AA v Refugee Status Appeals Authority

High Court Auckland CIV-2006-404-7974
3 May 2007; 29 June 2007
Harrison J

Credibility findings - lies - significance of

Credibility findings - whether independent evidence required before adverse finding can be made

Judicial review - fairness - credibility findings - whether notice given of adverse credibility findings

The plaintiffs (husband and wife) were not believed by the Refugee Status Appeals Authority. Various grounds of judicial review were advanced in the High Court, those grounds being an attempt to circumvent the adverse credibility findings which, on their own, were beyond challenge in the High Court.

Held:

1 There was no general rule of natural justice that a decision-maker must disclose that which he is minded to decide, thereby giving the parties a further opportunity of criticising his mental processes before he makes a final decision (see para [20]).

Khalon v Attorney-General [1996] 1 NZLR 458 and *Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 (HL) applied.

2 The Authority was under no obligation to put the husband on express notice of an adverse finding on one of a number of interlinked parts of their story which required acceptance in totality if they were to be believed (see para [31]).

3 The rules of fairness did not exist to provide the husband with a further opportunity of influencing the Authority's mental processes before it made a decision (see para [33]).

4 The Authority could determine a material point (and make an adverse credibility finding) in the absence of evidence such as of a documentary nature independent of the husband's viva voce account. The Authority's rejection of the husband and wife's evidence about a certain incident was wholesale. There could not be a challenge to the Authority's conclusion that the husband's account was implausible (see paras [37] & [41(1)]).

5 The fact that a party has lied when giving evidence at a hearing in any jurisdiction does not of itself mean that the whole of his or her evidence is untruthful. The nature and context of the lie are relevant to its weight. In the present case the Authority was entitled to be satisfied that the nature, extent and magnitude of the lies told by both the husband and wife undermined the credibility of all related aspects of the claim (see para [41(2)]).

Application dismissed.

Other cases mentioned in judgment:

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
B v Refugee Status Appeals Authority (High Court Auckland, M1600/96, 23 July 1997, Giles J)
Burut v Public Prosecutor [1995] 2 AC 579, 595C (PC)
Jiao v Refugee Status Appeals Authority [2003] NZAR 647 (CA)

Re Erebus Royal Commission: Air New Zealand v Mahon [1983] NZLR 662 (PC)
Wellington City Council v Woolworths New Zealand (No.2) [1996] 2 NZLR 537 (CA)

Counsel
R McLeod for the plaintiffs
A Longdill for defendants

HARRISON J

Introduction

[1] The plaintiffs, AA and others, are nationals of a foreign country (X). AA comprises a husband and wife and their four children. Immediately upon arrival in New Zealand they claimed refugee status and were granted temporary permits. The Refugee Status Branch of Immigration New Zealand (RSB) later declined AA's claim. The Refugee Status Appeals Authority (RSAA or the Authority) dismissed their appeal. However, AA remain in New Zealand pending determination of this application to review the RSAA's decision.

[2] AA's application is based upon every ground of judicial review apparently recognised by administrative law except for predetermination. AA say the RSAA's decision was made in breach of the principles of natural justice; was contrary to s 27 New Zealand Bill of Rights Act 1990; was based on an error or errors of law; was made on factual findings for which there was no or insufficient evidential basis; was irrational, unreasonable, arbitrary, capricious or disproportionately harsh; took into account irrelevant considerations; and failed to take account of mandatory relevant considerations.

[3] On examination, and with respect to the careful written and oral argument presented in support by Mr Richard McLeod, AA's various grounds for seeking review are restatements of the common theme of an attempt to circumvent the effect of adverse credibility findings made by the Authority which Mr McLeod accepted are beyond challenge in this Court.

