REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75386

AT AUCKLAND

Before:	C M Treadwell (Member)
Counsel for Appellant:	S Laurent
Appearing for NZIS:	No Appearance
Date of Hearing:	14 and 17 March 2005
Date of Decision:	27 June 2005

DECISION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch of the New Zealand Immigration Service declining the grant of refugee status to the appellant, a national of Iran.

[2] This is the second time that the appellant has claimed refugee status in New Zealand. His first claim was declined by both the Refugee Status Branch and, on appeal ("the first appeal"), by the Authority (differently constituted). See *Refugee Appeal No 74596* (17 November 2003).

[3] A brief chronology discloses:

15 March 2001	Arrives in New Zealand
16 May 2001	Files first refugee application
22 January 2002	First Refugee Status Branch interview
7 March 2003	First application declined by Refugee Status Branch
13 August and 5 September 2003	First appeal interview
17 November 2003	First appeal declined
8 December 2003	Files application for judicial review in High Court (later discontinued)

12 February 2004	Files second refugee application
12 April and 10 May 2004	Second Refugee Status Branch interview
22 September 2004	Second refugee application declined
14 and 17 March 2005	Second appeal interview

[4] The appellant says that he is a former colonel in the Iranian army who is at risk of being persecuted for having breached an order not to associate with a *Baha'i* sister, now residing in New Zealand. He says that, since his first refugee appeal, he has been indicted by the Iranian authorities on charges of espionage and is regarded as a deserter.

[5] It is necessary for the Authority to consider:

(a) whether the appellant meets the jurisdictional threshold of establishing that circumstances in Iran have changed to such an extent that his second claim is based on significantly different grounds to his first claim; and (only if so)

(b) whether the facts as found on the second claim establish that the appellant has a well-founded fear of being persecuted for a Convention reason.

[6] It is appropriate to consider the question of jurisdiction first.

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[7] The jurisdiction of a refugee status officer to consider a second or subsequent refugee claim is governed by s129J of the Immigration Act 1987 (the Act) (which came into force on 1 October 1999). It provides:

> "**129J. Limitation on subsequent claims for refugee status—**
>
> (1) A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim.

> (2) In any such subsequent claim, the claimant may not challenge any finding of credibility or fact made in relation to a previous claim, and the officer may rely on any such finding."

[8] There is then a right of appeal, pursuant to s129O(1) of the Act, which provides:

> "A person whose claim or subsequent claim has been declined by a Refugee Status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that the circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision."

[9] The question whether there is jurisdiction to entertain a second or subsequent refugee application was considered under the previous Terms of Reference of the Authority which were similar in content to the provisions of s129O(1) of the Act. A leading decision in that regard was *Refugee Appeal No. 2245/94* (28 October 1994), particularly at pp16-22. However, since that decision, the Authority has been compelled to review its application of the jurisdiction, in the light of the express statutory requirements of the Act.

Refugee Appeal No 75139 (18 November 2004) - the jurisdiction re-examined

[10] Regard is to be had to the decision of the Authority in *Refugee Appeal No 75139* (18 November 2004), a copy of which was given to counsel. On that appeal, the Authority re-examined its approach to second and subsequent refugee claims, in the light of the statutory requirements and against the background of case law which had arisen in the preceding decade. It is helpful to restate the principles which emerged and which were conveniently summarised at [54]-[57]:

> "[54] In any appeal involving a subsequent claim under s129O(1), the issues are not 'at large'. Rather, there are three distinct aspects to the appeal.
>
> [55] First, irrespective of the finding made by the refugee status officer at first instance, the claimant must satisfy the Authority that it has jurisdiction to hear the appeal. That is, the claimant must establish that, since the determination of the previous claim, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim. As to this:
>
> (a) The change of circumstances must occur ***in*** the claimant's home country. It is not open to the claimant to circumvent the jurisdictional bar by submitting that at the hearing of the previous claim the refugee status officer or the Authority misunderstood the facts.

