IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2010] NZIPT 800056**

AT AUCKLAND

Appellant:	**AA (Iran)**
Before:	A N Molloy (Chair) C M Treadwell (Member)
Counsel for the Appellant:	D Mansouri Rad
Counsel for the Respondent:	M P Whelan (submissions only)
Date of Hearing:	24 August 2010
Date of Decision:	22 December 2010

DECISION BY C M TREADWELL

INTRODUCTION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch of the Department of Labour, cancelling the grant of refugee status to the appellant, a citizen of both Iran and New Zealand.

[2] This appeal was lodged with the Refugee Status Appeals Authority ("the RSAA") prior to 29 November 2010 but had not been determined by that body by that date. Accordingly, it is now to be determined by the Immigration and Protection Tribunal. See subsections 448(1) and (2) of the Immigration Act 2009 ("the Act"). The members determining it are the members of the RSAA to whom the file was originally allocated by the RSAA (of which they were members at that time) and who presided over the oral hearing of the appeal on 24 August 2010.

[3] Pursuant to section 448(2), the appeal is to be determined as if it is an appeal under section 194(1) of the Act.

[4] Pursuant to section 198(2) of the Act, on an appeal under section 194(1)(e) (which provides for appeals against cancellation of refugee status) the Tribunal

must:

> "(a) determine the matter de novo; and
>
> (b) ... determine whether—
>
> (i) recognition of the person as a refugee or a protected person may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information:
>
> (ii) the matters dealt with in Articles 1D, 1E, and 1F of the Refugee Convention may not have been able to be properly considered by a refugee and protection officer for any reason, including by reason of fraud, forgery, false or misleading representation, or concealment of relevant information; and
>
> (c) determine, in relation to the person, the matters referred to in subsection (1)(b) and (c) of this section."

[5] Section 198(1)(b) directs the Tribunal to determine whether to recognise the person as:

(a) a refugee under the Refugee Convention (section 129); and

(b) a protected person under the Convention Against Torture (section 130); and

(c) a protected person under the International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[6] Subsection 198(1)(c) requires the Tribunal to determine whether, if the claimant is found to be a protected person,

> "... there are serious reasons for considering that the claimant has—
>
> (i) committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; or
>
> (ii) committed a serious non-political crime outside New Zealand before coming to New Zealand; or
>
> (iii) been guilty of acts contrary to the purposes and principles of the United Nations."

[7] Thus, in essence, there are two (sometimes three) stages to the enquiry. First, the Tribunal must determine whether the refugee status of the appellant "may have been" procured by fraud, forgery, false or misleading representation, or concealment of relevant information (hereafter "fraud or the like") or the matters dealt with in Articles 1D, 1E, and 1F of the Refugee Convention may not have been able to be properly considered for any reason, including by reason of fraud or the like.

[8] If so, it must then determine whether the person is a refugee or protected person. This second stage will depend on whether the appellant currently meets the criteria for refugee status set out in the Refugee Convention (see section 129 and also *Refugee Appeal No 75392* (7 December 2005) at [10]-[12]) or the criteria for recognition as a protected person under sections 130 and/or 131 of the Act.

[9] Third, and finally, if the person is recognised as a protected person, the Tribunal must also consider (if relevant), whether there are serious reasons for considering that he or she has committed any of the crimes or acts referred to in section 198(1).

[10] Given that these are inquisitorial proceedings, it is unhelpful to talk in terms of the burden or onus of proof - see *Attorney General v Tamil X & anor* [2010] NZSC 107, at [36]. Nonetheless, it is the responsibility of the Department of Labour to present the evidence on which it relies in asserting that the recognition of refugee status may have been procured by fraud or the like. Further, the term "may have been procured by" is deliberately imprecise and signals a standard of proof that is lower than the balance of probabilities but higher than mere suspicion – see *Refugee Appeal No 75563* (2 June 2006) at [20].

