

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76229

AT AUCKLAND

<u>Before:</u>	A N Molloy (Member)
<u>Counsel for the Appellant:</u>	I Uca
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	23 October 2008
<u>Date of Decision:</u>	12 February 2009

DECISION

[1] This is an appeal against a decision dated 16 May 2008, issued by a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a citizen of Chad.

[2] This is the second time the appellant has applied for refugee status. A different panel of the Authority (the first Authority panel) declined the appellant's first appeal in *Refugee Appeal No 76098* (21 November 2007).

[3] Because this is his second appeal the Authority is required to determine, as a preliminary matter, whether it has jurisdiction to consider the merits of the second appeal.

JURISDICTION: SECOND CLAIMS FOR REFUGEE STATUS

[4] Neither a refugee status officer nor the Authority has unlimited jurisdiction to receive and determine a further refugee claim after a first claim has been finally determined.

[5] The circumstances in which a refugee status officer may receive and determine a second or subsequent claim for refugee status are set out in Section 129J(1) of the Immigration Act 1987 (the Act):

“A refugee status officer may not consider a claim for refugee status by a person who has already had a claim for refugee status finally determined in New Zealand unless the officer is satisfied that, since that determination, circumstances in the claimant’s home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim.”

[6] Section 129O(1) of the Act provides a right of appeal from a decision made by a refugee status officer under s129J(1):

“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 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] The Authority considered s129O(1) of the Act in *Refugee Appeal No 75139* (18 November 2004), in which it held that its jurisdiction to hear and determine subsequent refugee claims is determined by comparing the previous claim for refugee status with the subsequent claim.

[8] In the absence of significantly different grounds in the respective claims, the Authority simply has no jurisdiction to consider the merits of the subsequent appeal as if it were an appellate body in relation to the decision of the first panel and accordingly it has no power to rehear the matter after a full hearing and decision; See *Refugee Appeal No. 71864/00* (2 June 2000) at [39] - [41] & [63]. Nor does the Authority possess a general “miscarriage of justice” jurisdiction at [47].

[9] Where jurisdiction is established, 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 under section 129P(9) of the Act, which prohibits any challenge to a finding of fact or credibility made by the Authority in relation to a previous claim. The Authority has discretion as to whether to rely on any such finding.

COMPARISON OF CLAIMS

[10] The Authority therefore needs to compare the appellant's first and second claims for refugee status. A summary of each is set out below. The appellant's first claim for refugee status is set out in more detail in the decision of the first Authority panel in *Refugee Appeal No 76098* (21 November 2007).

First claim for refugee status

[11] The appellant arrived in New Zealand in April 2007 and applied for refugee status for the first time later that month. After interviewing the appellant in May 2007, a refugee status officer of the RSB issued a decision dated 29 June 2007, declining the appellant's first application for refugee status. The appellant then appealed to this Authority for the first time.

[12] The appellant claimed that although he was born and had lived his whole life in Saudi Arabia he cannot return there because he is not a national of Saudi Arabia, and he does not have a right of residence there. He claimed to be a national of Chad by virtue of the fact that both his parents were nationals of Chad.

[13] The appellant claimed that he had a well-founded fear of being persecuted if he were returned to Chad because:

- a) he has never lived in Chad before;
- b) he has no support network there;
- c) he would enter Chad as an undocumented national;
- d) he is from the Gorane tribe, whose members are oppressed by the ruling Zaghawa tribe;
- e) after being deported to Chad when the appellant was one year old, the appellant's father was killed during inter-tribal fighting;
- f) the appellant's tribe will require him to avenge his father's death;
- g) he may be forcibly conscripted into the Chadian army;
- h) he will be arrested in Chad because he assaulted an official at the embassy of Chad in Saudi Arabia.

[14] As already stated, the first Authority panel published a decision dismissing the appellant's appeal in *Refugee Appeal No 76098* (21 November 2007). It accepted the appellant's claim with respect to his biographical details, but found that key aspects of his account had been fabricated to bolster an unmeritorious refugee claim. In particular, the first Authority panel rejected the appellant's claim to have been involved in an altercation at a Chad Embassy and found that the

appellant did not have an adverse profile with the authorities either in Saudi Arabia or in Chad.

