

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76330

AT AUCKLAND

Before: B A Dingle (Member)

Representative for the Appellant: The appellant represented herself

Date of Decision: 25 June 2009

DECISION

[1] This is an appeal against a decision of the Refugee Status Branch (“the RSB”) of the Department of Labour (“DOL”), declining the grant of refugee status to the appellant, a national of the People’s Republic of China.

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

JURISDICTION OF THE AUTHORITY TO HEAR THE APPEAL

[3] Because this is the third occasion on which the appellant has appealed to this Authority, the Authority must first determine whether it has jurisdiction to hear the appeal.

[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. Section 129J(1) of the Immigration Act 1987 (“the Act”) is headed “Limitation on subsequent claims for refugee status” and sets out the circumstances in which a refugee status officer may receive and determine a

second or subsequent claim for refugee status:

"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.**"
[Emphasis added]

[5] Where the refugee status officer declines the subsequent claim, or finds that there is no jurisdiction to consider the claim on the basis that the statutory criteria are not met, the claimant has a right of appeal to the Authority. Section 129O(1) of the Act provides that:

"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."

[6] The Authority therefore intends to consider the appellant's two previous claims, together with her further claim as presented at the third appeal, with a view to determining whether it has jurisdiction to hear the third appeal. If so, it will then determine whether the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

[7] Before doing so, however, it is necessary to address the issue of whether the appellant should be granted an interview.

JURISDICTION OF THE AUTHORITY TO DISPENSE WITH AN INTERVIEW

[8] Pursuant to ss129P(5)(a) and 129P(5)(b) of the Act, where an appellant was interviewed by the RSB or, having been given an opportunity to be interviewed, failed to take that opportunity, the Authority has a discretion as to whether to offer the appellant the opportunity to attend an interview. In exercising this discretion, the Authority will consider whether the appeal is *prima facie* 'manifestly unfounded or clearly abusive'. Should that be the case, the Authority may determine the appeal on the papers, without offering the appellant an interview. The Authority's general jurisdiction in this regard was examined in *Refugee Appeal No 70951* (5 August 1998).

PROCEDURAL HISTORY OF THE APPELLANT'S CLAIMS

FIRST CLAIM FOR REFUGEE STATUS

[9] The appellant arrived in New Zealand on 12 September 2006 and lodged an application seeking refugee status on 26 September 2006. She was interviewed by a refugee status officer of the RSB on 1 November 2006.

[10] Briefly, the appellant's first claim was that because of her involvement with *Falun Gong* in China between 1998 and 2006, and her involvement with the movement here in New Zealand after her arrival in 2006, she was at real risk of being persecuted if she returned to China. She claimed that in the year 2000 she had been detained and had her employment terminated because of *Falun Gong*. She also claimed that in 2006 she was taken from her home to a nearby police station where she was interrogated for being in possession of a book critical of the Communist Party. Further, she claimed that as a result of her *Falun Gong* affiliation, her daughter had been harassed, had her car windscreen smashed and a threatening note left on her car.

[11] A decision declining the appellant's application was published by the RSB on 18 May 2007. The Authority (differently constituted) received notice of an appeal against that decline decision on 24 May 2007 and, in a decision dated 27 March 2008, the Authority declined her appeal (*Refugee Appeal No 76065*) on the basis that it was not a credible account.

[12] The Authority rejected her entire account to have practised *Falun Gong* in China and to have had a profile of any sort with the authorities there. It found that she and her son (whose appeal was conjoined) had departed China legally using their own genuine passports. The Authority went on to find that although she had attended numerous *Falun Gong* events since her arrival in New Zealand, she was not a genuine *Falun Gong* practitioner. It held (on the basis of detailed reasons set out in the decision at [87]-[91]) that she would "have no hesitation in renouncing *Falun Gong* the moment it ceases to be a means of securing permanent residence for her and her son in New Zealand" ([85]).

