REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76533

AT AUCKLAND

Before:	A R Mackey (Chairman)
Counsel for the Appellant:	I Uca
Appearing for the Department of Labour:	No Appearance
Date of Hearing:	9 June 2010
Date of Decision:	28 June 2010

DECISION

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

[2] This is the appellant's second claim for recognition as a refugee in New Zealand.

INTRODUCTION

[3] The appellant is a single man in his early 30s. He departed Iran on a valid Iranian passport and arrived in New Zealand in early 2006 on a false passport. He lodged his first Confirmation of Claim for refugee status on the basis of a fear of being persecuted on return to Iran because he had committed the act of apostasy by converting from Islam to Christianity. He also claimed he feared serious harm at the hands of various family members for similar reasons. His credibility was largely rejected by the RSB. He then appealed to this Authority. The Authority, based on the totality of his evidence, did not find him an honest witness, stating that he had "proved himself to be a dishonest and opportunistic witness and he

has not resiled from the fabricated account he maintained throughout". The Authority was therefore satisfied that no weight could be placed on any of his testimony and dismissed his appeal.

[4] In late October 2006, the District Court extended the terms of his release on conditions so he could obtain an Iranian travel document. In mid-August 2007, the DOL found that he had absconded from the hostel where he had been released on conditions.

[5] In January 2010, the appellant was arrested as an overstayer and told by DOL officials that his Iranian driver's licence would be sent to the Iranian Embassy in Wellington with an application for his Iranian passport.

[6] Two days later, the appellant lodged his subsequent claim which is the subject of this appeal. He was interviewed at Auckland Central Remand Prison by the RSB in February 2010 and, in May 2010, the RSB declined his application for recognition. Again, his credibility was largely rejected. Ms Uca then lodged an appeal with this Authority, based on the appellant's instructions that he had given her in advance of a possible negative RSB decision. At the time she considered his mental health was reasonable.

Problems with the appellant's mental health

[7] In mid-May 2010, Ms Uca advised that, although she was unable to obtain legal aid, she was continuing to represent the appellant. She considered that he was mentally unwell and noted he had been on medication for several weeks. His situation was such that she considered he was unable to give instructions, as he failed to recognise her as counsel and could not answer questions. She also noted that he appeared to have been attacked in the prison due to injuries to his face which he could not explain.

[8] She stated that he was unable to focus and, at times, broke into song and did not make eye contact.

[9] She stated that she had expressed her concerns to Immigration New Zealand (INZ) and suggested that he should be released for assessment by a psychologist.

[10] Because the appellant was detained at the remand prison, the Authority directed that the matter be set down for hearing at an early date (9 June 2010) and wrote to counsel, who agreed that the Authority would be much assisted by a

psychiatric report. A preliminary directions hearing was therefore set down for 3 June 2010 to discuss the appellant's psychiatric condition and how the matter would best proceed.

[11] Ms Uca supplied a schedule of documents to the Authority on 2 June 2010, incorporating a psychiatric report from Dr AA, dated 1 June 2010. This report was prepared for INZ and is addressed to "Compliance Operations" at INZ. Ms Uca attached to her schedule of documents a number of emails addressed to the immigration officers concerned and to Dr AA.

[12] In the directions hearing, the Authority noted that the report had been prepared for INZ and not on the instructions of Ms Uca. After considering the psychiatric report and submissions put forward by Ms Uca, the Authority determined that the matter should proceed for hearing at the earliest possible date, namely 9 June 2010. Instructions were given for a summons to be issued to the appellant so that he could be brought from the prison to the Authority. Ms Uca, at the directions hearing, agreed that, based on the evidence before the Authority, the best course was to proceed with the hearing, noting however her serious and continuing concerns about the appellant's mental health and that she disputed some of the findings in the report from Dr AA, while acknowledging that she was not an expert in psychiatry.

