

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

AT AUCKLAND

Application No 76175

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 (DOL)
APPLICANT

AND RESPONDENT

BEFORE A R Mackey, Chairman

Counsel for the Applicant: V N Wells

Counsel for the Respondent: D Ryken

Dates of Hearing: 1 & 2 April 2008

Date of Decision: 30 April 2008

DECISION

[1] This is an application by a refugee status officer, in accordance with s129L(1)(f)(ii) of the Immigration Act 1987 (the Act), for a determination that the Authority should cease to recognise the respondent, a national of Iran, as a refugee on the grounds that recognition may have been obtained by fraud, forgery, false or misleading representation, or concealment of relevant information (hereafter referred to as fraud).

[2] The essential issues to be addressed are firstly whether, in the decision of this Authority, *Refugee Appeal No 71623/99* (13 April 2000), the respondent may have procured the grant of refugee status by fraud. The respondent's case, in

71623/99 was based on his claim to be a practising homosexual who was known to the authorities in Iran. The next issue, if the Authority finds that refugee status may have been procured by fraud, is to move to the second stage of the determination and conclude whether or not the respondent currently meets the criteria for refugee status, based upon the respondent's current predicament and the issues set out in terms of *Refugee Appeal No 70074/96* (17 September 1996).

JURISDICTIONAL ISSUES

[3] Pursuant to s129L(1)(f)(ii) of the Act, an refugee status officer may apply to the Authority for a determination as to whether the Authority should cease to recognise a person as a refugee where that status may have been procured by fraud. The Authority has the function of determining such an application pursuant to s129R(b) of the Act.

[4] When the Authority is considering an application for a determination under s129L(1)(f)(ii), there are two stages to the Authority's enquiry. First, it must be determined whether the refugee status of the respondent "may have been" procured by fraud. If so, it must then be determined whether it is appropriate to "cease to recognise" the respondent as a refugee. This determination 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].

[5] Given that these are largely inquisitorial proceedings, it is not entirely appropriate to talk in terms of the burden or onus of proof. Nonetheless, it is the Authority's view that in cancellation proceedings, it is the responsibility of the Department of Labour to present such evidence in its possession by which it can responsibly be said that the grant of refugee status may have been procured by fraud. It is also our view that the term "may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information" is deliberately imprecise and 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].

[6] There were no challenges to the jurisdictional issues in this case and both parties agreed that the issues involved in the two stage test should be heard together. The hearing therefore proceeded on that basis.

BACKGROUND

The respondent's refugee status

[7] The respondent is a married man now in his mid-30s who comes from ZZ, Iran. He arrived in New Zealand in June 1998 and made an application for refugee status immediately upon arrival. At that time he was a single man. Following an interview with the Refugee Status Branch (RSB) in January 1999, the respondent was notified of the decline of his application on 19 July 1999, and that prompted his appeal to this Authority.

[8] The respondent's claim was that he had been a practising homosexual who was known to the authorities in Iran. He had been aware of his homosexual inclinations from about the age of 16 or 17. His parents became aware of his homosexuality at that time through a relationship he was having with a male friend of approximately the same age.

[9] The respondent then went on to complete a polytechnic course and, during that time, met with a similarly inclined gay man of similar age. They went to gay parties together and consumed alcohol. This included the respondent dressing in female clothing. At one party in 1990, a group of uniformed *Komiteh* officials raided the premises. He and his friends were abused, blindfolded and taken off to a detention centre by the *Komiteh*. The respondent claimed that he had cleaned off the makeup and taken off his earring while in the van being transported to the *Komiteh* centre. After being questioned and beaten, the respondent was taken to court where he was convicted of un-Islamic behaviour and drinking alcohol and sentenced to three months' imprisonment and 60 lashes, both of which were carried out. Upon release, he returned home and was very ashamed and embarrassed. He did, however, continue his homosexual style of dress and appearance.

[10] The respondent then undertook his compulsory military service for a period of two years during which time he was ridiculed because of his sexual orientation.

[11] After completing his military service, the respondent worked in his brother's photography shop before renting a photography business of his own. He continued that business for three to four years until he departed for New Zealand. During that time, he had homosexual relationships with many sexual partners and was involved in homosexual-related photography.

[12] In April 1998, he and a friend visited Tehran. One night at a gay party there were a number of gay men wearing women's clothes and makeup; there was alcohol and much of the event was recorded by the respondent on video camera, including clips of the respondent dancing and drinking alcohol. He and two friends left the party and, after cleaning off their makeup, headed back to his friends' house. They were stopped at a *Komiteh* roadblock and the video camera was found. The respondent was made to rewind the tape whereupon it became obvious that they had all been to a gay party. He was again arrested, held for two weeks and beaten and tortured during that detention. A bribe was then paid to one of the gate-keepers to contact the respondent's father (a well-known identity in Iran). The father was then able to secure the respondent's release by putting up the brother's shop as security (termed "bail" in the 71623/99 decision). On release, the respondent was told to wait for a letter from the court which would advise where he should attend. So far as he is aware, his family never received such a letter.

[13] The respondent then returned to his home, closed his shop and handed it back to its owner. It appears that quite soon thereafter, on the advice of his father, the respondent left Iran, his father having made "arrangements" for him to leave on his own passport. He was unaware as to whether his passport had been processed in the normal manner or whether there was any official record of his departure. He stated that after he left Iran, there were reports of unidentified people visiting the family home. It was suspected that these were plainclothes *Komiteh* officials.

[14] In 2000, just before the hearing before the Authority, the respondent claimed that his father had telephoned him advising that his brother had been arrested for failing to produce the appellant and that the brother's shop was sealed.

[15] The Authority, in the 71623/99 decision, stated:

"The Authority has no doubt as to the appellant's sexuality. He is demonstrably homosexual. While having some concerns as to the credibility of his story concerning his arrests, the Authority will give him the benefit of the doubt and accept that he was twice arrested and mistreated. There were a number of inconsistencies, which are largely of a minor nature and, in respect of the first arrest, can be attributed to the effluxion of time since that incident."

