REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 72752/01

AT AUCKLAND

Before:	RPG Haines QC (Chairperson) J Baddeley (Member)
Representing the Appellant:	Sakol Thavee; J Hikuwai (Thammagay Immigration Consultant Limited)
Date of filing appeal:	21 June 2001
Date of Decision:	15 November 2001

DECISION

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INTRODUCTION

[1] The appellant is a Thai national. For reasons which will be explained, his refugee application is an abuse of the New Zealand refugee determination system.

[2] The claim to refugee status was lodged with the Refugee Status Branch (RSB) on 4 December 2000. It is one of approximately 285 almost identical cases lodged by Thai nationals. They claim to be in fear of persecution by the Thai government. There is no credible evidence to support this claim. They also claim to be in fear of persecution by Thai Muslims. Again there is no credible evidence to support this claim. These refugee applications should never have been made.

[3] The abusive nature of these cases is underlined by the manner in which the claimants manipulated the proceedings at first instance. Each member of the group is a Thai national and is a native speaker of the Thai language. However, when refugee status officers of the RSB interviewed the claimants in Thai, each person insisted upon being interviewed not in Thai, but in Pali, an ancient language which is not used in Thailand for everyday communication but survives as a relic of a previous age. The nearest analogy in Western terms is the Latin language. There are no known Pali interpreters in New Zealand.

[4] Faced with the refusal by this group to be interviewed in their own language (Thai) and faced with the fact that there is no credible basis to the claims, refugee status officers properly declined each application.

[5] Predictably there has been a flood of appeals to this Authority. Approximately 155 such appeals have been received to date. All appellants are represented by Thammagay Immigration Consultant Limited, a company which operates from a house

in New Lynn which has been styled as "the Wat Thai temple". Each appellant claims to be a member of this "temple".

[6] The Authority is in no doubt that these claims to refugee status (and the appeals to this Authority) are a scheme the purpose of which is to enable those involved to live and work in New Zealand in circumvention of this country's immigration laws.

[7] The Immigration Act 1987 confers on the Authority specific powers to deal with abuses of this kind. In particular, where a refugee claimant has been offered an opportunity to be interviewed by a refugee status officer and been declined refugee status, the Authority is under no obligation to give the claimant an oral appeal hearing if the Authority is of the view that the appeal is prima facie manifestly unfounded or clearly abusive. See s 129P(5). If the Authority decides not to offer an appellant an interview, the appeal is heard under an accelerated procedure in which the case is determined on the papers.

[8] This decision will first explain why it is not open to a refugee claimant to require the proceedings to be conducted in a language of the claimant's choice. The Authority will then explain its jurisdiction in respect of manifestly unfounded claims. Finally we will turn to the specific claims made by the present appellant and our assessment of those claims.

INTERPRETERS IN THE REFUGEE CONTEXT

The duty to act fairly and the duty to provide an interpreter

[9] The fundamental principle underlying the New Zealand refugee determination system is the duty of decision-makers to act fairly. See for example *Benipal v Ministers of Foreign Affairs and Immigration* (High Court, Auckland, 29 November

1985, A993/83, Chilwell J); *Santokh Singh v Refugee Status Appeals Authority* (High Court, Auckland, M1224/93, 9 February 1994, Smellie J); *Khalon v Attorney-General* [1996] 1 NZLR 458, 463 (Fisher J); *AB v Refugee Status Appeals Authority* [2001] NZAR 209, 213 (Nicholson J) and *A v Refugee Status Appeals Authority* [2001] 348, 354 (Nicholson J). This common law duty is underpinned by the New Zealand Bill of Rights Act 1990, s 27(1) which provides that every person has the right to the observance of the principles of natural justice by any tribunal which has the power to make a determination in respect of that person's rights, obligations or interests protected or recognised by law.

[10] Most refugee claimants in New Zealand speak no or little English. It is indisputable that in these cases procedural fairness requires the provision of a competent and impartial interpreter in a language the claimant can understand and speak. To prevent a person who has no understanding of English from using an interpreter would be no different from denying a hearing altogether. But at common law, the provision of an interpreter in curial proceedings is a matter within the discretion of the trial judge: Laster & Taylor, *Interpreters and the Legal System* (Federation Press 1994) 77-78. This approach has been criticised as anachronistic: Aronson & Dyer, *Judicial Review of Administrative Action* (Law Book Company 1996) 564:

> "There can be no doubt that procedural fairness may in some circumstances require that a person be permitted to use an interpreter at a hearing, although Australian authority to that effect is difficult to find. To prevent a person who has no understanding of English, or no hearing, from using an interpreter, would be no different from denying a hearing altogether. But the issues become more difficult when it comes to persons with some understanding, and the question of whether an interpreter must be provided at public expense. At common law, the provision of an interpreter in curial proceedings is a matter within the discretion of the trial judge. It would seem that the courts have maintained this seemingly anachronistic approach because of concerns about the difficulty of defining the limits of a right to an interpreter. There may well be difficult questions of fact concerning the need for an interpreter which ought to be a matter for the decision-maker at first instance. But it is difficult to see why that should preclude recognition of a right to an interpreter where the need for one is properly established. Nevertheless it would seem that, in the short term, the cautious approach of the courts in relation to curial proceedings

> may well qualify entitlement to an interpreter in administrative proceedings as well." [Footnotes omitted]

The statutory duty to provide an independent interpreter

[11] In New Zealand the law relating to refugee determination is very different. There is a statutory obligation on all refugee decision-makers, both refugee status officers and the Refugee Status Appeals Authority, to provide an independent interpreter at an interview where the first language of the claimant is not English. See the Immigration (Refugee Processing) Regulations 1999 (SR1999/285), Reg 20:

> **20. Provision of independent interpreters at interviews—**
>
> (1) It is the responsibility of the relevant refugee status officer or the Authority, as the case may require, to arrange for the attendance of an independent interpreter at an interview where the first language of the claimant or appellant or person whose refugee status is in question is not English.
>
> (2) An independent interpreter may be dispensed with at an interview only upon the request or application of the claimant or appellant or person whose refugee status is in question, and then only in such circumstances as are agreeable to the officer or member or members of the Authority determining the claim or appeal or matter involving the potential loss of refugee status.

