

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76158

AT AUCKLAND

Before: C M Treadwell (Member)
Representative for Appellant: J Taylor
Appearing for the Department of Labour: No Appearance
Date of Decision: 30 June 2008

DECISION

INTRODUCTION

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

[2] It is the second time that the appellant has claimed refugee status in New Zealand.

[3] On 21 February 2005, the Authority (a different panel) delivered its decision on the appellant's first appeal. See *Refugee Appeal No 73944* (21 February 2005). It declined to accept as truthful any part of the appellant's claim that he had been a supporter of, and worker for, two opposition political parties in Cambodia or that he was at risk of serious harm at the hands of the ruling Communist People's Party ("CPP").

[4] On the present appeal, the appellant says that, since his first claim, circumstances have changed, such that:

- (a) since arriving in New Zealand he has converted to Christianity; and

- (b) since his first claim the Sam Rainsy Party (“SRP”) has joined in coalition with the ruling CPP, which will cause the appellant to quit the SRP, or be expelled by it, thus putting him at risk of harm from the CPP.

[5] The central issues which emerge on this appeal are whether the appellant meets the jurisdictional threshold for second or subsequent claims to refugee status and, if so, whether his second refugee claim is credible, given that the Authority relies upon the findings of fact made by the Authority on the first appeal.

DECISION TO DECLINE TO OFFER THE APPELLANT AN INTERVIEW

[6] Before turning to those issues, however, it is necessary to record the decision of the Authority to treat this appeal as manifestly unfounded or clearly abusive, within the meaning of s129P(5) of the Immigration Act 1987 (“the Act”) and to decline to offer the appellant an interview. The reasons for so doing are as follows.

[7] On 6 March 2008, the Authority wrote to Mr Taylor in the following terms:

“I refer to the appellant’s notice of appeal received on 8 November 2007 in relation to the decision of the Refugee Status Branch of the New Zealand Immigration Service (“the RSB”) declining [the appellant’s] second application for refugee status.

Pursuant to subsections 129P(5)(a) and (b) of the Immigration Act 1987, except in those cases where an appellant was not interviewed by the RSB (unless the appellant was given an opportunity to be interviewed but failed to take that opportunity), the Authority has a discretion as to whether to offer the appellant an interview. In exercising its discretion the Authority will consider whether an appeal is *prima facie* ‘manifestly unfounded or clearly abusive’. Should that be the case the Authority may determine the appeal without giving the appellant an interview (see *Refugee Appeal No 70951/98* (5 August 1998)).

The Authority notes that the appellant was interviewed by the RSB in respect of his second refugee claim. In view of the following matters, the Authority, having reviewed the file, considers that his appeal is *prima facie* ‘manifestly unfounded or clearly abusive’ and could therefore be determined without giving him an interview.

Pursuant to sections 129J and 1290 of the Immigration Act 1987, a second or subsequent claim for refugee status may only be considered if, since the determination of the first claim, circumstances in the appellant’s home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim.

In the appellant’s first claim he alleged, *inter alia*, that he was at risk of persecution in Cambodia at the hands of state agents because, before the 1997 coup in which the Communist People’s Party (“the CPP”) seized power, he had switched allegiance from the CPP to the United National Front for an Independent, Neutral, Peaceful and Co-operative Cambodia Party (“FUNCINPEC”) and then to the

splinter group Sam Rainsy Party (“the SRP”). As a result, he claimed, he was at risk of serious harm at the hands of CPP members.

On appeal from the decline of the appellant's first refugee claim, the Authority rejected the whole of the appellant's claim as fabricated. See *Refugee Appeal No 73944* (21 February 2005).

The appellant's second claim to refugee status is, in brief, that:

1. Since arriving in New Zealand, he has converted to Christianity and is at risk of serious harm in Cambodia as a result; and
2. Since his first claim, the SRP has joined in coalition with the ruling CPP, which will cause the appellant (who opposes some policies which the SRP now supports) to quit the SRP (or be expelled by it), thus putting him at risk of harm from the CPP because the SRP will no longer be willing to protect him.

