

AT AUCKLAND

Appellant:	AC (Bangladesh)
Before:	D L Henare (Member)
Representative for the Appellant:	The appellant represented himself
Counsel for the Respondent:	No Appearance
Date of Hearing:	14 June 2011
Date of Decision:	25 August 2011

DECISION

INTRODUCTION

[1] AC (“the father”) is a national of Bangladesh. At the core of this, his third appeal, is whether he will be seriously harmed as a result of his profile with a political party in Bangladesh. The Tribunal finds that his claim lacks credibility and accordingly the appeal fails.

[2] This appeal had not been determined by the Refugee Status Appeals Authority (“RSAA”) by the time it was disestablished on 29 November 2010. The Immigration Act 2009 (“the 2009 Act”) came into force on that date and the appeal therefore transferred to this Tribunal under the transition provisions of that Act.

[3] On 7 May 2011, the appellant lodged a protected person claim, as he was entitled to do under the 2009 Act, and elected to have this claim heard by the Tribunal at the same time as his refugee appeal. He relies upon the same evidence, heard contemporaneously, for both determinations.

Background to Claims

[4] The appellant arrived in New Zealand with his then wife and two dependent sons on 27 February 2002, having come here alone on a business trip in late 2001. They were granted visitors' permits. In July 2002, he applied for a Long Term Business visa but his application was declined on 27 February 2004, on the basis that he had provided false information regarding his business. His second application for a Business visa was declined on 15 July 2004.

[5] On 23 July 2004, the family were granted visitors' permits. On 3 October 2004, the appellant's wife returned to Bangladesh with their New Zealand-born child, and divorced him. The appellant later married a New Zealand woman. He applied for a work permit under the partnership policy but his application was declined in March 2005 on the basis that the marriage was not genuine or stable. A month later he lodged an appeal with the Minister of Immigration which was declined on 20 July 2005. Two weeks later, he lodged his first application for refugee status.

[6] The applicants in the first claim were the father and his two eldest sons. The claim was lodged with the Refugee Status Branch ("RSB") on 1 August 2005 and declined on 18 November 2005. The appellants' first appeal was declined by the RSAA on 30 May 2006; see *Refugee Appeal Nos 75768, 75776 and 75777* (30 May 2006).

[7] The same applicants lodged a second claim on 8 June 2006. It was declined by the RSB on 3 August 2006. Their second appeals were declined by the RSAA (differently constituted) on 31 October 2006; see *Refugee Appeal Nos 75937, 75938 and 75939* (31 October 2006).

[8] The third claim was lodged by the father alone on 14 June 2010. The claim was declined by the RSB on 25 August 2010. He lodged his third appeal with the RSAA on 29 August 2010.

JURISDICTION TO HEAR SUBSEQUENT REFUGEE APPEALS

[9] The Tribunal must first address whether it has jurisdiction to consider the subsequent refugee appeal.

[10] The refugee and protection officer refused to consider the appellant's third

claim on the grounds that circumstances in Bangladesh have not changed to such an extent that the appellant's subsequent claim is based on significantly different grounds to his previous claim. On that basis, and by virtue of section 448(7) of the 2009 Act, section 448(8) applies. It provides that:

"The Tribunal must determine the appeal in accordance with the relevant provisions of the former Act and, for that purpose, the Tribunal, in addition to its powers and functions under this Act, is deemed to have all the necessary powers and functions of the Refugee Status Appeals Authority. However, if the Tribunal determines that the subsequent claim should be considered, the Tribunal must then determine the matter as if it were an appeal to the Tribunal under section 194(1)(c) of this Act."

[11] The Tribunal now turns to consider the relevant provisions of the 1987 Immigration Act ("the 1987 Act").

[12] The jurisdiction of the RSAA in relation to second or subsequent claims was set out in section 129O(1) of the 1987 Act:

"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."

[13] The RSAA had found that jurisdiction to hear and determine subsequent refugee claims under s129O(1) of the 1987 Act is determined by comparing the previous claim to refugee status against the subsequent one. This involves a comparison of claims as asserted by the refugee claimant. In the absence of a significant difference in the grounds upon which the claims are based, there is no jurisdiction to consider the subsequent claim: *Refugee Appeal No 75139* (18 November 2004).