[16] The Authority then went on in its assessment to find that the respondent (then the appellant) had embellished his evidence as it related to his mistreatment

at the hands of the authorities in the second arrest by the *Komiteh* (in 1999). The Authority did not accept the torture and the level of beatings the appellant claimed he had sustained but accepted that he had been subjected to occasional beatings.

[17] The Authority also rejected the appellant's claim as to his brother's arrest. This, for reasons set out in the decision, was found to be implausible. However, having noted that the Authority considered his story had been considerably embellished, the Authority went on to state:

"... the Authority does accept that he is a practising homosexual who has twice been arrested and mistreated by the Iranian authorities. He also has a conviction for organising an unIslamic gathering and drinking [1990]. It is clear that he is known to them as a homosexual. Indeed, he admitted as much to the authorities. Furthermore, they have a videotape depicting him at a homosexual party in compromising clothing (which the Authority accepts). A further risk to the appellant is that he absconded while on bail. The Authority refers to its previous decisions in *Refugee Appeal No. 1312/93* (30 August 1995) 6-11, 59 and *Refugee Appeal No. 71185/98* (31 March 1999). It finds that there is a real chance that this appellant will suffer persecution should he return to Iran."

CANCELLATION PROCEEDINGS

[18] On 31 January 2008, the respondent was served with a Notice of Application for Determination Concerning Loss of Refugee Status (the notice) in accordance with s129S(a) of the Act and Reg 16 of the Immigration (Refugee Processing) Regulations 1999.

[19] In the notice, the refugee status officer stated his preliminary view that the grant of refugee status conferred on the respondent was not properly made because it was procured by fraud and stated the matters which gave rise to the view that his refugee claim may have been false.

[20] At the core of the application were:

- (a) The Authority had granted the respondent refugee status on the basis of his criminal profile in Iran. The respondent had departed Iran on 30 May 1998 while on bail for homosexual offences.
- (b) However, the respondent had returned to Iran on three occasions: 2001, 2005 & 2006. He had also married in Iran on 30 May 2006.
- (c) On the basis of this information, the refugee status officer considered that the respondent had misled the Authority as to his homosexuality and/or his

homosexual profile with the Iranian authorities and may have procured his recognition as a refugee by making false or misleading representations and/or concealing relevant information at his hearing with the Authority on 15 February 2000. Evidence in support of that application was also provided to the respondent.

CASE PRESENTED ON BEHALF OF THE APPLICANT AT THE HEARING

[21] The applicant's case consisted of the core submissions supported by documentary evidence. That evidence included copies of the respondent's Iranian and New Zealand passports, material related to the residence and work permit applications made by the respondent's wife in 2005/2006, notes from Immigration New Zealand (Border & Investigation) compiled at the time of the respondent's return in 2005, partnership interview notes dated 9 May 2007, and a copy of a psychiatric report from Dr Ian Goodwin, dated 1 November 2006. Shortly before the hearing, additional documentation was supplied by the applicant in support of a supplementary submission. These were:

- (a) an article "Genes, hormones and sexuality" Neena B Schwartz, *The Gay and Lesbian Review Worldwide*, January -February 2008;
- (b) "Redirecting sexual orientation: techniques and justifications", Timothy F Murphy PhD (University of Illinois College of Medicine), *The Journal of Sex Research Vol 29 No 4*, pp501-523, November 1992;
- (c) "Answers to your questions about sexual orientation and homosexuality" website of the American Psychological Association 2008, accessed at <http://www.apa.org/topic/orientation>; and
- (d) a letter from the Surgeon General, United States Department of Health and Human Services (9 July 2001), accessed at <http://www.surgeongeneral.gov/library/sexualhealth/called/htm>.

[22] The applicant filed written opening submissions, supplementary submissions and closing submissions. The nub of these submissions fall into four general areas. Firstly, they relate to stage one of the assessment by the Authority (the fraud issue) and the final submissions to the second stage of the consideration before the Authority. The four grounds covered are:

- (a) challenges to the respondent's credibility;
- (b) the submission that the respondent could not change his sexuality "by choice" and that, accordingly, he may have misled the Authority in February 2000;
- (c) the returns, on three occasions, by the respondent to Iran, in particular the return some 18 months after obtaining refugee status and the failure by the Iranian authorities to sanction him in any meaningful way during that return, or the subsequent two returns in 2005 and 2006, despite disclosing his conversion to Christianity; and
- (d) in relation to the issue of whether the respondent is a refugee at this time (the second stage), submissions based upon the respondent's evidence and the lack of difficulties in Iran on his three returns. In particular, it is submitted he has a healthy Christian network in Iran made up of family and friends and that he and they have not indicated evidence of difficulties with the Iranian authorities.

[23] The refugee status officer appeared as a witness for the applicant and confirmed the contents of a brief statement confirming the application and material provided in support of that application. No other witnesses appeared on behalf of the applicant.

Evidence of the refugee status officer

[24] After adopting his brief statement which confirmed the application made to the Authority, the refugee status officer confirmed that he became involved in this application after receiving prejudicial information as a result of an airport interview conducted by an airport immigration officer at Auckland, with the respondent, in 2005. The matter came to his attention in 2006. The refugee status officer stated that he compiled a file at that time and worked on the matter until he considered he had enough information to place before the Authority for it to determine whether the respondent's refugee status may have been procured by fraud. After obtaining DOL legal advice, the application was made to the Authority.

[25] It is relevant at this point to note brief details of the interview between the respondent and an airport immigration officer in 2005 that sparked further investigation by Immigration New Zealand and ultimately by the refugee status

officer. In the opening part of the that interview (set out between pages 289 and 285 of the file), the immigration officer, after confirming that the interview could be conducted in English, introduced herself and stated:

"I would like to ask you some questions today about your visit to determine whether or not you will be granted a permit to be in New Zealand."