[12] It is to be noted that the obligation is to provide an interpreter, not an interpreter of the refugee claimant's choice. Nor is the obligation to provide an interpreter in the claimant's first language.

The standard of interpretation

[13] While the standard of interpretation should be high, it need not be one of perfection. In determining adequacy of interpretation, a qualitative evaluation over the entire hearing should be made and should not be confined to just selective passages: *A v Refugee Status Appeals Authority* [2001] NZAR 348 at [32] (Nicholson J).

[14] The issue in the present case, however, is not the standard of interpretation, but whether a refugee claimant has an unrestricted right to specify the language into which the English is to be interpreted.

The duty to provide an interpreter is not open-ended

[15] In imposing a duty to arrange for the attendance of an independent interpreter at an interview where the first language of the refugee claimant is not English, reg 20 of the Immigration (Refugee Processing) Regulations 1999 does not impose an open-ended duty. The nature and extent of the duty must be ascertained from the text of the regulation and in the light of its purpose: Interpretation Act 1999, s 5(1). The precise limits of the duty do not have to be identified for the purpose of this decision. The facts are so clear that only general findings are called for.

[16] In particular the duty cannot be given a meaning and effect which facilitates the abuse of the refugee determination procedures. Specifically, it is not open to a refugee claimant whose first language is not English to refuse to be interviewed in his or her first language.

[17] The refugee status officers went to considerable lengths to interview this group of claimants in the Thai language, but they were met with a uniform refusal. There can be no doubt that the refusal was an abuse of process and compelling evidence that the refugee claims are manifestly unfounded or clearly abusive. In our experience (and undoubtedly that of refugee status officers) no genuine refugee claimant would conduct him or herself in this manner.

[18] While it is strictly speaking not necessary to take the point any further, it is significant to note that at the international level the right to an interpreter is similarly not accepted as an unrestricted right. As the discussion which follows is simply

confirmatory of our conclusions, it will be in abbreviated form and drawn mainly from the leading texts.

Interpreters under the ICCPR and ECHR

[19] In addressing procedural guarantees in criminal trials, Article 14(3)(f) of the International Covenant on Civil and Political Rights, 1966 states that:

> "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> ...
>
> (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[20] While proceedings before refugee status officers and the Authority are in no sense a criminal trial, the ICCPR provision is nevertheless analogous.

[21] Commenting on this provision, Manfred Nowak in *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 1993) at 263 correctly underlines the point that the purpose in appointing an interpreter is to guarantee that an accused who does not understand the court's language receives a fair trial. To similar effect see *Alwen Industries Limited v Collector of Customs* [1996] 3 NZLR 226, 229 (Robertson J). However, Nowak goes on to point out that Article 14(3)(f) does not provide a right to have court proceedings conducted in the language of one's choice or to express oneself in the language in which one normally expresses oneself:

> "In a number of cases submitted by members of linguistic minorities, in particular by *Bretons against France*, the Committee stressed, however, that Art. 14(3)(f) does not provide any right simply to have court proceedings conducted in the language of one's choice or to express oneself in the language in which one normally expresses oneself. If members of a linguistic minority or aliens are sufficiently proficient in the official court's language, they have no right to the free assistance of an interpreter."

[22] In support of this statement Nowak cites *Guesdon v France*, No. 219/1986, §§ 10.2, 10.3; *Cadoret and Le Bihan v France*, Nos. 221/1987 and 323/1988, §§ 5.6, 5.7; *Barzhig v France*, No. 237/1988, §§ 5.5, 5.6; *C.L.D. v France*, No. 439/1990,§ 4.2; *Z.P. v Canada*, No. 341/1988, § 5.3; *C.E.A. v Finland*, No. 316/1988, § 6.2.

[23] In our view these rulings of the Human Rights Committee are highly significant.

[24] The discussion of Article 14(3)(f) by Stephen Bailey in "Rights in the Administration of Justice", Harris & Joseph eds, *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press Oxford 1995) 185, 231 is to the same effect. It is explicitly stated that if the accused can follow proceedings, he or she is not entitled to have proceedings conducted in a different preferred language, or the free assistance of an interpreter. Again *Guesdon v France, Cadoret and Le Bihan v France, Barzhig v France* and *C.E.A. v Finland* are cited. It is mentioned that in the latter case it was held that there is no right to have proceedings in a Finnish court conducted in Swedish, even though Swedish is an official language in Finland. The author also notes that while in Scotland there is legislation which requires that if the accused (or a witness) does not understand English, an interpreter must be provided, it was held in *Taylor v Haughney* [1982] SCCR 360 that a Gaelic speaker whose first language is English is not entitled to have the trial conducted in Gaelic.

[25] The jurisprudence of the European Convention on Human Rights, 1950 is to like effect. Article 6(3)(e) provides:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> ...

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in Court.

[26] Case law under this provision establishes that an accused who understands the language used in court cannot insist upon the services of a translator to allow him to conduct his defence in another language, including the language of an ethnic minority of which he is a member: Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights* (Butterworths 1995) 272 citing *K v France* No. 10210/82, 35 DR 203 (1983) and *Bideault v France* No. 11261/84, 48 DR 232 (1986).

[27] For completeness we mention that in *Vasile v Canada (Secretary of State)* (1994) 25 Imm LR (2nd) 207, 208 (FC:TD) it was held that to request the services of an interpreter when one is fluent in English is an abuse of the process.

