REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

AT AUCKLAND	Application No 76436
IN THE MATTER OF	An application pursuant to s129L of the Immigration Act 1987 to cease to recognise a person as a refugee
BETWEEN	A refugee status officer of the Department of Labour **APPLICANT**
AND	**RESPONDENT**
BEFORE	C M Treadwell (Member)

Counsel for the Applicant:	J Hopkins
Counsel for the Respondent:	D Ryken
Dates of Hearing:	23 February and 20 & 21 May 2010
Date of Decision:	30 June 2010

DECISION

INTRODUCTION

[1] This is an application by a refugee status officer under s129L(f)(ii) of the Immigration Act 1987 ("the Act") for a determination that the Authority should cease to recognise the respondent as a refugee on the grounds that such recognition may have been procured by fraud, forgery, false or misleading representation or concealment of relevant information (hereinafter "fraud").

[2] The respondent arrived in New Zealand in June 1997 with his brother-in-law, AB, both claiming to be Russian nationals. They were each recognised as

refugees by the Authority on 17 December 1998 (the respondent's appeal was *Refugee Appeal No 70739* (17 December 1998). The brother-in-law, AB, has since been subject to a similar 'cancellation application'. That application was declined by a different panel of the Authority in *Refugee Application No 76127* (29 August 2008) and AB continues to be recognised as a refugee.

[3] As to the present proceedings, the refugee status officer alleges that the respondent was born in Kokshetau, Kazakhstan in February 1961 and, at the time of determination of his refugee status in 1998, held (or could have obtained as a mere formality) Kazakh citizenship, all of which information he failed to disclose in the course of his refugee claim. As a result, the refugee status officer asserts, his recognition as a refugee by this Authority may have been obtained by fraud.

[4] On 11 February 2008, the refugee status officer lodged with the Authority an application for a determination that it cease to recognise the respondent's refugee status.

Proceedings *in absentia*

[5] The Authority attempted to serve notice of the application on the respondent at his known addresses, including his last known address. At one address, an occupant advised he thought the respondent had gone to Kazakhstan.

[6] The Authority concluded that it was "highly unlikely" that the respondent could be personally served in New Zealand. Following the reasoning in *Refugee Application No 75539* (29 June 2007), it concluded that reasonable steps had been taken to effect personal service. It determined that the respondent had failed, without reasonable excuse, to attend a notified interview with the Authority and that it would hear the application without an interview.

[7] The decision of the Authority is set out in *Refugee Application No 76189* (9 April 2008). No useful purpose would be served by repeating it *in extenso*. It suffices to record that it determined that the grounds of application disclosed sufficient evidence to meet the "may have been procured by fraud" threshold and that, in the absence of the respondent, the evidence before it did not establish that the respondent faced a real chance of being persecuted in Kazakhstan for any reason, and that it was appropriate to cease to recognise him as a refugee.

Application for re-hearing

[8] After the decision of the Authority was delivered, the respondent returned to New Zealand and, on 27 October 2009, lodged an application for re-hearing of the substantive application. The application to rehear was initially opposed by the applicant but, at the hearing, Ms Hopkins conceded (properly, in the view of the Authority) that the substantive application ought to be reheard and did not oppose the application to rehear. The Authority advised counsel that the application to rehear would be granted and that it would deliver its reasons in due course.

[9] Those reasons are as follows.

[10] The Authority has long recognised a narrow discretion to grant a rehearing, on the principles set out in *R v Kensington and Chelsea Rent Tribunal ex p MacFarlane* [1974] 3 All ER 390 (QBD), namely that, where the disposal of a proceeding had occurred in the absence of a party who, through no fault of his own, was unaware of the date of the hearing, then there is jurisdiction to re-open the matter. In *Kensington and Chelsea* , the Court held:

> [W]here ... the tribunal has acted impeccably so far as its own duty is concerned, has in other words sent out the right notices by the right means at the right time and has had no indication that the notices have gone astray or that the applicant for any other reason cannot attend, then an order made in those circumstances is a regular order and not normally open to challenge on certiorari. However the disappointed party has what is certainly a cheaper if not more effective remedy open to him, that he can go back to the tribunal, explain why he did not attend, and the tribunal will then have the jurisdiction if it thinks fit to re-open the matter and to reconsider its decision in the light of representations made by the absent party.

[11] For the application of the *Kensington and Chelsea* principle in the refugee context in New Zealand, see *Refugee Appeal No 680/92* (27 February 1995) and, more recently, *Refugee Appeal No 75826* (20 December 2007).