JURISPRUDENCE OF THE RSAA

[11] The Tribunal came into being on 29 November 2010, by virtue of section 217 of the Act. It has inherited (subject to modification by the Act) the jurisdictions of four former appeal bodies, the RSAA, the Residence Review Board, the Removal Review Authority and the Deportation Review Tribunal.

[12] The RSAA determined all refugee appeals from the Department of Labour from 1991 to 2010. The development of New Zealand's refugee law jurisprudence is substantially the product of the decisions of the RSAA in that period. Except where inconsistent with the provisions of the 2010 Act, the Tribunal intends to rely upon the jurisprudence of the RSAA in its determinations of appeals and matters concerning refugee status.

BACKGROUND

[13] The appellant is aged in his mid-forties. He arrived in New Zealand on 24 July 1998 and sought refugee status immediately on arrival.

[14] In summary, the basis of the appellant's refugee claim was that he had been a friend of a Baha'i man in Iran, from whom he had developed an interest in the Baha'i faith. Both the friendship and his own interest resulted in continual harassment by the authorities. Learning that he was to be arrested, the appellant hid in Mashad for some months before obtaining a false Iranian passport in another name and leaving Iran illegally. He eventually arrived in New Zealand, travelling on a different false passport, having disposed of the Iranian one.

[15] In a decision dated 4 March 2002, the Refugee Status Branch recognised the appellant as a refugee.

[16] On 20 June 2002, the appellant was granted permanent residence in New Zealand, as a result of his refugee status. He was then granted New Zealand citizenship on 28 July 2003.

[17] In 2006, for reasons unconnected with his refugee status, the appellant was convicted of serious crimes in New Zealand and was sentenced to a total of 10 years' imprisonment. He is currently serving that sentence.

[18] On 9 April 2009, more than seven years after he had been recognised as a refugee, the appellant was served with a Notice of Intended Determination Concerning Loss of Refugee Status.

CANCELLATION PROCEEDINGS

[19] In the notice, a refugee status officer stated his preliminary view that the grant of refugee status to the appellant was not properly made because it may have been procured by fraud and that it was appropriate to cease to recognise the appellant as a refugee.

[20] At the core of the officer's concern was an Iranian passport obtained by the appellant from the Iranian Embassy in Wellington in mid 2003, which disclosed, on its face, that:

(a) the appellant had departed Iran legally, not illegally, in 1998;

(b) he had obtained a further Iranian passport in mid 2003; and

(c) he returned to Iran in May 2004, on that passport, and remained there for approximately two months.

[21] The notice advised that the officer held the preliminary view that these factors indicated that the appellant was not a person of interest to the Iranian authorities, as he had claimed.

[22] On 26 May 2009, the appellant was interviewed by the Refugee Status Branch. He was sent a report of the interview two days later, on 28 May 2009, and was invited to comment. He was then sent a further letter on 4 June 2009, inviting his comment on further information which had come to light (facts referred to in the decision of the Court of Appeal in respect of his appeal against conviction appeared inconsistent with his account at the Refugee Status Branch interview), and on the question whether the exclusion provisions of Article 1F of the Convention applied to him.

[23] The appellant responded by counsel's letters of 19 June 2009 and 10 July 2009.

[24] On 27 April 2010, the Refugee Status Branch issued a decision determining to cease to recognise the appellant as a refugee. It is from that decision that the appellant now appeals.

CASE FOR THE APPELLANT

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

[26] The appellant does not resile from the account he gave in his refugee claim in 1998. He asserts that it was truthful.

[27] As to the allegations raised in 2009 by the refugee status officer, the appellant denies that his departure from Iran in 1998 was undertaken legally. He agrees, however, that he obtained a further Iranian passport in mid 2003 and that he returned to Iran in May 2004 on that passport, for approximately two months.

[28] In his refugee claim in 1998, the appellant stated that he went into hiding in Mashad in February 1998 because the authorities were looking for him. In his absence from the family home in Tehran, they detained both his mother and two brothers at various times for questioning.

