

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76271

AT AUCKLAND

Before: B A Dingle (Member)

Counsel for the Appellant: K H Lowe

Date of Decision: 12 January 2009

DECISION

[1] This is an appeal against a decision of the Refugee Status Branch ("the RSB") of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a citizen of the People's Republic of China (hereinafter referred to as China).

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[2] Because this is the second occasion on which the appellant has appealed to this Authority, the Authority must first determine whether it has jurisdiction to hear the appeal.

[3] Neither a refugee status officer nor the Authority has unlimited jurisdiction to receive and determine a further refugee claim after a first claim has been finally determined. Section 129J(1) of the Immigration Act 1987 ("the Act") is headed "Limitation on subsequent claims for refugee status" and sets out the circumstances in which a refugee status officer may receive and determine a second or subsequent claim for refugee status:

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

[Emphasis added]

[4] Where the refugee status officer declines the subsequent claim, or finds that there is no jurisdiction to consider the claim on the basis that the statutory criteria are not met, the claimant has a right of appeal to the Authority. Section 129O(1) of the Act provides that:

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

[5] The Authority therefore intends to consider the appellant's original claim, together with her further claims as presented at the second hearing, with a view to determining whether it has jurisdiction to hear the second appeal. If so, it will then determine whether the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

[6] Before doing so, however, it is necessary to address the issue of whether the appellant should be granted an interview.

JURISDICTION OF THE AUTHORITY TO DISPENSE WITH AN INTERVIEW

[7] Pursuant to ss129P(5)(a) and 129P(5)(b) of the Act, where an appellant was interviewed by the RSB or, having been given an opportunity to be interviewed, failed to take that opportunity, the Authority has a discretion as to whether to offer the appellant the opportunity to attend an interview. In exercising this discretion, the Authority will consider whether the appeal is *prima facie* 'manifestly unfounded or clearly abusive'. Should that be the case, the Authority may determine the appeal on the papers, without offering the appellant an interview. The Authority's general jurisdiction in this regard was examined in *Refugee Appeal No 70951* (5 August 1998).

PROCEDURAL HISTORY OF THE APPELLANT'S CLAIMS

FIRST CLAIM FOR REFUGEE STATUS

[8] The appellant arrived in New Zealand on 2 September 1996 and lodged her first application for refugee status on 15 August 1997.

[9] It is not intended that a full account of the appellant's first claim be

reproduced here. A detailed summary of the account can be found in the decision of the Authority (differently constituted) in *Refugee Appeal 72205* (21 December 2000).

[10] Briefly, the appellant's claim was derivative of her husband's claim that he was of interest to the authorities in China because he had been involved in pro-democracy activities in 1989. In 1992, when her husband departed China, the appellant was herself approached by the PSB and questioned about her husband's whereabouts. These visits reduced in frequency when she told the PSB her husband was in New Zealand.

[11] However, in early 1996, when the appellant approached the PSB on her husband's behalf so that he could be issued with an identity card, the PSB resumed their interest in the husband and subsequently detained the appellant for a week. After her release from custody, she was visited again by the PSB and soon after she too resolved to leave China. She was issued with a passport in August 1996 and travelled to New Zealand shortly thereafter. Her daughter remained living in the family apartment for some months but, as a result of continued visits by the PSB, she moved in with the appellant's mother.

[12] On 3 July 2000, the RSB declined the appellant's first application for refugee status on the basis that it was not credible. This led to her first appeal to the Authority.

[13] Following a hearing and the receipt of post-hearing submissions and documents, the Authority dismissed the appellant's appeal on 21 December 2000 on the basis that it was not credible.

[14] A second application for refugee status was submitted to the RSB on 7 December 2007 but was subsequently withdrawn.

THE PRESENT CLAIM FOR REFUGEE STATUS

[15] The present claim was submitted to the RSB on 7 February 2008 and the appellant was interviewed by the RSB on 13 June 2008. A decision finding that it had no jurisdiction to hear the claim was issued by the RSB on 30 June 2008.

[16] At her RSB interview, the appellant claimed that her husband is still of interest to the PSB on the basis of his pro-democracy involvement in 1989 and that he would suffer serious harm should he return to China. She submitted a letter from her daughter, still resident in China, stating that the authorities continue

to make enquiries about the appellant's husband.

[17] Additionally the appellant now claims that her 12 year involvement with the Pu Shien Charitable Trust, a Buddhist organisation in New Zealand puts her at risk of being persecuted in China. She asserts that the Chinese authorities have "thousands of spies" in New Zealand and Australia and that she will be blacklisted as a result of her association with the Trust.

[18] The RSB declined to accept the appellant's subsequent claim for consideration on the basis that she had not been able to satisfy the jurisdictional criteria for a second claim. The appellant now appeals against that decision.

