REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75139

AT AUCKLAND

Before:	RPG Haines QC (Chairperson) M Hodgen (Member)
Counsel for the Appellant:	D Ryken
Appearing for the NZIS:	No Appearance
Date of Hearing:	30 August 2004
Date of Decision:	18 November 2004

DECISION

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[1] This is the second occasion on which the appellant, a citizen of the Peoples Democratic Republic of Ethiopia, has appealed to this Authority. Important issues are raised.

REFUGEES *SUR PLACE*

[2] As a State party to the Refugee Convention New Zealand must ensure not only that it does not return to possible persecution an individual who has become a *refugee sur place* but also that it protects the refugee determination system from the abusive submission of repeat claims to refugee status by those who are not refugees. The meaning of *refugee sur place* is explained in the next paragraph.

The meaning of *refugee sur place*

[3] As Professor James C Hathaway in *The Law of Refugee Status* (Butterworths, 1991) explains at p 33, the Convention definition of a refugee does not distinguish between persons who flee their country in order to avoid the prospect of being persecuted and those who, while already abroad, determine that they cannot or will not return by reason of the risk of being persecuted in their state of nationality or origin. By virtue of its requirement that the claimant "***is*** outside the country of his nationality ...." the Convention protects refugees *sur place* on an equal footing with those who cross a border after the risk of being persecuted is already apparent. The UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* at para 94 is to like effect:

> The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee "*sur place*".

Categories of *sur place* claims

[4] A *sur place* refugee claim may be grounded either in events in the country of origin or grounded in the refugee claimant's activities abroad. In New Zealand, the refugee jurisprudence applied by the Authority recognises both categories of *sur place* claims.

Claims based on events in the country of origin

[5] As to claims grounded in events in the country of origin, Professor Hathaway in *The Law of Refugee Status* at 33-34 identifies two potential categories:

(a) The "classic" *sur place* refugee claim which derives from a significant change of circumstances in the country of origin at a time when the claimant is abroad:

> The classic *sur place* refugee claim derives from a significant change of circumstances in the country of origin at a time when the claimant is abroad for reasons wholly unrelated to a need for protection. At the time of departure from her state, she may have intended only to vacation, study, or do business abroad, and then to return home. If, however, events subsequent to her departure would put her at risk of serious harm upon return home, she may claim protection as a Convention refugee.

(b) Where there is a "dramatic intensification" of pre-existing factors since departure from one's home country:

> A variant of the classical *sur place* situation involves the dramatic intensification of pre-existing factors since departure from one's home country. While distinguishable from the first category by the fact that the claimant may have been aware of, or even motivated to depart by, disturbing events in her home country, these cases are characterized by an escalation of events post-departure which is sufficient to give rise to a reasonable risk of persecution upon return.

[6] Both of these categories of *sur place* claims are recognised and accepted in New Zealand, at least in the context of a ***first*** refugee claim. However, ss 129J(1) and 129O(1) of the Immigration Act 1987 restrict the circumstances in which a *sur place* claim can be submitted as a ***second*** refugee claim. In this decision the Authority is required to determine the scope and application of these provisions.

Claims based on claimant's activities abroad

[7] As to claims grounded in a refugee claimant's activities outside the country of origin, the legal position is the same. That is, a *sur place* claim based on such activities can be submitted as a ***first*** refugee claim. But once that claim has been

declined, a ***second*** refugee claim based on activities abroad may be submitted only in the circumstances allowed by ss 129J(1) and 129O(1).

[8] Although not arising on the facts of the present case, claims based on activities outside the country of origin can present special difficulties. It is possible for an individual, having no well-founded fear of being persecuted, to deliberately and cynically set about creating circumstances exclusively for the purpose of subsequently justifying a claim to refugee status. To protect the system from those who would seek, in a *sur place* situation, to manipulate circumstances merely to achieve the advantages which recognition as a refugee confers, the Authority has interpreted the Refugee Convention as requiring, implicitly, good faith on the part of the refugee claimant. See *Refugee Appeal No. 2254/94 Re HB* (21 September 1994) at 36 & 54-59 also reported in (1995) 7 IJRL 332. As the present appellant's refugee claim is not grounded on his activities abroad, the question of good faith does not arise.

SECOND AND SUBSEQUENT CLAIMS TO REFUGEE STATUS

[9] In only limited circumstances can a second or subsequent claim to refugee status be made. Those circumstances are prescribed by s 129J(1) of the Act. The claimant must show that since the determination of the first refugee claim circumstances in his or her home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim:

> **129J. Limitation on subsequent claims for refugee status—**
>
> (1) A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim.
>
> (2) In any such subsequent claim, the claimant may not challenge any finding of credibility or fact made in relation to a previous claim, and the officer may rely on any such finding.

[10] A person whose subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by such officer on the grounds that the statutory criteria have not been satisfied, may appeal to this Authority. Section 129O(1) provides:

> **129O. Appeals to Refugee Status Appeals Authority—**
>
> (1) A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision.

