

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

AT AUCKLAND

Application No 76141

IN THE MATTER OF An application pursuant to s129L of the
Immigration Act 1987 to cease to
recognise a person as a refugee

BETWEEN A refugee status officer of the
Department of Labour
APPLICANT

AND RESPONDENT

BEFORE A N Molloy (Member)

Counsel for the applicant: V Wells

Counsel for the respondent: M Parker

Date of hearing: 15 April 2008

Date of decision: 23 April 2008

DECISION

[1] The respondent, a national of Pakistan, was granted refugee status by this Authority in 2001. This decision concerns an application made by a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL) that the Authority cease to recognise the respondent as a refugee.

JURISDICTION

[2] The application is made under s129L(1)(f)(ii) of the Immigration Act 1987 (the Act). The Authority is given the function of determining such an application by s129R(b) of the Act, which is in the following terms:

“In addition to the function of hearing appeals from decisions of refugee status officers in relation to refugee status, the Authority also has the function of determining applications made by refugee status officers under s129L(1)(f) as to whether –

(a) ...

(b) The Authority should cease to recognise a person as a refugee, in any case where the earlier recognition by the Authority of the person as a refugee may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information.”

[3] There are two stages to an enquiry of this nature. The Authority must first determine whether the recognition of the respondent as a refugee “may have been” procured by “fraud, forgery, false or misleading representation, or concealment of relevant information” (for convenience, this is subsequently referred to as “fraud”).

[4] If so, the Authority must then determine whether it is appropriate to cease to recognise the respondent as a refugee. This will depend on whether the respondent currently meets the criteria for refugee status set out in the 1951 United Nations Convention relating to the Status of Refugees (the Refugee Convention): *Refugee Appeal No 75392* (7 December 2005) [10]-[12].

THE GRANT OF REFUGEE STATUS

[5] In order to place the application in its proper context, it is appropriate to outline the basis upon which the respondent was granted refugee status by the Authority. A summary of his claim, recounted in more detail in *Refugee Appeal No 72518* (13 September 2001), is therefore set out below

[6] The respondent claims that he arrived in New Zealand in May 2000, although there is no record of him doing so. He applied for refugee status immediately and asserted that he was at risk of being persecuted by Pakistani authorities for reason of his political opinion.

[7] His predicament arose out of his membership of a political party known as the Muttahida Quami Movement (MQM). In 1988, the respondent was arrested after he attended an MQM meeting. He was falsely charged with committing

various criminal offences including robbery, possession of firearms, kidnapping, and theft. He remained in custody until he was released in the early 1990s, following an amnesty granted to MQM prisoners.

[8] However, not all of the charges against the respondent were dropped and even after his release, the respondent had to make a number of appearances in court. He managed to avoid trial on any of the charges through the regular payment of bribes and the production of falsified medical certificates.

[9] The respondent's difficulties escalated again in September 1998 when he was arrested for the second time. He was detained by the police for several days, during which time he was severely mistreated because he refused to sign a confession. He was transferred to a prison where he was held until mid-1999, when he managed to escape. He sustained a number of permanent injuries as a result of mistreatment inflicted upon him during this period.

[10] The respondent then spent several months moving covertly around Pakistan while his family made arrangements for him to leave the country. He left Pakistan by air in May 2000, using a false passport, and arrived in New Zealand several days later. While there is no record of his arrival in New Zealand on the date he identified, the respondent claimed that he was issued with a visitor's visa in the false passport which he used to enter New Zealand.

[11] After his departure, the Pakistani police continued to visit the respondent's family. As a result of this police pressure, his family changed their address several times. His mother wrote to him in New Zealand to tell him that his life was in danger in Pakistan and that he should stay in New Zealand.

[12] The respondent lodged a written claim for refugee status in early August 2000. After interviewing the respondent in September 2000, a refugee status officer of the DOL issued a decision in January 2001, declining his application for refugee status.

[13] The respondent lodged an appeal which was heard by this Authority (differently constituted) in March 2001. The Authority issued a decision dated 13 September 2001. After giving the respondent the benefit of the doubt in connection with the credibility of his account, the Authority found that the respondent's claim was well-founded and granted him refugee status.

[14] The respondent obtained residence in New Zealand and has subsequently been granted New Zealand citizenship. He obtained a New Zealand passport in

September 2003.

CANCELLATION PROCEEDINGS

The application

[15] As a result of subsequent events, the DOL has formed the view that the Authority's decision to grant the respondent refugee status was improperly made, as it may have been procured by fraud.

