REFUGEE APPEAL NO. 2416/95

RE AMM

AT AUCKLAND

Before: R.P.G. Haines (Chairperson)
E. Aitken

Counsel for the Appellant: G M Monk

Appearing for the NZIS: No appearance

Date of Hearing: 20 September 1995

Date of Decision: 20 September 1995

Date of Delivery of
Reasons for Decision: 18 October 1995

DECISION ON APPLICATION FOR ADJOURNMENT

BACKGROUND

The appellant is a Syrian national who arrived at Auckland International Airport on 19 July 1994. Upon being questioned, he admitted that the Greek passport on which he was travelling was false and stated that he wished to apply for refugee status. A 30 day visitor's permit was issued.

On 18 August 1994, with the assistance of the Refugee and Migrant Service, the appellant submitted a formal application for refugee status together with a four page typewritten statement.

The Refugee Status Section interview took place on 8 November 1994, the appellant being represented at that interview by the Refugee and Migrant Service. By letter dated 9 November 1994, the Refugee Status Section invited the appellant's comments on the interview report. The Refugee and Migrant Service responded with submissions dated 29 November 1994 and 4 January 1995.

By letter dated 30 May 1995, the Refugee Status Section sought the appellant's comments on various aspects of the case. A full response was submitted by the Refugee and Migrant Service in a letter dated 14 June 1995.

In a letter dated 25 July 1995, the Refugee Status Section notified the appellant that his refugee application had been declined on the basis that there was no real chance of

persecution were the appellant to return to Syria with the result that objectively his fear of persecution was not well-founded.

In a letter dated 27 July 1995, the Refugee and Migrant Service gave notice that the appellant appealed against the decline decision.

By letter dated 17 August 1995, signed by Mr Monk, Vallant Hooker & Partners gave notice that they had received instructions to act for the appellant and requested that all correspondence be directed to their firm. This letter was not received by the Secretariat of the Authority until 21 August 1995.

By letter dated 22 August 1995 (drafted prior to the receipt of the Vallant Hooker & Partners letter of 17 August 1995), the Authority's Secretariat gave notice to the Refugee and Migrant Service that Tuesday 19 September 1995 had been provisionally allocated as the date of hearing of this appeal. The appellant was given seven days to negotiate an alternative date, failing which the provisional hearing date would be regarded as a firm fixture. The letter also gave notice that because of the considerable volume of appeals to be heard by the Authority, adjournment requests made after the date of hearing became a firm fixture would not be encouraged. In determining an adjournment application, the Authority would look not only at the circumstances of the request, but would also take into account the time made available to the appellant to make appropriate arrangements to meet the scheduled hearing date. The relevant paragraphs of the letter are as follows:

"I am writing to confirm acceptance of your appeal and to advise that a **hearing date has been provisionally set** on **Tuesday, 19 September 1995 at 10am**.
Within **7 days** of the date of this letter - that is before close of business on 29 August 1995 you may negotiate an alteration to the provisional hearing date with the Secretariat.

After 29 August 1995, and in the absence of communication from you, the provisional hearing date will be regarded as **firm** by the Authority. However should you find yourself in particular difficulties after this date for reasons outside your control, you are encouraged to raise the matter with the Authority at the earliest opportunity before the scheduled hearing date so that appropriate consideration can be given as to the best way in which the matter can be treated.

However, as there are a considerable volume of appeals to be heard by the Authority, adjournment requests after 29 August 1995 are not encouraged by the Authority and you can normally expect to be required to personally appear before the Authority in respect any adjournment request and seek formal leave to do so, on the scheduled hearing date.

In determining an adjournment application, the Authority will look not only at the circumstances of the request, but will also take into account the time made available to you to make appropriate arrangements to meet the scheduled hearing date. This includes instructing a lawyer or a consultant.

It is noted that you do not appear to be represented by a lawyer or a consultant. The Authority recommends that you give serious consideration to seeking appropriate representation. This should be done as a matter of urgency.
Once the scheduled hearing date becomes firm, the non availability of an agent you may have since instructed to represent you at the hearing, will not normally be regarded by the Authority as a satisfactory reason for agreeing to an adjournment.... "[Emphasis in text]

It is clear that this letter crossed in the mail with the notice from Vallant Hooker & Partners advising that they were now acting for the appellant. However, nothing turns on the point as there has been no claim on the part of the appellant that the Refugee and Migrant Service failed to promptly forward relevant correspondence to Vallant Hooker & Partners.

By letter dated 29 August 1995 mistakenly sent to the Refugee and Migrant Service, the Secretariat gave notice that the date of hearing had been put back two days from Tuesday 19 September 1995 to Thursday 21 September 1995 at 10am.