Background

[4] AA's claim for refugee status was based on the ground of a well-founded fear that they would face persecution within the meaning of the United Nations Refugee Convention 1991 if they returned to X. Mr McLeod summarised its factual foundation as follows:

(1) The husband was arrested in 1991 during his compulsory military service. The X Intelligence Service had accused him of trying to kill a senior officer, being a traitor, working against the government and working for another country. He was detained without charge for two years and beaten while in detention;

(2) Following release, the husband was required to report monthly to the X Military Intelligence Security Department. He was prohibited from leaving his city and from obtaining a X passport;

(3) In time the husband found self-employment as a plumber, although he continued to be subject to the original restrictions. He was required in October 2005 to carry out plumbing work in the office of a senior officer in the Military Intelligence Security Department. While the husband was performing this contract, the office was flooded. Considerable damage was caused to his office as a result. The authorities accused the husband of deliberately flooding the office in an attempt to conceal the theft of politically sensitive documents and compact discs which had gone missing;

(4) The husband went into hiding in X. He feared for his life and his family's safety. Together he and his wife and their children were smuggled across the border into a neighbouring country. The X Intelligence Services visited the husband's family and the wife's father in search of the husband. They made threats against and arrested the husband's brother;

(5) AA subsequently travelled to New Zealand on false passports. They sought asylum immediately on arrival at Auckland International Airport on 29 November 2005. Throughout this time the X Intelligence Services continued to show interest in the husband's whereabouts and questioned his mother.

RSAA Decision

[5] The Authority's decision, which was delivered on 6 November 2006, opened with this summary of its understanding of AA's case: at [4]:

… that [the husband] is wanted by [X] authorities for stealing and destroying politically sensitive materials from the office of a high-ranking military intelligence official after he had performed plumbing work in that office. The central issue to be determined is whether the account on which that claim is based is true.

[6] The Authority outlined the evidence given by both the husband and wife at the hearing, before identifying the principal issues for determination as: at [46]:

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

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

[7] The RSAA recorded that an assessment of the credibility of both the husband and wife was necessary before it could determine the principal issues, and concluded: at [48]:

Without exception, the core account put forward by the appellant is rejected. His account is implausible and inconsistent in key areas. The Authority does not believe that the appellant was engaged to perform plumbing work at the office in question. We find further that his attendant claim to have been sought by the authorities in [X] as a result of his work is false. The Authority does not believe that the appellants faced any impediment to their departure from [X] at the time they left and we find that there is no evidence that they would experience any difficulty if they were to return to [X] now. Our reasons follow.

[8] The RSAA carefully explained the reasons for its credibility finding. It was satisfied that the husband's account of carrying out the plumbing work was implausible: at [49]-[53]. It identified significant inconsistencies between his previous statements, including those to the RSB officer, and his evidence before the Authority: at [54]-[63].

[9] The Authority found as follows:

[64] For the reasons given above the Authority does not believe that the appellant was required to perform plumbing work in the office of the head of military intelligence and the events that followed. Accordingly the Authority finds that the appellant and his family left [X] legally and at that time were of no interest to [X] authorities. They did not depart clandestinely in the manner he claimed.

[65] The Authority holds great scepticism over the remainder of his claim particularly that after his release from detention in 1993 until the time he left the country he was subject to the restrictions of having to report to military intelligence once per month, having to remain in A city and not being able to obtain a passport.

[66] The Authority will accept that he was detained for two years as claimed and that he may have been subjected to these restrictions for a period of time. However, the Authority does not accept that the appellant was still under these restrictions in October 2005, in particular, the requirement that he report to military intelligence, more than a decade after his release from detention.

[67] The order to perform the plumbing work was made when he presented himself to military

headquarters as he claimed he had been required to do for the previous twelve years. As the Authority finds his narrative of being asked to do the plumbing work and the events that followed to be not credible, so too his claim of having to report himself and to have been under restrictions on his travel, some twelve years after his release from detention, is also not credible.

[68] The appellant was of no interest to [X] authorities when he left [X], was not under the claimed restrictions at that time and left the country legally.