[29] Resolving to leave Iran, the appellant approached his brother-in-law, who knew an influential police officer. By handing over his genuine passport and

paying a bribe of 3 million *toman*, the appellant was able to obtain an airline ticket and a false passport (in a different name), containing a visa for Thailand. The bribe included arrangements being made for him to pass through a special gate at the airport, in order to ensure that he was not stopped. He departed Iran by these illegal methods on 24 May 1998.

[30] It is this account which the appellant maintains, today, is the truth.

[31] As to the assertion now made by the refugee status officer that, in fact, the appellant left Iran legally, the officer put to the appellant that his 2003 passport (obtained from the Embassy in Wellington) expressly records that he left Iran lawfully from Mehrabad International Airport in Tehran, on 3 June 1998.

[32] The appellant's explanation for this entry in his 2003 passport is that it, too, was obtained by bribery.

[33] According to the appellant, he decided to obtain an Iranian passport in early 2003 because he wanted to retain his links to his country of birth and, in particular, to maintain contact with his family there. Further, he had married a New Zealand citizen, and she and their children would need to be able to maintain contact with the appellant's family as well.

[34] The appellant says that he faced two difficulties. First, his illegal departure precluded him from answering the mandatory question on the passport application form about the date of his departure from Iran. Second, he was concerned that his record with the Iranian authorities might lead to his arrest on any return.

[35] To resolve both these issues, the appellant arranged for his family in Iran to pay a bribe of 12 million *toman* to certain officials. The appellant does not know who was bribed, or what occurred, but he was told by his family that the necessary steps had been undertaken and he should give 3 June 1998 as the date of his lawful departure from Iran. He was warned that the bribe paid by his family had secured his safe passage into and out of Iran, but not his safety while in the country.

[36] On applying to the Iranian Embassy for a passport, the appellant claimed to have left Iran lawfully on 3 June 1998. He claimed to have lost his original passport. The Embassy duly issued him a fresh passport.

[37] Initially, the appellant planned to travel only to Turkey, where he could meet his mother in safety. This plan fell through, however, when he realised that his

New Zealand passport, on which he wished to enter Turkey, contained the wrong date of birth. When he applied in September 2003 to have it changed, he was told by the Department of Internal Affairs that his citizenship certificate would need to be corrected first. This took time. It was not until May 2004 that the appellant was ready to travel. By that point, his mother had become seriously ill and was unable to travel to Turkey.

[38] Aware that the more liberal Khatami regime then in power was actively encouraging exiled Iranians to return home, the appellant resolved to return to Iran to visit his mother and family there.

[39] Once he had settled on a date to return, the appellant informed his family of his travel dates. They, in turn, advised the relevant official, who confirmed that the appellant could return safely on the planned date.

[40] The appellant returned to Iran on 23 May 2004 and experienced no difficulty at Mehrabad airport.

[41] Once in Tehran, the appellant stayed away from his old haunts and lived with a relative in a different part of the city. His mother came to stay with him there. He stayed indoors for most of the time, venturing out only a few times, and always at night, to visit his siblings.

[42] The appellant had no difficulty in leaving Iran in July 2004 and re-entered New Zealand on 24 July 2004.

[43] During his stay in Iran, the appellant's mother's health improved dramatically. Wanting her to visit New Zealand so that she could attend an Islamic wedding ceremony between the appellant and his wife, the appellant lodged with the Singapore branch of Immigration New Zealand an application for a visitor's visa for his mother, on 5 August 2004. That application was later declined, on 22 September 2004.

[44] In January/February 2005, the appellant travelled overseas twice. After his second return to New Zealand, he was arrested and charged (along with others) with the importation of prohibited drugs. He pleaded not guilty but was convicted and sentenced to a lengthy term of imprisonment. An appeal to the Court of Appeal was dismissed.

