

REFUGEE STATUS APPEALS
AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75977

AT AUCKLAND

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| <u>Before:</u> | M A Roche (Chairperson) B L Burson (Member) |
| <u>Counsel for the Appellant:</u> | H Ratcliffe |
| <u>Counsel for the Respondent:</u> | S Houliston |
| <u>Date of Hearing:</u> | 23, 24 & 25 October 2007 |
| <u>Date of Decision:</u> | 22 November 2007 |

DECISION

[1] This is an appeal against a decision of a refugee status officer (RSO) of the Refugee Status Branch (RSB) of Immigration New Zealand (INZ), cancelling the refugee status of the appellant, a national of Afghanistan pursuant to s129L(1)(b) of the Immigration Act 1987 (“the Act”).

[2] Prior to being granted refugee status in New Zealand, (and unbeknown to the New Zealand authorities) the appellant had made a successful application for a protection visa in Australia using a different name and date of birth. He also provided an account which was materially different from that provided to the New Zealand immigration authorities. Three issues of particular importance emerged in this hearing. These are:

- (i) Were the details of the appellant’s identity and background provided to the New Zealand authorities true?
- (ii) If so, did the concealment of his Australian claim and time in Indonesia procure his refugee status in New Zealand?

- (iii) Is the appellant excluded from the Refugee Convention pursuant to Article 1F(b) because of his alleged involvement in people smuggling activities in Indonesia between May 1999 and May 2001?

JURISDICTIONAL ISSUES

[3] Pursuant to s129L(1)(b) of the Act, where recognition of a person as a refugee has been given by an RSO and where it appears such recognition may have been procured by fraud, forgery, false or misleading representation or concealment of relevant information (hereinafter referred to as fraud), an RSO may determine to cease to recognise the person as a refugee. Such a decision may be appealed to this Authority pursuant to s129O(2) of the Act.

[4] When the Authority is considering an appeal against a decision of an RSO under s129L(1)(b), there are two stages to the Authority's enquiry. First, it must be determined whether the refugee status of the appellant "may have been" procured by fraud. If so, it must then be determined whether it is appropriate to "cease to recognise" the appellant as a refugee. This determination will depend on whether the appellant currently meets the criteria for refugee status set out in the Refugee Convention: *Refugee Appeal No 75392* (7 December 2005) [10]-[12].

[5] Given that these are inquisitorial proceedings, it is not entirely appropriate to talk in terms of the burden or onus of proof. Nonetheless, it is well-recognised and accepted that, in cancellation proceedings, it is the responsibility of the Department of Labour to present such evidence in its possession by which it can responsibly be said that the grant of refugee status may have been procured by fraud. It is also our view that 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: *Refugee Appeal No 75563* (2 June 2006).

BACKGROUND

The grant of refugee status to the appellant

[6] The appellant is aged in his late 20s. He arrived in New Zealand on 2 December 2000 and claimed refugee status at the airport.

[7] The basis of the appellant's claim for refugee status was that he was of Uzbek ethnicity and was from Mazar-e-Sharif in the Faryab province of Afghanistan. His father had been an officer in the armed forces of General Dostum, an Uzbek warlord. He claimed that following the invasion of Mazar-e-Sharif by the *Taliban* in August 1998, and following the arrest and disappearance of his uncle, who was also in General Dostum's army, he and his family together with his aunt and cousins had fled Afghanistan by mini bus for Pakistan where they settled in Peshawar.

[8] He claimed that in November 2000 his family engaged a smuggler to take him to New Zealand and that he travelled with the smuggler from Karachi to Malaysia and then from China to Indonesia where he was briefly in transit before flying on to New Zealand.

[9] On 1 May 2001, the appellant was interviewed by the RSB in respect of his claim to be a refugee. On 12 October 2001 the RSB accepted his claim and granted him refugee status.

CANCELLATION PROCEEDINGS

[10] On 28 April 2006, the appellant was served with a Notice of Intended Determination Concerning Loss of Refugee Status ("the notice") in accordance with s129M of the Act and reg 11 of the Immigration (Refugee Processing) Regulations 1999.

[11] In the notice, the RSO stated his preliminary view that the grant of refugee status conferred on the appellant was not properly made because it was procured by fraud and stated the matters which gave rise to the view that the refugee claim may have been false.

[12] At the core was the RSO's view that evidence suggested that the appellant had;

- (i) lodged a refugee status claim in Australia on 8 November 1998 using an alias, BB;
- (ii) provided significantly different biographical information to the Australian authorities from that which he provided to the RSB;
- (iii) been granted an Australian Protection Visa on 23 December 1998 which was cancelled on 20 April 2000 because the appellant had stated a desire to return to Afghanistan and had a genuine Afghani passport issued by the Afghani consulate in Canberra on 8 April 1999.

[13] The appellant did not request an interview in connection with the matters raised by the notice and provided no comment on those matters to the RSB. On 31 October 2006, the RSB published a decision cancelling the grant of refugee status conferred on the appellant on 12 October 2001 on the basis that;

- (i) the differences between the appellant's refugee claims in Australia and New Zealand were such that neither could have any credence attached to them;
- (ii) the appellant's Australian Protection Visa was cancelled on 20 April 2000, because he had expressed a desire to return to Afghanistan, at a time when the *Taliban* still controlled 90 per cent of Afghanistan. His expression of a desire to return to Afghanistan was inconsistent with him having a well-founded fear of being persecuted by the *Taliban*;
- (iii) the fact that he had sought and received a genuine Afghani passport during a time when the *Taliban* were in control of Afghanistan was also inconsistent with a fear of persecution by the *Taliban* regime for the reasons expressed either to the Australian or the New Zealand immigration authorities;
- (iv) the appellant had stated in an interview with an Australian Department of Immigration and Multicultural Affairs (DIMIA) officer in Jakarta on 3 and 19 April 2000 that he had married an Indonesian citizen in September 1998 in Surabaya, Indonesia. Given that this wedding date pre-dated the supposed date of departure from Pakistan, provided to the Australian immigration authorities and the

New Zealand immigration authorities, his marriage cast doubt on his stated travel movements during both his Australian and New Zealand refugee claims.

