

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

AT AUCKLAND

Application No 76081

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: D Mansouri-Rad

Date of hearing: 10 March 2008

Date of decision: 31 March 2008

DECISION

[1] The respondent is an Iranian national aged in his late 30s. He was granted refugee status by the Authority in 1999. This is a decision in respect of an application made by a refugee status officer of the Department of Labour (DOL) that the Authority should 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), and 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] In considering such an application, there are two stages to the Authority’s enquiry. It must first determine whether the refugee status of the respondent “may have been” procured by “fraud, forgery, false or misleading representation, or concealment of relevant information”. For the sake of convenience, this is referred to in shorthand throughout the decision 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 Refugee Convention: *Refugee Appeal No 75392* (7 December 2005) [10]-[12].

The respondent's original claim for 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. His claim is recounted in more detail in *Refugee Appeal No 71344* (21 October 1999).

[6] In summary, the respondent came to New Zealand in mid-1996 and sought refugee status on his arrival. He claimed that in 1995 he had been arrested, detained and mistreated by the Iranian authorities for supposedly attending a political protest. He was charged with an offence and taken before the Revolutionary Court, which convicted him and imposed a suspended sentence of 10 years’ imprisonment upon him. He was also fined, prohibited from leaving Iran and prohibited from entering into various legal transactions.

[7] Soon after the imposition of that sentence the respondent allowed himself to be persuaded to participate in the distribution of pro-Monarchist pamphlets in

Tehran. Two of his accomplices were apprehended almost immediately. When the Iranian authorities then turned their attention towards the respondent, he fled across the border into Turkey. This was in mid-1995.

[8] From there the respondent made his way to New Zealand where he claimed that his predicament gave rise to a well-founded fear of being persecuted in Iran.

[9] After interviewing the respondent, a refugee status officer of the DOL issued a decision in February 1999 declining his application for refugee status. The refugee status officer found the respondent to be a credible witness but decided that he was not at risk of being persecuted.

[10] The respondent lodged an appeal which was heard by this Authority (differently constituted) on 21 October 1999. Like the refugee status officer, the Authority found the respondent to be a credible witness. Unlike the refugee status officer, the Authority decided that the respondent's claim was well-founded and granted him refugee status.

CANCELLATION PROCEEDINGS

[11] 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.

[12] The DOL lodged a Notice of Application for Determination Concerning Loss of Refugee Status ("the Notice") with the Authority on 22 June 2007. The DOL alleges in particular that the respondent:

- a) returned to Iran in 2005;
- b) was issued with a genuine Iranian passport in Iran on 4 July 2005;
- c) married in Iran in August 2005; and
- d) returned to Iran again in 2006.

[13] The DOL claims that the respondent's actions in returning to Iran in 2005 and 2006 indicate that his original claim to be at risk of being persecuted by the Iranian authorities was not truthful.

[14] The respondent was served with the Notice on 10 August 2007. He took

steps to oppose the application without delay, and instructed his lawyer to act on his behalf. The respondent lodged a written statement setting out his version of events under cover of a letter from Mr Mansouri-Rad to the Authority dated 15 November 2007.

[15] The respondent admits that he obtained a new Iranian passport in New Zealand in 2000, that he returned to Iran in 2005 and again in 2006, and that he married in Iran in 2005. However, he maintains that the claim which he advanced for the purposes of obtaining refugee status is true.

[16] At the hearing of the application the DOL presented its case first. However many of the concerns expressed by the DOL during the hearing arose out of explanations provided by the respondent in his statement. For that reason the respondent's position is outlined first.

THE CASE FOR THE RESPONDENT

[17] The respondent gave evidence in person at the hearing of the application and enlarged upon the explanations he had set out in his written statement. His account is summarised below.

[18] When the respondent left Iran in 1995, he left behind an elderly father. By the year 2000, the father's health had deteriorated markedly. He was by then in his mid-80s and had suffered a stroke. The respondent had not seen his father for five years and he feared that his father might die before they could meet again. At the same time, the respondent was also acutely aware that by returning to Iran he would be taking a significant risk.

[19] The respondent considered the possibility of meeting family members somewhere else outside Iran. However he had not yet been issued with a New Zealand passport and did not know when he would be able to get one. Nor was he able to use his Iranian passport, which had been left with his parents when he fled from Iran in 1995, and which had subsequently gone missing.

