IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2011] NZIPT 800225**

AT AUCKLAND

Appellant:	**AC (Nepal)**
Before:	S A Aitchison (Member)
Counsel for the appellant:	No appearance
Counsel for the Department of Labour:	No appearance
Date of hearing:	7 June 2011
Date of decision:	30 September 2011

DECISION ON APPLICATION FOR REHEARING

Introduction

[1] This is an application for rehearing.

[2] The applicant is a national of Nepal who arrived in New Zealand in August 2009, and applied for refugee status on 8 April 2010. He was interviewed by a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL) on 17 May 2010, who issued a decision declining his application on 10 August 2010.

[3] The applicant exercised his right of appeal to the Tribunal by lodging a notice of appeal, and the Tribunal allocated the appeal a date of hearing. The applicant failed to appear before the Tribunal both on that date and on a subsequent hearing date, which followed a successful adjournment request. As a result, the Tribunal dismissed his appeal in its decision in *AB (Nepal*) [2011] NZIPT 800008.

[4] The applicant now applies to the Tribunal to rehear that appeal. This decision turns upon whether the Tribunal has jurisdiction to do so.

[5] In order to determine the matter, it is necessary, first, to set out the background and circumstances in which the appeal came to be finally determined by the Tribunal.

AB (Nepal) [2011] NZIPT 800008

[6] In its decision in *AB (Nepal)* [2011] NZIPT 800008, delivered on 22 June 2011, the Tribunal outlined the sequence of hearing dates set for the applicant's appeal and his failure to appear, as follows:

> "[4] The hearing of the appellant's appeal before the Tribunal was first scheduled for 13 May 2011. On 9 May 2011, the appellant requested an adjournment on the grounds that his grandfather had died in Nepal and he needed to observe cultural practices incompatible with attending the hearing. This adjournment was granted and a new hearing date fixed for 7 June 2011.
>
> [5] On the morning of the hearing of 7 June 2011, the Tribunal received a facsimile message from the appellant stating that his grandmother had also died in Nepal and that he was required to observe the same cultural practices as for his grandfather, that would be incompatible with attending the hearing. He added that, having learnt the news of his grandmother passing, he had fallen in the bath and burnt his lips. He found it hard to take food and to talk.
>
> [6] The same day, the Tribunal contacted the appellant by telephone and wrote to him advising him that an adjournment would not be granted without strong and cogently presented grounds. To support his application for an adjournment the Tribunal sought a copy of a death certificate for his grandmother. The appellant was granted leave of two weeks, until 15 June 2011, to submit this evidence to explain his non-appearance on 7 June 2011.
>
> [7] The Tribunal also advised the appellant that it may determine an appeal without an oral hearing where an appellant fails, without reasonable excuse, to attend a hearing. He was advised that, if the evidence requested by the Tribunal was provided, his non-attendance at the hearing on 7 June 2011 would be adequately explained and an adjournment to 24 June 2011 would be granted."

[7] The applicant failed to submit any evidence in support of the second adjournment application in the timeframe provided, namely, by 15 June 2011. On 16 June 2011, he telephoned the Tribunal and explained that he had obtained a death certificate for his grandmother which would be sent with someone travelling to New Zealand in the first week of July 2011.

[8] Section 234 (1) of the Immigration Act 2009 (the Act) expressly provides the Tribunal with the power to determine an appeal without a hearing if an appellant fails, without reasonable excuse, to attend a notified interview. In accordance with this provision, the Tribunal found that the applicant had provided no reasonable explanation for his failure to submit the requested information in time, nor any

reasons as to why other transmission channels, such as email or fax, could not be utilised to send this information from Nepal. The Tribunal proceeded to determine the appeal in the applicant's absence and found that:

> "[10] In this case the appellant was notified of the time, date and place of the appeal hearing in accordance with the Act. He did not appear at the hearing on 7 June 2011 and, in spite of being given an opportunity to do so, he has failed to provide any reasonable excuse for that failure to appear. In the absence of the appellant at the hearing, without reasonable excuse, he has not established his claim. No findings as to the credibility of his claim or the facts can be made.
>
> [11] The Tribunal cannot satisfy itself whether the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention, is a protected person under the Convention Against Torture or is a protected person under the ICCPR."

