

**REFUGEE STATUS APPEALS AUTHORITY**  
**NEW ZEALAND**

**REFUGEE APPEAL NO 76413**

**AT AUCKLAND**

**Before:** A N Molloy (Member)

**Counsel for the Appellant:** R Chambers

**Appearing for the Department of Labour:** No Appearance

**Date of Decision:** 4 March 2010

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**DECISION**

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[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DoL), declining the grant of refugee status to the appellant, a citizen of Iraq and Turkey.

[2] This is the third time the appellant has appealed to this Authority. His first appeal was dismissed by a differently constituted panel of the Authority (the first Authority panel) in its decision in *Refugee Appeal No 74347* (13 January 2004).

[3] He then lodged a second appeal which was dismissed by the RSB in its decision dated 9 December 2005. He subsequently appealed from that decision to the Authority but then withdrew his appeal by notice in writing dated 10 April 2006.

[4] His third refugee application was lodged with the Refugee Status Branch (RSB) in April 2009. It was declined by the RSB on the basis that it had no jurisdiction to accept the appellant's third claim.

[5] This appeal turns upon whether the Authority has jurisdiction to determine the appellant's third claim for refugee status. The statutory framework against which that is to be assessed is set out below.

## **JURISDICTION: SECOND AND SUBSEQUENT CLAIMS FOR REFUGEE STATUS**

[6] Neither a refugee status officer nor the Authority has unlimited jurisdiction to receive and determine a further refugee claim after a previous claim has been finally determined. Section 129J (1) of the Immigration Act 1987 (the Act) sets out the circumstances in which a refugee status officer may receive and determine a second or subsequent claim:

“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.”

[7] Section 129O(1) of the Act provides a right of appeal from a decision made by a refugee status officer under s129J (1):

“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.”

[8] The Authority considered its statutory jurisdiction to hear and determine second and subsequent refugee claims in *Refugee Appeal No 75139* (18 November 2004). The Authority held that under ss129J(1) and 129O(1), jurisdiction is determined by comparing the previous claim for refugee status with the subsequent claim. This involves a comparison of the claims as asserted by the refugee claimant.

[9] In the absence of significantly different grounds in the respective claims, the Authority has no jurisdiction to consider the merits of the subsequent claim.

[10] The Authority therefore intends to consider the appellant’s previous 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.

[11] 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**

[12] In circumstances outlined in s129P(5) of the Act, the Authority has a discretion whether to offer the appellant the opportunity to attend an interview. The discretion arises where the appellant was interviewed by the RSB or, having been given an opportunity to be interviewed, failed to take that opportunity, and, if the Authority considers that the appeal is *prima facie* 'manifestly unfounded or clearly abusive'. The Authority's jurisdiction in this regard was examined in *Refugee Appeal No 70951/98* (5 August 1998).

[13] After setting out the procedural history of the appellant's case, the Authority will briefly outline the appellant's current claim for refugee status. That claim will then be assessed in light of ss129J(1) and 129O(1) and a conclusion reached about whether to dispense with an interview under s129P(5) of the Act. The Authority will then set out its conclusion as to whether it has jurisdiction to consider the appeal.

## **PROCEDURAL HISTORY OF THE APPELLANT'S CASE**

### The appellant's first claim for refugee status

[14] The appellant arrived in New Zealand in April 2001. He lodged his first claim for refugee status that month, claiming to be an Iraqi citizen named AA.

[15] For the purpose of his first claim, the appellant claimed he had a well-founded fear of being persecuted in Iraq because he was not a member of the ruling Ba'ath Party and because he was of Turkmen ethnicity. He also claimed that he had been tried *in absentia* and sentenced to a term of imprisonment for five years during the early 1990s after failing to report for duty as a military reservist. The appellant claimed that he was released from custody before he had served his entire sentence, on condition that he complied with a strict reporting regime. He also claimed that he would be sought by the Iraqi regime upon his return to Iraq because he had contravened the conditions upon which he was released from prison by leaving Iraq without permission and by entering Turkey unlawfully.

[16] The RSB published a decision in September 2002 declining his claim. It found that he was, in fact, BB, an Iraqi citizen who also held Turkish citizenship. The RSB found that he did not have a well-founded fear of being persecuted in Turkey. Accordingly, he could avail himself of the protection of that country and

was not a refugee.

#### The Authority's decision in respect of the appellant's first appeal

[17] The appellant appealed to this Authority for the first time in October 2002. He denied that he was a Turkish citizen, contrary to the finding of the RSB. He maintained that he was AA.