[10] The RSAA's exposition of its grounds for adverse credibility findings are clear, comprehensive and logical, and Mr McLeod accepted that they are beyond challenge on an application for review in this Court.

[11] The Authority then considered the two legal issues, noting that AA's counsel had submitted that apart from the risk arising from the plumbing work, there is a risk they 'will suffer persecution on their return to [X] because they had sought asylum in New Zealand and travelled out of [X] illegally': at [69]. Ms Anna Longdill for the Crown pointed out that this argument was raised by AA's counsel for the first time in closing submissions. The Authority granted her leave to file supplementary written submissions in support within 21 days.

[12] The RSAA considered counsel's further submissions, and a range of supplementary country information including decisions of refugee review tribunals in Australia and Canada, reports by Amnesty International and reports by a X Human Rights Committee. It dismissed AA's case that they would be at risk of persecution on the new ground relating to their return to X for these reasons:

[72] … Firstly, the Authority has rejected the appellant's account of being wanted by [X] authorities. We also find that he was of no interest to the [X] authorities when he left [X] and that he and his family departed that country legally. Accordingly, they will be of no interest to [X] authorities on return.

[73] There is no evidence that those authorities are currently aware of their refugee claims or that they would find out.

[74] While the appellant may have been detained in the early 1990's and may have been subjected to some restrictions after his release, we find that by the time he left [X] he was able to leave the country legally. His past adverse record will not lead to him suffering any adverse consequences on his return to [X] that will make him of interest to the [X] authorities.

[13] The Authority concluded that: at [86]:

… objectively, on the facts as found, there is not a real chance that any of the appellants will suffer persecution if they return to [X]. The second framed issue does not therefore arise for determination.

Decision

AA's Case

[14] Mr McLeod has identified these three findings by the Authority for challenge on review:

(1) The husband was of no interest to [X] authorities on his departure from [X], he was not under a rights ban at the time and he left the country legally;

(2) There is no real chance of AA suffering persecution in [X] for their illegal departure, forceful removal or having sought asylum in New Zealand, because they did not depart the country illegally and/or the cases and country information cited do not apply to them;

(3) The husband's past adverse record would not give rise to a real chance of persecution on his arrival in [X] following his forced removal there.

[15] I shall deal with each separately although in my view the second and third findings merge into one. However, before doing so, I record what seems to be the central plank underlying all of Mr McLeod's arguments. Mr McLeod, who was not counsel for AA before the RSAA, said that their appeal to that forum was based on the existence of 'different strands … which were not necessarily linked', giving rise to 'several aspects to their claim for refugee status'.

[16] Mr McLeod identified those different strands or aspects of AA's claim as (1) the plumbing incident; (2) the prohibition on the husband at the date of AA's departure from X from obtaining a passport and leaving the country on account of his adverse political record; (3) AA's illegal and unauthorised departure from X; (4) without travel documentation AA would be forcibly returned to X by Immigration New Zealand, with the result that the X authorities would likely deduce or suspect they had claimed asylum abroad; and (5) without travel documentation AA would be forcibly removed by Immigration New Zealand to X, where the authorities would likely discover the husband's past political record (namely his detention by X Intelligence Services in 1991 for allegedly trying to kill a senior officer, being a traitor, working against the X government and working for another country) in the course of an investigation into his background.

[17] This subdivision is, I think, artificially subtle; I agree with Ms Longdill that AA's claim for refugee status, and on appeal, was squarely based upon the risk of persecution arising from the plumbing incident – the first of the five strands identified by Mr McLeod in this Court. That is confirmed by counsel's opening synopsis of submissions before the RSAA. Mr McLeod's second and third strands – that at the date of departure the husband was still prohibited from obtaining a passport and leaving the country on account of his adverse political record; and that AA had thus left X illegally and without authorisation – were incidental but integral to and subsumed by the first. The last two strands, the fourth and fifth – of risks arising from the forcible removal from New Zealand to X – did not emerge until the close of AA's case but are also closely bound up with the first.