Documents

[45] Counsel for the appellant has lodged written submissions dated 20 August 2010. The appellant has also submitted copies (and translations) of documents relating to the purchase of family burial plots in Iran.

[46] Ms Whelan, counsel for the Department of Labour, though not appearing in person, has lodged written submissions dated 18 August 2010. Further, the Department has lodged a copy of its file in respect of the Notice of Intended Determination Concerning Loss of Refugee Status, which includes not only its relevant documents in respect of the cancellation decision but the material documents from the file in respect of the appellant's original refugee claim.

WHETHER RECOGNITION MAY HAVE BEEN PROCURED BY FRAUD

[47] The threshold of 'may have been procured by fraud' is a low one. It does not require the Authority to find that refugee status *was* procured by fraud. Instead, as was said 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."

[48] For the reasons which follow the Tribunal finds that the refugee status of the appellant may have been procured by fraud, forgery, false or misleading representation or concealment of relevant information.

The entry in the passport

[49] On its face, the 'legal departure' entry in the appellant's 2003 passport contradicts his claim to have left Iran illegally in 1998, with the consequential inference that a legal departure is *prima facie*, inconsistent with his claim to have been at risk of arrest by the authorities. Further, his bare assertion that the entry was obtained by bribery is unsupported by any other evidence. Supposedly, he asked his family in Iran to make the necessary arrangements but, in spite of the appellant knowing of the refugee status officer's concern about this issue since at least April 2009, he has produced nothing to corroborate the explanation.

[50] Asked why he has not provided evidence from his family of the steps taken by them, such as the position (if not the identity) of the person bribed, the method of payment and corroborative documents such as evidence of bank withdrawals or

transfers, or of the sale of property to raise funds, the appellant merely stated that his family could not be expected to take the risk of sending him such information. That explanation must be viewed against his own professed willingness to contact them to ask them to undertake such activities, their own (supposed) willingness to bribe officials and the myriad of ways in which information could be sent to the appellant (such as by anonymous letter, by email, by courier or in person).

The passport itself

[51] As to why the appellant obtained an Iranian passport, his evidence was also unsatisfactory.

[52] The appellant's explanation for having obtained an Iranian passport in 2003 is that he wished to retain links to his country of birth and that his wife and children would be able to maintain better contact with his family if he did so. These claimed reasons must be weighed against the reality that the appellant also says that he had his family in Iran pay a bribe of 12 million *toman* so that he could obtain the passport and have the way cleared for his return to Iran. Given that he says that he had no intention, at that time, of returning to Iran, it is difficult to comprehend why he would have had his family spend so much money on an item of no practical worth to him.

[53] It is not overlooked that the appellant did, in fact, travel to Iran the following year. It will be recalled, however, that the appellant claims that he initially intended to travel only to Turkey, to meet his mother there. He points to documents as early as a filenote dated 23 April 2003 by the Department of Internal Affairs, recording his intention to travel to Turkey and a departmental filenote of 28 March 2002, noting his advice that he wished to travel overseas (though the destination was not stated).

[54] According to the appellant, his travel was delayed until 2004, however, because he intended to travel to Turkey on his New Zealand passport. He did not, he said, wish to use his Iranian passport for the trip to Turkey because, if he struck any difficulties in Turkey, he might be handed to the Iranian Embassy there. For this reason, he could not travel until his New Zealand passport had issued, which did not happen until May 2004 (the first one having his incorrect birth date). Further, the decision to travel to Iran itself was not one he made until shortly before he travelled (in 2004), because it arose from his discovery that his mother was too ill to travel to Turkey.

[55] None of that, of course, addresses the reality that the appellant did not, in 2003, need to obtain an Iranian passport at all. His own evidence is that, in 2003, he was intending to travel to Turkey on his New Zealand passport, and he did not form any intention to travel to Iran until his mother fell ill in 2004. The claim that, in the first half of 2003, he had his parents pay a bribe of 12 million *toman* simply so he could have an Iranian passport which he did not intend to use, is disbelieved.