Second claim for refugee status

[15] The appellant claims that while he was in prison in Auckland awaiting removal from New Zealand, he spoke to his maternal aunt in Saudi Arabia by telephone. The appellant's aunt informed him that the identity of his real father is in fact unknown. She told him that his mother had concocted the story that the appellant's father was from Chad, that he had returned to Chad and that he had been killed as a result of tribal conflict. She had done so to hide her shame at having conceived the appellant out of wedlock.

[16] He now knows that his step-father married his mother by arrangement with his maternal grandfather, to hide the family's shame. He says that his step-father is from Sudan, not Chad.

[17] In addition, he claims that his mother's family would create difficulties for him if he were returned to Chad, because his illegitimacy brings shame upon them. Finally, he says that his wife's family in Saudi Arabia would also create problems for him because they have now learned of his background for the first time.

[18] The appellant only learned of this after he had completed his second written application for refugee status.

THE JURISDICTIONAL THRESHOLD

COMPARISON OF CLAIMS MADE

[19] The Authority is satisfied that the appellant's claim that his wife's family have now become aware of his full family history amounts to a change in circumstances sufficient to satisfy the jurisdictional requirement of s129O.

[20] Accordingly, the Authority has jurisdiction to determine the merits of the appellant's second appeal. His account is summarised below, and its credibility is then assessed.

THE APPELLANT'S SECOND CLAIM

[21] On 22 February 2008, the day after his application for a visa under the Convention against Torture was declined by the DOL, the appellant completed a second claim for refugee status. It was lodged with the RSB on 13 March 2008. The second application, as it was lodged, largely replicated the grounds relied upon by the appellant for the purposes of his first claim.

[22] The appellant was interviewed by a different refugee status officer in April 2008. In her letter to the RSB dated 13 March 2008, counsel submitted that "there is currently a civil war going on with the rebel forces battling the government forces". In a subsequent letter dated 12 May 2008 counsel submitted that there has been a "dramatic intensification and deterioration of pre-existing factors" since the final determination of his first refugee claim on 21 November 2007. That is the first plank of the appellant's second appeal.

[23] A further ground was introduced in counsel's letter dated 13 March 2008, in which she disclosed the appellant's current claim that his biological father may not have been a citizen of Chad.

[24] The appellant claims that while he was in prison in Auckland awaiting removal from New Zealand following the decline of his first appeal, he had spoken to his maternal aunt in Saudi Arabia by telephone. The appellant's aunt informed him that the identity of his real father is in fact unknown. She told him that his mother had concocted the story that the appellant's father was from Chad, that he had returned to Chad and that he had been killed as a result of tribal conflict. She had done so to hide her shame at having conceived the appellant out of wedlock.

[25] He now knows that his step-father married his mother by arrangement with his maternal grandfather, to hide the family's shame. His step-father is from Sudan, not Chad.

[26] In addition, he claims that his mother's family would create difficulties for him if he were returned to Chad, because his illegitimacy brings shame upon them. Finally, he says that his wife's family in Saudi Arabia would also create problems for him, because they did not know about any of this when he married.

[27] These form the second plank of the appellant's second appeal.

MATERIAL RECEIVED

[28] The Authority wrote to counsel, through its Secretariat, on 10 September 2008. Counsel responded in writing on 26 September 2008 and lodged further written submissions on 20 October 2008.

[29] The appellant produced various documents on the day of the hearing before the Authority. Among these are copies of a Sudanese passport purportedly belonging to the appellant's step-father, ownership documents relating to property in Sudan and a letter, in Arabic, dictated by the appellant's aunt.

[30] Following the conclusion of the hearing the appellant forwarded further documents via counsel, under cover of letters dated 6 and 7 November 2008. These documents include an exchange of emails between counsel and GG (a failed asylum-seeker who had made two claims for asylum in New Zealand before being removed from New Zealand in 2008) and various items of country information relating to Chad. The emails provide an account of GG's experience since being removed from New Zealand.

[31] Counsel also invited the Authority to consider her submissions dated 14 January 2008, tendered to the DOL in support of the appellant's application under the Convention against Torture.

THE ISSUES

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

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

[33] 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

CREDIBILITY

[34] Before addressing the principal issues identified, it is necessary to determine whether the appellant is a credible witness. The Authority finds that he is not.