Conclusion

[28] The duty under Regulation 20 of the Immigration (Refugee Processing) Regulations 1999 to arrange for the attendance of an independent interpreter at an interview where the first language of the claimant is not English is not an unrestricted one. Nor under international human rights instruments is the right to an interpreter an unrestricted one. Whatever the precise limits of the duty and of the right, it is plain that it is not open to a refugee claimant whose first language is not English to insist on the attendance of an interpreter for a language which the claimant does not speak. Nor can the claimant refuse to proceed with an interview in the claimant's first language. Though not necessary for the purposes of this decision, we are also of the view that a claimant cannot refuse to proceed with an interview in a language in which the claimant is sufficiently proficient, even though the language is not of the claimant's choice or in a language in which the claimant normally expresses him or herself. There will be instances in which the limited resources of a small country such as New

Zealand are unable to provide an interpreter in the first language of every refugee claimant.

[29] For the reasons given, there can be no doubt that the refusal of this group of refugee claimants to be interviewed in their first language (Thai) was an abuse of process and compelling evidence that the refugee claims were manifestly unfounded or clearly abusive.

[30] At this point it is appropriate to discuss the Authority's powers in relation to refugee claims which are prima facie manifestly unfounded or clearly abusive.

THE DISCRETION TO INTERVIEW MANIFESTLY UNFOUNDED OR CLEARLY ABUSIVE CLAIMS

[31] The current refugee determination system in New Zealand was set up in March 1991. The jurisdictional foundation for the system has evolved from Terms of Reference approved by Cabinet to the present day statutory scheme set out in Part VIA of the Immigration Act 1987.

[32] The basic features of the New Zealand refugee determination system have, however, remained unchanged. For present purposes it is necessary to note only three such features:

(a) The system is two-tiered. A first instance decision may be appealed to the Authority;

(b) Emphasis is given to the importance of interviewing refugee claimants both at first instance and on appeal, and rightly so, given the centrality of credibility

issues to refugee claims and further given the potential consequences of a mistaken decline of refugee status;

(c) The potential for a fair and generous system to be abused has always been recognised. From the outset the Authority has had explicit jurisdiction to ***not*** conduct an interview where the claim to refugee status is prima facie manifestly unfounded or clearly abusive.

The manifestly unfounded jurisdiction prior to 1 October 1999

[33] In the period 1991 to 1 October 1999,[1] **the manifestly unfounded jurisdiction conferred by the various Terms of Reference was described in different but not dissimilar language. A fuller account is set out in *Refugee Appeal No. 70951/98* (5 August 1998) 8-11:**

> **"... unless the claim is prima facie manifestly unfounded or frivolous or vexatious, or manifestly well-founded...." [Terms of Reference (March 1991) para 7]**
>
> **"... unless the claim is prima facie manifestly unfounded or frivolous or vexatious, or manifestly well-founded...." [Terms of Reference (1 April 1992) para 8]**
>
> **"... unless the claim to refugee status is prima facie 'manifestly unfounded' or 'clearly abusive' or manifestly well-founded." [Terms of Reference (30 August 1993) Part II para 8(3)]**

[34] The last Terms of Reference came into force on 30 April 1998 and were known as the Rules Governing Refugee Status Determination Procedures in New Zealand (30 April 1998). The wording of the manifestly unfounded jurisdiction was substantially different to that found in the three earlier Terms of Reference. Under the 1998 Rules

1 By virtue of s 1(3) of the Immigration Amendment Act 1999, Part VIA of the Immigration Act 1987 came into force on 1 October 1999.

everything was left to the discretion of the Refugee Status Appeals Authority. Para 9(3), Part II of the Rules provided:

> "Subject to paragraph 5(2) of this Part of these Rules, the Authority may, at the Authority's discretion, give the appellant an opportunity to attend an interview and shall consider any evidence presented by the appellant provided that the Authority shall offer such an interview to any appellant who was not interviewed by the RSB under Part I of these Rules in the making of the decision which is the subject of the appeal."

[35] The nature of this discretion and the grounds on which it was to be exercised were considered at some length by the Authority in *Refugee Appeal No. 70951/98* (5 August 1998). In that decision the Authority drew on principles of administrative law and on international standards for addressing abuse of refugee determination systems, including *Excom Conclusion No. 30: The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum* (1983). For a review of the status of Excom Conclusions reference should be made to the decision at 24-26 and there is a brief reference to such conclusions in *Attorney-General v E* [2000] 3 NZLR 257 at [38] (CA). The language used in *Excom Conclusion No. 30* is "manifestly unfounded" and "clearly abusive".

[36] The general conclusions reached by the Authority in *Refugee Appeal No. 70951/98* (5 August 1998) at 36 were:

> "Ordinarily, the very subject matter of refugee determination combined with the high standard of fairness expected in this jurisdiction would require that an opportunity to attend an interview should be offered by the Authority as a matter of course. However, the Authority also has a duty to address in a meaningful way the high level of abuse to which its processes are presently being subjected.
>
> As a working guideline, in those cases where the Authority has a discretion to interview, the Authority will give each appellant an opportunity to attend an interview unless the claim to refugee status is prima facie manifestly unfounded or clearly abusive. Generally, a claim will be prima facie manifestly unfounded or clearly abusive if it is not related to the criteria for the granting of refugee status laid down in the Refugee Convention or where the claim is clearly fraudulent. This very general definition is not, however, exhaustive of the circumstances in which an interview will not be offered and is to be

flexibly construed so as to include those cases where the presumption of state protection properly applies.

On the issue whether the claim to refugee status is manifestly unfounded or clearly abusive, the appellant is clearly entitled to be heard. The Authority will continue its practice of sending out a letter giving notice of the issue of manifest unfoundedness and offering the appellant an opportunity to be heard on that issue before any finding is made. The same considerations will apply under para 9(4), Part II of the Rules to second and subsequent appeals.

