REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75826

AT AUCKLAND

Before:	A N Molloy (Chairperson) B A Dingle (Member)
Counsel for Appellant:	D Mansouri-Rad
Appearing for the Department of Labour:	No Appearance
Date of Hearing:	27 June 2006
Date of Decision:	20 December 2007

DECISION ON APPLICATION FOR REHEARING

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[1] This application concerns a national of Nepal who is referred to, for ease of reference, as "the appellant".

[2] He arrived in New Zealand in May 2005, and applied for refugee status at the airport. After interviewing the appellant in June 2005, a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL) issued a decision declining his application on 25 August 2005.

[3] The appellant exercised his right of appeal to this Authority by lodging a notice of appeal dated 25 August 2005. In due course, the Authority allocated the appeal a date of hearing. The appellant failed to appear before the Authority on that date. As a result, the Authority dismissed his appeal in its decision in *Refugee Appeal No 75713* (30 November 2005).

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

[5] The Authority regrets the delay which has occurred in publishing this decision.

[6] In order to properly understand the issues which arise, it is necessary to set out the circumstances in which his appeal came to be finally determined by the

Authority.

Refugee Appeal No 75713

[7] As already stated, the appellant arrived in New Zealand in May 2005. Because he had no documentation with him when he arrived which enabled him to be identified, he was transferred to the Mangere Accommodation Centre (MAC), where he was detained under s128(5) of the Immigration Act 1987 (the Act).

[8] With the help of a refugee status officer, the appellant completed a written application for refugee status which was received by the RSB on 16 May 2005. He was granted legal aid and assigned counsel, Mr Mansouri-Rad, who forwarded an authority to act to the DOL, signed by the appellant.

[9] Mr Mansouri-Rad accompanied the appellant to his interview with the RSB on 13 June 2005. The RSB forwarded a preliminary report of that interview to Mr Mansouri-Rad on 18 July 2005. The report set out the refugee status officer's understanding of the appellant's case and identified apparent discrepancies in his account. The appellant was offered the opportunity of responding to the RSB, which he did, through counsel, on 3 August 2005. It is apparent from counsel's carefully prepared response that he had obtained detailed instructions from the appellant.

[10] The RSB issued a decision declining the appellant's application on 25 August 2005. That decision was forwarded to the appellant via his counsel under cover of a letter bearing the same date.

[11] The covering letter forwarded by the RSB advised the appellant of his right to appeal to this Authority. It also reminded the appellant of some of his obligations if he chose to appeal, including the obligation to provide a current address in New Zealand to which communications relating to the appeal may be sent (the communications address) and to provide his current residential address; see s129P(3) of the Immigration Act 1987 (the Act) and Reg14.3 of the Immigration (Refugee Processing) Regulations 1999 (the Regulations).

[12] The appellant lodged a notice of appeal with the Authority on 25 August 2005. The notice was contained within a letter from Mr Mansouri-Rad bearing his letterhead, and containing Mr Mansouri-Rad's address and contact details. Mr Mansouri-Rad's address is the communications address.

[13] The Authority responded to Mr Mansouri-Rad by return post on 25 August 2005 to acknowledge receipt of the notice of appeal. The Authority's letter observed that:

> "When communicating with you and your client, the Authority is entitled to rely upon the latest details provided."

[14] The Authority wrote to the appellant at his communications address again on 16 September 2005, to advise him that his appeal interview would take place on 16 November 2005.

[15] At the time that letter was sent, neither the Authority nor counsel was aware that the appellant had absconded from the MAC on 15 September 2005. Counsel subsequently confirmed to the Authority that he had lost contact with the appellant, and stated that he had been unable to inform the appellant of the hearing date before he absconded.

[16] The appellant failed to attend the scheduled interview with the Authority on 16 November 2005.

[17] Section 129P(6) of the Act expressly provides the Authority with the power to determine an appeal without a hearing if the appellant fails, without reasonable excuse, to attend a notified interview. The Authority proceeded to determine the appeal in the appellant's absence and found in *Refugee Appeal No 75713* (30 November 2005) that:

> "[15] The appellant did not appear at the hearing. It is possible that he did not know of the date of the hearing. However, if that is the case, it is because of his own non-compliance with the requirements and responsibilities imposed upon him by the Act. He has no "reasonable excuse" for this failing or for his failure to attend the notified interview.
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> [16] In his absence, the Authority is unable to make any finding in connection with the appellant's credibility or in connection with the facts of his appeal. Accordingly, the Authority is unable to satisfy itself whether the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. The appeal must therefore be dismissed."

Application for rehearing: Submissions

[18] The appellant learned of the Authority's decision dismissing his appeal when he subsequently renewed contact with Mr Mansouri-Rad. Mr Mansouri-Rad wrote to the Authority on 30 March 2006 to apply for a rehearing.