[26] She then went on to remind the respondent that he must tell the truth and that he should be aware that it was an offence to provide her with material information that was misleading and on conviction of such an offence, he could be sentenced to a term of imprisonment of seven years and/or a fine of up to \$100,000. The respondent, after confirming his name and date of birth, was then immediately asked to confirm whether he was the person named in the numbered New Zealand passport.

[27] The respondent then confirmed that he also had an Iranian passport and that he had been in Dubai and Iran attending his brother's funeral. He also confirmed that he had a partner in Iran and that they had been together for "maybe two years". He also stated, when asked whether he was gay, that

"I was gay 10 years ago, I come to New Zealand and I become Christian. I left everything behind and I got a new life and love it. I was wrong that time."

[28] He confirmed that he had claimed refugee status in 1998 because he was gay but that he could not now live in Iran because he was Christian. He also stated that he had travelled with his father from the airport in Dubai to Iran and then went on to give some details of entering Iran on a false passport provided by his father, details of his work in New Zealand and a few other personal details.

[29] The two key factors the refugee status officer took into account were the suspicious appearance of the returns to Iran made by the respondent and the fact that they appeared to be contradictory to his original claim and secondly, the respondent's claim that his sexuality had changed. He stated that the second issue was not as important to the RSB from a cancellation viewpoint, but the evidence relating to this respondent's three returns to Iran certainly was. If it had just been the change in sexuality, he stated that no further interest would have been taken by the RSB.

[30] On investigating the matter, he discovered the residence (with sponsorship) application made by the respondent's wife and the respondent's conversion to Christianity. He also discovered the return visit made to Iran by the respondent in

November 2001 - February 2002, which he considered was the most concerning when set against the respondent's initial claim for refugee status.

[31] In relation to the Christian conversion by the respondent, the refugee status officer stated that he was instructed to contact AA at the church where the respondent was a member, because of a written statement AA had made on the residence application by the respondent's wife. The refugee status officer stated that before contacting AA, he had concerns on the possible impact of s129T of the Immigration Act 1987 and that it did not appear ethical to approach a witness and reveal that a person, such as the respondent, was a refugee or personal details of the respondent. He was, however, instructed to proceed and kept a file note. A copy of the file note was produced.

[32] In this file note, dated 7 August 2006, the refugee status officer confirmed that initially AA had some confusion in placing the respondent. However, AA rang back at a later time, after realising that the refugee status officer had been referring to the respondent's full Islamic name, rather than the name he was known by at the church. AA then confirmed that he knew the respondent very well and was happy to be a referee on his behalf. He also confirmed that he had known the respondent for some time and was aware of his recent marriage. He believed that the respondent was a genuine Christian convert and also that the marriage was genuine. The report states:

"He knew that [the respondent] had had a "colourful" past, or words to that effect."

[33] The refugee status officer confirmed that, apart from a brief reference to the respondent having a "colourful past", he could not recall making any other insinuation that the respondent was homosexual, or had been homosexual.

CASE PRESENTED ON BEHALF OF THE RESPONDENT

[34] Mr Ryken called three witnesses, the respondent, AA and BB (the latter two being from the church). He stated that he was not calling Dr Ian Goodwin, Specialist Psychiatrist, as a witness in this respondent's case. Dr Goodwin had, however, provided a report in support of the residence (marriage) application made by the respondent's wife. A copy of that report, from the immigration file was, however, on the file put before the Authority (pp306-375). Mr Ryken also submitted a short letter from CC, a doctor at a clinic, dated 31 March 2002 which, he stated, gave evidence of the respondent undertaking a course of treatment to

increase his testosterone levels. (This document had been provided as part of the documentation supporting the fiancée/work visa application by the respondent's (now) wife.)

The evidence of the respondent

[35] At the outset, the respondent confirmed that he understood enough English to be confident to proceed without the use of an interpreter. The Authority made it clear that if there were problems with language or concerns with understanding at any time, the respondent should make this aware to the Authority or to counsel so that any problem areas could be immediately clarified to the respondent's understanding. He then adopted the statements he had made on 19 September 2006, 16 February 2007 and a brief of evidence, dated 29 March 2008. A letter from the respondent's employers (DD and EE - also members of the same church as the respondent) and a support letter from 10 Asian members of the church, were also provided at that time.

[36] Referring to the letter from CC, and the treatment he had undertaken in 2002-2003, the respondent stated that it was produced at that time as part of his genuine attempts to change his sexuality. He realised that, even though he had gone through a successful course of treatment, he was now aware that sexual preference could not simply be changed by such course of treatment.

[37] The respondent stated that he had returned to Iran at the end of 2001 because he was requested to by his father and he was very concerned because his mother was quite sick with blood and heart problems. She was hospitalised and had undergone a serious operation, although he was not exactly sure what treatment she had had. This had taken place before his visit. He had been very afraid to return and did not wish to. However, his father assured him that nothing would happen, as he would deal with the appropriate officials and pay bribes to ensure the respondent could safely enter Iran. He trusted his father implicitly in this regard.

[38] His father also told him to apply for an Iranian passport in New Zealand. He was able to complete that application and receive his passport relatively quickly. He explained that he had been very concerned in completing the application form for the Iranian embassy because it asked the question "What is your religion?". After serious discussion with friends at his church, he decided that he must make a decision "from the heart" and filled in the form, stating that he was a Christian.

He stated that he had not informed his father that he had taken this step in the application form because his father was a strict Muslim and he did not wish to upset him. He also obtained his first New Zealand passport about the same time.