THE SECOND CLAIM FOR REFUGEE STATUS

[13] The second claim to refugee status was lodged less than two months after the decline of the first appeal. In essence, the appellant maintained all the grounds of her first claim with the additional claim that she had received news, by notification on a *Falun Gong* website, that her daughter had been arrested in China. She also stated that her husband had been forced to divorce her because of her activities. The appellant resiled from evidence that she had given in her first claim as to how she met her sister in this country and stated that she regretted having lied. The appellant also claimed that while at a *Falun Gong* parade in Hamilton someone had broken the windscreen on her car; that in June 2008 someone had tracked her to her home and the windscreens of four cars had been broken in the yard; and that because of her active involvement in *Falun Gong* in New Zealand she is known to the Chinese authorities as a critic and would therefore be at risk of serious harm on return. The RSB declined the appellant's second claim and concluded that it did not have jurisdiction to hear the claim because circumstances had not changed significantly since the determination of the first claim.

[14] The appellant then appealed to the Authority (differently constituted). A decision declining that appeal was delivered on 26 November 2008. The appellant was represented by counsel at the second appeal and the appellant's son and older sister also appeared to give evidence. After considering all the threads of the second claim presented by the appellant, the Authority concluded that it did "not assert circumstances which could be described as 'significantly different' to the first claim. The Authority went on to say, at [86]:

"The claimed arrest of the daughter and searches of the home are noted, but, when weighted against the first claim, in which the appellant claimed years of personal harassment by the Chinese authorities, including her own detention (from which she claimed to have escaped) and her claim that the Chinese authorities knew of her *Falun Gong* activities in New Zealand and had intimidated the daughter by smashing her windscreen, the ongoing harassment which is now asserted - the detention of the daughter and searches of the home - merely continues the underlying nature of the first claim. The second claim is not significantly different."

[15] Although not strictly necessary, for the sake of completeness the Authority also assessed the credibility of the evidence presented in the second appeal and found "a serious lack of credibility in the second claim that is consistent with the findings in the first claim" ([87]).

THE PRESENT (THIRD) CLAIM FOR REFUGEE STATUS

[16] The appellant's third claim was submitted to the RSB on 9 January 2009.

[17] The basis of the appellant's third claim is that she now had documentary evidence to corroborate the claims she had made in her second claim, which were not accepted as credible. The documents are:

1. A document (in Mandarin and translated into English), dated 3 April 2008 and issued by the Beijing City Public Security Bureau. It says that the appellant's daughter, was detained on 2 April 2008 due to suspected "activity of screening from blame and interfering with the implementation of the State Public Security Regulatory Rules" and is currently detained at the district detention house.
2. A search warrant (in Mandarin with an English translation), dated 20 May 2008, also issued by the Beijing City Public Security Bureau. It authorises the search of the appellant's daughter, and states that the person to be searched is the appellant's husband.
3. A copy of her divorce certificate in Mandarin, with an English translation dated 25 August 2008. It was issued by the Ministry of Civil Affairs of the People's Republic of China and certifies the divorce of the appellant from her husband.

[18] On 27 February 2009, the RSB issued a decision which declined the appellant's subsequent claim on the basis that she had not been able to satisfy the jurisdictional criteria for a subsequent claim. The appellant now appeals against that decision.

WHETHER TO DISPENSE WITH AN INTERVIEW

[19] On 13 May 2009, the Authority, through its Secretariat, wrote to the appellant advising that the Authority's preliminary view of the appellant's appeal was that it was *prima facie* 'manifestly unfounded or clearly abusive', and giving reasons in this regard. It was noted that the account appeared not to identify any basis as to why the appellant would face a real chance of persecution for a Convention reason in the event that she returned to the People's Republic of China.