[16] The DOL lodged a Notice of Application for Determination Concerning Loss of Refugee Status ("the Notice") with the Authority on 13 September 2007, alleging in particular that:

- a) It is now apparent that the respondent lived in South Africa between 1995 and 2000. His claim to have been arrested, detained and tortured by Pakistani authorities during that period is therefore untrue.
- b) He failed to disclose that while he was in South Africa, he had applied, unsuccessfully, for refugee status.
- c) He has returned to Pakistan on at least six occasions between 2004 and 2007.

[17] The DOL submits that these facts contradict the respondent's claim that he was arrested, detained and seriously mistreated by the Pakistani authorities in 1998-1999, or that he escaped from custody and was thereafter a fugitive. In short, the DOL asserts that his claim to have had a well-founded fear of being persecuted in Pakistan at the time the Authority granted him refugee status in September 2001, is fundamentally undermined.

[18] The Notice is supported by a bundle of documents (the bundle) relating to the respondent's application for refugee status, the decision of the RSB and the subsequent appeal to the Authority. The bundle also contains information relating to the respondent's subsequent application for residence, and copies of documents obtained from the Department of Home Affairs of the Republic of South Africa (DHA).

Procedural steps prior to the hearing

[19] On 3 October 2007, the respondent was served with the Notice and the bundle, together with a letter from the Authority, dated 2 October 2007. That letter outlined the steps which the respondent should take if he wished to oppose the application. It drew the respondent's attention to the fact that he was entitled to request a interview and/or file submissions in connection with the Notice, and stated that :

"If we do not receive any such request within 21 days of the date of service of this letter, the Authority may proceed to determine this application without further reference to you."

[20] The respondent was also informed that he must provide an address to which communications regarding the application could be sent, and that the Authority is entitled to rely upon the latest address provided by virtue of s 129P(3) of the Act and regulation 24 of the Immigration (Refugee Processing) Regulations 1999. Section 129P(3) provides:

"An appellant must provide the Authority with a current address in New Zealand to which communications relating to the appeal may be sent and a current residential address in New Zealand, and must notify the Authority in timely manner of a change in either of those addresses. The Authority may rely on the latest address so provided for the purpose of communications under this Part.

[21] On 18 October 2007, the Authority received a letter from a firm of solicitors which has acted for the respondent from time to time for some years, Khan & Associates. The letter records that they had been instructed by the respondent earlier that week. Khan & Associates enclosed an authority to act signed by the respondent. It requested that the Authority:

"... forward any and all information you are holding in regards to me to my solicitors Messrs Khan & Associates, Solicitors (my Solicitors), whose address is 1st Floor, 131 Colmar Road, DX:EP47515, PO Box 23-492, Papatoetoe, Auckland New Zealand.

Please forward the information sought by my Solicitors to them as soon as possible.

I further inform you that Khan & Associates are my only representatives and you are only deal with them and none other in relation to all my matters." [sic]

[22] Khan & Associates sought an extension of time to respond to the Authority's letter dated 2 October 2007. The Authority agreed to an extension until 5 November 2007.

[23] On 7 November 2007, Khan & Associates wrote to the Authority again. They explained that no memorandum or submissions had been filed because they

had been unable to communicate with the respondent since requesting the extension of time. Khan & Associates undertook to provide an update as soon as possible. That update came in the form of a further letter dated 4 December 2007 in which Khan & Associates confirmed that they had been in contact with the respondent. At that time he was overseas but apparently intended to return to New Zealand in March 2008.

[24] The Authority convened a directions conference on notice to both parties on 19 December 2007. The respondent was required to lodge a memorandum providing information including the names of potential witnesses and a summary of their evidence; identifying any questions of law which might arise; identifying any documents in the possession of the DOL which need to be produced; the respondent's time estimate for the hearing and any other matters which ought to be raised.

[25] On 17 December 2007, Khan & Associates wrote to the Authority again to advise that:

"... we had briefly made contact with [the respondent] earlier this month but all communications have subsequently ceased once again. We have endeavoured to communicate to our client by email but to no avail.

Our client has however indicated that he wishes to pursue this matter on his return to New Zealand in the coming year.

In light of the fact that the holiday season is upon us and that our office will be closed from Friday 21st December 2007 and will re-open Monday 14th January 2008 we humbly request that this matter be heard in March 2008 pending the receipt of further firm instructions from our client." [emphasis added].

[26] Neither the respondent nor his solicitor attended the directions conference. The Authority directed that the matter be set down for hearing in April 2008 and made a timetable of directions with respect to the filing and service of evidence prior to the hearing.

[27] A Minute to that effect was distributed to the parties and they were subsequently advised in writing that the application to cancel the respondent's refugee status would be heard by the Authority on 15 April 2008.

[28] On 14 April 2008, Khan & Associates advised the Authority in writing that the respondent had made no further contact with them. Their attendance at the scheduled hearing was excused.

