘humanitarian factors’ and ‘public interest factors’ to be treated as mutually exclusive concepts. However, there is no reason why the former cannot come under the umbrella of the latter; no reason why humanitarian factors are inherently ‘private’ as asserted by the respondent. Hammond J stated in *Sale* at 9:

Clearly the term ‘humanitarian’ reflects the social fact that we all belong to a race of persons. We can communicate with each other. We share certain understandings which we believe all members of the human race ought to respect. The difference between humans and non-humans is that humans are not alone. A humanitarian concern is a concern for the wellbeing of others and respect for their particular circumstances.

[178] If anything, this indicates that humanitarian factors may indeed have inherently public features: their consideration is very much in the public interest.

[179] Mr McCarthy was inclined to suggested that s 47(3) is ‘awkward’. However, there is a relatively straightforward sequence about it: (particular) humanitarian factors are considered under the first limb and (general) humanitarian factors are considered under the second limb to the extent that they have relevance through the different lens of the public interest. This is the effect of the judgments in *Mwai* and *Garate*, and it seems more likely that Parliament would seek this outcome, especially given the explicit inclusion of the words ‘all the circumstances’. Whilst I accept the respondent’s argument that the second limb is designed to constrain the first limb, there is no logical reason why the second limb cannot consider factors already considered in the first limb. This ground of cross-appeal is dismissed.

*Summary on the approach to s 47(3)*

[180] I have found the following in respect of the grounds of appeal and cross-appeal attacking the RRA’s approach to the test under s 47(3).

- *First ground of appeal:* there is no logical reason why the two limbs under s 47(3) must have the same threshold applied.
- *Second ground of appeal:* the RRA should not have added a positive finding under the second limb that allowing Mr Zanzoul to remain would be contrary to the public interest. On the reconsideration directed under a previous successful ground of appeal on the RRA’s error under s 50(7) of the Act, the RRA should confine itself to the negative analysis of whether it is not contrary to the public interest to permit the appellant to remain. However, I

am not persuaded that this error would have been sufficient, on its own, to direct reconsideration.

- *First ground of cross-appeal:* the reliance by the RRA on the relative importance of Mr Zanzoul's separation from his children, and his mental health, are findings of fact not able to be challenged in an appeal confined to questions of law. The RRA does not need to have regard to Article 9 of the Convention, but did not err in law as it did not amount to a material error. The RRA was within its discretion to hold the first limb was met on the evidence before it.
- *Second ground of cross-appeal:* the RRA did not err in considering humanitarian circumstances under the second limb.

### **Failure to have regard to relevant considerations**

#### *Consideration of medical reports*

[181] Mr Ellis submitted that the way in which the RRA dealt with medical evidence tendered in support of Mr Zanzoul's appeal amounted to an error of law by failing to have regard to relevant considerations. Passages from medical reports that were particularly relied on in the appeal were those from Dr Wansbrough, a psychologist, in the following terms:

I was pleased to hear that his work permit was renewed last week and I am currently applying for a sickness benefit for him because of his stress disorder...at present he is on anti-depressant medication (this also has a small anti-anxiety effect) and sleeping medication. (27 April 2005)

[182] And from a general practitioner:

...the abovementioned patient suffers from depression problem for the last one year in form of poor sleep, poor appetite, isolation, loss of weight and suicidal tendencies.

I believe that removal from New Zealand would worsen his mental states especially his suicidal ideas, I have referred him to a psychiatrist. (2 September 2005)

[183] And a joint letter from Vicas Modgil (psychologist) and Corinna Friebe (transcultural therapist):

He presented with features suggestive of a major depressive illness which have affected his physical and mental well-being significantly. His friend was extremely worried about the risk of suicide...

Considering the above clinical and social context we think that the loss of access to children through Ahmad's deportation will put him at high risk of suicide. (2 September 2005)

[184] The RRA did consider this medical evidence, and had regard to it on both limbs of its considerations under s 47(3). On the first limb, the RRA made the finding cited at [63] above.

[185] When it came to the second limb of matters relevant to the public interest, the RRA reflected as follows:

[100] As for the appellant himself, there is psychological evidence from his general practitioner and from Auckland Public Health and also Auckland Mental Health Services as to his stress and depression. He has been seen by the Crisis Service. The authors of one report (a psychiatrist and psychotherapist) opine that the loss of access to his children will put him at a high risk of suicide.

[101] While acknowledging the professional expertise of the medical practitioners, such claims are easy to make and are commonly seen by refugee and immigration bodies. They are based on self-reported symptoms, which can be designed to achieve a desired effect. The appellant, it must be remembered, has a history of lying to achieve his goal of permanent residence outside Syria and has sought to manipulate others, including the oldest child and no doubt his wife along the path to reaching that goal.