[11] The essence of the appellant's submission is that while the s 129J(1) criteria for a second or subsequent refugee claim are plainly stipulated as a jurisdictional threshold before a second or subsequent claim can be submitted at first instance to a refugee status officer, no such criteria inhibit the Authority's powers under s 129O(1) on appeal from such officer. Therefore an intending appellant, on a second or subsequent appeal, is not constrained by the narrow requirements of s 129J(1) relating to changed circumstances and significantly different grounds. Those constraints operate at first instance only, not on appeal.

[12] The two issues before the Authority are:

(a) Whether, on a second or subsequent appeal to the Authority under s129O(1), all issues are "at large" in the sense that an appellant is entitled to a full rehearing on the merits without the constraint of having to first establish that circumstances in his or her home country have changed to such an extent that the second or subsequent claim to refugee status is based on significantly different grounds to the first claim; and

(b) The meaning of the statutory phrase "circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim".

[13] The historical background to the statutory provisions is relevant to the interpretation exercise.

HISTORICAL BACKGROUND

[14] The evolution of the Authority's jurisdiction and powers is briefly outlined in *Refugee Appeal No. 71864/00* (2 June 2000).

[15] In brief, following the October 1990 general election the incoming administration, on 17 December 1990, approved new procedures for the determination of applications for refugee status. Those procedures included the setting up of the Authority. On 11 March 1991 the procedures were incorporated into Terms of Reference and the Authority heard its first appeal early in June 1991: *Singh v Refugee Status Appeals Authority* [1994] NZAR 193, 198-199 (Smellie J). Although the Terms of Reference were subsequently modified on three separate occasions, the basic outline of the procedures remained unchanged. In chronological order, the Terms of Reference were Terms of Reference (March 1991); Terms of Reference (1 April 1992); Terms of Reference (in force on 30 August 1993) and the Rules Governing Refugee Status Determination Procedures in New Zealand (in force from 30 April 1998).

[16] The original Terms of Reference of March 1991 were silent on the question whether a second refugee application could be lodged. The second Terms of Reference of April 1992 explicitly ***prohibited*** the Authority from considering claims to refugee status where the claimants were appealing to the Authority on a second occasion. Paragraph 7 provided:

> "The Authority shall not consider claims to refugee status where the claimants are appealing to the Authority on a second occasion, or on any occasion in respect of a case at any stage decided by the Interdepartmental Committee on Refugees."

[17] The Terms of Reference which came into force on 30 August 1993 reversed the position and specifically ***permitted*** second applications, but only if it could be shown that since the original determination, circumstances in the claimant's home country had changed to such an extent that the further claim was based on significantly different grounds to the original claim (terms later carried forward into Part 6A of the Immigration Act 1987). Under Part I of the 1993 Terms of Reference, the Refugee Status Branch was given jurisdiction at first instance to consider a second or further refugee application provided the criteria specified by paragraph 3 were met. Paragraph 3 provided:

> "A person who has previously had a claim to refugee status finally determined by the Refugee Status Section or the Authority has no right to have a further claim accepted for consideration by the Refugee Status Section, unless since the original determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the original claim."

[18] Under Part 2 of the Terms of Reference, the Refugee Status Appeals Authority had jurisdiction to hear an appeal where the Refugee Status Branch had concluded that the criteria stipulated by paragraph 3 had not been met. Paragraph 5(1) of the Authority's Terms of Reference conferred on the Authority power:

> "(f) To determine an appeal, by a person who has made a further claim to refugee status, against the decision of the RSS not to accept the claim for consideration because, since the original determination, circumstances in the claimant's home country have not changed to such an extent that the further claim is based on significantly different grounds to the original claim."

[19] In the first decision addressing these new provisions, the Authority (comprising the Chair of the panel hearing the present appeal) in *Refugee Appeal No. 2245/94 Re SS* (28 October 1994) at 17-18 ignored the limitations imposed by these provisions and adopted what can only be described (in hindsight) as an impermissible reading of the Terms of Reference. The Authority held, in effect, that if a refugee claimant asserted (after a first or subsequent decline) that there was ***now*** a risk of being persecuted (no matter how it arose), that assertion would be investigated notwithstanding the restrictions ostensibly imposed by the Terms of Reference. The Authority's approach was naive. It did not appreciate the potential for abuse. Nor did it know that the immigration consultant who prepared the second refugee claim in *Refugee Appeal No. 2245/94 Re SS* would later be shown to have knowingly participated in, if not instigated, the wholesale production of fabricated evidence to the Authority in support of many second appeals, and to have made statements of fact in written submissions on behalf of appellants which he knew were false. See *Singh v Auckland District Law Society* [2002] 3 NZLR 392 (Harrison J) at [53]. Be that as it may, on delivery of the decision in *Refugee Appeal No. 2245/94 Re SS* on 28 October 1994, almost immediately the refugee determination system became the victim of abuse by the repeat submission of utterly meritless refugee claims. At one point some 63% of all new appeals received by the Authority were second or third appeals. The level of abuse is described in *Refugee Appeal No. 70951/98* (5 August 1998) at 19:

