

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75974

AT AUCKLAND

Before: C M Treadwell (Chairperson)
B A Dingle (Member)

Counsel for the Appellant: J Petris

Appearing for the Respondent: N Szeto

Date of Hearing: 30 April and 1 May 2007

Date of Decision: 25 September 2007

DECISION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch of the Department of Labour (“the Department”), cancelling the refugee status of the appellant pursuant to s129L(1)(b) of the Immigration Act 1987 (“the Act”).

[2] The appellant is an Iranian man aged in his early forties, who sought refugee status on his arrival in New Zealand in late 1995. The essential ground of his claim was that he had been caught up inadvertently in a student demonstration in Tehran and was being sought by the authorities. Two of his colleagues were arrested.

[3] After being interviewed by the Refugee Status Branch on 25 February 1997, the appellant was granted refugee status. He was subsequently granted permanent residence by Immigration New Zealand on 9 September 1997.

[4] On 18 November 2005, the appellant was served with a Notice of Intended Determination Concerning Loss of Refugee Status, pursuant to s129L(1)(b) of the Act.

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JURISDICTION

[5] Before turning to the facts leading to the issue of the Notice, we restate the essential jurisdiction of the Authority in respect of what are colloquially termed 'cancellation' proceedings.

[6] Section 129L(1)(b) of the Act provides that refugee status officers have the function of:

"Determining whether a decision to recognise a person as a refugee was properly made, in any case where it appears that the recognition given by a refugee status officer (but not by the Authority) may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information, and determining to cease to grant the person as a refugee in such a case if appropriate".

[7] Pursuant to s129O(2) of the Act, a decision of a refugee status officer under s129L(1)(b) of the Act to cease to recognise a person as a refugee gives rise to a right of appeal to the Authority.

[8] In determining appeals against decisions to cease to recognise a person as a refugee, the legislation requires that the Authority adopt a two-stage test. It must first determine whether the refugee status of the appellant "may have been" procured by fraud, forgery, false or misleading representation, or concealment of relevant information (hereafter, collectively called "fraud" for convenience). If so, and only if so, it must then determine whether to "cease to recognise" the person as a refugee. See *Refugee Appeal No 75392* (7 December 2005) at paras [10]-[12]. That limb of the test, if it proves necessary, is the Authority's standard forward-looking enquiry into whether the person is, at the date of determination, a refugee.

EVENTS SINCE THE GRANT OF REFUGEE STATUS

[9] The officer's decision to cease to recognise the appellant as a refugee was based on the following factors.

[10] It will be recalled that the appellant was granted refugee status on 9 September 1997. At the time, he had claimed not to have an Iranian passport with him and his permanent residence was noted in a New Zealand Certificate of Identity.

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[11] On 13 June 1998, some nine months later, he left New Zealand on the Certificate of Identity and, travelling via Malaysia, re-entered Iran on an Iranian passport issued in his name. He left Iran legally, on the same passport, on 24 August 1998, returning to New Zealand via Turkey. He re-entered New Zealand on his Certificate of Identity on 12 September 1998.

[12] At Auckland airport, the appellant was searched and questioned about his travel. He told Customs, and then the New Zealand Police, that he had returned to Iran to see his ailing mother. In order to get out of Iran again, he had been forced by his 'agent' to take part in the assassination of a government official.

[13] Interviewed by the police again on 6 October 1998, the appellant stated that he had not, in fact, been involved in any assassination and said that he had invented this out of fear that he would be returned to Iran.

[14] Asked to explain date-stamps in his Iranian passport for Turkey (1998), Iran (1995 and 1998), Malaysia (1995) and Singapore (1995), the appellant stated that they were false entries, inserted by an 'agent' in Iran to make the passport appear well-travelled.

[15] In early 2004, the appellant applied for, and was issued, a new Iranian passport by the Iranian Embassy in New Zealand. He used that passport to return to Iran on 8 May 2004 to visit his dying father, returning to New Zealand on 2 August 2004, three months later.

THE ISSUE OF THE NOTICE

[16] The Notice, issued on 18 November 2005, raised the following concerns:

- (a) The passport obtained by the appellant from the Embassy in early 2004 recorded that he had originally departed from Iran in October 1995 lawfully, through Mehrabad airport. In contrast, his refugee claim had stated that he left illegally, by mule, over the border to Turkey.
- (b) In applying for refugee status, the appellant claimed not to have left Iran before coming to New Zealand in 1995, yet the stamps in his

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passport indicate that he travelled to Malaysia and Singapore in September 1995.

