

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76360

AT CHRISTCHURCH

Before: C M Treadwell (Chair)
M A Roche (Member)

Counsel for the Appellant: K D Morrison

Appearing for the Department of Labour: No appearance

Date of Hearing: 8 September 2009

Date of Decision: 2 October 2009

DECISION

INTRODUCTION

[1] This is an appeal against a decision of a refugee status officer declining the grant of refugee status to the appellant, a national of the Democratic Republic of the Congo (“the DRC”).

[2] This is the second time that the appellant has claimed refugee status in New Zealand.

[3] On 23 January 2006, the Authority (differently constituted) delivered its decision in respect of the appellant’s first appeal. See *Refugee Appeal No 75687* (23 January 2006). It rejected as untruthful his claim that his father, a doctor who had worked for a medical organisation in Rwanda during the 1990s, had been forced to go into hiding in June 2004 following an unsuccessful coup attempt in Kinshasa and found that the appellant did not have a well-founded fear of being persecuted if he returned to the DRC.

[4] On the present appeal, the crux of the claim is that the appellant says he is now at risk of being killed or otherwise seriously harmed in the DRC by

government forces who are angered by the refusal of his father in 2008 (then a civil servant) to take bribes and his father's submission of a report to the relevant Cabinet Minister, providing the names of corrupt officials. The issues which arise are the credibility of the account and the question whether the appellant faces a real chance of serious harm.

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[5] Second or subsequent refugee claims (including appeals to the Authority) are subject to jurisdictional limitations.

[6] Section 129O(1) of the Immigration Act 1987 ("the Act") provides:

"A person whose claim or subsequent claim has been declined by a Refugee Status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that the circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision."

[7] It follows that it is necessary to consider the appellant's original claim and his further claim, as presented at the second appeal, with a view to determining:

- (a) whether, in terms of s129O(1) of the Act, the Authority has jurisdiction to hear the second appeal and, if so;
- (b) whether he is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

[8] Jurisdiction to hear and determine subsequent refugee claims under s129O(1) of the Act involves a comparison of the claims as asserted by the refugee claimant. In the absence of significant difference in the grounds upon which the claims are based, there is no jurisdiction to consider the subsequent claim. See *Refugee Appeal No 75139* (18 November 2004).

[9] Where jurisdiction is established, the merits of the subsequent claim will be heard by the Authority. This hearing may be restricted by the findings of credibility or fact made by the Authority in relation to the previous claim. Section 129P(9) of the Act prohibits any challenge to a finding of fact or credibility made by the Authority in relation to a previous claim and the Authority has a discretion as to whether to rely on any such finding.

THE APPELLANT'S FIRST CLAIM

[10] What follows is a summary of the appellant's evidence at the first appeal hearing. It is recorded in detail in *Refugee Appeal No 75687* (23 January 2006).

[11] The appellant told the Authority at his first appeal hearing that his father, a doctor, became the director of an international medical organisation in Rwanda in 1994, working with the Rwandan Ministry of Health. In August 1998, because of the outbreak of civil war in the DRC, the family joined their father in Rwanda, before moving, in late 1998, to Kenya.

[12] In 2000, his father took up a position with the World Health Organisation (WHO) in Brazzaville, in the Republic of Congo, where he was joined by the appellant's mother and most of his siblings in 2001. The appellant remained with his elder sister in Nairobi as they were arranging to study overseas. After being accepted for enrolment in a university here the appellant came to New Zealand.

[13] As the appellant's passport was due to expire in July 2004, he sent it by DHL courier to his father in Brazzaville some three weeks before the expiry of his visitor's permit on 11 June 2004.

[14] The appellant's father travelled to Kinshasa with the appellant's passport. The appellant received an email from him, in Kinshasa, on about 6 or 7 June 2004 advising that he had given the passport to someone. This email was the last contact the appellant or anyone else in the family had with his father.

[15] On 11 June 2004, a failed coup attempt by a group within the presidential guard took place in Kinshasa. The appellant thought it possible that his father had been caught up in the disturbance that followed.

