

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

CIV 2007-404-007932

UNDER The Judicature Amendment Act 1972
IN THE MATTER OF a decision under section 129N of the
Immigration act 1987 (as amended)
BETWEEN MN
Plaintiff
AND REFUGEE STATUS APPEALS
AUTHORITY
First Defendant
AND ATTORNEY-GENERAL
Second Defendant

Hearing: 6 June 2008

Appearances: C Curtis for the Plaintiff
M A Woolford for Second Defendant

Judgment: 26 August 2008

RESERVED JUDGMENT OF PRIESTLEY J

*This judgment was delivered by me on Tuesday 26 August 2008 at 4.30 pm
pursuant to Rule 540(4) of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Counsel/Solicitors:
C Curtis, Marshall Bird & Curtis, P O Box 105 045, Auckland 1001
M A Woolford, Meredith Connell & Co, P O Box 2213, Auckland 1140

Introduction

[1] The plaintiff challenges by judicial review a decision of the Refugee Status Appeals Authority (the Authority) delivered on 20 November 2007.

[2] In terms of s 129Q(5) of the Immigration Act 1987, decisions of the Authority, which is New Zealand's final refugee determination body, are final. Section 146A, however, permits, within certain temporal limits, judicial review of the Authority's decisions.

[3] It is trite law that a judicial review is conceptually very different from an appeal. This Court is not exercising an appellate function in respect of a decision of the Authority. It is exercising supervisory powers designed to correct jurisdictional, process, and other errors properly amenable to judicial review. (See *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 358 (PC); *G A v Refugee Status Appeals Authority* HC AK 2005-404-1520 1 March 2006, Priestley J; *S v Chief Executive of Department of Labour* [2006] NZAR 234; *M v Refugee Status Appeals Authority* HC AK 2004-404-6740 20 October 2005, Courtney J.)

[4] This Court has frequently stated that in the context of judicial review proceedings, credibility findings of the Authority will not be interfered with, unless they are so unreasonable that no Authority properly conducting itself could have made them. (See *X & Y v Refugee Status Appeals Authority* CIV 2006-404-4213, 17 December 2007 at [7] – [9], Courtney J.)

[5] The Authority hears appeals from decisions of refugee status officers declining refugee status. The plaintiff in this case had been interviewed by a refugee status officer twice in July 2006 and once in September 2006. A decision declining to grant him refugee status was made on 27 April 2007.

[6] From that decision the plaintiff appealed. The Authority constituted to hear the plaintiff's appeal was a single member with considerable expertise. The hearing occupied three days in July and September 2007.

[7] The Authority, as is normal, abides by the decision of the Court.

Background

[8] In its decision the Authority clearly and fairly set out the plaintiff's case for refugee status. He arrived in New Zealand on 8 June 2006, lodging a refugee status claim the following day. He claimed to have been born in Chad in 1990. He was uncertain of the precise date of his birth, there being no official record of it.

[9] He said he was the eldest of four children of a merchant living in N'Djamena, Chad's largest city. He studied English during his last two years at school. He became attracted to the English language and Anglo-American culture. He wanted to pursue his study of English rather than French, which was widely spoken in Chad, formerly part of the French colonial empire.

[10] The plaintiff claimed that in around 2003 (when he would have been 13), his father asked him to send various emails on his behalf in both French and Arabic. The plaintiff was computer literate and had a computer at home. He transcribed his father's written messages on to a floppy disk and sent them from an internet café. The appellant said his father warned him never to tell anyone about the emails and to destroy them. From this, the plaintiff assumed his father was sending information to exiles who opposed the current government. The plaintiff knew his father was involved in an opposition group known as the National Alliance.

[11] The plaintiff says he disobeyed his father and in fact kept copies of the emails on the hard drive of his computer at home and had also retained some of the written messages in a drawer.

[12] In November 2005, the plaintiff's father left home. This was something he frequently did, making trips as a merchant. Before he left, for some reason, he took the family to a studio to have photographs taken. The plaintiff has not heard from his father since.

[13] In April 2006, various opposition groups in Chad mounted a military attack on N'Djamena. Although the attack was initially successful, government forces repulsed it with assistance from French troops.

[14] In the days after the government's triumph, the plaintiff and his family returned from a visit to a friend's home to discover their house had been damaged. This friend features in the subsequent narrative and will be called "the friend".

[15] The family were told by neighbours that "the authorities" had been searching for the plaintiff's father. The plaintiff noticed that his computer, along with a television and a tape recorder, had been taken. The family left immediately for the friend's house.

[16] The next morning, the plaintiff's mother told him he had to leave Chad with the friend because he was at risk from the authorities. The plaintiff assumed from all of this that the authorities would know his father, as an older person, was not computer literate, and the emails would have been sent by the plaintiff. He saw the emails as the reason for the authorities' interest.