[14] The RSO concluded that for all these reasons the appellant's grant of refugee status was improperly made and may have been procured through fraud, forgery, false or misleading representation, or concealment of relevant information.

[15] The appellant now appeals against that decision to this Authority.

[16] Prior to the appeal hearing the appellant filed two written statements in support of his appeal. In the first of these, dated 26 February 2007, he admitted that he had entered Australia in 1998 and had provided false details to the Australian immigration authorities and was granted a protection visa by them. He went on to explain the circumstances which gave rise to the cancellation of that protection visa and his eventual arrival in New Zealand.

People smuggling allegation

[17] In the course of preparing for the appeal hearing, the Authority became aware of the existence of a video tape recording of an interview conducted on 9 January 2001 between an Afghani national, AA, a New Zealand police officer (former Detective Sergeant Turley), two officers from DIMIA and one officer from the Australian Federal Police. The video tape includes statements made by AA about the identity, movements and activities of an individual named BB who he identified as being the same person as appears in a photograph of the appellant shown to him in the video by former detective sergeant Turley. This photograph was taken from a refugee travel document issued to the appellant by the Australian authorities after his successful refugee claim there.

[18] On 29 June 2007, the Authority directed the Secretariat to provide a transcript of the relevant portion of the video tape to counsel for both parties and to offer counsel the opportunity to view the relevant portion of the video tape at the office of the Secretariat prior to the hearing. Both counsel accepted this invitation and viewed the video tape. Counsel for the Department of Labour requested that Mr Turley be made available for cross-examination at the hearing. We will return to the evidence of Mr Turley after recording the Department of Labour's case and the appellant's case on appeal.

THE RESPONDENT'S CASE

[19] At the hearing, the Department of Labour's case consisted mainly of documentary evidence compiled in the course of the RSO's determination concerning the loss of the appellant's refugee status. There was a considerable volume of material from the appellant's DIMIA file. Two witness statements were filed from Jessica Brier Lemon, a Department of Labour fraud investigator, and Greig Mark Young, the RSO who issued the decision cancelling the grant of refugee status to the appellant.

[20] Ms Lemon's statement noted the written opinion dated 2 May 2005, of a forensic anthropologist, Dr Robin Watt, that photographs of the person known as BB who had formerly resided in Australia and of the appellant were in fact, photographs of the same person.

[21] Ms Lemon also noted that when the appellant completed a Confirmation of Claim to Refugee Status in New Zealand form on 3 December 2000, he was asked to provide any other names he was known by, former names or aliases used and did not provide any details of the BB name and further that, when the appellant made an application for residence in New Zealand, he failed to state that he had been known by any other name. Ms Lemon stated that as a result of their investigation into the appellant, the Department of Labour had laid charges against the appellant under the Crimes Act 1961.

[22] Mr Young's statement simply stated that he was employed as a refugee status officer by the Department of Labour; that he had read the appellant's statement dated 26 February 2007, and that the reasoning for his decision, in respect of the appellant's refugee status, is contained in the RSB decision of 31 October 2006.

[23] Mr Young appeared as a witness for the Department of Labour and confirmed the contents of his written statement.

Evidence of former Detective Sergeant Turley

[24] Craig Martin Turley appeared as a witness at the hearing at the request of the Authority. He currently works as an investigator, having retired from the police force following a twenty year career as a police officer. At the time of his retirement he was a senior sergeant. Between approximately 1999 and 2002, he

coordinated a police operation known as "Operation Ahmad". This was a joint operation between a variety of government agencies including the New Zealand Police, the Department of Labour and the Customs Service which was initiated after the New Zealand Police received information from DIMIA and the Australian Federal Police.

[25] The goal of Operation Ahmad was to identify and if possible apprehend the AA syndicate, a group of people smugglers operating out of Auckland and Indonesia.

[26] Mr Turley first met AA in March 2000 when a search warrant was executed at a house where he was present. AA was the principal target of the operation and was ultimately convicted of fraud charges. In the course of Operation Ahmad, AA's activities as a people smuggler were revealed.

[27] Mr Turley told the Authority that a DIMIA investigator in Indonesia provided information to Operation Ahmad about a person using the name BB who was an Afghan national but who also held Australian citizenship. Mr Turley told the Authority that BB was known to have been in possession of a bag containing approximately 20 passports which were secured by DIMIA at the embassy in Indonesia and that, as a result the Australian government took action against BB in relation to his Australian citizenship. Mr Turley was aware that BB had spent time in an Indonesian prison but was unaware if this was related to the passports. He told the Authority that the New Zealand Police did not take action against the appellant in connection with the information produced by Operation Ahmed.

[28] Mr Turley told the Authority that the police eventually made a decision that there were insufficient police resources to pursue convictions against persons who came to their attention in the course of Operation Ahmed. This was because most of the information gathered was hearsay and the gathering of admissible evidence would require considerable police travel overseas. In view of the fact that considerable expenditure would ultimately only result in minor document charges, and because the police formed the view that the type of information generated by Operation Ahmed was more properly the responsibility of the New Zealand Immigration Service, the operation became more of an information gathering exercise. Mr Turley states that in 2002, the pool of information generated, including further information about BB, was ultimately left with the Department of Labour who have responsibility for prosecuting immigration fraud.