As to the claim to have become a Christian, it is clear from the appellant's past evidence that he began attending a Christian church in New Zealand as early as 1999. A letter dated 15 March 1999 from R M Cowan, President of the Wellington Mission of the Church of Jesus Christ of the Latter Day Saints congratulated the appellant on his baptism. It cannot be said that the appellant's conversion to Christianity (and any resulting risk, if any) post-dates his first refugee claim, which was finally decided on 21 February 2005.

Further, even if the claim to be at risk for religious reasons could be said to have arisen since the final determination of his first claim, country information does not establish that Christians (converts or not) are at risk of serious harm in Cambodia – a country with a predominantly Buddhist population which is tolerant towards the approximately two per cent Christian population. See, for example, the United States' Department of State *Country Reports on Human Rights Practices: Cambodia* (February 2007) and also its *International Religious Freedom Report 2006: Cambodia* (September 2006).

As to the claim to now be at risk from the CPP, because the SRP will not afford him protection, the appellant's first claim asserted that he was at risk of harm from the CPP and that the SRP would not be able to protect him. The only difference in the two claims is the immaterial change from the assertion, on the first claim, that the SRP could not protect him because it was in opposition and the assertion, on the second claim, that it will not protect him because he will oppose certain of its policies. The change is immaterial because the SRP is not said to be the agent of persecution on either claim. On both, it is said to be the CPP, whose antipathy towards the appellant remains unchanged. There does not appear to be any changed circumstance such that the second claim is brought on *significantly* different grounds.

It appears, *prime facie*, that the appellant's second claim is manifestly unfounded or clearly abusive because it is incapable of meeting the jurisdictional threshold imposed on second claims by the Act.

As a final point, even if the 'second claim' jurisdictional threshold were met, the appellant's second claim would still appear, *prime facie*, to be manifestly unfounded or clearly abusive because:

1. As to the 'Christianity' limb, the country information does not establish any risk for Christian converts in Cambodia, as already stated above; and
2. As to the 'CPP' limb, the second claim is predicated upon an acceptance of the appellant's credibility in respect of his first refugee claim. The Authority has already determined, however, that the appellant's credibility in relation to his first refugee claim is rejected. See *Refugee Appeal No 73944* (21 February 2005). Section 129P(9) of the Act provides that, in any appeal involving a subsequent claim, the claimant may not challenge any finding

of credibility or fact made by the Authority in relation to a previous claim and the Authority may rely on any such finding. The Authority does so rely and it follows that the second claim by the appellant is, *prima facie*, unsustainable.

A copy of the Immigration Service's file, as provided by it to the Authority in respect of the appellant's refugee application, is **enclosed**.

....

As a final matter, you are reminded that subsection 129P(1) of the Immigration Act 1987 states that it is the appellant's responsibility to establish the claim to refugee status. See also *Refugee Appeal No. 72668/01* (05 April 2002)."

[8] The appellant was invited to respond by 18 March 2008.

[9] On 14 March, the appellant wrote in person to the Authority, asking that the Authority not decline his second refugee claim and stating that he would kill himself if he is forced to leave New Zealand. The letter did not address the matters raised in the Authority's letter of 6 March 2008.

[10] On 18 March 2008, Mr Taylor wrote to the Authority, seeking an extension to enable him to receive instructions and advising that:

- (a) The issue of his Christianity was not an issue raised by the appellant himself but by the refugee status officer;
- (b) The "SRP CPP issue" is substantially different because the SRP which exists now is "manifestly and morally different" from its previous form and that the appellant would be unable to restrain himself from protesting against the compromises made by the SRP in its coalition with the CPP.

[11] Time was extended to 28 March 2008 for further submissions. On 1 April 2008, the Authority received a late letter from Mr Taylor, enclosing an extract from a 9 January 2007 article entitled *Cambodia: The changing political landscape*, by V Matthews (the whole article had already been submitted to the Refugee Status Branch at first instance). He repeated the submission that the appellant would become "politically reactive" if returned to Cambodia and would be at risk of harm from the government.