[17] A trans-continental trek across inhospitable terrain followed. The friend and the plaintiff travelled east, illegally crossing the border into Sudan. As a result of what the friend told him, the plaintiff came to believe his father had left Chad to join opposition forces.

[18] When the plaintiff and the friend arrived at Khartoum, they went to a people smuggler who took six photographs of him for a false passport. The friend paid the people smuggler US\$3000 for a false Chadian passport which, he says, was given to him the night before he left Sudan for New Zealand.

[19] The passport was in the name of "SS", a Chadian national who happened to reside in Saudi Arabia. The passport contained a New Zealand limited purpose visa (LPV). The plaintiff said none of the personal details in the passport applied to him other than a substituted photograph.

[20] The photograph, said the plaintiff, had been taken, not in Khartoum, but in Chad. He assumed his mother must have given the photograph to the friend the night they left N'Djamena.

[21] The plaintiff stated he left Khartoum by air on 6 June 2006, arriving in New Zealand two days later, having transited through Dubai and Singapore.

[22] Since arriving in New Zealand, the plaintiff has had telephone and email contact with various people, including a person based in France who is purportedly the leader of Chad's National Alliance. This person, helpfully, provided the plaintiff with a letter to the effect that he is wanted by the authorities in Chad and that his father is an armed insurgent in eastern Chad. The plaintiff has had no contact with any family members since leaving Chad, although he has had email contact with the friend.

[23] The basis of the plaintiff's refugee claim was that, in terms of Article 1A(2) of the Refugee Convention, he had a well-founded fear of being persecuted by reason of his political opinion. He believes the authorities are searching for him because he is his father's eldest son and because of his involvement in sending the emails.

[24] As an additional ground, the plaintiff told the Authority that members of his tribe in Chad, the Gorane, were being rounded up and conscripted into the army to fight against other Gorane, that tribe apparently being supportive of the opposition and enemies of the more influential Zaghawa tribe to which Chad's President belongs.

[25] He also told the Authority that, because of increasing co-operation between the governments of Chad and Saudi Arabia, there was a risk that, because he had falsely represented his identity (the Chadian passport on which he entered New Zealand contained a Saudi resident's permit), he would be in difficulties if he returned to either Chad or Saudi Arabia.

The Authority's decision

[26] The Authority did not believe the plaintiff's story. It rejected his account in its entirety, other than finding he was a Chadian national. It is not necessary extensively to set out the Authority's reasoning process. Ms Curtis is essentially only attacking a part of the Authority's decision.

[27] As is the case with so many refugee claims, the plaintiff travelled to New Zealand on false documents. The Chadian passport which features in the plaintiff's story was destroyed before his arrival in New Zealand.

[28] However, the New Zealand Immigration Service (NZIS) was able to trace a LPV application in the name of SS, which had been received by the New Zealand Embassy in Dubai in February 2006. Affixed to that visa application was a copy of the photograph the plaintiff said was taken by his father before the father's departure from N'Djamena in November 2005. This application had been received two months before, on the plaintiff's version, he had encountered any difficulties in Chad. This was in evidence before the Authority.

[29] Further documentary evidence related to notes by a NZIS visa officer in Dubai who telephoned a woman in Saudi Arabia on 13 June 2006 (a week after the plaintiff's departure for New Zealand). This woman had been described on SS's visa application as his mother. She advised that her son had recently arrived in New Zealand. The woman inquired about the possibility of applying for refugee status. SS, said the woman, had travelled to New Zealand from Saudi Arabia a week earlier.

[30] The Authority carefully reviewed all the evidence before it, including counsel's submissions. Given the number of assertions made by the plaintiff, a careful analysis was required.

[31] The headings of the Authority's analysis, after listing and dealing with eleven substantive submissions of counsel on the facts were:

Emails

Father's departure November 2005

News of [the plaintiff's] family

The passport photograph

Military service

[The plaintiff's] remaining fears on return

[32] The Authority rejected the plaintiff's evidence about having stored emails. It rejected his story about sending emails for his father. It rejected his explanation to explain a contradictory comment he had made to his original assertion that his father had left Chad on a trading venture. The Authority concluded the appellant had not received any news of his family in N'Djamena because his family had never lived there. It was highly unlikely the friend would have possession of a passport photograph of the plaintiff. The Authority noted that the plaintiff had not raised concerns over military service (and fighting the Gorane) until his counsel's opening submissions in June 2007 and found his professed fear of military service was untrue. It did not believe there was any substance to the appellant's remaining fears should he return to Chad.