> "The first "second appeal" by a claimant from the Punjab was heard by the Authority on 30 September 1994 and determined on 28 October 1994. See *Refugee Appeal No. 2245/94 Re SS* (28 October 1994). The appeal was successful. However, once the pattern of abuse was detected, it became rare for second appeals to succeed. Most failed on credibility grounds.
>
> Regrettably, the abuse continues down to the present time and on a considerable scale. For example, in the period from 1 April 1995 to 31 March 1996 some 63% of all new appeals were second or third appeals: *Refugee Appeal No. 70002/96 Re BS* (7 May 1996) at 8 and see also *Refugee Appeal No. 70387/97 Re MSI* (14

> May 1997) at 5. Of all second Punjabi appeals heard and decided by the Authority from October 1994 to 30 April 1998, and there are approximately 300 of such cases, only eight have succeeded. In percentage terms, the success rate has been 2.67%. There have been in the same period 21 ***third*** appeals (all unsuccessful) and even a ***fourth*** appeal (unsuccessful).
>
> Abuse of the appeal system is not the sole prerogative of Indian nationals. Second or third appeals have been received from:
>
> Iranians (37, of which one was successful)
> People's Republic of China (14, of which none were successful)
> Pakistan (4, of which none were successful)
> Peru (3, of which none were successful)
> South Africa (2, of which none were successful)
> Bulgaria (2, of which none were successful)
> Russia (2, of which none were successful)
> Nigeria (1, which was unsuccessful)
>
> It is significant that most of the refugee claimants who have lodged second (or subsequent) claims have been represented by immigration consultants. A particularly egregious example of the resubmission of a claim is *Refugee Appeal No. 70476/97 Re SS* (15 April 1997). Unfortunately, members of the legal profession do not have an entirely unblemished record: *Refugee Appeal No. 70002/96 Re BS* (7 May 1996) at 8-11."

[20] It was in this context that on 20 August 1998 the Immigration Amendment Bill was introduced proposing that the refugee determination system be placed on a statutory footing. This Bill led to the enactment of the Immigration Amendment Act 1999 which materially came into force on 1 October 1999. Section 40 of that Act inserted the new Part 6A into the principal Act, namely ss 129A to 129ZB.

[21] It must be presumed that at the time the Immigration Amendment Act 1999 was enacted Parliament was aware of the chronic level of abuse to which the refugee determination system was being subjected and in particular, the crippling number of cases in which disappointed claimants sought to reopen their cases by lodging second (or subsequent) refugee claims. Parliament must equally be presumed to have been aware, when domesticating the non-refoulement obligation via s 129X(1), of the need to permit second refugee claims to be submitted where the individual has become a refugee *sur place*. Because experience had shown that second refugee claims had led to wide scale abuse, the provisions inserted in 1999 narrowed the aperture for the submission of second (or subsequent) claims. From 1 October 1999 the only category of persons who had failed in an earlier attempt to secure refugee status and who could submit a further claim were those who could demonstrate that since the first determination, circumstances in the home country had changed to such an extent

that the further claim was based on significantly different grounds to the previous claim. The relevant provisions follow:

> **129J. Limitation on subsequent claims for refugee status—**
>
> (1) A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim.
>
> (2) In any such subsequent claim, the claimant may not challenge any finding of credibility or fact made in relation to a previous claim, and the officer may rely on any such finding.
>
> **129O. Appeals to Refugee Status Appeals Authority—**
>
> (1) A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision.
>
> **129P. Procedure on appeal—**
>
> (9) In any appeal involving a subsequent claim, the claimant may not challenge any finding of credibility or fact made by the Authority in relation to a previous claim, and the Authority may rely on any such finding.

[22] In the result the regime in place since 1 October 1999 has the following features:

(a) A refugee claim (including a *sur place* claim) may be submitted to a refugee status officer. A negative decision may be appealed to the Authority.

(b) The decision of the Authority is final once notified to the claimant (s 129Q(5)). There is no jurisdiction to rehear an appeal after a full initial hearing: *Refugee Appeal No. 71864/00* (2 June 2000).

(c) Second and subsequent refugee claims can only be considered if the intending claimant is able to establish that since the earlier determination circumstances in his or her home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim (ss 129J(1) and 129O(1)).

(d) A second or subsequent appeal to the Authority may be against the refusal by a refugee status officer to consider the second or subsequent claim or (where the claim is considered) against the rejection of the claim on the merits (s 129O(1)).

(e) In any such subsequent claim the claimant may not challenge any finding of credibility or fact made in relation to the previous claim unless the refugee status officer or the Authority determines otherwise (ss 129J(2) and 129P(9)).

(f) The Authority may dispense with an interview of the appellant if that person has been interviewed by a refugee status officer in the course of determining the second refugee claim and the Authority considers that the appeal is prima facie manifestly unfounded or clearly abusive (s 129P(5)).

[23] Under the statutory regime introduced on 1 October 1999 the Authority has frequently used its power under s 129P(5) to dispense with an interview (but not with a hearing on the papers) where a second or subsequent appeal has been lodged and the claimant has been interviewed by a refugee status officer at first instance in connection with that second or subsequent claim.

[24] The combined measures have led to a reduction in the levels of abuse documented in *Refugee Appeal No. 70951/98* (5 August 1998) at 19, but as the following table demonstrates, the Authority continues to receive a significant number of second and subsequent appeals.