In the result the practical effect is that the pre-30 April 1998 regime will continue under the new Rules except in those cases where no opportunity to attend an interview has been given by the Refugee Status Branch.

It is important to note, however, that the identification of a claim as prima facie manifestly unfounded or clearly abusive serves one, and one purpose only, namely to determine whether the Authority will give the appellant an opportunity to attend an ***interview***. Application of the label "manifestly unfounded" or "clearly abusive" is not a ground in itself for dismissing the appeal. Once a finding of manifest unfoundedness has been made, an interview can be dispensed with, but the appeal must still be ***heard***, albeit on the papers. That hearing must be conducted reasonably, fairly and according to law. If the appellant is unable to satisfy the criteria of the refugee definition, the appeal will no doubt be dismissed.

It is to be stressed that the Authority's discretion under para 9(3), Part II of the Rules is a very general one and is not confined to manifestly unfounded cases. The precise boundaries of this discretion are to be worked out on a case by case basis. It may be, for example, that an appellant who deliberately fails to attend an interview of which he or she has notice, will find the appeal being determined on the papers."

The manifestly unfounded jurisdiction after 1 October 1999

[37] The ***statutory*** jurisdiction in relation to manifestly unfounded claims is now set out in s 129P(5) of the Immigration Act 1987. It provides:

"The Authority may dispense with an interview of the appellant or other affected person only if both—

(a) The appellant or other affected person has been interviewed by a refugee status officer in the course of determining the relevant matter at first instance or, having been given an opportunity to be interviewed, failed to take that opportunity; and

(b) The Authority considers that the appeal or other contention of the person affected is prima facie manifestly unfounded or clearly abusive."

[38] It can be readily seen that the statutory phrase "manifestly unfounded or clearly abusive" in s 129P(5)(b) is a re-statement of the jurisdiction the Authority has possessed since it was first constituted and may be seen as an endorsement of the principles discussed and applied in *Refugee Appeal No. 70951/98* and in particular, the inspiration drawn from *Excom Conclusion No. 30*. The decision in *Refugee Appeal No. 70951/98* may therefore be drawn on when interpreting and applying the discretion to interview under s 129P(5)(b).

[39] We see no need to attempt a comprehensive definition of "manifestly unfounded or clearly abusive". The meaning must be worked out on a case by case basis.

[40] What does require emphasis is that the identification of a claim as prima facie manifestly unfounded or clearly abusive serves one, and one purpose only, namely to determine whether the Authority will give the appellant an opportunity to attend an ***interview***. Application of the label "manifestly unfounded" or "clearly abusive" is not a ground in itself for dismissing the appeal. Once a finding of manifest unfoundedness has been made, an interview can be dispensed with, but the appeal must still be ***heard***, albeit on the papers. That hearing must be conducted reasonably, fairly and according to law. If the appellant is unable to satisfy the criteria of the refugee definition, the appeal will no doubt be dismissed.

[41] The facts of the appellant's case must now be addressed and a decision made whether the appeal is to be determined under the accelerated procedure allowed by s 129P(5). This requires an assessment of the procedural history of the refugee claim as well as the factual claims on which the appellant rests his case to be a refugee within the meaning of Article 1A(2) of the Refugee Convention.

PROCEDURAL HISTORY OF THE APPELLANT'S CASE

At first instance

[42] The appellant arrived in New Zealand on 30 June 2000 under the visa exempt arrangements provided for by the Immigration Regulations 1999 (SR 1999/284), Reg 24 and Part 1 of Schedule 1. The exempt status of Thai nationals was later removed by the Immigration Amendment Regulations (No. 3) 2000 (SR 2000/259), Reg 3 which came into force on 1 January 2001.

[43] On arrival the appellant was granted a seven day visitor's permit valid to 7 July 2000. On his application a further visitor's permit was granted on 24 July 2000 valid to 31 December 2000. On 4 December 2000 the refugee application was submitted. A work permit was issued in accordance with standard policy.

[44] In the refugee application the appellant stated that he is a citizen of Thailand, having been born in that country on 26 May 1955. He entered primary school in 1962, secondary school in 1966 and undertook tertiary education in the period 1968 to 1971. The form also mentions that in addition he attended an engineering school.

[45] On the question of language, Question C4 asked:

> What language(s) do you speak, read and write? (Tick the appropriate box(s).) Please list in order of preference/fluency, starting with your most preferred/fluent language.
>
> The answer given by the appellant was "Thai" and he ticked each of the boxes which read "Speak", "Read", "Write".

Both this answer and his education history establish fluency in the Thai language.

[46] The appellant claims to be a Buddhist monk by occupation.

[47] By letter dated 26 March 2001 the appellant asserted his right to be interviewed in the Pali language:

> "We have the right to interview to recognise our claim to refugee status in Thai/Pali Language, it is noted that under regulation 10(d) of the Immigration (Refugee Processing) Regulations 1999.

[48] By letter dated 16 May 2001 the appellant was advised by the Refugee Status Branch of the New Zealand Immigration Service that an interview had been scheduled for the hearing of his claim for refugee status on Tuesday 29 May 2001 at 8.30am. The letter underlined (inter alia) the importance of his attendance at the interview.

[49] In relation to the request for a Pali interpreter, the appellant was advised by a refugee status officer in a letter dated 21 May 2001 that inquiries made by the Refugee Status Branch had revealed that Pali is not used by people to converse or to communicate with each other, but is used only in religious scriptures and in prayers and chants in Buddhist temples. Inquiries made with the University of Auckland, the Auckland University of Technology and the New Zealand Society of Translators and Interpreters and various other individuals and agencies offering interpreting and translation services had revealed that there was no interpreter in New Zealand for the Pali language. The appellant was provided with a copy of the advice given by Dr Eric van Reijn of the School of Asian Studies of the University of Auckland, and by Henry Liu of the New Zealand Society of Translators and Interpreters. The appellant was advised that the interview would therefore be conducted in the Thai language.