[12] Nothing in the submissions or evidence in any of the three letters received by the Authority advances the grounds of claim already made by the appellant or alters the provisional view which had been expressed in the Authority's letter of 6 March 2008. For the reasons expressed in that letter, the Authority concludes:

- (a) the appellant's second refugee claim is manifestly unfounded or clearly abusive; and
- (b) he is not offered an interview in respect of his second appeal.

[13] Given those findings, it is intended now to address the second refugee claim on the papers. In so doing, the first issue to address is whether it meets the jurisdictional threshold for second and subsequent claims – a consideration which arises under s129O(1) of the Act.

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[14] Second or subsequent refugee claims (including appeals to the Authority) are subject to jurisdictional limitations.

[15] Section 129O(1) of the Act (which came into force on 1 October 1999) 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.”

[16] It follows that it is necessary to consider the appellant's original claim and his further claim, as presented at the second appeal, with a view to determining:

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

[17] Because jurisdiction to hear and determine subsequent refugee claims under s129O(1) of the Act is determined by comparing the previous claim to refugee status against the subsequent one, the Authority is required to compare the claims as asserted by the refugee claimant. In the absence of significant difference in the grounds upon which the claims are based, there is no jurisdiction to consider the subsequent claim. See *Refugee Appeal No 75139* (18 November 2004).

[18] Where jurisdiction is established, the merits of the subsequent claim will be heard by the Authority. This hearing may be restricted by the findings of credibility or fact made by the Authority in relation to the previous claim. Section 129P(9) of the Act prohibits any challenge to a finding of fact or credibility made by the Authority in relation to a previous claim and the Authority has a discretion as to whether to rely on any such finding.

[19] Against that jurisdictional background, it is necessary now to compare the two claims.

THE APPELLANT'S FIRST REFUGEE CLAIM

[20] As a preface to the appellant's first refugee claim, the panel hearing the first appeal was compelled to warn that:

"[3] The account which follows is a summary of the appellant's evidence at the appeal hearing, as best the Authority can discern. As subsequently noted in this decision, the appellant's evidence was confused and has changed often in the telling."

[21] Mindful of that caution, the first refugee claim, set out at paragraphs [3]-[26] of *Refugee Appeal No 73944* (21 February 2005), is summarised as follows.

[22] The appellant's parents are deceased. His one sister is a doctor, living in Cambodia. His two brothers went to live in the United States before 1975. He has not had any contact with them since early 2000.

[23] The appellant married in 1989. He and his wife had three children in 1990, 1993 and 1995. He remains married but lost contact with his wife in 1999. From early 2000, the appellant's children have been in the care of his sister. The appellant is unsure why. He provides some financial support.

[24] After his education, the appellant was assigned to work for the Ministry of the Interior. He spent one year training as a military policeman before taking up employment in the police force as a guard at a training camp for police recruits and CPP members. He continued in this role until 1988 and then undertook further training as an investigator in the military police. He rose to the rank of Commander and had control over 48 men in the battle against the Khmer Rouge.

[25] In his employment, the appellant was responsible to the CPP. However, he became attracted to the United National Front for an Independent, Neutral,

Peaceful and Co-operative Cambodia Party ("FUNCINPEC") because he noticed that "intelligent people from overseas" supported it and he felt it had a real prospect of helping Cambodia. Wanting to join FUNCINPEC, he was obliged to leave his employment with the CPP. He was offered incentives to remain, including promotion and increased pay, because the CPP feared security would be jeopardised if he were to change his political affiliations. He had knowledge of political corruption and crime which the CPP was anxious to protect. The CPP "didn't want me to pass on tactics and experience I got while working with them".