Financial Year	Number of 2nd or subsequent appeals decided	Appeals Decided
2000/2001	15	642
2001/2002	34	637
2002/2003	46	570
2003/2004	68	569

[25] Many of the second or subsequent claims encountered on appeal are abusive. Recent examples include the pro forma re-submission of groundless claims to refugee status (*Refugee Appeal No. 74954* (21 September 2004)) even though out of time (*Refugee Appeal No. 74282* (11 June 2003)); the lodging of a second appeal by a claimant who attended neither the first interview by the refugee status officer nor the first appeal and who also failed to attend the second refugee status officer interview (*Refugee Appeal No. 74978* (30 April 2004) and *Refugee Appeal No. 75124* (21 September 2004)); the making of three meritless refugee claims and appealing each decline decision (*Refugee Appeal No. 74478* (15 December 2003)). But on the other hand, the Authority does encounter genuine refugees in the second or subsequent claim category. See the three conjoined appeals in *Refugee Appeal No. 74862* (19 February 2004) (genuine conversion from Islam to Christianity after the first appeal declined). For a successful second refugee claim outside the *sur place* circumstance but within the statutory criteria see *Refugee Appeal No. 73686* (2 September 2004) where the claimant, having been declined refugee status both at first instance and on appeal, was removed to Iran. At a later point he was detained, interrogated and beaten for reason of his and his wife's suspected political activities. After escaping Iran he returned to New Zealand and was successful in establishing a claim to refugee status on what was by then his second claim.

[26] Experience thus shows that the accommodation by the New Zealand refugee determination procedures of second or subsequent claims is essential. While in the past twelve months only four out of sixty-eight second or subsequent claims have been successful on appeal, all four of those individuals were persons to whom New Zealand owed a duty of non-refoulement. As for the balance, the existing statutory provisions (ss 129J, 129O(1) and 129P(5) & (9)) allow these claims to be processed summarily (high jurisdictional threshold, no interview on appeal, no challenge to prior adverse findings of credibility or fact).

[27] Against this background we turn to the facts of the appellant's case and the submissions made on his behalf.

BRIEF OUTLINE OF THE APPELLANT'S REFUGEE CLAIM

[28] The appellant comes from a large family which presently comprises his mother and twelve siblings. There are six sisters and six brothers. One sister and

three brothers live in New Zealand. His mother, one sister and one brother continue to live in Ethiopia. The balance of the siblings live in various countries including Denmark, the Netherlands, the USA and Canada. The four siblings in New Zealand have residence status, having been brought to New Zealand as quota refugees under the resettlement programme.

[29] The appellant himself arrived in New Zealand on 8 May 2000 after obtaining a student visa to undertake a 40-week course of study. On 20 March 2001, some ten months after his arrival, he filed an application for refugee status. He was represented at that time by a lawyer ("the first lawyer"). On this first claim to refugee status the appellant's case was that in 1993 he joined the All Amhara People's Organisation (AAPO), an organisation in which other family members had previously been active. Some, including his siblings in New Zealand, had had to leave Ethiopia after being subjected to repeated arrests, torture and intimidation for their activities in AAPO. For his part, the appellant said that he was detained by the Ethiopian authorities for two weeks in February 1997 before being released. A few weeks later he was detained for six months and twelve days, during which time he was beaten and interrogated. Upon his release he set himself up in a business making videos. However, he was arrested again in September 1999, interrogated, severely beaten and released after one month in custody. Thereafter he continued to be harassed by the authorities. Being unable to reopen his business he travelled to New Zealand with the assistance of his relatives.

[30] The appellant was interviewed by a refugee status officer on 5 March 2002. He told the officer that the remaining brother living in Ethiopia had been detained because of his involvement in student demonstrations in Addis Ababa and questioned about his brothers (including the appellant). The appellant also told the interviewing officer that he had learnt from family members that the authorities had been visiting the family home in Addis Ababa enquiring about the appellant and his brothers. He also mentioned an arrest warrant. At this interview the appellant continued to be represented by the first lawyer who, subsequent to the interview, submitted further responses and comments on issues raised by the interviewing officer.

[31] In a decision published on 4 October 2002 the refugee application was declined on the basis that the interviewing officer did not believe the appellant on significant issues. It was accepted, however, that the appellant was a low level

AAPO member who had been detained on one occasion in early February 1996 for fifteen days. The officer, however, concluded that country information showed that given the appellant's low level of participation in AAPO, he was not at risk.

[32] At this point the appellant instructed a new lawyer ("the second lawyer") and an appeal was lodged to this Authority. That appeal will be referred to as the first appeal. The first appeal was heard by a differently constituted panel of this Authority on 9 December 2002, the appellant being represented by his new lawyer. In a decision published on 8 April 2003 the appeal was dismissed on the grounds that the appellant was not a credible witness and his evidence was not believed. All that the Authority accepted was that the appellant had probably come to the attention of the authorities in Ethiopia through the activities of his family members, but in a minor way, and that he had had some low level involvement with AAPO. On its review of the country information, the Authority concluded that a person who had had such low level involvement with AAPO was not at risk of being persecuted.