[39] He explained that, prior to entering Iran, he had not been advised by his father of any specific person or manner in which he should attempt to pass through the immigration controls at the ZZ international airport. Accordingly, when he arrived, he presented his Iranian passport (not using his also recently acquired New Zealand passport, though carrying it with him). At the counter he was asked to wait and was then taken off initially for a short interview at the airport and then taken away by people he considered to be members of the "intelligence service" and not the police, to a building that he knew of in ZZ. He explained that his father was aware of his pending arrival as he had contacted him from Dubai before leaving and thus his father would have been waiting for him to pass through customs.

[40] He was detained for a period of just under two days by the intelligence service people. He was questioned, but apparently not at length, on the first day. Then, after staying overnight in a room of his own, he was released the following day. The questioning, to the best of his recall, was about his work, who was with him in New Zealand and "what group he attended or associated with". He surmised that his vague reference to a "group" may have been a reference to his stating he was Christian in the application form and an attempt to get him to confess. However, he stated he was not asked directly whether he had made a conversion to Christianity and did not tell the Iranian authorities. He stated that he was not questioned in great detail and that there was no mention of any outstanding arrest warrant or proceedings. Initially, he was not asked about his former homosexual activities or life, nor was he told why he had been detained and, in fact, he did not ask.

[41] He explained that his luggage had been taken with him when he was detained for the short period. Contained within his luggage were three Farsi bibles, his own copy and two others. When he later came to open his bag, after being released from the authorities, he felt that the bags had been rummaged but the bibles still remained. He considered that the bibles had not been confiscated because his father was an influential person and had known the people at the airport and paid additional bribes so the respondent could be released when he did not come through the customs/immigration barrier immediately after the arrival

of his plane. In the ultimate, however, he said he had no answer as to why the bibles had been left.

[42] When asked why he did not use his New Zealand passport, he replied that he did not think about it, although he had told the authorities that he had a New Zealand passport, and they were aware of it, when they searched everything on his person at the time he arrived. Additionally, he never thought of making any contact with the New Zealand embassy and had relied implicitly on the “arrangements” and bribes carried out by his father.

[43] The building he had been detained in, he said, was a notorious one, although he could not recall the exact district in which it was located.

[44] He stated that the people in his New Zealand church knew he was travelling to Iran and, in fact, AA had provided the Farsi bibles for him. They were aware of his arrival time and he had undertaken to call them once he arrived. He understood that once he did not call AA, either his parents had contacted him and people in the church in New Zealand, or alternatively they had contacted his parents. He presumed that in that way, the people in the church had promptly become aware of his detention. This had led to prayers for him at the church, details of which were included in the evidence.

[45] During the three months he was in Iran in 2001/2002, he spent most of his time with his parents in a new home they had recently moved to. It was different from the one he had lived in at the time he left Iran. For this reason, he did not know his neighbours. He did not attempt to attend Christian services at home churches or elsewhere during this visit. He did, however, give a copy of the Farsi bible to his sister and indeed, tried to give one to his father as well. The father became angry and refused to accept it. His sister and her husband, however, became interested and started to read the bible and, at the time of his second trip in 2005, converted to Christianity. He reported no other problems during his 2001/2002 visit, although he said he considered himself under pressure the whole time because he had taken the bibles with him. He had no problems leaving Iran.

[46] On his next visit in 2005, he explained his father had taken the same steps to ensure his smooth transition into the country as had happened in 2001. On this occasion, the respondent returned because his father had advised him that his brother was unwell and had become a drug user and dealer. The respondent stated that he was unaware of his brother’s drug addiction prior to this time. His

brother had been detained in prison for one and a half to two years before being released in 2005. During that visit, unfortunately his brother died suddenly.

[47] It was also during that visit that he met his wife who was a recent convert to Christianity. She was introduced to the respondent by his mother making an approach to his wife's family and setting up a meeting. He explained that his wife's father was actually a Zoroastrian and the rest of her family were nominally Muslim. He was unsure as to exactly how his wife came to convert to Christianity but considered it came about through the books she was reading and a search for God which she was clearly undertaking. It was her own personal decision. He met his wife at a home church in ZZ and then met her family. At that time, he realised that she was the person God intended to be his wife.

[48] As his brother died shortly after he had met with his wife and decided he wished to marry her, it was not possible for the marriage to proceed because of the Iranian custom of not proceeding with a marriage for a period of 12 months after the death of a family member.

[49] The respondent stated that he had no problems with the immigration or any other authorities in arriving or leaving Iran during that 2005 visit.

[50] The respondent was then asked about the interview in 2005 with Immigration New Zealand at the time of his return. He confirmed that a lot of the comments he had made at that time were not true, but his explanation was that he was very tired, having not slept properly for three or four days. He was desperate to get out from the airport and return to his home in Auckland. In addition, his brother's death had been a considerable shock to him and his family, which he was still trying to come to terms with. He stated that he had not followed up or tried to expand on some of the lies he had told at the airport interview, confirming soon after that he had not known his wife for two years before that time and had not used a false passport to enter Iran with his father from Dubai. In addition, he agreed that saying he was gay 10 years ago was an exaggeration and that he simply meant that he had been gay in the past.

[51] The respondent then explained the background to his joining the church in New Zealand and the introduction by his friend, FF, who had invited him to the church in 2000 for an Outreach meeting. He explained that FF had been a neighbour of his in Iran from the same street. He was not a close friend and was not sure when he had come to New Zealand. He explained that FF had now

returned to Iran and had established a small home church. After being attracted to the church by FF, his involvement had grown until he was baptised and became a devoted member of the church. He explained that at this time he did not regularly keep in touch with FF, although FF's brother, GG, lived in an apartment above him in Auckland. Thus, information he received now about FF came from his brother in New Zealand. He explained further that FF had attended his wedding in Iran in 2006. Recently he had heard that FF was in ZZ and was having difficulty in getting employment and was, however, waiting for the "call" on how he should proceed, that may be by moving to another country.

