(1) ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESS OR IDENTIFYING PARTICULARS OF THE PLAINTIFFS AND OF THEIR CHILDREN

(2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2014] NZHRRT 16**

	Reference No. HRRT 025/2008
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**NOP AND TUV**
	PLAINTIFFS
AND	**CHIEF EXECUTIVE, MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Ms ST Scott, Member
Ms M Sinclair, Member

REPRESENTATION:
Mr R Small for Plaintiffs
Mr GR La Hood for Defendant
Ms K Evans for Privacy Commissioner

DATE OF HEARING: 28, 29 and 30 May 2012; 11 and 12 July 2012

DATE OF DECISION: 17 April 2014

DECISION OF TRIBUNAL

Introduction

[1] Both plaintiffs have convictions which are of consequence in the Immigration context. The female plaintiff has convictions which render her statutorily ineligible for a residence visa unless the Minister of Immigration issues a special direction. The male plaintiff's conviction renders him a person not of "good character" in terms of Government immigration policy. This means that before he can be issued with a visa he must first be granted a character waiver.

[2] In a decision given on 8 June 2003 the then Minister of Immigration determined that the female plaintiff not be issued with a special direction and that the male plaintiff not be granted a character waiver.

[3] The primary issue in these proceedings is whether the personal information used by the Minister in making that decision was information in relation to which, in terms of information privacy Principle 8, reasonable steps had been taken to ensure that having regard to the purpose for which the information was proposed to be used, the information was accurate, up to date, complete, relevant and not misleading.

[4] The secondary issue is whether, in a subsequent request by the plaintiffs for access to personal information held by the Ministry of Business, Innovation and Employment, the Ministry had proper grounds for withholding certain information under s 27(1)(c) of the Privacy Act 1993. The Ministry having conceded that the information was wrongly withheld, the only question is the nature of the remedy to be granted.

Non-disclosure order

[5] It was only on the fourth day of the hearing (11 July 2012) that the plaintiffs sought an order prohibiting publication of their names or of any details that could identify them or their children. The grounds of the application were the interests of the children. While the Ministry adopted a neutral position, the application was supported by the Privacy Commissioner. In a brief oral decision given on the morning of 11 July 2012 the Tribunal made an interim order under ss 95(1) and 107(3) of the Human Rights Act 1993 (applicable by virtue of s 89 of the Privacy Act) prohibiting publication of the names of the plaintiffs and of any details which might identify them or their children. The order was expressed to operate until further order of the Tribunal. The reason for the order was to protect the identity of the child who was the victim of the assaults which led to the convictions referred to.

[6] Having now heard all the evidence we are of the view that the interim order should be made final. The sole reason for the making of the order is the need to protect the interests of the child victim. That child's position is analogous to that of the innocent third parties protected by non-publication orders in *R v Liddell* [1995] 1 NZLR 539 (CA) at 546. While the principle of open justice dictates that there should be no restriction on publication of information about a case except in very special circumstances, the potential for the child to be re-victimised some 14 years after the offences were committed (the child was 2 years of age at the time) is real. In our view that will not be in the child's best interests in terms of Article 3 of the Convention on the Rights of the Child, 1989. The public interest is satisfied first, by the fact that the 5 day hearing was open to the public and second, by the fact that no other details of the case or of the evidence heard by the Tribunal are to be the subject of a non-publication order. As the plaintiffs have 6 children, the names of all children must be the subject of the non-publication order.

[7] The female plaintiff is to be known as NOP and the male plaintiff as TUV.

An apology to the parties

[8] Before the evidence is addressed the long delay in publishing this decision is acknowledged and an apology offered to the parties. This case was not overlooked. Rather delays regrettably occurred because all members of the Tribunal are part-time appointees and despite best endeavours it is not always possible to publish decisions timeously.

Change of description of defendant

[9] At the time these proceedings were commenced and during the first three days of the hearing the proper defendant was the Chief Executive of the Department of Labour.

[10] However, as from 1 July 2012, the Department of Labour became part of the Ministry of Business, Innovation and Employment. See the State Sector (Ministry of Business, Innovation, and Employment) Order 2012 (SR2012/91). Consequently ss 30H and 30I of the State Sector Act 1988 require the defendant in these proceedings to be treated as the Chief Executive of the Ministry of Business, Innovation and Employment.

The witnesses heard by the Tribunal

[11] Unusually, neither plaintiff gave evidence. The only witness called on their behalf was Mr SB Hurring who at one time was employed by Mr Small and who worked on the plaintiffs' file during the course of that employment. Mr Hurring did not hold himself out to be an expert in immigration and Privacy Act matters nor was his evidence accepted as expert evidence. Mr Hurring was the only witness for the plaintiffs. The Ministry called one witness only, namely Ms NM Kirwan who for over 40 years has been employed by the Department of Labour (now the Ministry of Business, Innovation and Employment) in various capacities.

Basis on which Tribunal invited to consider Principle 6 and Principle 8 cases

[12] The hearing lasted five full days. We are not certain that that time was put to best use as substantial parts of the plaintiffs' case were advanced in a way which did not allow the merits of their case to be identified with any degree of clarity. At times it was difficult to discern what their case was. In addition an attempt was made to lead evidence which was plainly irrelevant. We refer here to the evidence which allegedly demonstrated that the Ministry had a propensity "to act in a certain way, that is, a willingness or indifference to breach the rights of the Plaintiffs, and a willingness or indifference to breach the INZ rules specifically designed to protect the Plaintiffs' rights, including rights under the Privacy Act 1993". For reasons given during the course of the hearing, that evidence was ruled inadmissible. It was only with the assistance of Ms Evans that on the last day the Tribunal was provided with a handwritten list of alleged breaches of Principle 8 which, although compiled by Ms Evans, was adopted by Mr Small in his submissions. We will return to the list shortly. The point presently of significance is that when adopting the list Mr Small invited the Tribunal to address the issues in a "broad brush" way in preference to identifying at micro level the alleged errors and mistakes made by Immigration New Zealand (INZ). Mr Small also at this late point reduced and simplified the remedies sought by the plaintiffs.

[13] We address first the Principle 6 issue.

THE PRINCIPLE 6 CLAIM

[14] Where an agency holds personal information about an individual, that individual has the right to obtain from the agency confirmation whether the agency holds such personal information and the further right to have access to that information:

> Principle 6
>
> *Access to personal information*
>
> (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled—
>
> (a) to obtain from the agency confirmation of whether or not the agency holds such personal information; and
>
> (b) to have access to that information.
>
> (2) Where, in accordance with subclause (1)(b), an individual is given access to personal information, the individual shall be advised that, under principle 7, the individual may request the correction of that information.
>
> (3) The application of this principle is subject to the provisions of Parts 4 and 5.

[15] On receipt of an information privacy request the agency is required by s 40(1) of the Privacy Act, as soon as practicable and in any case no later than 20 working days after the day on which the request is received by that agency:

[15.1] To decide whether the request is to be granted; and

[15.2] To give to the individual who made the request notice of the decision on the request.