Again, nothing turns on this error and no claim has been made by the appellant or his solicitors that the correspondence from the Secretariat was not promptly forwarded to them.

THE ADJOURNMENT APPLICATION

By fax dated 19 September 1995, but not sent until after the close of business that day, Vallant Hooker & Partners, under the signature of Mr Monk, sought an adjournment of the appeal scheduled for 21 September 1995. In brief, the grounds were that Mr Monk had "recently" been instructed to appear in a High Court fixture scheduled for 21 September 1995. It was said that the hearing concerned "a matter of considerable precedence (sic) for refugee applicants in New Zealand". It was stated that no other counsel was available to appear for the appellant at the hearing of this appeal. The body of the letter was in the following terms:

"We refer to the above named's appeal scheduled for 21 September 1995.

> We are seeking an adjournment of this matter for the following reasons:
>
> 1. The writerhas recently been instructed to appear in the High Court on 21 September 1995 at 10am for a fixture which is to last 1 full day. The hearing concerns a matter of considerable precedence for refugee applicants in New Zealand and is therefore of considerable importance.
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> 2. There is no other counsel available at 10am on 21 September 1995 to undertake the appeal and [the appellant] would like to retain the writer as counsel for the hearing. The writer is also familiar with the case.
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> In circumstances, we would be grateful if the hearing scheduled for 21 September 1995 is adjourned and a new date set. We suggest a fixture in the week beginning 13 November 1995 would be suitable. We would be grateful if the Authority would deal with this application on the papers given that the

writer will be required to attend the High Court at 10am on 21 September 1995. "

By fax dated 20 September 1995, the Secretariat gave notice to Mr Monk that he was required to attend the Authority at 4.45pm on 20 September 1995 in order to present the application for adjournment. The fax was in the following terms:

"Further to your letter dated 19 September 1995, the Member who will be hearing the appeal tomorrow requests that you present your application for an adjournment to the Authority at 4.45pm today (Wednesday 20 September 1995). "

The hearing of the adjournment application commenced at 5.10pm on 20 September 1995. Mr Monk appeared and advanced three grounds in support of the application:

(a) At 10am on 21 September 1995, the High Court would commence a one day hearing of an application by a refugee claimant who, having been declined refugee status and who had then instituted proceedings in the High Court by way of judicial review, had been refused a work permit pending the hearing of the substantive review proceedings. Mr Monk said that the case would have "some precedence value".

Mr Monk also advised that he would be appearing in the High Court as junior counsel to Mr Hooker, a partner in Vallant Hooker & Partners.

(b) No one else in Vallant Hooker & Partners was available to appear for the appellant.

(c) The third ground advanced by Mr Monk in support of the adjournment application was unusual, to say the least, and had not been mentioned in Mr Monk's letter of 19 September 1995.

The third ground was that although the appellant had applied for legal aid, no decision has been made on that application. The Authority was told that Vallant Hooker & Partners were first instructed on 3 August 1995, but the legal aid application had not been lodged until 17 August 1995. A letter acknowledging receipt of the legal aid application had been received, but as at 20 September 1995, no decision had been notified.

In his submissions, Mr Monk advised that the High Court fixture had been allocated by the High Court at call over the previous week and, in full knowledge of the appellant's hearing before this Authority, Mr Hooker had instructed Mr Monk to prepare the High Court case and to appear as junior counsel. In the result, Mr Monk had had no time to prepare for the appellant's hearing. He said that if the adjournment application was refused, he (Mr Monk) would have to withdraw from the case for two reasons:

(a) The appellant wanted Mr Monk to appear at the hearing of the appeal.

(b) As legal aid had not yet been granted, Vallant Hooker & Partners would have had to have sought leave to withdraw in any event.

ASSESSMENT OF THE ADJOURNMENT APPLICATION

Enquiries made by the Authority prior to the hearing of the adjournment application revealed that the High Court proceedings to which Mr Monk referred in his letter were those filed in M965/94 in which the Authority is second defendant. By notice of application dated 13 July 1995, the plaintiff in those proceedings sought an interim order declaring that his work permit be deemed to continue until the hearing of the substantive application for review. The Authority's enquiries also revealed that the interim order application was a half day fixture commencing at 2.15pm, not a full day fixture. The Authority had also been told that the interim order application had in fact been settled upon the Immigration Service agreeing to issue the plaintiff in M965/94 with a work permit. Upon this information being put to Mr Monk at the hearing on 20 September 1995, he said that he was unaware of the settlement.

