

**REFUGEE STATUS APPEALS**  
**AUTHORITY**  
**NEW ZEALAND**

**REFUGEE APPEAL NO 76460**

**AT AUCKLAND**

<b><u>Before:</u></b>	M L Robins (Chairperson) S A Aitchison (Member)
<b><u>Counsel for the Appellant:</u></b>	D Mansouri-Rad
<b><u>Appearing for the Department of Labour:</u></b>	No Appearance
<b><u>Dates of Hearing:</u></b>	23 and 24 March 2010
<b><u>Date of Decision:</u></b>	2 September 2010

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**DECISION DELIVERED BY M L ROBINS**

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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 the Islamic Republic of Iran.

**INTRODUCTION**

[2] This is the appellant's third appeal to this Authority. He claims to have a well-founded fear of being persecuted in Iran by reason of his participation in a number of demonstrations in Auckland and Wellington following the disputed presidential election held in Iran on 12 June 2009. As will be seen, there is no doubt that the appellant participated in at least some of these demonstrations. The central issue to be determined is whether his participation gives rise to a well-founded fear of him being persecuted if he returns to Iran.

[3] The appellant arrived in New Zealand on 29 August 2004 and lodged his first claim for refugee status on arrival at the airport ("the first claim"). He was interviewed by the RSB in respect of the first claim on 20 and 21 September 2004. By decision dated 28 October 2004 the RSB declined the first claim. The

appellant appealed to the Authority in respect of that decision (“the first appeal”). The first appeal was heard on 10 and 14 February 2005. By decision dated 22 June 2005 the Authority dismissed the first appeal.

[4] The appellant’s second claim was lodged on 23 July 2008. He was interviewed by the RSB on 1 September 2008. By decision dated 9 October 2008 the RSB declined the second claim. It found that his claim was not credible and therefore it had no jurisdiction to consider it. The appellant appealed once more to this Authority (“the second appeal”). The second appeal was heard on 2 and 3 February 2009. By decision dated 4 March 2009 the Authority (differently constituted) dismissed the second appeal.

[5] The appellant’s third claim was lodged on 23 July 2009. After an interview on 24 September 2009 the RSB declined the third claim on 25 November 2009. It is from this decision that the appellant appeals.

### **JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL**

[6] Section 129O(1) of the Immigration Act 1987 (which came into force from 1 October 1999) (“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 the 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.

[7] The question of whether there is jurisdiction to entertain a second or subsequent refugee application has been considered by the Authority in *Refugee Appeal No 75139* (18 November 2004). In that decision, the Authority ruled that in a subsequent claim under s129O(1) of the Act there are distinctive 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.

[8] The Authority further ruled at [55](e):

(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.

[9] The Authority noted at [55](g):

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

[10] In this appeal, therefore, it is proposed to consider the appellant's original claims and his third claim, with a view to determining:

- (a) whether, in terms of s129O(1) of the Act, the Authority has jurisdiction to hear the third appeal and, if so,
- (b) whether the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

### **The first claim**

[11] The first claim and appeal was based on an allegation that the appellant had a well-founded fear of being persecuted by reason of his involvement with a pro-monarchist political group in Iran. He claimed to have undertaken a number of political activities on behalf of this organisation and feared that if he returned to Iran he would be arrested, tortured and possibly executed.

### **The second claim**

[12] The basis of the appellant's second claim and appeal was that some time after his first appeal was dismissed he converted to Christianity. He claimed to have then discussed Christianity with his sister who was living in Iran. She then converted to Christianity and was subsequently arrested and killed in detention on account of her conversion. The appellant claimed that the Iranian authorities became aware that he was the person who caused her to convert to Christianity. He feared he would suffer a similar fate to his sister if he returned to Iran.