[33] On 15 April 2003 the New Zealand Immigration Service took steps to revoke the temporary permit then held by the appellant. On 24 April 2003 the appellant lodged a second refugee application containing virtually the same information as the first application. The appellant continued to be represented by his second lawyer.

[34] On 24 July 2003 the appellant was interviewed for a second time by a refugee status officer. He was represented at that hearing by his second lawyer. The appellant agreed at the interview that there was little change to his claim to refugee status. He had, however, received information that his mother had been experiencing difficulties with the authorities in Ethiopia and his brother, on being expelled from university on political grounds, was experiencing difficulty finding employment. In a decision published on 5 April 2004 the refugee status officer determined:

(a) In view of the explicit terms of s 129J(2) the appellant could not challenge any finding of credibility or fact made in relation to the first refugee claim and the officer would in fact rely on the earlier credibility and fact findings; and

(b) The second refugee application was identical to the first application save in respect of new supporting evidence to the effect that the appellant's mother was experiencing difficulties with the Ethiopian authorities and that his brother had been expelled from university and was having difficulty obtaining employment. In these circumstances the officer was not satisfied that since the determination of the first refugee claim and the first appeal, circumstances in the appellant's home country had changed to such an extent that the further claim was based on significantly different grounds to the first claim.

[35] From this determination the appellant appealed. Since the filing of the appeal he has instructed his third lawyer, Mr David Ryken.

[36] The submissions made by Mr Ryken both in writing and on appeal reduce to the following propositions:

(a) While the jurisdiction of a refugee status officer on a second or subsequent claim to refugee status is limited because the claimant must establish that since the earlier determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim, the jurisdiction of the Authority on a second or subsequent appeal is not so limited. Nowhere in either s 129O or in s 129P(9) is it required that, on appeal, the appellant establish a change of circumstances. The jurisdiction of the Authority on a second or subsequent claim to refugee status is not bound to or established by a finding of a change of circumstances.

(b) In any event, the appellant is able to establish a change of circumstances, namely the "disappearance" of his brother in Ethiopia and the continued harassment of his mother by the authorities. This evidence suggests that any member of the family (including the appellant) is at risk of being persecuted on return to Ethiopia. The submission is that a change in circumstances can include the persecution of other members of the family in circumstances which suggest that the likely treatment of the claimant would also involve persecution and mistreatment.

(c) If the appellant is able to establish a change of circumstances the Authority would then be able to examine the appellant's complaints which include:

(i) That he did not receive adequate and proper representation from the first two lawyers retained by him. It is alleged that their inadequate representation materially contributed to the adverse credibility findings made in the first refugee claim both at first instance and on appeal. Among the complaints is an allegation that he was not advised that his family members in New Zealand could and should be called as witnesses.

(ii) His evidence was misunderstood by the panel which heard the first appeal on 9 December 2002.

(iii) The reasons given by the first panel of the Authority for disbelieving the appellant do not withstand scrutiny.

(iv) The country information relied upon by the first panel of the Authority in the decision published on 8 April 2003 does not establish the facts for which it has been cited.

(v) The first panel of the Authority misdirected itself in law by stating that low profile members of AAPO are likely to be harassed rather than persecuted.

(d) Even if the Authority's first decision on credibility remained undisturbed, the appellant nevertheless faced a real chance of being persecuted in Ethiopia simply because of the family he belongs to.

ANALYSIS OF THE ISSUES

[37] We return to the two broad issues earlier identified, namely:

(e) Whether, on a second or subsequent appeal to the Authority under s 129O(1), all issues are "at large" in the sense that an appellant is entitled to a full rehearing on the merits without the constraint of having to first establish that circumstances in his or her home country have changed to

such an extent that the second or subsequent claim to refugee status is based on significantly different grounds to the first claim; and

(f) The meaning of the statutory phrase "circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim".

[38] For ease of reference the relevant provisions follow once more.

> **129J. Limitation on subsequent claims for refugee status—**
>
> (1) A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim.
>
> (2) In any such subsequent claim, the claimant may not challenge any finding of credibility or fact made in relation to a previous claim, and the officer may rely on any such finding.
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> **129O. Appeals to Refugee Status Appeals Authority—**
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> (1) A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision.
>
> **129P. Procedure on appeal—**
>
> (9) In any appeal involving a subsequent claim, the claimant may not challenge any finding of credibility or fact made by the Authority in relation to a previous claim, and the Authority may rely on any such finding.

Whether second or subsequent appeal "at large"

[39] The submission is that whereas s 129J(1) bars a refugee status officer from even considering a second (or subsequent) claim ***unless*** the "changed circumstances" and "significantly different grounds" criteria are established, no such bar is to be found in the provisions which confer on the Authority jurisdiction to hear an appeal from the decision of the officer on that second or subsequent claim. The argument is that on a second or subsequent appeal to the Authority an appellant is not required to establish that since the earlier determination circumstances in his or her home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim. In

other words, the appeal is at large notwithstanding that the appellant may not challenge any finding of credibility or fact made by the Authority in relation to a previous claim if the Authority, pursuant to s 129P(9), decides to rely on any such finding.

