ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF PLAINTIFF/APPLICANT PURSUANT TO SECTION 129T OF THE IMMIGRATION ACT 1987

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-003296

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	a decision under Section 129N of the Immigration Act 1987 (as amended)
BETWEEN	R Plaintiff/Applicant
AND	THE REFUGEE STATUS APPEALS AUTHORITY First Defendant
AND	THE ATTORNEY-GENERAL Second Defendant

Hearing: 14 October 2010

Appearances: C Curtis and I Uca for the Plaintiff/Applicant
A Longdill for Second Defendant

Judgment: 11 November 2010 at 2.00 p.m.

JUDGMENT OF VENNING J

This judgment was delivered by me on 11 November 2010 at 2.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar / Deputy Registrar

Date…………

Solicitors: Marshall Bird & Curtis, Auckland
Meredith Connell, Auckland

Introduction

[1] The applicant seeks to review the decision of the Refugee Status Appeals Authority (RSAA) declining his application to be recognised as a refugee.

Brief background

[2] The applicant is a 31 year old Tamil Muslim and a national of Sri Lanka. He arrived in New Zealand in December 2003 and sought refugee status the following month. The applicant claimed to fear persecution in Sri Lanka because of his involvement with a political organisation promoting the interests of the Muslim community.

[3] His claim for refugee status was declined by the Refugee Status Branch on 10 June 2004. His appeal against that decision was dismissed by the RSAA on 12 November 2007. The plaintiff then lodged an appeal with the Removal Review Authority. That appeal was dismissed on 29 August 2008.

[4] The applicant then filed a second refugee claim on 5 September 2008. On 19 February 2009 the Refugee Status Branch declined that claim. The applicant then appealed to the RSAA for the second time. On 17 March 2010 the RSAA declined the second appeal. It is that decision the applicant seeks to review.

Procedural issues

[5] The applicant's second claim to refugee status was declined by the Refugee Status Branch on the ground there was no jurisdiction to consider it because the circumstances in Sri Lanka had not changed to such an extent that the second claim was based on significantly different grounds: s 129J(1) Immigration Act 1987.

[6] However, when the applicant appealed to the RSAA it accepted that there had been a significant change in circumstances in Sri Lanka with the wholesale

destruction of the Liberation Tigers of Tamil Eelam (LTTE) by the Sri Lankan army in mid 2009 so that there was jurisdiction to consider the second claim.

[7] While the RSAA accepted there was jurisdiction for the second appeal, the findings of the RSAA in the first appeal as to credibility and fact were, however, still relevant. Section 129P(9) of the Act applies to credibility and facts found by the Authority in relation to a previous claim:

> 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 decision of the RSAA on the second appeal

[8] Section 129D of the Act requires the RSAA to act in "*a manner that is consistent with New Zealand's obligations under the Refugee Convention*." The RSAA addressed this requirement by first directing itself to art 1A(2) of the Refugee Convention which provides that a refugee is a person who:

> ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; ...

[9] The RSAA then identified the issues for consideration on the appeal were:

a) Objectively, on the facts as found, is there a real chance of the applicant being persecuted if returned to the country of his nationality?

and:

b) If yes, is there a Convention reason for that persecution?

[10] The RSAA heard from two medical practitioners (who had treated or assessed the applicant), the applicant, his brother and a friend Mr Ismail. The applicant was also represented by counsel who provided further material to the RSAA. As to the second claim, the RSAA noted that significant aspects of the

second claim were derived from the applicant's assertion his first claim was truthful. It reviewed the factual findings from the first appeal and concluded that it could rely on the findings of fact and credibility made in the first appeal. The RSAA considered the core of the second claim was the supposed disappearance of the applicant's parents in early 2009. Having heard from the witnesses and counsel, the RSAA concluded that the applicant's second claim was not credible either. It independently disbelieved the applicant and the factual witnesses who appeared before it to support the claim that his parents had disappeared.