Guidance from the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status – January 1992*

[13] At the outset of the hearing, the Authority, having noted the psychiatric report and submissions from Ms Uca, which were provided in a memorandum dated 8 June 2010, advised that it would examine the appellant, noting the possible mental health problems, and would also be guided by the provisions of paragraphs 206 – 212 of the *UNHCR Handbook*. These state:

> Mentally disturbed persons
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> 206. It has been seen that in determining refugee status the subjective element of fear and the objective element of its well-foundedness need to be established.
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> 207. It frequently happens that an examiner is confronted with an applicant having mental or emotional disturbances that impede a normal examination of his case. A mentally disturbed person may, however, be a refugee, and while his claim cannot therefore be disregarded, it will call for different techniques of examination.
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> 208. The examiner should, in such cases, whenever possible, obtain expert medical advice. The medical report should provide information on the nature and degree of mental illness and should assess the applicant's ability to fulfil the requirements normally expected of an applicant in presenting his case (see paragraph 205 (a) above). The conclusions of the medical report will determine the examiner's further approach.

> 209. This approach has to vary according to the degree of the applicant's affliction and no rigid rules can be laid down. The nature and degree of the applicant's "fear" must also be taken into consideration, since some degree of mental disturbance is frequently found in persons who have been exposed to severe persecution. Where there are indications that the fear expressed by the applicant may not be based on actual experience or may be an exaggerated fear, it may be necessary, in arriving at a decision, to lay greater emphasis on the objective circumstances, rather than on the statements made by the applicant.
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> 210. It will, in any event, be necessary to lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant, or from his guardian, if one has been appointed. It may also be necessary to draw certain conclusions from the surrounding circumstances. If, for instance, the applicant belongs to and is in the company of a group of refugees, there is a presumption that he shares their fate and qualifies in the same manner as they do.
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> 211. In examining his application, therefore, it may not be possible to attach the same importance as is normally attached to the subjective element of "fear", which may be less reliable, and it may be necessary to place greater emphasis on the objective situation.
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> 212. In view of the above considerations, investigation into the refugee status of a mentally disturbed person will, as a rule, have to be more searching than in a "normal" case and will call for a close examination of the applicant's past history and background, using whatever outside sources of information may be available.

[14] Taking into account these paragraphs in the Handbook, the appellant's statement supporting his second claim, his interview with the RSB, the evidence he was able to give to the Authority (some of which was rational and some of it was irrational), the psychiatric report and Ms Uca's submissions, the Authority is satisfied that, in the totality of this case, the fairest process possible for the determination of the appellant's appeal has been conducted. This is so, even though the appellant could not be fully examined, either by the Authority or counsel, with the normal depth and detail associated with refugee appeals before the Authority.

JURISDICTION TO HEAR THE APPEAL

[15] The Authority's jurisdiction in connection with second claims is set out in s129O of the Immigration Act 1987 (the Act). The Authority explained, in simple terms, the meaning of this provision to the appellant at the outset of the hearing. Section 129O(1) of the Act provides:

> 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.

[16] If the Authority finds it has jurisdiction under s129O(1), it is then required to consider whether the appellant meets the requirements of the Refugee Convention in accordance with the issues which are set out later in this decision.

[17] The question of whether there is jurisdiction to entertain a second or subsequent claim was considered in *Refugee Appeal No 75139* (19 November 2004) where the relevant principles were set out at [54] to [57]:

> **[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.
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> **[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:
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> (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.
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> (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.
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> (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.
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> (d) A second appeal cannot be used as a pretext to revisit adverse credibility findings made in the course of the prior appeal.
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> (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.
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> (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***.
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> (g) The Authority does not possess what might be called a "miscarriage of justice" jurisdiction.
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> **[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.
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> **[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.

[18] Against this background, it is now necessary to have regard to the first and second claims of the appellant in order to determine whether the jurisdictional threshold is met.

