REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75574

AT AUCKLAND

Before:	RPG Haines QC (Chairperson) A N Molloy (Member)
Counsel for the Appellant:	RJ Hooker
Counsel for the Department of Labour:	E Cotton
Date of Hearing:	20, 21 & 22 June 2007; 29, 30 & 31 October 2007
Date of Further Submissions:	14 April 2009 (DoL); 21 April 2009 (Appellant)
Date of Decision:	29 April 2009

DECISION OF THE AUTHORITY DELIVERED BY RPG HAINES QC

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THE CANCELLATION INQUIRY - OVERVIEW

[1] Part 6A of the Immigration Act 1987 provides the statutory basis for the system by which New Zealand ensures it meets its obligations under the Refugee Convention. It prescribes the procedure not only for recognising refugee status but also for the cancellation of refugee status where such recognition may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information. See ss 129A, 129L(1)(b), 129L(1)(f)(ii) and 129R(b) of the Act. These statutory provisions do not employ the term "cancellation" but in the interests of brevity we will throughout this decision use that term even though, as will be seen, it does not entirely capture the essential legal characteristics of the process.

[2] The relevant statutory provisions follow.

[3] Where recognition of a person as a refugee has occurred at first instance by a refugee status officer, cancellation proceedings are likewise taken at first instance by a refugee status officer. The relevant function of a refugee status officer, as described in s 129L(1)(b), is in the following terms:

> **129L. Additional functions of refugee status officers**
>
> (1) In addition to their function of determining claims for refugee status, refugee status officers also have the following functions:
>
> (a) ...
>
> (b) Determining whether a decision to recognise a person as a refugee was properly made, in any case where it appears that the recognition given by a refugee status officer (but not by the Authority) may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information, and determining to cease to recognise the person as a refugee in such a case if appropriate.
>
> (c) ...

[4] Where, however, recognition of a person as a refugee has occurred on appeal as a result of a decision of the Authority, s 129L(1)(f)(ii) confers on a refugee status

officer the function of applying to the Authority for a determination whether the Authority should cease to recognise the person as a refugee:

> (1) In addition to their function of determining claims for refugee status, refugee status officers also have the following functions:
>
> (f) applying to the Refugee Status Appeals Authority for a determination as to whether—
>
> (i) ...
>
> (ii) the Authority should cease to recognise a person as a refugee, in any case where that recognition may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information.
>
> (iii) ....

[5] The function of the Authority, in relation to an application under 129L(1)(f)(ii) is set out in s 129R(b):

> **129R. Functions of Authority in relation to continuation, etc, of refugee status**
>
> In addition to the function of hearing appeals from decisions of refugee status officers in relation to refugee status, the Authority also has the function of determining applications made by refugee status officers under section 129L(1)(f) as to whether—
>
> (a) ...; or
>
> (b) the Authority should cease to recognise a person as a refugee, in any case where the earlier recognition by the Authority of the person as a refugee may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information; or
>
> (c) ....

[6] The Authority has held that these provisions pose two issues for determination in the cancellation context:

(a) Whether the earlier recognition of the person as a refugee may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information;
(b) Whether the refugee status officer or Authority (as the case may be) should

cease to recognise the person as a refugee.

These two issues, for convenience, are sometimes described as Stage 1 and Stage 2 of the cancellation inquiry.

[7] The most notable feature of the statutory provisions is that an affirmative ruling at the first stage of the inquiry that there was fraud, forgery, false or misleading representation, or concealment of relevant information cannot lead automatically to loss of refugee status. Rather, the affirmative finding simply puts back in issue the status of the person and reopens the refugee enquiry. The refugee decision-maker must determine anew, on the evidence available at the date of re-determination, whether the person is a refugee within the meaning of Article 1 of the Refugee Convention and therefore a person to whom, *inter alia*, the non-refoulement obligation is presently owed. The significance of this point will be returned to later in this decision.

[8] The present ruling has as its focus Stage 1 of an appeal from cancellation proceedings brought in respect of the appellant by a refugee status officer. Regrettably, the proceedings have been characterised by delay (not of the officer's making) and the Authority regrets that it itself has some responsibility for the delay which has occurred from mid-November 2007. In part this was due to the need to await the delivery of judgment by the Supreme Court in *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 and in part to the need for the Authority to carry out its own researches and to afford counsel for both parties an opportunity to comment on those researches. To place the submissions and rulings which follow in context, a broad overview of the history of the case follows.

BACKGROUND

[9] The appellant, a citizen of the Islamic Republic of Iran, first arrived in New Zealand on 28 August 1996 at Auckland International Airport whereupon he claimed refugee status. Due to the then substantial backlog of refugee claims, it was not until 4 April 2002 that a refugee status officer determined that the appellant should be recognised as a refugee. That decision was based on acceptance of the assertion by the appellant that he was at risk of being persecuted in Iran because of his distribution in that country of anti-regime videos and that he had been forced to flee Iran overland into Turkey without travel documentation.

[10] Subsequent to his recognition in New Zealand as a refugee, the appellant sought and on 15 July 2002 obtained from the Iranian Embassy in Wellington, a new Iranian passport. On 16 December 2002 he was also issued with a New Zealand passport. Using his Iranian passport he re-entered Iran by air on 27 March 2003, remaining in that country until 9 August 2003. After returning to New Zealand he re-entered Iran on a second occasion on 4 February 2004, departing on 10 April 2004. He says that the purpose of both visits was to see his ailing father who in fact died on 7 February 2004, two days after the appellant's second arrival in Iran.

[11] On 2 December 2004 the appellant was served with a notice under s 129L(1)(b) of the Immigration Act 1987 advising that a refugee status officer intended making a determination whether his recognition of refugee status should be cancelled.

[12] Following an interview on 14 February 2005 the refugee status officer published a decision on 7 April 2005 determining to cease to recognise the appellant as a refugee. From that decision the appellant appealed to this Authority. Through his solicitor he sought a preliminary ruling by the Authority on a range of issues, including the burden of proof, standard of proof and order of presentation in

cancellation proceedings. In *Minute No. 1* (29 November 2005) the Authority declined to address these points in a preliminary way, preferring to determine the issues in the context of the hearing of the appeal itself. On 2 March 2006 the appellant challenged this ruling by commencing judicial review proceedings in the High Court at Auckland. In a decision given on 28 August 2006 Cooper J dismissed the proceedings on the grounds that as no substantive decision had been made in relation to the matters raised and as the Authority had simply said that it would consider those matters at the substantive hearing, there was no respect in which the appellant could argue that he was in any way embarrassed or that his position had been unfairly prejudiced by anything that had been done. He was unable to point to any reviewable error. See *M v Refugee Status Appeals Authority* (High Court Auckland, CRI 2006-404-001046, 28 August 2006, Cooper J).

[13] On being seized with the appeal once more and at the appellant's request, the Authority in *Minute No. 2* (1 November 2006) directed the Department of Labour (for the refugee status officer) to file particulars of the alleged fraud, forgery, false or misleading representation, or concealment of relevant information on which the refugee status officer based his case. Those particulars were provided on 29 November 2006. Simultaneously, the appellant was required to file and serve his written submissions on or before 8 December 2006. Because those submissions were not filed, the Authority by *Minute No. 3* (23 January 2007) issued a further direction requiring that the submissions be filed. They were eventually received on 5 February 2007.

[14] The hearing on the first issue (whether the recognition of refugee status may have been procured by fraud, false or misleading representation, or concealment of relevant information) commenced on 20 June 2007 and continued on 21 and 22 June 2007. At the conclusion of the evidence led by the Department of Labour the appellant made a no case submission. That submission failed, the Authority directing that the first stage

of the statutory inquiry was to continue. See *Decision on No Case Submission* (22 June 2007). However, the appellant then successfully applied for an adjournment to enable him to make further inquiries and to prepare his case. See the *Decision on Adjournment Application* (22 June 2007).

[15] The hearing resumed on 29, 30 and 31 October 2007. The appellant himself gave evidence and produced a number of exhibits. At the conclusion of the first stage of the hearing a number of legal submissions were made on behalf of the appellant in support of the contention that the evidence before the Authority was not sufficient to establish that the recognition of refugee status given by the refugee status officer may have been procured by fraud, false or misleading representation, or concealment of relevant information. The essential point made was that if the "may have been" threshold was not crossed the Authority had no jurisdiction to embark on the second stage of the statutory inquiry, namely a determination whether to cease to recognise the appellant as a refugee. The appellant also sought and obtained leave to file further evidence by 14 November 2007. By letter dated 16 November 2007 the appellant advised that the search for evidence was "continuing". However, no further evidence has in fact been filed.

[16] We address now the legal submissions of the appellant.

LEGAL SUBMISSIONS OF APPELLANT

[17] Reduced to their essentials, the legal submissions for the appellant can be briefly stated:

(a) The Department of Labour must elect which of the statutory grounds to rely on namely either fraud, or forgery, or false or misleading representation, or concealment of relevant information.

(b) The Department of Labour carries the burden of proof and must establish that the recognition of the appellant as a refugee may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information.

(c) The standard of proof to be met by the Department of Labour is the balance of probabilities.

(d) The Department of Labour must establish a causal connection between the recognition of refugee status and the established fraud, forgery, false or misleading representation, or concealment of relevant information.

(e) The decision-maker has a discretion whether to cancel the recognition of refugee status. The word "may" in the statutory expression "may have been procured" does not qualify the word "procured" but rather confirms the discretionary nature of the power.