[16] The only grounds on which an agency may refuse to disclose the requested information are those allowed by ss 27 (security, defence, international relations), s 28 (trade secrets) and s 29 (other reasons). Refusal is not permitted for any other reason. See s 30.

[17] In the present case the plaintiffs' application to the Minister of Immigration for a special direction (Mrs NOP) and for a character waiver (Mr TUV) were declined by the Minister on 8 June 2003. In the making of that application they had at times been self-represented and at other times assisted by an immigration consultant.

[18] In or about May 2006 the plaintiffs instructed Mr Small. By letter dated 25 May 2006 from Mr Small addressed to what was then known as the New Zealand Immigration Service (but now Immigration New Zealand) and marked for the attention of Ms Kirwan, a request was made by the plaintiffs for access to all personal information held about them. For reasons not known this letter did not reach INZ, nor did a subsequent letter dated 21 June 2006. It was only when, on 7 July 2006, Mr Small sent a fax that the attention of INZ was drawn to the access request. In a response dated 10 July 2006 Ms Kirwan advised that the request had been sent to the Auckland Central Branch for processing.

[19] The maximum 20 working day period "allowed" by s 40(1) of the Act was treated by INZ to run from 7 July 2006.

[20] By letter dated 17 July 2006, well within the statutory period, INZ Auckland Central Branch released certain of the requested information but recorded that other information had been withheld under s 27(1)(c) of the Act:

> Certain information has been withheld pursuant to Section 27(1)(c) of the Privacy Act 1993. The reason for this is that the disclosure of the information would be likely to prejudice the maintenance of the law.

[21] After a complaint was made by the plaintiffs to the Privacy Commissioner on 30 November 2006 the Department of Labour on 1 May 2007 wrote to Mr Small releasing the previously withheld information, being:

> **[21.1]** Character checks relating to the plaintiffs.
>
> **[21.2]** Information received from the New Zealand Police.
>
> **[21.3]** Application Management System notes dated 7 March 2002 and 4 July 2002.
>
> **[21.4]** New Zealand birth certificates, Tongan birth certificates and marriage certificates.

[22] It has been expressly conceded by the Ministry in the present proceedings that the information eventually released on 1 May 2007 should not have been withheld in the first place and that the acknowledged facts establish a breach of Principle 6. In our view this concession was properly made.

[23] The Ministry does not, however, concede that there has also been a breach of s 40, being the plaintiffs' related allegation. The Ministry submits that all s 40 requires is a **decision** on the request as soon as reasonably practicable and in any case not later than twenty working days after the day on which the request is received. It points out that the request was received on 7 July 2006 and the **decision** communicated by letter dated 17 July 2006. This was well within the statutory timeframe, however interpreted. In our view the Ministry position is correct. It is not a requirement of s 40 that the requested information **also** be provided within the stipulated timeframe. There has been no breach of s 40 of the Act.

[24] Nevertheless, the conceded facts do establish that the Ministry refused to make the withheld information available when there was no proper basis for that decision. This means that the statutory definition of interference with privacy in s 66(2) has been satisfied.

[25] It follows that the only issue is one of redress. The remedies sought by the plaintiffs, as advanced in their closing submissions, were a declaration of interference with privacy and the legal costs they incurred in pursuing the Principle 6 complaint to the Privacy Commissioner. Those costs were $2,500, a sum not seriously disputed by the Ministry. Costs in these proceedings were also sought.

[26] In these circumstances, acting pursuant to s 85(1)(a) of the Act we make the declaration sought and in terms of ss 85(1)(c) and 88(1)(a) the sum of $2,500 is also awarded, being the pecuniary loss suffered by the plaintiffs. Costs in these proceedings, however, are reserved. The terms of the formal order follow at the conclusion of this decision.

[27] We now turn to the Principle 8 claim.

THE PRINCIPLE 8 CLAIM

[28] An understanding of the plaintiffs' case under Principle 8 requires an account of their immigration status and of their criminal convictions.

Immigration status

[29] The plaintiffs are Tongan citizens who first arrived in New Zealand in February 1998 (the male plaintiff) and March 1998 (the female plaintiff) on visitor permits which expired on 29 November 1998 and 20 March 1998 respectively.

The convictions – details

[30] According to the Police Summary of Facts, between 1 June 2000 and 27 November 2000 one of the plaintiffs' children (then aged one and turning two during this period) was assaulted by the female plaintiff on repeated occasions. The female plaintiff pleaded guilty to a number of charges under the Crimes Act 1961 including assault with intent to injure, cruelty to a child and assault on a child. For this she was on 3 August 2001 sentenced to imprisonment for 18 months, a sentence she served by way of home detention.

[31] The male plaintiff was on the same date sentenced to six months imprisonment on a charge under the Crimes Act of cruelty to the same child. That sentence was suspended for 18 months and he was subsequently required to undergo supervision of nine months.

The convictions – consequences

[32] The convictions meant that the female plaintiff was statutorily barred by s 7(1)(b) of the then Immigration Act 1987 from being granted a permit. Only the Minister of Immigration had power to override that provision by way of a special direction. See s 7(3)(a)(ii) of the 1987 Act.

[33] For the male plaintiff the immigration consequence of his conviction was equally serious as then Government residence policy required applicants to be of "good character". The male plaintiff was not of good character because he had been sentenced to a term of imprisonment and also because he had been convicted of an offence committed at a time when he was in New Zealand unlawfully.

[34] However, in late 2000 a possible solution to the plaintiffs' immigration problems appeared in the form of an immigration amnesty.

The immigration amnesty of 1 October 2000

[35] Under the amnesty provisions of the October 2000 Transitional Policy, persons who were unlawfully in New Zealand on or before 30 March 2001 were given an opportunity to regularise their New Zealand immigration status if, by reason of their personal circumstances, they could be considered to be well-settled in New Zealand. One of the "well settled" criteria was being (as at 18 September 2000) the biological parent of one or more dependent children born in New Zealand and continuing to be the parent of that child or children.

[36] The Immigration (Special Regularisation) Regulations 2000 (SR2000/187) set out the procedure for such persons to apply for an initial temporary permit under a transitional immigration policy and then for a residence permit under a special residence

policy. The intention was that ordinarily, overstayers who met the terms of the regularisation policy would ultimately be granted residence permits. However, the terms of the policy did not override the exclusion provisions of the Immigration Act 1987 itself nor ordinary Government residence policy which, as mentioned, required an applicant for a residence permit to be of "good character".

[37] The then Minister of Immigration (the Hon Lianne Dalziel) instructed INZ that any October 2000 Transitional Policy cases which had significant character issues were to be referred to her for decision.

The application by the plaintiffs under the October 2000 Transitional Policy

[38] Being overstayers as at 30 March 2001, the plaintiffs lodged an application under the October 2000 Transitional Policy on the declared basis that they were the parents of two dependent New Zealand born children. In their application they gave those children as having been born in New Zealand on 27 August 1998 and 30 May 2000 respectively. They did not disclose that they were then under investigation for the events which later led to their convictions.