[14] Conversely, where jurisdiction is established, the merits of the subsequent claim will be heard.

[15] The Tribunal turns first to consider whether there has been a significant change in circumstances such that the appellant's claim is based on significantly different grounds, since the RSAA declined his second appeal on 31 October 2006.

The First Claim for Refugee Status

[16] The first claim, in 2005, was based on allegations of attacks by Bangladesh

National Party (“BNP”) supporters against the father, as the organising secretary of a branch of the Awami League political party (“AL”). Specifically:

- (a) in 2000 he was attacked at an AL rally;
- (b) in September 2001 he was injured by a petrol bomb thrown by BNP supporters while at a rally;
- (c) in October 2001 a BNP supporter aimed a pistol at him outside a polling booth, and two days later his wife was attacked; and
- (d) at the end of 2001, fearing for his safety, he went into hiding before travelling to New Zealand on a business trip. In February 2002, he returned here with his family.

[17] The RSAA rejected the appellant’s first claim “in its entirety” (para [52]), and specifically rejected his claim to have been targeted by BNP supporters (para [40]). It found that his evidence in connection with core aspects of his account was contradictory; his actions at times undermined his claim to be at risk from BNP supporters and documents he produced in supposed corroboration of his account were vague, self-serving and contrived. The cumulative effect of all of these concerns led the RSAA to conclude that “nothing the father says is able to be believed” (para [52]).

[18] The RSAA also found that the letters he produced to support the claim were contrived. The father’s business trip to New Zealand at the end of 2000 was found by the RSAA to be a device to bring his family here.

The Second Claim for Refugee Status

[19] The second claim asserted that an attempt was made to kidnap the youngest son, not long after his return to Bangladesh, by BNP supporters. Additionally, a certain group believed the appellant and his two eldest sons had converted to Christianity in New Zealand and declared them to be an enemy of Islam, and, in consequence, at risk of death. The RSAA found that, as asserted, this additional circumstance was a “significantly different ground” in the appellant’s home country, and found that it had jurisdiction to consider the appellant’s second appeal.

[20] The RSAA rejected the claim that the appellant’s son had been the subject of an attempted kidnap. It referred to the implausible timing of the attempt, which

came four and a half years after the appellant came to New Zealand, yet little more than a week after the decision of the first panel of the RSAA declining the appellant's first refugee appeal. It also identified inconsistencies in respect of core aspects of the appellant's evidence and drew an adverse inference in connection with the belated production of documentary evidence. The RSAA placed no weight on the documents submitted and found the appellant's account "clearly bogus". It relied on the credibility findings in the first claim and found [at 18]:

"There is nothing about the appellant's second claim which makes the Authority believe the evidence that the previous Authority rejected regarding his involvement with the Awami League. Indeed, the flaws in the appellant's evidence reinforce the finding of the first Authority."

[21] The RSAA found the second claim to be "devoid of credible content" and dismissed the appeal.

The Third Claim for Refugee Status

[22] The appellant's third claim may be summarised as follows:

- (a) in February 2010, the appellant's two eldest sons, who had been living with him in New Zealand, returned to Bangladesh;
- (b) on 20 April 2010, three men approached the sons and asked when their father would return to Bangladesh. The manner of the men was intimidating;
- (c) on 5 May 2010, the same men approached them again and repeated their inquiries about their father. The sons were frightened by their aggressive manner; and
- (d) the appellant believes these men are his former BNP rivals dating back to his conflicts with them in 2000.

[23] Fearing for the safety of his family, the appellant arranged for his former wife to take their sons out of Bangladesh and enrol them in a school in India. His former wife took the sons to Darjeeling, India. She subsequently returned to Bangladesh. The youngest son arrived back in New Zealand in December 2010.

[24] Central to the appellant's claim is that the father's BNP rivals have not given up on him. He asserts that the harassment of his sons by these persons caused the decision to send them to India.

JURISDICTION TO DETERMINE THE THIRD APPEAL

[25] Comparing the appellant's claims for refugee status (as asserted) the Tribunal finds that the return of his sons to Bangladesh and the harassment of them by BNP supporters, amount to a change in circumstances in Bangladesh such that the appellant's third claim is based on significantly different grounds. These (alleged) circumstances arose since the final determination of the appellant's previous appeal in October 2006. Accordingly, the Tribunal finds that it has jurisdiction to determine the merits of the appellant's third refugee appeal.