The appellant's first refugee claim

[19] As noted above, the appellant's first claim was based on his fear of being persecuted because he had converted from Islam to Christianity and therefore would be maltreated by the Iranian authorities and/or his relatives on return to Iran.

The appellant's second refugee claim (brief summary)

[20] The appellant's second refugee claim is set out in a statement he appears to have completed in February 2010, apparently with the assistance of counsel. The nub of this statement is that his brother, BB, who is approximately 18 years older than the appellant, had, in approximately September or October 2009, been arrested, although the family did not know where he was being kept or if he was still alive. The appellant considered that this arrest, along with the fact that he had applied for refugee status in New Zealand, and had family living overseas, placed him in the situation where he was at risk of being persecuted on return to Iran.

CONCLUSION ON JURISDICTION

[21] The Authority is satisfied that since the first determination by the Authority in September 2006, circumstances in the appellant's home country have changed to such an extent that his subsequent claim is based on significantly different grounds from his previous claim. The evidence he presents in support of his second claim and all of the surrounding circumstances relating to his mental health are now set out before going on to identify the relevant issues, assess the appellant's credibility and then reach final conclusions on the issues identified.

THE APPELLANT'S CASE

[22] At the outset, the Authority pointed out to the appellant and counsel that as the appellant's credibility in respect of his first claim had been strongly rejected by the first Authority, this Authority, in accordance with the provisions of s129P(9) of the Act would rely on those credibility findings and his second claim would be primarily based on the totality of evidence presented in support of his second

claim. In doing so, the Authority notes that it has compiled "The appellant's case" by putting together his statement of 8 February 2010 (which he adopted before this Authority in a coherent manner), the evidence he gave to the RSB (where relevant), those parts of the appellant's oral evidence given to the Authority at the hearing, that the Authority considers fairly and appropriately can be relied on as having been rationally presented by the appellant, and other relevant surrounding information.

[23] The Authority is, of course, fully cognisant that the appellant has been held in remand detention for some months and currently is based in the hospital unit of Auckland Remand Prison and that, over recent times, counsel has had difficulty in obtaining formal, cogent instructions from him. All these factors have been taken into account.

[24] In the appellant's confirmation of claim, and before the Authority, the appellant confirmed that his parents were still alive and lived in a family home based in the northern town of ZZ. He is the youngest of nine siblings. Two older sisters and their families live in the family home and, over the past six or seven years, an older brother, BB, has also been based at the family home.

BB's situation

[25] BB is some 18 years older than the appellant. He was an adult at the time the appellant was growing up. During that time, BB apparently operated a vegetable shop which had been previously owned by another brother. That business was sold, however, and BB then went overseas, looking for employment to earn money to overcome serious financial strains upon him and the family. He had travelled to Cyprus, Turkey and South Korea. BB returned to Iran from time to time and then, on the last occasion, approximately six or seven years ago. The appellant was unaware of his occupation at the present time. He thought he may have married a member of their maternal family but was unsure of this and also as to whether BB had children.

[26] At the hearing before the Authority, the appellant adopted the statement he had made in February 2010 and provided to the RSB. The appellant sets out in that statement his relationship with BB and current issues relating to him. He states that BB had lived in Korea for four years and was removed back to Iran in 2002 or 2003 because he was an overstayer, but he was always trying to find ways to leave again. BB helped the appellant to leave Iran by putting him in touch with someone in Malaysia.

[27] From August 2007, when he absconded from the Auckland hostel, until he was detained on 20 January 2010, the appellant stated that he had kept in touch with his family and would talk a lot to BB on the telephone. He explained that BB had been involved, some 30 years ago, in the Iranian revolution and was an active member of the national guard, guarding mosques and important buildings. BB, at that time, had been deeply religious and somewhat fanatical in his beliefs. After the revolution was victorious, however, it was announced that people from the national guard group were no longer on the revolutionary side and had to deliver up their weapons. BB and other members of his group became confused as they were doing their task perfectly. BB then changed completely and no longer practised religion. He had left the ZZ district and gone to YY to live for eight or nine years. It was after that that BB left Iran for the first time.