[20] The letter went on to note that this is the appellant's third refugee status appeal and advised of the relevant additional jurisdictional requirements. The letter continued:

"In summary, both of your previous claims were based on assertions that you would be persecuted on return to China because of your involvement with the *Falun Gong* movement in China and New Zealand. In your first claim you alleged that you had been harassed by Chinese authorities for a number of years because you practised *Falun Gong*, including dismissal from your employment in 2000 and two arrests and interrogation, the most recent in 2006. You also claimed that your husband had been told to divorce you and your daughter had been threatened and had her car windscreen smashed because of your activities. Your first application and appeal were dismissed, largely on credibility grounds. In summary, the Authority (differently constituted) made the following conclusion as to your claimed *Falun Gong* activity in China:

"For the above reasons, we do not accept that the appellant had any involvement whatsoever in *Falun Gong* in China. It follows that we do not accept that she had the conversation with AA, that she gave a banned book to BB, that she practised *Falun Gong* secretly for many years, or that she was arrested or that she escaped. We find that she and her son left China legally on their own genuine passports and that when they arrived in New Zealand they had no grounds whatsoever to claim refugee status."

In your second application and appeal, you claimed that as a consequence of your practice of *Falun Gong*, your daughter in Beijing was detained (some four to five days after the decline of your first appeal), your husband was forced to divorce you and your former home was ransacked by the authorities. Both at first instance and on appeal it was found that your second claim did not reach the jurisdictional threshold such that it could be accepted for determination. Furthermore, in relation to the events you claimed had occurred since the determination of your first claim, the Authority found a "serious lack of credibility in the second claim that is consistent with the findings on the first claim"; see [87] of *Refugee Appeal No 76284* (26 November 2008).

The grounds for your current appeal do not appear to be significantly different from the preceding claims. Essentially, you contend that the factual basis of your previous claims is the basis for your new claim, with the added factor that you have provided some documentation to support the claims which have already been finally determined as not credible. As noted above, a subsequent claim is not an opportunity to revisit an adverse credibility finding made in a previous decision.

The Authority's preliminary view is that you have failed to establish that the grounds giving rise to your third refugee claim are significantly different from those giving rise the previous two claims. All of the claims are based on continuing interest from the Chinese authorities because of your involvement with *Falun Gong* - facts which have all been found to be not credible by previous Authority panels. It appears that you are unable to satisfy the jurisdictional criteria for second and subsequent refugee claims established by ss129J and 129O Immigration Act 1987."

[21] The Secretariat's letter also advised that the Authority has the jurisdiction to determine an appeal on the papers, without offering an interview pursuant to s129P(5) of the Act, in circumstances which, on a preliminary view, applied in the appellant's case. The appellant was provided with an opportunity to present

submissions and/or evidence to support her claim, by 28 May 2008. Notice was given that, unless the Authority was persuaded otherwise by such submissions and evidence, it could consider and determine the appeal without giving the appellant an opportunity of attending a further interview.

[22] The Secretariat's letter advised that the responsibility for establishing an appellant's refugee claim lay with the appellant, pursuant to ss129P(1) and 129P(2) of the Act (as referred to in *Refugee Appeal No 72668/01* (Minute No. 2) (5 April 2002) and in *Anguo Jiao v Refugee Status Appeals Authority* (HC, Auckland, M.207-PLO2, 29 July 2002, Potter J)). The letter further advised that persecution has been defined as 'the sustained or systemic denial of basic or core human rights such as to be demonstrative of a failure of state protection'; see Hathaway, *The Law of Refugee Status* (1991) 104 to 108, as adopted in *Refugee Appeal No 2039/93* (12 February 1996) at 15.

[23] The appellant wrote to the Secretariat on 27 May 2009 requesting that she be granted an extension of time in which to respond so that she could instruct a lawyer. On 17 June 2009 the Secretariat replied to the respondent, noting her letter and stating:

"In considering your request, the Authority notes that you submitted your Notice of Appeal on 9 March 2009 and therefore have been aware of the need to instruct a lawyer in advance of your appeal for three months. Further, in a letter sent to you by the Authority on 9 March 2009, you were directed to seek legal representation immediately should you require it and you were provided with a copy of the Authority's Refugee Legal Advocate Referral List. The letter stated:

"You have the right to a representative (including legal counsel) to assist you with your appeal. If you decide to get help, please do this immediately. Do not wait until we next write to you, because then there might not be enough time available for you to find someone. The Authority will not delay processing your appeal just because you did not get a lawyer or representative promptly."