[26] By virtue of section 448(8) of the 2009 Act, the Tribunal must now determine the matter as if it were an appeal to the Tribunal under section 194 (1) (c). The Tribunal will therefore consider whether the appellant is recognised as:

- (a) a refugee under the Refugee Convention (section 129); and
- (b) as a protected person under the Convention Against Torture ("CAT") (section 130); and
- (c) as a protected person under the International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[27] The Tribunal will first outline the account presented by the appellant on appeal. It will then assess the appellant's credibility before making the findings of fact upon which the appeal is determined. The Tribunal will then outline the legislation governing such appeals before assessing the appellant's claim for refugee status and/or protected person status.

THE APPELLANT'S CASE

[28] The appellant maintains that the accounts he has previously advanced are true. His further account is summarised below. Its credibility will be assessed later.

[29] The appellant claims that he will continue to be at risk from his BNP rivals as a result of his past political profile in Bangladesh.

Past Political Profile

[30] The appellant explained that he had developed his interest in politics and

joined the AL in the late 70s when he was at university in Dhaka. He acquired a political profile in the 90s when he was appointed to an organisational role in the AL. In consequence of this political profile, both he and his family had suffered threats and attacks by certain BNP supporters.

[31] In 2000, when he participated in a certain AL rally, he was attacked by BNP supporters. He recognised a number of them as locals from his district in Dhaka and also knew them by name. Thereafter, he received threats from them.

[32] In 2001, in the lead up to the general elections that year, the appellant's AL activities increased. He experienced two major attacks in September and October. On the first occasion, he suffered injuries when they threw an explosive at him. On the second occasion, he was outside a polling booth and one of the BNP supporters aimed a gun at him. He ran away and avoided being shot. His former wife was subsequently attacked at the family's home by BNP supporters who looked for him.

[33] In 2006, BNP supporters had attempted to kidnap the appellant's youngest son. The *Jamaat-e-Islami* had claimed that the appellant and his sons had converted to Christianity in New Zealand and declared them to be enemies of Islam. They had incited hatred of the appellant and wanted to kill him.

[34] The appellant explained that his BNP political rivals have been and continue to be at the forefront of all the clashes against him or his family. Three of his political rivals were involved in the harassment of his sons in 2010. As a result, the appellant claims that he continues to be at risk from these BNP supporters whom he describes as "BNP gang members".

[35] The appellant has not taken an active interest in politics in Bangladesh since he came to New Zealand. However, he had maintained contact with a former co-worker who also knew of the BNP gang members until December 2010.

The Appellant's Children

[36] The appellant has five children. His three sons aged 18, 13 and 7 years were born to his first wife. He has two daughters aged 5 and 4 years from his second marriage which has also been dissolved. The two eldest sons were born in Bangladesh and the three younger children are New Zealand-born.

[37] In February 2010, the appellant's two eldest sons (who lived with him)

returned to Bangladesh after he had tried 'all the channels to get permanent residency' here. The appellant remained in New Zealand to resolve matters relating to his daughters.

[38] Upon their return to Bangladesh, the sons stayed variously with their mother who had remarried, but mainly with their maternal grandfather. They were enrolled in a school in Dhaka.

Harassment of the Eldest Sons in Bangladesh

[39] On 20 April 2010, the sons were on their way home, when they were approached by three men who enquired whether their father had returned with them. The sons were scared because the men were aggressive in their questioning. The men did not say who they were or give any reason for their enquiry.

[40] The sons informed the father that "some people are asking after you and looking for you". The father did not tell them that he suspected the men to be his BNP rivals because he did not want to frighten them.

[41] On 5 May 2010, the sons were approached again by the same men at a bus station next to their school. The men enquired in an angry manner about the whereabouts of their father. Again, the men did not disclose who they were.

[42] The sons told the father of this second approach by the same three men. The father asked his sons to provide descriptions of the men. The sons told him that one had a beard, another, a round face and the third had big eyes. The father told his sons that he suspected they were his political rivals. The father named his rivals as AA, BB, CC, DD and EE. He believed the three men were part of this group.