[50] The appellant attended at the scheduled interview. A Thai interpreter interpreted all communications between him and the refugee status officer. Asked what languages he spoke, the appellant answered "Thai". Asked what languages he read and wrote, he again answered "Thai". The appellant nevertheless insisted on being interviewed in Pali. Asked on three separate occasions whether he was willing to be interviewed in Thai, he responded each time that he was only willing to be interviewed in Pali. He

confirmed that he had received the letter dated 21 May 2001 advising him that no Pali interpreter was available. He was reminded of the importance of the interview. He confirmed that he understood this but claimed that Buddhist monks use a different language from lay people, and as a monk he had to use the Pali language. He stated that he was not able to talk about his claim in any language other than Pali, as it was based on the Buddhist Bible, which was written in Pali. The refugee status officer advised the appellant that if the interview could not proceed, the decision on his refugee claim would be based on the information on his file. The appellant confirmed that he understood this. He was informed that after the interview he would have ten working days to submit any further information in support of his claim, and that such submissions would have to be either in English or accompanied by an independent certified translation. He confirmed his address and telephone number. By letter dated 29 May 2001 the refugee status officer confirmed to the appellant that his claim would be decided on the basis of the information on his file and that any further submissions had to be received by the refugee status officer by 4pm on Wednesday, 13 June 2001.

[51] In submissions dated 2 June 2001 the appellant tendered further documentation. On the language issue he argued that Pali was the study language of Buddhist teachings, a statement which tends to support the earlier expert advice that Pali is not a spoken language. Among the documentation submitted was a religious notice from the Buddhist Patriarch Council together with an English translation. The translator's note records that the document has been translated from the Thai language and in a footnote refers to the fact that the document "contains words in Pali or Thai words derived from Pali, similar to Latin used in Roman Catholic". This again is confirmatory of the marginal, if not anachronistic place of Pali in the Thai language.

[52] For the reasons which have earlier been explained there was no duty on the refugee status officer to provide a Pali interpreter and no "right" on the part of the appellant to insist on such interpreter. The appellant is a native speaker of the Thai

language. There can be no doubt that his refusal to be interviewed in the Thai language was an abuse of process.

On appeal

[53] In a decision dated 14 June 2001 the appellant's refugee application was declined. From this decision he promptly appealed by notice dated 21 June 2001.

[54] On the instruction of the Authority, the Secretariat by letter dated 9 July 2001 drew the appellant's attention to s 129P(5) of the Immigration Act 1987 and gave notice that the Authority intended to consider whether the appellant would be given an opportunity to be interviewed. After referring to the fact that Thai had been given by the appellant in his refugee application as his most preferred or fluent language and that he had nevertheless refused to be interviewed in Thai, the letter recorded that the Authority was satisfied that in terms of s 129P(5)(a), the appellant had been given the opportunity to be interviewed and had failed to take that opportunity. The letter went on to record that in view of the following matters, the Authority, having reviewed the appellant's file, considered that his appeal was prima facie manifestly unfounded or clearly abusive and could therefore be determined without giving an interview:

> "As a Buddhist you claim that you fear persecution by the Thai government for reason of your religion. In particular you claim that the Thai government refuses to allow public discussion of Buddhist issues and refuses to recognise Buddhist holidays. You claim to fear violence from Muslims because you are a Buddhist.
>
> The Authority advises that persecution is defined as the sustained or systemic violation of basic or core human rights such as to be demonstrative of a failure of state protection (*Refugee Appeal No. 2039/93* (12 February 1996)). The evidence you have provided in support of your claim falls far short of demonstrating that you have in the past suffered persecution or face any real chance of persecution on return to Thailand.
>
> Country information contained in the United States *Department of State Country Reports on Human Rights Practices 2000: Thailand* (February 2001) and in the *2000 Annual Report on International Religious Freedom: Thailand* Bureau of Democracy of Human Rights and Labour (US Department of State, September 5, 2000) demonstrates that freedom of religion is protected by law in Thailand and the government respects this right in practice. In Thailand, 93% of the population are Buddhist. The constitution requires that the monarch be Buddhist and although there is no designated state religion in effect

> Theravda Buddhism is the state religion. There is no evidence of which the Authority is aware to suggest that Buddhists are at risk of persecution in Thailand, either by state or non-state (eg Muslim) agents.
>
> It is a well established principle of refugee law that nations should be presumed capable of protecting their citizens. Clear and convincing evidence is required to demonstrate a state's inability to protect its citizens *Refugee Status Appeal No. 523/92* (17 March 1995). This principle has particular application where a refugee claimant comes from an open democratic society such as Thailand with a developed legal system which makes serious efforts to protect the citizens from harm. According to United States *Department of State Country Reports on Human Rights Practices: Thailand*, February 2001, Thailand is a democratically governed constitution monarchy with an active police and judicial arm. In the Authority's view the presumption of state protection applies in the appellant's circumstances in Thailand. There is no evidence before the Authority that you would be unable to access state protection from any harm you fear."

[55] The appellant was invited to submit within seven working days submissions responding to these points and any other submissions or evidence to support the refugee claim. The appellant was warned that unless the Authority was persuaded otherwise it could consider and determine the appeal on the papers without giving the appellant an opportunity of attending an interview.

[56] By letter dated 11 July 2001 application was made for an extension of time. That application was granted and the new deadline set was 6 August 2001. Since then the Authority has received further submissions dated 6 August 2001 and 20 September 2001. All of the materials submitted to the Authority has been taken into account in the preparation of this decision.

