REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76320

AT AUCKLAND

Before: A R Mackey (Chairman)

Counsel for the Appellant: E Orlov

Date of Decision: 15 April 2009

DECISION

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[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a national of Poland of Jewish ethnicity.

INTRODUCTION

[2] Together with his wife and son, the appellant travelled to New Zealand arriving on 6 May 2006 for the first time. They were granted visitors' visas. On 15 June 2006, Immigration New Zealand (INZ) issued a work permit to the appellant. He departed New Zealand to return to Poland on 26 July 2006 "in order to collect some of his electronic equipment". He returned legally on 11 August 2006 and was issued with a work permit. On 13 October 2006, INZ cancelled the appellant's work permit and on 24 December 2006 he was served with a Removal Order by INZ. That Removal Order was appealed to the High Court. The appellant was given interim relief restraining INZ from deporting him and the Removal Order was formally cancelled on 9 January 2007. The appellant then reapplied for a work permit.

[3] On 14 March 2007, the High Court determined that there was no impediment to serving a further Removal Order on the appellant. On 23 May 2007, INZ declined an application for a work permit. In June 2007, the appellant appealed to the Removal Review Authority (RRA). On 29 May 2008, the RRA dismissed his appeal. On 10 October 2008, the appellant appealed against the RRA decision to the High Court, however that appeal was dismissed by the High Court on 16 October 2008. The following day, 17 October 2008, the RSB received a Confirmation of Claim to Refugee Status in New Zealand from the appellant who stated at that time that he had not lodged an application for refugee status immediately on arrival in New Zealand because he had wanted to obtain a work permit and then a residence permit under normal immigration procedures.

[4] On 6 November 2008, the appellant was interviewed by a refugee status officer. He was unrepresented at that time. A further interview took place on 21 November 2008 and, on 30 January 2009, the RSB declined his application. The appellant then lodged an appeal to this Authority which was received on 20 February 2009. The appeal was lodged through his counsel.

JURISDICTION OF THE AUTHORITY TO DISPENSE WITH AN INTERVIEW

[5] In certain circumstances the Authority is permitted to determine an appeal on the papers without giving the appellant an interview. This arises under s129P(5)(a) and (b) of the Immigration Act 1987 ("the Act"), where an appellant was interviewed by the RSB (or given an opportunity to be interviewed but failed to take that opportunity) and where the Authority considers the appeal to be *prima facie* "manifestly unfounded or clearly abusive". The Authority's general jurisdiction in this regard has been examined in *Refugee Appeal No 70951/98* (5 August 1998).

[6] In this case the Authority, through its Secretariat, wrote to the appellant's counsel on 18 March 2008. That letter advised that, in the Authority's preliminary view, this appeal was *prima facie* "manifestly unfounded or clearly abusive", for the reasons set out in that letter. The Authority invited the appellant to submit to the Authority by Friday 3 April 2009 submissions responding to the matters raised in the letter and any other submissions or evidence in support of the appellant's refugee claim. The letter advised that following that deadline the Authority, unless otherwise persuaded by the submissions and evidence provided, may proceed and determine this matter on the documents and information available to it without

giving the appellant the opportunity of attending an interview. No submissions or comment have been received by the Authority at this time.

[7] The Authority's letter also explained that it was the responsibility of the appellant to establish his own claim pursuant to ss129P(1) and 129P(2) of the Act as referred to in *Anguo Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA).

CONCLUSION ON WHETHER TO DISPENSE WITH AN INTERVIEW

[8] The appellant was interviewed by a refugee status officer on 6 and 21 November 2008. The Authority has had an opportunity to carefully consider all of the evidence, interview and submissions that were put forward by the appellant to the RSB.

[9] The letter from the Authority, dated 18 March 2009, states:

> "It appears undisputed, as is set out at p515 of the Authority's file (now attached), that your client's fears, on return to Poland, are that he would be arrested or killed for one or more of the following reasons:
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> (a) his Jewish ethnicity;
>
> (b) that he has information about a Polish man (AA) in New Zealand, and associates of that man, of criminal activities and their part in the Polish mafia;
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> (c) that the appellant's wife's father and brothers are members of a criminal gang in Poland and that, with Mrs Misiuk's assistance, AA could convince them to harm him; and
>
> (d) that he provided information to Polish authorities about business people in Poland who were involved in criminal activities relating to drugs and human trafficking.
>
> After carefully checking all of the evidence and information on the appellant's file, the Authority is satisfied that, *prima facie*:
>
> (a) The appellant's fears of reprisal by members of the Polish mafia in Poland, even if they were accepted (which is not established at this time), any such risk would not arise "for reasons of" any one or more of the five Refugee Convention reasons set out in Article 1A(2) of the Refugee Convention which states:
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> > "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 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."

It is well-settled refugee law, both in New Zealand and internationally, that fears of being persecuted for reasons of retribution from members of criminal gangs/mafia do not fall within the ambit of any of the five Convention reasons and, in particular, "membership of a particular social group".

(b) Other fears held by the appellant for reasons of his Jewish ethnicity may, hypothetically, arise for reason of one of the five Convention reasons. However, any such risks, as alleged by the appellant, would arise from non-state actors and not from the Polish state. Persecution in such situations can only be established if an applicant presents well-founded evidence of both risk of serious harm (being persecuted) AND a failure of state protection. The objective evidence referred to in the appellant's file, together with updated information from the most recent United States Department of State *Country Reports on Human Rights Practices 2008: Poland* (March 2009), confirms there is no lack of state protection by the state of Poland in such situations.