[18] For the appellant it was explicitly accepted that the statutory provisions mandated the two-stage inquiry as earlier described. The Authority's jurisprudence was not challenged in that respect.

[19] We address first the election point.

WHETHER SINGLE GROUND FOR CANCELLATION MUST BE ELECTED

[20] The statutory provisions permit a cancellation inquiry where the recognition of the person as a refugee "may have been procured by fraud, forgery, false or

misleading representation, or concealment of relevant information". The Notice of Intended Determination Concerning Loss of Refugee Status dated 2 December 2004 (served on the appellant on 6 December 2004) and which was required by Regulation 11 of the Immigration (Refugee Processing) Regulations 1999 (SR1999/285) explicitly pleads reliance on all five of the statutory grounds listed in s 129L(1)(b).

[21] At the commencement of the hearing on 20 June 2007 it was submitted for the appellant that as a matter of procedural fairness, the refugee status officer was required to select one only of the five statutory grounds on which to proceed, namely either fraud or forgery or false representation or misleading representation or concealment of relevant information. It was said that this would enable the appellant to know the case he had to answer and to focus on the evidence relevant to the particular ground. He faced a serious allegation and the grounds relied upon "should not change or shift".

[22] For the Department of Labour it was acknowledged that on the facts the forgery ground had no application but it was contended that the refugee status officer was entitled to rely on all the other grounds, individually and in the alternative.

[23] Based as it was on potential prejudice, the submission for the appellant had an air of unreality. The Notice of Intended Determination Concerning Loss of Refugee Status signed by the refugee status officer on 2 December 2004 explicitly sets out the reasons for the issuing of the notice and the evidence to be relied on. The appellant clearly understood the nature of the case he had to meet as he filed a declaration dated 11 February 2005 in response and made submissions on the substantive issues. There was also a full interview with the refugee status officer on 14 February 2005 followed by an opportunity to comment on the officer's subsequent interview report. The election point was not raised and no prejudice was asserted. On appeal to this Authority the appellant sought and received full particulars dated 20 November 2006.

It was only then that the election point was raised for the first time.

[24] On 20 June 2007, being the first day of the hearing, and after submissions, the Authority dismissed the election point. Briefly stated our reasons were:

(a) The Department of Labour confirmed that which was already clear from the papers, namely that no allegation of forgery was made against the appellant. The Department continued, however, to rely on the balance of the statutory grounds.

(b) Those statutory grounds, while not identical or co-extensive, are capable of overlapping each other. Given that the purpose of cancellation proceedings is to ensure that those who are not in truth refugees do not secure the benefits of refugee status by the stratagem of fraud, forgery, false or misleading representation, or concealment of relevant information, the proceedings must focus on the substantive merits of the case and not be allowed to descend into the pursuit of technocratic points and meritless arguments on pleadings.

(c) Unless an individual can demonstrate genuine prejudice there is no reason why a refugee status officer cannot rely, simultaneously or in the alternative, on one or more or all of the statutory grounds applicable to the facts of the case.

[25] In the present case no prejudice was demonstrated by the appellant beyond theoretical arguments as to conceptual distinctions between fraud, false or misleading representation, or concealment of relevant information. The application by the appellant that the refugee status officer elect one only of the statutory grounds was accordingly dismissed. It is to be noted that at no time during the subsequent hearing did the appellant claim that this ruling by the Authority caused him any prejudice or embarrassment.

[26] We turn now to the two main issues raised by the appellant, namely the burden of proof and the standard of proof.

THE BURDEN OF PROOF

[27] The submission for the appellant is that in relation to both categories of cancellation cases, namely "own motion" determinations under s 129L(1)(b) by refugee status officers (and subsequent appeals from such determinations) and in "application cases" to the Authority under s 129L(1)(f)(ii), the refugee status officer (in reality, the Department of Labour) carries the burden of proof to establish that the recognition of the appellant as a refugee may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information.

Fundamental difficulties to appellant's submissions

[28] There are a number of fundamental difficulties to this submission:

(a) Both in describing the responsibility of the refugee claimant when seeking recognition of refugee status and in describing the function of the refugee status officer in the cancellation context, the Act avoids the words "onus" or "burden", a point made by the Court of Appeal in *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA) at para [23].

(b) This Authority, the High Court and Court of Appeal have consistently emphasised that the procedures prescribed by Part 6A of the Immigration Act 1987 for the determination of refugee status are administrative in nature and that it is unhelpful to use terms such as "burden of proof" borrowed from the universe of discourse which has civil litigation or criminal prosecution as its subject. See for example *Jiao* at para [31] and *Refugee Appeal No. 72668/01* [2002] NZAR 649 at paras [11] to [17]. In its discussion of the issues in the latter case, the Authority at para [15] referred to *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 279 (HCA), 289-283

(Brennan CJ, Toohey, McHugh & Gummow JJ) where the comment made was that in the context of administrative decision-making on issues relating to refugee status "the use of such terms provides little assistance".

(c) Rather than trying to adapt terms borrowed from the universe of discourse which has civil litigation as its subject, it is more relevant to focus on the text of the statutory provisions in the light of their purpose: s 5 Interpretation Act 1999, a point underlined in the refugee context by the *Jiao* decision and in the different but analogous context of deprivation of citizenship illustrated by *Yan v Minister of Internal Affairs* [1997] 3 NZLR 450 (Hammond J) at 460.

The statutory provisions

[29] We accordingly turn to the statutory provisions.

[30] Sections 129L(1)(b) and 129L(1)(f)(ii) provide that the refugee status officer has the "function" of determining whether a decision to recognise a person as a refugee was properly made or, as the case may be, of applying to the Authority for a determination whether recognition of a person as a refugee should cease. Under s 129R(b) the Authority has the "function" of determining applications under s 129L(1)(f).

[31] Obviously someone must set in motion the cancellation process before a determination can be made either by a refugee status officer or by the Authority. That responsibility is placed on a refugee status officer by the Immigration (Refugee Processing) Regulations 1999. But neither the regulations nor the statute employ the terms "onus" or "burden of proof". That, however, is not the end of the matter. Whether there is such an onus or burden depends also on the context but caution must be exercised so as not to conflate the duty to produce evidence with a duty to

discharge a legal burden of proof.

[32] In "own motion" cases, Regulation 11 requires the refugee status officer not only to give notice of an intended cancellation determination, but also to give notice of the officer's reasons and the evidence to be relied upon. This is suggestive of a responsibility of only "to have and to produce" relevant evidence:

> **11. Notice of intended determination concerning loss of refugee status -**
>
> (1) If a refugee status officer intends to make a determination under section 129L of the Act to the effect that a person's refugee status may be lost, the officer must notify the person concerned of that intention and the matter it involves, including the reasons for it and any evidence relating to it, in an approved form, which must be signed by the officer.
>
> (2) ...
>
> (3) At the same time as the person is served with the notice, -
>
> > (a) The person must also be given a copy of all relevant information from any departmental file about the person; and
> >
> > (b) ...
>
> (4) ...
>
> (5) ...

[33] Regulation 12 goes on to stipulate that a person to whom a notice regarding the possible loss of refugee status is given is entitled to be interviewed and to make written representations in relation to the matter. The refugee status officer is required to take into account the evidence given at the interview, all other evidence produced by the person and any representations which may have been made.

[34] These provisions together with s 129L(1)(b) make it clear that the refugee status officer is at the same time a "prosecutor" with a duty of disclosure and a decision-maker with a duty to act fairly. Conventional notions of onus and burden of proof simply do not fit this context.

[35] In "application" cases ie applications by a refugee status officer to the Authority

for a determination as to whether the Authority should cease to recognise a person as a refugee, Regulation 16 again imposes an obligation on the officer to disclose evidence. The obligation is to produce all relevant information and evidence to the Authority:

> **16. Filing of application seeking loss of refugee status**
>
> (1) An application by a refugee status officer under section 129L(1)(f) of the Act for a determination that may result in loss of a person's refugee status must be made by the officer in an approved form. The application must be signed by the officer and lodged with the Secretariat of the Authority.
>
> (2) At the time of filing the application, the officer must also lodge with the Authority -
>
> > (a) A copy of any part of any departmental file about the person that is relevant to the recognition of the person as a refugee;
> >
> > (b) Any other information in the officer's possession that is relevant to the determination of the application.

[36] Regulations 11 and 16 make it clear that in both "own motion" and "application" cases the process is to be initiated by a refugee status officer who, by necessary inference, must be in possession of some evidence to support the proceedings before they are taken. In our view the effect of these provisions is to stipulate that it is the responsibility of the officer, in both categories of cases, to produce evidence which, at least initially, could (not would) lead a reasonable decision-maker to the conclusion that the grant of refugee status may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information. This responsibility is not to be confused or conflated with an "onus" or "burden of proof". It simply means that the officer must initiate the proceedings and that in doing so, must disclose the evidence to be relied on. If, when tested, that evidence does not carry the decision-maker to the point of being satisfied that the earlier recognition of the person as a refugee may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information, the first stage of the inquiry will end with a determination in favour of the refugee.

[37] The standard of proof or, expressed another way, the quality or degree of persuasion which the evidence must reach, is a separate and distinct issue which we address shortly.

The Authority's practice and procedure

[38] First we must refer briefly to the Authority's practice and procedure in cancellation cases as it appears that some counsel have drawn from it the erroneous inference that such practice and procedure imposes a burden of proof on the refugee status officer.