[29] Mr Turley confirmed that the extract from the interview transcript referred to at para [18] above was an accurate record of the interview with AA he participated in on 9 January 2001. In this transcript, AA identifies the appellant from a photograph as his nephew Sadiq who was using the name BB. AA said that BB's father was named Zahesh and that BB's mother had died many years ago and that BB had been brought up by his grandmother, being AA's mother. He went on to say that BB had an Australian passport and had started out as a people smuggler in Indonesia, having smuggled three or four people with assistance and advice from AA and that he was in prison in Indonesia in early 2000 when AA went to Indonesia to assist him, having been caught without a passport.

[30] Mr Turley was asked to produce the photograph from which AA identified BB. The photograph he produced was incorporated in a DIMIA intelligence bulletin about BB dated October 2002. This intelligence bulletin contained a copy of an Australian travel document bearing the appellant's photograph but bearing the name BB and the date of birth provided by the appellant to the Australian authorities. The bulletin asserted that BB had been smuggled into Australia by his uncle, AA, and that BB came to the notice of DIMIA in June 1999, when Merpati airline staff reported to DIMIA that an Australian permanent resident had been attempting to smuggle Afghans to Australia and presented DIMIA with a copy of BB's Afghan passport. The bulletin documents BB's travel movements between Australia and Indonesia and details BB's activities in Indonesia in April and May 2001. The bulletin noted that information had been received by DIMIA that BB had relocated to New Zealand, possibly under a new identity.

[31] Mr Turley stated that he had not spoken to any of the people named in the DIMIA report except for AA and had never seen any evidence of BB's alleged marriage to an Indonesian national.

THE APPELLANT'S CASE

[32] A summary of the evidence given by the appellant at the hearing follows. An assessment of this evidence is made later in this decision.

[33] The appellant was born in July 1978 in Mazar-e-Sharif, Afghanistan. He was the eldest of his parent's 10 children. He estimates that his mother was aged about 20 at the time of his birth, making her now in her late 40s or very early 50s. His family was relatively well off and owned houses, land and other assets.

[34] When he was 10 years old, he was sent to live with his grandparents in Meymaneh, another city in Faryab Province. He completed high school in Meymaneh and then returned to Mazar-e-Sharif where he began an apprenticeship as a tailor.

[35] The appellant's father held the rank of *Dagarwal* in General Dostum's army and was a tank driver. He served under General Dostum's brother, Kadar. The appellant's paternal uncles were also members of General Dostum's army. One of them, DD, held the rank of General. Three other uncles died during the war between the *Mojahedin* and the Soviet forces.

[36] After the *Taliban* took Mazar-e-Sharif for the second time in August 1998, they killed five to six hundred Uzbeks in the Ghazar area of the city including one of the appellant's uncles (his paternal aunt's husband) who was a shopkeeper. After the appellant's family learned of his death, the appellant's father decided that the family should escape to Pakistan. He and the appellant visited his Pashtun friend, CC, and asked him to assist them. CC agreed to help. The appellant and his father stayed overnight with CC and returned home the next day. In their absence the *Taliban* had been and had taken his uncle DD away. The appellant subsequently learned that DD was imprisoned by the *Taliban* in Herat where he remained until the end of 2001 when his release was arranged by a relative. He now resides in Mazar-e-Sharif.

[37] One day later, CC with a driver and a hired mini bus, took the appellant's family and DD's wife and children out of Mazar-e-Sharif. Following an indirect route, the appellant and his family were driven to Pakistan. The appellant and other males wore black turbans so that they would look like Pashtuns. When they were stopped at *Taliban* checkpoints, they claimed to be on their way to attend a wedding.

[38] The family eventually arrived in Peshawar, Pakistan, where the appellant's father rented a house for them in an area known as "the Afghan colony".

[39] The appellant stayed in Peshawar with his family for approximately two months. Because they felt there was no future for them in Pakistan or Afghanistan, the appellant's family decided to send him to New Zealand because they had heard that it was safe and that New Zealand allowed refugees to sponsor other family members. Using funds from the sale of their house in Mazar-e-Sharif

(arranged by the appellant's grandfather who had remained in Afghanistan) the appellant's father organised an agent to take the appellant to New Zealand.

[40] In approximately October 1998, the agent flew with the appellant from Pakistan to Jakarta where the appellant stayed with him at his home for approximately 20 days. From Jakarta, the agent took the appellant to Bali where he provided him with a passport, a boarding pass and a ticket for a flight to New Zealand via Sydney.

[41] On 8 November 1998 the appellant flew to Sydney. At Sydney he needed to obtain a new boarding pass for his flight to New Zealand. However, he became disoriented at the airport and, because of his lack of English, was unable to locate the correct place to obtain the boarding pass. He was directed to a counter at the airport and handed his passport to an airport official. He was then taken into a side room and told that the passport he was using was either lost or stolen. The appellant was then taken from the airport to an immigration detention centre.

[42] The appellant had been warned by his agent that Australia did not accept refugees and returned people to Afghanistan. The agent had also advised him that if he was caught in Australia, he should not provide his real name because if he was deported under that name he would then be blacklisted. He also told him that he would be asked fewer questions if he claimed to be minor. Following his agent's advice, the appellant provided the Australian authorities with a name he made up, BB, and a false date of birth that made him a minor. He claimed that he only had two siblings who were dead and that his parents, who worked in a television station and were supporters of General Dostum, were also dead. He claimed to have escaped from Mazar-e-Sharif with the assistance of an uncle. He gave the real name of his father as his uncle's name.

[43] The appellant stayed in an immigration detention centre for approximately one month. During this time he met an Indonesian woman who was in the detention centre because she had been an overstayer in Sydney for approximately one year. This woman subsequently became his girlfriend.

[44] On 23 December 1998, the appellant was granted an Australian Protection Visa in the name of BB.

