REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

AT AUCKLAND Application No 76166

IN THE MATTER OF An application pursuant to s129L of the Immigration Act 1987 to cease to recognise a person as a refugee

BETWEEN A refugee status officer of the Department of Labour (DOL)
APPLICANT

AND **RESPONDENT**

BEFORE A R Mackey, Chairman

Counsel for the Applicant: S Blick, Solicitor, Department of Labour

Counsel for the Respondent: No appearance

Date of Hearing: 19 May 2008

Date of Decision: 27 May 2008

DECISION

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[1] This is an application by a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), in accordance with s129L(1)(f)(ii) of the Immigration Act 1987 (the Act), for a determination that the Authority should cease to recognise the respondent, a national of Somalia and Sweden, as a refugee on the grounds that recognition may have been procured by

fraud, forgery, false or misleading representation, or concealment of relevant information (hereafter referred to as fraud).

[2] The respondent is a young man in his early 20s. The nub of the application is that the Authority granted him refugee status, pursuant to a decision (*Refugee Appeal No 75667* (28 October 2005)), on the basis of his claim that he was a member of an minority clan in Somalia. It is now claimed that the respondent had not used his true identity and had withheld the fact that he was a Swedish citizen who had lived in that country since 1993 and was the holder of a valid Swedish passport. The original application for refugee status to the RSB and appeal to this Authority were made in the name of AA, whereas it now appears that his true name is BB.

[3] Shortly before the hearing set down for 19 May 2008, the Authority was advised (on 14 May 2008) by the applicant that the respondent had, on 7 May 2008, been sentenced by Judge CC to two years' imprisonment for perverting the course of justice as a lead offence, the same term for using a forged document and a further concurrent sentence of 18 months' imprisonment for making a false declaration. Home detention was refused by the judge.

[4] The appellant had pleaded guilty to the charges.

JURISDICTIONAL ISSUES

[5] Pursuant to s129L(1)(f)(ii) of the Act, a refugee status officer may apply to the Authority for a determination as to whether the Authority should cease to recognise a person as a refugee where that status may have been procured by fraud. The Authority has the function of determining such an application pursuant to s129R(b) of the Act.

[6] When the Authority is considering an application for a determination under s129L(1)(f)(ii), there are two stages to the Authority's enquiry. First, it must be determined whether the refugee status of the respondent "may have been" procured by fraud. If so, it must then be determined whether it is appropriate to "cease to recognise" the respondent as a refugee. This determination will depend on whether the respondent currently meets the criteria for refugee status set out in the Refugee Convention: *Refugee Appeal No 75392* (7 December 2005) [10]-[12].

[7] Given that these are largely inquisitorial proceedings, it is not entirely appropriate to talk in terms of the burden or onus of proof. Nonetheless, it is the Authority's view that in cancellation proceedings, it is the responsibility of the Department of Labour to present such evidence in its possession by which it can responsibly be said that the grant of refugee status may have been procured by fraud. It is also our view that the term "may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information" is deliberately imprecise and signals a standard of proof that is lower than the balance of probabilities but higher than mere suspicion: *Refugee Appeal No 75563* (2 June 2006) [20].

BACKGROUND

The respondent's refugee status

[8] The respondent is approximately 21 years of age. His exact age is unable to be determined because of differing dates in his passports. He arrived in New Zealand in June 2004. It appears that at that time he used a valid Swedish passport and travelled under the name of BB. He claimed refugee status in this country on 27 August 2004.

[9] The basis of the respondent's claim was that he was a member of the minority Yibir clan from Somalia. His parents had been killed in 1991 by the Hawiye militia in Mogadishu and he had lived with an aunt in Mogadishu for several years before moving to live with his aunt at her teashop close to the Somali/Kenya border. He claimed that in May 2004, 10 members of the Marehan clan had gone to the tea shop and stated they were taking over the premises. He, his aunt and uncle had been told to leave within 24 hours. He then travelled to Nairobi and, with the use of an agent, was ultimately able to make his way to New Zealand.

[10] The respondent was interviewed by a refugee status officer in January 2005. His application was declined on the basis that there was no credible evidence to confirm he was the person he claimed to be, although he was afforded the benefit of the doubt that he was a Somali national from the Yibir clan.

[11] He then appealed to this Authority and, as noted, the Authority found him to be a refugee and allowed his appeal.

CANCELLATION PROCEEDINGS

[12] On 23 November 2007, a Notice of Application for Determination Concerning Loss of Refugee Status (the notice) was made to the Authority by a refugee status officer. On 7 December 2007, the respondent was served with the notice, in accordance with s129S(a) of the Act and Reg 16 of the Immigration (Refugee Processing) Regulations 1999. The process server, in the affidavit of service sworn in December 2007, recorded the respondent's address. In a letter from the Authority, dated December 2007, also served on the respondent, the Authority stated that he was entitled to have an interview and should make a request for one within 21 days from the date of service of the letter. The letter advised that:

> "If we do not receive any such request within 21 days of the date of service of this letter, the Authority may proceed to determine this application without further reference to you."