[20] After much deliberation the respondent decided to approach the Iranian Embassy in Wellington to try to obtain a new Iranian passport. After paying the appropriate fee and a fine for departing Iran illegally, the respondent was issued with his new Iranian passport in 2000. While this meant that he now had a means of seeking entry to Iran, the respondent did not realise at the time that the passport

did not contain the multiple-exit permit required for departure from Iran.

[21] Later in 2000, the respondent received his New Zealand passport. He used this to travel to Japan to see a relative. He also travelled to Malaysia and to Turkey where he had hoped to be able to meet family members, including his father. However, as his father's doctors did not permit the father to travel by air and the journey by bus from Iran would have been too onerous, the anticipated reunion did not eventuate.

[22] The respondent then spent some time in the United States. He worked for various relatives and was also able to help a sibling who had been allowed to travel to the United States in order to obtain medical treatment for her child (the respondent's niece) who was seriously ill.

[23] The respondent then returned to New Zealand in 2002. He remained here until 2005, when his father's deteriorating health forced the respondent to turn his mind once more to the prospect of returning to Iran.

[24] The respondent weighed his circumstances carefully. He took into account the fact that 10 years had passed since the entry of his conviction in Tehran. As far as he was aware the Iranian authorities had made no attempt to locate him since 1997. He also knew that there had been a degree of social change in Iran under President Khatami. There had been some talk of amnesty for Iranians who had gone abroad, and the respondent knew people who had returned to Iran without encountering difficulties. Underpinning all of this was the fact that by then the respondent had not seen his father for ten years, and was aware that the chances of seeing him again were receding.

[25] In all of the circumstances the respondent decided to return to Iran despite the risk which this might entail. He left New Zealand by air in early-mid 2005.

[26] When the respondent reached Tehran airport, his passport was taken from him by Iranian immigration officials. The respondent believes that his passport must have been earmarked for enquiry because the airport officials knew that he had some type of problem. However, they did not appear to know the details and did not ask him any questions about it. He was asked to complete a form ("the disembarkation card") and told to wait.

[27] Another uniformed person escorted the respondent to a room where he was questioned about his family and his background, where he had travelled from and why he had returned to Iran. The respondent was given an envelope marked

'confidential' and told to take it to the Ministry of Justice in order to locate his file.

[28] Before being allowed to leave the airport, the respondent was required to deposit the deeds to his father's house as a sort of bail bond to ensure that he endeavoured to resolve his problem.

[29] The officials also kept his Iranian passport. This meant that if he had tried to leave Iran unlawfully, he would have had to leave his passport behind. This would also have created difficulties for his family, whose house had been posted as security for his release.

[30] The respondent was then sent back and forward between various departments in the Ministry of Justice, in search of his file.

[31] Eventually the respondent found an official who was prepared to help. For an agreed sum, the official wrote a letter for the respondent stating that the respondent's case had been closed and archived, and that the relevant governmental office had no objection to his departure from Iran.

[32] The official then took the respondent to a different official in another part of the building and explained that the respondent had left Iran unlawfully. The respondent paid a fine and was issued with an official receipt ("the receipt"). His passport was not returned to him, but had been due to expire in any event. Armed with the letter the respondent applied for and was issued with a new Iranian passport while he was in Iran. The Authority has been provided with a copy of that passport, the original of which was brought to the hearing by the respondent. It contains an exit permit.

[33] Once his difficulties had been addressed, the respondent married the sister of a friend and returned to New Zealand. His wife followed some months later. The respondent returned to Iran again the following year (2006) after his father's health had deteriorated further. He took with him copies he had kept of the letter and the receipt in case he encountered further difficulties upon arriving in Tehran, however his return was uneventful and he did not need to produce them.

[34] The respondent's father died in late 2006, shortly after the respondent had returned to New Zealand. He has provided a copy of a memorial leaflet relating to his father's death. The respondent has also produced the disembarkation card together with copies of the letter and the receipt.

THE CASE FOR THE DOL

[35] Counsel for the DOL lodged opening submissions in writing dated 5 March 2008 and called one witness whose evidence is summarised below.

Evidence of Matthew Barlow

[36] Mr Barlow is a refugee status officer employed by the DOL. He was not the refugee status officer who compiled the original application, but inherited the file when that person left the DOL. Mr Barlow confirmed the content of his written statement dated 26 November 2007 filed in support of the application.