[186] This argument on behalf of Mr Zanzoul was really a complaint that the RRA attributed inadequate weight to the medical evidence. If at all, that would be an error of fact and does not demonstrate any error of law.

[187] Mr Ellis was inclined to argue that the RRA could not be sceptical of the medical reports in the absence of contradictory evidence put before it, or obtained by the RRA. That notion has been consistently rejected, eg *Al Mamoon Ahamed Bhuiyan v Minister of Immigration* HC WN AP321/01 2 May 2002 Doogue J and *Butler v Removal Review Authority* [1998] NZAR 409 (HC), especially 424 and 425. In the latter case, Giles J found that the RRA was obliged to consider whether

medical reports might be exaggerated or overstated, and then to assess them in the context of the statutory framework. Further, the RRA was not obliged to accept the report of a qualified expert without more. The RRA is fully entitled to evaluate and assess the evidence, to consider it in the context of the totality of the evidence and reach its own objective and reasoned assessment of it.

[188] In this case, the RRA was not prevented from objectively testing the real impact of the medical reports by virtue of the absence of expert criticisms of them. I consider in particular that the terms of paragraph [101] of its decision, cited above, were well justified, given the terms of the reports, and the period of time that had elapsed since they were produced with no documented occurrences of the concerns as to medical health they addressed.

[189] Part of Mr Ellis's criticism of the RRA's approach to the medical evidence was the excessive reliance he suggested had been placed on the fact that Mr Zanzoul had lied previously about matters relevant to attempts to gain residence. He drew an analogy with s 124 of the Evidence Act 2006 which codifies the obligation on a Judge in a criminal trial to either warn the jury, if there is one, or for the Judge him or herself to have regard to the proposition that people do lie for various reasons, and that a finding that a defendant had lied on a previous occasion does not mean the defendant is guilty of the offence for which he or she is being tried.

[190] However, the absence of an explicit qualification on the extent of relevance placed on Mr Zanzoul's lying on previous occasions cannot constitute an error of law, in the nature of the RRA misdirecting itself as to the relative weight that can be given to various aspects of the evidence before it. Tribunals such as the RRA are to apply their expertise at sifting through and assessing factual materials within their areas of expertise. They ~~and~~ are to be taken as applying the common sense that the existence of lies on previous occasions, even in closely analogous circumstances, do not of themselves establish that Mr Zanzoul has deliberately lied on the occasions that are directly relevant to the medical evidence being considered. Here, the terms of the RRA decision reflect no more than a concern not to accept at face value the accuracy of self-reported symptoms. No error of law can be made out.

*Failure to consider s 8 of BORA*

[191] Mr Ellis asserted a positive obligation for the RRA to consider and protect Mr Zanzoul's right to life, in reliance on the terms of s 8 of BORA, which provides:

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

[192] This argument was coupled with the last one considered, namely that the medical evidence ought to have drawn the RRA to the conclusion that there was a real risk of Mr Zanzoul committing suicide. That was a risk the RRA had positively to recognise, when in light of s 8 of BORA it amounted to a relevant consideration favouring the granting of his appeal.

[193] In responding to this point, the respondent first questioned whether the terms of s 8 of BORA create a positive duty to protect life, or whether instead the section recognises only a right not to be deprived of life. Their submissions drew a distinction between the positive terms of a right to life as provided in equivalent provisions in other jurisdictions, and an assumption that s 8 is deliberately cast in a more confined way in BORA. (See, for example, Article 2(1) of the European Convention on Human Rights, and Article 6(1) of ICCPR.)

[194] A further issue is whether and, if so, to what extent the right protected by s 8 of BORA is a consideration to which the RRA was required to have regard, under either or both of the limbs of s 47(3). In that context, Mr McCarthy submitted that not every claimed right to life will oblige the State to take proactive measures to prevent a risk to that right from materialising. He cited decisions to this effect in *Osman v United Kingdom* (2000) 29 EHRR 245 at [15], *Edwards v United Kingdom* (2002) 35 EHRR 487 at [54]). Beyond any general obligation to have proper systems in place, an obligation to any individual could only arise where the State authorities knew or ought to have known of a real and immediate risk to the life of that individual. On the facts as found by the RRA, Mr Zanzoul is not in that position. If he were so, then the evaluation under both limbs of s 47(3) would no doubt have been weighted differently, and it is by no means clear that Mr Zanzoul

would have needed to invoke a right as expressed in s 8, to warrant a finding in his favour.