[13] The letter also advised that the respondent had the right to get a lawyer or representative to assist him and that again, the representative could communicate with the Authority within the 21 day period. The Authority offered to provide a list of lawyers who practise in the area, if required.

[14] No response was received from the respondent. Accordingly, on 29 January 2008, the Authority, by courier, wrote to the respondent, noting that he had not responded to the Authority's earlier letter. The Authority's letter stated that the DOL had been asked to advise whether they wished to appear on the application and that their response was due by 8 February 2008. The letter stated again that the Authority may proceed to determine the matter without further reference to the respondent.

[15] On 15 February 2008, the Authority received advice from the applicant (DOL) that they were amenable to either an appearance being made before the Authority or for the Authority to proceed based on the documentation already filed, without the need for their appearance. When no further response was received from the respondent, the Authority again wrote to him, on 17 April 2008 (again using a courier). In that letter, the Authority noted the previous correspondence of 7 December 2007 and 29 January 2008, and stated that in the circumstances, the Authority had decided that this matter would be set down for hearing on Monday, 19 May 2008, at the Authority's Auckland premises. The letter stated:

> "If you fail to attend that hearing, without reasonable excuse, the Authority will have the ability, pursuant to s129P(6) of the Immigration Act, to determine this matter "without an interview".
>
> Please advise if you intend to attend, otherwise the Authority will proceed in the manner prescribed under s129P(6) of the Act."

[16] On 9 May 2008, the Authority requested the DOL to provide brief submissions in support of their application. Those were received by the Authority on 14 May 2008. Whilst the Authority had been notified at an earlier date by the applicant that the respondent was represented by ZZ in respect of the criminal charges being pursued against him by the DOL, it was only in the submissions and evidence provided on 14 May 2008 that the Authority became aware that the respondent had pleaded guilty and was sentenced as noted above.

[17] In this situation, the Authority requested that Ms Blick, for the applicant, make contact with ZZ and ascertain whether the respondent had instructed him in relation to this application or any other relevant advice that could assist. No contact was made with the Authority by the respondent or any representative on his behalf between the time when the matter was set down for hearing (17 April 2008) and the date of conviction and detention on 7 May 2008. The Authority understands that the respondent was on bail and at his address in Hamilton up to the date of hearing, which also appears to have been on 7 May 2008, before a District Court. Thus the Authority considered it was able, in terms of the regulatory regime, to presume the respondent had full notice of all matters relating to this application, including his ability to seek representation and to attend the hearing.

[18] At the hearing on 19 May 2008, Ms Blick advised the Authority that in her discussions with ZZ, he informed her that the respondent was now in custody and that while he had represented him in the criminal case, he was not instructed to appear and the respondent had not given him any instructions in relation to this matter.

[19] Ms Blick submitted that it may be appropriate, noting the respondent's recent detention, for the Authority to issue a warrant to produce in this case so that the respondent could be brought from prison for a future hearing. Whilst the Authority notes that in normal circumstances, this would be a procedure (under s129P(7) of the Act) the Authority would adopt when a respondent (or appellant) before the Authority was held in prison, for the reasons set out below, the Authority has determined that this matter can proceed on the papers, without the necessity of adjournment and a warrant to produce.

JURISDICTION OF THE AUTHORITY TO DISPENSE WITH AN INTERVIEW

[20] In certain circumstances, the Authority is permitted to determine an appeal on the papers without the appellant being given an interview. This arises under s129P(5)(a) and (b) of the Act. In this case, which is an application made by the DOL as applicant and not an appeal against the decision of an refugee status officer, s129P(5) is not applicable. However, s129P(6) states:

> "6. Despite subsection (5), the Authority may determine an appeal *or other matter* without an interview if the appellant or other person affected fails without reasonable excuse to attend a notified interview with the Authority." (emphasis added)

[21] In the current case, the Authority, through its Secretariat, wrote to the respondent on three occasions: first notifying him of his ability to have an interview with this Authority and to have representation in two separate letters in December 2007, and then, on 17 April 2008, of the date of hearing, reiterating his ability to have representation and/or appear before the Authority. The respondent has made no response to these letters nor made contact with the Authority at any time over the period of some five months since he was initially served with the Notice of Application. When the Authority became aware of his conviction, some five days before the date of hearing, the Authority immediately requested Ms Blick to contact the respondent's counsel who represented him in the criminal matters. That contact led to the advice that the respondent did not wish to instruct ZZ.

CONCLUSION ON WHETHER TO DISPENSE WITH AN INTERVIEW

[22] During the short period of 12 days before the hearing, the respondent has been in custody and thus, unless he made a request (which the Authority would have supported) to be produced at this hearing, or the Authority, of its own volition, had issued a warrant to produce, the respondent could not attend the hearing. The Authority has carefully evaluated the provisions of s129P(6) of the Act and the complete lack of engagement by the respondent in this application process. On these unique facts: a total lack of interest by the respondent and failure to seek representation, his guilty plea, and the finding below that any claims or submissions that might possibly be made by the respondent would be clearly abusive, the Authority considers this is a situation where the respondent ("other person affected") has failed, without reasonable excuse, to attend a notified interview.