[37] Mr Barlow accepted that there was no overt element of fraud which could be attributed to the respondent. In essence, the DOL's position, as explained by Mr Barlow, is that the respondent's return to Iran in 2005 and 2006 renders implausible his original claim to have been at risk of being persecuted in Iran for reason of his political opinion. Mr Barlow stated that the respondent's explanations about his first return to Iran in 2005 contain elements of good fortune which are so remarkable as to be implausible. He referred to the respondent's claim to have been released by the airport authorities; his claim that he was sent to the Public Court to locate his file and his claim that he happened to find a person who would lie about the fate of his file.

[38] In that context, Mr Barlow believes that the respondent's ability to obtain a new Iranian passport, return to Iran without being imprisoned, and to marry in Iran are inconsistent with his original claim to have been in trouble with the Iranian authorities. He points out that, among the various conditions imposed upon the respondent by the Iranian Court when it suspended his prison sentence, was the requirement that the respondent could not leave Iran without permission.

[39] He asserts that if the respondent's account were true, he would expect the respondent's attempt to obtain a passport in New Zealand in 2000 to have created interest in the respondent among Iranian officials.

[40] He would also have expected the Iranian authorities to express interest in the respondent upon his return to Iran in 2005. Mr Barlow does not accept that the respondent would have been released at the airport in Tehran or that he would have been asked to locate his court file.

Application to examine documents

[41] During the week prior to the scheduled hearing of the application, the DOL (somewhat belatedly) sought leave to subject the letter, the receipt and the embarkation card to forensic analysis. The respondent did not object to that course of action provided that no undue delay was caused. However, by the time the oral evidence had been completed, the DOL decided that its case would not be advanced by pursuing this course. Its application for that direction was withdrawn.

[42] The DOL had also asked the Authority to direct the respondent to sign a privacy waiver to enable an approach to be made to the Iranian authorities to try to verify his account in connection with the letter and the receipt.

[43] The Authority's preliminary view was that it has no legal power to direct the respondent to waive his privacy. The Authority also expressed its concerns that such an approach may give rise to a *sur place* claim by the respondent if, by making the enquiry, renewed interest was sparked in him.

[44] Counsel were invited to make submissions on that point after the evidence had been completed. In the event, counsel for the DOL also withdrew the application for that direction. Accordingly, the Authority is not required to rule upon this point either.

Material received by the Authority

[45] The Authority received written submissions from the DOL under cover of a letter dated 5 March 2008 and from Mr Mansouri-Rad under cover of a letter dated 6 March 2008. On the day of the hearing, the respondent provided his New Zealand passport, copies of which were distributed to the DOL and the Authority.

[46] After the appeal interview Mr Mansouri-Rad forwarded additional country information with regard to the Revolutionary Court under cover of a letter dated 12 March 2008.

Production of a document by the DOL

[47] On 4 December 2007 then counsel for the DOL (not Mr Wells, who appeared at the hearing) wrote to the Authority to indicate that information was being sought about a particular aspect of the evidence given by the respondent for the purposes of his application for refugee status. During his cross-examination of Mr Barlow, Mr Mansouri-Rad elicited the fact that the information had been

obtained. Unfortunately, it had not been disclosed by the DOL. Mr Barlow did not have the information at hand, but candidly admitted that from memory the response to the DOL enquiry had been consistent with the respondent's evidence.

[48] If the information obtained by the DOL could have arguably undermined the evidence given by the respondent during his claim, it is inevitable that the DOL would have sought to rely upon that information. There would have been nothing wrong with pursuing such a course of action. However, it is disappointing that the information which came to light was not subsequently produced without prompting. Having alerted the respondent and the Authority to its quest, it might have been preferable had the DOL ensured that the information obtained was disclosed, notwithstanding the fact that it did not support the DOL case.

[49] The High Court has held that only the highest standards of fairness are appropriate in the refugee context; see *Khalon v Attorney General* [1996] NZLR 458, at 463. There is no reason why that principle should not apply in the context of cancellation applications.

[50] In expressing its disappointment, the Authority emphasises that it accepts Mr Barlow's suggestion that this was a simple oversight. Given that neither the refugee status officer who prepared the application nor counsel who wrote the letter dated 4 December 2007 appeared at the hearing of the application, it is easy to see how such an oversight could occur.