[57] There is one final preliminary matter to address. In the submissions of 20 September 2001 the Authority is requested to issue a witness summons to the Thai Ambassador to New Zealand. The purpose of the request is stated in the following terms:

> "So the Appeal Authority can question him about the alleged activities of our Group, and whether or not under Thailand Law, our Group is unlawful, and as such punishable by law. As this man is of some standing in the eye's of the New Zealand Government, and we are just ordinary people, perhaps his words to the Authority will lend weight to our submissions and convince the Appeal Authority that we are indeed true refugees under the convention, and should be granted permanent residence so our ***fears of persecution and imprisonment*** can be laid to rest". [Emphasis in original]

[58] The question of the witness summons will be addressed next.

REQUEST TO ISSUE WITNESS SUMMONS TO THAI AMBASSADOR

[59] There are several fundamental reasons why a witness summons cannot be issued to the Thai Ambassador.

Diplomatic immunity

[60] First and foremost, while Schedule 3C, para 7 of the Immigration Act 1987 provides that the Authority has the powers of a Commission of Inquiry under the Commissions of Inquiry Act 1908, those powers are not unrestricted. In particular the Authority's power to issue a witness summons under s 4D of the Commissions of Inquiry Act 1908 must be read subject to Article 31 of the Vienna Convention on Diplomatic Relations, 1961 which by virtue of s 5(1) of the Diplomatic Privileges and Immunities Act 1968 has the force of law in New Zealand. Article 31 provides:

> **Article 31**
>
> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
>
> 2. A diplomatic agent is not obliged to give evidence as a witness.
> 3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

> 4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

[61] It will be seen that a diplomatic agent enjoys immunity from this country's civil and administrative jurisdiction. In addition Article 31(2) specifically provides that a diplomatic agent is not obliged to give evidence as a witness. The term "diplomatic agent" is defined by Article 1 of the Convention as the head of the mission or a member of the diplomatic staff of the mission. Article 1 has the force of law in New Zealand by virtue of s 5(1) of the Diplomatic Privileges and Immunities Act 1968.

[62] In the circumstances it is clear that the Thai Ambassador cannot be compelled to give evidence, nor may any member of the diplomatic staff of the Thai mission to New Zealand. See further Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* 2nd ed (Clarendon Press 1998) 258-262. On this ground alone the application must be declined.

Issue of summons inconsistent with Immigration Act 1987

[63] Even if the Authority had a discretion to issue a witness summons to the Thai Ambassador, it would not be prepared to grant the request. Under s 129T of the Immigration Act 1987 the Authority has a statutory duty of confidentiality as to the identity of the appellant and as to the particulars of his case. It would be difficult, if not impossible, to preserve such confidentiality were the Authority to summons as a witness a diplomatic official from the very State in respect of which the risk of being persecuted is said to relate.

[64] There is also the factor that there is no evidence to suggest that the appellant himself is unable to obtain from other sources the intended evidence.

Conclusion

[65] The request that the Thai Ambassador to New Zealand be summonsed to appear as a witness is accordingly declined.

THE APPELLANT'S CASE

[66] No purpose would be served by repeating the rambling and at times incoherent assertions made by the appellant in support of his case. In essence, the claim to refugee status is based on two grounds:

(a) He is in fear of persecution from Muslim terrorists;

(b) As a member of the Thammagay group of Buddhists, he fears persecution from the Thai government, the Thai monarchy and the Buddhist clergy.

[67] These grounds will be explained and addressed in greater detail under the Assessment section of this decision.

THE ISSUES

[68] 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."

[69] In terms of *Refugee Appeal No. 70074/96 Re ELLM* (17 September 1996) the principal issues are:

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

2. If the answer is Yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

[70] As earlier explained, the Authority has taken into account all of the evidence and submissions which have been provided both to the refugee status officer and to this Authority. It is not intended to refer to each item of evidence or to each submission. The case rests on very broad assertions and will accordingly be addressed in broad terms.

Fear of persecution by Muslims

[71] The appellant claims that as a Buddhist he fears persecution by Muslim extremists in Thailand. He adds that as Thailand is an ally of the United States of America Muslim terrorists are likely to "step up terrorist activities and continue to bomb Thailand and kill its citizens". In support he has provided the following:

(a) An article entitled "High Rank Buddhist Priest Slain", *The Daily News*, 28 April 2001. This article describes the bombing of a railway station and the murder of a Buddhist priest and the consequential issue of arrest warrants for members of the Barisan Revolusi Nasional Movement and Pattani United Liberation Organisation for this murder. It is said that both groups are militant Muslim separatist organisations;

(b) An article entitled "Thai floats reward to trace jet bombers" <http://www.cnn.com.world> (7 March 2001). This article reports the bombing of a Thai Airways jet which had been intended to be used by the Thai Prime Minister. Unnamed "international terrorists" are reported as being the suspects;

(c) An item published on the internet by the University of Maryland entitled "Muslims in Thailand" <http://www.bsos.umd.edu/cidcm/mar/thamusl.htm>. The authorship of this document is not entirely clear. This article describes various terrorist attacks in Thailand in the period 1990 to 1998. Notably the article states that there has been a decline in the intensity of support of the Muslim separatist movement in the south in the 1990's due to efforts by government officials to reduce the marginalisation of Islamic communities. The author also states:

> "Overall, observers doubt that any separatist organisation has the ability to engage in large-scale campaign."

[72] As to these claims the Authority referred the appellant to the publication by the Bureau of Democracy of Human Rights and Labour, United States Department of State, *2000 Annual Report on Religious Freedom: Thailand* (5 September 2000) in which it is recorded that approximately 85% to 90% of the population in Thailand is Buddhist and up to 10% are Muslims. It is stated in the report that Muslims are more likely to experience discrimination than Buddhists. Furthermore, the 1997 Constitution of Thailand contains provisions prohibiting speech "likely to insult Buddhism".

