IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2012] NZHRRT 6**

	Reference No. HRRT 008/2011
IN THE MATTER OF	**A CLAIM UNDER THE PRIVACY ACT 1993**
BETWEEN	**AA (PAKISTAN)**
	PLAINTIFF
AND	**CHIEF EXECUTIVE,**
	DEPARTMENT OF LABOUR
	DEFENDANT

AT AUCKLAND

Mr RPG Haines QC, Chairperson
Mr R Musuku, Member
Mr B Neeson, Member

Plaintiff in person
Ms C Pille for Defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 28 March 2012

DECISION OF TRIBUNAL

Introduction

[1] The plaintiff is a citizen of Pakistan who first arrived in New Zealand on 30 March 1999. He was deported from New Zealand on 18 May 2011. In these proceedings he alleges that while an inmate at Springhill Corrections Facility in 2010 Immigration New Zealand unlawfully disclosed to prison officers the fact that he had twice in New Zealand

sought recognition as a refugee. It is said that the alleged disclosure was in breach of Principle 11 of the information privacy principles set out in the Privacy Act 1993.

Hearing procedure

[2] These proceedings were filed on 28 April 2011. Some 20 days later the plaintiff was deported from New Zealand on 18 May 2011. He is now an excluded person under s 15(1) of the Immigration Act 2009 meaning that no visa or entry permission may be granted to him. In short, it became impossible for him to attend the hearing of these proceedings in person.

[3] The plaintiff did, however, provide an email address at which he could be contacted in Pakistan and as will be seen, he has maintained contact with the Secretary of the Tribunal.

[4] On 7 November 2011 a teleconference was convened for the purpose of discussing with The plaintiff how he intended to conduct his case and in particular, whether he would be instructing a lawyer. The time and date of the teleconference had been previously arranged by the Secretary in consultation with the plaintiff. However, in the circumstances outlined in the *Minute* issued on 7 November 2011, the plaintiff did not in fact participate in the teleconference. In his absence the following directions were made:

> **Directions**
>
> **[6]** The following directions are made:
>
> > **[6.1]** Written statements of the evidence to be called at the hearing by [the plaintiff] are to be filed and served by 5pm on Friday 9 December 2011. In the alternative it is possible for him to rely instead on the letters and documents already filed by him. The choice is entirely his but he is asked to provide written confirmation of his election by 5pm on Friday 9 December 2011.
> >
> > **[6.2]** At the same time he is to advise which of the options he elects in terms of para [3] above.
> >
> > **[6.3]** Written statements of the evidence to be called at the hearing by the Chief Executive, Department of Labour are to be filed and served by 5pm on Friday 23 December 2011.
> >
> > **[6.4]** Leave is reserved to both parties to make further application should the need arise.
> >
> > **[6.5]** The proceedings are to be heard in Auckland on 17 February 2012. While it is highly unlikely that more than half a day will be required, it would be best that one day be set aside.

[5] Although a copy of this *Minute* was sent to the plaintiff at the email address provided by him no further correspondence was received and no documents were filed until by email dated 8 February 2012 the plaintiff wrote:

> new time is fine with me, just like to make arequest, could u kindly send me all the file by email pls, as i have left some paper in new zealand, and I have misplace in the mail.

The "new time" referred to was the adjustment of the starting time on 17 February 2012 from 10am to 10.30am.

[6] On an urgent basis the plaintiff was on 9 February 2012 provided with PDF copies of the statement of claim (and related documentation), the statement of reply, the *Minutes*

issued on 7 July 2011 and 7 November 2011 and finally, the affidavit of Nicole Sheree Willson, which had been filed by the Department of Labour on 4 January 2012 in compliance with para [6.3] of the *Minute* dated 7 November 2011.

[7] Nothing further having been received from the plaintiff the hearing scheduled for 17 February 2012 was adjourned.

[8] By email dated 21 February 2012 the plaintiff advised:

> i do really apologise for not attending the hearing, but I had (load shedding) problems in Pakistan. i would like to have another hearing, and i will arrange a generator to cover the light issue.

[9] By email dated 22 February 2012 the Secretary advised the plaintiff that the Tribunal had decided to deal with his claim on the papers. He was asked to ensure that everything he wanted the Tribunal to consider when making its decision was received by 5pm on Friday 9 March 2012.

[10] By email dated 28 February 2012 the plaintiff replied:

> i am happy with the case i put forwared, so i am happy that my case be deal in papers, and i dont have any wish for a lawer.

[11] It is against this background that the appeal is now determined on the papers.