The appellant's 'new' evidence is untrue

[35] The first Authority panel recorded the appellant's version of events in the following terms:

"The appellant was born in 1984 in Medina, Saudi Arabia. Both his mother and father are Chadian nationals. They met in Saudi Arabia, having both travelled there with family members on an Umrah pilgrimage. At the time of the appellant's birth, neither of his parents had any legal immigration status in Saudi Arabia. When he was approximately one year old, his father was arrested and deported to Chad because of his status as an illegal overstayer in Saudi Arabia." *Refugee Appeal No 76098* (21 November 2007 [8]).

[36] The appellant now claims that no one knows the identity of his biological father, and that his mother had made up a story about him being from Chad to hide the fact that he had been conceived out of wedlock. The appellant's evidence in this regard is not credible.

[37] The appellant claims that he only learned of this information when he was in prison awaiting removal from New Zealand. He was told this by his aunt. However, the appellant also confirmed that he had discussed his first claim for refugee status with his aunt. He admitted that she was aware of the consequences of first claim failing but could not provide an adequate explanation as to why this information had only been revealed to him at such a late stage.

[38] In this context the Authority bears in mind that the first Authority panel found that the appellant had fabricated part of the account he gave during his first appeal in order to bolster an unmeritorious claim.

[39] It is also apparent that since that decision was published the appellant had evinced a clear intention to take whatever steps he could in order to avoid being removed from New Zealand. In January 2008, shortly after that decision was published, the appellant made an application to the DOL under the Convention

against Torture for a permit to remain in New Zealand. It was declined by the DOL on 21 February 2008. The following day the appellant completed a written second application for refugee status which contained no hint of the new evidence upon which he has subsequently relied.

[40] In the circumstances the Authority finds that the appellant's testimony that his father was unknown and may not have been from Chad has been fabricated in an attempt to circumvent the finding of the first Authority panel that he is not a refugee.

[41] The Authority has not overlooked the documents produced in support of the second appeal. However none of these documents can be afforded any weight. As the Authority has previously observed, because of the ease with which certain types of documentary evidence can be obtained in order to support refugee claims, findings as to the reliability of documents will usually follow findings with regard to the credibility of witnesses: *Refugee Appeal No 72570* (11 November 2002) and *Refugee Appeal No 75794* (23 May 2006) at [56].

[42] It is apparent that the copies of passports, identity documents and other documents purportedly emanating from Sudan and said to belong to the appellant's step-father and step-brother can be given no weight. The name on one Sudanese passport is XX, which the appellant now claims is his step-father's name. However during his first refugee claim the appellant specifically identified that as the name of his biological father (whom he claimed was from Chad, and whom he had maintained was killed in Chad when he was a child). The appellant could not explain this discrepancy, which adds weight to the Authority's findings that he has fabricated evidence for his second appeal.

[43] Given that the Authority rejects the appellant's account it follows that the handwritten letter purportedly dictated by the appellant's illiterate aunt can be given no weight.

[44] Nor can any weight be given to the content of email correspondence between counsel and GG, who is referred to in counsel's letter to the Authority dated 6 November 2008 as "a failed Chadian asylum seeker who was forcibly returned to Chad".

[45] GG made two claims for refugee status before being removed from New Zealand in 2008. A differently constituted panel of the Authority wholly rejected his first appeal in its decision in *Refugee Appeal No 76080* (14 November 2007). It

found that he had “cynically” presented three irreconcilable accounts of his former life for his claim to refugee status in New Zealand and also found that he had only admitted fabricating the first two accounts only when the credibility of each was challenged to the point that that he had been unable to maintain it. The Authority concluded that:

“There is no sense whatsoever that his admissions of falsehood have been in any sense voluntary or would have occurred in the absence of compelling evidence that his accounts were not credible. The Authority has no doubt that in the absence of credibility challenges by the RSB and the Authority, the appellant would have been content to continue advancing his false claims and be granted refugee status on that basis.” [46]

In light of such comprehensive findings, and particularly bearing in mind that the Authority has had no opportunity to question the author of the emails in person, the Authority places no weight upon the content of the emails.

Findings of the first Authority panel to be relied upon

[46] The Authority has found that the appellant is not a credible witness. There is no basis for exercising the Authority’s discretion under s129P(9) against relying on the findings of the first Authority panel as to credibility and fact, and those findings are therefore relied upon.