[73] From the material supplied by the appellant and the material supplied by the Authority to the appellant, the following conclusions may be drawn:

(a) Buddhism is the national religion in Thailand;

(b) The overwhelming majority of the population in Thailand are Buddhists;

(c) Thai law discriminates in favour of Buddhists. By contrast, Muslims experience some societal and economic discrimination;

(d) The murder of the Buddhist priest provoked a rapid response from the police who arrested Muslim suspects;

(e) There is no evidence to suggest that Buddhists in Thailand are at risk of persecution at the hands of Muslims. Nor is there any credible evidence which would even suggest that the appellant personally is at real risk of being harmed by Muslim terrorists. The claim that there is a well-founded fear of being persecuted at the hands of Muslims is untenable. It is significant that the appellant's claim is a general one. He does not claim that he has ever suffered harm or a threat of harm from Muslims in Thailand, nor is there any evidence to suggest that there is a real chance of such events occurring in the future should the appellant return to Thailand. The Authority finds that the appellant has no well-founded fear of persecution at the hands of Muslims in Thailand.

[74] Although not strictly necessary for the purposes of this decision, it is to be noted also that there is a complete absence of evidence that should the appellant ever be faced with harm or the threat of harm from Muslims, he could not access effective state protection. Indeed, the evidence establishes that state protection is available. The appellant carries the responsibility of providing clear and convincing evidence that Thailand is unable to protect him. See *Refugee Appeal No. 70074/96* (17 September 1996). He has provided no such evidence.

Persecution by the state - membership of the Thammagay group

[75] In at least two documents submitted by the appellant it is expressly recorded that the Thai government permits religious diversity. One document goes so far as to say that there is "total religious freedom". This notwithstanding, the argument for the appellant is that he is part of a group which has taken parts of the names of each of the two main streams of Buddhism in Thailand (the Thammayut and Mahaneigay streams) and styled themselves the Thammagay group. It is said that under Thai law this is illegal as one can only belong to either the Thammayut or Mahaneigay groups.

[76] Beyond this bare assertion, there is no evidence to support the claim. Specifically there is no evidence that the Thammagay group is illegal in Thailand or (more importantly) that members are at risk of persecution by reason of their membership of the Thammagay group. In the absence of such evidence (let alone credible evidence) this aspect of the case must fail.

[77] It is then said that reported comments made by members of the Thai Senate Foreign Affairs Committee show that an allegation has been made that two (unnamed) Thai Buddhist monks claiming to belong to the Thammagay group in New Zealand are implicated in an immigration scam. The reported comments are to be found in two items published in *Tairath Newspaper*, Thursday 12 July 2001 entitled "Exposing (Thai) monks for taking commissions from workers" and "Swindling gang was set up to cheat Thais in New Zealand". According to these items it has been said that the scam involves arranging for Thai people to come to New Zealand to work. In New Zealand they claim to be refugees and ask for financial support. It is alleged in the newspaper reports that "commissions" are collected from the workers. Concern has been expressed that this reflects adversely on Buddhism. A further report published in *The Daily News* (21 July 2001) entitled "Push to revoke passports of two monks suspected of involvement in labour exports scam" records that the Thai Ministry of Foreign Affairs has issued a letter requesting that the passports held by the two monks allegedly involved in the scam be cancelled on the grounds that they had engaged in activities contrary to the stated purpose for which their passports had been issued.

Although not entirely clear, the passports were allegedly issued to allow the monks to travel to Europe to teach Buddhist principles and practices. The Ministry intended to cooperate with the New Zealand authorities to arrange for the monks to be sent back to Thailand. Whether this appellant is one of the two monks in question is not made clear in the submissions. Even if he is one of the monks, this is of no assistance to his refugee claim or to anyone else's claim. The reasons are explained in the next paragraph. But before leaving the newspaper items, it should be recorded that the appellant also claims that as one or more members of the Senate Foreign Affairs Committee are Muslims they might pass on information to Muslims who might kill the monks or members of the Wat Thai New Lynn temple on their return to Thailand.

[78] It is entirely unexceptionable for the Thai government to investigate allegations of criminal acts committed by Thai nationals against their fellow countrymen. A distinction must be drawn between legitimate state investigation and prosecution on the one hand and persecution on the other. The principle is succinctly stated by Professor James C Hathaway in *The Law of Refugee Status* (Butterworths 1991) 169:

> "It is clear that refugee status may not be invoked by an individual solely on the basis that she is at risk of legitimate prosecution or punishment for breach of the ordinary criminal law."

It is a distinction well established in the jurisprudence of this Authority. See for example *Refugee Appeal No. 1222/93 Re KN* (5 August 1994) 17-22. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, para 56 is to the same effect:

> "Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim - or potential victim - of injustice, not a fugitive from justice."

[79] In relation to the reported investigation there is simply no evidence to suggest that it is anything more than a legitimate investigation for a breach of the ordinary criminal law. Nor is there any evidence to suggest that any members of the Thammagay group

are liable to excessive punishment which may amount to persecution within the meaning of the refugee definition.

[80] The cancellation or recall of a passport is equally unexceptional where the authorities are investigating serious offences and where a passport obtained for one purpose is used for another. Indeed at New Zealand domestic law the Passports Act 1992 expressly provides for the cancellation and recall of New Zealand passports. The grounds include the obtaining of a passport by false representation (s 9(1)(e)) and where there is a warrant issued in New Zealand for the arrest of the holder (s 10(1)(a)).

[81] The evidence of "persecution" amounts to nothing more than evidence that the Thai authorities are concerned that Thai nationals are the victims of an immigration scam in New Zealand. The appellant and those similarly positioned, with some enterprise, seek to turn this to their advantage. Their fundamental problem, however, lies in the fact that as with the rest of their refugee claim, there is simply no evidence to suggest that there is a real risk of punishment, or that such punishment will be of sufficient severity as to amount to persecution. Nor is there any evidence to suggest that the legitimate investigation and potential prosecution are for reason of one of the five Convention grounds.