[12] Here, it is clear that the respondent did not have actual notice of the application for a determination that the Authority cease to recognise his refugee status and thus did not attend the hearing. The reality is that, through no fault of his own, consideration of the application took place without the respondent having the opportunity to present evidence or make submissions.

[13] The *Kensington and Chelsea* principle gives the Authority the discretion to grant such an application to rehear “if it thinks fit”. As to the exercise of that discretion, the respondent’s explanation – that he was out of the country and was never actually served with, nor had actual notice of, the application – is patently reasonable. Further, and importantly, the evidence establishes that he has a good

arguable case. Coupled with his non-appearance at the original hearing, for reasonable cause, the Authority determines that it is appropriate to exercise its discretion to order a rehearing.

[14] The decision in *Refugee Application No 76189* (9 April 2008) is hereby set aside.

[15] It is now necessary to turn to the substantive application

JURISDICTION

[16] A refugee status officer may apply to the Authority, under s129L(1)(f)(ii) of the Act, for a determination as to whether the Authority should cease to recognise a person as a refugee where that status may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information.

[17] The jurisdiction of the Authority to hear such applications is set out in s129R(b) of the Act:

> In addition to the function of hearing appeals from decisions of refugee status officers in relation to refugee status, the Authority also has the function of determining applications made by refugee status officers under s129L(1)(f) as to whether –
>
> (a) ...
>
> (b) The Authority should cease to recognise a person as a refugee, in any case where the earlier recognition by the Authority of the person as a refugee may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information; or
>
> (c) ...

[18] It is a two-stage test. The Authority must first determine whether refugee status "may have been procured" by fraud or the like. If so, it must then determine whether to "cease to recognise" the person as a refugee. That consideration (in effect, whether to cancel the recognition of refugee status) does not automatically follow, since it will depend on whether the person currently meets the criteria for refugee status. This second stage is the Authority's orthodox, forward-looking enquiry into whether a claimant – at the date of the fresh determination – satisfies the terms of the Refugee Convention. See ss129P(1) and 129S(b) of the Act and *Refugee Appeal No 75392* (7 December 2005) at [10]-[12].

[19] As to the first limb – whether refugee status "may have been procured" by fraud – responsibility for adducing the evidence to support such a finding rests with

the Department. See, for example, *Refugee Appeal No 75989* (14 May 2007), at [6] and also *Refugee Application No 75891* [16 April 2007], at [7].

[20] Against this procedural background, it is now necessary to address the respondent's claim to refugee status and the present application.

THE RESPONDENT'S REFUGEE CLAIM

[21] The grounds upon which the respondent was granted refugee status are set out in *Refugee Appeal No 70739* (17 December 1998). The following is a summary of the claim.

[22] The respondent told the Authority that he was a widower in his mid-30s, from North Ossetia. His father had been Ingush and his mother Chechen. He was born and raised in ABC village in North Ossetia, close to the city of Vladikavkaz. In 1980, he was conscripted into the Soviet military for two years. Thereafter, he returned to Vladikavkaz and studied engineering part-time, graduating in 1988. He then worked as an engineer in a town near Vladikavkaz. He married in 1990 and, in June 1991, his daughter was born.

[23] In 1992, ethnic tensions led to the outbreak of the Ingush-Ossetian conflict. One evening in October 1992, Ossetian men confronted the respondent at home. He was verbally abused and knocked unconscious. When he regained consciousness, he found himself tied up in the basement of a school with approximately 100 other Chechen and Ingush.

[24] The respondent was held in the basement for some three days with little food. He and others were then transferred to DEF village and traded for Ossetians. His sister, wife and child had, he discovered, also been traded in this way. His mother had refused to leave the home and had been killed by gunfire.

[25] On his arrival in Nazran in Ingushetia, the respondent registered as a displaced person and was issued with identity documents. After two weeks, he learned that his wife and child were with his sister and her husband AB in Grozny. On reaching there, he registered his presence at their home with the local police.

[26] The respondent and his family remained living with his sister and AB in Grozny until war broke out in Chechnya. In early 1995, AB's home was bombed in an air raid, while the respondent and AB were out. Though they searched for

some time, there was no sign that their families had survived the blast. They decided to leave Grozny for Nazran, believing that it was safer there.

[27] Eventually, after walking for a day or so, they reached a camp at Nazran. There, they were provided with food and humanitarian aid by the United Nations and other relief organisations. They were issued with identity certificates and "Forced Migrant Certificates" by the Ingushetian Department of Internal Affairs. They remained in Nazran for two years, in difficult conditions.

[28] Believing that they would find safer residence in Kazakhstan, the respondent and AB left for Kazakhstan in the beginning of 1997. They crossed the border hidden in a truck, in January 1997, and went to the town of Almaty.