[11] The RSAA then went on to consider, "objectively, on the facts as found" whether there was a real chance of the applicant being persecuted if he returned to Sri Lanka. The RSAA reviewed the information before it in relation to the position of Muslims in Sri Lanka before concluding:

> [107] In general, the picture emerging from the country information is that Muslims are not the subject of adverse interest by the Sri Lankan authorities, unless there is suspicion of pro-LTTE activity or support. The vast majority of Muslims do not support the LTTE, which evicted them from their homes in the north twenty years ago. Muslims face the inconvenience of checkpoints that all civilians face but, absent an adverse record, they are not detained or harassed. Any Muslims will, it is accepted, face challenges in reclaiming land in the north. Some may be unable to. Others, like the [applicant's] parents, will have forged new lives in the western and southern provinces and may elect to remain there.

[12] The RSAA then concluded there was no real chance of the applicant being persecuted if he returned to Sri Lanka and that he had no adverse profile with the authorities. As the RSAA concluded there was no real chance of the applicant being persecuted if he returned to Sri Lanka there was no need to consider the second issue. The RSAA dismissed the appeal.

The basis of the application for review

[13] This application is advanced primarily on the basis of the medical evidence led before the RSAA. The case for the applicant is essentially that he suffers poor mental health as confirmed by the doctors, and that his mental health explained his poor responses to questioning and the poor impression he made before the RSAA at the first appeal hearing which led to the adverse credibility findings against him.

Further, it is said that the medical evidence supported a finding that he had been subjected to torture in the past and inferentially, would be subject to torture if returned to Sri Lanka.

[14] Ms Curtis argued forcefully that the RSAA had not taken sufficient account of the medical evidence (if it had considered it at all).

[15] Ms Curtis referred extensively to passages of the doctors' evidence to support the submission that the evidence showed the applicant had given truthful evidence at the first appeal and had been tortured. The evidence confirmed he suffered from severe psychological impairment which would have affected his ability to give coherent and reliable evidence. She submitted that as that medical evidence had not been before the first Authority, the credibility finding of the first RSAA against the applicant should be looked at again in that light.

[16] The argument for the applicant was formulated into three causes of action. First, a failure to take into account relevant considerations. Ms Curtis submitted that, as in *Isak v Refugee Status Appeals Authority and Chief Executive of the Department of Labour* (where the application for review was allowed on the basis the RSAA did not have a relevant letter before it), the RSAA in this case failed to consider art 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, despite the view of the medical experts that the deterioration of the applicant's mental and emotional health was due to his past torture in Sri Lanka.[1]

[17] Next, the applicant says the RSAA's decision was unreasonable and substantially unfair because the Authority had not produced any evidence contrary to the medical evidence by the applicant. Ms Curtis referred to the guidance from the UNHCR Handbook on Procedures and Criteria for determining Refugee Status – January 1992 insofar as it related to dealing with mentally disturbed persons and submitted that the RSAA fell into error by failing to address the Handbook or to take into account that as a result of the medical evidence it would:

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1 *Isak v Refugee Status Appeals Authority and Chief Executive of the Department of Labour* [2010] NZAR 535.

> be necessary to lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant, or from his guardian, if one has been appointed. It may also be necessary to draw certain conclusions from the surrounding circumstances. ...

[18] Finally, the applicant says generally that the RSAA's decision was a breach of natural justice and in breach of the applicant's legitimate expectation to have his application properly considered. Ms Curtis submitted that neither the applicant nor his witnesses were told the expert medical evidence was not going to be accepted, in order for the applicant to provide further evidence. Alternatively, the RSAA should have turned its mind to consider the evidence given at the first appeal by the applicant in light of the evidence available at the second appeal.

[19] In summary, Ms Curtis submitted that the decision should be set aside to enable the applicant to have a further hearing where his evidence could be properly analysed, his mental health condition addressed per the UNHCR Handbook and a decision made after such analysis.

Decision

[20] This application is based on the alleged failure of the RSAA to take into account the medical evidence and particularly its relevance to, and explanation for, the applicant's demeanour and inadequate responses at the first RSAA hearing which had led to the adverse factual findings against the applicant at that first appeal.