### **The third claim**

[13] The basis of the appellant's third claim and appeal is that from the middle of June 2009 he took part in demonstrations triggered by the allegedly rigged election that took place in Iran on 12 June 2009. The appellant's claim is that he has taken part in three significant protests and that he has also been attending weekly demonstrations in Auckland outside the Imax theatre complex ("Imax"). He believes that the Iranian embassy may have identified him on some of these

protests and, accordingly, he fears that if he is returned to Iran he will suffer a similar fate to some of the protestors in Iran who have been arrested, tortured and sometimes executed.

### **Assessment of the jurisdictional question**

[14] The third claim is based on events which are said to have occurred after the determination of his second claim. The jurisdictional threshold is clearly met because the third claim is based on significantly different grounds to the previous claims.

[15] What follows is a summary of the evidence given in support of the third claim and then an assessment of the appellant's credibility and the well-foundedness of the claim.

## **THE APPELLANT'S CASE**

### **Evidence of the appellant**

[16] The appellant lives in Auckland. In mid-June 2009, he saw newspaper, television and Internet reports of huge demonstrations that followed the announcement that Mahmoud Ahmadinejad had won the general election held in Iran on 12 June 2009. It was widely believed by Iranians that Ahmadinejad's opponent, Mir Hossein Mousavi, should have won by a comfortable margin.

[17] On 16 June 2009, the appellant learned of a protest planned for later that day in Auckland city. He was compelled by strong and genuine feelings of anger to join the protest. He made his way to Queen Elizabeth Square, at the foot of Queen Street, Auckland where he joined several hundred other Iranian protestors there. The appellant showed the Authority a "YouTube" clip. It started with scenes of the demonstrators gathered in Queen Elizabeth Square chanting slogans such as "Death to the dictator!" and "Where is my vote?" The protestors could then be seen moving slowly up Queen Street, chanting and waving placards and the Iranian flag. The appellant identified himself in the crowd of protestors.

[18] On Sunday, 21 June 2009, the appellant attended a demonstration outside Imax. This protest, and all following Imax protests, was organised by AA. The protestors held posters with photographs of people who had been killed in demonstrations in Iran. They waved Iranian flags and chanted anti-government

slogans. The appellant was one of approximately 60 demonstrators on this occasion.

[19] On Saturday, 27 June 2009, the appellant attended another demonstration outside Imax. He was one of about 40 protestors who chanted slogans against the Iranian regime and waved placards.

[20] On 4 July 2009, the appellant attended another demonstration outside Imax and went from there to the ASB Stadium in Kohimarama to watch a basketball game between Iran and France. He went with his friends BB and CC. The appellant learned later that the Iranian ambassador to New Zealand and some embassy officials were in the crowd.

[21] The appellant was leaving the stadium after the game when he saw approximately 15 people demonstrating with Iranian flags and placards. They were chanting slogans. The appellant joined in for about three minutes before security officials moved the protestors away. During the demonstration he saw people taking photographs. The appellant showed the authority YouTube footage of this demonstration and identified himself standing behind a man who was standing beside a large placard which read "Down with the theocratic dictatorship".

[22] Two days after this protest, BB told the appellant that after the basketball game the Iranian players introduced him to the ambassador and officials. BB said the ambassador remarked with obvious displeasure that the demonstrators were not holding the appropriate Iranian flag (with an Islamic symbol) but rather flags with no emblem or with the monarchist emblem. The ambassador also mentioned that he was returning to Iran shortly.

[23] On 23 July 2009, the appellant lodged his claim for refugee status because he became frightened after seeing the video clip taken at the demonstration after the basketball game and having learned of the ambassador's attendance at the game, the ambassador's displeasure over the protest and the fact that the ambassador was about to return to Iran.

[24] On Saturday and Sunday, 19 and 20 September 2009, the appellant attended protests outside Imax. By this time the nature of the protests had changed. The emphasis had shifted from noisy chanting to a silent protest focussed on distributing pamphlets and explaining to interested members of the public the reason for the protest.