[39] The application itself was submitted under cover of a letter dated 8 January 2001 on the letterhead of their then agent, Smart Choice Consultant, and was received by the INZ on 15 January 2001.

[40] Later, by letter dated 25 June 2002 NZ Immigration Solutions Ltd advised that they were now agents for the plaintiffs and a request was made under the Privacy Act for a copy of the INZ file. That request was complied with on 10 July 2002.

[41] Although the INZ file does not contain a record of every contact between INZ, the plaintiffs, their advisers and third parties, INZ did become aware of the convictions and there are a number of communications between INZ and the Police. In addition, by letter dated 13 September 2002 (received on 17 September 2002) NZ Immigration Solutions Ltd submitted information that had been requested by INZ including a bank statement (relevant to proof of custody of the child), a letter dated 25 October 2001 from Child Youth and Family advising (inter alia) that there were no further care and protection concerns for the child and a letter (undated) from St Anthony's Family Support Services Trust attesting to the fact that the plaintiffs were "very good parents and [had] learnt from their mistakes".

[42] Other recorded activity included correspondence between INZ, the Police and Child, Youth and Family requesting information or, as the case may be, updated information. Customer Interaction Notes further recorded (inter alia) that:

> **[42.1]** On 19 July 2001 a sister of one of the plaintiffs telephoned to advise that the plaintiffs wanted all information sent to them directly and the agent was to be removed from the contact list. INZ advised that a letter should be sent in confirming this.
>
> **[42.2]** On 17 June 2002 the female plaintiff was spoken to and told that INZ was waiting for information from the New Zealand Police. In the meantime the female plaintiff was advised to explain in writing "any convictions she thinks they may have".
>
> **[42.3]** On 1 July 2002 a note was made that CYFS had advised they were investigating the whereabouts of the child who had been the victim of the

offending and would have to do a home visit. The INZ officer recorded that she would not make a decision until satisfied that the "child is safe in the hands of the parents".

[42.4] On 4 July 2002 a request was made that a "sight check" be made regarding the welfare of the child.

[42.5] On 21 August 2002 the female plaintiff was spoken to. She advised that she still had the child in her care and would be providing evidence of this. She had also served her sentence and would provide evidence of that also.

[42.6] On 16 September 2002 the agent representing the plaintiffs called to speak to the case officer to get an extension of time for submitting further evidence. That evidence was received by INZ on 17 September 2002.

[42.7] On 15 October 2002 the female plaintiff contacted INZ for an update and was advised that as she was a section 7 person a decision would have to be made by the Minister of Immigration. She would have to wait until that decision was made. This could mean a wait until December or January 2003.

[42.8] On 2 July 2003 the female plaintiff telephoned to advise that the plaintiffs did not wish to have any dealings with their agent. They had also changed address.

[42.9] On 4 July 2003 the female plaintiff telephoned to state that the authority of the immigration consultant had been cancelled.

[43] The foregoing does not represent a full account of activity on the file but it does show that the plaintiffs were aware of the need to supplement the information provided by them.

The INZ report to the Minister of Immigration

[44] In a two page report dated 30 May 2003 the Minister was asked by INZ to decide whether a special direction was to be issued under s 7(3) of the Immigration Act 1987 for the female plaintiff and a character waiver granted for the male plaintiff. Accompanying the report were a number of documents. In all the report and related documents comprised 63 leaves. Those documents included the application form under the Transitional Policy, all the supporting documentation filed by the plaintiffs both at the time of the application and subsequently, the Police Summary of Facts and criminal history sheets. It is not practical to reproduce here the two page report in full although relevant extracts will be provided where necessary.

[45] On 8 June 2003 the Minister of Immigration declined both the special direction application by the female plaintiff and the character waiver application by the male plaintiff.

[46] As previously recorded, in or about May 2006 the plaintiffs instructed Mr Small.

[47] Against this background it is possible to turn to the Principle 8 claim.

Information privacy Principle 8

[48] Information privacy Principle 8 provides:

Principle 8

Accuracy, etc, of personal information to be checked before use

An agency that holds personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant, and not misleading.

The plaintiffs' complaints as originally articulated in the statement of claim

[49] By statement of claim received by the Tribunals Unit on 6 August 2008 the plaintiffs alleged that INZ had violated Principle 8 in the following respects:

4. The defendant was required under its own policy and appeal precedents:

   a) to put the immigration implications of any convictions directly, unambiguously and in writing to the plaintiffs

   b) to ensure that the plaintiffs had direct and timely input into any special directions or character waiver issues

   c) to generally ensure it had accurate and up to date information before declining the work permit application.

5. It was not open to the defendant, and it was a breach of the defendant's own advertised policy which it applied in other cases, to assume that the defendants (sic) instinctively knew of the immigration implications of their convictions or of the procedures for character waiver or special direction to enable residence to be granted in spite (sic) those convictions.

6. The requirements referred to in 4 above were the "reasonable steps" required to ensure information was accurate, up to date and complete before its use under Information Privacy Principle 8, the immigration policy and appeal decision being the relevant circumstances in terms of that principle.

7. In breach of its above obligations and its standard practices the defendant failed to write to the plaintiffs with its adverse information check with both plaintiffs before making adverse submissions to the Minister of Immigration ("the Minister") contrary to its own advertised policy and without the defendants' (sic) knowledge and in declining the application in June 2003.

8. The inaccuracies in the information submitted to the Minister included.

   (a) The defendant failed to update its files to reflect that the Department of Child, Youth and Family found no ongoing risk by the plaintiffs towards their children.

   (b) The defendant failed to distinguish between the completely different convictions and sentences of the two plaintiffs despite law and policy requiring this. The option of the first named plaintiff returning to Tonga to serve out her exclusion period whilst the second named plaintiff and their Tongan born child continued to apply for residence was thereby precluded.

   (c) The defendant told the Minister that there were two New Zealand born children in the family when there were in fact four, it was required to be fully accurate in such matters under well established law and policy.

   (d) The defendant provided no notice that such consideration was occurring and therefore no opportunity to explain positive changes the family had made. The first named plaintiff was released on home detention in the context of very positive changes both plaintiffs had made to ensure the safety of their children.

9. The defendant's breach of information privacy principle 8 as set out above:

   (a) seriously undermined the plaintiffs' right to a fair decision concerning their work permit thus undermining their legal rights and interests.

   (b) by putting seriously inaccurate, misleading and incomplete material before the Minister without their knowledge and input, pre-empted and discredited the plaintiffs right to put character waiver and special direction submissions directly to the Minister further undermining the plaintiff's legal rights and interests.

   (c) was particularly prejudicial to the second named plaintiff who may not in fact have been required to seek a special direction and may have been able to continue with a character waiver to seek New Zealand residence.

   (d) led them to incur additional legal costs in seeking to remedy the situation above and beyond what would otherwise be the case.

