REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76187

AT AUCKLAND

Before:	A R Mackey, Chairman
Representative for the Appellant:	Al Manco, Christchurch
Date of Decision:	18 June 2008

DECISION

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[1] This is an appeal against a 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, who claims he is stateless. His country of former habitual residence is the United States of America.

INTRODUCTION

[2] The appellant is a man in his late 50s. He was born in the United States of America and was thereby a citizen of that country. He has since renounced that citizenship.

[3] The appellant then lodged a claim for refugee status with the RSB in May 2007. He was interviewed by a refugee status officer and the RSB declined the application on 23 January 2008. He then appealed to this Authority. That appeal was received on 29 January 2008. The appellant also made an application for New Zealand citizenship in November 2007.

[4] He stated that he has made a request for a grant of interim measures under "Rule 92 of the International Covenant on Civil and Political Rights 1966" (ICCPR)

and that the request has been accepted by the United Nations Human Rights Council (UNHRC) but it is yet to make any findings on the matter.

[5] On 26 March 2008, the appellant wrote to this Authority requesting the Authority "stay this appeal's proceeding, or at least defer any final decision until the conclusion of the UNHRC communication". In further letters, dated 18 April and 25 May 2008, the appellant renewed that request. The last two letters from the appellant were received in response to letters to him from this Authority dated 4 April 2008 and 13 May 2008, which are referred to in more detail later in this decision.

DECISION ON APPLICATION FOR ADJOURNMENT

[6] For the reasons set out below and the conclusion that this appellant's claim is manifestly unfounded or clearly abusive, adjourning this matter or deferring any final decision until the conclusion of the UNHRC communication will not assist in the resolution of this matter. The application for adjournment is therefore refused.

THE ISSUES

[7] The first issue for determination is whether this matter should be determined without giving the appellant the opportunity to be interviewed in accordance with the power provided to the Authority by s129P(5)(a) and (b).

[8] The second issue arises from the appellant's claim that he is stateless, although a former resident of the United States of America and Canada. Accordingly, the issue is whether he has the right to acquire US or Canadian citizenship without qualification or, even if he is stateless, the USA is his country of former habitual residence and the claim can be measured in terms the Convention Relating to the Status of Refugees 1951 and the 1967 Protocol thereto.

[9] Thirdly, if he can return to the USA, the appellant's claim must be assessed in accordance with the Convention Relating to the Status of Refugees 1951 and the 1967 Protocol thereto (the Refugee Convention).

[10] The fourth issue then arises as to whether the appellant falls within the inclusion clause in Article 1A(2) of the Refugee Convention which 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."

[11] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the relevant factors relating to the fourth issue 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 or former habitual residence?

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

[12] After assessment of the first issue, a conclusion is reached by the Authority. The appellant's case in relation to the other three issues is then set out and this is followed by the assessment and conclusions on those three issues.

JURISDICTION OF THE AUTHORITY TO DISPENSE WITH AN INTERVIEW

[13] 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 Immigration Act 1987 (the Act) where the appellant was interviewed by the RSB (or given the opportunity to be interviewed but failed to take that opportunity) and where the Authority considers the appeal to be *prima facie* manifestly unfounded or clearly abusive. The Authority's jurisdiction in this regard was examined in *Refugee Appeal No 70951/98* (5 August 1998).

[14] The provisions of s129P(5)(a) and (b) provide:

> "(5) The Authority may dispense with an interview of the appellant or other affected person only if both-
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> (a) The appellant or other affected person has been interviewed by a refugee status officer in the course of determining the relevant matter at first instance or, having been given the opportunity to be interviewed, failed to take that opportunity; and
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> (b) The Authority considers that the appeal or other contention of the person affected is *prima facie* manifestly unfounded or clearly abusive."

ASSESSMENT OF WHETHER TO DISPENSE WITH AN INTERVIEW

[15] The Authority, through its Secretariat, wrote to the appellant and his representative on 4 April 2008 and 13 May 2008. Those letters advised that, in the Authority's preliminary view, the appeal was *prima facie* manifestly unfounded or clearly abusive. This was because, from an analysis of the whole of the RSB file made available to the Authority and the appellant's written submissions, the appellant has not been able to establish that there would be any failure of state protection on his return to the United States of America or Canada, nor has he established that any persecution predicted by him, on return to either of those countries, would arise for reasons of any one or more of the five Refugee Convention reasons set out in Article 1A(2) of the Refugee Convention Relating to the Status of Refugees 1951 and its 1967 Protocol (the Refugee Convention).

