ORDER PROHIBITING PUBLICATION OF NAMES OR OTHER PARTICULARS IDENTIFYING THE PLAINTIFF.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-003298

BETWEEN	M Plaintiff
AND	REFUGEE STATUS APPEALS AUTHORITY First Defendant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF LABOUR Second Defendant

Hearing: 9 August 2010

Appearances: Plaintiff in Person
P M McCarthy for Defendants

Judgment: 17 September 2010 at 4:30 pm

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 17 September 2010 at 4:30 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date……..

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Introduction

[1] The plaintiff, M, applies for judicial review of a decision by the Refugee Status Appeals Authority in which the Authority found that M, a Romanian national, did not satisfy the requirements of Article 1A(2) of the 1951 Convention on the Status of Refugees.[1]

[2] M had been convicted in Romania and sentenced to a term of imprisonment on a charge of VAT refund fraud. Although M accepted that he had signed documents used to perpetrate the fraud, he claimed that he was an unwitting participant and that his prosecution and conviction were orchestrated by his wife's uncle, D, as punishment for M trying to distance himself from D and his associates.

[3] The grounds for the judicial review application are that the Authority:

a) did not have grounds for its adverse credibility finding in respect of M and failed to warn M of the possibility of an adverse credibility finding;

b) failed to give M the benefit of the doubt;

c) erred in finding that the prosecution of M had been genuine and did not amount to persecution;

d) failed to give any or adequate weight to the evidence M relied on to show a well-founded fear of persecution if he returned to Romania;

e) erred in finding that M's actions in reporting D's involvement in the fraud did not amount to an expression of political opinion.

[4] An application for judicial review is concerned with the decision making process rather than the decision itself. The Court will only intervene if the decision making process was procedurally unfair or the decision was based on a misunderstanding of facts, an error of law or if the Authority has taken irrelevant

matters into account, failed to take relevant matters into account or was so unreasonable that no rational authority could have made that decision.[2]

[5] A significant aspect of M's challenge is the Authority's adverse credibility assessment of him. That assessment unquestionably influenced the Authority's decision. One of the reasons given for the Authority's assessment was the inherent implausibility of M's account. This is recognised as a legitimate basis for decision making. In *B v Refugee Status Appeals Authority* [3] Giles J considered this issue, referring with approval to the decision in *Cen v Canada (The Minister of Citizenship and Immigration)*[4] and the passage cited in that case from *Augebor v Minister of Employment and Immigration*:[5]

> There is no longer any doubt that the Refugee Division, which is a specialised Tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the Tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. In *Giron* the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable and so more easily identifiable, since the account appears on the face of the record. In our opinion, *Giron* in no way reduces the burden that rests on an appellant of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn.

The basis for M's claim for refugee status

[6] M asserts that his problems in Romania arose from his involvement with his wife's family. His wife's father and uncle both held responsible positions within the local authority. Although his wife's father disapproved of the marriage, eventually M was accepted into the family, particularly by D. M emphasised D's political connections, which existed by reason of his business relationships, local government connections and membership of the Social Democrat Party. He also emphasised (and the Authority accepted) that they hold these positions in the context of pervasive corruption in Romania.

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[1] Refugee Appeal No.76339 23 April 2010
[2] *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155, 1173 applied in *Mercury Energy Ltd v Electricity Corp of NZ Ltd* [1994] 2 NZLR 385, 389
[3] *B v Refugee Status Appeals Authority* HC Auckland M1600/96, 23 July 1997
[4] *Cen v Canada (The Minister of Citizenship and Immigration)* [1996] 1 CS 301
[5] *Augebor v Minister of Employment and Immigration* (1993) NR 315 (FCA)

[7] M became involved with D's group and eventually, in 2003, D assisted him to set up business on his own account dealing in trucks and vehicles. M described at least one fraudulent transaction organised by D to assist M acquire a vehicle for his new business. Also in 2003 M agreed to transfer 55 per cent of the shareholding in his company to D's wife so that she could start a business without the difficulty of D being associated with the company of a close relative, thereby exposing him to a claim of conflict of interest.

[8] The VAT fraud stemmed from a transaction later in 2003 involving M's company. D asked M to sign a contract and an invoice recording the sale of land by D's associate S, to M's company. D gave M few details and told M that it was a matter between D and S and that M should stay out of it. D subsequently advised M that VAT returns on the transaction had been submitted and that he should expect a visit from VAT inspectors. M claimed not to have signed any VAT refund request. D instructed M as to what to say to the VAT inspectors and M followed these instructions. Within a few days D told M that the VAT refund had been approved and told him to meet with the VAT inspectors to go through details of the claim. He did this and duly received the VAT refund of €120,000. On D's instructions he transferred this money to S's account.