[19] He submitted that the reason the appellant absconded from detention at the Mangere Accommodation Centre was because he and a group of his compatriots

believed that they were going to be deported to Nepal. He said that he feared that if he had given his new contact details to his lawyer, his address would have been disclosed to the DOL and to the police.

[20] In support of the application, Mr Mansouri-Rad submits that:

a) The Authority has a narrow jurisdiction to re-open a previous decision where there may be legitimate reasons for an appellant's non-appearance such as where an appellant does not actually receive notification of the hearing through no fault of their own (*R* v *Kensington & Chelsea Rent Tribunal, Ex Parte MacFarlane* [1974] 3 All ER 390, 396).

b) The Authority failed to enquire as to whether or not the appellant had a reasonable excuse for his failure to attend.

c) The Authority's decision in *Refugee Appeal No 75713* (30 November 2005) is not "final" for the purposes of s129Q(5) of the Act because the word "decision" should be read as meaning a decision reached after "full hearing"; anything less would be a breach of natural justice.

Application for rehearing: Discussion

[21] It is helpful to set out some of the relevant provisions of the Act in full:

> "**129P Procedure on appeal**
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> (1) It is the responsibility of an appellant to establish the claim, and the appellant must ensure that all information, evidence, and submissions that the appellant wishes to have considered in support of the appeal are provided to the Authority before it makes its decision on the appeal.
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> (2) The Authority—
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> …
>
> (c) may determine the appeal on the basis of the information, evidence, and submissions provided by the appellant.
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> (3) An appellant must provide the Authority with a current address in New Zealand to which communications relating to the appeal may be sent and a current residential address in New Zealand, and must notify the Authority in timely manner of a change in either of those addresses. The Authority may rely on the latest address so provided for the purpose of communications under this Part.
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> …
>
> (5) The Authority may dispense with an interview of the appellant or other affected person only if both—
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> (a) The appellant or other affected person has been interviewed by a refugee status officer in the course of determining the relevant

matter at first instance or, having been given an opportunity to be interviewed, failed to take that opportunity; and

(b) The Authority considers that the appeal or other contention of the person affected is prima facie manifestly unfounded or clearly abusive.

(6) Despite subsection (5), the Authority may determine an appeal or other matter without an interview if the appellant or other person affected fails without reasonable excuse to attend a notified interview with the Authority."

"**129Q Decisions of Authority**

…

(3) A decision of the Authority must be given in writing, and include reasons both for the decision and for any minority view.

(4) The Authority must notify the appellant or other affected person of its decision, and provide a copy of the decision.

(5) A decision of the Authority is final once notified to the appellant or other affected person."

The Authority's decision is final

[22] Mr Mansouri-Rad submits that the Authority's decision of 30 November 2005 is not "final" for the purposes of s129Q(5) because the word "decision" should be read as meaning a decision reached after "full hearing". He submitted that otherwise, the end result would be inconsistent with the provisions of s129D of the Act which states that, in carrying out its functions, the Authority must act in a manner consistent with New Zealand's obligations under the Refugee Convention.

[23] In considering whether the appellant is entitled to a "full hearing", reference must be made to ss129P(5) and (6). An appellant is entitled to be offered an interview by the Authority in all but the narrow circumstances outlined in s129P(5). However, where (as in this instance) an appellant is offered an interview, but fails to attend that interview, the Authority is expressly permitted by the Act to determine the appeal in the absence of the appellant.

[24] For the purposes of s129Q(5) of the Act, a decision of the Authority is final once "notified" to the appellant. The appellant was notified, in law, of the Authority's decision in *Refugee Appeal No 75713* (30 November 2005) when the decision was forwarded to the appellant at his communication address on 30 November 2005. He has subsequently been notified of the decision, in fact, after resuming contact with his lawyer in 2006.

Obligations under the Refugee Convention

[25] The obligations that New Zealand has assumed under the Refugee Convention do not exist in a vacuum. While appellants are entitled to, and benefit from, a process which is fair and simple, they also assume various responsibilities imposed in order to ensure the due process of appeals.

[26] The means by which refugee status is sought in New Zealand is relatively informal. Once engaged, the refugee determination process provides applicants with legal assistance in preparing and lodging applications. An appeal to the Authority also involves a simple process. It involves no more than the bare minimum necessary to permit the fair and timely determination of the appeal.

[27] The appellant needed only to lodge a notice of appeal in writing, which he did through his lawyer. The form of the notice is uncomplicated. It requires an appellant to supply the address where the appellant is living, and an address to which communications in connection with the appeal may be sent (the communications address).

[28] In this case, the appellant gave his lawyer's address as the address for communication. It is implicit that, having done so, he would remain in contact with or be contactable by his lawyer in order to be informed about any communications received by the lawyer.

[29] Section 129P(3) of the Act provides that it is incumbent upon an appellant to advise the Authority of any change of address or contact details. By virtue of that section, the Authority is entitled to rely upon the information thus provided, and it did so in the present case. It forwarded notice of the date of the appeal interview to the appellant at the communications address provided.