[26] The appellant stopped working for the CPP in 1992/1993. He then worked as an investigator for FUNCINPEC until July 1997. In this role, he would investigate crimes to ascertain any political dimension. He also campaigned for FUNCINPEC and was able to recruit about 300-500 people to the party.

[27] In about 1995, FUNCINPEC split into two factions, one continuing as FUNCINPEC and the other as the SRP. The appellant joined the SRP but continued to work as an investigator for FUNCINPEC. He was involved in advertising SRP activities, the writing, publication and distribution of booklets about the SRP, and general networking until the military coup in July 1997, in which the CPP deposed FUNCINPEC. Both FUNCINPEC and SRP supporters were killed in the violence. The appellant and his troops were involved in the fighting. Over 200 people from his unit were killed. He feared for his own safety and began to investigate means of leaving Cambodia.

[28] Once the CPP had regained power, the appellant was pressured to return to his former work with the CPP. He was unwilling to do so and went into hiding.

[29] The appellant left Cambodia travelling on his own passport. He paid a bribe of US\$700 to an airport official and was then able to leave without further incident.

[30] After his departure, his wife reported that people had come to the family home on one occasion, looking for him. No inquiries were made of his sister.

[31] The appellant claimed that, if he returned to Cambodia, CPP members would abduct and murder him because he knew their secrets. Because CPP members also knew that he worked for FUNCINPEC and the SRP, he would be more of a target because they would think he had disclosed CPP secrets to them.

[32] Evidence from Dr A McLeod, psychiatrist, recorded that the appellant was suffering a Major Depressive Episode and had chronic Post Traumatic Stress Disorder.

THE APPELLANT'S SECOND REFUGEE CLAIM

[33] The appellant's second refugee claim repeats the account of his first claim and adds the following.

[34] In about 2005, the appellant began attending the Evangelical Presbyterian Church in New Zealand, including attending Bible study classes. Other Cambodians in Christchurch, of whom some 60 per cent are Christian, were aware of his attendance.

[35] In New Zealand, the appellant continued to support the SRP, including by making a donation to a now-defunct SRP office in Palmerston North.

[36] In 2007, he learned that the SRP had formed a coalition government with the CPP because (he believed) it was too dangerous for the SRP to remain in opposition. Initially, the appellant was in favour of this because he understood that the SRP intended to work for change from within the coalition.

[37] Later, however, the appellant realised that the SRP had abandoned some of the "10 points" which had formed its original platform and was supporting policies of the CPP to which he is opposed.

[38] If he is returned to Cambodia, the appellant will feel compelled to voice his displeasure to the SRP and will either resign from it or will be expelled. In either case, he will no longer have its protection against acts of harm by the CPP.

[39] In June 2007, the appellant stopped attending the Evangelical Presbyterian Church, because two members of its congregation had asked him to return to Cambodia. He did not wish to and so stopped attending the church.

[40] The appellant believes that, if he is returned to Cambodia, he will be at risk of serious harm at the hands of the CPP and will no longer have access to the protection of the SRP. The coalition government under Hun Sen is, he believes, moving more towards a totalitarian state and is targeting political opponents, particularly low profile ones. Further, his conversion to Christianity, when

compounded with his political difficulties, aggravates the risk. Added to this, his brother-in-law and sister work for the government and would turn him in to the authorities in order to avoid trouble for themselves.

Documents

[41] As well as the documents produced by him to the Refugee Status Branch (recorded at the commencement of its decision) the appellant produces in support of his second appeal a further extract from a 9 January 2007 article entitled *Cambodia: The changing political landscape*, by V Matthews.

[42] Counsel has filed opening and closing submissions in writing, together with numerous articles of country information.

CONCLUSION ON JURISDICTION

[43] As noted in *Refugee Appeal No 75139* (18 November 2004):

“[51] Jurisdiction under s 129J(1) is determined by comparing the previous claim to refugee status against the subsequent claim. It is clear from the definitions in s129B(1) that the exercise requires the refugee status officer and the Authority to compare the claims **as asserted by the refugee claimant**, not the facts subsequently found by [the Refugee Status Branch] officer or the Authority.”