[9] The following year the Economic Police commenced an investigation about the VAT refund. By late 2004 M had decided to begin distancing himself from D's group. This change of heart, he claimed, was prompted by the discovery that his company's accounts showed a debt to S about which he knew nothing. When M sought to exit the company he was told by D's wife that he could not do so because that would leave her with the apparent debt to S.

[10] Throughout 2005 M had no contact with D. He learned later that year that the investigation into the VAT refund was ongoing. M passed this information on to D who told him that there was nothing to worry about. In 2006 however, the investigation seemed to intensify, with M being interviewed by the Economic Police and later the District Attorney.

[11] M was subsequently charged with fraud and making a false statement. S and the two VAT inspectors were also charged. M was acquitted following a trial in September 2006. D conveyed to him that he had fixed this outcome by bribing the Court appointed expert. The prosecution appealed. D told M that one of the Appeal Court Judges had had an affair with M's father-in-law and M's own lawyer also warned that this Judge was against M. M claimed that at this time he began to pay attention to the documents and discovered to his surprise that D's signature had been on the VAT refund approval. D was not prosecuted in relation to the refund.

[12] The appeal succeeded with the result that all defendants were found guilty. M and S each received prison terms of four years two months. M appealed the conviction. He was not required to begin serving his term of imprisonment pending the appeal but the legal advice he received was that there was no prospect of success on appeal. M and his wife decided to leave Romania and, in the meantime, to divorce from one another in order to protect the wife. During discussions in mid-2008 with D, D encouraged M to leave the country, which M interpreted as D wanting to be rid of him so that he could not use the knowledge he had about D's group.

[13] M claimed that it was about this time that he came to believe that D had planned for M to be prosecuted as retribution for him having distanced himself from D's group and that M was seen as a danger to the group because of his knowledge about how it operated. M believed that D had influenced or arranged the initial acquittal in order to give the illusion that the account given by D to M about the transaction would be accepted. By the time a conviction was later entered by the Appeal Court it would be too late for M to change his account and implicate D. In his statement M explained what he believed had happened:

> When the Appeal Court decision came out I had stopped trusting [D] but it wasn't until later (September 2008) that I fully realised what he had done. That's when it all fell into place for me that he had planned the prosecution in his usual immaculate way as retribution for me falling out with his group which they took as an act of rebellion against them. When I said to [D] that I would no longer server them, I didn't properly understand how seriously they would take it …
>
> It became clear to me that once the investigation of the VAT refund had stated [D] had plenty of time to plan how it was going to go. I have no direct

> evidence but I am sure he influenced or arranged the Base Court's decision so as to sell me the illusion that the story I was telling would work … . Once I had been sold the illusion that his story would work I would be comfortable with what would happen in the Appeal Court, where he would get me convicted and then it would be too late to reverse the decision or to reverse the story I had been given to tell.

[14] M resolved to disclose what he knew about D to the High Court. In October 2008 M wrote out a statement which he claimed to be the truth of what had happened with the VAT refund and arranged for it to be sent to the High Court on 3 November 2008, by which time he had already left the country. The High Court subsequently upheld the conviction and sentence.

[15] On M's instructions, the statement he had made to the High Court was also sent to the National Anti-Corruption Directorate. His wife made a similar complaint which was lodged with the office of the Romanian President in early 2009. M did not think that these statements would result in any independent investigation and, further, believes that D will have got himself in charge of processing the complaints either personally or through members of his group. M claims that if he returns to Romania he will be targeted by D and his group in retribution.

Credibility assessment

[16] Early in its decision the Authority recorded its acceptance of the fact that corruption is pervasive in Romania at all levels. The Authority considered, however, that the evidence suggested that D's group was engaged in "low-level" corruption rather than the high-level corruption asserted by M.