[21] But contrary to the applicant's submissions, the RSAA did consider the submissions and medical evidence before it in some detail in the course of its decision. First it noted:

> [70] First, counsel points to the appellant's low IQ, exemplified by Mr Poole's assessment of him as "very dull". In contrast, the statement submitted on the first appeal is of such linguistic complexity that it could not have been written by him. Mr Poole was emphatic that the appellant does not have the intellect to have written it. It follows, Ms Uca argues, that the Authority was misled at the time of the first appeal and would have credited the appellant with far more ability than he actually has. Thus, she argues, its findings as to his credibility are unsafe.

> [71] Second, counsel submits that the appellant's mental state is one of chronic depression and post-traumatic stress disorder, to the point that his ability to give evidence is affected. His fragility is such that he cannot be told bad news, cannot live independently and cannot hold down employment. This too, Ms Uca says, would have affected his ability to give evidence coherently and impressively.
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> [72] The Authority has regard to counsel's submissions on this point not because the appellant has any right to challenge prior findings of fact or credibility (he has not) but because the concerns to which she has alluded appear to be ones which it ought to consider, in the context of the discretion it has to rely on its prior findings of fact or credibility.

Then towards the end of its decision, it confirmed it accepted the evidence that the applicant suffered from mental health issues:

> [94] Taking these concerns into account, the Authority finds that the appellant's second refugee claim is not credible. It is disbelieved. As the first appeal panel found, it is accepted that the appellant is a Tamil Muslim who spent much of his life in a refugee camp in the north-western region. To that, the Authority now also adds that it is accepted that he is of low IQ and is suffering mental health issues including depression and post-traumatic stress disorder of unspecified origin. His parents continue to reside in the Puttalam, Negombo and Kalpitya regions.

And later:

> [112] The Authority has particular regard to the mental state of the appellant. It is accepted that six and a half years of uncertain status in New Zealand have led to depression and trauma for him. Coupled with his low IQ, he will likely require careful support and monitoring, both on being further declined refugee status and in confronting the reality that he must return to Sri Lanka. It is equally evident, however, that he has such support from his family and his mental health workers. In Sri Lanka, he will have the care and guidance of his parents. His depression and trauma will improve once the uncertainty of his future is resolved.

[22] Significantly, while it accepted the applicant had mental health issues, the RSAA did not accept that those issues explained the adverse credibility findings that the first RSAA had made:

> [73] Notwithstanding counsel's submissions and the assistance of both Dr Wansbrough and Mr Poole, however, the Authority finds that the appellant's IQ and his mental state do not impugn the findings by the panel on the first appeal. It reaches this view for the reasons which follows.
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> [74] First, before his first appeal hearing, the appellant attended a lengthy Refugee Status Branch interview and would not have been taken by surprise by the questions on appeal. On appeal, his evidence was taken over four days. He was represented by experienced counsel who had acted for him

> since the first claim was lodged. The file was comprehensive at over 1,000 pages. His case included evidence from his brother (by letter) and his father (in person). The part of the decision which addressed his credibility exceeded seven pages. While it is accepted that the first appeal statement is too sophisticated to be his own work, that is not to say that he was unaware of it or that he was not closely consulted during its drafting or that he did not endorse it. Indeed, it is clear that he did.
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> [75] Second, the grounds on which the first appeal panel rejected his credibility are not ones for which either his IQ or his mental impairment were at issue. Significant aspects of the Authority's disbelief arose from concerns unrelated to his demeanour or presentation, such as:
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> (a) the absence of any country information confirming the existence of the new political party;
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> (b) the implausibility of him working as an active campaigner for a new Muslim political party – a finding reinforced (not undermined) by the assertion, now made, that he is of very low intellect only;
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> (c) the failure of the authorities to take any steps when the appellant immediately breached his obligation to report weekly to the police; and
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> (d) the significant discrepancies on the faces of the summonses and warrant.
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> [76] None of these arose from the appellant's incomprehension, confusion or poor presentation. Put simply, the credibility findings of the first appeal panel were not the result of the appellant's IQ or his mental state.