[28] During their recent discussions, the appellant and BB spoke about the current situation in Iran and BB's dissatisfaction with the cruel manner in which government agents acted to suppress freedom. In approximately September 2009, the appellant heard from his family that the Iranian regime officials had arrested BB as he had participated in a protest against the government in ZZ. The appellant was unaware which group BB had been involved with nor did his parents have any idea about the matter. During telephone calls, apparently in late 2009, the appellant heard his family crying and stating that they did not know where BB was. A brother-in-law had heard that arrested people had been transferred to the XX Prison. Hearing this news made the appellant "a complete mess". His memories were that his brother had been angry and spoke of his hatred of the regime on their last discussions.

[29] At the present time, the appellant has no idea what happened to BB, where he is kept or indeed, whether he is still alive.

[30] In reasonably rational evidence that the appellant gave to the Authority, he reported that BB had continuing financial and psychological problems and that the appellant was sure that BB wanted to live in Europe or the USA. He wished to do that so he could refresh himself and get employment. The appellant considered that BB maybe had problems with the Iranian authorities. When asked whether his family had told him that BB had been arrested, the appellant stated that his family had not said that and that he had made a mistake. When asked what was the mistake, the appellant said that he had emailed a nephew and requested information from him about when they were younger and about BB's job in the past and his involvement in the revolution. The appellant's reply related primarily

to his first claim in that he stated that the information he had been given he had put together as part of his first refugee claim. Much of that information had been provided to him by BB but it had been a mistake on his part to present it untruthfully as part of his first claim.

[31] Additionally, from the information he had seen on the Internet, the situation in Iran had become chaotic; people were killing each other and no-one was helping these people. This caused him great fears. At other times, however, it was not so frightening.

General risks on return

[32] In addition to risks he claimed relating to the possible detention of his brother, BB, the appellant claimed that he could not go back to Iran because he had been out of the country for several years and the Iranian authorities knew he had applied for refugee status in this country. This was due to an application made for an Iranian passport in 2006, at the request of the DOL/INZ, who had contacted the Iranian Embassy twice to ask about his passport.

[33] When he was asked to imagine himself returning to Iran, arriving at Tehran airport, after a considerable pause the appellant stated that the authorities might kill him or maybe they would not, because he had told many lies in the past. As of now, he was not sure what was true and what was false. Other evidence provided by the appellant was somewhat irrational and none of it appeared to be relevant to his claim.

THE ISSUES

[34] 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.

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

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

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

ASSESSMENT OF THE APPELLANT'S CASE

Credibility

[36] The psychiatric report from Dr AA concluded that the appellant was: "a normally functioning Iranian man of average intelligence … with no adverse family background and no previous psychiatric history prior to detention by the Immigration Department". Dr AA considered that following detention, the appellant experienced an adjustment reaction resulting in a range of depressive and anxiety symptoms, including a period of suicidality which had now been resolved. He also noted there were many inconsistencies in his presentation which did not "fit with course and presentation or criteria of DSM IV Axis I diagnosis".

[37] Dr AA went on to find that the appellant was a pleasant and co-operative man who showed no convincing indication of any current psychiatric disorder, although he did suffer symptoms after his detention. His conclusion was that the appellant required no ongoing treatment aside from periodic review. He recommended, as a precaution, that the appellant be kept in his current unit until the outcome of the proceedings is known and that the termination of current detention would result in the resolution of any unusual behaviours.