[17] At the outset of its assessment of M's case the Authority made an adverse credibility finding in respect of M:

> [66] The Authority does not accept the appellant's exculpatory protestations and his claim that he was an innocent who, having unwittingly married into a leading family of the "oligarchy", had to extract himself from it. Rather, the clear impression of the appellant as a witness is that he is an opportunist who readily takes advantage of any favourable circumstance but quickly blames others for circumstances which are not in his favour. He is presently facing a prison term which he does not wish to serve. He would much rather start a new life with his wife and son in a country from which he cannot be extradited and he hopes that the refugee claim will serve this

> purpose. To achieve his end he has minimised his own part in the fraud and attempted to shift all responsibility to others such as [D] and the members of the "oligarchy". His "spin" to the fact is given superficial plausibility because the "oligarchy", [D] and the other *dramatis personae* in his detailed account do in fact exist. As does pervasive corruption in commerce and the judiciary. However, the fact that the appellant is able to weave his account around persons and circumstances which do exist does not mean his account itself is true. Having seen and heard the appellant give evidence the Authority is of the view that the *dramatis personae* and the corrupt society in which they operate have simply been co-opted into the appellant's self exonerating (and untrue) twist to events. …

[18] The Authority gave two main reasons for this view. The first was that by the time the offending had occurred M had already become involved in the corrupt practices of D's group and had obtained personal advantages. It commented that:

> [69] Against this background the Authority does not believe the appellant when he claimed that his involvement in the VAT refund scheme was an unwitting one in which he was as much a victim of it [D's] scheming as the VAT system itself. The Authority's assessment of the appellant is that he was a willing accomplice in the VAT fraud, operating in the climate of perceived impunity in which he was protected by [D] and [D's] circle. Only when he was charged with a VAT fraud and ultimately convicted did he reflect on his activities and the consequences to his wife and young child. He now minimises his own role and "talks up" anything and everything which lends plausibility to the "persecution claim".

[19] The second reason given was the inherent improbability at the core of M's case. M's assertion that [D] arranged the prosecution, conviction and jail sentence in order to punish him for leaving D's group and prevent him from disclosing what he knew was inherently unlikely, particularly given the fact that the prosecution was not commenced until 2006, a year and a half after M had begun to distance himself from the group. During that time there had been no concern expressed by D and no steps to punish him in any way. Further, the Authority considered that, even allowing for a level of corruption in the Romanian judicial system, M's claim that D not only fixed the outcome of the first instance proceeding, but also either knew or persuaded the prosecution to appeal and knew that the Appeal Court would convict or corruptly arrange that, was "fanciful".

[20] M asserted that there was no evidential basis for the adverse credibility assessment such as inconsistent or contradictory statements by him. He challenges several specific findings forming part of the overall credibility assessment on the

basis that they were not supported by the evidence. They can be conveniently summarised as being the findings that :

a) That M was not an unwitting and innocent participant in the VAT fraud.

b) M gave a false account to the VAT inspectors.

c) M minimised his part in the fraud.

d) M's account of his prosecution and conviction were inherently implausible.

e) The prosecution process was not unfair.

[21] Underlying these specific challenges is the assertion that the Authority wrongly rejected M's sworn statement and failed to give any or adequate weight to other evidence that was available to it. In terms of M's own statements, M asserted that the Authority was obliged to take the approach that is taken in Canada whereby when an applicant swears to the truth of allegations it creates a presumption that the allegations are true unless there is a reason to doubt their truthfulness. This, however, is not the approach that has ever been adopted in New Zealand and it would in fact be contrary to the requirement under ss 129G(5) and 129P(1) Immigration Act 1987 that the claimant has a statutory duty to "establish the claim".

[22] In any event, it is apparent that the Authority did have reasons for rejecting M's sworn statements. First, by M's own account he had engaged in dishonest practises at D's instigation. These included corrupt transactions in his business, bribing his way out of a drink driving conviction and agreeing to D's wife taking a controlling interest in his company to help D avoid the problems of conflict of interest rules.

[23] Secondly, in terms of providing a false statement to the VAT inspectors, even on M's own account he made statements to the VAT inspectors that were based on instructions from D rather than his own knowledge. Given his knowledge of D's

business practises and his own previous involvement in them the Authority was entitled to conclude that M either knew or suspected that the VAT transaction was a fraud and nevertheless co-operated by passing on to the VAT inspectors an account created by D for that purpose.

[24] I also consider that M's claim was inherently improbable and the Authority was entitled to take that view. M's claim that the prosecution and his ultimate conviction had been manipulated by D was not plausible in light of the long period between M's supposed break with D's group and the commencement of the prosecution and D's apparent attempt to assist him at the trial. Further, the suggestion that D had the ability to engineer the prosecution, the acquittal, the appeal and ultimate conviction is not only improbable but overlooks the fact that a conviction on the evidence as it was known to the Authority would have been entirely justified.

[25] M also asserts that the Authority failed to give adequate weight to the statements by T and recordings of conversations between M's wife and T and M's wife and D. The statement by T, a family friend and prosecutor, is only mentioned in passing at [38] of the decision. T's only involvement at the relevant time was prior to the prosecution actually commencing. He met with M, advised M that there was an ongoing investigation and advised him to repay the money. Because of his connection with M's family, T took no further part in the investigation or prosecution.