[40] We are of the view that this submission is untenable. A first appeal to the Authority is unquestionably a de novo hearing in which all issues of law, fact and credibility are at large. See *Practice Note 1/04* (23 February 2004) at [3.1]. But once a first refugee claim has been finally determined either by a refugee status officer or by the Authority, a failed refugee status claimant no longer holds a full set of cards. On a second or subsequent claim for refugee status s 129J(1) explicitly bars a refugee status officer from even considering the claim unless the officer is satisfied that, since that first determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim. There is a right of appeal both against a determination that the jurisdictional criteria have not been satisfied and against a decline decision where the jurisdictional hurdle has been overcome.

[41] If a second or subsequent appeal was intended to be "at large", it would render otiose the jurisdictional hurdle in s 129J(1) as well as the distinction in s 129O(1) between appeals where the jurisdictional hurdle has not been overcome and those where it has.

[42] Abuse of the refugee determination system is not confined to the first instance level but (as the statistics show) permeates the appellate level as well. The clear purpose of s 129J(1) and (2) together with ss 129O(1) and 129P(9) was to equip both levels of the system with the means of preventing abuse of the system by the repeat submission of claims while protecting the genuine *sur place* refugee. Were the appellant's argument to be accepted violence would be done to the language of s 129O(1) and the clear legislative intent would be thwarted. It would leave the first instance level with a means of protection from abuse, but not the appellate level. Such consequence would be absurd. The better view is that the Authority has jurisdiction under s 129O(1) to inquire into the question whether the jurisdictional criteria stipulated by s 129J(1) have been satisfied. If the Authority determines that they have not been so satisfied, there is no jurisdiction to entertain the appeal on the merits. The procedure thus protects the genuine *sur*

place refugee claimant from an erroneous determination at first instance while protecting the Authority from the pro forma re-submission of meritless cases. The appellant's argument would require this jurisdiction to be read out of the statute. In effect, the jurisdictional hurdles imposed by s 129J(1) could be circumvented by the simple expedient of lodging an appeal to the Authority.

[43] We accordingly hold that where a refugee status officer has concluded that a second or subsequent claim for refugee status does not satisfy the statutory criteria stipulated by s 129J(1), on an appeal against such determination the appellant must first satisfy the Authority that, contrary to the officer's determination, circumstances in the claimant's home country have indeed changed to such an extent that the further claim is based on significantly different grounds to the previous claim. Unless the claimant thereby establishes jurisdiction the Authority has no power to embark upon an inquiry into the merits of the second or subsequent claim to refugee status. Put bluntly, the Authority does not have unlimited jurisdiction over second (or third or fourth) appeals. That jurisdiction was asserted in *Refugee Appeal No. 2245/94 Re SS* (28 October 1994) in the context of the Terms of Reference. But the interpretation was wrong and cannot be maintained in the face of the (now) statutory provisions inserted by the Immigration Amendment Act 1999 and in the light of the abuse which was encouraged by an impermissible reading of the jurisdictional threshold. The Authority can only hear and determine (on the merits) a second or subsequent appeal if narrow statutory criteria are satisfied.

[44] We address now the wording of the jurisdictional bar. It is elementary that proper meaning and effect must be given to each of the words of the statute:

> ... circumstances ***in*** the ... ***home country*** have ***changed*** ...
>
> ... to such an extent that the further claim is based on ***significantly different grounds*** to the previous claim.

The meaning of "circumstances in the claimant's home country have changed"

[45] The first jurisdictional requirement of s 129J(1) is that the intending claimant must establish a change of circumstances ***in*** his or her home country:

> ... circumstances in the claimant's home country have changed ...

[46] These words must be given their ordinary meaning in the light of the purpose of the provisions in question. See the Interpretation Act 1999, s 5 and generally JF Burrows, *Statute Law in New Zealand* 3rd ed (LexisNexis, 2003) Chapters 8, 9 & 10. The more so when the language is clear and unambiguous and neither the purpose nor the context of the relevant paragraphs indicate a need to depart from the ordinary meaning of the words. The section unambiguously requires that the change of circumstances occur ***in*** the claimant's home country. It is therefore not open to an intending refugee claimant to argue that the jurisdictional bar is overcome because at the hearing of the first claim the refugee status officer or the Authority misunderstood the facts. As the Authority made clear in *Refugee Appeal No. 70387/97 Re MSI* (14 May 1997) at p 11 in relation to the comparable requirement in the earlier Terms of Reference, a "reinterpretation" of a claimant's case is neither a change of circumstances, nor is it a change of circumstances ***in*** the claimant's home country. Furthermore, a refugee claimant cannot invite the Authority to sit as if it were an appellate authority in relation to the decision of the first panel and to rehear the matter. Not only is there no jurisdiction for this to be done, it is an exercise expressly precluded by the terms of s 129Q(5) which provide that a decision of the Authority is final once notified to the appellant. The finality of the decision is reinforced by the definition of "subsequent claim" in s 129B(1). The Authority has no jurisdiction to rehear an appeal after a full hearing and decision. See *Refugee Appeal No. 71864/00* (2 June 2000) at [39] - [41] & [63]. Nor, unless an appellant crosses the jurisdictional threshold, can the Authority ever permit a challenge to adverse findings of credibility or fact made in the course of a prior appeal. See s 129P(9).