[45] The appellant was surprised to be granted a protection order and found himself in a difficult position. He had given false information about himself

because he had expected to be deported. He could not now go back to the Australian authorities and tell them the truth. However, he thought that his family may be able to obtain protection visas in Australia in their own right. He contacted his family and told them to join him in Australia.

[46] After hearing from the appellant, his parents sold some of their land in Afghanistan, and engaged the same agent to bring them and the appellant's siblings to Australia. However, the agent disappeared with the family's money.

[47] In approximately April 1999 the appellant's father telephoned him and told him that he had heard that the agent who had taken their money was in Indonesia. The appellant applied to the Afghan Embassy in Canberra for a passport under the BB name. He was not required to provide any identity documents but merely to submit a completed form. He was subsequently issued an Afghani passport. On 17 April 1999, he departed Australia from Sydney using the Afghan passport. He stayed in Indonesia for a month looking for the agent and providing his telephone number to people who knew him. Despite his efforts, he was unable to locate the agent and returned to Australia on 29 May 1999.

[48] Two days after his arrival in Australia, he received a telephone call from an Afghani national living in Indonesia who told him that the agent was in Bali. On 4 June 1999 the appellant returned to Indonesia and made his way to Bali to look for the agent. Three or four days after arriving, he was robbed by two men who stole his Afghan passport and his money. He reported the robbery to the Indonesian police. He then returned to Jakarta where he visited the Australian Embassy and asked for assistance. At the Embassy he dealt with a man named "Richard" who declined to assist him because he was not an Australian national. At this time the appellant was staying with the Indonesian woman he had met in the detention centre in Sydney.

[49] The appellant made a number of visits to Richard at the Embassy seeking assistance. On one occasion Richard showed him the photographs of two men he did not know and asked him who they were. When he told Richard he did not know who they were he was told that until he cooperated he would not receive any assistance. On one occasion he refused to leave the Embassy and was taken outside by security guards. On another occasion he attempted to see the Australian Ambassador but was refused.

[50] The appellant spent approximately seven months in Indonesia without a passport. During this time he sent a letter by fax to Richard in which he provided his telephone number. Richard telephoned him back and told him that he (the appellant) would be unable to return to Australia because his visa had been cancelled.

[51] In early January 2000 the appellant returned to the Australian Embassy. He was asked to leave. When he refused, he was removed from the Embassy and taken to the office of the Indonesian immigration authorities. From there he was transported to Karantina Immigration Detention Centre where he was held for six or seven months. During this time he was interviewed by two DIMIA officers who asked him questions about how people were smuggled into Australia. He told them he did not know anything about that sort of thing. The officers returned approximately one week later and questioned him again.

[52] After spending six or seven months in the Indonesian detention centre, the appellant managed to get a message to his family about his predicament through a Pakistani national whom the appellant had met in detention and who was being deported to Pakistan.

[53] Using funds obtained from selling more land in Afghanistan and additional funds provided by the appellant's grandfather, the family engaged another agent in Pakistan who organised for the appellant a second Afghan passport in the name BB and an airline ticket to Malaysia. These documents were delivered to the detention centre and the appellant was then released from the detention centre and taken directly to the airport.

[54] Using the passport and ticket provided by the agent the appellant flew to Malaysia where he was met by another agent. He stayed in Malaysia with this agent for several weeks. Using a false passport provided by the Malaysian agent, he then flew to China and from there to Auckland via Bali. The agent accompanied him to China and Bali but not on to Auckland.

[55] When the appellant claimed refugee status at Auckland airport he was frightened that if he told the New Zealand immigration authorities about what had happened to him in Australia and Indonesia, he would be rejected as a refugee and sent to Afghanistan. He feared that if he was returned to Afghanistan he would be killed by the *Taliban* because he is Uzbek. At the airport he gave his real name, date of birth and family details. Apart from omitting his time in Australia and

Indonesia and the fact that he had previously used the name BB, the information he provided on arrival in New Zealand was, he says, entirely truthful.

[56] After being granted refugee status in New Zealand in October 2001 he applied for residence which was granted in March 2002. He obtained work at a Pak 'n' Save supermarket. To supplement his income he worked at a McDonald's restaurant in the weekends. He was in constant contact with his family as he wished to be reunited with them in New Zealand. However, he received legal advice that he would be unable to sponsor them for three years.

[57] In May 2002 the appellant met his wife, a New Zealand citizen. The couple married in October 2002 and have a son who was born in 2006.

[58] The appellant's wife is a nurse. In 2005 she received a job offer in Saudi Arabia. She was unable to sponsor the appellant in Saudi Arabia until she had worked for three months and so the appellant decided to visit his family in Afghanistan until he could join his wife in Saudi Arabia. The appellant's family had returned from Peshawar to Meymaneh in 2004. By this time the *Taliban* had been removed from power. They settled there, rather than Mazar-e-Sharif because their house and property in Mazar-e-Sharif had been sold to finance the appellant and his family's attempts to seek refuge abroad.

[59] Using an Afghan passport issued in his real name by the Embassy in Canberra, the appellant flew to Kabul where he was met by his brother and a cousin. They accompanied him by bus to Mazar-e-Sharif where he visited his aunt and then took him to Meymaneh where he was reunited with his family.

[60] The appellant stayed in Afghanistan for two months. During this time he attended a number of family celebrations including the weddings of two of his cousins and his sister's engagement party. He then visited his wife in Saudi Arabia using an *umra* visa (issued to Muslims for the purpose of making a pilgrimage). He stayed in Saudi Arabia for 18 days and returned to Afghanistan on 19 August 2005. His wife had decided that she did not wish to live and work in Saudi Arabia and, after completing a period of notice, flew to Kabul on 7 September 2005 to join him. The purpose of her trip to Afghanistan was to meet her in-laws and to have an Afghani wedding celebration with them.