[33] Although the Authority found that the plaintiff was, in its view, the Chadian national SS who had been resident in Saudi Arabia and had acquired a New Zealand LPV, it nonetheless examined the plaintiff's story as it related to his fear of persecution in Chad. It concluded that there was no real chance of persecution.

[34] The penultimate paragraph of the Authority's decision accurately summarises its findings:

[73] The Authority rejects the appellant's claim in its entirety. It finds that he is one in the same individual as SS, a Chadian national resident in Saudi Arabia who travelled to New Zealand, on a genuine Chadian passport with a Limited Purposes Visa, for the purpose of studying English in New Zealand. The evidence does not establish a real chance of the appellant being persecuted in Chad (or in Saudi Arabia). The second issue raised by the Convention does not, therefore, arise.

Evidence before the High Court

[35] The plaintiff filed an affidavit. Much of it was irrelevant and argumentative. Ms Curtis did not resile from her responsibility which her position as counsel obliged her to take for the affidavit. She candidly informed the Court that much of the material had been prepared on the plaintiff's instructions.

[36] Sixteen paragraphs deal with publicity in April 2008 relating to Ms Mary-Anne Thompson in respect of whom there had been allegations of improper use of her influence in NZIS to obtain permits for family members in Kiribati. On the basis of that, the plaintiff attacks the performance of NZIS in Dubai, stating that the passport to which the LPV had been attached had not been copied; suggesting that SS had applied for a student permit rather than a LPV; and that because the Immigration Service "has internal problems with persuasion by other people to approve applications that are unlawful" the processing of SS's visa in Dubai was wrong and suspect.

[37] The next six paragraphs of the affidavit constitute an attack on the Lonely Planet Guide publication. Surprisingly perhaps, at [51] of its decision the Authority had relied on the 10th edition of "Africa on a shoestring" for information about postal services in Chad. The plaintiff's affidavit was designed to suggest that because there had been adverse recent publicity about a Lonely Planet writer who had never visited the country he was writing about, the Authority's information was flawed.

[38] Finally, there is an unverified assertion that an unnamed Chadian who had been declined refugee status in New Zealand had been deported to Dubai and, having attempted to "slip back" into Saudi Arabia, had been arrested and imprisoned.

[39] The second defendant, for its part, filed an affidavit from Ms C Parton, a risk manager, who is the Second Secretary (Immigration) at New Zealand's Embassy in Bangkok. She gives evidence about the assessments and inquiries which were made about SS's visa application lodged in Dubai in February 2006. A visa officer manager in Dubai contacted her by email on 4 June 2006 expressing concerns about

SS's bona fides and seeking permission to revoke his LPV. Obviously nothing happened, because the plaintiff arrived in New Zealand on that visa four days later.

[40] Ms Parton deposes that she has reviewed the file relating to the application and has also read the plaintiff's affidavit. She is satisfied from the documents that SS's passport was submitted with the visa application; that the passport expired in June 2008; that there is nothing to suggest the relevant photographs have been removed or replaced; that the bio-data page of the applicant's Chadian passport was not retained; that there has been no fraud or cover up; and that the applicant, SS, had the offer of a place at a language school and a credit-worthy sponsor employed in Saudi Arabia.

[41] Nothing in any of this affidavit evidence undercuts or calls into question the Authority's findings.

Discussion

[42] Ms Curtis's submissions were in the main directed to the finding of the Authority that the plaintiff was in fact SS. In her submission, in reaching that conclusion, the Authority had failed to take all relevant matters into account and had thus wrongly come to the conclusion that the plaintiff was untruthful.

[43] The bulk of Ms Curtis's submissions was directed to the performance of NZIS visa officers in Dubai and the evidence relating to SS's visa application.

[44] Counsel observed that, having concluded that the visa application was in fact genuine, the Authority decided that the plaintiff's account of events in Chad was fictitious.

[45] The grant of a LPV in Dubai was contrary to policy. An analysis of the type of visa applied for, the materials in support, and the process, all demonstrated the grant of a visa to SS was wrongful.

[46] These were potent reasons, submitted counsel, for suggesting that a people smuggler, acting for the plaintiff, had in fact applied for a false visa on, presumably, a photo substituted passport (it being significant that no copy of SS's passport was available). This was consistent with the plaintiff's story that false documentation was arranged on his behalf from Khartoum to enable him to travel to New Zealand to seek refugee status.

[47] In terms of refugee jurisprudence, the plaintiff was entitled to the benefit of any doubt. There was no evidence to justify finding that the plaintiff was being untruthful with his narrative about how he obtained a false passport and visa to come to New Zealand.

[48] Ms Curtis analysed the evidence apparent from Ms Parton's affidavit (it not being necessary to detail this in full). Particularly given the suspicion hanging over the processing of SS's application by the NZIS in Dubai, it was unfair and prejudicial to rely on a telephone conversation (supra [29]) which might be suspect.