[16] The appellant was provided with opportunities to present submissions and/or evidence responding to the matters raised in these two letters and any other matters supporting his refugee claim. The first letter advised that submissions should be provided to the Authority by Monday, 21 April 2008. The second letter required the submissions be received by Monday, 26 May 2008. The appellant replied to both of the Authority's letters in a timely fashion on 18 April 2008 and 25 April 2008 respectively.

[17] In a letter dated 18 April 2008 from the appellant, received by the Authority on the same date, he stated that the Authority appeared to have:

> "…preliminarily rejected the entirety of hundreds of pages of documented evidence presented in the RSB as to [his] well founded fear of being persecuted arising from the reasons of religion, membership of a particular social group and political opinion."

He submitted that

> "…the very political nature and international implications surrounding this case may justify more than what appeared to be an expedient preliminary review."

He also claimed that the *prima facie* assessment that the appeal was manifestly unfounded or clearly abusive was apparently incorrect, given that it had been reached "without the opportunity of due process to rebut any detailed written foundation for such a harsh conclusion".

[18] In the Authority's letter of 13 May 2008, the Authority explained that in addition to a failure to demonstrate a nexus to any of the Convention reasons, the claim did not appear to demonstrate the necessary prospective risk of being persecuted. The reasons for this were that, on an objective assessment, there was no reason to conclude that meaningful state protection, in the form of legal

process, would not be available to the appellant on return to his country of former habitual residence (the United States of America). The Authority's letter pointed out that it was well-settled refugee law that the risk of "being persecuted" could not be established unless a claimant demonstrated both a real risk of both serious harm and a failure of state protection. It noted the Authority's jurisprudence on this issue was explained in *Refugee Appeal No 71427/99* (16 August 2000) [43]-[71]. The Authority invited the appellant to provide further written submissions on these concerns by Monday, 26 May 2008. The Authority stated that the appellant may wish to set out:

> "i. why, objectively assessed, you are at a real risk of serious harm on return to the US;
> ii. why and how there will be a failure of state protection in the country of your former habitual residence, the US;
> iii. how any such real risk (well-founded fear), if established, of being persecuted is for reasons of any one or more of the five Refugee Convention reasons."

[19] A response to the Authority's letter of 13 May 2008 was received on 26 May 2008.

[20] The appellant was born in the United States of America and obtained citizenship there by birth. He renounced that citizenship and thus now considers himself to be stateless. As will be noted from the provisions of Article 1A(2) of the Refugee Convention, a claimant who does not have a nationality but who is outside his country of former habitual residence is to have his or her status assessed in the terms of that former habitual residence. In the appellant's case, that is the United States of America. Accordingly, the Authority's conclusion that the appellant's claim is *prima facie* a manifestly unfounded one because of his ability to access meaningful state protection in the United States leads to the conclusion that the Authority has the ability to dispense with an interview in this case.

[21] In reaching this conclusion that the appellant has not established there would be a failure of state protection on his return to the United States, the Authority finds that it is substantially supported in this conclusion in that, after research, including the statistics and material from the UNHCR, the Authority has been unable to establish that there has ever been a successful claim for refugee status made in respect of a person being returned to that country, either as a national or as a former habitual resident.

[22] This appellant has been interviewed by a refugee status officer in the course of determining this matter at first instance. For the reasons explained

above, the Authority is satisfied that the appeal is manifestly unfounded. It therefore determines that this matter will be concluded on the papers without giving the appellant the opportunity to attend a further interview.