[195] However, on the facts no sufficient prospect of suicide was found to arise, to trigger either such a positive obligation, or a more limited one.

[196] Accordingly, I reject the notion that there was a positive obligation on the RRA in this case to treat the right recognised in s 8 of BORA as a relevant consideration. Nor am I satisfied that, if a real and immediate risk of suicide was established, the nature of the right under s 8 would apply to elevate the relevant consideration beyond the level of relevance it would have, as a material factor under s 47(3) in its own right.

#### *Failure to consider s 9 of BORA*

[197] Section 9 of BORA recognises the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment.

[198] In developing his oral submissions, Mr Ellis placed considerable weight on what he saw as the double jeopardy or double punishment imposed on Mr Zanzoul. First, by prosecuting him for passport fraud in reliance on his statement volunteered when he entered New Zealand, surrendering a false passport and acknowledging the extent of previous resort to it. Secondly, on Mr Ellis's analysis, having convicted Mr Zanzoul on those charges and sentenced him to a term of imprisonment, the New Zealand Government was now submitting him to a second form of punishment in relation to the same conduct, by requiring that he be removed from New Zealand.

[199] Treating the second consequence as a further form of punishment flowing from his immigration fraud adopts an unrealistically narrow approach to the range of reasons why Mr Zanzoul is not able to lawfully remain in New Zealand. He sought status as a refugee, and was found not to qualify for that status. He subsequently pursued other avenues to remain legally in New Zealand, without success. In the RRA's judgment under appeal, the nature and extent of his immigration fraud is but one aspect of the factual context. It did assume some significance in the evaluation

of the public interest, which was treated as including the deterrence of immigration fraud. Its relevance in that regard does not constitute a second punishment of Mr Zanzoul for the crimes of which he has been convicted.

[200] Mr Ellis acknowledged what was required to establish disproportionate severity, as considered by the Court of Appeal decision in *Puli'uvea* and the Supreme Court decision in *Taunoa v Attorney-General* [2008] 1 NZLR 429. In the judgment of Keith J in the former case, reference was made to the high threshold required on disproportionately severe treatment. There, an earlier expression endorsed was “treatment that is so excessive as to outrage standards of decency”. In *Taunoa*, Blanchard J expressed s 9 as being concerned “with conduct on the part of the State and its officials which is to be utterly condemned as outrageous and unacceptable in any circumstances”. For the majority in that decision, Tipping J articulated the test in the following terms:

[289] I would prefer a test to the same general effect, defining disproportionately severe conduct as being conduct which is so severe as to shock the national conscience. This test achieves purposes which must be deemed inherent in a concept which is linked with torture and other cruel and degrading treatment. First, it emphasises that the standard is well beyond punishment or treatment which is simply excessive, even if manifestly so. Second, it introduces the notion of the severity being such as to cause shock and thus abhorrence to properly informed citizens. Third, the reference to the national conscience brings into play the values and standards which New Zealanders share.

[201] The approach those decisions contemplate reflects the bedrock nature of the rights and freedoms protected by BORA. As its long title specifies, it is an Act:

- (a) to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
- (b) to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights.

As such, it operates as the backstop rather than the vanguard for protection of human rights. In the vast majority of situations, more specific manifestations of the protections for individuals will be reflected elsewhere so that it is generally unlikely to be the provision first resorted to, and will more likely be the last provision resorted to in the human rights context.

[202] Here, I accept the submission on behalf of the respondent that if a material extent of disproportionately severe treatment could be made out for Mr Zanzoul, then it would avail him under s 47(3) without the need to resort to s 9. Accordingly, no error of law is made out by virtue of the fact that the RRA did not turn its mind to whether the right protected by s 9 had been breached.

*Failure to take into account Articles 17 and 23(1) of ICCPR*

[203] These Articles of ICCPR recognise that no one is to be subjected to arbitrary or unlawful interference with, among other things, his privacy, family or home, and that the family is the natural and fundamental unit of society and is entitled to protection. Whilst acknowledging that the rights of Mr Zanzoul's children were taken into account, or at least referred to, on the tests under both limbs, Mr Ellis contended the RRA had erred because it did not refer to Articles 17 and 23(1) of the ICCPR. He contended a positive obligation to do so in reliance on observations in the Court of Appeal decision in *Tavita v Minister of Immigration* [1994] 2 NZLR 257. That decision explicitly did not decide the question whether, when a statute is silent as to relevant considerations, international obligations are required to be taken into account in such an absence. The Court of Appeal did, however, recognise that a failure to give practical effect to international instruments to which New Zealand is a party "may attract criticism".