[18] In its decision in *Refugee Appeal No 74347* (13 January 2004), the first Authority panel dismissed the appellant's first appeal. The appellant was granted the benefit of the doubt with respect to his claim that he was not entitled to Turkish citizenship. His first appeal was accordingly considered upon the basis that his country of origin was Iraq and that he would not be able to avail himself of the protection of any other country.

[19] The first Authority panel noted that, by the time the appeal was heard, the former Ba'athist government under Sadaam Hussein had been removed by US-led coalition military forces, which invaded Iraq in early 2003. In that context, it found that the appellant was not at risk of serious harm from the former Ba'ath Party or its supporters, and that he was not at risk by reason of his ethnicity. The first Authority panel found that the appellant was not a refugee.

#### The appellant's second claim for refugee status

[20] In May 2005, the appellant lodged a second claim for refugee status, again under the name AA. He claimed to be a citizen of Iraq and maintained the account he had given for the purposes of his application for refugee status and throughout the subsequent first appeal to the Authority.

[21] In order to address the jurisdictional hurdle imposed by s129J (1) of the Act, the appellant claimed that there had been a significant change in circumstances in Iraq since the final determination of his first claim on 13 January 2004. He claimed that a dispute had arisen with local Kurds over the ownership of land occupied by his family. This had led to the death of his brother and to his father being beaten.

[22] The RSB issued a decision dated 9 December 2005 declining the appellant's second claim. While bearing in mind the decision of the first Authority panel to grant the appellant the benefit of the doubt in connection with this issue in *Refugee Appeal 74347* (13 January 2004), the RSB had additional information available to it and found as a fact that the appellant was, in addition to being an

Iraqi citizen, also a Turkish citizen.

[23] Prior to making its decision, the RSB invited the appellant to provide evidence that he faced any difficulties in Turkey. He did not produce any evidence to that effect. Significantly, he made no reference to any of the matters upon which he now relies for the purposes of his third claim for refugee status.

[24] The RSB declined the appellant's second application for refugee status. It found for the second time that the appellant was able to avail himself of the protection of the Turkish state. For that reason, the appellant was found not to be in need of surrogate protection and therefore he was not a refugee.

#### The appellant's second appeal to the Authority

[25] The appellant lodged an appeal to this Authority for the second time in December 2005. However, he subsequently withdrew his application by written notice of his intention to that effect on 11 April 2006.

[26] The appellant's second claim for refugee status was therefore finally determined by the RSB in its decision dated 9 December 2005.

#### **THE APPELLANT'S THIRD CLAIM**

[27] The appellant lodged a further claim for refugee status with the RSB on 27 April 2009. He did so under the name BB, and disclosed that he does indeed have the right of residence in both Iraq and Turkey.

[28] For the purposes of his third claim, the appellant repeats much of what he claimed for the purposes of his first and second refugee claims.

[29] The appellant has added additional elements to his claim. He claims that he fled to Turkey from Iraq during the early 1990s in order to avoid military service obligations. After making his way to Istanbul, where he registered with the United Nations High Commission for Refugees (UNHCR), the appellant says that he was recognised as a refugee by the Turkish government in early 1991.

[30] The appellant then came into contact with members of the Turkish national intelligence organisation (MIT). They informed the appellant that they would help him obtain Turkish citizenship if he undertook work for them to gather information about members of a Kurdish separatist organisation, the PKK.

[31] From that time, the appellant began to regularly travel to Kurdish areas to gather intelligence for the Turkish authorities. In return, the MIT assisted him with entrance to university and with some of his study costs. The appellant was granted Turkish citizenship in late 1991. He received a national identity card.

[32] The appellant continued to gather information for the MIT until 2000, when he decided to leave Turkey. By that time, he was in his final year at university. He obtained a genuine Turkish passport toward the end of 2000, and obtained a visa to come to New Zealand, ostensibly to conduct academic research.

[33] The appellant now claims that if he were to return to Turkey he would be detained, tortured and killed by the MIT, effectively because he reneged on his agreement to provide them ongoing assistance.

[34] With respect to Iraq, the appellant repeats his earlier claim that he and his family are at risk because they are of Turkmen ethnicity from Kirkuk, where they would be at risk of being persecuted by the Kurdish community.