[29] The respondent has taken no steps to comply with the Authority's directions and he did not appear when the application was heard. The DOL appeared

through counsel and presented its case through a refugee status officer, Mr Newth.

Ability to determine the application in the absence of the respondent

[30] The Authority is entitled to determine the application in the absence of the respondent by virtue of s129P(6) of the Act, which provides that:

“... the Authority may determine an appeal **or other matter** without an interview if the appellant **or other person affected** fails without reasonable excuse to attend a notified interview with the Authority.” [Emphasis added].

[31] Section 129P applies to applications of this nature as well as to appeals, by virtue of s 129S, which provides that:

“Procedures to be followed in carrying out non-appellate functions

When carrying out any function under section 129R-

- (a) the Authority must take reasonable steps to notify the person concerned in the prescribed manner of the matter that is being considered; and
- (b) section 129P and any regulations made under this Part apply (unless the context otherwise requires, and with any necessary modifications) as if the matter being considered were an appeal under section 129O and the person concerned were an appellant.”

[32] The respondent instructed solicitors, with whom he has had a longstanding relationship, to act for him in respect of the application to cancel his refugee status. Since doing so, he has remained in contact with them sporadically and seemingly at his own convenience.

[33] The respondent was informed of the date of the scheduled interview with the Authority. He was informed that the hearing was to be set down, and he was told what steps he would need to take if he wished to contest the application.

[34] For his part the respondent has sought to delay the interview in respect of the application, and has never given any coordinated account in opposition to the core allegations upon which the application is based. Nor has he ever provided any assurance about when he might be available to attend a hearing, although he indicated through his solicitors in December 2007 that he intended to be back in New Zealand by March 2008.

[35] In all of the circumstances of the application, given that the respondent failed without reasonable excuse to attend the notified interview, the Authority is entitled to determine the application without an interview.

THE CASE FOR THE DOL

Evidence of Wayne Newth

[36] Mr Newth is a refugee status officer employed by the DOL. During the course of his testimony, Mr Newth identified various key documents which support the core of the DOL's application.

The respondent lived in South Africa between 1995 and 2000 and applied for refugee status while there.

[37] The DOL's assertion that the respondent had lived in South Africa between 1995 and 2000 is supported by a bundle of documents forwarded to Immigration New Zealand (INZ) by the DHA in July 2007.

[38] According to the DHA records, a person of the same name as the respondent entered South Africa in 1995, using a Pakistani passport. That person applied for refugee status in South Africa in April 1995. The application was unsuccessful, as was the subsequent appeal lodged in South Africa, which was rejected in 1998.

[39] Mr Newth asserts that the respondent is the person who sought refugee status in South Africa. He identified various similarities which are beyond the realm of coincidence. For example: the grounds for the application for refugee status advanced in South Africa were almost identical to the claim advanced by the respondent in New Zealand, (at least in respect of his life up until the mid-1990s). In addition, documents submitted by the applicant for refugee status in South Africa gave the same home address in Pakistan as that disclosed by the respondent in New Zealand, and each gave the same name for the father.

[40] In addition, documents provided by the DHA indicate that a person left South Africa on 10 June 2000 using a false South African passport issued in the respondent's name. Mr Newth also identified a New Zealand Passenger Arrival Card (the arrival card) showing that a person with the respondent's name arrived in New Zealand by air the following day, 11 June 2000. That person used a South African passport to enter New Zealand and claimed to be a South African national. Documents in the bundle disclose that the passport number disclosed on the arrival card is the same as the passport number issued in South Africa in the respondent's name.

The respondent has returned to Pakistan on at least six occasions since the grant of refugee status

[41] Mr Newth referred the Authority to extracts from a copy of the respondent's New Zealand passport and New Zealand immigration records which indicate that the respondent has returned to Pakistan on six occasions between 2004 and 2007. Mr Newth submitted that the respondent's willingness and ability to return to Pakistan so frequently indicate that his original claim to have been in trouble with the Pakistani authorities is false.

Material received by the Authority

[42] In addition to the comprehensive bundle of documents prepared in support of the application for cancellation, the Authority received written submissions from the DOL under cover of a letter dated 14 April 2008. Counsel for the DOL lodged opening submissions in writing on 14 April 2008. Additional documents from the DHA were produced by Mr Newth at the interview. These included an affidavit and two statements provided by various DHA officials. These were forwarded under cover of a letter from the DHA, dated 21 January 2008.

THE CASE FOR THE RESPONDENT

[43] As already noted, the respondent failed to provide any witness statement or evidence in opposition to the application, and failed to appear at the hearing either in person or through his solicitors. The Authority therefore has no first hand account from the respondent in response to the allegations made and evidence put forward by the DOL.

