

**REFUGEE STATUS APPEALS AUTHORITY  
NEW ZEALAND**

**AT CHRISTCHURCH**

**Application No. 75891**

**IN THE MATTER OF**

an application pursuant to s 129L of the  
Immigration Act 1987 to cease to  
recognise

a person as a refugee

**BETWEEN**

A refugee status officer of the Department  
of Labour

**APPLICANT**

**AND**

**[AA]**

**RESPONDENT**

**Before:**

RPG Haines QC (Chairperson)

**Counsel for the Applicant:**

C. Hurren

**Counsel for the Respondent:**

A. James

**Date of Hearing:**

10 April 2007

**Date of Decision:**

16 April 2007

## DECISION

### INTRODUCTION

[1] This is a case of a man with two identities. To the New Zealand immigration authorities he has presented himself as [AA] born in Somalia on 15 June 1959 (ie he is now some 48 years of age). To the immigration authorities in the Netherlands he has presented himself as [KK] born in Somalia on 21 July 1952 (ie he is some 55 years of age). Using the “[AA]” identity he secured recognition in New Zealand as a refugee, relying on critical events said to have occurred in Somalia in the period 1996 to 2001. Concealed from the New Zealand authorities was the fact that as [KK] he has held Dutch nationality since April 1999 and was living in the Netherlands in the period 1993 to 2001.

[2] If [AA] and [KK] are one and the same person certain consequences follow:

- (a) The refugee claim advanced in New Zealand was based on false evidence.
- (b) As a matter of law [AA]/[KK] cannot be recognised as a refugee given the terms of:
  - (i) Article 1A(2) of the Refugee Convention.
  - (ii) Article 1E of the Convention.

(iii) Article 1C(3) of the Convention.

### **The application**

[3] This is an application by a refugee status officer under s 129L(1)(f)(ii) of the Immigration Act 1987 and Regulation 16 of the Immigration (Refugee Processing) Regulations 1999 (SR1999/285) for a determination that the Authority should cease to recognise [AA]/[KK] as a refugee. The jurisdiction of the Authority to determine the application is conferred by s 129R(b) of the Act which provides:

**129R. Functions of Authority in relation to continuation, etc, of refugee status—**

In addition to the function of hearing appeals from decisions of refugee status officers in relation to refugee status, the Authority also has the function of determining applications made by refugee status officers under section 129L(1)(f) as to whether—

- (a) ...
- (b) The Authority should cease to recognise a person as a refugee, in any case where the earlier recognition by the Authority of the person as a refugee may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information; or
- (c) ...

In colloquial terms, the application before the Authority is for cancellation of refugee status.

**[4]** Sections 129L(1)(f)(ii) together with s 129R(b) pose two issues for determination:

- (a) Whether the earlier recognition of the person as a refugee **may have been** procured by fraud, forgery, false or misleading representation or concealment of relevant information; and
- (b) Whether the Authority should cease to recognise the person as a refugee.

**[5]** In other words the mandated statutory inquiry is a “two-step” one:

- (a) If the decision-maker is satisfied that the earlier recognition **may have been** procured by fraud, forgery, false or misleading representation or concealment of relevant information, there is jurisdiction to move to the second step of the inquiry.

- (b) Once the “may have been procured” threshold has been crossed the question of refugee status is opened and it is for the individual to establish that he or she is today a refugee within the meaning of Article 1 of the Refugee Convention. In this context it is the responsibility of the individual to establish his or her claim to refugee status. See ss 129P(1) and 129S(b).

See also *Refugee Appeal No. 75392* (7 December 2005).

[6] As to the “**may have been procured**” element, the qualified terms in which the statutory threshold has been expressed mandate a standard of proof that is lower than the balance of probabilities but higher than mere suspicion. See also *Refugee Appeal No. 75563* (2 June 2006).

[7] It is not helpful in inquisitorial proceedings of this kind to import notions such as the burden of proof found in the adversarial context. That having been said the Authority cannot proceed to the second step of the inquiry (whether the individual is today a refugee) unless and until it is satisfied that the earlier recognition of refugee status may have been procured by fraud, forgery, false or misleading representation or concealment of relevant information. As to this first step the “burden” is on the refugee status officer to present such evidence as is in the possession of the New Zealand authorities from which it can responsibly be said that the earlier recognition of refugee status may have been procured by fraud, forgery, false or misleading representation or concealment of relevant information.