[29] The respondent and AB registered at W, an Ingush Cultural Centre and refugee aid organisation in Almaty. Both were given temporary shelter, staying with a couple who worked at the centre. After two days, AB moved out to find alternative accommodation.

[30] The situation for internally-displaced Chechens and Ingush was no better in Almaty than in Nazran. The respondent, dark complexioned, encountered hostility from the general public and the authorities. On one excursion, he was arrested nine times, despite explaining to the police that he had registered at W. Faced with such hostility, he generally left it to AB to deal with the Kazakhstan authorities.

[31] At this time, AB re-established links with AD, a casualty he had helped carry from Grozny to Nazran in January 1995. AD had lived in Australia and suggested that he and the respondent go to New Zealand. AD offered to help with their travel arrangements and obtained Kazakhstan passports, visas and airline tickets. The passports, in their names, were obtained on the black market and stated that both men had been born in and were citizens of Kazakhstan.

[32] On 10 June 1997, the respondent and AB left Kazakhstan by air. They arrived in New Zealand on 13 June 1997. The respondent applied for refugee status on 26 June 1997 and was interviewed by a refugee status officer on 8 October 1997. His application was declined on 28 November 1997.

[33] The respondent's appeal was heard by the Authority (differently constituted) on 7, 8 and 24 April 1998. A decision granting him refugee status was delivered on 17 December 1998.

[34] In brief, the Authority found the respondent and AB (the claims were heard

together) to be truthful. As to the respondent, the Authority found that, cumulatively, his ethnicity, physical features, lack of valid identity documents, 'forced migrant' status and the country information on discrimination against and mistreatment of Caucasian people led to a finding of a real chance of the respondent suffering serious harm when confronted by Russian officials, particularly during the period in which he would have to make his way from a port of entry to Ingushetia or Chechnya, at which time he would be vulnerable.

[35] In reliance on the grant of refugee status to him, the respondent was subsequently granted permanent residence in New Zealand and, later, became a New Zealand citizen.

APPLICATION FOR DETERMINATION TO CEASE TO RECOGNISE AS REFUGEE

[36] It will be recalled that the application for a determination that the Authority cease to recognise the respondent's refugee status asserts:

(a) The respondent was not born in Russia but was, in fact, born in Kokshetau, Kazakhstan in February 1961 and, at the time of determination of his refugee status in 1998, held (or could have obtained as a mere formality) Kazakh citizenship, all of which information he failed to disclose in the course of his refugee claim.

(b) The Kazakhstan authorities advise that the respondent was issued Kazakh citizenship in February 1992.

[37] As a result, the refugee status officer asserts, his recognition as a refugee by this Authority may have been obtained by fraud.

[38] The crux of the argument is that, if the respondent was a Kazakh national in 1998, when his refugee status was recognised, that was a material consideration which he should have disclosed to the Authority because Article 1A(2) of the Convention requires that the claim be measured against the person's country of nationality. It further provides:

> In the case of a person who has more than one nationality, the term the country of his nationality shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

[39] The requirement that a claimant demonstrate a lack of protection in each country of which he or she is a national reflects the underlying assumption in refugee law that, where available, national protection takes precedence over international protection. See J C Hathaway, *The Law of Refugee Status* (1991, Toronto) p57.

[40] Thus, it is argued for the applicant, the respondent's failure to admit to his Kazakh citizenship prevented the Authority from considering his claim to refugee status as against his right to reside in Kazakhstan.

[41] Alternatively, it is argued, even if he was *not* a Kazakh citizen in 1998, his birth there means that the obtaining of Kazakh citizenship would have been a mere formality and he was equally under an obligation to disclose his Kazakh birth, which would have founded such an application. As to the "mere formality" threshold for determining whether the ability to obtain another country's citizenship is relevant to the refugee enquiry, see for example *Refugee Appeal No 76332* (1 September 2009) at [34]-[40] and *Refugee Appeal Nos 72558/01 & 72559/01* (19 November 2002) at [83], citing *Tatiana Bouianova v Minister of Employment and Immigration* [1993] FCJ No 576; (1993) 67 FTR 74 (FC:TD).

[42] In support of the application, evidence was given orally and by way of a written statement dated 5 February 2010 by the refugee status officer, Erin Jones.