[44] Bearing in mind that the comparison of the second claim against the first simply requires the Authority to consider the claims *as asserted*, the appellant's second refugee claim does not meet the jurisdictional threshold.

[45] The changed circumstances asserted by the appellant since his first claim are:

- (a) his conversion to Christianity (whether expressly advanced by him or picked up by the Refugee Status Branch); and
- (b) that the coalition formed by the SRP and the CPP has led the SRP to abandon some of its own policies and endorse various CPP policies, which will cause the appellant to quit the SRP, thus exposing himself to harm from the CPP, with the SRP being unwilling to protect him.

[46] As to the conversion element of the claim, it is clear that the appellant began attending a Christian church in New Zealand as early as 1999 and had

been baptised as early as March of that year. Given that the law requires the appellant to establish that the changed circumstances have arisen since the final determination of his first claim (which occurred on 21 February 2005) it cannot be said that the appellant's conversion to Christianity meets the jurisdictional threshold.

[47] As to the political element of the second claim, the first claim asserted that the appellant was at risk of harm from the CPP and that the SRP would not be able to protect him. The only difference in the two claims is the immaterial change from the assertion, on the first claim, that the SRP could not protect him because it was in opposition and the assertion, on the second claim, that it will not protect him because he will oppose certain of its policies. The change is immaterial because the SRP is not said to be the agent of persecution on either claim. On both, it is said to be the CPP, whose claimed antipathy towards the appellant remains unchanged.

[48] Put simply, there is no changed circumstance such that the second claim is brought on *significantly* different grounds.

[49] The Authority concludes that the appellant's second refugee claim does not meet the jurisdictional threshold for such claims.

[50] That conclusion alone is sufficient to require the Authority to dismiss the second appeal. For the sake of completeness, however, it is appropriate to record that the second appeal would, in any event, fail for substantive reasons.

[51] It will be recalled that the Authority has the discretion under s129P(9) of the Act to rely upon the findings of fact made by the Authority on the first appeal. The reasons for the first panel's conclusion that all of the evidence on the first appeal was not credible are to be found at [31]-[62] of *Refugee Appeal No 73944* (21 February 2005). It found widespread inconsistency and implausibility in virtually every aspect of the appellant's evidence, including his identity, his biography, his family's particulars, his work record, his involvement with the CPP and with politics generally and, most significantly, in his claim to be at risk of harm from the CPP. It rejected his credibility in its entirety.

[52] The reasoning of the panel which heard the first appeal is cogent and persuasive. The Authority relies upon the findings of fact made on the first appeal.

[53] It follows that the second claim, which has attempted to repeat and build upon the assertions made in the first claim, cannot succeed. The evidence continues not to establish that the appellant is who he says he is, that his background is as he says it is or that he is at any risk of harm in Cambodia. In particular, it is not accepted that the CPP has any adverse interest in the appellant.

[54] As to the conversion claim, country information does not establish that Christians (converts or not) are at risk of serious harm in Cambodia – a predominantly Buddhist country which is tolerant towards the approximately two per cent Christian population. See, for example, the United States Department of State *Country Reports on Human Rights Practises: Cambodia* (February 2007) and also its *International Religious Freedom Report 2006: Cambodia* (September 2006) and the 2008 editions of both reports, which record no significant change.

[55] If it were necessary to reach a conclusion on the substantive second claim, it would be that the appellant does not have a well-founded fear of being persecuted for any Convention reason in Cambodia.

CONCLUSION

[56] It is concluded:

- (a) The Authority has no jurisdiction to consider the second appeal.
- (b) Even if it did (which it does not), the Authority relies upon the findings of fact on the first appeal and the second refugee claim, predicated upon the same factual background as the first claim, does not disclose that the appellant has a well-founded fear of being persecuted for any Convention reason in Cambodia.

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

“C M Treadwell”

C M Treadwell
Member