Summary of findings

[47] The Authority rejects the claims advanced by the appellant for the purposes of his second claim, including his claims that his biological father is unknown, and that he was not from Chad. It therefore follows that the Authority also rejects the appellant’s claim that his step-father is Sudanese, that he married the appellant’s mother to hide the family’s shame; that his mother’s family would create difficulties for him if he were returned to Chad because his illegitimacy brings shame upon them, and that his wife’s family in Saudi Arabia would also create problems for him because they did not know about any of this when he married.

[48] Counsel submitted that the appellant is unable to be returned to Chad. However no evidence has been produced to that effect. If anything, information provided by counsel indicates that undocumented failed asylum-seekers can be returned to Chad. In referring to the predicament of just such a person counsel stated that she had been advised by INZ that he had reached Chad safely after being returned initially to Saudi Arabia. The Authority relies upon the finding of the

first Authority panel that the appellant could be returned despite a lack of documentation.

[49] The Authority finds that the appellant is a young male Chadian from the Gorane tribe who travelled to New Zealand using a false Saudi Arabian passport and who has never lived in Chad. He travelled to New Zealand on a false Saudi Arabian passport but has no right of return to Saudi Arabia even though he lived all his life in Saudi Arabia as an undocumented migrant. He has never had a Chad passport and if he were to enter Chad now it would probably be as an undocumented national.

[50] The appellant's second claim will be considered upon that basis.

OBJECTIVELY, ON THE FACTS AS FOUND, IS THERE A REAL CHANCE OF THE APPELLANT BEING PERSECUTED IF RETURNED TO CHAD?

[51] The term "being persecuted" has been interpreted by the Authority as the sustained or systemic violation of basic or core human rights, such as to be demonstrative of a failure of state protection. In short, international human rights law is relied upon in order to define the forms of serious harm which comprise "being persecuted"; see *Refugee Appeal No 74665* [2005] NZAR 60. The Authority also recognised in that decision that the concept of state protection is central to the definition of a refugee under the Convention. "Being persecuted" is therefore conveniently expressed as comprising serious harm together with the failure of state protection; see *R v Immigration Appeal Tribunal; Ex Parte Shah* [1999] 2 AC 629, (653F) (HL) and *Refugee Appeal No 71427* (16 August 2000) paras [43] – [67].

[52] The risk of being persecuted is well-founded when there is a real (as opposed to a remote or speculative) chance, that it will occur; *Refugee Appeal No 76044* [2008] NZAR 719 (para [57]).

[53] The Authority now turns to consider the country information against which the risk to this appellant is to be assessed.

General outline of country conditions in Chad

[54] The first Authority panel found that the appellant had not established that there was a real chance of him being persecuted for a Convention reason if he was

returned to Chad, taking into account that he was an undocumented returnee from the Gorane tribe; *Refugee Appeal No 76098* (21 November 2007). It held that :

“Undocumented returnees to Chad may well be questioned by the appropriate authorities on arrival - such procedures are routine in many countries. Beyond such routine questions however, there is no indication that ordinary undocumented returnees suffer any form of serious harm.” [at [47]]

[55] After the first Authority panel published its decision the Authority had further opportunity to assess country conditions in Chad. Prior to the hearing of the second appeal the Authority wrote to counsel to draw attention to the findings of the Authority in *Refugee Appeal No 76245* (7 August 2008). By coincidence that decision relates to the second appeal lodged by GG.

[56] The Authority found in *Refugee Appeal No 76245* (7 August 2008) that;

“... fighting between government and rebel groups has been going on for many years. Thus whilst the events of February/April 2008 may have escalated the situation to some degree it is not a significantly different set of circumstances from that which prevailed when the appellant made his first claim and appeal.” [30].

[57] The Authority found in that decision that there had been ongoing fighting between the government and rebels in Chad for many years. It found that “while the events of February-April 2008 may have escalated the situation to some degree”, conditions in Chad had not deteriorated to the extent that there was jurisdiction to determine a second appeal.

[58] Counsel disputed that summary in her response dated 25 September 2008. She submitted that there had been a “dramatic intensification” of the conflict in Chad since 21 November 2007.

[59] Prior to the hearing of the second appeal, counsel provided the Authority with just two items of country information to support her submission. They refer to insecurity in the east of Chad, near the Sudanese border: “Aid agencies suspend work in eastern Chad because of insecurity” *UN News Service* (7 October 2008) and: “ICG proposes inclusive path to peace” *IRIN Chad* (26 September 2008). Similar reports were received towards the end of 2008; “Armed attacks blocking aid in the east” *IRIN Chad* (29 October 2008).