[18] It was a composite case, built around the plumbing incident, in which all strands were, contrary to Mr McLeod's submission, necessarily linked and interdependent.

(1) Husband of no interest to [X] authorities on his departure

(a) Breach of Natural Justice

[19] First and primarily, Mr McLeod submitted that the RSAA breached the rules of natural justice by finding that the husband was of no interest to X authorities at the time of his departure, was not under a rights ban and left the country legally. He said that this breach was constituted by the Authority's failure to give adequate notice to the husband and wife of its intention to reach an adverse credibility finding on their claim that the official restrictions on the husband were still in place in 2005. By doing so, Mr McLeod said, the Authority deprived AA of the opportunity to respond on a point which later became important, if not critical, to its dismissal of the appeal.

[20] Ms Longdill does not, of course, challenge Mr McLeod's starting point that the Authority's proceedings are subject to the rules of natural justice. He submitted that only the higher standards of fairness will suffice since questions of life, personal safety and liberty are at stake: s 27 New Zealand Bill of Rights Act 1990; *Khalon v Attorney-General* [1996] 1 NZLR 458, Fisher J, at 15. However, he acknowledged that there is no general rule of natural justice that a decision-maker must disclose that which he is minded to decide, thereby giving the parties a further opportunity of criticising his mental processes before he makes a final decision: *Khalon; Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295.

[21] Mr McLeod says, though, that the rules of natural justice require that persons before an inquiry who stand to be adversely affected by a finding: *Re Erebus Royal Commission: Air New Zealand v Mahon* [1983] NZLR 662 (PC) at 671:

… should not be left in the dark as to the risk of the finding being made **and thus deprived of any opportunity to adduce additional material of probative value** which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicated that it would inevitably have had that result.

[Emphasis added]

[22] Mr McLeod also acknowledged that notice is only required if the applicant could not reasonably be expected to foresee the hazard he faces. However, he said that, while an adverse credibility finding will usually be foreseeable without the necessity for express notice of that possibility, a remedy on judicial review may be available if the party can show that he was being taken unfairly by surprise on a credibility matter, and that with adequate notice it might have been possible to rebut the adverse inference: *Khalon* at 26.

[23] Mr McLeod submitted that the Authority failed to probe in any real way AA's claim that the restrictions placed on the husband following his release were still in place in 2005, particularly his claim that he could not still get a passport. He pointed to what he said was an absence of questions on this issue. Nor did the Authority warn the husband, he said, of the real possibility of an adverse credibility finding on the claim that the restrictions placed on the husband were still in place in 2005. To the contrary, he submitted, one passage from the transcript of cross-examination suggested that during the hearing an Authority member put the claim of restrictions being in place in 2005 to the husband as if it was a fact which the RSAA accepted.

[24] Mr McLeod contrasted the absence of probing questions on the rights ban with the extremely lengthy examination by Authority members of both the husband and wife about the plumbing incident. Accordingly, he submitted, they were placed in an invidious position where, in breach of the rules of justice and unfairly, they faced the risk of an adverse finding to which they were not alerted and were not given opportunity to counter. He relied on Giles J's statement that 'nowhere in the transcript do the RSAA members make it clear that they have concerns going to credibility on all of the six points eventually recited in the decision as being fundamental to that determination': *B v Refugee Status Appeals Authority* HC AK M1600/96 23 July 1997, at 30.

[25] I reject Mr McLeod's submission. The rationale for this particular rule of natural justice was articulated in the passage highlighted above from *Re Erebus*. Fairness requires the decision-maker to give the person at risk of an adverse credibility finding the opportunity to adduce further evidence, either written or oral, which might not otherwise be led at the hearing but which might, if rendered relevant by the prospect of such a finding, have a determinative effect.