Beyond the Polish state, because of Poland's membership of the European Union and Council of Europe, the appellant has the added protection in his ability to take any claim, that he has a real risk of serious harm, to the European Court of Human Rights.

(c) The appellant's evidence, as provided to the RSB and recorded at p527 of the file, notes that the appellant considers that he is entitled to Israeli citizenship and also to German citizenship. In this situation, noting the provisions of the second paragraph of Article 1A(2) of the Refugee Convention, set out above, as this appellant has the ability to access protection from either or both of these two additional nationalities, he cannot be deemed to be lacking the protection of the country of his nationality, as he has not availed himself of the protection or one or either of those countries to which he is entitled to nationality.

For all of the above reasons, it is the preliminary view of the Authority that the appeal, as presented, is clearly abusive or manifestly unfounded. For these reasons, the Authority has formed the view that the appellant does not face a real chance of being persecuted on return to Poland, or to Israel or Germany."

[10] Noting that there has been no response to the Authority's letter, the Authority is now satisfied that the appeal is one that is "manifestly unfounded or clearly abusive" and does not warrant an oral hearing before this Authority.

THE APPELLANT'S CASE

[11] The grounds upon which the appellant presented his case are summarised in the letter sent by the Authority to the appellant's counsel and are set out above at [8] in this decision.

THE ISSUES

[12] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly 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, 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."

[13] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues 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?

ASSESSMENT OF THE APPELLANT'S CASE

[14] As the Authority has determined that it will not interview the appellant, an assessment of credibility will not be made. Accordingly, his account, as summarised above at [9], is accepted for the purposes of determining this appeal.

[15] In refugee law, "being persecuted" has been defined as the sustained or systemic denial of basic or core human rights, demonstrative of a failure of state protection; see J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) pp104-108, as adopted in *Refugee Appeal No 2039/93* (12 February 1996) at [15].

[16] The Authority has previously noted that discrimination, in itself is not sufficient to establish a case for refugee status, nor does every breach of a claimant's human rights necessarily amount to a situation of "being persecuted" within the coverage of Article 1A(2) of the Refugee Convention; *Refugee Appeal No 71404/99* (29 October 1999) [65]-[67].

[17] The Refugee Convention was never intended to protect all persons from all forms of harm, even serious harm, but confers protection where there is a real risk of serious harm that is inconsistent with the basic duty of protection owed by the state to its citizens; Hathaway *(supra)* at 103.

NO CONVENTION REASON

[18] As will be noted from the first paragraph of Article 1A(2) set out above, it is a requirement of the Refugee Convention that a well-founded fear of being persecuted must be for one of the five reasons set out in Article 1A(2). It is well-settled refugee law, both within New Zealand and internationally, that fears of being persecuted for reasons of retribution by members of criminal gangs, mafia, or the like, do not fall within the ambit of any of the five Convention reasons, in particular, "membership of a particular social group". This is because the possible "group" is defined by the persecution. Clearly a circular argument; see *Refugee Appeal No 1312/93 Re GJ* (30 August 1995), *Refugee Appeal No 70146/93* (30 August 1996), *Refugee Appeal No 73386/01* (18 October 2002) and *Refugee Appeal No 76136* (26 November 2007) at [66].

[19] The only possible ground upon which the appellant's claim could be based is his Jewish ethnicity, however, as is clear from the evidence presented, that risk would only arise from non-state actors and not the Polish state. Persecution in such situations can only be established if an appellant presents well-founded evidence of both the real risk of serious harm (being persecuted) AND a failure of state protection. An analysis of the objective evidence relating to Poland, as set out in the appellant's file, together with the updated information from the most recent United States Department of State *Country Reports on Human Rights Practices for 2008: Poland* (March 2009), confirms that there is no lack of state protection by the state of Poland in such situations. As an essential element of the requirement to establish a risk of "being persecuted" is not present in this case, the appeal is again manifestly unfounded; see *Refugee Appeal No 74665/03* (7 July 2004) [36] to [56].

MORE THAN ONE NATIONALITY

[20] As is noted above, this appeal not only lacks well-foundedness but also the appellant is a person with an ability to access more than one nationality and he has not availed himself of the protection of one of the other countries where he is entitled to nationality. The Authority has established in previous decisions

(Refugee Appeal Nos 72558/01 and 72559/01 (19 November 2002)) that an appellant can be considered to hold a second nationality provided it can be acquired by a "mere formality", as opposed to any discretion to give or withhold vested in the putative country of nationality.

[21] The terms of the second paragraph of Article 1A(2) of the Refugee Convention are relevant in this case. The appellant gave evidence, noted at page 527 of his file, that he considers he is entitled to Israeli citizenship and also German citizenship. In this situation, it appears, at the level of a "mere formality", that the appellant is able to access protection from either of those two additional countries. This being the case, he cannot be found to be lacking in the protection of these two other countries of nationality, as he has not availed himself of the protection of one or either of those two countries. A claim to invoke the international obligations of New Zealand and provide surrogate protection to this appellant is thus clearly unfounded and abusive.

CONCLUSION

[22] The Authority finds the appellant is a person who falls within the terms of the second paragraph of Article 1A(2) of the Refugee Convention. Additionally, he does not have a well-founded fear of being persecuted on return to Poland. Both issues as framed are answered in the negative. Even if grounds based on the appellant's Jewish ethnicity were to be considered, they are also manifestly unfounded on the evidence presented, as the appellant has not established a failure of state protection from Poland on his return.

[23] 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.

"A R Mackey"
A R Mackey
Chairman