REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76195

AT AUCKLAND

Before:	A R Mackey, Chairman
Representative for the Appellant:	H Hylan, Avondale Law
Date of Decision:	29 April 2008

DECISION

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[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a national of Malaysia.

INTRODUCTION

[2] This appellant has made three applications for refugee status and this is the second appeal relating to him. He is a married man in his early 60s who arrived in New Zealand in July 2000 and made an application for refugee status on the first occasion on 10 October 2000. He failed to appear at a scheduled interview with the RSB in respect of that first claim and it was thereupon dismissed.

[3] The appellant lodged a second application on 25 February 2002 and an interview was scheduled for 15 April 2002. The RSB was advised that the appellant would not be able to attend that interview due to injuries he suffered on 11 April 2002. He subsequently did not appear for the interview. The RSB proceeded to determine the matter on the papers on the basis that the medical certificate provided by the appellant stated that he would be fit to start work on the

date of the interview and thus there was no acceptable reasons for him failing to attend. The decision to decline the grant of refugee status was delivered by the RSB on 16 April 2002.

[4] The appellant then appealed to this Authority on 26 April 2002. On 21 May 2004, a letter was couriered to the appellant at the address he had provided, advising him that the hearing of his appeal would take place on 2 July 2004. A copy of his file was sent to him. The courier returned the file, advising that the appellant was no longer available at that address. Pursuant to s129P(3) of the Immigration Act 1987, and Regulation 24 of the Immigration (Refugee Processing) Regulations 1999, the Authority proceeded with the hearing on the basis that it could rely on the latest address provided by the appellant.

[5] A short decision was then delivered (*Refugee Appeal No 73753* (21 July 2004)), wherein the Authority, after setting out its ability to make a decision on the papers, concluded:

> "In the absence of the appellant at the hearing, no finding can be made as to credibility or as to substantive facts. Therefore the Authority cannot satisfy itself whether the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. The appeal is dismissed."

[6] It appears that nothing further was done until 11 July 2007, when an immigration officer from the Compliance Section of the DOL wrote to the appellant, noting that he was unlawfully in New Zealand and that he agreed to depart by 31 July 2007. The officer advised that, unless the appellant made a voluntary departure, he would be liable to be served with a removal order. This appears to have prompted a third application for refugee status from the appellant on 25 July 2007. Surprisingly, and in an apparently *ultra vires* manner, overlooking the provisions of s129J(1) of the Immigration Act 1987 which states:

> "**129J. Limitation on subsequent claims for refugee status—**
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> (1) A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim."

the Refugee Status Branch proceeded to give the appellant an interview and to determine his claim substantively without enquiring whether this third claim is based on significantly different grounds from either of his previous claims. On 11 December 2007, the refugee status officer declined the application, setting out

reasons, at length, which are in the RSB file that has now been made available to the Authority. All of the appellant's claims appear to have been based on his prediction of potential harm to him from a money-lender in AA and some possible associated discrimination because of his Chinese ethnicity. There appears to have been little or no mention of any discrimination on the grounds of the appellant's conversion to the Christian faith many years ago, now alleged in grounds submitted by the appellant's representatives.

[7] There is nothing in the grounds presented by the appellant, or his current representatives, indicating that circumstances in Malaysia have changed to such an extent that a further claim is based on significantly different grounds from the previous claims.

[8] The appellant then appealed to this Authority, out of time, on 6 March 2008. The Authority, noting the appeal was lodged out of time from the limits set out in s129O(3) of the Immigration Act 1987, invited the appellant to provide submissions as to why the appeal should be accepted out of time and also provided a referral list of legal advocates to the appellant.

[9] Mr Hylan of Avondale Law wrote to the Authority on 12 March 2008, advising that he was now acting for the appellant and attaching an authority to act.

[10] The Authority, in a letter dated 4 April 2008, acknowledged the receipt of the notice of appeal and the affidavit, dated 18 March 2008, from the appellant, setting out the reason why he considered the appeal should be accepted out of time. In that letter of 4 April 2008, the Authority stated that the application to grant leave out of time would be "considered contemporaneously with any submissions you may wish to provide in accordance with the invitation set out later in this letter".

[11] On 18 April 2008, the Authority received submissions from the appellant's representatives. These have been taken into account in the consideration of this matter.

APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

[12] As noted in the Authority's letter to the appellant, dated 6 March 2008, the Authority will accept an application for leave to appeal out of time which is supported by an affidavit. The affidavit provided by the appellant, dated 18 March 2008, stated that whilst the decision from the RSB was couriered to the appellant's home, he did not receive it personally until the beginning of March 2008. The reasons for this, he claims, are that the address at which he lives is home to seven people, one of whom may have received this letter in error and not passed it on to him.