However, in an abundance of fairness, you are hereby granted leave of five working days in which to instruct a lawyer or representative. If the Authority does not hear from you or your representative by 4pm on Wednesday 24 June 2009 we will proceed to determine your appeal without further notice."

[24] The appellant has not responded to this letter.

CONCLUSION AS TO WHETHER TO DISPENSE WITH AN INTERVIEW

[25] Having carefully considered all relevant matters, for the reasons which will be apparent later in this decision, the Authority is satisfied that the appellant's appeal is *prima facie* 'manifestly unfounded or clearly abusive'.

[26] It is appropriate to now proceed to determine the appeal on the papers pursuant to ss129P(5)(a) and 129P(5)(b) of the Act, without giving the appellant an opportunity to attend a further interview. All material and submissions tendered throughout the determination process have been taken into account in determining this appeal.

HAS THE JURISDICTIONAL THRESHOLD BEEN MET?

[27] It is now necessary to consider whether the jurisdictional threshold for the hearing of a second or subsequent claim is met: see s129O(1) and *Refugee Appeal 75139* (18 November 2004).

COMPARISON OF CLAIMS

[28] The appellant's first claim for refugee status was based on her practise of *Falun Gong* in China and New Zealand, starting in 1998. The first claim encompassed the fact that: the appellant's daughter was harassed and threatened; her (the appellant's) husband was made to undergo "self-criticism" at work and told he should divorce her; and the appellant's activities in New Zealand had exposed her to the Chinese authorities as someone critical of the Communist Party and regime.

[29] The second claim was based on the same account as the first claim, with the additional element that the daughter had been detained and the husband had, in fact, been forced to divorce her. The Authority found that the second claim did not meet the jurisdictional threshold for subsequent claims and, in any event, the evidence presented in support of the second claim was not found to be credible.

[30] The third claim is a re-statement of the second claim. The only difference is that the appellant now presents documents which she purports provide corroboration for the assertions made in the second claim. However, these documents do not provide a basis on which jurisdiction to hear a subsequent appeal can be assumed. Neither do they disclose any new grounds on which this third claim is being made.

[31] It is well established in the Authority's jurisprudence that a decision of the Authority is final once notified to the claimant (s129Q(5)). For reasons set out in *Refugee Appeal No 75139* (18 November 2004), the Authority does not have jurisdiction to sit as an appellate body in respect of its previous decisions (at [44]-

[47]). The Authority also noted in that decision that it does not have a "miscarriage of justice" jurisdiction and cannot rehear an appeal already determined as if it were an appellate authority (at [55]). If a refugee claimant contends that the previous decision of the Authority was flawed, the appropriate remedy is judicial review, not the submission of a subsequent refugee claim.

CONCLUSION ON JURISDICTION

[32] The Authority finds that the jurisdictional threshold is not met. The present claim is based on the same account as the second claim, which claim has been finally determined by the Authority. There is no significant difference in the grounds between the appellant's first two claims and the appellant's third claim. The production of new evidence to corroborate facts which have already been found to be not credible in a previous claim does not satisfy the jurisdiction threshold.

[33] The appellant does not satisfy the requirements of ss129J and 129O(1) of the Act and it follows that the Authority has no jurisdiction to consider this second claim to be recognised as a refugee in New Zealand.

CONCLUSION

[34] In closing, it is concerning to note the cynical abuse of the refugee determination system by the appellant. This is now the third refugee claim she has made. The appellant has been disbelieved on every occasion she has had her claim heard. She must be aware that repeated efforts to advance the same claim will not bear fruit. We do not expect to see a further specious claim lodged by the appellant.

[35] 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.

"B A Dingle"
B A Dingle
Member