[39] In cancellation appeals and cancellation applications before the Authority, the practice which has evolved is that in both categories of cases the refugee status officer will appear in person to assist the Authority by formally producing the evidence in his or her possession and to make him or herself available for cross-examination on that evidence, either by the Authority or by the person whose refugee status is in issue. The refugee status officer may be represented by counsel for the Department of Labour. See further *Practice Note 1/04* (23 February 2004) at paras [28.3] and [29.7] and the more recent *Practice Note 1/2008* (11 September 2008) at paras [29.3] and [30.6].

[40] These procedural mechanisms (which are in some respects inquisitorial and in other respects adversarial) do not, however, change the nature of the hearing before the Authority from inquisitorial to adversarial or change the nature of the responsibility carried by the refugee status officer. The Authority has held in *Refugee Appeal No. 2226/94 Re LRR* (16 October 1996) that it may conduct proceedings in a manner which is in part inquisitorial and in part adversarial, citing *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688, 705 (Barker J) and *Minister for Immigration, Local Government and Ethnic Affairs v*

Immigration Review Tribunal (1993) 113 ALR 737, 744 (Keely J). This approach was upheld in *Jiao v Refugee Status Appeals Authority* [2002] NZAR 845 (Potter J) at para [36]:

> [36] ... A tribunal may adopt either an inquisitorial or adversarial procedure, or some combination of both.

[41] It is an approach which is supported by Schedule 3C of the Immigration Act 1987, clause 8, which provides that the procedure of the Authority is to be such as the Authority thinks fit.

[42] In the circumstances there is no reason why the Authority should not allow cross-examination of the refugee status officer and other witnesses called in support of the application (or in opposition) but within the context of the Authority's own inquisitorial function and in particular, its freedom to ask a witness any relevant question without being accused of descending into the arena. Cancellation proceedings are a combination of both adversarial and inquisitorial processes. But we emphasise once again, this does not change the nature of the responsibility carried by the refugee status officer. It is a responsibility to produce evidence, not an onus or burden of proof.

An Exclusion analogue

[43] Our conclusion finds an analogue in the Exclusion context. Article 1F of the Convention provides that an individual cannot be a refugee if there are "serious reasons for considering" that he or she has committed (for example) a crime against humanity or a serious non-political crime. In *X & Y v Refugee Status Appeals Authority* (High Court Auckland, CIV-2006-404-4213, 17 December 2007) Courtney J at para [21] held that there was no burden on an asylum-seeker to prove that Article 1F does not apply, but there must be some evidence on which an exclusion

determination can be made and it is for the Executive to point to such evidence. In the absence of such evidence there will not be "serious reasons for considering" that the refugee claimant has committed one of the specified acts, but this does not equate to imposing a legal burden of proof on the Executive.

[44] In our view this holding usefully supports the approach we have taken in cancellation cases.

Summary of conclusions on burden of proof

[45] In general terms our conclusions on the burden of proof are:

(a) The procedures prescribed by Part 6A of the Act for determining refugee status are administrative in nature and it is unhelpful to use terms such as "burden of proof" borrowed from civil litigation or criminal prosecution. It is more relevant to focus on the text of the statutory provisions in the light of their purpose.

(b) The effect of the statutory provisions and of the regulations is that it is the responsibility of the refugee status officer, in both "own motion" and "application" categories of cases, to produce evidence which, at least initially, could (not would) lead a reasonable decision-maker to the conclusion that the grant of refugee status may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information.

(c) The fact that in cancellation cases the Authority's procedures are in some respects inquisitorial and in other respects adversarial does not change the nature of the responsibility carried by the refugee status officer.

(d) The responsibility of the refugee status officer is to produce evidence which meets the standard identified in para (b) above, but this does not equate to a legal burden of proof.

[46] We turn now to the appellant's submissions on the standard of proof. Because context and policy are important to the determination of this issue, we address them first.

THE STANDARD OF PROOF

REFUGEE DETERMINATION VULNERABLE TO FRAUD

[47] Fraud is not uncommon in refugee claims, a point underlined by the two recent decisions of the Court of Appeal in *R v Hassan* [2008] NZCA 402 (1 October 2008) and *R v Sabuncuoglu* [2008] NZCA 448 (30 October 2008). For recent High Court authority see *MA v Attorney-General* (High Court Auckland, CIV2006-404-1371, 21 September 2007, Priestley J) at para [107]. For a description of the levels of abuse sometimes encountered by the Authority, see *Refugee Appeal No. 72668/01* [2002] NZAR 649 at paras [36] to [42].

[48] There are a number of reasons for the high incidence of fraud. Only two will be mentioned here.

Independent verification of refugee claims precluded

[49] First, fraud is facilitated by the fact that it is not possible to verify or cross-check by way of investigation in the country of origin the assertions made by the refugee claimant. While the cloak of confidentiality extended by s 129T of the Immigration Act 1987 is not complete, it is nevertheless extensive. See *Attorney-General v X* [2008] 2 NZLR 579 (NZSC) at para [18]. As was pointed out in *Jiao v Refugee Status*

Appeals Authority [2003] NZAR 647 (CA) at para [26], there can in general be no question of the claimant, or for that matter the Authority, seeking information particular to the claimant from the government of the state from which the applicant is seeking refuge. For a more detailed discussion of the factors inhibiting the inquiry process, see *AB v Refugee Status Appeals Authority* [2001] NZAR 209, 222-225 (Nicholson J) and *Refugee Appeal No. 72668/01* at paras [44], [45] & [70].

A low standard of proof

[50] Second, the evidentiary standard which applies in establishing a refugee claim is one which is necessarily below the civil standard of proof and the rules of evidence are not applied. This Authority has never accepted that "facts" in a refugee claim must be proved to a balance of probability standard. See for example *Refugee Appeal No. 72668/01* at paras [11] to [17] and [152] to [153]. This approach was approved in *Jiao* at paras [13] and [31] where the Court of Appeal observed:

> ... general principle requires the applicant to establish the claim, and the particular difficulties faced by refugee claimants in making out their claims justify a generous approach to the determination of the claim. Such generosity is also to be seen operating in a different sense in the tests of "well-founded" or "a real chance": those tests do not require, for instance, a showing that persecution is more probable than not. But we recall that that is a distinct matter of evaluation (against a rather low threshold) in respect of which of talk of onus or standards of proof is inappropriate.

[51] The reasons for not adopting a balance of probabilities test in the context of refugee claims were perhaps most elegantly stated by Sedley LJ in *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 (CA) at p 477-479 approved in *R (Sivakumar) v Secretary of State for the Home Department* [2003] 1 WLR 840 (HL) at para [19] (Lord Steyn with Lord Bingham agreeing) and Lord Hutton at para [29]. In *Karanakaran* Sedley LJ at pp 477-479 said:

> The issues for a decision-maker under the Convention (whether the decision-maker is a Home Office official, a special adjudicator or the Immigration Appeal Tribunal) are questions not of hard fact but of evaluation: does the applicant have a well-founded fear

> of persecution for a Convention reason?
>
> ...
>
> The question whether an applicant for asylum is within the protection of the convention is not a head-to-head litigation issue. Testing a claim ordinarily involves no choice between two conflicting accounts but an evaluation of the intrinsic and extrinsic credibility, and ultimately the significance of the applicant's case. It is conducted initially by a departmental officer and then, if challenged, by one or more tribunals which, though empowered by statute and bound to observe the principles of justice, are not courts of law ... Such decision-makers, on classic principles of public law, are required to take everything material into account. Their sources of information will frequently go well beyond the testimony of the applicant and include in-country reports, expert testimony and - sometimes - specialised knowledge of their own (which must of course be disclosed). No probablistic cut-off operates here: everything capable of having a bearing has to be given the weight, great or little, due to it. What the decision-makers ultimately make of the material is a matter for their own conscientious judgment, so long as the procedure by which they approach and entertain it is lawful and fair and provided their decision logically addresses the convention issues. Finally, and importantly, the convention issues from first to last are evaluative, not factual. The facts, so far as they can be established, are signposts on the road to a conclusion on the issues; they are not themselves conclusions.

[52] He continued, at p 479j:

> While, for reasons considered earlier, it may well be necessary to approach the convention questions themselves in discrete order, how they are approached and evaluated should henceforward be regarded not as an assault course on which hurdles of varying heights are encountered by the asylum seeker with the decision-maker acting as umpire, nor as a forum in which the improbable is magically endowed with the status of certainty, but as a unitary process of evaluation of evidential material of many kinds and qualities against the convention's criteria of eligibility for asylum.

[53] Speaking extra-judicially at the Fifth World Conference of the International Association of Refugee Law Judges at Wellington, October 2002, Sir Stephen Sedley spoke of the asylum judge making "a possible life-and-death decision extracted from shreds of evidence and subjective impressions": Stephen Sedley, "Asylum: Can the Judiciary Maintain its Independence" in *Stemming the Tide or Keeping the Balance - The Role of the Judiciary* (IARLJ, Wellington, October 2002) 319 at 324. In similar terms Professor James C Hathaway in *Rebuilding Trust - Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (December 1993) at pp 6 & 7 described refugee status determination as:

> ... among the most difficult forms of adjudication, involving as it does fact-finding in regard to foreign conditions, cross-cultural and interpreted examination of witnesses, ever-present evidentiary voids, and a duty to prognosticate potential risks rather than simply to declare the more plausible account of past events.
>
> ...
>
> These evidentiary and contextual concerns make departure from traditional modes of adjudication imperative. We need expert, engaged, activist decision-makers who will pursue substantive fairness rather than technocratic justice. We must not view refugee claimants as opponents or threats, but rather as persons seeking to invoke a right derived from international law.

