



## To the Registrar of the Supreme Court

The applicant for leave to appeal gives you notice that he applies for the leave of the Supreme Court to appeal to the court against the judgment of the Court of Appeal dated 20 October 2009, CA109/2008, [2009] NZCA 488.

### Grounds of appeal

1. The Court of Appeal erred in law by:
  - 1.1 applying a higher standard for “serious reasons for considering” than is required on the correct interpretation of Article 1F of the Refugee Convention (“the Convention”);
  - 1.2 misdirecting itself in law as to the proper approach to the issue of complicity in the context of Article 1F and, in particular, limiting Article 1F(a) to cases where an individual has committed an international crime applying the principles of joint criminal enterprise set out in the 1998 Rome Statute of the International Criminal Court;
  - 1.3 finding that there was a sufficiently close and direct link between the crime and alleged political purpose for the purposes of Article 1F(b) and, in any event, that the convictions entered by the Supreme Court of India were unsafe; and
  - 1.4 prohibiting the Refugee Status Appeals Authority (“RSAA”) from entering an Article 1F inquiry on the reconsideration directed by the Court of Appeal.

### Why the Court should give leave

2. The proper interpretation of Article 1F of the Convention is of significant general and public importance in the following respects:
  - 2.1 The Supreme Court of New Zealand has not previously considered directly the proper approach to Article 1F, although indirect reference to Article 1F was made in *Zaoui v Attorney-General* (No 2) [2006] 1 NZLR 289 (at [29]) and *Attorney-General v X* [2008] 2 NZLR 579.

- 2.2 The ability to exclude a person where there are serious reasons for considering that person has committed crimes against peace, war crimes, crimes against humanity or a serious non-political crime under Article 1F is an essential attribute of the refugee protection regime. It is at the heart of the balance struck in the Convention between the interests of states parties and the interests of individual claimants.
- 2.3 The approach adopted by New Zealand courts to Article 1F has significant implications for not only New Zealand's refugee jurisprudence but also the approach to Article 1F internationally because the Convention has a single, autonomous and international meaning. Further, Article 1F fulfils an important role internationally as a non-criminal remedy supplementing the deterrent effect of international criminal law remedies.
- 2.4 Each of the three proposed grounds of appeal raises important issues relating to the proper approach to be applied to Article 1F (and, in particular Articles 1F(a) and (b)) and to refugee decision-making generally.
- 2.5 Following the Court of Appeal's decision:
- 2.5.1 There is considerable uncertainty as to the proper approach to the "serious reasons for considering" standard in Article 1F.
- 2.5.2 The higher "serious reasons for considering" standard applied by the Court has undermined the utility of Article 1F given the practical and statutory constraints on refugee decision-makers.
- 2.5.3 New Zealand's approach to both that standard and also to Article 1F(a) is out of step with the approach adopted in the relevant comparative jurisprudence, including the approach adopted by the Supreme Court of Canada.
- 2.5.4 The English Court of Appeal authority relied on by the Court in support of its approach is currently under appeal to

the House of Lords. (If leave is granted, it will be the first time the House of Lords has considered the proper approach to Article 1F(a).)

2.6 The correct interpretation and application of Article 1F is of immediately relevant general public importance in New Zealand having regard to:

2.6.1 The outstanding determination of refugee status by the RSAA in two cases in which there are allegations of involvement in genocide: ‘X’ (*Attorney-General v X* [2008] 2 NZLR 579) and ‘Z’ (*Z v Attorney-General* (HC Auckland, CIV-2007-404-330, 30/3/07, Andrews J)).

2.6.2 It was resolved in a meeting of Attorneys-General in London on 10 November 2009 (New Zealand time). That the New Zealand Attorney-General would look at ways in which New Zealand, Australia, Canada, the United Kingdom and the United States can cooperate in the prosecution of those responsible for genocide.

### **Judgment sought**

3. The applicant seeks the judgment of the Supreme Court determining :

3.1 That the “serious reasons for considering” standard in Article 1F is lower than the balance of probabilities.

3.2 The correct interpretation of the words “serious reasons for considering” in Article 1F.

3.3 The correct approach to the issue of complicity in the context of Article 1F.

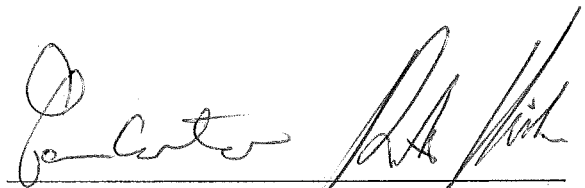
3.4 The Court of Appeal was wrong to limit Article 1F(a) to cases where an individual has committed an international crime applying the principles of joint criminal enterprise set out in the Rome Statute.

- 3.5 There are serious reasons for considering that the respondent committed a serious-non-political crime for the purposes of Article 1F(b).
- 3.6 The RSAA decision was lawful and, in relation to X, should be confirmed and reinstated.
- 3.7 On a reconsideration of X's claim for refugee status that the RSAA may enter into an Article 1F inquiry, in the event that this Court formulates an approach to Article 1F that is different to the Court of Appeal, but nevertheless confirms that the RSAA decision relating to X should be reconsidered.

**Documents accompanying application**

4. This application is filed with the following documents:
- 4.1 The judgment of the Court of Appeal given in CA109/2008 dated 20 October 2008.
- 4.2 The judgment of the High Court given in CIV 2006-404-4213 dated 17 December 2007.
- 4.3 The decision of the RSAA given in Refugee Appeal No 74796 dated 19 April 2006.

18 November 2009



Ian Carter/Robert Kirkness  
Counsel for the applicant for leave to appeal

**TO:** The Registrar of the Supreme Court of New Zealand.  
**AND TO:** The respondents

This document is filed by Ian Carter, Crown Counsel, solicitor for the appellant, of Crown Law.

The address for service of the appellant is Crown Law, Unisys House, 56 The Terrace, Wellington 6011. Documents for service on the appellant may be left at this address for service or may be:

- (a) posted to the solicitor at PO Box 2858, Wellington 6140; or
- (b) left for the solicitor at a document exchange for direction to DX SP20208, Wellington Central; or
- (c) transmitted to the solicitor by facsimile to 04 473 3482.

**Note: service of documents may not be effected by email or by fax if faxed to a number other than the number above without prior arrangement with the solicitor.**