Application to Reopen Appeal

[9] By letter dated 14 July 2011 (received by the Tribunal on 18 July 2011), the appellant lodged a humanitarian appeal against deportation, simultaneously requesting that his refugee appeal be reopened.

[10] As grounds for seeking to reopen his refugee appeal, the appellant claims that he had been unable to submit a copy of his grandmother's death certificate within the deadline set by the Tribunal due to logistical difficulties. His brother was in India at the time and his parents were uneducated. He states that he intended to request someone to bring the certificate to New Zealand in the first week of July. He now submits a scanned copy of a document issued by the Waling Municipality Office entitled "Regarding Recommendation", certifying that the appellant's grandmother had died on 2 June 2011. He advises that the original is still being couriered from Nepal, and, as soon as he receives it, he will provide a copy to the Tribunal. He also attaches a section of a newspaper (not translated into English) which he claims is relevant to his refugee appeal.

Powers to Reopen Appeal

[11] The Tribunal operates expressly under statute and its powers are drawn from the Act. The nature of the power to determine refugee status is emphasised by ss 124 and 125 of the Act. Those sections provide:

> "**124 Purpose of Part**
>
> The purpose of this Part is to provide a statutory basis for the system by which New Zealand -

(a) determines to whom it has obligations under the United Nations Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees; and

(b) codifies certain obligations, and determines to whom it has these obligations, under –

(i) The Convention against Torture and Other cruel, Inhuman or Degrading Treatment or Punishment:

(ii) The International Covenant on Civil and Political Rights.

125 Refugee or protection status to be determined under this Act

(1) Every person who seeks recognition as a refugee in New Zealand under the Refugee Convention must have that claim determined in accordance with this Act.

(2) Every person who seeks recognition as a protected person in New Zealand must have that claim determined in accordance with this Act.

(3) Every question as to whether a person should continue to be recognised as a refugee in New Zealand or as a protected person in New Zealand must be determined in accordance with this Act.

(4) Nothing in subsection (1) affects section 126."

[12] This legislation expressly provides that a decision of the Tribunal is final (except upon appeal to the High Court on a point of law) once notified to the appellant. In this respect, clauses 17(5) and (6) of schedule 2 and section 245(1) of the Act provide:

"**17 Decisions of Tribunal**

[...]

(5) The Tribunal must notify, and provide a copy of its decision to, the appellant or affected person and the Minister, the refugee and protection officer, or the chief executive (as the case may be).

(6) A decision of the Tribunal is final once notified to the appellant or affected person.

245 Appeal to High Court on point of law by leave

(1) Where any party to an appeal to, or matter before, the Tribunal (being either the person who appealed or applied to the Tribunal, an affected person, or the Minister, Chief executive, or other person) is dissatisfied with any determination of the Tribunal in the proceedings as being erroneous in point of law, that party may, with the leave of the High Court (or, if the High Court refuses leave, with the lave of the court of Appeal), appeal to the High Court on that question of law."

[13] In *Refugee Appeal No 71864* (2 June 2000), the Refugee Status Appeals Authority (RSAA) considered whether it was able to order a rehearing after conducting a hearing and issuing its decision. It concluded, at [48], that:

> "[...] the Authority was not intended to have, and does not in fact possess, the power to order a rehearing after a full initial hearing and decision."

[14] In that decision, however, the RSAA also referred to earlier decisions that had identified limited exceptions to that principle, based primarily on the rules of fairness, public policy grounds and the principle enunciated in *R v Kensington and Chelsea Rent Tribunal ex p MacFarlane* [1974] 3 All ER 390 (QBD) of real and reasonable excuse; see also *Refugee Appeal No 76436* (30 June 2010) and *Refugee Appeal No 75826* (20 December 2007). In *Kensington and Chelsea*, at [396] the Court held:

> "[W]here [...] the tribunal has acted impeccably so far as its own duty is concerned, has in other words sent out the right notices by the right means at the right time and has had no indication that the notices have gone astray or that the applicant for any other reason cannot attend, then an order made in those circumstances is a regular order and not normally open to challenge on certiorari. However the disappointed party has what is certainly a cheaper if not more effective remedy open to him, that he can go back to the tribunal, explain why he did not attend, and the tribunal will then have the jurisdiction if it thinks fit to re-open the matter and to reconsider its decision in the light of representations made by the absent party.
>
> [...]
>
> Tribunals must be satisfied before they re-open a case that there is a good argument on the merits for giving the absent party a chance to be heard, that he has got a real and reasonable excuse, that he had to be given a further chance [...]"