[54] It was no doubt for these reasons that the Court of Appeal in *Jiao* spoke of the need for a "generous approach" to refugee determination. Any other approach would leave the decision vulnerable to challenge:

> [27] ... reinforced by the consideration that the applicant's right to life may be put at risk if the refugee status is declined....
>
> [32] Were a decision-maker to deny the particular difficulties of refugee claimants and to insist on proof that it was impossible for the applicant to provide there might well be an argument that the decision-making process was fundamentally flawed, and that it did not meet the obligations of States in respect of that process, implicit in the Convention, especially given its vital humanitarian purpose.

As observed by Priestley J in *MA v Attorney-General* at para [107], refugee determination procedures are benign and tilted very much in favour of a claimant.

[55] Bearing in mind the vulnerability of the refugee determination process to fraud and the like, we turn to the principal policy considerations which underline the cancellation process.

POLICY CONSIDERATIONS UNDERLYING CANCELLATION OF REFUGEE STATUS

[56] The vulnerability of the refugee determination process to abuse is recognised by Part 6A of the Immigration Act 1987 which prescribes a procedure not only for

determining inclusion issues under Article 1 of the Refugee Convention but also for the cancellation of refugee status where fraud or similar is present. The policy considerations underlining the cancellation process are not difficult to identify:

(a) Both the "generous approach" to the evaluation of evidence in the refugee determination process and the integrity of that process require that remedial action is taken where fraud, forgery, false or misleading representation, or concealment of relevant information is discovered.

(b) A person who is not a Convention refugee but who obtains a favourable determination of refugee status through fraud, forgery, false or misleading representation, or concealment of relevant information, is not entitled to the status of a refugee. Recognition of such status must be withdrawn on the deception being discovered.

Each of these points will be addressed in turn.

Integrity and credibility of the system

[57] The first point requires little elaboration. The general principle is that fraud unravels everything: *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712-713 (Denning LJ); *Al-Nehdawi v Secretary of State for the Home Department* [1990] 1 AC (HL), 895 (Lord Bridge delivering the judgment of the Court); *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 (HCA) at paras [8] to [27] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon & Crennan JJ). It can hardly be disputed that the integrity of the refugee status determination process requires that where fraud, forgery, false or misleading representation, or concealment of relevant information is detected, the refugee status of the individual must be re-investigated.

Refugee status declaratory, not constitutive

[58] As to the second point, refugee status is declaratory, not constitutive. Refugee status under the Convention arises from the nature of one's predicament rather than from a formal determination of status: James C Hathaway, *The Rights of Refugees under International Law* (Cambridge 2005) at 11 and 278. The following passage is taken from *op cit* 11:

> As a fundamental principle, the acquisition of refugee rights under international law is not based on formal status recognition by a state or agency, but rather follows simply and automatically from the fact of substantive satisfaction of the refugee definition. As UNHCR has affirmed:
>
> > A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee, but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee.

[59] Conversely, if an individual is mistakenly recognised as a refugee as a result of fraud, forgery, false or misleading representation, or concealment of relevant information, he or she is not in law entitled to the benefits conferred by the Refugee Convention and by New Zealand domestic law and policy. Fraud, forgery, false or misleading representation, or concealment of relevant information must be investigated and exposed to prevent those not at risk of harm from accessing the surrogate protection of the international community and the benefits reserved only for those who satisfy the terms of Article 1 of the Refugee Convention.

[60] Abuse of the refugee regime undermines and erodes the commitment by States party to the Refugee Convention and to their formal legal obligation to provide protection to refugees notwithstanding the otherwise vigorously asserted sovereign right to determine who should be admitted to a state's territory. The refugee processing regime must not be allowed to become a back door to immigration.

Maintenance of the integrity of the refugee system will also help defuse what Professor Hathaway in "What's in a Label?" (2003) 5 European Journal of Migration and Law 1, 20 has described as "unwarranted restrictionist pressures and the *non-entrée* policies which they breed".

[61] It is against this context that the legal submissions of the appellant on the standard of proof are to be considered.

The appellant's submission

[62] The submission for the appellant is that in all refugee status cancellation cases the standard of proof to be met by the evidence is the balance of probabilities "having regard to the serious nature of the allegation". Specifically it is submitted that if fraud is alleged, the same test is to be applied as if the individual were facing a criminal charge of fraud. In short, in such cases the criminal standard of proof applies.

[63] Two standard of proof issues are posed by this submission having regard to the statutory phrase in question, namely "may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information":

(a) The degree of proof required to establish that there was fraud, forgery, false or misleading representation, or concealment of relevant information.

(b) Assuming the evidence must show a causal connection between the procuring of recognition as a refugee and the alleged fraud, forgery, false or misleading representation, or concealment of relevant information, the degree of proof required to establish that causal connection.

[64] Each of these components will be addressed separately.

THE DEGREE OF PROOF REQUIRED TO ESTABLISH FRAUD, FORGERY, FALSE OR MISLEADING REPRESENTATION, OR CONCEALMENT OF RELEVANT INFORMATION

[65] The appellant relied on *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608 (CA) paras [70] and [71] for the proposition that a civil court, when considering a charge of fraud, will require a higher degree of probability than that which it would require if considering whether negligence has been established. However, quite apart from the fact that the decision of the Court of Appeal was reversed in part in *Amaltal Corporation Ltd v Maruha Corporation* [2007] 3 NZLR 192 (NZSC) (albeit on another point) the proposition relied on by the appellant is no longer good law.

Standard of proof and policy considerations

[66] We refer of course to *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (NZSC) which had as its focus the standard of proof in professional disciplinary proceedings. All members of the Court were in agreement that no intermediate standard of proof between the criminal and civil standards exists in New Zealand. The majority, comprising Blanchard, Tipping & McGrath JJ, with whom Anderson J agreed but with Elias CJ dissenting, held on the particular facts that the civil standard of proof applied notwithstanding the serious nature of allegations made in disciplinary proceedings and notwithstanding the potentially grave consequences of a "conviction". The majority also held that the balance of probability standard was to be flexibly applied, particularly where allegations of a serious nature are made. While this did not mean that the degree of probability changed, decision-makers would require stronger evidence before being satisfied that such serious allegations were accepted as proved. The Chief Justice, on the other hand, was of the view that a flexible balance of probability standard was problematical and that it was preferable in

professional disciplinary proceedings for the criminal standard of proof to apply as it would avoid the conceptual confusion inherent in a flexible civil standard of proof and minimise inconsistency in treatment.

[67] While disagreeing on the standard of proof applicable to professional disciplinary proceedings, all members of the Supreme Court were in agreement that identification of the standard of proof applicable within a specific context is largely determined by the statutory setting, policy and value judgments. Thus at para [107] of the majority judgment Blanchard, Tipping & McGrath JJ stated:

> But the true reason for the flexible application of the civil standard is concerned more with judicial policy as to what the ends of justice require outside of the criminal justice system.
>
> [citations omitted]

And at paras [115] & [116] the majority, after making reference to the particular statutory context with its purpose of public protection, found no policy considerations favouring the making of an exception to the balance of probability standard in cases involving occupational disciplinary proceedings. For her part, the Chief Justice was of the view that policy considerations favoured the criminal standard of proof being applied in such proceedings.

[68] In some respects the decision in *Z v Dental Complaints Assessment Committee* is not on point because occupational disciplinary proceedings and the determination of refugee status are unrelated, if not entirely disparate fields, and it is well established that proceedings under Part 6A of the Immigration Act 1987 are neither civil nor criminal. Nevertheless, substantial assistance is to be derived from the Supreme Court judgments in so far as they address the policy considerations which explain why a particular standard of proof applies in one context but not in another. The judgment of the Chief Justice articulates this issue the most fully and for that reason will be drawn on to the greatest extent.

[69] The Chief Justice helpfully begins at para [26] with the reminder that the term "standard of proof" means the quality or degree of persuasion required before a decision-maker can determine facts and arrive at conclusions of legal responsibility. Except where a different standard is required by statute, New Zealand law recognises only two standards of proof, the civil and the criminal.

[70] In so far as the appellant before the Authority might draw comfort from the statement by the Chief Justice that only two standards of proof are recognised in New Zealand, it must be observed that the statement is qualified by the explicit recognition that everything depends on the statutory setting. We must add that where the statute in question has the purpose of ensuring that New Zealand meets its obligations under an international human rights treaty, the decision on the standard of proof will be determined not only by the statutory setting, but also by the treaty setting and New Zealand's obligations under that treaty. Questions of standard of proof are not answered in a legal vacuum. Rather, they are answered in the legal framework in which they arise. It is not intended, by drawing on the judgments in *Z v Dental Complaints Assessment Committee*, to suggest that in the refugee determination context the civil or criminal standards of proof have relevance. They do not.

[71] Elias CJ points out at paras [30] and [31] of her judgment that a "fundamental value determination" lies behind the decision as to the standard of proof to be applied in any particular context. That value judgment requires, *inter alia*, an acknowledgement of the need to reduce error in fact finding and an assessment of "the cost of error" that is to be found acceptable within the particular decision-making context:

> [30] The choice between the standards of proof is explained by the need to reduce error in fact finding where the costs of such error are considered by the legal system to be too high. Thus in the US Supreme Court Justice Harlan in *Re Winship* described the standard of proof as representing "an attempt to instruct the fact finder concerning the degree of

confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication":

> Although the phrases "preponderance of the evidence" and "proof beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

[31] Assessment of the social cost of error is behind the value judgment as to the standard of proof to be applied in particular contexts. The difference between the standards in civil and criminal litigation was explained by Justice Harlan in this way:

> When one makes such as assessment, the reason for different standards of proof in civil as opposed to criminal litigation becomes apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious and general for there to be an erroneous verdict in the defendant's favour than for there to be an erroneous verdict in the plaintiff's favour. A preponderance of the evidence standard therefore seems peculiarly appropriate for, as explained most sensibly, it simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favour of the party who has the burden to persuade the [judge] of the fact's existence.
>
> In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty ...
>
> In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free. It is only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation.

