

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76269

AT AUCKLAND

Before: B A Dingle (Member)

Counsel for the Appellant: K H Lowe

Date of Decision: 12 January 2009

DECISION

[1] This is an appeal against a decision of the Refugee Status Branch (“the RSB”) of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a citizen of the People’s Republic of China (hereinafter referred to as China).

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[2] This is the third occasion on which the appellant has appealed to this Authority. (He has made four claims but one was withdrawn.) Therefore the Authority must first determine whether it has jurisdiction to hear the appeal.

[3] Neither a refugee status officer nor the Authority has unlimited jurisdiction to receive and determine a further refugee claim after a first claim has been finally determined. Section 129J(1) of the Immigration Act 1987 (“the Act”) is headed “Limitation on subsequent claims for refugee status” and sets out the circumstances in which a refugee status officer may receive and determine a

second or subsequent claim for refugee status:

"A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, **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.**"

[Emphasis added]

[4] Where the refugee status officer declines the subsequent claim, or finds that there is no jurisdiction to consider the claim on the basis that the statutory criteria are not met, the claimant has a right of appeal to the Authority. Section 129O(1) of the Act provides that:

"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 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."

[5] The Authority therefore intends to consider the appellant's first and second claims, together with his further claim as now presented in this third appeal, with a view to determining whether it has jurisdiction to hear the third appeal. If so, it will then determine whether the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

[6] Before doing so, however, it is necessary to address the issue of whether the appellant should be granted an interview.

JURISDICTION OF THE AUTHORITY TO DISPENSE WITH AN INTERVIEW

[7] Pursuant to ss129P(5)(a) and 129P(5)(b) of the Act, where an appellant was interviewed by the RSB or, having been given an opportunity to be interviewed, failed to take that opportunity, the Authority has a discretion as to whether to offer the appellant the opportunity to attend an interview. In exercising this discretion, the Authority will consider whether the appeal is *prima facie* 'manifestly unfounded or clearly abusive'. Should that be the case, the Authority may determine the appeal on the papers, without offering the appellant an interview. The Authority's general jurisdiction in this regard was examined in *Refugee Appeal No 70951/98* (5 August 1998).

PROCEDURAL HISTORY OF THE APPELLANT'S CLAIMS

PREVIOUS CLAIMS FOR REFUGEE STATUS

[8] The appellant arrived in New Zealand on 1 April 1992 and lodged his first application for refugee status on 1 May 1992.

[9] It is not intended that a full account of the appellant's previous claims be reproduced here. A detailed summary of these accounts can be found in the decisions of the Authority (differently constituted each time) in *Refugee Appeal No 607/92 re XDY* (28 March 1996) and *Refugee Appeal No 70477/97* (30 October 1997).

[10] Briefly, the appellant's first claim was that he was of interest to the authorities in China because he had been involved in pro-democracy activities in 1989. He claimed to have helped a student group create anti-government posters and to have been arrested by the Public Security Bureau (PSB) and detained as a result. In 1992, after he had departed China, the appellant's wife was frequently approached by the PSB and questioned about his whereabouts. These approaches gradually lessened and then stopped altogether.

[11] On 30 September 1992, the RSB declined the appellant's first application for refugee status. This led to his first appeal to the Authority which was also dismissed on 28 March 1996 because he was found not to be credible.

[12] On 10 May 1996, the appellant filed a second refugee application with the RSB. It repeated the first claim and added that in early 1996, the wife approached the PSB on his behalf so that he could be issued with an identity card and return to China. In response, the PSB resumed their interest in him and subsequently detained his wife for a week, seeking information regarding his whereabouts and activities.

[13] By letter dated 14 March 1997, the RSB declined the claim after he failed to attend the RSB interview. The appellant lodged his second appeal with the Authority which was dismissed on 30 October 1997 on the basis that the second account was also not credible.

[14] A third application for refugee status was submitted to the RSB on 7 December 2007 but was subsequently withdrawn.

[15] The appellant's INZ file also indicates that since his arrival in New Zealand

in 1992, he has made nine ministerial appeals, two complaints to the Office of the Ombudsman, one application (five years out of time) for judicial review of the exercise of a Ministerial discretion and two appeals to the Removal Review Authority.

THE CURRENT CLAIM FOR REFUGEE STATUS

[16] The present (fourth) claim for refugee status was submitted to the RSB on 7 February 2008 and the appellant was interviewed by the RSB on 13 June 2008. A decision finding that it had no jurisdiction to hear the claim was issued by the RSB on 30 June 2008.

[17] In the fourth claim, the appellant asserts that he is still of interest to the PSB on the basis of his pro-democracy involvement in 1989 and that he would suffer serious harm should he now return to China. He submits a letter from his daughter, still resident in China, stating that the authorities continue to make enquiries about him.

[18] The appellant also introduces a novel element to his claim at RSB in that he claims that his involvement with the Pu Shien Charitable Trust, a Buddhist organisation in New Zealand, would put him at risk of being persecuted. He asserts that the Chinese authorities have “thousands of spies” in New Zealand and Australia and that he will be blacklisted as a result of his involvement with the Trust.