[61] The appellant, accompanied by his brother, collected his wife from the airport in Kabul and took her to Mazar-e-Sharif where the couple stayed with his

aunt before travelling to Meymaneh the following day. The appellant and his wife stayed in Meymaneh with his family for approximately one month. During this time they held an Afghani celebration of their marriage because none of the appellant's family had been able to attend their marriage in New Zealand. They left Afghanistan in early October and, after holidaying in Turkey, returned to New Zealand.

[62] When asked, the appellant denied ever being known by the name Sadiq and ever meeting AA. He stated he has never been involved in people smuggling and knows nothing about it. He commented that if he was able to smuggle people he would have smuggled his family. He also commented that before he was put into detention in Australia he was begging Richard for a passport with which to return to Australia and that if he was a smuggler he would have simply made one.

Evidence of the appellant's wife

[63] The appellant's wife appeared as a witness in support of the appeal. She lives with the appellant and is a registered nurse. Very early in their relationship, the appellant told her about his time in Australia and Indonesia and that he had used a false name in Australia and had been granted refugee status there but had left Australia for Indonesia to try and locate the person who had taken his family's money.

[64] He also told her that he had met his first girlfriend, an Indonesian, in a detention centre in Australia. He had told her that the reason he used a different name from his real name in Australia was because he knew he would be deported from Australia and he did not want his real name to be tarnished. He also told her early in their relationship that his father had been in the army.

[65] Although she could not recall exactly when the appellant had made these disclosures to her she said that she and the appellant had been married for five years and that he had told her about his Australian and Indonesian experiences within the first year she knew him.

[66] The wife told the Authority that the appellant has a close relationship with her parents. As well as being open with his wife about what had happened in Australia and Indonesia, he also told her mother and father. The appellant and his wife were therefore unsurprised when these current proceedings began. The appellant had applied for New Zealand citizenship and, after making enquiries

about the progress of his application had been told it was on hold. At that point they guessed that something was going to happen related to the appellant's Australian claim although they did not anticipate that the appellant would be subject to criminal proceedings.

[67] The appellant's wife told the Authority that, after leaving Saudi Arabia on 31 July 2005, she flew to Kabul where she was met by the appellant and his brother who drove her to Mazar-e-Sharif. There she met the appellant's aunt and cousins and then went on to Meymaneh where she met the remainder of appellant's family for the first time. She stayed in Afghanistan for a month and got to know her in-laws well. She became particularly close to her mother-in-law whom she said rarely left her side. She estimated that the appellant's mother was approximately 50 years old and commented that she knew that the appellant was born soon after the mother's marriage when she was a teenager. She told the Authority that their Afghani wedding celebration was attended by several hundred people and that during her time in Meymaneh and Mazar-e-Sharif she met many members of the appellant's extended family, including his uncle DD.

Documentary evidence

[68] The extract from the transcript recording the interview with AA and the DIMIA intelligence bulletin on BB were produced by Mr Turley as exhibits.

[69] As noted earlier, two written statements by the appellant were filed prior to the appeal. On the second day of the hearing, a written statement from the appellant's father-in-law was filed in support of the appeal.

[70] Because an issue arose in the hearing as to whether the appellant was, in fact, the person using the Afghan passport in the name BB to smuggle people, both counsel were given leave to file further documents in evidence on this issue. In particular, the appellant was invited to file documents supporting his claim to have been in New Zealand from the time of his documented arrival in December 2000 and throughout 2001.

[71] Accordingly on 5 November 2007, the following documents were filed and served on counsel for the Department of Labour:

- (i) Bank statements recording the appellant's transactions from 2 March 2001 until 19 September 2001.

- (ii) A letter from the Inland Revenue Department attaching printouts of the records of the appellant's PAYE records between February and July 2001.
- (iii) A letter from the appellant's former flatmate confirming that he lived with the appellant at a Glenfield address between February and July 2001 and regularly socialised with him.
- (iv) A letter from his former landlord's son (the landlord being currently overseas) confirming that the appellant lived at the Glenfield address from December 2000 and then in a different Glenfield house owned by the landlord's family where he stayed until June 2002.
- (v) A letter from the appellant's former employer confirming that the appellant worked full-time between May 2001 until December 2002.

[72] By letter dated 5 November 2007, counsel for the Department of Labour advised that he did not intend to file any further evidence.

[73] Both counsel filed opening and closing submissions.

ASSESSMENT

Was refugee recognition procured by fraud?

Procurement of refugee status by fraud

[74] In a paper published by the UNHCR on cancellation, it is noted that the issue of cancellation arises where a person recognised as a refugee is subsequently found not to have been entitled to Convention refugee status at the time of the positive determination: Kapferer Sibylle, Cancellation of Refugee Status, (Legal and Protection Policy Research Series), UNHCR, March 2003.

[75] In her introduction, Kapferer states:

"...individuals who were not eligible for international protection at the time they were determined to be refugees cannot claim to be prejudiced by cancellation of a status which ought not to have been recognised in the first place. Cancellation will normally be the appropriate measure where, at the time of the positive determination, the person concerned did not fulfil the eligibility criteria under the 1951 Convention, because s/he was not in need, or not deserving of international protection."

[76] The UNHCR paper reviews the practices of a number of states including New Zealand. At [20] it is noted that state practice for cancellation of refugee status on the ground of fraud consistently requires:

- (i) the existence of objectively incorrect statements by the interested party; and
- (ii) causality between these statements and the decision to grant refugee status.

[77] There is no direct authority in New Zealand concerning the interpretation of the phrase “procured by fraud” as it is employed in the context of the cancellation of refugee status in s129L(1)(b) and s129(1)(f)(ii) of the Act.