THE APPELLANT'S CASE

[23] The appellant lodged his confirmation of claim for refugee status in New Zealand on 11 May 2007 with the RSB. He claims he is at risk of being persecuted in the United States for reasons related to complex and often inter-related issues from his personal and business life in the United States. The details of the many aspects to his claim appear to be set out in a petition and complaint for a violation of human rights to the UNHRC which was attached to the original application for refugee status in New Zealand and his evidence to the RSB. He identified the source of the risks to him, in a lengthy interview and assessment of his case carried out by the RSB, as being the US federal and state authorities, particularly the AA District Attorney's office. He claims that he will be immediately arrested on return to the United States, on the basis of a false criminal record and, owing to his profile, may be held in detention. He claims that he will not be able to seek redress from the US courts and may be repeatedly incarcerated and frustrated by the AA District Attorney. He asserted that there was also a genuine risk of his returning to the USA, both from his personal security and freedom, because of threats made to him by BB as a result of his involvement in having blown the whistle on the so-called "CC". There are also outstanding issues relating to custody and maintenance in respect of children from his former marriages which have been the subject of litigation involving him with the AA courts and extradition from Canada and which, he considers, put him at risk from the US and AA authorities.

[24] The appellant also claims that he is legally stateless and that he would thus be unable to re-enter the United States of America.

[25] The appellant provided extensive supporting material which was considered by the refugee status officer. The Authority has considered that material and the additional submissions made by the appellant to this Authority in his letters of 18 April 2008 and 25 May 2008.

ASSESSMENT OF THE APPELLANT'S CASE

[26] The Authority now turns to the assessment of the second, third and fourth issues set out above. As noted, the Authority has determined it will not interview this appellant. Accordingly, his account, as recorded, is accepted for the purposes of determining this appeal.

[27] If it is accepted, as was the case with the RSB, that the appellant may be legally stateless, information sourced by the RSB from the US Department of State indicates that under US law, he can still be removed to the US to face trial (US Department of State "Renunciation of US Citizenship" - http://travel/states.gov /law/citizenship/citizenship776.html). That evidence is not refuted by the appellant and the Authority considers the conclusion of the RSB on this issue was a valid one. There is thus no barrier to his being returned to his country of former habitual residence. The Authority in the past has determined that voluntary renunciation of citizenship does not invoke a basis for protection under the Refugee Convention. In *Refugee Appeal No 72635/01* (6 September 2002), the Authority concluded, after a detailed analysis, at [90] "Statelessness is considered to be the result of the operation of a conflict of nationality laws, not the result of persecution." The Authority also concluded, when considering the situation of stateless persons and the Refugee Convention, that whilst the responsibility for stateless persons eventually was given to the United Nations High Commissioner for Refugees, this did not mean that stateless persons are refugees.

[28] Again, in *Refugee Appeal No 72635/01*, as part of the extensive consideration of statelessness and the situation of assessment against countries of former habitual residence, the Authority concurred with findings in other jurisdictions that "The status of statelessness is not one that is optional for a refugee applicant" [138]. The Authority then referred to the whole rationale underlying international refugee law as expressed in the Canadian decision in *Canada (Attorney General)* v *Ward* (1993) 2 SCR 689 where, at 709, it stated:

> "International refugee law was formulated to serve as a back-up to the protection one expects from a state of which one is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection …"

[29] The same decision noted that the jurisprudence in the United Kingdom and in New Zealand (140, 141) was to similar effect. Accordingly, not only has this appellant the ability to return to his country of former habitual residence, he would not be at risk of being persecuted for reasons of statelessness.

[30] I turn now to whether the appellant, on the facts as found, has a real chance of being persecuted if returned to the United States. Clearly, as noted above, any obligations upon New Zealand as a contracting state to the Refugee Convention to provide surrogate protection can only be invoked when a claimant is unable to obtain meaningful state protection in their country of former habitual residence or nationality.

[31] This issue was also dealt with in some depth in the decline decision by the refugee status officer. As was rightly pointed out, New Zealand jurisprudence (indeed, internationally accepted refugee law on this issue) formulates that the concept of "being persecuted" requires the following:

> "Persecution = serious harm + failure of state protection."