Return to Iran

[56] If there was any credence in the appellant's account of his family bribing an official to create a false 'legal departure' date and to ensure a safe passage into Iran, then it might be that the appellant's return to Iran in mid 2004 was explicable. However, given the above concerns as to the veracity of related aspects of the claim, the fact that he returned to Iran for some two months at a time when, he says, the authorities wanted to arrest him, raises further concerns about the truthfulness of the appellant's refugee claim.

[57] We also note that the claim that the appellant could only see his ailing mother by returning to Iran (during which she made an unexpected recovery), is significantly undermined by the fact that he had signed a sponsorship form in respect of his mother's visitor's visa application for New Zealand, as early as 17 May 2004, some days before he had even left New Zealand for Iran. If his mother was well enough to be considering travel to New Zealand, it is implausible that she was unable to travel to neighbouring Turkey.

Conclusion on 'may have been'

[58] These reasons, taken cumulatively, satisfy the Tribunal that the recognition of refugee status may have been procured by fraud or the like within the meaning of s147(2)(a)(i) of the Act.

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

WHETHER THE APPELLANT IS A REFUGEE OR PROTECTED PERSON

[60] It will be recalled that, pursuant to section 198 of the Act, the Tribunal must determine, in the following order, whether to recognise the appellant as:

(a) a refugee under the Refugee Convention (section 129); and

(b) a protected person under the Convention Against Torture (section 130); and

(c) a protected person under the International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

THE REFUGEE CONVENTION – THE ISSUES

[61] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

> "... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
>
> 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."

[62] Normally, the Tribunal is required to address two issues, In terms of *Refugee Appeal No 70074/96* (17 September 1996), they are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

[63] Here, for reasons which will become apparent, Article 1A(2) also requires the Tribunal to identify the appellant's country or countries of nationality and to address the questions:

(d) whether the appellant is outside his countries of nationality (or any of them); and

(e) Whether he is currently able to avail himself of the protection of any of his countries of nationality.

Assessment of the claim to refugee status

[64] For reasons which will become apparent, it is not necessary to address in any depth the question of the credibility of the appellant's evidence. The concerns expressed at [45]-[51] above are, however, noted.

[65] As to the issues raised by Article 1A(2), the term "the country of his nationality" means each of the countries of which he is a national. It is common ground that the appellant is currently a national of both Iran and New Zealand.

[66] Whether or not the appellant faces a real chance of serious harm in Iran (on which no finding need be made here), he currently enjoys the protection of his second country of nationality, New Zealand. He is neither outside his country of nationality (New Zealand), nor is he unable to avail himself of its protection.

[67] This view accords with the decision of the RSAA in *Refugee Appeal No 76377* (27 April 2010), at [51]-[55] where, in an analogous 'cancellation' case, the Authority held, at [52]:

> "In terms of the Article 1A(2) definition, the appellant is neither outside her country of nationality (New Zealand) nor does she have any well-founded fear of being persecuted in her country of nationality (New Zealand). Even if somehow her Sri Lankan nationality has been retained, the second paragraph of Article 1A(2) precludes her recognition as a refugee because she has the protection of New Zealand."

[68] See also the decision of the High Court in *A v Refugee Status Appeals Authority & anor* (CIV 2009-404-003379, High Court, Auckland, 6 December 2010), per French J, at [56]-[57], approving and adopting *Refugee Appeal No 76377* (27 April 2010).

[69] Mr Mansouri Rad properly concedes the point, at para 4 of his submissions of 20 August 2010.