[78] The meaning of the term “procured by fraud” in section 17(2) of the Citizenship Act was however considered in *Rajan v Minister of Internal Affairs High Court*, Auckland, M 1040/95, 5 November 1996. Anderson J noted:

“The ordinary meaning of the word ‘procured’ connotes causation. In a general criminal law context this is acknowledged in *R v EF* at 392, lines 39-40. There the New Zealand Court of Appeal attributed to the word ‘procure’ a minimal meaning of effective cause. A definition of ‘procure’ in the 3rd (revised) edition of the Shorter Oxford dictionary includes ‘induce’. The theme of all these authorities is a connotation of substantial cause, though not a principal or overwhelming cause. In my judgement the word ‘procured’ in s17(2) has the same connotations of substantial although not necessarily principal or overwhelming cause, and goes beyond a mere insubstantial link in a causative chain”.

[79] Anderson J’s approach was followed in *Wang v Minister of Internal Affairs* [1998] 1 NZLR 309 which also considered the term “procured by fraud” in section 17(2) of the Citizenship Act. In *Wang*, Randerson J held that where a misrepresentation was not material to the decision it could not be said to have procured the grant: p315.

[80] Criminal law authorities on fraud also require a causal relationship between the deception and the obtaining or causing of loss. For example, it was held in *R v King* [1987] 1 All ER 547; that false pretence must have been an effective or operative cause of the obtainment.

[81] The appellant admits that on arrival in New Zealand in December 2000, he concealed the facts that:

- (i) he had entered Australia in November 1998;

- (ii) he had provided a false name, date of birth and biographical details to the Australian authorities;
- (iii) he had been granted an Australian protection visa in December 1998 and;
- (iv) he had spent between May 1999 and November 2000 in Indonesia where he was known as BB before eventually travelling to New Zealand.

[82] The question arises as to whether the appellant's concealment of these matters procured his recognition as a refugee. In other words, was his concealment of these matters a substantial cause of his recognition as a refugee? In order to answer this question, it is necessary to have some regard to both the definition of a refugee under the Refugee Convention and the nature of the refugee status determination process.

[83] A refugee is a person, outside the country of his nationality who, owing to a well-founded fear of being persecuted by reason of his race, religion, nationality, membership of a particular social group or political opinion is unable, or unwilling owing to such fear, to avail himself of the protection of that country (see Article 1A of the Refugee Convention).

[84] It is an elemental principle in refugee law that refugee status is declaratory in nature not constitutive. In other words, the RSB decision does not create refugee status, but rather recognises a status under international law that already exists, for the purpose of identifying persons to whom New Zealand has protection obligations under the Refugee Convention. In *Refugee Appeal No 59* (19 May 1992) paragraph 28 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status was quoted. It is worth setting out the same passage here:

'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee.'

[85] The proposition that refugee status is declarative not constitutive was referred to without criticism in *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 at [151], per Glazebrook J (NZCA).

[86] Counsel for the Department of Labour submits that the appellant's concealment of his previous identity and refugee claim had the potential to undermine the credibility of the refugee claim he made in New Zealand and obscured any link to his possible involvement in people smuggling. He submits this concealment "clearly assisted" the Appellant to obtain refugee status. However, counsel's submission ignores the central issue of whether the appellant was in fact a refugee in October 2001 when he was recognised as such. The Authority accepts the credibility of his claim may well have received stronger scrutiny by the RSB had he disclosed his previous identity and refugee claim. Such scrutiny, according to usual practice, would have included the obtaining of relevant files from the Australian authorities which have now been obtained and are relied on by the Department of Labour in this appeal.

[87] However, given the declaratory nature of refugee status determination, that is not the end of the matter. If the appellant was a person to whom New Zealand owed protection obligations under the Refugee Convention in October 2001, he was entitled to recognition as a refugee despite his concealment of his Australian claim.

[88] Although counsel for the Department of Labour has submitted otherwise, on our reading of the RSB decision, the appellant's recognition as a refugee by the RSB was clearly based on his status as an Uzbek from Faryab province. After quoting country information sourced from Human Rights Watch concerning the actions of the *Taliban* in Mazar-e-Shariff against male members of the Hazara, Tajik and Uzbek communities, the decision states:

"This information confirms [the appellant's] fear that he will be suspected on account of his Uzbek ethnicity, of being an actual or potential enemy of the Taliban.

Exacerbating this risk is the appellant's personal profile, that is, being a young male who could be a potential soldier for the Uzbek forces, he would be viewed with particular circumspection by the Taliban authorities."

[89] The decision then records that over and above the risk already identified from the appellant's ethnicity age and gender (which is in itself sufficient to qualify him for refugee status), were the Taliban to find out about his Mazar-e-Sharif origin and family background (linking him to the forces of General Dostum) there would be real chance of his arrest, interrogation, severe ill-treatment and perhaps execution at the hands of the *Taliban*.

[90] If the evidence establishes that the appellant is indeed an Uzbek from Mazar-e-Sharif in Faryab province, it follows that, provided he was not subject to the exclusion criteria in the Refugee Convention, he was entitled to be recognised as a refugee in October 2001 because he had a well-founded fear of persecution at the hands of the *Taliban* by reason of his race and membership of a particular social group.

Findings of fact

[91] It is necessary therefore to make findings concerning the appellant's origins and identity before it can be determined whether he was entitled to the refugee status he obtained in October 2001 or, alternatively, whether that status was procured by fraud.

[92] To the Authority, the appellant presented his evidence in a forthright and credible manner. When asked, he was able to provide spontaneous detail concerning aspects of his life in Afghanistan. His wife was a highly credible witness. She had stayed in Meymaneh and Mazar-e-Sharif with the appellant and his family for over a month in 2005. She was accordingly able to name and describe members of his family. The names and descriptions she provided accorded with the information about his family provided by the appellant to the New Zealand Immigration authorities in 2000 and 2001.