### **The Respondent’s response to the application**

[8] By letter dated 5 April 2007 (countersigned by his client) Mr James for the Respondent advised that the application was not opposed:

I refer to this application to cancel grant of refugee status. I have been instructed to appear for [the Respondent]. He saw me only this current week but we were only able to uplift from Mr AND Garrett yesterday, the papers and disclosure previously provided. I have discussed matters further with [the Respondent]. It is accepted that he is one and the same person as [KK] who holds a passport from The Netherlands and therefore has Netherlands nationality.

I am instructed that the application to cancel refugee status is not now opposed.

[9] In the circumstances the Authority directed that there was no need for the departmental witnesses to travel from Auckland to Christchurch for the hearing and that it would be sufficient for the application to be determined on their sworn affidavit evidence.

[10] It is now possible to turn to the facts.

## **STEP ONE**

### **THE FACTS - THE NETHERLANDS**

[11] The evidence establishes that using the name “[KK]” the Respondent arrived in the Netherlands on or about 11 October 1993 and sought in that country recognition as a refugee. That application does not appear to have been determined because his wife had preceded him, having arrived in the Netherlands on or about 29 July 1993. She also submitted an application for refugee status. After her application was granted both she and the Respondent were given residence status in the Netherlands and it would appear that the couple then had two sons while living in the that country, their dates of birth being 16 February 1994 and 22 December 1997. All four members of the family are Dutch citizens. The Respondent is a citizen by grant, having received his citizenship by Royal Decree on 2 April 1999. His Dutch passport was issued on 8 April 1999. He remained living in the Netherlands for the entire period from 1993 through to 2001.

[12] It would appear that at some point the couple separated and the wife and children came to New Zealand where they have residence status. The Authority was told by Mr James that that status was obtained on grounds unrelated to any refugee matter. A Custody Order was made in favour of the wife by the District Court at Christchurch on 11 May 2001.

[13] The reason for the Respondent leaving the Netherlands for New Zealand was apparently to re-establish contact with his children. Travelling on his Dutch passport in the name of [KK] he arrived in New Zealand at Christchurch International Airport on 10 December 2001 and was granted a visitor's permit to 10 March 2002, a permit which expired without a further permit being granted.

#### **THE FACTS - NEW ZEALAND**

[14] Using the assumed identity of "[AA]" the Respondent on 31 January 2002 lodged with the Refugee Status Branch of the New Zealand Immigration Service an application for refugee status. Concealing his true background and his possession of Dutch nationality he claimed to have arrived in New Zealand on 22 January 2002 after fleeing from Somalia in November 2001.

[15] The narrative of facts given to the refugee status officer at first instance was, in essence, that he came from a family comprising his father, mother, two sisters and two brothers. The family were of the Ashraf Sarman clan and lived in a district of Mogadishu. His father operated a grocery shop. In 1996 the Respondent opened his own grocery shop in a location close to his father's. That same year his father was killed when members of the Hawiye clan attacked the family home and tried to rape one of the sisters. In 1997 and again in 2001 there were further attacks by rival clans. In November 2001 the Respondent left Somalia for Kenya leaving behind his wife (the

name given was not the name of the wife who now has Dutch citizenship) and seven children (four sons, three daughters). Following an interview a refugee status officer declined the refugee application on credibility grounds.

[16] An appeal to this Authority was successful, the panel member hearing that appeal taking a different view of the Respondent's credibility by applying the benefit of the doubt in his (the Respondent's) favour. The decision of the Authority was published on 1 April 2003.

[17] Consequent upon that decision the Respondent was granted a New Zealand residence permit on 6 August 2003 and a Refugee Convention Travel Document was issued by the Department of Internal Affairs on 16 September 2005. Both the residence permit and the travel document were issued in the name of "[AA]". An application for New Zealand citizenship in the same name was lodged with the Department of Internal Affairs on 8 March 2005.

[18] At no time throughout this entire process did the Respondent disclose that he had lived continuously in the Netherlands from October 1993 through to November 2001, held Dutch citizenship, possessed a Dutch passport and had arrived in New Zealand on 10 December 2001 on his Dutch passport. It is clear from the videotape interview held on 20 October 2005 that the reason for the deception was to enable the Respondent to be near his former wife and his two Dutch citizen children referred to earlier in this decision.

### **Findings in relation to Step 1**

[19] By the clearest margin possible the uncontested evidence establishes that the earlier recognition by the Authority of "[AA]" as a refugee may have been procured by fraud, false or misleading representation or concealment of relevant information. It is



now necessary to move to the second step of the inquiry and to determine whether the Authority should cease to recognise the Respondent as a refugee.