[23] The above passages provide a substantial answer to the applicant's case. The RSAA was aware of, and expressly considered the medical evidence. Further, it accepted the applicant could not have written a submission he had purported to write for the first appeal. But the RSAA noted that the applicant accepted or endorsed what was said in the submission. He said as much in his further statement of 23 June 2009.

[24] Insofar as the first cause of action alleges a failure to consider art 3 of the Convention Against Torture, Part 6A of the Act does not directly address that particular Convention. Section 129A confirms the object of the Part is to ensure New Zealand's obligations under the Refugee Convention are met. I accept the respondent's submission that, at present, if there is a suggestion that to deport a person would breach New Zealand's international obligations under the Convention Against Torture the issue falls to the Minister to determine. By contrast, s130 of the

Immigration Act 2009 provides expressly, (in addition to the possibility of being recognised as a refugee) for recognition as a protected person under the Convention Against Torture.

[25] For present purposes however, it may well be immaterial. The applicant says he was beaten first by the LTTE and then later, on several occasions, by the police. If that evidence was accepted by the RSAA and it also accepted the applicant had a well-founded fear of further beatings at the hands of the authorities on his return, he would have qualified as a refugee. However, the RSAA did not accept his account of the beatings and rejected the submission that he had a well-founded fear of further beatings if returned to Sri Lanka.

[26] Quite apart from rejecting the applicant and his supporting witnesses at the second appeal as not credible, the RSAA concluded at [109]:

> There is not a real chance of the appellant being persecuted if he returns to Sri Lanka. He has no adverse profile with the authorities. He will be able to reside with his parents and, as a Muslim, will not attract the attention of the authorities. It is accepted that he will be returning to Sri Lanka after many years overseas, but the reality is that the Sri Lankan diaspora is vast. As a returning Muslim national with no adverse record, he will be of no interest at the border.

[27] The medical evidence the applicant relies on cannot establish the applicant was beaten in Sri Lanka. At its highest, it was consistent with his evidence that he was mistreated. It confirms his symptoms were consistent with mis-treatment. However, as noted, against that, there were the adverse credibility findings against the applicant on both the first and second appeal, independently of each other, by two experienced appeal authorities both of whom provided reasons for disbelieving the applicant and his other supporting witnesses.

[28] The first cause of action is not made out.

[29] The second cause of action notes that the RSAA did not produce any medical evidence of its own and alleges that it was wrong to make adverse findings against the applicant without probative evidence to support those findings. But there was no need for the RSAA to obtain its own medical evidence. As noted above, it largely

accepted the medical evidence as to the applicant's mental state. Nor was there any obligation on the RSAA to obtain further evidence. The obligation was on the applicant to make out his case: s129P(1). The RSAA was not obliged to seek any further evidence: s129P(2)(b).

[30] To the extent the complaint is about the adverse credibility findings made by the first RSAA, it is answered by s129P(9) and the reasons noted above for the rejection of the applicant's account. To the extent that it is about the adverse findings by the second RSAA, the Authority set out its reasons at [82] to [93] of the decision. Nor does the applicant's reliance upon the UNHCR handbook assist him. The point of the recommendation in the handbook is to ensure the hearing authority takes any disability into account when considering the case of an applicant suffering from an adverse mental health condition. The RSAA was aware of the applicant's condition in this case. However, the applicant was able to engage in the interview process. He was also assisted by counsel throughout. The UNHCR handbook also suggests the Authority should consider information from others apart from the applicant. It is apparent the RSAA rejected not only the applicant's account, but also the evidence of his brother and friend. The RSAA was entitled to do so. The second ground of review fails.

[31] Despite the careful drafting to support a pleading of legitimate expectation and breach of natural justice, the final cause of action is essentially a repeat of the argument the RSAA did not take sufficient account of the medical evidence and that both RSAAs should have made different decisions on the facts. It is essentially a challenge to the substantive findings of both. The decision of the first RSAA is not before the Court for review. The finding of the second RSAA, that the applicant's account was not credible, was open to the Authority on the evidence before it. The final cause of action must also fail.

Result

[32] The application for review is dismissed.

Costs

[33] I reserve the issue of costs.

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Venning J