[49] In short, submitted Ms Curtis, the Authority's decision was the wrong way around. Instead of focusing on the credibility of the plaintiff's narrative and his fear of persecution in Chad, the Authority had made a finding that the plaintiff was in fact SS and in doing so had down-played or ignored the central core of his refugee claim.

Decision

[50] Had the Authority's decision been based solely on the ground that it believed the plaintiff was in fact SS, a Chadian national resident in Saudi Arabia who had applied for a New Zealand visa in Dubai, then there might have been legitimate concerns over the Authority's reasoning process.

[51] Even so, it would have been an uphill struggle because the Authority's reasoning for concluding the plaintiff was SS, on the basis of the documents it had, seems soundly based. There would be no reason for an NZIS employee to fabricate the 13 June 2006 telephone conversation (supra [29]). If a refugee claimant has spun a totally false story about his or her identity then that would, in most cases, be reason

enough to discard the broader narrative as false. Refugee status is designed to protect the individual as a specific person. A claimant seeking the protection of a country is obliged to be candid and truthful about his or her identity, even if a false identity was used to arrive at a safe haven.

[52] Had the Authority made its decision solely on the basis that it believed the plaintiff was SS, it would probably have been necessary for it to give specific reasons for rejecting the possibility that the identity of SS had not been falsely assumed by the plaintiff for the specific purpose of obtaining the travel documents necessary to reach New Zealand. Many genuine asylum seekers will travel on false documents, particularly in situations where risks in their country of origin make it difficult or impossible for them to use their own travel documents.

[53] In this case, however, the difficulty with the plaintiff's story that the LPV and the Chadian passport in which it sat were obtained for him by a people smuggler in Khartoum, is that the LPV application was lodged two or three months before the plaintiff left N'Djamena.

[54] That, however, was not the basis on which the Authority approached its task. Having found that the plaintiff was SS, the Authority nonetheless went on to consider his narrative and rejected his assertion that there was a real chance of him being persecuted in Chad.

[55] As is apparent from the transcript, most of the hearing was spent questioning the plaintiff about his activities in Chad. The Authority is an inquisitorial tribunal. It was his Chadian story about which the Authority asked. As Mr Woolford points out, only four pages of the transcript out of approximately 153 pages, appear to relate to the visa application.

[56] In other words, the Authority, in addition to its findings about the plaintiff's identity and credibility, assessed the risk of persecution on the basis of the plaintiff's story and the stand-alone credibility of that story.

[57] For valid reasons, the Authority disbelieved the plaintiff's evidence that he had stored his father's emails. There is no flaw in the Authority's reasoning process on this issue ([42] to [45] of its decision). The Authority also rejected, on grounds which are compelling ([61] to [68] of its decision), what was termed the "eleventh hour" assertion by the plaintiff that he was going to be forced into military service to fight other Gorane. In particular, military service questions are a specific part of the standard questions contained in the refugee claim form filled in when the plaintiff was being interviewed by a refugee status officer. He made no mention of this aspect.

[58] The Authority turned its mind to relevant country information and concluded there was no real chance of Gorane being persecuted in Chad in any event.

[59] Certainly the Authority's view of the plaintiff's credibility as to his identity has washed across to its assessment of his story of what had happened to him in Chad. But, reviewing Authority's assessment of that story, I discern no error which would trigger judicial review. The Authority's findings and conclusions were open to it.

[60] In any event, I accept Mr Woolford's submissions that the Authority's primary finding that the plaintiff was SS was clearly open to it. It is not permissible for this Court, in a judicial review context, to re-assess that finding and substitute its own.

[61] That said, there were strong pointers to the plaintiff being SS. Either SS or his family in Saudi Arabia were the applicant for a visa from the New Zealand Embassy in Dubai which was date-stamped 15 February 2006. It was the plaintiff's photograph which appeared on the visa application. The timing of the application was significantly inconsistent with the plaintiff's story about his departure from Chad. The finding is reinforced by the hand-written note of a telephone conversation between a person identifying herself as SS's mother from a Saudi Arabian telephone number several days after the plaintiff's arrival in New Zealand.

Result

[62] I see no basis, given the thorough and comprehensive nature of the Authority's decision, to interfere with it in a judicial review context.

[63] For these reasons, no grounds for judicial review are made out. There is no basis to challenge the lawfulness of the Authority's decision.

[64] The plaintiff's application is accordingly dismissed.

Costs

[65] I do not know whether the plaintiff is in receipt of a grant of legal aid or whether the second defendant seeks costs. Costs are thus reserved.

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Priestley J