After hearing Mr Monk's submissions, the Authority decided that in relation to each of the three grounds advanced in support of the adjournment application, the application would be refused. However, an adjournment would be granted on the sole ground that the appellant would be prejudiced by being forced on to a hearing for which he was wholly unprepared due to the way in which his solicitors had conducted his case. The Authority's reasons would be delivered at a later date. Those reasons we now set forth. We will deal with each of the three grounds in turn.

Mr Monk appearing in High Court as Junior Counsel

As early as 22 August 1995, the Authority's Secretariat gave notice that this appeal would be heard on Tuesday 19 September 1995. Subsequently, by letter dated 29 August 1995, that date of hearing was put back by two days to Thursday 21 September 1995. The appellant and his solicitors have accordingly had ample time to prepare for the 21 September 1995 fixture. It is significant that no claim has been made of difficulty in preparing the appellant's case. The only claim made is that, to suit their own convenience, the appellant's solicitors have required the staff solicitor handling the appellant's case to abandon preparation of this appeal in favour of some other matter. That other matter (an interim order application seeking the continuation of a work permit) could hardly be said to justify two counsel. We are not impressed by, and do not accept, the submission that the application raised "a matter of considerable precedence for refugee applicants in New Zealand". The facts simply do not allow an inflated claim of this kind to be made. We accordingly reject the first ground advanced in support of the application.

No other Counsel available

Given that the appellant claims to be in fear of persecution and further given that it is in his interests to have his claim to refugee status determined at the earliest opportunity, the Authority set this case down for hearing on the first available date. Ample notice of the fixture was given and the appellant's solicitors have had every opportunity to so order their affairs as to ensure that the appellant was represented at the hearing scheduled for 21 September 1995. If necessary, other counsel could have been briefed. What has happened, however, is that Mr Monk became unavailable simply because it suited his employers to have him prepare an interim order application in an unrelated case and in which he would appear only as junior counsel.

The Authority is of the view that, in so conducting themselves, Vallant Hooker & Partners gave little or no recognition to the appellant's own interests in having the earliest possible determination of his refugee claim, and the wider public interest which not only dictates the early resolution of asylum applications, but also the efficient employment of the Authority's slender resources. As at September 1995, there were 394 appeals awaiting hearing.

The Authority is of the view that with reasonable diligence, alternative arrangements could have been made by the appellant's solicitors to ensure his representation on the allocated hearing date, or to have briefed Counsel. We accordingly reject the second ground advanced in support of the adjournment application.

Legal Aid

The Authority was surprised to hear an application for an adjournment being advanced on the grounds that an application for legal aid had not yet been granted. The submission is, in effect, that because the appellant's solicitors do not know whether they will be paid for representing the appellant, the appellant's case should therefore be adjourned. No authority was advanced in support of this novel proposition, and the Authority itself is unaware of any such precedent. The Legal Services Act 1991 illustrates the entirely misconceived nature of this limb of the adjournment application. First, section 22(1) of that Act specifically provides that an application for civil legal aid may be made at any time before final judgment is delivered in the proceedings to which the application relates. The clear inference is that hearings are not to be adjourned simply because no decision on the legal application has been made. Second, section 89 specifically provides that the solicitor-client relationship is not affected by the grant of legal aid. The section is in the following terms:

"89 **Solicitor-client relationship not affected by grant of legal aid** - Except as expressly provided in this Act or in any regulations made under this Act, -

(a) The fact that the services of a counsel or a solicitor are given by way of civil legal aid or criminal legal aid does not affect the relationship between, or the rights of, counsel, solicitor, and client, or any privilege arising out of that relationship; and

(b) The rights conferred by this Act on a person receiving civil legal aid or criminal legal aid do not affect the rights or liabilities of other parties to the proceedings, or the principles on which the discretion of any Court or Tribunal is normally exercised. "

The purpose of this section is quite clear and the Authority must recognise that appellants who are **in receipt of** civil legal aid stand before this Tribunal in no different a position to those persons who are not in such receipt. It is a necessary corollary that those persons who have **applied for** legal aid but whose applications have not yet been granted, likewise stand in no different a position before the Authority than other appellants. The fact that section 22 envisages an application for civil legal aid being made at any time before the Authority delivers a decision simply underlines the point.

Without hesitation, therefore, we reject the submission that because a District Committee has made no decision on an application by a refugee claimant for legal aid, that therefore the hearing of the appeal by this Authority should be adjourned.

CONCLUSION

For the foregoing reasons, each of the three grounds advanced in support of the adjournment application were rejected. However, as the appellant would suffer prejudice by reason of the way in which his solicitors have ordered their own priorities, the interests of fairness require that the adjournment be granted. The adjournment is, however, to be a final adjournment, and the Secretariat is directed to allocate the earliest available date for the hearing of the appeal.

"R P G Haines"

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[Chairperson]