

AT AUCKLAND

Appellant: AO (Iran)

Before: A R Mackey (Chair)
S A Aitchison (Member)

Counsel for the Appellant: C Curtis

Counsel for the Respondent: C Pille

Date of Hearing: 17 August 2011

Date of Decision: 23 September 2011

DECISION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch of the Department of Labour, made pursuant to section 129L(1)(b) of the former Immigration Act 1987 (“the former Act”), cancelling the grant of refugee status to the appellant, a citizen of both Iran and New Zealand.

[2] This appeal was lodged with the Immigration and Protection Tribunal pursuant to section 194(1)(e) of the Immigration Act 2009 (“the Act”). In accordance with section 198(2) of the Act, on an appeal under section 194(1)(e), the Tribunal must:

- “ (a) determine the matter de novo; and
- (b) [...] determine whether –
 - (i) recognition of the person as a refugee or a protected person may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information;
 - (ii) the matters dealt with in Articles 1D, 1E, and 1F of the Refugee Convention may not have been able to be properly considered by a refugee and protection officer for any reason, including by reason of fraud,

forgery, false or misleading representation, or concealment of relevant information; and

- (c) determine, in relation to the person, the matters referred to in subsection (1)(b) and (c) of this section.”

[3] There are potentially two stages to the enquiry. In this case, the Tribunal must first determine whether the refugee status of the appellant “may have been” procured by “fraud forgery, false or misleading representation, or concealment of relevant information” (“fraud or the like”). If so, it must then determine whether the appellant is now a refugee or protected person. This latter stage will depend on whether the appellant currently meets the criteria for refugee status set out in the Refugee Convention – see section 129 and also *Refugee Appeal No 75392* (7 December 2005) at [10]-[12], or protected person status under sections 130 and/or 131 of the Act.

[4] Given that this is an inquisitorial proceeding, it is unhelpful to talk in terms of the burden or onus of proof. Nonetheless, it is the responsibility of the Department of Labour to present the evidence on which it relies in asserting that the recognition of refugee status may have been procured by fraud or the like. The term “may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information” is deliberately imprecise and signals a standard of proof that is lower than the balance of probabilities but higher than mere suspicion – see *Refugee Appeal No 75563* (2 June 2006) at [20].

BACKGROUND

[5] The appellant is now 39 years old. Prior to coming to New Zealand, he applied for refugee status with the United Nations High Commissioner for Refugees (UNHCR) in Pakistan in 2000 and was recognised as a mandated refugee in June 2000. The appellant was accepted for residence in New Zealand under the Refugee Quota category in August 2000 and arrived in New Zealand the following month.

[6] In summary, the basis of the appellant’s claim to the UNHCR was that he served in the Disciplinary Forces in Iran as a Warrant Officer from 1990 to 1999, and was posted to Malu on the Afghanistan-Iran border as second-in-charge of the post. On 19 July 1999, he attempted to assist his cousin, who was sought by the Iranian Intelligence Service, to escape across the border into Afghanistan. The Intelligence Service pursued them and shot his cousin dead. The appellant

entered Afghanistan and was assisted by a commander of the Afghan border authorities (whom he knew) in order to travel to Kabul and on to Pakistan.

[7] On 7 September 2001, he arrived in New Zealand and was granted permanent residence. He was granted New Zealand citizenship in 2005.

[8] On 18 September 2005, the appellant departed New Zealand, travelling to Iran via Bangkok, Thailand, where he extended his Iranian passport at the Iranian Embassy. He entered Iran on this Iranian passport. He married AA in Iran on 26 September 2005 in an officially recognised and registered ceremony. He returned to New Zealand on 6 December 2005.

[9] On 14 June 2006, the appellant travelled again to Iran using his Iranian passport. He remained there for approximately three-and-a-half years, until 28 October 2009. During this time he worked as a contract cartage contractor, and renewed his driving licence for this purpose. His son was born on 30 May 2008, and his birth was registered. On 30 August 2009, the appellant was issued a new Iranian passport. His wife and son were also issued with passports.

[10] The appellant returned to New Zealand on 28 October 2009. At the airport he was questioned by border operations staff about the reason for his prolonged absence from New Zealand. During questioning he stated that he returned to Iran in June 2006 illegally, and was arrested and imprisoned until a month prior to coming to New Zealand when he escaped. When later interviewed by the Refugee Status Branch he admitted that he had given false evidence to avoid "being caught" in New Zealand.

CANCELLATION PROCEEDINGS

[11] On 24 May 2010, approximately 10 years after the appellant had been recognised as a refugee, he was served with a Notice of Intended Determination Concerning Loss of Refugee Status pursuant to section 129L of the former Act and Regulation 11 Immigration (Refugee Processing) Regulations 1999 ("the Notice").