- (c) After gaining refugee status, the appellant returned to Iran legally on 15 June 1998, using a genuinely-issued Iranian passport and then departed on it, on 24 August 1998.
- (d) The appellant then returned to Iran for a second time, from May to August 2004, this time travelling on a further Iranian passport, obtained since the expiry of his first passport.

[17] According to the Notice, these concerns indicated that the appellant may not, in fact, have been of any interest to the Iranian authorities and that his refugee claim may have been procured by fraud.

[18] The appellant was offered the opportunity to be interviewed in respect of the Notice but, apparently on the advice of his solicitor, he declined. Instead, he submitted a written statement.

[19] The appellant's refugee status was cancelled in a decision dated 30 October 2006, leading to the present appeal.

THE CASE FOR THE DEPARTMENT

[20] For the Department, evidence was given by a refugee status officer, Wayne Newth and by a document examiner, Patricia James.

Evidence of Wayne Newth

[21] Mr Newth confirms the issue of the Notice to the appellant, his rejection of the invitation to attend an interview and the decision to cease to recognise the appellant as a refugee.

[22] Mr Newth also states that the appellant was first served with a Notice in 2001. That Notice was not pursued by the Department, however, and it was deemed appropriate to issue the fresh Notice in November 2005.

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Evidence of Patricia James

[23] Ms James is a document examiner with the New Zealand Police. At the request of the Department, she examined the passport which the appellant used to enter and leave Iran in 1998. She confirms the contents of her report, dated 10 December 1998, in which she concluded that the passport appears genuine, as do the stamps therein. Without a specimen passport and “extensive specimen material” by way of stamps, for comparison, she cannot be more definitive. She advises that the stamps were subjected to non-invasive testing, to try to determine the sequence from the overlapping, but no definitive results were obtained.

Documents produced by the Department

[24] The Department also submits:

- (a) A two-page analysis by an immigration officer of the stamps in the 1995 passport.
- (b) Selected translations from the website of the Iranian Embassy, as to procedures for applying online for a passport.
- (c) Selected translations from the 2004 passport – notably of the entry recording “Last Exit: 02/06/77 [04/08/1998] from Mehrabad”.
- (d) Written Statement by Mark Westenra, an employee at the New Zealand Embassy in Ankara, Turkey. Mr Westenra advises that the Embassy has no record of the appellant’s visit to it in 1998 and that, in the intervening period, the personnel at the Embassy have changed.
- (e) An email dated 12 April 2007 from Bernard Maritz, Immigration Manager at Compliance Operations, Immigration New Zealand, advising that the stamps in the 1995 passport appear to him to be genuine but, because of their age and the lack of specimen samples for comparison, no definitive answer is possible. Further, Mr Maritz notes the impossibility of obtaining information from the authorities in the countries mentioned in the stamps, due to the passage of time.

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- (f) An extract from a paper presented by officials of Citizenship and Immigration Canada, delivered at a conference on Iran in Toronto on 24 February 1998 (NZRS Library reference IRN/98/62) on the exit and entry procedures at Mehrabad airport.

THE CASE FOR THE APPELLANT

[25] The account which follows is a summary of the evidence given by the appellant at the cancellation appeal hearing. It is assessed later.

[26] The appellant does not resile from his refugee claim and does not accept that the concerns raised by the Department in its Notice justify a finding that his refugee status may have been procured by fraud. He maintains that his refugee status was not procured by fraud.

[27] According to the appellant, he did not have his 1995 Iranian passport with him when he came to New Zealand in 1998, because he was compelled to leave it behind at the family home in Esfahan when he fled the country. He left, he maintains, illegally by mule across the border into Turkey.

[28] In mid-1998, the appellant learned from his family by telephone that his mother was dying. Determined to return to see her, he arranged for his family to send him his passport by post. Before they sent it to him, however, they took it to the same 'agent' who had helped him to escape in 1998 and had false stamps put in it. This was necessary, or otherwise the empty passport would appear suspicious on his return.

[29] The 'agent' also told the appellant, through his family, on which day to travel, so that he could arrange for a particular official to be on duty at the airport to facilitate the appellant's entry. The 'agent's' fee was met by the appellant's father.

[30] The appellant duly travelled to Iran and had no difficulty in locating the 'safe' official, who let him pass through. He arrived home in Esfahan only a few hours before his mother died.