> (b) A "reinterpretation" of a claimant's case is neither a change of circumstances, nor is it a change of circumstances ***in*** the claimant's home country.
>
> (c) The claimant cannot invite the Authority to sit as if it were an appellate authority in relation to the decision of the first panel and to rehear the matter. The Authority has no jurisdiction to rehear an appeal after a full hearing and decision.
>
> (d) A second appeal cannot be used as a pretext to revisit adverse credibility findings made in the course of the prior appeal.
>
> (e) Jurisdiction under ss129J(1) and 129O(1) is determined by comparing the previous claim to refugee status against the subsequent claim. This requires the refugee status officer and the Authority to compare the claims as asserted by the refugee claimant, not the facts subsequently found by that officer or the Authority.
>
> (f) Proper recognition must be given to the statutory language which requires not only that the grounds be different, but that they be ***significantly different***.
>
> (g) The Authority does not possess what might be called a "miscarriage of justice" jurisdiction.
>
> [56] Second, in any appeal involving a subsequent claim, s129P(9) expressly prohibits a claimant from challenging any finding of credibility or fact made by the Authority in relation to a previous claim. While the Authority has a discretion whether to rely on any such finding, that discretion only comes alive once the jurisdictional threshold for subsequent claims set by ss129J(1) and 129O(1) has been successfully crossed.
>
> [57] Third, where jurisdiction to hear the appeal is established, the merits of the further claim to refugee status will be heard by the Authority. That hearing may be restricted by the findings of credibility or of fact made by the Authority in relation to the previous claim, or "at large", depending on the manner in which the discretion under s129P(9) is exercised by the Authority."

[11] Against this background, it is now necessary to have regard to the appellant's first and second refugee claims, in order to determine whether the jurisdictional threshold is crossed.

THE APPELLANT'S FIRST REFUGEE CLAIM

[12] The account which follows is a summary of the claim which was made to the Authority (differently constituted) at the time of the first appeal.

[13] The appellant is a middle-aged married man with three children. His wife and three children remain living in Tehran.

[14] In 1961, the appellant's sister married a *Baha'i* and converted from Islam to the *Baha'i* faith.

[15] In 1974, the appellant enlisted in the Iranian Army and was trained as an electronics technician. By the time of the revolution in 1980, he had reached the rank of captain. He had considerable contact with English electronics advisers and, being a competent pianist, would regularly socialise with them at 'western' clubs in Tehran, playing music and drinking.

[16] After the revolution, the appellant and his sister began experiencing difficulties on account of her conversion to the *Baha'i* faith. In particular, the appellant was interrogated by a mullah about the fact that he had played music for, and socialised with, foreigners and about his sister's conversion. He was ordered to have no further contact with his sister. The appellant obeyed the order, out of fear of being suspected of passing on military secrets to the Israelis, to whom the *Baha'i* are seen as being linked.

[17] In 1982 the appellant's house burned down. He suspects that it was arson, in retaliation for his sister's apostasy. The appellant was refused further army accommodation, even though there were available houses nearby. Angry correspondence ensued, with the appellant finally writing to the army to advise that he would not be returning to work until the matter was resolved. For three years, the appellant did not go to work and, apart from the stopping of his pay, the army made no attempt to contact him.

[18] In 1985 the appellant applied for a passport, resulting in his arrest as a deserter. He was detained in solitary confinement for six months. During his detention, he was regularly beaten and was let out of his cell only once a day, to use the toilet. Shortly before his release, he was interrogated and accused of passing on military secrets to foreign governments. He was told that his name was on a list of persons banned from leaving the country. The appellant was released after signing a written undertaking that he would not have any contact with his sister and on the basis that he would return to his duties with the army.

[19] In 1986 the appellant's sister fled Iran and two years later arrived in New Zealand as part of the UNHCR quota of mandated refugees.

[20] By 1997 the appellant had attained the rank of colonel. In spite of his reinstatement to the army he continued to be treated with suspicion. He and his family had been compelled to buy their own house, unlike other military personnel, and his children were not allowed to attend government schools. Although the appellant ultimately managed to achieve a relatively high rank, he believes that this would have occurred more quickly had he not been unfavourably treated.