[citations omitted]

[72] The "protection against error in result" factor led the Chief Justice to the conclusion that the standard of proof to be applied in any particular context is to be determined by the interests of fairness:

> [55] In conclusion, the standard of proof depends upon what is required for reasons of fairness. The standard of proof beyond reasonable doubt [in professional disciplinary proceedings] protects against error in decision making. It promotes consistency. All charges under s 54 are serious. Where serious disciplinary charges are brought under statutory process in circumstances where substantial penalties may be imposed and damage to reputation and livelihood is inevitable if adverse findings are made, fairness requires application of a higher standard of proof than one on the balance of probabilities.

[73] Although disagreeing as to the result, the majority were in broad agreement with Elias CJ on the point that the decision as to the relevant standard of proof is largely driven by policy considerations. See the passage from their judgment at [107] cited earlier which contains the acknowledgement that the true reason for the flexible application of the civil standard is concerned more with judicial policy as to what the ends of justice require outside of the criminal justice system. Later, at para [115] and [116] the majority set out the reasons why, in professional disciplinary proceedings under the Dental Act 1988, the flexible civil standard applies rather than the criminal standard and conceded that considerations of pragmatism and policy had a substantial influence on their decision.

Policy considerations in refugee determination

[74] Addressing the "fundamental value determination" in the refugee context, there are two facets. First, in determining the **inclusion** issues under Article 1A(2) of the Convention, the low "less than balance of probability" standard reflects a judgment that the "cost of error" is the unacceptable risk of returning an individual to a place where he or she faces a real risk of being persecuted. Such return is prohibited by Article 33(1) of the Refugee Convention. It also reflects the practical difficulties faced by the refugee claimant in "proving" his or her case and the challenges facing a decision-maker who more often than not must reach a decision on "shreds of evidence and subjective impressions".

[75] But as earlier explained, in reducing one "cost of error", the "generous approach" to refugee determination creates another, namely the risk that by fraud, forgery, false or misleading representation, or concealment of relevant information, a person who is not a refugee may secure recognition as a refugee and collect the rights and entitlements which flow from that status.

[76] This brings us to the second facet. To paraphrase Anderson J in *Z v Dental Complaints Assessment Committee* at para [145], there must be protection against error in both directions. Because the refugee definition is declaratory, not constitutive of the status of a refugee, as a matter of treaty law a person who is not a Convention refugee but who obtains a favourable determination of refugee status through fraud or similar deception is not entitled to the status of a refugee. Recognition of such status must be withdrawn on the deception being discovered. Additionally, preserving refugee status for only those who are in genuine need of protection is integral to maintaining the credibility and integrity of the refugee protection regime, if not its sustainability. Achievement of these critical ends cannot be frustrated by the imposition of an unrealistic standard of proof in the cancellation context. Effluxion of time between the fraud and its discovery is in this context irrelevant. It is not possible to gain a prescriptive right to refugee status, a point underlined not only by the declaratory nature of the definition in Article 1A(2) but also by the fact that there is no time limit to the application of the Cessation provisions of Article 1C. These important policy considerations are imported into New Zealand domestic law by s 129A of the Immigration Act 1987 which stipulates that the object of Part 6A is to provide a statutory basis for the system by which New Zealand ensures it meets its obligations under the Refugee Convention. The composite procedures thereafter prescribed for the recognition of refugee status logically stipulate not only a process for refugee recognition, but also for the cancellation of such recognition where fraud or other forms of deception are discovered.[1]

[77] In these circumstances we see no reason why the standard of proof in the cancellation inquiry should be any different to that in the original inclusion inquiry. Both processes are part of the same composite investigation, namely whether the particular individual is in truth a refugee and therefore someone to whom New

[1] The effect of such cancellation on immigration and even citizenship status is separately addressed by other provisions of the Immigration Act 1987 and by the Citizenship Act 1977.

Zealand owes a duty of protection. Both raise the same evidentiary difficulties exacerbated by the inability to make inquiry in the country of origin and by the obligation to maintain confidentiality of the refugee claim. Given the shared evidentiary difficulties it would be illogical for different standards to apply, particularly when policy requires there to be protection against error in both directions. There is considerable logic to maintaining identical standards of proof for both the inclusion and cancellation inquiries.

[78] In making this determination we have given substantial weight to the fact that the cancellation process prescribed by Part 6A incorporates a Stage 2 safety mechanism which has as its purpose the elimination of the "cost of error" in opening a cancellation inquiry at Stage 1. That safety mechanism is the statutory stipulation that even if it is established that the recognition of refugee status was procured by fraud, forgery, false or misleading representation, or concealment or relevant information, cancellation of refugee status cannot occur if the individual at the date of the inquiry is in fact a refugee within the meaning of Article 1 of the Refugee Convention. The presence of Stage 2 as a safety mechanism against breach of the non-refoulement obligation strengthens the case for a less than balance of probability standard of proof operating at Stage 1 of the cancellation inquiry.

[79] To assert, as the appellant does, that an allegation of fraud is serious and must therefore be proved to a high standard of probability approaching the criminal standard rather misses the point. It also overlooks the fact that the statutory phrase embraces not only fraud, but also "less than fraud" circumstances ie false or misleading representation and concealment of relevant information. As all the judgments in *Z v Dental Complaints Assessment Committee* underline, it is not the seriousness of the allegation which determines the standard of proof. It is the policy considerations in the particular statutory (and here, treaty) context together with the requirements of fairness. In this regard there is nothing inherently unfair in applying,

at the first stage of the cancellation inquiry, the same standard of proof as that which applies generally in the inclusion assessment, given that the evidentiary difficulties are the same and further given the presence of the safety mechanism in the form of the second stage of the inquiry.

[80] Then the appellant submitted that the consequences of cancellation are serious, namely loss of refugee status. This rather begs the question. If the individual is not a refugee but has secured recognition as one by failing to give truthful evidence, the individual was never in law or in fact a refugee. No status is lost. This is the inevitable corollary of the fact that refugee status is declaratory not constitutive. But the submission is in any event mistaken in law and untenable as a matter of construction of the domestic statute. Sections 129L(1)(b), 129L(1)(f)(ii) and 129R(b) do not (as the submission presupposes) stipulate that refugee status is lost on a determination being made that the recognition of refugee status may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information. These provisions stipulate only that on such determination being made at Stage 1, the consequence is that the inquiry into refugee status is re-opened and Stage 2 of the inquiry is embarked on, nothing more. The process ends with the question "Is this person today a refugee"? Proper weight must therefore be given to the fact that at the re-determination stage the individual has the same opportunity as before of establishing that he or she is a refugee within the meaning of Article 1 of the Convention. If he or she is able to do this, he or she must be recognised as a refugee on the now true circumstances placed before the decision-maker and the rights in Articles 2 to 34 of the Refugee Convention are triggered, particularly the non-refoulement obligation in Article 33.

A Canadian comparison

[81] The simplicity of the New Zealand cancellation proceedings is to be contrasted

with the convoluted Canadian provisions which are strangely disconnected from the obligations under the Refugee Convention. The legislation in Canada (past and present) confines the inquiry to an investigation whether, at the time of the original decision, there was other sufficient evidence before the decision-maker on which the recognition of refugee status could have been based. There is no inquiry as to whether the individual is presently a person to whom the non-refoulement obligation is owed. In the result, the Canadian cancellation procedures create the potential for the expulsion of a person who is a refugee. We set out first the Canadian statutory provisions and then refer briefly to the relevant case law.

[82] The Immigration Act 1985 (Can) contained the following provisions:

> 69.2(2) The Minister may, with leave of the Chairperson make an application to the Refugee Division to reconsider and vacate any determination made under this Act or the regulations that a person is a Convention refugee on the ground that the determination was obtained by fraudulent means or misrepresentation, suppression or concealment of any material fact, whether exercised or made by that person or any other person.
>
> 69.3(5) The Refugee Division may reject an application under subsection 69.2(2) that is otherwise established if it is of the opinion that, notwithstanding that the determination was obtained by fraudulent means or misrepresentation, suppression or concealment of any material fact, there was other sufficient evidence on which the determination was or could have been based.

[83] The more recent Immigration and Refugee Protection Act 2001(Can) makes similar provision in s 109:

> **109.(1) Vacation of refugee protection** - The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.
>
> **(2) Rejection of application** - The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.
>
> **(3) Allowance of application** - If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.

Contrast the "was obtained" requirement of this provision with the "may have been procured" language of the New Zealand provision.

[84] The policy underlying the Canadian legislation was articulated in *Coomaraswamy v Canada (Minister of Citizenship & Immigration)* (2002) 21 Imm LR (3d) 161 (FC:CA) at 15. The Federal Court of Appeal stated that otherwise it would allow a fraudulent claimant a second bite at the cherry, a second bite which is not afforded to either truthful or deceptive claimants whose claims for refugee status are dismissed:

> Any possible doubt about the interpretation of subsection 69.3(5) is resolved by asking what legislative purpose would be served by affording to claimants who succeed in deceiving the Board an opportunity to submit additional evidence in an attempt to prove *de novo* at the vacation hearing that their claims were genuine. No such opportunity is available to either truthful or deceptive claimants whose claims for refugee status are dismissed. To allow a claimant who succeeded in deceiving the Board a second bite at the cherry by introducing new evidence at the vacation hearing would reward deception and remove an incentive to tell the truth.