[26] The facts in *Re Erebus* illustrate the point. Senior Air New Zealand employees who appeared before the Royal Commission of Inquiry into the crash of one of the company's passenger jets were never put on notice by the Commissioner that he might find they lied when giving evidence. The Commission's terms of reference were directed to the circumstances of the disaster. The question of whether or not the airline's executives gave fabricated evidence to the Inquiry was at best collateral or consequential. The issue of their credibility was never manifestly at the forefront of the inquiry.

[27] The importance of adherence to this right to natural justice was illustrated in the decisions of the Court of Appeal and Privy Council in *Re Erebus*. Both were satisfied there was no material of any probative value upon which the Commissioner could find the Air New Zealand executives were guilty of a predetermined plan of deception. The individuals affected would have been able to expose this evidential deficiency if the Commissioner had put them on notice of his adverse intention at some stage during the inquiry, thus sparing them from damaging and unfounded reputational findings.

[28] This case could not be further away from *Re Erebus*. As Ms Longdill submitted, AA were under a statutory obligation to establish their claim and '… ensure that all information, evidence and submissions which [they] wish to have considered in support of the appeal …'

were provided to the RSAA before it reaches a decision: s 129P(1) Immigration Act 1987; *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA). The transcript and submissions confirm that the plumbing incident was the primary ground for AA's claim of a risk of persecution.

[29] However, in a detailed submission filed in reply to Ms Longdill's synopsis, Mr McLeod attempted to moderate or soften AA's apparent reliance on the plumbing incident by reference to his several strands or aspects theory of the case. In this way he sought to elevate the two components of the rights ban allegedly existing at the date of AA's departure from X – a prohibition from obtaining a passport and leaving the country, and leaving illegally and without authorisation – as discrete grounds of risk which the RSAA was required by the rules of natural justice to isolate out and treat as separate subjects of specific notice when questioning the husband and wife.

[30] In my judgment Mr McLeod has drawn a distinction without a difference. The allegations of a rights ban or travel prohibition were an essential link in the chain of AA's case. The 2005 travel prohibition, some 12 years after the original restrictions were imposed, could not have of itself justified the husband escaping X for fear of persecution. He had to provide a credible nexus between the ban and the plumbing incident. The success of his account depended on showing that the authorities regarded him as a security risk in 2005. Without that background, on the husband's account, the X authorities would have had no cause to accuse him of deliberately flooding the office; he would have had no apparent motive to steal politically sensitive documents and compact discs. The incident, if it had occurred, would have been susceptible to an innocent explanation.

[31] As noted, the plumbing incident was and remained throughout the centrepiece of AA's claim for asylum. AA and their advisors knew that the Authority had no independent knowledge of the facts alleged, and that its decision would be entirely reliant upon acceptance of the truth of the husband and wife's account. But the plumbing incident did not stand alone or apart from preceding events which together constituted AA's story of persecution. An adverse finding on the plumbing incident, and everything that was advanced to support or justify it including the alleged rights ban, was foreseeable. The Authority was under no obligation to put AA on express notice of an adverse finding on one of a number of interlinked parts of their story which required acceptance in totality if they were to be believed.

[32] Two other points should be made. One is that an analysis of the transcript of the husband's cross-examination, upon which Mr McLeod relied to support a proposition that the Authority appeared to lead the husband to believe that it accepted his account of the 2005 travel ban, shows that the contrary is true. The RSAA was seeking the husband's explanation, which he could not provide, for the authorities' decision to engage him to carry out the plumbing work 'in the office of this very important intelligence official' when he had a record as a security risk. The RSAA expressly recognised this inconsistency in its decision: at [49].

[33] The other point is that as noted, even if the Authority was required to place AA on separate notice of its prospective adverse finding on the 2005 rights ban claim, AA were under a statutory obligation to prove their case and, in particular, to ensure that all information, evidence and submissions were made in support. Mr McLeod did not identify any other evidence, information or submission which might have been tendered and might have persuaded the Authority to reach a different conclusion on the 2005 rights ban. Mr McLeod himself acknowledged that this particular rule of natural justice did not exist to provide AA with a further opportunity of influencing the RSAA's mental processes before it made a decision. In the circumstances of AA's claim of a risk of persecution, the Authority was hardly likely to be swayed from its adverse credibility assessment of the husband and wife by further viva voce evidence and cross-examination on the rights ban.