[50] It will be seen that these allegations, particularly those in paras 4, 7, 8 and 9, would not be out of place in judicial review proceedings brought under the Judicature Amendment Act 1972. The question is whether these same points can be properly pleaded as breaches of Principle 8.

The plaintiffs' complaints as articulated in closing

[51] As mentioned, on the last day of the hearing, the Tribunal received a list (adopted by Mr Small) amending the alleged breaches of Principle 8 as set out in the statement of claim. The allegations were now particularised as follows:

> **[51.1]** The INZ report to the Minister failed to distinguish between the differences in the convictions and sentences imposed on the female plaintiff on the one hand and on the male plaintiff on the other. In terms of Principle 8 it was said that the report was both inaccurate and misleading.
>
> **[51.2]** The assertion in the report that there were two New Zealand born children was inaccurate as there were in fact three such children.
>
> **[51.3]** INZ failed to advise the plaintiffs that a decision would be made on their application. In addition, INZ failed to obtain the views of the plaintiffs on the positive changes which had been made by them. These failures meant that the report was both incomplete and misleading.
>
> **[51.4]** INZ failed to advise the female plaintiff that she could make an application for a special direction. It also failed to include in the report to the Minister a submission from the female plaintiff addressing the humanitarian reasons why she should be allowed to remain in New Zealand. It followed that the report was both incomplete and misleading.
>
> **[51.5]** Because the report noted that the plaintiffs had, at the time of submitting their amnesty application, failed to disclose that they had been charged with criminal offences relating to the victim child it meant that the report contained irrelevant information because INZ was not relying on that failure as a ground for advising the Minister that a character waiver was required. In addition INZ failed to obtain from both plaintiffs comments on the alleged non-disclosure.

[51.6] The INZ report to the Minister failed to distinguish between the two different types of applications to be considered by the Minister, that is a special direction in relation to the female plaintiff and a character waiver in relation to the male plaintiff. This meant that the report was misleading.

[51.7] Because INZ failed to offer the plaintiffs an opportunity to comment on the potentially prejudicial information contained in the report to the Minister the report was both incomplete and misleading.

[52] In closing submissions Mr Small expanded on these complaints.

Further articulation of plaintiffs' complaints in closing submissions

[53] It is not possible to adequately summarise the lengthy submissions advanced in support of the plaintiffs' case. We have selected below possibly the most significant:

[53.1] The INZ character waiver policy at the time required the decision-maker to consider (inter alia) the surrounding circumstances of the application including whether the applicant was able to supply a reasonable and credible explanation or other evidence indicating that in supplying or withholding such information he or she did not intend to deceive the INZ. The decision-maker was also required to comply with the rules of fairness. It was alleged by the plaintiffs that the INZ and the Minister failed to follow and apply this policy because:

[53.1.1] INZ failed to put to the male plaintiff that he had failed to disclose his convictions.

[53.1.2] INZ failed to give the male plaintiff a meaningful opportunity to comment before undertaking the character waiver assessment. It also failed to make him aware of the stipulated factors in the relevant policy and did not give him an opportunity to comment on the surrounding circumstances.

[53.2] The INZ special direction policy at the relevant time required an applicant for a special direction to be given opportunity to make submissions and if submissions were submitted, they were required to be taken into account. This policy was not complied with in respect of the female plaintiff.

[53.3] The decision in *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA) established that INZ was obliged to give an applicant an opportunity to comment on potentially prejudicial information. Here the allegation that the plaintiffs had failed to declare certain matters such as the criminal charges or convictions was not put to them.

[53.4] Where the consequences of a decision are serious the Principle 8 "requirement of reasonableness" imposes on the decision-maker a duty to ensure that the person affected has an opportunity to comment on potentially prejudicial information.

[53.5] Once INZ decided to "allow" consideration of a special direction, the female plaintiff had a right to make a written submission and to be advised of, and to include in that application, humanitarian factors.

[53.6] Only by allowing the plaintiffs to exercise these rights could INZ be said to have taken reasonable steps to ensure that the information placed before the Minister was accurate, up to date, complete, relevant and not misleading.

[53.7] Where an application for a special direction or an application for a character waiver is under consideration but the information is initially incomplete or insufficient because the applicant has not been given opportunity to comment on the information placed before the decision-maker, the failure to afford that opportunity to be heard means that the information is, by definition, not accurate, not up to date, not complete, and misleading.

[53.8] The information prepared by INZ and used by the Minister was incomplete and inaccurate for the following reasons:

[53.8.1] There was no written request from the female plaintiff for a special direction contrary to the requirements of INZ policy.

[53.8.2] There was no explanation from the male plaintiff addressing the allegation that he withheld information from INZ.

[53.8.3] The male plaintiff had not made submissions addressing the "good character" policy criteria in Government residence policy.

[54] Again, the case advanced by the plaintiffs was a case framed in concepts drawn from the judicial review of administrative decisions.

The Ministry's reply to the plaintiffs' case

[55] The submissions for the Ministry can be briefly summarised:

[55.1] Principle 8 is not an alternative vehicle for the judicial review of actions by immigration officials (including the content of reports provided by them to the Minister of Immigration) or to review decisions made by the Minister.

[55.2] The substantive information before the Minister in this particular case was accurate.

[55.3] The plaintiffs were obliged to inform INZ of any relevant fact that might affect the decision on their application under the October 2000 Transitional Policy. This obligation flowed not only from the Declaration they signed in the application form itself but also from s 34G of the then Immigration Act 1987. Reliance was placed on the evidence given by Ms Kirwan that the New Zealand immigration system relies to a large extent on applicants providing accurate information to INZ. Immigration New Zealand receives approximately 500,000 visa applications each year and it is simply not possible for INZ to check whether the information submitted with each application is accurate, up to date, complete, relevant and not misleading. Of necessity INZ relies on applicants to ensure that they comply with their continuing obligation to make proper disclosure of all relevant facts or of any change of circumstances that may affect the decision on their application.

PRINCIPLE 8 – DISCUSSION

[56] The circumstances of the present case do not call for an exhaustive examination of the circumstances affecting the interpretation and application of Principle 8. It is necessary, however, that we set out our understanding of the application of Principle 8 in the immigration setting with particular reference to the facts of the present case.

The Principle

[57] It might be helpful to repeat the text of Principle 8:

> Principle 8
>
> *Accuracy, etc, of personal information to be checked before use*
>
> An agency that holds personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant, and not misleading.

[58] It is to be observed that the language is heavily qualified by key words or phrases which are themselves of some imprecision:

- such steps (if any).
- as are in the circumstances.
- reasonable.
- having regard to the purpose.

[59] In the present context the key phrase in Principle 8 is:

> … in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used….

[60] This phrase must be interpreted and applied having regard to:

[60.1] The immigration setting and relevant immigration legislation.

[60.2] The particular facts of the case.

We will address each in turn but first it is important to observe that Principle 8 is a "principle", not a right.