[52] The respondent then explained about his third trip to Iran in 2006. He stated that this was again assisted and organised by his father with the appropriate arrangements and bribes. The purpose of this visit was so that he and his wife could get married. He explained this had taken place by way of three ceremonies. The first was an official registration process where it was necessary to state that he was Muslim, although it was not a fully Islamic religious ceremony. He explained that without stating he was a Muslim, the registration could not proceed. Converts to Christianity are unable to register a marriage whilst those who are born Christian were in a situation where, in Iran, they could register their marriage. After the registration ceremony, he explained that there had been a small Christian group wedding and then a group of some 50 family members and Christian friends came together in a more traditional Iranian wedding.

[53] He explained that after his wedding, he only remained in ZZ for some two days before he went to Tehran to distribute five bibles to a home church group. He also left another five with a Christian group in ZZ. He then decided that he should return to New Zealand and apply for his wife to join him on the basis of a residence application based on marriage. At an earlier date he and his wife had lodged an application with Immigration New Zealand for temporary entry as a fiancée. Both applications were declined. He had since lodged a further application through the services of Mr Ryken's office. This is an application for a work permit because the couple were not living together. That application was still outstanding.

[54] The respondent considered that, whilst his wife was remaining in Iran, he could not return to live with her and he was under considerable distress as her family were threatening to arrange a divorce because of his inability to have his wife live with him in New Zealand.

[55] It was put to him that during his three visits to Iran, he had in fact spent some seven to eight months in Iran, attended house church meetings, met with Christian groups, distributed bibles in ZZ and Tehran and had generally developed a healthy Christian network. In this situation, he was asked why he could not return and conduct his life with relative safety. He explained that the situation in Iran was confusing for Christians. Some of them keep quiet and some of them do not. However, he considered it was certainly not safe for him to return on a long term basis and that he and his wife living together as evangelical Christians attending a house church would place him in a position of substantial risk. He explained that FF, who had organised a small church group, was continuing to live in Iran and whilst he had heard of no specific problems that FF was having, he thought that he may have been missing at this time.

[56] The respondent was then asked about his activities in New Zealand and also the statement he made on 18 September 2006 where he stated he had had to flee Iran because he had pornographic video material. He was asked to explain why he had made this statement, whereas in his refugee claim he had stated that he had taken his video camera to the party in Tehran and carried out the filming himself. He explained that this was his mistake and that, in fact, whilst he did have other pornographic videos, he had made the offending material himself so that the statement made in September 2006 was actually incorrect. Submissions on this issue were received by the Authority later in the hearing from Mr Ryken who prepared the declaration for the respondent, to the effect that the error may have been compounded by the manner Mr Ryken actually prepared the declaration.

[57] The respondent's evidence then turned to the issue of his homosexuality. From the declaration, the respondent stated that after he came to New Zealand, he continued to consider that he was homosexual but did not enter into any serious relationship with any other man in New Zealand. He did have some gay friends and one particular Malaysian friend. However, that relationship was not sexual. He stated that he went to bars and restaurants in Auckland where other gay men were present.

[58] He explained that after being introduced to the church in New Zealand in 2000, he started to attend Monday bible study meetings and gradually became more and more involved in church activities in 2001. He claimed that he was never an effeminate person and gradually began to put his gay behaviour and activities to one side. At the time when he was baptised, he remembered that he

still considered himself to be gay but had realised by that time that the teachings of his church were against such a lifestyle as it considered homosexuality as against the will of God.

[59] In approximately 2002, the respondent started taking active steps to pursue a more heterosexual lifestyle. He consulted a doctor at a clinic and undertook a two-year course of treatment, after it was discovered that he had a lower than normal male testosterone level. He said he went to the doctor about every three months and had a course of treatment. He said he now realised that that course of treatment may have had no impact on his change in sexual orientation. He claimed that, gradually, because of his strongly committed faith, he had moved to a stage where he considered himself heterosexual.

[60] By approximately 2005, when he returned to Iran, he then, with the assistance of his mother, started making enquiries about a possible marriage. This led to the introduction to the lady to whom he then became engaged and ultimately married in 2006.

[61] When asked why, in a country like New Zealand where he was free to practise homosexuality, particularly after obtaining his refugee status, he did not enter into any serious gay relationships, he stated that he had taken a long while to settle into New Zealand because of language and other concerns and then, after becoming deeply involved with the church and the teachings in the bible, his lifestyle had gradually changed. He considered that it was not an overnight change, but took a long time in his mind. He stated that he had not had any gay friends over the past six years.

[62] When it was put to him that there were reports such as those set out from the United States Surgeon General that it is not possible to change sexual orientation "by choice", his reply was that he did think it was possible, over time, because it happened to him. This had come about with God's help and a long-term genuine desire.

[63] He was asked about the report from Dr Goodwin and why this had been obtained. He said he had obtained the report for the case officer in Immigration New Zealand who was handling the application for his fiancée/wife. He had not known Dr Goodwin in advance and the report had been prepared after talking to the psychiatrist at an appointment with him in the latter part of 2006. He said that after the discussions with Dr Goodwin, he felt that Dr Goodwin understood him

and that, as an expert in sexual orientation, the opinion of Dr Goodwin was valid. Relevant comments in the opinion noted by the Authority were:

“It appears notable that once out of the environment from which he had fled, [the respondent’s] sexual behaviours were somewhat changed. He did not take up sexual relationships, or any form of relationship with other males on arrival in New Zealand. He did, however, mix socially with other self-identified gay males.

[The respondent’s] gradual change from a self-professed homosexual through to heterosexual orientation appears to have occurred with two external influences. The first being the religious influence of his conversion to Christianity and his apparent interpretation of the bible that homosexuality was somewhat incompatible with the Christian faith.