By way of commentary we observe that the New Zealand procedures specifically allow "a second bite at the cherry" for the simple reason that this is the only sure way a State party has to determine whether, at the date of the proposed expulsion, the State party has a duty of non-refoulement in relation to the particular individual. In the Authority's jurisprudence the second decision-maker does not attempt to second-guess the conclusion the first decision-maker would have reached had he or she known the "true" facts: *Refugee Appeal No. 76079* (6 January 2009) at paras [70] & [71].

[85] Be that as it may, in *Coomaraswamy* the Federal Court of Appeal held that while at the vacation hearing neither the Minister nor the claimant were restricted as to the evidence relevant to the issue of whether there was fraud or misrepresentation, once fraud or misrepresentation was established, the resumed refugee inquiry was an extremely narrow one and not "at large". The second decision-maker was limited to the evidence before the first decision-maker at the time the refugee claim was

originally allowed. New evidence of risk not before the initial panel was inadmissible: *Sayed v Canada (Minister of Citizenship & Immigration)* (2000) 9 Imm LR (3d) 123 (FC:TD) at [29]:

> Therefore, it follows that I conclude that there was no duty on the Board in the present case to afford Mr Sayed a fresh oral hearing into his current refugee status. Mr Sayed was, instead, limited to making submissions on the issue of whether, on the untainted evidence before the Convention Refugee Determination Division on his original hearing, there was sufficient evidence on which the determination could have been made that he was a Convention refugee.

[86] Under the new 2001 Statute the same position applies. See *Canada (Minister of Citizenship & Immigration) v Wahab* [2006] FC 1554 (FC:TD) at para [29]; *Canada (Minister of Public Safety & Emergency Preparedness) v Gunasingan* (2008) 73 Imm LR (3d) 151 (FC:TD) at paras [16] to [20] and *Canada (Minister of Citizenship & Immigration) v Chery* (2008) 74 Imm LR (3d) 132 (FC:TD) at para [23].

[87] While the policy underlying the Canadian provisions is clear, it is difficult to reconcile with the non-refoulement obligation in Article 33 of the Refugee Convention. Unless the individual is given an opportunity to establish, *de novo*, that he or she satisfies Article 1 of the Refugee Convention, a State party which cancels refugee status is potentially at risk of breaching Article 33. Against this background, it can be seen more clearly that in contrast, the New Zealand provisions are uniquely simple in concept and operation. They are also faithful to the Refugee Convention.

[88] The distinct features of the New Zealand statutory provisions have led us to the conclusion that not only is the very different Canadian setting of no assistance, nor is the UNHCR, *Note on the Cancellation of Refugee Status* (22 November 2004). Its highly abstract if not technical approach to cancellation cannot be applied in the specific New Zealand statutory setting, a point perhaps underlined by its

recommendation that the second decision-maker attempt to second guess the conclusions the first decision-maker would have reached had the new evidence been available to that first decision-maker. This is the Canadian approach but it is not one which the New Zealand statutory provisions allow.

[89] Because in the New Zealand context the establishment of fraud, forgery, false or misleading representation, or concealment of relevant information can lead only to a re-determination of refugee status, the statutory provisions ought not to be given an interpretation which surrounds the re-opening process with a high evidentiary standard and with requirements more appropriate to a conventional adversarial setting. This would frustrate the statutory purpose of withdrawing refugee status recognition from those who are not in truth refugees and of discouraging fraud and the lack of candour by facilitating the withdrawal of the fruits of that fraud or lack of candour.

Summary of conclusions on standard of proof

[90] In general terms, our conclusions on the standard of proof are:

(a) The standard of proof is to be determined by reference to the legal framework for refugee determination in New Zealand, being the Refugee Convention itself and Part 6A of the Immigration Act 1987. Particular importance is to be given to ss 129A and 129D which stipulate that the object of Part 6A is to provide a statutory basis for the system by which New Zealand ensures it meets its obligations under the Refugee Convention and both refugee status officers and this Authority are to act in a manner that is consistent with New Zealand's obligations under the Refugee Convention.

(b) New Zealand's obligations under the Refugee Convention require not only the recognition as refugees of those persons who satisfy the definition of "refugee"

in Article 1 of the Convention, but also the withholding of recognition from those persons who are not refugees.

(c) Maintenance of the integrity and credibility of the New Zealand refugee status determination process and the good faith discharge by New Zealand of its obligations under the Refugee Convention require that all refugee claimants are candid and truthful in the evidence they give in support of their claims.

(d) In reaching a judgment as to the "fundamental value determination" and "cost of error" in refugee determination, recognition must be given to the need for there to be protection against error in both directions, that is, not only error in failing to recognise the refugee status of those who satisfy the refugee definition but also error in recognising as refugees those who are not in truth refugees.

(e) The standard of proof which applies in the assessment of the inclusion clause issues in Article 1A(2) applies also in the cancellation process under ss 129L(1)(b), 129L(1)(f)(ii) and 129R(b) of the Immigration Act 1987. In particular, the processes are part of the same composite investigation into whether the person is someone to whom New Zealand has obligations under the Refugee Convention.

(f) The standard of proof in the inclusion assessment and in the cancellation inquiry is lower than the balance of probabilities but higher than mere suspicion.

[91] We turn now to the causal connection issue preliminary to addressing the degree of proof required to establish that connection.

WHETHER THE EVIDENCE MUST SHOW A CAUSAL CONNECTION

[92] It is clear that the word "procured" in the statutory phrase "may have been procured" requires that a causal connection be shown between the procuring of recognition as a refugee and the alleged fraud, forgery, false or misleading representation, or concealment of relevant information. In practical terms the causal connection will in most, if not all cases, be established if it is shown that the particular refugee claimant did not give to the original refugee decision-maker a full, honest and candid account of the circumstances on which the refugee claim was based. This is because issues of credibility lie at the heart of most determinations of refugee status, as has been recognised in numerous decisions of the Authority and in *Khalon v Attorney-General* [1996] 1 NZLR 458, 467 (Fisher J). If a refugee claimant does not give a full, honest and candid account of his or her circumstances to the refugee decision-maker, that decision-maker will be disabled from making a proper determination of the claim to refugee status.

Conclusion on causal connection

[93] A causal connection must be shown between the procuring of recognition as a refugee and the alleged fraud, forgery, false or misleading representation, or concealment of relevant information.

[94] We turn now to the standard of proof required to establish that causal connection.

THE STANDARD OF PROOF REQUIRED TO ESTABLISH THE CAUSAL CONNECTION

[95] Neither in an "own motion" nor in an "application" case do the Act and Regulations require that the refugee status officer establish that the recognition of

refugee status **"was procured"** or **"was more likely than not procured"** by fraud, forgery, false or misleading representation, or concealment of relevant information. The threshold to the re-investigation of the person's refugee status is crossed if the decision-maker is satisfied that the earlier recognition **"may have been"** so procured. The auxiliary verb **may** is used in this context to convey the notion of a possibility. See *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press, Oxford 1993) and McArthur (ed), *The Oxford Companion to the English Language* (Oxford University Press 1992) at 98.

[96] In our view it is clear from the language of the section that the evidence does not have to establish that it is more probable than not that the recognition of refugee status may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information. The standard of proof is lower than the balance of probabilities but higher than mere suspicion.

[97] Given that it is our finding that this standard also applies to the establishment of fraud, forgery, false or misleading representation, or concealment of relevant information, it follows that there is one, uniform, standard of proof for the entire first stage of the cancellation inquiry.

[98] In closing we make one comment arising from the appellant's unsuccessful no case submission. If at the hearing, prior to the refugee giving evidence in the first stage of the inquiry, it emerges that the evidence then before the decision-maker establishes suspicion only, ie does not reach the "lower than balance of probabilities but higher than mere suspicion standard", the refugee would have the option of making a no case submission at the end of the officer's "case". If the application is successful, stage one of the inquiry will come to an end with a determination in favour of the refugee and there will be no continuation of the first stage of the inquiry, just as there will be no inquiry into the second stage, ie whether the person currently satisfies

the refugee definition. We do not, however, encourage the making of a no case submission in the Stage 1 context as the threshold which the evidence must meet at this point of the case is a low one, namely whether, on the uncontradicted evidence as it stands, a refugee status officer or Authority, properly directed, could find that the recognition of refugee status may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information. In our experience, it would be unusual, if not exceptional, for a refugee status officer to initiate cancellation proceedings without being in possession of evidence which would satisfy this standard on a no case submission.

Conclusion on standard of proof required to establish causal connection

[99] The standard of proof required to establish the causal connection is lower than the balance of probabilities but higher than mere suspicion.

[100] We turn now to the final submission, namely whether the decision-maker has a discretion whether to cancel the recognition of refugee status.

WHETHER A DISCRETION TO CANCEL

[101] The submission for the appellant is that the decision-maker has a discretion whether to cancel the (wrongful) recognition of refugee status. It was said that the word "may" in the statutory expression "may have been procured" does not qualify the word "procured" but rather confirms the discretionary nature of the power.