[43] The appellant's former wife lodged a General Diary report or complaint to the local police on 8 May 2010 that:

"Some unknown persons appeared before my two sons and made lots of queries about their father, like where their father is now living, what their father is doing abroad and when their father will come back to Bangladesh etc. and threatened my sons in rude language and my sons became very much frightened. Seeing the attitude and mode of talking of these people whom my sons never saw before."

[44] The father contacted his elder brother and other family members who arranged a family meeting. The family decided it was unsafe for the sons to

continue their schooling in Bangladesh. Arrangements were made to send them to India.

[45] On 31 May 2010 the appellant's former wife took the sons to Darjeeling, India. The father explained that the youngest son was taken to India for two reasons. First, as a result of the attempted kidnap of him in 2006 by BNP supporters, the family had decided not to enrol him in school. Second, he and his stepbrother (from his mother's second marriage) used to fight each other. This behaviour resulted in the stepfather taking strong disciplinary action against the youngest son.

[46] The wife enrolled the boys in school, arranged rental accommodation for them and returned to Bangladesh. The youngest son returned two or three months later to Bangladesh. In December 2010, he came to New Zealand to live with the father, due to family difficulties arising from the remarriage of his mother and his ill health.

[47] In December 2010, the eldest sons experienced an "incident of terrorism" by persons who had entered their rooms at night. These persons stole money and personal items from the sons.

[48] In May 2011, the eldest sons returned to Bangladesh to renew their visa. They stayed with their maternal grandfather for two months until their return to school in India.

Material Received

[49] In addition to the material provided by appellant to the RSB, he also submitted on appeal:

- (a) a letter dated 24 November 2010 from the appellant to the Tribunal advising that his sons had left Bangladesh for India due to his "political involvement"; that his political rivals had attacked his sons in India and that it is unsafe for him to return to Bangladesh;
- (b) a letter dated 8 June 2011 from the appellant to the Tribunal repeating the reasons for his sons' return from New Zealand to Bangladesh and their subsequent departure to India. The appellant referred to the circumstances which led to his youngest son's return to New Zealand (verbatim):

My younger son who is born New Zealand citizen also went to India with his brothers. As he has a long medical history his health did not permit him to stay there. It is to be mentioned that my ex-wife [name] married for a second time and have a kid from her second marriage. Both the kids fight each other at the end her present husband accused my son used to beat him up and some time tie him with rope and locked him in a room to cool down. Finding no other way I had to bring him to his own country.

- (c) a letter dated 8 June from the President of the Bangladeshi Community Tauranga Incorporated, stating that the appellant is “well known” to him, that he had moved his two sons to India and another son came to New Zealand because of his political problems with the BNP; and
- (d) a letter dated 16 June 2011 from the Director of a school in Darjeeling certifying that the two eldest sons of the appellant had enrolled there on 7 May 2010 and “they are attending as regular students”. He also records the passport details of the two sons, their address and the name of their guardian in Darjeeling.

ASSESSMENT OF THE APPEAL

[50] The appellant’s third claim is based upon his assertion that his former political rivals have once again come to light, and that they have advanced threats to him through his sons in Bangladesh.

[51] Previous appeal bodies have comprehensively rejected the appellant’s first and second appeals which were advanced on a similar basis. Two separate panels of the RSAA found that the appellant’s evidence could not be believed. He has advanced vague, self-serving and contrived evidence and testimony which was inconsistent in respect of core elements of his claims. The Authority specifically rejected his claim to have been targeted by political rivals and found that his account was “clearly bogus”.

[52] These findings are relevant because, under section 231 of the 2009 Act, the Tribunal is entitled to rely upon the findings of fact or credibility made by any appeals body in respect of any earlier appeal. The findings of the RSAA in respect of the appellant’s first and second appeals are robust and cogently expressed, and the Tribunal finds that it is appropriate to exercise its discretion to rely upon them.

[53] The Tribunal therefore rejects the appellant’s core account that his two

eldest sons were approached at all by his BNP political rivals and, as a result, either he or they are at risk. In reaching that conclusion the Tribunal bears in mind that the appellant is an unreliable witness who has consistently advanced false refugee claims over a period of six years. It draws further support for those conclusions from the following additional credibility concerns in relation to the appellant's third appeal.