[25] On Thursday, 24 September 2009, the appellant was interviewed by a refugee status officer who issued his decision on 25 November 2009, declining the appellant's application. The appellant appealed to this Authority.

[26] The appellant continued to attend the weekly protests outside Imax from September 2009 until the date of hearing in the Authority (March 2010). Numbers began to dwindle until by February 2010 there were only about a dozen regular protestors of whom the appellant was one.

[27] Ashura is a celebration which takes place in January or February each year and commemorates the anniversary of the Islamic Revolution. On the day of Ashura there was a bigger protest at Imax. The organiser (AA) decided to capitalise on this renewed interest by organising a bus trip to the Iranian embassy in Wellington to coincide with 22 Bahman. 22 Bahman (12 February) is another significant date in the Iranian calendar.

[28] The appellant was one of about 30 Auckland protestors who boarded the bus on the night of 11 February 2010. They travelled to Wellington and upon arrival next morning, they parked the bus about 30 metres from the embassy.

[29] The appellant was aware of how dangerous it would be if he was identified by embassy staff. Accordingly, he had a hat, scarf and sunglasses to disguise himself. He was going to wear the scarf around his face but instead he wore a white surgical mask given to him by the organisers.

[30] He stepped down from the bus and onto the road. He was carrying his disguise, not wearing it. He was standing a few metres in front of the bus with two other protestors, one of whom was carrying an Iranian flag. Another of the protestors shouted out "They are taking photos of us!" This person was referring to an embassy official who could be seen taking photographs of the protestors from the highest level of the three-story embassy building. The appellant quickly moved in close to the front of the bus, out of the official's line of vision and then put on his disguise. He is unsure whether the official managed to obtain a photograph of him but says that, if he did, it would be only be a side-on view. The appellant then joined the other protestors who included Iranians based in Wellington, an Iranian/French journalist and a member of the Pen Institute.

[31] The appellant showed the Authority a 21 minute YouTube clip of this demonstration. The appellant identified himself as the camera panned along the line of protestors. Most of the demonstrators had disguised their identity. Some

had not. For several hours they stood on the roadside opposite the embassy behind flags and banners. They kept up a regular chant, taunting the embassy staff with slogans such as "Shame on You". The protest was filmed and then broadcast on the TVNZ and TV3 news bulletins that evening.

[32] The appellant continued to protest outside Imax about once a week and was still protesting at the time of his hearing before the Authority in March 2010.

[33] The appellant has no intention of returning to Iran but, when asked to comment on the hypothetical, he said that if he was returned to Iran he would suffer a similar fate to the protestors in his home country. He fears that, due to his participation in the protests in Auckland, he would be arrested, detained for a long period of time, tortured and even executed. The appellant believes he might have been identified if embassy staff compare the photographs taken of him by their agents at various protests with the photographs he submitted to the embassy in December 2008 with his passport application.

### **The evidence of AA**

[34] The appellant called AA to give evidence. AA said he was not involved in organising the first protest in Auckland on 16 June although he was present. He has, however, organised all the protests in front of Imax and the demonstration in front of the Iranian embassy in Wellington.

[35] He said that in the weeks following 16 June 2009, protests were held two or three times a week. By the end of 2009 the protests were held on Saturdays and Sundays and by January they were held only on Sunday.

[36] AA said the appellant was present at most of the Imax protests. He said the appellant was hard working and committed, that he helped AA set up the placards and photographs and that he spoke to members of the public who asked questions. AA went so far as to say that if there were ten most identifiable protestors in New Zealand, the appellant would be one of them. He said the embassy was aware of who the Imax protestors were and would "of course" have identified the appellant.