[47] If a refugee claimant wishes to argue that on the first appeal the Authority misdirected itself either on the facts or on the law, the proper remedy is judicial review, not the submission of a second refugee claim. If the refugee claimant is outside the three month time limit prescribed by s 146A(1) of the Act for commencing judicial review proceedings and is unable to establish special circumstances for the allowance of further time, the re-submission of the refugee claim is not an alternative remedy. The New Zealand refugee determination system is a generous one, but it does have necessary limits. For good reason the Authority does not possess what might be called a general "miscarriage of justice" jurisdiction.

The meaning of "to such an extent that the further claim is based on significantly different grounds to the previous claim"

[48] The second jurisdictional requirement of s 129J(1) is that the circumstances ***in*** the home country have changed ***to such an extent*** that the further claim is based on ***significantly different grounds*** to the previous claim:

> ... to such an extent that the further claim is based on significantly different grounds to the previous claim.

[49] Again, proper recognition must be given to the statutory language. The grounds must not only be different, they must be ***significantly*** different.

[50] Because s 129J(1) requires the first and subsequent claims to be compared, it should be remembered that there are definitions of "claim" and "subsequent claim" in s 129B(1).

> **129B. Definitions—**
>
> (1) In this Part, unless the context otherwise requires:
>
> ``Claim'' means a claim in New Zealand to be recognised as a refugee in New Zealand:
>
> ``Subsequent claim'' means a claim in New Zealand to be recognised as a refugee in New Zealand by a person who has previously made such a claim in New Zealand that has been finally determined.

[51] Jurisdiction under s 129J(1) is determined by comparing the previous claim to refugee status against the subsequent claim. It is clear from the definitions in s 129B(1) that the exercise requires the refugee status officer and the Authority to compare the claims ***as asserted by the refugee claimant***, not the facts subsequently found by that officer or the Authority.

[52] Beyond these few observations we do not intend engaging in a detailed analysis of this aspect of the jurisdictional bar. The facts of the present case do not require it.

SUMMARY OF PRINCIPAL POINTS

General

[53] By way of overview:

(a) A refugee claim (including a *sur place* claim) may be submitted to a refugee status officer. A negative decision may be appealed to the Authority.

(b) The decision of the Authority is final once notified to the claimant (s 129Q(5)). There is no jurisdiction to rehear an appeal after a full initial hearing: *Refugee Appeal No. 71864/00* (2 June 2000).

(c) Second and subsequent refugee claims can only be lodged if the intending claimant can establish that since the earlier determination circumstances in his or her home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim (ss 129J(1) and 129O(1)).

(d) A second or subsequent appeal to the Authority may be against the refusal by a refugee status officer to consider the second or subsequent claim or (where the claim is considered) against the rejection of the claim on the merits (s 129O(1)).

(e) In any such subsequent claim the claimant may not challenge any finding of credibility or fact made in relation to the previous claim unless the refugee status officer or the Authority determines otherwise (ss 129J(2) and 129P(9)). The discretion under these provisions is only enlivened once the jurisdictional bar has been crossed.

(f) The Authority may dispense with an interview of the appellant if that person has been interviewed by a refugee status officer in the course of determining the second refugee application and the Authority considers that the appeal is prima facie manifestly unfounded or clearly abusive (s 129P(5)).

Sections 129J(1) & 129O(1)

[54] In any appeal involving a subsequent claim under s 129O(1), the issues are not "at large". Rather, there are three distinct aspects to the appeal.

[55] First, irrespective of the finding made by the refugee status officer at first instance, the claimant must satisfy the Authority that it has jurisdiction to hear the appeal. That is, the claimant must establish that, since the determination of the previous claim, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim. As to this:

(a) The change of circumstances must occur ***in*** the claimant's home country. It is not open to the claimant to circumvent the jurisdictional bar by submitting that at the hearing of the previous claim the refugee status officer or the Authority misunderstood the facts.

(b) A "reinterpretation" of a claimant's case is neither a change of circumstances, nor is it a change of circumstances ***in*** the claimant's home country.

(c) The claimant cannot invite the Authority to sit as if it were an appellate authority in relation to the decision of the first panel and to rehear the matter. The Authority has no jurisdiction to rehear an appeal after a full hearing and decision.

(d) A second appeal cannot be used as a pretext to revisit adverse credibility findings made in the course of the prior appeal.

(e) Jurisdiction under ss 129J(1) and 129O(1) is determined by comparing the previous claim to refugee status against the subsequent claim. This requires the refugee status officer and the Authority to compare the claims as asserted by the refugee claimant, not the facts subsequently found by that officer or the Authority.

(f) Proper recognition must be given to the statutory language which requires not only that the grounds be different, but that they be ***significantly different***.

(g) The Authority does not possess what might be called a "miscarriage of justice" jurisdiction.