The plaintiff's immigration history

[12] According to the affidavit by Ms Willson, the plaintiff first arrived in New Zealand from Pakistan on 30 March 1999. On arrival he was granted a student permit. Thereafter he was granted a number of further temporary permits in the period between 5 July 1999 and 21 May 2003. An application for residence was declined on 17 September 2003. His last permit expired on 21 November 2003.

[13] On 25 February 2000 the plaintiff made a refugee claim. That claim was withdrawn on 7 September 2001. A subsequent claim was lodged on 11 July 2005. Due to the limited information provided, that claim was declined. The plaintiff's appeal to the Refugee Status Appeals Authority (RSAA) was dismissed on 23 March 2006.

[14] On 18 September 2006 the plaintiff made a third claim for recognition as a refugee. Again, due to the limited information provided, that claim was declined. An appeal to the RSAA was dismissed on 27 June 2007.

[15] In 2010 the plaintiff was an inmate at Springhill Corrections Facility. The reason for his detention is not known to the Tribunal. He became eligible for parole on 24 July 2010 and his statutory release date was 12 June 2014. Release on parole occurred on 18 May 2011. He was then taken into immigration custody and as mentioned, deported from New Zealand on 18 May 2011.

The plaintiff's case

[16] There being no affidavit or written statement of evidence, the plaintiff's case is to be found in the statement of claim and the documents attached to it.

[17] The central exhibit filed by the plaintiff with the Tribunal is a Prisoner Complaint Form which shows that it was printed on 3 June 2010 at 01:15pm by a Mr Phillip Bond who, as best we understand, is a prison officer. In this document the plaintiff is recorded

as having complained that on 2 June 2010 at approximately 8.30am, in an interview room and in the presence of another prison officer, Mr Bond allegedly said that two of the plaintiff's refugee claims had been declined. In the complaint form the plaintiff requests that Mr Bond confirm what he had said. In a separate part of the form the following is recorded (presumably by Mr Bond):

> [The plaintiff] requested that he be able to contact the Immigration Office every day.
>
> I contacted the Immigration office who stated that there is absolutely no need or requirement for [the plaintiff] to contact them on a daily basis, and that this could be done by written correspondence.
> They also stated that [the plaintiff] had previously made application for refugee status.

[18] The plaintiff has also filed a document containing a "certificate" by Mr Bond to the effect that on the following day, 3 June 2010, there is no record of the plaintiff having "a phone call":

> Prisoner [the plaintiff] did not have a phone call recorded on our Phone Call Register log book on the 3rd of June 2010.
>
> Phillip Bond
> P.C.O.
> SHCF

The significance of this document will be returned to later.

[19] For the alleged breach of Principle 11 of the Privacy Act (the alleged unauthorised part-disclosure of the plaintiff's immigration history) the plaintiff is seeking:

> **[19.1]** $46,000.
>
> **[19.2]** The grant to him and his family of residence visas.
>
> **[19.3]** A letter of apology from Immigration New Zealand.

The case for the Department of Labour

[20] In her affidavit sworn on 23 December 2011 Ms Willson deposes that on 2 June 2010 she received a telephone call from the plaintiff through the Duty Immigration Officer's phone. The plaintiff requested an update on his request for information under the Official Information Act 1982. The conversation concluded with the plaintiff requesting that Ms Willson take over his case. He stated he would correspond directly with her from that point on. Ms Willson made a file note of this conversation at 3.13pm on 2 June 2010. It is in the following terms:

> 2 June 2010: Call received through the Duty Officer's phone. Client requested to know when his OIA request was going to be sent to him. I advised that to my knowledge, his application was within the processing timeframe associated with these requests, however I would check up on it and let him know.
>
> [The plaintiff] also requested that I issue him with a letter stating that his Removal Order will be cancelled. I told him that no one from INZ has advised him that his Removal Order will be cancelled, nor would I issue him a letter advising him of this. I advised him that irrespective or not, since he had an application pending with RSB, INZ were not able to remove him anyway. I asked him why he wanted INZ to issue him with a letter like this and he would not elaborate, however he did mention he was up for parole in July. He asked me if I was then refusing to grant him his request via the Privacy Act. I advised him that all requests, no matter what for had

> to be submitted in writing anyway and since this action was not due to occur I was not going to prolong this conversation with him.
>
> [The plaintiff] concluded by requesting that I take over his case and that he would correspond directly with me now. He wished to lodge a complaint and I gave him our BM's name and address. Conversation cluded by client advising that he was in Unit 14C, Springhill Prison.