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[31] Following her death, the appellant considered it was too risky to remain in Esfahan and went to Tehran, where he waited until August, when the 'agent' told him it was safe for him to depart again by air.

[32] In Turkey, the appellant found that he needed a returning resident's visa for New Zealand, which he had not earlier realised. After some weeks of difficulty, he persuaded the New Zealand Embassy to issue him a visitor's visa.

[33] On his return to New Zealand, the appellant was detained at the airport, with the consequence that he invented the story of having been forced into an assassination plot in order to secure his safe exit from Iran. Following his retraction of that story, which the New Zealand Police accepted, they had no further interest in him.

[34] In 2004, the appellant learned that his father was very ill and likely to die. By this time, his Iranian passport had expired and so the appellant decided to apply to the Iranian Embassy in Wellington for a further passport.

[35] On learning that he would need to disclose whether or not he had left Iran legally, the appellant became concerned. His last departure from Iran had been with the assistance of the 'agent' to facilitate his passage through the airport in 1998. The appellant was unsure what steps the 'agent' had taken to achieve this and, thus, whether an official record of a legal departure had been created. Fearing that it would raise suspicions to claim a legal departure which the Embassy could not verify, the appellant decided to admit to the illegal departure in 1995, though not telling the Embassy that he had sought refugee status. He applied on that basis and paid the \$100 fine which was asked.

[36] When the appellant then received his passport from the Embassy, he found that it did record his 1998 departure as legal. Although he had paid the fine due by someone who had departed illegally, he elected not to pursue the matter, out of fear of rousing the suspicions of the Embassy staff.

[37] On using the passport in May 2004 to return to Iran, the appellant experienced no difficulties in entering Iran, or in leaving a few months later. His father died while he was in Iran.

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Evidence of AA

[38] *[Deleted]*

[39] *[Deleted]*

[40] *[Deleted]*

[41] *[Deleted]*

Documents produced by the appellant

[42] In support of his appeal, the appellant submits:

- (a) A letter dated 26 April 2007 from Linda Morrell, forensic document examiner, confirming her agreement with the view of Patricia James, that she cannot offer an opinion as to the genuineness of the stamps in the appellant's 1995 passport, given the lack of specimen samples.
- (b) A letter dated 2 April 2007 from Trevor Morley, of Morley Security & Investigation Group Ltd, also endorsing Ms James' view.
- (c) Letters of support from the appellant's wife (13 December 2006), his brother-in-law (12 December 2006), his parents-in-law (8 December 2006), a bank officer friend (12 December 2006) and his employer (14 December 2006).
- (d) A copy of the death certificate (and translation) recording the death of the appellant's mother on 16 June 1998.
- (e) A copy of the death certificate (and translation) recording the death of the appellant's father on 30 May 2004.
- (f) *[Deleted]*
- (g) A receipt dated [date given], from the Iranian Embassy to the appellant, for the sum of \$100, as the penalty for illegally departing Iran, sealed with the Embassy's seal and the signature of [an Embassy official, BB].

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Submissions

[43] Written submissions dated 1 March 2007 and 9 May 2007 have been submitted for the Department. Written submissions dated 18 April 2007 and 16 May 2007 have been submitted for the appellant.

THE FIRST LIMB – THE ASSESSMENT OF ‘MAY HAVE BEEN’

[44] It will be recalled that responsibility for establishing that a person’s refugee status “may have been” procured by fraud rests with the Department.

[45] Reduced to its essence, the Department’s case is that the appellant:

- (a) apparently travelled to Singapore and Malaysia between July and September 1995 (contradicting his claim to have been in Iran);
- (b) apparently left Iran legally, via Mehrabad airport in October 1995 (contradicting his claim to have left illegally by land, to Turkey);
- (c) returned to Iran in 1998 (inconsistent with his claim to be at risk of being persecuted there);
- (d) obtained a replacement passport in 2004 (inconsistent with the claim that the Iranian authorities have an adverse political view of him and wish to detain him); and
- (e) returned to Iran in 2004 (inconsistent with his claim to be at risk of being persecuted there).

[46] If the appellant’s explanations were unsupported by any corroborative evidence, it is likely that we would find that “may have been” was established by the concerns listed at (a) to (e) above. As it is, however, there is one item of evidence which, if genuine, strongly supports the view that the appellant’s account is true. We refer to the 2004 receipt from the Iranian Embassy.

[47] We will return shortly to the question of the genuineness of the receipt. First, it is necessary to place it in context.