[102] This submission is untenable. Both grammatically and from a statutory interpretation perspective, the word "may" is contextually part of the verbal expression "may have been procured". As previously stated, as an auxiliary verb, **may** is used in this context to convey the notion of a **possibility** that the recognition of refugee status was procured by fraud or misrepresentation. The language of the statute leaves no room for the appellant's argument that "may" confers a discretion. As was pointed out in *Tyler v Attorney-General* [2000] 1 NZLR 211 (CA) at paras [22] to [33], s 5 of the Interpretation Act 1999 requires the meaning of an enactment to be extracted from its text and in the light of its purpose. Here, the textual setting positively excludes the appellant's submission.

[103] So does the statutory purpose. There can be no discretion as to whether to cease to recognise a person as a refugee where that person's recognition may have been procured by fraud, forgery, false or misleading representation, or concealment of

relevant information. Refugee status is declaratory, not constitutive. As a matter of law, a person cannot be a refugee unless he or she satisfies the refugee definition. It is not a matter that is left to the discretion of the decision-maker. The integrity and credibility of the refugee determination process would be seriously compromised were a decision-maker to continue to recognise a person as a refugee notwithstanding that that person secured recognition through fraud. As earlier pointed out, the general principle is that fraud unravels everything. The overarching point is that ss 129A and 129D require Part 6A to be interpreted so as to meet New Zealand's obligations under the Refugee Convention, not to undermine or defeat those obligations.

Conclusion on whether a discretion to cancel

[104] There is no discretion as to whether to cease to recognise a person as a refugee where that person's recognition may have been procured by fraud, forgery, false or misleading representation, or concealment of relevant information.

[105] Having dealt with all the appellant's legal submissions it is now possible to address the facts of the case.

THE FACTS

The background to the cancellation proceedings

[106] In his claim to refugee status the appellant asserted that soon after the Iranian Revolution and at a time when he was approximately fifteen years of age, he took part in (then) legitimate activities of the People's Mojahedin Organisation of Iran (PMOI). However, as the Khomeini regime consolidated its power it began suppressing the activities of the PMOI. It was in this context that in 1981 the appellant was arrested and detained in Evin Prison for six months. Although permitted to complete his

schooling after his release, he was refused admission to University. Between 1988 and 1990 he completed his military service without event. On discharge he appears to have had several informal employment positions before starting work as a taxi driver in 1994. In the same year he met up with a friend from his time in the military who was then operating a business selling and distributing video tapes and video games. Over the next two years the appellant was drawn into assisting this friend in duplicating and distributing videos, some of which were standard films but others were of a political and anti-regime nature. These "sensitive" videos were distributed only to those whom the appellant and his friend trusted as they were aware that they could be severely punished by the authorities should they be found to be in possession of the items.

[107] In mid-1996 the appellant learnt that his friend had been arrested. The appellant immediately left his home and in a short time was smuggled across the land border into Turkey. Being without a passport or other form of identification, his helper arranged a false Dutch passport which the appellant first used to travel to Greece and then to Thailand. After subsequently securing a false Danish passport he travelled to New Zealand, arriving at Auckland International Airport on 28 August 1996 where he claimed refugee status. Through his family the appellant learnt that the authorities had searched the family home and detained both his brothers for a short period. His military service friend had been executed within a matter of months after the arrest. The authorities continued looking for the appellant for some time and they visited the parents' home on many occasions.

[108] As previously mentioned at the commencement of this decision, a then backlog of refugee claims in the New Zealand system led to delay and it was not until 4 April 2002 that a refugee status officer, after finding the appellant to be a credible witness, determined that he should be recognised as a refugee. On 15 July 2002 the appellant obtained from the Iranian Embassy in Wellington a new Iranian passport. This

passport purported to show that the appellant lawfully left Iran by air on 5 June 1996, an assertion fundamentally at odds with the narrative of events given in the refugee claim. On 16 December 2002 the appellant was issued with a New Zealand passport. Using his Iranian passport he re-entered Iran by air on 27 March 2003, remaining in that country until 9 August 2003. After returning to New Zealand he re-entered Iran on a second occasion on 4 February 2004, departing on 10 April 2004.

The case presented by the Department of Labour

[109] In its *Response of Respondent to Notice Requiring Further and Better Particulars* (2 November 2006) the Department of Labour, in explaining the evidence on which the case for cancellation was based, identified three broad categories into which the alleged fraud or false or misleading representation, or concealment of relevant information could be divided:

(a) The appellant maintained in his refugee claim that he had left Iran illegally by crossing the land border to Turkey. However, the passport obtained by the appellant from the Iranian Embassy, Wellington on 15 July 2002 shows that he left Iran legally by air on 5 June 1996.

(b) In support of his refugee claim, the appellant stated he would not be able to obtain an Iranian passport were he to apply for one. However, he obtained an Iranian passport from the Iranian Embassy in Wellington on 15 July 2002 and had previously held an Iranian passport which he used in 1996 to leave Iran.

(c) The appellant stated that he would be persecuted if he returned to Iran. However, he had returned to Iran on two occasions for a period of six months in 2003 and a period of two months in 2004 without incident.

[110] We will deal with each of the elements of the Department of Labour case in turn.

That the appellant left Iran legally by air on 5 June 1996

[111] The appellant's new Iranian passport issued at Wellington on 15 July 2002 shows a "Last Departure" date of 5 June 1996 "from Mehrabad". As to this entry the Department of Labour relies on a letter from the Ministry of Foreign Affairs and Trade dated 16 September 2005 which is in the following terms:

> You have asked for clarification regarding the "exit date" noted in the Observations page of passports issued by the Iranian Embassy in Wellington to Iranians who have lost or destroyed their original Iranian passport.
>
> According to the Iranian Embassy (Mr Noushabadi) the date does not always correspond to the departure date from Iran.
>
> If they left legally it is the date as confirmed to the Embassy by the authorities in Tehran. If they left illegally they have to pay a "fine" or departure tax before the new passport is issued and once this is paid the date is the "permission to issue" date. That is, it is the date that the Embassy is given permission to issue the passport in Wellington.
>
> On this basis, where an Iranian has received a new passport and has subsequently made a visit to Iran and then left again, legally through normal channels/exit points, it would seem fair to assume that there is no substantive constraint on their freedom of movement in Iran and therefore no reason why they should not be free to return to Iran.

[112] The essence of the information received from Mr Noushabadi of the Iranian Embassy is that where an individual has left Iran **legally**, it is that date of departure which will appear in the new passport issued by the Iranian Embassy in Wellington as the "Last Departure" date. Where the individual departed Iran **illegally**, the date which will appear in the passport is not the date of departure, but rather the date on which the Embassy received from Tehran permission to issue the passport. Reading the letter in context it can be seen that it is this "approval" date which is referred to in the statement in the second paragraph as the date in the passport which does not always correspond to the actual departure date from Iran. There is no suggestion that in cases of legal departure the date in the passport in anything other than the departure date from Iran as confirmed by the authorities in Tehran.

[113] In his evidence before the Authority in the present cancellation proceedings the appellant reiterated that he left Iran illegally by crossing the land border into Turkey as described in his original refugee claim of 1996. In support he produced in evidence a statement by the man [FG] with whom the appellant stayed for approximately ten days in Uromieh after fleeing Tehran. It was [FG] who found the helper who, for one million Tomans, had escorted the appellant over the land border to Turkey. The statement, although couched in general terms, supports the appellant's account of an escape over the land border as described in the original refugee claim. Anticipating a point taken by the Department of Labour, the submission made for the appellant is that the lack of detail in the statement is understandable given the considerable effluxion of time since the events occurred; the witness could not realistically be expected to remember the events with clarity.

[114] Also in his evidence before the Authority the appellant confirmed what he had said at the first instance cancellation interview, namely that following his recognition as a refugee on 4 April 2002 he decided to return to Iran as his father was ill and not expected to live for much longer. As the eldest son in the family it was his duty to see his father before he (the father) died. By paying a bribe, a brother in Iran had procured alteration of the official record there to show (falsely) that the appellant had left Iran legally by air in 1996. Once the official record had been falsified, the appellant submitted a passport application to the Iranian Embassy in Wellington and in due course the Embassy issued an Iranian passport. Travelling on this passport there was less risk that enquiry would be made of him on arrival in Iran. Travelling on a New Zealand passport would have required a visa check and possibly questioning on arrival at the airport in Iran.

[115] In addition to the [FG] statement already referred to, the appellant tendered other supporting evidence:

(a) The death certificate for his father establishing that the father indeed passed away in Tehran on 7 February 2004.

(b) A letter from a brother confirming that he (the brother) had advised the appellant that their father was suffering from heart problems and needed emotional support. The brother had found a person with connections and through this person it had been possible, on paying a bribe of four million Tomans, to falsify the passport records in Iran, thereby facilitating the appellant's application for an Iranian passport. To the same contact the brother had passed the appellant's arrival details in Iran.

(c) A statement by an Iranian citizen who lives in New Zealand but who spends substantial time in Iran confirming that at the appellant's request, he (the witness) had transferred to the brother's account in Iran the amount of 7.3 million Tomans. The witness had been reimbursed by the appellant with the New Zealand dollar equivalent. The reimbursement had been paid into the witness' bank account in Auckland. In this regard the appellant produced a bank statement showing the withdrawal from his bank account of NZ$10,800 on 29 March 2006.