[16] In August or September 2004 the appellant learned from his sister that his family had heard that his father may have "gone towards Mbandaka" a city to the north of Kinshasa. There was no further news of him.

[17] The appellant then filed a refugee claim, on the grounds that he assumed that, because his father was from Kisangani in the east and had worked in Rwanda, this may have caused the Joseph Kabila regime (which was hostile to Rwanda) to harm him, notwithstanding his lack of political allegiances or activities.

[18] The appellant also raised the existence of an uncle in Paris whom he believed had been recognised there as a refugee. The uncle had served in the army under Mobutu and had then fought with the Congolese Rally for Democracy under a particular general. He went to France around the end of 2000, after the death of the general. The appellant feared that if the DRC authorities learned of his connection to the uncle, it would further endanger him.

Conclusion by Authority on first claim

[19] The panel on the first appeal rejected the appellant's first claim. In brief, it found:

- (a) The father's disappearance coincided suspiciously with the expiry of the appellant's visitor's permit in early June 2004.
- (b) The appellant's attempt to link his father's disappearance to the coup attempt on 11 June 2004 was vague and implausible.
- (c) The claim that his father took his passport to Kinshasa on 6-8 June 2004 was inconsistent with the appellant's claim that it was to be returned to New Zealand by the first week of June and was invented to place his father in Kinshasa on the date of the coup attempt.
- (d) The appellant could give no coherent evidence concerning the attempts made by his family to investigate what might have happened to his father, a well educated medical doctor.
- (e) If his father disappeared in June 2004 it was incredible that the appellant would have delayed telephoning his mother in Brazzaville until late 2005 merely on the grounds of cost, particularly in view of his evidence that, during 2003 and the first half of 2004, he had spoken to his mother as frequently as once or twice a week.
- (f) After the expiry of his permit in June 2004, the appellant was helped by a pastor who gave him accommodation, supported him financially and helped him to find and pay for a room in a flat. Inexplicably, the appellant had not told the pastor about his father's disappearance.
- (g) The appellant failed to produce evidence from any member of his family, in particular his mother, his father's brother living in Paris or

his elder sister, as to what was known about his father's disappearance, in spite of being given ample opportunity to produce such evidence after the hearing.

[20] Taken cumulatively, the above concerns led the Authority to conclude that the appellant's claims concerning his father's disappearance and his consequent fear of returning to the DRC were not credible.

[21] The Authority went on to consider whether what could be accepted as truthful about the appellant (that his father originated from the eastern DRC and worked in Rwanda during the 1990s and that he has an uncle, now a refugee in France) gave rise to a well-founded fear of being persecuted but concluded that it did not.

THE APPELLANT'S SECOND CLAIM

[22] The appellant does not resile from his first claim and maintains that the account he gave at his first appeal hearing was truthful. Nevertheless, he does not rely on those events as the grounds of his second claim. Rather, he relies upon claimed developments in the DRC since his first claim was declined.

[23] As to his father, the appellant says that he re-emerged from hiding in August 2006, whereupon he was immediately given a position as director of a department within the Ministry of Health in the DRC. In that capacity, he attended a conference in another African country, representing the DRC, in September 2006.

[24] In spite of his new position, the appellant's father experienced difficulties in obtaining a passport for himself. In order to force him to pay a bribe, he was accused by the passport office of having connections to anti-government elements. Even though a passport was then issued to him (on payment of the bribe), he was placed under restrictions which required him to seek permission every time he travelled, including to a relative's funeral in Kisangani in November 2006.

[25] In November 2006, an uncle who had been fighting with a militia in the east of the country, opposing Rwandan and Ugandan incursions into the DRC, returned to Kinshasa as part of the militia's merger into the regular DRC army.

[26] On his return, the uncle was questioned and detained by the intelligence services without reason being given. He was transferred after a month to a prison, where the appellant's father was able to provide him with food.