[21] Ms Willson goes on to depose that on 3 June 2010 she was advised that the Duty Immigration Officer had received a telephone call from the plaintiff through the Duty Immigration Officer's phone. Ms Willson then spoke with the plaintiff and advised him to contact her directly on the contact details she had previously given to him. She says that during this conversation the plaintiff advised that he had wanted Immigration New Zealand to contact his "parole officer" (said to be Mr Phillip Bond), as the plaintiff was coming up for parole in July that year. The plaintiff gave to Ms Willson the contact details of his "parole officer" as Mr Bond. At 09:54am on 3 June 2010 Ms Willson made the following file note of her telephone interaction with the plaintiff:

> Call received by Duty Officer from client, even though I told him not to call this number. Client has my direct number and as per our conversation yesterday I advised him to contact me directly as he has my contact details. He was ringing up because he is due for parole shortly (July). Apparently he wants his parole officer to be contacted by INZ. His parole officer's details are: ....

[22] Later, at 12:50pm on 3 June 2010 Ms Willson sent to Mr Bond an email in the following terms:

> Good morning Philip,
>
> I have taken over [the plaintiff's] case from Pat McAlpine. I spoke to him yesterday directly and asked him that in future he only contact me directly on .... He is no longer able to call our Duty Officer number on .... The Immigration Officer who answers these calls has no knowledge of his case, and she has reported that he is constantly harassing her. Can you please make sure that he is no longer able to call this number, as it will be refused from our end.
>
> I was wondering if you were also able to pass a message on to [the plaintiff], that his Official Information Request will be sent out to him by end of business today.
>
> If I can assist you in any way please do not hesitate to contact me.

[23] Ms Willson did not receive a reply from Mr Bond nor has she had any contact with him other than the email set out above.

[24] Ms Willson deposes that she has not provided to Mr Bond any details of the plaintiff's immigration status nor any information about his various applications for permits or claims for refugee status.

Discussion

[25] The claim by the plaintiff that Immigration New Zealand disclosed information to a prison officer rests entirely on the file note apparently made by Mr Bond on the Prisoner Complaint Form. It records that he was told by "the Immigration office" that "the plaintiff had previously made application for refugee status". However, there is no direct evidence from Mr Bond either by way of affidavit or by way of unsworn statement admitting that the note is his, explaining the circumstances in which the note was made, the nature of the information received and the identity of the person from whom it was received.

[26] This is highly significant. The file note made by Ms Willson on 2 June 2010 refers to a refugee application by the plaintiff which was then "pending" before the Refugee Status Branch (RSB) of Immigration New Zealand. It may well have been necessary for the information apparently recorded by Mr Bond to be disclosed to the prison authorities for the purpose of facilitating communications between the plaintiff and the RSB, for the purpose of arranging an interview or for the purpose of ensuring that once the plaintiff was in immigration custody (upon his release on parole) all relevant actors were aware of the refugee claim and therefore of the consequential protection against removal mandated by s 129X(1) of the then Immigration Act 1987. In addition, s 129T(3)(b) and (f) of that Act permitted disclosure to an officer or employee of a government department or other Crown agency whose functions in relation to the claimant required knowledge of those particulars or if there was no serious possibility that the safety of the claimant would be endangered by the disclosure in the particular circumstances of the case. It is to be remembered that Principle 11 is necessarily read down in the face of such provisions. See s 7(1):

> Nothing in principle 6 or principle 11 derogates from any provision that is contained in any enactment and that authorises or requires personal information to be made available.

The Prison Complaint Form on which the plaintiff's case depends is, in the circumstances of little assistance in determining the facts.

[27] There is also the unequivocal evidence from Ms Willson that she certainly did not provide the information in question and the contemporary file notes made by her provide strong support for this claim.

[28] In his written submissions the plaintiff alleges, in effect, that the two file notes made by Ms Willson have been fabricated to cover up the alleged unauthorised disclosure by her of information to Mr Bond. He relies also on Mr Bond's other file note recording that the plaintiff "did not have a phone call recorded on our Phone call Register log book on the 3rd of June 2010". The plaintiff argues that it was therefore not possible for him to have had a telephone discussion with Ms Willson on the morning of 3 June 2010.