[19] In a decision dated 30 June 2008, the RSB declined to accept the appellant’s subsequent claim for consideration on the basis that he did not satisfy the jurisdictional criteria for a second claim. He now appeals against that decision.

WHETHER TO DISPENSE WITH AN INTERVIEW

[20] On 10 November 2008, the Authority, through its Secretariat, wrote to the appellant’s representative, Mr Lowe, advising that the Authority’s preliminary view of the appellant’s appeal was that it was *prima facie* ‘manifestly unfounded or clearly abusive’, and could therefore be determined on the papers without giving him an interview pursuant to s129P(5) of the Act. The letter noted that the appellant had been interviewed by the RSB in respect of his current refugee claim.

[21] The letter went on to note that this was the fourth refugee status application

lodged by the appellant and advised of the relevant additional jurisdictional requirements. The letter continued:

"It is the Authority's preliminary view that [the appellant's] fourth claim does not satisfy the statutory criteria for the acceptance for consideration of a subsequent refugee claim because the grounds of his subsequent claim do not appear to be significantly different to those of his preceding claim.

In summary, all of his previous claims were based on assertions that he had been associated with the pro-democracy movement in 1989 and in particular with a student who had involved him (the appellant) and his wife in the making of political signs and pamphlets. As a result, the appellant claimed to have been arrested and detained at the local Public Security Bureau (PSB), interrogated and required to report for a period of time thereafter. The Authority (differently constituted) who heard the first appeal rejected the account on credibility grounds.

The additional aspect of the claim made in his (first) subsequent claim (filed with the RSB on 10 May 1996) was that after he had been declined refugee status the first time, he was informed by his wife, who at that time was still residing in China, that she had been taken to the PSB several times and had been asked about [the appellant] and what he was doing in New Zealand. The PSB then discovered he had claimed refugee status in New Zealand and he claimed that this would cause further difficulties should he return to China. In its decision in respect of his second appeal, the Authority (differently constituted) found that [the appellant] and his wife were not credible witnesses and that therefore there was no basis on which it could find that there had been a change of circumstances (as then required under the Terms of Reference which regulated *inter alia* the Authority's jurisdiction to hear subsequent claims). As noted above, that second appeal was finally determined by the Authority on 30 October 1997.

The grounds for [the appellant's] current appeal do not appear to be significantly different from the preceding claims. He contends that the PSB maintain interest in him because of his 1989 involvement in the pro democracy movement. Indeed, in the confirmation of claim form filed on 7 February 2008 he has responded to question E3 "What happened to cause this fear [about what would happen on return to China]?" by stating:

"All details stated clearly in my previous application. Please refer to it for full details for your information"

At E6 he then confirmed that he did not fear returning to China for any other reason other than that already stated. In other words, the grounds for his current claim to refugee status are exactly the same grounds as those previously presented and which have twice been substantively considered by the Authority and dismissed as not credible.

It is noted that at the RSB interview on 13 June 2008 [the appellant] also asserted that his involvement with the Buddhist organisation referred to as the Pu Shien Charitable Trust was also a ground on which he claimed refugee status. However, his evidence to the RSB is that he has been involved with the trust since his arrival in New Zealand in 1992 and therefore prior to both previous determinations of his refugee appeals. Those grounds can not therefore form the basis of a subsequent claim for refugee status.

The Authority's preliminary view is that [the appellant] has failed to establish that the grounds giving rise to his fourth refugee claim are significantly different from those giving rise the previous three claims. All of the claims are based on continuing interest from the PSB in his home area because of his very limited political involvement in 1989 – facts which have all been found to be not credible

by previous Authority panels. It appears that he is unable to satisfy the jurisdictional criteria for second and subsequent refugee claims established by ss129J and 129O Immigration Act 1987.”

[22] The appellant was provided with an opportunity to present submissions and/or evidence to support his claim by 25 November 2008. Notice was given that, unless the Authority was persuaded otherwise by such submissions and evidence, it could consider and determine the appeal without giving the appellant an opportunity of attending a further interview. Reference was also made to *Refugee Appeal No 70951/98* (5 August 1998).

[23] The Secretariat’s letter advised that the responsibility for establishing an appellant’s refugee claim lay with the appellant, pursuant to ss129P(1) and 129P(2) of the Act (as referred to in *Refugee Appeal No 72668/01* (Minute No. 2) (5 April 2002) and in *Anguo Jiao v Refugee Status Appeals Authority* (HC, Auckland, M.207-PLO2, 29 July 2002, Potter J)). The letter further advised that persecution has been defined as ‘the sustained or systemic denial of basic or core human rights such as to be demonstrative of a failure of state protection’; see Hathaway, *The Law of Refugee Status* (1991) 104 to 108, as adopted in *Refugee Appeal No 2039/93* (12 February 1996) at 15.

[24] On 25 November 2008, Mr Lowe wrote to the Authority by way of facsimile and sought further time because the appellant was “awaiting further materials available” without providing details as to what the materials sought were. In an abundance of fairness, the Authority granted an extension of time to 5 December 2008. In doing so it indicated that no further extension of time would be granted in the absence of a compelling reason or the provision of detailed information about the material being sought by the appellants.