[27] In early 2007, the appellant's mother and siblings travelled from Brazzaville to Kinshasa to join the appellant's father. At about this time, the appellant's father started to come under pressure from corrupt officials connected to his department. The officials were producing forged immunisation certificates to manipulate foreign aid and welfare for their own financial gain and were engaged in other, similar, scams. The appellant's father refused to be complicit and so became an obstacle to their access to funds.

[28] In July 2007, the appellant's uncle was released from custody, under strict bail conditions, including restrictions on travel, an undertaking from the appellant's father that he would vouch for him and a prohibition on the uncle contacting any international human rights agencies.

[29] In spite of the last-mentioned restriction, the appellant's uncle wrote a letter on 17 October 2007, to *Justice sans Frontières*, a human rights organisation with an office in Kinshasa.

[30] In April 2008, the appellant's father submitted a report to the Minister of Health, providing particulars of the officials who were involved in the 'immunisation certificate' fraud. As a result, he received visits from security officials who questioned him about the matter. The appellant's father then immediately took leave of absence and left Kinshasa for Kisangani, in the east of the country, where he has a palm oil farm. He has remained there ever since, travelling into Kisangani only for supplies, to visit a doctor and to make the occasional telephone call. The appellant's mother and siblings have remained living in Kinshasa because the education is better there than in Kisangani.

Documents

[31] In support of his claim, the appellant produces the following relevant documents:

- (a) Undertaking dated 3 July 2007 by the appellant's father, to secure the release of the appellant's uncle;

- (b) Letter dated 11 April 2008 from the appellant's uncle "to whom it may concern";
- (c) Letter dated 14 April 2008 from the appellant's father "to whom it may concern";
- (d) Email dated 1 October 2008 from the appellant's father to the appellant and his sister in the United States;
- (e) Letter dated 17 October 2008 from the appellant's uncle to *Justice sans Frontières*, in Kinshasa;
- (f) Letter dated 19 October 2008 from *Justice sans Frontières* to the appellant's uncle;
- (g) Letter dated 13 April 2009 from the appellant's uncle in Kinshasa to the appellant;
- (h) Email dated 19 April 2009 from the appellant's sister in Kinshasa to the appellant;
- (i) Letter dated 4 August 2009 from Pastor Dafydd Hughes "to whom it may concern".

[32] Counsel has tendered written opening submissions dated 6 August 2009. At the conclusion of the second appeal hearing, leave was granted for him to lodge closing submissions by 22 September 2009. They were received on that date, together with a four-page, faxed letter dated 16 September 2009 from the appellant's father, attaching a copy of a DRC Ministry of Health *Autorisation de Sortie*, dated 30 November 2007, authorising the appellant's father to travel from Kinshasa to Kisangani to attend his mother's funeral.

CONCLUSION ON JURISDICTION

[33] As explained in *Refugee Appeal No 75139* (18 November 2004) at [51]:

"Jurisdiction under s.129J(1) is determined by comparing the previous claim to refugee status against the subsequent claim. It is clear from the definitions in s.129B(1) that the exercise requires the refugee status officer and the Authority to compare the claims **as asserted by the refugee claimant**, not the facts subsequently found by [the Refugee Status Branch] officer or the Authority."

[34] The Authority is satisfied that, in the present case, the jurisdictional threshold is met. The appellant's second claim is predicated upon grounds different to those put forward in his first claim.

[35] Given that finding, it is necessary to consider the second claim in the context of the Refugee Convention.

THE ISSUES

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

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

[37] 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?

ASSESSMENT OF THE APPELLANT'S CASE

[38] At the outset, it is necessary to address the question of the appellant's credibility, including the findings made by the panel on the first appeal.

[39] The Authority has a discretion to rely upon findings made in relation to an earlier claim. Pursuant to s129P(9) of the Act:

"... the claimant may not challenge any finding of credibility or fact made by the Authority in relation to a previous claim, and the Authority may rely on any such finding."