[29] As mentioned, the Tribunal has received no evidence from Mr Bond and the circumstances in which his two file notes were made are not known. We are not prepared to infer that because there was no record of a phone call in the log book the plaintiff was not in telephone contact with the Immigration New Zealand Duty Officer and, in turn, Ms Willson on 3 June 2010. To the contrary, Ms Willson is an experienced officer (she has worked as a Compliance Officer for seven years) and the two file notes dated 2 June 2010 and 3 June 2010 are contemporaneous notes. The file note of 3 June 2010 in particular is consistent only with a telephone discussion having taken place on that date. First, reference is made to the discussion Ms Willson had with the plaintiff on the previous day and second, the file note records the email address and telephone number of Mr Bond as provided by the plaintiff when he made his request that Ms Willson contact Mr Bond. Ms Willson would not otherwise have had access to this information. Nor would she have had cause to write to Mr Bond on the same day. The fact that later that morning she sent a detailed email to Mr Bond as requested by the plaintiff satisfies us beyond any reasonable doubt that Ms Willson has given a true and accurate account of her dealings with the plaintiff and Mr Bond. In the face of this evidence the "no phone call recorded on our log book" file note is an unexplained document and can be given little if any weight. We unequivocally reject the allegation that Ms Willson has falsified the record.

[30] This leaves only the file note made by Mr Bond recording that he was told by "the Immigration office" that the plaintiff had previously made application for refugee status". As to this the difficulty facing the plaintiff is that there is no evidence from Mr Bond explaining the circumstances in which it was made. If anything the disclosure, if there was one, may well have been authorised by the then Immigration Act 1987 and therefore within the savings provisions of s 7 of the Privacy Act.

[31] In bringing these proceedings for an alleged interference with his privacy the plaintiff must establish such interference on the balance of probabilities. See s 85(1) of the Privacy Act. While we appreciate the practical difficulties in conducting a case at a distance from Pakistan, the plaintiff was nevertheless offered clear opportunity to instruct a lawyer to act on his behalf and in addition he has had more than one opportunity to file all the evidence he wishes to rely on. Having elected to rely on the unattested and unexplained documentation attached to the statement of claim he must accept the risk of a finding that his evidence does not satisfy the prescribed probability standard.

[32] It is our finding that the file note made by Mr Bond on the Prisoner Complaint Form does not persuade us that it is more probable than not that Immigration New Zealand breached information privacy Principle 11.

[33] The Chief Executive seeks costs. As the plaintiff lives in Pakistan and for immigration purposes is a person excluded from New Zealand we see little point in making an award which has no utility. The application is declined.

Name suppression

[34] The Immigration Act 2009 came into force at 2am on 29 November 2010, repealing the Immigration Act 1987. Both the new and the repealed statutes protect the identity of refugee claimants and refugees. In the 1987 Act the relevant provision was s 129T. Under the new Act reference should be made to s 151. It is necessary to refer only to the terms of this provision. It requires that confidentiality be maintained in respect of persons who make claims in New Zealand for recognition as a refugee. This duty of confidentiality applies not only during the determination of the claim but also "at all times ... subsequent to the determination of the claim". Confidentiality does not depend on the success of the claim:

> **151 Confidentiality to be maintained in respect of claimants, refugees, and protected persons**
>
> (1) Confidentiality as to the fact that a person is a claimant, a refugee, or a protected person, and as to the particulars relating to the person's claim or status, must at all times during and subsequent to the determination of the claim or other matter be maintained by all persons and, in a particular case, may require confidentiality to be maintained as to the very fact or existence of a claim or case, if disclosure of its fact or existence would—
>
> (a) tend to identify the person concerned; or
>
> (b) be likely to endanger the safety of any person.

[35] Limited exceptions to this obligation are permitted by s 151(2) including where there is no serious possibility that the safety of the claimant would be endangered by the disclosure of the information.

[36] We have no information whatsoever as to the nature or content of the refugee claims made by the plaintiff. It is therefore not possible to make a determination that

there is no serious possibility that his safety would be endangered by the disclosure of the fact that he has made a claim in New Zealand for recognition as a refugee.

[37] It follows that in terms of s 151 of the Immigration Act 2009 we must maintain the confidentiality mandated by that provision. We accordingly direct that there be an order prohibiting publication of the plaintiff's name or any other details which might identify him.

Formal orders

[38] For the foregoing reasons the decision of the Tribunal is that:

> **[38.1]** The claim by the plaintiff is dismissed.
>
> **[38.2]** A final order is made prohibiting publication of the name or any details which may lead to the identification of the plaintiff.
>
> **[38.3]** There is no order for costs.

"RPG Haines"	**"R Musuku"**	**"B Neeson"**
.....	.....	.....
Mr RPG Haines QC	**Mr R Musuku**	**Mr B Neeson**
Chairperson	**Member**	**Member**