[21] In 1997 the appellant obtained a passport through bribery and he and his wife made several unsuccessful attempts between 1997 and 1999 to obtain visas for New Zealand, wanting to visit the appellant's sister.

[22] In 1999 the appellant's sister returned to Iran for a short visit to see family and friends, travelling on her Iranian passport. She was detained on arrival at the airport for some hours. She was interrogated about her religion and was accused of having links with Israel, only being released when a friend produced his house ownership papers as security. The appellant's sister was required to report to the airport again the next day and paid a substantial sum of money to be freed, but her passport was retained until later, when further bribes were paid.

[23] On 13 November 2000 the appellant's fourth application for a New Zealand visitor's visa was approved. It did not include his wife or children.

[24] The appellant obtained leave from his part-time employment with a private company. It was not necessary to seek leave from the Army because it was the Iranian New Year and all military personnel were expected to take a week's holiday. From experience, he knew that he could extend this to cover the intended 20-day trip to New Zealand without questions being asked.

[25] On 13 March 2001, the appellant departed Iran on his Iranian passport without difficulty and flew to Malaysia. At that time, it was his intention only to visit New Zealand. He arrived here on 15 March 2001.

[26] On 30 March 2001, after discussions with his sister, the appellant lodged an (ultimately unsuccessful) application for permanent residence in New Zealand. By that time, the appellant's wife in Iran had rung the appellant's sister in New Zealand and advised her that the Iranian authorities had discovered that the appellant had gone to New Zealand and had breached the 1985 undertaking.

However, the appellant did not know of that phone call, or any difficulties being experienced by the wife, until five or six weeks later because his sister did not tell him that his wife had telephoned.

[27] In late April 2001 the appellant received a telephone call from a friend, one AB, in Iran. AB advised him that the appellant's wife had been detained by the authorities after they had discovered that the appellant had gone to New Zealand in breach of the 1985 undertaking not to associate with his sister. The appellant was also advised that he had been dismissed from his employment with the private company, following his failure to return, and that his family had received notification of this on 9 April 2001. AB told the appellant that his children were with his parents-in-law, and that he would do his best to find out more about the fate of his wife.

[28] The appellant then learned from his sister that his wife had telephoned some five to six weeks previously. On 16 May 2001, he lodged an application for refugee status.

[29] In October 2001 the appellant spoke to his wife for the first time since he left Iran. His wife told the appellant that their youngest child had mentioned to neighbours that his father had gone to New Zealand who, in turn, alerted the authorities. She told him that she had been detained by the authorities for six months and, though not mistreated, they had interrogated her about the appellant having breached his undertaking by going to New Zealand to see his sister. She had been asked why the appellant had gone to Israel with military secrets. The appellant also learned that his oldest son, who had started at university when he left Iran, had been expelled.

[30] In early January 2002, the appellant's father died. As a result, his sister made a second visit to Iran. Again, she experienced difficulties on arrival, being detained for six hours, interrogated and searched.

[31] In letters submitted with the first appeal, the appellant's wife referred to:

(a) the mental illness of their son, S, which developed when the appellant left Iran, and enclosed medical reports;

(b) the news that their house has been confiscated because of his activities and that neighbours have accused the family of being *Baha'i* and enemies of Islam;

(c) the appellant's daughter being assaulted on the street, and knocked unconscious, by members of the *basij*.

[32] The appellant claimed on the first appeal that he fears that if he returns to Iran he will be severely mistreated, and possibly killed, by the Iranian authorities. He contended that the Iranian authorities regard him as an apostate and of having become a spy against Iran. He acknowledged that his sister had travelled in and out of Iran but believed that the authorities understand her to have been *Baha'i* from birth. They did not, he said, have the same level of information about her as they do about to the appellant.