[204] The respondent's argument on this was to the effect that the RRA decision did indeed reflect the concerns identified in these two Articles of ICCPR and, from the respondent's perspective, more weight was placed on them than is warranted. Paragraph [16] of the RRA decision treated Mr Zanzoul's right to remain in contact with his children and their right to know their father as "the primary basis for the appeal". That paragraph referred to the Convention, and the recognition of their interests reflected in the decisions in *Puli'uvea* and *Tavita*. Further, in paragraph [58], the RRA recognised that it was required to have regard to the Convention, and that the best interests of the children are a primary consideration. Further, the children should not be separated from their parents except where that is in their best

interests (citing Articles 3.1 and 9.1 on these points). The RRA did not accept, however, that the interests of the children were “paramount”.

[205] It is unnecessary to decide whether there was a specific obligation, as a matter of law, for the RRA to have regard to these provisions of ICCPR. In any event, I accept the respondent’s point that the passages from the decisions referred to above do reflect the protections contemplated by Articles 17 and 23 of ICCPR. There could be no error in the RRA not explicitly acknowledging them, where to have done so would not have altered the reasoning. Accordingly, that ground of appeal must be dismissed.

#### *Section 27 of BORA*

[206] There were two aspects to the criticisms of the RRA’s failure to afford Mr Zanzoul a hearing that complied with the principles of natural justice, as recognised in s 27. The first related to the failure to disclose the existence of material potentially prejudicial to him and that has already been considered, in the finding in Mr Zanzoul’s favour reflected in [78] to [98] above.

[207] The second criticism was an alleged inadequacy in reasons for the RRA’s decision. This appeared to focus on perceived inadequacies in the reasons for rejecting the medical evidence that had been provided to the RRA on behalf of Mr Zanzoul. Mr Ellis rejected paragraph [101] as not containing reasons for the determination on the medical evidence, but rather conclusions which were made without reasoned justification. He relied on the Court of Appeal’s decision in *Lewis v Wilson & Horton* [2000] 3 NZLR 546 in this regard. That decision considered the adequacy of the way in which a District Court Judge had dealt with an application for suppression of name in criminal proceedings. Having heard submissions on the matter in chambers, the terms of an order granting suppression of name reflected conclusions, which on their terms did not reflect the statutory grounds on which suppression of name might be ordered. The Court of Appeal expressly declined to determine whether reasons are required by Courts in New Zealand in all circumstances. Citation of the grounds referred to but not explained in the District Court Judge’s decision predictably drew a measure of criticism.

[208] However, I do not consider the Court of Appeal's approach in those circumstances would apply in the same way to an evaluation of the adequacy of reasons on this part of the RRA's decision. It is not a Court, but a specialist Tribunal. It is entitled as a matter of law to form its own view on the evidence it has heard, and paragraph [101] does provide an adequate indication of the reasons relied on by the RRA for not attributing greater weight to the claimed risks to Mr Zanzoul's mental health.

*Failure to take into account lack of future risk, and the benefits Mr Zanzoul could provide to the New Zealand community*

[209] Mr Ellis argued that the level of risk to the community that would be present if Mr Zanzoul remained was a relevant consideration in assessing the public interest under the second limb of the test in s 47(3). Mr Ellis drew an analogy with s 382 of the Companies Act 1993, which prohibits certain convicted persons and those against whom a judgment has been obtained in an action under Part 1 of the Securities Markets Act 1988 from being directors or promoters of a company, unless such person has first obtained the leave of the Court to do so. Authorities applying that section indicate that protection of the public interest is a primary objective. Mr Ellis argued that the public interest consideration under s 47(3) ought similarly to reflect what level of risk a person might present if permitted to remain. The respective mischiefs addressed are obviously quite different, and whilst in general terms I recognise there are cases in which reliably predictable outcomes in the future may influence the RRA's assessment of the public interest, it does not warrant status as a mandatory relevant consideration.

[210] Mr Ellis's submission depended upon the reliability of a prediction he made that there was no prospect of Mr Zanzoul offending in any way in the future, and that his skills as an expert tiler would enhance the skills available within the country.

[211] The respondent made the point that past conduct is one indication of the likely nature of future conduct, and in this case Mr Zanzoul has repeatedly breached immigration laws and committed fraud and perjury. The argument that granting him residence in New Zealand would remove the motive for future offending of that type

is one reason for questioning whether there will be any repetition of previous criminal conduct, but it can hardly be presented as a compelling basis for an assurance there would be no further offending.

[212] Nor was there any basis for the RRA to find skilled tilers as being a resource so scarce that the public interest favoured permitting Mr Zanzoul to remain, in order to lessen some serious skill shortage.