[15] In *Refugee Appeal No 70537* (14 August 1997), for example, the RSAA ordered a rehearing after a decision had been delivered in ignorance of the fact that further evidence or submissions had been filed after the appeal hearing. In *Refugee Appeal No 690/92* (27 February 1995), the RSAA also recognised a "very limited" exception relating to the disposal of an appeal in the absence of an appellant who, through no fault of his own, was unaware of the date of the hearing.

Conclusion on Application

[16] The applicant's claim for refugee status has been fully heard by the RSB. He was interviewed by the RSB and responded to the concerns that the RSB presented in its interview report. The RSB found that he is not a refugee and declined his claim. The Act provided him with an additional safeguard. He was entitled to seek a *de novo* hearing before the Tribunal, which he did by lodging a notice of appeal.

[17] The applicant was twice offered hearing dates by the Tribunal, namely, 13 May 2011 and 7 June 2011. He failed to physically attend either. The Tribunal

granted the applicant's request to adjourn the first hearing of 13 May 2011 without requesting any documentary evidence in support. Upon receiving the second request for an adjournment on similar grounds to the first, the Tribunal sought documentary evidence in support. The applicant failed to comply within the reasonable timeframe provided. On that basis, the Tribunal found that he did not have a reasonable excuse for failing to attend the second scheduled hearing.

[18] In the face of the express provisions of the Act, the application to re-open must fail. The applicant was notified of the Tribunal's decision to decline his appeal for refugee status on 22 June 2011. That decision is final. There is no evidence that any of the limited exceptions to the finality principle, based upon fairness, public policy, or reasonable excuse, apply in the applicant's case.

[19] On the information available to it at the time the applicant's appeal was finally determined, the Tribunal was entitled to find that he had no reasonable excuse for his failure to attend the hearing. He did not provide any evidence to support his adjournment application within the reasonable timeframe provided, nor did he provide any reasonable explanation for his failure to do so.

[20] For those reasons alone, the present application must fail. For the sake of completeness, however, it is also noted that the documents submitted with the application to reopen do not persuade the Tribunal that (even if it had the power) it should reopen the appeal. In this application, the appellant simply claims that he was unable to provide a copy of his grandmother's death certificate within the timeframe provided by the Tribunal because his brother was in India at the time and his parents are not educated. He provides no explanation for why he was unable to have the document faxed or scanned and emailed to him, notwithstanding the fact that he now produces a certificate which he states he received by scanning from Nepal.

[21] In his letter of 14 July 2011, he claimed that the original certificate was on its way by courier from Nepal and would be sent to the Tribunal upon receipt. Several months have transpired and the Tribunal has still not received the original certificate. The 'certificate' the applicant now presents is not an original. Further, the scanned copy of the certificate is entitled "Regarding Recommendation" and is not a death certificate as such. Its actual status is unclear. It refers to the appellant's request for certification of the death of his grandmother, and records that she died on 2 June 2011. Given the belated presentation of the "Regarding Recommendation" document, in its current form (lacking originality, and not being

a death certificate), viewed, too, in the context of the ease with which documentary evidence can be obtained in order to support refugee claims, the Tribunal finds the applicant has still presented no real or reasonable excuse for his failure to attend the appeal hearing. The newspaper section that he has been submitted with the application, without any translation or explanation, provides no assistance to the Tribunal.

[22] The Tribunal finds that the explanation offered by the applicant for his failure to attend his appeal hearing is not one that enables the Tribunal to reopen the appeal. The Act does not bestow upon the Tribunal the right to reopen an appeal, and this applicant's circumstances do not bring him within the very narrow circumstances which might otherwise enable the Tribunal to do so. Finally, if more need be said, the documents upon which the present application is brought do not satisfy the Tribunal that any injustice has occurred or that it should reopen the appeal, even if it had power to do so.

CONCLUSION

[23] The Tribunal declines to reopen the appeal in *AB (Nepal)* [2011] NZIPT 800008.

"S A Aitchison"
S A Aitchison
Member

Certified to be the Research Copy released for publication.

S A Aitchison
Member