### **Documents and submissions**

[37] Before the appeal hearing, Mr Mansouri-Rad filed written submissions dated 19 March. Attached to these submissions was an article "F Fassihi "Iranian crackdown goes global" *Wall Street Journal* (4 December 2009) ("the Wall Street

Journal report”). During the appeal hearing, Mr Mansouri-Rad submitted three further documents:

- (a) A written statement by the witness, AA;
- (b) A copy of the Canadian Immigration and Refugee Board, Research Directorate *IRN103327.E Iran: Treatment by Iranian authorities of relatives of persons who have left Iran and claimed refugee status, including former members of the Bureau of National Security (Savak), Fedayeen Organisation Corp or opposition protestors* (4 January 2010);
- (c) A translation of an article published on a website called “Iran Emrooz” (Electronic News – Political Bulletin). The title of the article was *“Mostafa Tajzadeh was released but many still in prison; Jila Baniyaghoob’s weblog/Friday 12 March 2010”*.

[38] At the conclusion of the evidence, Mr Mansouri-Rad made further oral submissions in which he submitted that the Iranian authorities would infer from the appellant’s lengthy absence from Iran that he did not support the Islamic regime, an inference that would be heightened by his connection to his brother who was granted refugee status in New Zealand on account of his monarchist activities.

[39] Mr Mansouri-Rad also urged the Authority to consider that the Iranian authorities have access to the latest technology and software which enables them to analyse high-definition images and thereby identify protestors.

## **THE ISSUES**

[40] 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.

[41] 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**

[42] In relation to the appellant's participation in protest activities in New Zealand we find, for reasons that follow, that he has embellished the extent of his activities and the degree of his commitment to the protest movement.

[43] We accept that the appellant attended four protests, on 16, 21 and 27 June and on 4 July 2009. He did not, however, attend any further protests until the Saturday and Sunday before his RSB interview, two and a half months later, on 24 September 2009. According to AA, protests were being held two or three times a week during July to September 2009. The appellant's reason for not attending any protests during this time was that he helped his brother repair his house and that he went to church. The appellant rejected the Authority's suggestion that his absence during this period of relatively intense protest activity indicated a lack of genuine commitment to the cause. The appellant also rejected the Authority's suggestion that the primary motivation for his attendance at two protests the weekend before his RSB interview was to strengthen his refugee claim. The appellant offered to produce receipts proving that building work had been done and he said there was no need for him to go to every protest because millions of people were protesting.

[44] In his oral evidence at the appeal hearing, the appellant claimed to have participated in protests every week from 20 September 2009 until the date of the hearing in March 2010. This claim was inconsistent with a statement made by Mr Mansouri-Rad in his 16 November 2009 letter to RSB, in which he advised the RSB officer that after the protests in September 2009, the appellant attended two protests, on 1 and 8 November 2009. We put the inconsistency to the appellant who confirmed his evidence that he protested every week. He distanced himself from Mr Mansouri-Rad's letter, claiming that he did not put much effort into answering the RSB's questions because "RSB is not important to me." He said he did not care about the RSB interview process because RSB "makes no good decisions" and that he "was waiting to come to the Authority". We asked him if he

thought Mr Mansouri-Rad had made up the reference to the 1 and 8 November protests to which he answered that he had “no idea”.

[45] We find that the appellant’s failure to participate in any protests during the critical period between 4 July and 19 September 2009 is a strong indicator of his level of commitment. Accordingly we find that his attendance at the 19 and 20 September protests was primarily motivated by his impending RSB interview. We find that Mr Mansouri-Rad’s detailed letter to RSB in November 2009 was written by counsel on the basis of definite instructions from his client and accordingly we find, further, that the appellant did not attend any protests from 24 September until 1 November 2009.

[46] We accept that the appellant has regularly attended small Imax protests from 1 November 2009 at least until the date of his appeal hearing in March 2010 and that he attended the protest outside the Iranian embassy in Wellington on 12 February 2010.

[47] We accept that the appellant has been out of Iran for at least six years, and that his brother was granted refugee status in New Zealand on account of his monarchist activities. We also accept that the Iranian embassy may have a passport photograph of the appellant.

[48] We turn now to the first of the two issues posed.