[13] Whilst, *prima facie*, the Authority does not consider this is a justifiable reason for failing to lodge the appeal within the correct time limit, the Authority has gone on, in the alternative, to assess the more substantive aspects of the appellant's appeal and the reasoning on these issues follows below.

JURISDICTION OF THE AUTHORITY TO DISPENSE WITH AN INTERVIEW

[14] In certain circumstances, the Authority is permitted to determine an appeal on the papers without the appellant being given an interview. This arises under s129P(5)(a) and (b) of the Act where the appellant was interviewed by the RSB (or given the opportunity to be interviewed but failed to take that opportunity) and where the Authority considers the appeal to be *prima facie* manifestly unfounded or clearly abusive. The Authority's jurisdiction in this regard was examined in *Refugee Appeal No 70951/98* (5 August 1998).

[15] In the current case, the Authority, through its Secretariat, wrote to the appellant's representatives, Avondale Law, on 4 April 2008. That letter advised that, in the Authority's preliminary view, the appeal was *prima facie* manifestly unfounded or clearly abusive for the reasons set out in that letter. It was noted that the appellant had not indicated any well-founded basis for a prediction that he was at risk of being persecuted on return to Malaysia, nor was there any indication of a nexus between any fears held by the appellant on return and one or more of the five Refugee Convention reasons.

[16] The Secretariat's letter advised that the Authority had jurisdiction to determine the matter on the papers, without offering an interview, pursuant to s129(5) of the Act. It also explained that the responsibility for establishing an appellant's claim lay with the appellant.

[17] A response was received from the appellant's representatives in a letter dated 18 April 2008 with attached to it, a set of submissions from the appellant's representatives. These have been fully considered by the Authority.

CONCLUSION ON WHETHER TO DISPENSE WITH AN INTERVIEW

[18] As noted above, despite the provisions of s129J(1) of the Immigration Act 1987, this appellant was interviewed by a refugee status officer in respect of this third claim on 16 October 2007. The Authority has now had the opportunity to consider the submissions put forward by Mr Hylan and his request for an oral hearing. After considering those submissions and all of the other evidence available on the file, the Authority is satisfied that this is an appeal that is manifestly unfounded or clearly abusive and the submissions do not indicate a situation where an oral hearing should be held before this Authority. The reasons for rejecting the submissions follow.

[19] Mr Hylan's submissions commenced by claiming that the appellant's well-founded fear of being persecuted by a "loan shark" was accepted by the RSB, and that there was a lack of government protection for a person with a non-Muslim faith. It is submitted that his details had not been adequately considered in the RSB decision. Mr Hylan then noted that the interview before the refugee status officer had proceeded without the appellant being represented and that the refugee status officer did not take an initiative to inform the appellant that he had an option to contact the Legal Services Agency to seek out a legally-aided representative. The submission then went on to claim that the RSB accepted the appellant faced a risk of persecution because of his failure to repay his loan and therefore, the issue of persecution by a non-state actor needed to be assessed. Then submissions are made about the situation of Christians in Malaysia and a claim that the appellant had demonstrated he had been subjected to discrimination by a loan shark due to "appellant's Christian religion" and that the loan shark took it for granted that the appellant would not be able to obtain protection from the Malaysian authorities. Various anecdotal problems for Christians in Malaysia are then listed. Finally, it is submitted that the appellant will not be in a position to pay his debts on return and that:

> "In these circumstances, the risk of persecution by the loan shark while taking the advantage of government machinery is inevitable."

[20] The appellant is also stated to have little chance of finding a job and may

now be incorrectly viewed as a wealthy man, having worked and saved money from overseas for more than seven years.

[21] Unfortunately, none of these submissions have any substantive merit at all. Firstly, the lack of representation was a matter that was noted by the refugee status officer in the interview with the appellant, when the appellant commented that a lawyer was too expensive. Similarly, when the appellant was offered an interview by the RSB on 28 September 2007, he was advised that he was welcome to appoint a representative to assist him, who could be a lawyer and who could attend the interview with him. Similar offers were made to the appellant in the previous applications he made, including the letter from this Authority which set down for hearing his first appeal (*Refugee Appeal No 73753*).

[22] The Authority is therefore satisfied that there has been no lack of notice or unfairness to the appellant through his lack of representation and he has been given ample notice of his ability to obtain representation at all stages.