[26] M produced a written statement by T and the transcript of a taped conversation between M's wife and T in support of his claim. However, it is apparent that neither could have improved the Authority's assessment of M's credibility. T's statement was that when he advised M to repay the money:

> [M] told me that [D] in his position as chief in department of … had approved the VAT refund … [D] had promised [M] that nothing will happen because of his [D's] connection, on the condition that [M] not declare the truth and keep secret that this business was initiated by the husband of his associate …
>
> Fully trusting his promise and because of his position …[M] easily ignored any of my advice, being convinced that [D] would do everything possible to

> end this investigation and exonerate him from responsibility, without having to pay back the VAT refund.

[27] There is nothing in this part or any other part of T's statement that would support M's claim that he was genuinely innocent and unwitting in his participation of the VAT refund. Instead, it paints a picture of M having gone along with D's plans and not being prepared to take any action to rectify the position, in reliance on D's assurance that he would end the investigation (through corrupt means). It is certainly clear from T's statement that D was involved in the fraud. That fact, however, does not mean that M himself was not party to the fraud. The fact that he felt pressured by D and the fact that he did not make any money from the fraud does not change this position.

[28] Nor, for the same reasons, is there any assistance to be gained for M from the recordings of a conversation between his wife and D.

[29] M also argued that the Authority should have given him warning of the possibility of an adverse credibility finding. Any such submission needs to be considered against the fact that the Authority is a body recognised as having specialist expertise in the assessment of claims for refugee status. Its expertise and the specialist nature of its inquisitorial process has previously been recognised by this Court[6] and by the Court of Appeal.[7]

[30] The question of whether and in what circumstances it might be incumbent on the Authority to give warning of a possible adverse credibility finding was considered by Fisher J in *Khalon v Attorney-General*.[8] Fisher J made the observation that credibility findings seemed fundamental to the work of the Authority; its function was to decide whether a refugee applicant's version of events ought to be accepted. Although the Authority usually has available to it some independent information about the conditions in the applicant's country of origin it will almost always depend on the applicant to provide a truthful account of the particular circumstances relied on to support the claim to refugee status. In that

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[6] e.g. *U v Refugee Status Appeals Authority* HC Auckland CIV-2003-404-002530, 30 September 2003; *A v Refugee Status Appeals Authority* HC Auckland CIV-2005-405-1520, 1 March 2006
[7] *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647
[8] *Khalon v Attorney-General* [1996] 1 NZLR 458

situation, and especially where an applicant is represented, it is difficult to see how any applicant would not appreciate his or her credibility was in issue. These comments are apt to the present case.

[31] M's claim depended, in part, on his assertion that he was an innocent and unwitting participant in the VAT fraud and that threats had been made to him and his wife. Self-evidently, his claim could not succeed unless those aspects of it were accepted. Since the only evidence of them came from M himself (leaving aside the unsworn statement of his wife), the Authority clearly could not make an accurate assessment of the validity of his claim without first making an assessment as to his credibility. Further, I was advised by counsel for the defendant that at the hearing before the Authority, M's counsel acknowledged specifically that M's credibility was in issue.

[32] In these circumstances the Authority was not under any obligation to warn M that he might be disbelieved.

Benefit of the doubt

[33] M argued that, given the Authority had such serious doubts about his credibility, he was entitled to be given the benefit of the doubt in terms of the assessment of his claim. The approach to giving the applicant the benefit of the doubt in this context was considered at some length in *Jiao v Refugee Status Appeals Authority*.[9] Noting the feature of many refugee claims that the applicant may not be in a position to conclusively prove his or her assertions and the fact that a refugee's life may be a risk if refugee status is declined, the Court of Appeal referred to the *Handbook on Procedures and Criteria for Determining Refugee Status of the Office of UN High Commissioner for Refugees* which provides that:

> … if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt …
>
> The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible and must not run counter to generally known facts.

[9] *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647

[34] In this case there is no real dispute over the significant facts in the case. The issue was whether M was a knowing participant or an innocent participant. That was a question that required an assessment of M's credibility. The Authority has concluded (and was entitled to) that M is generally unreliable. It is plain that the question whether M should be entitled to the benefit of the doubt was not one that the Authority was even required to consider.

Well founded fear of persecution

[35] In order to establish refugee status M had to establish a well founded fear of persecution if he were to return to Romania. In his submission, M submitted that the Authority had "failed to establish [the] plaintiff's well-founded fear". This of course misunderstands the fact that the obligation lay with M himself to establish that fear.