[25] On 2 December 2008, a further letter from Mr Lowe (dated 3 December 2008) was received in respect of both this appeal and that of the appellant’s wife.

[26] As to the matters raised in the Authority’s letter of 10 November 2008, namely the preliminary assessment that the appellant’s case is *prima facie* “manifestly unfounded or clearly abusive” Mr Lowe’s letter made the following points:

“As you are aware, we are sure that: All asylum applicants are considered in terms of normal policy for permanent resident; especially [the appellant] has her wife immediate relatives resident in New Zealand. (2 sisters) along with her trade and professional - therefore your Authority shouldn’t penalize her at that.

Therefore with all due respects, her Refugee motives appear to be genuine in the true sense of the word in terms of the 1951 Convention: NO particular

requirements are attached to such applications beyond normal suitability and processing –

Despite your Authority suggestion that: manifestly -unfounded or clearly abusive “which is not act with in the principle of natural and fairness to all applicants as required and **it is contrary to the UNHCR office manual policy.**

It is simplify that the applicant is unable or, owing to such fear, is unwilling to avail herself/himself of the protection of that country, or being outside the country of her/his former habitual residenceis unable, or owing to such fear, is unwilling to return to it “

Please refer it to your letter dated 10th November 2008 which clearly stated that “In the intervening years between her arrival in New Zealand on 1 April 1992 and” - **It is well over 16 years plus now - Can you Authority offer her your sympathetic** , As she must went through lots of fears during this long period of waiting. Which clearly are meeting the Refugee Status criteria of fears and against her will and better judgment by returning to her homeland due to her involvement or action? - **If it is applicable for an interviewing before making your final decision please.**

We are quietly confident that common sense will prevail, especially given the fact that she is praying every day and night for a miracle which just about sent her mad. She is recently out of hospital as well. therefore we write respectfully ask for your authority look into their case more seriously be in a compassionate humanitarian ground within the Refugee Status criterion.”

[27] The letter has not addressed the jurisdictional issue with regard to second and subsequent claims, namely, that the appellant must establish that since the determination of the preceding 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.

CONCLUSION AS TO WHETHER TO DISPENSE WITH AN INTERVIEW

[28] Having carefully considered all relevant matters, for the reasons which will be apparent later in this decision, the Authority is satisfied that the appellant’s appeal is *prima facie* ‘manifestly unfounded or clearly abusive’.

[29] It is appropriate to now proceed to determine the appeal on the papers pursuant to ss129P(5)(a) and 129P(5)(b) of the Act, without giving the appellant an opportunity to attend a further interview. All material and submissions tendered throughout the determination process have been taken into account in determining this appeal.

HAS THE JURISDICTIONAL THRESHOLD BEEN MET?

[30] It is now necessary to consider whether the jurisdictional threshold for the hearing of a second or subsequent claim is met; see s129O(1) and *Refugee Appeal 75139* (18 November 2004).

COMPARISON OF CLAIMS

[31] The appellant's first claim for refugee status was based on assertions that he was at risk from the PSB because he had been involved with the pro-democracy movement in China in 1989. He had been arrested, detained and interrogated by the PSB before departing China in 1992. His second claim was essentially the same with the added feature that his wife had been detained and interrogated by the PSB in 1996 when she sought an identity card for the appellant.

[32] The current claim is based on the same account as the previous claims. In the Confirmation of Claim form the appellant simply refers back to the alleged incidents of 1989 to 1996, the latter being the year his wife departed China. When asked in question E8 of the form to "set out in chronological order, any other events that caused you to leave your home country and claim refugee status in New Zealand", the appellant refers to his daughter's letters submitted in support of the claim which assert that the PSB are still seeking his whereabouts in relation to the previously claimed events of 1989.

[33] The Authority also notes that at the RSB interview on the present claim, the appellant asserted that a further component of his claim is that he is involved with a Buddhist organisation, the Pu Shien Charitable Trust. His involvement dates from soon after his arrival in New Zealand in 1992 however, and clearly pre-dates the determination of his first and second claims. There is no evidence that this "new" aspect to the claim incorporates any event which could properly be said to have arisen since the determination of the earlier claims.

[34] The Authority finds that the jurisdictional threshold is not met. The present claim is based on the same account as the first three claims, of which two have been appealed and finally determined by the Authority. There is no significant difference in the grounds upon which the appellant's current claim is based. The recent additional element of involvement in the Buddhist organisation is not a circumstance which has arisen since the determination of the previous appeals and cannot therefore form the basis of a subsequent claim.

[35] The appellant does not satisfy the requirements of ss129J and 129O(1) of the Act and it follows that the Authority has no jurisdiction to consider this second claim to be recognised as a refugee in New Zealand.

CONCLUSION

[36] In closing, it is concerning to note the cynical abuse of the refugee determination system by the appellant. This is now the third time he has taken a refugee claim on appeal. He has been twice disbelieved and he must know that his repeated efforts to advance the same claim will not bear fruit. We do not expect to see a further specious claim lodged by him, or by his representative.

[37] 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.

"B A Dingle"
B A Dingle
Member