This appears to be combined with the second factor which was one of seeking and receiving an (implausible) bio-medical explanation for his sexuality. It is likely that [the respondent] was somewhat exploited in this regard, though he appears to have genuinely believed his treatment with testosterone and other supplements may have an influence upon his sexuality. This, combined with his religious beliefs at the time, was probably a potent factor in bringing him to believe that his sexuality could indeed be changed from homosexual through to heterosexual.

[The respondent’s] apparent change in sexuality does not therefore appear to be sudden but it is the result of a gradual process influenced by religious and bio-medical shaping. This is consistent with those cases reported in the psychiatric literature around individuals altering their sexual orientation. It should be noted, however, that [the respondent’s] initial understanding of his sexual orientation was also heavily influenced by his social and religious environment, including his family home and social circle.

I am therefore of the opinion that [the respondent’s] apparent conversion from homosexuality to heterosexuality does appear to be genuine. It should, however, be noted by the court that most modern understandings of human sexuality see it as being based on a continuum rather than discrete entities such as homosexual or purely heterosexual. Individuals can vary in their sexual expression with age and social and cultural determinants. This would appear to be the case with [the respondent].”

[64] The respondent did agree that he now understood the implausibility of the bio-medical explanation and the comments made by Dr Goodwin.

[65] The respondent stated that when he first started attending the church, he was told by his friend to dress appropriately, to take the earring out of his ear and to have his hair cut. He stated that he changed the manner in which he dressed when attending the church.

Evidence of AA

[66] AA explained that he had been involved with the respondent for many years. He had been confused by the use of the respondent’s name when initial enquiries were made to him by the refugee status officer but, after realising who the reference was to, he gave his strong support to the respondent’s commitment

to Christianity. He explained that his role in the church was to oversee the Iranian group at the church. The respondent was one of a few Iranian immigrants who had become central pillars within the Iranian group at the church. FF and GG were also heavily involved.

[67] The respondent, he explained, is now heavily involved in church activities and helps significantly by putting words and music into DVD format in both English and Farsi and transliterates Farsi into the Latin alphabet so that others can participate in services conducted in Farsi. Additionally, the respondent has, for many years, been involved in Friday night evangelism in central Auckland. It is clear to all at the church that the respondent was now very much a committed Christian.

[68] AA also explained the respondent's dilemma in completing his Iranian passport application and his ultimate decision, based on his faith, that he should state that he was Christian in the form. He also explained the prayers for the respondent when he was detained in 2001 and that church members had been contacted by the respondent's family members when the respondent had not been released immediately upon his arrival in November 2001.

[69] He also explained the support of the church to the marriage between the respondent and his wife and the manner in which he had supplied Farsi bibles from the New Zealand Bible Society to the respondent for him to take to Iran on the occasions of his three visits.

[70] When asked about the return to Iran of FF, AA stated that he had noted that FF became restless and unsettled as an unmarried man in New Zealand. He felt some sense of shame and humiliation and eventually had decided to return.

[71] He explained that when he received the telephone call in 2006 from the immigration officer/refugee status officer he had been surprised that the officer had given personal information which appeared to indicate that the respondent's original claim for refugee status had been based on his homosexuality. He had not noticed the respondent as having a gay orientation at the time when he first met him. He had worked with other homosexuals over the years and, unless he had been told, he would not have picked it up in the case of this respondent. He confirmed that the church's view on sexual relations was that they should be reserved for marriage between a man and a woman and it was not part of God's

plan to do otherwise. He gave the Authority references to certain passages in the Bible that he stated supported this approach.

[72] He explained that it was part of the role of members of his church to evangelise or proselytise. They saw their role as to give the “good message of Christ to others”, particularly as it was explained in the Bible. It was therefore part of their role as Christians and he considered the respondent had adopted this attitude firmly as part of his life. In his view, this had led to the respondent being instrumental in the conversion of his sister and brother-in-law and now a deepened interest in Christianity by his other family members including, to a lesser degree, the respondent’s father.

Evidence of BB

[73] BB confirmed his statement of 17 March 2008 and explained that he was one of the pastors at the church. He said that he had known the respondent for some seven or eight years and had become more particularly involved with him over the past one or two years since he had taken over the role of being pastor to the Chinese and Iranian groups within the church. He agreed that AA had used his position to encourage and develop a ministry in the Chinese and Iranian communities and this had evolved over time. He explained that it was not the first time he had given evidence before this Authority and that he was very much a realist and did not give evidence in support of claimants that he did not consider genuine. However, in support of this respondent, he consider he was very much part of the Christian community within his church and that the respondent was not using the faith in the manner that others sometimes unfortunately did. The respondent was a fine man of high character whom he strongly supported as a very special person.

Submissions on behalf of the respondent

[74] Counsel for the respondent’s submissions fell into four general areas. These related firstly to jurisdictional issues; secondly to credibility issues, thirdly, that there were no grounds for cancellation as no fraudulent, false or misleading information had been provided in the course of his original appeal; and finally, to the current risk to this appellant on return because of his conversion to being an evangelical Christian actively involved in proselytising and conversion of Iranian Muslims.

[75] In the jurisdictional area, Mr Ryken submitted that when considering the terms of s129L(1)(f)(ii), which states:

- “(ii) The Authority should cease to recognise a person as a refugee, in any case where that recognition may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information:”

it is important to note that the words “may”, “procured” and “cease to recognise” clearly left a discretion with the Authority, although little guidance was given as to how that discretion should be used. There was nothing to indicate that merely by returning to the country of origin, when there had been no specific regime change or other eradication of the cause of the real chance of being persecuted, required the Authority to cease to recognise a refugee. Thus, the explanations for all three return visits made by this respondent should, after careful evaluation by the Authority, be accepted as rational and reasonable and not in any way evidence of initial fraud or false or misleading information.