[33] The appellant produced a number of documents on the first appeal, including photographs of himself in social settings, in army surroundings and photographs of injuries suffered by his daughter when she was assaulted in the street by the *basij*. He also produced a copy of a letter dated in 1995, from the Iranian army, releasing him from his previous ban on leaving the country.

[34] The appellant's first refugee appeal was declined by the Authority. For the reasons given at [60]-[89] of *Refugee Appeal No 74596* (17 November 2003) his claim was found not to be credible.

[35] In December 2003, the appellant filed an application for judicial review in the High Court, asserting that the Authority had erred in law. That application was, however, discontinued on 20 April 2004 for the reason that:

> "The plaintiff is unable to afford to continue with the proceeding owing to his unlawful status in New Zealand and his financial circumstances."

[36] The second refugee application was lodged on 12 February 2004.

THE APPELLANT'S SECOND REFUGEE CLAIM

[37] The account which now follows is a summary of the evidence given by the appellant and his sister in respect of the second refugee claim.

[38] The appellant's second refugee claim does not resile from his first claim in any respect. He says that his first claim was truthful and he describes further events which he says have occurred since his first appeal interview.

[39] It will be recalled that the first appeal interview was concluded on 5 September 2003. The appellant's sister, who gave evidence at the first appeal hearing, took the view that the appeal would succeed and returned to Iran on 10 September 2003, to assist the appellant's wife and children in their preparations for coming (so she assumed) to New Zealand. She forewarned her sister AA in Iran and asked her to meet her at the airport, bringing her house papers in case they were needed as security.

[40] On arrival in Iran, the appellant's sister was detained and interrogated by an official at the airport. She was asked whether she was aware that she was the sister of an army deserter. She was only released after AA's house papers had been taken as a bond. Her passport was retained and she was required to report to the airport officials during her stay in Iran. Later, when she did report, she was told that the appellant had breached his undertaking not to associate with his sister and AA's house papers would not be returned until the appellant surrendered himself to the authorities.

[41] When the first appeal was declined on 17 November 2003, the appellant rang his wife with the news. She could not immediately inform the appellant's sister, who was travelling within Iran. In December 2003, the appellant's sister made a short trip to Dubai, before returning to New Zealand. On returning to Iran again, she was again detained briefly at the airport.

[42] When the appellant's sister learned from his wife that the first appeal had been declined, she resolved to return to New Zealand. On 1 January 2004, she contacted the officials at the airport and asked that AA's house papers be released. She was told that there was an investigation in progress and that AA's house papers would continue to be held in the interim. Efforts over several weeks

failed to secure the release of the house papers. Eventually, in late January 2004, the appellant's sister was given a letter to give to the appellant, summonsing him to present himself to the authorities. She was also given a copy of an "Intelligence Report" from the Security and Intelligence Service of the *Sepah* to the Ideological and Political Office of the Army, recording that the appellant's sister had been told that he must report within 10 days but that he had failed to do so, giving rise to a presumed plea of guilty "to all charges" (unspecified). AA's house papers were not released.

[43] The appellant's sister left Iran in early February 2004, to return to New Zealand. Shortly before she departed, a summons was served on the appellant's wife to appear at the office of Military Intelligence. When she did so, she was detained for a day and was interrogated as to the appellant's activities. She was told to tell him to report in person within 10 days.

[44] In August 2004, AA was evicted from her home in Iran and it was seized by the authorities in reliance upon the bail bond which she had given and the appellant's failure to report to the authorities. The appellant's sister in New Zealand has sold her own house in this country, in order to provide capital for AA to secure other accommodation in Iran.