[44] There is some correspondence within the bundle which outlines the stance taken by the respondent to some of the DOL allegations in the past. For example in a letter from Khan & Associates to Immigration New Zealand dated 2 April 2007, the respondent denied having travelled to South Africa, having lived there, having applied for refugee status there, or having applied for a South African passport.

[45] In an earlier letter from his solicitors, dated 28 November 2005, the respondent admitted returning to Pakistan. It was claimed that he did so only because his mother was seriously ill. There is no evidence before the Authority to corroborate that claim, or to explain his motives for returning on other occasions.

THE AUTHORITY'S FINDINGS

STAGE ONE: WHETHER REFUGEE RECOGNITION "MAY HAVE BEEN" PROCURED BY FRAUD

[46] The DOL has made an application that the Authority cease to recognise the respondent as a refugee. While it is not entirely appropriate to use terms such as the "burden" or "onus of proof", given that this is an inquisitorial proceeding, the Authority's view is that in cancellation proceedings, the DOL must present evidence by which it can responsibly be said that the grant of refugee status "may have been procured by fraud": *Refugee Application No 75700* (28 June 2006) [12].

[47] The Authority has previously observed that this term is deliberately imprecise. It signals a standard of proof that is lower than the balance of probabilities but higher than mere suspicion: *Refugee Appeal No 75563* (2 June 2006) [20].

[48] For the purposes of this application, the DOL submits that the appellant was granted refugee status by the Authority in 2001 on the basis that in September 1998 he was arrested, detained and severely mistreated by the Pakistani police, leading to permanent injuries; and that he left Pakistan in 2000 as a fugitive, having escaped from a Pakistani prison.

[49] It is self-evident that if the respondent was living in South Africa in 1998 and 1999, then the core part of his claim for refugee status cannot be true.

[50] Having considered all of the information available, and in the absence of any explanation by the respondent, the Authority finds that the evidence presented by the DOL meets the necessary threshold. In the absence of any explanation by the respondent, the Authority finds that the grant of refugee status to the respondent may have been procured by fraud. The evidence available to the Authority raises more than "mere suspicion".

[51] The documents forwarded by the South African Department for Home Affairs demonstrate that the respondent was living in South Africa between 1995 and 2000. The similarity of the refugee claims lodged in both countries, and the common identifying features including the name, date of birth, home address and name of parent support this finding.

[52] The respondent's New Zealand claim bears a significant similarity to the account advanced in South Africa. To that core claim the respondent added an

additional claim that he was arrested and mistreated in Pakistan in 1998. That additional claim served both to bolster the claim which had been unsuccessful when advanced in South Africa, and also to explain away the five-year period during which he had lived in South Africa.

[53] The Authority has frequently observed that the fact that a refugee may have returned to their home country after being granted refugee status is not necessarily in itself evidence of fraud. However, in the circumstances of this application, the Authority is satisfied that the willingness of the respondent to return to Pakistan so frequently and within a relatively short time after the grant of refugee status lends weight to the DOL's submission that the respondent falsely claimed to be at risk of being persecuted when he was granted refugee status in New Zealand in 2001.

Conclusion with respect to stage one

[54] The Authority finds that the earlier recognition by the Authority of the respondent as a refugee may have been procured by fraud. That being so, it is necessary to proceed to the second stage of the test.

STAGE TWO: WHETHER THE RESPONDENT SHOULD CEASE TO BE RECOGNISED AS A REFUGEE

[55] A claimant bears the responsibility of establishing his refugee claim: see ss129G(5) and 129P(1) 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* [2003] NZAR 647 (CA)).

[56] The respondent has been afforded the opportunity to provide the Authority with information or evidence to establish his continuing entitlement to refugee status. He has provided nothing in writing. Further, he chose not to attend the hearing of this application on 15 April 2008, despite being notified of the date of the interview.

[57] The Authority has already found that it is entitled to determine the application in the absence of the respondent by virtue of s129P(6) of the Act, given that the respondent has no "reasonable excuse" for his failure to attend the notified interview.

[58] The Authority notes that there is evidence that the respondent has been willing and able to return to Pakistan on numerous occasions since 2004.

However, in his absence, the Authority is unable to make any finding in connection with the respondent's credibility or to satisfy itself whether the respondent is currently a refugee within the meaning of Article 1A(2) of the Refugee Convention.

CONCLUSION

[59] In all of the circumstances the Authority therefore makes the following determinations:

- (a) The respondent's refugee status may have been procured by fraud.
- (b) The Authority ceases to recognise the respondent as a refugee.

"A N Molloy"
A N Molloy
Member