Principle 8 does not confer a right

[61] Information privacy Principle 8 does not of itself confer a **right**. That is, a right which requires that before an agency proposes to use information it must ensure that the information is accurate, up to date, complete, relevant, and not misleading. Of all the information privacy principles only Principle 6 confers a legal right and then only in relation to personal information held by a public sector agency:

> **11 Enforceability of principles**
>
> (1) The entitlements conferred on an individual by subclause (1) of principle 6, in so far as that subclause relates to personal information held by a public sector agency, are legal rights, and are enforceable accordingly in a court of law.
> (2) Subject to subsection (1), the information privacy principles do not confer on any person any legal right that is enforceable in a court of law.

INTERPRETING PRINCIPLE 8 – THE IMMIGRATION SETTING AND RELEVANT IMMIGRATION LEGISLATION

The legislative context

[62] At the heart of immigration decision-making in New Zealand lies the challenge of the large volume of visa applications (presently 500,000 per year) received by INZ and the practical impossibility of checking whether the information required to make a decision on each application is "accurate, up to date, complete, relevant, and not misleading". To this figure must be added the large number of "other" applications such as applications for reconsideration, for special directions, protection claims and appeals to the Immigration and Protection Tribunal. For good reason immigration applicants have a statutory responsibility:

> **[62.1]** To ensure that all information, evidence and submissions the applicant wishes to have considered in support of the application are provided when the application is made.
>
> **[62.2]** To inform the Minister or an immigration officer of any relevant fact, including any material change in circumstances that occurs after the application is made, if that fact or change in circumstances may affect the decision on the application.

[63] Failure to comply with the continuing obligation to disclose changed circumstances amounts to concealment of relevant information for the purpose of determining what in the 2009 Act is called deportation liability and what under the 1987 Act was referred to as permit cancellation or revocation.

[64] By way of illustrating this paradigm we reproduce s 58 of the present Immigration Act 2009 (the counterpart in the Immigration Act 1987 being s 34G):

> **58 Obligation on applicant to inform of all relevant facts, including changed circumstances**
>
> (1) It is the responsibility of an applicant for a visa to ensure that all information, evidence, and submissions that the applicant wishes to have considered in support of the application are provided when the application is made.
> (2) The Minister or immigration officer considering the application—
> (a) is not obliged to seek any further information, evidence, or submissions; and
> (b) may determine the application on the basis of the information, evidence, and submissions provided.
> (3) It is also the responsibility of an applicant for a visa to inform the Minister or an immigration officer of any relevant fact, including any material change in circumstances that occurs after the application is made, if that fact or change in circumstances—
> (a) may affect the decision on the application; or
> (b) may affect a decision to grant entry permission in reliance on the visa for which the application is made.
> (4) Without limiting the scope of the expression *material change in circumstances* in subsection (3), such a change may relate to the applicant or another person included in the application, and may relate to any matter relevant to this Act or immigration instructions.
> (5) Failure to comply with the obligation set out in subsection (3) amounts to *concealment of relevant information* for the purposes of sections 157 and 158.
> (6) It is sufficient ground for the Minister or an immigration officer to decline to grant a visa to a person if the Minister or officer is satisfied that the person,—
> (a) whether personally or through an agent, in applying for the visa submitted false or misleading information or withheld relevant information that was potentially prejudicial to the grant of the visa; or

(b) did not ensure that an immigration officer was informed of any material change in circumstances to which subsection (3) applies between the time of making the application and the time of a decision on the application.

[65] The following table illustrates the extensive deployment of this principle in both the 1987 and 2009 Acts:

Immigration Act 1987	**Immigration Act 2009**
s 13D(2) – expressions of interest – residence	s 58 – obligation on applicant to inform of all relevant facts, including changed circumstances
s 14B(3) – application for residence visa	s 93(1) & (4) – expressions of interest
s 17A(3) – application for residence permit	s 112(1) & (3) – application for entry permission
s 18F(2) – appeals to Residence Review Board	s 133(3) – claim for protection status
s 34G – obligation to inform all relevant facts, including changed circumstances	s 135(1) & (2) – claim for protection status
s 50 – appeal to Removal Review Authority	s 226(1) – appeal to Immigration and Protection Tribunal
s 129G(5) – claim for refugee status	
s 129P(1) – appeal to Refugee Status Appeals Authority	

[66] In the present case the specific provision of the 1987 Act which applied to the plaintiffs was s 34G:

34G Obligation to inform all relevant facts, including changed circumstances

(1) Every person who applies for any type of visa, permit, or exemption under this Act has the obligation to inform an immigration officer of any relevant fact, including any material change in circumstances that occurs after the application is made, if that fact or change in circumstances—
  (a) may affect the decision on the application; or
  (b) may affect a decision to grant a permit in reliance on the visa for which the application is made.

(1A) Every person expressing an interest in obtaining an invitation to apply for residence under section 13E has the obligation to inform a visa officer or an immigration officer of any relevant fact, including any material change in circumstances that occurs after the expression of interest is notified, if that fact or change in circumstances—
  (a) may affect the decision to issue an invitation to apply for residence; or
  (b) may affect a decision to issue a residence visa or grant a residence permit as a consequence of the invitation to apply for residence.

(2) Without limiting the scope of the expression **material change in circumstances** in subsections (1) and (1A), such a change may relate to the applicant or another person included in the application, and may relate to any matter relevant to the applicable policy.

(3) Failure to comply with the obligation set out in subsection (1) or subsection (1A)—
  (a) amounts to **concealment of relevant information** for the purposes of sections 20(1)(b) and (c) and 20A(1)(b) and (c); and
  (b) renders any visa or permit granted subject to cancellation or revocation.

(4) It is sufficient ground for the Minister or a visa officer or immigration officer to decline to issue a visa or grant a permit to a person if the Minister or officer is satisfied that the person,—
  (a) whether personally or through an agent, in expressing his or her interest in obtaining an invitation to apply for residence submitted false or misleading information, or withheld relevant information that was potentially prejudicial to the issue of the invitation; or

(b) did not ensure that a visa officer or immigration officer was informed of any material change in circumstances between the time of expressing interest and the time of the person's application for the relevant visa or permit; or
(c) whether personally or through an agent, in applying for the visa or permit submitted false or misleading information or withheld relevant information that was potentially prejudicial to the issue of the visa or the grant of the permit; or
(d) did not ensure that a visa officer or immigration officer was informed of any material change in circumstances between the time of making the application and the time of a decision on the application.

[67] This provision was supplemented by the Immigration (Special Regularisation) Regulations 2000, reg 6(1)(e) and (g) which stipulated that an application for a temporary permit under the October 2000 Transitional Policy was required to be tendered with:

(e) such information and evidence as is required by the approved application form to be tendered in order to demonstrate that the applicant fits the October 2000 Transitional Policy; and …

(g) any information, evidence, or submissions that the applicant considers demonstrate that the applicant should be granted a temporary permit under the Government immigration policy known as the October 2000 Transitional Policy.

[68] An identical requirement applied to an application for a residence permit. See reg 7(1)(c) and (d):

(c) such information and evidence as is required by the approved application form to be tendered in order to demonstrate that the applicant fits the October 2000 Transitional Policy; and …

(d) any information, evidence, or submissions that the applicant considers demonstrate that the applicant should be granted a residence permit under the Government immigration policy known as the October 2000 Transitional Policy.