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The receipt

[48] Assuming the receipt to be genuine, it establishes that, at the time he applied for his passport in 2004, the appellant:

- (a) did not know whether his exit from Iran in 1998 after his first return visit had been recorded as a legal departure (had he known, there is no apparent reason why he would not have told the Embassy this); and
- (b) had, in fact, departed illegally in 1995 (had he departed legally, there is no apparent reason why he would have told the Embassy otherwise).

[49] The receipt, if genuine, tends to establish that the appellant did leave illegally in 1995 and then left again in 1998 by methods which made him uncertain as to whether or not a 'legal' departure had been recorded.

[50] It would only have been necessary for the appellant to depart illegally in 1995 and then to employ an 'agent' to facilitate his departure in 1998, if he had, in fact, believed that he was being sought by the Iranian authorities. That suggests that his refugee claim was truthful and was not procured by fraud. Indeed, if the receipt is genuine, barring sheer speculation it is difficult to see how it could have come into being unless the appellant's background was as he claimed when seeking refugee status.

[51] As to its genuineness, Ms Szeto submits:

- (a) the receipt is a mass-produced one, which could have been purchased at any store;
- (b) the appellant would not consent to the Authority or Department approaching the Embassy to have it verified, even with the unique identifiers removed;
- (c) it was highly convenient that the appellant should have located the receipt "by accident" after some three years and only shortly before the appeal hearing.

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[52] We do not, with respect, accept Ms Szeto's submission that, for these reasons, the receipt should be given no weight.

[53] First, while the receipt is a pro forma one, the seal and signature of BB are not. Ms Szeto concedes that the seal is consistent with those issued by the Embassy.

[54] Second, the appellant's refusal to have anyone approach the Embassy needs to be seen in context. Initially, the appellant was content for such enquiry to be made. It was, in fact, Mr Petris who first raised the concern on the appellant's behalf that it was inappropriate to expect the appellant to allow contact with the Embassy. He also made the salient point that, without identifiers such as his name or the receipt number, the receipt would be incapable of verification in any event. To that might be added the difficulty that BB is no longer at the Embassy.

[55] Third, the appellant's production of the receipt shortly before the appeal hearing is not suspicious. It was not "by accident" that it was located, according to the appellant. Rather, he stated that he had a vague recollection of the receipt, which led him to look for it. Bearing in mind that:

- (a) the appellant was not served with the Notice until 18 November 2005;
- (b) his first lawyer seems to have advised him not to attend an interview with the Refugee Status Branch;
- (c) his first lawyer returned his instructions in late 2006, after which the appellant sought AA's assistance, which enabled him to instruct Mr Petris in early 2007; and
- (d) it was not until March 2007 that a hearing date was allocated for this appeal hearing;

the emergence of the receipt as the hearing approached is not difficult to comprehend.

[56] In summary, there is nothing about the receipt or its production which raises any serious concern, beyond mere speculation. It bears every appearance of

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being genuine and we are satisfied, in the absence of any evidence to the contrary, that it is appropriate to treat it as such.

The issue of the 2004 passport

[57] Given Ms Szeto's submissions on the point, we intend also to address the issue of the passport in 2004. Prima facie, it might be considered unusual for a country to issue a passport to a person being sought by its own law enforcement agencies.

[58] In terms of the Iranian authorities, however, we bear in mind the evidence of AA as to *[deleted]*.

[59] Further, the appellant's own evidence that in 2003 the Iranian authorities were urging expatriates to return home at that time, without fear of reprisals, is well-documented. See, for example, the Radio Free Europe/Radio Liberty report of 17 November 2003 (www.rferl.org/reports/iran-report/2003/11/46-171103.asp), which noted:

"TEHRAN KEEN FOR EXPATRIATES' RETURN

The Iranian government is eager for the return of expatriates. It recently signaled a renewed effort to encourage expatriates to return to Iran and invest in the country. One reason for the new emphasis is that Iran would like to benefit from the expertise of foreign-trained Iranians. Another reason is to counter the flood of money exiting the country. According to Ministry of Intelligence and Security and Ministry of Commerce documents cited in the reformist 'Aftab-i Yazd' daily, approximately \$2.5 billion a year leaves Iran, Radio Farda reported on 12 November. Almost \$31 billion has left the country since the 1979 revolution, Radio Farda reported, citing 'Iran'."