[12] In the Notice, the refugee status officer stated his preliminary view that the grant of refugee status to the appellant was not properly made because it may

have been procured by fraud and that it was appropriate to cease to recognise the appellant as a refugee.

[13] At the core of the officer's concern was the fact the appellant was able to enter and exit Iran on two occasions using his Iranian passport, and was then able to remain in Iran, without difficulty, for a total of 40 months. The officer was further concerned that, upon return to Iran, the appellant had a number of interactions with state agencies, where he registered his marriage and the birth of his son, without experiencing any difficulties. The Notice advised that the officer held the preliminary view that these factors indicated that the appellant was not a person of interest to the Iranian authorities, as he had claimed.

[14] Accompanying the Notice, the officer served on the appellant a bundle of documents. Of particular relevance were the following:

- (a) UNHCR Resettlement Form for the appellant (July 1999);
- (b) appellant's application for residence in New Zealand;
- (c) photocopy of official translation of Iranian Marriage Certificate (15 November 2005); and
- (d) photocopy of an Islamic Republic of Iran Passport for appellant, No P17033624, issued on 21 November 2009.

[15] On 7 September 2010, the appellant was interviewed by the Refugee Status Branch. He was sent a copy of the interview report on 22 September 2010 and was invited to comment. The appellant responded by counsel's submissions dated 12 October 2010. On 9 December 2010, the Refugee Status Branch invited submissions from the appellant on protection person status under the Act. The appellant responded by counsel's submissions dated 13 December 2010.

[16] On 18 March 2011, the Refugee Status Branch issued a decision cancelling its recognition of the appellant as a refugee. It is from that decision that the appellant now appeals.

CASE FOR THE RESPONDENT

[17] The essence of the respondent's case is that the appellant's return to Iran on two occasions in September 2005 and June 2006, remaining there for over

three and a half years, and interactions with Iranian state agencies, including the renewal and replacement of his Iranian passport, the registration of his marriage and the birth of his son, indicates that he was not a person of interest to the Iranian authorities as claimed.

Evidence of Robin McMurray

[18] Robin McMurray is a refugee and protection officer at the RSB. Under cross-examination from Ms Curtis, he stated that the appellant's returns to Iran, and repeated interactions with the Iranian state agencies, suggested that his refugee status may have been procured by fraud. He elaborated that an inference can be drawn that the state have no interest in the appellant as officials make passport checks for each person who enters or exits the country, and no interest was shown in the appellant when he passed through these controls.

[19] When questioned by Ms Pille, Mr McMurray stated that persons who have committed serious crimes that are high profile would be placed on a list of wanted persons maintained at the airport. A security alert would be triggered upon their entry and exit of the country.

[20] Upon re-examination from Ms Curtis, Mr McMurray was not aware if a security alert would be enabled for a situation such as the appellant's, where an incident took place in a remote border post in Iran.

CASE FOR THE APPELLANT

[21] The account which follows is a summary of the evidence given by the appellant at the hearing of the appeal. It is assessed later.

[22] The appellant does not resile from the account he gave to the UNHCR in his refugee claim in 2000. He asserts that it was truthful.

[23] Responding to allegations raised in 2010 by the refugee status officer, the appellant states that he returned to Iran in September 2005 to marry AA. He made the decision to return following careful deliberation concerning his safety, and after Immigration New Zealand declined his application to sponsor his fiancé to come to New Zealand.

[24] Before travelling to Iran in 2005, the appellant requested his father, a retired police officer, to ascertain if it were safe for him to return. His father made checks

with airport officials in Iran, and assured him that he was not included on any list of wanted individuals by the Iranian authorities. The appellant only travelled to Iran once he had received that reassurance. He tendered a statement from his father in support. The father explained that he had over thirty years experience in the police force and extensive contacts with Iranian officials, including officers in the Tehran and Mashad airports, with whom he liaised concerning his son's circumstances and return.

[25] The appellant had no difficulty renewing his passport at the Iranian Embassy in Thailand and experienced no difficulties while entering Iran in 2005 or 2006, or when departing in 2005 and 2009. He also, had no difficulty or obtaining a new Iranian passport in Tehran.

[26] After he returned to New Zealand in December 2005, the appellant applied again to Immigration New Zealand to permit his wife to join him in New Zealand. His application was unsuccessful. As a consequence, and as a result of pressure from his wife, her family, and his own family, the appellant returned to Iran in June 2006 to be with his wife. Their son was born later that year. Throughout the entire period he remained in Iran, the appellant lived in constant fear that he would come to the attention of the Iranian authorities.

[27] At the time of the incident that gave rise to his refugee claim in 1999, the appellant's father had laid a formal complaint about the appellant's disappearance (not knowing what had happened to him at the time). The military questioned the father about the appellant and there was a case against the appellant in the Khorasan province military base. Neither the appellant nor his father knew whether the case still continued. They felt that the military considered the appellant dead, and that the matter had not been transferred to the court system.