[43] The applicant submits, in support of the application, the following:

(a) A *note verbale* dated 26 November 2007 from the Kazakhstan Embassy in Moscow to the New Zealand Embassy in Moscow, attaching an extract from the Kazakhstan "documentary database of population" relating to the respondent;

(b) Kazakhstan Law No 1017-XII of 20 December 1991, "On Citizenship of the republic of Kazakhstan", including amendments by Presidential degree in 1995 and again, by statute, in 2002. The Law came into force on 1 March 1992;

(c) "Text of Russian-Kazakh Agreement on Obtaining Citizenship" – *BBC Summary of World Broadcasts*, 2 February 1995;

(d) Two reports (and accompanying email correspondence) by Dr Anar Ibrayeva, a lawyer with postgraduate qualifications in humanitarian law. Until recently, she was Director of a branch of the Kazakhstan

International Bureau for Human Rights and Rule of Law for 10 years and is an observer member of the Kazakhstan Commission on Granting Refugee Status. Her reports seek to explain the application of Kazakhstan citizenship law.

[44] In order to properly understand the case for the applicant, it is necessary to address those documents in greater detail.

Extract from documentary database

[45] The document provided by the Kazakhstan Embassy relevantly states (as translated):

[photograph of respondent]

Identity card No:	[AAAAAAA] Issued: 21.11.1995, valid until 21.02.2006
Passport:	[ZZZZZZZZ] Issued: 23.11.1995, valid until 21.02.2006
Issued by:	Ministry of Internal Affairs of the Republic of Kazakhstan, Almaty
Family name:	[given]
Given name:	[given]
Patronymic:	[given]
Date of birth:	[given]
Gender:	Male
Ethnicity:	Ingush
Place of birth:	Kazakhstan, North-Kazakhstan Region Kokshetau
Place of residence	
Region:	North-Kazakhstan region
Town:	Kokshetau
Street:	Stasovoi 13
Citizenship:	Kazakhstan
Previous citizenship:	Kazakhstan
Issue based on:	Ex-USSR passport [number given]
Date of Issue:	19.02.1992
Place of Issue:	Kokshetau

[46] The applicant's argument is that this document establishes that the respondent held Kazakhstan citizenship at least from 23 November 1995, when it appears that a Kazakh passport was issued to him.

Kazakhstan's citizenship laws

[47] The relevant date for determining whether the respondent procured refugee status by fraud is the date of determination of his appeal (17 December 1998). It is thus necessary to identify the law in force in Kazakhstan at that date.

[48] According to the United Nations High Commissioner for Refugees ("UNHCR"), Kazakhstan's 1991 nationality law was originally published in Russian, in the newspaper *Kazakhstankaya Pravda*, on 14 January 1992. The 1991 law underwent two amendments – the first in 1995, by Presidential decree and the second, in 2002, by legislative amendment. It follows that the relevant version is the one which incorporates the 1995 amendments but not the 2002 amendments.

[49] The applicant has approached sources in Kazakhstan in order to find an official translation, without success. Neither counsel (nor the Authority) has been able to locate an official version, in any language, of the 1991 Law as amended in 1995. The best at hand is the 1991 Law, as translated by UNHCR on its *Refworld* CD-Rom, July 1996, supplemented by the 'noted-up' 2002 version recorded by UNHCR at www.unhcr.org.

[50] Article 3 of the 1991 law, as translated by UNHCR, relevantly provides (clause numbers added here for clarity):

Article 3 - Possession of Citizenship in the Kazakhstan Republic

1. Citizens of the Kazakhstan Republic are persons who:

    a) are residing permanently in the Kazakhstan Republic on the day this law becomes effective;

    b) have acquired citizenship in the Kazakhstan Republic in accordance with this law.

2. Except in cases foreseen by international treaties, possession of citizenship in another state by a person who is a citizen of the Kazakhstan Republic is not recognized.

3. The right of possession of citizenship in the Kazakhstan Republic in addition to citizenship in other states is recognized in relation to all Kazakhs who had been forced to leave the republic and who reside in other states, unless this contradicts the laws of the states of which they are citizens.

4. The Kazakhstan Republic creates conditions for the return, to its territory, of persons who had been forced to leave the republic in periods of mass repressions, due to forced collectivization and as a result of other inhumane political acts, of their progeny, and of Kazakhs living in former Union republics.

Article 10 - Grounds for Acquisition of Citizenship

1. Citizenship in the Kazakhstan Republic is acquired:

a) by birth;

b) as a result of naturalization in the Kazakhstan Republic;

c) on grounds foreseen by international treaties of the Kazakhstan Republic;

d) on other grounds foreseen by this law.

Article 15 - Naturalization in the Kazakhstan Republic

1. Citizens of other states and persons without citizenship may petition for naturalized citizenship in the Kazakhstan Republic in accordance with this law.