[40] The Authority finds the reasons given by the panel on the first appeal for its conclusions on credibility to be cogent and persuasive and determines to rely upon

the findings of credibility therein. It follows that, of the evidence which was before the panel on the first appeal, the Authority accepts only that the appellant is originally from Kisangani, in the east of the country, that his father worked in Rwanda during the 1990s and that an uncle was granted refugee status in France.

[41] As to the second refugee claim, (that is to say, the claimed events since the appellant's first refugee claim), there are elements of it which give rise to further credibility concerns (discussed shortly) but, for reasons which will become apparent, the Authority extends the benefit of the doubt to the appellant.

[42] The principle concerns which arise are the circumspection with which any second claim must be approached where the first claim has been rejected for lack of credibility, and the fact that there are cogent reasons for considering that the letter of 19 October 2007 from the human rights organisation *Justice sans Frontières*, to the appellant's uncle is fake.

[43] In particular, the letter appears to lack authenticity because:

- (a) the printed letterhead of the letter wrongly misspells the name of the organisation as *Justice sans Frontière* (without the final "s");
- (b) the telephone number given on the letterhead does not match that given by the organisation on various websites which record the contact details for such organisations;
- (c) the email address is similarly incorrect (and is a yahoo.com address – itself unlikely for such an organisation).

[44] Further, the appellant concedes that his uncle is, in fact, a serving commander in the Congolese army. This only emerged when the Authority pointed out to the appellant that the letter from *Justice sans Frontières* referred to his uncle as "*Commandant Armée Nationale Congolaise à Kinshasa*". Faced with the incongruity of a serving army officer being simultaneously under suspicion of anti-government activity, the appellant attempted to minimise his uncle's role as a "commandant", claiming for the first time that his uncle did not have men serving under him and so was not an important officer. We reject that explanation as specious. The notion that the military would permit an officer to retain his rank and duties of any sort while under such suspicion is implausible.

[45] For these reasons, we are satisfied that the letter of 19 October 2007 from *Justice sans Frontières* is fabricated. We have considered whether that finding taints the other documents which accompanied the appellant's sister's email (the letter of 13 April 009 from the appellant's uncle to the appellant, his father's undertaking of 3 July 2007, securing the release of the uncle and the uncle's letter of 17 October 2007 to *Justice sans Frontières*). For reasons which follow, however, we find that we do not need to determine that issue.

[46] For the purpose of this hearing, we extend the benefit of the doubt to the appellant and find that his father is living on a family-owned farm near Kisangani, following his submission of a report to the Minister of Health which named people in the Department whom he considered to be corrupt and that he (the appellant's father) was questioned by security officials as a result and that, further, the appellant's uncle was detained for a period of eight months following his activities with a militia in the country's western regions and that he has since been released, with travel and reporting conditions.

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

[47] "Being persecuted" comprises two elements – serious harm and the failure of state protection; see *Refugee Appeal No 71427/99* (16 August 2000) at [67]. Further, the appropriate standard is a sustained or systemic violation of core human rights. See in this regard J C Hathaway *The Law of Refugee Status*, (Butterworths, Toronto, 1993) at p108 and *Refugee Appeal No 2039/93* (12 February 1996).

[48] Counsel submits that:

“2.11 The appellant's father and uncle have experienced serious harm from corrupt government officials, and have been forced to pay bribes to avoid greater harm. The DRC government has entirely failed to protect them from that harm.

2.12 The appellant fears that if he is returned to the DRC he will be identified at point of entry as a relative of his father and uncle and subjected to arrest and threat of harm because of his connection to them which will mean that he will be seen as another easy target for extortion of bribes.”

[49] A number of points must be made:

[50] First, the evidence does not establish that the appellant's father has suffered serious harm. He says that he had to pay bribes in 2006 to ensure that he cleared his name from any possible problems arising from the failed coup

attempt in 2004 and that, thereafter, he had no difficulty being employed in a high-ranking government position. Having blown the whistle on corrupt government officials in 2008, he was then questioned and paid bribes to get rid of the matter, as a result of which he elected to abandon his job and to go to live on his farm property near Kisangani. The evidence does not establish more than this. He does not claim that he suffered any physical harm, or that he was detained. He has not been the subject of any interest since.