### **COMMUNICATIONS BETWEEN THE AUTHORITY AND THE APPELLANT**

[35] The Authority formed the preliminary view that the appellant's third appeal was *prima facie* 'manifestly unfounded or clearly abusive' because it did not meet the jurisdictional threshold for second or subsequent claims. That view, and the basis upon which it had been formed, was set out in a letter dated 9 February 2010 from the Authority's Secretariat to counsel for the appellant. The letter noted that the appellant had been interviewed by the RSB in respect of his current application for refugee status, and continued:

#### "The Authority's preliminary view

The appellant's previous claim was finally determined on 9 December 2005.

With respect to the appellant's claim to be at risk of being persecuted in Turkey, all of the circumstances which he now seeks to rely upon existed at the time his previous appeal was finally determined on 9 December 2005.

With respect to the appellant's claim to be at risk of being persecuted in Iraq, there does not appear to be any change in circumstances in Iraq such that the appellant's claim is based on significantly different grounds to his previous claim.

It is therefore the Authority's preliminary view that the appellant does not satisfy the statutory criteria for the acceptance for consideration of a subsequent refugee claim under ss 129J and 129O of the Act."

[36] The Secretariat's letter, dated 9 February 2010, reminded counsel that the appellant bears the responsibility for establishing his refugee claim 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* [2003] NZAR 647 (CA)).

[37] Notice was also given that, unless the Authority was persuaded otherwise, it could consider and determine the appeal pursuant to s129P(5) (a) and (b) of the Act, without giving the appellant an opportunity of attending a further interview. Reference was also made to *Refugee Appeal No 70951* (5 August 1998).

[38] The appellant was invited to provide the Authority with submissions and/or evidence to address these issues by Wednesday, 23 February 2010. The appellant did not respond within that time frame.

[39] The Authority notes that the appellant has not provided any submissions, evidence or country information to support his claim that, since the final determination of his previous claim for refugee status, circumstances in Turkey or Iraq have changed to such an extent that his further claim is based on significantly different grounds to his previous claim.

### **CONCLUSION AS TO WHETHER TO DISPENSE WITH AN INTERVIEW**

[40] For reasons which will become apparent, the Authority finds that the appellant's second appeal is *prima facie* 'manifestly unfounded or clearly abusive'.

[41] As the appellant was interviewed by a refugee status officer on 15 July 2009 in the course of the determination of his third refugee claim, the Authority finds that it is appropriate to determine this 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.

### **THE JURISDICTIONAL THRESHOLD**

#### **Comparison of claims made**

[42] As noted above, for the purposes of his third claim, the appellant repeats his earlier claim that he is at risk of being persecuted in Iraq because he is of Turkmen

ethnicity from Kirkuk, where he would be at risk of being persecuted by the Kurdish community. With respect to his claim that he is at risk of being persecuted in Turkey, he now claims that if he were to return to Turkey he would be detained, tortured and killed by the MIT, effectively because he reneged on his agreement to provide assistance by leaving Turkey in 2000.

[43] Comparing the appellant's third claim for refugee status with his previous claims, and taking into account all of the material available to it, the Authority finds that there is no significant difference in the grounds upon which the appellant's current and his previous claims are based with respect to Iraq. The short point is that the decision of the Authority in respect of his first appeal has already determined that the appellant does not have a well-founded fear of being persecuted in Iraq on account of his Turkmen ethnicity. He advances no new information (and the Authority is unaware of any itself) since that determination which would amount to changed circumstances. The claimed changes in respect of Turkey fail to cross the threshold of establishing that "the further claim is based on significantly different grounds" because they are not *significantly* different, given that the appellant can reside in Iraq and the application of the second paragraph of Article 1A(2) of the Convention, which provides:

"In the case of a person who has more than one nationality... a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

[44] Further (if more need be said), the recent additional element of claimed difficulties with the MIT because of his departure from Turkey in 2000 is not a circumstance which has arisen since the determination of the appellant's previous appeals. It cannot therefore form the basis of a subsequent claim.

[45] The appellant has not established that, since the final determination of his previous claim on 9 December 2005, circumstances in Iraq or Turkey have changed to such an extent that his subsequent claim is based on significantly different grounds to his previous claim.

## **CONCLUSION**

[46] The appellant does not satisfy the requirements of ss129J and 129O(1) of the Act. It follows that the Authority has no jurisdiction to consider the appellant's third claim to be recognised as a refugee in New Zealand. The appeal is



dismissed.

"A N Molloy"  
A N Molloy  
Member