2. The decision on a petition for naturalized citizenship in the Kazakhstan Republic is made by the president of the Kazakhstan Republic.

Article 16 - Conditions of Naturalization in the Kazakhstan Republic

1. Persons who have been permanently residing in the Kazakhstan Republic for not less than 10 years or who are married to citizens of the Kazakhstan Republic may become naturalized citizens of the Kazakhstan Republic.

2. The conditions foreseen by the first part of this article are not a requirement of naturalization in the Kazakhstan Republic for juveniles, incompetents, and persons who have rendered special services to the Kazakhstan Republic, as well as for persons forced to leave the territory of Kazakhstan for political reasons, and their progeny, if they have returned for permanent residence in the Kazakhstan Republic as their historical motherland.

[51] The reports by Dr Ibrayeva, explaining the application of these laws, are discussed in detail later.

Russian-Kazakh Agreement on Obtaining Citizenship

[52] The applicant also submits that a special relationship existed between Kazakhstan and Russia by 1998.

[53] On 21 January 1995, *Kazakhstankaya Pravda* published the text of an agreement for the simplification of processes for nationals of one country to obtain the citizenship of the other. In a *BBC Summary of World Broadcasts* article of 2 February 1995, entitled “Text of Russian-Kazakh Agreement on Obtaining Citizenship”, the text of the Agreement was stated to include:

Article 1

1. Each party affords its citizens arriving for permanent residence in the territory of the other party simplified (registration) procedure for the acquisition of citizenship, when one of the following conditions are present:

    a) when the applicant was a citizen of the Kazakh SSR or RSFSR and simultaneously a USSR citizen in the past, resided in these territories as of 21st December 1991, and has been permanently residing there up to the entry into force of this agreement….

2. The procedure indicated in point 1 of this Article is applicable to citizens of the parties permanently residing in the territory of the other party, regardless of the period of residence in the territory of the party of citizenship to be acquired.

3. The relinquishment of citizenship with respect to one party and acquisition of citizenship with respect to the other party are effected on the basis of the free will of the persons concerned.

THE CASE FOR THE RESPONDENT

[54] The respondent disputes the assertion that his refugee status may have been procured by fraud and says that the evidence he gave in his refugee claim in 1998-2000 was truthful in every respect, save that he admits that he was born in Kazakhstan. He says that that omission did not procure his refugee status because he did not have, and was not entitled to, Kazakhstan citizenship.

[55] According to the respondent, his family were among the Ingush and Chechen populations forcibly displaced by Stalin in 1944, when they were falsely accused of collaborating with the Nazis. The entire Ingush and Chechen populations were deported to Kazakhstan, Uzbekistan, and Siberia. The respondent's parents lived for many years in a refugee camp near Kokshetau. The respondent was born in that camp in 1961. He lived there until his parents returned to North Ossetia when he was about 5 years old, following Khrushchev's rehabilitation of the Ingush and Chechen people.

[56] The respondent admits that he withheld this information from the New Zealand authorities on arrival because he was afraid that he would be considered a Kazakh national (or to have the ability to become one) and that his refugee claim would fail.

[57] The respondent produces the following documents of relevance:

(a) Forced Migration Certificate dated 2 February 1995, issued to the respondent by the Federal Immigration Service of the Republic of Ingushetia, Russian Federation (with attached certificate of 2 February 1995 of loss of passport).

(b) Federal Law No 115-FZ of 25 July 2002 on the legal position of Foreign Citizens in the Russian Federation;

(c) USSR Military Service Record card dated 29 April 1980, in the name of the respondent, issued by the enlistment office in North Ossetia and

noting his military service from 1980-1982;

(d) Certificate dated 17 April 2009, issued by the Russian Federal Migration Service, confirming that the respondent registered with the Migration Service of the Republic of Ingushetia on 8 November 1992 and was on their books as a "forced settler' from 1995 to 1996, having arrived there from North Ossetia;

(e) Kazakhstan Passport No XXXXXXX, in the respondent's name, with issue date of 23 April 1997, valid for one year (this being the passport on which he travelled to New Zealand).

Submissions

[58] For the applicant, Ms Hopkins has submitted opening submissions dated 18 February 2010 and closing submissions dated 28 May 2010. For the respondent, Mr Ryken has tendered opening submissions dated 8 February 2010 and closing submissions dated 15 June 2010.

ASSESSMENT

[59] The first issue to be addressed is whether the refugee status of the respondent may have been procured by fraud.

[60] At the outset, it is necessary to record the applicant's submission that the respondent gave conflicting and unsatisfactory evidence when questioned about some aspects of the background to his original refugee claim.