[23] Secondly, this is, of course, the third claim by the appellant. In terms of the provisions of the Immigration Act 1987 s129J(1), the refugee status officer should have first established whether or not the appellant had established whether there had been a change in circumstances in the appellant's home country such that the additional claim was based on significantly different grounds, before going on to consider the appellant's claims substantively. It is clear from the grounds that were put forward by the appellant and all of the details of the interview he did have, that this third claim was not based upon a change in circumstances in Malaysia to such an extent that this claim is based on significantly different grounds from the previous claims. All of the claims have, at their core, been related to the appellant's fears of the loan shark and, to a much lesser degree, possible discrimination primarily on the basis of his Chinese ethnicity (which was set out in brief in his original claim). Beyond all this, none of his submissions, even tangentially, indicate a nexus between the fears of this appellant and one or more of the five Refugee Convention grounds.

[24] For all of the above reasons, therefore, the Authority will determine this matter on the papers without giving the appellant the opportunity to attend a further interview.

THE APPELLANT'S CASE

[25] The appellant claimed from the outset of his first claim that he feared repercussions from the loan shark because of the appellant's inability to repay a loan he had taken out in the late 1990s. The appellant has explained on several occasions that the purpose of this loan and indeed, much of the funds earned by the appellant while in New Zealand was to pay for treatment for the appellant's grandson who is, sadly, afflicted by a blood disorder. It was only tangentially that the appellant has stated that the problems he suffered in the past with the loan shark were possibly because of his Chinese ethnicity. There appears to be no suggestion of any substance that it was related to the appellant's Christian religion. His claim has been examined in depth by the RSB in this third application. There are no new elements in the appellant's third RSB claim and interview, or in this appeal, that were not relevantly taken into account by the RSB.

THE ISSUES

[26] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

> "… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

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

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

[28] In this case, as this is a third claim for refugee status, the Authority must also determine whether the RSB was correct in the approach it took to this claim and, in the alternative, even if the RSB did proceed in error by failing to note the provisions of s129J(1) of the Act, has this appellant established that the circumstances in his home country have changed to such an extent that this subsequent claim is based on significantly different grounds from the previous claims; s129J(1) and s129O(1) of the Act?

ASSESSMENT OF THE APPELLANT'S CASE

[29] As noted, the Authority has determined it will not interview this appellant and thus an assessment of credibility will not be made. Accordingly, his account, as recorded, is accepted for the purposes of determining this appeal.

[30] Firstly, the Authority is satisfied that, despite a failure of determination on this point by the RSB, it actually lacked jurisdiction under s129J(1) in that the appellant had not indicated any material change in circumstances since his first claim was made. Additionally, it does not differ from the second claim. The appeal is therefore manifestly unfounded and clearly abusive on that ground alone.

[31] However, as noted, the Authority has gone on to consider this appellant's latest claim, in the alternative, and based upon the claim and interview he held with the RSB. In this regard, the Authority firstly concludes that the appellant has not established a nexus between any fear of being persecuted with race, religion, nationality, membership of a particular social group or political opinion. Any predicted fears held by this appellant substantially, and almost entirely, relate to his fears of maltreatment from the loan shark because of the failure by the appellant to repay the outstanding loan and interest. Any possible claim based on religion or ethnicity is utterly peripheral and, in fact, only raised as a passing comment in the claims and interview of the appellant. Accordingly, there is no Refugee Convention reason established in this case and again, this leads the Authority to conclude that the appeal is manifestly unfounded and clearly abusive.

[32] The Authority, as a final conclusion, agrees with the assessment of the RSB that this appellant does not have any well-founded fear of being persecuted on return for any Convention reason.

[33] The appellant's situation is, unfortunately, a sad one which appears to have been brought about by the appellant's understandable and earnest desire to assist his grandson by providing treatment with the hope of recovery from his very unfortunate medical affliction. It appears that substantial funds that have been earned in New Zealand have also been sent back to Malaysia, either for repayment of the outstanding loan or to assist the appellant's grandson's medical treatment. This unfortunate predicament, however, and the appellant's approach to it, together with the difficulties with the repayment of the loan and possible maltreatment for failure to repay, simply do not come within the ambit of refugee or protection law responsibilities undertaken by this country. This Authority has no

ability to consider humanitarian issues and the appellant's advisors will hopefully explain the correct legal position to him so that he is not wasteful of further resources in trying to pursue refugee claims in this country that clearly have no prospect of success whatsoever.

CONCLUSION

[34] The Authority therefore finds that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"A R Mackey"
A R Mackey
Chairman