## STEP TWO

### WHETHER RESPONDENT A REFUGEE

[20] Once the threshold set by the first step of the inquiry has been passed, the decision-maker arrives at the ultimate issue, namely whether at the date of the determination the individual is a refugee within the meaning of the Refugee Convention. To be recognised as a refugee the individual must establish (s 129P(1)) that he or she satisfies the Inclusion requirements of Article 1A(2) and is not excluded by the Exclusion provisions of Articles 1D, E and F.

#### **Inclusion**

[21] The full text of Article 1A(2) follows:

For the purposes of the present Convention, the term “refugee” shall apply to any person who:

...

- (2) ...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.”

[22] The terms of Article 1A(2) identify the country of reference in relation to which the refugee inquiry must take place. The risk of being persecuted must be established in the country of nationality or, if the individual is stateless, the country of former

habitual residence. As the Respondent is not stateless this aspect of the Inclusion clause will not be addressed. The second paragraph of the Inclusion clause recognises that it is possible for an individual to have more than one nationality. In such a case the obligations of a State party to the Convention are not engaged unless the individual can establish a well-founded fear of being persecuted for a Convention reason **in each** of the countries of nationality. The underlying rationale is explained by Professor James C Hathaway in *The Law of Refugee Status* (1999) at 57:

It is an underlying assumption of refugee law that wherever available, national protection takes precedence over international protection. In the drafting of the Convention, delegates were clear in their view that no person should be recognized as a refugee unless she is either unwilling or unable to avail herself of the protection of *all* countries of which she is a national. Even if an individual has a genuine fear of persecution in one state of nationality, she may not benefit from refugee status if she is a citizen of another country that is prepared to afford her protection.

[23] It is not clear whether, on the receipt of his Dutch nationality in April 1999, the Respondent lost his Somali nationality. It will be assumed in his favour that such nationality was not lost and that he is a dual national. While it is possible to concede his **legal** ability to assert a refugee claim against Somalia under the first paragraph of Article 1A(2), the second paragraph is an insurmountable obstacle because he has the protection of the Netherlands Government and is required to avail himself of that protection. The only way that he can avoid the terms of Article 1A(2) is to establish, by credible evidence, that in the Netherlands itself there is a real risk of his being persecuted for a Convention reason. There is not a shred of evidence to support such claim and in fairness none was asserted by the Respondent.

[24] In the result even it is assumed that the Respondent presently has a well-founded fear of being persecuted for a Convention reason in Somalia (and no such claim was made at the hearing), he cannot in law be recognised as a refugee as he is a citizen of the Netherlands and enjoys the protection of the government of that country.

### **Exclusion**

[25] There is a further reason why the Respondent cannot in law satisfy the terms of the refugee definition in Article 1 of the Convention. He is in fact excluded from the Convention by virtue of Article 1E which provides:

**Article 1E**

This Convention shall not apply to a person who is recognized 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.

[26] The Respondent has taken residence in the Netherlands and enjoys the rights and obligations attached to the possession of the nationality of that country.

[27] Out of an abundance of caution it is also intended to address the cessation provisions of the Convention.

**Cessation**

[28] Even if it were to be assumed (contrary to the evidence) that the Respondent, on facts which have not been disclosed, can today assert a valid claim to refugee status against Somalia under Article 1A(2), refugee status cannot be recognised because Article 1C(3) provides that the Convention “shall cease” to apply to any person falling under the terms of Article 1A if:

(1) ...

(2) ...

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) ...

(5) ...

(6) ...

[29] It is clear that having acquired Dutch nationality any valid claim to refugee status against Somalia, if one was to be assumed to be hypothetically possible, cannot in law result in recognition of the Respondent as a refugee.

### **Findings in relation to Step Two**

[30] The explicit terms of the Refugee Convention make it clear that no matter from which perspective viewed, the Respondent cannot in law be recognised as a refugee:

- (a) He cannot satisfy the Inclusion terms of Article 1A(2); and
- (b) He is in any event excluded from the Convention by Article 1E; and
- (c) His Dutch nationality means that the cessation provisions of Article 1C(3) would apply.

## CONCLUSION

[31] The Authority concludes:

- (a) That the Respondent's recognition as a refugee was procured by fraud, false or misleading representation or concealment of relevant information; and
- (b) The Authority should now cease to recognise the Respondent as a refugee.

.....

[Rodger Haines QC]

Chairperson