[32] This formulation was explained and set out in detail in the Authority's decision in *Refugee Appeal No 71427* (16 August 2000) at [67]. The Authority has also addressed in the past the issue of state protection in the United States of America in *Refugee Appeal No 71759* (31 March 2000), where the Authority stated (and as again set out in the refugee status officer's decision):

> "It is a well-established principle of refugee law that there is a presumption of state protection. See *Canada (Attorney General)* v *Ward* (1993) 2 SCR 689. If a claimant is unable to rebut that presumption by providing clear and convincing evidence of the state's inability or unwillingness to protect, then the claim must fail as nations are presumed capable of protecting their citizens. In the New Zealand context, see *Refugee Appeal No. 523/92 Re RS* (17 March 1995) and see also *Refugee Appeal No 70074/96 Re ELLM* (17 September 1996), where the Authority was required to consider a claim brought by a citizen of the United States and held, at p.10:
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> > "The United States of America is an open and democratic society, possessing an efficient and multi-layered system of law enforcement, both at state and federal level. It would be incongruous, to say the least, for New Zealand to accept that citizens of the United States are able to satisfy the criteria of the refugee definition. There is every reason, therefore, to require of the appellant that she provide "clear and convincing confirmation" of the inability of the United States to protect her from the Sendero Luminoso."
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> … the Authority concluded in *Refugee Appeal No 70074/96 Re ELLM* (17 September 1996) at p.12:
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> > "The short point is that where a refugee claimant comes from an open democratic society with a developed legal system and which makes serious efforts to protect its citizens from harm, the presumption of state protection as formulated in Ward has particular application. Unless the refugee claimant is in possession of evidence establishing clear and convincing confirmation of such a state's inability to protect ***the claimant***, the claim should fail. It could even be said that in the absence of such evidence, the claim is manifestly unfounded or clearly abusive. There is every justification for expediting such claims and for confining the hearing to an initial determination as to whether

> clear and convincing evidence of the kind required by Ward is present."

[33] The Authority adopts the same reasoning as set out in *Refugee Appeal No 71759*. Those conclusions are as equally applicable today as they were in March 2000. As was rightly pointed out in a High Court decision [citation omitted] in relation to this appellant, the appellant has appropriate remedies in the United States, and the decision goes on to state:

> "… I make it clear, however, that he does not assert through his counsel that he is not able to be subject to protection through the judicial process and courts of the United States."

[34] The decision also stated:

> "In this case, the Authority acknowledged the appellant's statement that he feared risk of arrest if returned to the United States and that the law enforcement authorities there had mistreated him in the past and were likely to do so in the future. However, the Authority observed correctly that the appellant, if unlawfully treated, had appropriate remedies in that country. It was acknowledged in this Court that no criticism was or could be made about the United States justice system. With a democratic country such as that, it would required cogent country information for a New Zealand Court or Authority to assume that a person would not be given anything other than proper judicial treatment in the United States."

[35] The Authority is therefore satisfied that in this case, the appellant can access appropriate remedies in the state and federal United States courts to the highest levels. Thus meaningful state protection is available to him, regardless of any perceived subjective views the appellant may claim. The presumption of state protection is not rebutted by any of the evidence put forward by the appellant.

[36] The response given by the appellant to the RSB on this issue acknowledges that the United States "does have the legal infrastructure to protect and indeed to address any and all violations of civil and human rights". The appellant claims however that there is an unwillingness to provide such redress by default to him through political retribution and persecution against him. He therefore claims that the presumption is rebutted.

[37] The appellant's claim, however, is one that sets out his subjective assessment of the situation only, not an objective assessment, a point which he himself appears to acknowledge when stating that the United States does have the legal infrastructure to protect and indeed any or all violations of civil and human rights. No state can be expected to protect its citizens at all times against all serious harm; *Refugee Appeal No 70074/96* (17 December 1996). There is no guarantee of permanent safety in all circumstances.

[38] This appellant has the ability to resolve all of the issues he has outstanding with the AA state and United States federal authorities in the United States of America. These cannot be resolved in New Zealand.

[39] For these reasons, therefore, the third issue must be answered in the negative. The appellant has not established that there is a real chance of being persecuted if returned to the United States. In this situation, there is no necessity to go on and consider whether any persecution would have been for one or more of the Refugee Convention reasons. The Authority is, however, also fully satisfied that, on the facts as found, the appellant has not established a nexus to any one or more of the Refugee Convention reasons.

CONCLUSION

[40] The Authority finds that 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.

"A R Mackey"
A R Mackey
Chairman