WHETHER TO DISPENSE WITH AN INTERVIEW

[19] On 10 November 2008, the Authority, through its Secretariat, wrote to the appellant's representative, Mr Lowe, advising that the Authority's preliminary view of the appeal was that it was *prima facie* 'manifestly unfounded or clearly abusive', and could therefore be determined on the papers without giving her an interview pursuant to s129P(5) of the Act. The letter noted that the appellant had been interviewed by the RSB in respect of her current refugee claim.

[20] The letter went on to note that this is the appellant's second refugee status appeal and advised of the relevant additional jurisdictional requirements. The letter continued:

"It is the Authority's preliminary view that [the appellant's] subsequent claim does not satisfy the statutory criteria for the acceptance for consideration of a subsequent refugee claim because the grounds of the subsequent claim do not appear to be significantly different to those of her preceding claim.

In summary, her previous claims were based on assertions that her husband (Mr [A]) had been associated with the pro-democracy movement in 1989 and in particular with a student who had involved him [and] [the appellant] in the making of political signs and pamphlets. As a result, the appellant claimed that her husband had been arrested and detained at the local Public Security Bureau (PSB), interrogated and required to report for a period of time thereafter. She also claimed that after his departure from China, she was detained and questioned about his whereabouts. The Authority (differently constituted) who heard the first appeal rejected the account on credibility grounds. Her husband's claims, based on the same factual grounds, were likewise dismissed on credibility grounds.

The grounds for [the appellant's] current appeal do not appear to be significantly different from the preceding claims. She contends that the PSB maintain an interest in her husband because of his 1989 involvement in the pro-democracy movement and that she will also continue to be of interest from the authorities because of this.

It is noted that at the RSB interview on 13 June 2008 [the appellant] also asserted

that her involvement with the Buddhist organisation referred to as the Pu Shien Charitable Trust was also a ground on which she now claimed refugee status. However, her evidence to the RSB is that she has been involved with the trust since her arrival in New Zealand in 1996 and therefore prior to the previous determination of her refugee appeal. Those grounds can not therefore form the basis of a subsequent claim for refugee status.

The Authority's preliminary view is that [the appellant] has failed to establish that the grounds giving rise to her subsequent refugee claim are significantly different from those giving rise the first claim. Both of the claims are based on continuing interest in her husband from the PSB because of his very limited political involvement in 1989 – facts which have all been found to be not credible by previous Authority panels. It appears that she is unable to satisfy the jurisdictional criteria for second and subsequent refugee claims established by ss129J and 129O Immigration Act 1987."

[21] The appellant was provided with an opportunity to present submissions and/or evidence to support her claim by 25 November 2008. Notice was given that, unless the Authority was persuaded otherwise by such submissions and evidence, it could consider and determine the appeal without giving the appellant an opportunity of attending a further interview. Reference was also made to *Refugee Appeal No 70951/98* (5 August 1998).

[22] The Secretariat's letter advised that the responsibility for establishing an appellant's refugee claim lay with the appellant, pursuant to ss129P(1) and 129P(2) of the Act (as referred to in *Refugee Appeal No 72668/01* (Minute No. 2) (5 April 2002) and in *Anguo Jiao v Refugee Status Appeals Authority* (HC, Auckland, M.207-PLO2, 29 July 2002, Potter J)). The letter further advised that persecution has been defined as 'the sustained or systemic denial of basic or core human rights such as to be demonstrative of a failure of state protection'; see Hathaway, *The Law of Refugee Status* (1991) 104 to 108, as adopted in *Refugee Appeal No 2039/93* (12 February 1996) at 15.

[23] On 25 November 2008, Mr Lowe wrote to the Authority by way of facsimile and sought an extension of time because the appellant was "awaiting further materials available". He did not say what the materials sought were. In an abundance of fairness, the Authority granted an extension of time to 5 December 2008. In doing so it indicated that no further extension of time would be granted in the absence of a compelling reason or the provision of detailed information about the material being sought by the appellants.

[24] On 2 December 2008, a further letter from Mr Lowe (dated 3 December 2008) was received in respect of this appeal. It recorded that the appellant was still waiting for materials from China but it did not specify what those materials were or their relevance to the claim. The letter does not seek a further deferment

in the determination of the appeal. In the absence of submissions as to why the hearing should be further adjourned or as to the nature of the materials sought, the Authority, mindful of paragraph [25.1] of Practice Note 1/2008 in relation to adjournments, considers it appropriate to proceed with a determination of the appeal.

[25] As to the preliminary assessment that the appellant's case is *prima facie* "manifestly unfounded or clearly abusive", Mr Lowe's letter made the following points:

"As you are aware, we are sure that: All asylum applicants are considered in terms of normal policy for permanent resident; especially [the appellant] has immediate relatives resident in New Zealand. (2 sisters) along with her trade and professional - therefore your Authority shouldn't penalize her at that.