[34] This ground must fail.

(b) Error of Law

[35] Second, Mr McLeod submitted, the RSAA compounded its failure to give notice by committing an error of law in drawing an inference and reaching a finding of fact that was not open on the evidence. He attacked this finding: at [66]:

The Authority will accept that [the husband] was detained for two years as claimed and that he may have been subjected to these restrictions for a period of time. However, the Authority does not accept that [the husband] was still under these restrictions in October 2005, in particular, the requirement that he report to military intelligence, more than a decade after his release from detention.

[36] Mr McLeod submitted that the RSAA was not in possession of any evidence upon which it could legitimately form the view that the rights ban had ended on or before October 2005: *Burut v Public Prosecutor* [1995] 2 AC 579, 595C (PC); that the RSAA did not evaluate any of the evidence given by the husband and the wife in support of their claim that the former was still under restrictions and without a passport at the date of departing X; and that no adverse inferences were drawn relating to the content of that evidence itself – such as poor demeanour, inconsistencies, or the manner and conduct of AA's evidence regarding the rights ban or its duration.

[37] This argument is advanced on an artificial premise. It implies that the RSAA cannot decide a material point in the absence of evidence such as of a documentary nature which is independent of AA's viva voce account. The Authority's rejection of the husband and wife's evidence about the plumbing incident was wholesale. There could not be a challenge to the RSAA's conclusion that the husband's story of carrying out the plumbing work was implausible: see [49]-[53]. And the inconsistencies in his various statements were so extreme that the Authority was entitled to treat the evidence of either the husband and wife as untruthful on any material point including the rights ban: see [54]-[63]. The husband's practice of changing his account whenever confronted with inconsistencies provided a sufficient foundation for rejecting all aspects of his evidence.

[38] This allegation of error of law fails.

(c) Unreasonableness

[39] Third, Mr McLeod submitted that the RSAA's finding was unreasonable. He referred to the traditional or Wednesbury concept of unreasonableness: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA), as recently discussed in *Wellington City Council v Woolworths New Zealand (No.2)* [1996] 2 NZLR 537 (CA) and a number of other authorities. His argument repeated his earlier challenge to the RSAA's characterisation of the plumbing incident as the core of AA's claim when there were actually several aspects to it, as already discussed. He criticised the Authority for devoting to the plumbing incident approximately two thirds of its entire examination of the case within its two day inquiry. As a result, Mr McLeod submitted, the RSAA incorrectly narrowed its case to an undue focus and failed to take into account or give proper consideration to the other four strands or aspects of the case.

[40] Again, for the reasons earlier given, this argument must fail. There is nothing unreasonable in the Authority's decision to focus its examination on the plumbing incident. AA represented it to the New Zealand authorities as the rationale for the family's decision to flee X. As already observed, AA's case for refugee status stood or fell on the credibility of that allegation. The Authority's focus upon it did not approach unreasonableness.

[41] Mr McLeod advanced an alternative argument of unreasonableness. He submitted that the Authority's factual analysis of the evidence before it on the duration of the rights ban was inadequate or irrational. His submission subdivided into a number of grounds and I shall deal with each as follows:

(1) Mr McLeod submitted that the sole basis for the Authority's finding that the husband was not under any restrictions at the date of departing X was because the account of the plumbing incident in 2005 was not credible; and thus the claim that the rights ban was still in place in

2005 was also not credible. Mr McLeod characterised this reasoning process as effectively 'throwing the [rights ban claim] baby out with the [plumbing incident] bath water' without detailing any other evidential basis for the finding. With respect, this is yet another restatement of Mr McLeod's core argument but under a different jurisprudential guise. I repeat that the RSAA was entitled to reject the evidence of the husband and wife in totality on all material elements of the claim;