Documents

[45] In support of his second appeal, the appellant produces:

(a) An army salary certificate dated February 2001 and a late 2000 payslip, both recording, *inter alia*, the appellant's name, rank, platoon and serial number; and

(b) A copy of a "warning summons", dated May 2004, given to the appellant's sister AA, requiring her to vacate the property "that is subject to confiscation and is now under the ownership of [AA]" by a specified date; and

(c) A copy of a New Zealand real estate agent's property listing and advertising pamphlet for the sale of the appellant's sister's house; and

(d) A copy of the January 2004 “Intelligence Report” from the Security and Intelligence Service of the *Sepah* to the Ideological and Political Office of the Army, recording that the appellant had failed to report, giving rise to a presumed plea of guilty “to all charges”; and

(e) A copy of the summons, dated January 2004, given to the appellant’s wife, requiring her to attend at the local Military Prosecutor’s Office on a certain date and referring to her as “wife of fugitive [the appellant], indicted on espionage charges against the holy sovereignty of the Islamic Republic of Iran”; and

(f) An undated letter from the appellant’s wife to the appellant, referring to the appellant’s sister’s visit to Iran, the summons served on the appellant’s wife and her suspicion that the recent return to Iran of the appellant’s sister’s ex-husband may have been behind the authorities’ interest in the appellant.

[46] Counsel has made both oral and written submissions on the question of the jurisdiction threshold and, if it is met, the substantive refugee claim.

THE JURISDICTION QUESTION

[47] A preliminary point needs to be addressed. That is the relevance of the adverse credibility findings on the first appeal. In addressing the jurisdiction issue, Mr Laurent made submissions in respect of the adverse credibility findings upon which the first appeal turned. The assertion is made that those credibility findings did not support the wholesale rejection of the appellant’s first refugee claim.

The relevance of the adverse credibility findings on the first appeal to jurisdiction

[48] The adverse credibility findings on the first appeal are, in fact, irrelevant to the jurisdiction issue. That is because, in determining whether there are “significantly different grounds”, s129O of the Act requires the Authority to assess any subsequent *claim* against the previous *claim*, not against the facts as found by the Authority on the first appeal. See also *Refugee Appeal No 75139* (18 November 2004), at [51]:

> "Jurisdiction under s129J(1) is determined by comparing the previous claim to refugee status against the subsequent claim. It is clear from the definitions in s129B(1) that the exercise requires the refugee status officer and the Authority to compare the claims ***as asserted by the refugee claimant***, not the facts subsequently found by that officer or the Authority."

[49] Thus, for the purposes of addressing the jurisdiction issue, the findings of the Authority on the first appeal are immaterial. Obviously, those findings may well be relevant to the consideration of the substantive second appeal, but only once the jurisdictional threshold is crossed.

[50] With this in mind, it is possible to turn to the jurisdiction issue.

Whether there is jurisdiction

[51] As to the jurisdiction issue, Mr Laurent more materially submits that the appellant relies upon:

(a) the issue of the "Intelligence Report" by the airport officials to the appellant's sister, which refers to "charges"; and

(b) the summonsing of the appellant's wife by the Military Prosecutions Office, which refers to "espionage charges"; and

(c) the retention of AA's house papers and her subsequent eviction.

[52] As regards these events, Mr Laurent submits:

> "These are discrete events… which were not present in the first Appeal. Furthermore, they demonstrate that the authorities' interest in the Appellant has not lapsed. In particular, there is confirmation, in the ['Intelligence Report'] and in the Summons given to the appellant's wife… that the Appellant faces charges of 'espionage'. The indictment either remains active or has been determined *in absentia*."

[53] In essence, the grounds of the second claim are the charges of espionage, the breach of the 1985 undertaking and the appellant's failure to return to the army. It is for those reasons that the appellant says, on his second claim, that he fears being persecuted if he returns to Iran.

[54] The difficulty faced by the appellant is that these are exactly the same grounds as he asserted on his first claim. The evidence on the second claim

simply does not support a finding that there are "significantly different grounds" to the grounds advanced in his first claim, when he made the same assertions that the Iranian authorities regarded him as having breached his undertaking not to associate with his sister, that they had accused him of espionage and that he was regarded as a deserter from the Army.