[36] M's argument on this point was directed towards the likelihood of revenge being taken against him in the event of him returning to Romania as a result of his denunciation of D. In particular, M pointed to the fact that his father in law had physically and psychologically abused his wife and other members of the family for not complying with family "politics" and ideals. He referred particularly to the abuse of his wife following M's departure from Romania and his subsequent denunciation of D to the authorities. He also pointed to the attitude of D's group to opponents of their interests and politics, being one of threat and revenge.

[37] M criticised the Authority for not according proper weight to his wife's statement which he maintained supported his fears. This lengthy statement was produced in typewritten form, undated and unsigned. In her statement M's wife described an incident when her father asked her to go out for lunch with him following his conviction. Her father took her to the restaurant within the prison where prison staff ate. She did not report any specific threat made but conveyed the intimidation she felt.

[38] The Authority referred to the statement at [84] noting that:

> The Authority has not had an opportunity to question the wife in relation to her unsworn statement and given the credibility findings made in relation to

> the appellant, the Authority is not prepared to attach significant weight to the statement. In particular, it does not consider the statement to in any way out weigh the simple fact that [D] was supportive of the appellant throughout the Court process and has not since made threats of any kind. The prison lunch incident must be seen in the context of the longstanding psychological control which the father exercises over his wife and daughters. The claimed implicit threat contained in the prison visit, is, in the Authority's view, conjecture or surmise as there is no "real ground" for believing that there is a well-founded risk to the appellant in … Prison. As mentioned earlier, a fear of being persecuted is not well-founded if it is merely assumed or if it is mere speculation.

[39] It is apparent from [84] that the Authority did take in M's wife's statement into account; it did not reject the account given of the prison lunch, for example. However, the Authority cannot be criticised for declining to attach significant weight to the statement. It was unsigned, unsworn and M's wife was not available for cross-examination. The Authority was bound to treat such a statement with caution.

[40] The statement does not significantly assist M's position in any event. The factors that weighed most heavily with the Authority were essentially that, notwithstanding M's decision to leave D's group in 2004, there was no evidence of actual threats, intimidation or acts of retribution after that date. This, of course, assumes that D did not manipulate M's acquittal and subsequent conviction and I have concluded that the Authority had ample reason to find that D did not influence the outcome of the prosecution. Given the fact that the Authority was entitled to find that there had been no threats or other retribution taken against M, its conclusion that there was no well-founded fear of persecution is entirely justified.

Political opinion

[41] The convention ground asserted by M in support of his claim is a fear of being persecuted on the ground of political opinion. M's claim was based on the assertion that his complaint against D was a political act or expression of political opinion because D's group was a political oligarchy that could influence public administration and, as a result, a complaint would be perceived by that group as an expression of opinion against the PSD based elite.

[42] The Authority rejected this characterisation. It held that:

> [107] … the making of complaints to the authorities by the appellant, his wife and brother concerning the alleged unlawful activities by [D] and his group was done not to manifest a political opinion or to align themselves with the forces of law and order, but as a means to an end namely, the exoneration, if not acquittal, of the appellant and the simultaneous exposure of [D]. The appellant acted in self interest both when getting into the [D] group and when leaving it. Nothing he has done can sensibly described as a political act or expression of a political opinion. Nor, on the facts, has [D] or [his group] seen any actual or imputed political act or expression on the appellant's part in their dealings with him. [D]'s singular aim in all his dealings with the appellant has been to enrich himself by crime and to protect himself from being held to account. As far as the appellant's father in law is concerned, the operative elements here are disappointment and the dishonouring of the family's name. In short, it is manifestly artificial to talk in terms of political opinion in the context of the present case.

[43] M submitted that it is sufficient that perceived political opinion, as opposed to actual political opinion, can form the basis for a claim for refugee status and argued that the Authority failed to properly consider how the complaints by M and his wife would have been viewed by D and his group.

[44] It was essential to M's argument that D's group be regarded as having political control. However, the Authority was entitled on the evidence before it to take the view that D's primary interest was enriching himself, and that M's complaint to the authorities about D were properly viewed as steps taken in self-interest. Aside from M's assertions as to D's political power, which were not supported by any independent evidence, there was simply no basis on which the Authority could properly have found that complaining to the authorities about M's fraud was a political act or an expression of political opinion.

Result

[45] The application for judicial review is declined.

[46] I was not addressed on the issue of costs. If costs are to be pursued memoranda may be filed within 14 days. The plaintiff may respond within seven days after that and the defendant may reply within a further seven days.

P Courtney J