THE AUTHORITY'S FINDINGS

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

[51] 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]. Given that this is an inquisitorial proceeding it is not entirely appropriate to use terms such as the "burden" or "onus of proof".

[52] The Authority has previously observed that the term "may have been procured by fraud" is deliberately imprecise. Accordingly, 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].

[53] There is no doubt that the respondent's account indicates that he assumed a degree of risk by returning to Iran. Likewise, his account contains elements of happenstance and good fortune.

[54] However, the fact that a respondent is able to return to Iran, particularly after such a protracted period, is not of itself proof that his original claim for refugee status may have been procured by fraud; *Refugee Appeal No 76014* (30 May 2007) [79] *et seq.* For reasons set out below, the Authority finds that in this case any speculation which might arise simply by virtue of the respondent's return to Iran is amply countered by his explanations. In short, the evidence in this case does not rise above the level of mere suspicion.

[55] While the respondent was able to obtain an Iranian passport in New Zealand, the DOL does not dispute that the Iranian Embassy issues passports to Iranians living here. Nor was it disputed by the DOL that the tenure of President Khatami in Iran coincided with a softening in official attitudes towards people returning to Iran. The Authority has previously noted the existence of country information to the effect that in 2002-03 the Iranian authorities were encouraging expatriates to return without fear of reprisals; *Refugee Appeal No 75974* (25 September 2007) [59] *et seq.*

[56] It is also notable that, while the respondent obtained his Iranian passport in 2000, there is no evidence that he returned to Iran before 2005, by which time he had had the new passport for five years. The respondent claims that he did not return because he did not wish to take the risk of doing so. In all the circumstances of this case, the Authority accepts his explanation.

[57] Nor does the DOL dispute the respondent's evidence that his father was elderly, or that he had been unwell for some time when the respondent finally decided to return to Iran in 2005. By the time the respondent decided to take the risk in order to see his father again they had not seen each other for 10 years, and by that time the period for which the respondent's prison sentence had been suspended would have expired.

[58] The likely level of interest must also be placed in context. After the respondent arrived in New Zealand in 1996 he claimed that he was being pursued as a suspect in the distribution of political pamphlets. This was aggravated by the fact that his actions had occurred while he was subject to a suspended sentence in respect of a conviction entered in the Revolutionary Court. He claimed that the Iranian authorities continued to look for him now and then until approximately

1997. By the time the Authority considered the respondent's claim towards the end of 1999 it was already apparent that Iranian officials had expressed no overt interest in the respondent for more than two years.

[59] While the DOL claim that the respondent would surely have been earmarked as a person of concern by the Iranian authorities, the evidence he gave is that he *was* so earmarked. Something within the Iranian system alerted the officials at the airport to the fact that he was not to enter Iran without conditions. The respondent's evidence is that he was detained and questioned at the airport and fined for his unlawful departure. However, the airport officials had no means of knowing exactly why the respondent had been earmarked.

[60] It is also true that the respondent claimed he was allowed to leave the airport. However there was a level of interest displayed, in that his passport was confiscated and he was required to post house deeds as security before being released. This is not implausible.

[61] The respondent's claim that he was able to tidy up his affairs by bribing a corrupt official may also be "convenient" as the DOL claim. Again, however, it is not in itself implausible, and is consistent with country information considered by this Authority in earlier appeals such as *Refugee Appeal No 76014* (30 May 2007), [85] *et seq.*

Conclusion with respect to stage one

[62] Having heard the respondent's testimony and having considered his explanations in light of the evidence as a whole, the Authority finds the respondent to be a plausible, credible and consistent witness.

[63] In the absence of additional matters giving rise to concerns about the respondent's actions, the Authority is not satisfied that the grant of refugee status to the respondent "may have been procured" by fraud. The DOL has failed to meet that threshold in respect of this application.

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

[64] On the basis of the Authority's finding that refugee status was not procured by fraud, the second issue does not fall to be determined.

CONCLUSION

[65] The following determinations are made:

- a) The evidence does not establish that the refugee status of the respondent may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information.
- b) The question of whether it is appropriate to cease to recognise the respondent as a refugee does not arise.

[66] The application is therefore declined.

"A N Molloy"
A N Molloy
Member