[55] Both the appellant's failure to return to the army and his breach of the 1985 undertaking were clearly made out at the time of the appellant's first claim. As to the claim of espionage, consider the following extracts from the appellant's written statement, dated 13 July 2001, filed in respect of his first claim:

> "They have accused me of being a Spy, that I've gone to New Zealand to meet my sister… who has been in Israel and I've given lots of the Iranian army's information to her.
>
> They believe that I've reported the types and the ranges of the frequencies used in the receivers and transmitters used by the Iranian army telecommunication system, to Israel….
>
> [T]he authorities took my wife… to an unknown place….
>
> The term Spy is due to the undertaking which I gave them.
>
> So it is obvious that [the neighbours have] passed on the news to the factory and to the army's political ideology branch…."

[56] In his first refugee application form, the appellant also stated:

> "When I was in Iran and in the army, I've been questioned by the [army's political ideology branch] about the religion of my sister and they wanted to know if I am a Baha'i or not….
>
> "I am 100% sure if I go back to Iran, I will never meet my family and they'll take me to "Evin" prison. And it won't take long to hang or shoot at me, due to the false accusations which they've given me….
>
> They are calling me spy."

[57] Numerous passages exploring these assertions are to be found in the notes of evidence taken by the refugee status officer at the Refugee Status Branch interview on the appellant's first claim and in his evidence to the Authority at the first appeal hearing (the typed transcript of which is on file). There is no escaping the conclusion that the breach of the 1985 undertaking, the accusation of espionage and his failure to return to the Army were the grounds of the appellant's first claim, just as they are the grounds of his second claim.

[58] In factual terms, the appellant also points to the eviction of his sister AA from her house as going to "significantly different grounds". That must be viewed,

however, against the fact that his first claim included the assertion that his own family had been evicted from *their* house, for essentially the same reasons.

[59] Mr Laurent makes the submission that "significantly different grounds" does not necessarily mean "significantly *worse* grounds". That is accepted - "different" and "worse" are not synonymous. Nevertheless, proper recognition must be given to the statutory language. The grounds must not only be ***different***, they must be ***significantly*** different and it is the ***grounds*** of the claim which must be different, not merely matters of evidence.

[60] With this is mind, the Authority is satisfied that the appellant's second refugee claim is not brought on significantly different grounds to his first refugee claim. The second refugee claim is simply a continuation of the same grounds. The assertions of "espionage charges", summonsing of his wife and the eviction of AA from her house continue the same pattern of activity, for the same reasons, as were advanced by the appellant on his first claim.

[61] Consideration has been given to whether the reference in the Intelligence Report to "charges" and in the wife's summons to "espionage charges", when compared with the claim on the first appeal that he had merely been "accused" of espionage might constitute such an escalation of interest in the appellant as to give rise to significantly different grounds. However, there is no ***significant*** difference to the ***grounds*** of his claim here. On his first appeal, the appellant explicitly stated that he anticipated that the accusation of espionage would result in his arbitrary jailing and likely execution. The assertion on the second appeal that such charges have since been laid does not in any sense constitute significantly different grounds.

[62] It must be clearly understood that the jurisdiction of the Authority to entertain subsequent appeals is one that is strictly limited by statute. It is not an unfettered discretion. Under the former Terms of Reference of the Authority, substantial manipulation of the system occurred with the lodgement of hundreds of specious and egregious second, third and even fourth refugee claims. The regrettable history of that abuse has been amply traversed in *Refugee Appeal No 75139* (18 November 2004) and need not be repeated. It led to the statutory enactments now in force, and to the Authority in *Refugee Appeal No 75139* (18 November 2004) concluding at [43] that:

> "Unless the claimant thereby establishes jurisdiction the Authority has no power to embark upon an inquiry into the merits of the second or subsequent claim to refugee status. Put bluntly, the Authority does not have unlimited jurisdiction over second (or third or fourth) appeals. That jurisdiction was asserted in *Refugee Appeal No. 2245/94 Re SS* (28 October 1994) in the context of the Terms of Reference. But the interpretation was wrong and cannot be maintained in the face of the (now) statutory provisions inserted by the Immigration Amendment Act 1999 and in the light of the abuse which was encouraged by an impermissible reading of the jurisdictional threshold. The Authority can only hear and determine (on the merits) a second or subsequent appeal if narrow statutory criteria are satisfied."