[213] An error of law in the nature of failure to have regard to a relevant consideration, when that consideration is not mandatory, must depend on the existence of circumstances which ought to have been taken into account. Here, the existence of factual circumstances supportive of Mr Zanzoul's appeal to be permitted to remain in New Zealand depends on a different view of factual matters than was obviously in the mind of the RRA. It was open to the RRA to have regard to the extent of previous offending, and it was open to the RRA not to treat Mr Zanzoul's work skills as so significant as to influence the assessment of the public interest. Accordingly, failure to have regard to these matters as an allegedly relevant consideration cannot constitute an error of law.

### **Failure to undertake a proportionality assessment**

[214] The fourth ground of appeal was that the RRA had erred in law by not undertaking an assessment of proportionality, claimed to be required at common law. Although Mr Ellis did not explicitly articulate how the proportionality assessment should have been undertaken, it was implicit that, because of the finding under the first limb of s 47(3) that Mr Zanzoul's removal from the country would be unduly harsh or unjust, then proceeding to require his removal would be disproportionate to pursuit of the aim of maintaining the integrity of New Zealand's immigration law.

[215] To the extent that anything might have been added to this argument on the appeal when considered within the challenge under a judicial review, I note that the failure to undertake a proportionality assessment was also pleaded as the third ground in the first application for judicial review. I have declined leave for parts of that proceeding, including this claim. The scope of the substantive argument

available will be the same, whether raised on appeal or in an application for judicial review.

[216] However, material distinctions may arise at the outset in establishing a basis for challenge, and at the end if the Court needs to consider relief, depending on whether the context is in appeal or in review. The High Court's jurisdiction in judicial review is a supervisory one, essentially limited to the lawfulness of the exercise of statutory powers. Without necessarily impugning a decision for a failure to undertake a proportionality analysis, a Court on review might grant relief if it were persuaded that the outcome was an unreasonable one in administrative law terms. Conceptually, that outcome could be produced by various measurements, including that the result was disproportionate to the appropriate solution reflecting the statutory aims. On the other hand in an appeal, the burden on an appellant is to demonstrate that the original decision-maker was obliged to undertake a proportionality analysis, and failed to do so.

[217] Here, Mr Ellis assumed the burden of establishing that the RRA was positively obliged to undertake a proportionality analysis, not merely that it produced a result which, on review by the Court, should be treated as flawed because of the absence of proportionality.

[218] There has been extensive consideration by the Courts of the prospect of applying a proportionality analysis to the correctness of decisions in the immigration area. There is presently a measure of uncertainty, given the comments in the two recent Court of Appeal decisions in *Ye v Minister of Immigration* [2008] NZCA 291 and *Huang v Minister of Immigration* [2008] NZCA 377, discussed in detail below, and given that appeals from both those decisions have been argued in the Supreme Court with a decision pending. Counsel in the present case did not suggest that I defer my decision pending the result of those appeals to the Supreme Court, and I do not consider it appropriate to do so.

[219] Within the jurisprudence on proportionality, Mr Ellis has in his favour the recognition that the relative intensity of review will be greater when judicial review relates to matters affecting fundamental human rights. Removal from New Zealand

under the Act of persons wishing to stay here is clearly among the categories of case warranting the most intense level of review.

[220] Mr Ellis acknowledges, as he must, that the New Zealand Courts have generally been reluctant to embrace proportionality as a distinct head of review, notwithstanding what is now a relatively settled acceptance of it in cases in the United Kingdom. On this, I agree with the observations of Wild J in *Wolf v Minister of Immigration* [2004] NZAR 414, distinguishing the position in the United Kingdom as operating in a different legislative and human rights environment. That basis for distinction was acknowledged in the Court of Appeal decision in *Huang* at [64].

[221] In administrative law, context remains everything. If one treats the United Kingdom authorities as recognising proportionality as an appropriate tool where relatively intense levels of review are justified because matters of fundamental human rights are involved, such an approach must still be tempered by the terms of the statutory power, the exercise of which is going to be measured against some expectation of proportionate outcomes. Here, the test applied under s 47(3) requires the evaluation of two limbs. The first provides for recognition of the relative extent of hardship imposed on the appellant, and those directly affected by his removal from New Zealand, requiring exceptional circumstances of that type to warrant the prospect of reversing the requirement for removal.