[69] Both s 34G of the 1987 Act and s 58 of the 2009 Act are buttressed by the requirement that applicants complete a declaration acknowledging that if any false statement is made the application may be declined or the visa later revoked. They must also declare that they will inform INZ of any relevant fact or any change of circumstances that may affect the decision on the application. In the present case both plaintiffs signed a declaration in which they stated (inter alia):

I understand that if I make any false statements, or provide any false or misleading information, or have changed or altered this form in any way, my application may be declined, or my permit may later be revoked, and that I may also be committing an offence and liable to prosecution.

...

I declare that I will inform the New Zealand Immigration Service (INZ) of any relevant fact or any change of circumstances that may affect the decision on my application for a permit.

I declare that there are no matters or warrants outstanding, or investigations of any kind, which could have any current or future effect on the assessment of my good character or the good character of any other persons included in this application.

I authorise the INZ to make any enquiries it deems necessary in respect of the information provided on this form and to share this information with other Government agencies. I also consent to any organisation providing relevant information to the INZ about me ….

The legislative context as a determinant of the application of Principle 8

[70] Returning to the interpretation of Principle 8, it is inescapable that the "circumstances" which determine what steps by INZ are "reasonable" to ensure

compliance with Principle 8 must include the statutory responsibility on immigration applicants:

> **[70.1]** To ensure that all information, evidence and submissions the applicant wishes to have considered in support of the application are provided when the application is made.
>
> **[70.2]** To inform the Minister or an immigration officer of any relevant fact, including any material change in circumstances that occurs after the application is made, if that fact or change in circumstances may affect the decision on the application.

[71] Both the 1987 Act (see for example s 17A(3) in the context of residence permits) and the 2009 Act (see, for example s 58(2)) contain provisions which further provide that the Minister or immigration officer is not obliged to seek any further information, evidence or submissions and can determine the application on the basis of the information, evidence and submissions provided.

[72] On one view, such statutory provisions largely, if not completely, sideline Principle 8 and it is to be noted that s 7(4) of the Privacy Act 1993 provides:

> (4) An action is not a breach of any of principles 1 to 5, 7 to 10, and 12 if that action is authorised or required by or under law.

[73] However, the point was not the subject of submissions at the hearing. Given also that the terms of s 58(2) of the 2009 Act are in some respects more explicit than those in s 34G of the 1987 Act we leave the point open and proceed on the basis that Principle 8 was engaged.

[74] The question is the degree to which Principle 8 was engaged. In our view the answer is "not much". Bearing in mind the statutory duties on the plaintiffs there was little work for Principle 8 to do. This was because (as previously explained) the immigration setting and the statutory obligations on the plaintiffs were critical factors in limiting those steps (by INZ) which were "in the circumstances, reasonable to ensure that, having regard to the purpose for which the information [was] proposed to be used, the information [was] accurate, up to date, complete, relevant, and not misleading" in terms of Principle 8. This is borne out by the particular facts of the case as analysed under the next heading.

[75] The point can be expressed another way. The collection and use of personal information in the immigration context is a highly structured and formal activity. An individual making application is under a statutory duty to provide all relevant information, evidence and submissions, signs a declaration verifying that true and correct answers have been given to the questions in the application form and is under a statutory obligation to advise INZ of any changes in circumstance that occur after the lodging of the application. This is to be contrasted with other contexts, particularly those where the individual is not an applicant and where there is no statutory obligation to provide accurate personal information or to advise the collecting agency of any relevant change in circumstances. In the immigration context Principle 8 will have application in a more narrow range of circumstances than would otherwise be the case.

Principle 8 cannot be used to evade statutory obligations

[76] Given the manner in which the plaintiffs mounted their challenge in the present case, it is equally important to recognise that Principle 8 cannot be used as a vehicle to reverse the statutory onus and thereby impose on INZ a legal duty to make inquiry of the applicant as to whether there are any further relevant facts which the applicant has not already disclosed, including any material change in circumstances occurring after the application has been submitted. This would defeat (here) the purpose of s 34G and of the Immigration (Special Regularisation) Regulations 2000 as well as the rationale for the inbuilt limitation to Principle 8, namely the stipulation that the steps to be taken be measured against what is "reasonable in the circumstances".

Principle 8 not a platform for judicial review

[77] It can be seen from the various forms in which the plaintiffs articulated their case that the Tribunal was in many respects asked to sit as a court engaged in the judicial review of actions taken by INZ when submitting a report to the Minister of Immigration.

[78] As to this, the Tribunal does not have a judicial review jurisdiction. Such jurisdiction is possessed by the High Court alone under the common law and under the Judicature Amendment Act 1972. Principle 8 cannot be for the Tribunal what the Judicature Amendment Act 1972 is for the High Court. It is not a back door to the review of administrative action. Further, for the reasons given, it may have little work to do in the context of a specific immigration decision-making process. The particular facts of the case will always be of first importance. This will become clear as we now turn to the plaintiffs' complaints as articulated in closing.

INTERPRETING PRINCIPLE 8 – THE PARTICULAR FACTS OF THE CASE

[79] We address in turn the plaintiffs' case as articulated in their closing submissions.

Failure to distinguish between the different convictions and sentences

[80] The allegation that the report provided to the Minister failed to distinguish between the different convictions and sentences is unsustainable on the facts because the report not only made the distinction clear it also provided the Minister with a copy of the female plaintiff's criminal history sheet and (separately) the male plaintiff's criminal history sheet. In addition the Police summary of facts was attached. That summary clearly explained the different liability of the two plaintiffs. Further, the report provided the Minister with the following summary:

> **Summary of Conviction/s:**
>
> Mr & Mrs [NOP and TUV] have several convictions recorded against them here in New Zealand and at the time of lodging their Transitional Policy in January 2001 the couple were being investigated by the NZ Police. However, Mr & Mrs [NOP and TUV] failed to declare that they had charges pending against them. (**Tag 'A'**) The couple's convictions are summarised as below:
>
> - **[The male plaintiff] – June 2000**. Convicted of Cruelty to/illtreat child (Crimes Act). He was sentenced to 6 months imprisonment that was then suspended for 18 months. He was subsequently required to undergo 9 months supervision.
> - **[The male plaintiff] – August 2001**. Convicted on 2 charges of breach of Fisheries Regulations and was fined $200.00 on each charge. (**Tag 'B'**)
> - **[The female plaintiff] – August 2001**. Convicted on 1 charge of Assaults With Intent To Injure (Manually), 2 charges of Assault Person With Blunt Instrument, 1 charge of Assault Child (Manually) and 1 charge Cruelty to/Illtreat Child (Crimes Act). [The female plaintiff]

was convicted and sentenced to 18 months imprisonment and Home Detention leave was granted. (**Tag 'C'**)

As a consequence of [the female plaintiff's] convictions she falls within Section 7(1)(b) of the Immigration Act 1987 being a person who, at any time within the preceding 10 years has been convicted of any offence for which that person has been sentenced to a term of imprisonment for a period of 12 months or more. In addition [the male plaintiff] falls under Section A5.25(e), (f) & (g) of the NZIS Operational Manual that describes those applicants normally ineligible for the grant of a residence visa or permit.