[93] The circumstances in which she claims the disclosures of the appellant's background were made to her were entirely natural and plausible and do not suggest that she was subjected to pre-meditated coaching.

[94] Having heard the evidence of the appellant and his wife we are satisfied that the biographical information he provided on his arrival in New Zealand and upon which his recognition as a refugee was based, was truthful. We find that he is indeed an Uzbek from Mazar-e-Sharif, that his name and age are as he claimed in New Zealand from the outset, that he is the eldest of ten siblings in his family and that his father and uncles served with the forces of General Dostum.

[95] A significant point that emerges from the Australian material is that the Australian authorities did not find the account the appellant presented to them regarding his family background to be credible. However, after close testing, they accepted that he was an Uzbek from Afghanistan and found him to be a refugee on that basis.

[96] In his closing submissions, counsel for the Department of Labour submits that doubt still remains as to the appellant's true identity. In support he notes that no one in the Afghani community in New Zealand has corroborated his identity. He also notes that no satisfactory explanation was advanced for the appellant's use of a false name in Australia. It should also be mentioned that counsel asserts that in Australia the appellant claimed to be from a different town and province.

[97] As noted earlier, the explanation advanced by the appellant for the use of the name BB in Australia was that he anticipated having his refugee status claim declined in Australia and had been advised not to use his real name as it would be "tarnished" by a failed refugee claim. The assertion that he claimed to be from a different town and province is incorrect; the Australian decision at page 2 records his claim to be from Meymaneh in Faryab province. With regards to counsel's point concerning the lack of corroboration of his identity, this submission ignores the unchallenged evidence of his wife that in 2005 she spent a month with the appellant and his family in Faryab province, Afghanistan, and that the names she used for his family members were the same as he had disclosed in his refugee and residence forms.

[98] We note that some of the information provided by AA at his interview with Mr Turley in January 2001 contradicts the biographical details claimed by the appellant. In particular, AA asserted that the appellant's real name is "Sadiq" and that he is the offspring of a man named Zahesh and AA's deceased sister whose death long ago had necessitated the appellant being brought up by his maternal grandmother (who is AA's mother). AA also claimed that "Sadiq", unlike the appellant, was an Australian citizen

[99] We note that the interview with AA was terminated after a series of warnings because he was attempting to mislead Mr Turley and the DIMIA officials by lying about various matters. We consider his evidence to be inherently unreliable and prefer that of the appellant and his wife both of whom gave evidence in person and were cross-examined. We reject the allegation made by AA that the appellant's natural mother is deceased, that he was raised by AA's mother and that his father was a person called Zahesh.

[100] Both the appellant and his wife gave evidence that the appellant's mother is alive and is aged in her late 40s or early 50s and that she is approximately twenty years older than the appellant. The appellant's wife spent a month in her company in 2005 and formed a close bond with her. She also got to know the eight

surviving younger siblings to the appellant his mother had borne, the youngest of whom is aged 17 or 18.

[101] It was suggested in counsel for the Department of Labour's opening submissions at [26] that the appellant had (mis)used the refugee process as a means of emigrating from Afghanistan to New Zealand for purposes other than seeking genuine asylum. This submission appears to be based on the appellant's demonstrated lack of fear of the *Taliban* in making two lengthy visits to Afghanistan in 2005. It ignores completely the fact that in November 2001 the *Taliban* were routed from Mazar-e-Sharif by the Northern Alliance following bombardment by American forces and that the departure of the *Taliban* prompted the return of thousands of Uzbek refugees to Faryab province, including the appellant's family.

[102] It simply does not follow that because the appellant did not fear the *Taliban* in Faryab province in 2005, he also did not fear them in 2001 when he was recognised as a refugee. We are satisfied that he did.

[103] The Authority does not overlook the fact that the appellant has entered guilty pleas to three charges under s229A(b) of the Crimes Act 1961 that have arisen from his concealment of his use of the name BB. The charges are that with intent to defraud he used documents, namely the refugee confirmation of claim form, an application to work in New Zealand and an application for residence in New Zealand to obtain benefits, namely, refugee status, a work permit and permanent residence status.

[104] The Police summary of facts provided to the Authority records that as BB, the appellant entered Australia in November 1998 where he was granted refugee status and that he was subsequently detained at the Karantina Detention Centre in Jakarta. The summary records that in each of the documents from which the charges arise the appellant failed to disclose that he was also known by the name BB.

[105] It might be seen as surprising that the criminal charges against the appellant have proceeded while his appeal against the decision cancelling his refugee status had yet to be delivered. The jurisdiction of the Authority is limited however, to the determination of refugee status. It is inappropriate therefore for us to comment on the charges to which the appellant has pleaded guilty or the issue of whether or not he was entitled to various immigration permits.

[106] The most we are able to say is that for the reasons given above, we find that the appellant's refugee status was not, in fact, procured by the withholding of the information about his time in Australia or the use of the name BB.

[107] Unless the appellant was a person who was excluded from the benefit of the Refugee Convention under Article 1F(b), he was a refugee at the time he entered New Zealand and was entitled to the recognition of that status made in the RSB's decision of 12 October 2001.

Assessment of people smuggling allegations

[108] As noted, the issue of exclusion arose during the Authority's preparation of the appeal.

[109] Allegations concerning the appellant's involvement in people smuggling are significant because such involvement, if true, may well have excluded him from the protection of the Refugee Convention under Article 1F(b) which provides that the Convention shall not apply to a person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. In other words, had he been a person to whom Article 1F(b) applied, he would not have been entitled to recognition as a refugee in October 2001.

[110] At the Authority's request, Mr Turley appeared at the hearing and gave evidence on this issue.