[222] The second limb of s 47(3) then balances that assessment of individual circumstances, against the broader public interest in allowing someone to remain who the law otherwise requires to be removed from New Zealand. In those cases where the first limb of the test favours the appellant, the second directs a broader perspective to balance the circumstances of the individual against the public interest. That constitutes a proportionality assessment on its own terms. A paraphrasing of the second limb might well be expressed as whether all factors relevant to the public interest in enforcing the law that requires the appellant's removal, if upheld, would be disproportionate to the recognised adverse consequences for the appellant, as evaluated under the first limb of s 47(3).

[223] Accordingly, even within the more usual context of judicial review, if the relative intensity of review appropriate to matters involving human rights was to embrace a notion of proportionality, then there must be an issue that s 47(3) already has its own form of proportionality analysis. Therefore the justification for superimposing any other proportionality test must surely require greater justification than might arise in other human rights contexts.

[224] There is a further aspect that makes reliance on proportionality even more ambitious in the present proceedings, than in the judicial review context in which it arose in *Ye* and *Huang*. Mr Ellis has sought to attribute to the RRA an obligation to consider its decision by reference to a proportionality test. As a statutory body, it was obliged to arrive at its decision by application of the two limbs in s 47(3). Mr Ellis's argument is that a proportionality test reflects the right recognised in s 9 of BORA, and is therefore to infuse the approach the RRA adopts to the two limb test. However, I have already found that s 9 does not avail Mr Zanzoul because the protection it provides is already catered for within the tests under s 47(3), and s 9 could add nothing.

[225] In the judicial review context, appellants seek to invoke proportionality as a means of testing the lawfulness of the outcome procured by the statutory decision-maker, so that it constitutes one measure by which the Court on review assesses the lawfulness of the exercise of the statutory power. Mr Ellis's argument would require the recognition of proportionality as part of the primary analysis under the statute.

[226] It is even less tenable to impute to the RRA a proportionality overlay on the application of the test under s 47(3), than it is to subsequently measure the lawfulness of an RRA decision on review, by applying a proportionality test to it.

[227] I am also satisfied that the analysis on proportionality in judicial review, as reflected in *Ye* and *Huang*, could not alter this outcome.

[228] *Ye* involved an appeal by two families against decisions of the High Court dismissing applications for judicial review of removal orders. The judgment of Glazebrook J includes acknowledgements that as the case involved fundamental

human rights of children, it is one where the Court should apply the standard of “anxious scrutiny”. Having acknowledged academic analyses urging proportionality reviews as a replacement for *Wednesbury* unreasonableness, and United Kingdom decisions adopting a proportionality analysis, Her Honour observed:

For myself, I have doubts that merely upholding immigration policy could ever be proportionate to breaking up a family, without there being other public interest factors involved, such as may arise in deportation cases or those involving revocation of permits. ([312])

[229] That approach would suggest that a proportionality analysis might be warranted, at least in circumstances where interests of children are prominent.

[230] The second decision in *Huang* involved similar circumstances of dismissal by the High Court of applications for judicial review of decisions declining to interfere with removal orders. The judgment of William Young P and Hammond J acknowledged the approach of Glazebrook J in *Ye* as affording some support for the argument that a full proportionality review should replace the standard grounds for administrative law review (see [62]). After endorsing Wild J’s observation in *Wolf* to the effect that United Kingdom precedents cannot be directly applied because of the different legislative and human rights environment, the judgment of Their Honours continued:

[65] It is in any event difficult to see how an undiluted proportionality approach could be adopted at the s 47 stage of the process, given the weighting which is implicit in the language of the s 47(3) test. Further, the whole point of a proportionality analysis is to permit the Court to review the balance struck by the primary decision-maker between the conflicting considerations and thus to specify the weight to be attached to the different interests. But this Court expressly held in *Puli’uvea* that it did not have the right to engage in such an exercise in relation to the humanitarian interview, see the passages cited in [39] above. Instead the Court in that case simply adopted the orthodox administrative law approach.

[231] The judgment continued:

[67] As to intensity of review, we therefore propose to follow the approach adopted in *Puli’uvea*. The Court should ensure that the best interests of an affected child were genuinely taken into account as a primary consideration but beyond that, how conflicting considerations are weighed is for the decision-maker and not the Court unless unreasonableness considerations can be successfully invoked.

[232] Until delivery of the Supreme Court judgment on the appeals in those cases, that represents the current state of the law on the approach to proportionality in applications for judicial review arising in circumstances such as the present. I would be comfortable adopting it for a judicial review analysis in the circumstances of the present case. The RRA's decision in this case is unusual in recognising that the first limb of the test in s 47(3) had been met, but that the constraint created by the second limb did apply to prevent a reversal of the removal order. In terms of the Court of Appeal's approach in *Huang*, the relative weight of the public interest factors appropriately considered under the second limb was a matter for the RRA. Mr Ellis did not contend that the decision was an unreasonable one in the administrative law sense, and that is understandable, as the mode of application of the two limbs of the s 47(3) test could not be challenged as unreasonable. Since there is a form of proportionality embedded in the two limbs of the test, some overlay of proportionality could only be justified if the law had advanced to the point that proportionality was a regularly applied, stand alone basis for asserting an error of law.