[116] Explaining why he had paid to his brother nearly eight million Tomans when the bribe for the passport entry cost four million Tomans, the appellant said that his debt to his brother was much higher than the four million Toman bribe. Money had had to be paid to the contact to ensure there were no problems on the appellant's second return to Iran and in addition, during his stays in Iran he had borrowed money from his brother. Addressing the delay between obtaining the Iranian passport on 15 July 2002, his first arrival in Iran on 27 March 2003 and his second arrival there on 4 February 2004 on the one hand and the bank transfer on 29 March 2006 on the other,

the appellant said that it had taken him some considerable time to accumulate sufficient savings.

[117] In relation to his evidence that he left Iran by crossing the land border to Turkey, the appellant points to the UK Home Office Immigration and Nationality Directorate, *Country Assessment - Iran* (April 2002) which at para 5.87 states that people seeking to leave Iran illegally do so most commonly overland through Turkey, Pakistan and Azerbaijan. Although it is conceded that this report is not contemporaneous with the appellant's flight in June 1996, it is said nevertheless to offer some support for his account. As to the claim that the record in the passport office in Iran had been altered by means of a bribe, the appellant relies on exhibit 4, which is the instruction list published on the website of the Iranian Embassy in Wellington. It sets out the passport procedure to be followed by Iranians who have left Iran legally and who then secure a residence permit in New Zealand by making a claim to refugee status. According to the English translation, one of the guidance notes states:

> Because these applicants do not know the date they left Iran, they have to contact their relatives in Iran and ask them to go to the passport office or Visa section of Internal Affairs and ask the date and the port of their exit. Then send it to the Embassy.

[118] The submission for the appellant is that these instructions establish that there is an official record in Iran of legal departures. That being so, it is not beyond the bounds of credibility that that record can be manipulated in a number of ways, including the insertion of a fictitious "legal" departure of a person at a nominated port of exit. Thus the brother's account of paying someone to insert such a fictitious entry is circumstantially reinforced and explains why the appellant's Iranian passport contains a false record of legal departure from Iran on 5 June 1996. The appellant was emphatic that he did not leave from Iran on that date from Mehrabad Airport but he does agree that the 5 June 1996 date is proximate to the actual date on which he crossed the land border.

[119] The appellant was questioned at length on all aspects of this part of the case. Our conclusion is that notwithstanding some untidiness to his evidence, the central core was not seriously weakened. There is suspicion but not more. His account is sufficiently supported by the evidence we have detailed and our conclusion is that even on the less than balance of probability standard which applies, the evidence does not allow a finding that his original departure from Iran was not over the land border to Turkey.

That the appellant was able to obtain an Iranian passport

[120] When the appellant arrived at Auckland International Airport on 28 August 1996 an application for refugee status in New Zealand was completed with the assistance of an immigration official. In response to questions 27 to 31 the appellant stated that he had left Iran illegally by crossing the land border to Turkey. Then, in a series of seemingly contradictory responses, he answered "No" to Q28 "Did you have difficulties in your country obtaining a passport?" and in relation to Q30 stated that the passport was not presently in his possession, "It is in Iran. Not valid any longer". In a separate interview sheet it is recorded that he was asked "Where is your passport now?". His answer was:

> In Iran with my family.

[121] After instructing an experienced refugee lawyer, the appellant on 19 September 1996 completed a second application for refugee status. He again claimed to have crossed illegally from Iran to Turkey by foot on or about 4 July 1996. He said that he was without travel documents and would not get a passport if he applied for one.

[122] At the original interview by the refugee status officer on 22 May 2000 the

appellant stated, at the commencement of the interview, that at the airport interview he had given a wrong answer when asked where his passport was:

> [The appellant] stated that he gave the wrong answer at the airport when he was asked where his passport was.

[123] At the cancellation hearing before the Authority attention was drawn to the fact that at the first instance cancellation interview by the refugee status officer the appellant had stated that the application he had made to the Iranian Embassy in Wellington was the first time he had applied for an Iranian passport. Yet in evidence before the Authority, on 30 October 2007 he said that he had in fact applied (unsuccessfully) for a passport in Iran in approximately 1992. Prominence was given to this contradictory and inconsistent evidence.

[124] Whatever criticism may be levelled at the appellant, the short point is that apart from the airport interview of 28 August 1996, he has never asserted that he has been issued with an Iranian passport prior to the one issued by the Iranian Embassy in Wellington on 15 July 2002. As to the airport interview, it was corrected at the first available opportunity and we are not prepared to attach much weight to what, in the airport situation, was a peripheral issue. The more important point is that the appellant's account of escaping by foot into Turkey following the arrest of his friend has never altered. In addition, the responses recorded in the airport interview are not entirely internally consistent. We believe that at most, there is only suspicion and this is not evidence of false information.

[125] The Department of Labour relies on the appellant's statement in his second application form (the one dated 19 September 1996) that he would not get a passport if he applied for one. But as to this, the essential point is that this statement was made some five and a half to six years prior to his passport application being submitted to the Iranian Embassy in Wellington. Given the substantial effluxion of time, we do not

see how the subsequent issue of a passport can cast doubt on the veracity of what was the subjectively perceived situation nearly six years earlier in September 1996. Insofar as the Department of Labour allegation also rests on the statement in the Iranian passport issued on 15 July 2002 that the appellant left Iran legally through Mehrabad Airport, for the reasons given earlier we do not accept, in the context of the present case, that this assertion can be relied upon as evidence that such departure occurred in fact. In the result, while there may once again be suspicion, we find that the evidence does not take us any further.

That the appellant was able to return to Iran without experiencing persecution

[126] There is force to the point made by the Department of Labour that the ability of a recognised refugee to return to his or her own country not once, but twice, for extended periods without attracting the attention of the authorities or experiencing any harm would ordinarily raise an issue as to the individual's refugee status. However, as illustrated by *Refugee Appeal No. 76014* (30 May 2007) at para [79], caution must be exercised as to the appropriate inference to be drawn from such return. The circumstances might indeed show that the individual was never at risk (as the Department contends here). But the well-founded standard prescribed by Article 1A(2) of the Refugee Convention does not require the refugee claimant to establish, to the point of certainty, a risk of being persecuted on return or even that being persecuted is more likely than not. It is required only that the risk of being persecuted is "well-founded" or, as understood in New Zealand, that there is a real chance of harm occurring. The point being made is that inherent in the refugee definition is an acknowledgement that a person can be a refugee even though it is more likely than not that the person will be able to return to the country of origin without experiencing serious harm. Return to the country of origin without incident nearly seven years later does not necessarily establish that the original recognition of refugee status was obtained by fraud, forgery, false or misleading representation, or concealment of

relevant information. There must be more in the circumstances before "return without persecution" becomes significant in the cancellation process.

[127] It must be understood also that the Refugee Convention itself conceives of refugee status as a transitory phenomenon which expires when a refugee can (*inter alia*) reclaim the protection of his or her own state: James C Hathaway, *The Law of Refugee Status* (1991) at 189. Article 1C defines the various situations in which the cessation of refugee status occurs. The relevant provision for current purposes are paragraphs (1) and (5) of Article 1C:

> (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
>
> ...
>
> (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality ...

[128] A "return without persecution" therefore gives rise to the following possibilities (the list is not exhaustive):

(a) Even though there has been a return without experiencing persecution, the well-founded standard of Article 1A(2) nevertheless remains satisfied. The successful return to and departure from the country of origin was accompanied by a well-founded risk of being persecuted, a risk the individual was willing to accept and which happily did not eventuate.

(b) The return without persecution establishes that in terms of either Article 1C(1) or (5) the individual has ceased to be a refugee.

(c) The return without persecution is evidence that the original recognition of refugee status was procured by fraud, forgery, false or misleading

representation, or concealment of relevant information.

[129] In cancellation proceedings only (c) is in issue. If loss of refugee status through cessation is to be relied on, there is separate statutory provision for that circumstance to be pleaded. See ss 129L(1)(a), 129L(1)(f)(i) and 129R(a) of the Immigration Act 1987. The problem, however, is that in cancellation proceedings (a) and (c) may not always be distinguished as separate possibilities.

[130] Dealing as we are with a cancellation application based on fraud or the other types of misrepresentation listed in s 129L(1)(f)(ii), the Authority notes that the salient feature of the case is the lengthy delay in the processing of the appellant's refugee claim. That delay began from the arrival date of 28 August 1996 and ran through to the recognition decision of 4 April 2002, a period in excess of five and a half years. While at the interview with the refugee status officer on 22 May 2000 the appellant asserted his belief that the circumstances giving rise to his refugee claim were still extant, the two year delay which then followed before a decision was given presents the Authority with real difficulty in drawing the inference that the evidence given at that interview (that the risk was still present) was false evidence by reason of the fact that the appellant was able to return to Iran three years later without experiencing problems. Again there is suspicion but nothing more. The appellant did have a genuine and understandable reason for returning to Iran (the father's illness) notwithstanding any risk of harm. He did not return for reasons of personal convenience or to simply visit his family.

[131] Even standing back and looking at the three pleaded grounds cumulatively, we are not persuaded that the case against the appellant can sensibly be construed as being stronger than mere suspicion.

CONCLUSION

[132] Our conclusion at the end of Stage 1 of the cancellation inquiry is that we have not been persuaded, beyond mere suspicion, that the original recognition of the appellant as a refugee may have been procured by fraud, false or misleading representation, or concealment of relevant information.

[133] It follows that the appeal is allowed. The end result is that unless further evidence comes to hand or unless the cessation provisions of Article 1C are successfully invoked by a refugee status officer in separate proceedings, the appellant continues to be recognised as a refugee.

"Rodger Haines"

.....

Rodger Haines QC

[Chairperson]