Therefore with all due respects, her Refugee motives appear to be genuine in the true sense of the word in terms of the 1951 Convention: NO particular requirements are attached to such applications beyond normal suitability and processing –

Despite your Authority suggestion that: manifestly -unfounded or clearly abusive "which is not act with in the principle of natural and fairness to all applicants as required and it is contrary to the UNHCR office manual policy.

It is simplify that the applicant is unable or, owing to such fear, is unwilling to avail herself/himself of the protection of that country, or being outside the country of her/his former habitual residenceis unable, or owing to such fear, is unwilling to return to it "

Please refer it to your letter dated 10th November 2008 which clearly stated that "In the intervening years between her arrival in New Zealand on 2September 1996 and " - It is well over 12 years plus now - Can you Authority offer her your sympathetic , As she must went through lots of fears during this long period of waiting. Which clearly are meeting the Refugee Status criteria of fears and against her will and better judgment by returning to her homeland due to her involvement or action? - If it is applicable for an interviewing before making your final decision please.

We are quietly confident that common sense will prevail, especially given the fact that she is praying every day and night for a miracle which just about sent her mad. She is recently out of hospital as well. therefore we write respectfully ask for your authority look into their case more seriously be in a compassionate humanitarian ground within the Refugee Status criterion."

[26] The letter does not address the jurisdictional issue with regard to second and subsequent claims, namely, that the appellant must establish that since the determination of the preceding claim, circumstances in the appellant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim.

CONCLUSION AS TO WHETHER TO DISPENSE WITH AN INTERVIEW

[27] Having carefully considered all relevant matters, for the reasons which will be apparent later in this decision, the Authority is satisfied that the appellant's appeal is *prima facie* 'manifestly unfounded or clearly abusive'.

[28] The Authority notes that the appellant was interviewed by the RSB on 13 June 2008.

[29] It is appropriate to now proceed to determine the appeal on the papers pursuant to ss129P(5)(a) and 129P (5)(b) of the Act, without giving the appellant an opportunity to attend a further interview. All material and submissions tendered throughout the determination process have been taken into account in determining this appeal.

HAS THE JURISDICTIONAL THRESHOLD BEEN MET?

[30] It is now necessary to consider whether the jurisdictional threshold for the hearing of a second or subsequent claim is met: see s129O(1) and *Refugee Appeal 75139* (18 November 2004).

COMPARISON OF CLAIMS

[31] The appellant's first claim for refugee status was based on her husband's risk from the PSB because of his involvement with the pro-democracy movement in China in 1989. The husband had been arrested, detained and interrogated before departing China in 1992. A further component of the first claim was that after her husband's departure from China, the appellant was also detained and questioned by the PSB about him.

[32] The appellant's second claim is based on the same account as the previous one. In the Confirmation of Claim form the appellant simply refers back to the alleged incidents of 1989 to 1996, the latter being the year she departed China. When asked in question E8 of the form to "set out in chronological order, any other events that caused you to leave your home country and claim refugee status in New Zealand", the appellant's response is recorded as being: "Please refer to my previous application for your information with my daughter's confirmation more recently."

[33] As noted above, at the RSB interview, the appellant also asserted that

involvement with the Pu Shien Charitable Trust puts her at risk from the Chinese authorities. Her involvement dates from soon after her arrival in New Zealand in 1996. It clearly pre-dates the final determination of her first claim on 21 December 2000. The evidence does not establish any relevant event occurring since that date.

[34] The Authority finds that the jurisdictional threshold is not met. The present claim is based on the same account as the first claim, which claim has been finally determined by the Authority. There is no significant difference in the grounds upon which the appellant's first and second claims are based. The recent additional claim of involvement in the Buddhist organisation is not a circumstance which has arisen since the determination of the first claim and therefore cannot form the basis of a subsequent claim.

[35] The appellant does not satisfy the requirements of ss129J and 129O(1) of the Act and it follows that the Authority has no jurisdiction to consider this second claim to be recognised as a refugee in New Zealand.

CONCLUSION

[36] In closing, it is concerning to note the cynical abuse of the refugee determination system by the appellant and her husband. This is now the third refugee claim she has made (and the second time she has taken a claim on appeal) and her husband is advancing his refugee claim for the fourth time. Both the appellant and her husband have been disbelieved on every occasion they have had their claims heard. They must know that their repeated efforts to advance the same claim will not bear fruit. We do not expect to see a further specious claim lodged by the appellant, her husband, or their representative.

[37] The Authority finds that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"B A Dingle"
B Dingle
Member