[76] In respect of the credibility issues, Mr Ryken turned firstly to the apparent inconsistency between the respondent’s declaration of 18 September 2006 (made in conjunction with his wife’s immigration application) and the evidence given in his refugee appeal (71623/99). In the declaration of 18 September 2006 (paragraph 5), it is stated:

- “I had to flee from Iran when it was discovered I had in my possession some gay videos (these were pornographic videos from Europe).”

[77] In the refugee appeal in April 2000, he stated that after being stopped by the *Komiteh* at a road block, his video camera was found in the search of the car and, after being rewound, it was immediately apparent to the officers that the respondent and others had been to a gay party. Mr Ryken submitted that the mistake in the declaration was largely caused by his own drafting errors, when he conflated two pieces of explanation and evidence given by the respondent. In the process of taking the statement and ultimately preparing the declaration, he had confused the two issues and the mistake had been made.

[78] When the Authority explained to Mr Ryken that he was almost at the point of giving evidence by this submission, Mr Ryken said he would take the matter no further but that the Authority and the respondent were owed an explanation.

[79] He then turned to the airport immigration interview with the respondent that had taken place in 2005. He submitted that this interview and the apparent credibility inconsistencies that arose from it should be given no weight by the

Authority as it was blatantly wrong for the immigration officer to imply or threaten a New Zealand citizen, travelling on a valid passport, that they would not be given a permit to enter and could possibly be subjected to imprisonment or a fine, when clearly, as a valid citizen on a valid passport, entry simply could not be refused. The distress and anguish that this put the respondent under, while particularly noting that he had not slept for several days, also had to be taken into account. He submitted that the airport interview did not involve any disclosure that information was being collected for the purposes of the cancellation proceedings and accordingly, the respondent has not had the opportunity to explain in any detail the circumstances surrounding his entry and exit from Iran. He also submitted that weight should not be placed on the evidence of inconsistencies that arose from that interview because the appellant did not, in any event, follow them up or continue with the inconsistent statements in either his support of his wife's immigration applications or in the evidence before this Authority.

[80] Turning to the grounds for cancellation, Mr Ryken submitted that there was no direct evidence of any information provided in the course of the respondent's refugee appeal in April 2000 that was either incorrect or false. He submitted that it was important to note that the respondent's father was a prominent, well-known identity in Iran and that the officials at the ZZ airport would know him and logically be prepared to accept bribes or to do favours for him. The situation had to be seen in the environment of the highly corruptible infrastructure which is endemic in Iran. Accordingly, the apparent ease with which the respondent was able to move in and out of the country with the arrangements made by his father did not indicate a lack of credibility by the appellant in his original claim, particularly when this was coupled with the explanations given by the respondent for all three of his visits.

[81] On the issue of sexual orientation, he submitted that the medical evidence showed that sexual orientation was notoriously fluid and that in this situation, the whole procedure and change in the respondent had taken place over a number of years. Essentially, the key point was that there was no evidence to suggest that the respondent provided false information at the time of his appeal in April 2000, by supposition or inference.

[82] When considering the terms of the Authority's determination in April 2000, he submitted that the Authority had then, of course, reached its determination after finding the claimed arrest of the respondent's brother as lacking in credibility. On the information now available, in retrospect, other explanations might be plausible

for the respondent's evidence at that time relating to the arrest of his brother which had just been reported to him by his father and the respondent's own detention and release. He submitted that in retrospect, the brother could have been detained in relation to drug offences which were discovered when some investigation was made of the respondent's own detention and release by the *Komiteh* in Tehran. The respondent's situation that he still maintained, based on the information that had been provided by his father, was that he had been released on some form of bail after the intervention of his father with the *Komiteh* authorities. Mr Ryken submitted that this did not show any form of fraud or misrepresentation in the original claim and appeal.

[83] The other area of submissions related to the second limb of the assessment the Authority is required to carry out and as to whether there is a real chance of the respondent being persecuted on return to Iran at this time. Given the conclusions reached later that the "fraud" element is not established, there is no need to set them out.

REFUGEE RECOGNITION PROCURED BY FRAUD?

[84] The Authority finds that the application made by the applicant does not establish that the respondent may have procured his refugee status by fraud, forgery, false or misleading representation or concealment of relevant information. This is not to say that the three return visits to Iran by the respondent, particularly the first one in 2000/2002, were not *prima facie* suspicious or could have indicated inferences that the grant of refugee status to this respondent may not have been a genuine one.

[85] Before turning specifically to the grounds upon which the applicant presented the application to the Authority and the Authority's conclusions on each of those grounds, it is firstly necessary to assess the credibility of the respondent. At the outset, it is important to note that the Authority in its determination in April 2000 had some credibility concerns and, as noted above, considered the respondent had embellished his evidence in certain aspects. The core elements, or the facts as found by the Authority in the April 2000 decision, are however what must be closely examined to determine whether the procurement of refugee status may have been by fraud.

[86] In the evidence given before this Authority at this hearing, no additional substantive credibility concerns have arisen. The respondent provided explanations for the areas where inconsistencies in his evidence have arisen over the past eight years. The bulk of those inconsistencies arise following the May 2005 airport immigration interview. The introduction to that interview was clearly flawed and the immigration officer clearly did not have a legal basis for stating that the respondent may possibly not be given a permit to enter, unless there were valid concerns, at that time, as to his citizenship and/or the validity of his New Zealand passport. That was not the case and thus, as a New Zealand citizen, the respondent could not have been denied entry. The interview therefore commenced on this unfortunately seriously flawed basis.

[87] In the circumstances, as was agreed by Mr Ryken, it is unnecessary for this Authority to reach firm conclusions on whether any significant weight should be attached to this interview, or the inconsistencies that may apparently arise from them. The Authority has taken into account the respondent's evidence when questioned about the inconsistencies. Even if some of those responses are not entirely convincing, the inconsistencies themselves are not of a significant nature and do not go to the core of a claim that the original refugee status may have been procured by fraud.

[88] Whether the respondent had been in a relationship for two years or two months with his fiancée does not, in the view of the Authority, impact on the fraud issue.