[61] It is not intended to traverse the minutiae of the revisiting of the original refugee claim. There were aspects of the respondent's evidence which, in other circumstances, might arguably be cause for concern. It must be borne in mind, however, that the events in question occurred some 13 to 18 years ago, during a period of significant civil unrest in which, the respondent says, he was essentially homeless and suffered prolonged deprivation and the loss of his family. The Authority does not find that his credibility as to the core of his refugee claim (save for his place of birth) was impugned to the point that it should be disbelieved. As the appeal panel noted in 1998, in much greater proximity to the events:

> The Authority had the opportunity of hearing the appellant's evidence over the course of some two days, and also extensive corroborative evidence from his

> brother-in-law, whose appeal was jointly considered by this Authority. The Authority found the evidence of both appellants to be compelling. The sheer detail of the evidence proffered and the frank and spontaneous manner in which it was delivered leaves the Authority with no doubt that the appellant's account is true.

Jurisdictional threshold – "may have been procured by fraud"

[62] "May have been" does not require the Authority to find that the person's refugee status *was* procured by fraud or the like. As held in *Refugee Appeal No 75563* (2 June 2006), at [20]:

> "…the term 'may have been' signals a standard of proof that is lower than the balance of probabilities but higher than mere suspicion. Beyond that it is not realistic to define an expression that is deliberately imprecise."

[63] For the person's refugee status to have been "procured" by fraud or the like, there must be some causal connection, some nexus, between the information falsely given, or improperly withheld, and the determination that the person met the criteria for recognition as a refugee.

[64] Given the respondent's admission that, in 1998, he withheld the information that he had been born in Kazakhstan, the narrow question which arises is whether the evidence before the Authority today establishes that fraud is positively discounted. If it does not, then, for the reasons given in *Refugee Application No 76079* (6 January 2009) and *Refugee Appeal No 75574* (29 April 2009), the Authority ought to find that the "may have been" threshold is established.

Kazakhstan's Citizenship Laws

[65] In addressing counsels' submissions on the relevance of Kazakhstan's citizenship law, it is convenient to commence with the submissions for the applicant. Summarised, Ms Hopkins' submissions (at para 19 *et seq*) are that the respondent was either a Kazakh citizen in 1998 or could have obtained citizenship as a mere formality;

Always a Kazakh citizen

(a) As to the possibility that he always was a Kazakh citizen, the respondent has not shown any independent evidence to show that he was a Russian citizen in 1992.

Became a Kazakh citizen

(b) As to the possibility that he had become a Kazakh citizen by 1998 by

not disclosing his Russian citizenship, the 'documentary database' record indicates that he *is* a Kazakh citizen;

Could have become a Kazakh citizen

(c) Even if he was a Russian citizen in 1998, the respondent could have obtained Kazakh citizenship as a mere formality, through the terms of the 1995 "Russian-Kazakh Agreement on Obtaining Citizenship". Dr Ibrayeva asserts that the respondent could have obtained citizenship in 1998 because he was born there and that the respondent could be a Kazakh citizen, if the Kazakh authorities were unaware of his citizenship of another country. Further, the effect of a failure to disclose his Russian citizenship to the Kazakh authorities is not an issue for the Authority to now determine. If he *did* have Kazakh citizenship, it is information which the appeal panel in 1998 should have had before them to consider and "may have been procured by" is established;

Right of residence

(d) Even if he was not a Kazakh citizen but was a Russian citizen, the respondent could "live and reside freely" in Kazakhstan as a member of the Commonwealth of Independent States.

[66] Each of these submissions requires greater scrutiny.

Always a Kazakh citizen

[67] Prior to Kazakhstan's secession from the former USSR on 16 December 1991, there was no internationally-recognised Kazakhstan citizenship. Any argument that the respondent was always a Kazakh citizen must take, as its starting point, the birth of the Republic of Kazakhstan on that date. That this date is key is evident in the Article 3(1)(a) recognition as citizens of persons who "are residing permanently in the Kazakhstan Republic on the day this law becomes effective".

[68] It is clear from the evidence of Dr Ibrayeva that being born before 18 December 1991 on that part of the then-USSR which would later become the independent Republic of Kazakhstan does not mean that the person is someone who, without more, acquires Kazakh citizenship under Article 10(1) "by birth".

Although the respondent's birth near Kokshetau was made clear to her, she does not say, in either of her two opinions, that the mere fact of his birth suffices. If such an interpretation of the law was correct, it would have been dispositive of the matter. Clearly, it is not.