[82] In fact the entire case for refugee status is built on highly speculative and fanciful claims, perhaps exemplified by the assertion that a Muslim member of the Senate Foreign Affairs Committee ***might*** pass on information to Muslim extremists who ***might*** harm the appellant on his return to Thailand. This falls far short of the real or substantial risk of harm mandated by the well-founded standard: *Refugee Appeal No. 70074/96 Re ELLM* (17 September 1996) at [11] to [15]; *Refugee Appeal No. 71404/99* (29 October 1999) at [23] to [40]; [62]. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.

[83] Next it is claimed that there is a well-founded fear of persecution by reason of the fact that the Wat Thai temple is opposed to certain practices of the Patriarch Council of Thailand. It is said that there is a close association between the Buddhist Church and the State and that criticism of the Council amounts to opposition to the State. The particular ordinances of the Patriarch Council to which the appellant objects are:

(a) The prohibition against monks and novices practising as medical doctors or medical specialists. This prohibition is contained in an "announcement"from the Buddhist clergy on 24 March 1956. A translated copy of this document (originally in Thai) has been provided to the Authority. The document, while acknowledging that some monks and novices had made their living by practising folk and conventional medicine, goes on to note that such persons were not properly trained and the resulting errors in treatment led to criminal charges. A prohibition is imposed on monks and novices from practising medicine. As to this, it is difficult to see how rational objection could be taken to the "announcement" or to its enforcement by the state. The objection taken is bereft of merit and contrary to commonsense. Nothing more needs to be said;

(b) Then it is said that a February 1928 "announcement" prohibits women being ordained as Buddhist nuns. As to this, the role of women is a controversial one in many religions but it cannot be suggested that such prohibition amounts to persecution of either the adherents of the particular religion, the clergy of that religion (including dissidents) or of female members of that religion.

[84] Next the appellant objects to the government's refusal to recognise as public holidays certain days in the Buddhist religious calendar. The appellant claims that all Uposatta days should be public holidays. The fact that this contention is advanced in support of the refugee claim simply underlines the trivial if not concocted nature of the claim.

[85] The next claim is that the Thai government has made it unlawful to talk about Buddhism. No evidence has been provided to support this proposition and it is fanciful to suggest that in a country where Buddhism is, in effect, the state religion that discussion of that religion is outlawed. There is no basis for the submission and it is rejected.

[86] Then it is said that another Thai temple in Auckland has published a newsletter critical of the Wat Thai temple. The newsletter asks how Thai nationals could be granted refugee status on religious grounds and hints at reporting the affair to the Religious Affairs Department in Thailand. The Authority cannot see how legitimate debate over a controversial group of which the appellant is a member can in any realistic manner support the claim to refugee status. Nor is there any evidence to suggest that any report to the authorities in Thailand could lead to persecution of the appellant or any member of the Thammagay group.

[87] What entirely escapes the appellant is that the Refugee Convention does not protect against any and all forms of even serious harm. Refugee status is restricted to situations where there is a risk of a type of injury that is inconsistent with the basic duty of protection owed by the state to its own population: Professor James C Hathaway, *The Law of Refugee Status*, 103-104. For the reasons explained by this Authority in *Refugee Appeal No. 71427/99* [2000] NZAR 545 at [43] to [54], persecution may be defined as the sustained or systemic denial of basic human rights demonstrative of a failure of state protection. Superimposed on these considerations is the need for a refugee claimant to establish that the well-founded fear of being persecuted is for reason of one of the five grounds recognised by the Refugee Convention. In the present case there is not only a complete absence of evidence relating to the persecution element, there is also a complete absence of evidence in relation to the requirement that the well-founded fear of being persecuted be for reason of one of the five Convention grounds.

[88] The inescapable conclusion is that there is simply no evidence before the Authority on which a rational finding could be made that there is a well-founded fear of persecution for a Convention reason. This refugee application is based upon fanciful claims, supposition and speculation. Most, if not all of the grounds advanced are complaints about trivia or actions of the state which are entirely legitimate (eg investigating immigration fraud; preventing unqualified individuals from practising medicine). We are of the clear view that the claim is untenable and has been pursued for ulterior purposes, that is for reasons wholly unconnected with the Refugee Convention.

CONCLUSION ON SECTION 129P(5)

[89] The question is whether an interview is to be dispensed with under s 129P(5) of the Immigration Act 1987.

[90] It is clear that the appellant has been interviewed by a refugee status officer in the course of determining his refugee application at first instance or, having been given an opportunity to be interviewed, failed to take that opportunity. The first limb, namely s129P(5)(a) has therefore been satisfied.

[91] As to the second limb, it is clear from the Authority's assessment of the evidence that the claim to refugee status is unmistakably and entirely bereft of credible evidence. For the reasons which have been given the Authority finds that in terms of s 129P(5)(b) the appeal is prima facie manifestly unfounded or clearly abusive.

[92] The requirements of s 129P(5) having been satisfied, the Authority has decided that it will determine the appeal without an interview.

CONCLUSIONS ON THE MERITS OF THE APPEAL

[93] As can be seen from the procedural history of the case, the Authority has heard this appeal on the papers and afforded the appellant a full opportunity to be heard.

[94] Having assessed all of the information tendered by the appellant both at first instance and on appeal, and having considered the information which the Authority, in turn, has disclosed to the appellant, the clear conclusion is that there is a complete lack of evidence to support the claim that the appellant has a well-founded fear of being persecuted for a Convention reason.

[95] The formal answer given to the two issues earlier identified is "No".

[96] Our finding is that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. This appeal is dismissed.

.....
[Rodger Haines QC]
Chairperson