[28] While in Iran, the appellant had contact with various officials in order to register his marriage and the birth of his son. He was fearful each time he made contact with the authorities, but his father oversaw these matters to ensure that the appellant did not experience any difficulties. When applying for a new passport in Tehran, the appellant's brother-in-law sought the aid of a friend who worked in the passport office there.

Material Received

[29] Counsel for the appellant lodged written submissions dated 11 and 16 August 2011, and various documents, including statements and an official

translation of the appellant's marriage certificate and son's birth certificate, lodged on 10 August 2011. At the hearing before the Tribunal on 17 August 2011, counsel produced a letter from a colleague of the appellant in his current employment in New Zealand, dated 17 March 2011, and a letter from a registered psychologist, dated 11 March 2011, outlining that the appellant was experiencing severe depressive and anxiety symptoms.

[30] Ms Pille, counsel for the Department of Labour, lodged written submissions dated 11 August 2011. A statement of evidence from the refugee status officer, Robin McMurray, dated 15 August 2011, was lodged on 15 August 2011.

WHETHER RECOGNITION PROCURED BY FRAUD

[31] The crux of the respondent's case is that the appellant's return to Iran, and interactions with state agencies during his stay there, indicates that he was not a person of interest to the Iranian authorities as claimed. The respondent submits that such actions are inconsistent with the appellant holding a well-founded fear of being persecuted in Iran, such that it appears that his refugee status may have been procured by fraud or false or misleading representation or concealment of relevant information.

[32] The ability of a recognised refugee to return to his or her own country on several occasions, for extended periods, without attracting the attention of the authorities or experiencing harm, may well raise questions as to his or her refugee status. However, caution must be exercised before making inferences based on return alone; see *Refugee Appeal No 76014* (30 May 2007) at para [79]. The well-founded fear standard, as understood in New Zealand, requires only that there is a real chance of harm occurring. There is no requirement that a refugee claimant establish such risk to the point of certainty. It follows, therefore, that the return of a recognised refugee to the country of origin without incident, subsequent to the original recognition of refugee status, does not necessarily establish that such refugee status was obtained by fraud, forgery, false or misleading representation, or concealment of relevant information; see *Refugee Appeal No 75574* (29 April 2009).

[33] The fact that the appellant returned to Iran and interacted with state agencies, as above stated, does not, in itself, raise more than a mere suspicion that the original recognition of the appellant as a refugee may have been procured by fraud, false or misleading representation, or concealment of relevant

information. His living without difficulty in Iran upon return, together with the renewal and issuance of a new passport, and registration of his marriage and the birth of his son in Iran, do not cast doubt on the veracity of his claim for refugee status. As stated in *Refugee Appeal No 75574* (29 April 2009) at para [128], a return without persecution gives rise to a number of possibilities (the list is not exhaustive):

- (a) even though there has been a return without experiencing persecution, the well-founded standard of Article 1A(2) nevertheless remains satisfied. The successful return to and departure from the country of origin was accompanied by a well-founded risk of being persecuted, a risk the individual was willing to accept and which happily did not eventuate;
- (b) the return without persecution establishes that in terms of either Article 1C(1) or (5) the individual has ceased to be a refugee; and
- (c) the return without persecution is evidence that the original recognition of refugee status was procured by fraud, forgery, false or misleading representation, or concealment of relevant information.

[34] In these cancellation proceedings only (c) is in issue. The appellant presented to the Tribunal genuine and appreciable reasons for returning to Iran (to marry his wife and live with his family) notwithstanding any risk of harm. His evidence of the steps he took (assisted by his father) to evade any adverse attention when interacting with state agencies in Iran is credible, as is his evidence that the case against him rests with the military, and has not been advanced any further, or transferred to the court system, on account of his perceived death.

[35] Further, the appellant's evidence before the Tribunal of the circumstances that lead to his refugee claim in 2000 was consistent with his account to the UNHCR. While the appellant admitted that he gave false evidence upon return to New Zealand on 28 October 2009 when questioned by the border operations officer about his prolonged absence from New Zealand after his travel documents were taken from him and he feared the Iranian Embassy would be contacted, the Tribunal finds this alone does not undermine the credibility of his original claim to refugee status.

[36] The Tribunal is, accordingly, not persuaded, beyond mere suspicion, that the original recognition of the appellant as a refugee may have been procured by

fraud, forgery, false or misleading representation, or concealment of relevant information.

[37] Given this finding, it is not necessary to consider the second stage of the test, that is, whether or not the appellant is, today, a refugee or protected person.

CONCLUSION

[38] The Tribunal is not satisfied that the refugee status of the appellant may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information.

[39] The appeal is allowed.

"S. A. Aitchison"
S A Aitchison
Member

Certified to be the Research
Copy released for publication.

S A Aitchison
Member