[81] The only error we can see is that for the male plaintiff the date of June 2000 (being the offence date) has been mistaken for the conviction date (August 2001). The error is, however, immaterial as the convictions are not disputed and the Minister was in any event provided with the criminal history containing the correct information. In fairness, the error in the date has not been the subject of the plaintiffs' attack. Rather the challenge is to the alleged failure to distinguish between the different convictions and sentences. We do not see how this challenge can be advanced. It is entirely unsupported by the evidence.

The number of New Zealand born children

[82] Under the October 2000 Transitional Policy the "well-settled criteria" were satisfied if (inter alia) the applicant was the parent of one or more children born in New Zealand. In their application filed on 15 January 2001 the plaintiffs disclosed that they were the parents of two dependent New Zealand born children, their dates of birth being 27 August 1998 and 30 May 2000 respectively. When on 12 October 2002 a third New Zealand citizen child was born the plaintiffs did not notify this fact to INZ. That is they failed to discharge their statutory obligation to give to INZ notice of their change of circumstances. Similarly they failed to discharge their obligation under the declaration in the application form. Because Principle 8 is qualified by the phrase "in the circumstances, reasonable to ensure", Principle 8 did not override the statutory obligation on the plaintiffs. Nor did it impose on INZ a duty to go to the plaintiffs, prior to submitting the report to the Minister (and indeed after that date but prior to the Minister's decision) to check whether the number of New Zealand citizen children had changed from two to three. Again, the point is unsustainable.

Failure to advise plaintiffs that decision would be made and inviting evidence on positive changes within the family

[83] The complaint that the plaintiffs were not advised that a decision would be made on their amnesty application and that there was a failure to invite them to present evidence on positive changes in the family is similarly unsustainable on the facts:

[83.1] The whole point of the application under the October 2000 Transitional Policy was to generate a decision on whether the plaintiffs were to be granted residence permits. It is difficult to see how an alleged failure to advise the plaintiffs that a decision would be made comes within Principle 8. A failure to advise an applicant of the process to be followed in making a decision on an application is neither "personal information" nor a "use" of that information.

[83.2] On the facts, the plaintiffs were clearly aware that a decision was to be made and that their convictions for assaulting their child would be at the centre of the case, as was their fitness to be parents. They knew they needed to present evidence that there had been positive changes within the family and such evidence was submitted to INZ.

[83.3] The NZ Immigration Solutions Ltd letter dated 13 September 2002 enclosed a bank statement (showing that the female plaintiff was receiving family support for her New Zealand born children) together with the very favourable letter from Child, Youth and Family dated 25 October 2001 and the equally favourable letter from St Anthony's Family Support Services Trust. These documents did not appear out of the blue. They clearly followed contact between INZ and the plaintiffs (or their representative). The Customer Interaction Notes record that on 21 August 2002 the female plaintiff was spoken to. She advised that she still had in her care the child who had been the victim of the offending and would be providing evidence of this. She had also served her sentence and would provide evidence of that also. On 16 September 2002 the agent representing the plaintiffs telephoned to advise that further evidence was on its way. The documents arrived the next day.

[83.4] Represented as they were by an agent, and having submitted highly relevant and important evidence in support of their application, we can see no grounds for the plaintiffs' allegation that they should have been advised that a decision would be made on their application and that they should submit further evidence. INZ was under no such duty but in any event the plaintiffs were advised to submit any new information relevant to the case. INZ did not fail to take steps to ensure that the information proposed to be used was accurate, up to date, complete, relevant and not misleading.

[83.5] But even if we are wrong Principle 8 does not impose on a public sector agency a duty to ensure that an applicant has put forward the best possible case.

[83.6] Given the immigration context and the legislative setting, it is difficult to see how Principle 8 can impose on the decision-maker a duty to draw the attention of the applicant to defects in the case or to ways in which his or her case can be strengthened or better presented.

Failure to advise female plaintiff she could make an application for a special direction

[84] As we understand it, the female plaintiff claims that because she did not know that a special direction was required, she was unaware that she could make a case justifying the exercise of the Ministerial discretion in her favour. Because the report before the Minister did not contain her representations, the report was not accurate.

[85] The difficulty faced by the female plaintiff is that she must be taken to be aware that she had made an application for a permit under the amnesty provisions and that her convictions were a substantial stumbling block. To that end she and her husband had submitted relevant, persuasive information that those convictions notwithstanding, the plaintiffs should be issued with residence permits under the amnesty provisions. The fact that the plaintiffs might have been able to have presented more and better evidence and more and better submissions does not impact on Principle 8. The information in the report and the supporting documentation has not been shown to be inaccurate, out of date, incomplete, irrelevant or misleading unless one interprets these terms as absolutes. But Principle 8 does not impose absolute standards. Rather the standards are set by what, in the circumstances, was reasonable for the agency to have done before using the information. See for example *Director of Human Rights Proceedings [EFG (No. 2)] v Commissioner of Police* [2012] NZHRRT 8 at [28]. Once again we are driven to observe that the letters from Child, Youth and Family and St Anthony's Family

Support Services Trust are compelling documents. Neither the fact that more evidence and more persuasive submissions could have been submitted nor the fact that the Minister did not ultimately make a decision in favour of the plaintiffs leads to a conclusion that Principle 8 was breached.

It was irrelevant for the report to refer to the plaintiffs' failure to declare that charges were pending at the time their application was submitted

[86] In the declaration signed by the plaintiffs they specifically acknowledged that if they made any false statements or provided any false or misleading information the application could be declined. The relevant question at paragraph A54 asked:

> Are you and/or any of your accompanying family members currently under investigation, or wanted, by any law enforcement agency in any country?

To this question the plaintiffs answered "No".

[87] It is correct that the INZ report asserted that the plaintiffs "failed to declare that they had charges pending against them". But it has not been shown that this statement was anything other than accurate, up to date, complete and not misleading. The plaintiffs claim, however, that it was not relevant. As to this, it is difficult to see how INZ could have justified omitting this information from the report. As Ms Kirwan stated in her evidence, the immigration system depends on applicants making full disclosure of all relevant information. The "good character" policy applicable at the time specifically stated that a character waiver was required where, in the course of applying for a New Zealand visa, the applicant had made any statement or provided any information, evidence or submission that was false, misleading or forged, or withheld material information. The effect of the plaintiffs' submission is that INZ should not have drawn the attention of the Minister to the failure by the plaintiffs to disclose highly relevant adverse information. This is an unattractive submission. We do not accept that failure to declare that charges were pending was irrelevant in the context of the application. It went to the heart of whether the plaintiffs were eligible under the amnesty programme.