[56] Second, in any appeal involving a subsequent claim, s 129P(9) expressly prohibits a claimant from challenging any finding of credibility or fact made by the Authority in relation to a previous claim. While the Authority has a discretion whether to rely on any such finding, that discretion only comes alive once the jurisdictional threshold for subsequent claims set by ss 129J(1) and 129O(1) has been successfully crossed.

[57] Third, where jurisdiction to hear the appeal is established, the merits of the further claim to refugee status will be heard by the Authority. That hearing may be restricted by the findings of credibility or of fact made by the Authority in relation to the previous claim, or "at large", depending on the manner in which the discretion under s 129P(9) is exercised by the Authority.

APPLICATION OF THE LAW TO THE FACTS

[58] The change of circumstances in Ethiopia are said by the appellant to be the continued harassment of his mother by the authorities and the "disappearance" of his brother. Unfortunately for the appellant, neither circumstance is a change which would permit a finding to be made that the second claim is based on significantly different grounds to the previous claim. This is because the proffered evidence does not establish a claim based on significantly different grounds. Rather it is evidence of alleged ongoing interest by the authorities in the family. The first claim itself was based on such interest, including (inter alia) the assertion that the mother was being regularly questioned about the appellant and his brothers and that the appellant's younger brother had been dismissed from university because of his political activities and imprisoned. See particularly the decision of the first panel of this Authority delivered on 8 April 2003 at para [32]:

> The appellant's mother is still regularly questioned by the authorities about the whereabouts of the appellant and his brothers. His younger brother in Ethiopia

> has recently been imprisoned there on account of his involvement with the Ethiopian student movement.

[59] The second claim to refugee status and supporting documentation again asserts the brother's dismissal from university, his inability to find work, his "disappearance" and ongoing visits by the authorities to the family home accompanied by questioning of the appellant's mother. One document refers to the mother being placed under house arrest though the Authority understood from Mr Ryken at the hearing that "house arrest" was possibly a misnomer and was more likely to be a refusal of permission to leave Ethiopia for Kenya where a meeting between the mother and one of her daughters had been proposed.

[60] We are of the clear view that the alleged questioning and further difficulties of the mother and brother as detailed in the second claim are simply a continuation of the earlier alleged interest in this family by the Ethiopian authorities. The most that can be said is that the evidence allegedly shows that the family in general continues to be regarded by the authorities as AAPO supporters and as targets for continued interest and harassment. This has always been a central aspect of the appellant's refugee claim and it follows that the Authority does not accept that since the determination of his first refugee claim circumstances in Ethiopia have changed to such an extent that the second refugee claim can be said to be based on significantly different grounds to the previous claim. The Authority has no jurisdiction to embark upon an examination of the credibility and merits of the second refugee claim.

[61] While this finding is dispositive of the appeal, there is the question of the appellant's complaints against his two previous lawyers.

The complaints against the two previous lawyers and the question of privilege

[62] As earlier recorded in this decision, the appellant alleges that he did not receive adequate and proper representation from his first two lawyers. It is alleged that their inadequate representation materially contributed to the adverse credibility findings made in the first refugee claim, both at first instance and on appeal. It is not intended to rehearse these complaints in detail as our finding on jurisdiction makes this unnecessary. Furthermore, it should be recalled, in fairness to the appellant, that it was accepted at the hearing that the complaints

made against the first two lawyers would only become relevant if the jurisdictional hurdle was overcome and the Authority was deciding whether to exercise its discretion under s 129P(9) to not rely on the findings of credibility and fact made in relation to the previous claim.

[63] There are two significant points.

[64] First, it is by no means clear whether it is appropriate for the Authority, on a subsequent claim, to enquire into allegations of the nature made by the appellant. If the alleged inadequate representation materially contributed to the adverse credibility findings made in the first refugee claim, the proper forum for the allegations is arguably the High Court on an application for judicial review.

[65] Second, the appellant's complaints were not accompanied by waiver of the legal professional privilege which he continues to enjoy vis-à-vis his two previous lawyers. The Authority has therefore not had the benefit of a response to the appellant's allegations. Had the Authority not dismissed the appeal on jurisdictional grounds and had the appellant refused to waive privilege, the Authority might have been forced to examine the appellant's complaints in a vacuum.

[66] The general purpose of legal professional privilege is to promote the sound administration of justice: *The Ophthalmological Society of New Zealand Inc v Commerce Commission* (2003) 16 PRNZ 569 at [31]9 (CA). The question which may arise in the future is whether allegations of the nature made here amount to an implied waiver of privilege, thereby enabling the Authority to test the allegations by obtaining the response of the law practitioner(s) concerned. Certainly in the criminal context, the practice is that complaints against former counsel must be accompanied by a waiver of privilege so that the court has the benefit of the true facts. See for example *R v Taite* (1998) 16 CRNZ 10, 14-15 (CA).

[67] We leave both issues open for future consideration.

CONCLUSION

[68] The Authority finds that it has no jurisdiction to entertain this, the appellant's second appeal. Since the determination of the first refugee claim circumstances in the appellant's home country have not changed to such an extent that the second claim is based on significantly different grounds to the first claim.

[69] In view of the finding of absence of jurisdiction, the appeal is dismissed.

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R P G Haines, QC
Chairperson