[233] Accordingly, I find that the RRA did not err as a matter of law in the present circumstances, by failing to supplement its assessment by the application of some form of proportionality test.

### **Summary on grounds of appeal and first judicial review**

[234] The conclusions on the various challenges to the RRA's mode of application of s 47(3) were summarised at [180] above. Except for the non-disclosure of prejudicial material (see [78] to [98] above), and overstatement of the test on the public interest (see [164] and [168] above), I have dismissed all the remaining grounds of appeal. To the extent that the errors I have upheld were also criticised in the first application for judicial review, then, if I was wrong to decline leave to file that application out of time, these would have been successful challenges in that context as well. To the extent that other grounds raised in the first application for judicial review overlapped with challenges raised unsuccessfully in the appeal, I am satisfied that those arguments would be similarly unsuccessful.

## **The second application for judicial review**

[235] The first to fifth grounds of review in the second application sought various declarations, including confirmation of alleged inconsistency between certain statutory provisions and either BORA or ICCPR. It was also argued that the respondent is estopped from pleading that ICCPR is not a part of New Zealand law, and that prohibiting a grant of legal aid for such proceedings as provided by s 10(1)(a) of the Legal Services Act 2000 was a denial of access to the Court (see summary, paragraph [20] above).

[236] None of the declarations sought on the first to fifth grounds of review, if granted, could have any direct bearing on Mr Zanzoul's attempts to remain in New Zealand. At best, they might add weight to initiatives beyond the scope of Court proceedings, such as seeking to bring political pressure to bear in making further pleas that Mr Zanzoul be permitted to remain. The claims are attacks on the broader context in which the law in New Zealand deals with persons in situations such as Mr Zanzoul's. More particularly, in jurisdictional terms they do not allege the exercise of a statutory power in relation to Mr Zanzoul's position, that is cited as the basis for reconsideration by the Court. The claims lack the nexus connecting the exercise of a specific statutory power to the predicament complained of by Mr Zanzoul that is necessary to invoke s 4 of the Judicature Amendment Act 1972.

[237] The character of these grounds of review are to be analysed on the terms of their pleading. However, there is no avoiding the categorisation of them expressed by Mr Ellis in correspondence with the Legal Services Agency that he provided to the Court. From a response to advice that a legal aid application for the second application for judicial review had been declined, Mr Ellis commented:

Whilst it is filed as a judicial review, and called a judicial review out of convenience, it is really a combination of judicial review and constitutional challenge of matters of public importance.

[238] Some care is required to ensure that the Court does not exceed its supervisory jurisdiction in judicial review. Both the Court's long-standing inherent jurisdiction, and its conventional statutory manifestation in the Judicature Amendment Act are

founded on the ability of the Court to review the lawfulness of the exercise of a statutory power that has been undertaken by a person or entity authorised to do so, under a New Zealand statute. Matters of “constitutional challenge” cannot be entertained in abstract. Here, the declarations sought do not depend on any allegedly unlawful exercise of a statutory power. Rather, the criticisms relate to the terms in which the New Zealand legislature has promulgated legislation. That is beyond all of the inherent jurisdiction, the Judicature Amendment Act and the Declaratory Judgments Act 1908.

[239] The extent to which the matters of concern reflected in the first to fifth grounds of review remain in the abstract is illustrated by the fact that Mr Zanzoul did not make any application for legal aid in respect of the appeal, his advisers recognising that aid was unavailable by virtue of the terms of s 10(1)(a) of the Legal Services Act. An application was pursued in respect of the application for judicial review, but declined on the ground that the Agency was not persuaded that the applicant had any reasonable grounds for pursuing those proceedings. Therefore this is a situation in which the litigant accepted that the Legal Services Act did not afford any basis for granting aid for the appeal proceedings. The complaint is brought against the terms of the Act rather than its mode of application by the statutory decision-maker, as demonstrated by the absence of any application.

[240] The Courts in New Zealand have in recent years been pressed to provide declarations of inconsistency between the provisions in BORA, and other domestic statutes. The high-water mark of potential recognition of such relief is the dissenting judgment of Thomas J in *R v Poumako* [2000] 2 NZLR 695 where His Honour observed that nothing less than a formal declaration (of inconsistency) will suffice to maintain the constitutional integrity of BORA (paragraph [86]).