[111] The allegations raised in the DIMIA intelligence bulletin on BB produced by Mr Turley are serious. It is alleged that between 1999 and April 2001, a person using the name BB, who is the nephew of the known people smuggler AA, was involved in smuggling Afghan nationals from Indonesia into Australia and New Zealand.

[112] The information about BB in the DIMIA bulletin is attributed to unnamed sources. One such source has claimed that he paid BB, who was known to him as Sadiq, the sum of US\$10,000 in April 2001 to smuggle him to New Zealand. He also claimed that he had been provided with BB's contact details by AA's brother and that BB was living in Puncak at the time. According to the source, BB provided two Afghan nationals with Spanish passports in late April or early May

2001 and disappeared from Indonesia around this time. The source also reports that BB had divorced from his Indonesian wife.

[113] In addition to the allegations in the DIMIA bulletin, AA claimed in his interview that BB had smuggled three or four people to other countries.

[114] The appellant has denied any connection with AA. Specifically, he denies being his nephew and ever having had any involvement in people smuggling. He denies having been previously married to an Indonesian national. He arrived in New Zealand on 2 December 2000. He claims not to have left New Zealand again until 2004. He has provided proof of his continuous presence in New Zealand in the form of his bank records and tax records as well as the other material noted at [71]. Although given the opportunity to provide evidence in response, counsel for the Department of Labour has not done so, nor challenged the appellant's assertion that he was in fact present in New Zealand throughout 2001.

[115] We have accepted earlier in this decision that the appellant is not the nephew of AA and that the information provided about him by AA is not to be relied upon. We accept that the documentary evidence provided by the appellant establishes that he was continuously present in New Zealand in April and May 2001. The DIMIA source may well have paid US\$10,000 in April 2001 to a person known as Sadiq, who was using the identity of BB who may have been the nephew of AA. However we are satisfied that this was not the appellant who has provided evidence establishing that he was at the time residing in Auckland and working at a McDonald's restaurant. Similarly, while it is accepted that a person using the identity BB may have provided Spanish passports to two Afghan nationals in late April or early May 2001 and assisted them to travel from Indonesia to New Zealand, we are satisfied this person was not the appellant for the reasons that the appellant was not in Indonesia at the time.

[116] In the appellant's statement of 26 February 2007, he claimed that within days of his arrival in Bali, he was robbed of the Afghan passport in the name of BB. It is significant that he made this claim prior to the Authority alerting counsel to the existence of the transcript of the interview with AA. In other words, the appellant did not make the claim to have lost control of his passport in June 1999 in response to the allegation that "BB" had been involved in people smuggling, but rather raised the loss of the BB passport spontaneously and without knowledge of its potential significance to the cancellation proceedings.

[117] At [46] of his submissions, counsel for the Department of Labour argues that none of the material provided by the appellant contradicts the allegations in the intelligence bulletin that relate to the period prior to the appellant's arrival in New Zealand. This is true, but only up to a point. The intelligence bulletin contains allegations concerning not only prior to the appellant's arrival but also afterwards. In essence it claims the same person was involved in the activities before and after the appellant's arrival in New Zealand.

[118] It is logical that if the appellant could not have been the person, using the identities BB and Sadiq, who engaged in the post-arrival activities, he also could not be the person engaged in the pre-arrival activities.

[119] Moreover, apart from recording the fact that people smuggling activities being carried out by a person using an Afghan passport in the name BB first came to light in Indonesia in June 1999, there are no other specific allegations relating to BB in the DIMIA bulletin relating to the pre-arrival period. It notes that many undocumented Afghans arrived in Australia during the period July 1998-2000. It also notes that one of these appears to have been on the same flight that the appellant arrived in Sydney on, on 29 May 1999. This information falls far short of satisfying the test that there be serious reasons for considering the appellant has committed a crime of the type that would exclude him from the protection of the Refugee Convention.

[120] No other information linking the appellant to the AA syndicate has been provided by the Department of Labour, who did not raise the exclusion of the appellant as a ground for the cancellation of his refugee status or a ground for opposing the appeal. The information concerning the links between the appellant and AA were sourced entirely by the Authority and would not have been ventilated at the appeal hearing otherwise.

[121] Mr Turley impressed the Authority as a reliable witness. His evidence was clear and balanced. He did not claim to have ever met the appellant prior to the hearing and based his belief that the appellant was AA's nephew Sadiq, and had been involved in the AA syndicate using the name BB, on information provided by AA himself and DIMIA. None of the specific allegations that link the appellant to people smuggling activities carried out by a person using the BB passport withstand scrutiny. Similarly the claim that the appellant is a member of AA's family is contradicted by evidence that we have found to be reliable.

[122] We have noted Mr Turley's evidence that the pool of information assembled by Operation Ahmad has been in the possession of the Department of Labour since 2002. There has been ample opportunity to put any further evidence linking the appellant to "Sadiq" before the Authority. It is recorded that following the hearing, counsel for both parties were given leave to provide further relevant evidence to us and that counsel for the Department of Labour declined the opportunity to do so. We must conclude that no further relevant evidence is available.

[123] We are satisfied that, on the evidence before us, serious reasons do not exist for considering that the appellant committed a serious non-political crime prior to arriving in New Zealand in December 2000. The evidence before us does not establish that the appellant is "Sadiq" and does not establish that the appellant has been involved with the activities of the AA syndicate. Such involvement is therefore not a matter the concealment of which procured his refugee status.

CONCLUSION

[124] The following determination is made:

- (a) The appellant's refugee status was not procured by fraud, forgery, false or misleading representation or concealment of relevant information.
- (b) It is inappropriate therefore to cease to recognise the appellant as a refugee.

[125] The appeal is granted.

"M A Roche"

M A Roche
Chairperson