[23] The Authority therefore has also concluded it is appropriate to proceed to determine this application without issuing a warrant to produce the respondent.

THE APPLICANT'S CASE

[24] The applicant's case consists mainly of documentary evidence compiled and submitted with the application. Of particular relevance are:

(a) evidence as to false identity in the form of the respondent's previous and current Swedish passports;

(b) a transcript of a videotape interview with an Immigration New Zealand compliance officer and the respondent, dated 16 August 2007. In that transcript, the respondent admits his true identity as BB and that he left Somalia with his parents in 1993 when he obtained refugee status in Sweden and that he is a Swedish national;

(c) an email from a counsellor at the embassy of Sweden, dated 29 June 2007, confirming the respondent arrived in Sweden on 18 June 1993 under the name of BB. The email noted that there are no records of the respondent leaving Sweden;

(d) a deposition from Dr RJ Watt, forensic anthropologist, dated 25 September 2007, confirming through "face-mapping" that the photograph attached to the confirmation of claim to refugee status in New Zealand in the name of AA and the photograph supplied with the respondent's passport application in the name of BB, is the same person; and

(e) a copy of a letter from the Crown Solicitors, addressed to the Department of Labour, Legal Manager Auckland, setting out that the respondent pleaded guilty to three charges in relation to immigration matters as noted above. This letter also records the sentencing of the respondent.

[25] The applicant filed written opening submissions which have been fully noted by the Authority. These maintain that the first stage in the two-stage test, "may have been procured by fraud", has been established in this case, both through the evidence relating to the false identity and the respondent's false declarations in failing to state that he was a citizen of Sweden.

[26] The submissions relating to the second-stage test submit that the respondent, having pleaded guilty to criminal charges directly related to his claim for refugee status in this country, clearly established he is a national of Sweden. There is thus no basis or evidence before the Authority that if he were returned to that country, he would be at any risk of being persecuted and/or that there would be a failure of state protection by the Swedish government.

THE RESPONDENT'S CASE

[27] As noted, the respondent has not engaged with this application process at all and there are no submissions presented by him. It is noted that he has pleaded guilty to criminal charges directly related to the declarations and the documentation that he submitted in support of his refugee claim. It also appears that the sentencing judge took into account submissions by counsel representing the Crown that the respondent's offences amounted to a serious attack on the administration of New Zealand's refugee determination and justice system.

THE AUTHORITY'S FINDINGS

STAGE ONE: CONCLUSIONS ON THE FRAUD ISSUE

[28] The Authority finds that the refugee status of the respondent may have been procured by fraud, forgery, false or misleading representation or concealment of relevant information.

[29] In the context of the clear evidence of his Swedish citizenship, any claims or submissions by the respondent that he is not a Swedish citizen would be clearly abusive.

[30] This respondent has been convicted in a criminal court, at the higher standard of proof required in that court, to have been guilty of using a forged document and making false declarations, both in relation to his refugee claim and the appeal. He was not truthful in his original application and appeal. He has now admitted to that guilt. The evidence establishes, both objectively assessed, and on the admission of the respondent, that he is a citizen of Sweden who, with his family, obtained refugee status in that country in 1993. He admits he resided in Sweden for some 11 years before coming to this country in an attempt to assist an aunt and uncle in Somalia who were trying to obtain refugee status in New Zealand.

[31] Accordingly, the recognition of refugee status by this Authority in the earlier hearing was wrongful and that recognition should cease.

STAGE TWO: WHETHER THE RESPONDENT SHOULD CEASE TO BE RECOGNISED AS A REFUGEE

[32] Having found that the respondent's grant of refugee status may have been procured by fraud, it is now necessary to consider the second stage of the two-stage test, that is, whether or not the respondent currently meets the criteria for refugee status.

THE ISSUES

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

> "…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
>
> In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

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

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

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

[35] In this case, it is abundantly clear that, regardless of whether the respondent may originally have been a Somali national or indeed may still have the right to Somali nationality, he also has Swedish nationality and accordingly, pursuant to the provisions of Article 1A(2) (second paragraph) of the Refugee Convention, as he is a national of Sweden, he cannot be deemed to be lacking in protection of that country. He has not availed himself of the protection of Sweden and there is no evidence whatsoever of him having a well-founded fear of being persecuted for one or more of the five Convention reasons, should he be returned to Sweden.

[36] Similarly, the appellant would be excluded from any form of recognition based upon any fear of being returned to Somalia, pursuant to the provisions of Article 1E of the Refugee Convention which states:

> "This Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

[37] Not only does this respondent have such protection from residence in Sweden, he also has the greater level of protection afforded to Swedish nationals.

[38] The respondent has thus provided no case for refugee status other than that presented by him to the Authority in its decision, *Refugee Appeal No 75667* (28 October 2005) which has now been found to be false.

CONCLUSION

[39] The following determinations are made:

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

(b) It is appropriate to cease to recognise the respondent as a refugee.

[40] The application is therefore granted.

"A R Mackey"
A R Mackey
Chairman