Did the appellant have a reasonable excuse for his failure to attend the interview?

[30] Mr Mansouri-Rad submitted that the Authority failed to enquire as to whether or not the appellant had a reasonable excuse for his failure to attend. He submitted that because the appellant was not, in fact, personally made aware of his appeal hearing the Authority was unable, in the appellant's absence, to assess whether the appellant had a reasonable excuse for his failure to attend.

[31] The Authority rejects that submission. It is for the appellant to establish that he has a reasonable excuse. It is not for the Authority to rule out all possible "reasonable" explanations for his non-attendance. Any contrary finding would

frustrate the purpose of s129P(6), which expressly provides that the hearing can proceed in the absence of the appellant if he fails to appear without reasonable excuse. On the information available to it at the time the appellant's appeal was finally determined, the Authority was entitled to find that the appellant had no reasonable excuse for his failure to attend his hearing.

[32] As a creature of statute, the Authority has no inherent jurisdiction to reopen an appeal.

[33] In *Refugee Appeal No 71864* (2 June 2000), the Authority considered whether it was able to order a rehearing after a full initial hearing and 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".

[34] In that decision, the Authority referred to earlier decisions which had identified limited exceptions to that principle. For example, in *Refugee Appeal No 70537* (14 August 1997), the Authority ordered a rehearing after delivering a decision in ignorance of the fact that further evidence or submissions had been filed after the appeal hearing.

[35] The principle identified in that decision does not apply, by analogy, to the current application.

[36] In *Refugee Appeal No 690/92* (27 February 1995), the Authority recognised in principle a "very narrow" exception to the rule that the Authority had no jurisdiction to reopen an appeal. The exception related 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. This was referred to as the principle in *R* v *Kensington and Chelsea Rent Tribunal ex p MacFarlane* [1974] 3 All ER 390 (QBD).

[37] The Authority identified a variety of potential explanations for a failure to attend an appeal interview. It referred to language difficulties, problems of literacy, the letter being sent to a wrong address, delay or non-delivery of the mail, default or negligence on the part of the appellant's solicitor or sudden illness (pages 4-5).

[38] The Authority is not looking to limit the circumstances which might amount to a reasonable explanation and these examples were not intended to be exhaustive. They are simply by way of illustration. It is feasible that, depending

on the particular facts and circumstances of any individual appeal, they may be, in effect, the type of “reasonable excuse” anticipated by s129P(6). There may be other potential reasons, such as a failure of transport.

[39] However, there is no suggestion that any of these circumstances explain the failure of this particular appellant to attend his appeal interview.

[40] The fact that the appellant was not personally informed of the date of his interview hearing is the result of his own deliberate actions. He left his accommodation with the express purpose of avoiding contact. He deliberately absconded from his last known address in order to remove himself from the appeal process.

[41] His decision to disengage with the refugee determination system led to the predicament about which he now complains. It is not a “reasonable excuse” that the appellant failed to attend because he absconded from the address at which he was required to attend and because he failed to make contact with his own counsel.

[42] By choosing to abscond, he made it impossible for anyone to inform him of the date upon which it was to take place. Having done, so, he cannot complain that the natural consequences of his actions are in any sense a breach of natural justice.

Summary

[43] The appellant’s claim for refugee status has been fully heard by the RSB. He was interviewed by the RSB and he responded to the concerns identified by the RSB in its interview report. The RSB found that he is not a refugee. His claim was unsuccessful. The Act provided him with an additional safeguard. He was entitled to seek a *de novo* hearing before the Authority, which he did by lodging a notice of appeal.

[44] The appellant was entitled to be offered an interview by the Authority. He was in fact offered an interview. The interview was notified to the appellant at his communications address. He failed to attend the notified interview. The Authority found that he did not have a reasonable excuse for failing to attend the notified interview. The Authority was entitled to determine the appeal in the absence of

the appellant. The Authority's decision was notified to the appellant at his address for service and in person, and is therefore a "final" decision.

[45] With some narrow exceptions, the Authority has no jurisdiction to reopen an appeal once a decision is final. Once an appeal has been finally determined, the Authority is *functus officio*, and its role has come to an end.

[46] The Authority notes that some appellants are furnished with a further remedy under the Act, in that a subsequent claim might be lodged in limited circumstances, notwithstanding that an application for refugee status has been finally determined.

[47] The Authority finds that the explanation offered by the appellant for his failure to attend his appeal interview is not one that enables the Authority to reopen and hear afresh the appeal. The Act does not bestow upon the Authority the right to reopen an appeal, and this appellant's circumstances do not bring him within the very narrow circumstances which might enable the Authority to do so.

CONCLUSION

[48] The Authority has no jurisdiction to reopen its decision in *Refugee Appeal No 75713* (30 November 2005). The application for a rehearing is dismissed.

"A N Molloy"
A N Molloy
Chairperson