[241] Much more recently, the Court of Appeal in *Boscawen v Attorney-General of New Zealand* [2009] 2 NZLR 229 recognised a range of factors counting against there being jurisdiction for the High Court to make a declaration of inconsistency in the abstract. The point did not have to be resolved in a finite way in that appeal, and so was notionally left open (see paragraphs [50] to [55]).

[242] Another theme of the extensive arguments advanced for Mr Zanzoul on these grounds of review was the alleged failure of the New Zealand Government to embrace the provisions of ICCPR, as if it were a domestic statute, to the extent of requiring primacy to be given to it in any circumstances where its provisions were inconsistent with those of any domestic statute.

[243] After the hearing had concluded, Mr Ellis sought to reinforce the case for determining the present issues by reference to international pronouncements of standards by referring the Court to two further sources of encouragement to do so. The first was the 210 page judgment of the Victorian Civil and Administrative Tribunal in *Kracke v Mental Health Review Board & ors* [2009] VCAT 646. The second was the concluding observations of the United Nations Committee Against Torture issued in an advanced, unedited version on 14 May 2009.

[244] Mr McCarthy has filed a short Memorandum dated 5 June 2009, opposing these post-hearing submissions being taken into account. He relies on the very narrow scope for the necessary leave to be granted only in exceptional circumstances (Practice Note [1968] NZLR 608) and, among other things, submits that these further materials could not add materially to everything that had already been submitted. That ground for opposition requires the further material to be assessed in a preliminary way, and I have done so.

[245] I am not satisfied that these sources add anything to the position, being one in which, even if jurisdiction did exist, the Court ought not to recognise this as an appropriate situation in which to give an abstract declaration of inconsistency. Accordingly, leave is declined.

[246] Mr Zanzoul has succeeded on grounds arising directly out of the terms on which his appeal was dealt with by the RRA, so discussion on this point is academic. Regardless, however, I am disinclined to afford any measure of recognition to the argument that the statutory context within which Mr Zanzoul was dealt with in New Zealand is, in some abstract way, inadequate, or in derogation of obligations owed to him since he became unlawfully in New Zealand in terms of his status under the Act. Caution is well justified when the constitutional consequences of any such

declaration of inconsistency in abstract have not been fully identified, let alone argued. The grounds for caution are well recognised (see, for example, paragraph [54] of the Court of Appeal decision in *Boscawen*), and the full consequences of assuming such a jurisdiction should await a situation where the relief is critical to the litigant, and the context better able to be assessed and debated.

[247] Accordingly, had there been jurisdiction to entertain these claims under s 4 of the Judicature Amendment Act, I would have declined the declarations of inconsistency sought in the first to fifth grounds of review of the second application for judicial review.

[248] The sixth to eighth grounds of review in the second application for judicial review challenged the constitution of the RSAA and the RRA. Those causes of action are caught by s 146A of the Act, and I have declined to grant leave for them to be brought, on the basis that they are very substantially out of time. Having heard the argument in support of, and in opposition to, those causes of action, I am comfortable as a matter of preliminary assessment that there appears to be no tenable basis for those arguments. Mr Ellis recently argued challenges to the constitution of the Parole Board in comparable terms, and was entirely unsuccessful in the case of *Miller v New Zealand Parole Board and Attorney-General* (2008) 24 CRNZ 104 (HC). The criticisms of that judgment, which Mr Ellis foreshadowed as the points he is likely to pursue on an appeal from it, did not raise for me any realistic prospect that the approach of MacKenzie J in *Miller* is in any way incorrect.

### **Costs**

[249] Mr Ellis has succeeded on two discrete points, argument on which occupied a very modest part of the hearing. Further, I acknowledge that the cross-appeal was entirely unsuccessful, although again argument in opposition to it was not a focus of Mr Ellis's arguments.

[250] By far the largest part of the hearing was taken up with various repackaging of arguments run in other cases, consistently without success. All those arguments needed a response in the written submissions filed on behalf of the respondent prior

to the hearing, although I was able to indicate that counsel for the respondent did not need to traverse the detail of some parts of those written submissions.

[251] Adopting the most generous approach possibly justifiable to the Court's discretion on costs in such circumstances, I consider Mr Zanzoul is entitled to no more than an award of costs as if for a one day hearing, with no allowance for interlocutory appearances or other steps, and no certification for second counsel. I accordingly award costs as if for a one day hearing in accordance with 2B scale, in favour of the appellant.

**Dobson J**

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