[69] Further, counsel's submissions that the respondent has not provided any evidence of his Russian citizenship as at 1992 (a citizenship which must logically dispose of this limb of the applicant's argument) is not correct. His 1980-1982 USSR Military Service certificate records him as being of Ingush ethnicity and his Forced Migration certificate, issued in Ingushetia on 15 May 1995, records his citizenship as Russian. Further, his registration as a displaced person in Kazakhstan in 1995 strongly indicates that he was a Russian citizen (there is no suggestion that he was a national of any third country and it is difficult to comprehend why a Kazakh national would register himself as a refugee in Kazakhstan unnecessarily).

[70] Dr Ibrayeva is careful to say that even if the respondent could have obtained citizenship in 1998 as a result of being born there, it would only have been possible if the Kazakh authorities were unaware of his Russian citizenship. This would, inevitably, have required the respondent to lie in his application to the Kazakh authorities and for him to obtain Kazakh citizenship by unlawful means. Ms Hopkins argues that the effect of a failure to disclose his Russian citizenship to the Kazakh authorities is not an issue for the Authority to now determine. But that is the wrong question. It is not the effect of the failure to disclose it which is relevant but the acknowledgement inherent in the submission that the respondent was not entitled to Kazakh citizenship if he remained a Russian national.

[71] It is clear that dual nationality is absolutely prohibited by Kazakh law, even under the 1995 treaty with Russia. It is not equivocal. Nor was it in 1998. On the face of the Kazakhstan Citizenship Law, the respondent's Russian nationality was an absolute bar at law to his acquisition of Kazakhstan citizenship. Dr Ibrayeva tacitly admits as much.

Became a Kazakh citizen

[72] The primary support for this submission by the applicant is the extract from the Kazakhstan 'documentary database' which states, on its face, that the respondent became a Kazakhstan citizen in or about November 1995, as a result of having been issued an 'ex-USSR' passport in Kokshetau on 19 February 1992.

It also states that he was issued a Kazakh passport on 23 November 1995.

[73] The difficulty with the applicant's submission that this provides evidence of the respondent's Kazakhstan citizenship as from 1995 (and, therefore, the procurement of refugee status by fraud), is that this information is consistent with the account given by the respondent when he applied for refugee status in 1998. The Authority recorded in its decision, at p12, that:

> AD offered to help them with their travel arrangements and accordingly proceeded to obtain Kazakhstan passports, the relevant visas and airline tickets to New Zealand. The passports, while in the names of both the appellant and AB respectively, had been obtained on the black market. These "tourist passports" falsely declared that the appellant and AB had both been born in and were citizens of Kazakhstan. The passports obtained had a low 'street-market' value given that the Kazakhstan government had issued a decree that such passports were due to expire in July 1997 and that outward travel beyond that date would not be permitted.

[74] It would be consistent with that evidence that a bribe was paid to have official records tampered with so that a passport could be 'issued'.

[75] It might be thought that the reference to an "ex-USSR" passport being issued in Kazakhstan in November 1992 would point to the respondent having Kazakhstan citizenship at that date. In fact, it simply raises further suspicions about the correctness of the 'documentary database' record. First, such a record conflicts with the 1995 Forced Migration certificate which recorded the respondent as being in North Ossetia and being a Russian citizen. Second, it is surprising that the respondent would get a further passport in 1995 if he already had one. Third, it is incomprehensible that the respondent would have registered himself as a refugee with an NGO in Kazakhstan if, in fact, he was already a citizen of that country. Fourth, the 'documentary database' record shows him being issued an identity card only two days before the 1995 passport was issued – suggesting that the identity card was issued as a step in the issue of a passport. In any event, if he was already a Kazakh national from 1992, it would be surprising that he would still need to obtain an identity card in 1995, three years later. Fifth, and most compelling, the 'documentary database' record gives an entirely different serial number for the 1995 passport to the 1995 passport on which he arrived in New Zealand. Such an anomaly points to "fixed" records.

[76] It is clear that the 'documentary database' record is of uncertain correctness – a condition which supports the evidence always given by the respondent, that he was not a Kazakh citizen in 1995 and that he illegally obtained a Kazakh passport on the black market.

Could have become a Kazakh citizen

[77] The applicant submits that, even if the respondent was not a Kazakh citizen in 1998, he could have become one as a mere formality. It will be recalled that a claimant is to be regarded as having the nationality of a country if he or she could acquire citizenship as a mere formality.

[78] The attention of the Authority is drawn by Ms Hopkins to the 1995 "Russian-Kazakh Agreement on Obtaining Citizenship", which was designed to simplify procedures.