[89] The inconsistency that could possibly have been of significance was that between the declaration of September 2006 and the respondent's original evidence in his refugee appeal. Mr Ryken gave submissions which explained this situation. In the circumstances, this appears to have been a very unfortunate slip up by Mr Ryken in drafting the declaration. As fault appears significantly to lie with counsel, the Authority finds it cannot treat this as a significant point of negative credibility in the respondent's evidence.

[90] Overall, therefore, the Authority found the appellant to be generally truthful in his evidence to the Authority.

[91] The applicant's submission that the respondent's claim that his sexual orientation had changed from homosexual to heterosexual was not credible, was not strongly pressed in the hearing, particularly when the refugee status officer's

evidence stated that that alone would not have been sufficient for the Refugee Status Branch to proceed with the application.

[92] It was also accepted by the applicant that the modern understanding of sexuality suggested sexual orientation was not fixed and may change over time. In this situation, it was difficult to conclude that a change such as that claimed by the respondent could not take place, or that there was not some (perhaps small) element of choice in the matter. The material provided from the US Surgeon General, which appears quite dated (1981) appears to be too simplistically expressed. The Authority is satisfied from the material that has been produced, along with the report of Dr Goodwin, that the Authority can conclude that the best expert evidence before it appears to indicate at this time that human sexuality is based on a continuum rather than discrete entities such as being purely homosexual or heterosexual and that individuals may vary their sexual expressions with age, social and cultural determinants.

[93] In this situation, the changes made by the respondent appear to be genuine. However, the Authority is satisfied that in the very unique circumstances of this case, based on the credible evidence of the respondent, and the generally accepted medical evidence, there is no evidence to indicate that there may have been fraud on the part of the respondent in his initial application. The quite definitive conclusion of the first Authority in April 2000 (admittedly after a relatively short hearing) that “He is demonstrably homosexual” also could suggest a remote possibility that the respondent went through some form of deception at that time.

[94] The grounds presented on the basis the evidence, freely conceded, that the respondent had returned to Iran on three occasions, are more problematic and, as stated, indicated a basis for suspicion by the applicant on the basis, as the applicant rightly submits:

“... truthful self-declaration is the cornerstone of New Zealand immigration and refugee policy. Immigration officers rely on individuals to tell the truth, as lies are difficult to detect and verification of information is often not possible.”

[95] The explanations given by the respondent to the second and third visits, which took place some five or six years after his grant of refugee status, are accepted as plausible. He claimed that his father had, as on all occasions, made the necessary arrangements and bribes at the ZZ airport. It is accepted that this is not a large international airport and so the ability to “arrange” his entry, particularly

when he was travelling on a valid passport, and also had dual nationality, does go some way to explaining the reasons he was able to pass through the airport.

[96] In 2005, he returned at the request of his father because of the illness of his brother. The 2006 return appears to have been driven totally by his desire to marry his fiancée.

[97] The concerning factor with these two returns and, more importantly, the visit in 2001/2002, was that the authorities took little or no interest in him. The Authority considers that if the respondent had been a “bail-jumper” who had absconded from some form of genuine court-imposed bail after conviction, it would be highly implausible for the Iranian authorities, regardless of a bribe, would overlook the fact that the respondent was a convicted criminal who had been released on bail from which he had absconded.

[98] The applicant’s evidence as to the first return in 2001/2002, some 18 months only after the respondent had obtained refugee status, was the strongest part of the applicant’s claim. On that visit, the respondent stated that he was detained for a period of less than two days and that he was not questioned about his homosexuality, any previous charges against him or any matters relating to his carrying Farsi bibles in his baggage. His explanation for this situation was that his father paid bribes for his entry and may have had to take further steps and pay further bribes when the respondent did not pass immediately through immigration control on his arrival at ZZ airport in November 2001.

[99] Whilst there was some vagueness in the respondent’s evidence relating to this trip, particularly his inability to know, despite having come from the city of ZZ, where the security services building was located, there were no serious inconsistencies in his evidence. The Authority therefore closely considered the original decision of April 2000 where the Authority had noted that “A further risk to the appellant was that he absconded while on bail.” The evidence of the respondent then and now is that, to his understanding, his father had had to pay some form of bribe and give a surety to the *Komiteh* authorities so that he could be released after being detained in Tehran in possession of the incriminating video camera and tape.

[100] On close examination of the evidence, as recorded in the Authority determination of April 2000, the use of the word “bail” appears to have been imprecise or inappropriate on the actual evidence that the respondent had given

and is recorded in the decision. What it actually states is that the respondent's father came to know where he (the respondent) was and was able to secure his release by putting up a valuable shop as a surety. Additionally, on his release he was told to wait for a letter from the court. No letter was ever received. In the circumstances, accepting the evidence at face value, there never was any criminal charge, court appearance or "bail", in the correct use of the word. In this situation the respondent, on his return to Iran in 2001, was not a person absconding from bail and thus, it is unsurprising that there was no record of any conviction or bail that would alarm the authorities at the time of his re-entry.

[101] The Authority, in 2000, however, reached its conclusions in the terms set out earlier in the decision. The "absconding while on bail" was an apparent add-on factor to the determination but not part of the core finding.

[102] In this situation, therefore, noting the apparent overstatement of the evidence, the Authority is not satisfied, after a careful and detailed examination of all of the evidence relating to this application and the respondent's response to the claims made, that the procurement of the refugee status, as reasoned and explained in the Authority's decision 71623/99, may have been by fraud, forgery, false or misleading representation or concealment of relevant information.

[103] As the applicant has not established that the first stage of the two-stage test has been satisfied, the application is dismissed. In this situation, it is unnecessary to go on to determine whether the respondent should cease to be recognised as a refugee.

[104] The application is therefore declined.

"A R Mackey"
A R Mackey
Chairman