[51] Second, as to the uncle, he does not know why he was detained, save that it related to his time with a militia. He says, in an undated letter (at 346 of the file), that he was questioned about weapons and communications devices, though no trace of either was found in his flat. He was not mistreated.

[52] There is too little information for us to know why the authorities detained the uncle. We accept that it appears to have been in connection with his activities with a militia (where, he says, he was merely a liaison officer), but it does not follow that their concerns about the uncle at that time (some three years ago now) would give rise to any interest by the authorities in the appellant. Indeed, the lack of mistreatment, release and reinstatement of the uncle into the army as an officer is more indicative of any concerns being allayed at the time. The likelihood that the uncle's personal difficulties some years ago would now have repercussions for the appellant is remote and speculative. Indeed, the evidence does not indicate that it caused any difficulties for the appellant's father, who has a much closer relationship to the uncle, as his brother.

[53] Third, while past persecution can be an excellent indicator of likely future harm, so too can a lengthy absence of harm signal that there is unlikely to be any harm in the future. The father has experienced no serious difficulties since early 2008 and the uncle none since 2006.

[54] Fourth, antipathy towards one family member does not automatically translate into a risk for all family members in all circumstances. Assessment of the degree of any risk to other family members requires an understanding of the context and consideration of the evidence of the experiences of other family members.

[55] With these points in mind, we address first the claim that the appellant is at risk because of his father's difficulties.

Risk arising from relationship to father

[56] The Authority is satisfied that there is no risk of the appellant suffering serious harm at the hands of the authorities on account of his father's claimed difficulties. His father continues to live openly and without difficulty on a family-owned property near Kisangani, a major centre. He has been there for well over a year and is engaged in trade there, according to his email of 1 October 2009. In spite of the ease with which he could be located, if the authorities had any wish to contact him, there are no reports of him experiencing any difficulties whatsoever.

[57] In his letter of 16 September 2009, the appellant's father says that, before leaving Kinshasa, he had been spoken to by personnel of the ruling political party, whose preoccupation was whether he had given information to any opposition parties because some of the funds taken from his department had been used for electoral campaigns. Beyond those enquiries, he does not report any further interest in him whatsoever.

[58] Even if the appellant's father was of some ongoing interest to the authorities, it does not follow that the appellant would himself be of any interest to them. The fact that he would not be is reinforced by the continuing residence of his mother and siblings in Kinshasa. That they continue to live there (solely for the purpose of accessing better education) strongly suggests that the appellant's father is confident that they are not at any risk – a conclusion borne out by the reality that none of them have suffered any harm at all.

[59] Invited to comment on the apparent safety of his family in Kinshasa, the appellant speculated that he would nevertheless be at risk because he is an adult male. We decline to accord any weight to that speculative and unfounded assertion. Indeed, the appellant's brothers are approximately 24 years old and 21 years old and also qualify as adult males, yet neither of them is reported as suffering any harm. Further, the history of human rights abuses by soldiers and security forces in the DRC does not suggest that women are immune from harm.

[60] The appellant's father, in his letter of 16 September 2009, asserts that he did not take his family to Kisangani with him in early 2008 because he had no money at the time to pay their airfares. That does not explain why he has not subsequently moved them to Kisangani or elsewhere (including Brazzaville, across the river, where they previously lived). Nor does it address the appellant's

evidence that they remain in Kinshasa so that the appellant's siblings can access better education.

[61] Towards the end of the appeal hearing, the appellant was invited to clarify why, in view of the safety of his family in Kinshasa, he would be at risk. In response, he asserted that, as a person returning from overseas, he would be at risk of being targeted by government officials for bribes. Again, we decline to give that speculative assertion any weight. Counsel suggests that he would be identifiable as a person returning from some years in a western country immediately on arrival. We disagree. As was put to the appellant, country information indicates that Ndjili, Kinshasa's main airport, handles over half a million passengers a year and has numerous international arrivals daily (see www.2747.com/2747/world/airport/kinshasa.htm). The Congolese diaspora is vast, after decades of conflict. There is nothing remarkable about the appellant, such as to make him stand out. At most he might be forced to pay a bribe to get through customs and immigration, as the country information suggests many do, but that falls far short of amounting to serious harm.