Failure to distinguish between the different types of applications

[88] Immigration New Zealand placed before the Minister a report which addressed first, the question whether the female plaintiff should receive a special direction and second, whether the male plaintiff should receive a character waiver. The submission is, in effect, that these two separate issues were conflated with the result that the report was misleading as to which issue applied to the relevant plaintiff.

[89] Once again the answer is to be found on the face of the INZ report. It explains in clear terms that the Minister must make not only a decision on a special direction application in relation to the female plaintiff but also on a character waiver in relation to the male plaintiff. We refer in particular to the following features of the report:

> **[89.1]** The heading to the document was "Special Direction/Character Waiver Request".
>
> **[89.2]** The report carefully explained that as a consequence of the female plaintiff's convictions she fell within Section 7(1)(b) of the Immigration Act 1987 and that in relation to the male plaintiff the consequence of his conviction was that he fell under the relevant provisions of the INZ *Operational Manual* which at

the relevant time specified the categories of applicants normally ineligible for the grant of a residence visa or permit on character grounds.

[89.3] The next sub-heading read:

> "Other reasons advanced in support of [the plaintiffs] being granted a Special Direction/Character Waiver are as follows".

[89.4] The report continued:

> As [the plaintiffs] fall within Section 7(1) of the Immigration Act and Section A5.25 of the NZIS Operational Manual the couple's Transitional Policy application has been referred to you for consideration and decision as to whether they should or should not be granted a Special Direction & Character Waiver.

[90] In our view any reasonable reading of this document makes it clear that the female plaintiff required a special direction decision and the male plaintiff required a character waiver decision. The plaintiffs point has no substance. The report was not, in terms of Principle 8, misleading.

Failure to afford an opportunity to comment on potentially prejudicial information

[91] This last submission makes overt that which is implicit in the earlier points namely, that by virtue of Principle 8, INZ (and the Minister) were under a duty to act fairly, reasonably and according to law. The plaintiffs also relied on INZ policy manual provisions incorporating fairness obligations and on the administrative law requirement that policy statements (for example, relating to the processing of character waiver applications) be followed and applied.

[92] But as we have explained, the Tribunal does not sit as a court with jurisdiction under the Judicature Amendment Act 1972 and Principle 8 does not open a side door through which the Tribunal can step into the judicial review arena. A breach of the rules of fairness or of immigration policy does not establish a breach of Principle 8. The issues under Principle 8 are both different and more narrow.

[93] To re-iterate, both the declaration signed by the plaintiffs and s 34G of the Immigration Act 1987 imposed on the plaintiffs a legal obligation to inform INZ of any relevant fact, including any material change in circumstances occurring after the application was made if that fact or change in circumstances might affect the decision on the application. Principle 8 does not reverse that statutory onus nor does it impose on INZ a legal duty to make inquiry of an applicant as to whether there are any further relevant facts which the applicant has not already disclosed. Principle 8 requires that before personal information is used, steps be taken (which in the circumstances are reasonable) to ensure that the information is accurate. It does not impose an obligation to afford an opportunity to comment on potentially prejudicial information. Such obligation comes from the common law duty to act fairly, not from the information privacy principles and the two should not be conflated.

[94] The majority decision delivered by Tipping J in *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [48] explicitly recognised that the obligations of decision-makers in the immigration context must be measured according to what is reasonable in the circumstances and immigration officers can ordinarily expect parents to put forward all that can reasonably be said on behalf of themselves and of their children. Proactive steps on the part of immigration officers will be necessary only when something relatively obvious is not addressed by the parents.

[95] In the present case we are of the view that there was nothing obvious for immigration officers to do under Principle 8 to ensure that the information assembled for the Minister of Immigration was accurate, up to date, complete, relevant and not misleading. The plaintiffs had submitted relevant evidence and on the face of that information there was nothing to put INZ on notice that Principle 8 was in play notwithstanding the statutory obligations resting on the plaintiffs. Immigration officers and Ministers of Immigration must be able to rely on the statutory onus imposed on immigration applicants.

Conclusion on Principle 8 claim

[96] For the reasons given we conclude that there was no breach of Principle 8 and it follows that the plaintiffs have not, in terms of s 66(1) of the Privacy Act, established an interference with their privacy.

Alternative grounds for decision on Principle 8 claim

[97] Even had the Tribunal found differently on the breach of information privacy Principle 8, our finding would have been that the plaintiffs came nowhere near establishing a head of damage listed in s 66(1)(b) of the Privacy Act. Not only was there a paucity of evidence it must be observed that direct evidence from the individual concerned is usually the best evidence the Tribunal can receive in relation to these heads of damage. Exceptional cases aside, the claim will almost certainly fail if a plaintiff does not appear to give evidence about the effect that the breach has had on him or her. The cost of engaging a lawyer to deal with a dispute is not, in itself, a financial loss contemplated by s 66(1)(b)(i). As Ms Evans pointed out, if it were, a plaintiff could transmute any breach of a privacy principle into an "interference with privacy" simply by engaging a lawyer to handle the complaint. Instead, recompense for legal costs earlier in the dispute is one of the remedies that can be claimed if there is an interference.

[98] Assuming against the evidence that in terms of s 66(1)(b)(ii) the plaintiffs lost the opportunity to put their case in full to the decision-maker, they were still required to establish a causal link between the breach and an established harm. We agree with the submission made by the Privacy Commissioner that in this respect the plaintiffs needed to prove that had Principle 8 been observed the additional personal information which would then have been placed before the Minister was capable of making a difference to the decision. Only then could the necessary causal link between the alleged breach and the alleged harm be established. Not every inaccuracy or omission will lead to loss of a benefit. No such causal link was established on the evidence.

[99] Overall, by a substantial margin the plaintiffs have failed to establish an interference with their privacy in terms of s 66(1) of the Act. The claim under Principle 8 is dismissed.

FORMAL ORDERS

The Principle 6 claim

[100] The decision of the Tribunal is that:

> **[100.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that Immigration New Zealand interfered with the Privacy of the plaintiffs by refusing, without good reason, to make personal information available to them in response to their personal information request dated 7 July 2006.

[100.2] Damages of $2,500 are awarded against the Chief Executive under ss 85(1)(c) and 88(1)(a) of the Privacy Act 1993 for the pecuniary loss suffered by the plaintiffs.

Principle 8 claim

[101] The decision of the Tribunal is that this claim is dismissed.

FINAL NON-PUBLICATION ORDER

[102] A final order is made prohibiting publication of the names, address and any other details which might lead to the identification of the plaintiffs or of their children. There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

COSTS

[103] Costs are reserved in relation to both the Principle 6 claim and in relation to the Principle 8 claim:

[103.1] The plaintiffs are to file their submissions within 14 days after the date of this decision. The submissions for the Chief Executive are to be filed within a further 14 days with a right of reply by the plaintiffs within 7 days after that.

[103.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without any further oral hearing.

[103.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines QC	**Ms ST Scott**	**Ms M Sinclair**
Chairperson	**Member**	**Member**