[38] He further concluded that there was no evidence of cognitive abnormality at the time when he interviewed the appellant and, at that time, he found no convincing evidence of an abnormal state of mind, even though he was clearly very distressed following his detention. He noted that the appellant "hesitates and appears confused and distracted when asked about his health when given specific prompts". These reactions were inconsistent with his overall mental state. In his opinion, the doctor considered that the appellant was not mentally disordered at the time of the assessment he made in the manner defined by the Mental Health Act. He therefore considered that the appellant did not satisfy the criteria for mental disorder at the time of interview, as he was able to recall clearly the reasons for his detention and seemed to think that it was reasonable. While the appellant's response to questions was vague at times, at other times it was clear and fluent.

[39] For these reasons, Dr AA considered the appellant was fit to proceed under his present mental condition and would be able to follow the course of proceedings, conduct a defence and be able to instruct his counsel.

[40] While the Authority has carefully noted the criticism and submissions made of this report by counsel, the Authority found itself in agreement with Dr AA's conclusions that the appellant was vague and very hesitant at some times, but clear and fluent at other times, in responding to questioning. The Authority also found that when more mundane questions were put to the appellant, such as those about his family background and his association with his former partner in New Zealand, clear and rational responses were given. However, at times, when the Authority tried to probe the appellant's assessment of his risks on return and, in particular, how the current predicament of BB impacted on the appellant's situation on return, he became extremely hesitant, vague and often irrational in his responses.

[41] Taking into account both the content of the psychiatric report and the submissions given by Ms Uca, the Authority is satisfied that the appellant has given adequate responses to most of the questions relating to the issues before the Authority in respect of the second appeal. Those issues relate only to the changed circumstances upon which his claim is based, that is, primarily any risks to him arising from a claimed detention of his brother, BB, and the claim that the Iranian authorities are aware that he has claimed refugee status in New Zealand, following requests by INZ for the Embassy to provide the appellant with a fresh passport.

Well-founded fear

[42] The Authority is satisfied, even based upon the evidence he included in his statement made in August 2009 to the RSB and the additional information garnered in his interview with the RSB and with the Authority, that the appellant's subsequent claim, considered in the round, has not established that he has a real chance of being persecuted on return to Iran. At most, the appellant's evidence establishes that there is a remote, or speculative, chance that his brother, BB, may have been detained by the Iranian authorities in the second or third quarter of 2009. Beyond a remote possibility of participating in a protest, no evidence at all has been produced for the reasons that BB may have been detained and essentially to this claim there is no nexus whatsoever to the appellant in any such possible detention. The appellant's only evidence in this regard was that BB was

constantly complaining about the activities and abusive manner in which the Iranian authorities conducted themselves. This evidence, even taken at its highest, does not establish anything beyond a very remote or highly speculative risk that this appellant would be detained and maltreated on his return to Iran because of any issues related to his brother, BB. There is simply no link between the activities of BB and the appellant.

[43] As to any risk arising because of the contact made with the Iranian Embassy in New Zealand by INZ, following the rejection of the appellant's first appeal and in the attempts to obtain a passport for him to travel back to Iran, the Authority considers that these events simply do not establish even a remote risk of the appellant being maltreated on return. The appellant departed from Iran, on his own evidence, using a valid Iranian passport. He has no profile of any significance with the Iranian government or its officials and thus would be returning, even after obtaining a new passport from the Iranian Embassy in New Zealand, in a position no different from any returning Iranian who had spent several years out of the country attempting to either obtain economic betterment or using a groundless asylum claim to remain in New Zealand to pursue other personal activities of a non-contentious nature.

[44] Accordingly, it is highly speculative and fanciful that the Iranian authorities will take any interest in the appellant on return, because he simply has no negative profile with them. This subsequent claim completely lacks the necessary well-foundedness.

CONCLUSION

[45] From a consideration of the totality of the evidence before the Authority, and taking into account the appellant's specific mental health and psychiatric issues that have been carefully presented to the Authority by counsel, the Authority is satisfied that the first issue is answered in the negative. It is therefore unnecessary to go on and consider the second issue. The appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention The appeal is dismissed.

"A R Mackey"
A R Mackey
Chairman