[60] We also bear in mind that the Iranian Embassy's website makes specific provision for persons who left the country illegally to apply for a passport – a point which the appellant says reassured him when he was debating whether to apply. His evidence is consistent with the United Kingdom Home Office *Country Report: Iran* (October 2003), which noted:

"6.105. Government attitudes to the question of returnees people who left illegally, failed asylum seekers etc seems to have become more pragmatic. In September 2002 the deputy foreign minister announced that Iranians who have obtained the citizenship of foreign countries with Iran's prior agreement can, once again, become Iranian citizens.... and further that the question of illegal exit had been resolved.

6.106. In the case of returned asylum seekers it has been reported by observers that they have seen no evidence that failed claimants, persons who have illegally

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exited Iran, or deportees face any significant problem upon return to Iran.... Several times in the recent past, senior government officials have declared that all Iranians living abroad are welcome to return home without fear of reprisal.... and the Foreign Ministry's Consular Department has confirmed that applying for asylum abroad is not an offence in Iran."

[61] In summary, we agree that the issue of a passport to a person might, in some cases, raise the possibility that the person was of no interest to the authorities of the issuing country. It is a factor to be weighed in the balance and every case will depend upon its own facts. Here, we are satisfied that the ability of the appellant to obtain a passport in 2004 was not suspicious and does not lend any weight to the assertion that his 1997 grant of refugee status may have been procured by fraud.

Other concerns

[62] Ms Szeto raises other concerns in her submissions, including:

- (a) the appellant's claim that the pre-November 1998 stamps in his 1995 passport are bogus;
- (b) the appellant's vagueness about the identity of his 'agent'; and
- (c) the fact that the appellant admits that, on his return to New Zealand in 1998, he initially concocted a story of having been involved in an assassination in Iran.

[63] For the most part, these further concerns fall by the wayside, given that the receipt tends to establish that the appellant *did* leave Iran illegally in 1995. We intend to refer briefly, however, to the question of the pre-November 1998 stamps in the appellant's passport.

[64] The forensic evidence from all three experts is equally equivocal. It is not possible to say with certainty whether the stamps are genuine or not. Nor is it even possible, according to Ms James, to determine the sequence in which they were put in the passport. The result is the inconclusive, but honest, view expressed by all three experts that the stamps may or may not be genuine.

[65] We find that the appellant is entitled to the benefit of the doubt. We reach that view at least in part because other aspects of his evidence, such as his claim that he told the Iranian Embassy of his illegal departure in 1995, have been

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corroborated by documentary evidence. But, more fundamentally, we remind ourselves that the responsibility is on the Department to establish that refugee status “may have been” procured by fraud. The nature of the document in question is such that the expert evidence is not able to go beyond the merely speculative.

[66] We need comment only briefly on the extraordinary foolishness of the appellant in inventing a tale of an assassination when he returned to New Zealand in 1998. We bear in mind that he had been stranded for some weeks on his own in Turkey, with the New Zealand Embassy seeming to be unco-operative in issuing him a returning resident’s visa. We accept that he may well have been in real fear that his permanent residence would be withheld from him, especially when he was given only a visitor’s visa. Without legal or other advice, the fact that he would invent a story to ground, if necessary, a further refugee claim, is not hard to comprehend, even if not condone. The reality is that the story was so naïve and ill-considered that it actually raised the prospect of *exclusion* from the Refugee Convention and was clearly not the product of a sophisticated mind.

Conclusion on the first limb – the assessment of ‘may have been’

[67] For the foregoing reasons, we find that the Department has not discharged the onus of establishing that the appellant’s refugee status may have been procured by fraud. On the evidence, the January 2004 receipt strongly corroborates the appellant’s claim to have left Iran illegally in 1995 and to have had his further departure in 1998 facilitated by an ‘agent’, as he claims. There is no explanation before us which would explain those facts, save that his original refugee claim was truthful. One can speculate of course but, as the Authority has stated on many occasions, mere speculation alone does not satisfy the ‘may have been’ requirement.

[68] The first limb of the test not being met, the second limb – whether the appellant is, today, a refugee – does not arise for consideration.

CONCLUSION

[69] For the foregoing reasons, we find:

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- (a) The evidence does not establish that the appellant's refugee status may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information; and
- (b) It follows that the question whether the Authority should cease to recognise the appellant as a refugee does not arise.

[70] The Authority does not cease to recognise the appellant as a refugee. The appeal is allowed.

"C M Treadwell"

C M Treadwell
Chairperson