(2) Mr McLeod submitted that the Authority's finding that there was no rights ban in 2005 did not follow logically or reasonably from its rejection of the plumbing incident; that the fact of a lie does not of itself indicate that a refugee claimant is not telling the truth relating to the central aspects of his or her claim; and that a person may be a refugee even if he or she is found to have lied in parts of the claim. This statement of general principle is correct. The fact that a party has lied when giving evidence at a hearing in any jurisdiction does not of itself mean that the whole of his or her evidence is untruthful. The nature and context of the lie are relevant to its weight. In this case the Authority was entitled to be satisfied that the nature, extent and magnitude of the lies told by both the husband and wife undermined the credibility of all related aspects of the claim;

(3) Mr McLeod submitted there was a further irrationality in the Authority's finding that the husband was of no interest to X authorities at the time of his departure given that during the hearing it had put the fact that he was of interest to the X authorities to the husband as if it was a fact which the Authority accepted. I have already dismissed this argument;

(4) Mr McLeod submitted that the RSAA failed to explain why, even if the rights ban on the husband had indeed ended prior to 2005, it followed that he was therefore of no interest to the X authorities when he left that country or would be of no interest to the authorities on his return there following forcible removal. The Authority had accepted that the husband had previously been detained for two years without charge and tortured by the X Intelligence Services; and that following his release he had been required to report monthly to the relevant security department. There was no explanation of how the interest shown by the X authorities in the husband could effectively have disappeared by the time he departed. With respect, this argument misconstrues the RSAA's decision. Plainly it was prepared to accept the husband's claim of detention for two years; until 1993 he may have been subject to restrictions. But that factor was relegated to one of historical importance given the Authority's satisfaction that the husband lied about the existence of the rights ban in 2005;

(5) Mr McLeod submitted finally, within this framework, that there was a duty on the RSAA as a statutory body to evaluate and assess the evidence before it in a reasoned, objective and judicial manner; and that the Authority failed to make findings of implausibilities or inconsistencies in AA's oral or written evidence as to the manner and circumstances of their departure when concluding there was no credible evidence on this subject. However, for the reasons I have already given, this ground, which is again a variant on the others, must also fail. I repeat that the Authority did not believe the evidence of the husband and wife on all the material circumstances surrounding their departure from X.

[42] This ground of unreasonableness must also fail.

(d) Failure to take into account relevant considerations

[43] Fourth, Mr McLeod submitted that, in finding the reporting requirements and rights ban on the husband were no longer in place at the date of AA's departure from X in 2005, the Authority failed to take into account and give proper consideration to available country information confirming that (1) former prisoners in X are subject to a rights ban which officially lasts for seven to 10 years and can often continue beyond that period; and (2) X is a well known abuser of human rights and that its supporters are proportionately repressive, particularly towards suspected political dissidents.

[44] Mr McLeod submitted that this failure stemmed from three other failures as follows:

(1) The RSAA's failure to give notice to AA that it entertained concerns on their claim that the reporting requirements and rights ban were still in place in 2005; if such notice had been given, they would have taken the opportunity to adduce country information corroborating that claim. However, country information, as the Authority consistently recited in its decision, was irrelevant given its conclusion that no rights ban was in place in 2005 and that AA would be of little or no interest to the X authorities on their return;

(2) The RSAA's failure to properly consider the country information in its possession. The decision provides ample evidence that the Authority did consider the information but, as I have said, it was of little relevance given its principal factual findings;

(3) The RSAA's failure to makes its own inquiries or conduct its own research into the issue of the duration of rights bans in X. Mr McLeod did not explain why the Authority was under this obligation where the burden of proving their claim lay with AA.

[45] This head of challenge also fails.