[79] In fact, it appears that obtaining Kazakh citizenship would not have been a mere formality. In answer to questions put to her by the Department of Labour, Dr Ibrayeva responded as follows:

> **If not [a citizen merely by birth], would this person have been able to obtain citizenship [in 1997/98]?**
>
> Yes, the applicant could obtain citizenship of Kazakhstan in 1997 on the basis of "by birth" principle, as he was born in Kazakhstan. This conclusion is based upon article 10 paragraph 2 of the Law of Kazakhstan "On Citizenship".
>
> In this case he had (according to article 16 of the Law of Kazakhstan "On Citizenship") to correspond to one of the four following conditions:
>
> 1. Permanently reside in Kazakhstan for at least 5 years;
> 2. Be married to a citizen of Kazakhstan…. ;
> 3. [*Here, Dr Ibrayeva initially indicated that certain types of employment would suffice but later withdrew this condition on realising it had been inserted by the 2002 amendment and was thus irrelevant to a consideration of circumstances in 1997/98*]
> 4. Be a citizen of one of the union republics, but have one of his close relatives – the citizens of Kazakhstan: the child, spouse, parent sister, brother, grandfather or grandmother. Here, there is no requirement for residency in Kazakhstan.

[80] Clearly, the respondent could not obtain Kazakh citizenship as a mere formality in 1998. He had not been permanently residing in Kazakhstan for five years, was not married to a Kazakh citizen and did not have any close relatives living in Kazakhstan.

[81] It is noted that the 'mere formality' requirement was considered by the Federal Court of Canada in *Williams v Canada* [2005] FCJ No 63, [2005] FCA 126. There, Decary JA, delivering the decision of the whole Court, was required to consider the 'mere formality' issue in respect of a Rwandan national who could obtain Ugandan citizenship, contingent only on her renouncing her Rwandan

citizenship. In rejecting as "much too broad" the submission that citizenship is a fundamental right no one should be compelled to renounce, Decary JA held at [22] that the true test is:

> … if it is within the control of the applicant to acquire the citizenship of a country…. While words such as "acquisition of citizenship in a non-discretionary manner" or "by mere formalities" have been used, the test is better phrased in terms of "power within the control of the applicant" for it encompasses all sorts of situations, it prevents the introduction of a practice of "country shopping", which is incompatible with the "surrogate" dimension of international refugee protection….

[82] It is not necessary to decide, in the present proceedings, whether "as a mere formality" or "power within the control of the applicant" better expresses the test. On either measure, the respondent could not have met the Article 16 terms for obtaining citizenship in 1998. Nor, of course, is it necessary to determine here whether the renunciation of another nationality is more than a mere formality (either generally or in a given case). The reasoning of Decary JA, particularly at [28]-[32], requires greater scrutiny than is called for here.

Right of residence

[83] Although not a point raised in the Notice of Application, or put to the respondent in the hearing, counsel for the applicant submits in her closing submissions that the respondent had a right of indefinite residence in Kazakhstan because of his Russian citizenship and the membership of both countries in the Commonwealth of Independent States. No evidence is put forward in support.

[84] The first point to be made (and one which is dispositive of the matter) is that, even if true, the assertion draws solely on information which the respondent made known to the Authority in 1998 – that he was a Russian citizen and that Russia and Kazakhstan are members of the Commonwealth of Independent States. It is not drawn from information withheld by the respondent and cannot be said to have procured his refugee status.

[85] If more were needed, the applicant has adduced no evidence to support the proposition and refers to no authority or sources for it. Indeed, the website of the International Organisation for Migration (www.iom.ch) indicates that, among CIS member states, residency is subject to national laws and regulations, as well as bilateral arrangements and that residency permits are required. It does not appear on the evidence at hand that the respondent has a right of residence, as a mere formality, in any other CIS state or that such residency would give the holder the rights normally accruing to a national.

Conclusion on the first issue

[86] The Authority is grateful to Ms Hopkins for her careful and thorough submissions. Having now seen and heard the respondent, however, and having had the chance to review a substantial quantity of evidence, much of which was not available to the Department at the time the application was commenced, the Authority is satisfied that, while the respondent did withhold some information, it has proved to be incidental and did not procure his refugee status. The evidence does not establish that his refugee status may have been procured by fraud.

[87] Given that finding, there is no jurisdiction for the Authority to consider the second limb of its jurisdiction and the application must be declined.

CONCLUSION

[88] It is concluded that:

(a) The evidence does not establish that the respondent's refugee status may have been procured by fraud, forgery, false or misleading representation or concealment of relevant information; and

(b) his refugee status should continue to be recognised.

[89] The application is dismissed.

"C M Treadwell"

C M Treadwell
Member