[54] The appellant's account in general had an air of unreality. He said that BNP interest in him had been maintained by five BNP gang members, whom he knew by name. He could not adequately explain a sudden resurgence in interest in him when he has been absent from Bangladesh for nearly a decade. Likewise he was unable to explain why the BNP men in question knew that the boys they approached were his sons, nor how he could be so confident of their identity, given that they did not identify themselves to the sons.

[55] Despite the fact that the appellant specifically identified the men in question, the General Diary report that his former wife supposedly provided to the police referred to the men who approached the sons as "unknown persons". The Diary report does not mention that these persons are believed to be the appellant's BNP political rivals, it does not mention their names and it contains no description of the men as provided by the sons.

[56] The appellant's evidence was again inconsistent in respect of various aspects of his claim. For example, upon questioning from the Tribunal whether the BNP supporters had made any enquiries about the appellant during the four years between his second and third claims, the appellant first said that the men had approached his sister in a shopping area. But they had not done so "in an angry way". However he later changed his story and claimed that he did not know who had approached his sister.

[57] In his letter to the Tribunal dated 24 November 2010, the appellant stated that his political rivals had attacked "my sons in India too". However, when questioned by the Tribunal, he admitted that the incident that occurred when his sons were in India and was an isolated criminal act that had nothing to do with the BNP.

[58] In summary, the appellant's core claim is rejected. The Tribunal has not overlooked the documents provided by the appellant in reaching that conclusion. However, to the extent that the documents appear to support the appellant's claim, they cannot be relied upon for the reasons outlined. Further, while there is some

evidence that the appellant's sons may have been enrolled in a school in India, the Tribunal does not accept that this is for the reasons claimed by the appellant.

[59] The letter from the President of the Bangladeshi Community Incorporated in Tauranga contains a mere assertion that the appellant had political problems with the BNP. This assertion has been rejected in this appeal.

The facts as found

[60] The residual aspects of the appellant's claim that the Tribunal accepts are:

- (a) He is a national of Bangladesh;
- (b) He has five children of whom his three sons are from his first marriage and his daughters are from his second relationship; and
- (c) He departed Bangladesh in 2002 and he has been living in New Zealand for the past nine years.

THE REFUGEE CONVENTION

[61] Article 1A(2) of the Refugee Convention 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

[62] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

CONCLUSION ON REFUGEE STATUS

[63] The appellant's credibility is not accepted in respect of this subsequent claim. There is no credible evidence that the appellant is at risk of being persecuted or harmed in any way if he were to return to Bangladesh. The Tribunal finds that he does not have a well-founded fear of being persecuted in Bangladesh.

[64] Accordingly, the appellant's claim fails. The first principal issue is therefore answered in the negative. There is no need to consider the second issue.

THE CONVENTION AGAINST TORTURE

[65] Section 130(1) of the 2009 Act provides that:

"A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

[66] Section 130(5) of the 2009 Act provides that torture has the same meaning as in the Convention against Torture, article 1(1) of which states that torture is:

"...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[67] The appellant's claim under the Convention against Torture is based on the same factual matrix as that presented in respect of the refugee claim and appeal. The Tribunal finds that there are no substantial grounds for believing that he would be in danger of being subjected to torture if deported from New Zealand.

[68] For the foregoing reasons the appellant is not a protected person under section 130 of the 2009 Act and within the meaning of the Convention Against Torture.

THE ICCPR

[69] Section 131(1) of the 2009 Act provides that:

“A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.”

[70] The same analysis as referred to in the CAT claim above applies to this limb of his claim.

[71] Since the ICCPR claim is made on the same factual matrix as the other two claims, for the reasons set out above the Tribunal finds the appellant is not in danger of being subjected to cruel treatment and thus he is not a person to whom New Zealand owes protection obligations under the ICCPR and section 131 of the 2009 Act.

CONCLUSION

[72] For the foregoing reasons, the Tribunal finds that the appellant:

- (a) is not a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture;
- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[73] The appeal is dismissed.

“D L Henare”

D L Henare
Member

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D L Henare
Member