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

[49] “Being persecuted” comprises two elements – serious harm and the failure of state protection; see *Refugee Appeal No 71427/99* (16 August 2000) at [67]. Further, the appropriate standard is a sustained or systemic violation of core human rights. See in this regard J C Hathaway *The Law of Refugee Status*, (Butterworths, Toronto, 1993) at p108 and *Refugee Appeal No 2039/93* (12 February 1996).

[50] The fact that the appellant is a single Iranian national who has spent some six years living in New Zealand will not, of itself, bring him to the adverse attention of the Iranian authorities. There are (according to the Wall Street Journal report) four million Iranians living abroad, many of whom routinely return to Iran for family or other reasons. Further, there is no evidence or country information to suggest that the fact that the appellant may have sought refugee status in New Zealand will put him at risk of harm.

[51] Nor, we find, will the fact that the appellant's brother was involved in pro-monarchist activities before the brother departed Iran in 1991, expose the appellant to any greater risk, because the brother's activities did not cause the appellant any difficulties at any time between 1991 and 2004 when the appellant himself departed Iran. Moreover, the appellant's brother visited Iran in 2003 and was able to stay there and subsequently depart without incident.

[52] We turn now to the appellant's participation in the protests in Auckland and in Wellington. As indicated at the beginning of this decision, the issue to be determined in this appeal is whether the appellant has a well-founded fear of being persecuted by reason of his participation in these protests.

[53] We refer first to the country information. In *Refugee Appeal No 76454* (8 March 2010), the Authority considered the country information about the response of the Iranian authorities to overseas protest activity and we do not intend to reproduce it in this decision. The conclusions reached in that decision were usefully summarised by the Authority in *Refugee Appeal No 76445* (20 April 2010) at [60]:

- (a) There is a documented history of serious human rights abuses against detainees in Iran, including against some persons detained after engaging in Iran in peaceful public protest after the 2009 elections. There is, however, no direct evidence as to the predicament of persons (other than those who have an ability to subsequently leave Iran and resume "living abroad") who have been returned to Iran from other countries after having engaged in some form of public protest overseas in response to the 2009 election. An email of 27 January 2010, from the Iran Human Rights Document Centre, cited at [57] of *Refugee Appeal No 76454* (8 March 2010), illustrates the point.
- (b) TVNZ broadcasts and YouTube video clips of the Auckland protests are available on the Internet. With the regime's increasing awareness of new media in terms of intelligence gathering, there is an increased likelihood that these have been viewed by embassy staff and some participants identified;
- (c) The broadcast by VOA of some TVNZ and YouTube footage into Iran also increases the chance that some participants may be identified by the Iranian authorities;
- (d) A person exhibiting a leadership or organisational role in such protests (perhaps by standing at the front and/or leading other protestors in shouting anti-government slogans) may be viewed with greater antipathy by the authorities than someone who appears only at the margins of a demonstration.

[54] In *Refugee Appeal No 76454* (8 March 2010), the appellant was found to have had a high profile during the protests, notably "standing on his own at the front of the group leading other protestors shouting slogans". The appellant was found to be "clearly identifiable" in TVNZ and Voice of America broadcasts and

videos posted on YouTube. Applying the benefit of the doubt, the Authority found "by a narrow margin" that there was a real chance of him suffering serious harm if returned to Iran.

[55] In *Refugee Appeal No 76445* (20 April 2010), the appellant attended five protests in June 2009 during which he held placards and shouted slogans. He attended another half a dozen Imax protests after June 2009 and before his appeal hearing in January 2010. Like the appellant in the present appeal, that appellant had been outside Iran for a significant time (in his case ten years) and had submitted to the Iranian embassy photographs of himself accompanying his application for a passport. The Authority in *Refugee Appeal No 76445* held that the appellant was not prominent in the protests, that he did not figure prominently in any of the video clips and that he did not appear to be anything other than an ordinary protestor.