[70] It is not overlooked that the appellant's New Zealand citizenship was obtained by him on the basis of his refugee status. Given the unsatisfactory nature of his explanations for obtaining an Iranian passport in 2003, its 'legal departure' entry and his return to Iran, the Department of Internal Affairs may consider, in due course, whether revocation of his citizenship is appropriate. However, as was noted in *Refugee Appeal No 76377* (27 April 2010):

> "[57] The bare possibility that the appellant having possibly retained her Sri Lankan citizenship, may lose her New Zealand citizenship, and may then face expulsion to Sri Lanka is a matter which at this point is entirely speculative and not relevant to the present day determination of her current refugee status. It would be speculative

> for the Authority to attempt to determine now whether the appellant may at some indeterminate point in the future satisfy the inclusion provisions of article 1A(2) of the Refugee Convention.
>
> [58] The Authority resolves that it is appropriate to deal with the appellant in the circumstances she finds herself, at the date of this decision."

Conclusion on claim to refugee status

[71] New Zealand being one of the appellant's countries of nationality, he:

(a) is not outside his country of nationality;

(b) is a person enjoying the protection of his country of nationality; and

(c) does not have a well-founded fear of being persecuted in his country of nationality.

[72] For these reasons (indeed, for any one of them), he is not a refugee within the meaning of Article 1A(2) of the Convention.

[73] Obviously, the issue of Convention reason does not arise.

THE CONVENTION AGAINST TORTURE – THE ISSUES

[74] Section 130(1) of the Act provides that:

> "A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

[75] The analysis does not permit a finding materially different to that in respect of the Refugee Convention. Put briefly, the appellant's New Zealand citizenship means that he cannot be deported from New Zealand – see section 13(1) and (3)(b) of the Act. Thus, the question whether there are substantial grounds for believing that he would be in danger of being subjected to torture in Iran does not arise.

[76] Again, the possibility that the appellant's citizenship might be revoked at some indeterminate point in the future, leading to a possible re-engagement of the deportation provisions of the Act, is so speculative at this time that it is unnecessary to address it. The Tribunal must deal with the appellant as it finds him today – that is to say, not at any risk of being deported and thus not requiring

the protection of the *non-refoulement* obligation in the Convention Against Torture.

Conclusion on claim under Convention Against Torture

[77] The appellant being a New Zealand citizen, he cannot be deported from this country as a matter of law. He is not, therefore, a person requiring protection under the Convention Against Torture. He is not a protected person within the meaning of section 130(1) of the Act.

THE ICCPR – THE ISSUES

[78] Section 131(1) of the Act provides that:

> "A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand."

Assessment of the claim under the ICCPR

[79] Again, for the reasons already given, there is no prospect of the appellant, a New Zealand citizen, being deported from this country. He is not, today, a person who requires recognition as a protected person under the ICCPR.

Conclusion on claim under ICCPR

[80] The appellant being a New Zealand citizen, he cannot be deported from this country as a matter of law. He is not, therefore, a person requiring protection under the ICCPR and it follows that he is not a protected person within the meaning of section 130(1) of the Act.

EXCLUSION

[81] It will be recalled that the Refugee Status Branch raised with the appellant the question whether he should be excluded from the protection of the Refugee Convention by virtue of Article 1F.

[82] Given the finding that the appellant's New Zealand citizenship precludes him from being recognised as a refugee, it is not necessary for us to address the exclusion issue at this time. If the question arises at any time in the future as to

whether he is a refugee, the exclusion question may become relevant at that point. For the present, we make no finding.

[83] For completeness, we note that subsection 198(1)(c) of the Act does not arise for consideration here. That subsection requires the Tribunal to determine whether, if the claimant is found to be a protected person, they have committed crimes analogous to those referred to in Article 1F of the Refugee Convention. Given the finding that the appellant is not a protected person, no further enquiry need be made.

CONCLUSION

[84] The following determinations are made:

(a) The refugee status of the appellant may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information.

(b) For the reasons given above, the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention, nor is he a protected person within the meaning of either section 130(1) or 131(1) of the Act.

[85] The application is dismissed.

"C M Treadwell"
C M Treadwell
Member

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"CM Treadwell"
Chair/Member