[60] Counsel has subsequently provided additional country information which refers to rebel forces entering the capital city, N’djamena, in February 2008, in an attempt to overthrow the President: for example, Canadian Immigration and Refugee Board, Research Directorate TCD102896.E *Chad: The attempted coup of February 2008; treatment of certain tribes and members of political parties since*

the attempted coup (25 August 2008). There were an estimated 270 fatalities and 1000 casualties, and the report referred to an estimate by the Office of the United Nations High Commissioner for Refugees that 30,000 people fled to Cameroon. The report also indicated that many people had since returned to Chad, although others were reluctant to do so for reasons of “insecurity”.

[61] The country information provided indicated that the government has since targeted individuals suspected of supporting the rebels. It refers to the arbitrary detention of 15 people, 11 of whom were of Gorane ethnicity, and the arrest of up to half a dozen opposition politicians; e.g. Amnesty International *Prominent Chad opposition members arrested* (6 February 2008). Those targeted appear to have had political profiles which the appellant clearly lacks.

[62] Counsel also provided information about arbitrary steps taken by the government to evict homeowners in the capital in February and March 2008, with no regard to due process or land ownership rights. However the steps taken were described as having been carried out in an “ad hoc, uncoordinated fashion”; Human Rights Watch *Chad: Thousands left homeless by forced evictions* (3 April 2008). There is no suggestion that this chain of events is part of a trend whereby an individual with the appellant’s characteristics is at risk of being seriously harmed.

[63] The Authority finds that none of the information provided assists the appellant. While counsel asserts that there had been a dramatic intensification of conflict in Chad since the decision of the first Authority panel in late 2007, much of the conflict relied upon by the appellant has taken place in the east of the country, near the Sudanese border. It is an area which is geographically remote from the capital, N’Djamena, where the appellant would most likely be removed.

[64] It is also apparent that the attack on the capital city in early 2008 is one more incident reflecting a long-standing conflict. Neither the rebel attacks nor the government response to those attacks indicate that an individual with the appellant’s characteristics is currently at risk of being persecuted in Chad for a Convention reason.

Saudi Arabia

[65] The first Authority panel considered the risk faced by the appellant if he were returned to Saudi Arabia. It observed that he had no right of return to that country, but found that:

"... even if he were to somehow effect a return to Saudi Arabia, there is no evidence to establish that he would face a risk of being persecuted there to the real chance level." *Refugee Appeal No 76098* (21 November 2007) [49].

[66] For the purposes of the appellant's second appeal counsel submits that the appellant is at risk of being "punished severely for having left Saudi Arabia on a fraudulently obtained passport". She provided selective extracts of generic country information relating to the treatment meted out to some individuals in Saudi Arabia in response to terrorist attacks in 2003 and 2004.

[67] None of the information provided post-dates the decision of the first Authority panel in November 2007. In any event the Authority finds that there is no credible evidence which establishes that the appellant has a well-founded fear of being persecuted for a Convention reason even if he were to be returned to Saudi Arabia.

SUMMARY

[68] It is not difficult to accept that this appellant may find himself dealing with significant practical difficulties in navigating the transition to life in the unfamiliar surrounds of Chad. It is likely that everyday life in Chad will be more difficult for the appellant than in New Zealand, given the comparative economic circumstances in those two countries.

[69] However, the focus on the Refugee Convention is narrowly confined. While the general purpose and intent of the Convention is broadly humanitarian, it does not protect individuals from every type of harm. The Authority's jurisdiction is confined to determining whether the appellant is a refugee within the meaning of Article 1 of the Refugee Convention. It is statutorily barred from considering general humanitarian issues "that arise outside the context of a decision relating to the recognition of refugee status in New Zealand" (s129W(e) of the Act).

[70] Even taking into account all of the appellant's circumstances, and considering their cumulative effect, the Authority finds that objectively, on the facts found, the appellant does not have a well-founded fear of being persecuted in Chad or in Saudi Arabia.

CONCLUSION

[71] The Authority has jurisdiction to consider the appellant's second appeal.

[72] The first principal issue framed for consideration is answered in the negative. Accordingly the second principal issue does not arise for consideration.

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

"A N Molloy"
A N Molloy
Member