[62] Kinshasa itself is a cosmopolitan city of over seven million people. Beyond the routine checking of his travel documents at the airport, there is nothing on the evidence before us to suggest that the appellant – a Congolese national fluent in Lingala, the main language spoken in Kinshasa – would be identifiable as having lived overseas.

[63] We accept that there is a high degree of corruption in officialdom in the DRC, as there is in much of Africa. Illegal bribes are routinely demanded for the provision of services. The appellant is likely to encounter it from time to time, as do most other citizens and residents. We do not condone or minimise such unlawful practices. Generally, however, such abuse of official power falls far short of reaching the level of serious harm inherent in the notion of persecution (and, being for reasons of criminality, would be likely to fall outside any of the 'Convention reasons').

[64] The appellant suggests that he is at risk of being detained and mistreated in the course of such bribery demands, with government antipathy towards his father providing a pretext. Again, there is no evidence to support that assertion. The appellant's mother and siblings continue to reside in Kinshasa without being subject to detention, mistreatment or bribery demands on account of the

appellant's father. There is no reason to think that the appellant is at any risk himself.

[65] One final issue arose in relation to the appellant's father. It is asserted that he was subject to travel restrictions when he was employed by the Ministry of Health. As evidence, he has produced an *Autorisation de Sortie*, authorising him to travel to Kisangani for his mother's funeral in November 2007. It must, however, be seen in context. The *Autorisation de Sortie* was issued by the appellant's employer, not by the security forces. It appears to be an employment-related requirement, not a law-enforcement requirement. That view is reinforced by the fact that there has been no suggestion that the appellant's father required permission to fly there in early 2008, after he had quit his employment. We are satisfied that any travel restriction on the appellant's father as a requirement of his former employment is not a matter which will give rise to any serious harm for the appellant in the future.

Risk arising from relationship to uncle

[66] It will be recalled that the appellant says that his uncle's difficulties also put him at risk. He says that his uncle was a member of a militia fighting against Ugandan and Rwandan forces in eastern DRC, before returning to Kinshasa where he was detained for eight months without explanation, before being released and returning to duties as a serving officer in the army, though subject to reporting and travel conditions.

[67] As with the appellant's father, the difficulties the appellant says that his uncle experienced do not, on the evidence, indicate any risk of harm to the appellant. Were they to do so, his mother and siblings in Kinshasa would undoubtedly have experienced difficulties before now. They have not. Further, the appellant's father is well aware of the uncle's position because it was his father who provided a surety for the uncle's good conduct as a condition of his release. If the appellant's father considered that the uncle's predicament gave rise to any concern for members of the appellant's family, it is incomprehensible that he would have been content to leave the family living in Kinshasa.

[68] The fact that the uncle is not now viewed as a person of concern to the authorities is reinforced by his continuing service in the army as an officer – a position which he would be certain to lose, or have suspended, if he were not trustworthy.

[69] We have considered whether, cumulatively, the difficulties experienced by the appellant's father and his uncle might create a risk for the appellant but we are satisfied that they do not.

[70] Objectively, on the facts as found, the Authority finds that the appellant does not face a real chance of serious harm if he returns to the DRC. He does not have a well-founded fear of being persecuted.

Convention reason

[71] Given that finding, it follows that the issue of Convention reason does not require consideration.

CONCLUSION

[72] It is concluded:

- (a) The Authority has jurisdiction to consider this second appeal.
- (b) For the reasons given above, the appellant is not a refugee within the meaning of Article 1A(2) of the Convention.

[73] Refugee status is declined. The appeal is dismissed.

"C M Treadwell"

C M Treadwell
Chair