(2) Finding of no real chance of persecution in X for illegal departure

[46] On this second principal finding Mr McLeod submitted that, having made a reviewable error on the rights ban, the RSAA then proceeded to make further errors in drawing inferences and making findings of fact which were not open on the evidence. On this finding Mr McLeod restricted the grounds of challenge to error of law and unreasonableness.

(a) Error of Law

[47] First, Mr McLeod submitted that the Authority's finding that the husband was of no interest to X authorities when he left and was not under restrictions formed the basis of further critical findings and ultimately for rejecting the claim that AA would encounter persecution in X if they were to return there; that the Authority sought to rely on its factual finding in order to distinguish and dismiss country reports and jurisprudence regarding X returnees to the effect that those who have departed illegally or sought asylum or been deported from another country are at risk of persecution on their return; and that these findings were errors of law because they were predicated on a previous finding which was made in breach of natural justice, lacked any evidential foundation, and was unreasonable.

[48] This submission is simply a restatement of and does not add anything to the arguments already considered and is accordingly dismissed.

(b) Unreasonableness

[49] Second or alternatively, Mr McLeod submitted that, even if the Authority's finding as to the duration of the rights ban claim was not invalid in any of the ways already submitted, its attempts to dismiss the country reports and jurisprudence and distinguish AA's claim from them was unreasonable; and that the RSAA failed to properly consider and weigh the country reports and jurisprudence against the facts, logically and rationally, and in accordance with its own legal precedents.

[50] While Mr McLeod undertook a detailed analysis of the relevant information, I found it difficult to discern the basis for this argument of irrationality. With respect, some aspects were obscure. As best I can follow Mr McLeod's proposition, it was to the effect that the RSAA failed (1) to ask itself or answer the question of how might the X authorities know or infer that AA have sought asylum abroad; (2) to draw an inference that was obvious on the material before it – that the X authorities would likely know or infer that AA had sought asylum abroad if they were forcibly removed from New Zealand to X without valid passports; and (3) to take into account and give proper consideration to the jurisprudential principle that a refugee claim may be established by circumstantial evidence, and that evidence from a home country of harm to persons who are similarly situated to a refugee claimant can serve as a reliable indicator of the fate awaiting that claimant.

[51] The RSAA considered and answered this proposition. It formulated AA's submission in this way: at [71]:

… if [AA] are removed from New Zealand and returned without a valid genuine passport the [X] government will conclude they sought asylum abroad and would know that they left the country illegally. Counsel submitted that [AA's] past adverse record would come to light and according to this country information he will face detention and torture for subversion or spreading false information about the state.

[52] The Authority expressly considered and dismissed the submissions now made by Mr McLeod, based upon its rejection of the husband's account of being wanted by X authorities: at [72]. The RSAA considered the country information which indicated that some X nationals who have been returned to that country from abroad have been arrested. However, it was satisfied that they were principally members of religious or ethnic groups with which AA was not associated: at [75]-[77].

[53] The Authority accepted that the country information conveyed that those who depart illegally are at risk on return and will be questioned, when it may become apparent that they have applied for refugee status abroad. Given its satisfaction that AA did not depart illegally, that information was not relevant: at [78]. The RSAA was not satisfied there was any evidence that X authorities were aware of AA's refugee claims or that they would find out: at [80].

[54] With respect to Mr McLeod's argument, there was nothing unreasonable in the Authority's approach. It rejected AA's argument after proper consideration. The fact that the result was adverse to AA does not equate with irrationality.

[55] Ultimately on all the evidence tendered, the Authority was not satisfied there was a 'real chance' that AA will suffer persecution if they return to X. There is nothing unreasonable or irrational in this conclusion given the RSAA's credibility findings.

Result

[56] AA's application for orders reviewing the RSAA's decision dated 7 December 2006 is dismissed.

[57] There will be no order as to costs.

Solicitors for the applicant: *McLeod & Associates* (Auckland)
Solicitors for the respondents: *Meredith Connell* (Auckland)