[56] In *Refugee Appeal No 76345* (30 June 2010), the Authority noted that Iran has a history of human rights abuse, that the Iranian authorities have embraced new media as a means of intelligence gathering, and that the authorities have taken steps to identify protestors overseas. The Authority found no evidence of widespread targeting and held that a mere participant in the protests was unlikely to come to the attention of the authorities without a pre-existing profile.

[57] Turning now to the facts of the present appeal, in the YouTube footage of the 16 June 2009 protest in Queen Street, the appellant is visible for four seconds in the middle of a clip that lasts nine minutes and 20 seconds. The videographer is standing on the footpath as the crowd passes him. For two of the four seconds, the appellant is partially obscured. He is not carrying a placard or otherwise drawing attention to himself. He is an ordinary protestor who is not playing any leadership role whatsoever.

[58] In the YouTube footage of the 4 July 2009 demonstration that took place after the basketball game, the appellant is present throughout the entire one minute 20 second clip but is visible only as a shadow in the darkness and cannot be identified. Once again, he is a participant, not an organiser or a leader.

[59] In the 21 minute YouTube footage of the protest outside the Iranian embassy in Wellington, the appellant is one of approximately fifty protestors standing behind banners. He is wearing sunglasses and a white surgical mask. He cannot be identified. In his evidence to the Authority, the appellant initially stated that he feared embassy staff had taken a photograph of him upon arrival as

he stood in front of the bus, 30 metres from the embassy. Subsequently he resiled from this and asserted that any photograph would have captured only a fleeting, side-on view of him. AA estimated that the bus was parked 100 metres from the embassy. On the basis that the bus was parked between 30 and 100 metres away from the embassy and that the photographer on the third floor of the embassy building would only have caught a fleeting view of the appellant, we do not believe there is a real chance that he was identified at this protest.

[60] We now turn to the Imax protests. The appellant presented photographs showing him in a small group of silent protestors near the Imax theatre complex in Queen Street, Auckland. These are the protests which, according to AA, would put the appellant in the “top ten” of identifiable protestors. Apart from the assertions of AA and the appellant that occasionally strangers took photographs of protests, there is no evidence that the Iranian embassy has possession of any photographs of the appellant at these Imax protests or that they have otherwise identified him. The appellant disguised himself at these protests by wearing sunglasses. Even if the embassy has photographs of the Imax protests, and has identified the appellant by means of a comparison with his submitted passport photograph, the appellant is not, by participating in these small protests, acting in a leadership role.

[61] The appellant has not engaged in protest activity by means of any of the new media such as Facebook, Twitter or texting. He has not, so far as he is aware, appeared on television either in New Zealand or in Iran. He is barely recognisable in the three YouTube clips and, furthermore, he was in each of those three demonstrations an ordinary protestor, not acting in a leadership capacity.

[62] Nor has the appellant’s family in Iran been pressured by the Iranian authorities to urge the appellant to cease his protest activity. This latest factor is relevant in the context of the Canadian Immigration and Refugee Board’s Response to Information Request IRN103327.E, which reports:

**Post-election protesters**

The Director of the [International Campaign for Human Rights in Iran] stated that '[t]he relatives of post-election protesters have been heavily targeted, [including] those of persons residing inside Iran, those who have left and are seeking asylum, and those who were already abroad and engaged in protests outside Iran' (ICHR 9 Dec. 2009)....

[63] The Authority is not in possession of any country information to suggest that ordinary protestors are at risk of serious harm. It is possible that, as a person who has been out of Iran for a long time, the appellant might be detained briefly and

questioned upon return but that is speculative only and, in any event, such actions would fall well short of constituting serious harm.

[64] We conclude that the appellant does not face a real chance of serious harm on return to Iran. He does not have a well-founded fear of being persecuted. It follows that the second issue raised by the Convention, that of the reason for any such persecution, does not arise for consideration.

### **CONCLUSION**

[65] For the reasons mentioned above, the Authority finds the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"M L Robins"

M L Robins  
Chairperson