[63] It is not misreading the appellant to say that his second refugee claim is, in large part, an attack upon the adverse credibility findings of the Authority on the first appeal. It is expressly stated in the appellant's evidence and counsel's submissions on the second appeal that those findings are disputed. The evidence produced on the second appeal is aimed substantially at asserting not "significantly different grounds" to the first claim but the very same grounds, which are maintained and, indeed, so the appellant says, ought to have been accepted. The second appeal, while advancing some matters of evidence which are new (but which continue exactly the same grounds of claim), seeks to have the grounds of the first refugee claim reheard.

[64] The limited jurisdiction of the Authority to consider subsequent appeals cannot be read as licence to re-litigate adverse credibility findings. A decision of the Authority is, in terms of s129Q(5) of the Act, final once delivered. Judicial review exists as the appropriate remedy for error of law or administrative unfairness. As noted in *Refugee Appeal No 75139* (18 November 2004) at [47]:

> "If a refugee claimant wishes to argue that on the first appeal the Authority misdirected itself either on the facts or on the law, the proper remedy is judicial review, not the submission of a second refugee claim. If the refugee claimant is outside the three month time limit prescribed by s 146A(1) of the Act for commencing judicial review proceedings and is unable to establish special circumstances for the allowance of further time, the re-submission of the refugee claim is not an alternative remedy. The New Zealand refugee determination system is a generous one, but it does have necessary limits. For good reason the Authority does not possess what might be called a general "miscarriage of justice" jurisdiction."

[65] The appellant was alive to his remedies. He did apply for judicial review of the first appeal decision. The discontinuing of those proceedings was, apparently, the result of his impecuniosity, though no explanation has been given as to why his sister could not assist him. In any event, the appellant's impecuniosity does not in any way justify a finding that the Authority therefore has jurisdiction to consider a second claim that is, inescapably, *not* brought on grounds which are significantly different.

[66] No comment is intended here on whether the judicial review application had merit, or whether it would have merit if reinstated or renewed. That is not the function of the Authority on this appeal.

CONCLUSION ON JURISDICTION

[67] For the reasons set out herein, it is concluded that the appellant's second refugee claim does not disclose grounds which are significantly different to his first claim. The jurisdictional threshold established by s129O(1) of the Act is not met. There is no jurisdiction for the Authority to consider whether the appellant's second refugee claim discloses a well-founded fear of being persecuted for a Convention reason. The second appeal must fail.

[68] Because the second appeal fails for want of jurisdiction, it is not necessary for the Authority to address the appellant's submission that the adverse credibility findings reached on the first appeal were unjustified or inadequate. Whether they were or not is not relevant to a second appeal which does not cross the statutory jurisdictional threshold.

[69] There remains only one further matter to record, namely that there has been no need here to address the fact that parts of the appellant's second refugee claim are said to have occurred *before* delivery of the decision on the first appeal (ie, the appellant's sister's return to Iran and detention on arrival) and, arguably, are not circumstances which have changed "since that determination" – see ss129J(1) and 129O(1) of the Act. Because the events are said to have been part of a continuum of similar activity which straddled the determination of the first appeal, and given the outcome here of the second appeal, there has been nothing to be gained by teasing apart the evidence to isolate what may be considered and what may not. For the sake of the analysis here, it has all been treated as going to the second refugee claim. That is not to be taken, however, as implying any general principle. In particular, it does not signify that events prior to the determination of a first appeal are able to be taken into account in considering whether there are changed circumstances, *whether or not* they were brought to the attention of the panel hearing the first appeal. Such issues are left to be considered as and when they arise.

CONCLUSION

[70] The Authority finds that it has no jurisdiction to entertain the appellant's second appeal. Since the determination of the first refugee claim circumstances in the appellant's home country have not changed to such an extent that the second claim is based on significantly different grounds to the first claim.

[71] In view of the finding of absence of jurisdiction, the appeal is dismissed.

.....
C M Treadwell
Member